

No. 42790-7-II

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

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STATE OF WASHINGTON,  
Appellant,

v.

ROBERTA D. MASHEK,  
Respondent.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE GORDON L. GODFREY, JUDGE

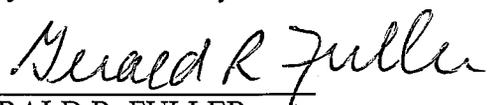
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BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

### **Procedural Background.**

The defendant was charged by Information on February 14, 2011, with Felony Driving Under the Influence, RCW 46.61.502(6). The Information contained an allegation that the defendant had previously been convicted of Vehicular Assault while under the influence of or affected by intoxicating liquor in Grays Harbor County Cause No. 94-1-123-2. (CP 1-2).

The defendant filed a Motion to Suppress the BAC result. Following hearing, the trial court granted the motion. (CP 63-66). The defendant subsequently moved to strike the allegation that the defendant's prior Vehicular Assault conviction was a "prior offense" within the meaning of RCW 46.61.5055 and also moved to disallow any testimony from a drug recognition expert regarding the effects of alcohol and correlation to the field sobriety tests. Argument was heard on October 21, 2011 without testimony from the drug recognition expert.

On October 24, 2011, the trial court entered an order granting those motions, also. (CP 67-76). A certified copy of the prior vehicular assault conviction is attached to that order. The court found that the order striking the Vehicular Assault conviction as a "prior offense" effectively abated and discontinued any prosecution for felony Driving While Under the Influence. See RAP 2.2(b)(1).

On October 26, 2011, the State filed a Notice of Appeal of the order dismissing the supplemental allegation and a Notice of Discretionary Review of the order regarding the evidentiary rulings.

**Factual Background.**

On February 6, 2011, the defendant was stopped by Deputy Jason Wecker for Driving While Under the Influence. Following administration of field sobriety tests, the defendant was placed under arrest for Driving Under the Influence. (CP 63-66, Findings of Fact, I - III). The defendant consented to the administration of the BAC. Deputy Wecker checked her mouth for foreign substances and had the defendant remove a tongue ring that she was wearing. During the 15 minute observation period prior to the administration of the test, she did not vomit, nor did she eat, drink or smoke or place any foreign substance in her mouth. (RP 18-19, 50-52, Finding of Fact IV). The entire procedure was videotaped. That video was admitted at the hearing. (Exhibit 1).

The undisputed evidence is that the defendant did not, during the observation period, place any foreign substance in her mouth. (CP 63-66, RP 18, 24, 79, Finding of Fact IV). She did not burp or belch, nor was there any claim that she did. (RP 18-19, 50-52). There was a brief time, however, while the officer was calibrating the BAC machine, that he was not looking directly at the defendant. (RP 79-81). The trial court found that the defendant was not "under observation" even though the entire observation period was taped and Deputy Wecker never left the immediate

presence of the defendant. (CP 63-66, Findings of Fact IV, Conclusions of Law IV, Exhibit 1).

#### **ASSIGNMENTS OF ERROR**

- 1. The trial court committed error when it suppressed the BAC result.**
- 2. The trial court committed error when it disallowed the proposed testimony of the drug recognition expert without hearing an offer of proof.**
- 3. The trial court committed error when it found that the defendant's vehicular assault conviction was not a "prior offense" within the meaning of RCW 46.61.502(6) and RCW 46.61.5055(4)(14)(a).**

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. Did the State present prima facie evidence that the arresting officer complied with the requirements of RCW 46.61.506(4)(a)(ii) and 46.61.506(4)(a)(iii)?**
- 2. May the trial court refuse to allow testimony from an expert witness without first hearing testimony concerning the expert's qualifications and the proposed testimony of the expert?**
- 3. Is the defendant's prior conviction for Vehicular Assault a "prior offense" within the meaning of RCW 46.61.502(6) and RCW 46.61.5055(4)?**

#### **ARGUMENT**

- 1. The trial court committed error when it suppressed the BAC result. (Assignment of Error No. 1)**

In 2004, the Washington State Legislature rewrote RCW 46.61.506 – Persons under the influence of intoxicating liquor or drug-Evidence-Tests-Information concerning tests. This rewrite was partially in response to a Washington State Supreme Court case, *Seattle v. Allison*, 148 Wash.2d 75, 59 P.3d 85 (2002), in which the defendants attempted to suppress breath test results based upon a very narrow reading of the statute.

The court in *Allison* held that, “... the breath test documents . . . constitute a sufficient foundation for admissibility of the test results and arguments as to reliability of the particular test results are questions for the jury.” *Seattle v. Allison*, 148 Wash.2d at 86.

In the statutory notes for the amendment, the Legislature found that previous legislation meant to curtail drunk driving was not sufficiently effective. Therefore, new standards were adopted for governing the admissibility of blood and breath results.

“These standards will provide a degree of uniformity that is currently lacking, and will reduce delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.”  
*Wash.Rev.Code Ann.* § 46.61.506 (West 2011),  
Finding – Intent (2004) ch. 68 §1 (prior to 2010 amendments).

The breath test is admissible if the State presents *prima facie* evidence that the eight requirements of RCW 46.61.506(4) have been met.

These are as follows:

4(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of any liquid simulator solution utilized as an external standard, as measured by a thermometer approved by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The result of the test of the liquid simulator solution external standard or dry gas external standard results did lie between .072 to .088 inclusive; and

(viii) All blank tests gave the results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, *the court or administrative tribunal is to assume the truth of the prosecution's or department's*

*evidence and all reasonable inferences from it in a light most favorable to the prosecution or department. (emphasis supplied)*

- (a) **There was substantial evidence to support the trial court's finding that there were no foreign substances in the defendant's mouth.**

The defendant alleged that she contaminated the procedure by placing her hand or fingers in or near her mouth, thus violating the “no foreign substances” prong of the rule. A viewing of the BAC room video showed that the defendant did put her fingers to her lips and around the general area of her mouth several times. (Exhibit 1). Toward the end of the video the defendant is seen yawning. The video does not show the defendant sticking her fingers or anything whatsoever in her mouth during the observation period or during the breath testing. (Exhibit 1). Her hands are consistently shown to be empty and there was nothing on her person or in the BAC room that she could have put in her mouth to contaminate the results. The court found that the defendant placed no foreign substances in her mouth during the pertinent time. (CP 63-66, RP 79, Findings of Fact II). This finding is supported by substantial evidence.

The case of *City of Sunnyside v. Fernandez*, is illustrative. There, the defense challenged the admissibility of the breath test result by claiming that foreign substances were introduced to the defendant's mouth while the police were administering the breath test. Specifically, the defendant was still bleeding inside his mouth from an auto accident when the test was administered. *City of Sunnyside v. Fernandez*, 59 Wash.App.

578, 580, 799 P.2d 753 (1990). The court noted that the term “foreign substance” was not defined by the code and when a term is undefined by the statute, it should then be given its ordinary meaning. *City of Sunnyside v. Fernandez*, 59 Wn.App. at 581, quoting *State ex rel. Graham v. Northshore Sch. Dist.* 417, 99 Wash.2d 232, 244, 662 P.2d 38 (1983). The court in *Fernandez* found that a person’s own blood was not a “foreign substance” and further determined that “the term ‘foreign substance’ should, in light of this purpose, involve substances which adversely affect the accuracy of test results.” *Fernandez*, 59 Wn.App. at 581-82.

The same can be said here. One’s own fingers are not foreign substances. Additionally, there was no evidence or reason to believe that there was alcohol on the defendant’s fingers. There was no evidence that she placed her fingers in her mouth. There was no evidence of any “foreign substance” that would have adversely affected the accuracy of the test results. (RP 24).

The court made a finding that there were no foreign substances in the defendant’s mouth during the pertinent time period. (RP 79-81). This is supported by the video and the testimony of Deputy Wecker.

**(b) The court’s Conclusion of Law IV that the defendant was not “under observation” is not supported by evidence in the record.**

The court did suppress the BAC result for the alleged failure of Deputy Wecker to “observe” the defendant during the entirety of the observation period, even though it found that the defendant, in fact, had no

foreign substances in her mouth. (CP 63-66, Conclusion of Law IV). In doing so, the trial court committed error.

Although RCW 46.61.506(4)(a)(iii) speaks of a 15 minute observation period, there is no requirement that the officer keep the defendant under constant personal observation. The requirement is that the State present evidence that there was no foreign substance in the defendant's mouth at the beginning of the observation period and that the defendant did not vomit or have anything to eat, drink, or smoke during the observation period immediately prior to the test. This can be established through both the personal observations of the officer and a review of the video prepared at the time.

Contrary to the court's finding, the defendant was "under observation" throughout the entire time. The entire process was video recorded. (Exhibit 1). *Walk v. Dept. of Licensing*, 95 Wn.App. 653, 658, 976 P.2d 185 (1999). An officer may observe by assuring that the safeguards and observation period are complied with. That is the exact purpose of the video. It allows the officer to "observe" even though he may not be looking directly at the defendant.

The purpose of the observation period is to ensure compliance with RCW 46.61.506(4)(a)(ii) and RCW 46.61.506(4)(a)(iii). It does not require personal, direct and unswerving observation by the deputy throughout the entire time. The statute only requires proof that all the

steps have been complied with. The video provided the proof concerning compliance with RCW 46.61.506(4)(a)(iii) and RCW 46.61.506(4)(a)(ii).

In any event, the video recording proved that the defendant was sufficiently “under observation” at the time to allow admission of the BAC result. Other courts have more specifically defined the term “under observation”. See *Wilkinson v. State of Idaho, Department of Transportation*, 264 P3d 680 (Idaho App., 2011). Defendant Wilkinson was cited for DUI. She was taken to a separate room where the events were videotaped and the defendant ultimately performed a chemical breath test. The defendant challenged the result of the breath test claiming that she was not under observation during the entire 15 minute period because the officer had his back turned to her several times during the 15 minute observation period.

As explained in *Wilkinson*, Idaho law expressly provides that the officer must “monitor” the defendant for 15 minutes. During this time the defendant may not smoke, consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in the mouth. The training manual specifically provides that the officer is to “observe” the defendant for 15 minutes. This may be a matter of semantics, but the express language of the Idaho administrative rule is stricter than RCW 46.61.506(4). The court in *Wilkinson* found that the officer did, in fact, “observe” and “monitor” the defendant during the 15 minute period prior

to the test even though he may have turned his back on the defendant briefly.

The court in *Wilkinson* noted that the purpose of the rule is to “rule out the possibility that alcohol or other substances had been introduced into the subject’s mouth from the outside or by belching....” *Wilkinson* 264 P3d at 683. The level of surveillance during the 15 minute observation period “must be such as can reasonably be expected to accomplish that purpose”. *Wilkinson*, quoting *Bennett*, *infra*, 206 P.3d at page 508. See also, *State v. Vialpando*, 496 Utah Adv.Rep. 34, 89 P.3d 209 (2004).

The specific holding of the court in *Wilkinson* is instructive:

Wilkinson also points to the officer’s testimony to show that the observation requirement of the fifteen-minute monitoring period was not satisfied. Davis testified that because he had his back turned to Wilkinson several times, he did not believe the observation requirement of the monitoring period was satisfied. As set out above, however, the test is not whether Officer Davis “stared fixedly” at Wilkinson for fifteen minutes before the test, or even if he kept her in his peripheral vision. *See Bennett*, 147 Idaho at 144, 206 P.3d at 508. As long as Officer Davis was in a position to use his senses to determine that Wilkinson did not belch, burp, or vomit for the requisite time period, his observation was in compliance with State Police procedure.

In the case at hand, Deputy Wecker was in the immediate presence of the defendant the entire time and in a position to use his senses to ensure that the requirements of the statute were met. He did not leave the room. *See Bennett v. State*, 147 Idaho 141, 206 P.3d 505 (Ct.App. 209, 2009). Nor did the observation period take place while the defendant was being transported in the back of a patrol vehicle and observed only

“intermittently” by the arresting officer. See *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Id.App., 1999); *State v. DeFranco*, 143 Idaho 335, 144 P.3d 40 (2006); *State v. Cash*, 3 Neb.App. 319, 526 N.W.2d 447 (1995).

Deputy Wecker’s attention to the BAC machine did not prohibit him from having the defendant under observation. *State v. Remsburg*, 126 Idaho 338, 882 P.2d 993 (1994). The statute must be interpreted in light of its purpose. *State v. Smith*, 16 Conn.App. 156, 547 A.2d 59 (1988). It should not be read to require the officer’s “unswerving gaze” within the entire observation period. *Smith*, 547 A.2d at page 164-65.

In light of the regulation’s purpose, we do not interpret § 14-227a-10(b)(1)(A) to require that an officer fix his unswerving gaze upon a subject during each fifteen minute interval prior to administration of a breath test. Such an interpretation would not only be practically impossible to perform but would allow a subject to thwart compliance with the regulation simply by turning his head away from the observing officer. Where, as here, evidence shows that a defendant was in an officer’s presence for at least a period of fifteen minutes and that the defendant did not ingest food or beverages, regurgitate or smoke, the requirement of “continuous observation” under § 14-228a-10(b)(1)(A) has been complied with.

*In re Ramos*, 155 Ill.App.3d 374, 508 N.E.2d 484 (1987) provides facts nearly identical to the case at hand, involving a situation in which the officer adjusted the breathalyzer during the observation period while in the defendant’s presence, but did not have his direct gaze on the defendant the entire time. The court in *Ramos* found substantial compliance with the observation requirement and allowed admission of the test result. *Ramos*, 508 N.E.2d at page 486.

The conclusion of the trial court that the defendant was not “under observation” because Deputy Wecker, though in her immediate presence, could not see her in his peripheral vision, is just the kind of reasoning criticized by the court in *Wilkinson*. (RP 79-81)

Numerous other courts have addressed this issue. They have uniformly applied the test as stated in *Wilkinson, supra*. See *State v. Filson*, 409 N.J. Super 246, 976A.2d 460, 469 (2009); *Glasman v. State, Dept. of Revenue*, Colo. App. 719 P.2d 1096 (1986); *Peterson v. Wyoming Dept. of Transportation*, 158 P.3d 706, 710 (Wyo. 2007); *Hadaway v. Commonwealth*, 352 S.W.3d 60, (Kentucky App. 2011). See also 96 ALR 3d 745, 784-88 where a number of similar cases are collected.

The State demonstrated that the requirements of RCW 46.61.506 (4)(a) were properly met. The question for this court is whether a trial court should suppress the BAC result if it finds all the requirements of RCW 46.61.506(4) have, in fact, been met because it believes the officer didn't have the defendant completely within his vision during the entire observation period. The answer must be no. The arresting officer need only be continuously in a position to use all his senses, not just sight, to ensure that no foreign substance was introduced and the defendant did not belch or vomit. *State v. Stump*, 146 Idaho 857, 203 P.3d 1256 (2009).

The trial court was required to assume the truth of the State's evidence and give all reasonable inferences from it in a light most favorable to the State. The State produced prima facie evidence that

should have allowed the State to present the evidence at trial. The order suppressing the BAC result must be reversed.

**2. The trial court committed error when it disallowed the proposed testimony of the drug recognition expert without hearing an offer of proof. (Assignment of Error No. 2)**

ER 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact and issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

In the case at hand, the defendant simply filed a written motion claiming that the State's expert did not possess the qualifications to testify concerning the effects of alcohol and its correlation to the field sobriety tests. (CP 49-62). The motion was argued without the opportunity to present an offer of proof regarding the expert's qualifications and opinion. The proposed expert witness was never allowed to present his qualifications or establish the basis for his opinion.

As noted in *Tegland*, Washington Practice, Volume 5 §702.5 there is a process to establish whether the individual is qualified as an expert and whether he or she will be allowed to express an expert opinion. A necessary foundation needs to be established by questioning the expert. Ordinarily, this would take place either before trial or during trial outside the presence of the jury. Once the court has sufficient information, it can make a ruling See *Tegland*, Washington Practice, §702.6.

In the case at hand, this entire process was short-circuited. This court should reverse the ruling of the trial court and remand this matter to the court for hearing to determine the expert's qualifications and the extent of the expert testimony, if any, that will be allowed at trial.

**3. The trial court committed error when it found that the defendant's vehicular assault conviction was not a "prior offense" within the meaning of RCW 46.61.5055 and RCW 46.61.502(6). (Assignment of Error No. 3)**

RCW 46.61.502(6) provides as follows:

It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or (b) the person has ever previously been convicted of (i) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or (iii) an out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection.

RCW 46.61.5055 further provides that an individual convicted of Driving While Under the Influence, RCW 46.61.502, who has a prior conviction for Vehicular Assault While under the Influence, shall be punished under RCW 9.94A. RCW 46.61.5055(4). Neither statute places a time limitation on the prior conviction. Any prior conviction for Vehicular Assault While Under the Influence qualifies as a "prior offense" and elevates a DUI conviction to a class C felony. RCW 46.61.5055(14).

Had the legislature chosen to do so, they could have put in language providing that a conviction for Vehicular Assault or Vehicular Homicide could only elevate a DUI conviction to a felony if the prior

conviction occurred on or after a certain date or within a certain period of time prior to the current DUI prosecution. The legislature chose not to do so.

At the time of the defendant's conviction, Vehicular Assault was a class C felony. It has since been elevated to a class B felony. Laws of 1996, Chapter 199 § 7. There is nothing in this change to suggest that it should have any affect upon whether the prior conviction should be treated as a "prior offense" within the meaning of RCW 46.61.502(6) and RCW 46.61.5055.

Indeed, at the time of the defendant's prior conviction in 1994 the elements of Vehicular Assault were identical to the current statute except that the statute required that the victim sustain "serious bodily injury." The statute specifically defined serious bodily injury as follows, RCW 46.61.522(2):

"Serious bodily injury" means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.

RCW 46.61.522 has since been amended to require proof of substantial bodily harm rather than serious bodily harm. Laws of 2001, Chapter 300, § 1. The term substantial bodily harm is defined by statute. RCW 9A.04.110. The injuries required to constitute substantial bodily harm are significantly less than those required to establish serious bodily injury under the previous version of RCW 46.61.522. (emphasis supplied).

In short, there is nothing about the amendment of the statute that would suggest any reason to treat a conviction for vehicular assault committed prior to the amendment any differently. Indeed, it appears that the offense for which the defendant was convicted required proof of a much more serious injury.

Finally, there can be no claim that enactment of RCW 46.61.502(6) and RCW 46.61.5055 somehow increased the defendant's punishment for her prior vehicular assault conviction. The law in effect at the time of the current offense governs. The enactment of RCW 46.61.502(6) and RCW 46.61.5055 did not alter the punishment for the prior vehicular assault conviction. There is no issue that the current statute is ex post facto. *State v. Schmidt*, 143 Wn.2d 658, 23 P.3d 462 (2001).

The ruling of the court finding that the defendant's prior Vehicular Assault was not a "prior offense" must be reversed.

### CONCLUSION

For the reasons set forth, this court must reverse the order suppressing the BAC and the order disallowing the drug recognition expert's testimony, reinstate the allegation that the defendant has been convicted of a "prior offense" and remand the matter for trial.

DATED: January 12, 2012

Respectfully Submitted,

By: Gerald R. Fuller  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

FILED  
COURT OF APPEALS  
DIVISION II

12 FEB -8 AM 11:52

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 42790-7-II

v.

**DECLARATION OF MAILING**

ROBERTA D. MASHEK,

Appellant.

**DECLARATION**

I, Janeelle Semmraag hereby declare as follows:

On the 11<sup>th</sup> day of February, 2012, I mailed a copy of the BRIEF OF  
RESPONDENT to RICK CORDES; CORDES BRANDT, PLLC; 2625 B PARKMONT LN.  
SW; OLYMPIA, WA 98502, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the  
foregoing is true and correct to the best of my knowledge and belief.

Janeelle Semmraag