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Court of Appeals  
Division III  
State of Washington  
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Division III

No.362680

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CITY OF PASCO, CITY OF RICHLAND  
Respondents

v.

DEAN STENBERG, JASON SHERGUR  
Appellants

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ON APPEAL FROM THE SUPERIOR COURTS OF BENTON AND FRANKLIN COUNTIES

The Honorable Joseph Burrowes, Judge

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BRIEF OF APPELLANTS'

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John Gary Metro WSB 37919

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Attorney for Defendants

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## ASSIGNMENT OF ERROR

The Benton County and Franklin County Superior Courts erred when they failed to suppress evidence found in the blood of the defendants when blood was drawn from the defendants in violation of their rights under the constitutions of the State of Washington and the United States to be free from unreasonable searches and seizures.

### Issue Presented on Appeal

The issue presented to this Appellate Court for review is whether the state can draw a person's blood with or without a warrant if the information sought by the state can be just as efficiently obtained by a breath sample.

## STATEMENT OF THE CASE

### Substantive Facts

The cities of Richland, Washington and Pasco, Washington determined through their city attorneys that the cities would draw blood from everyone suspected of driving under the influence of alcohol. The cities believed they could draw the suspects blood provided they had warrant.

On October 14, 2016 Dean Stenberg was stopped for a traffic infraction by police officers employed by the City of Richland which is in Benton County, Washington. The police smelled the odor of alcohol. The police contacted a Benton County judge and requested a warrant to draw Mr. Stenberg's blood to determine how much alcohol was in his blood stream. The warrant was approved. Mr. Stenberg was taken to a hospital where his blood was drawn. His blood was subsequently analyzed by the Washington State Patrol

On March 23, 2016 Jason Shergur was stopped for a traffic infraction by police officers employed by the City of Pasco which is

in Franklin County, Washington. The police officers detected the smell of alcohol on Mr. Shergur. The officers contacted a superior court judge, and a warrant was issued to draw Mr. Shergur' s blood for the sole purpose of determining if there was alcohol in Mr. Shergur' s blood stream.

### Procedural Facts

Defendant Stenberg moved the Pasco Municipal Court to suppress the evidence of a blood draw because the blood draw was not reasonable. The Court denied Mr. Stenberg's motion. Mr. Stenberg appealed the Municipal Court decision to the Franklin County Superior Court. The Franklin County Superior Court denied Mr. Stenberg's motion.

Defendant Shergur moved the Benton County District Court to suppress the evidence of the blood draw extracted from his body because the blood draw was not reasonable. The Benton County District Court denied Mr. Shergur' s motion. Mr. Shergur appealed the district court's ruling to the Benton County Superior Court. The Benton County Superior Court denied the defendants motion

Both Mr. Stenberg and Mr. Shergur appealed the Superior Courts decision to the Washington Court of Appeals Division III and

moved the Washington Court of appeals to grant discretionary review. Discretionary Review was granted. The cases have been consolidated for purposes of the review.

## ARGUMENT

### **WASHINGTON STATE LAW PROVIDES THAT A DRIVER'S BLOOD ALCOHOL CONTENT SHALL BE DETERMINED BY A BREATH TEST.**

Washington's implied consent statute RCW 46.61.508 reads in pertinent part as follows:

- (1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject of the provisions of RCW 46.61.5067 to a test of his or her breath for blood for the purpose of determining the alcohol concentration or the presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer had reasonable grounds to believe the person had been driving or was in physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.46.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath of blood.
  
- (3) Except as provided in this section, the test administered shall be of the breath only.....”

The plain language meaning of the statute and case law make it perfectly clear that a Washington Prosecutor can only demand a blood draw under very limited circumstances. For example, a blood draw is permitted in cases of vehicular homicides (See

*State v. Judge* 100 Wn. 2d 706). Here in *City of Richland v. Stenberg* and *City of Pasco v. Shergur*, the defendants were stopped for ordinary traffic violations. The implied consent statute provides that the test administered to determine blood alcohol content shall be of the breath. Nothing in the statute gives the city or the state the right to draw a person's blood if breath will provide the city or the state with the same information.

Even if the blood draws were reasonable under RCW 4620.508, the blood draws were unreasonable under the Fourth Amendment of the United States Constitution, its due process clause, and Article 1 Section 7 of the Washington State Constitution. A blood draw is an invasion of the body. *State of Washington v. Garcia-Salgado*, 170 Wn. 2d 576 (2010).

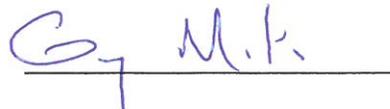
In the context of searches that intrude into the body, the United States Supreme Court has held that the interests of "human dignity and privacy which the Fourth Amendment protects requires three showings in addition to a warrant. *Schmerber v. California*, 384 U.S. 757, 768., 86 S. Ct 1826 (1966). First, there must be a clear indication that the desired evidence will be found *Id at 770*. Second, the method of searching must be reasonable *Id at 771*. Third, the search must be performed in a reasonable manner *Id at 772*. Here, the invasions into the defendants' bodies were not reasonable because the defendants could have been searched for the same evidence by a far less invasive procedure. The Supreme Court of the United States in *Birchfield v. North Dakota*, 579 U.S. 23 (2016) has

must be a clear indication that the desired evidence will be found *Id at 770*. Second, the method of searching must be reasonable *Id at 771*. Third, the search must be performed in a reasonable manner *Id at 772*. Here, the invasions into the defendants' bodies were not reasonable because the defendants could have been searched for the same evidence by a far less invasive procedure. The Supreme Court of the United States in *Birchfield v. North Dakota, 579 U.S. 23 (2016)* has ruled that blood tests are more intrusive than breath tests and the reasonableness of a blood test must be judged considering the less intrusive alternative of a breath test. Here, the cities decided not to offer the defendants the opportunity to take a breath test when the breath test a far less intrusive procedure provides the city with the same information it can find with blood. The city/state must present reasons why blood is preferable to breath; here, the cities can provide no reasons to support the tests of either defendants blood.

## CONCLUSION

The taking of the defendants' blood was not supported by reason. The State should not be permitted to forcibly insert a needle into a person's blood stream when a person's breath will provide the state with the information it seeks.

Dated July 8, 2019



Gary Metro

Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that on the July 8 2019, I Carla Toebe being over the age of 21, and not a party to this action caused a true and correct copy of the" Appellants

Brife for Dean Stenberg, Jason Shergur No. 362680 to be served on the following in the manner indicated below:

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