

Court of Appeals No. 331300-III

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Court of Appeals
Division III
State of Washington

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**JOSE ALVARADO
Appellant.**

v.

**STATE OF WASHINGTON, DEPT. OF LICENSING
Respondent.,**

OPENING BRIEF OF APPELLANT

**James Kirkham, WSBA 36612
Attorney for Appellant**

TABLE OF CONTENTS:

TABLE OF AUTHORITIES	i-ii
I. Introduction	1
II. Assignment of error	2
III. Statement of the case.	2
IV. Law and Argument	3
A) The plain language and context support Mr. Alvarado's position that the MROP report was not a copy of the test results.	3
B) Due process requires that an actual copy of the test result be provided.	6
V. CONCLUSION	9

TABLE OF AUTHORITIES

Table of Cases

Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90
(1971).....7

Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d
724 (2003).....7

In re Det. of Stout, 159 Wn.2d 357, 370 (Wash. 2007).....8

In re Pers. Restraint of Young, 122 Wn.2d 1, 13 (1993).....8

Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d
18 (1976).....7,8

Olympic Forest Prods. v. Chaussee Corp., 82 Wn.2d 418, 421
(1973).....7

State v. Dolson, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999).....7

Regulations and Statutes

49 C.F.R. 40.....	4,5
49 CFR 40.87.....	5
Chapter 46.25 RCW.....	2,5
RCW 46.25.005.....	6
RCW 46.25.125.....	1,2,3
RCW 46.25.125(4).....	4

I. INTRODUCTION

The sole issue presented for review in this case is the interpretation of RCW 46.25.125. This statute allows the Department of Licensing to establish a prima facie case in support of suspension for a positive drug test, by providing “a copy of a positive test result with a declaration by the tester or medical review officer or breath alcohol technician stating the accuracy of the laboratory protocols followed to arrive at the test result.” RCW 46.25.125.

In the proceedings below, the Department and then the AG relied upon a single page form prepared by the Medical Review Officer (MRO) which rather than giving a numerical value or any further information on the result of the test simply states that the subject tested positive for drugs, and that the drug found was Benzoyllecgonine (Cocaine). CR 16, RP 18.

Mr. Alvarado’s position is that this statement that the test was positive is not a “copy of a positive test result” because the regulations underlying the test procedures clearly require that the result be a numerical value, in order to establish that it is over the cutoff level.

In addition to the plain language and context of the statute, The State relied upon the prefatory language of Chapter 46.25 RCW, which indicates that the chapter is to be liberally construed to promote public safety as supporting a less stringent standard for interpreting the language. RP 18.

Conversely, Mr. Alvarado argues that because of the interest that he has in his commercial license, and because of the minimal burden that our interpretation would put on the department, Due Process requires the Department to provide an actual copy of the test results.

II. Assignment of error

The Superior Court erred in finding that the one page document submitted by the MRO in this case constituted “a copy of the test results” and therefore erred in determining that the State made a prima facie case for suspension. RCW 46.25.125

III. Statement of the case

At de novo hearing in Yakima County Superior Court which took place on January 23, 2015 the Superior Court found that the report from the MRO was “a copy of the test result,” per the statute, and

that the State had made out a prima facie case. RP at 18. This was the only real issue in that de novo hearing. See RP.

IV. Law and Argument

This case presents an issue of statutory interpretation and a due process claim, both purely legal issues. The standard of review is de novo. See *State v. Evans*, 177 Wn.2d 186, 191 (Wash. 2013), (Issues of statutory construction and constitutionality are questions of law subject to de novo review). *Citing State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

A. The plain language and context support Mr.

Alvarado's position that the MRO's report was not a copy of the test results.

. The RCW in this case is 46.25.125. which states:

(4) For the purposes of this section, or for the purpose of a hearing de novo in an appeal to superior court, the hearing must be limited to the following issues: (a) Whether the driver is the person who is the subject of the report; (b) whether the motor carrier, employer, or consortium has a program that is subject to the federal requirements under 49 C.F.R. 40; and (c) whether the medical review officer or breath alcohol technician making the report accurately followed the protocols established to verify or confirm the results, or if the driver refused a test, whether the circumstances constitute the refusal of a test under 49 C.F.R. 40. Evidence may be presented to demonstrate that the test

results are a false positive. For the purpose of a hearing under this section, a copy of a positive test result with a declaration by the tester or medical review officer or breath alcohol technician stating the accuracy of the laboratory protocols followed to arrive at the test result is prima facie evidence:

- (i) Of a verified positive drug test or positive alcohol confirmation test result;
- (ii) That the motor carrier, employer, or consortium has a program that is subject to the federal requirements under 49 C.F.R. 40; and
- (iii) That the medical review officer or breath alcohol technician making the report accurately followed the protocols for testing established to verify or confirm the results.

After the hearing, the department shall order the disqualification of the person either be rescinded or sustained.

RCW 46.25.125(4), *emphasis added*.

Mr. Alvarado's argument that the test result is a numerical value, and that therefore a checkbox indicating a positive test can not be a copy of the test result comes directly from the description of the testing process described in 49 C.F.R. 40, which is directly referenced in the statute. For example at the initial hearing. to demonstrate that this was not a copy of the test result, counsel referred to 49 CFR 40, Subpart F - Drug Testing Laboratories. In

Section 40.87, there are cutoffs for the confirmation testing. That section reads:

§ 40.87

What are the cutoff concentrations for drug tests?

(a) As a laboratory, you must use the cutoff concentrations displayed in the following table for initial and confirmatory drug tests. All cutoff concentrations are expressed in nanograms per milliliter (ng/mL). The table follows:

49 CFR 40.87.

This language clearly demonstrates that if the MRO had in fact followed the procedures set forth in 49 CFR 40, that the result of the test was a numerical value. This is necessarily so because in order to arrive at his conclusion that the test was positive he would have had to compare whatever numerical value was obtained, to make sure it was over the cutoff value and was therefore “positive.”

In addition to the clear context of the statute and the referenced regulation requiring a “real” test result, common sense and experience tells us what a test result is. Courts across the state deal with the results of drug tests in monitoring probationers, or persons on community custody, and common experience is that more than an assertion that a test was positive be provided.

It is also important to note that providing an actual lab report test result would minimize the possibility that scriviners error, or reading a sample number incorrectly would occur. It provides an opportunity to ensure that those kind of mistakes are less likely.

B. Due process requires that an actual copy of the test result be provided.

The State successfully argued before the Superior Court that the prefatory language of Chapter 46.25 RCW favored their interpretation of the requirements regarding a “copy” of the test result. RP at 18. The court stated that it was unable to determine what the statute required by its plain language, and made its decision primarily based upon the liberal interpretation language. Id. That language comes from RCW 46.25.005 which reads in relevant part:

(2) This chapter is a remedial law and shall be liberally construed to promote the public health, safety, and welfare. To the extent that this chapter conflicts with general driver licensing provisions, this chapter prevails. Where this chapter is silent, the general driver licensing provisions apply.

RCW 46.25.005

This argument may seem at first to have merit. However, a countervailing interest which outweighs this language is Due Process, which clearly applies to license suspension proceedings.

It is well established that “[a] driver’s license is a property interest protected by the due process clauses of the United States and Washington Constitutions. *State v. Dolson*, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999) (citing *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)).

“The fourteenth amendment to the United States Constitution provides in part that no “state [shall] deprive any person of life, liberty, or property, without due process of law . . .” Article 1, section 3 of the Washington State Constitution likewise states that, “No person shall be deprived of life, liberty, or property, without due process of law.” *Olympic Forest Prods. v. Chaussee Corp.*, 82 Wn.2d 418, 421 (1973).

“Due process” is not, however, an easily definable thing. At its base are the fundamental principles of fairness.

As the Supreme Court of this State has explained:

Due process is a flexible concept. At its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Demore v. Kim*, 538 U.S. 510, 551, 123 S. Ct.

1708, 155 L. Ed. 2d 724 (2003) (Souter, J., concurring). In determining what procedural due process requires in a given context, we employ the *Mathews* test, which balances: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures.

In re Det. of Stout, 159 Wn.2d 357, 370 (Wash. 2007), citing *Mathews*, supra and citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 13 (1993).

As stated above, the private interest (driver's license) in this case is significant and is clearly established by case law as deserving of constitutional protection. The first factor clearly requires significant and meaningful procedural safeguards.

The second factor weighs in favor of finding that due process requires a different result than that reached by the Superior Court. . Adding a requirement that the Department actually provide the actual results would be a simple and straightforward way of eliminating error. This second factor is really at the heart of Mr. Alvarado's complaint here. It seems the very least that the Department can do when it seeks to suspend or revoke a license based upon a scientific test is to provide a copy of that test result. We know that if the MRO's statement is true, that an actual copy of the test result exists. He must have used it to determine the test

was positive. There is no principled reason that the Department should not have the burden of providing it.

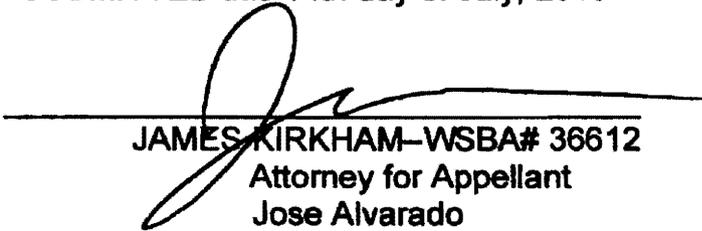
This leads to the last factor. Requiring the Department to provide the actual test results would not present a significant burden on the Department, or adversely affect the governmental interest involved. It would increase that accuracy of the proceedings, and as stated above, this test result likely already exists, because the MRO must have used it in drafting his statement. Even if the results had not been reduced to writing (in which case the danger of error would be higher), then requiring the Department to produce at the hearing a standard lab report would not be a significant burden. It is done by labs reporting results all over this State for use in court and otherwise.

V. Conclusion

The issue raised in this appeal is important. The court will decide whether the Department, when it seeks to suspend or revoke a commercial driver's license needs to provide a simple straightforward test result, of the type produced customarily in labs across the country, or whether a checkbox positive is close enough for government work.

The language and regulatory context support Mr. Alvarado's position, and Due process requires the basic procedural protections. Ultimately, the basic sense of fairness requires that persons who are brought before the Department are given more information than "you tested positive for X." It isn't that hard, and it should be done. Allowing the sloppy procedure followed in this case reflects poorly on the Department and the concept of the rule of law. We ask the court to reverse the Superior Court and remand for dismissal of the suspension.

RESPECTFULLY SUBMITTED this 14th day of July, 2015.



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