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NO.60257-8-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

CITY OF SEATTLE,
Respondent,
v.
ROBERT ST. JOHN,
Appellant.

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SUPREME COURT
STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for providing advice to the duly elected sheriff. RCW 36.27.020.

WAPA is interested in cases, such as this, which have wide-ranging impact on the ability to investigate criminal activity and on the ability to collect relevant evidence.

II. ISSUE PRESENTED

Whether police may obtain a search warrant for breath or blood in order to determine whether an individual who is arrested upon probable cause to believe that he or she was driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug (DUI) or was in violation of RCW 46.61.503?

III. ARGUMENT

While the Fifth Amendment of the United States Constitution and Wash. Const. art. I, § 9, confer an absolute privilege against self incrimination, that privilege does not include a right to withhold physical evidence. Physical evidence, including identification evidence and biological evidence, must be provided in response to a lawful demand. *Schmerber v.*

California, 384 U.S. 757, 764, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 232-33, 978 P.2d 1059 (1999). An individual's failure to do so can result in the imposition of sanctions. *See, e.g., Deering v. Brown*, 839 F.2d 539 (9th Cir. 1998) (separate criminal charge of refusing police request for a breathalyzer); *Stalsbrotten*, 138 Wn.2d at 236-38 (consideration of the refusal to produce the evidence in assessing guilt); *Nowell v. State Dep't. of Motor Vehicles*, 83 Wn.2d 121, 516 P.2d 205 (1973) (license suspension); *State v. Miller*, 74 Wn. App. 334, 873 P.2d 1197 (1994) (contempt of court for refusing to produce a handwriting exemplar).

A search warrant is the quintessential lawful demand for the collection of evidence. In Washington, a search warrant may be obtained for evidence of a crime, contraband, and items used to commit a crime. CrR 2.3(b); CrRLJ 2.3(b); *see also* RCW 10.79.015.

Evidence may also be collected without a warrant. The procurement of evidence without a warrant, however, is presumed to be unreasonable absent proof that one or more of the limited exceptions to the search warrant requirement applies. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). The existence of one or more exceptions to the search warrant requirement is not a bar to the issuance of a search warrant. *See, e.g., State v. Stenson*, 132 Wn.2d 668, 696-97, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) (search conducted pursuant to the defendant's consent and

to a search warrant upheld).

An individual may waive the requirement for a search warrant. An individual's waiver of the search warrant requirement is generally referred to in the case law as a "consent" to search. The consent to search or waiver of the search warrant requirement must be knowingly, intelligently, and voluntarily made. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

An individual who chooses to insist upon a warrant may do so without adverse consequences. *See, e.g., United States v. Hyppolite*, 65 F.3d 1151, 1157 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1558 (1996) (an individual's refusal to grant consent to a search may not be used to establish probable cause to search); *State v. McGovern*, 111 Wn. App. 495, 501 n. 18, 45 P.3d 624 (2002) (same). The withholding of consent, however, does not place the location or the object out of the reach of police. The withholding of consent merely means that police will need to obtain a warrant in order to access the location or object or a valid exception to the warrant requirement.

In Washington, special warnings are generally provided to an individual prior to obtaining a waiver of the search warrant requirement. These warnings advise the individual of their "three r's": the right to refuse to grant consent, the right to restrict what is searched, and the right to revoke their consent. *See State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

Expressly excluded from the warnings is any explanation of what might or will happen if the individual refuses. Specifically, police refrain from telling the individual that if they refuse to consent to a warrantless search that their refusal will result in the officer seeking a search warrant. Such “advice,” while often accurate, can unduly pressure an individual into waiving the warrant requirement. *See State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489, 589-90 (2003).

Exigent circumstances may also provide an exception to the search warrant requirement. One exigent circumstance arises from the need to prevent the imminent destruction of evidence. This circumstance is present when dealing with an ingested substance, such as alcohol, that rapidly metabolize. *Schmerber*, 384 U.S. at 770-71. Accordingly, the United States Supreme Court held in *Schmerber* that a search warrant was not required in order to collect a blood sample from an objecting patient in a hospital who had previously been placed under arrest for DUI. *Id.*

The above principles apply to all crimes – from arson to murder to minor in possession of alcohol. Over the years, however, legislatures have enacted statutes, generally called “implied consent statutes,” that modify the rules to some extent when dealing with driving while under the influence of intoxicants (“DUI”) and other related crimes.

Various justifications have been given for these statutes. The Washington statute was adopted to serve three purposes: “(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 nonintoxication.” *Nowell*, 83 Wn.2d at 124 (citing *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971)).

The instant appeal deals with the proper interpretation of the current version of Washington’s implied consent statute. The relevant provision was adopted by the Legislature in Laws of 2004, ch. 68, § 2(1). RCW 46.20.308(1), as amended by Laws of 2004, ch. 68, § 2(1), provides that:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, 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 arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. *Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.*

[Emphasis added.]

This brief explains the impact the italicized sentence has upon the collection of breath or blood from individuals who are arrested in Washington upon probable cause to believe that they were driving or were in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or were in violation of RCW 46.61.503.

A. Laws of 2004, ch. 68, §2(1) Did Not Change the Rules Governing the Warrantless Collection of Breath or Blood

Although an individual who is arrested for DUI can constitutionally be compelled to submit to a blood alcohol or breath test, Washington has chosen to give the arrestee the right to refuse a breath test. *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). This “right” is codified in our state’s implied consent statute, RCW 46.20.308.

Washington’s implied consent statute is similar in many respects to those found in other states. The statute, while limiting the circumstances in which a blood test may be obtained, recognizes that a warrant is not required to obtain blood or breath. RCW 46.20.308(1); RCW 46.20.308(3); *see* RCW 46.20.308(2) and (4) and *City of Kent v. Beigh*, 145 Wn.2d 33, 41, 32 P.3d 258 (2001) (discussing when an officer may obtain a blood sample under RCW 46.20.308).

The statute requires an officer to honor a driver’s refusal to submit to a test in most circumstances. *See* RCW 46.20.308(5) (“no test shall be given except as authorized under subsection (3) or (4) of this section.”). Of course, the driver’s refusal carries licensing consequences and may be considered by a jury in determining his or her guilt. RCW 46.20.308(6) and (7); RCW 46.20.3101; RCW 46.61.517; *see also*, *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989).

The existence of the implied consent statute, RCW 46.20.308, has been interpreted as a restraint upon law enforcement’s ability to use any other

means to collect breath or blood samples for testing. *See, e.g., State v. Avery*, 103 Wn. App. 527, 13 Wn. P.3d 226 (2000) (a suspect may voluntarily consent to a blood test for alcohol or drugs, but only in cases where the implied consent statute is inapplicable); *State v. Krieg*, 7 Wn. App. 20, 497 P.2d 621 (1972) (search warrant is not available once a suspect refuses to provide breath or alcohol for testing pursuant to RCW 46.20.308). At least one case has called this interpretation of the statute into question. *See State v. Smith*, 84 Wn. App. 813, 819, 929 P.2d 1191 (1997), *review denied* 133 Wn.2d 1005 (1997) (“Absence of authorizing language in a statute does not convert it into a rule of exclusion. While the implied consent statute does not authorize seizure or admission of Smith’s blood sample, neither does the statute prevent its seizure or admission on other grounds.”).

Laws of 2004, ch. 68, § 2 added language to RCW 46.20.308 to establish that the statute does not preclude an officer’s ability to utilize search warrants. The language, however, leaves intact RCW 46.20.308’s preeminence over warrantless searches.

B. Laws of 2004, ch. 68, § 2(1) “Overruled” Prior Case Law to Specifically Allow for the Issuance of Search Warrants for Breath or Blood

The Court of Appeals decision in *State v. Krieg*, 7 Wn. App. 20, 497 P.2d 621 (1972), that the implied consent statute superseded the general statute that authorizes magistrates to issue search warrants for evidence of crimes was consistent with the construction other courts placed upon their

jurisdiction's implied consent statutes. *See, e.g., Collins v. Superior Court*, 158 Ariz. 145, 761 P.2d 1049, 1050-51 (1988); *State v. Hitchens*, 294 N.W.2d 686 (Iowa 1980); *People v. Cords*, 75 Mich. App. 415, 254 N.W.2d 911 (1977); *State v. Steele*, 93 N.M. 470, 601 P.2d 440 (App.1979); *Pena v. State*, 684 P.2d 864 (Alaska 1984).

Unhappy with the prospect that statutory language inadvertently placed “allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them,” *Pena v. State*, 684 P.2d 864, 869 (Alaska 1984) (Compton, J., dissenting), many state legislatures amended their implied consent statutes to specifically authorize search warrants. *See, e.g., State v. Stanley*, 172 P.3d 848, 852 ¶ 17 (Ariz. App. 2007). Compare Alaska Stat. § 28.35.031(h) (2008) (“Nothing in this section shall be construed to restrict searches or seizures under a warrant issued by a judicial officer, in addition to a test permitted under this section.”) with *Pena*, 684 P.2d at 171-72 (quoting the 1984 version of Alaska’s implied consent statute). Compare 23 V.S.A. § 1202 (2007) (b) and (f) (2007) with *State v. Beyor*, 161 Vt. 565, 641 A.2d 344 (1993) (quoting the 1993 version of 23 V.S.A. § 1202(b)). The Washington Legislature followed suit in 2004, thus overruling *Krieg*.¹

¹The legislature can effectively overrule an appellate court’s decision interpreting a statute by prospectively amending the statute. *State v. Vargas*, 151 Wn.2d 179, 191-92, 86 P.3d 139 (2004).

The relevant language consists of a single sentence that was added to RCW 46.20.308(1). This sentence makes it clear that a search warrant may be used to collect blood or breath for alcohol testing when an arrestee consents to a request pursuant to RCW 46.20.308 and when an arrestee refuses to provide a breath or blood sample pursuant to RCW 46.20.308: “Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.” Laws of 2004, ch. 68, §2(1).

The defendant, Robert St. John, contends that the legislature engaged in an act of futility, characterizing the new language as “nothing more than a general admonition to law enforcement that they have the discretion to seek a warrant.” *Appellant’s Opening Brief*, at 22. Mr. St. John arrives at this conclusion by manufacturing a conflict between the newly added language and the language contained in subsection (5) of RCW 46.20.308. His argument, however, must fail as it ignores the structure of the Revised Code of Washington and the legislature’s use of a term “section.”

The Revised Code of Washington divides all statutes into titles, chapters, sections, and subsections. *See generally* Chapter 1.04 RCW. Thus, RCW 46.20.308 is a statute that appears in title 46, chapter 20, and section 308. Numbered or lettered paragraphs within RCW 46.20.308 are the subsections. *See also* Office of the Code Reviser, *Bill Drafting Guide 2007*, Part IV, §§ 5 and 6.

A general provision in a title applies to all chapters and sections within that title, absent express language to the contrary. *See, e.g.*, RCW 46.04.010 (“Terms used in this title shall have the meaning given to them in this chapter except where otherwise defined, and unless where used the context thereof shall clearly indicate to the contrary.”). A general provision in a chapter applies to all sections within that chapter absent express language to the contrary. *See, e.g.*, RCW 46.09.020 (“The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.”). Similarly, a reference to a “section” in a statute includes all subsections. *See, e.g., Webster’s Ninth New Collegiate Dictionary*, at 1176 (1985) (defining “subsection” as “a subdivision or a subordinate division of a section.”). Thus, the legislature’s choice of the word “section” in Laws of 2004, ch. 68, § 2(1), includes subsection (5) of RCW 46.20.308.

This conclusion is further bolstered by the fact that subsection (5) of RCW 46.20.308 uses both terms – “section” and “subsection”:

(5) 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.

These two terms must mean different things. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.”);

Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (it is "well established that when 'different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.'" (quoting *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976))). Here, it is clear that subsection means a numbered portion of the entire section.

Honoring the legislature's plain language will give effect to both the 2004 amendment and to RCW 46.20.308(5). RCW 46.20.308(5) serves to limit any warrantless collection of breath or blood to that authorized by RCW 46.20.308, while the new language establishes that RCW 46.20.308 has no impact upon the ability to conduct a search pursuant to a warrant. Other jurisdictions have recognized that use of a search warrant can peacefully co-exist with implied consent statutes.² See, e.g., *Oregon v. Shantie*, 193 Or. App. 813, 818, 92 P.3d 746, 748-749 (2004); *Koller v. Arizona Dep't of*

²Some of the "unanswered questions" that Mr. St. John raises as grounds for ignoring the Legislature's plain language have already been answered by these other jurisdictions. Compare *Appellant's Opening Brief*, at 20-22, with *People v. Callon*, 256 Mich. App. 312, 662 N.W.2d 501, 510 (2003) (constitutional principles govern the admissibility of blood-test results obtained under a search warrant); *Stanley*, 172 P.3d at 854, ¶ 27 (a search warrant does not resolve the issue of whether the arrestee refused to take a test; refusal is addressed factually in the administrative hearing); *Cook v. Commonwealth, Ky.*, 129 S.W.3d 351, 360 (2004) (evidence that an arrestee refused to submit to a voluntary breath test may be admitted at trial even if blood is ultimately collected pursuant to a search warrant); *Koller v. Arizona Dept. of Transportation*, 195 Ariz. 343, 988 P.2d 128, 131 ¶ 15 (1999) (a driver cannot prevent a license revocation by recanting his refusal to agree to a chemical test under the implied consent statute after a search warrant for a blood sample is issued); *Oregon v. Shantie*, 193 Or. App. 813, 818, 92 P.3d 746, 749 (a defendant has "no right – constitutional or otherwise – to confer with an attorney before police execute[a] warrant to draw his blood").

Transportation, Motor Vehicles Division, 195 Ariz. 343, 346, 988 P.2d 128 (1999); *Cook v. Kentucky*, 129 S.W.3d 351, 359 (2004).

The glaring problem with Mr. St. John's argument that subsection (5) of RCW 46.20.308 can trump the 2004 amendment to subsection (1) of RCW 46.20.308, is his failure to offer any guidance on what should be done with the 2004 amendment. Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130 (2002). Mr. St. John's approach would render the search warrant language in RCW 46.20.308(1) a nullity as the pre-amendment law would continue unchanged. This same concern caused the Oregon Court of Appeals to reject a defendant's claim that the "no chemical test" language of the Oregon implied consent statute, ORS § 813.100(2), prevented the admission of a blood test result obtained pursuant to a search warrant as authorized by the later enacted ORS § 813.320(2)(b). *Shantie*, 92 P.3d at 747-48.

C. The Implied Consent Warnings Mandated by the Legislature Satisfy Due Process

Mr. St. John contends that the implied consent warnings must provide the additional information that a refusal to submit to the test may result in the police seeking a search warrant. *Appellant's Opening Brief*, at 34. His argument is contrary to existing precedent.

In *South Dakota v. Neville*, 459 U.S. 553, 74 L. Ed. 2d 748, 103 S. Ct. 916 (1981), the United States Supreme Court held that since the right to refuse to submit to a breath test following an arrest for DUI is an act of legislative grace and not constitutionally mandated, a driver need not be advised of all of the adverse consequences that might befall him if he should refuse to take the test. The important thing is that the warnings must convey to the motorist that refusing the test is not a "safe harbor," free of adverse consequences. *Neville*, 459 U.S. at 566. The language selected by the Washington legislature conveys this information to a driver.

The language that Mr. St. John contends should have been tendered to him, that a refusal might be met with a compelled test pursuant to a search warrant, is misleading and inaccurate. Warnings proposed by a defendant that contain inaccurate or incorrect statements of the law are properly rejected. *Cf. State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979) (it is not error for a trial court to refuse jury instructions that are incorrect in any material particular; trial court has no duty to rewrite incorrect or inaccurate statements of law contained in proposed instructions).

The 2004 amendment allows a search warrant to be obtained if the DUI arrestee agrees to submit to the test and if the DUI arrestee refuses to submit to the test. In other words, the arrestee's decision with respect to the breath test is irrelevant with regard to an officer's decision to seek a search

warrant.

A police officer may choose to apply for a search warrant when an arrestee refuses to submit to a breath test. A police officer may choose to apply for a search warrant when an arrestee agrees to submit to a breath test but the test cannot be administered because the arrestee cannot provide sufficient breath for an accurate test or the machine is inoperable. A police officer may choose to apply for a search warrant when an arrestee agrees to submit to a breath test and the breath test is successfully administered, if the breath test result is not consistent with the degree of impairment, or if the trial court judge is likely to suppress the breath test result. *See, e.g., City of Kent v. Beigh*, 145 Wn.2d 33, 32 P.3d 258 (2001) (motorist's breath twice registered an "interference detected" signal); *State v. Faust*, 274 Wis. 183, 682 N.W.2d 371, 379-383 (2004), *cert. denied*, 543 U.S. 1089 (2005) (identifying why police may wish to obtain a blood test in addition to a breath test). A police officer may choose to seek a warrant for an alcohol test without invoking the implied consent law in cases where the arrestee cannot understand English and a certified translator is not available.

In light of these realities, the legislature could rightfully conclude that adding "search warrant" language to the implied consent warnings might unduly coerce a DUI arrestee into waiving his statutory right to refuse to provide a breath sample. This legislative decision is consistent with the

Ferrier consent warnings which also avoid any reference to search warrants.

VI. CONCLUSION

The legislature properly concluded that DUI arrestees should no longer be granted the ability to place relevant physical evidence beyond the reach of police.

Respectfully submitted this 12th day of August, 2008.


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