IN THE MUNICIPAL COURT OF THE CITY OF SEATTLE

IN RE DRAEGER ALCOTEST
BAC RESULTS

Case # 660378

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL HISTORY

In response to similar litigation in other jurisdictions, Seattle Municipal Court invoked SMCLR 8.2.4 and designated the limited issue of whether the Draeger Alcotest 9150 breath testing instrument results complied with the requirements outlined in the Washington Administrative Code as an issue of citywide significance. SMCLR 8.2.4 creates the procedural framework for the court to hear any issue of citywide significance *en banc* and allows for the ruling rendered to be considered precedent on that issue. The Court created the caption "In re DRAEGER, Alcotest BAC Results" and assigned the above case number to the *en banc* hearing. Approximately 95 cases have been consolidated into this litigation. In the consolidated cases, each defendant is charged with DUI or Physical Control. Each defendant submitted to a breath test on Draeger Alcotest 9510 ("Draeger") instrument.

After reviewing the briefing of the parties, reviewing the stipulated exhibits, a panel consisting of Judge Catherine McDowall, Judge Andrea Chin, Judge Anita Crawford-Willis, and Judge Damon Shadid heard evidence in the form of witness testimony and arguments at a

hearing on December 13, 2022. Based upon this record, this court now makes the following findings of fact and conclusions of law.

FACTS

The state legislature has established the criteria for the admissibility of breath alcohol test evidence at trial under RCW 46.61.506. RCW 46.61.506(3) authorizes and directs the state toxicologist 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 to those individuals.

RCW 46.61.506(4) lays out eight foundational requirements for the admissibility of breath test evidence by an instrument approved by the State toxicologist. The purpose of these foundational requirements is to ensure that competent evidence is admitted at trial. Specifically, the purpose of RCW 46.61.506(4)(a) (ii), (iii) and (vi) is to ensure that breath samples are taken from a person's deep lung air, and not from mouth alcohol or other interfering substances. If the foundational requirements are met, the test shall be admissible at trial.

Pursuant to this statutory authority, the State Toxicologist approved three machines for use conducting a qualitative measurement of alcohol in a person's breath.[1] The Draeger Alcotest 9510 was approved as an instrument to be used for this measurement in 2010.

RCW 46.61.506(4)(vi) requires that "The two breath test samples agree to within plus or minus of ten percent of their mean to be determined by the method approved by the state toxicologist." (*hereinafter* "the 10% requirement"). To comply with this statutory direction, the

[1] WAC 448-16-020.

State Toxicologist promulgated WAC 448-16-060. The prior version of that regulation approved a method of calculating the 10% requirement as follows:

> (1) The breath test results will be reported, truncated to three decimal places.
> (2) For the DataMaster instruments, the mean of the two breath test results will be calculated and rounded to four decimal places. For the Drager instrument, the mean of all four results will be calculated and rounded to four decimal places.
> (3) The lower acceptable limit will be determined by multiplying the above mean by 0.9, and truncating to three decimal places.
> (4) The upper acceptable limit will be determined by multiplying the mean by 1.1 and truncating to three decimal places.
> (5) If the individual results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.[2]

This method uses both rounding and truncation in the calculation.

The Draeger instrument itself, in step (2) of this process, calculates the mean of the breath test results truncated (as opposed to rounded) to four decimal places. Therefore, prior to November 6, 2022, the Draeger calculations did not meet the requirements of RCW 46.61.506(4)(vi) because the instrument was not using the method specifically approved for making the calculations under the prior version of WAC 448-16-060(2). If the values do not meet the 10% requirement, a breath ticket will not issue from the machine.

In an Interoffice Communication dated June 29, 2022, the State Toxicologist acknowledged that the different calculation methods used by the Draeger instrument and what is set out in WAC 448-16-060(2) was an administrative oversight.[3] The Toxicologist further stated that both rounding and truncation are generally acceptable in the field of forensic toxicology, and that the Toxicology Laboratory currently truncates results from blood alcohol and drug analyses for reporting. The Interoffice Communication also outlined several attempts to update the

[2] WAC 448-16-060 (effective until November 6, 2022) (emphasis added).
[3] Defense Exh. 22.

Draeger software to align the Draeger instrument with the WAC, but none successfully passed the Quality Assurance Procedures necessary to use a new software.

In July of 2022, the Toxicologist proposed an amendment to WAC 448-16-060 "to align the rule with the method currently utilized by the Draeger."[4] The proposal stated that the amendment was intended to be remedial in nature.

The amended regulation changes 448-16-060(2) to read:

> (2) For the DataMaster instruments, the mean of the two breath test results will be calculated and rounded to four decimal places. For the Drager instrument, the mean of all four results will be calculated and truncated to four decimal places.[5]

Thus, the current version of the WAC specifically approves the method that is used by the Draeger instrument for this calculation.

ANALYSIS OF ISSUES PRESENTED

A. Retroactive Application of the revised WAC 448-16-060.

The primary issue presented by the parties is whether the revised WAC should be applied to breath tests that were conducted before the effective date of the regulation. The defense has argued that retroactive application of this revised WAC would violate the ex post facto clauses of the US and Washington state constitutions.

Washington courts have defined ex post facto laws as falling into one of four categories: 1) a law that makes an action criminal, which was innocent at the time it was committed; 2) a law that aggravates a crime or makes it a greater crime than when it was committed; 3) a law that changes the punishment of the crime to one greater than the punishment in effect when the crime

[4] Defense Exh. 25.
[5] WAC 448-16-060(2) (effective November 6, 2022) (emphasis added).

was committed, and 4) 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."[6] Only the fourth category is at issue in this case.

In Ludvigsen, the Washington Supreme Court evaluated a similar, but distinguishable, issue. In that case, the defendant was arrested for DUI in 2002, when the foundation requirements set forth in the WAC required the prosecutor to establish that the breath testing machine be certified with a thermometer that was traceable to NIST standards. In 2004, the WAC was changed to remove this requirement. Ludvigsen's trial occurred in 2005, after this change went into effect. The question presented in that case was whether the state must lay the foundation using the 2002 version of the WAC.[7]

In Ludvigsen, the court noted that the answer to whether to apply the change to the WAC retroactively turned on whether the change is characterized as procedural or substantive.[8] Revisions to the administrative code may be retroactive when the purpose of the regulation is remedial, in that it relates to "practice, procedure, or remedies and does not affect a substantive or vested right."[9] In Ludvigsen, the court ultimately decided that the *removal* of a foundational requirement regarding the thermometer was a substantive change that would violate the ex post facto clause if it applied to breath tests administered before the effective date in the act.

This situation differs from the cases presented to this court. The new WAC 448-16-060 does not remove any requirements, does not change the quantum of evidence that must be presented, or otherwise alter a substantive or vested right. Rather, the new WAC simply

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[6] Ludvigsen v. City of Seattle, 162 Wn.2d 660, 669 (2007).
[7] Ludvigsen, 162 Wn.2d at 665-67.
[8] Ludvigsen, 162 Wn.2d at 671.
[9] City of Seattle v. MacKenzie, 114 Wn. App. 687, 699-700.

approves a different – but equally acceptable – means of calculating the 10% requirement.[10] The fact that both methods are approved is further demonstrated by the fact that the former WAC already employed the methods of truncation in steps 1, 3 and 4 of the process.[11] Moreover, the documents published when promulgating the change to the WAC unequivocally demonstrate that the change is intended to be "remedial" in nature.[12]

Therefore, this court finds that the application of the revised WAC to tests performed on the Draeger Alcotest 9510 does not violate the ex post facto clauses. The City will not be required to provide additional testimony regarding the rounding procedure in order to establish the foundation requirements for the admissibility of the test. The defense motion to suppress the results of Draeger tests performed prior to the adoption of the revised WAC is denied.

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[10] See Defense Exhibit 22 at page 2 ("Use of both rounding and truncation are generally acceptable in the field of forensic technology.").

[11] Former WAC 448-16-060 provided:

> (1) The breath test results will be reported, truncated to three decimal places.
> (2) .... For the Drager instrument, the mean of all four results will be calculated and rounded to four decimal places.
> (3) The lower acceptable limit will be determined by multiplying the mean by 0.9 and truncating to three decimal places.
> (4) The upper acceptable limit will be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(emphasis added).

[12] See Defense Exhibit 25 ("Reasons supporting proposal: The amendment would align the rule with the method currently utilized by the Drager Alcotest 9510. The amendment is intended to be remedial in nature.") (Emphasis added).

B. Alternative Ruling on Suppression if the revised WAC is not applied retroactively.

This court's ruling in section (A) is dispositive. Even if the revised WAC is not applied retroactively, however, this court would find that the City would still be permitted to establish the foundation requirements of RCW 46.61.506(4) without relying on the calculation of the 10% requirement that is performed by the Draeger instrument itself.

In making this finding, this Court adopts the reasoning set forth in Judge Klinge's dissenting opinion in King County District Court Case No. XZ0714516, State v. Malinovskiy (filed 10/6/2022). That opinion is attached and incorporated here by reference as Attachment A.

C. Arbitrary and Capricious

The defense briefs have also raised a challenge to the use of Draeger Alcotest 9510 breath tests on the basis that the actions of the State Toxicologist in approving the machine for use despite the fact that the calculations of the 10% requirement did not align with the WAC methods, were "arbitrary and capricious."[13]

The courts have inherent power to review administrative agency action that is "'illegal or manifestly arbitrary and capricious action violative of fundamental rights.'"[14] "The right to be free of such [arbitrary and capricious] action is itself a fundamental right and hence *any* arbitrary and capricious action is subject to review."[15] "The courts' inherent power of review extends to

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[13] Defense Memorandum to Suppress Breath Results, at 5.
[14] Pierce County Sheriff v. Civ. Serv. Comm'n of Pierce County, 98 Wn.2d 690, 693 (1983) *quoting* State ex rel. DuPont-Fort Lewis Sch. Dist. 7 v. Bruno, 62 Wash.2d 790, 794 (1963).
[15] Pierce County Sheriff, 98 Wn. 2d at 693-694 (*quoting* Williams v. Seattle Sch. Dist. 1, 97 Wash.2d 215, 221–22, (1982)) (emphasis in original).

administrative action which is contrary to law as well as that which is arbitrary and capricious."[16] An agency's violation of rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental.[17] "The courts thus have inherent power to review agency action to assure its compliance with applicable rules."[18] A reviewing court's scope of review is narrow, and the person seeking to overturn agency action bears a heavy burden to demonstrate that the agency action is arbitrary and capricious.[19]

Arbitrary and capricious action is defined as "willful and unreasoning action, without consideration and in disregard of fact and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached."[20]

The defense has argued that the actions of the State Toxicologist were arbitrary and capricious when she approved the Draeger 9510. Defense repeatedly alleges that the State Toxicologist knew of the software error. However, the record does not support this assertion. The defense presented no evidence that the State Toxicologist had actual knowledge that the software of the Draeger 9510 did not perform the mean calculation in accordance with the WAC. Instead, it appears that the State Toxicologist only became aware of the software discrepancy in

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[16] Pierce County Sheriff, 98 Wn.2d at 694.
[17] Pierce County Sheriff, 98 Wn.2d at 694 *citing* Leonard v. Civil Serv. Comm'n, 25 Wash.App. 699, 701–02, 611 P.2d 1290 (1980); Wilson v. Nord, 23 Wash.App. 366, 373, 597 P.2d 914 (1979), *cited with approval in* Williams, 97 Wash.2d at 222; Tacoma v. Civil Serv. Bd., 10 Wash.App. 249, 250–51 (1973).
[18] Pierce County Sheriff, 98 Wn.2d at 694.
[19] Pierce County Sheriff, 98 Wn.2d at 695.
[20] State v. Rowe, 93 Wn.2d 277, 284 (1980).

June 2021.[21] The State Toxicologist has now conformed the rule to the software. The court declines to find her action arbitrary and capricious.

The defense also does not ask the court to invalidate any specific regulation promulgated by the State Toxicologist. Therefore, this court declines to suppress any BAC tests on this basis.

D. Estoppel Arguments

The defense has argued that the principles of judicial or equitable estoppel should apply to this case to prevent the State Toxicologist from making arguments in this case (i.e., that the 10% requirement may be calculated by the truncation method) that are contrary to positions that have been taken in prior cases via the declarations submitted to the Department of Licensing stating that the Draeger complies with the WAC requirements.

There is no precedent for applying these principles to a criminal case. Moreover, the defense position in this case suggests that the State Toxicologist would never be able to change or correct an error that appeared in previous versions of the WAC. This court declines to apply these principles to the case at bar.

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[21] The defense has provided no evidence that the State Toxicologist had actual knowledge that the machine did not conform with the WAC before June 2021. To the extent that the defense argues the State Toxicologist "should have known" or that the State Toxicologist had "constructive knowledge" of the discrepancy, the court finds that such theory would not rise to the level of arbitrary and capricious.

CONCLUSIONS

It is hereby ORDERED that:

(1) the defense motion to suppress BAC readings obtained from the Draeger Alcotest 9510 is DENIED.

(2) The city may rely on revised WAC 448-16-060 to lay foundation for the admissibility of the Draeger Alcotest 9510 breath results, or the city may choose to lay additional foundation as to the method used to calculate the 10% requirement.

(3) If the city lays adequate foundation for each of the other elements, the Draeger Alcotest 9510 results will be admitted at trial, and any additional arguments or testimony regarding the method used to calculate the 10% requirement will be considered as to the weight of the evidence.

(4) Cases consolidated under 660378 will be set for status hearings on February 7, 2023 in accordance with this court's order date December 19, 2022.

Dated: January 3, 2023

JUDGE CATHERINE McDOWALL

JUDGE ANDREA CHIN

JUDGE ANITA CRAWFORD-WILLIS

by CAMM with electronic authorization

JUDGE DAMON SHADID

ATTACHMENT A

Dissenting Opinion of Hon. Jill Klinge

State v. Malinovskiy, Case No. XZ0714516

King County District Court

KING COUNTY DISTRICT COURT
MRJC COURTHOUSE, SOUTH DIVISION
STATE OF WASHINGTON

STATE OF WASHINGTON. Plaintiff, vs. LEONID MALINOVSKIY, Defendant	Cas No. XZ0714516 ORDER ON MOTION

I. FACTS

1. Defendant was charged with one count of Driving Under the Influence (DUI) by complaint on July 7, 2021.

2. On November 28, 2020, Defendant was stopped by Trooper Seaburg of the Washington State Patrol on State Route 410 approaching Cole St. Trooper Seaburg indicated in his probable cause statement that the vehicle appeared to be travelling at a high rate of speed. He then decided to overtake the vehicle and noted the speed at 53 miles per hour in a 40 miles per hour zone.

3. Trooper Seaburg also included in the probable cause statement that he observed the vehicle "cross the fog line by half tire width and the center line by half a tire width". Trooper Seaburg activated his emergency equipment and stopped the vehicle east of 244th St.

4. Upon stopping the vehicle, Trooper Seaburg indicated "I could immediately smell a strong odor of intoxicants on his breath and person". There were others in the

It is not unheard of that a witness would testify in a criminal case in a manner contradictory to earlier testimony. Through the trial process of cross-examination and impeachment, the veracity and weight of testimony is tested. Ultimately it is a question for the trier of fact to decide what weight, if any, to give the testimony. This court declines to apply the principles of equitable or judicial estoppel in this context.

THIS IS THE ORDER OF THE COURT.

Dated this date October 6th 2022, in Kent, WA.

Fa'amoe[illegible]t P. Masaniai, Jr.
King County District Court Judge

Lisa Paglisotti
King County District Court Judge

Klinge, J. (dissenting) –

At issue in this case is whether a foundation can be laid for the admissibility of a Draeger-generated breath test. If the foundation cannot be laid, the test is not admissible. If it can be laid. then all arguments with respect to the reliability of the test go to the weight of the evidence, not its admissibility.[1]

[1] RCW 46.61.506

The law governing the admissibility of a breath test is codified under RCW 46.61.506. In 2004, the legislature enacted this law via SHB 3055, which stated in part, "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 reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to the 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."[2]

RCW 46.61.506(4)(a) lists eight foundational requirements that must be met for a breath test to be admissible. The requirements are not specific to the Draeger, but apply to all breath tests, regardless of the instrument performing the test. The only foundational requirement at issue in this case is (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." The method approved by the state toxicologist is set forth in WAC 448-16-060. The second step of that calculation requires that "the mean of the two breath test results will be calculated and rounded to four decimal places."[3] The Draeger, however, calculates the mean and *truncates* to four decimal places. Therefore, the Draeger does not perform the calculation by the method approved by the state toxicologist. Prima facie evidence of the foundational element under RCW 46.61.506(4)(a)(vi) cannot, therefore, be supported by the calculation done by the Draeger.

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[2] SHB 3055, Sec. 1
[3] Known throughout this opinion as "the calculation."

The next question, then, is whether the prosecution is required to only rely on the Draeger to lay this foundational element, or whether the prosecution can rely on other evidence, such as an expert witness who can do the calculation after the fact. The defense argues that the calculation must be done by the Draeger, at the time of the test. The defense argues that because the government has relied on the Draeger in the past to do the calculation, and because the State Toxicologist and various state troopers have testified that the Draeger does the calculation in compliance with the WAC, that prosecutors must now rely on that past testimony in future cases. The fact that the Draeger does not actually perform the calculation in compliance with the WACs certainly calls into question past cases that relied on testimony to the contrary. However, errors in past cases do not dictate how a prosecution must move forward in future cases, except to compel the government to avoid the same errors in the future. Nothing in the WAC or the RCWs prevents the prosecutor from laying the foundational element in another way, without relying on the Draeger.

Defense argues that because the Draeger prints out a test result after using the unapproved calculation, that printout is not in compliance with the WAC and cannot be used in any way, including in a future approved calculation by a witness. WAC 448-16-050 defines a breath test. It indicates that two valid breath samples will constitute one test. It then sets forth the ten steps necessary "to ensure accuracy, precision, and confidence in each test." These steps begin with Data Entry, and end with "Step 10. Printout of results." The ticket itself can be examined to determine that the ten steps were followed. These ten steps do not require that the calculation required for admissibility be done before the test results are printed. Therefore, the Draeger properly prints test results by following the ten steps under WAC 448-16-050. The

improper calculation does not become relevant until the prosecutor attempts to *admit* the printed test results under RCW 46.61.506.

The defense argues that because the Draeger is programmed to only print out results after the calculation is erroneously done, that those results themselves are invalid, and cannot be used by a witness to later perform an approved calculation. However, this argument, and the findings in this majority opinion, add a step to WAC 448-16-050 that does not currently exist. By approving software that erroneously performs the relevant calculation, the State Toxicologist did not effectively change WAC 448-16-050 by adding a requirement for printing a ticket. In other words, the State Toxicologist does not amend the ten-step requirement of WAC 448-16-050 simply by allowing the Draeger to perform an additional calculation not currently required by WAC 448-16-050.

This same principle works to the advantage of the defense when determining what method of calculation has been approved by the state toxicologist. The state argues that by approving the Draeger, and the software within the Draeger that truncates instead of rounds, the state toxicologist is effectively changing WAC 448-16-060 to endorse an additional method of performing the calculation. However, the act of approving software that truncates does not change the WAC, just as the act of allowing the Draeger to perform a calculation doesn't change the WAC. In the end, the calculation is not required by the WAC for the Draeger to print out a ticket. It is only required at the time of trial, when determining whether the printed results will be admitted into evidence.

When examining the eight foundational requirements of RCW 46.61.506(4)(a), some of them must be offered through the testimony of a witness (e.g. the person did not vomit for fifteen minutes; the person did not have foreign objects in their mouth.) Therefore, there is no inference

that the Draeger must independently provide the basis for each of the elements. The prosecutor can provide prima facie evidence for each of the foundational requirements in any relevant manner, including through the testimony of witnesses.

The language of WAC 448-16-060 likewise does not require the Draeger to perform the calculation. The plain language of WAC 448-16-060 indicates that the mean "will be calculated," but does not say who or what is required to perform the calculation, or for that matter, when the calculation is to be performed. The WAC specifically left this language in the passive tense. If the intention was to indicate that the calculation had to be done by the Draeger, the WAC would have said so.

The first step of the calculation is the "the breath test results will be reported, truncated to three decimal places."[4] This step is not in conflict with WAC 448-16-050, which sets forth the ten steps which must be followed for the Draeger to report the results. The second step of the calculation reads as follows:

> "(2) For the Data Master instruments, the mean of the two breath test results will be calculated and rounded to four decimal places. For the Drager instrument, the mean of all four results will be calculated and rounded to four decimal places."[5]

The second step requires that the mean of the results reported by the instrument be calculated and rounded to four decimal places. (This is where the Draeger improperly truncates rather than rounds.) The language in the second step distinguishes between the Datamaster and

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[4] WAC 448-16-060(1)
[5] WAC 448-16-060(2)

the Draeger, because the Datamaster prints out two results, and the Draeger prints out four results. Therefore, the calculation is necessarily slightly different. However, this distinction simply acts to clarify the number of results obtained from each instrument. It does not add a requirement that those instruments perform the calculation.

SHB 3055, and by extension, RCW 46.61.506(4), sought to "reduce the delays caused by challenges to various breath test instrument components and maintenance procedures." The software used in the Draeger to calculate whether the results agree within plus or minus ten percent of their mean is exactly the type of "breath test instrument component" that was contemplated by SHB 3055. The clear intent of SHB 3055 and RCW 46.61.506 is that a challenge such as this one shall go to the weight of the evidence, not its admissibility. There is no legal basis to prevent the prosecution from calling relevant witnesses to lay the foundational elements under RCW 46.61.506. With respect to the foundational element under RCW 46.61.506(4)(a)(vi), the prosecution has produced prima facie evidence by calling Trooper Hooper, who performed the appropriate calculation via the method approved by the State toxicologist, and testified that the four results all agree within plus or minus ten percent of their mean. Therefore, the breath test results should not be excluded based on the foundational requirement of RCW 46.61.506(4)(a)(vi). Assuming prima facie evidence is produced for the remaining foundational elements, any further challenges may be considered by the trier of fact in determining what weight to give the test result.[6]

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[6] RCW 46.61.506(4)(c)

Applying the clear and unambiguous language of WAC 448-16-050 and RCW 46.61.506, I would admit the test (presuming the foundational requirements are laid at trial). Further arguments regarding the reliability of the test would go to the weight of the evidence to be considered by the trier of fact.

Jill Klinge
King County District Court Judge