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

**COA No.60257-8-1  
Superior Court No. 06-1-07998-9 SEA**

FILED  
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STATE OF WASHINGTON  
2007 SEP 28 PM 3:21

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**CITY OF SEATTLE,**  
Respondent/Plaintiff,

v.

**ROBERT ST. JOHN,**  
Petitioner/Defendant.

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**BRIEF OF RESPONDENT**

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ORIGIN

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**I. RESPONSE TO ISSUES PRESENTED FOR REVIEW**

- A. The implied consent warnings adequately and fairly advise defendants of their legal options and do not prevent an officer from obtaining a search warrant.**
- B. Equitable estoppel does not apply in this case.**
- C. No issues of public interest are addressed in this case that have not been addressed previously by this court.**

**II. STATEMENT OF THE CASE**

The defendant has filed a motion for discretionary review of a decision by King County Superior Court reversing Seattle Municipal Court's dismissal of his Driving Under the Influence charge. King County Superior Court found that the defendant's blood test was admissible, the implied consent warnings (ICW's) regarding breath and blood tests did not prevent service of a search warrant for the defendant's blood, and the ICW's are not statutorily or constitutionally defective.

**III. ARGUMENT**

- A. The implied consent warnings adequately and fairly advise defendants of their legal options and do not prevent an officer from obtaining a search warrant.**

St. John alleges the officer violated his due process rights by omitting reference to the possibility a warrant could be sought if he refused a blood test. We find no record St. John raised this argument below in the trial court. Accordingly, we find no basis for his new claim

and distinguish City v. Beck, 130 Wn. App. 481 (2005). We address the argument should the court find the issue was preserved for appeal.

Under the implied consent statute, the driver must be provided the specific warning stated within the implied consent statute before the sanctions of the implied consent statute may be levied. Leininger v. Dept. of Licensing, 120 Wn. App. 68 (2004). St. John does not contest he received the exact warning prescribed by the statute. Instead, he argues that he should have been given additional warning, warning about what might happen and a summary of criminal search and seizure law as applied to this case. No authority supports his argument.

The 2004 Amendments to RCW 46.20.308, governing breath and blood alcohol tests, added a provision stating:

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

Similarly, the synopsis of the passed bill in Final Bill Report upon SB 3055 states:

Summary:

Search Warrants

Nothing in the implied consent law prevents a police officer from getting a search warrant in order to obtain breath or blood evidence samples.

With these amendments, Washington joins a number of other

jurisdictions authorizing officers to pursue test evidence outside the restrictions of their implied consent statute. See e.g. Oregon v. Shantie, 92 P.3d 746 (2004)(Oregon officer may pursue search warrant for blood when defendant refuses breath test under implied consent); Koller v. Arizona DOT, 988 P.2d 128 (1999)(Arizona implied consent statute does not preclude officer from seeking warrant for blood evidence); Beeman v. Texas, 863 W.3d 613 (2002)(Texas implied consent statute allows officers to obtain blood test by search warrant); Brown v. Indiana, 774 N.E.2d 1001 (2002)(Indiana implied consent statute does not prevent an officer from obtaining evidence pursuant to a search warrant); Michigan v. Calon, 256 Mich. App. 312 (2003)(Michigan implied consent statute does not prohibit officer seeking blood test by search warrant); Cook v. Kentucky, 129 SW.3d 351, 359 (2004)(Kentucky officer may obtain warrant for blood test after refusal under implied consent statute); State v. Baker, 502 A.2d 489 (1985)(Maine permits warrantless seizure of blood evidence when probable cause and exigent circumstances even over defendant's refusal and despite implied consent statute); State v. Sisler, 683 N.E.2d 106 (1995)(Ohio Officer may take blood test despite refusal and implied consent statute if there is risk of loss of evidence, test may be warrantless if difficulty or delay in obtaining a warrant); State v. Faust, 682 NW.2d

371 (2004)(Wisconsin police not precluded by implied consent statute from obtaining warrantless blood test after defendant provides consensual breath test).

Under Schmerber v. California, 384 U.S. 757, 8 S.Ct. 1826, 16 L.Ed. 908 (1966) the court affirmed an officer need not obtain a warrant to seize physical evidence of intoxication in a DUI case. Washington followed with its implied consent statute, providing some procedural due process rights to DUI defendants. In 2004, the legislature modified those due process rights to expressly exclude circumstances that arise when an officer seeks a search warrant.

St. John complains that excluding notice of the possibility of a search warrant from the implied consent statute “renders meaningless the right to refuse a test under the law”. He essentially argues that the purpose of refusing a test is to prevent the state from obtaining evidence. While the *defendant's purpose* in refusing the test may be to prevent the state from obtaining evidence—that purpose is nowhere adopted by the legislature. To the contrary, such a purpose would run counter to all three stated goals in the statute.

The stated goals of the statute are to discourage intoxicated individuals from driving, to suspend the privilege of intoxicated drivers;

and to provide an efficient means of gathering reliable evidence of intoxication or non-intoxication. Lax v. Dept. of Licensing, 125 Wn.2d 818, 824 (1995). Assuring officers the authority to pursue blood evidence by search warrant furthers each and every stated goal. The right to refuse under the ICW is not “meaningless” to the defendant. Just as before under the amendments to the ICW statute, the suspect is provided the proverbial carrot-and-stick choice. He may voluntarily provide test evidence to demonstrate his sobriety. Or he may refuse. If he refuses, a refusal will result in a mandatory-minimum one-year suspension. A refusal remains admissible as evidence of consciousness-of-guilt. State v. Long, 113 Wn.2d 266 (1989). The fact officers have the ability to force collection of alcohol test evidence means defendants no longer control whether or not blood test evidence is collected. But, under the implied consent statute, defendants still control whether or not they cooperate and whether or not they are sanctioned for failing to cooperate by refusing tests.

In State v. Bostrom, 127 Wn.2d 580 (1995), our court discussed this area of law. The Bostrom court unambiguously held the State has no obligation to provide warnings not required by the text of the statute. Id., at 586-87. Bostrom explained that the prohibition on “misleading or misstated” warnings are limited to analyzing warning required by the

statute. Id., at 589-90. In other words, the statute is not misleading by failing to discuss issues not required by the statute.

In Bostrom, the court notes that a State is not free to give any warning it wishes without fear of contravening due process, citing South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983). Id., at 590. In Neville, the defendant argued that warning him about possible administrative sanctions from a refusal without mentioning any criminal sanctions from the refusal implied that no criminal sanctions would arise. The Neville court disagreed, holding that advising a defendant regarding the licensing consequence for refusal and not informing him of the possible criminal consequences of refusing was not misleading because it did not assure the driver that the refusal would *not* be used against him at trial. Bostrom, 127 Wn.2d at 591, citing Neville, 459 U.S. at 555-56. The court held, “such a failure to warn was not the sort of implicit promise to forgo use of evidence that would unfairly trick respondent if the evidence were later offered against him at trial.”

In addition, the Neville court noted the defendant was warned that a refusal to take the test would result in loss of his driving privileges for one year. The court concluded this warning “made it clear that refusing the test was not a ‘safe harbor’ free of adverse consequences.” Bostrom, at

591 citing Neville, 459 U.S. at 566.

In our own case, St. John was advised of the direct civil *and* criminal consequences of refusing a breath test. No mention was made of blood testing. No mention was made upon what effect a breath test refusal might have on blood testing. In other words, St. John was not given any indication that refusing a breath test would mean no blood test could be sought. And, like Neville, he was warned that refusing the test had consequences—which was sufficient to warn him that refusal was not a safe harbor.

Contrary to St. John's unsupported assertions, the police report reflects St. John was simply advised with the standard warning, that he had a right to seek independent testing. The warnings mandated by RCW 46.62.308 are not "fundamentally unfair" and St. John fails to establish beyond a reasonable doubt a constitutional due process violation.

Outside the framework of the implied consent statute, this circumstance is not novel. In State v. Ferrier, 136 Wn.2d 103 (1998) our court outlined the analysis to apply when an officer seeks voluntary consent to enter and search a home without a warrant. The Ferrier court required the officer to advise the homeowner of the right to refuse entry and the right to terminate the search at any time. Despite the requirement

that the homeowner be advised of their constitutional right to refuse entry during a voluntary entry, our court's have not required that such notice include the range of options available to the officer if the homeowner refuses consent. For instance, in State v. Johnson, 104 Wn. App. 489, 504-06 (2001) the court affirmed a voluntary search where the officers not only did not inform the person that they could get a warrant if he refused entry, the officers already had a warrant in their possession and did not reveal that fact. Under St. John's analysis, the initial advice that the homeowner had a "right to refuse" entry was a sham. In fact, as Johnson illustrates, the advice to the homeowner was completely correct. The homeowner had the right to refuse *voluntary* entry. The homeowner was never advised that this was the *only* means available to law enforcement.

Just as Johnson had a constitutional right to refuse voluntary entry into his house, St. John has the legislatively created "right" to refuse a voluntary blood or breath alcohol test. But just as Johnson could still be served with a search warrant after a refusal, with no notice of that possibility, so could St. John. St. John was advised in precisely the terms required by the statute. St. John cannot complain he did not understand the consequences of his decisions by blaming law enforcement for his choice to rely upon his own inebriated understanding of the law. Neither

law enforcement nor the implied consent warnings are a substitute for the advice of counsel. Bostrom, at 590 FN 3. St. John's decision to proceed upon his own understanding of the law and not discuss the matter with an attorney is fatal to his claim that he did not understand the consequences of his choice. Outrageous conduct violative of Due Process is conduct that "shocks the universal sense of fundamental fairness". State v. Lively, 130 Wn.2d 1 (1996). St. John fails to meet that high standard.

**B. Equitable estoppel does not apply in this case.**

St. John also claims that under the principles of equitable estoppel, the authorities cannot compel a blood test from him via search warrant if they do not inform him of that possibility.

To raise an equitable estoppel argument in this court, the defendant would have had to raise it at the trial court level, or establish that what occurred is a "manifest error affecting a constitutional right." State v Foulkes, 63 Wn.App. 643, 649, 821 P.2d 77 (1991). The defendant did not raise this issue in the lower court. Therefore they have to prove by clear, cogent, and convincing evidence that there was manifest error affecting a constitutional right committed by the police officer. Mercer v. State, 48 Wn.App. 496, 500, 739 P.2d 703 review denied, 108 Wn.2d 1037 (1987).

Equitable estoppel against the government is disfavored.

Kramarevcky v. DSHS, 64 Wn.App. 14, 19, 822 P.2d 1227 (1992).

Equitable estoppel is applied against the government only when necessary to prevent a manifest injustice and the exercise of governmental powers will not be impaired. Foulkes, 63 Wn.App. at 649. Equitable estoppel will also not be applied to the government if its application would therefore thwart the purpose of the laws. State v. O'Connell, 83 Wn.2d 797, 827, 523 P.2d 872 (1974).

The elements of equitable estoppel are: 1) an admission, statement, or act inconsistent with the claim afterwards asserted; 2) action by another in reliance upon that act; and 3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or omission. Shafer v. State, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). The defendant must prove each of these elements must be established by clear, cogent, and convincing evidence. Mercer v. State, 48 Wn.App. 496 at 500.

To satisfy the first element, the defendant must prove by clear, cogent, and convincing evidence that Officer Michl made a statement or acted in a manner inconsistent with a claim later asserted. The defendant cannot show that this occurred. Officer Michl read the defendant his the

implied consent warnings, which are a correct statement of the law. The service of a search warrant for the defendant's blood was not inconsistent with any information provided in the implied consent warnings. Thus, the defendant cannot prove the first element of equitable estoppel.

To satisfy the second element, the defendant would have to prove by clear, cogent, and convincing evidence that he actually relied on Officer Michl's statement in making any decision to refuse the blood test. In a criminal case, the defendant must, at a minimum, show that his reliance on misleading information by the government was objectively reasonable. State v. Locati, 111 Wn.App. 222, 227, 43 P.3d 1288 (2002).

There is nothing in the record to support this element. The defendant cannot prove that the information provided by Officer Michl was misleading or mislead him in any way. There is nothing from the trial court record which speaks to the defendant's understanding of the law or that if informed of the possibility of a search warrant he would not have refused the breath test.

The defendant also cannot prove the third element, which was that he was injured. The search warrant was validly obtained, and evidence of the crime of Driving Under the Influence discovered. Discovery of incriminating evidence alone does not constitute injury under the

principles of equitable estoppel

The defendant has also failed to show that there was a manifest error affecting an important constitutional right. There is nothing that bars an officer from obtaining a search warrant after a defendant refuses a voluntary blood test. This is a search and seizure case, just like any other. DUI defendants are not afforded extra protections under the Fourth Amendment. (See arguments above). Although the defendant cites to Raley v. Ohio, 360 U.S. 324, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), that case is distinguishable. In Raley, the defendants were essentially entrapped into committing a crime by the government, which failed to inform them that they could not invoke their Fifth Amendment privilege while testifying before an Ohio state commission investigating “Un-American” activities. Believing that they were therefore protected and not subject to criminal prosecution, the invoked the Fifth Amendment and refused to answer questions, thus committing a crime.

Here, the defendant had already completed the crime of Driving Under the Influence, before he ever encountered Officer Michl or was advised of any rights or methods of collecting evidence. Officer Michl did not inform him that he could freely drink a gallon of vodka and then freely drive in the State of Washington, and then arrest him for doing so. Officer

Michl properly informed him of his legislatively created “right” to refuse a breath test, and then obtained a search warrant when he refused. This sequence of events has been upheld under the Fourth Amendment. See State v. Johnson, 104 Wn.App. 489 (2001).

If equitable estoppel were to be applied in these kinds of cases, it would hamper the legitimate function of the government in lawfully gathering evidence of criminal activity. Just as the government can and should lawfully obtain search warrants to obtain evidence in any other kind of case, its ability to do so should not be constrained in DUI cases. Without the evidence of breath or blood alcohol levels, prosecution in this case and many others would be severely impaired, subverting the goals of the DUI laws.

The defendant did not raise this issue in the trial court, cannot prove any element of equitable estoppel, and cannot show there was a manifest error affecting an important constitutional right. Therefore, discretionary review should be denied.

**C. No issues of public interest are addressed in this case that have not been addressed previously by this court.**

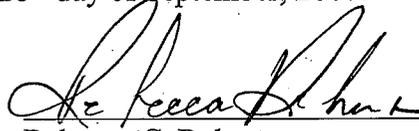
The Superior Court was correct in finding that the implied consent warnings do not prohibit the obtaining of a search warrant for a blood test in a DUI or Physical Control case. Defense counsel now attempts to argue

issues that were not brought before the Seattle Municipal Court or the Superior Court. Statutes and case law do not prohibit the government from obtaining a search warrant for evidence after a defendant has refused to voluntarily hand over that evidence. These issues have been addressed in other cases, and therefore discretionary review should be denied.

**IV. CONCLUSION**

For the foregoing reasons the Court should deny the Petitioner's request for discretionary review.

Respectfully submitted this 28<sup>th</sup> day of September, 2007.

A handwritten signature in black ink, appearing to read "Rebecca C. Robertson", written over a horizontal line.

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