72260-3

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NO. 72260-3-I

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

STATE OF WASHINGTON,

Petitioner,

v.

DARREN J. ROBISON,

Respondent.

AMENDED BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

WASHINGTON STATUTES

I. ASSIGNMENTS OF ERROR

The Superior Court on RALJ appeal erred in the following conclusions:

1. The Implied Consent Warning statute requires the State to give marijuana-related warnings to BAC test subjects;

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3. Officers are not vested with discretion to omit certain warnings;

4. The marijuana-related warnings constitute a significant portion of the overall required warnings;

***

6. Given the above, the warnings given to Mr. Robison were a gross departure from the Legislature's mandate;

7. When the State omits from the warnings an entire area of subject matter, it is unfair to require a defendant to manifest confusion about that subject matter;

8. Under the circumstances, the warnings given to Mr. Robison were incomplete and misleading;

9. In this case, the remedy for incomplete and misleading warnings is suppression of the resulting BAC test.

The Superior Court further erred in reversing the District Court. CP 5-7, Court's Conclusions and Order on RALJ Appeal (copy attached).

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Since THC[1] cannot be detected by a breath test, should the results of a breath test be suppressed because defendant was not advised of the consequences of a positive result for THC concentration in blood?

III. STATEMENT OF THE CASE

A. CIRCUMSTANCES OF THE INVESTIGATION.

The factual findings of the Snohomish County District Court—Cascade Division, are not in dispute. On June 29, 2013, at approximately 1:23 a.m., Trooper Hyatt stopped a vehicle driven by Darren Jon Robison, defendant, for traffic violations. Trooper Hyatt could smell an odor of intoxicants coming from the vehicle and observed that defendant's eyes were bloodshot and watery. Defendant stated that he had been drinking alcohol. Trooper Hyatt noticed the odor of marijuana coming from the vehicle and inquired. Defendant stated that he had smoked some marijuana a couple hours earlier. Trooper Hyatt did not make any other observation regarding marijuana. Defendant agreed to perform sobriety tests. Following field sobriety tests defendant was arrested for DUI.

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[1] Tetrahydrocannabiniol (THC) is the chief active ingredient in marijuana, and the one largely responsible for its effects. State v. Smith, 93 Wn.2d 329, 333, 610 P.2d 869 (1980).

Based on his observations, Trooper Hyatt believed that defendant was impaired by his consumption of alcohol and not impaired by marijuana. Defendant was read the implied consent warnings for a breath test. He did not express any confusion regarding the implied consent warnings and agreed to take the breath test. CP 19-23, 171, 177; 1Report of Proceedings (RP)[2] 2-20.

B. SUPPRESSION MOTION AND RULING IN TRIAL COURT.

Defendant was charged with DUI. He filed a motion challenging whether Trooper Hyatt had a reasonable suspicion to stop his vehicle,[3] and a motion to suppress the breath test. A testimonial hearing was held October 28, 2013, in the Snohomish County District Court—Cascade Division. The court heard testimony from Trooper Hyatt and defendant[4] and reviewed the Implied Consent Warnings For Breath Form read to defendant. The warnings provided in pertinent parts:

> FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF

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[2] The report of proceedings for the October 28, 2013 motion hearing is referred to as 1RP. The report of proceedings for the May 21, 2014 RALJ hearing was already designated in the State's Clerk's Papers and will therefore be referred to as CP 8-17.

[3] Defendant did not appeal the trial court's denial of his motion challenging the reasonableness of the stop.

[4] Defendant only testified regarding the basis for the stop. 1RP 15-20.

YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION.

1. YOU ARE NOW ADVISED THAT YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE:

(A) YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE REVOKED OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST ONE YEAR; AND

(B) YOUR REFUSAL TO SUBMIT TO THIS TEST MAY BE USED IN A CRIMINAL TRIAL.

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, OR YOU ARE 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 171, 177. The court also considered the video recording from Trooper Hyatt's vehicle camera, and the "new" Implied Consent

Warnings For Breath Form used by the Washington State Patrol.[5] Defendant argued he was not provided with the statutorily required implied consent warnings. The State argued the implied consent warnings read to defendant were sufficient to provide him the opportunity to make a knowing and intelligent decision whether to take or refuse the breath test, and that defendant did not demonstrate actual prejudice. CP 125-129, 132-143, 150-166, 180; 1RP 26-34.

The trial court took judicial notice that the breath test does not obtain a THC reading and found that it would be improper for the implied consent warnings to imply that the breath test could give a reading for THC. The court denied defendant's motion to suppress the breath test concluding that the warnings read to defendant provided him opportunity to make a knowing and intelligent decision about whether to submit to a breath test to obtain an alcohol concentration. CP 23-25; 1RP 32-34. Defendant was found guilty following a bench trial and timely appealed the district court's denial of the motion to suppress the breath test. CP 129-130, 182-191.

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[5] The "new" form includes the language, "or that the THC concentration of the driver's blood is 5.00 of more" and neutralizing language stating, "The DataMaster will not test for THC concentration in a breath sample." CP 180.

C. DECISION OF THE RALJ COURT REVERSING THE TRIAL COURT.

The Superior Court on RALJ appeal concluded:

1. The Implied Consent Warning statute requires the State to give marijuana-related warnings to BAC test subjects;
2. The State did not provide marijuana-related warnings to Mr. Robison;
3. Officers are not vested with discretion to omit certain warnings;
4. The marijuana-related warnings constitute a significant portion of the overall required warnings;
5. Mr. Robison smelled of marijuana at the time of his arrest, the officer inquired about marijuana consumption, and Mr. Robison admitted smoking marijuana, all clearly implicating the role of marijuana in this case;
6. Given the above, the warnings given to Mr. Robison were a gross departure from the Legislature's mandate;
7. When the State omits from the warnings an entire area of subject matter, it is unfair to require a defendant to manifest confusion about that subject matter;
8. Under the circumstances, the warnings given to Mr. Robison were incomplete and misleading;
9. In this case, the remedy for incomplete and misleading warnings is suppression of the resulting BAC test.

The RALJ court reversed the district court, and remanded for further proceeding consistent with its ruling. CP 5-7; CP 10-15. The State timely sought discretionary review in this Court. CP 1-4.

IV. ARGUMENT

A. STANDARD OF REVIEW.

A trial court's ruling on a motion to suppress evidence is reviewed to determine whether substantial evidence supports the trial court's factual findings and whether the factual findings support the trial court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are verities on appeal. State v. Arreola, 176 Wn.2d 284, 288, 290 P.3d 983 (2012); State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. Arreola, 176 Wn.2d at 291; Gaines, 154 Wn.2d at 716. Here, the question on appeal is whether the unchallenged findings support the trial court's conclusions. State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15 (1999). In making its review, an appellate court may affirm on any grounds supported by the factual record, regardless whether such grounds were relied upon by the trial court. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2007). The validity of implied consent warnings is a question of law reviewed de novo. Lynch,

163 Wn. App. at 705; Jury v. Dep't of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002).

B. THE IMPLIED CONSENT WARNING STATUTE DOES NOT REQUIRE GIVING WARNINGS REGARDING THC CONCENTRATION IN BLOOD TO BREATH TEST SUBJECTS.

Washington's implied consent statute, RCW 46.20.308, "was enacted (1) to discourage persons from driving motor vehicles while under the influence of alcohol or drugs, (2) to remove the driving privileges of those persons disposed to driving while intoxicated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or non-intoxication." Lynch v. Dep't of Licensing, 163 Wn. App. 697, 705, 262 P.3d 65 (2011), quoting Cannon v. Dep't of Licensing, 147 Wn.2d 41, 47, 50 P.3d 627 (2002). These identified legislative goals must be harmonized with the underlying purpose of the warning provision; to provide drivers an opportunity to make an informed decision about refusing a breath test. State v. Bostrom, 127 Wn.2d 580, 588, 902 P.2d 157 (1995). The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace. Bostrom, 127 Wn.2d at 590. The implied consent statute provides in pertinent parts:

> (1) Any person who operates a motor vehicle within this state is deemed to have given consent ... 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 the arresting officer has reasonable grounds to believe the person had been driving ... a motor vehicle while under the influence of intoxicating liquor or any drug ....
> (2) ... The officer shall inform the person of his or her right to refuse the breath test .... 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; or
> ***
> (3) Except as provided in this section, the test administered shall be of the breath only. ... [The section discusses circumstances when a blood test may be administered—none are relevant here.]
> (4) 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, no test shall be given except as authorized by a search warrant.

RCW 46.20.308(2)-(4).

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. Lynch, 163 Wn. App. at 707; Jury, 114 Wn. App. at 732. A warning is neither inaccurate nor misleading as long as "no different meaning is implied or

conveyed." Pattison v. Dep't of Licensing, 112 Wn. App. 670, 674, 50 P.3d 295 (2002), quoting Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 785, 831 P.2d 149 (1992). The warnings must permit a person of normal intelligence to understand the consequences of his or her actions. Allen v. Dep't of Licensing, 169 Wn. App. 304, 306, 279 P.3d 963 (2012). It is difficult to imagine how information regarding THC concentration in a driver's *blood* could significantly influence a decision regarding whether to submit to a test to determine alcohol concentration in a driver's *breath*. The RALJ court erred when it concluded that the statute requires giving the warning regarding THC concentration in blood to a driver being asked to submit to a breath test.

C. OFFICERS HAVE DISCRETION TO OMIT IRRELEVANT INFORMATION FROM THE IMPLIED CONSENT WARNINGS.

The RALJ court concluded that regardless of whether the language is irrelevant, the warning regarding THC concentration in blood must be included when a driver is requested to take a breath test for alcohol concentration. The Court has rejected a similar argument. State v. Richardson, 81 Wn.2d 111, 499 P.2d 1264 (1972) (advising driver that he had the right to have additional tests made by a qualified person was sufficient without stating that the

test may only be performed by a physician, a registered nurse, or a qualified technician). "We think it can be assumed rather safely that a person under the influence of intoxicating liquor will be better able to grasp a brief statement of his rights than a lengthy exposition of them." Richardson, 81 Wn.2d at 116. The RALJ court erred as a matter of law when it concluded that the officer could not omit irrelevant information from the implied consent warnings.

D. THE WARNINGS GIVEN TO DEFENDANT WERE NEITHER INCOMPLETE NOR MISLEADING.

Trooper Hyatt provided defendant with written warnings prior to administering the breath test. CP 171, 177. Except for the reference to THC concentration of the driver's *blood*, which is not relevant to a *breath* test, the implied consent warnings read to defendant contained all the statutorily required warnings for a breath test under RCW 46.20.308. Legally accurate warnings do not trigger suppression, even if elements or adverse consequences are left out. Bostrom, 127 Wn.2d at 588-589; Dep't of Licensing v. Grewal, 108 Wn. App. 815, 822, 33 P.3d 94 (2001). "In evaluating the adequacy of implied consent warnings, the issue is whether the warnings gave the defendant an opportunity to knowingly and

intelligently decide whether to take an evidentiary breath test." State v. Koch, 126 Wn. App. 589, 594, 103 P.3d 1280 (2005). These standards are met if the warning permits a person of normal intelligence to understand the consequences of his actions. Id. at 595; Jury, 114 Wn. App. at 731. The driver only needs to have the opportunity to exercise informed judgment. Lynch, 163 Wn. App. at 707. Defendant did not contend that he was in fact deceived, confused or misled by the warnings he was read. Rather, defendant argued that the THC language must be included when a driver is requested to take a breath test for alcohol concentration regardless of whether it is confusing or misleading.

Defendant has not shown that the warnings he received falsely encouraged him to submit to the breath test. Nor has defendant shown how he was misled by not including the language, "the TCH concentration of the driver's blood is 5.00 or more," in the warnings he was read. Suppression of test results is required only for defendants who were part of a group misled by erroneous warnings. State v. Bartels, 112 Wn.2d 882, 889-890, 774 P.2d 1183 (1989); State v. Elkins, 152 Wn. App. 871, 877-878, 220 P.3d 211 (2009). There was nothing misleading about the implied consent warnings given to defendant. The RALJ court erred in

concluding that the implied consent warnings read to defendant were incomplete and misleading.

E. THE WARNINGS GIVEN DEFENDANT WERE NOT A GROSS DEPARTURE FROM THE LEGISLATURE'S MANDATE.

A breath test shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person had been driving a motor vehicle within this state while under the influence. RCW 46.20.308(2); Medcalf v. Dep't of Licensing, 133 Wn.2d 290, 298, 944 P.2d 1014 (1997). Here, the trial court found: Trooper Hyatt determined defendant was impaired by his alcohol consumption and not by the marijuana he admitted smoking; and the implied consent warnings read to defendant stated in pertinent part, "you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently, to determine alcohol concentration." CP 22-23, 171, 177. Substantial evidence supports the trial court's determination that the warnings gave defendant the opportunity to make a knowing and intelligent decision whether to take the breath test. "A warning, either in general language or in statutory terms, which neither misleads nor is inaccurate and which permits the suspect to make inquiries for

further details is adequate." Lynch, 163 Wn. App. at 707. The RALJ court erred in concluding that the warnings read to defendant were a gross departure from the legislature's mandate.

F. WASHINGTON LAW REQUIRES DEFENDANT TO MANIFEST CONFUSION ABOUT THE IMPLIED CONSENT WARNINGS.

Washington Courts have declined to follow cases from other jurisdictions that presume confusion. State v. Staeheli, 102 Wn.2d 305, 310, 685 P.2d 591 (1984); Paulson v. Dep't of Licensing, 42 Wn. App. 362, 363, 710 P.2d 211 (1985) (the confusion doctrine rule presumes confusion from the driver's insistence upon counsel after *Miranda* warnings have been given). When a confusion defense is presented, a finding as to whether or not the defendant explicitly exhibited his lack of understanding must be entered. Strand v. State Dep't of Motor Vehicles, 8 Wn. App. 877, 883, 509 P.2d 999 (1973). The burden of showing that he made his confusion apparent to the officer is upon the driver who proposes such a defense. Id. A lack of understanding not made apparent to an officer is of no consequence. Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 71, 734 P.2d 24 (1987).

In the present case, defendant did not assert a confusion defense. On the contrary, defendant indicated that he did not

"express any confusion regarding the implied consent warnings" by initialing the "NO" box on the Implied Consent Warnings For Breath Form. CP 22-23, 171, 177. The RALJ Court erred in concluding that it was unfair to require defendant to manifest confusion about the warnings.

G. DEFENDANT IS REQUIRED TO SHOW ACTUAL PREJUDICE FROM THE IMPLIED CONSENT WARNINGS.

Before the result of a breath test will be suppressed defendant must show that the implied consent warnings given were inaccurate, and must also demonstrate that he was actually prejudiced by the warnings. Bartels, 112 Wn.2d at 889-890; Allen, 169 Wn. App. at 309; Grewal, 108 Wn. App. at 822. Washington courts have held that warnings were inaccurate or misleading when (1) the arresting officer failed to inform driver of the right to take additional tests; (2) the arresting officer stated that a refusal "shall," as opposed to "may," be used in a criminal trial; (3) the arresting officer attempted to clarify the warnings by telling the driver that her license would "probably" be suspended if she refused the test; (4) the arresting officer told the driver that if he refused to take the test, his license would be revoked "probably for at least a year," which the court found to be inaccurate because it "implies that a

possibility exists that [the driver's] license might be revoked for less than 1 year"; and (5) the arresting officer informed the driver that additional tests would be at his own expense, failing to inform the driver that, if the driver were indigent, the costs would be waived. Lynch, 163 Wn. App. at 708 (citations omitted). Even if the warnings were inaccurate or misleading, defendant still must demonstrate how he was actually prejudiced. Bartels, 112 Wn.2d at 889-890; Allen, 169 Wn. App. at 316-317; Grewal, 108 Wn. App. at 822. The cases where prejudice has been found all involved warnings that were legally inaccurate. E.g., Bartels, 112 Wn.2d at 889, (adding "at your own expense" to the defendant's right to additional testing, misleading to indigent defendants); Gonzales v. Dep't of Licensing, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989) (companion case to Bartels in revocation context); State v. Whitman County Dist. Court, 105 Wn.2d 278, 285-287, 714 P.2d 1183 (1986) (warning that refusal "shall" be used in a criminal trial, instead of "may" be used, misleading when admissibility of refusal evidence was uncertain under the existing law); Connolly v. Dep't of Motor Vehicles, 79 Wn.2d 500, 504, 487 P.2d 1050 (1971) (failing to inform driver of the right to take additional tests); Mairs v. Dep't of Licensing, 70 Wn. App. 541, 546, 854 P.2d 665 (1993) (attempting

to clarify the warnings by telling the driver that her license would "probably" be suspended if she refused the test was confusing and misstated the law); Cooper v. Dep't of Licensing, 61 Wn. App. 525, 528, 810 P.2d 1385 (1991) (adding revocation would be "probably for at least a year" was misleading when one-year revocation is a certainty). Legally accurate warnings do not trigger suppression, even if elements or adverse consequences are left out. Bostrom, 127 Wn.2d at 590-592; Grewal, 108 Wn. App. at 822.

In the present case, defendant did not establish prejudice. He chose to submit to the *breath* test knowing that he could be found guilty of DUI and that his license would be suspended if the alcohol in his system was over 0.08. Defendant has not shown how knowledge that if THC concentration in his *blood* was over 5.00 would have influenced him to make a different choice regarding taking the *breath* test. The RALJ court erred by not requiring defendant to show actual prejudice.

H. THE IMPLIED CONSENT WARNINGS PERMITTED DEFENDANT TO MAKE A KNOWING AND INTELLIGENT DECISION TO SUBMIT TO THE BREATH TEST.

"In evaluating the adequacy of implied consent warnings, the issue is whether the warnings gave the defendant an opportunity to knowingly and intelligently decide whether to take an evidentiary

breath test." State v. Koch, 126 Wn. App. 589, 594, 103 P.3d 1280 (2005). These standards are met if the warning permits a person of normal intelligence to understand the consequences of his actions. Koch, 126 Wn. App. at 595; Jury, 114 Wn. App. at 731. The driver only needs to have the opportunity to exercise informed judgment. Lynch, 163 Wn. App. at 707.

Here, the trial court's unchallenged findings were that Trooper Hyatt detected the odor of intoxicants and defendant admitted having consumed alcohol. Defendant was offered a breath test that was incapable of testing for THC concentration in blood. After being given the implied consent warnings, defendant expressly agreed to take the tests by initialing the "YES" box on the form. CP 22-23, 171, 177. Substantial evidence supported the trial court's determination that the warnings read to defendant gave him the opportunity to make a knowing and intelligent decision whether to take the breath test. The RALJ court erred by reversing the trial court's denial of defendant's motion to suppress the breath test.

V. CONCLUSION

For the reasons stated above, the decision of the RALJ court should be reversed.

Respectfully submitted on this 11th day of May, 2015,

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