

FILED  
Court of Appeals  
Division III  
State of Washington  
2/19/2019 10:21 AM

No. 36270-1-III

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

---

STATE OF WASHINGTON, Respondent

v.

SIMON STOTTS, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
OF STEVENS COUNTY  
THE HONORABLE JUDGE JESSICA T. REEVES

---

OPENING BRIEF OF APPELLANT - AMENDED

---

Marie J. Trombley  
WSBA 4410  
PO Box 829  
Graham, WA  
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR ..... 1

II. STATEMENT OF FACTS ..... 1

III. ARGUMENT..... 5

    A. The Trial Court Erred When It Admitted Unconfirmed Drug  
    Screen Results. .... 5

IV. CONCLUSION ..... 11

## TABLE OF AUTHORITIES

### *Washington Cases*

<i>Bokor v. Department of Licensing</i> , 74 Wn. App. 523, 874 P.2d 168 (1994).....	5
<i>Dix v. ICT Group, Inc.</i> 160 Wn.2d 826, 161 P.3d 1016 (2007).....	6
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860 (2013).....	7
<i>State v. Copeland</i> , 130 Wn.2d 244,922 P.2d 1304 (1996).....	6
<i>State v. Powell</i> , 126 Wn.2d 244,893 P.2d 615 (1995) .....	6
<i>State v. Riker</i> , 123 Wn.2d 351,869 P.2d 43 (1994) .....	6
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012) .....	10
<i>State v. Straka</i> , 116 Wn.2d 859, 810 P.2d 888 (1991).....	11

### *Federal Cases*

<i>Frye v. United States</i> , 293 F.1013, 34 A.L.R. (D.C. Cir.1923) .....	6
--	---

### *Court Rules*

ER 102.....	5
ER 104(a) .....	5
ER 401 .....	5
ER 402.....	5
ER 403.....	5
ER 702.....	6

### *Regulations*

WAC 448-15-010 .....	10
WAC 448-15-020(1).....	10

*Other Sources*

Moeller, Karen E., PHarmd, BCPP, Kelly, C. Lee, Pharmd, BCPP,  
Kissack, Julie C., Pharmd,BCCP, *Urine Drug Screening:  
Practical Guide for Clinicians*,  
[https://www.mayoclinicproceedings.org/article/S0025-6196\(11\)61120-8/fulltext](https://www.mayoclinicproceedings.org/article/S0025-6196(11)61120-8/fulltext) Vol.83, Issue 1, Pages 66-76, January  
2008 ..... 8

Zeese, Kevin B. Drug Testing Legal Manual § 3:26 (2d ed.  
November 2018 upate) *Technological Problems with Testing:  
Confirmation testing* ..... 8

## I. ASSIGNMENT OF ERROR

- A. The Trial Court Erred When It Admitted Unconfirmed Drug Screen Test Evidence.

### ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. Where the official rapid drug screen test warns the result is not confirmed, and should not be used for legal purposes, does the trial court err when it admits the unconfirmed results as substantive evidence?

## II. STATEMENT OF FACTS

Stevens County prosecutors charged Simon Stotts by second amended information with assault of a child in the third degree or in the alternative, reckless endangerment. CP 68-69. The matter proceeded to a jury trial. RP 127.

On December 10, 2017, Simon Stotts and his partner, Talonna Baldwin, drove her three-year-old niece, A.L.L.D, from the child's grandmother's home in Republic to the family home in Colville, WA. RP 138, 273-275. They arrived between 9:00 pm and 9:30 pm. RP 237, 240, 275-276.

When they pulled into the driveway, A.L.L.D.'s uncle, who suffers from dementia and uses medical marijuana, came out of the

home as A.L.L.D. went inside to find her great aunt. RP 159, 170-171, 238. The uncle testified he noticed a strong smell of cat urine emanating from Mr. Stott's truck. RP 159. He reportedly saw Mr. Stotts set down a water pipe and observed smoke coming out of Mr. Stotts and the truck. RP 160-61.

According to her great aunt, Ms. Jones, who owned the home where A.L.L.D. lived, she did not see the child until 10 or 10:30 pm. RP 145. Ms. Jones said A.L.L.D. seemed quiet and lethargic and the child reported she had a headache and wanted to die from the pain. RP 139-140. She said A.L.L.D. told her that Mr. Stotts and Ms. Baldwin had been smoking in the car and it smelled. RP 140-141. She said A.L.L.D. had dilated pupils. RP 139, 162.

Ms. Jones and the child's uncle did not call 9-1-1, instead, they drove her to a hospital. RP 163-64. An ER physician examined the child. The physician reported she observed the child was quiet but did not observe dilated pupils. RP 230. The physician ordered a urine drug screen test, which was performed at 11:37 p.m. RP 221, 228.

Defense counsel objected to the admission of the urine drug screen test results and moved for suppression. RP 178; CP 4-6. The basis for the suppression was two-fold. First, under a *Frye*

challenge, the defense pointed to the caveat supplied by the test maker:

**This entire battery is for screening purposes only. Results are not confirmed.** Please note: Some medications cause positive results with any or all tested drugs in this battery. **Results from any unconfirmed drug in this screening battery should not be used for legal purposes.**

CP 5 Exh.1.

The State responded that the disclaimer on the screening test went to weight not admissibility of the results, citing to a DUI *per se* violation based on following the statutory demands of reliability. *State v. Charley*, 136 Wn. App. 58, 147 P.3d 634 (2006).

CP 10.

Second, defense counsel noted that the State had not provided the name of the instrument used by the hospital, the maintenance records, the manual, or the name of the individuals involved in the collection and testing of the sample. CP 5.

To lay a foundation for the drug screen results the State called the hospital medical technologist who conducted the test. RP 180. The hospital used the *MedTox* scan analyzer which detected the presence of drugs using an immunoassay<sup>1</sup> test. RP

---

<sup>1</sup> The transcript RP 186 refers to the test as “amino assay testing”, however, this appears to be a mistake.

186. The written disclaimer, which accompanied every patient test result warned the test results were not to be used for legal purposes. RP 182,185. The value of the test was that it was a screening tool only, for medical diagnosis and treatment. RP 189-190.

The technologist<sup>2</sup> testified she did not know the accuracy of the unconfirmed test results, or how often the machine registered false positive or negative readings. RP 192. The Colville hospital lab lacked the equipment to conduct a confirmation test. RP 185-186.

The court determined the *Frye* test did not apply, saying “UA is not a new method of proof, it’s not based on new scientific principles.” RP 195. The court held the *Frye* test inapplicable, and the results of the unconfirmed test went to the weight not the admissibility of the evidence. RP 195. The drug screen test indicated positive for the presence of opiates. RP 223.

Mr. Stotts testified he had not smoked drugs in the car. RP 273. Ms. Baldwin similarly testified saying A.L.L.D. slept during the drive and no one smoked in the vehicle. RP 275.

---

<sup>2</sup> The technologist testified she was not an expert in the field and was a “tech” not a technical specialist or a medical director. RP 209.

The jury found Mr. Stotts guilty of third-degree assault of a child. CP 97. Mr. Stotts makes this timely appeal. CP 116-117.

### III. ARGUMENT

#### A. The Trial Court Erred When It Admitted Unconfirmed Drug Screen Results.

Whether a rapid urine drug screen test (UDT) conducted by the immunoassay method, which the manufacturer warns is suitable for legal purposes, should be admitted as evidence of guilt appears to be to an issue of first impression in Washington. The unconfirmed immunoassay test result should have been excluded from evidence because by its own disclosure it did not meet the standards for use in a court. The Medtox test provided a prominent warning from the test maker: the results were unconfirmed and not to be used for legal purposes.

The trial court acts as a gatekeeper in determining whether evidence is admissible. ER 102; ER 104(a). *Bokor v. Department of Licensing*, 74 Wn. App. 523, 874 P.2d 168 (1994). To be admissible the evidence must be probative, and relevant, and not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 401, ER 402, ER 403. Generally,

a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). If the trial court's ruling on admissibility of evidence is based on an erroneous view of the law or involves an application of an incorrect legal analysis, it necessarily abuses its discretion. *Dix v. ICT Group, Inc.* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Admission of novel scientific evidence is evaluated under the *Frye* standards and ER 702. *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). The *Frye* test is used to determine the admissibility of novel scientific evidence. *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996) (citing *Frye v. United States*, 293 F.1013, 34 A.L.R. (D.C. Cir.1923)). The analysis has two parts: (1) whether the underlying theory is generally accepted in the scientific community, and (2) whether there are techniques utilizing the theory that are capable of producing reliable results. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). Because a *Frye* issue involves a mixed question of law and fact, review is de novo. *Copeland*, 130 Wn.2d at 255.

If scientific testimony passes the *Frye* test, the trial court moves on to determine whether the testimony should be admitted

under ER 702. *Id.* Under ER 702, scientific evidence must help the trier of fact, and it must be reliable. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013).

The court here found the UDT was not a new method of proof, or based on new scientific principles, and held the *Frye* test did not apply to the facts. RP 195. However, the issue here is not whether immunoassay tests are novel. The issue is whether the results are accepted in the scientific community for the purpose for which they were being used in the proceeding. The answer is no.

If a trial court finds the UDT test not a new method of proof or based on new scientific procedures, then it must also accept the warning prepared by the test maker that the test is not useful for legal purposes. It is not reliable in a criminal context.

Not only did the test manufacturer specifically warn that unconfirmed tests were not to be used in a legal proceeding, but according to the Mayo Clinic:

*Clinicians need to be aware that the preliminary tests performed by immunoassays are presumptive only and that external factors and variables can influence these results. A confirmatory test (eg, GC-MS) is required before decisions can be made on the basis of UDSs. Also, UDSs do not provide information regarding the length of time since last ingestion, overall duration of abuse, or state of intoxication.*

Thus, it is important that health care professionals understand the limitations of UDSs and appropriately assess results using both objective and clinical information. Inaccurate interpretations of these tools can have serious consequences and should be minimized<sup>3</sup>.

The Toxicology Section of the American Academy of Forensic Sciences have taken the position that confirmation of results is essential in forensic toxicology. Positive results of toxicological screening tests, regardless of the method used, and positive toxicological analysis results obtained by immunoassay methods should either be adequately confirmed before the results are used for forensic purposes or be clearly designated as “unconfirmed” results<sup>4</sup>. Unconfirmed test results are overly prejudicial, misleading and, obfuscate the issue for the trier of fact.

There is dispute over what type of confirmatory test is necessary. “The view of Dr. Kurt Dubowski is typical of other respected scientists in the field”:

Positive presumptive results of screening tests, standing alone lack the validity necessary for use in strictly forensic applications such as driving under the influence of drugs prosecution and for use in other

---

<sup>3</sup> Moeller, Karen E., Pharmd, BCPP, Kelly, C. Lee, Pharmd, BCPP, Kissack, Julie C., Pharmd, BCCP, *Urine Drug Screening: Practical Guide for Clinicians*, [https://www.mayoclinicproceedings.org/article/S0025-6196\(11\)61120-8/fulltext](https://www.mayoclinicproceedings.org/article/S0025-6196(11)61120-8/fulltext) Vol.83, Issue 1, Pages 66-76, January 2008.

<sup>4</sup> Zeese, Kevin B. Drug Testing Legal Manual § 3:26 (2d ed. November 2018 upate) *Technological Problems with Testing: Confirmation testing*.

proceedings which will or can adversely affect the test, such as disciplinary action by employers, denial of employment job applicants, or for most other applications than anonymous studies of drug use. Accordingly, all such results of screening tests must be properly verified (or superseded) by subsequent confirmatory analysis.

In a letter to the American Medical Association, Dr. Dubrowski joined with other leading forensic toxicologists addressing how urine tests were being used in employment, and the criminal justice system, stated:

For this much weight to be placed on the result of an assay, there should be no question concerning the validity of the results; the drug identification must be positive and beyond a reasonable doubt...They must be confirmed by adequate alternative chemical analyses, if any weight is to be placed on positive findings.... Since false positive results are possible, adequate alternative confirmatory tests must be used<sup>5</sup>...

To be admissible evidence must not be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 401, ER 402, ER 403. Under an abuse of discretion standard the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would

---

<sup>5</sup> Zees, Kevin B., Zeese Drug Testing Legal Manual § 3:26 (2d ed.) Technological problems with Testing: Confirmation Testing. November 2018 update.

take and is thus manifestly unreasonable, (2) rests on facts unsupported in the record and is thus based on untenable grounds, or (3) was reached by applying the wrong legal standard and is thus made for untenable reasons. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

The maker of the immunoassay drug screen test warns the test should not be used for legal purposes. According to forensic toxicologists, the results must be confirmed. The UDT result may be sufficient for probable cause, but it is not sufficient as substantive evidence because of the danger of unfair prejudice and misleading the jury as to the meaning of the test result. It is manifestly unreasonable to admit evidence which by definition is not reliable for legal purposes.

By analogy, this is similar to the Portable Breath Test authorized under WAC 448-15-010, the results of which are inadmissible. WAC 448-15-020(1) provides:

Valid results from the PBT instruments described in WAC 448-15-010 are approved for use to determine that a subject has consumed alcohol and establish probable cause to place a person under arrest for alcohol related offenses or probable cause to support issuance of a search warrant for blood to test for alcohol.

The concern of the judiciary is that the methods approved result in an accurate test, competently administered so that results reflect a reliable and accurate measurement. *State v. Straka*, 116 Wn.2d 859, 870, 810 P.2d 888 (1991). The reviewing Court retains the authority to clarify and refine the outer bounds of the trial court's available range of choices and, in particular, to identify appropriate legal standards. *Sisouvanh*, 175 Wn.2d at 623.

Admission of unconfirmed UDT for a criminal proceeding as substance evidence does not appear to have been decided in Washington. Mr. Stotts respectfully asks this Court to find it is an abuse of discretion to admit an unconfirmed UDT result.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Stotts respectfully asks this Court to reverse the trial court's ruling and remand for retrial.

Respectfully submitted this 19<sup>th</sup> day of February 2019.



WSBA 41410  
PO Box 829  
Graham, WA 98338  
marietrombley@comcast.net

## CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on February 19, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Stevens County Prosecuting Attorney at [trasmussen@co.stevens.wa.us](mailto:trasmussen@co.stevens.wa.us) and to Simon Stotts, 17326 N. Highway 21, Malo, WA 99150.



Marie Trombley  
WSBA 41410  
PO Box 829  
Graham, WA 98338

**MARIE TROMBLEY**

**February 19, 2019 - 10:21 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36270-1  
**Appellate Court Case Title:** State of Washington v. Simon Carl Stotts  
**Superior Court Case Number:** 17-1-00399-3

**The following documents have been uploaded:**

- 362701\_Briefs\_20190219101945D3346798\_0200.pdf  
This File Contains:  
Briefs - Appellants - Modifier: Amended  
*The Original File Name was STOTTS AOB 36270-1-III - Amended.pdf*
- 362701\_Designation\_of\_Clerks\_Papers\_20190219101945D3346798\_5398.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was Stotts Supplemental Designation of Clerks Papers.pdf*

**A copy of the uploaded files will be sent to:**

- trasmussen@stevenscountywa.gov

**Comments:**

Please disregard previously filed brief. There were typographical errors and errors in the tables that needed corrected. Thank you.

---

Sender Name: Valerie Greenup - Email: valerie.mtrombley@gmail.com

**Filing on Behalf of:** Marie Jean Trombley - Email: marietrombley@comcast.net (Alternate Email: )

Address:  
PO Box 829  
Graham, WA, 98338  
Phone: (253) 445-7920

**Note: The Filing Id is 20190219101945D3346798**