

FILED
SUPREME COURT
STATE OF WASHINGTON
8/8/2022 4:48 PM
BY ERIN L. LENNON
CLERK

101150-4

No. 381404-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

LARRY D. DUBEY,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING,

Respondent.

PETITION FOR REVIEW

*APPEAL FROM THE COURT OF APPEALS,
DIVISION III*

DOUGLAS D. PHELPS
WSBA No. 22620
Attorney for Respondent
PHELPS & ASSOCIATES, P.S.
2903 N. STOUT ROAD
SPOKANE, WA 99206
(509)892-0467

TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	ii
I. IDENTITY OF PETITIONER	1
II. COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR REVIEW	1-2
IV. STATEMENT OF THE CASE	2-4
V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	4-8
VI. CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Table of Cases	
<u>STATE CASES</u>	
<u>Mayer v. Sto Industries, Inc.</u> , 156 Wash. 2d 677, 684, 132 P. 3d 115 (2006).....	2, 6-7
<u>Wade’s Eastside Gun Shop, Inc. v. Department of Labor and Industries</u> , 185 Wash. 2d 270, 279, 372, P. 3d 97 (2016)	7
<u>STATUTES</u>	
RCW 46.20.445.....	2
RCW 46.45.....	2
RCW 46.01.011.....	3
RCW 46.25.125(4).....	7
<u>REGULATIONS AND RULES</u>	
RAP 13.4	1, 5
CrR7.8.....	1, 6, 12, 14, 17, 26, 31

I. IDENTITY OF MOVING PARTY

Larry Dubey, Petitioner, brings this Petition for Review pursuant to RAP 13.4 and respectfully requests this Court to accept review of the lower Court of Appeals decision.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of Court of Appeals Decision issued July 7, 2022, denying Petitioner's Motion for Reconsideration. Petitioner seeks review of the Court of Appeals decision because it conflicts with a decision of the Supreme Court; the decision involves a significant question of law under the Constitution of the State of Washington and of the United States; and it involves an issue of significant public interest. RAP 13.4(b)(1), (3), and (4).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision involves an issue of substantial public interest that should be determined by the Supreme Court?

2. Whether Petitioner’s petition involves a significant question of law under the Constitution of the State of Washington or of the United States?

3. Whether the Court of Appeals’ denial of the Motion for Reconsideration violated the Petitioner’s rights because the Court of Appeals incorrectly applied a federal standard instead of the standard set forth in Mayer v. Sto Industries, Inc.?

IV. STATEMENT OF THE CASE

On August 23, 2020, the Honorable Tony D. Hazel in the Spokane County Superior Court conducted a hearing under RCW 46.45. This hearing was conducted de novo, pursuant to RCW 46.20.445. The hearing concerned the Department of Licensing’s suspension of Mr. Larry Dubey’s license for a positive result on a drug test.

The Petitioner maintains that the reading was a false positive due to an accidental consumption of a CBD candy used by the Petitioner’s wife to treat her arthritis. The Attorney General’s Office moved to admit R-101-15 and R-102-2, and the Petitioner objected on relevancy. The Petitioner maintained

that without cut-off levels, the court would be unable to distinguish between CBD use and marijuana usage.

The court ultimately ruled that the test would not be helpful to determine whether the CBD use resulted in a positive test due to a psychoactive ingredient. When questioned about how the Department of Licensing would have evidence to show an active position test for THC, the attorney general stated that they could not provide proof of psychoactive THC. (VRP p. 22).

The attorney general then requested a continuance but ultimately advised that he would have nothing more to provide to the court. (VRP p. 25)

Before stating its decision, the court again stated that the hearing was held de novo, so it was not bound by the decisions of other courts. (VRP 26). RCW 46.01.011 set out the legislative purpose of protecting and enhancing the well-being of residents of the state. (VRP p. 26). The court held that there was no evidence relating to whether the intoxicating substance

was in his system. The court further explained that there must be proof of the presence of psychoactive ingredients. (VRP p. 31). The court ultimately stated that it needed to establish the psychoactive substance component before taking away a citizen's livelihood. (VRP p.30).

The Findings of Fact and Conclusions of Law were filed on March 22, 2021. (CP 47-50). There were no opposing Findings of Fact and Conclusions of Law filed in this matter. A Motion for Discretionary Review was filed with the Washington State Court of Appeals, Div. III on June 9, 2022, and an Order Denying Motion for Reconsideration was entered on July 7, 2022.

V. ARGUMENT

1. Whether the Court of Appeals' decision involves an issue of substantial public interest and it involves a significant question of law under the Constitution of the State of Washington or of the United States that should be determined by the Supreme Court?

A petition for review will be accepted by the Supreme Court if it involves an issue of substantial public interest and Constitutional implications that should be determined by the Supreme Court. RAP 13.4(b)(3-4).

Marijuana, CBD, and its compounds have become popular and commonly used only in the last few years. The body of law surrounding CBD usage, drug tests, and false positives is scarce. The issue of whether a person's livelihood can be taken away due to a false positive test – without any evidence of the psychoactive THC ingredients in the person's system – involves significant and substantial personal and Constitutional interests that must be addressed by the Supreme Court.

The Honorable Judge Hazel himself expressed that the psychoactive THC ingredient must be proven by the prosecuting attorney, given the significant public interests at stake because a person's livelihood may be in jeopardy due to a false positive. Marijuana is fundamentally different from

alcohol and other intoxicating substances, so applying a standard and body of law concerning other intoxicating substances is irrelevant at best and fundamentally misconstrues the substances at worst. As marijuana continues to develop in popularity, the body of knowledge and laws governing marijuana usage and false positive tests must also expand to address the growing number of cases involving positive tests and psychoactive ingredients. Therefore, this petition involves issues of substantial public interest and significant Constitutional questions that must be addressed by the Supreme Court.

2. Whether the Court of Appeals' denial of the Motion for Reconsideration violated the Petitioner's rights because the Court of Appeals incorrectly applied a federal standard instead of the standard set forth in *Mayer v. Sto Industries, Inc.*?

Under the abuse of discretion standard, an appellate court will only reverse a trial court's decision if the decision applies the wrong legal standard, relies on unsupported facts, or adopts

a view no reasonable person would take. Mayer v. Sto Industries, Inc., 156 Wash. 2d 677, 684, 132 P. 3d 115 (2006). The abuse of discretion standard is extremely deferential to the trial court's authority and discretion in its decision making. Wade's Eastside Gun Shop, Inc. v. Department of Labor and Industries, 185 Wash. 2d 270, 279, 372, P. 3d 97 (2016).

In its opening brief, the Department of Licensing acknowledged that the appellate court must demonstrate an abuse of discretion standard in order to reverse the trial court's decision. The Department of Licensing failed to demonstrate that the trial court abused its discretion. The trial court properly considered the objected to Exhibits R101-1 and R101-2, including R101-15 and R102-2) holding the parties could argue weight. (CP 48) (VRP p. 10) The court then found in its conclusions of law that it "is unable to make a just determination serving underlying purposes of the statute under the de novo standard." RCW 46.25.125(4) (referencing false positives). (CP 48; VRP p. 31).

The Department of Licensing argues that a person could have a false positive from ingestion of CBD medical cookies. A reasonable person could arrive at the same conclusion as the trial court found. Therefore, the Department of Licensing failed to establish an abuse of discretion standard and the trial court decision should stand on appeal.

Ultimately, the determination of the trial court was properly made that the Petitioner's argument supported the findings of a false positive to CBD ingestion. The court's determination was properly made, without an abuse of discretion.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court accept review of the Court of Appeals decision because it conflicts with a decision of the Supreme Court; the decision involves a significant question of law under the Constitution of the State of Washington and of the United States; and it involves an issue of substantial public interest.

CERTIFICATE OF COMPLIANCE

This document contains 1,244 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Signed on this 8th day of August, 2022.

Respectfully Submitted,

s/Douglas D. Phelps
DOUGLAS D. PHELPS
WSBA No. 22620
Phelps & Associates, P.S.
2903 N. Stout Road
Spokane, WA
(509) 892-0467

CERTIFICATE OF SERVICE

I, Douglas D. Phelps, certify that on August 8, 2022, the original of the foregoing document was filed with the Court of Appeals, Division III; and copies were served on the following by e-mail electronic service via the Washington State Appellate Portal.

brandon.stallings@atg.wa.gov

s/Douglas Phelps
WSBA No. 22620
2903 N. Stout Rd
Spokane, WA 99206
Telephone: (509)892-0467
Fax: (509) 921-0802
E-mail: phelps@phelpslaw1.com

PHELPS & ASSOCIATES, P.S.

August 08, 2022 - 4:48 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Larry Dubey v. Washington Dept. of Licensing (381404)

The following documents have been uploaded:

- PRV_Petition_for_Review_20220808164830SC138081_2391.pdf
This File Contains:
Petition for Review
The Original File Name was petition for reviewd.pdf

A copy of the uploaded files will be sent to:

- LALOLyEF@atg.wa.gov
- brandon.stallings@atg.wa.gov

Comments:

Sender Name: Peggy Phelps - Email: phelps@phelpslaw1.com

Filing on Behalf of: Douglas Dwight Phelps - Email: phelps@phelpslaw1.com (Alternate Email:)

Address:
2903 N. Stout Rd
Spokane, WA, 99206
Phone: (509) 892-0467

Note: The Filing Id is 20220808164830SC138081

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LARRY D. DUBEY,)	No. 38140-4-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
WASHINGTON STATE DEPARTMENT)	
OF LICENSING,)	
)	
Appellant.)	

PENNELL, J. — Larry Dubey had his commercial driver’s license (CDL) revoked by the Washington State Department of Licensing (DOL) after he submitted a urine sample that tested positive for marijuana. The sample was collected under state law pursuant to protocols set by the United States Department of Transportation (USDOT). Mr. Dubey appealed the CDL revocation to superior court and invoked his right to a trial de novo. At trial, Mr. Dubey successfully objected to the DOL’s introduction of the drug test report, arguing it did not clarify whether he had ingested tetrahydrocannabinol (THC), the psychoactive component of marijuana, or a nonpsychoactive component of marijuana, such as cannabidiol. Without introduction of the report, the DOL lacked evidence of a positive drug test and the superior court reinstated Mr. Dubey’s CDL.

Because the superior court's evidentiary ruling was legal error, we reverse the order of dismissal. The drug test report proffered by the DOL was prepared pursuant to federal standards set by the USDOT. These standards require specific testing protocols and minimum thresholds for a positive drug test result. 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 DOL's revocation claim. The superior court's refusal to admit the report of Mr. Dubey's positive test result into evidence was legal error. The order reinstating Mr. Dubey's CDL is therefore reversed and this matter is remanded for further proceedings.

FACTS

Larry Dubey worked as a school bus driver and possessed a valid CDL as part of his employment. Mr. Dubey's employer conducted random drug testing and obtained a result for Mr. Dubey that was positive for marijuana. The employer then sent a copy of Mr. Dubey's drug test result report to the DOL. The report indicated that the employer had a federally compliant testing program and that protocols were followed in the testing of Mr. Dubey. The test result report was signed under penalty of perjury by a medical review officer.

Upon receiving the verified positive test result, the DOL notified Mr. Dubey his CDL would be disqualified unless he successfully appealed. Mr. Dubey requested an administrative hearing. Disqualification of the CDL was stayed during the administrative proceedings.

At the administrative hearing, Mr. Dubey claimed he accidentally consumed one of his wife's medical cannabidiol edibles. Mr. Dubey's positive drug test report was admitted into evidence. The hearing officer ultimately sustained Mr. Dubey's CDL disqualification, reasoning that unwitting consumption was not a valid defense to a positive drug test result pursuant to RCW 49.25.125 and 49 C.F.R. § 40. Mr. Dubey appealed the disqualification to superior court and invoked his right to a trial de novo.

At trial, the DOL moved to admit the exhibits from the administrative hearing, including the positive drug test report. Mr. Dubey had indicated in a pretrial management report that he would stipulate to admissibility of the certified administrative record, but at trial he objected to introduction of the positive drug test report into evidence on relevance grounds. Mr. Dubey argued that because the report did not specify a drug potency cutoff level, it failed to clarify whether he had consumed THC or a nonpsychoactive component of marijuana, such as hemp.

The superior court sustained Mr. Dubey's objection. The court found the drug test report irrelevant because it did not specify whether "a psychoactive component of marijuana was tested positive or present." Report of Proceedings (Nov. 23, 2020) at 19. After the court made its evidentiary ruling, Mr. Dubey moved for dismissal of the case. The superior court granted the motion and reversed the CDL disqualification.

The DOL timely appeals the reversal of the CDL disqualification and order of dismissal.

ANALYSIS

The sole issue on appeal is whether the superior court erroneously excluded the positive drug test report from evidence on relevancy grounds. We review a trial court's relevance decision for manifest abuse of discretion. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014). A court necessarily abuses its discretion if its decision is grounded in a mistake of law. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

The verified positive drug test at issue in this case was issued pursuant to the Uniform Commercial Driver's License (UCDL) Act, chapter 46.25 RCW. The UCDL Act provides that a CDL holder will be disqualified from driving a commercial motor vehicle "if a report has been received by the [DOL] under RCW 46.25.125 that the person

No. 38140-4-III

Dubey v. Dep't of Licensing

has received a verified positive drug test or positive alcohol confirmation test as part of the testing program conducted under 49 C.F.R. 40.” RCW 46.25.090(7). 49 C.F.R. part 40 sets forth USDOT procedures for transportation workplace drug and alcohol testing programs.

A CDL holder who challenges a positive drug test result has the right to an administrative hearing and de novo appeal to superior court. RCW 46.25.125(2), (4). The issues relevant at the administrative hearing and on appeal are limited to: (a) whether the driver is the person who is the subject of the report, (b) whether the motor carrier, employer, or consortium has a program that is subject to the federal requirements under 49 C.F.R. 40, and (c) whether the medical review officer or breath alcohol technician making the report accurately followed the protocols established to verify or confirm the results, or if the driver refused a test, whether the circumstances constitute the refusal of a test under 49 C.F.R. 40. RCW 46.25.125(4).

The DOL can establish a prima facie case of elements (b) and (c) by presenting “a copy of a positive test result with a declaration by the tester or medical review officer or breath alcohol technician stating the accuracy of the laboratory protocols followed to arrive at the test result.” *Id.* Evidence of a false positive is relevant to the issues on review

No. 38140-4-III

Dubey v. Dep't of Licensing

at the administrative hearing or on appeal. *Id.* No authority has been cited for the prospect that unwitting consumption of alcohol or drugs is a defense to CDL disqualification.

We previously addressed evidentiary issues related to a positive drug test report under the UC DL Act in *Alvarado v. Department of Licensing*, 193 Wn. App. 171, 371 P.3d 549 (2016). At issue in *Alvarado* was whether the DOL could satisfy its burden of proof at a CDL disqualification hearing based on a verified positive test result alone, without accompanying information documenting the underlying data. We held that the positive test report alone was sufficient. As we recognized in *Alvarado*, the report “is not a meaningless piece of paper.” *Id.* at 177. It is a document “signed under penalty of perjury by a medical doctor, verifying federal protocols were met in reaching a positive test result.” *Id.* Among other things, the medical doctor’s signature means the test sampled meets federal cutoff standards on concentrations of controlled substances. *Id.* at 176.

Like the report deemed sufficient in *Alvarado*, 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).¹ Specifically, the initial test required at least 50 ng/ml and the confirmatory test required at least 15ng/ml. 49 C.F.R. § 40.87 (2017).²

Given the federal reporting requirements, the positive test result in Mr. Dubey's case revealed he had submitted a urine specimen containing the amount of THCA required to meet the applicable federal definition of marijuana. *Id.* The federal definition of marijuana under 49 C.F.R. part 40 governs Washington's CDL drug testing requirements. *See* RCW 46.25.090(7) (positive drug test under 49 C.F.R. 40 requires CDL disqualification). Other definitions of marijuana or marijuana components are not relevant to the analysis.

Mr. Dubey points to the purpose of the UCDL Act, which aims to "reduce or prevent commercial motor vehicle accidents, fatalities, and injuries." RCW 46.25.005(1).

¹ THCA is a precursor to tetrahydrocannabinol (THC), the psychoactive component of marijuana. *See* Supaart Sirikantaramas, et. al., *Tetrahydrocannabinolic Acid Synthase, the Enzyme Controlling Marijuana Psychoactivity, is Secreted into the Storage Cavity of the Glandular Trichomes*, 46 PLANT AND CELL PHYSIOLOGY 9 (2005), <https://doi.org/10.1093/pcp/pci166>. THCA is not psychoactive itself.

² Federal regulations contemplate an initial test and confirmation test. If the initial test is above the cutoff, a confirmation test must be conducted. 49 C.F.R. § 40.87(b). A result above the confirmation test cutoff must be reported as a positive test result. 49 C.F.R. § 40.87(c). A result below the initial test result cutoff, or below the confirmation test cutoff after a confirmation test, must be reported as a negative test result. 49 C.F.R. § 40.87(b), (c).

According to Mr. Dubey, this purpose is not served by revoking CDLs for individuals who consume nonpsychoactive components of marijuana. Whatever the merits of Mr. Dubey's public policy argument, it is not a basis for us to ignore the plain language of the governing laws that require CDL revocation based on a positive test for marijuana as defined by 49 C.F.R. § 40.87. The issue of whether the UCDL Act's marijuana cutoff standards are unnecessary or unwise is a matter to be taken up with our legislature or federal regulatory authorities. It is not something to be decided by this court.


The superior court committed legal error when it excluded the positive drug test result on the basis that the report failed to reveal the type of marijuana detected in Mr. Dubey's urine sample. As set forth above, the verified report necessarily contemplated the type and quantity of marijuana sufficient for a positive drug test result under the UCDL Act. The superior court's failure to recognize the significance of the positive drug test result was understandable, as the parties failed to bring the federal testing standards to the court's attention at the time of trial. Nevertheless, this issue was not waived. We therefore grant the DOL its requested relief and reverse the order of dismissal.

No. 38140-4-III
Dubey v. Dep't of Licensing

CONCLUSION

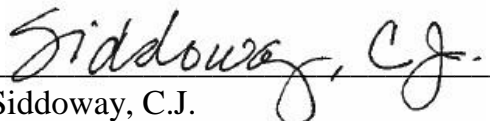
This order of dismissal is reversed and we remand for further proceedings consistent with the terms of this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

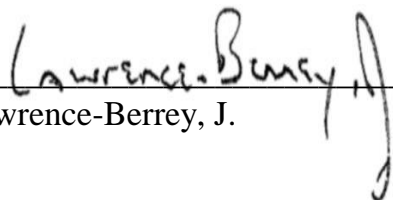


Pennell, J.

WE CONCUR:



Siddoway, C.J.



Lawrence-Berrey, J.

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*



500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>

May 24, 2022

Douglas Dwight Phelps
Phelps & Associates, P.S.
2903 N Stout Rd
Spokane, WA 99206-4373
phelps@phelpslaw1.com

Lloyd Brandon Stallings
Washington Attorney General's Office
1116 W Riverside Ave Ste 100
Spokane, WA 99201-1106
brandon.stallings@atg.wa.gov

CASE # 381404
Larry Dubey v. Washington Dept. of Licensing
SPOKANE COUNTY SUPERIOR COURT No. 2020044032

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:sh

Enclosure

c: **E-mail** Honorable Anthony Hazel