

66201-5

66201-5

No. 66201-5-1

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COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DAVID OLSON,

Appellant,

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## **I. APPELLANT'S REPLY TO ISSUES RAISED IN RESPONDENT'S BRIEF**

1. State mis-states testimony of phlebotomist. (BOR, pg. 6)
2. State mis-states testimony regarding Tyco Certificate of Compliance. (BOR, pg. 7)
3. State mis-states testimony regarding toxicologist's training. (BOR, pg. 8)
4. Absence of clotting in vial has no bearing on sufficiency of enzyme poison. (BOR, pg. 16)
5. State's reliance on opinion testimony of witness to meet foundational requirements fails prima facie standard. (BOR, pg. 13-15)
6. State's argument that it is not required to establish what is a sufficient amount of enzyme poison to stabilize alcohol concentration is contrary to statutory construction and case law. (BOR, pg. 15-16)
7. State's interpretation of harmless error is incorrect. (BOA, pg. 16-18)

## **II. ARGUMENT**

1. **Phlebotomist testified she rubbed SEPP on Olson's arm for one minute only.**

The State's brief incorrectly stated Ruth McDonough applied a sterilizer (SEPP) to Olson's arm for three to four minutes. (BOR, pg. 6; 12) Ms. McDonough testified she applied SEPP for only one

minute. (VRP 9/14 116) To have full “efficacy” (sic) SEPP should be applied for three to four minutes. (VRP 9/14 117)

**2. Tyco certificate of compliance does not relate to compliance with WAC regulations for admission of test results.**

The State’s brief incorrectly stated a certificate created by the manufacturer of the blood vial established that the amount of enzyme poison contained in the vial complied with “the regulations.” (BOR, pg. 7; 12) Ms. O’Reilly testified the certificate showed “what compounds are in the tubes, and how much.” (VRP 9/14 157) Her testimony regarding the certificate, which ends at pg. 158, never states any relationship the certificate has to WAC compliance.

**3. Ms. O’Reilly’s training at Borkenstein Institute did not include training for specific amounts of enzyme poison needed to preserve blood.**

The State’s brief incorrectly stated Ms. O’Reilly received training at the Borkenstein Institute establishing that the amount of enzyme poison present in the vials was sufficient. (BOR, pg. 8) Ms. O’Reilly testified she learned at the Institute the “nominal values for the preservative.” (VRP 9/14 183; 185) But she did not testify what a nominal value might be. She testified she received no formal training from the State toxicology lab regarding sufficiency of

enzyme preservative used in the vials; (VRP 9/14 184), even though the state toxicologist was required to identify what amount was required under the Washington Administrative Code. (VRP 9/14 184)

**4. Sufficiency of enzyme poison is not established by lack of clotting in vial.**

The State's brief incorrectly stated that the sufficiency requirement for enzyme poison was established by the lack of clotting in the vial. (BOR, pg. 16) Clotting relates to the absence of anti-coagulant. (BOR, pg. 7-8) (VRP 9/14 182) Ms. O'Reilly testified that the appearance of the blood in the vial is no clue whether it is sufficiently preserved. (VRP 9/14 182) This observation had no bearing on the issue related to enzyme poison.

**5. State's interpretation of "prima facie" fails to comport with established principles defining the term.**

The State has failed to articulate any reason why the definition of the term "prima facie," as an evidentiary standard, should be different in the context of blood-alcohol test admissibility than in other circumstances where the standard is applied.

"Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts

the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” Morissette v. U.S., 342 U.S. 246, 250, 72 S.Ct. 240 (1952).

Our courts first used the term “prima facie” to address the issue of factual sufficiency for admissibility of a breath or blood alcohol test in State v. Baker, 56 Wash.2d 846, 355 P.2d 806 (1960):

“We therefore hold that before the result of a breathalyzer test can be admitted into evidence, the state must produce *prima facie* evidence that each of the four requirements listed above have been complied with.” State v. Baker, 56 Wn.2d at 852. [Emphasis in original]

All published cases thereafter use the term “prima facie” to describe the evidentiary burden the State must meet to satisfy administrative code requirements to admit a blood test.

The Washington Legislature enacted RCW 46.61.506 in 2004, and included a definition for “prima facie” in section (4)(b).<sup>1</sup>

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<sup>1</sup> 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

Yet this definition is identical to the definition of prima facie evidence employed in corpus delicti cases.<sup>2</sup> See State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). This definition merely codifies the long standing interpretation of the term used to describe a burden of proof for preliminary foundational issues.

This point is crucial for two reasons. First, the State failed to directly address the “prima facie” analysis under Aten, supra. To meet the prima facie standard the State’s evidence must be consistent with compliance and inconsistent with non-compliance of the rule that must be met. Aten, at 660. Aten rejected the interpretation of “prima facie,” apparently argued by the State here, that a trial court may ignore conclusions from the evidence contradicting compliance. See Aten, at 659; (BOR, pg. 10). Here, Ms. O’Reilly was presented with treatises from within the field of

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the prosecution’s or department’s evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

<sup>2</sup> “‘*Prima facie*’ in this context means there is ‘evidence of sufficient circumstances which would support a logical and reasonable inference’ of the facts sought to be proved. The evidence need not be enough to support a conviction or send the case to the jury. But, as the rule indicates, if no such evidence exists, the defendant’s confession or admission cannot be used to establish the *corpus delicti* and prove the defendant’s guilt at trial. ... In assessing whether there is sufficient evidence of the *corpus delicti*, independent of a defendant’s statements, this Court assumes the truth of the State’s evidence and all reasonable inferences from it in a light most favorable to the State.”

toxicology, including one written by Dr. Dubowski, uniformly establishing a 10 mg to 1 mL standard for using enzyme poison to stabilize alcohol concentration in blood. Ms. O'Reilly instead relied upon an e-mail which she admitted she did not fully understand and would have worded differently to underscore her opinion the enzyme poison in the vial was sufficient. (VRP 9/15 15-23) To ignore the overwhelming evidence on this point shows not only a mis-application of the prima facie standard, but a clear abuse of discretion.

Second, the State failed to identify any fact in the record establishing the enzyme poison contained in the vial did in fact sufficiently preserve the alcohol concentration as required under administrative rule. Instead, the State referred five times to Ms. O'Reilly offering her opinion the amount of enzyme poison in the vials was sufficient and complied with the administrative code requirement.<sup>3</sup> But opinion is not fact. Summary Judgment motions, under CR 56, apply the "prima facie"<sup>4</sup> standard to determine

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<sup>3</sup> Pgs, 8, 9, 12, 15, 16.

<sup>4</sup> Using the "prima facie" standard, all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Washington v. Boeing, Co., 105 Wn. App. 1, 7, 19 P.3d 1041 (2000).

whether a party has established a genuine material factual dispute. CR 56(c); Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). A prima facie case is not established asserting opinion or by making conclusory statements. Sangster v. Albertsons, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000). To defeat summary judgment, a party must establish specific and material facts to support each element of the prima facie case. Id. Here the State must present fact to establish the enzyme poison was sufficient in amount to preserve the alcohol concentration in the blood. However, the State does not attempt to make this argument from this record.

**6. Rules for statutory construction require State to establish the sufficient amount of enzyme poison necessary to stabilize blood alcohol.**

The State responds that no authority compels the State to prove what amount of enzyme poison is necessary to sufficiently preserve the alcohol concentration of a blood sample. (BOR, pg. 15) This argument ignores the rules of statutory construction. All words used in a rule must be given meaning and effect. Parents Involved in Cmty. Sch. v. Seattle School Dist., No. 1, 149 Wn.2d 660, 685, 72 P.3d 151 (2003). In making its argument, the State

fails to explain what the State Toxicologist could have meant when requiring that the enzyme poison must be sufficient in amount to stabilize the alcohol concentration. The phrase “sufficient in amount” is conceptually different from showing mere “presence” of the enzyme poison in the vial. The former phrase presumes there is a threshold amount necessary to stabilize the blood. The two concepts cannot be harmonized, and the argument that any amount of enzyme poison the State places into the vial is sufficient must be rejected.

The State’s argument further ignores the Supreme Court ruling in City of Seattle v. Clark-Munoz.<sup>5</sup> There, The Court required the State to establish, as a foundational requirement, that thermometers used on breath test machines were “traceable” to NIST as specified by the State Toxicologist under administrative rules in effect at the time. “Traceability” of thermometers and the sufficiency of an amount of enzyme poison to stabilize blood alcohol concentration are unique scientific terms and subject to definition applying recognized meanings from within the relevant scientific fields. The record shows not only can this standard be

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<sup>5</sup> 152 Wn.2d 39, 93 P.3d 141 (2004).

identified and employed by the State, but that evidence of the recognized standard of 10 mg of enzyme poison to 1 mL of blood has existed in the State Toxicology laboratory for years.

Requiring the State to identify the amount of enzyme poison sufficient to stabilize a defendant's blood does not alter the State's burden of proof, but instead is consistent with the meaning of the administrative rules written by the state toxicologist. In essence, the State toxicology lab and the State of Washington should simply be required to comply with the rules they wrote to admit blood tests at trial.

**7. Error in admitting blood test not harmless error as jury verdict does not distinguish between “per se” and “affected by” prongs for establishing DUI element for Vehicular Assault.**

The State argues that State v. Watson<sup>6</sup> is no longer controlling law. The State incorrectly argues Watson has been distinguished by State v. Walker.<sup>7</sup>

While Walker may address the analysis leading to the Watson Court's ruling to suppress a breath test, Walker fails to call into question the Watson analysis on harmless error.

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<sup>6</sup> 51 Wn. App. 947, 756 P.2d 177 (1988).

<sup>7</sup> 83 Wn. App. 89, 920 P.2d 605 (1996).

Jurors were instructed they could find Mr. Olson was “under the influence” of intoxicants two separate ways: (1) a blood test exceeding .08 (the per se prong); or (2) by finding he was under the influence of intoxicating liquor. (CP 1268) Jurors were not instructed they had to be unanimous as to which definition they used; meaning some jurors could rely on the blood test, some could rely on evidence of impairment, and still others could rely on both to come to a collective decision on guilt.

Watson holds that where a defendant is charged under an “alternate means<sup>8</sup>” statute, and evidence is erroneously admitted that establishes one of the alternate elements necessary to convict the defendant, the Court may not affirm the conviction considering the unaffected alternate means for conviction. Watson, at 952. Therefore, it is irrelevant to consider whether the remaining evidence satisfied the “affected by” prong for being under the influence. It is impossible to tell from this record whether any or all jurors relied upon the blood test to convict Mr. Olson using the “per se” prong for DUI and Vehicular Assault. For this reason, the

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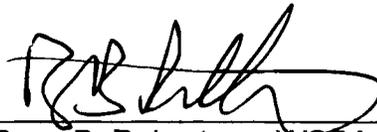
<sup>8</sup> DUI is an “alternate means” crime. State v. Franco, 96 Wn.2d 816, 821, 639 P.2d 1320 (1982).

erroneous admission of blood test evidence requires the reversal of conviction and new trial.

**III. CONCLUSION**

For the reasons submitted herein, Mr. Olson asks this Court to reverse the conviction for Vehicular Assault and remand for new trial.

RESPECTFULLY SUBMITTED this 3 day of January, 2012.



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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 66201-5-1

Respondent,

vs.

DECLARATION OF SERVICE

DAVID OLSON,

Appellant.

[CLERK ACTION REQUIRED]

I certify that on the 3<sup>rd</sup> day of January, 2012, I caused a true and correct copy of the following to be served on the below parties and Court of Appeals in the manner indicated below:

(1) REPLY BRIEF

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12 **I swear under penalty of perjury under the laws of the State of**  
13 **Washington the foregoing is true and correct.**

14  
15 Signed at Seattle, WA the 3 day of January, 2012.

16  
17 

18 Ryan B. Robertson, WSBA #28245  
19 Attorney for Mr. Olson