

No. 42914-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TERRY JACOB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber Finlay

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Austin, 59 Wn. App. 186, 796 P.2d 746 (1990) 3

CONSTITUTIONAL PROVISIONS

U.S. Const., Sixth Amendment 3

U.S. Const., Fourteenth Amendment 3

Washington Constitution, Article 1, Section 22 3

UNITED STATES SUPREME COURT CASES

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S. Ct. 1038 (1973) 3

STATUTES AND COURT RULES

ER 401 3

A. REPLY ARGUMENT

EVIDENCE THAT MR. JACOB USED AN INHALER WAS RELEVANT TO THE ACCURACY OF HIS BLOOD/ETHANOL READING BASED ON THE EXISTING TESTIMONY AND NO FURTHER EVIDENCE OR OFFER OF PROOF WAS NECESSARY.

Mr. Jacob's blood was drawn at the Mason General Hospital, and Deputy Dugan submitted the sample for toxicology testing. 12/1/11RP at 57-68. Justin Knoy, the Washington State Patrol Crime Laboratory toxicologist who analyzed Mr. Jacob's blood and produced a report submitted as Exhibit 9, stated that his blood ethanol concentration was 0.10 grams per hundred milliliters. 12/1/11RP at 133-36; Exhibit 9. This reading was plainly critical to Mr. Jacob's conviction.

On appeal, Mr. Jacob has argued that his right to present a defense was violated when the trial court excluded evidence that the defendant had used an inhaler earlier on the day of the blood/alcohol testing. At trial, the toxicologist's testimony provided foundation for this evidence, when he stated the basic fact that the testing he conducted measured central nervous depressants, which included both alcohol and inhalants.

The Respondent contends that this proffered inhalant-use evidence was not relevant to the blood/alcohol reading, absent some further offer of proof. But no further offer of proof was required. Regarding neurological observation testing for alcohol intoxication, he stated that his laboratory's processes tested for "central nervous system depressants such as alcohol or inhalants or PCP being in the person's system." 12/1/11RP at 126. The Respondent fails to acknowledge that the toxicologist specifically testified that the testing which was done on Mr. Jacob's blood tests for the presence of central nervous system depressants, which includes both alcohol and inhalants in the blood.

The toxicologist, Justin Knoy, testified that, in the way described, a person's blood alcohol reading can be affected by the presence of medications in the person's blood. 12/2/11RP at 213-14. Thus, this is not a question of whether the use of an inhalant can "skew" or "affect the accuracy" of the blood test that was performed.

As an analogy, if a person were being prosecuted for driving with sugar in their blood, and a toxicologist testifies that he conducts a blood test for sweeteners generally, which provides a single number percentage which single number reflects both the presence of sugar and

the presence of “artificial sweetener,” it would be directly relevant that the defendant had recently consumed artificial sweeteners.

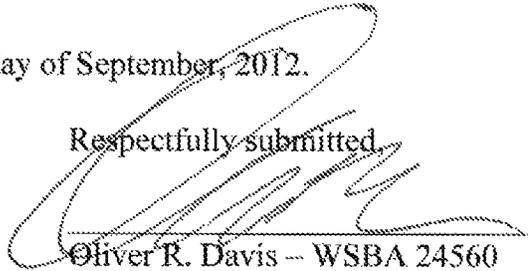
The blood test in question in the present case specifically tests for the presence of central nervous system depressants. Both alcohol and inhalants fall within this category, according to the toxicologist’s testimony. Mr. Jacob merely sought to show that he had indeed used a legal inhalant. Thus the .10 reading obtained by the toxicologist would, in total, reflect not only the presence of alcohol but also the presence of another central nervous system depressant – an inhalant. The jury should have been presented with evidence which showed that the reading of .10 may not have been the result entirely of alcohol – but may well have had a component reflecting the use of a legal inhalant. This evidence was relevant in a most fundamental sense. ER 401. Its exclusion violated Mr. Jacob’s right to present a defense. U.S. Const. amends. 6, 14; Washington Constitution, Article 1, Section 22; Chambers v. Mississippi, 410 U.S. 284, 294, 35 L.Ed. 2d 297, 93 S. Ct. 1038 (1973); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

C. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Jacob asks that his judgment of guilty should be reversed because the trial court's relevance ruling excluding the evidence of inhalant use violated his right to present a defense.

Dated this 14 day of September, 2012.

Respectfully submitted,



Oliver R. Davis -- WSBA 24560
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 42914-4-II
v.)	
)	
TERRY JACOB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TIMOTHY HIGGS, DPA	()	U.S. MAIL
MASON COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
PO BOX 639	(X)	E-MAIL VIA COA
SHELTON, WA 98584-0639		PORTAL TO:
		timh@co.mason.wa.us

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF SEPTEMBER, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

September 13, 2012 - 3:25 PM

Transmittal Letter

Document Uploaded: 429144-Reply Brief.pdf

Case Name: STATE V. TERRY JACOB

Court of Appeals Case Number: 42914-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

timh@co.mason.wa.us