

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Plaintiff,

v.

AUSTIN RIVER KELLER,

Defendant.

No. 101171-7

Kitsap County No. 23707601

RULING GRANTING DIRECT
REVIEW OF RALJ DECISION

The State seeks direct review of a Kitsap County District Court order entered on June 13, 2022, and findings entered on July 25, 2022, holding that breathalyzer results obtained from all Draeger Alcotest 9510 machines (9510 machines) are invalid. Because this decision has the potential to affect a great number of Washington prosecutions for driving under the influence, this case involves significant public interest questions in need of prompt and ultimate resolution in this court; therefore, direct review is granted and the case is retained in this court for a decision on the merits.

Keller drove his car into a ditch and a Kitsap County Sheriff's deputy responded. The deputy smelled alcohol on Keller's breath and conducted field sobriety testing. Keller consented to a portable breath test with an alcohol result of 0.132 g/100 ml of breath. The deputy arrested Keller. At 9:12 p.m., the deputy began observing Keller as part of administering a breath alcohol concentration (BAC) test. At 9:34 p.m. and 9:38 p.m. the deputy took two breath samples from Keller using a 9510 machine.

The infrared spectroscopy results were 0.117 and 0.117 and the electrochemical cell results were 0.116 and 0.116. This exceeded the limits set by RCW 46.61.502(1)(a).

The State charged Keller with one count of driving under the influence. Keller moved to suppress the results of the BAC test, arguing that the 9510 machines do not comply with regulations governing BAC testing. The district court agreed. The court explained that regulations promulgated by the state toxicologist require the four breath samples to be calculated and “rounded” to four decimal places before the machine software determines if the samples fall within plus or minus ten percent of their mean. WAC 448-16-020(1)(c); RCW 46.61.506(4)(a). The 9510 machines, however, “truncate” rather than round the results to four decimal places. The toxicologist approved the 9510 machines for statewide use by trained personnel in 2010. WAC 448-16-020(1)(c). The district court found that the toxicologist knew that the 9510 machines truncated rather than rounded the breath sample results and failed to disclose this information until 2021. The court found that all 9510 machine test results have been invalid and inadmissible because they did not comply with the rounding requirement. Accordingly, the district court granted the motion to suppress. But the court rejected Keller’s argument that the State had committed government misconduct through arbitrary and capricious conduct by the toxicologist in approving the 9510 machines without disclosing the truncating issue.

The State now seeks direct discretionary review in this court. RAP 2.3(d); RAP 4.2. Keller filed a notice of cross-appeal of the district court’s ruling that the practical effect of the order was to terminate the case, and opposes both discretionary and direct review. Keller argues that the State could elect to prosecute the case without relying on BAC test results.

Direct Supreme Court review of decisions of courts of limited jurisdiction is rare and available only if the decision is a final appealable decision under RALJ 2.2 and the trial court finds that:

- (a) The case involves a fundamental and urgent issue of statewide importance which requires a prompt and precedential determination;
- (b) Delay in obtaining such a determination would cause significant detriment to any party or to the public interest; and
- (c) The record of the proceedings in the court of limited jurisdiction adequately presents the issue.

RAP 4.3(a). RALJ 2.2(c)(2) allows direct appeal from an order suppressing evidence if the practical effect of the order is to terminate the case. Here, the trial court entered findings consistent with RAP 4.3 and RALJ 2.2. The parties disagree on whether the district court decision effectively terminates the prosecution.

The district court found that the State could not, as a practical matter, proceed with the prosecution without the BAC test results because the remaining evidence was insufficient to demonstrate beyond a reasonable doubt that Keller was “affected by” intoxicating liquor or drugs. While it may be possible in specific circumstances for the State to prove driving under the influence based on evidence other than a breath or blood test, the record here does not establish an available alternative means for the State to prove beyond a reasonable doubt that it was alcohol that affected Keller. *Cf. State v. Crediford*, 130 Wn.2d 747, 761, 927 P.3d 1129 (1996) (stipulation was insufficient to establish alcohol caused impairment). While the smell of alcohol and the portable breath test results are substantial evidence and strongly suggest that Keller was impaired by alcohol, the district court sustainably held that as a practical matter this evidence was insufficient to maintain the prosecution’s burden. And the RAP 4.3(a) factors clearly apply here, as the district court’s findings will effect a multitude of current, recent, and

potentially older cases prosecuted based on BAC test results from the 9510 machines. Taking a longer view, this case has the potential to affect prosecutions all across the state. Direct review is therefore justified under RAP 4.3(a).

The case is retained in this court. The clerk of the court will set a schedule for perfecting the record and briefing, and then set a date for oral argument.


COMMISSIONER

August 25, 2022