72501-7

FILED
June 1, 2015
Court of Appeals
Division I
State of Washington

72501-7

NO. 72501-7-I

No. 92930-1

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

STATE OF WASHINGTON,

Petitioner,

v.

JUDITH ELAINE MURRAY,

Respondent.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 2

A. CIRCUMSTANCES OF THE INVESTIGATION. 2

B. SUPPRESSION MOTION AND RULING IN TRIAL COURT. 4

C. DECISION OF THE RALJ COURT REVERSING THE TRIAL COURT. 7

IV. ARGUMENT 8

A. STANDARD OF REVIEW. 8

B. THE IMPLIED CONSENT WARNING STATUTE DOES NOT REQUIRE GIVING WARNINGS REGARDING THC CONCENTRATION IN BLOOD TO BREATH TEST SUBJECTS.... 8

C. OFFICERS HAVE DISCRETION TO OMIT IRRELEVANT INFORMATION FROM THE IMPLIED CONSENT WARNINGS... 10

D. THE WARNINGS GIVEN TO DEFENDANT WERE NEITHER INCOMPLETE NOR MISLEADING. 11

E. DEFENDANT IS REQUIRED TO SHOW ACTUAL PREJUDICE FROM THE IMPLIED CONSENT WARNINGS. 13

F. THE IMPLIED CONSENT WARNINGS PERMITTED DEFENDANT TO MAKE A KNOWING AND INTELLIGENT DECISION TO SUBMIT TO THE BREATH TEST 15

V. CONCLUSION 18

TABLE OF AUTHORITIES

WASHINGTON CASES

Allen v. Dep't of Licensing, 169 Wn. App. 304, 279 P.3d 963 (2012) 10, 13, 14
Connolly v. Dep't of Motor Vehicles, 79 Wn.2d 500, 487 P.2d 1050 (1971) 14
Cooper v. Dep't of Licensing, 61 Wn. App. 525, 810 P.2d 1385 (1991) 15
Dep't of Licensing v. Grewal, 108 Wn. App. 815, 33 P.3d 94 (2001) 11, 12, 13, 14, 15
Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 734 P.2d 24 (1987) 16
Gonzales v. Dep't of Licensing, 112 Wn.2d 890, 774 P.2d 1187 (1989) 14
Jury v. Dep't of Licensing, 114 Wn. App. 726, 60 P.3d 615 (2002) 8, 10, 12, 16
Lynch v. Dept. of Licensing, 163 Wn. App. 697, 262 P.3d 65 (2011) 1, 7, 8, 9, 12, 14
Mairs v. Dep't of Licensing, 70 Wn. App. 541, 854 P.2d 665 (1993) 14
Pattison v. Dep't of Licensing, 112 Wn. App. 670, 50 P.3d 295 (2002) 10
Paulson v. Dep't of Licensing, 42 Wn. App. 362, 710 P.2d 211 (1985) 16
State v. Arreola, 176 Wn.2d 284, 290 P.3d 983 (2012) 8
State v. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989) ... 12, 13, 14
State v. Bostrom, 127 Wn.2d 580, 902 P.2d 157 (1995) 9, 11, 15
State v. Elkins, 152 Wn. App. 871, 220 P.3d 211 (2009) 13
State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005) 8
State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 8
State v. Koch, 126 Wn. App. 589, 103 P.3d 1280 (2005).. 12, 15, 16
State v. Richardson, 81 Wn.2d 111, 499 P.2d 1264 (1972) 11
State v. Smith, 93 Wn.2d 329, 610 P.2d 869 (1980) 1
State v. Staeheli, 102 Wn.2d 305, 685 P.2d 591 (1984) 16
State v. Whitman County Dist. Court, 105 Wn.2d 278, 714 P.2d 1183 (1986) 14

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) 8
Strand v. State Dep't of Motor Vehicles, 8 Wn. App. 877, 509 P.2d 999 (1973) 16
Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 831 P.2d 149 (1992) 10

WASHINGTON STATUTES

RCW 46.20.308 ..... 8, 9, 11

I. ASSIGNMENTS OF ERROR

The Superior Court on RALJ appeal erred in the following conclusions:

> ***
>
> 9. Officers do not have discretion to decide which of the required warnings are given to subjects suspected to have consumed both alcohol and THC;[1]
>
> 10. For the reasons stated above, the [sic] Ms. Murray's appeal is granted and the case is remanded for proceeding consistent with this decision.

CP 6, Decision and Order on RALJ Appeal.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Since THC[2] cannot be detected by a breath test, should the results of a breath test be suppressed because defendant was not advised of the consequences of a positive result for THC concentration in blood?

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[1] This conclusion is contrary to conclusion 5, "When the officer knows that certain warnings do not apply, under Lynch v. Dept. of Licensing, 163 Wn. App. 697, 262 P.3d 65 (2011), the officer may have discretion to omit certain warnings, namely commercial driver's license-related warnings and warnings related to drivers under the age of 21;" and conclusion 6, "Under Lynch Officers may also paraphrase the required warnings, but are required to give the entire substance of the warning." CP 6.

[2] Tetrahydrocannabiniol (THC) is the chief active ingredient in marijuana, and the one largely responsible for its effects. State v. Smith, 93 Wn.2d 329, 333, 610 P.2d 869 (1980).

III. STATEMENT OF THE CASE

A. CIRCUMSTANCES OF THE INVESTIGATION.

The factual findings of the Snohomish County District Court—Cascade Division, are not in dispute. On December 8, 2012, at approximately 8:10 p.m., Trooper Gerrer stopped a vehicle driven by Judith Elaine Murray, defendant, for traffic violations. Trooper Gerrer could smell an odor of intoxicants coming from the vehicle and observed that defendant's eyes were bloodshot and watery. Defendant stated that she had just returned from Florida, was tired, and that she had taken Xanax that morning. Trooper Gerrer detected the odor of intoxicants on defendant's breath. Defendant stated that she had a couple drinks at the casino. Her speech was extremely slurred. Defendant agreed to perform field sobriety tests and declined the portable breath test. Following field sobriety tests defendant was arrested for DUI; she appeared confused. At the time of arrest, the only indication that defendant's impairment was from anything other than alcohol was her statement that she had taken Xanax that morning. Trooper

Gerrer's observations, training and experience indicated alcohol impairment. CP 24-27; 1RP[3] 2-8.

During an inventory search of defendant's vehicle, Trooper Gerrer observed a pipe and a baggie containing a small amount of marijuana. Defendant stated that she had smoked some marijuana earlier that day. Defendant was read the implied consent warnings for a breath test. Defendant did not express any confusion regarding the implied consent warnings and agreed to take the breath test. Because defendant was not under age twenty-one, was not driving a commercial vehicle, and did not have a commercial driver's license, Trooper Gerrer did not read the portions of the implied consent warnings pertaining to persons in those categories. The breath test does not detect THC. The implied consent warnings read to defendant did not include language regarding THC. CP 27-28, 254; 1RP 9-10.

During the mouth check, the trooper observed green, raised taste buds on defendant's tongue. Defendant provided two breath samples that showed levels over the legal limit for alcohol. After obtaining the results of the breath test, Trooper Gerrer felt that

[3] The report of proceedings for the December 9, 2013 motion hearing is referred to as 1RP. The report of proceedings for the July 16, 2014 RALJ hearing is referred to as 2RP.

defendant's level of intoxication was much higher than the alcohol concentration shown by the breath test. Since the breath test results were over the limit for alcohol, Trooper Gerrer did not attempt to obtain a blood test. Defendant was informed about her right to obtain additional tests. CP 28-29; 1RP 10,13-14.

B. SUPPRESSION MOTION AND RULING IN TRIAL COURT.

Defendant was charged with DUI. She filed a motion to suppress the breath test.[4] A testimonial hearing was held December 9, 2013, in the Snohomish County District Court—Cascade Division. Trooper Gerrer was the only witness. The court reviewed the Implied Consent Warnings For Breath Form read to defendant. The warnings provided in pertinent parts:

> FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION.
>
> 1. YOU ARE NOW ADVISED THAT YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE:
>
> > (A) YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE REVOKED OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST ONE YEAR; AND

[4] Defendant included a motion to suppress evidence based on the legality of the stop. The trial court denied the motion and defendant did not appeal that decision.

> (B) YOUR REFUSAL TO SUBMIT TO THIS TEST MAY BE USED IN A CRIMINAL TRIAL.
>
> 2. YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST, AND THE TEST IS ADMINISTERED, YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE SUSPENDED, REVOKED, OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST NINETY DAYS IF YOU ARE:
>
> (A) AGE TWENTY–ONE OR OVER AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.08 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE;
>
> ***

CP 27-28, 254. The court also considered the "new" Implied Consent Warnings For Breath Form used by the Washington State Patrol.[5] Defendant argued she was not provided with the statutorily required implied consent warnings regarding THC.[6] The State argued the implied consent warnings read to defendant were sufficient to provide her the opportunity to make a knowing and

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[5] The "new" form includes the language, "or that the THC concentration of the driver's blood is 5.00 of more" and neutralizing language stating, "The DataMaster will not test for THC concentration in a breath sample." CP 205.

[6] Defendant also argued that she was not provided with the statutorily required warnings regarding commercial drivers and persons less than 21 years of age. CP 194. The trial court denied the motion on the grounds that defendant was not a commercial driver and was not under the age of 21 years. CP 30-32. Defendant did not appeal that part of the trial court's decision.

intelligent decision whether to take or refuse the breath test, and that defendant did not demonstrate actual prejudice. CP 29, 192-201, 213-228; 1RP 20-29, 35-36.

The trial court denied defendant's motion to suppress the breath test concluding: The implied consent statute does not require that all the warnings be read, only those warnings needed to provide the defendant with an opportunity to make a knowing, intelligent and voluntary decision on whether to take a breath test. Further, warning a subject who is being asked to submit to a breath test—a test that cannot obtain THC concentrations—about the level of THC concentration in their blood would be confusing and is not required under the plain language of the implied consent statue. Here, the warnings that were read allowed defendant to make a knowing and intelligent decision about whether to submit to a breath test to obtain an alcohol concentration. CP 30-33; 1RP 36-38. Defendant was found guilty following a bench trial and timely appealed the district court's denial of the motion to suppress the breath test. CP 258-259.

C. DECISION OF THE RALJ COURT REVERSING THE TRIAL COURT.

The Superior Court on RALJ appeal concluded: The officer made a valid DUI stop and arrest based upon his suspicion of alcohol intoxication. The officer knew that other substances, marijuana and Xanax were involved in the case. Under Lynch v. Dept. of Licensing, 163 Wn. App. 697, 262 P.2d 65 (2011), Officers may have discretion to omit certain warnings that do not apply, and may also paraphrase the required warnings. However, because a decision to participate or not participate in the test impacts the obligations, rights, and potential defenses at trial, due process requires that the decision be made upon complete information, Officers do not have discretion to decide which of the required warnings are given to subjects suspected to have consumed both alcohol and THC. See RALJ Court's written decision (copy attached as Appendix). The RALJ court reversed the district court, and remanded for further proceeding consistent with its ruling. CP 5-7; 2RP 2-5. The State timely sought discretionary review in this Court. CP 1.

IV. ARGUMENT

A. STANDARD OF REVIEW.

A trial court's ruling on a motion to suppress evidence is reviewed to determine whether substantial evidence supports the trial court's factual findings and whether the factual findings support the trial court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are verities on appeal. State v. Arreola, 176 Wn.2d 284, 288, 290 P.3d 983 (2012); State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The validity of implied consent warnings is a question of law reviewed de novo. Lynch, 163 Wn. App. at 705; Jury v. Dep't of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002).

B. THE IMPLIED CONSENT WARNING STATUTE DOES NOT REQUIRE GIVING WARNINGS REGARDING THC CONCENTRATION IN BLOOD TO BREATH TEST SUBJECTS.

Washington's implied consent statute, RCW 46.20.308, "was enacted (1) to discourage persons from driving motor vehicles while under the influence of alcohol or drugs, (2) to remove the driving privileges of those persons disposed to driving while intoxicated, and (3) to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication." Lynch v. Dep't of Licensing, 163

Wn. App. 697, 705, 262 P.3d 65 (2011). These identified legislative goals must be harmonized with the underlying purpose of the warning provision; to provide drivers an opportunity to make an informed decision about refusing a breath test. State v. Bostrom, 127 Wn.2d 580, 588, 902 P.2d 157 (1995). The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace. Bostrom, 127 Wn.2d at 590. The implied consent statute provides in pertinent parts:

> (2) ... The officer shall inform the person of his or her right to refuse the breath test .... The officer shall warn the driver, in substantially the following language, that:
>
> ***
>
> (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:
> (i) The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver's breath is 0.08 or more or that the THC concentration of the driver's blood is 5.00 or more; or
>
> ***

RCW 46.20.308(2).

The exact words of the implied consent statute are not required so long as the meaning implied or conveyed is not different from that required by the statute. Lynch, 163 Wn. App. at 707 ("A warning, either in general language or in statutory terms, which neither misleads nor is inaccurate and which permits the

suspect to make inquiries for further details is adequate."); Jury, 114 Wn. App. at 732. A warning is neither inaccurate nor misleading as long as "no different meaning is implied or conveyed." Pattison v. Dep't of Licensing, 112 Wn. App. 670, 674, 50 P.3d 295 (2002); Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 785, 831 P.2d 149 (1992). The warnings must permit a person of normal intelligence to understand the consequences of his or her actions. Allen v. Dep't of Licensing, 169 Wn. App. 304, 306, 279 P.3d 963 (2012). It is difficult to imagine how information regarding THC concentration in a driver's *blood* could significantly influence a decision regarding whether to submit to a test to determine alcohol concentration in a driver's *breath*. The RALJ court erred when it concluded that the statute requires giving the warning regarding THC concentration in blood to a driver being asked to submit to a breath test.

C. OFFICERS HAVE DISCRETION TO OMIT IRRELEVANT INFORMATION FROM THE IMPLIED CONSENT WARNINGS.

The RALJ court's conclusion, that regardless of whether the language is irrelevant, the warning regarding THC concentration in blood must be included when a driver is requested to take a breath test for alcohol concentration. The Court has rejected a similar

argument. State v. Richardson, 81 Wn.2d 111, 499 P.2d 1264 (1972) (advising driver that he had the right to have additional tests made by a qualified person was sufficient without stating that the test may only be performed by a physician, a registered nurse, or a qualified technician). "We think it can be assumed rather safely that a person under the influence of intoxicating liquor will be better able to grasp a brief statement of his rights than a lengthy exposition of them." Richardson, 81 Wn.2d at 116. The RALJ court erred as a matter of law when it concluded that the officer could not omit irrelevant information from the implied consent warnings.

D. THE WARNINGS GIVEN TO DEFENDANT WERE NEITHER INCOMPLETE NOR MISLEADING.

Trooper Gerrer provided defendant with written warnings prior to administering the breath test. CP 27-28, 254; 1RP 9-10. Except for the reference to THC concentration of the driver's *blood*, which is not relevant to a *breath* test, the implied consent warnings read to defendant contained all the statutorily required warnings for a breath test under RCW 46.20.308. Legally accurate warnings do not trigger suppression, even if elements or adverse consequences are left out. Bostrom, 127 Wn.2d at 588-589; Dep't of Licensing v.

Grewal, 108 Wn. App. 815, 822, 33 P.3d 94 (2001). "In evaluating the adequacy of implied consent warnings, the issue is whether the warnings gave the defendant an opportunity to knowingly and intelligently decide whether to take an evidentiary breath test." State v. Koch, 126 Wn. App. 589, 594, 103 P.3d 1280 (2005). These standards are met if the warning permits a person of normal intelligence to understand the consequences of her actions. Id. at 595; Jury, 114 Wn. App. at 731. The driver only needs to have the opportunity to exercise informed judgment. Lynch, 163 Wn. App. at 707. Defendant did not contend that she was in fact deceived, confused or misled by the warnings she was read. Rather, defendant argued that the THC language must be included when a driver is requested to take a breath test for alcohol concentration regardless of whether it is confusing or misleading.

Defendant has not shown that the warnings she received falsely encouraged her to submit to the breath test. Nor has defendant shown how she was misled by not including the language, "the TCH concentration of the driver's blood is 5.00 or more," in the warnings she was read. Suppression of test results is required only for defendants who were part of a group misled by erroneous warnings. State v. Bartels, 112 Wn.2d 882, 889-890,

774 P.2d 1183 (1989); State v. Elkins, 152 Wn. App. 871, 877-878, 220 P.3d 211 (2009). There was nothing misleading about the implied consent warnings given to defendant.

E. DEFENDANT IS REQUIRED TO SHOW ACTUAL PREJUDICE FROM THE IMPLIED CONSENT WARNINGS.

Before the result of a breath test will be suppressed defendant must show that the implied consent warnings given were inaccurate, and must also demonstrate that she was actually prejudiced by the warnings. Bartels, 112 Wn.2d at 889-890; Allen, 169 Wn. App. at 309; Grewal, 108 Wn. App. at 822. Washington courts have held that warnings were inaccurate or misleading when (1) the arresting officer failed to inform driver of the right to take additional tests; (2) the arresting officer stated that a refusal "shall," as opposed to "may," be used in a criminal trial; (3) the arresting officer attempted to clarify the warnings by telling the driver that her license would "probably" be suspended if she refused the test; (4) the arresting officer told the driver that if he refused to take the test, his license would be revoked "probably for at least a year," which the court found to be inaccurate because it "implies that a possibility exists that [the driver's] license might be revoked for less than 1 year"; and (5) the arresting officer informed the driver that

additional tests would be at his own expense, failing to inform the driver that, if the driver was indigent, the costs would be waived. Lynch, 163 Wn. App. at 708 (citations omitted). Even if the warnings were inaccurate or misleading, defendant still must demonstrate how she was actually prejudiced. Bartels, 112 Wn.2d at 889-890; Allen, 169 Wn. App. at 316-317; Grewal, 108 Wn. App. at 822. The cases where prejudice has been found all involved warnings that were legally inaccurate. E.g., Bartels, 112 Wn.2d at 889, (adding "at your own expense" to the defendant's right to additional testing, misleading to indigent defendants); Gonzales v. Dep't of Licensing, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989) (companion case to Bartels in revocation context); State v. Whitman County Dist. Court, 105 Wn.2d 278, 285-287, 714 P.2d 1183 (1986) (warning that refusal "shall" be used in a criminal trial, instead of "may" be used, misleading when admissibility of refusal evidence was uncertain under the existing law); Connolly v. Dep't of Motor Vehicles, 79 Wn.2d 500, 504, 487 P.2d 1050 (1971) (failing to inform driver of the right to take additional tests); Mairs v. Dep't of Licensing, 70 Wn. App. 541, 546, 854 P.2d 665 (1993) (attempting to clarify the warnings by telling the driver that her license would "probably" be suspended if she refused the test was confusing and

misstated the law); Cooper v. Dep't of Licensing, 61 Wn. App. 525, 528, 810 P.2d 1385 (1991) (adding revocation would be "probably for at least a year" was misleading when one-year revocation is a certainty). Legally accurate warnings do not trigger suppression, even if elements or adverse consequences are left out. Bostrom, 127 Wn.2d at 590-592; Grewal, 108 Wn. App. at 822.

In the present case, defendant did not establish prejudice. She chose to submit to the *breath* test knowing that she could be found guilty of DUI and that her license would be suspended if the alcohol in her system was over 0.08. Defendant has not shown how knowledge that if THC concentration in her *blood* was over 5.00 would have influenced him to make a different choice regarding taking the *breath* test. The RALJ court erred by not requiring defendant to show actual prejudice.

F. THE IMPLIED CONSENT WARNINGS PERMITTED DEFENDANT TO MAKE A KNOWING AND INTELLIGENT DECISION TO SUBMIT TO THE BREATH TEST.

"In evaluating the adequacy of implied consent warnings, the issue is whether the warnings gave the defendant an opportunity to knowingly and intelligently decide whether to take an evidentiary breath test." State v. Koch, 126 Wn. App. 589, 594, 103 P.3d 1280 (2005). These standards are met if the warning permits a person of

normal intelligence to understand the consequences of her actions. Koch, 126 Wn. App. at 595; Jury, 114 Wn. App. at 731. The driver only needs to have the opportunity to exercise informed judgment. Lynch, 163 Wn. App. at 707.

Washington Courts have declined to follow cases from other jurisdictions that presume confusion. State v. Staeheli, 102 Wn.2d 305, 310, 685 P.2d 591 (1984); Paulson v. Dep't of Licensing, 42 Wn. App. 362, 363, 710 P.2d 211 (1985) (the confusion doctrine rule presumes confusion from the driver's insistence upon counsel after *Miranda* warnings have been given). When a confusion defense is presented, a finding as to whether or not the defendant explicitly exhibited his lack of understanding must be entered. Strand v. State Dep't of Motor Vehicles, 8 Wn. App. 877, 883, 509 P.2d 999 (1973). The burden of showing that she made her confusion apparent to the officer is upon the driver who proposes such a defense. Id. A lack of understanding not made apparent to an officer is of no consequence. Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 71, 734 P.2d 24 (1987). In the present case, defendant did not assert a confusion defense. On the contrary, defendant indicated that she did not "express any confusion

regarding the implied consent warnings" by initialing the "NO" box on the Implied Consent Warnings For Breath Form. CP 254.

Here, the trial court's unchallenged findings were that Trooper Gerrer detected the odor of intoxicants and defendant admitted having consumed alcohol. Defendant was offered a breath test that was incapable of testing for THC concentration in blood. After being given the implied consent warnings, defendant expressly agreed to take the tests by initialing the "YES" box on the form. CP 25, 28, 254. Substantial evidence supported the trial court's determination that the warnings read to defendant gave her the opportunity to make a knowing and intelligent decision whether to take the breath test. CP 27-29, 254; 1RP 9-10. The RALJ court erred by reversing the trial court's denial of defendant's motion to suppress the breath test.

V. CONCLUSION

For the reasons stated above, the decision of the RALJ court should be reversed.

Respectfully submitted on this 1st day of June, 2015,

MARK K. ROE
Snohomish County Prosecutor

By: _____
JOHN J. JUHL, #18951
Deputy Prosecuting Attorney
Attorney for Petitioner

FILED

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COUNTY CLERK
SNOHOMISH CO. WASH

SNOHOMISH COUNTY SUPERIOR COURT

STATE OF WASHINGTON Respondent, v. **JUDITH MURRAY,** Appellant.	No. **13-1-02618-4** (Cascade District cause 9050A-12D) DECISION AND **ORDER ON RALJ APPEAL** CLERKS ACTION REQUIRED

THIS MATTER having come before the Court upon RALJ appeal from rulings of the District Court and subsequent conviction;

THE COURT, having considered the record on appeal as well as the briefs and argument of the parties, and being fully advised;

THE COURT CONCLUDES:

1. The waiver of the right to a jury trial was valid because it was made knowingly, voluntarily, intelligently, and Ms. Murray obtained an advantage as a result of it, so appeal on this basis is denied;
2. The State is not collaterally estopped from re-litigating the propriety of the

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missing THC-related Implied Consent Warnings;

3. The officer made a valid DUI stop and arrest based upon his suspicion of alcohol intoxication;
4. Given Ms. Murray's admission to taking Xanex, the officer's observation of marijuana in the vehicle, Ms. Murray's repeated admission to smoking marijuana earlier in the day, the officer knew that other substances were involved in the case;
5. When the officer knows that certain warnings do not apply, under Lynch v. Dept of Licensing, 163 Wn. App. 697, 262 P.3d 65 (2011), the officer may have discretion to omit certain warnings, namely commercial driver's license-related warnings and warnings related to drivers under the age of 21;
6. Under Lynch Officers may also paraphrase the required warnings, but are required to give the entire substance of the warning;
7. It is Ms. Murray's due process right to make a decision to participate in the test or not;
8. Because that decision impacts the obligations, rights, and potential defenses Ms. Murray would face at trial, due process requires that decision be made upon complete information;
9. Officers do not have discretion to decide which of the required warnings are given to subjects suspected to have consumed both alcohol and THC;
10. For the reasons stated above, the Ms. Murray's appeal is granted and the case is remanded for proceedings consistent with this decision.

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//

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ORDER

The Clerk of Court is directed to transmit written notification of this decision to the Cascade Division, Snohomish County District Court, and to the parties, not less than 30 days, nor more than 60 days from filing this decision.

DATED this 25 day of Aug, 2014.

The Honorable Judge Richard T. Okrent

Presented by:

Braden Pence; WSBA# 43495
Attorney for Defendant

Approved as to form:

John Juhl; WSBA# 18951
Deputy Prosecuting Attorney

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

THE STATE OF WASHINGTON, Petitioner, v. JUDITH E. MURRAY, Respondent.	No. 72501-7-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 1st day of June, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF PETITIONER

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Braden Pence, Attorney at Law, Snohomish County Public Defender's Office, bpence@snocopda.org; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of June, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office