

NO. 64073-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Appellant,

v.

LEROY E. OLSEN, III,

Respondent.

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

The Honorable John M. Meyer, Judge
Superior Court Cause No. 08-1-00066-5

BRIEF OF APPELLANT

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THIRD JUDICIAL DISTRICT

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I. INTRODUCTION

The State charged the defendant, Leroy E. Olsen, III, by Information with one count of vehicular assault by being under the influence of alcohol filed on September 22, 2008. The charge arose from a March 23, 2008 high-speed one-car crash in which the defendant's passenger suffered serious injuries. The State anticipated proving at trial that the defendant's blood alcohol level was 0.23 g/100 mL, nearly three times the "legal limit," approximately 2 hours and 10 minutes after the accident. The *per se* prong of all crimes involving the control or operation of a vehicle while under the influence requires proof of the blood alcohol level within two hours of driving. Where the blood is taken from a suspect more than two hours after driving, the State routinely relies on its toxicologist to offer an opinion as to the alcohol concentration at an earlier time, using a linear mathematical equation and certain assumptions. The use of this equation is known as "retrograde extrapolation."

At a hearing in January, 2009, the court asked the deputy prosecutor assigned to the case whether the State would use retrograde extrapolation. The deputy prosecutor responded: "[A]t this point, no." Four days before the August 4, 2009 trial, the State advised counsel that it indeed would elicit such testimony. On the morning of trial, visiting

Skagit County Superior Court Judge John Meyer, sitting as the Island County Superior Court, ruled that the disclosure was untimely. Defense counsel stated, “[w]e’re not going to ask for a continuance,” even though 30 days remained on the “speedy trial” clock. Based on that assertion, Judge Meyer suppressed the retrograde extrapolation testimony. Further, he found the State could not proceed without the evidence, and dismissed the case.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that the timing of the State’s disclosure of its intent to use retrograde extrapolation precluded the defense from obtaining an expert to counter it when the defense declined an offer of a continuance.

2. The trial court erred by suppressing retrograde extrapolation evidence.

3. The trial court erred by finding the disclosure of the toxicologist’s proposed retrograde extrapolation testimony was untimely.

4. The trial court erred by denying a motion to reconsider its suppression ruling and order of dismissal entered on the morning of trial.

5. The trial court erred by finding “the State ... said that extrapolation was not going to be addressed.”

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion by suppressing evidence, when the State advised defense counsel four days before trial that it intended to elicit routine extrapolation testimony from the toxicologist.

2. Whether the trial court abused its discretion in suppressing evidence where defense counsel refused a continuance, even though the time for trial deadline was nearly thirty days off.

3. Whether the trial court's order suppressing legally gathered evidence was at odds with the truth-seeking function of the trial.

IV. STATEMENT OF THE CASE

A. Substantive Facts

On March 23, 2008 at approximately 6:30 p.m., police were notified of a serious one-car collision on rural Goss Lake Road in Island County. CP 140.¹ The defendant was driving his 2008 Audi R8, a rare high-performance sports car, when he failed to negotiate a turn, and collided first with a telephone utility pedestal, and then with what police described as a "large" tree, sheering it off. CP 140. Shortly before the collision, the defendant, traveling at a high rate of speed, ran Sydney Daly

¹ The facts recited in this brief are those expected to be proved at trial, and are taken from the Affidavit of Probable Cause attached to the State's Motion for Issuance of Summons, and affidavits attached to the State's pretrial motions.

off the road, as she traveled Goss Lake Road in the opposite direction. CP 140.

Police arriving at the scene noticed that Olsen had a faint odor of intoxicants on his breath, glassy eyes, and a flushed face. CP 141. Olsen was taken by ambulance to the hospital. While he was “strapped to a backboard,” he was asked to take a preliminary breath test (PBT), and refused. 1RP 19-20.² Later, at approximately 8:25 p.m., police took samples of his blood. Olsen denied drinking. CP 141.

Subsequent testing by Washington State Toxicology Laboratory analyst Lisa Noble revealed that Olsen’s blood had an ethanol concentration of 0.23 g per100mL of blood. CP 141.

Olsen’s passenger, Kim Blain, suffered a fractured pelvis as a result of the collision. CP 141.

Analyst Lisa Nobel, in a letter to deputy prosecutor Colleen Kenimond, estimated that one hour prior to the blood draw, Mr. Olsen’s BAC was between 0.24 g/100mL and 0.26 g/100mL. CP 56-57.

² The Verbatim Report of Proceedings includes two volumes, designated as follows:

1RP – Pretrial hearing conducted before the Honorable Dave Needy on January 21, 2009 in Mt. Vernon.

2RP – Hearing conducted before the Honorable John Meyer on August 4, 2009 in Coupeville. Both judges Needy and Meyer are Skagit County judges, and were sitting because both Island County judges were disqualified from hearing the case.

Judge Meyer ruled on the State’s motion to reconsider without argument on August 18, 2009.

Additionally, she extrapolated back 10 minutes prior to the blood draw (assumed to be approximately 2 hours after the collision), and estimated that his BAC was between 0.232 g/100mL and 0.235 g/100mL. The extrapolation was based on an assumption that Mr. Olsen was “post absorptive” for the times in question. The extrapolation formula is a simple linear equation, based on alcohol burn-off rates between 0.01 to 0.03 g/100mL per hour. CP 56-57.

B. Procedural History

On September 22, 2008, the State charged Olsen by Information with one count of vehicular assault by reason of being under the influence of alcohol. CP 143. On January 15, 2009, the defendant moved for a continuance of trial for “a minimum of 45 days” in part because his counsel was concerned they may need to employ an expert witness to counter the State’s accident reconstructionist, Trooper Thompson. CP 102. The court ordered that the trial be set to commence not later than August 31, 2009. CP 81.³ On February 27, 2009, the trial was set to commence on August 4, 2009. CP 77.

On January 21, 2009, Judge Needy conducted a hearing on various defense motions to suppress and a defense motion to compel discovery.

³ The hearing was held on January 21, 2009 before Skagit County Judge Needy. The order was not filed with the Island County Clerk until January 26, 2009.

The hearing was conducted in Skagit County. 1RP. Deputy Prosecutor Patrick McKenna represented the State.

The defense moved to suppress the following:

1. Horizontal gaze nystagmus (HGN) test
2. Preliminary breath test (PBT) results
3. The defendant's refusal to take the PBT.
4. All evidence obtained as the result of an alleged illegal arrest.
5. "The results of the Defendant's blood test because the arresting officer did not have reasonable grounds (i.e. probable cause) to believe the defendant committed" an alcohol-related traffic crime.

CP 91-101.

At the same hearing, the defense moved to compel discovery. The motion complained that the State had named four experts, and had not yet provided the subject of their testimony or any reports they submitted to the State. CP 105. The named experts included Lisa Noble, Trooper Thompson, and the two physicians who treated the victim's broken pelvis. CP 105. The motion also complained that the State provided Lisa Noble's toxicology report, but had "not provided the Defendant with any other discovery relevant to Lisa Noble." CP 105.

Lead defense counsel, Mr. Vargas⁴, asserted at the hearing on the motion to compel, that his “biggest concern” was that the State had not indicated whether it would use Trooper Thompson, the accident reconstructionist, as an expert witness or a fact witness. 1RP 9. The State indicated that Trooper Thompson’s testimony would be limited to what was in the reports already provided to defense counsel. 1RP 10.

Mr. Vargas then indicated that he had subpoenaed from the Washington State Patrol “information regarding the blood test.” 1RP 10. The exchange that followed is reprinted below in its entirety:

MR. VARGAS: What I’m also wondering ... hasn’t been disclosed to the defense yet ... is [Lisa Noble] going to offer any other opinions to the jury? Is she going to talk about the effects of alcohol on the human body, and it’s a central nervous system depressant? These are the things you would expect to see. Is she going to give an opinion of that nature, how it could effect [sic] a person’s ability to operate a motor vehicle? If she’s going to do that, I would just like a summary or a statement about what’s going to be offered so that I can anticipate, well, I’ll need to hire an expert to counteract that. *Or an interview with Ms. Noble, at least, would be sufficient to address those issues before a jury. That’s the only thing I’m interested in.*⁵

MR. MCKENNA: Your Honor, we have not asked Ms. Noble to provide any sort of opinion regarding anything beyond what’s contained within

⁴ Mr. Vargas’ co-counsel was William H. Hawkins, PLLC.

⁵ Notwithstanding Mr. Vargas’ assertion that an interview with Ms. Noble would be sufficient to prepare for her testimony, the record reflected that he never interviewed her prior to the date set for trial.

her report, basically the level of alcohol she found while testing the blood. *If we did at a later date ask her to form those opinions, we would, of course, put that in a summary and disclose that to counsel. But at the moment she has not been asked to do that.*

THE COURT: All right. I don't want to create an issue, but is there any extrapolations [sic] going on as to ... someone who may testify what their opinion was of the level at the time of the accident. I see this was a couple of hours later that the blood was drawn.

MR. MEKENNA: Your Honor, at this point, no.

THE COURT: Like I said, I don't want to create issues, but I thought I'd ask since we're all here.

1RP 10-12 (emphasis added).

The pre-trial hearing then moved on to other matters, and the court ruled on the various evidentiary motions. None of Judge Needy's January 21, 2009 rulings was dispositive, nor are any challenged on this appeal.

Mr. McKenna left the employ of the prosecuting attorney's office in March of 2009, and the Olsen case was reassigned to another deputy. 2RP 14. Some two weeks prior to trial, lead counsel for Mr. Olsen ordered a full transcript of the January 21 hearing, because he wanted the record of the discussion about retrograde extrapolation and the effects of alcohol on the human body. 2RP 15. He provided that transcript to the State via email on July 30, 2009 after the prosecutor's offices were closed. CP 62. The next morning, Deputy Prosecutor Colleen Kenimond responded that the State did indeed intend to introduce retrograde

extrapolation evidence, and evidence of the toxicological effects of alcohol on humans. CP 62. Defense counsel advised the deputy prosecutor that he had not yet interviewed Lisa Noble, the State's toxicologist. CP 62. Olsen endorsed only one defense witness that was not included in the State's witness list – Robin Flem, a paramedic or EMT. CP 73; CP 75. The defense witness list filed on July 22, 2009 included no expert to challenge the handling and testing of the defendant's blood with a headspace gas chromatograph, and no expert to challenge the report provided by reconstructionist Trooper Thompson. CP 73.

On the Tuesday, August 4, 2009 trial date, visiting Skagit County Judge Meyer considered the defense motion to exclude testimony by Lisa Noble of retrograde extrapolation and of the human toxicological effects of alcohol. CP 66-67; 2RP 10-20. The court ruled that it would not allow testimony on retrograde extrapolation, but that it would permit testimony about the effects of alcohol on the human body. 2RP 12. The court did not explain why it suppressed one type of evidence from the toxicologist, but allowed another.

Lead defense counsel indicated that he had based his entire case preparation on Mr. McKenna's representation at the January hearing. He indicated that he was "happy about" McKenna's statements, and that he believed McKenna's statements were "unwise." 2RP 18. Counsel also

made an oral motion to dismiss the case for prosecutorial misconduct, under CrR 8.3(b)⁶. 2RP 14. The court responded immediately: “I’m not going to find 8.3.” 2RP 14. Again, near the conclusion of the hearing, the court stated: “I don’t find any misconduct on – any intentional misconduct.” 2RP 19.

The court asked lead defense counsel Vargas what he thought about a continuance to a date within the speedy trial period, in order to prepare to meet the retrograde extrapolation evidence. 2RP 17. Counsel responded with an illogical assertion that such a continuance amounted to a coerced waiver of his client’s speedy trial right, apparently based on CrR 3.3(b)(5) (setting the allowable time for trial at least 30-days after an excluded period). 2RP 17.

The court pointed out that the 30 day extension was a product of a court rule, and asked defense counsel “what difference would it make” if the trial were held within the 30 days then remaining in the time for trial period? 2RP 19. Defense counsel indicated that it would depend upon whether or not he could get an expert who would be available by the trial date. 2 RP 19. The court responded: “Bet you could.” *Id.*

⁶ CrR 8.3(b) provides: The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

Whereupon defense counsel asserted: “[W]e’re not going to ask for a continuance.” 2RP 20. The court then ruled: “I’ll suppress and find that the prosecution is unable to move forward, and, therefore, dismiss the case.” 2RP 20. The court did not enter a written order.

On August 6, 2009, the State filed a motion to reconsider the court’s oral ruling suppressing retrograde extrapolation evidence. CP 25; CP 61. The State’s memorandum supporting its motion included an August 5, 2009 letter from Lisa Noble explaining the calculations and results of retrograde extrapolation to estimate the blood alcohol level (BAC) ten minutes prior to the blood draw, and one hour prior to the blood draw. CP 56-57. The analyst explained that ten minutes prior to the blood draw, the BAC would have been between 0.232 and 0.235 g/100mL. CP 57. The level at the time of the blood draw was 0.23.

The State’s memorandum in support of its motion to reconsider also included recent advertisements from lead defense counsel Diego Vargas, in which he and his firm, Fox Bowman Duarte, claimed to have an “encyclopedic knowledge of DUI law.” The firm is “[o]n a regular basis...called upon to educate judges and other attorneys about our state’s complex DUI laws and procedures.” CP 59. Mr. Vargas in particular, lays claim to tremendous experience in DUI cases, devoting his practice exclusively to such cases. CP 60. He touts such success as securing a

mistrial when a police officer testified about evidence which counsel had succeeded in suppressing. In another case, he succeeded in getting a vehicular assault charge reduced to DUI, where the defendant, with a BAC of 0.23 g/100mL, was driving at more than 90 m.p.h., flipped her car and injured her passenger. CP 60. Clearly, this “rising star” would not easily be surprised or befuddled by retrograde extrapolation evidence.

Judge Meyer considered the State’s Motion to Reconsider and the defense response in chambers without oral argument. In a hand-written ruling filed on August 19, 2009, Judge Meyer stated that the State “said that extrapolation was not going to be addressed.” He then concluded that the State’s notice to defense counsel one and one-half work days (four calendar days) before trial was “late in the game.” Given that, the court pondered: “Who knows whether an expert could have been retained within speedy trial to counteract this testimony.” He found that “the defense also had a right to rely on the State’s representations to the Court.” Ultimately, he felt “the Court tailored its remedy here to fit the transgression.” CP 6. The motion to reconsider was denied. The court finally entered a written order suppressing the evidence and dismissing the case on August 31, 2009. CP 4.

The State filed a timely Notice of Appeal on September 1, 2009.

V. ARGUMENT

Suppression of evidence is an extraordinary remedy, at odds with the truth-seeking function of a trial, and only justified to protect basic constitutional rights, as with illegally obtained evidence or confessions.

State v. Hughes, 56 Wn.App. 172, 175, 783 P.2d 99 (1989).

A. **Suppression Of Evidence Is Not An Available Remedy For Failure To Comply With Discovery Rules.**

Criminal discovery is primarily regulated by CrR 4.7. CrR 4.7(a) sets forth the general obligations of the prosecutor. CrR 4.7(b) addresses the general duties of the defense. CrR 4.7(h)(7) establishes the only sanctions permissible for violations of the rule. CrR 4.7(h)(7) applies to both the prosecutor and the defendant, stating:

(7) Sanctions.

(i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

CrR 4.7(h)(7).

Washington courts have consistently held that “suppression of evidence is not one of the sanctions available for failure to comply with

discovery rules.” *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (citing *State v. Thacker*, 94 Wn.2d 276, 280, 616 P.2d 655 (1980)). In *Ray* the state learned, after it rested its case, that a defense witness’ testimony was substantially more involved than the defense CrR 4.7(b) summary indicated. In fact, for the first time, it became apparent the witness was prepared to testify that she was an eyewitness on the date of the alleged crime, and could say the charged count of incest did not occur. The trial court excluded the witness’ testimony. The Supreme Court reversed, because CrR 4.7(h)(7) does not authorize suppression as a remedy. *Ray*, 116 Wn.2d at 538.

In *Thacker*, the defense had removed a named witness from its original witness list, but then decided to call the witness at trial. Again, the Supreme Court, relying on CrR 4.7(h)(7) held that “[s]uppression of evidence is not one of the sanctions available for failure to comply with the discovery rules.” *State v. Thacker*, 94 Wn.2d 276, 280, 616 P.2d 655, (1980).

While these cases involved defense violations of discovery rules, CrR 4.7(h)(7) applies equally to violations by the prosecutor. In *State v. Laureano*, the Supreme Court determined that the State was dilatory in fulfilling its obligation under CrR 4.7(a)(1)(i). *State v. Laureano*, 101 Wn.2d 745, 763, 682 P.2d 889 (1984)(overruled on other grounds, *State v.*

Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989)). Citing *Thacker*, the Court held that suppression of evidence was not one of the sanctions available for failure to comply with the discovery rules. *Laureano*, 101 Wn.2d at 762. The Court went on to address the defendant's CrR 8.3 motion to dismiss, holding that "dismissal of charges remains an extraordinary remedy and is appropriate only if the defendant's right to a fair trial has been prejudiced in a manner which could not be remedied by a new trial." *Laureano*, 101 Wn.2d at 62-63 (internal citations omitted). The Court noted that dismissal was "especially inappropriate" in that case because the defense refused to ask for a continuance. *Laureano*, 101 Wn.2d at 63. *Laureano* is squarely on point.

Numerous other cases have relied on this bedrock principle of Washington discovery regulation, rejecting suppression as a remedy. See e.g., *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986)(after jury empanelled, state disclosed new witness in murder trial who could testify that defendant believed the victim had caused the defendant's mother's death); *State v. Stamm*, 16 Wn.App. 603, 610, 559 P.2d 1 (1976)(testimony of state's witness went beyond the witness summary provided by the prosecution); *State v. Glasper*, 12 Wn.App. 36, 38, 527 P.2d 1127 (1974)(suppression not available as remedy for rebuttal

testimony by police of previously undisclosed statements made by defendant).

The *Stamm* court explained that the Washington Judicial Council and the Washington Supreme Court both explicitly rejected exclusion of evidence as a sanction when considering proposed CrR 4.7 in 1971. *Stamm*, 12 Wn.App. at 38. The comments to the 1971 adoption of CrR 4.7, state:

ABA Draft-Discovery s 4.7. This rule was adapted from Fed.R.Crim.P. 16(g). The Advisory Committee intentionally omitted one provision of 16(g)-that the court might 'prohibit the party from introducing in evidence the material not disclosed.'

Washington Proposed Rules of Criminal Procedure, Rule 4.7, Comment (1971).

The principles espoused by the Judicial Council, and the Washington appellate courts all advance a simple maxim: "Suppression of evidence is an extraordinary remedy, at odds with the truth-seeking function of a trial, and only justified to protect basic constitutional rights, as with illegally obtained evidence or confessions." *State v. Hughes*, 56 Wn.App. 172, 175-176, 783 P.2d 99, 101 (1989). *Hughes* involved a charge of rape of a child in the first degree, where the State announced its intention to introduce child hearsay from the victim *on the morning of trial*. As in this case, the defendant was offered and declined a continuance. The Court of Appeals upheld the trial court's decision to

proceed with the trial and to admit the hearsay testimony. *Id.* Although construing RCW 9A.44.120, the notice provision of the child hearsay statute, the *Hughes* court noted its similarity to CrR 4.7. *Id.*, at 176 n. 8.

In the case at bench, the court's order to suppress the evidence is at odds with the truth seeking process, and a remedy not warranted by the facts of the case nor authorized by law. The evidence here was not illegally obtained, and its inclusion in a trial such as this can only be categorized as commonplace. The proper remedy was to offer the defendant a continuance to prepare for the anticipated testimony. Since the defendant declined the offer of a continuance, the trial should have gone forward, and the testimony should have been permitted.

Confronted with a mountain of consistent and well-grounded decisional law, the trial court inexplicably ignored all of it, and ordered suppression of half of the newly-proposed toxicological evidence.

B. By Suppressing Evidence As A Remedy For Dilatory Discovery Actions, In The Face Of Black Letter Law, The Trial Court Abused Its Discretion.

A trial judge has wide latitude when imposing sanctions for discovery violations. Absent a showing of abuse of discretion, the rulings should not be disturbed on appeal. *E.g. State v. Dunivin*, 65 Wn.App. 728, 731, 829 P.2d 799, *review denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992). Discretion is abused when the trial court's decision is manifestly

unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Ramos*, 83 Wn.App. 622, 636, 922 P.2d 193 (1996). Here, the trial judge abused his discretion, and his decision should be reversed.

First, it must be said that the State did not violate the discovery rules. CrR 4.7(a)(1) requires “any reports or statements of experts made in connection with the particular case” to be disclosed “no later than the omnibus hearing.” The State provided all expert reports in its possession in a timely manner.

In contrast, CrR 4.7(a)(2) requires the State to notify the defense of “any expert witnesses whom the prosecuting attorney will call ... the subject of their testimony, and any reports they have submitted to the prosecuting attorney.” The rule imposes no deadline for such disclosure. At the January 21, 2009 hearing, Mr. McKenna held open the possibility that he might present both extrapolation and alcohol toxicology evidence, but as of that date, he had not yet explored those subjects, and thus eschewed any potential misrepresentation by asserting otherwise. 1RP 11-12.

Rather than limiting the State’s options at a date months before trial, Mr. McKenna was cautious and forthright to both the court and defense:

Your Honor, we have not asked Ms. Noble to provide any sort of opinion regarding anything beyond what's contained within her report, basically the level of alcohol she found while testing the blood. If we did at a later date ask her to form those opinions, we would, of course, put that in a summary and disclose that to counsel. But *at the moment*, she has not been asked to do that.

1RP 11 (emphasis added).

Similarly, in response to the retrograde extrapolation question raised by Judge Needy, Mr. McKenna said only: "Your Honor, at this point, no." 1RP 12.⁷

The State concedes its supplemental disclosure of its intent to elicit generic toxicological testimony ought to have been timelier, but does not concede a violation of CrR 4.7. While the State regrets the inconvenience caused by its late notification, it did not prejudice the defendant, and did not warrant dismissal of the prosecution.

Here, the trial court's ruling suppressing evidence was manifestly unreasonable, exercised on untenable grounds, and for untenable reasons.

The trial court's various positions about the propriety of a continuance, and the absence of prejudice to the defendant, shows the decision to suppress was unreasonable. The tardy disclosure of the anticipated testimony of the toxicologist was not prejudicial because there

⁷ It was this statement, apparently, that led Judge Meyer to find: "[T]he State...said that extrapolation was not going to be addressed." CP 6. The State asserts that finding is not supported by the evidence.

was ample time for a continuance to permit the defense team additional time to prepare. The defense refused a continuance.

The record strongly suggests that the lead defense counsel was well aware that the State's case would require the extrapolation testimony since the January hearing. 2RP 14-15. The State is not suggesting that the defense counsel has an obligation to tutor a deputy prosecutor on what he needs to prove his case. But, neither should the defense enlist the Court in a game of "gotcha" to exonerate their client and thwart justice. The discovery rules are designed to facilitate the truth seeking process, not be a tool to block it.

Moreover, the anticipated testimony of the toxicologist could only be described as "commonplace." The extrapolation, though necessary to prove the BAC exceeded 0.08g/100mL within two hours of driving, was hardly shocking or complicated to even a lay person. It was even less so to one of the state's preeminent DUI attorneys. The same can be said of the anticipated testimony about the human toxicological effects of alcohol. With no prejudice to the defendant, there was no reason to impose any sanction, let alone an illegal one. The decision was manifestly unreasonable.

As discussed at length above, the court's ruling was directly contrary to consistent decisional law going back decades. The decision to suppress was based on untenable legal grounds.

Finally, the decision to suppress was based upon untenable reasons. The defense asked to suppress both the retrograde extrapolation evidence and the human toxicological effects of alcohol. Without offering any reasonable distinction between the two, the trial judge chose to suppress one, but not the other. The trial court's oral and written rulings were devoid of any reasoning showing how the court got from a finding that the State should have made the explicit disclosure earlier, to a ruling that half of the proffered evidence must be suppressed.

The State does not reach this conclusion lightly, but here the only reasonable conclusion is that the trial judge abused his discretion. His decision must be reversed.

VI. CONCLUSION

This trial court's decision concerned routine extrapolation evidence that, even under the most favorable cross examination imaginable, would not cast doubt on the defendant's BAC being greater than 0.08 g/100mL an hour before the blood draw. The suppression of this legally obtained extrapolation evidence is at odds with the truth-

seeking process. The ruling was manifestly unreasonable, and arbitrary. It was based upon untenable grounds, and made for untenable reasons. For the foregoing reasons, the Order of Dismissal should be vacated, and the matter remanded for trial

Respectfully submitted this 18th day of November, 2009.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LEROY E. OLSEN, III,

Defendant/Appellant.

NO. 64073-9-I

DECLARATION OF SERVICE

I, CAROLINE MORSE, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

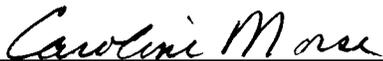
That on the 19th day of November, 2009, a copy of Brief of Appellant and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

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Signed in Coupeville, Washington, this 19th day of November,
2009.



CAROLINE MORSE