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BY SCOTT B. CARPENTER

NO. 40041-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LEESA M. LYNCH,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Leesa Lynch was read legally accurate implied consent warnings after being arrested for driving under the influence in a non-commercial vehicle. She was accurately advised: 1) You have the right to refuse this breath test. If you refuse, your driver's license will be revoked or denied for at least one year; 2) If you take the test and your breath alcohol is over the legal limit, your driver's license will be suspended, revoked or denied for at least ninety days; 3) If your driver's license is suspended, revoked, or denied, you may be eligible to immediately apply for an ignition interlock license. She was also accurately advised: For those not driving a commercial motor vehicle at time of arrest: If your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified.

The superior court erred in finding that these warnings misleadingly implied the ignition interlock license would remedy the commercial driver's license disqualification, and were misleading regarding the length of that CDL disqualification. The superior court further erred in finding that the misleading nature of the warnings prejudiced Lynch's ability to make a knowing and intelligent decision as to whether to take the breath test. Lynch's argument to the contrary is based on hypotheticals and assumptions and is not supported by case law.

II. ARGUMENT

A. The implied consent warnings given to Lynch were not misleading.

In order for Lynch to prevail, she must demonstrate that the warnings she received were so misleading as to prevent her from making a knowing and intelligent decision regarding whether or not to withdraw her consent and refuse the breath test. *State v. Elkins*, 152 Wn. App. 871, 877–78, 220 P.3d 211 (2009). Lynch’s entire argument that the implied consent warnings are misleading rests on her unsupported assertions that the warnings *imply* that commercial drivers license disqualification will be for the same length as a personal license suspension or revocation and *imply* that the ability to apply for an ignition interlock license will remedy or rescind CDL disqualification. Lynch then contends that these alleged implications prejudiced her by causing her to take the breath test when she should have refused. Lynch cites to no case law to support this position because Lynch is asking this Court to go beyond what any other court has found when faced with legally accurate implied consent warnings.

Lynch concedes the warnings given to her were legally accurate. However, she then suggests that the legally accurate statements of law are only legally accurate when read “in isolation.” Brief of Respondent (Resp’t’s Brief) at 12. Lynch argues “it is the mixture of the provisions

that creates the problem.” *Id.* This argument is not supported by any legal authority. Lynch cites to no case, even outside the implied consent arena, where a court has found that two legally correct statements of law are misleading simply because they are presented near one another, either in writing or speech. Lynch has merely conjured up a potential basis for misunderstanding and as such her argument should be rejected. There is no justification to introduce such a novel holding here.

Lynch briefly surveys a number of decisions in which Washington appellate courts determined that drivers were given legally inaccurate warnings. Resp’t’s Brief at 6-7. None of those decisions considered whether legally accurate warnings may nonetheless be misleading by implication.

In *State v. Whitman*, the court was looking at two different warnings given to drivers, one which said the refusal to take a breath test “shall” be used at trial and the other said “may” be used at trial. *State v. Whitman Cnty. Dist. Ct.* 105 Wn.2d 278, 286-287, 714 P.2d 1183 (1986). The warning which used “shall” was a legally inaccurate statement of the law, but the warning using “may” was not. Because the use of “shall” was legally inaccurate, the court found that the defendants who were given that warning “were denied the opportunity of exercising an intelligent

judgment concerning whether to exercise the statutory right of refusal.”
Id. at 286-87.

In *Welch v. Dep’t of Motor Vehicles*, also cited by Lynch, the driver was advised that if he refused that he “could” lose his license. *Welch v. Dep’t of Motor Vehicles*, 13 Wn. App. 591, 592, 536 P.2d 172 (1975). Similarly, this was legally inaccurate information because it was certain that he would lose his license if he refused the breath test. The court reversed the suspension because the warning did not provide the driver with “the opportunity to exercise the intelligent judgment which the mandatory language of the statute requires.” *Id.* at 592.

Again in *Cooper v. Dep’t of Licensing*, the driver was informed that if he refused the test his license would be revoked “probably for at least a year, depending upon his driving record, maybe two.” *Cooper v. Dep’t of Licensing*, 61 Wn. App. 525, 526, 810 P.2d 1385 (1991). This was clearly inaccurate information because it was certain his license would be revoked for at least one year. The court found the inaccuracy prevented the driver from making a knowing and intelligent decision. *Id.* at 527.

Finally, in *Mairs v. Dep’t of Licensing*, the driver was inaccurately informed that he would “probably” lose his license if he refused. *Mairs v. Dep’t of Licensing*, 70 Wn. App. 541, 545, 854 P.2d 665 (1993). As a

result, the court found Mairs did not have an opportunity to make a knowing and intelligent decision on whether to take or refuse a test. *Id.* at 547.

Lynch's case is distinguishable from all of these cases. It is undisputed that she was given legally accurate information. The fact that both statements of law are presented in conjunction does not make the information misleading. Ms. Lynch's statement that reading them in conjunction renders them misleading does not make them so.

Lynch further argues that the CDL warning is misleading because it ostensibly "link[s] the terms 'suspension' and 'revocation' together," which, Lynch suggests, somehow implies that *disqualification* of a CDL endorsement will be for the same period of time as *suspension* or *revocation* of the driver's personal license. Resp't's Brief at 9. This assertion does not withstand close examination. By correctly and distinctly using the three separate terms suspension, revocation, and disqualification, the warnings make clear that there are different

consequences for a driver's personal license and her CDL endorsement.¹

CP 46. First, a warning explains that refusing the test will result in license revocation. Then a different warning explains that taking the test and registering an over-limit alcohol level will result in license suspension *or* revocation. Revocation is thus identified as a potential consequence of refusing the test or taking the test. Finally, after two other intervening warnings, the CDL warning states:

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

DOL 46. The CDL warning uses a completely different term—disqualified—to describe the consequence to the CDL endorsement, a consequence that follows whether the driver's personal license is suspended *or* revoked. Contrary to Lynch's assertion, the terms are not "linked" and the warnings provide no reasonable basis to conclude that CDL disqualification would be for the same period of time as license suspension or revocation.

¹ It is noteworthy that the State carefully adhered to the statutorily employed terms which convey there are distinct consequences for different actions: "Suspend," in all its forms and unless a different period is specified, means invalidation for any period less than one calendar year and thereafter until reinstatement. RCW 46.04.580. "Revoke," in all its forms, means the invalidation for a period of one calendar year and thereafter until reissue. However, under the provisions of RCW 46.20.311, 46.20.265, or 46.61.5055, and chapters 46.32 and 46.65 RCW, the invalidation may last for a period other than one calendar year. RCW 46.04.480; "Disqualification" means a prohibition against driving a commercial motor vehicle. RCW 46.25.010(8).

Lynch additionally argues that the warning regarding the availability of the ignition interlock license leads the CDL driver to believe that their CDL will “also be reinstated.” Resp’t’s Brief at 17. The statutorily required warning about the driver’s ability to apply for an ignition interlock license does not state or imply that the driver’s license is going to be “reinstated.” In fact, as explained in the warning, a driver is not eligible for an ignition interlock license unless their driver’s license is suspended or revoked. RCW 46.20.385. Lynch’s argument that the CDL holder would assume that their CDL would be “reinstated” if they were granted a conditional restricted license such as an ignition interlock license is contrary to common sense. Lynch asks this court to accept the argument that drivers would reasonably believe that their licenses are going to be suspended or revoked but then reinstated in full once they apply for an ignition interlock license. This is not what the warnings tell the driver nor is it a reasonable implication from the warnings. Moreover, the ignition interlock license advisement does not reference any effect on the CDL or disqualification thereof.

Unlike the drivers in *Whitman*, *Welch*, *Cooper*, and *Mairs*, Lynch was given legally accurate information which would allow a person of normal intelligence the opportunity to make a knowing and intelligent decision regarding the breath test even if they also held a commercial

driver license endorsement. *See Elkins*, 152 Wn. App. at 876-877. The warnings provided to Lynch gave her this opportunity therefore the court should reverse the superior court's finding to the contrary.

B. The State is not required to inform drivers of all consequences that could result from a DUI arrest.

It is not necessary for police officers to inform drivers of *all* consequences that will flow from refusing or submitting to a breath test. *State v. Bostrom*, 127 Wn.2d 580, 586, 902 P.2d 157 (1995); *Elkins*, 152 Wn. App. at 877-78.² Nor are police officers required to tailor the warnings to every driver stopped. *Jury v. Dep't of Licensing*, 114 Wn. App. 726, 734, 60 P.3d 615 (2002).

Lynch argues: "The State essentially wants to provide unnecessary additional language in an apparent attempt to anticipate future defense arguments, but then not be held accountable if the addition results in a misleading advisement." Resp't's Brief at 14. This is incorrect. The Department did not change the form to provide additional advisements regarding the law in anticipation of future defenses; rather, it was in response to successful defense arguments in superior court.

² The United States Supreme Court has similarly upheld implied consent warnings that do not include all consequences that will flow from refusing a blood-alcohol test. *South Dakota v. Neville*, 459 U.S. 553, 565-66, 103 S. Ct. 916 (1983).

Prior to the 2009 amendments to the implied consent warnings form, drivers who held CDLs who were stopped for DUI in their personal, noncommercial vehicles complained that nothing in the implied consent warnings, and in particular the CDL warnings, informed them that their commercial drivers' licenses would be disqualified if action was taken against their personal licenses. Drivers argued that they should be told that their CDL was going to be disqualified. This argument met with success in King and Snohomish counties.³

In light of those successful arguments, when the implied consent warnings were revised the CDL warning was added. And in contrast to the drivers in those previous cases, Lynch was advised:

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED

Lynch's argument that this is not comprehensive enough to afford the driver the opportunity to make a knowing and intelligent decision is without merit. If Lynch's position were accepted by this Court there would be no end to this line of argument. Drivers could always argue for more information. The State argued unsuccessfully in at least three other

³ *Hantkle v. Department of Licensing*, King County Superior Court 08-2-32514-8; *Black v. Department of Licensing*, Snohomish County 08-2-03927-5; and *Talley v. Department of Licensing*, Snohomish County Superior Court 08-2-05253-1.

cases in King and Snohomish Superior Courts that the statutory warnings are sufficient. This argument was rejected when it came to CDL holders and therefore the WSP appropriately amended the warnings to include a notification to CDL holders that their CDLs would be disqualified if their driver's license was suspended or revoked.

Lynch's argument that the warning needs to be more comprehensive, would be more persuasive if the consequences to a CDL varied depending on whether a driver took the breath test or refused, but they do not. A CDL will be disqualified after a DUI arrest regardless of whether or not a driver takes the breath test and has a breath test over the legal limit or refuses. RCW 46.25.090.

Lynch claims that the implied consent warnings disfavor refusing. She argues a CDL holder faced with these warnings will certainly take the test and "risk a suspension/disqualification for as short as 90 days, rather than refuse and suffer a revocation/disqualification for at least one year." Resp't's Brief at 9. If this were true, then no driver would ever refuse the breath test. All drivers are advised that if they take the breath test that their driver's license will be suspended for at least ninety days and that if they refuse the test that their license will be revoked for at least one year. If Lynch's hypothesis were true, then all drivers faced with a personal driver license suspension would also take the test because it is made clear

to them at the outset that the license consequence will be longer if they refuse. This hypothesis is clearly incorrect because in reality drivers refuse to take the breath test everyday for any number of reasons.

C. Even if this Court were to find the warnings misleading, Lynch has not demonstrated she was prejudiced.

Lynch argues that under *Gahagan v. Dep't of Licensing* she only needs to demonstrate that she has a commercial driver's license in order to prove prejudice, but this is incorrect. See *Gahagan v. Dep't of Licensing* 59 Wn. App. 703, 800 P.2d 844 (1990). In *Gahagan*, the driver was advised that he had the right to an additional test at his "own expense." Division I found that under *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989), if a driver demonstrates indigency, then he has demonstrated actual prejudice if he received the warning that additional test could be obtained "at your own expense." However, the court does not find that a driver who is in a particular class of drivers, such as CDL holders, has automatically demonstrated actual prejudice simply by being in the class. The *Gahagan* decision is fact specific and is only applicable to drivers who demonstrated they were indigent and were given the "at your own expense" warning.

The Gahagan court relied on *Graham v. Dep't of Licensing*, where the court found that the question of actual prejudice was a factual one and in order to obtain a reversal on remand “Ms. Graham must demonstrate that she would have been eligible, at the time she made her decision to refuse the breath test, for public payment for services under CrRLJ 3.1(f)”. *Gahagan*, 59 Wn. App. at 706-707 (citing *Graham v. Dep't of Licensing*, 56 Wn. App. 677, 681, 784 P.2d 1295 (1990)). This is distinguishable from Lynch because simply having a CDL does not establish that she was prejudiced even if the warnings imply that the personal license suspension or revocation will be for the same length of time as the CDL disqualification. Resp't's Brief at 9. In *Graham*, the incorrect warnings told the driver that they would have to pay for any additional tests. This prejudiced the indigent driver specifically because they would arguably not seek out an additional test because of the cost. Lynch argues that a CDL holder who believed their CDL would be disqualified for the same length of time as the suspension or revocation of their personal license would “certainly agree to take the test” when the driver might be better off refusing the test. Resp't's Brief at 9. This argument does not establish prejudice.

A driver does not know what their breath test result is going to be when they are deciding whether to submit to the test. After the fact one

could argue that refusing might have been beneficial in the criminal case if there was no other evidence of intoxication. But at the time the driver is being asked to take the test, it is completely unrealistic to think they are analyzing the other evidence of intoxication in order to establish whether it would be better or worse for them if they refuse. *Jury v. Dep't of Licensing*, 114 Wn. App. 726, 734, 60 P.3d 615 (2002), does not support Lynch's argument that she is prejudiced by the misleading warnings because refusing it might make the criminal prosecution more difficult to prove. Resp't's Brief at 10. Rather *Jury* simply requires the State to give the required statutory warnings which sufficiently warn someone of the administrative and criminal licensing consequences. *Jury*, 114 Wn. App at 734.

Lynch's reliance on *Thompson v. Dep't of Licensing*, is also misplaced. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 786, 792, 982 P.2d 601 (1999). *Thompson* involved the driver of a commercial vehicle who received both warnings set out in RCW 46.20.308(2) and RCW 46.25.120(3), which meant he was given warnings stating two different alcohol concentration levels. The case was decided purely on the question of whether the superior court had properly applied the doctrine of collateral estoppel in holding that the Department of Licensing should have suppressed the breath test after a district court did the same. The

language from *Thompson* that Lynch relies on is selectively excerpted from dicta in a footnote where the Court acknowledged that the driver was unlikely actually prejudiced by the recitation of both sets of warnings when the officer explained the difference between the warnings and the driver did not express any confusion. Notably, *Thompson* was decided over ten years ago before a court with a significantly different composition, so the dicta in the footnote is not indicative of the present court's potential holding.

Finally, the warnings form read to the driver in *Thompson* did not include the statement read to Lynch from the warnings form in this case that her CDL "will be disqualified" if her personal driver's license is suspended or revoked. That case has no bearing on the facts here.

Lynch is required to prove that not only are the warnings misleading but that she was also actually prejudiced by the misleading warnings. *Graham*, 56 Wn. App. at 680. Lynch's situation is distinguishable from the indigent drivers in *Gahagan* and *Graham* and she has not demonstrated that simply because she holds a CDL that she was actually prejudiced.

III. CONCLUSION

The Department respectfully requests that this court reverse the superior court order and affirm the Department's order of suspension. Lynch was provided legally correct warnings, consistent with the statute, which would allow a person of normal intelligence to knowingly and intelligently decide whether to submit to a breath test.

RESPECTFULLY SUBMITTED this 30th day of August, 2010.

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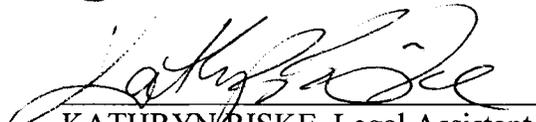
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 30th day of August, 2010.


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