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COURT OF APPEALS NO. 57935-5-I
Superior Court No. 05-1-08111-9 SEA

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

MARK LUDVIGSEN, Appellant/Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005/05/11 PM 2:08

BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

Assignment of Error

The Superior Court erred when it ruled that SMC 11.56.020, WAC 448-16 and RCW 46.61.506 as amended in 2004 were retroactively applicable to a 2002 charge of DUI under former SMC 11.56.020 and WAC 448-13.

Issues Pertaining to Assignments of Error

No.1: Retroactive application of SMC 11.56.020, WAC 448-16 and RCW 46.61.506 as amended in 2004 to a 2002 charge of DUI under former SMC 11.56.020 and WAC 448-13 is a violation of the ex post facto clauses of the Washington State and Federal Constitutions.

No.2: Retroactive application of SMC 11.56.020, WAC 448-16 and RCW 46.61.506 as amended in 2004 to a 2002 charge of DUI under former SMC 11.56.020 and WAC 448-13 is a violation of the due process clauses of the Washington State and Federal Constitutions.

B. STATEMENT OF THE CASE

Mr. Ludvigsen was arrested for DUI under Seattle Municipal Code (“SMC”) 11.56.020 on February 5, 2002.¹ He was subsequently charged through complaint under the City Code then in effect which by reference required compliance with WAC 448-13 for a breath test to be deemed

¹ CP 5, 13.

valid.² He subsequently failed to appear for arraignment and a bench warrant was issued for his arrest.³ He was arrested on this warrant on January 21, 2005.⁴

Mr. Ludvigsen appeared for a pretrial hearing on these charges on May 17, 2005.⁵ At that time he moved to suppress his breath test under City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 44 (2004) for failure to comply with the provisions of SMC 11.56.020 and WAC 448-13 in effect at the time of his breath test.⁶ The City opposed the motion arguing that the City and Administrative Code provisions amended as of 2004, as well as the relevant provisions of RCW 46.61.506 also amended as of 2004, should apply to his prosecution.⁷

The Trial Judge determined that “compliance with the Washington Administrative Code in the year 2002 is so substantive and not procedural under Clark-Munoz, and moreover, compliance with the Washington Administrative Code is so related to compliance with the statutory language in effect at that time, and thus substantive.”⁸ As a result, he found “that the Washington Administrative rule in effect at – in the year 2002, which was found to be untraceable or lack of traceability, is the law

² CP 6, 10, 13.

³ CP 13.

⁴ CP 13.

⁵ CP 2.

⁶ CP 5-6.

of this case.”⁹ Based on that ruling the Judge subsequently suppressed Mr. Ludvigsen’s 2002 breath test and, finding that the City could not go forward with its case, dismissed the pending charge.¹⁰

The decision was appealed and on January 30, 2006, the Superior Court overturned the trial court in City of Seattle, v. Ludvigsen, No. 05-1-08111-9 SEA (2006).¹¹ In doing so the Court found that “RCW 46.61.506(4) and WAC 448-16 et seq. are procedural in nature and therefore are presumed to apply retroactively.¹² Thus, according to the Superior Court, the law in effect on the date of the hearing was to be applied and not that in effect at the time of the alleged conduct charged.¹³

C. SUMMARY OF ARGUMENT

Under former SMC 11.56.020 (the statute in effect at the time of the conduct alleged herein), the only breath test evidence sufficient to support a conviction for driving under the influence of alcohol was a valid test as defined by former WAC 448-13. Under former WAC 338-13-060, the criteria applied to determine the validity of a test was to be the law in effect at the time the test was administered. At the time of Mr. Ludvigsen’s breath test these criteria included the requirement that

⁷ CP 8.

⁸ CP 10.

⁹ CP 10.

¹⁰ CP 10-11.

¹¹ CP 49-50.

reference thermometers be traceable to NIST. Combined these provisions dictated what evidence was sufficient as a matter of law to convict an individual under SMC 11.56.020. Moreover, as to the *per se* prong, they dictated what evidence was necessary as a matter of law to convict. Under these provisions, Mr. Ludvigsen was immune to conviction for a *per se* violation.

In 2004, SMC 11.56.020 and RCW 46.61.506 were amended. The amendments completely eliminated any requirement that a breath test used in a prosecution under SMC 11.56.020 be valid. At the same time, WAC 448-13 was replaced by WAC 448-16. WAC 448-16 dropped the requirement of NIST traceability. Combined, these new provisions: (1) allow breath test evidence formerly insufficient as a matter of law to support a conviction to be considered by the finder of fact in determining guilt; and (2) affirmatively establish that such evidence is now sufficient as a matter of law to support a conviction. Moreover, in the instant case they would subject Mr. Ludvigsen to the possibility of conviction on the *per se* prong of the offence where under the law in effect at the time of the alleged conduct he would have been immune from such consequence.

1. Ex Post Facto – The newly enacted/amended provisions: (1) alter the legal rules of evidence, and receive less, or different, testimony,

¹² CP 49-50.

than the law required at the time of the commission of the offence, in order to convict the offender; and (2) make it easier for the prosecution to meet the threshold for overcoming the presumption of innocence by allowing it to rely on evidence formerly deemed insufficient as a matter of law to support a conviction. As a result, both the state and federal ex post facto clauses preclude retroactively applying them to the case *sub judice*. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

2. Due Process I – The City’s attempt to apply the newly enacted/amended provisions retroactively is a stark example of the government refusing, after the fact, to play by its own rules by altering them in a way that is advantageous only to the State in order to facilitate an easier conviction. This is fundamentally unfair. The government must abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty. As a result, both the state and federal due process clauses preclude retroactive application of the current laws to the case *sub judice*. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

¹³ CP 49-50.

3. Due Process II – All parties agree that under the law in effect at the time of Mr. Ludvigsen’s breath test his test was invalid. Accordingly, the test administered was not the one Mr. Ludvigsen had a reasonable expectation of receiving nor the one he consented to. Because it was invalid, as a matter of law it was deemed not to exist under former SMC 11.56.020. Because it was a different test, performed according to different procedures, he could not have had the opportunity to make a “knowing and intelligent” decision as to whether to submit to it. For both reasons, retroactive application of the current law to resurrect Mr. Ludvigsen’s test under different guidelines would be violative of the state and federal due process clauses. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

D. ARGUMENT

“A decision on the admissibility of evidence is within the discretion of the trial court.” In re Detention of Halgren, 124 Wn.App. 206, 220 (2004). As a result, a trial judge’s ruling on the admissibility of evidence is reviewed for abuse of discretion. City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 44 (2004). Only “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons [does] an abuse of discretion exist.” State v. Stenson, 132

Wn.2d 668, 701 (1997). The Trial Court “will not be overturned unless there was a manifest abuse of that discretion.” Hayes v. Wieber Enterprises, Inc., 105 Wn.App. 611, 615 (2001).

1. RETROACTIVE APPLICATION OF SMC 11.56.020, WAC 448-16 AND RCW 46.61.506 AS AMENDED IN 2004 TO A 2002 CHARGE OF DUI UNDER FORMER SMC 11.56.020 AND WAC 448-13 IS A VIOLATION OF THE EX POST FACTO CLAUSES OF THE WASHINGTON STATE AND FEDERAL CONSTITUTIONS.

The Constitution of the United States commands that “[N]o State shall...pass any...ex post facto Law.” U.S. CONST. art. I § 10, cl. 1. The Washington State Constitution similarly commands that “[N]o...ex post facto law...shall ever be passed.” WASH. CONST. art. 1, § 23. These provisions are interpreted under the same framework. State v. Handran, 113 Wn.2d 11, 14 (1989). Under this framework, relied upon for over 200 years, an ex post facto law refers to certain retroactively applied criminal laws including:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. **Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.**

Carmell v. Texas, 529 U.S. 513, 522, 120 S.Ct. 1620 (2000)(*quoting*, Calder v. Bull, 3 U.S. 386, 390 (1798))(*Emphasis added*); *see also*, State v. Edwards, 104 Wn.2d 63, 70-1 (1985).

“All these, and similar laws, are manifestly unjust and oppressive.” Calder at 391. They “have been in all ages the favorite and most formidable instruments of tyranny.” THE FEDERALIST NO. 84 (Alexander Hamilton).

Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed, at other times, **they violated the rules of evidence (to supply a deficiency of legal proof) by admitting [or] receiving evidence...or other testimony, which the courts of justice would not admit**; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender...

Calder at 389 (*Emphasis added*).

“[B]ecause [they] are oppressive, unjust, and tyrannical [they] are condemned by the universal sentence of civilized man.” Ogden v. Saunders, 25 U.S. 213, 266 (1827). “Very properly therefore [was the prohibition against ex post facto laws] added [to the] constitutional bulwark in favor of personal security and private rights.” FEDERALIST NO. 44 (James Madison). It stands as one of the greatest “securities to liberty

and republicanism” contained within our Constitution. THE FEDERALIST NO. 84 (Alexander Hamilton).

State courts have exhibited confusion “concerning the application of the *Ex Post Facto* Clause to changes in rules of evidence.” Murphy v. Kentucky, 465 U.S. 1072, 1073, 104 S.Ct. 1427 (1984) (WHITE, J., *dissenting from denial of certiorari*). This arises from the fact that while “[E]very ex post facto law must necessarily be retrospective; [not] every retrospective law is...an ex post facto law.” Calder at 391. “[A]lterations which do not...change...the ultimate facts necessary to establish guilt, but--leaving untouched the...amount or degree of proof essential to conviction...relate to modes of procedure only...which the state...may regulate at pleasure.” Hopt v. People of Territory of Utah, 110 U.S. 574, 590, 4 S.Ct. 202, (1884). In this context:

Ordinary rules of evidence...do not violate the Clause...Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as “unfair” or “unjust,” they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard.

Carmell at 533, n.23.

An example of evidentiary rules included in this category are those “[S]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases.” Hopt at 589; *See e.g., Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68 (1925); State v. Clevenger, 69 Wn.2d 136 (1966). “[I]t is now well settled that...A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing [a] disqualification...is not an ex post facto law.” Beazell at 170-1. This follows from the fact that under such statutes “[T]he quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.” Id. at 170. As the Court in Hopt explained:

Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not...**alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.** The crime for which the present defendant was indicted, the punishment prescribed therefore, **and the quantity or the degree of proof necessary to establish his guilt,** all remained unaffected by the subsequent statute. **Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws.** But alterations which do not increase the punishment, nor change the ingredients of the offense or **the ultimate facts necessary to establish guilt,** but--leaving untouched the nature of the crime and the amount

or degree of proof essential to conviction--only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only...

Hopt at 589-90 (*Emphasis added*).

Nonetheless, “by simply labeling a law ‘procedural,’ a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause.” Collins v Youngblood, 497 U.S. 37, 46, 110 S.Ct. 2715 (1990).

The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name...If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

Cummings v. Missouri, 71 U.S. 277, 325 (1866); *see also*, Weaver v. Graham, 450 U.S. 24, 31 n.15, 101 S.Ct. 960 (1981).

Accordingly, “it is the effect, not the form, of the law that determines whether it is *ex post facto*.” Weaver at 31. Any “procedural change may constitute an *ex post facto* violation if it affect[s] matters of substance.” Collins at 45 (*citation omitted*). “Subtle *ex post facto* violations are no more permissible than overt ones...the prohibition which may not be evaded is the one defined by the Calder categories.” Id. The U.S. Supreme “Court...has repeatedly endorsed this understanding, including, in particular, the fourth [Calder] category.” Carmell at 525.

Under this framework, a law will be deemed “an *ex post facto* law”

if it “changes the rules of evidence [so that] **less or different** testimony is sufficient to convict” than was required at the time the alleged conduct occurred. Duncan v. State, 152 U.S. 377, 382, 14 S.Ct. 570 (1894)(*Emphasis added*). This includes “laws that diminish ‘the quantum of evidence required to convict.’” Stogner v. California, 539 U.S. 607, 615, 123 S.Ct. 2446 (2003). “The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the *Ex Post Facto* Clause accordingly.” Carmell at 534. In this context “[T]he relevant question is whether the law affects the quantum of evidence required to convict.” Id. at 551. “Calder’s fourth category addresses this concern precisely.” Id. at 532. As explained by the Court in Carmell:

A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, **the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction.** There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in

having the **government abide by the rules of law it establishes** to govern the circumstances under which it can deprive a person of his or her liberty or life.

Carmell at 532-3 (*Emphasis added*).

Carmell dealt with a defendant who had been convicted of “various sexual offenses against his stepdaughter.” Carmell at 516. At the time of the offenses in question, the statute prohibiting such conduct read:

A conviction...is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. TEX.CODE CRIM. PROC. ANN., ART. 38.07 (1983).

The Court interpreted that statute as:

establish[ing] a sufficiency of the evidence rule respecting the minimum quantum of evidence necessary to sustain a conviction. If the statute’s requirements are not met (for example, by introducing only the uncorroborated testimony of a 15-year-old victim who did not make a timely outcry), a defendant cannot be convicted, and the court must enter a judgment of acquittal. Conversely, if the requirements are satisfied, a conviction, in the words of the statute, “is supportable,” and the case may be submitted to the jury and a conviction sustained.

Carmell at 517-8 (*citations omitted*).

At trial, the State introduced testimony from the stepdaughter of acts which occurred after she had attained the age of 14 years, but while

she was still under 18 years old, which were unaccompanied by a timely outcry. It sought to do so under a statute amended subsequent to the commission of the alleged acts which read:

A conviction...is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense. TEX.CODE CRIM. PROC. ANN., ART. 38.07 (*as amended* 1993).

The amended statute “extended the child victim exception to victims under 18 years old.” Carmell at 518. This was “critical” for the convictions in question because:

The “outcry or corroboration” requirement was not satisfied...they rested solely on the victim’s testimony. Accordingly, the verdicts...stand or fall depending on whether the child victim exception applies. Under the old law, the exception would *not* apply, because the victim was more than 14 years old at the time of the alleged offenses. Under the new law, the exception would apply, because the victim was under 18 years old at that time. In short, the validity of...petitioner’s convictions depends on whether the old or new law applies to his case, which, in turn, depends on whether the *Ex Post Facto* Clause prohibits the application of the new version of Article 38.07 to his case.

Carmell at 518-9.

The Court held that the amended statute was:

unquestionably a law “that alters the legal rules of evidence, and receives less, or different, testimony, than the

law required at the time of the commission of the offence, in order to convict the offender.” Under the law in effect at the time the acts were committed, the prosecution’s case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim’s testimony *and* corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim’s testimony alone, without any corroborating evidence. Under any commonsense understanding of Calder’s fourth category, Article 38.07 plainly fits. Requiring only the victim’s testimony to convict, rather than the victim’s testimony plus other corroborating evidence is surely “less testimony required to convict” in any straightforward sense of those words.

:::

It is true, of course, as the Texas Court of Appeals observed, that “[t]he statute as amended does not increase the punishment nor change the elements of the offense that the State must prove.” But that observation simply demonstrates that the amendment does not fit within Calder’s first and third categories. Likewise, the dissent’s remark that “Article 38.07 does not establish an element of the offense,” only reveals that the law does not come within Calder’s first category. The fact that the amendment authorizes a conviction on less evidence than previously required, however, brings it squarely within the fourth category.

The fourth category, so understood, resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice.

Carmell at 530-2.

The Court went on to explain that “there is no good reason to draw a line between laws that lower the burden of proof and laws that reduce the quantum of evidence necessary to meet that burden; the two types of

laws are indistinguishable in all meaningful ways relevant to concerns of the *Ex Post Facto* Clause.” Carmell at 541. As indicated above, “[T]he legal result must be the same...what cannot be done directly cannot be done indirectly.” Cummings at 288; *see also*, Carmell at 541.

The distinction to be drawn between Hopt and Carmell is between statutes that simply enlarge the class of persons who may testify and laws relating to the sufficiency of evidence to convict for an offense. Carmell at 544-5. The former affects only “the mode in which the facts constituting guilt may be placed before the jury.” Hopt at 590. On the other hand, “a sufficiency of the evidence rule...does not merely ‘regulat[e]...the mode in which the facts constituting guilt may be placed before the jury,’...but governs the sufficiency of those facts for meeting the burden of proof.” Carmell at 545. As indicated above, the latter fits squarely within the fourth Calder category whereas the former does not.

Furthermore:

a sufficiency of the evidence rule resonates with the interests to which the *Ex Post Facto* Clause is addressed in a way that a witness competency rule does not. In particular, the elements of unfairness and injustice in subverting the presumption of innocence are directly implicated by rules lowering the quantum of evidence required to convict. **Such rules will *always* run in the prosecution’s favor, because they always make it easier to convict the accused.** This is so even if the accused is not in fact guilty, because the coercive pressure of a more easily obtained conviction may induce a defendant to plead

to a lesser crime rather than run the risk of conviction on a greater crime. **Witness competency rules, to the contrary, do not necessarily run in the State's favor.** A felon witness competency rule, for example, might help a defendant if a felon is able to relate credible exculpatory evidence.

Nor do [witness competency] rules necessarily affect, let alone subvert, the presumption of innocence. The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. **Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained.** Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. **Sufficiency of the evidence rules (by definition) do just that-- they inform us whether the evidence introduced is sufficient to convict as a matter of law (which is not to say the jury *must* convict, but only that, as a matter of law, the case may be submitted to the jury and the jury may convict).**

Carmell at 546-7 (*Emphasis added*).

In short, the distinction:

concerns what a witness competency rule has to say about the evidence "required...in order to convict the offender." The answer is, nothing at all...prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules, however, tell us precisely that.

Carmell at 551-2.

In 2002, SMC 11.56.020 read in relevant part:

11.56.020 Persons under the influence of intoxicating liquor or any drug--Chemical analysis--Tests, evidence and penalties.

A. Driving While Intoxicated.

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within the City:

a. and the person has, within two (2) hours after driving, an alcohol concentration of .08 or higher, **as shown by analysis of the person's breath or blood made under the provisions of this section;** or

b. while the person is under the influence of or affected by intoxicating liquor or any drug

∴

D. Implied Consent. - Any person who operates a motor vehicle within the City is deemed to have given consent, **subject to the provisions of this section**, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood...The officer shall inform the person of the person's right to refuse the breath or blood test...

∴

J. Methods of Analysis. - **Analysis of the person's blood or breath to be considered valid** under the provisions of this section **shall have been performed according to methods approved by the State Toxicologist...**

SMC 11.56.020(A)(1)(a)-(b), (D) & (J)(2002)(*Emphasis added*).

Subsection A of this provision is substantially similar to the State DUI statute RCW 46.61.502.¹⁴ *Cf.*, City of Seattle v. Urban, 32 Wn.App. 634 (1982). One noticeable difference between SMC 11.56.020, as it

existed in 2002, and RCW 46.61.502 was that the City Code referenced an analysis “made under [its own] provisions” while the State statute referenced an analysis “made under RCW 46.61.506.” The absence of language generally adopting RCW 46.61.506 or evidencing any intent to be bound by its subsequent amendments itself mandates that former SMC 11.56.020 be given independent effect immune from any subsequent amendments to RCW 46.61.506.¹⁵ Town of Republic v. Brown, 97 Wn.2d 915, 917-9 (1982). This includes the 2004 amendment to RCW 46.61.506(4) establishing new rules of admissibility for breath test evidence.

While former SMC 11.56.020 did not incorporate RCW 46.61.506 itself, however, it did adopt some of its language. In particular, Subsection J contained language mirroring a portion of that contained in RCW 46.61.506(3) requiring that for an “[A]nalysis of the person’s blood or breath to be considered valid [it] shall have been performed according

¹⁴ This is required by the rule that traffic laws are to be “uniform upon all persons” “throughout this state.” City of Seattle v. Williams, 128 Wn.2d 341, 342 (1995).

¹⁵ Had the City wanted to, it could have incorporated RCW 46.61.506 and any subsequent amendments thereto into the provisions of SMC 11.56.020 by explicitly referencing the statute and making clear its intent. Town of Republic v. Brown, 97 Wn.2d 915, 917-8 (1982). Nonetheless, while former SMC 11.56.020 did reference former RCW 46.61.506(4) for the limited purpose of determining what constitutes a qualified person for purposes of performing a blood draw, nowhere did it incorporate or reference any other provisions of the statute. Although RCW 46.61.506 had been in existence for over 30 years, this formulation of SMC 11.56.020 remained unchanged through several amendments until 2004. As a result, the omission must be viewed as not being inadvertent but rather purposeful. State v. Edwards, 104 Wn.2d 63, 67-8 (1985).

to methods approved by the state toxicologist.” Because of the identity in language, the standards relied upon by former SMC 11.56.020 for determining whether a breath test was valid were deemed to be the same standards relied upon by RCW 46.61.506(3). State v. MacKenzie, 114 Wn.App. 687 (2002).

Under former SMC 11.56.020, it was a crime for an individual to have an alcohol concentration of .08 or higher within two hours of driving. State v. Crediford, 130 Wn.2d 747, 754-5 (1996). The Code explicitly limited the evidence that could be used to establish alcohol concentration, though, to an “analysis of the person’s breath or blood made under the provisions of this section.” As a result, unless the prosecution had obtained a breath or blood test, its evidence would necessarily have been insufficient to support a conviction under the *per se* prong of the Code.

Even a breath test indicating an alcohol concentration of .08 or higher, though, was not sufficient. The clear language of SMC 11.56.020 dictated that this “alone [was] not conclusive proof of the *per se* offense.” State v. Brayman, 110 Wn.2d 183, 191 (1988). In addition, before a test could be sufficient to support a conviction under the *per se* prong, the State was still required to establish that the “analysis [had been] made under the provisions of this section.” Id. A test which failed to meet the explicit requirements of the section did not constitute evidence of a *per se*

offense upon which a conviction could be based. City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 44 (2004); *see also*, State v. McElroy, 553 So.2d 456, 458 (La. – 1989)(state could not prosecute under statute requiring compliance with provisions governing alcohol test procedures where those provisions had not been complied with).

From this it is clear that not only did former SMC 11.56.020 dictate what evidence was “**sufficient** to convict [for a *per se* offense] as a matter of law,” it mandated what evidence was **necessary** to convict as a matter of law. To have been guilty of a *per se* offense, one must have had a BAC of .08 or higher as determined by an “analysis of the person’s breath or blood **made under the provisions of [SMC 11.56.020].**” Accordingly, any amendment of this provision that changed or lessened the quantum of evidence required to convict would constitute a violation of the State and Federal ex post facto clauses if it were applied to an incident occurring prior to its amendment.

In this context, former Subsection J mandated that “[A]nalysis of the person’s blood or breath to be considered valid under the provisions of this section shall have been performed according to methods approved by the State Toxicologist.” For purposes of former SMC 11.56.020, the “methods approved by the State Toxicologist” were contained in WAC 448-13. State v. MacKenzie, 114 Wn.App. 687 (2002). “These rules

dictate[d] how to perform a test and what constitute[d] a valid test.” Kent v. Beigh, 145 Wn.2d 33, 44 (2001). A breath “test [was] *valid* only if the machine [was] maintained in accordance with [these] regulation[s].” State v. Watson, 51 Wn.App. 947, 950 (1988).

In a prosecution for driving under the influence of alcohol there was no flexibility: “a test must be a *valid* test...No test occur[ed] until a valid test occur[ed].” State v. Brokman, 84 Wn.App. 848, 852 (1997). Compliance with the relevant WACs was the “exclusive method” of establishing the validity of test results. Watson at 950. Moreover, under the WACs in effect in 2002, the “criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect at the time the test is administered.” *Former* WAC 448-13-060(5) (repealed 10/23/04). Accordingly, under SMC 11.56.020 as it stood in 2002, unless a test was valid under the provisions of WAC 448-13 in existence at the time of the test, it was not sufficient to support a conviction for a per se offense.

In 2002, WAC 448-13-060 stated that “[A] test shall be a valid test...if the requirements of WAC 448-13-040...are met.” *Former* WAC 448-13-060 (repealed 10/23/04). Under WAC 448-13-040, “[P]rior to the start of the test, the operator must verify that the thermometer, certified per WAC 448-13-035, indicates that the temperature of the simulator solution

is thirty-four degrees centigrade plus or minus 0.3 degrees centigrade. *Former* WAC 448-13-040 (repealed 10/23/04). Finally, WAC 448-13-035 required that “[T]he thermometers used in the simulators...be certified on an annual basis...using a reference thermometer traceable to standards maintained by the National Institute of Standards and Testing (NIST).” *Former* WAC 448-13-035 (repealed 10/23/04). These rules required “[T]hat certification...be proven by the State in order to sustain a valid breath test.” Cannon v. Dept. of Licensing, 147 Wn.2d 41, 60 (2002). To do so the State needed to establish that the thermometer in the breath test was “tested against a thermometer traceable to standards maintained by NIST.” Clark-Munoz at 48.

As this makes clear, for a test to be valid under former SMC 11.56.020 the City was required to show that the associated simulator thermometer was tested against a thermometer traceable to NIST under WAC 448-13-035. Any subsequent amendment to SMC 11.56.020 or the applicable WACs which removed this requirement would necessarily “changes the rules of evidence [so that] **less or different** testimony [would be] sufficient to convict” than was required by the Municipal Code at the time the alleged conduct occurred. Accordingly, it would constitute a violation of the State and Federal ex post facto clauses if it were applied to an incident occurring prior to its amendment.

In 2004, SMC 11.56.020 was amended in relevant part to read:

A person is guilty of driving while under the influence of intoxicating liquor...if the person drives a vehicle...And the person has...an alcohol concentration of 0.08 or higher, as shown by analysis of the person's breath or blood **made under RCW 46.61.506...**

SMC 11.56.020(A)(1)(a)(*as amended 2004*)(*Emphasis added*). As amended, the City Code explicitly adopted the amended provisions of RCW 46.61.506 while also doing away with former sections D and J listed above.

The Legislature's intent in amending RCW 46.61.506 was "to ensure swift and certain consequences for those who drink and drive." Laws of 2004, ch. 68, § 1. To achieve this goal, it "adopt[ed] standards governing the admissibility of tests of a person's blood or breath [which would] reduce the delays caused by challenges to various breath test instrument components and maintenance procedures." Laws of 2004, ch. 68, § 1. In particular, a test no longer needs to be valid to support a conviction under the *per se* prong of a DUI offense.¹⁶ RCW 46.61.506(4)(c). The new law eliminates any requirement of NIST traceability or adherence to any other "methods approved by the State Toxicologist." Instead, now all that is required is adherence to a simple

¹⁶ A valid test is defined in RCW 46.61.506(3).

checklist, codified in RCW 46.61.506(4), and the test is admissible for the determination of guilt whether or not it is valid. RCW 46.61.506(4).

While challenges made under the previous law can still be argued at trial, they no longer prevent a finding of guilt on the *per se* prong. Laws of 2004, ch. 68, § 1; RCW 46.61.506(4)(c). As a result, the newly amended law not only allows breath test evidence formerly **insufficient as a matter of law** to support a conviction “to be considered by the finder of fact” in determining the guilt of a defendant, it makes it **sufficient as a matter of law** to support such a finding.¹⁷ Laws of 2004, ch. 68, § 1; RCW 46.61.506(4)(c). Thus, the new law makes it “easier [for the prosecution] to meet the threshold for overcoming the presumption” of innocence.

Because amended SMC 11.56.020 incorporates this new framework, a test no longer needs to be valid to support a conviction under the *per se* prong of its provisions either. Thus, there is no longer any requirement of compliance with any standards set forth by the State Toxicologist. It has completely done away with what was once necessary to support a conviction under the *per se* prong of the City Code: a valid test as defined by the Washington Administrative Code. Moreover,

¹⁷ Sufficiency determines whether the evidence introduced is sufficient to convict as a matter of law not whether the jury *must* convict as a matter of law, i.e., only whether the case may be submitted to the jury and the jury may convict. Carmell at 546-7

because the offense itself was explicitly defined with reference to such a test, “[T]he amendment at issue changes ingredients of the offense and is therefore markedly different than a change in witness competency.” Edwards at 71.

From this it is clear that amended SMC 11.56.020: (1) “alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender;*” and (2) makes it “easier [for the prosecution] to meet the threshold for overcoming the presumption” of innocence by allowing it to rely on evidence formerly deemed **insufficient as a matter of law** to support a conviction. As a result, if applied retroactively to Mr. Ludvigsen’s case the current law “violates the state and federal constitutional prohibitions against ex post facto legislation.” Edwards at 72. This precludes retroactive application of amended SMC 11.56.020 and amended RCW 46.61.506 to the matter *sub judice*.

The City may argue that, although the 2002 version of SMC 11.56.020 must be applied, current WAC 448-16 ought to be applied and not former WAC 448-13 (which was in existence at the time the breath test under consideration was performed). This argument fails for the same reasons stated above.

First, as recognized by the Trial Judge and demonstrated by the above analysis, “compliance with the Washington Administrative Code is so related to compliance with the statutory language in effect at the time.” This follows from the fact that the very definition of a *per se* offense under former SMC 11.56.020, as well as the definition of a valid test, required a test “**performed according to methods approved by the State Toxicologist**” before a *per se* offense could even be deemed committed or a breath test to have occurred. SMC 11.56.020(A)(1)(a), (J). Thus, the very meaning of the Municipal Code in effect at the time was determined by, and inseparable from, the WAC in effect at the time. Accordingly, if the Municipal Code in effect at the time must be applied, the only way to do so is to apply the WAC giving it meaning at that time which would be the WAC in effect at that time: WAC 448-13. And WAC 448-13 explicitly stated that the “criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect at the time the test is administered.” *Former* WAC 448-13-060 (repealed 10/23/04).

Second, the Toxicologist “adopted [the] new rules in accordance with the amendments” to RCW 46.61.506. Letourneau v. DoL, 131 Wn.App. 657, 662 n.7 (2006). Mirroring the intent of the Legislature, his purpose was the “[A]doption of streamlined rules for administration of

breath alcohol test[s].” WASH. ST. REG. 04-19-144. “Due to the **significant scope of changes**, the prior rules chapter 448-13 WAC [were] struck in their entirety and replaced with [] chapter 448-16 WAC.” WASH. ST. REG. 04-16-062. Thus, the prior requirements for a valid test were eliminated in order to “simplify” and stream line the requirements for law enforcement. WASH. ST. REG. 04-16-062.

The elimination of the requirement of NIST traceability is only one example of the necessary ingredients for a valid test which have been done away with. Prior to repeal of WAC 448-13, NIST traceability had to be established for a test to be sufficient to support a conviction under the *per se* prong of SMC 11.56.020. Under WAC 448-16 it does not. WAC 448-16 *et. seq.*. Hence, application of WAC 448-16 to this case would permit conviction of a *per se* offense under SMC 11.56.020 on “less or different” evidence than that required under WAC 448-13 at the time the breath test was administered. In fact, it would permit a conviction based on evidence formerly deemed **insufficient as a matter of law**. Thus, as the trial Judge concluded, this makes “compliance with the Washington Administrative Code in the year 2002 substantive and not procedural.”

From this it is clear that application of newly enacted WAC 448-16 would: (1) “alter[] the *legal* rules of *evidence*, and receive[] less, or different, testimony, than the law required at the time of the commission

of the offence, *in order to convict the offender;*” and (2) make it “easier [for the prosecution] to meet the threshold for overcoming the presumption” of innocence by allowing it to rely on evidence formerly deemed **insufficient as a matter of law** to support a conviction. As a result, if applied retroactively to Mr. Ludvigsen’s case it “violates the state and federal constitutional prohibitions against ex post facto legislation.” Edwards at 72. This precludes retroactive application of newly enacted WAC 448-16 to the case at bar as well.

While the analysis to this point has focused on the newly amended/enacted provisions in the context of a prosecution on the *per se* prong of a DUI charge, the same conclusions hold in a prosecution on the “under the influence” prong as well. This results from three facts.

First, under former SMC 11.56.020, breath tests that did not meet the technical requirements of the state toxicologist’s regulations were also not admissible as evidence of intoxication. Clark-Munoz at 50. The same provisions governed the admissibility of breath test results whether they were sought to be introduced for purposes of establishing a *per se* or an “under the influence” offense. Id. Thus, breath test evidence that was insufficient to support a conviction on the *per se* prong was also insufficient to support a conviction on the “under the influence” prong. Without repeating the foregoing arguments, it is beyond dispute that by

eliminating the requirements of a valid test and NIST traceability the newly amended/enacted provisions allow the City to rely on breath tests formerly deemed **insufficient as a matter of law** to support a conviction.

Second, a positive breath alcohol test may create a strong “inference of intoxication.” South Dakota v. Neville, 459 U.S. 553, 564, 103 S.Ct. 916 (1983). Thus, in a prosecution on the “under the influence” prong, “evidence of intoxication is far stronger where there is a positive blood (or breath) alcohol test.” State v. Cohen, 125 Wn.App. 220, 225 (2005). As a result, any law allowing the City to rely on breath test results formerly deemed **insufficient as a matter of law** also makes it “easier [for the prosecution] to meet the threshold for overcoming the presumption” of innocence on this prong. Accordingly, because the newly amended/enacted provisions allow the City to rely on breath test results formerly deemed **insufficient as a matter of law**, they also make it “easier [for the City] to meet the threshold for overcoming the presumption” of innocence on this prong as well.

Third, the newly enacted/amended laws *always* run in the prosecution’s favor because their only effect is to make it easier for the City to present breath test evidence and hence to convict the accused. In this context it must be noted that the strictures limiting the introduction of breath test evidence do not apply to a defendant’s use of that evidence.

They merely prevent the City from using such evidence to convict an individual. State v. Milstead, 646 P.2d 63, 65-6 (Or.App. – 1982); *Cf.*, Rock v. Arkansas, 483 U.S. 44, 55-66, 107 S.Ct. 2704 (1987). Accordingly, the easing of the standards of admissibility with respect to breath test results offers no advantage to a defendant.

As a result of these factors, if the newly amended/enacted laws are applied retroactively to this case on only the “under the influence” prong, it would still violate the state and federal constitutional prohibitions against ex post facto legislation. This precludes their retroactive application and requires that the Superior Court be reversed and the Trial Court’s determination reinstated.

Both the state and federal ex post facto clauses preclude retroactive application of the recently amended/enacted statutory and regulatory provisions under consideration in the case *sub judice*. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

2. **RETROACTIVE APPLICATION OF SMC 11.56.020, WAC 448-16 AND RCW 46.61.506 AS AMENDED IN 2004 TO A 2002 CHARGE OF DUI UNDER FORMER SMC 11.56.020 AND WAC 448-13 IS A VIOLATION OF THE DUE PROCESS CLAUSES OF THE WASHINGTON STATE AND FEDERAL CONSTITUTIONS.**

a. **Retroactive Application Of Rules Concerning The Sufficiency Or Admissibility Of Evidence Amended To Facilitate Easier Convictions.** “The general rule is that, absent contrary legislative intent, statutes are presumed to operate prospectively only.” Bayless v. Com. Coll. Dist. No. XIX, 84 Wn.App. 309, 312 (1997). “Where a new enactment does not expressly provide for retroactive application, it should not be judicially implied.” Everett v. State, 99 Wn.2d 264, 270 (1983); Hammack v. Monroe St. Lumber Co., 54 Wn.2d 224, 233 (1959). Accordingly, “a legislative enactment will not be held to apply retrospectively unless that is clearly the legislative intent.” Johnson v. Morris, 87 Wn.2d 922, 927 (1976). In this respect, “an amendment is like any other statute and applies prospectively only.” In re F.D. Processing, INC., 119 Wn.2d 452, 460-463 (1992). These principles apply with equal effect to administrative rules and regulations. Letourneau at 651. More to the point, where retroactivity is not expressly provided for, the adoption of standards governing the taking of alcohol tests evidences an “intent that [they] apply to tests made **after** the effective date of the act” so that they

operate prospectively only. Poston v. Clinton, 66 Wn.2d 911, 916 (1965)(*Emphasis added*).

“Nevertheless, an amendment may be retroactively applied if the legislature so intended or if the amendment is ‘clearly curative’¹⁸ [or] Additionally, ‘remedial’¹⁹...under certain circumstances.” F.D. Processing at 460; *see also*, Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 47 (1990); State v. MacKenzie, 114 Wn.App. 687, 699-701 (2002). It must be kept in mind, however, that “[R]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations.” General Motors Corp. v. Romein, 503 U.S. 181, 191, 112 S.Ct. 1105 (1992). Thus, “[I]t does not follow...that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects,

¹⁸ A regulatory provision “is curative only if it clarifies or technically corrects an ambiguous [rule].” F.D. Processing at 461. “Generally, [it is] made necessary by inadvertence or error in the original enactment of a [regulation] or in its administration.” In re Matteson, 142 Wn.2d 298, 308 (2000). For such a provision to be given retroactive effect, however, it must be “clearly curative.” Howell at 47. “Where ambiguity is lacking in [regulatory] language, th[e] court presumes an amendment to the [rule] constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied.” F.D. Processing at 462.

¹⁹ A regulation “is deemed remedial when it relates to practice, procedure, or remedies, and does not affect a substantive or vested right.” MacKenzie at 692. “The reason for this rule is that a party does not have a vested right in any particular form of *procedure*.” Tellier v. Edwards, 56 Wn.2d 652, 654 (1960). Labeling regulations themselves as “procedural” or “substantive,” however, obscures the law. State v. T.K., 139 Wn.2d 320, 333 (1999). The better practice is to “consider the issue in more fundamental terms” of

must meet the test of due process, and the justifications for the latter may not suffice for the former.” Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 96 S.Ct. 2882, (1976); U.S. CONST. amend. V. Moreover, “retroactive application of the adoption of a statute or a change in the statute can offend due process” even where the provision in question is not “penal” in nature. Office of Disciplinary Counsel v. Zdrok, 645 A.2d 830, 834 (Pa. – 1994); *see also*, Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 349-50, 55 S.Ct. 758 (1935); U.S. CONST. amend. XIV. As a result, “[E]ven if one of [the aforementioned] rules of statutory interpretation calls for retroactive application, retroactivity will be granted only if it does not violate constitutional protections relating to due process.” F.D. Processing at 460; WASH. CONST. art. 1, § 3; *see also*, Sanders v. Loomis Armored, Inc., 614 A.2d 320, 322 (Pa.Super. – 1992)(retroactive application of a law is prohibited if it offends due process).

While Washington is free to adopt and enforce rules of evidence, by statute or decision, such rules and their enforcement are not exempt from the requirements of Due Process. Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280 (1941). In this context, “the Fourteenth Amendment forbids ‘fundamental unfairness in the use of _____ precisely what a particular regulation applicable in a criminal case is, and how it

evidence whether true or false.” Blackburn v. State of Ala., 361 U.S. 199, 206, 80 S.Ct. 274 (1960). The aim of this prohibition is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence regardless of its truth value. Id.

Many of the due process concerns involved in the application of retroactive legislation are the same as those encountered in an ex post facto analysis so that the two protections rest on many of the same underlying principles. State v. Aho, 137 Wn.2d 736, 742 (1999); Carnell at 532. Under the Fourteenth Amendment, “[T]he Constitution prohibits a state from retrospectively applying a new or modified law or rule in such a way that a person accused of a criminal offense suffers any significant prejudice in the presentation of his defense.” Talavera v. Wainwright, 468 F.2d 1013, 1015-6 (5th Cir. – 1972). As an example, consider the situation where a rule of evidence has been altered and applied to circumstances arising before its amendment so that it now permits evidence formerly deemed inadmissible to be introduced for the sole purpose of facilitating convictions. In such circumstances:

the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the

functions. State v. Hodgson, 108 Wn.2d 662, 667 (1987).

circumstances under which it can deprive a person of his or her liberty or life.

Carmell at 532-3 (*Emphasis added*).

From the discussion contained in the previous section, it is clear that application of the recently enacted/amended laws to this case would **facilitate an easier conviction** for actions completed before their effective date. It is not simply because they make evidence which was once inadmissible admissible though. It is because they transform evidence formerly deemed **insufficient as a matter of law** to support a conviction into evidence that is now, standing alone, **sufficient as a matter of law** to support that same conviction. Moreover, they would subject Mr. Ludvigsen to the possibility of conviction on the *per se* prong of the offence where under the law in effect at the time of his alleged offense he would have been immune from such consequence.

It is important to note that the rules in effect at the time of Mr. Ludvigsen's test were adopted "in an attempt to provide standardized procedures that [would] ensure a high degree of accuracy."²⁰ Clark-Munoz at 42. This included the requirement of NIST traceability which was adopted as a "reasonable standard" meant to insure that the

²⁰ "[I]n order for the results of [an alcohol] alcohol test to be admissible, the state must prove that the reliability of the test satisfies due process and fairness." State v. Honeyman, 560 So.2d 825 (La. 1990); see also, State v. McElroy, 553 So.2d 456, 458 n.1 (La. 1989); State v. Busby, 893 So.2d 161 (La.App. Cir.3 – 2005).

thermometers used in the simulator “meet a specified minimum standard for certification.” WASH. ST. REG. 01-17-009. The ultimate basis for the decision in Clark-Munoz was the Supreme Courts requirement that “the State abide by its own rules, especially when applied to vital privileges like driving.” Clark-Munoz at 50. As illustrated above, however, the law governing the admissibility of breath test was amended for the express purpose of circumventing these requirements thereby excusing the City from having to comply with them for the sole purpose of facilitating the convictions of those charged with DUI.²¹

The City’s attempt to apply the newly enacted/amended provisions retroactively is a stark example of the government refusing, after the fact, to play by its own rules by altering them in a way that is advantageous only to the State in order to facilitate an easier conviction. This is fundamentally unfair. The government must abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty. Allowing the City to apply the newly enacted/amended laws retroactively to the matter *sub judice* would be a blatant deprivation of Substantive Due Process.

As the trial Judge concluded, compliance with the law in effect at the time of the alleged offense is a “substantive and not procedural”

²¹ See *infra*, p.20-2, 24-5.

matter. Accordingly, Due Process would be violated by a failure to apply those laws. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

b. Vested Rights, Consent And The Opportunity To Make A Knowing And Intelligent Decision. In addition to those areas of common concern, “the protection afforded by the due process clause of the Fourteenth Amendment to the United States Constitution [also] extends to prevent retrospective laws from divesting vested rights.” Town of Eureka v. Office of State Engineer of State of Nev., Div. of Water Resources, 826 P.2d 948, 950 (Nev. – 1992)(*citing*, Ettor v. Tacoma, 228 U.S. 148, 155-56, 33 S.Ct. 428 (1913)). Accordingly, “[A] retrospective law that extinguishes a vested right in property violates due process.” West Des Moines State Bank v. Mills, 482 N.W.2d 432, 436 (Iowa – 1992); *see also*, Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 349-50, 55 S.Ct. 758 (1935). In this context, “the proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties.” State v. Hennings, 129 Wn.2d 512, 528-9 (1996).

“A driver’s license represents an important property interest.” State v. Dolson, 138 Wn.2d 773, 776 (1999)(citing, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971)); see also, Devine v. State, Dept. of Licensing, 126 Wn.App. 941, 951-2 (2005). “Once issued it has the attributes of a vested property right.” Barton v. Hults, 198 N.Y.S.2d 539, 543 n.2 (N.Y.Sup. – 1960). “The property right...is not in the plastic license itself, but in the right to drive represented by the license.” McGraw v. State, 498 S.E.2d 314, 315 (Ga.App. – 1998). “[D]rivers have a substantial property right in their driving privilege.” Svendgard v. State, 122 Wn.App. 670, 681 (2004). Nonetheless, an individual convicted of driving under the influence of alcohol will have his license suspended or revoked. RCW 46.20.285(3). “It is well settled [however] that driver’s licenses may not be suspended or revoked without that...due process required by the Fourteenth Amendment.” City of Redmond v. Moore, 151 Wn.2d 664, 670 (2004)(citing, Dixon v. Love, 431 U.S. 105, 112, 97 S.Ct. 1723 (1977)).

Subsection D of former SMC 11.56.020 read:

Implied Consent. - Any person who operates a motor vehicle within the City is deemed to have given consent, **subject to the provisions of this section**, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood...The officer shall inform the person of the person’s right to refuse the breath or blood test...

SMC 11.56.020(D).

The express language of this provision dictates that “a person is deemed to have given consent to a **valid...test or tests of the person’s breath...by the statutorily and administratively defined methods.**” Brokman at 853 (*Emphasis added*). Thus, “under [SMC 11.56.020(D)] a test must be a *valid* test--an invalid test does not satisfy [SMC 11.56.020(D)].” Id. at 852. Moreover, “[P]eople are presumed to know the law.” State v. Esquivel, 132 Wn.App. 316, 327 (2006); State v. Patterson, 37 Wn.App. 275, 282 (1984). As a result, Mr. Ludvigsen must be presumed to have known this.

According to the laws in existence at the time of Mr. Luvigsen’s breath test, “the criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect **at the time the test is administered.**” *Former WAC 448-13-060(5)(Emphasis added)*. This created a reasonable expectation that the law applied to determine whether his breath test would be sufficient as a matter of law would be the law in effect **at the time his test was administered.**²² Retroactive application of any subsequently enacted law not encompassing this framework would defeat his reasonable

expectations. If it resulted in a license suspension that would not have issued under the law in place when the test was administered, it would extinguish his vested property right in his driving privilege. Combined, this would constitute a denial of due process. This is precisely what retroactive application of the newly enacted/amended laws considered herein would result in.

This language also “creates a statutory right to...refuse the test.” State v. Franco, 96 Wn.2d 816, 825 (1982). Attendant to that right is the right to be given an opportunity to make a “knowing and intelligent” decision when determining whether to submit to a breath test. Thompson v. State Dept. of Licensing, 138 Wn.2d 783, 791-792 (1999). While the right to make a “knowing and intelligent” decision has been granted through the statutory process, it “is anchored in fundamental fairness and due process.” Id. at 792. “Revoking the license of someone who was not given [an opportunity to make a “knowing and intelligent” decision] would violate due process.” Gibson v. Department of Licensing, 54 Wn.App. 188, 195 (1989).

Because Mr. Ludvigsen had a reasonable expectation that the law applied would be the law in effect **at the time his test was administered**,

²² Statutory provisions governing aspects of City action against its citizens also create a “statutory due process” right held by its citizens that these provisions will be adhered to. Devine at 951-2; *see also*, Dolson, *supra*.

he could be deemed to have been given an opportunity to make a “knowing and intelligent” decision as to whether to submit to a test **performed in accordance with those provisions.** On the other hand, he could not possibly be deemed to have been given an opportunity to make a “knowing and intelligent” decision to submit to a test which would be evaluated under different and less stringent standards than those in existence at the time he made his decision. This is especially so in this case since the new provisions were not yet even under consideration at the time of his test. Thus, retroactive application of any later law not fully encompassing the safeguards in place at the time of his test would deny him the opportunity to make a “knowing and intelligent” decision and hence due process. Again, this is precisely what retroactive application of the newly enacted/amended laws considered herein would result in.

When Mr. Ludvigsen submitted to his breath test, the provisions of WAC 448-13 were in effect. All parties agree that under those provisions his test was invalid for failure to comply with WAC 448-13-035 under Clark-Munoz. Accordingly, the test administered was not the one Mr. Ludvigsen had a reasonable expectation of receiving nor the one he had consented to. Because it was invalid, as a matter of law it was deemed not to exist under former SMC 11.56.020. Because it was a different test, performed according to different procedures, he could not have had the

opportunity to make a “knowing and intelligent” decision as to whether to submit to it. For both reasons, retroactive application of the current law to resurrect Mr. Ludvigsen’s test under different guidelines would be violative of Due Process.

Both the state and federal due process clauses preclude retroactive application of the newly enacted/amended provisions under consideration in this case. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

E. CONCLUSION

Retroactive application of SMC 11.56.020, WAC 448-16 and RCW 46.61.506 as amended in 2004 to a 2002 charge of DUI under former SMC 11.56.020 and WAC 448-13 is a violation of the due process and ex post facto clauses of the Washington State and Federal Constitutions. The Trial Court properly applied former SMC 11.56.020 and WAC 448-13. The Superior Court must be reversed and the case against Mr. Ludvigsen dismissed.

DATED this 11 day of August 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be "Elizabeth Anne Padula", written over a horizontal line.

Elizabeth Anne Padula, WSBA #24612

Ted Vosk, WSBA #30166

Attorney for Appellant, Mark Ludvigsen

APPENDIX

- 1.1 SMC 11.56.020 (2002).
- 2.1 SMC 11.56.020 (2004).
- 3.1 WAC 448-13-060.

APPENDIX 1



City of Seattle Legislative Information Service

Information updated as of March 16, 2006 1:33 PM

Council Bill Number: 112400

Ordinance Number: 119189

AN ORDINANCE relating to persons under the influence of intoxicating liquor or any drug, amending Sections 11.34.020, 11.56.020 and 16.20.110 and adding sections to Chapters 11.14, 11.20 and 11.56 of the Seattle Municipal Code.

Date introduced/referred: October 5, 1998

Date passed: October 12, 1998

Status: PASSED

Vote: 9-0

Committee: Public Safety, Health & Technology

Sponsor: PODLODOWSKI

Index Terms: DWI, CORRECTIONAL-PUNISHMENT-AND-REHABILITATION, SUBSTANCE-ABUSE

References/Related Documents: Amending: Ord 108200, 119011, 118992, 87983, 90653

Text

AN ORDINANCE relating to persons under the influence of intoxicating liquor or any drug, amending Sections 11.34.020, 11.56.020 and 16.20.110 and adding sections to Chapters 11.14, 11.20 and 11.56 of the Seattle Municipal Code.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Chapter 11.14 of the Seattle Municipal Code (Ordinance 108200, as amended) is further amended by adding the following section:

11.14.183 Drug.

"Drug" includes, but is not limited to, those drugs and substances regulated by RCW Chapters 69.41 and 69.50. (RCW 46.61.540)

Section 2. Chapter 11.14 of the Seattle Municipal Code (Ordinance 108200, as amended) is further amended by adding the following section:

11.14.257 Ignition interlock device.

"Ignition interlock device" means breath alcohol analyzing ignition equipment, certified by the Washington State Patrol, designed to prevent a motor vehicle from being operated by a person who has consumed an alcoholic beverage. (RCW 46.04.215)

Section 3. Chapter 11.14 of the Seattle Municipal Code (Ordinance 108200, as amended) is further amended by adding the following section:

11.14.403 Other biological or technical device.

"Other biological or technical device" means any device meeting the standards of the National Highway Traffic Safety Administration or the Washington State Patrol, designed to prevent the operation of a motor vehicle by a person who is impaired by alcohol or drugs. (RCW 46.04.215)

Section 4. Chapter 11.20 of the Seattle Municipal Code (Ordinance 108200, as amended) is further amended by adding the following section:

11.20.230 Ignition interlock or other biological or technical device required.

A. The court may order that after a period of suspension, revocation, or denial of driving privileges, and for up to as long as the court has jurisdiction, any person convicted of any offense involving the use, consumption, or possession of alcohol while operating a motor vehicle may drive only a motor vehicle equipped with a functioning ignition interlock or other biological or technical device.

B. If a person is convicted of a violation of Section 11.56.020A or B, the court shall order that after a period of suspension, revocation, or denial of driving privileges, the person may drive only a motor vehicle equipped with a functioning ignition interlock or other biological or technical device.

C. The court shall establish a specific calibration setting at which the ignition interlock or other biological or technical device will prevent the motor vehicle from being started and the period of time that the person shall be subject to the restriction.

D. In the case of a person subject to the restriction under subsection B of this section, the duration of the restriction shall be as follows:

1. for a person subject to subsection N1b, N2 or N3 of Section 11.56.020 who has not previously been restricted under this section, RCW 46.20.720 or equivalent local ordinance, a period of not less than one (1) year;

2. for a person who has previously been restricted under subsection D1 of this section, RCW 46.20.720(3)(a), or equivalent local ordinance, a period of not less than five (5) years;

3. for a person who has previously been restricted under subsection D2 of this section, RCW 46.20.720(3)(b), or equivalent local ordinance, a period of not less than ten (10) years.

E. For purposes of this section, "convicted" means being found guilty of an offense or being placed on a deferred prosecution program under RCW Chapter 10.05. (RCW 46.20.720)

Section 5. Section 11.34.020 of the Seattle Municipal Code (Ordinance 108200 Section (11.34.020), as last amended by Ordinance 119011 Section 10) is further amended as follows:

11.34.020 Penalties for criminal offenses.

A. Any person convicted of any of the following offenses may be punished by a fine in any sum not to exceed Five Thousand Dollars (\$5,000.00) or by imprisonment for a term not to exceed one (1) year, or by both such fine and imprisonment:

1. Section 11.22.070 B, Licenses and plates required -- Penalties -- Exemptions;
2. Section 11.22.090, Vehicle trip permits -- Restrictions and requirements -- Penalty;
3. Section 11.23.400, Disabled parking -- Enforcement;
4. Section 11.55.340, Vehicles carrying explosives, flammable liquids and poison gas, liquefied petroleum gas (LPG) and cryogenics must stop at all railroad grade crossings;
5. Section 11.56.120, Reckless driving;
6. Section 11.56.130, Reckless endangerment of roadway workers;
7. Section 11.56.320 B, Driving while license is suspended or revoked in the first degree;
8. Section 11.56.320 C, Driving while license is suspended or revoked in the second degree;
9. Section 11.56.340, Operation of motor vehicle prohibited while license is suspended or revoked;
10. Section 11.56.420, Hit and run (attended);
11. Section 11.56.355, Assisting another in starting and operating motor vehicle in violation of court order regarding ignition interlock or other biological or technical device;
12. Section 11.56.445, Hit and run (by an unattended vehicle);
13. ~~12.~~ Section 11.56.450, Hit and run (pedestrian or person on a device propelled by human power);
14. ~~13.~~ Section 11.60.690, Transportation of liquefied petroleum gas;
15. ~~14.~~ Section 11.62.020, Flammable liquids, combustible liquids and hazardous chemicals;
16. ~~15.~~ Section 11.62.040, Explosives;
17. ~~16.~~ Section 11.80.140 B, Certain vehicles to

carry flares or other warning devices (subsection B only);

18. ~~17.~~ Section 11.80.160 E, Display of warning devices when vehicle disabled (subsection E only);

19. ~~18.~~ Section 11.84.380, Fire extinguishers;

20. ~~19.~~ Section 11.86.080, Flammable or combustible labeling;

21. ~~20.~~ Section 11.86.100, Explosive cargo labeling;

22. ~~21.~~ Section 11.34.040, with respect to aiding and abetting the foregoing criminal offenses.

B. Any person convicted of any of the following offenses may be punished by a fine in any sum not to exceed One Thousand Dollars (\$1,000.00) or by imprisonment for a term not to exceed ninety (90) days, or by both such fine and imprisonment:

1. Section 11.20.010, Driver's license required -- Exception -- Penalty, unless the person cited for the violation provided the citing officer with an expired driver's license or other valid identifying documentation under RCW 46.20.035 at the time of the stop and was not in violation of Section 11.56.320 or Section 11.56.340, in which case the violation is an infraction;

2. Section 11.20.100, Display of nonvalid driver's license;

3. Section 11.20.120, Loaning driver's license;

4. Section 11.20.140, Displaying the driver's license of another;

5. Section 11.20.160, Unlawful use of driver's license;

6. Section 11.20.350 C, Providing false evidence of financial responsibility;

7. Section 11.22.025, Transfer of ownership;

8. Section 11.22.070 A, Licenses and plates required -- Penalties -- Exceptions;

9. Section 11.31.090, Failure to respond -- Written and signed promise;

10. Section 11.31.100, Failure to respond -- Parked, stopped or standing notice;

11. Section 11.32.100, Failure to appear;

12. Section 11.40.430, Prohibited entry to no admittance area;

13. Section 11.56.320 D, Driving while license is suspended or revoked in the third degree;

14. Section 11.56.350, Operation of a motor vehicle without required ignition interlock or other biological or technical device;

15. Section 11.56.430, Hit and run (unattended vehicle) -- Duty in

case of accident with unattended vehicle;

16. ~~15.~~ Section 11.56.440, Hit and run (property damage) -- Duty in case of accident with property;

17. ~~16.~~ Section 11.58.005 A, Negligent driving in the first degree;

18. ~~17.~~ Section 11.58.190, Leaving minor children in unattended vehicle;

19. ~~18.~~ Section 11.59.010, Obedience to peace officers, flaggers, and firefighters;

20. ~~19.~~ Section 11.59.040, Refusal to give information to or to cooperate with officer;

21. ~~20.~~ Section 11.59.060, Refusal to stop;

22. ~~21.~~ Section 11.59.080, Examination of equipment;

23. ~~22.~~ Section 11.59.090, Duty to obey peace officer -- Traffic infraction;

24. ~~23.~~ Section 11.34.040, Aiding and abetting with respect to the criminal offenses in this subsection.

Section 6. Section 11.56.020 of the Seattle Municipal Code (Ordinance 108200 Section 2 (11.56.020), as last amended by Ordinance 118992 Section 1) is further amended as follows:

11.56.020 Persons under the influence of intoxicating liquor or any drug -- Chemical analysis --Tests, evidence and penalties.

A. Driving While Intoxicated.

1. A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within the City:

a. and the person has, within two (2) hours after driving, an alcohol concentration of 0.08 ~~0.10~~ or higher, as shown by analysis of the person's breath or blood made under the provisions of this section; or

b. while the person is under the influence of or affected by intoxicating liquor or any drug; or

c. while the person is under the combined influence of or affected by intoxicating liquor and any drug.

2. The fact that any person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against any charge of violating this subsection.

3. It is an affirmative defense to a violation of subsection Ala of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an

analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 ~~0.10~~ or more within two (2) hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

4. Analysis of blood or breath samples obtained more than two (2) hours after the alleged driving may be used as evidence that within two (2) hours after the alleged driving a person had an alcohol concentration of 0.08 ~~0.10~~ or more in violation of subsection Ala of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections Alb or Alc of this section.

5. Driving while under the influence of intoxicating liquor or any drug is a gross misdemeanor.

B. Physical Control.

1. A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within the City:

a. and the person has, within two (2) hours after being in actual physical control of the vehicle, an alcohol concentration of 0.08 ~~0.10~~ or higher, as shown by analysis of the person's breath or blood made under the provisions of this section; or

b. while the person is under the influence of or affected by intoxicating liquor or any drug; or

c. while the person is under the combined influence of or affected by intoxicating liquor and any drug.

2. The fact that any person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against any charge of violating this subsection. No person may be convicted under this subsection if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

3. It is an affirmative defense to a violation of subsection Bla of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 ~~0.10~~ or more within two (2) hours after being in actual physical control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

4. Analysis of blood or breath samples obtained more than two (2) hours after the alleged being in actual physical control of a vehicle may be used as evidence that within two (2) hours after the alleged being in actual physical control of a vehicle a person had an alcohol

concentration of 0.08 ~~0.10~~ or more in violation of subsection 1a of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections 1b or 1c of this section.

5. Being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug is a gross misdemeanor.

C. Minor Driving Or Being In Actual Physical Control Of A Motor Vehicle After Consuming Alcohol.

1. Notwithstanding any other provision of this title, a person is guilty of minor driving or being in actual physical control of a motor vehicle after consuming alcohol if the person:

a. operates or is in actual physical control of a motor vehicle in the City;

b. is under the age of twenty-one (21); and

c. has, within two (2) hours after operating or being in actual physical control of the motor vehicle, an alcohol concentration of at least 0.02 but less than 0.08 ~~0.02 or more~~, as shown by an analysis of the person's breath or blood made under the provisions of this section.

2. It is an affirmative defense to a violation of this subsection which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving or being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be at least 0.02 but less than 0.08 ~~0.02 or more~~ within two (2) hours after driving or being in actual physical control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the earlier of (i) seven (7) days prior to trial or (ii) the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

3. Analysis of blood or breath samples obtained more than two (2) hours after the alleged driving or being in actual physical control of the vehicle may be used as evidence that within two (2) hours after the alleged driving or being in actual physical control of the vehicle a person had an alcohol concentration ~~of 0.02 or more~~ in violation of this subsection.

4. Minor driving or being in actual physical control of a motor vehicle after consuming alcohol is a misdemeanor.

D. Implied Consent.

Any person who operates a motor vehicle within the City is deemed to have given consent, subject to the provisions of this section, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has probable cause to believe the person had been driving or was in actual physical control of a motor

vehicle while under the influence of intoxicating liquor or any drug or was in violation of subsection C of this section. The test or tests of breath shall be administered at the direction of a law enforcement officer having probable cause to believe the person to have been driving or in actual physical control of a motor vehicle within the City while under the influence of intoxicating liquor or in violation of subsection C of this section. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility in which a breath testing instrument is not present or where the officer has probable cause to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(4).

The officer shall inform the person of the person's right to refuse the breath or blood test, and of the person's right to have additional tests administered by any qualified person of the person's choosing as provided elsewhere in this section. The officer shall warn the driver that (i) the driver's license, permit, or privilege to drive will be revoked or denied if the driver refuses to submit to the test, (ii) the driver's license, permit, or privilege to drive will be suspended, revoked, or denied, ~~or placed in probationary status~~ if the test is administered and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 ~~0.10~~

or more in the case of a person age twenty-one (21) or over, or in violation of this section 0.02 ~~or more~~ in the case of a person under age twenty-one (21), and (iii) the driver's refusal to take the test may be used in a criminal trial. Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520, or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in this section, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

E. Person Incapable of Refusal.

Any person who is dead, unconscious, or who is otherwise in a condition rendering the person incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection D of this section and the test or tests may be administered, subject to the provisions of this section hereof, and the person shall be deemed to have received the warnings required under subsection D of this section.

F. Refusal to Submit to Test.

If, following his/her arrest and receipt of warnings under subsection D of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test of his/her breath or blood, no test shall be given except as authorized under subsection D or E of this section.

G. Notices to Person After Arrest.

If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 ~~0.10~~ or more if the person is age twenty-one (21) or over, or in violation of this section ~~0.02 or more~~ if the person is under the age of twenty-one (21), or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given shall give the person the notices and mark the person's Washington state driver's license or permit to drive, if any, as provided by RCW 46.20.308.

H. Notification of Arrest and Test Result or Refusal to Department of Licensing.

After giving the notices to the person and marking the person's Washington state driver's license or permit to drive, if any, the law enforcement officer shall, within seventy-two (72) hours, except as delayed as the result of a blood test, transmit to the Washington State Department of Licensing a sworn report or report under a declaration authorized by RCW 9A.72.085 stating: (i) that the officer had probable cause to believe that the arrested person had been driving or was in actual physical control of a motor vehicle within the City while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one (21) years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection C of this section ~~of 0.02 or more~~; (ii) that after receipt of the warnings required by subsection D of this section the person refused to submit to a test of the person's breath or blood, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 ~~0.10~~ or more if the person was age twenty-one (21) or over, or was in violation of this section ~~0.02 or more~~ if the person was under the age of twenty-one (21); and (iii) any other information that the Director of the Washington State Department of Licensing may require by rule.

I. Admissibility of Evidence.

Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08 ~~0.10~~, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug. The breath analysis shall be based upon grams of alcohol per two hundred ten (210) liters of breath. The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

J. Methods of Analysis.

Analysis of the person's blood or breath to be considered valid under the provisions of this section shall have been performed according to methods approved by the State Toxicologist and by an individual possessing a valid permit issued by the State Toxicologist

for this purpose.

K. Blood Tests.

When a blood test is administered in accordance with this section, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, or a qualified technician. This limitation shall not apply to the taking of breath specimens.

L. Right to Additional Tests.

The person tested may have a physician or a qualified technician, chemist, registered nurse or other qualified person of his or her own choosing administer one (1) or more tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

M. Right to Information.

Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning this test or tests shall be made available to him/her or his/her attorney.

N. Penalty.

1. a. A person who is convicted of a violation of subsection A or B of this section, who has no prior offense within seven (7) ~~five (5)~~ years and whose alcohol concentration was less than 0.15, or for any reason other than the person's refusal to take a test offered pursuant to subsection D of this section there is no test result indicating the person's alcohol concentration, shall be punished by imprisonment for not less than twenty-four (24) consecutive hours nor more than one (1) year and by a fine of not less than Three Hundred Fifty Dollars (\$350.00) and not more than Five Thousand Dollars (\$5,000.00). In lieu of the mandatory minimum term of imprisonment required under this subsection N1a, the court may order not less than fifteen (15) days of electronic home monitoring.

b. A person who is convicted of a violation of subsection A or B of this section, who has no prior offense within seven (7) ~~five (5)~~ years and whose alcohol concentration was 0.15 or more, or who refused to take a test offered pursuant to subsection D of this section, shall be punished by imprisonment for not less than two (2) consecutive days nor more than one (1) year, ~~and by~~ a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) and a court-ordered restriction under Section 11.20.230. In lieu of the mandatory minimum term of imprisonment required under this subsection N1b, the court may order not less than thirty (30) days of electronic home monitoring.

2. a. A person who is convicted of a violation of subsection A or B of this section, who has one (1) prior offense within seven (7) ~~five (5)~~ years and whose alcohol concentration was less than 0.15, or for any reason other than the person's refusal to take a test offered pursuant to subsection D of this section there is

no test result indicating the person's alcohol concentration, shall be punished by imprisonment for not less than thirty (30) consecutive days nor more than one (1) year, sixty (60) days of electronic home monitoring, and by a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) and a court-ordered restriction under Section 11.20.230.

b. A person who is convicted of a violation of subsection A or B of this section, who has one (1) prior offense within seven (7) ~~five (5)~~ years and whose alcohol concentration was 0.15 or more, or who refused to take a test offered pursuant to subsection D of this section, shall be punished by imprisonment for not less than forty-five (45) consecutive days nor more than one (1) year, ninety (90) days of electronic home monitoring, and by a fine of not less than Seven Hundred Fifty Dollars (\$750.00) nor more than Five Thousand Dollars (\$5,000.00) and a court-ordered restriction under Section 11.20.230.

3. a. A person who is convicted of a violation of subsection A or B of this section, who has two (2) or more prior offenses within seven (7) ~~five (5)~~ years and whose alcohol concentration was less than 0.15, or for any reason other than the person's refusal to take a test offered pursuant to subsection D of this section there is no test result indicating the person's alcohol concentration, shall be punished by imprisonment for not less than ninety (90) consecutive days nor more than one (1) year, one hundred twenty (120) days of electronic home monitoring, and by a fine of not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00) and a court-ordered restriction under Section 11.20.230.

b. A person who is convicted of a violation of subsection A or B of this section, who has two (2) or more prior offenses within seven (7) ~~five (5)~~ years and whose alcohol concentration was 0.15 or more, or who refused to take a test offered pursuant to subsection D of this section, shall be punished by imprisonment for not less than one hundred twenty (120) consecutive days nor more than one (1) year, one hundred fifty (150) days of electronic home monitoring, and by a fine of not less than One Thousand Five Hundred Dollars (\$1,500.00) nor more than Five Thousand Dollars (\$5,000.00) and a court-ordered restriction under Section 11.20.230

4. a. "Prior offense" means any of the following:

(i) a conviction for a violation of subsection A of this section, RCW 46.61.502 or equivalent local ordinance;

(ii) a conviction for a violation of subsection B of this section, RCW 46.61.504 or equivalent local ordinance;

(iii) a conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;

(iv) a conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;

(v) a conviction for a violation of Section 11.58.005 A, RCW 46.61.5249, Section 11.56.120, RCW 46.61.500, Section 12A.06.050, RCW 9A.36.050 ~~46.61.525(1)~~ or equivalent local ordinance,

if the conviction was the result of a charge that was originally filed as a violation of subsection A or B of this section, RCW 46.61.502 or RCW 46.61.504, or equivalent local ordinance, or RCW 46.61.520 or RCW 46.61.522;

(vi) an out-of-state conviction for a violation that would have been a violation of subsections N4a(i), (ii), (iii), (iv) or (v) of this section if committed within this state; ~~or~~

(vii) a deferred prosecution under RCW Chapter 10.05 granted in a prosecution for a violation of subsection A or B of this section, RCW 46.61.502 or RCW 46.61.504 or equivalent local ordinance; or

(viii) a deferred prosecution under RCW Chapter 10.05 granted in a prosecution for a violation of Section 11.58.005 A, RCW ~~46.61.5249~~ ~~46.61.525(1)~~, or equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of subsection A or B of this section, RCW 46.61.502 or RCW 46.61.504, or equivalent local ordinance, or RCW 46.61.520 or RCW 46.61.522.

b. "Within seven (7) ~~five (5)~~ years" means that the arrest for the prior offense occurred within seven (7) ~~five (5)~~ years of the arrest for the current offense.

5. For purposes of sentencing pursuant to subsections N1, N2, and N3 of this section, the judge shall determine, based on a preponderance of the evidence, the number of prior offenses within seven (7) ~~five (5)~~ years the person has, whether the person's alcohol concentration was less than 0.15 or 0.15 or more, whether the person refused to take a test offered pursuant to subsection D of this section or whether for any reason other than the person's refusal to take a test offered pursuant to subsection D of this section there is no test result indicating the person's alcohol concentration. The prosecutor or the court may obtain an abstract of the person's driving record, which shall be prima facie evidence of the person's prior offenses.

6. Unless the judge finds the person to be indigent, the mandatory minimum fine shall not be suspended or deferred. Neither the ~~The~~ mandatory minimum jail sentence nor the mandatory minimum period of electronic home monitoring shall ~~not~~ be suspended or deferred unless the judge finds that the imposition of this ~~jail~~ sentence will pose a substantial risk to the defendant's physical or mental well-being. Whenever the mandatory minimum ~~jail~~ sentence is suspended or deferred, the judge must state, in writing, the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based. Whenever the court sentences an offender to a period of electronic home monitoring, the court may also require the offender's home electronic monitoring device to include an alcohol detection breathalyzer and may restrict the amount of alcohol the offender may consume during the period of electronic home monitoring. The cost of electronic home monitoring shall be paid for by the offender and determined by the City. In exercising its discretion in setting penalties within the limits allowed by this subsection, the court shall particularly consider whether the person's driving at the time of the offense was responsible for injury or damage to another or another's property, whether the person's license, permit or privilege to drive was suspended, revoked, denied or in probationary status at

the time of the offense, whether the person was in compliance with Section 11.20.340 at the time of the offense and whether the person was driving or in actual physical control of a vehicle with one (1) or more passengers at the time of the offense.

7. A person convicted under this section shall be required to complete a course in an alcohol information school approved by the Washington State Department of Social and Health Services or more intensive treatment at a program approved by the Washington State Department of Social and Health Services, as determined by the court. The court shall notify the Washington State Department of Licensing of a conviction under this section and whenever it orders a person to complete a course or treatment under this subsection N7 of this section. A diagnostic evaluation and treatment recommendation shall be prepared under the direction of the court by an alcoholism agency approved by the Washington State Department of Social and Health Services or a qualified probation department approved by the Washington State Department of Social and Health Services. A copy of the report shall be sent to the Washington State Department of Licensing. Based on the diagnostic evaluation, the court shall determine whether the person shall be required to complete a course in an alcohol information school or more intensive treatment.

8. In addition to any nonsuspendable and nondeferrable jail sentence required by this subsection, whenever the court imposes less than one (1) year in jail, the court shall also suspend but shall not defer a period of confinement for a period not exceeding five (5) years. The court shall impose conditions of probation that include: (i) not driving a motor vehicle within this state without a valid license to drive and proof of financial responsibility for the future; (ii) not driving a motor vehicle within this state while having an alcohol concentration of 0.08 or more within two (2) hours after driving; and (iii) not refusing to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has probable cause to believe the person was driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor. For each violation of mandatory conditions of probation (i) and (ii) or (i) and (iii) of this subsection N8 of this section, the court shall order the convicted person to be confined for thirty (30) days, which shall not be suspended or deferred. For each incident involving a violation of a mandatory condition of probation imposed under this subsection N8 of this section, the court shall suspend the person's license, permit or privilege to drive for thirty (30) days or, if the person's license, permit or privilege to drive already is suspended, revoked or denied at the time the finding of probation violation is made, then the suspension, revocation or denial then in effect shall be extended by thirty (30) days. The court shall notify the Washington State Department of Licensing of a person's violation of any mandatory condition of probation imposed under subsection N8 of this section and the suspension of or extension of the suspension, revocation or denial of a person's license, permit or privilege to drive. The court may impose conditions of probation that include nonrepetition, installation of an ignition interlock or other biological or technical device on the probationer's motor vehicle, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The sentence may be imposed in whole or in part upon violation of a condition of probation during the suspension period.

~~9. At the time a person is convicted on the third occasion within five (5) years of driving a motor vehicle while under the influence of intoxicating liquor or any drug, the convicting court shall notify the person, orally and in writing, that the person may not possess a firearm unless the person's right to do so is restored by a court of record. The convicting court also shall forward a copy of the person's driver's license or identicard, or comparable information, to the Washington State Department of Licensing, along with the date of conviction.~~

~~10.~~ In addition to the penalties set forth in this subsection, a fee of One Hundred Twenty-five Dollars (\$125.00) shall be assessed to a person who is either convicted, sentenced to a lesser charge or given a deferred prosecution as a result of an arrest for violating subsection A or B of this section, RCW 46.61.520 or RCW 46.61.522. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay. The fee shall be collected by the clerk of the court and distributed according to RCW 46.61.5054.

O. Vehicle Seizure and Forfeiture.

1. Upon conviction for a violation of subsection A or B of this section, where the person has a prior offense within seven (7) ~~five (5)~~ years, as defined in subsection N4 of this section, the motor vehicle the person was driving or over which the person had actual physical control at the time of the offense, if the person has a financial interest in the vehicle, is subject to seizure and forfeiture pursuant to RCW 46.61.5058.

2. Upon the arrest or filing of a complaint or citation in Municipal Court based on probable cause to believe that a person has violated subsection A or B of this section, if such person has a prior offense within seven (7) ~~five (5)~~ years, as defined in subsection N4 of this section, the person shall be provided written notice that any transfer, sale or encumbrance of the person's interest in the vehicle the person was driving or over which the person had actual physical control at the time of the offense is unlawful pending acquittal, dismissal, sixty (60) days after conviction or other termination of the charge, except that:

a. A vehicle encumbered by a bona fide security interest may be transferred to the secured party or a person designated by the secured party;

b. A leased or rented vehicle may be transferred to the lessor, rental agency or a person designated by the lessor or rental agency; and

c. A vehicle may be transferred to a third party or a vehicle dealer who is a bona fide purchaser or may be subject to a bona fide security interest unless it is established that either (i) the purchaser had actual notice that the vehicle was subject to the prohibition prior to the transfer of title or (ii) the holder of the security interest had actual notice that the vehicle was subject to the prohibition prior to the encumbrance of title.

P. Refusal Admissible.

The refusal of a person to submit to a test of the alcoholic content

of the person's blood or breath under ~~Seattle Municipal Code~~ Section 11.56.020 D is admissible into evidence at a subsequent criminal trial.

Q. Mandatory Appearance after Arrest or Charging.

1. A defendant who is arrested for a violation of this section shall be required to appear in person before a judge or magistrate within one (1) judicial day after the arrest if the defendant is served with a citation or complaint at the time of the arrest.

2. A defendant who is charged by citation, complaint or information with a violation of this section and who is not arrested shall appear in court for arraignment in person as soon as practicable, but in no event later than fourteen (14) days after the next day on which court is in session following the issuance of the citation or the filing of the complaint or information.

3. At the time of an appearance required by this subsection, the court shall determine the necessity of imposing conditions of pretrial release according to the procedures established by court rule for a preliminary appearance or an arraignment.

4. Appearances required by this subsection are mandatory and may not be waived.

5. Failure of the court to comply with the requirements of this subsection shall not be grounds for dismissal of any charge under this section nor the establishment of a constructive date of arraignment for purposes of Criminal Rule for Courts of Limited Jurisdiction 3.3.

Section 7. Chapter 11.56 of the Seattle Municipal Code (Ordinance 108200, as amended) is further amended by adding the following section:

11.56.350 Operation of motor vehicle without required ignition interlock or other biological or technical device.

No person whose driver's license includes a notation, pursuant to RCW 46.20.740, that the person may operate only a motor vehicle equipped with an ignition interlock or other biological or technical device shall operate a motor vehicle that is not so equipped. Violation of this section is a misdemeanor. (RCW 46.20.740)

Section 8. Chapter 11.56 of the Seattle Municipal Code (Ordinance 108200, as amended) is further amended by adding the following section:

11.56.355 Assisting another in starting and operating motor vehicle in violation of court order regarding ignition interlock or other biological or technical device.

A. No person shall knowingly assist another person who is restricted to the use of a motor vehicle equipped with an ignition interlock or other biological or technical device to start and operate such a motor vehicle in violation of a court order regarding such device.

B. This section shall not apply to the starting of a motor vehicle

or the request to start a motor vehicle equipped with an ignition interlock or other biological or technical device if done for the purpose of safety or mechanical repair of the device or the vehicle and the person subject to the court order does not operate the vehicle.

C. "Knowingly" has the same meaning as in Section 12A.04.030 B.

D. Violation of this section is a gross misdemeanor. (RCW 46.20.750)

Section 9. Section 16.20.110 of the Seattle Municipal Code (Ordinance 87983 Section 13, as last amended by Ordinance 90653 Section 3) is further amended as follows:

16.20.110 Intoxication.

A. 1. It shall be unlawful for any person ~~who is under the influence of intoxicating liquor or narcotic or habit-forming drugs~~ to operate or be in actual physical control of any vessel or watercraft

a. and the person has, within two (2) hours after operating or being in actual physical control, an alcohol concentration of 0.08 or more, as shown by analysis of the person's breath or blood made under Section 11.56.020;

b. while the person is under the influence of or affected by intoxicating liquor or any drug; or

c. while the person is under the combined influence of or affected by intoxicating liquor and any drug.

2. The fact that a person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this subsection.

3. Analysis of blood or breath samples obtained more than two (2) hours after the alleged operating or being in actual physical control may be used as evidence that within two (2) hours after the alleged operating or being in actual physical control a person had an alcohol concentration of 0.08 or more in violation of subsection 1A of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections 1B or 1C of this section

4. "Alcohol concentration" has the same meaning as in Section 11.14.023.

5. "Drug" has the same meaning as in Section 11.14.183.

6. Notwithstanding Section 16.64.040, violation of this subsection is a misdemeanor.

B. It shall be unlawful for the owner of any vessel or watercraft or any person having such in charge or in control to authorize or knowingly permit the same to be operated by any person who is under the influence of intoxicating liquor or any drug, ~~narcotic~~

~~or habit-forming drugs.~~

C. Whenever it appears reasonably certain to any police or harbor officer that any person under the influence of, or affected by the use of, intoxicating liquor or of any ~~narcotic~~ drug is about to operate a watercraft or vessel in violation of subsection A of this section, the officer may take reasonable measures to prevent any such person from so doing, either by taking from him the keys of such watercraft or vessel and locking the same, or by some other appropriate means. In any such case, the officer shall immediately report the facts to his Commanding Officer of the Harbor Department, and shall, as soon as possible, deposit the keys or other articles, if any, taken from the watercraft or vessel or person with the Commanding Officer. Such keys or other articles may be returned to any person upon his demand and proper identification of himself when it appears that he is no longer under the influence of intoxicating liquor or any narcotic drug.

Section 10. This ordinance shall take effect and be in force from and after January 1, 1999.

Passed by the City Council the ____ day of _____, 1998, and signed by me in open session in authentication of its passage this ____ day of _____, 1998.

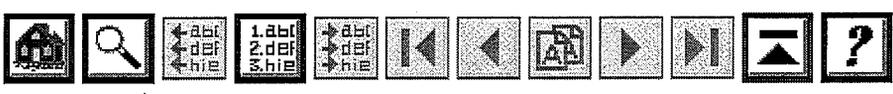
President _____ of the City Council

Approved by me this ____ day of _____, 1998.

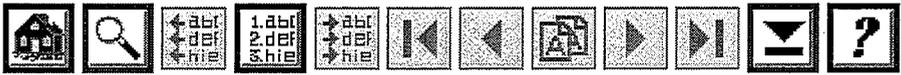
Mayor

Filed by me this ____ day of _____, 1998.

City Clerk



APPENDIX 2



Seattle Municipal Code

Information retrieved March 16, 2006 1:32 PM

Title 11 - VEHICLES AND TRAFFIC
Subtitle I Traffic Code
Part 5 Driving Rules
Chapter 11.56 - Serious Traffic Offenses

SMC 11.56.020 Persons under the influence of intoxicating liquor or any drug.

A. Driving While Intoxicated.

1. A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within the City:

a. And the person has, within two (2) hours after driving, an alcohol concentration of 0.08 or higher, as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

b. While the person is under the influence of or affected by intoxicating liquor or any drug; or

c. While the person is under the combined influence of or affected by intoxicating liquor and any drug.

2. The fact that any person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against any charge of violating this subsection.

3. It is an affirmative defense to a violation of subsection Ala of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two (2) hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

4. Analysis of blood or breath samples obtained more than two (2) hours after the alleged driving may be used as evidence that within two (2) hours after the alleged driving a person had an alcohol concentration of 0.08 or more in violation of subsection Ala of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections Alb or Alc of this section.

5. Driving while under the influence of intoxicating liquor or any drug is a gross misdemeanor.

B. Physical Control.

1. A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within the City:

a. And the person has, within two (2) hours after being in actual physical control of the vehicle, an alcohol concentration of 0.08 or higher, as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

b. While the person is under the influence of or affected by intoxicating liquor or any drug; or

c. While the person is under the combined influence of or affected by intoxicating liquor and any drug.

2. The fact that any person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against any charge of violating this subsection. No person may be convicted under this subsection if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

3. It is an affirmative defense to a violation of subsection Bla of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two (2) hours after being in actual physical control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

4. Analysis of blood or breath samples obtained more than two (2) hours after the alleged being in actual physical control of a vehicle may be used as evidence that within two (2) hours after the alleged being in actual physical control of a vehicle a person had an alcohol concentration of 0.08 or more in violation of subsection Bla of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections Blb or Blc of this section.

5. Being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug is a gross misdemeanor.

C. Minor Driving Or Being In Actual Physical Control Of A Motor Vehicle After Consuming Alcohol.

1. Notwithstanding any other provision of this title, a person is guilty of minor driving or being in actual physical control of a motor vehicle after consuming alcohol if the person:

- a. Operates or is in actual physical control of a motor vehicle in the City;
- b. Is under the age of twenty-one (21); and
- c. Has, within two (2) hours after operating or being in actual physical control of the motor vehicle, an alcohol concentration of at least 0.02 but less than 0.08, as shown by an analysis of the person's breath or blood made under RCW 46.61.506.

2. It is an affirmative defense to a violation of this subsection which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving or being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be at least 0.02 but less than 0.08 within two (2) hours after driving or being in actual physical control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the earlier of (a) seven (7) days prior to trial; or (b) the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

3. Analysis of blood or breath samples obtained more than two (2) hours after the alleged driving or being in actual physical control of the vehicle may be used as evidence that within two (2) hours after the alleged driving or being in actual physical control of the vehicle a person had an alcohol concentration in violation of this subsection.

4. Minor driving or being in actual physical control of a motor vehicle after consuming alcohol is a misdemeanor.

D. Mandatory Appearance After Charging.

1. A defendant who is charged with a violation of this section shall be required to appear in person before a judicial officer within one (1) judicial day after the arrest if the defendant is served with a citation or complaint at the time of the arrest. The Municipal Court may by local court rule waive the requirement for an appearance within one (1) judicial day if it provides for the appearance at the earliest practicable day following arrest and establishes the method for identifying that day in the rule.

2. A defendant who is charged with a violation of this section and who is not served with a citation or complaint at the time of the incident shall appear in court for arraignment in person as soon as practicable, but in no event later than fourteen (14) days after the next day on which court is in session following the issuance of the citation or the filing of the complaint or information.

3. At the time of an appearance required by this subsection, the court shall determine the necessity of imposing conditions of pretrial release according to the procedures established by court rule for a preliminary appearance or an arraignment.

4. Appearances required by this subsection are mandatory and may not be waived.

5. Failure of the court to comply with the requirements of this subsection shall not be grounds for dismissal of any charge under this

section nor the establishment of a constructive date of arraignment for purposes of Criminal Rule for Courts of Limited Jurisdiction 3.3.

(Ord. 121525 Sections 8, 9, 2004; Ord. 120481 Sections 4, 5, 2001; Ord. 120057 Section 1, 2000; Ord. 119636 Section 1, 1999; Ord. 119189 Section 6, 1998; Ord. 118992 Section 1, 1998; Ord. 118105 Section 4, 1996; Ord. 117734 Section 2, 1995; Ord. 117642 Section 1, 1995; Ord. 117155 Section 3, 1994; Ord. 116880 Section 1, 1993; Ord. 116872 Section 4, 1993; Ord. 113550 Section 1, 1987; Ord. 112959 Section 1, 1986; Ord. 112466 Section 1, 1985; Ord. 111859 Section 6, 1984; Ord. 111279 Section 1, 1983; Ord. 110967 Section 6, 1983; Ord. 109475 Section 1(part), 1980; Ord. 108635 Section 1, 1979; Ord. 108200 Section 2(11.56.020), 1979.)

Cases: Person could be charged with drunk driving even if he was not driving erratically. City of Seattle v. Tolliver, 31 Wn.App. 299, 641 P.2d 719 (1982).

Being in physical control of a motor vehicle while intoxicated is a lesser included offense of driving while intoxicated. McGuire v. City of Seattle, 31 Wn.App. 438, 642 P.2d 765 (1982).

Ordinance defining crime of driving while intoxicated as driving with a blood alcohol level of 0.10 or above did not create an unconstitutional presumption that a person with that blood alcohol level is intoxicated. City of Seattle v. Urban, 32 Wn.App. 634, 648 P.2d 922 (1982).

Where defendant, after being advised of his right to have an assigned attorney if he could not afford a retained attorney, was given access to a telephone and a telephone book containing the phone numbers of private attorneys and the public defender, both having 24-hour answering services, and did not request a list of available retained or assigned attorneys nor other means of contacting an attorney, he was not denied access to counsel. City of Seattle v. Carpenito, 32 Wn.App. 809, 649 P.2d 861 (1982).

A jury instruction similar to the language of subsection A 1 and 2 was found to be erroneous. Seattle v. Gellein, 112 Wn.2d 58 and 113 Wn.2d 1, 768 P.2d 470 and 775 P.2d 448 (1989).

A citation describing the offense as "DWI" and listing the code section by its numbers without the periods is sufficient. State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989). A citation "D.W.I." and "11.56.020(1) (A & B)" is sufficient. Seattle v. McKinney, 58 Wn.App. 607, 794 P.2d 857 (1990).

Editor's Note: The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this ordinance, or the invalidity of the application thereof to any person or circumstance shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances. In the event that a court should declare void any provision of the Municipal Code affected by this ordinance because the alcohol concentration is 0.08 rather than 0.10, then an alcohol concentration of 0.10 rather than 0.08 shall be in full force and effect as though "0.10" appeared everywhere "0.08" appears in the Municipal Code, except in Section 11.56.020 N8, and prosecutions shall be made and shall continue thereunder as if the alcohol concentration was 0.10.

(Ord. 117734 Section 3, 1995; Ord. 117642 Section 2, 1995; Ord. 117155 Section 4, 1994.)

Link to Recent ordinances passed since 1/17/06 which may amend this section. (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. For more information, contact the Seattle City Clerk's Office at 206-684-5175, or by e-mail at clerk@seattle.gov)



APPENDIX 3

WAC 448-13-060

Wash. Admin. Code 448-13-060

WASHINGTON ADMINISTRATIVE CODE
TITLE 448. STATE TOXICOLOGIST
CHAPTER 448-13. ADMINISTRATION OF BREATH TEST PROGRAM
Current with amendments adopted through September 1, 2004

448-13-060. Validity and certification of test results.

A test shall be a valid test and so certified, if the requirements of WAC 448-13-040, 448-13-050 and 448-13-055 are met, and in addition the following criteria for precision and accuracy, as determined solely from the breath test document, are met:

- (1) The internal standard test results in the message 'verified.'
- (2) In order to be valid, the two breath samples must agree to within plus or minus ten percent of their mean. This shall be determined as follows:
 - (a) The breath test results shall be reported, truncated to three decimal places.
 - (b) The mean of the two breath test results shall be calculated and rounded to four decimal places.
 - (c) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.
 - (d) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.
 - (e) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.
- (3) The simulator external standard result must lie between .072 to .088 inclusive.
- (4) All four blank tests must give results of .000.

If these criteria are met, then these and no other factors are necessary to indicate the proper working order of the instrument, and so certify it, at the time of the breath test.

(5) These criteria have changed over time, and the criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect at the time the test is administered.

Statutory Authority: RCW 46.61.506, 01-17-009, S 448-13-060, filed 8/2/01, effective 9/2/01; 99-22-009, S 448-13-060, filed 10/22/99, effective 11/22/99; 95-20-025, S 448-13-060, filed 9/27/95, effective 10/28/95; 91-06-022, S 448-13-060, filed 2/26/91, effective 3/29/91.

WA ADC 448-13-060

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5 IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
6 DIVISION 1

7 CITY OF SEATTLE,)

8 Appellant,)

9 vs.)

10 MARK BENJAMIN LUDVIGSEN,)

11 Respondent.)

Court of Appeals No.: 57935-5-I

) King County Superior Court

) Case No.: 05-1-08111-9 SEA

) **CERTIFICATE OF SERVICE BY**
) **COURIER**

COA
Filed 8-11-06
JG

12
13 The undersigned certifies and declares as follows:

14 I am a citizen of the United States of America, over the age of eighteen years and
15 competent to be a witness herein.

16 That on the 11th of August 2006, I sent by ABC Legal Messengers (with directions to
17 deliver on or before August 11, 2006 at 4:30 p.m.), a true and correct copy of *APPELLANT'S*
BRIEF directed to:

18 Moses Garcia
19 Seattle City Attorney's Office
20 700 5th Ave., 53rd Floor
Seattle, WA 98124-4667

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

23 DATED at Bellevue, Washington on August 11, 2006.

24 
CYNTHIA ALVAREZ ENGEL, Legal Assistant

25 CERTIFICATE OF SERVICE BY COURIER - 1

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