

FILED
COURT OF APPEALS

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No. 40255-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DUANE JOHNSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-00055-9
The Honorable Frederick Fleming, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered Findings as to Disputed Facts 1, 2 and 5.
2. The trial court erred when it concluded that the State satisfied the foundational requirements for admissibility of toxicology test results conducted on blood drawn from Appellant following his arrest on suspicion of driving under the influence of a controlled substance.
3. The trial court erred when it concluded that the test chemicals and the blood sample taken from Appellant were free from adulteration that could conceivably introduce errors into the test results.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the vials used to draw and store Appellant's blood sample had expired, were not filled to their proper capacity, were not immediately refrigerated, and were stored for two years before being tested for the presence of intoxicating chemicals, did the State fail to present prima facie evidence that the samples were free from adulteration that could conceivably introduce errors into the test results, and did the State therefore fail to meet its burden of establishing the

admissibility of the test results? (Assignments of Error 1, 2, & 3)

III. STATEMENT OF THE CASE

A. FACTS FROM TRIAL

Shortly after noon on September 23, 2007, Washington State Patrol Trooper Gerald Ames responded to a single-car accident on Interstate 5 in Fife. (RP 250, 253-54)¹ When Ames arrived, he saw a Jeep Wrangler entangled in the freeway cable barriers and Michael Johnson standing in front of the car assessing the damage. (RP 255) Ames testified that Johnson seemed lethargic and unsteady, but Johnson said he was not injured. (RP 257) Ames did not detect the odor of intoxicants, but suspected that Johnson might be impaired by drugs or alcohol. (RP 257, 259)

Ames arrested Johnson and placed him in the back seat of his patrol car. (RP 258, 259) Ames testified that Johnson's speech was slurred, and Johnson eventually fell asleep in the back of the patrol car. (RP 259-60, 262) Ames escorted Johnson to the hospital for a blood draw, then transported Johnson and the vials of blood to the Pierce County Jail. (RP 263, 269, 274)

¹ The trial volumes are consecutively paginated, and citations to those volumes will be to "RP" followed by the page number. Citations to the sentencing hearing will be to "SRP" followed by the page number.

Testing conducted on the blood by toxicologists at the Washington State toxicology lab nearly two years later showed the presence of oxycodone and clonazepam at higher than normal therapeutic levels. (RP 325, 344, 348-49) Oxycodone is generally prescribed to manage pain, but has sedative properties and can impair motor and cognitive functioning. (RP 329) Clonazepam is a relaxant that is often prescribed for insomnia because it induces sleep. (RP 331)

The State charged Johnson by Information with one count of felony driving while under the influence of intoxicants (RCW 46.61.502) and one count of driving with a suspended license (RCW 46.20.342). (CP 1-2) Johnson pleaded guilty before trial to the suspended license charge. (RP 12, 15, 18) Johnson also moved before trial to exclude the results of the blood tests, but the trial court denied the motion. (CP 5-42, 132-40; RP 156-69)

The jury returned a verdict of guilty. (RP 422) The trial court imposed a standard range sentence totaling 60 months. (SRP 22; CP 86, 90) This appeal timely follows. (CP 105)

B. FACTS FROM THE SUPPRESSION HEARING

At the hearing to determine whether to suppress or admit the toxicology test results, Trooper Ames testified that he was present

when phlebotomist Angela Kester conducted Johnson's blood draw at St. Joseph Hospital. (RP 130-31, 136, 137) He gave Kester two gray-topped vials, which are provided by the Washington State Patrol and which he stores in the trunk of his patrol car. (RP 137, 138) He testified that they were clean, dry and unused. (RP 138) The expiration date printed on the vials had passed, but he directed Kester to use the vials anyway. (RP 139)

Ames testified that he observed Kester sterilize Johnson's arm then use a new needle to prick his arm. (140, 146) He saw the vials fill with blood, then Kester handed him the vials. (RP 140-41) Ames noticed that one vial contained more blood than the other vial. (RP 147) Ames and Johnson then sat at the hospital for several hours waiting for Johnson to receive medical clearance. (RP 141) After transporting Johnson to the jail, Ames took the vials to the Washington State Patrol, entered them into the evidence system, placed evidence tape over the tops of the vials, and placed them into the evidence locker. (RP 142)

Lorinda Cox is the laboratory supervisor at St. Joseph. (RP 35) She testified that a vacuum seal causes blood to flow into the vial during a blood draw. (RP 44) If a vial does not fill to capacity, it could mean that the vacuum seal is compromised. (RP 47, 51)

She also testified that a vial must be inverted several times in order to adequately activate and mix anticoagulant and antibacterial additives that are present in the vial. (RP 45)

Naziha Nuwayhid is a forensic toxicologist at the Washington State Toxicology Lab. (RP 54, 55) She testified that the lab orders the gray-topped vials, then provides them to law enforcement agencies for collection of blood. (RP 90) The gray-topped vials contain a pre-measured amount of two additives: potassium oxalate, which prevents the blood from coagulating; and sodium fluoride, which is an enzyme poison that prevents bacteria growth. (RP 91)

The expiration date listed on the two vials in this case is May 2007, so the vials had expired by the time they were used to draw Johnson's blood in September of 2007. (RP 93) The expiration date for gray-top vials relates to the stability of the additives, but the vials also lose some of their vacuum seal over time. (RP 95)

Nuwayhid testified that the ratio of blood to additives would not affect forensic testing and would not adversely affect test results. (RP 98-99) She also testified that the blood in both vials was liquid when tested in 2009, indicating that the anticoagulant had been properly mixed with the blood at the time of the draw.

(RP 89, 106, 115) And because the anticoagulant and antibacterial additives are mixed together in the vial, she assumes that if the anticoagulant was properly mixed with the blood, then the enzyme poison was also properly mixed. (RP 122)

However, Nuwayhid also testified that chemical degradation can occur over time, and there is no way to know how much degradation has occurred in a particular blood sample. (RP 120-21) Therefore, the test results from 2009 only measure the amount of controlled substance present at the time of the test, so the results may not accurately reflect the amount of substance present at the time the blood was drawn. (RP 120-21)

In denying Johnson's motion to suppress or exclude the results of the toxicology tests, the trial court entered the following relevant Findings as to Disputed Facts:

1. The use of expired tubes did not compromise the validity of the blood test results.
2. [The] amount of blood collected in this case was sufficient for analysis and mixture of the Sodium [F]loride and Potassium Oxalate.
- ...
5. The blood samples were sufficiently mixed with the anti-coagulant and enzyme poison.

(CP 137-38) The trial court concluded that the anticoagulant and enzyme poison were still effective and properly mixed even if the

vials were not completely filled, that any vacuum loss was minimal, and that “the State has presented prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce errors into the test results.” (CP 138-39) The court found that the State satisfied all foundational requirements, that any irregularities with the drawing and storing of the blood go to weight and not admissibility, and that the toxicology results were therefore admissible. (CP 140; RP 168-69)

IV. ARGUMENT & AUTHORITIES

When reviewing the denial of a motion to suppress, the court should determine whether substantial evidence supports the challenged findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Mendez, 137 Wn.2d at 214 (citing Hill, 123 Wn.2d at 644). “A trial court’s erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.” Hill, 123 Wn.2d at 647. The trial court’s conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)). Additionally, a trial court’s

evidentiary rulings are reviewed for abuse of discretion. See State v. Hultenschmidt, 125 Wn. App. 259, 264, 102 P.3d 192 (2004).

A person is guilty of driving while under the influence if “the person drives a vehicle within this state . . . [w]hile the person is under the influence of or affected by intoxicating liquor or any drug[.]” RCW 46.61.502(1)(b). To prove that Johnson was under the influence of a drug, the State planned to introduce the results of toxicology tests done in July of 2009 on blood drawn from Johnson after his accident in September of 2007. (RP 83, 115)

Before blood tests can be admitted into evidence, the State must present prima facie proof that the test chemicals and the blood sample are “free from adulteration that could conceivably introduce error to the test results.” State v. Bosio, 107 Wn. App. 462, 466-67, 27 P.3d 636 (2001); State v. Wilbur-Bobb, 134 Wn. App. 627, 630, 141 P.3d 665 (2006). The State failed to meet its burden here.

First, the trial court’s Findings as to Disputed Facts 1, 2 and 5, finding that Johnson’s blood sample was not compromised by the fact that the vials were both expired and not filled to capacity, are not supported by the record. Nuwayhid testified that the expiration date on the vials refers to the stability of the additives

and Cox testified that the additives are specifically measured to properly mix with a full vial of blood. (RP 47, 95)

Second, the trial court erred when it concluded that the irregularities of the drawing and storage of the blood samples in this case could not impact the results of the toxicology tests. The expiration date had passed by the time the vials were used to collect and store Johnson's blood, the vials were not filled to their proper capacity, the blood was not immediately refrigerated, and was later stored for two years before it was tested. (RP 83, 93, 115, 139, 147, 141-42) Nuwayhid testified that the passage of time could result in degradation of chemicals in the blood, so there was no way to be sure that the test results accurately measured the amount of chemicals in the blood at the time the blood was drawn. (RP 120-21)

Based on these facts, it is impossible for the State to show, and for the court to find, prima facie evidence that the blood drawn from Johnson was free from any "adulteration that could conceivably introduce error" into the test results. The State therefore failed to meet its burden of establishing that the results met the standard of admissibility, and the trial court should not have allowed the results to be presented to the jury at trial.

Moreover, ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 402 states that "evidence which is not relevant is not admissible." As Johnson pointed out at the suppression hearing, results of tests done two years after the incident were not relevant because chemicals naturally degrade over time and the State could not establish with certainty that the results accurately measured the chemical levels present at the time of the incident. (RP 120-21, 158) Because Johnson's level of intoxication at the time of the incident is the only relevant issue in this case, results that do not reflect chemical levels at the time of the incident are not relevant.

The admission of the test results was an abuse of discretion and prejudicial to Johnson's defense. Without the potentially inaccurate and irrelevant results, the State could not establish that Johnson's lethargic behavior was caused by intoxicants, rather than lack of sleep or effects of having just been in a collision. The error was not harmless, and Johnson's conviction should be reversed.

V. CONCLUSION

The State failed to present prima facie evidence that the

samples were free from adulteration that could conceivably introduce errors into the test results because the vials used to draw and store Johnson's blood sample had expired, were not filled to their proper capacity, were not immediately refrigerated, and were stored for two years before being tested for the presence of intoxicating chemicals. Johnson's conviction for driving while under the influence of intoxicants should be reversed, and his case remanded for a new trial.

DATED: July 6, 2010



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CERTIFICATE OF MAILING

I certify that on 07/06/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Michael D. Johnson, DOC#337626, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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