

NO. 42790-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTA MASHEK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY
The Honorable Gordon L. Godfrey, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE TRIAL COURT DID NOT ERR IN SUPPRESSING THE BAC RESULTS FOR LACK OF COMPLIANCE WITH RCW 46.61.506(4).....	3
2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT DRUG EXPERT TESTIMONY WAS INADMISSIBLE.....	13
3. THE COURT CORRECTLY RULED THAT THE BAC EVIDENCE WAS NOT ADMISSIBLE FOR ANY PURPOSES.	17
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Seattle v. Allison,
148 Wn.2d 75, 79, P.3d 85 (2002),
reconsideration denied (2003).

City of Sunnyside v. Fernandez,
59 Wn.App. 578, 799 P.2d 753 (1990).

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384, 110 S.Ct. 2447, 2459 L.Ed.2d 359 (1990).

Cox v. Spangler,
141 Wn.2d 431, 5 P.3d 1265, 22 P.3d 791 (2000).

Dep't of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, , 43 P.3d 4 (2002).

Lacey Nursing Ctr., Inc. v. Dep't of Revenue,
128 Wn.2d 40, , 905 P.2d 338 (1995)

Sintra, Inc. v. City of Seattle,
131 Wn.2d 640, 935 P.2d 555 (1997).

Salas v. Hi-Tech Erectors,
168 Wn.2d 664, , 230 P.3d 583 (2010)

State v. Alvarez, 1
28 Wn.2d 1, 904 P.2d 754 (1995).

State v. Baker,
56 Wn.2d 846, 355 P.2d 806 (1960).

State v. Baity,
140 Wn.2d 1, 991 Pd.2d 1151 (2000).

TABLE OF AUTHORITIES

Page

WASHINGTON CASES con't.

State v. Baker,
56 Wn. 2d 846, 355 P. 2d 806 (1960)

State v. Cauthron,
120 Wn.2d 879, 846 P.2d 502 (1993),
reversed on other grounds in
State v. Buckner,
133 Wn.2d 63, 941 P.2d 667 (1997).

State v. Cannon,
147 Wn.2d 4, 50 P.3d 627 (2002);

State v. Clark-Munoz,
152 Wn.2d 39, 48, 93 P.3d 141 (2004),
Superseded by regulation in
Ludvigsen v. City of Seattle,
162 Wn.2d 660, 174 P.3d 43 (2007)

State v. Donahue,
105 Wn.App. 67, 69, 18 P.3d 608 (2001)

State v. J.M.,
144 Wn.2d 472, 28 P.3d 720 (2001).

State v. Morales,
173 Wn.2d 560, 269 P.3d 263 (2012)

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997).

State v. Straka,
116 Wn.2d 859, 810 P.2d 888 (1991)

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, con't.

Walk v. Department of Licensing,
95 Wn. App. 653, 976 P.2d 185 (1999)

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
122 Wn.2d 299, 858 P.2d 1054 (1993)

STATUTES, RULES AND OTHERS

RCW 46.61.506

WAC 448-13-010

WAC 448-13-035

WAC 448-13-040

ER 702

ER 703

*32 WAPRAC § 25:8 Washington
DUI Practice Manual Part VII.
Chemical Tests and Refusals
Chapter 25. Breath Testing*

RANDOM HOUSE DICTIONARY
OF THE ENGLISH LANGUAGE 1338 (2d ed.1987)

RANDOM HOUSE COLLEGE DICTIONARY
918 (Revised Ed. 1984).

A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly suppressed the BAC results based on the state's failure to adhere to the mandatory procedural safeguards for protecting the validity of the BAC results.

2. Respondent assigns error to finding of fact IV: that the defendant did not put anything in her mouth during the observation period.

3. The trial court properly suppressed the DRE testimony.

4. The trial court properly suppressed the BAC results for all purpose.

Issues Presented on Appeal

B. STATEMENT OF THE CASE

The evidence presented during the hearing demonstrated that officer Wecker, the arresting officer and BAC officer did not continually observe Ms. Mashek during the mandatory 15 minute observation period prior to administering the BAC test. CP 67-68; RP 48-51. Wecker did not see Ms. Mashek put anything in her mouth during the observation period but he was not paying attention for a full 3 minutes during the 15 minute period. Id; Ex 1

(Video of BAC Proceedings).

Moreover, while Wecker did a cursory search of Ms. Mashek after the arrest, he did not search her pockets and he missed an electronic cigarette that Ms. Mashek smoked in the BAC room just prior to the observation period, and he missed some sort of mints that Ms. Mashek consumed just prior to the BAC test. RP 44-48, 51-52.

The trial court's relevant findings and conclusions are as follows. Finding of Fact IV provides in relevant part,

a video of the breath test showed that during the 15 minute period prior to the breath test, **Deputy Wecker was not observing Ms. Mashek for a full 3 minutes. During the observation period,** Ms. Mashek did not put any foreign substances in her mouth, but the Officer did not have her under constant observation.

CONCLUSIONS OF LAW

IV.

Tests-Information concerning tests contemplates a required 15 minute observation period. **The Deputy in this case violated the 15 minute observation period by not keeping the defendant under observation for 3 minutes.** Therefore, the State cannot meet its statutory of RCW 46.61.506 and the breath test results are inadmissible under this statute in the State's in chief.

(Emphasis added) CP 63-66. A Washington State Patrol forensic scientist testified that the 15 minute observation period was necessary condition precedent to the admissibility of the BAC results. RP 63.

The trial court suppressed the BAC results for all purposes and suppressed DRE testimony. The trial court's order in relevant part provides as follows:

IT IS FURTHER ORDERED that the BAC result, which has previously been suppressed by the court may not be used by the State for any purpose at trial to include, but not limited to, impeachment of the defendant or for rebuttable evidence by the State.

IT IS FURTHER ORDERED that the State may not call an expert witness to explain the effects of alcohol as it relates to field sobriety tests administered to the defendant.

CP 67-68. The state appealed. CP _____

C. ARGUMENT

1. THE TRIAL COURT DID ERR IN SUPPRESSING THE BAC RESULTS FOR LACK OF COMPLIANCE WITH RCW 46.61.506(4).

The trial court correctly suppressed the BAC results where the state failed to comply with the criteria for admission of the BAC results as set forth in RCW 41.61.506(4). Specifically, the police did

not observe Ms. Mashek for the required 15 minute period prior to administering the BAC test. CP 67-68.

Officer Wecker testified that he searched Ms. Mashek after her arrest but did not search or empty her pockets. RP 44-45. While in the BAC room, Ms. Mashek started to smoke an electronic cigarette that Wecker did not notice during his search. RP 48. Wecker testified that he did not see Ms. Mashek eat or drink or burp during the 15 minute period but did not know if she did or not because he did not observe her during the entire 15 minute period. RP 48, 49, 51-51.

The prosecutor played a video tape of the BAC observation room and the prosecutor admitted in closing argument that she observed Ms. Mashek put a mint in her mouth shortly before the 15 minute waiting period. RP 21, 68, 71. Wecker admitted that the video tape indicated that there were many times during the 15 minute period when he was not observing Ms. Mashek. RP 51. On one occasion, Wecker indicated that he had his back to Ms. Mashek and out of the corner of his eye he saw her duck her head below a table where he could not see her mouth. RP 48-49. Wecker did not conduct another mouth check and did not restart

the 15 minute observation period. RP 50. RCW 41.61.506(4)(iii) provides 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:

.....

(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;

RCW 41.61.506(4)(iii).

The foundational requirements for admissibility of breath test results were first established in *State v. Baker*, 56 Wn. 2d 846, 852, 355 P. 2d 806 (1960); *City of Seattle v. Allison*, 148 Wn.2d 75, 79, 79, P.3d 85 (2002), reconsideration denied (2003). "Compliance with approved breath test procedures is a condition precedent to admission of the test results." *Allison*, 148 Wn.2d at 82. The observation requirement is mandatory under RCW 46.61.506(3). Evidence of a driver's breath test is admissible only if the test administrator performed the test according to methods and procedures approved by the State Toxicologist. RCW 46.61.506(3).

The goal of breath testing is to determine the alcohol

concentration of the breath from deep in the lungs, to give an indication of the concentration of alcohol in the body. If a person took a single sip of alcohol, and for some reason, some alcohol remained in the mouth during breath testing, the device would detect a quick rise in alcohol as it detected the mouth air, then a dramatic drop as it detected deep lung air, free of alcohol.

32 WAPRAC § 25:8 Washington DUI Practice Manual Part VII.

Chemical Tests and Refusals Chapter 25. Breath Testing

WAC 448-13-040 is the Administrative Code describing the requirements for compliance with the administration of the breath test and sets forth the minimum procedure needed to produce prima facie evidence that the person tested did not put anything in their mouth during the 15 minute observation period. The WAC is explicit in requiring the operator to conduct the observation. Case law has expanded that to allow another person to conduct the observation. *Walk v. Department of Licensing, 95 Wn. App. 653, 976 P.2d 185 (1999)*; WAC 448-13-040 states in relevant part:

Administration of breath test on the BAC Verifier DataMaster. The following method for performing a breath test is approved by the state toxicologist pursuant to WAC 448-13-130 and includes the following safeguards ***to be observed by the operator*** prior to the test being performed. It must be determined that: (1) The person does not vomit or

have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test; and (2) the subject does 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. Such determination shall be made by either an examination of the mouth or a denial by the person that he or she has any foreign substances in mouth.

(Emphasis added) *Id.*

The purpose of the observation is to: (1) inform “the public of the administrative aspects of the state's breath alcohol test program” and (2) practice those principles accepted in the scientific community to ensure that the test results are valid. *Walk*, 95 Wn. App. at 187-188, quoting, WAC 448-13-010.

Whether WAC 448-13-040 requires the officer who conducts the breath test to actually observe during the observation period is a question of law reviewed de novo. *Walk*, 95 Wn. App. at 187; Accord, *State v. Morales*, 173 Wn.2d 560, 567 Fn. 3; 269 P.3d 263 (2012) (The Courts of Appeal review questions of statutory interpretation de novo). The primary objective in construing a statute is to ascertain and carry out the intent of the legislature. *Morales*, 173 Wn.2d at 567; citing, *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). The Court determines the intent of the

legislature primarily from the statutory language. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). The Courts construe the meaning of a statute by reading it in its entirety, *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

If a rule's meaning is plain on its face, then the court must give effect to that plain meaning. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. *Allison*, 148 Wn.2d at 81.

Like a statute, the Court interprets a WAC provision to give effect to its underlying policy and intent. *City of Sunnyside v. Fernandez*, 59 Wn.App. 578, 582, 799 P.2d 753 (1990). Intent and purpose are derived from the subject matter and statutory text as a whole. *Id.*

The term "observe" is not statutorily defined, but the Court in *Walk* relied on the RANDOM HOUSE DICTIONARY OF THE

ENGLISH LANGUAGE 1338 (2d ed.1987) for a definition of “observe” to ascertain the intent of WAC 448-13-040.

“Observe” means “to obey, comply with, or conform to....” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1338 (2d ed.1987); *see* WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 815 (1989) (“to conform one’s action or practice to (as a law, rite, or condition): comply with”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1558 (1993) (“tak[ing] notice of by appropriate conduct: conform one’s action or practice to ... to give heed to (as in deference) ... to come to realize or know esp[ecially] through consideration of noted facts....”).

Walk, 95 Wn. App. at 187-188. This definition provided the Court with authority to allow another officer to “observe” the person to be tested as long as the safeguards in the WAC were conformed with. *Id.*

In determining whether the operator or a different officer could conduct the observation period, the Court held that observation requirement could be satisfied if the person observing communicates his or her observations to the operator “(i.e., by relying on the word of the observing officer)”. *Walk*, 95 Wn. App. at 187-188. The Court held that the purpose and intent of the WAC could be satisfied as long as there were both: (1) human

observation; and (2) reliable communication between the observer and the operator. *Walk*, 95 Wn. App. at 187-188.

Walk is the only Washington State case discussing the “observation” period and interestingly, the State failed to discuss *Walk* or the many other Washington State cases that rely on *Walk* (AOB at page 8).

The WAPRAC DUI manual, supports the *Walk* opinion and Ms. Mashek’s position requiring human observation and communication with the operator of that observation.

The required 15 minute observation period prior to breath testing is to help to ensure that the breath test result will not be the product of mouth alcohol or another interfering substance in the mouth *State v. Baker*, 56 Wn. 2d 846, 856, 355 P.2d 806 (1960). See also National Safety Council Committee on Alcohol and Drugs, Report of the Subcommittee on Alcohol: Technology, Pharmacology and Toxicology, p.2 (Feb. 18, 2008).

The officer administering the test need not be the person observing the person for the entire 15 minutes if another officer observes, then communicates to the administering officer that the observation period was satisfied. *Walk v. State*, Dept. of Licensing, 95 Wn. App. 653, 976 P.2d 185 (Div. 3 1999).

32 WAPRAC § 25:8. Breath Testing (Emphasis added). There is no provision for replacing human observation with video recording,

particularly here where the video demonstrated the officer's inattention for at least a full 3 minutes during the observation period. CP 64. The practice manual clarifies the procedure needed to comply with the WAC and it is clear and unambiguous. Moreover, the term "observe" is straight forward and also means in addition to "compliance, "to watch, perceive or notice". RANDOM HOUSE COLLEGE DICTIONARY 918 (Revised Ed. 1984).

A video cannot and does not watch, perceive or notice; it records what is in front of the camera. Here it recorded three minutes of officer Wecker's inattention. CP 64. The relevant RCW's and WAC's are clear and unambiguous on this point and require human observation. The need for strict adherence with the observation requirement is explained in *32 WAPRAC § 25:8* which indicates that an invalid result will occur from the most minute contamination, something a video in this case could not detect.

Because the DataMaster™ is taking a very, very small sample and extrapolating it to 210L (imagine two-hundred bottles of 1L of soda pop—nearly the equivalent of a 55 gallon drum), even a very, very small amount of mouth alcohol would be detectable in breath testing, and could cause a very high alcohol concentration result. World renowned expert on breath testing, A. W. Jones.

Id.

Here, the video verified that the BAC operator Wecker did not observe Ms. Mashek for the required 15 minute period, nor did a fellow officer. Here a video cannot satisfy the observation requirement because it confirms Wecker's inattention. Thus finding of Fact IV Is not supported by the record and must be vacated. CP 76-67 Additionally, although not testimony, the prosecutor in her closing argument conceded that the video depicted Ms. Mashek putting something like a "cert" into her mouth shortly before the observation period and the defense attorney and Judge agreed that Ms. Mashek's hands were on her face near her mouth many times during the observation period, which in addition to the lack of observation, the judge determined made the test results inadmissible. RP 68, 79; CP 64.

The WAC's and RCW require a person to observe the subject to satisfy the public that the procedural safeguards are followed and the results reliable. Allowing a video that depicts the officer's inattention and in which the subject's mouth cannot be seen for part of the observation period cannot satisfy the goal of informing "the public of the administrative aspects of the state's

breath alcohol test program” and (2) practicing those principles accepted in the scientific community to ensure the validity of the results. *Walk*, 95 Wn. App. at 187-188, quoting, WAC 448-13-010. There was no expert testimony to support the notion that a video is a scientifically accepted alternative to human observation.

Only when the protocols and existing statutory provisions for administering the breath test are followed, is there sufficient assurance of accuracy and reliability of the test results to allow for general admissibility of test results. *Allison* 148 Wn.2d at 82. If this Court declines to address whether a video may ever satisfy the procedural safeguards, under the facts of this case, the procedural safeguards were insufficient to establish that the results of the BAC were reliable because the evidence presented depicted the officer’s repeated inattention during the observation period.

2. THE TRIAL COURT DID NOT ABUSE
ITS DISCRETION IN RULING THAT
DRUG EXPERT (DRE) TESTIMONY
WAS INADMISSIBLE.

The state argues that ER 702 and ER 703 required the trial court to conduct a hearing to determine if DRE expert’s testimony was admissible. AOB at 13. This is incorrect. Neither ER 702 nor ER 703 requires the trial court to conduct a hearing to determine

the admissibility of the proposed expert. ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in 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.

ER 702. ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

These provisions permit the trial court to determine first whether an expert is needed to assist the jury; and second whether the facts or data used by the expert to form his or her opinion are of a type reasonably relied on by experts in the field. *Id.*

This Court reviews a trial court's decision to admit or reject expert opinion testimony under ER 702 and 703 under an abuse of discretion standard. *State v. Baity*, 140 Wn.2d 1, 991 Pd.2d 1151 (2000). A trial court has 'broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.' "*Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22

P.3d 791 (2000). Quoting, *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662–63, 935 P.2d 555 (1997). The abuse of discretion standard recognizes that deference is owed to the trial court because it is “better positioned than [the appellate court] to decide the issue in question.” “*Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S.Ct. 2447, 2459 L.Ed.2d 359 (1990).

“A trial court abuses its discretion when its decision ‘is manifestly unreasonable or based upon untenable grounds or reasons.’ “*Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

For a DRE expert opinion to be admissible, the DRE expert must follow a 12-step protocol. *Baity*, 140 Wn.2d at 17. The 12-steps of the protocol are:

- (1) breath (or blood) alcohol concentration;
- (2) interview of the arresting officer;
- (3) preliminary examination;
- (4) eye examinations;
- (5) divided attention tests;
- (6) vital signs examination;
- (7) darkroom examination of pupil size;
- (8) examination of muscle tone;
- (9) examination of injection sites;
- (10) statements, interrogation;
- (11) opinion;
- (12) toxicology

analysis.

“A DRE's opinion is based not on one element of the test, but on the totality of the evaluation. When in doubt, the DRE must find the driver is not under the influence.” *Baity*, 140 Wn.2d at 4. The DRE evidence is inadmissible unless all 12-steps have been followed. *Baity*, 140 Wn.2d at 17.

The DRE evidence must also satisfy the predicate two-part inquiry under ER 702-whether the witness qualifies as an expert, and whether the testimony would be helpful to the trier of fact-before the evidence is admissible. *Baity*, 140 Wn.2d at 17, citing, *State v. Cauthron*, 120 Wn.2d 879, 889-90, 846 P.2d 502 (1993), reversed on other grounds in *State v. Buckner*, 133 Wn.2d 63, 66, 941 P.2d 667 (1997). A proper foundation for DRE testimony includes a showing that the test was properly administered and complies with ER 702 and ER 703. *Baity*, 140 Wn.2d at 17.

The Supreme Court determined that the 12-step process used in *Baity* met the Frye standards, but because the trial court did not ascertain whether the DRE expert was qualified, the Court remanded for a hearing to determine the DRE expert's qualifications. *Baity*, 140 Wn.2d at 17.

Unlike in *Baity*, in this case, the qualifications of the DRE expert were irrelevant because the state could not lay a proper foundation regarding the proper administration of the BAC test and the DRE expert did not follow the 12-step process. Thus, the court trial correctly concluded that DRE expert testimony was inadmissible.

3. THE TRIAL COURT CORRECTLY RULED THAT THE BAC EVIDENCE WAS NOT ADMISSIBLE FOR ANY PURPOSES.

The trial court was correct in suppressing the BAC for all purposes where the state did not comply with the WAC's to ensure the validity of the BAC test. The Supreme Court in *State v. Clark-Munoz*, 152 Wn.2d 39, 48, 93 P.3d 141(2004) *Superseded on other grounds by Regulation as Stated in Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 174 P.3d 43 (2007) addressed the issue of the admissibility of allowing breath tests as evidence of intoxication when they do not conform to properly promulgated reliability regulations. *Id.* The Court ruled that breath tests were inadmissible as "other evidence" of intoxication where the breath tests did not comply with the statute and regulations. *Munoz*, 152 Wn.2d at 48.

The Court in *Clark –Munoz* relied on the legislature’s directive that for “analysis of the person’s blood or breath to be considered valid under the provisions of this section or RCW 46.61.504, it “*shall* have been performed according to methods approved by the state toxicologist.”) (Emphasis added.) This means that “[t]he test must comport with those regulations, and by statute they must be performed by “an individual possessing a valid permit issued by the state toxicologist.” *Id. Munoz*, 152 Wn.2d at 49. The Court further noted that the trial court therein correctly rejected the state’s reliance on *State v. Donahue*, 105 Wn.App. 67, 69, 75–76, 18 P.3d 608 (2001) to suppress the BAC as other evidence of intoxication because *Donahue* was not on point. *Donahue* involved the admissibility of a blood test done on an injured driver for the purposes of medical diagnosis and treatment. *Donahue*, 105 Wn.App. at 70.

The Court of Appeals determined that the test was admissible as “other evidence” of intoxication even though it did not meet the standards laid out under Washington law because it was not conducted under the authority of Washington law. *Donahue*, 105 Wn.App. at 69, 75–76. In *Munoz*, the Supreme Court held that

Donahue “provides scant support for admitting nonconforming breath tests.” *Munoz*, 152 Wn.2d at 50.

Clark–Munoz controls this issues. The Supreme Court concluded the breath test was inadmissible because the State failed to establish that the test complied with another specific requirement of WAC 448-13-035 concerning the standards for certification of thermometers used in breathe test simulators. *Clark–Munoz*, 152 Wn.2d at 48. Breath tests that do not meet the technical requirements of chapter 46.61 RCW and state toxicology regulations are not admissible as any other competent evidence of intoxication. “This court has long required the State to abide by its own rules, especially when applied to vital privileges like driving.” *Clark–Munoz*, 152 Wn.2d at 50, citing, *Allison*, 148 Wn.2d 75; *State v. Cannon*, 147 Wn.2d 4, 50 P.3d 627 (2002); *State v. Straka*, 116 Wn.2d 859, 810 P.2d 888 (1991); *State v. Baker*, 56 Wn.2d 846, 355 P.2d 806 (1960). In this case, the trial court properly found that the State did not abide by its own rules, and excluded these tests.

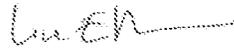
In the instant case as in *Clark–Munoz*, the trial court properly found that the State did not abide by its own rules, and excluded the breath test that did not comply with the WAC’s and RCW’s.

D. CONCLUSION

Roberta Mashek respectfully requests this Court affirm the trial court's order suppressing her BAC results.

DATED this 25th day of June 2012.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office Gfuller@co.grays-harbor.wa.us and Roberta Mashek 50 N Blockhouse Rd. Elma, WA 98541, June 25, 2012. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE

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