No. 89290-3

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 67456-1-I

King County Superior Court No. 10-2-36977-5 SEA
King County District Court No(s). 9Y6231062, C0769494

STATE OF WASHINGTON,

Respondent,

v.

BRETT BALLOW AND LESLIE FAUSTO,

Petitioners.

STATE'S ANSWER OPPOSING DISCRETIONARY REVIEW IN RESPONSE TO AMICUS CURIAE MEMORANDUM

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny review of the decision designated.

B. COURT OF APPEALS DECISION

The Court of Appeals affirmed the Superior Court's decision, which reversed the District Court's ruling that calculated "uncertainty intervals" are a foundational prerequisite to the admission of a breath test in every prosecution for driving under the influence ("DUI").

C. STATEMENT OF THE CASE

The State relies upon the summary of the facts and proceedings contained in the ably written decision of the Court of Appeals. See State v. King Cnty. Dist. Court, 175 Wn. App. 630, 633–36, 307 P.3d 765 (2013). Following that decision, Petitioners moved for discretionary review in this Court on August 28, 2013. On October 23, the Washington Association of Criminal Defense Lawyers ("WACDL") filed an amicus curiae memorandum in support of Petitioners' motion for review. The State responds now to WACDL's memorandum.

D. WHY REVIEW SHOULD BE DENIED

This Court should deny review of this case under RAP 13.5(b) because the Court of Appeals neither obviously nor probably erred. Even if the Court of Appeals erred, WACDL and Petitioners cannot demonstrate that the decision of the Court of Appeals renders further proceedings useless, or that it either substantially alters the status quo or substantially limits the freedom of a party to act. The former criteria are not satisfied because the Court of Appeals reached the correct decision under Frye,[1] ER 702, and decisions of this Court construing both. The latter criteria are not satisfied because the sole consequence of the Court of Appeals' decision is to leave intact the order of the Superior Court.

E. ARGUMENT

1. AMICUS CURIAE CITES THE WRONG CRITERIA FOR DISCRETIONARY REVIEW AND PROVIDES THIS COURT WITH NO MEANINGFUL ANALYSIS IN SUPPORT OF PETITIONERS' MOTION.

WACDL urges this Court to accept review of this case because it raises new questions of forensic science and law, and because it is a "question of substantial public importance" under RAP 13.4(b)(4). Amicus Curiae Mem. of WACDL at 1. These are not the criteria for

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

discretionary review of an interlocutory decision of the Court of Appeals. Neither WACDL nor Petitioners have provided this Court with any meaningful analysis for the acceptance of review.[2] Review should be denied on this basis alone. See State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (providing that the Supreme Court will not review issues inadequately briefed or argued); see also Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.")

This case began when the district court issued a blanket pre-trial suppression order, excluding all breath test results in the absence of calculated "uncertainty intervals." King Cnty. Dist. Court, 175 Wn. App. at 634. The State sought and obtained a Chapter 7.16 RCW writ of review in King County Superior Court. Id. at 634–35. The superior court reversed the district court. Id. at 635. Petitioners sought and obtained discretionary review of that interlocutory decision in the Court of Appeals. Id. at 636. The Court of Appeals affirmed the superior court's reversal of the district court. The entire process has been interlocutory in nature; indeed, neither Petitioner Ballow nor Fausto has yet been

[2] Petitioners likewise assert erroneously that review is appropriate under RAP 13.4(b). See Pet'rs' Mot. for Discretionary Review at 3.

brought to trial, let alone convicted. This case is therefore subject to the stricter criteria for discretionary review contained in RAP 13.5(b), not those contained in RAP 13.4(b).

2. PETITIONERS' MOTION FAILS THE REQUIREMENTS OF RAP 13.5(b) AND SHOULD BE DENIED.

Under RAP 13.5(b), this Court considers both the propriety of the Court of Appeals' decision *and* the effect of its decision. In pertinent part, discretionary review will be granted only:

> (1) If the Court of Appeals has committed an *obvious error* which would *render further proceedings useless*; or
>
> (2) If the Court of Appeals has committed *probable error* and the decision of the Court of Appeals *substantially alters the status quo* or *substantially limits the freedom of a party to act* . . . .

Id. at (1)-(2) (emphasis added). WACDL has not provided any basis upon which to conclude that the Court of Appeals obviously or probably erred; nor has WACDL shown that the Court of Appeals' decision will render further proceedings useless, substantially alter the status quo, or substantially alter the freedom of a party to act.

a. The Court of Appeals did not "Obviously" or "Probably" Err.

The Court of Appeals relied upon a straightforward application of the Frye standard, ER 702, and decisional authority of this Court. Regarding Frye, the Court of Appeals properly noted that "a court must

determine whether an expert's opinion is based on a theory generally accepted in the relevant scientific community." 175 Wn. App. at 636 (citing State v. Cauthron, 120 Wn.2d 879, 890 n.4, 846 P.2d 502 (1993)). The Court of Appeals concluded that the district court erred by wholly misapplying the Frye standard:

> [T]he district court concluded that without [a] confidence interval, a breath alcohol measurement is incomplete and therefore inherently misleading and unhelpful to the trier of fact in every case. This conclusion is fatally flawed. To properly reach this result, the district court would have needed to conclude that BrAC results without confidence intervals are not generally accepted within the relevant scientific community. *However, BrAC results without confidence intervals are generally accepted in the forensic toxicology community. In fact, measurement uncertainty reporting is almost nonexistent in the context of these cases. Indeed, the WTLD is unique in that regard. Neither Couper nor Gullberg knew of another breath test program in the country that offers a measurement of uncertainty.* Sklerov likewise testified that there is little consensus in the forensic toxicology community on how to even calculate or report uncertainty measurements. At the time of the 2010 hearing, only two scientific publications discussed calculating uncertainty for breath tests-both of which were written by Gullberg. The district court's findings reflect this testimony

Id. at 639 (emphasis added). The Court of Appeals also acknowledged this Court's recognition that "the DataMaster produces scientifically accurate, reliable test results when the eight criteria of RCW 46.61.506(4)(a) are met, *satisfying the Frye test.*" Id. at 636–37(citing

State v. Ford, 110 Wn.2d 827, 833, 755 P.2d 806 (1988); State v. Straka, 116 Wn.2d 859, 870, 810 P.2d 888 (1991)) (emphasis added).

Regarding ER 702, the Court of Appeals correctly observed that scientific evidence must pass a two-part test: "(1) whether the witness is qualified as an expert and (2) whether the expert testimony is helpful to the trier of fact." 175 Wn. App. at 637 (citing State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996)). Under ER 702, "if a scientific test is generally accepted by the relevant scientific community, lack of certainty goes to weight rather than admissibility." Id. at 641 (citing State v. Stenson, 132 Wn.2d 668, 717–18, 940 P.2d 1239 (1997); State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991)). Similarly, "unless errors rates are so serious as to be unhelpful to the trier of fact, error rates go to weight, not admissibility." Id. (citing Copeland, 130 Wn.2d at 270; Straka, 116 Wn.2d at 875). If a court determines that such an error renders scientific evidence inadmissible, it must do so *on the facts of a particular case*. Id. at 639 (citing City of Fircrest v. Jensen, 158 Wn.2d 384, 398-99, 143 P.3d 776 (2006); State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004)).[3] It was therefore error for the district court to

[3] As this Court stated in Willis, "[t]he admissibility of expert testimony is governed by ER 702 and requires a *case by case inquiry*." 151 Wn.2d at 262 (emphasis added).

issue a blanket suppression order under ER 702, applicable to all DUI cases.[4]

Finally, Petitioners contend that "a confidence interval is necessary to understand a BrAC test result, just like a probability estimate is necessary to understand a DNA (deoxyriboneucleic acid) match." 175 Wn. App. at 640.[5] Petitioners rely upon this Court's holding in State v. Cauthron, 120 Wn.2d 879, 907, 846 P.2d 502 (1993), that evidence of a DNA "match" could not be introduced unless accompanied by a probability estimate. Cauthron, however, is readily distinguishable, because "[t]estimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact." 120 Wn.2d at 907. Thus the Court of Appeals reasoned that the "failure to satisfy Frye clearly distinguishes the rejected DNA testimony from the BrAC test results in this case." 175 Wn. App. 640. This distinction is correct. For this reason, and for all of the reasons articulated above, the Court of

[4] The Court of Appeals also recognized that the district court's ruling was error in light of RCW 46.61.506(4)(a). See 175 Wn. App. at 636–37. Under this statute, once the foundational criteria enumerated in that subsection are met, "all other challenges to the reliability or accuracy of the test 'shall not preclude the admissibility of the test,' but instead 'may be considered by the trier of fact in determining what weight to give the test result.'" Id. at 637 (quoting RCW 46.61.506(4)(c)). This Court upheld the constitutionality of these requirements in Jensen, 158 Wn.2d at 399.

[5] See also Pet'rs' Mot. for Discretionary Review at 11–13.

Appeals did not err.

b. The Court of Appeals did not "Render Further Proceedings Useless;" or "Substantially Alter the Status Quo" or "Substantially Limit the Freedom of a Party to Act."

Even if the Court of Appeals obviously or probably erred, review under RAP 13.5(b) is inappropriate because the latter criteria of subsections (1) and (2) are not met. These require that that the error either render further proceedings useless, or substantially alter the status quo or substantially limit the freedom of the party to act, respectively. There is no sense in which the Court of Appeals' decision can be deemed to have done so.[6] The sole consequence of the Court of Appeals' decision is to leave intact the superior court's interlocutory decision. Thus the status quo was not altered by the Court of Appeals—it was in fact *maintained*.

In a broader sense, the decision of the Court of Appeals does not render any proceedings useless or limit the freedom of any party to act. Defendants in DUI cases—and Petitioners, in particular—retain the full array of options available to any criminal defendant. They are free to introduce uncertainty intervals if they choose. Indeed, the Washington

[6] Indeed, the breath tests in both of Petitioners' cases were suppressed separately by the district court, because of concerns relating to the certification of chemical solutions utilized during the test. CP 1448–449 (Order on State's Motion to Clarify). Thus, with respect to Petitioners, the Court of Appeals' decision changes nothing.

State Patrol's Toxicology Laboratory Division now produces confidence interval calculations as a matter of course, for every breath test machine, which are freely available online to the public. 175 Wn. App. at 635 n. 6; see also Breath Test Program Discovery Materials Site. WASHINGTON STATE PATROL FORENSIC LABORATORY SERVICES. *Available online at* http://www.wsp.wa.gov/breathtest/wdms_home.htm (last accessed November 15, 2013). Ultimately, [t]he burden is on defendants, not the State, to present uncertainty evidence challenging BrAC test results." 175 Wn. App. at 641. The Court of Appeals' decision does not prevent DUI defendants from meeting that burden.

F. CONCLUSION

"The delay occasioned by an interlocutory appeal prejudices both the defendant and the State." State v. Brown, 64 Wn. App. 606, 617, 825 P.2d 350 (1992). Accordingly, a petitioner must meet the applicable requirements before discretionary review is granted. Even considering the information provided by amicus curiae WACDL, Petitioners have failed to meet these requirements. Petitioners' motion should be denied and these cases should be allowed to proceed to trial.

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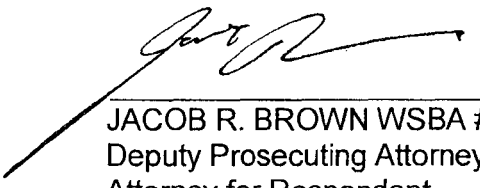
DATED this 15th day of November, 2013.

Respectfully submitted,
DANIEL T. SATTERBERG,
King County Prosecuting Attorney



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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, properly stamped envelopes, containing the State's answer opposing discretionary review in response to amicus curiae memorandum, in the matter of KING COUNTY DISTRICT COURT ET AL. V. STATE OF WASHINGTON, Cause No. 89290-3, in the Supreme Court of the State of Washington.

The envelopes were addressed separately to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name JACOB R. BROWN
Done in Seattle, Washington

Date 11/15/2013

OFFICE RECEPTIONIST, CLERK

To: Brown, Jacob
Subject: RE: State's answer in State v. Ballow/Fausto (No. 89290-3)

Received 11-15-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Brown, Jacob [mailto:Jacob.Brown@kingcounty.gov]
Sent: Friday, November 15, 2013 2:21 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'tvosk@comcast.net'; 'ryan@robertsonlawseattle.com'; 'scottwonder@gwwp.com'; 'suzanne-elliott@msn.com'
Subject: State's answer in State v. Ballow/Fausto (No. 89290-3)

To the Office of the Clerk of the Supreme Court of Washington:

Please find attached a PDF copy of the State's answer opposing discretionary review, in response to amicus curiae memorandum.

Counsels for Petitioner and Amicus Curiae have been served separately via U.S. Mail.

Thank you,

Jacob Brown, WSBA # 44052
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Cc'd: Mr. Theodore Vosk, Counsel for Petitioner; Mr. Ryan Robertson, Counsel for Petitioner; Mr. Scott Wonder, Counsel for Petitioner; Ms. Suzanne Elliot, Counsel for Amicus Curiae.

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