SUPREME COURT NO. 93293-0

COA NO. 46062-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

RESPONSE TO PETITION FOR REVIEW

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II. STATEMENT OF THE CASE

The state charged Ascension Salgado-Mendoza with driving under the influence and tried him in district court. CP 56-57.

Mr. Salgado's attorney made a formal discovery demand, which included a request that the state disclose the names of each witness it

would call at trial. CP 11-15. The prosecutor intended to rely upon the expert testimony of a toxicologist. CP 57.

Rather than provide Mr. Salgado with the name of the witness it would call, however, the state provided Mr. Salgado with the names of the eight toxicologists at the state laboratory. CP 6; RP (5/9/13) 20. The afternoon before trial, the state provided Mr. Salgado with a narrowed-down list of three toxicologists. CP 57; RP 21.

On the morning of trial – still not knowing which witness the prosecutor would call – Mr. Salgado moved to dismiss the charge against him. CP 39-44, 57; RP (5/9/13) 30. The district court denied the motion. CP 57; RP 35. Later that day, an expert from the toxicology lab provided expert testimony on behalf of the prosecution. CP 57; RP (5/9/13) 228-263.

Mr. Salgado was convicted of DUI. He appealed his case to the Superior Court under the Rules of Appeal from Courts of Limited Jurisdiction (RALJ). CP 56.

The RALJ court reversed Mr. Salgado's conviction. CP 60, 66. The superior court found that the prosecutor had violated the discovery rules and engaged in governmental mismanagement by failing to disclose the name of its expert until the day of trial. CP 60.

The Court of Appeals granted the state's motion for discretionary review of the superior court's RALJ opinion regarding the discovery issue.[1] Ruling Granting Motion for Discretionary Review.

The Court of Appeals agreed with the RALJ decision. Opinion. The court held that the prosecutor violated the discovery rules by failing to take reasonable steps to obtain the name of the toxicology expert witness in a timely manner as required by CrRLJ 4.7(d). Opinion, p. 6. The court also found that this discovery violation amounted to governmental misconduct under CrRLJ 8.3(b). Opinion, p. 6.

The Court of Appeals ordered that the toxicologist's testimony should be suppressed on remand. Opinion, pp. 14-15

The state filed a Petition for Review in this court. State's Petition for Review.

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[1] The Superior Court also reversed on the independent ground that the trial court had abused its discretion by excluding testimony from Mr. Salgado-Mendoza's expert witness regarding the breathalyzer machine. CP 66. The Court of Appeals denied discretionary review of that decision. Ruling Granting Motion for Discretionary Review. The state did not raise that issue in this court. *See* State's Petition for Review. Accordingly, Mr. Salgado-Mendoza's conviction will remain reversed regardless of the outcome of this appellate case.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. This Court should deny review because Court of Appeals' opinion on the discovery matter is controlled by well-established precedent; it does not conflict with any prior appellate case. The issues in this case also are not of substantial public interest.

1. The discovery rules required the state to disclose the name of the toxicologist who would testify against Mr. Salgado-Mendoza

The purpose of the criminal discovery rules is to "provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process." *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The discovery rules are "designed to enhance the search for truth." *Id.* at 433. Courts should apply the rules to "insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage." *Id.*[2]

A prosecutor must disclose the names and addresses of persons the state intends to call as witnesses at trial. CrRLJ 4.7(a)(1).

[2] In addition, "courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial." *Boyd*, 160 Wn.2d at 434 (*citing Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

If the accused requests specific information, the prosecutor must attempt to provide the information even if it is not within his/her knowledge. CrRLJ 4.7(d).

If the prosecutor is unable to obtain the information requested by the defense, the court must issue any subpoenas or orders necessary to make the information available to the accused. CrRLJ 4.7(d). The prosecutor must provide discovery materials within twenty-one days of receipt of the demand. CrRLJ 4.7(a)(2).

The state may not, by failure to provide timely discovery, force an accused person to choose between his/her rights to a speedy trial and to the effective assistance of adequately-prepared counsel. *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009).

Late discovery resulting from governmental misconduct is ground for dismissal. *Brooks*, 149 Wn. App. at 391. Misconduct does not have to be malicious; "*simple mismanagement is sufficient.*" *Id.* (emphasis in original).

Here, despite Mr. Salgado's repeated requests, the state did not provide the name of its toxicology expert until the morning of trial. CP 39-44, 57; RP (5/9/13) 30. This forced Mr. Salgado to choose between his

rights to a speedy trial and to adequately-prepared counsel.[3] CP 39-44; RP (5/9/13) 30.

Accordingly, the Court of Appeals found that the prosecutor at Mr. Salgado-Mendoza's trial violated CrRLJ 4.7(d) by failing to making reasonable attempts to acquire the name of the testifying toxicologist within the discovery timeline. Opinion, pp. 9-11.

If the prosecutor's attempts to obtain the identity of the state's expert witness failed, the state should have notified the trial court in time for it to issue any necessary orders in time to allow Mr. Salgado-Mendoza to prepare for trial. Opinion, p. 10.

Mr. Salgado specifically asked the prosecutor for the names of the witnesses the state would call at trial. CP 11-15. He also asked for the toxicologist's name, specifically, several times in the weeks leading up to trial. CP 39-40.

These requests triggered the prosecutor's obligation under subsection (d) to attempt to make the information available to Mr. Salgado. If his efforts proved unsuccessful, the court should have made the orders necessary to compel the toxicology lab to disclose the name of

[3] Furthermore, the inability of the prosecutor's office and the toxicology lab to coordinate their schedules in order to comply with the discovery rules constitutes governmental mismanagement. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). Governmental mismanagement that affects the rights of accused person's qualifies as governmental misconduct. *Id.*

expert who would testify against Mr. Salgado. CrRLJ 4.7(d). The Court of Appeals correctly held that the prosecutor had failed to comply with the requirements of the discovery rules at CrRLJ 4.7(d).

Still, the state argues that this court should accept review because the name of the toxicologist who would testify at Mr. Salgado-Mendoza's trial was included in the list of eight possible experts on the state's witness list. State's Petition for Review, pp. 10-13.

But the rule requires the prosecutor to provide names and addresses of the people it "intends to call as witnesses." CrRLJ 4.7(a)(1)(v). The prosecutor never intended to call all eight toxicologists as witnesses in Mr. Salgado-Mendoza's trial. The state's proposed interpretation of this is contrary to its plain language and would produce absurd results.[4]

Finally, the state claims that the Court of Appeals decision breaks new ground by reading CrRLJ 4.7(d) to require the state (rather than the defense) to seek the court's assistance in obtaining discovery information

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[4] The state attempts to liken the prosecutor's provision of "too much discovery" to providing discovery of evidence that the state does not intend to use at trial in the *Brady* context. State's Petition for Review, pp. 12-13 (*citing Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983)). But the state makes no claim that the names of the eight toxicologists who were not called as witnesses comprised exculpatory evidence. Indeed, those names had nothing at all to do with Mr. Salgado-Mendoza's case. This situation is not analogous to a *Brady* issue. Rather, it is much more like a circumstance in which the state provides extensive discovery from another, wholly-unrelated case without clarifying which materials apply to which case.

from a third party when that party does not provide it voluntarily. State's Petition for Review, p. 13.

But the Court of Appeals decision makes clear that the rule places the responsibility on the court to issue any orders necessary to cause the discovery to be made available to the accused. Opinion, p. 11. In order to trigger that obligation, however, the prosecutor must first inform the court that s/he has attempted to obtain the information and has been unable to do so. Opinion, p. 11; CrRLJ 4.7(d). The court simply applies the plain language of CrRLJ 4.7(d).

The state is also incorrect in its assertion that the Court of Appeals decision in Mr. Salgado-Mendoza's case somehow places a new burden on the prosecution to obtain discovery. Indeed, this Court has already interpreted the discovery rule to require the state to make reasonable efforts to gain access to specifically-requested materials. *State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993) (prosecutor complied with criminal discovery rule by making reasonable efforts to obtain police personnel files even when the police department refused to provide them and by informing the court of the efforts that had been made).

Here, on the other hand, the prosecutor simply acquiesced to the toxicology lab's refusal to name the testifying expert and failed to inform

the court that the state would be unable to comply with its discovery obligations. CP 57.

The Court of Appeals' decision in Mr. Salgado-Mendoza's case was based on the plain language of CrRLJ 4.7 and on clearly-established precedent. This court should deny review. RAP 13.4(b).

2. The Court of Appeals properly decided that suppression of the toxicologist's testimony was the least restrictive appropriate remedy for the state's discovery violation.

The accused is prejudiced by governmental mismanagement and discovery violations if they affect his/her right to a speedy trial or "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." *Brooks*, 149 Wn. App. at 391; *Michielli*, 132 Wn.2d at 239-40.

The Court of Appeals found that suppression of the toxicologists's testimony (as opposed to outright dismissal) was the proper and least-restrictive remedy for the discovery violation and governmental mismanagement in Mr. Salgado-Mendoza's case. Opinion, pp. 14-15.

This is because the prejudice to Mr. Salgado-Mendoza – the Hobson's choice between adequately-prepared counsel and his right to a

speedy trial – could be eliminated only by the suppression of the evidence. Opinion, p. 14.[5]

Still, without citation to authority, the state claims that this court should grant review because the only legitimate prejudice that could flow from a finding of governmental mismanagement is "the interjection of new facts that will require the defendant to proceed to trial unprepared." State's Petition for Review, p. 17. The state's claim is belied by this Court's holding in *Michielli*. *Michielli*, 132 Wn.2d at 239-40; *see also Brooks*, 149 Wn. App. at 391.

The Court of Appeals' decision does not meet any of the criteria for review set forth at RAP 13.4(b).

3. The Court of Appeals' decision does not conflict with any prior appellate case.

The state attempts to devise a conflict between the Court of Appeals' decision in Mr. Salgado-Mendoza's case and prior precedent from the Courts of Appeals and the Supreme Court. *See* State's Petition for Review. But the cases upon which the state relies either do not purport to apply the discovery rules at all or are otherwise inapplicable to Mr. Salgado-Mendoza's case.

[5] The Court of Appeals also noted that the state likely had sufficient evidence to convict Mr. Salgado-Mendoza even without the Breathalyzer evidence. Opinion, p. 15.

The state fails to identify any true conflict between the Court of Appeals' decision in Mr. Salgado-Mendoza's case and any prior appellate case.

First, the state endeavors to identify a conflict between the Court of Appeals' decision in Mr. Salgado-Mendoza's case and the Supreme Court's holdings in *Mullen*, *Thomas*, and *Holifield.* State's Petition for Review, pp. 10-14 (*citing State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011); *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004); *City of Seattle v. Holifield*, 170 Wn.2d 230, 240 P.3d 1162 (2010)).

But none of those cases have any bearing on the discovery rules at issue in this case. *See Mullen*, 171 Wn.2d at 896 (state does not commit *Brady*[6] violation when the defense has access to enough information to ascertain the supposed exculpatory evidence alone); *Thomas*, 150 Wn.2d at 851 (state does not violate *Brady* by failing to inform the defense that a certain witness will not testify at trial); *Holifield*, 170 Wn.2d at 239 (suppression of evidence is the proper remedy for falsification of records at the state toxicology lab).

Mr. Salgado-Mendoza's case does not raise a *Brady* issue or deal with falsification of records. Even so, the Court of Appeals decision in

[6] *Brady*, 373 U.S. 83.

Mr. Salgado-Mendoza's case orders the same remedy as this court in *Holifield*, applying very similar reasoning. Opinion, pp. 14-15.

The state fails to point to any conflict between the Court of Appeals' decision in this case and any prior Supreme Court precedent.

Second, the state undertakes to formulate a conflict between the decision in Mr. Salgado-Mendoza's case and prior Court of Appeals cases. State's Petition for Review, pp. 10-14 (*citing State v. Barry*, 184 Wn. App. 790, 339 P.3d 200 (2014); *State v. Dunivin*, 65 Wn. App. 728, 732, 829 P.2d 799 (1992); *State v. Bradfield*, 29 Wn. App. 679, 682, 630 P.2d 494 (1981)).

But *Barry* and *Bradfield* hold that the defense was not prejudiced by the state's discovery violations when the accused had weeks or months to prepare for trial after receiving the new evidence. *Barry*, 184 Wn. App. at 799; *Bradfield*, 29 Wn. App. at 682. Mr. Salgado-Mendoza did not receive the name of the testifying toxicologist until the morning of trial.[7] CP 57. *Barry* and *Bradfield* are inapposite.

Likewise, the state tries to unearth a conflict between the Court of Appeals' decision in this case and *dicta* in Division II's decision in

[7] Additionally, a continuance would not have solved the problem in Mr. Salgado-Mendoza's case. Even if the trial date had been continued, the state would have provided the names of all eight toxicologists on its witness list, narrowed it down to three names the day before trial, and only given the name of the actual testifying expert on the morning of trial. Opinion, p. 5.

Dunivin. State's Petition for Review, pp. 8-12 (*citing Dunivin*, 65 Wn. App. at 732).

The *Dunivin* court held that reversal was required when the state failed to disclose before trial that its informant had been paid for the information he provided against the accused. *Dunivin*, 65 Wn. App. at 732. The state relies on the court's *dicta* noting that the fact that the state did not intend to elicit the information unless it was necessary for impeachment was not relevant to the analysis. *Id.* at 732.

Despite the fact that the *Dunivin* court's *dicta* is not controlling precedent, the information the state failed to turn over in that case was indisputably relevant to the defense. The extra information the state provided to the defense in Mr. Salgado-Mendoza's case – the names of seven expert witnesses who had nothing to do with the case – was not.

The state fails to identify any conflict between the Court of Appeals' decision in Mr. Salgado-Mendoza's case and any prior decision of the Court of Appeals or Supreme Court. This court should deny review. RAP 13.4(b).

4. The state's alarmist speculation about the effect of the Court of Appeals' decision on other DUI cases has no support in the record.

The prosecutor at Mr. Salgado-Mendoza's trial described the WSP crime lab's current system for assigning toxicologists to trials, in which

the list of eight potential expert witnesses is narrowed down to three the day before a trial begins. CP 57. The actual toxicologist who will testify at any given trial is not named until the day of trial. CP 57.

But nothing in the trial record explains why this system was deemed appropriate. Likewise, there is no evidence that a different system – such as one in which each toxicologist is assigned to a certain geographic zone for a certain period of time – would be unworkable. Indeed, there is nothing in the record indicating that the crime lab has ever considered or attempted any system that would permit identification of the testifying toxicologist before the day of trial.

Indeed, the record indicates that the toxicology lab has a negotiated agreement with King County, which allows the naming of an expert witness much further in advance. RP (5/9/13) 26-27.

Even so, the state argues that this court should accept review based on speculation that the Court of Appeals' decision would render breathalyzer tests all but inadmissible in DUI prosecutions. State's Petition for Review, pp. 8-10. The record does not support the state's alarmism.

This court should deny review. RAP 13.4(b)

B. This court should deny review of the issue of when a toxicologist's absence would provide good cause for a continuance because that

> issue was not before the trial court, the RALJ court, or the Court of Appeals in Mr. Salgado-Mendoza's case and the record is devoid of any facts on the matter.

The state did not ask for a continuance of Mr. Salgado-Mendoza's trial in order to comply with its discovery obligations. Accordingly, that issue was not before the RALJ court or the Court of Appeals.

Indeed, the record implies that the prosecution would have followed the same procedure – listing all eight toxicologists in its witness list and then narrowing it down to two names on the day before trial – regardless of when the trial had occurred. Opinion, p. 5.

Still, the state urges this court to accept review of the issue of whether good cause would exist to continue a DUI trial if a toxicologist was unable to testify. State's Petition for Review, p. 1.

But there is no decision on the issue for this court to review and any relevant facts are completely absent from the record. This court should deny review. RAP 13.4(b).

IV. CONCLUSION

The Court of Appeals' decision in Mr. Salgado-Mendoza's case does not present any issue of substantial public interest and does not conflict with any prior appellate case. This court should deny review. RAP 13.4(b).

Respectfully submitted July 21, 2016.

Skylar T. Brett, WSBA No. 45475
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Response to Petition for Review, postage pre-paid, to:

Ascencion Salgado-Mendoza
1657 Carlsborg Rd
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and I sent an electronic copy, with the permission of the recipient(s), to:

Jefferson County Prosecuting Attorney
prosecutors@co.jefferson.wa.us

In addition, I electronically filed the original with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 21, 2016.

Skylar T. Brett, WSBA No. 45475
Attorney for Respondent

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,

Respondent.

No. 46062-9-II

RULING GRANTING MOTION FOR DISCRETIONARY REVIEW OF A COURT OF LIMITED JURISDICTION IN PART AND DENYING IN PART

The State moves for discretionary review pursuant to RAP 2.3(d), arguing (1) the superior court erred when it reversed a district court conviction on the ground that the prosecutor violated CrRLJ 4.7(a)(4), and (2) the superior court erred when it conducted a RALJ review de novo. This court grants review as to the first issue and denies it with respect to the second.

FACTS

The State charged Salgado-Mendoza with driving under the influence and reckless endangerment.[1] The State subpoenaed the state toxicologist who tested the standard solution used in Salgado-Mendoza's breath test machine. The toxicology lab did not respond. In December 2012, the State filed a witness list that listed eight possible toxicologists, all of whom had tested the solution.

[1] The facts are taken from the briefing and the superior court's decision. No additional documents were submitted in connection with this motion. RAP 17.3(b)(8). This court also notes that the Respondent's first name is spelled three different ways in the limited court documents received in conjunction with this motion.

In April 2013, the State filed a motion to exclude the testimony of a defense expert witness, Dr. Michael Hlastala. The trial court denied the motion.

On May 8, 2013, the State received a list of three toxicologists from the toxicology lab, one of whom the lab would make available to testify at trial set to begin the next morning. The State provided this list to the defense.

The parties appeared for trial on May 9.[2] The defense moved to exclude the testimony of the state toxicologist who appeared to testify or to dismiss the DUI charge. The trial court denied the motion, finding that Salgado-Mendoza was not prejudiced. Salgado-Mendoza did not seek a continuance because counsel stated he did not want to waive his speedy trial rights and because it would be difficult to get his defense expert to return on a different date.

Dr. Hlastala testified, but the trial court limited his testimony to exclude opinion about the BAC Datamaster breath test machine "and its function in testing the breath of this Defendant." Mot. for Disc. Rev., Appendix at 2. Salgado-Mendoza was convicted of DUI[3] and sentenced. He appealed to the superior court. The superior court reversed the DUI conviction. The State moves for discretionary review.

ANALYSIS

Pursuant to RAP 2.3(d):

> Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

[2] The State asserts that the speedy trial period ran until May 18, 2013.

[3] It is unclear what happened to the reckless endangerment charge.

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

Toxicologist Witness

The superior court addressed the State's failure to provide the toxicologist's name until the morning of trial. It concluded that a continuance would not have resolved the situation because the State likely would have again provided three names prior to trial and the name of the actual witness the morning of the continued trial. It added, "The fact that the state toxicologist has limited resources and busy schedules does not justify failure to comply [with] discovery rules." Mot. for Disc. Rev., Appendix at 5. It found a violation of CrRLJ 4.7(a)(1)(i), because the prosecutor, in providing lists of names, did not disclose the name of the person it intended to call as a witness. It concluded:

> The court finds that the trial court abused its discretion in not suppressing the testimony of the state toxicologist at trial based upon the violation of CrRLJ 4.7 and governmental misconduct in the form of mismanagement of the case by the State.

Mot. for Disc. Rev., Appendix at 5.

The State's discretionary review motion asserts that the superior court ignored a clear court rule, CrRLJ 4.7(a)(4), which states:

> The prosecuting authority's obligation under this section is limited to material and information within the actual knowledge, possession, or control of members of his or her staff.

Salgado-Mendoza responds that the State failed to comply with CrRLJ 4.7(d):

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority, the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

Specifically, he asserts that "the name of a state witness is never unavailable to the prosecutor. . . . information that is available to a party's expert witness is available to the party." Resp. to Mot. for Disc. Rev. at 8 (emphasis omitted).

He further argues:

> the inability of the prosecutor's office and the toxicology lab to coordinate their schedules in order to comply with the discovery rules constitutes governmental mismanagement. Governmental mismanagement that affects the rights of accused person's qualifies as governmental misconduct.
>
> The toxicology lab and the prosecutor's office are both part of the executive branch of state government. *See e.g.* [*State v.*] *Wake*, 56 Wn. App. [472] at 475 [(2012)] (noting that congestion at crime lab should not be permitted to excuse continuances based on toxicologist unavailability because the state would then have no incentive to remedy the problem). The state does not present any explanation as to why the two offices should be unable to exchange the information necessary to get a specific expert witness to court with more than a few hours' notice.

Resp. to Mot. for Disc. Rev. at 10 (most citations omitted).

In *State v. Wake*, this court addressed a trial court's decision to grant the State's motion for a continuance that extended the trial date beyond the speedy trial time limit

because a state toxicologist was unavailable to testify. 56 Wn. App. 472, 783 P.2d 1131 (1989). *Wake* determined that the trial court abused its discretion, finding that the fact that "the crime rate had increased and that the witnesses from the State labs were responsible for serving a broad geographic area" did not justify the continuance. 56 Wn. App. at 474. *Wake* criticized issues with the toxicologist witnesses:

> the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem.

56 Wn. App. at 475.

Although *Wake* did not involve CrRLJ 4.7, the court indicated that the State had the ability to make toxicologists available to testify. *Wake*, 56 Wn. App. at 475 ("The rationale of[*State v.*] *Mack*[, 89 Wn.2d 788[, 576 P.2d 44 (1978) (discussing invalid reasons to continue trials)] is equally applicable to the use of expert witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints.").

The issue whether state toxicologist witnesses are within the control of the prosecution's staff, *see* CrRLJ 4.7(a)(4), and the larger issue whether the superior court's decision regarding the toxicologist's testimony is correct involve "issue[s] of public interest which should be determined by an appellate court," in part because this issue may reoccur in light of the manner in which the toxicology lab makes its toxicologists available to testify. RAP 2.3(d)(3); *see Eide v. Department of Licensing*,

101 Wn. App. 218, 223, 3 P.3d 208 (2000). Consequently, this court grants discretionary review of the first issue raised in the State's motion.

Expert Witness

The State additionally contends that the superior court erred by conducting a de novo review of Dr. Hlastala's qualifications and deciding that the trial court incorrectly evaluated the evidence.[4] Mot. for Disc. Rev. at 4-5 (citing RALJ 9.1[5]). Specifically, the State argues:

> In its memorandum opinion, the Superior Court performs a de novo review of the information considered by the District Court and decides the District Court erred. This is beyond the scope of review allowed by RALJ 9.1 or the Supreme Court's holding in [*State v.*] *Basson*[, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986)[6]].

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[4] Although the superior court listed Dr. Hlastala's qualifications, the State does not provide this court with specific trial court factual findings that the superior court rejected or reweighed. RALJ 9.1(b).

[5] RALJ 9.1 provides:

> **(a) Errors of Law.** The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.
>
> **(b) Factual Determinations.** The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.

[6] *Basson* counsels:

> As an appellate court, "[t]he superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction." RALJ 9.1(b). It is not within the Superior Court's scope of review to examine the evidence de novo. *Seattle v. Hesler,* 98 Wn.2d 73, 653 P.2d 631 (1982).

105 Wn.2d at 317.

Mot. For Disc. Rev. at 5.

Here, the superior court ruled that the trial court misinterpreted ER 703 in considering whether to permit Dr. Hlastala to testify about the breath test machine, Opinion at 9-10, and the State does not challenge the merits of this decision. The rules permit the superior court to "review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law." RALJ 9.1(a). Thus, discretionary review of this portion of the superior court's decision is not warranted.

The superior court also concluded that the trial court abused its discretion in restricting Dr. Hlastala from testifying as to the operation of the breath test machine. It relied on *City of Mount Vernon v. Cochran*, 70 Wn. App. 517, 523-24, 855 P.2d 1180 (1993), *review denied*, 123 Wn.2d 1003 (1994). In *Cochran*, the superior court approved of a court commissioner's decision to appoint Dr. Hlastala as an expert with respect to the functioning of a breath test machine. 70 Wn. App. at 526-27.

Although the State contends that the superior court conducted a de novo review of the trial court's decision regarding Dr. Hlastala's testimony, the superior court's opinion applies an abuse of discretion standard. Mot. for Disc. Rev., Appendix at 6 (citing *State v. Swan*, 114 Wn.2d 613, 219 P.3d 666 (1990), *cert. denied*, 498 U.S. 1046 (1991). This is the correct standard to apply to a review of the admissibility of testimony. *See generally State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998) ("The usual rule is that admissibility of evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion." (Footnotes omitted)). Absent additional direction from the State as to how the trial court

nevertheless conducted de novo review or violated RALJ 9.1(b), *see supra* n.4, this court cannot rule that the superior court's decision meets the standards for review set out in RAP 2.3(d)(1) through (4).

Salgado-Mendoza additionally moves to stay the State from collecting court-ordered fines and fees because the superior court reversed his conviction. Although this court grants discretionary review in part, the superior court reversed his conviction and it remains reversed unless and until a panel of this court rules otherwise. RCW 10.01.160(1) ("Costs may be imposed only upon a convicted defendant"); *Utter v. Department of Soc. & Health Servs.*, 140 Wn. App. 293, 312, 165 P.3d 399 (2007) (a trial court may only impose fines and fees on a convicted defendant). Consequently, his motion is granted and the State is barred from collecting these fines and fees during the pendency of this appeal. Accordingly, it is hereby

ORDERED that the motion for discretionary review is granted in part and denied in part; it is further

ORDERED that the State is barred from collecting fines and fees owed by Salgado-Mendoza while this appeal is pending.

DATED this 10th day of July, 2014.

Aurora R. Bearse
Court Commissioner

cc: Thomas Brotherton
Jodi Backlund
Manek Mistry
Skylar Brett
Hon. Keith Harper

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Subject: 93293-0-State v. Ascencion Salgado-Mendoza-Response to Petition

Please find attached Respondent's Response to Petition for Review.

Thank you.

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