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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MARK G. MORRIS,

Petitioner,

vs.

WASHINGTON STATE DEPARTMENT OF
LICENSING,

Respondent.

No. 07-2-40123-7 SEA

MEMORANDUM OPINION AND ORDER
DENYING RALJ APPEAL

(Clerk's Action Required)

THIS MATTER is before the Court on a RALJ appeal of the final decision of the Department of Licensing Hearing Officer. The issue before the Court is whether the hearing officer erred in sustaining the Department of Licensing's suspension of appellant Mark Morris' ("Morris") driving privileges. Appellant contends that the hearing officer committed legal error in admitting the BAC results because it violated of Mr. Morris' due process rights.

I. Factual Background

On July 29, 2007, appellant Morris was arrested for suspicion of driving under the influence (DUI) by an officer of the Kirkland Police Department. Mr. Morris was taken to the Kirkland Police Department where he was informed of the implied consent rights and warnings. Morris voluntarily

1 agreed to submit to a breath test. Mr. Morris submitted two (2) breath samples with readings of .103 and
2 .103, respectively.

3 As a result of the breath test readings, on August 28, 2007, the Department of Licensing issued
4 an order suspending Mr. Morris' driver's license for ninety (90) days effective September 28, 2007. At
5 Mr. Morris' request, an administrative hearing was held on October 25, 2007. Counsel for the State and
6 Mr. Morris presented arguments but no live testimony was taken. Counsel for Mr. Morris also filed a
7 motion to dismiss the license suspension based, *inter alia*, on the WSP State Toxicology Lab's failure to
8 follow protocols for simulator solution 07015. This was the batch that was used for Mr. Morris' alcohol
9 concentration determination. On December 3, 2007, the hearing officer issued an order sustaining the
10 Department's order of suspension and Mr. Morris has appealed the Department's order.

11 II. Standard of Review

12 The standard of review on an appeal to superior court must be limited to a determination of whether
13 the Department has committed any errors of law. Also, the superior court shall accept factual
14 determinations, expressly made or inferred from the final order, that are supported by substantial evidence
15 in the record. RCW 46.20.308(9); *Lewis v. Dep't of Licensing*, 125 Wn. App. 666, 673-74, 105 P.3d 1029
16 (2005). In applying the substantial evidence test to review the findings of fact, the reviewing court is
17 limited to the record below and is not to substitute its judgment for that of the trial court or to re-weigh
18 evidence or the credibility of witnesses. *Davis v. Dep't of Labor and Industries*, 94 Wn.2d 119, 124, 615
19 P.2d 1279 (1980). Findings of fact supported by substantial evidence are treated as verities on appeal, and
20 an appellate court will not substitute its judgment for that of the trial court, even though it may have
21 resolved the factual dispute differently. *Doe v. Boeing Co.*, 121 Wn.2d 8, 19, 846 P.2d 531 (1993).
22 Evidence may be substantial enough to support a finding of fact even if the evidence is conflicting and
23

1 could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107
2 Wn.2d 693, 713, 732 P.2d 974 (1987). The party challenging a finding of fact bears the burden of
3 demonstrating the finding is not supported by substantial evidence. *Mairs v. Dep't of Licensing*, 70 Wn.
4 App. 541, 545, 854 P.2d 665 (1993).

5 III. Statutory Basis for Admissibility of Tests for License Suspension

6 Pursuant to RCW 46.61.506(4)(a), a breath test performed with "any instrument approved by the
7 state toxicologist" will be admissible at trial if the Department produces prima facie evidence of each of
8 the following elements: (i) The person who performed the test was authorized to perform such test by
9 the state toxicologist; (ii) The person being tested did not vomit or have anything to eat, drink, or smoke
10 for at least fifteen minutes prior to administration of the test; (iii) The person being tested did not have
11 any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the
12 beginning of the fifteen-minute observation period; (iv) Prior to the start of the test, the temperature of
13 the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-
14 four degrees centigrade plus or minus 0.3 degrees centigrade; (v) The internal standard test resulted in
15 the message "verified"; (vi) The two breath samples agree to within plus or minus ten percent of their
16 mean to be determined by the method approved by the state toxicologist; (vii) The simulator external
17 standard result did lie between .072 to .088 inclusive; and (viii) All blank tests gave results of .000.
18 Once prima facie evidence has been shown and the test results properly admitted, the subject of the test
19 may challenge the reliability of the test. But such challenges only affect the weight to be given the
20 results, not their admissibility. RCW 46.61.506(4)(c).

21 IV. The Courts of Limited Jurisdiction Suppress Test Results in Criminal Cases

22 This Court is well aware of the controversy surrounding evidence of malfeasance and
23 nonfeasance at the Washington State Toxicology Lab and the resultant rulings in the various courts of

1 limited jurisdiction. See, e.g. *State v. Ahmach, et al.*, King County District Court, East Division, Case
 2 No. C00627921; *State v. Etheridge, et al.*, Skagit County District Court, Case Nos. C644658, PA1619,
 3 C4700, and C472268; *State v. Lang*, Snohomish County District Court, Cause No. C616184. In King
 4 County, a three-judge panel found a host of defalcations committed by the lab, including: false
 5 certifications; defective and erroneous procedures; software failure, human error, equipment malfunction
 6 and violation of protocols; improper evidentiary procedures; inadequate and erroneous protocols and
 7 training; and nondisclosure of machine bias. *State v. Ahmach, et al.*, King County District Court, East
 8 Division, Case No. C00627921

9 Citing *City of Fircrest v. Jensen*, 158 Wn.2d 384 (2006), the *Ahmach* court observed that our
 10 Supreme Court in that case held that "once the prosecution had met its prima facie burden under R.C.W.
 11 46.61.506(4), the breath test thereafter became 'admissible,' meaning the court could still serve in its
 12 role as the gatekeeper under the applicable rules of evidence." *Ahmach*, Order of Suppression, at 12. In
 13 its gatekeeper function, the district court panel noted that after the prosecution has met its prima facie
 14 burden for the admission of a BAC reading, a trial court must engage in a meaningful review of the
 15 admissibility of the BAC evidence involving, under ER 702, a two-part test. The district court
 16 recognized the application of that 2-part test as well established under Washington law:

17 The 2-part test to be applied under ER 702 is whether: (1) the witness
 18 qualifies as an expert and (2) the expert testimony would be helpful to
 19 the trier of fact. Part 2 of this standard should be applied by the trial
 20 court to determine if the particularities of the [scientific testing] in a
 21 given case warrant closer scrutiny. If there is a precise problem
 22 identified by the defense which would render the test unreliable, then
 23 the testimony might not meet the requirements of ER 702 because it
 would not be helpful to the trier of fact. In other words, although the
 possibility of a mistake or human error in a particular case is indeed
 pertinent, the trial court is best suited to address these factual matters.
 Moreover, these concerns are not properly a part of the Frye analysis,
 but are within the discretion of the trial court.

1 *State v. Cauthron*, 120 Wn.2d 879, 890 (1993). Thus, the district court panel noted that alleged
2 infirmities in the performance of a test usually go to the weight of the evidence, not its admissibility.
3 However,

4 [i]f the testimony before the trial court shows that a given testing
5 procedure was so flawed as to be unreliable then the results might be
6 excluded because they are not "helpful to the trier of fact". The issue
of human error in the forensic laboratory is analyzed under ER 702
and is not a part of the Frye test.....

7 *State v. Kalakosky*, 121 Wn.2d 525, 541 (1993). Nevertheless, critical to the analysis of the case before
8 this Court, "When the challenge to admissibility is to the errors in a given test, the determination of
9 whether expert testimony is admissible is within the discretion of the trial court." *Id.* In exercising its
10 discretion and in serving its role as the trial court and as the gatekeeper under ER 702, the district court
11 panel reached the conclusion that "the work product of the WSTL [Washington State Toxicology Lab] is
12 sufficiently compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific
13 principals (sic) that the WSTL simulator solution work product would not be helpful to the trier of fact."
14 *Ahmach*, at 25.

15 Notably, the hearing examiner at the administrative level serves in the same role as the trial court
16 judge in the DUI criminal prosecution: s/he is the gatekeeper to determine the admissibility of the
17 scientific evidence under ER 702. However, a key distinction between the judge and the hearing
18 examiner is that the hearing examiner is also always the trier of fact. This is a distinction with
19 significance because the hearing examiner is in the best position to exercise his/her discretion in
20 determining whether or not the WSTL simulator solution work product would be helpful to the trier of
21 fact, i.e. the hearing examiner, based on the considerations of the compromises in the WSTL testing and
22 the claimed unreliability of the test results.
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1 weighing the evidence as presented by the State and by the driver. In this instance, the hearing officer
 2 weighed the evidence and concluded that Mr. Morris had failed to persuade him that the "taint"
 3 associated with the WSTL compromised Batch 7015 and Mr. Morris' BAC test results. As a
 4 consequence, the hearing officer's admission and consideration of the BAC test results did not violate
 5 Mr. Morris' due process rights and the hearing officer's findings that the test results accurately and
 6 reliably reflected Mr. Morris' blood alcohol content are supported by substantial evidence.

7 **VI. Conclusion**

8 For the foregoing reasons this Court concludes that the hearing examiner did not err in admitting
 9 the BAC test results for the petitioner driver, Mark Morris, in the license suspension hearing.
 10 Additionally, the hearing examiner's findings that Mr. Morris failed to sustain his burden of proving that
 11 the taint in his specific simulator solution rendered it unreliable is supported by substantial evidence.

12 Accordingly, it is hereby ORDERED that the decision of the hearing officer for the Department
 13 of Licensing is AFFIRMED and the RALJ appeal of Mr. Mark Morris is DENIED.

14 DATED this 18th of July, 2008.

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 19 JOHN P. ERLICK, Judge