72260-3

FILED
May 26, 2015
Court of Appeals
Division I
State of Washington

No. 72260-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Appellant,

v.

DARREN J. ROBISON,

Respondent.

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

The Honorable George N. Bowden

BRIEF OF RESPONDENT

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A. ISSUES ON REVIEW

1. Whether the RALJ Court correctly concluded the mandatory nature of RCW 46.20.308(2)(c)(i), noting the arresting officer *shall warn*, required the trooper here to advise Mr. Robison of the marijuana (THC) warning and the trooper's failure was error?

2. Whether the RALJ Court properly concluded that the failure of the trooper to correctly advise Mr. Robison of the implied consent warning as required by RCW 46.20.308(2)(c)(i) must result in suppression of the alcohol test result?

B. STATEMENT OF THE CASE

On June 29, 2013, Darren Robison was stopped by Washington State Trooper (WSP) B.S. Hyatt for failure to stop and failure to yield. CP 148. Upon contacting Mr. Robison, Hyatt stated he could smell the odor of marijuana emanating from the interior of the car. CP 149. Hyatt arrested Mr. Robison for suspected driving while under the influence and read him the Implied Consent Waiver (ICW) prior to the administration of a breath test to determine the alcohol concentration of his breath (BAC). *Id.* It is undisputed that Hyatt failed to advise Mr. Robison of all of the warnings required in RCW 46.20.308, specifically

the portion dealing with Tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana.[1] CP 5, 9.

Mr. Robison was charged with driving while under the influence (DUI) in violation of RCW 46.61.502. CP 58. He moved to suppress the results of the breath test on the basis that he was given an inaccurate and incomplete ICW.[2] CP 65-76. Following an evidentiary hearing, the district court Commissioner denied the motion to suppress, concluding that since the breath test cannot test for the THC concentration in the blood, it would be misleading to advise Mr. Robison of the marijuana related warnings. CP 155-57.

Mr. Robison appealed the Commissioner's ruling to the superior court. The RALJ court reversed the Commissioner's ruling and ordered

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[1] The trooper advised Mr. Robison in pertinent part:

> 2. You are further advised that if you submit to this breath test, and the test is administered, your driver's license, permit, or privilege to drive will be suspended, revoked, or denied by the Department of Licensing for at least ninety days if you are:
>
> (A) Age twenty-one or over and the test indicates the alcohol concentration of your breath is 0.08 or more in violation of RCW 46.61.502 driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence;
>
> CP 105.

[2] Mr. Robison also challenged the legality of the traffic stop but abandoned that issue in the RALJ appeal.

the breath test suppressed. CP 6, 9-15. The RALJ court found that the marijuana related warnings constituted a significant portion of the required implied consent warnings, and the officer's failure to give these warnings rendered the implied consent warnings given misleading and incomplete. CP 5-6, 14-15. This was especially true in light of the fact, at the time of his arrest, the officer smelled marijuana in Mr. Robison's car and Mr. Robison admitted he had smoked marijuana. CP 6, 9.

The State moved for discretionary review of the RALJ Court's decision, which was granted by this Court.

C. ARGUMENT

The trooper failed to give Mr. Robison the THC concentration portion of the ICW as required by RCW 46.20.308(2)(c)(i).

1. *A person arrested for DUI must be advised of the implied consent warnings.*

It is illegal to drive while under the influence of alcohol, marijuana, or other drugs. RCW 46.61.502.[3] The necessity for

[3] RCW 46.61.502 states in relevant part:

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

advisement of the implied consent is triggered once there is a valid DUI arrest. *City of Seattle v. St. John*, 166 Wn.2d 941, 950, 215 P.3d 194 (2009); *O'Neill v. Dep't of Licensing*, 62 Wn.App. 112, 116, 813 P.2d 166 (1991).

Drivers in Washington are presumed to have consented to a breath or blood test to determine alcohol concentration if arrested for DUI, but drivers may refuse the test. RCW 46.20.308(1). "The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). "A driver must be afforded an opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test." *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 894, 774 P.2d 1187 (1989).

> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
>
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
>
> (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Implied consent warnings must strictly adhere to the plain language of the statute. *Bostrom*, 127 Wn.2d at 587. Courts review the warnings provided by arresting officers to ensure that all of the required warnings were provided and that they were not inaccurate or misleading. *Gonzales*, 112 Wn.2d at 896-98. The exact words of the implied consent statute are not required "so long as the meaning implied or conveyed is not different from that required by the *statute*." *Jury v. Dep't of Licensing*, 114 Wn.App. 726, 732, 60 P.3d 615 (2002) (emphasis added). The officer must relate the law correctly and not mislead. *Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 791-92, 982 P.2d 601 (1999).

The validity of any implied consent warning is a question of law that is reviewed *de novo*. *Martin v. State Dep't of Licensing*, 175 Wn.App. 9, 18, 306 P.3d 969 (2013); *Jury*, 114 Wn.App. at 731. When reviewing a decision following a CrR 3.6 suppression motion, the Court determines whether substantial evidence supports the challenged findings of fact and whether those findings of fact support the challenged conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are considered verities on appeal. *State v. Lohr*, 164 Wn.App. 414, 418, 263 P.3d 1287

(2011). The trial court's conclusions of law regarding suppression of evidence suppression are reviewed *de novo*. *Garvin,* 166 Wn.2d at 249.

2. *The implied consent warning was deficient since it omitted the marijuana warning required by the statute.*

RCW 46.20.308 (2) states in relevant part:

> The officer *shall warn* the driver, in substantially the following language, that:
> . . .
> (c) 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:
>
> (i) The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver's breath is 0.08 or more *or that the THC concentration of the driver's blood is 5.00 or more*;

(Emphasis added).[4] The term "shall" indicates a mandatory duty. *State v. Krall,* 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Here, it is undisputed that the warnings given by the officer did not include all of the statutory language, omitting the marijuana-related warnings highlighted above. CP 5, 9. The State in various forms claims that this was not erroneous and the RALJ Court was incorrect in

[4] The recreational use of marijuana was legalized in the successful passage of Initiative Measure No. 502. 2013 c 3 § 31, approved November 6, 2012, effective December 6, 2012. This particular subsection was part of that initiative.

finding that it was. The State's arguments are contrary to established law and should be rejected.

In accordance with the rules of statutory construction, "Washington case law has consistently required strict adherence to the plain language of the implied consent statute." *Bostrom*, 127 Wn.2d at 587, *citing Connolly v. Department of Motor Vehicles*, 79 Wn.2d 500, 487 P.2d 1050 (1971) (holding that the omission of the statutorily required warning that drivers have the right to have additional tests administered by the qualified person of their choosing renders any license revocation invalid); *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 284-88, 714 P.2d 1183 (1986) (holding that officers cannot diverge from the statutory language and advise drivers that their refusal to take a breath test "shall" be used against them when the statute requires that they be told that it "may" be used against them); *State v. Bartels*, 112 Wn.2d 882, 774 P.2d 1183 (1989) (holding that officers cannot supplement the statutory warnings by informing drivers that they may have additional tests taken "at your own expense").

In *State v. Whitman County Dist. Court*, the Supreme Court affirmed the suppression of a breath test where the police officer failed to strictly comply with the implied consent warning. 105 Wn.2d at 285-

88. The defendants in *Whitman* were advised that the refusal to submit to the test shall be used at trial instead of may be used. *Id.* at 280. The Court of Appeals agreed with the district court's order suppressing the alcohol test:

> The warnings received by the defendants in the "shall" category present a similar issue as that in *Welch.* The implied consent statute requires that the officer *shall* warn the driver that his refusal to take the test *may* be used against him in any subsequent criminal trial. RCW 46.20.308(1) (now codified under subsection (2). The defendants in this category were advised by the officer "that your refusal to take the test *shall* be used against you in a subsequent criminal trial." The implied consent statute is worded in the mandatory sense as noted by the court in *Connolly.* Therefore, the officer had no discretion with regard to the wording he used to warn the accused. In addition, as in *Welch,* the change in wording operated to convey a different meaning than that specified in the statute. The word "may" merely expresses a contingency that may be possible, nothing more. It suggests that there is a possibility that his refusal will be used against him. The word "shall" conveys to the accused absolute certainty that his refusal would be subsequently used against him. As a result, the warning actually read to the accused by the officer contains a more coercive impact than that required by statute.

Whitman, 105 Wn.2d at 285-86 (emphasis in original). As a result the Court ruled: "We find that the defendants in the 'shall' category of cases were denied the opportunity of exercising an intelligent judgment concerning whether to exercise the statutory right of refusal. The

suppression of the results of the Breathalyzer test in this category of cases is the appropriate remedy." *Id.* at 286-87.

Similarly, in *Spokane v. Holmberg*, the defendants were not advised that a refusal to submit to a breath or blood test may be used at a subsequent criminal trial. 50 Wn.App. 317, 319, 745 P.2d 49 (1987), *reversed on other grounds, Storhoff, supra,* 133 Wn.2d at 531. The statute in effect at that time stated: "The officer *shall* warn the driver that (a) his or her privilege to drive will be revoked or denied if he or she refuses to submit to the test, and (b) *that his or her refusal to take the test may be used against him or her in a subsequent criminal trial.*" *Holmberg*, 50 Wn.App. at 322 (emphasis in original). Once again applying the rules of statutory construction, the court held the failure to advise the defendants of this warning was error:

> The use of the word "shall" in a statute generally and presumptively operates to create a duty rather than confer discretion. *State v. Bartholomew*, 104 Wn.2d 844, 710 P.2d 196 (1985). Unless there is legislative intent to the contrary, the word should be given its usual and ordinary meaning. *State ex rel. Nugent v. Lewis,* 93 Wn.2d 80, 605 P.2d 1265 (1980). While "shall" may be directory or mandatory depending on legislative intent, *see Nugent*, at 82, 605 P.2d 1265, both the language and purpose of RCW 46.20.308 appear to be mandatory and we so hold it to be. Therefore, there is a mandatory affirmative duty placed upon police officers to inform drivers of the consequences of refusing to consent, and

> one of those consequences is that refusal may be used against him or her in a subsequent criminal action.

Ibid.

Finally, in *State v. Krieg*, the officer failed to advise the defendant of his right to refuse the test and his right to have additional testing by his own qualified person. 7 Wn.App. 20, 21, 497 P.2d 621 (1972). This Court agreed with the trial court and ordered the alcohol test suppressed:

> Thus, consent is no longer an issue in this state, since all drivers have consented *in advance* to testing for the presence of alcohol. The issue becomes one of deciding whether the officer complied with the statute in such a fashion as to adequately apprise the driver of his right to *withdraw* his consent. Since no statutory warnings were given in this case, the officer did not meet that burden.

Krieg, 7 Wn.App. at 23.

These cases stand for the proposition that the statutory terms of the ICW have a meaning and must be strictly complied with in giving the implied consent warning to the arrested person. Where the terms are not included, or where the terms are modified, the result is the suppression of the alcohol test. Here, the trooper failed to comply with the specific terms of RCW 46.20.308, and as a result, the RALJ Court was correct in ordering the suppression of the results of Mr. Robison's alcohol test.

3. *Since the implied consent warning was deficient, the remedy is suppression of the breath test result.*

The State contends that even if the failure to advise Mr. Robison of the correct warnings was erroneous, he has not shown actual prejudice. Once again, the State's arguments are contrary to established law. The RALJ Court's decision was correct and should be affirmed.

"[A] showing of actual prejudice to the driver is appropriate in a *civil* action where the arresting officer has given all of the warnings, but merely failed to do so in a 100 percent accurate manner." *Thompson v. Dep't of Licensing,* 138 Wn.2d 783, 797 n. 8, 982 P.2d 601 (1999). However, in a *criminal* matter, the "[f]ailure to give a proper implied consent warning will result in suppression of the results of the [B]reathalyzer test." *State v. Trevino,* 127 Wn.2d 735, 747, 903 P.2d 447 (1995), *citing State v. Whitman County Dist. Court,* 105 Wn.2d 278, 287, 714 P.2d 1183 (1986). [5] *See also State v. Elkins,* 152 Wn.App. 871, 877, 220 P.3d 211 (2009) (this Court citing same quote from *Trevino*).

[5] *State v. Storhoff,* 133 Wn.2d 523, 530-31, 946 P.2d 783 (1997), purported to reject the criminal/civil case distinction, but courts have continued to rely on the language from *Trevino* requiring suppression when the officer fails to give a proper implied consent warning. *See e.g., Morales,* 173 Wn.2d at 273

In a recent case, the failure to comply with the statutory requirements of the implied consent law resulted in suppression of a blood test without any additional showing of prejudice. *State v. Morales*, 173 Wn.2d 560, 577, 269 P.3d 263 (2012). In *Morales*, the State failed to prove that an interpreter correctly advised a defendant, who had been arrested for vehicular assault and required to submit to a blood test, of his right to additional testing of the blood sample. *Id.* at 568-69. The defendant was subsequently charged with vehicular assault, hit and run, and DUI. *Id.* at 565. After finding the State failed to prove that the blood test warning was given, the Supreme Court required a showing of prejudice regarding the vehicular assault and hit and run counts. *Morales*, 173 Wn.2d at 273. However, regarding the DUI count, the Court reversed without a specific showing by the defendant of prejudice:

> Admission of the blood alcohol test results did not prejudice Morales in the hit and run charge; indeed, Morales did not contest that charge. The blood alcohol test results obviously infected the charge of "driving while under the influence of intoxicating liquor." RCW 46.61.502(1). "Morales's blood alcohol level was per se evidence that Morales drove under the influence of alcohol." *Morales*, 154 Wn.App. at 58, 225 P.3d 311 (Bridgewater, J., dissenting); RCW 46.61.502(4). Accordingly, we reverse Morales' DUI conviction. We see equal prejudice in the vehicular assault by the DUI conviction; it too is reversed.

Morales, 173 Wn.2d at 577.

Here too the trooper failed to correctly advise Mr. Robison of the implied consent law as required by statute. As in *Morales*, Mr. Robison's blood alcohol level was *per se* evidence that he drove under the influence, thus he is entitled to suppression of the blood test. *Morales*, 173 Wn.2d at 577. This Court must affirm the RALJ Court's suppression of the blood test.

E. CONCLUSION

For the reasons stated, Mr. Robison asks this Court to affirm the RALJ Court's order suppressing the breath test.

DATED this 22nd day of May 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Appellant, DARREN ROBISON, Respondent.	)))))))))	NO. 72260-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	DARREN ROBISON 28015 35TH AVE NE ARLINGTON, WA 98223	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 26TH DAY OF MAY, 2015.

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