No. 1035632

SUPREME COURT OF WASHINGTON

APPEAL FROM
Court of Appeals Division III No. 393151
Re: Ferry County Superior Court No. 2010002010

STATE OF WASHINGTON,
Respondent/Plaintiff,

v.

JOHN HENRY SLIGER,
Petitioner/Defendant.

STATEMENT OF ADDITIONAL AUTHORITIES RE: PETITION FOR REVIEW PURSUANT TO RAP 10.8

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***Eide v. State, Dep't of Licensing*, 101 Wn. App. 218, 222–23, 3 P.3d 208, 210 (2000) (Appendix A).**

In *Eide*, as in *City of Sunnyside v. Fernandez,* 59 Wn. App. 578, 799 P.2d 753 (1990), Division III does not examine the prima facie test set forth in RCW 46.61.506(4). With good reason. The statute did not include the prima facie evidence standard until 2004. LAWS OF 2004, ch. 68, §4 (Appendix B).

Therefore, neither *Eide* or *Fernandez* are relevant for determining prima facie evidence of admissibility by examining whether the "foreign substance" in the mouth adversely affected the results of the test.

Conversely, the dictionary definition of a "foreign substance" established in *Fernandez* as "'belonging to or proceeding from other persons or things ... not belonging to the place or body where found'" remains valid. *Fernandez*, 59 Wn. App. at 581 (quoting RANDOM HOUSE DICTIONARY 749 (2d ed. 1987)).

Also valid is Mr. Sliger's analysis that tobacco does not belong to the place or body in which it was found. *See* Petition for Review at 13-14. The prima facie evidence test merely sets forth the foundational facts necessary for the admission of the breath test results. *See* RCW 46.61.506(4)(b) (discussing the prima facie test as a foundational one).

DATED: October 23, 2024.

This document contains 209/350 words (as limited by RAP 10.8(b)), excluding the parts of the document exempted from the word count by RAP 18.17.

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APPENDICES TO THE STATEMENT OF ADDITIONAL AUTHORITIES

APPENDIX A:

***Eide v. State, Dep't of Licensing*, 101 Wn. App. 218, 222–23, 3 P.3d 208, 210 (2000) (attached).**

APPENDIX B:

LAWS OF 2004, ch. 68, §4 (attached).

APPENDIX A:

***Eide v. State, Dep't of Licensing*, 101 Wn. App. 218, 222–23, 3 P.3d 208, 210 (2000) (attached).**

101 Wash.App. 218
Court of Appeals of Washington,
Division 3,
Panel One.

John EIDE, Appellant,
v.
STATE of Washington, DEPARTMENT OF LICENSING, Respondent.

No. 18837–0–III.
|
June 20, 2000.

Synopsis

Driver sought judicial review of decision by Department of Licensing (DOL) revoking his driver's license for refusing to take breath test after he was arrested for driving under the influence. The Superior Court, Spokane County, Linda Tompkins, J., affirmed the revocation. Driver appealed. The Court of Appeals, Kato, J., held that: (1) superior court decision affirming the revocation was not appealable as matter of right, and (2) discretionary review would be inappropriate.

Discretionary review denied.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] **Automobiles** Judicial Remedies and Review in General

Superior court order affirming the administrative revocation of a driver's license for refusing to take a breath test after being arrested for driving under the influence was not appealable as a matter of right, where the superior court decision was made in the same manner as its review of a decision of a court of limited jurisdiction and there was no trial de novo. West's RCWA 46.20.308(9); RAP 2.2.

[2] **Automobiles** Judicial Remedies and Review in General

Decisions by Department of Licensing (DOL)on driver's license revocations are reviewed as limited jurisdiction proceedings. West's RCWA 46.20.308(9).

[3] **Automobiles** Judicial Remedies and Review in General

Court of Appeals would not accept discretionary review of a superior court decision affirming the administrative revocation of driver's license for refusing to take breath test after driver was arrested for driving under the influence; question of whether driver's conduct in belching after taking breath test constituted a refusal to take test was fact-specific issue and superior court order did not conflict with prior case law. West's RCWA 46.20.308(9); RAP 2.3(d).

2 Cases that cite this headnote

[4] **Appeal and Error** Grounds for allowance or refusal

In determining whether an issue involves a sufficient public interest, so as to warrant discretionary review, appellate court considers the public or private nature of the question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence. RAP 2.3(d).

1 Case that cites this headnote

Attorneys and Law Firms

**209 John C. Cooney, Michael E. Little, Spokane, for Appellant.

Laura J. Watson, Asst. Atty. Gen., Seattle, for Respondent.

Opinion

Kato, J.

*219 The superior court affirmed the Department of Licensing's revocation of the driver's license of John Eide for refusing to take a breath test. Contending this was error, he appealed. Thereafter, the Department filed a motion to

determine appealability, which was referred to a panel of judges. We hold the revocation is not appealable as a matter of right, but is subject only to discretionary review that we decline to accept.

***220** On May 21, 1999, Mr. Eide was arrested for driving under the influence. He initially refused to take a breath test, but later changed his mind after talking to a public defender. The first test was invalid because he did not give a continuous breath sample. The next test read a .151 blood alcohol level. After providing the sample for this test, Mr. Eide belched. As a result, the testing officer invalidated the test and performed a third test. This final test registered his blood alcohol content at .142. After giving this sample, he again belched. The officer concluded Mr. Eide was refusing to take the test by belching.

On July 16, 1999, the Department entered an order revoking Mr. Eide's driver's license for a year for refusing to take a breath test. The superior court upheld the revocation, whereupon Mr. Eide appealed. The Department responded by filing motions to (1) determine appealability and (2) dismiss. A court commissioner asked the parties to focus on whether the case was appealable as of right or subject to discretionary review. After a hearing, the commissioner stayed the order revoking Mr. Eide's license and referred the appealability issue to a panel of judges.

A party may seek review of a superior court decision by two methods: appeal as a matter of right or discretionary review. RAP 2.1(a). RAP 2.2 governs what types of decisions are appealable as a matter of right. RAP 2.3 provides the rules for discretionary review.

[1] **[2]** Mr. Eide seeks review of the superior court order upholding the revocation of his driver's license based upon his refusal to take a breath test. RCW 46.20.308(2)(a) authorizes the Department to revoke an individual's license for a refusal. The individual whose license is being revoked may request a hearing before the Department. RCW 46.20.308(8). The Department's decision at the hearing may be reviewed as follows:

> *If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order* ***221** *of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction.* Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing.... The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the ****210** department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings.

RCW 46.20.308(9) (emphasis added). By enacting this statute, the Legislature clearly intended the Department's decisions on license revocations to be treated as limited jurisdiction proceedings. *See generally, Walk v. Department of Licensing,* 95 Wash.App. 653, 656, 976 P.2d 185 (1999); *Hatfield v. Department of Licensing,* 89 Wash.App. 50, 55, 947 P.2d 269 (1997).

Because these cases are treated as decisions of courts of limited jurisdiction, RAP 2.2(c) governs whether the superior court decision may be appealed:

> If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo and the final judgment is not a finding that a traffic infraction has been committed.

Under RCW 46.20.308(9), the superior court decision was made in the same manner as its review of a decision of a court of limited jurisdiction. There was no trial de novo. Mr. Eide is not entitled to an appeal as a matter of right under RAP 2.2.

The only other way to seek review is by a petition for discretionary review. RAP 2.3(d) governs when this court ***222** will accept discretionary review of a superior court decision reviewing a decision of a court of limited jurisdiction:

(d) Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

Mr. Eide claims that discretionary review is appropriate because (1) the superior court order conflicts with the holding of *City of Sunnyside v. Fernandez,* 59 Wash.App. 578, 799 P.2d 753 (1990), and (2) the case involves an issue of public interest.

In *Sunnyside,* Mr. Fernandez argued that the results of his breath test should be suppressed because there was blood in his mouth, which constituted a foreign substance invalidating the test. The court determined that a foreign substance was anything which adversely affects the accuracy of the test results. *Id.* at 582, 799 P.2d 753. Uncontradicted testimony indicated that one's blood in one's own mouth would not have any effect on breath test results. The court accordingly held that one's own blood was not a foreign substance. *Id.* at 583, 799 P.2d 753.

[3] The court's order upholding the Department's revocation of Mr. Eide's license does not conflict with the holding in *Sunnyside.* Mr. Eide's case involved belching, not blood. He presented no evidence as to what effect, if any, belching would have on breath test results. There is no conflict and ***223** discretionary review is inappropriate on this ground.

[4] Mr. Eide also argues this court should accept review because his case involves an issue of public interest. In determining whether an issue involves a sufficient public interest, we consider the public or private nature of the question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence. *See In re A.D.F.,* 88 Wash.App. 21, 24, 943 P.2d 689 (1997). The question here is whether Mr. Eide's specific conduct constituted a refusal to take the breath test as required by law, which conduct further involves a public question suggesting the need ****211** for guidance. His case, however, is fact-specific and the need for future guidance is thus minimal as is the likelihood of recurrence. The superior court decision does not involve an issue of public interest that we should determine.

Discretionary review is denied.

Brown, A.C.J., and Sweeney, J., concur.

All Citations

101 Wash.App. 218, 3 P.3d 208

End of Document

APPENDIX B:

LAWS OF 2004, ch. 68, §4 (attached).

2004 Wash. Legis. Serv. Ch. 68 (S.H.B. 3055) (WEST)

WASHINGTON 2004 LEGISLATIVE SERVICE

58th Legislature, 2004 Regular Session

Additions are indicated by Text; deletions by

~~Text~~ . Changes in tables are made but not highlighted.

Vetoed provisions within tabular material are not displayed.

CHAPTER 68

S.H.B. No. 3055
DUI TEST—ADMISSIBILITY

AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

The legislature's authority to adopt standards governing the admissibility of evidence involving alcohol is well established by the Washington Supreme Court. See generally *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989); *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

Sec. 2. RCW 46.20.308 and 1999 c 331 s 2 and 1999 c 274 s 2 are each reenacted and amended to read as follows:

<< WA ST 46.20.308 >>

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, 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 reasonable grounds 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 RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. 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 reasonable grounds 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)~~ (5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. ~~The officer shall warn the driver that:~~

~~(a) His or her license, permit, or privilege to drive will be revoked or denied if he or she refuses to submit to the test;~~

~~(b) His or her license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of the person's breath or blood is 0.08 or more, in the case of a person age twenty-one or over, or in violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a person under age twenty-one; and~~

~~(c) His or her refusal to take the test may be used in a criminal trial.~~ The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver will not be eligible for an occupational permit: and

(c) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(d) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

(3) 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 RCW 46.61.502, 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.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) 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 or more if the person is age twenty-one or over, or ~~is in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more if the person is under the age of twenty-one, 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, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was ~~in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within thirty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of one hundred dollars as part of the request. If the request is mailed, it must be postmarked within thirty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required one hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required one hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration ~~in violation of RCW 46.61.503 and~~ of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or ~~was in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration ~~in violation of RCW 46.61.503~~ of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other

evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, the court may direct the department to stay any actual or proposed suspension, revocation, or denial for at least forty-five days but not more than ninety days. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

Sec. 3. RCW 46.20.3101 and 1998 c 213 s 2, 1998 c 209 s 2, and 1998 c 207 s 8 are each reenacted and amended to read as follows:

<< WA ST 46.20.3101 >>

Pursuant to RCW 46.20.308, the department shall suspend, revoke, or deny the arrested person's license, permit, or privilege to drive as follows:

(1) In the case of a person who has refused a test or tests:

(a) For a first refusal within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, revocation or denial for one year;

(b) For a second or subsequent refusal within seven years, or for a first refusal where there has been one or more previous incidents within seven years that have resulted in administrative action under this section, revocation or denial for two years or until the person reaches age twenty-one, whichever is longer. A revocation imposed under this subsection (1)(b) shall run consecutively to the period of any suspension, revocation, or denial imposed pursuant to a criminal conviction arising out of the same incident.

(2) In the case of an incident where a person has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was 0.08 or more:

(a) For a first incident within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, suspension for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for two years.

(3) In the case of an incident where a person under age twenty-one has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was ~~in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~ 0.02 or more:

(a) For a first incident within seven years, suspension or denial for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for one year or until the person reaches age twenty-one, whichever is longer.

Sec. 4. RCW 46.61.506 and 1998 c 213 s 6 are each amended to read as follows:

<< WA ST 46.61.506 >>

(1) 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, 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.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section 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.

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 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. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4)(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational

facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

(5) When a blood test is administered under the provisions of RCW 46.20.308, 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~~ a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

~~(5)~~ (6) 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 or more tests in addition to any administered at the direction of a law enforcement officer. The test will be admissible if the person establishes the general acceptability of the testing technique or method. 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.

~~(6)~~ (7) 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 the test or tests shall be made available to him or her or his or her attorney.

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