NO. 101150-4

SUPREME COURT OF THE STATE OF WASHINGTON

Larry D. Dubey,

Petitioner,

v.

Washington State Department of Licensing,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Larry Dubey's employment as a school bus driver required him to hold a commercial driver's license (CDL). After Mr. Dubey tested positive for marijuana while at work, Washington's Department of Licensing properly disqualified his CDL as required by the Uniform Commercial Driver's License (UCDL) Act, chapter 46.25 RCW. When Mr. Dubey appealed his disqualification to the superior court, however, the superior court improperly excluded his positive drug test result from evidence at trial and summarily reversed his disqualification based on an erroneous interpretation of both federal and state law, and contrary to *Alvarado v. Department of Licensing*, 193 Wn. App. 171, 371 P.3d 549 (2006).

In an unpublished decision, the Court of Appeals properly reversed the superior court and remanded for further proceedings. *Dubey v. Dep't of Licensing*, No. 38140-4-III, 2022 WL 1640814 (May 24, 2022). Under the UCDL Act, "a copy of a positive test result with a declaration by the . . . medical review

officer . . . stating the accuracy of the laboratory protocols followed to arrive at the test result is prima facie evidence" on appeal justifying a CDL holder's disqualification. RCW 46.25.125(4). Because Mr. Dubey's positive test result established the Department's prima facie case against him at trial, the Court of Appeals correctly concluded that the superior court abused its discretion by excluding it from evidence.

Mr. Dubey now seeks review by this Court, asserting that the Court of Appeals' decision conflicts with this Court's precedent and that this matter involves significant constitutional questions and issues of substantial public interest. Yet, he fails to identify any conflicting decisions, constitutional provisions, or issues of significant public interest implicated by this case. This Court should deny his Petition for Review.

II. COUNTERSTATEMENT OF ISSUES

Whether the superior court erroneously excluded Mr. Dubey's verified positive drug test result from evidence on relevancy grounds when the UCDL Act's plain language, 49

C.F.R. Part 40, and the Court of Appeals' decision in *Alvarado* make clear that Mr. Dubey's positive test result was admissible prima facie evidence supporting the Department's disqualification of Mr. Dubey's CDL.

III. COUNTERSTATEMENT OF THE CASE

A. Background on the UCDL Act

The UCDL Act sets forth the requirements for CDL holders in Washington, including school bus drivers. RCW 46.25.010 (3), .010(6)(e), .010(18), .050, .080(2)(b)(vi). A CDL is not a separate license but rather an endorsement upon a personal driver's license that authorizes the licensee to operate a commercial motor vehicle. RCW 46.25.010 (3).

Under the UCDL Act, the Department "shall" disqualify[1] an individual's CDL when it receives a "verified positive drug test" result for the individual. RCW 46.25.125 (1). A "verified positive drug test" result occurs when a CDL holder has a drug

[1] "'Disqualification' means a prohibition against driving a commercial motor vehicle." RCW 46.25.010(8).

concentration at or over established concentration cutoff thresholds after testing by a federally-approved laboratory and verification by a medical review officer. RCW 46.25.010(10), (25); 49 C.F.R. §§ 40.3, .87.

The UCDL Act allows a CDL holder to challenge disqualification, first at an administrative hearing with the Department, followed by a trial de novo in superior court. RCW 46.25.125(2)-(6). The only issues at either hearing are whether (1) the CDL holder is the subject of the verified positive drug test result, (2) the CDL holder's employer has a testing program as required by 49 C.F.R. Part 40, and (3) the medical review officer who verified the result accurately followed the protocols established by 49 C.F.R. Part 40. RCW 46.25.125(4). A copy of a verified positive drug test result, with a declaration by a medical review officer confirming that the result was obtained through accurate protocols required by federal law, is prima facie evidence on appeal for the second and third issues. *Id.* The CDL holder may present evidence of a false positive. *Id.*

B. Mr. Dubey's Employment and Verified Positive Drug Test Result Required the Department To Disqualify His CDL

Mr. Dubey worked as school bus driver, which required him to possess a valid CDL. CP 2-4, 6-8; Exs. R-101, R-102; *see* RCW 46.25.010(3), .010(6)(e), .010(18), .050, .080(2)(b)(vi). At his employer's request, he submitted to a random drug and alcohol test. CP 2-4, 6-8; Exs. R-101, R-102. Two days later, the Department received a verified positive drug test result, with a declaration from a medical review officer, showing that: (1) Mr. Dubey tested positive for marijuana; (2) his employer had a drug-testing program as required by federal law; and (3) his sample was verified as required by federal law. CP 2-4, 6-8; Exs. R-101 at 15, R-102 at 2.

Upon receiving Mr. Dubey's positive test result, the Department notified him that his CDL would be disqualified unless he successfully appealed. Exs. R-101 at 14, R-102 at 3. Mr. Dubey appealed, first seeking review by the Department. CP 2-4, 6-8; Exs. R-101 at 4-6, R-102 at 9-11.

C. The Department Sustained Mr. Dubey's Disqualification, After Which He Sought De Novo Review in Superior Court

At Mr. Dubey's administrative hearing, his positive test result was admitted into evidence without objection. CP 2-4, 6-8, 48; Exs. R-101 at 4-6, R-102 at 9-11. Mr. Dubey testified that he mistakenly ate a cannabidiol (CBD) product belonging to his wife. CP 2-4, 6-8; Exs. R-101 at 4-6, R-102 at 9-11. He did not offer any evidence to support his false positive claim, however. CP 2-4, 6-8; R-101 at 4-6, R-102 at 9-11.

Following the hearing, the Department sustained Mr. Dubey's disqualification. CP 2-4, 6-8; Exs. R-101 at 4-6, R-102 at 9-11. Among other things, the Department's hearing examiner reasoned that Mr. Dubey's positive test result established a prima facie case against him and that unwitting drug consumption was not a valid defense under the UCDL Act. CP 2-4, 6-8; Exs. R-101 at 4-6, R-102 at 9-11.

Mr. Dubey sought de novo review of his disqualification in superior court. CP 1, 5; Exs. R-101 at 3, R-102 at 12, 14.

D. Pre-Trial Procedure in Superior Court

Mr. Dubey's superior court appeal was set for trial in November of 2020. CP 10, 17-21. Before trial, the Department timely filed a Notice of Intent to Admit Documents pursuant to ER 904, which included Mr. Dubey's positive test result; Mr. Dubey filed no objections in response. CP 12-13, 39. In fact, he stipulated to the admissibility of the Department's exhibits, including his positive test result, in an Amended Trial Management Joint Report submitted to the superior court before trial. CP 51-53.

E. The Superior Court Excluded Mr. Dubey's Test Result, Denied the Department's Request for a Continuance, and Summarily Reversed Mr. Dubey's Disqualification

Having heard no prior objections to its exhibits, the Department moved to admit them at the start of trial. RP 4; CP 47. For the first time, Mr. Dubey objected to the admission of his positive test result, arguing that it showed a false positive and that it was irrelevant without the underlying testing data explaining it. RP 4-9; CP 48. Initially, the superior court

overruled Mr. Dubey's objection and admitted the Department's exhibits in their entirety. RP 10; CP 48. During opening statements, however, the superior court reconsidered the admissibility of Mr. Dubey's positive test result because the result did not expressly reference tetrahydrocannabinol (THC) concentrations. RP 16; CP 48.

The Department explained that, by law, Mr. Dubey's positive test result established a prima facie case against him under the UCDL Act. RP 17, 23; CP 29-35. Nevertheless, the superior court, relying on Title 46's general purpose (rather than the UCDL Act's specific purpose, RCW 46.25.005) and non-specific provisions of the federal Agricultural Improvement Act of 2018, disagreed, deemed the positive test result to be irrelevant and unfairly prejudicial without its underlying data, and excluded it from evidence. RP 16-32; CP 48-50.[2]

[2] In its oral ruling, the superior court stated it could not "make a just determination" without the underlying data to establish a foundation for Mr. Dubey's test result. RP 19, 25-32.

Because Mr. Dubey had stipulated to the admission of his positive test result and because the Department had no prior notice that the superior court would require the underlying data, the Department moved for a continuance to consult the medical review officer in Mr. Dubey's case. RP 23-25. The superior court denied the Department's motion because the Department could not guarantee that the underlying data was obtainable. RP 24-28; CP 54-55. After excluding Mr. Dubey's positive test result from evidence, the superior court summarily reversed Mr. Dubey's disqualification. RP 28-34; CP 47-50.

The superior court subsequently denied the Department's motion for reconsideration. CP 38-46, 54-55.

F. The Court of Appeals Reversed the Superior Court

The Department appealed to the Court of Appeals. In an unpublished decision, the Court of Appeals agreed with the Department that the superior court erred by excluding Mr. Dubey's test result from evidence at trial. *Dubey*, 2022 WL 1640814, at *1.

The Court of Appeals recognized that the test result proffered by the Department was "prepared pursuant to federal standards set by the [United States Department of Transportation (DOT),]" which "require specific testing protocols and minimum thresholds for a positive drug test result." *Id.* The Court of Appeals also recognized that, by law, "[a] verified positive drug test result is admissible in a CDL revocation hearing without the need for further explanatory evidence, and is considered prima facie evidence justifying the [Department's] revocation claim." *Id.* Accordingly, the Court of Appeals reversed the order reinstating Mr. Dubey's CDL and remanded for further proceedings. *Id.*

The Court of Appeals subsequently denied Mr. Dubey's motion for reconsideration. Order Den. Recons. Mot., No. 38140-4-III (July 7, 2022).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mr. Dubey asserts that this Court's review is appropriate under RAP 13.4(b)(1), (3), and (4). Pet. for Rev. 1. Because

Mr. Dubey fails to show that the Court of Appeals decided this matter incorrectly and fails to establish any of the grounds warranting review by this Court, his Petition for Review should be denied.

A. The Court of Appeals Correctly Concluded the Superior Court Erroneously Excluded Mr. Dubey's Verified Positive Drug Test Result from Evidence

As discussed above, under the UCDL Act, "a copy of a positive test *result* with a declaration by the . . . medical review officer … stating the accuracy of the laboratory protocols followed to arrive at the test result is prima facie evidence" establishing: (1) a CDL holder tested positive for a proscribed substance; (2) the CDL holder's employer had a testing program as required by federal law; and (3) the medical review officer verified the test result as required by federal law. RCW 46.25.125(4) (emphasis added).

"[A] result is the conclusion drawn from data analysis. It is not the analysis itself." *Alvarado*, 193 Wn. App. at 175 (quoting *Webster's Third New International Dictionary* 1937

(1993)). "Because the statute requires only a copy of the test 'result,' it does not contemplate disclosure of the quantitative data or information utilized to reach a positive result." *Id.* Thus, the superior court here erred by deeming Mr. Dubey's positive drug test result irrelevant and unfairly prejudicial without its underlying data.

Rather, as the Court of Appeals explained, Mr. Dubey's positive test result met statutory requirements and should have established the Department's prima facie case against him:

> Mr. Dubey's positive drug test report was signed by a medical doctor, under penalty of perjury, verifying the testing met federal protocols under 49 C.F.R. part 40. The report states the specimen submitted by Mr. Dubey tested positive for marijuana. In order to report a positive test result for marijuana under 49 C.F.R. part 40, the medical doctor was required to verify the specimen provided by Mr. Dubey contained tetrahydrocannabinolic acid (THCA). Specifically, the initial test required at least 50 ng/ml and the confirmatory test required at least 15ng/ml.

Id. (citing 49 C.F.R. § 40.87) (footnote omitted); *see* Exs. R-101 at 15, R-102 at 2. The Court of Appeals correctly concluded that

the superior court erroneously excluded Mr. Dubey's positive test result from evidence.

B. The Court of Appeals' Decision Does Not Conflict with Any Decision of This Court

Mr. Dubey fails to explain how the Court of Appeals' decision here actually conflicts with any decision of this Court, thereby warranting review under RAP 13.4(b)(1). Instead, he asserts, without support, the Court of Appeals incorrectly applied the abuse of discretion standard as set forth generally in *Mayer v. Sto Industries, Incorporated*[3] and *Wade's Eastside Gun Shop, Incorporated v. Department of Labor and Industries*[4]. The Court should not consider Mr. Dubey's unsupported assertion. *Cf. Brown v. Vail*, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010) ("A party that offers no argument in its opening brief on a claimed assignment of error waives the assignment."); *Peters v. Vinatieri*, 102 Wn. App. 641, 655, 9 P.3d 909 (2000) (Courts

[3] 156 Wn.2d 677, 132 P.3d 115 (2006).

[4] 185 Wn.2d 270, 372 P.3d 97 (2016).

"need not consider assertions that are given only passive treatment and are unsupported by reasoned argument.").

Even if the Court were to consider Mr. Dubey's unsupported assertion, review under RAP 13.4(b)(1) remains unwarranted. The Court of Appeals correctly determined that the superior court "necessarily abuse[d] its discretion" by excluding Mr. Dubey's positive test based on "a mistake of law[,]" the proper determination made under the proper standard of review. *Dubey*, 2022 WL 1640814, at *2; *see Mayer*, 156 Wn.2d at 684 (citation omitted) ("noting that '[a] trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law'").

The Court of Appeals also properly analyzed this issue under both state and federal law. This is because "[t]he federal definition of marijuana under 49 C.F.R. part 40 governs Washington's CDL drug testing requirements." *Dubey*, 2022 WL 1640814, at *3 (citing RCW 46.25.090(7)). "Given the federal reporting requirements, the positive test result in

Mr. Dubey's case revealed he submitted a urine specimen containing the amount of THCA required to meet the applicable federal definition of marijuana …. Other definitions of marijuana or marijuana components are not relevant to the analysis." *Id.*

Thus, the superior court erred as a matter of law in concluding Mr. Dubey's positive test result failed to demonstrate that he had consumed marijuana. Because Mr. Dubey fails to show how the Court of Appeals' decision here conflicts with any applicable Supreme Court (or any other appellate court) precedent, review under RAP 13.4(b)(1) should be denied.

C. This Matter Does Not Involve a Significant Constitutional Question

Mr. Dubey also asserts this Court's review is necessary under RAP 13.4(b)(3) to answer significant constitutional questions. Pet. for Review 4-6. Again, Mr. Dubey fails to identify a single provision of the Washington or United States Constitutions that is implicated by this case. Pet. for Rev. 4-6. The Court should decline review on this basis as well. *Cf. Brown*, 169 Wn.2d at 336 n.11; *Peters*, 102 Wn. App. at 655.

D. This Matter Does Not Involve an Issue of Substantial Public Interest That Should Be Determined by the Supreme Court

Finally, the Court should decline review under RAP 13.4(b)(4) because this matter does not involve issues of substantial public interest. *See* Pet. for Review 4-6. Instead, it involves an isolated, erroneous evidentiary ruling regarding a CDL holder's verified positive drug test result. *Dubey*, 2022 WL 1640814, at *1-3. As the Court of Appeals correctly recognized, under RCW 46.25.125(4)'s plain language, a CDL holder's verified positive drug test result, with a medical review officer's supporting declaration, is prima facie evidence against the CDL holder and is admissible without further foundation; a positive test result's underlying data is simply not required to admit the result into evidence at trial. *Dubey*, 2022 WL 1640814, at *1; *Alvarado*, 193 Wn. App at 174-76.

Even if, as Mr. Dubey claims, "Marijuana, CBD, and its compounds have become popular and commonly used only in the

last few years[,]" review here remains unwarranted under RAP 13.4(b)(4). *See* Pet. for Review 5.

In Washington, changes in marijuana laws began in 2012 with the passage of Initiative 502. *See* RCW 69.50.101 (2013 c § 3, and as subsequently amended). Then, in 2018, Congress passed the Agricultural Improvement Act. *See* Pub. L. 115-334 § 12619. In general, these changes relaxed restrictions, decriminalized usage, and created a regulated market, largely by redefining what constitutes marijuana, for example, by excluding hemp from the definition. *See id.*; 7 U.S.C. § 1639o; 21 U.S.C. § 802(16); 21 U.S.C. § 812(c)(17); 21 C.F.R. § 1308.11(d)(31); RCW 15.14.020; RCW 69.04.009; RCW 69.50.101(y).

But these changes had no impact on the rules that CDL holders must follow in order to maintain a valid CDL, nor did they alter the Department's burden of production in an appeal under the UCDL Act. *See* 21 C.F.R. § 1308.11(d)(31); 49 C.F.R. § 40.3, .23(a), .137(a), .151(d)-(f); RCW 46.25.010(10), .090(7),

.125; *Alvarado*, 193 Wn. App. at 174-78.[5] Indeed, the law remains the same: CDL holders may not test positive for marijuana; if they do, then the Department must disqualify them when it receives their verified positive drug test result; and if they appeal, then that test result is admissible prima facie evidence

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[5] In 2012, DOT made "it perfectly clear that state initiatives will have no bearing on [DOT's] regulated drug testing program" and that 49 C.F.R. Part 40 "does not authorize the use of Schedule I drugs, including marijuana, for any reason." *See* DOT "Recreational Marijuana" Notice, *available at* www.transportation.gov/odapc/dot-recreational-marijuana-notice).

And after the Agricultural Improvement Act of 2018's passage, DOT announced that it "remains unacceptable for any safety-sensitive employee subject to [DOT's] drug testing regulations[,]" including school bus drivers, "to use marijuana. Since the use of CBD products could lead to a positive drug test result, [DOT]-regulated safety-sensitive employees should exercise caution when considering whether to use CDB products." Under 49 C.F.R. Part 40, "CBD use is not a legitimate medical explanation for a laboratory-confirmed marijuana positive test[,]" and medical review officers's "will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product." *See* DOT "CBD" Notice, *available at* www.transportation.gov/odapc/cbd-notice.

against them, shifting the burden to them to prove otherwise (e.g., a false positive occurred). *See* RCW 46.25.090(7), .125(4).

Mr. Dubey's concern that his "livelihood may be in jeopardy due to a false positive" is thus unfounded in both fact and law. *See* Pet. for Review 5. After all, he has access to his test result's underlying data and the opportunity to present evidence of a false positive at his appeal hearings. *Alvarado*, 193 Wn. App. at 174-76; 49 C.F.R. §§ 40.3, .163-.167, .321-.331. And, in any event, it is ultimately Mr. Dubey's burden under the UCDL Act to prove a false positive occurred, not the Department's burden to disprove a false positive occurred. *See* RCW 46.25.125(4); *Alvarado*, 193 Wn. App. 177.

Furthermore, the UCDL Act's purpose is to "reduce or prevent commercial motor vehicle accidents, fatalities, and injuries[,]" which the Department has a strong interest in achieving by, among other things, "Disqualifying commercial drivers who have committed certain serious traffic violations, or other specified offenses[.]" RCW 46.25.005(1)(b); *see also*

Alvarado, 193 Wn. App. at 178 (recognizing the Department's "significant interest in maintaining safety on public roadways"). "This strong interest weighs against requiring a burden of production of evidence that is not required by statute and is easily accessed by the CDL holder." *Alvarado*, 193 Wn. App. at 178.

Because the superior court's evidentiary ruling was unique to Mr. Dubey's case, is unlikely to recur, and does not require any further authoritative guidance, there are no issues of substantial public interest here for this Court to resolve. *Cf. Eide v. Dep't of Licensing*, 101 Wn. App. 218, 221-22, 3 P.3d 208 (2000) (discussing RAP 2.3(d)(3)'s criteria for granting review of a superior court's review of a lower court's decision, when "the decision involves an issue of public interest which should be determined by an appellate court"). Review under RAP 13.4(b)(4) should be denied.

V. CONCLUSION

The issues raised by Mr. Dubey were thoroughly considered and addressed by the Court of Appeals, and

Mr. Dubey fails to show otherwise or show that this Court's review is necessary under RAP 13.4(b). Accordingly, the Department respectfully requests that Mr. Dubey's petition be denied.

CERTIFICATION

This document contains 3366 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 7TH day of October, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing DEPARTMENT'S REPLY BRIEF to be filed with the Clerk of the Court using the electronic filing system and to be on the following electronic filing system participant as follows:

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I certify under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of October, 2022, at Spokane, Washington.

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