

1 KING COUNTY DISTRICT COURT, STATE OF WASHINGTON

2 AUKEEN DIVISION

3
4 STATE OF WASHINGTON,) Case No.: No. CQ34146KC
5 Plaintiff,)
6 vs.) COURT'S MEMORANDUM OPINION
7 PATRICK JENKINS,) THERMOMETER ISSUE
8 Defendant)
9

10 Other Cases Consolidated For Purposes of This Motion:

11 State v. David Good CQ41561KC
12 State v. James Krolich CQ40468KC
13 State v. Danny Hackler CO230893
14 State v. James Howard C406002
15 State v. Kurt Isop CQ39418KC
16 State v. Donald Johnson CQ41507KC
17 State v. Robert Jurgensen CO312771
18 State v. Maxwell Kingry CQ40458KC
19 State v. Gary Vandecar C00377123
20 State v. Gregory Hubbard C00295294

21 These matters came on for hearing June 11, 2001, before the
22 undersigned Judges of the King County District Court, Aukeen Division,
23 en banc.¹ King County Deputy Prosecutor Mychal Schwartz presented
24 argument on behalf of the Plaintiff, and Francisco Duarte presented
25 argument on behalf of all defendants. In addition to oral argument,
26 the Court has reviewed the transcript of the proceedings in the Renton
27 Division case number CO378716, State v. Leo Mitchell and all exhibits
28 admitted, Defendants' Brief, and the State's Response and Supplemental
29 Response Briefs.

30 ¹ In any case where a Judge has been disqualified either by recusal or due to
an Affidavit for Change of Judge, that Judge is not rendering a holding in
that particular case.

1 breath or blood under the DUI/Physical Control statutes. That
2 provision requires that, "Analysis of the person's blood or breath to
3 be considered valid under the provisions of this section or RCW
4 46.61.502 or 46.61.504 shall have been performed according to methods
5 approved by the state toxicologist...".

6 In accordance with the Legislature's wishes, the State
7 Toxicologist promulgated the rules set out in WAC 448-13 and adopted
8 them as the approved method for performing a valid test. According to
9 those rules, "A test shall be a valid test and so certified, if the
10 requirements of WAC 448-13-040, 448-13-050, and 448-13-055 are
11 met...", WAC 448-13-060. At issue here is the provision of WAC 448-
12 13-040 which requires that, "The temperature of the solution in the
13 simulator prior to the start of the test must be thirty-four degrees
14 centigrade plus or minus 0.2 degrees centigrade."

15 The State contends that once the officer has made the
16 determination that the thermometer reads within the accepted range,
17 the foundational requirement as to the temperature of the solution has
18 been met, regardless of the accuracy of the thermometer. While the
19 State Toxicologist certainly could have adopted such a provision, the
20 rule he adopted in WAC 448-13-040 mandates the standard for the
21 temperature of the solution itself. The Court cannot take on a
22 legislative role and rewrite the foundational requirements for a valid
23 test.

24 Accordingly, this Court accepts the legal analysis set out in the
25 Renton District Court Memorandum Opinion, and for the reasons stated
26 therein, concludes that the State cannot, as a matter of law, meet the
27 foundational requirements for admissibility of the breath test in the
28 cases consolidated for the purposes of this Motion.

29 In regard to Defendants' Motion to dismiss, the Court does not
30 find sufficient evidence of government misconduct or bad faith to

1 justify dismissal. Suppression of the breath test, rather than
2 dismissal provides an appropriate remedy in these matters.

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4 HOLDING

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6 This Court holds that in the cases consolidated for purposes of
7 this Motion and any other cases wherein the Prosecution is unable to
8 provide proof that the actual temperature of the simulator solution
9 was within the parameters required to meet the foundational
10 requirements for a valid test, the breath test is suppressed. Defense
11 Motion for dismissal is denied.

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13 Entered this 20th day of June 2001.

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18 _____
19 Judge Linda Thompson

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22 Judge Darrell Phillipson

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25 Judge Rick Bathum
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