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No. 60257-8-I

**COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON**

FEB 11 2007
COURT OF APPEALS
DIVISION ONE

AUG - 7 2007

ROBERT ST. JOHN,

Petitioner,

v.

CITY OF SEATTLE,

Respondent,

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 AUG - 7 AM 10:24

PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Robert St. John, Petitioner, asks this Court to review the decision designated in Part B of this motion.

B. TRIAL COURT/RALJ DECISION

Mr. St. John was charged with DUI in the Seattle Municipal Court. The charge was dismissed following the trial court's ruling to suppress from trial the results of a blood test to determine the alcohol concentration in Mr. St. John's blood.¹

The City of Seattle sought review of this decision in the superior court on RALJ appeal. The court reversed.² Mr. St. John seeks review of the decision whether it was correct to suppress the blood test from trial.

C. ISSUES PRESENTED FOR REVIEW

1. Whether review should be granted (RAP 2.3(d)(1)) to address the issue whether the implied consent warning is fundamentally unfair where it fails to inform drivers who refuse a test the officer may seek a warrant to compel a blood test?
2. Whether review should be granted (RAP 2.3(d)(2)) to address the issue whether equitable estoppel prevents the State from compelling a driver to submit to a blood test after telling the driver they have the right to refuse testing?

¹ Exhibit 1 – trial court ruling.

² Exhibit 2 – superior court ruling.

3. Whether review should be granted under RAP 2.3(d)(3) because the issue of whether the State may compel a blood test from a driver after being told they have the right to refuse testing is a matter of public interest which is likely to be addressed in future cases?

D. STATEMENT OF THE CASE

Robert St. John was arrested for DUI by Seattle Police Officer Eric Michl on July 24, 2005. Mr. St. John was injured due to a motorcycle accident, and taken to Harborview Hospital. Officer Michl informed Mr. St. John of the implied consent warning for a blood test, as he was not capable of submitting to a breath test. Mr. St. John refused the test. The warning advised Mr. St. John he had the right to refuse the test.

The officer prepared an affidavit for a warrant and submitted it to Judge Michael Hurtado of the Seattle Municipal Court to obtain a compulsory blood test. The judge approved the warrant. Officer Michl obtained a sample of Mr. St. John's blood, which was submitted to the State Toxicologist's laboratory for testing. The results were given to the city prosecutor's office (0.16), and DUI charges were filed.

The trial court conducted a pre-trial hearing to determine the admissibility of the blood test. Officer Michl testified that he had obtained warrants from Judge Hurtado on prior occasions where the driver had refused to submit to a breath or blood test. (Transcript 33) He wanted to

get the warrant because of the severity of the accident and because he was not able to perform sobriety tests. (Transcript 36-37) When he read the warning to Mr. St. John, he was aware that he could seek a warrant if he refused. (Transcript 34) Officer Michl was asked if he intended to get a warrant if Mr. St. John refused, and said that, at the time, he “probably” would have sought the warrant. (Transcript 34) However, the officer testified that he did not tell Mr. St. John he would do so.

The officer also testified that based upon the initial test refusal he filled out a form reporting the refusal and sent it to the Department of Licensing. (Transcript 35) He knew that the refusal would result in a one year license revocation for Mr. St. John. (Transcript 35)

The court suppressed the blood test. The City asked for a RALJ 2.2 ruling dismissing the case in order to appeal the ruling. The superior court reversed the trial court ruling.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Mr. St. John asks for review under RAP 2.3(d)(1) and (3):

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

...

(3) If the decision involves an issue of public interest which should be determined by an appellate court,

This appeal presents critical issues concerning the State's power to forcibly compel blood alcohol evidence following the State's advisement to drivers they can refuse to submit to testing under the implied consent law. Mr. St. John contends the actions by the State violate basic principles of due process of law when the State fails to inform drivers that if they refuse breath and/or blood testing the State may nonetheless compel the evidence from the driver by obtaining a warrant.

Withholding this information from drivers violates the established legal holdings of South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), and State v. Bostrom, 127 Wn.2d 580, 902 P.2d 157 (1995). Further, the State's actions should be barred by the principle of "equitable estoppel" as described in Raley v. Ohio, 360 U.S. 324, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), and Kramarevcky v. DSHS, 122 Wn.2d 738, 863 P.2d 535 (1993).

1. Review should be granted under RAP 2.3(d)(1) because the State's failure to advise drivers that officers may compel a blood test after being told they have the right to refuse testing violates fundamental fairness and due process of law.

Appellate courts review alleged due process violations de novo. State v. Autrey, 136 Wn. App. 460, 467, 150 P.3d 580 (2006); State v. Sandoval, 123 Wn. App. 1, 4, 94 P.3d 323 (2004).

Counsel for Mr. St. John filed a pre-trial motion and argued before the court to suppress the blood alcohol test on the grounds the implied consent warning failed to advise Mr. St. John that the officer could seek a warrant to compel his blood in the event he refused a breath test. The trial court denied the motion relating to the warning, but suppressed the blood test on other grounds. Therefore, Mr. St. John urges an alternate ground for affirming the trial court ruling to suppress. See City of Spokane v. Beck, 130 Wn. App. 481, 485, 123 P.3d 854 (2005). The appellate court may affirm the trial court's decision on any ground supported by the record, even if the trial court made an erroneous legal conclusion. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

The implied consent statute mandates that prior to a request for a breath or blood test the arresting officer must advise the driver of the following warnings:

The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(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 the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504. RCW 46.20.308(2).

Effective 2004, the legislature added to the implied consent law the provision that;

Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood. RCW 46.20.308(1).

The warnings were not modified to notify drivers of this consequence under the law.

The legal sufficiency of an implied consent warning is a question of law and reviewed de novo. Jury v. Dept of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002).

Washington law recognizes a driver's right to refuse a breath or blood test requested under the implied consent law. The implied consent law "is a limiting statute specially enacted to govern the chemical or blood testing of a driver." State v. Krieg, 7 Wn. App. 20, 23, 497 P.2d 621

(1972).³ The implied consent law is triggered once there is a valid arrest for DUI. State v. Avery, 103 Wn. App. at 534. Except under certain circumstances, which are not applicable to Mr. St. John's case, once a driver refuses a breath or blood test, "no test shall be given." RCW 46.20.308(5).

The State has the burden to prove a driver was afforded a knowing and intelligent opportunity to decide whether to take a breath test or elect to refuse under the implied consent law. Jury v. Dept of Licensing, 114 Wn. App. 726, 60 P.3d 615 (2002). The "knowing and intelligent decision" rule is anchored in fundamental fairness and due process. Thompson v. Dept of Licensing, 138 Wn.2d 783, 792, 982 P.2d 601 (1999). These standards are met, at least in part, if the warning permits a person of normal intelligence to understand the consequences of his actions. State v. Koch, 126 Wn. App. 589, 595, 103 P.3d 1280 (2005); and see Gibson v. Dept of Licensing, 54 Wn. App. 188, 194, 773 P.2d 110 (1989).

³ Court of Appeals rejected the State's argument that it could disregard implied consent law and seek a search warrant for a blood test under RCW 10.79.015. The Court held that the implied consent law was a special statute and thus separated blood and chemical testing from the general search statute. Thus, the State could not disregard the implied consent statute, and the notice requirements, and merely seek a search warrant in its place. State v. Krieg, 7 Wn. App. at 23.

Generally, the State discharges its burden once it provides the statutory warnings under RCW 46.20.308(2). State v. Bostrom, 127 Wn.2d 580, 586, 902 P.2d 157 (1995); citing Gonzales v. Dept of Licensing, 112 Wn.2d 890, 897, 774 P.2d 1187 (1989). However, the State is not free to give any warnings it wishes without fear of contravening due process. Bostrom, at 590; citing South Dakota v. Neville, 459 U.S. 553, 565, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). A warning may violate due process where it creates a situation which is “fundamentally unfair.” Bostrom, at 590. A warning is fundamentally unfair if it is “implicitly misleading” to the driver. Bostrom, at 591.

The warning given to Mr. St. John was implicitly misleading; violating his due process rights. The warning told him he had the right to refuse the test, but never told him the State could obtain his blood without his consent with a warrant if he refused; thus rendering the right to refuse meaningless. To explain how his due process rights were violated, one must contrast the facts of Neville and Bostrom to the situation created in Mr. St. John’s case.

In Neville, the officer arrested the defendant for DUI and read him South Dakota’s implied consent warning. He was advised that he could refuse a breath test, and if he did his license would be revoked for one

year. He was not told that his refusal could be used as evidence against him court, although under South Dakota law the refusal was admissible evidence for trial.

The trial court suppressed the refusal, and the ruling was upheld in the South Dakota Supreme Court. The United States Supreme Court, however, reversed. Using the above due process standard, the Court held the warning was not implicitly misleading:

We hold that such a failure to warn was not the sort of evidence that would unfairly “trick” respondent if the evidence were later offered against him at trial. Neville, at 566. [Emphasis in original]

The Court reasoned nothing was stated in the warning implicitly assuring a defendant no other consequences, other than those mentioned, would occur. Neville, at 566. That is to say, the warning did not state that a refusal would not be used at trial. Because the warning stated the defendant could lose his license if he refused, “refusing the test was not a ‘safe harbor,’ free of adverse consequences.” Neville, at 566.

In Bostrom, several individuals were arrested for DUI, and read Washington’s version of the implied consent law. The warning gave the consequences for refusing a test, but failed to mention any consequences for submitting to the test. A few weeks prior to the arrests, Washington

law was changed mandating a probationary license suspension for persons whose test results were above .10, as well as enhanced penalties based on a refusal. The warning did not mention these consequences.⁴

In Washington, the implied consent law implements three legislative objectives: (1) to discourage individuals from driving an automobile while under the influence of intoxicants, (2) to remove the driving privileges from those individuals disposed to driving while inebriated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or non-intoxication. Bostrom, at 588; quoting Nowell v. Dept. of Licensing, 83 Wn.2d 121, 124, 516 P.2d 205 (1973). The court held that the omission of any warning concerning the consequences of taking the test furthered the statutory objectives. Bostrom, at 588. A warning which focuses on the consequences of a refusal encourages defendants to submit to the test and provide reliable evidence of their intoxication. Bostrom, at 588.

In regards to due process, the Court held the warning was not fundamentally unfair for those who refused the test because the warning left open the possibility consequences may accrue based upon a decision

⁴ The legislature amended the warning in 1995 to include this information. Bostrom, at 584.

to refuse the test; such as with sentencing. Bostrom, at 591. For those who submitted to the test, the Court found they were not implicitly misled by the warning, which failed to advise of consequences for a result exceeding .10, because;

Most, if not all, drivers are well aware that if they agreed to the test and the results reveal a breath alcohol concentration higher than the legal limit, there would be adverse consequences both criminal and administrative. Bostrom, at 591.

The Court refused to accept the contention that the warning could mislead a person to believe there was no administrative consequence to their license for submitting to a breath test. This contention was based solely on the Court's belief there had been widespread media coverage of the consequences of drinking and driving including public service announcements that advised the public of the harsh penalties for drinking and driving. Bostrom, 592.

It should go without saying there have been no public service announcements advising the public the State can seek a warrant to compel a blood test if you refuse a test under the implied consent law. Unlike Bostrom, this Court cannot make the assumption the media has educated the general public of this significant change in law.

The critical question is whether it should be deemed reasonable for a driver to assume that asserting the right to refuse means the State can obtain a sample of your blood without your consent. Neville and Bostrom dealt with consequences that reasonably flow from a refusal. In Neville, it was reasonable to assume that a consequence of refusing the test would be that the refusal could be used as evidence at trial. In Bostrom, it was reasonable to assume that a refusal could lead to consequences for sentencing if convicted for DUI. In Mr. St. John's case, it is unreasonable, and implausible, to believe that a decision to refuse the test could reasonably lead to compulsory submission to a blood test.⁵ The issue is not omitting a consequence stemming from a refusal, but rather omitting to tell the driver the decision to refuse will lead to submission to a compulsory test.

The opportunity to refuse is presented to the driver as a "right." The driver has the "right" to withhold evidence of their intoxication by refusing the test. Assertion of this "right" carries consequences, which are described to the driver in the warning. It is essential to uphold the

⁵ This omission is not without consequence to the driver. As the warning makes clear, a "refusal" results in a one year license revocation, whereas submission to a test, with a result over .08, results in only a 90 day suspension. Additionally, if convicted of DUI with a "refusal" the minimum license revocation is for two years. RCW 46.61.5055. Therefore, when a driver "refuses" and the State obtains a warrant, the driver is subject to the penalties of both submitting to a test and "refusing."

integrity of the “knowing and intelligent decision” rule by advising drivers that the decision to refuse the test does not foreclose the State from obtaining evidence the driver seeks to withhold. Otherwise, the “right” to refuse is a hollow promise, leading to a needle being stuck into a person’s arm simply because they did what the officer told them they could do; refuse.

The implied consent law is a sham if it fails to tell drivers about the potential for a compulsory test if they refuse. The implied consent law was never meant to be a “trick” statute.⁶ However, this is exactly what the law becomes when the State is allowed to tell a driver they can refuse a test, and then use that refusal as the basis to compel submission to the test that was just refused. Such a result undermines any legitimacy of the implied consent law.

A valid implied consent warning is one which is fundamentally fair, and void of misleading statements and false assurances. In order to comply with existing due process protections, this Court must hold that the warning given to Mr. St. John was fundamentally unfair, and misled him into believing a refusal would result in no test being given. This Court should accept review to make this ruling.

⁶ See South Dakota v. Neville, 459 U.S. at 566.

2. Review should be granted under RAP 2.3(d)(1) because the State's failure to advise drivers that the officer may compel a blood test after being told they have the right to refuse violates the principle of equitable estoppel.

Equitable estoppel is based on the principle that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. Kramarevcky v. DSHS, 122 Wn.2d 738, 743, 863 P.2s 535 (1993); Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. Kramarevcky, 122 Wn.2d at 743; Robinson v. Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992). Injury in this context means a party justifiably relied upon the words or conduct of another to his detriment. Kramarevcky, at 747. When asserting equitable estoppel against the government, one must also establish; (1) equitable estoppel must be necessary to prevent a manifest injustice; and (2) the exercise of governmental functions must not be impaired as a result of the estoppel.

Kramarevcky, at 743; Shafer v. State, 83 Wn.2d 618, 622, 521 P.2d 736 (1974). These elements must be proven with clear, cogent, and convincing evidence. Kramarevcky, at 744. The court must be convinced the fact in issue is “highly probable.” Kramarevcky, at 744.

In Kramarevcky, the petitioners sought government aid upon emigration from the Soviet Union. They complied with all requirements for the aid, and no allegations were ever made that they filed any false claims. The State provided Kramarevcky with aid for a period of time. Within that time, Kramarevcky found a job and notified DSHS. However, DSHS never altered or ceased aid payments. When DSHS finally realized its error, it sought recoupment from Kramarevcky in the amount it had overpaid.

The State conceded the first two issues of equitable estoppel, and instead argued Kramarevcky could not establish the third element. The Court held that Kramarevcky established injury where the State sought to force him to re-pay funds the State had erroneously provided him.

In Mr. St. John’s case clear, cogent, and convincing evidence establishes that the State must be equitably estopped from using the compelled blood test as evidence at trial. First, the officer read Mr. St. John a warning telling him he had the “right” to refuse the blood test. He

stated the consequences for a refusal, but never mentioned the potential for a compulsory test even though he said he probably would have sought the warrant if Mr. St. John refused. Second, upon the State's admission, Mr. St. John exercised his right to refuse the blood test. Third, the officer repudiated the original admission and took a sample of Mr. St. John's blood without his consent. Mr. St. John thus faced a criminal DUI prosecution wherein the City of Seattle sought to use evidence of both a refusal and a blood test as evidence to show his guilt, and Mr. St. John faced sentencing consequences for both the test and refusal.

As stated above, it is manifestly unjust to permit the State to characterize the ability to refuse a blood test as a "right," when the State intends to disregard the driver's assertion and compel the evidence with a warrant. Further, it is manifestly unjust to subject Mr. St. John to criminal and civil penalties for refusing a test when ultimately his blood alcohol level was revealed through the compulsory test. Additionally, the government's ability to prosecute DUI cases is not impaired by the suppression of blood test evidence because it retained evidence that he had consumed alcohol, had been involved in an accident, and refused a blood

test.⁷ In general, the State may still secure DUI convictions using breath or blood test refusals, and in addition, may still obtain warrants to collect blood alcohol evidence in the future by simply advising drivers that if they refuse a test, the officer may obtain the warrant.

The United States Supreme Court addressed a similar situation in Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). In Raley, the defendants were brought before a state commission investigating “Un-American” activities such as membership in the Communist Party. Each defendant was told in advance of answering the commission’s questions they had the right to remain silent. Unbeknownst to the defendants, an Ohio law excluded the privilege against self incrimination from applicability before the commission. The defendants refused to answer certain questions, and were subsequently charged and convicted for various crimes associated with the failure to answer questions before the commission.

The Supreme Court reversed the convictions, stating;

We repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction **an indefensible sort of entrapment by the State-convicting a citizen for**

⁷ The City sought dismissal in Mr. St. John’s case per RALJ 2.2 in order to pursue the appeal. The trial court’s suppression order did not require dismissal of the DUI charge.

exercising a privilege which the State clearly had told him was available to him. ... We cannot hold that the Due process clause permits convictions to be obtained under such circumstances. Raley v. Ohio, 360 U.S. at 438-439.
[Emphasis added]

In making this ruling, the Supreme Court rejected an argument by the State that the defendants would have refused to answer questions even if properly informed:

We think it impermissible in a criminal case to excuse fatal defects by assuming that a person summoned to an inquiry, simply because he expresses defiance beforehand, will continue to be defiant even if a proper explanation is made of what the inquiry wants of him and the basis on which it is wanted. Raley, at 439.

Compelling to the Court was the fact the person giving the defendants the advisement on the right to remain silent was the chairman of the commission. Raley, at 437-438. The Court found the actions of the commission as a whole gave the impression Ohio "had no immunity statute at all." Raley, at 438. The Court was obviously swayed by the fact it was inherently unfair to penalize the defendants for their reliance on statements made by the commission itself, just moments before the defendants elected to assert the rights they were told they had.

By analogy, the officer in Mr. St. John's case was the state agent in the position of authority to tell Mr. St. John what "rights" he did and did

not have following his arrest. The Raley Court rejected the argument that the defendants should have known Ohio law required them to answer the commission's questions because it was the commission who gave them notice of the rights they had. Likewise, it is irrelevant whether Mr. St. John should have known about the State's ability to get a warrant; he was told by the officer he had the right to refuse the test. Consistent with Raley, the State should not punish citizens for exercising a privilege the State clearly had told him was available to him. Raley, at 438.

3. Review should be granted under RAP 2.3(d)(3) because the issue of whether the State may compel a blood test from a driver after being told they have the right to refuse testing is a matter of public interest which is likely to be addressed in future cases.

Per RAP 2.3(d)(3), Mr. St. John contends the issues presented in this appeal constitute "public questions" which merit review by this Court. Eide v. Dept of Licensing, 101 Wn. App. 218, 3 P.3d 208 (2000).

The statutory authority permitting compulsory blood testing was enacted in 2004 (Laws of Washington 2004, Ch. 68, sect. 2), and has yet to be reviewed by any appellate court. According to statistics reported on the Washington Courts website (www.courts.wa.gov)⁸ over 40,000 DUI/Physical Control cases were filed in 2005 in Washington State.

⁸ www.courts.wa.gov/caseload/clj/ann/2005/annualtbls05_wo_staffing.pdf - reports 41,782 cases filed in 2005.

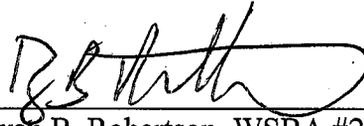
Citizens and law enforcement would benefit from guidance by the courts how to apply this statute and whether the implied consent warnings, as presently written, are constitutionally defective.

F. CONCLUSION

For the reasons stated herein, Mr. St. John asks the Court to accept review of this case.

RESPECTFULLY SUBMITTED this 6 day of August, 2007.

RYAN B. ROBERTSON
ATTORNEY AT LAW



Ryan B. Robertson, WSBA #28245
Attorney for Petitioner

EXHIBIT 1

TRIAL COURT RULING

THE MUNICIPAL COURT OF SEATTLE



July 7, 2006

TO: William J. Ross, WSBA #19494
Assistant City Attorney
Stephen W. Hayne, WSBA# 595
Attorney for Defendant

FILED
JUL 10 2006
COURT 903

RE: City v. Robert St. John, 474722

MEMORANDUM OPINION

The Defense has moved this Court to suppress the Blood draw result in the above referenced case. Following hearing and argument on the motion. The Court enters the following findings and conclusions:

Officer Michl responded to a motor cycle collision in which Mr. St. John, the Defendant, was the driver and seriously injured. At the scene, emergency personnel treated Mr. St. John, one of whom reported smelling an odor of alcohol. The other emergency personnel did not smell alcohol. Officer Michl observed no odor of alcohol at the scene but testified that he noticed red watery bloodshot eyes, slurred speech and lethargy that could be attributed to the accident or intoxicants. A witness arrived at the scene reporting that the collision occurred when another vehicle cut-off Mr. St. John.

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At the scene, an associate of Mr. St. John who arrived after the collision informed the officer that Mr. St. John had one drink. Officer Michl followed Mr. St. John to the hospital in order to make his own observation regarding any odor of alcohol. He testified to observing a faint odor of alcohol on Mr. St. John's breath in the hospital. After Officer Michl arrested Mr. St. John for DUI and informed him of his implied consent warnings for blood, Mr. St. John refused. Officer Michl then sought and obtained a search warrant for a blood draw to obtain evidence of intoxication or non-intoxication. At a hearing on June 30, 2006, the Court found probable cause for the arrest. The question remains as to whether the blood result and the refusal are both admissible at trial pursuant to the statutory right to refuse under RCW 46.20.308.

AUTHORITY

RCW 46.20.308 outlines the procedures for test refusal under the implied consent statute. It begins by outlining in section (1) that any person who drives a motor vehicle within this state is deemed to have given consent, per RCW 46.61.506, to a blood or breath test, to determine alcohol concentration, if an officer has probable cause to arrest for driving under the influence or physical control. State v. Bostrom, 127 Wn.2d 580, 902 P.2d 157 (1995), held that the warnings are "intended to allow drivers to make an intelligent and informed decision about their right to refuse a breath alcohol test, not about their right to submit to the test."

There is no requirement that a driver be warned of each specific consequence of refusal. Id@589 and courts must construe the statute to give meaning to the purpose of the implied consent law which is to:

- 1) discourage people from DUI;
- 2) remove driving privilege of those who drive under the influence;
- 3) Provide an efficient means of gathering reliable evidence of intoxication or non-intoxication.

Id@599

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Our courts have consistently found that a driver's due process rights are not violated unless the warnings create a situation that is fundamentally unfair, i.e., unless the warnings offer implicit assurances that could mislead a driver who either refuses to take or agrees to a blood or breath test. State v. Bostrom, supra @590. The warnings advised Mr. St. John that if he refused his license would be revoked. There was nothing in the warnings that misled him or assured him regarding his license revocation or use of his refusal at trial. According to the Washington cases referenced herein, and the line of cases addressing the implied consent warnings, there was no obligation to tell Mr. St. John that the test could be obtained without his consent. In fact, if the officer had told Mr. St. John that if he refused he would obtain a search warrant, it's likely the issue before the court would be to suppress the blood test due to coercion similar to the argument in the Collier case.

The Defense brings this motion under an Equitable Estoppel Argument rather than a Due Process argument referencing a Georgia Supreme Court case, State v. Collier, 279 Ga. 316, 612 S.E.2d 281 (2005), with a similar implied consent law. The Collier case is similar in that the driver refused to give blood and urine samples, was threatened with a search warrant, submitted to the testing then challenged on appeal. Interestingly enough, the Georgia consent law allowed refusal even where a collision resulting in death is present as was in Mr. Collier's case. Their Court determined that a clear reading of the statute including a portion similar to ours, where there was a refusal, no test would be given. Unlike our implied consent law, there was no exception for collision resulting in death. The Georgia Court held that the legislative intended the consequences of refusal to be license revocation and use of refusal in court and did not include being compelled to submit to testing through a search warrant process. As outlined in the Defense brief, the Georgia Court found that to rule to the contrary would render the statutory right meaningless.

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According to Section (3) and (4) of RCW 46.20.308, a breath or blood test may be administered without the consent of the individual so arrested in the following circumstances:

- an individual is unconscious or otherwise incapable of refusal;
- an individual is under arrest for vehicular homicide as provided in RCW 46.61.520;
- an individual is under arrest for vehicular assault as provided in RCW 46.61.522, or
- an individual is under arrest for driving while intoxicated as provided in RCW 46.61.502 when the arrest results from a **collision that resulted in serious bodily injury to another person** (emphasis added).

In the case before the court, only Mr. St. John was seriously injured in the collision and was transported to the hospital. According to the Officer, Mr. St. John was incapable of giving a breath sample, as he was strapped to a backboard and being treated by medical personnel. However, he was neither unconscious nor incapable of refusal. After being advised of his 242 rights, Mr. St. John refused a blood test.

RCW 46.20.308 section (1) states that neither consent nor this section precludes an officer from obtaining a search warrant; it does not say that the evidence obtained by search warrant shall be admissible. In fact, the statute indicates in section (5) **no test shall be given after a refusal** except as authorized under section (3) and (4) as outlined above. (Emphasis added).

Under the 4th Amendment Article 1 Section 7, blood may be seized by law enforcement without a warrant if made incident to arrest and is warranted by a reasonable emergency. An officer must have probable cause to believe the driver is under the influence and driving impaired. State v. Baldwin, 109 WA. App. 516 (2001). The City cites State v. Smith, 84 WA. App 913, 1997 for the holding that non-consensual seizure

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of blood through other constitutional means is admissible in trial. In Smith, a physician, in a vehicular homicide case, not law enforcement, took the blood. In Mr. Smith's case the court agreed that the implied consent statute did not control the admissibility of blood alcohol evidence taken by a physician when the defendant was not under arrest. Id@818. The court agreed with other jurisdictions in concluding that such evidence could be seized in accordance with general search and seizure law, Id@819.

The nonconsensual taking of a blood test at the scene of an automobile accident does not violate constitutional protections against unreasonable search and seizures, so long as the test is performed in a reasonable manner, State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991), citing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 980 (1966), the court held that a nonconsensual blood test of a hospitalized driver did not violate the driver's Fifth Amendment guarantees against self-incrimination.

In the Curran case a blood draw was taken at the scene of the accident giving rise to probable cause for the arrest of Mr. Curran for vehicular homicide (two passengers died in the collision). Curran argued that RCW 46.20.308(3) did not authorize two samples. The Court rejected this argument. He also objected to the second draw given to law enforcement following the first draw by medics for treatment purposes as a violation of Const. Art. 1, Section 7. Rejecting his second argument, the court found that the blood was admissible under search and seizure law, that it was reasonable because it would reveal evidence of his intoxication and it was performed in a reasonable manner. Finally in response to another argument by Mr. Curran, in denying suppression of the blood result, the Court stated: "...The language Curran relies upon refers only to the per se crime of driving while under the influence. Curran was not charged with the per se crime. RCW 46.61.506(2) specifically indicates constraints associated with the per se crime shall not limit the use of "other competent evidence" when a per se conviction is not sought. See, e.g., State v. McElroy, 553 So. 2d 456 (La.1989) (results of blood alcohol test not administered in accordance with the statute admissible but would not give rise to presumption of intoxication). Curran@182.

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This court is guided by the finding in City of Kent v. Beigh, 145 Wn.2d 33, 32 P3d 258 (2001):

The implied consent statute is clear and unambiguous. If a statute is unambiguous this Court is required to apply the statute as written and assume that the legislature mean[t] exactly what it says. State v. Radan, 143 Wn.2d 323,330, 21 P 3d 255 (2001). When the words in a statute are clear and unequivocal, this court must apply the statute as written. State v. Michielli, 132 Wn 2d 229, 237, 937 P2d 587 (1997). The general rule under the implied consent statute is that a breath test will be administered to persons arrested for DWI. R.C.W. 46.20.308(2). However an officer may request a motorist to submit to a blood test "where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample. Beigh@ 46. We find neither RCW 46.20.308(2) nor RCW 46.20.308(3) provides exclusive authority for an officer to request a person arrested for driving while under the influence to submit to a blood test rather than a breath test. Properly interpreted R.C.W. 46.20.308(3) establishes those instances in which a driver is given the choice between either (A) submitting to a test of his breath or blood (depending on the circumstances) or (B) losing his license. RC W 46.20.308(3) on the other hand outlines those circumstances in which a test of breath or blood may be administered without the driver's consent. This interpretation is supported by RCW 46.20.308(5), which provides:

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 or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

Supra @ 43.

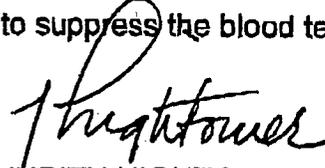
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CONCLUSION

The clear, unambiguous and unequivocal provisions of the statutes governing testing for driving under the influence as outlined above requires that no test should have been given to Mr. St. John. Though the statutes authorize seeking a search warrant (RCW 46.20.308(1) and competent evidence need not be excluded (RCW 46.61.506(2)), they do not mandate that the evidence should be admitted into evidence at trial. The cases cited by the City in support of denying the Defense motion are easily distinguished as those cases involving incidents where consent is not required and/or are not charged under the per se prong.

If this were an incident where law enforcement was or became aware of another test sought by Mr. St. John, or where the blood was drawn by the hospital for medical treatment and not at the direction of the police, the search warrant evidence might then be admissible as circumstantial evidence of driving under the influence under RCW 46.20.308(1). If there was a test such as urine or breath test, for example, that met the scientific requirements for admissibility that came into the hands of the prosecution, that then may be admissible as circumstantial evidence of the crime under RCW 46.61.506(2).

Under the facts presented in this case, the intent of the legislature is to revoke Mr. St. John's privilege to drive for the refusal and use the refusal against him at trial, not to authorize additional evidence gathering after the refusal. The motion to suppress the blood test results is granted.


JUDITH HIGHTOWER

Seattle Municipal Court Judge

EXHIBIT 2

SUPERIOR COURT (RALJ) RULING

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

City of Seattle

Appellant,

NO. 06-1-07998-8 SEA

vs.

Robert St. John

Respondent

DECISION ON RALJ APPEAL

CLERK'S ACTION REQUIRED

This appeal came on regularly for oral argument on June 11, 2007 pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error: The trial court is reversed because the blood test is admissible. The implied consent warnings do not prohibit admission of a blood test on a DUI or physical control pursuant to the service of a warrant upon finding of probable cause. The implied consent warning in regards to ability to obtain a warrant is not defective statutorily or constitutionally.

IT IS HEREBY ORDERED that the above cause is:

AFFIRMED; REVERSED; MODIFIED;

COSTS

REMANDED to Seattle Municipal Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED: 6-11-07

Rebecca Johnson
Counsel for Appellant

[Signature]
JUDGE
MICHAEL S. FOX

[Signature] 25245
Counsel for Respondent

DECISION ON RALJ APPEAL (DCRA)

10/01