

COA NO. 66357-7-I

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

REC'D
MAR 31 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PEBLEY, JR,

Appellant.

26

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's petition for writ of habeas corpus. CP 34-37.

2. The pre-trial release condition that appellant attend Alcoholics Anonymous meetings is invalid under CrRLJ 3.2 and violates appellant's constitutional rights to autonomy and confidentiality, the right against self-incrimination and the Establishment Clause of the First Amendment.

3. The superior court erred in determining the Alcoholics Anonymous meeting requirement was justified on the ground that appellant's criminal history showed a risk of failure to appear in court. CP 36.

4. The pre-trial release condition that appellant not refuse a blood or breath test upon reasonable request from law enforcement is invalid under CrRLJ 3.2 and violates the separation of powers doctrine.

Issues Pertaining to Assignments of Error

1. Should this Court strike the pre-trial release condition that appellant attend Alcoholics Anonymous meetings because the condition is (a) unnecessary to ensure future court appearances; (2) treats appellant like a convict rather than a person who is presumed innocent; (3) and violates his constitutional rights to autonomy and confidentiality, the right to avoid self-

incrimination, and the right to be free from coerced religious activity under the Establishment Clause of the First Amendment?

2. Should this Court strike the pre-trial release condition that appellant submit to blood or breath tests upon reasonable law enforcement request because the condition is (a) unduly onerous in requiring appellant to forfeit his statutory right to refuse such tests; (b) treats appellant like a convict rather than a person who is presumed innocent, (c) not the least restrictive means available to reasonably ensure protection of the community; and (d) violates the separation of powers doctrine by allowing a court rule to trump a substantive statutory right?

B. STATEMENT OF THE CASE

Michael Pebley, Jr. appeared for arraignment on September 22, 2010 in front of Judge Eileen Kato in King County District Court on one count of driving while under the influence (DUI). CP 17-22. Pebley pleaded not guilty. CP 19. Without input from either party and before any discussion of pre-trial release took place, Judge Kato told Pebley "Okay, and during the pendency of this case you'll have no further criminal law violations, no alcohol-related infractions, no driving unless you do have a valid license and insurance, and no refusals of any blood or breath test upon reasonably requested [sic] by law enforcement." CP 19. The

language referring to the blood/breath test condition was pre-printed in a form and made applicable by checking a box. CP 12.

The prosecutor requested imposition of additional pre-trial release conditions in the form of an ignition interlock and \$30,000 bail. CP 20. The prosecutor represented this was Pebley's "alleged fifth DUI". CP 20. However, the charge relating to a DUI arrest subsequent to this case was dismissed. CP 20. The prosecutor "pointed out" Pebley failed to appear on February 5. CP 20. In actuality, Pebley missed that February court date because he was in custody on another matter in Pierce County at the time. CP 14, 20. The defense requested the court to release Pebley on his own recognizance. CP 20.

Judge Kato required Pebley to install an interlock ignition device on any vehicle that he drove during the pendency of this case. CP 12, 21. The court also ordered Pebley to attend three Alcoholics Anonymous (A.A.) meetings a week with proof of compliance required at every court hearing. CP 12, 21.

Defense counsel objected to the A.A. meeting requirement. CP 21. Judge Kato said this condition was "specific to the criminal history here of Mr. Pebley, and that's why it's being imposed." CP 21.

Pebley filed a petition for writ of habeas corpus in King County Superior Court, challenging the legality of two release conditions: (1)

imposition of requirement to attend three weekly A.A. meetings and (2) imposition of requirement to not refuse a blood or breath test upon reasonable request of law enforcement. CP 1-22.

Defense counsel argued the meeting requirement was invalid under Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007) (holding pre-trial release conditions of alcohol evaluation following recommended treatment, and three self-help meetings each week were not authorized by court rule and violated the United States and Washington constitutions). CP 6-9. Counsel further argued the blood/breath test requirement was invalid on various grounds. CP 1-10, 30-33. One ground was that the tests violated Pebley's constitutional right to privacy. CP 30-33. Another ground was that the condition impermissibly sacrificed Pebley's statutory right to refuse such tests. CP 9; RP 12-14.

The State argued the blood/breath test condition was legal. CP 23-28. The State, however, conceded the court could not legally require Pebley to attend A.A. meetings as a pre-trial release condition. RP¹ 5-6, 24. The State further noted it had not even requested the A.A. condition as part of Pebley's pre-trial release. RP 6.

¹ The verbatim report of proceedings is referenced as follows: RP - 10/27/10.

Superior Court Judge Palmer Robinson denied Pebley's writ of habeas corpus. CP 34-37. Judge Robinson refused to accept the State's concession on the A.A. requirement. CP 36. Judge Robinson concluded "Mr. Pebley has a history from which it is reasonable to conclude both a substance-abuse [sic] problem exists and that it imposes a treat [sic] to community safety and a risk of failure to appear." CP 36. Judge Robinson also rejected Pebley's Fourth Amendment challenge to the breath/blood test requirement, concluding "Whether the totality of circumstances supports the request can only be determined once the request is made." CP 36-37. The court did not address Pebley's alternative argument that the test condition impermissibly violated his statutory right to refuse the test. CP 33-37. This appeal follows. CP 38-42.

C. ARGUMENT

1. THE PRE-TRIAL RELEASE REQUIREMENT THAT PEBLEY ATTEND ALCOHOLICS ANONYMOUS IS ILLEGAL.

As a pre-trial condition of release, Judge Kato imposed "3 AA[']s/week w/ proof req'd at each ct hg." CP 12. The "AA[']s" referred to Alcoholics Anonymous meetings, which are a form of self-help support group. CP 21. Judge Robinson, sitting in superior court, denied Pebley's writ of habeas corpus challenging this condition. CP 36.

In a writ of habeas corpus action, the petitioner does not seek review of another court's decision, but rather sets forth allegations detailing the unlawfulness of detention. Butler, 137 Wn. App. at 520-21. This Court reviews writ actions of the superior court de novo. Id. at 521.

Furthermore, "[t]he application of a court rule to particular facts is a question of law reviewable de novo." Id. A claimed denial of constitutional rights is also reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009)

CrRLJ 3.2 governs conditions of pretrial release. Release from pretrial detention on personal recognizance is presumed. Butler, 137 Wn. App. at 521; CrRLJ 3.2(a). The presumption of release may be overcome if the court determines that such recognizance will not reasonably assure the accused's appearance when required, or when there is shown a likely danger that the accused will commit a violent crime. Butler, 137 Wn. App. at 521; CrRLJ 3.2(a)(1), (2). "If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the *least restrictive* . . . conditions that will reasonably assure that the accused will be present for later hearings." Butler, 137 Wn. App. at 521 (quoting CrRLJ 3.2(b)).

The A.A. meeting requirement is unlawful because it is not needed to ensure Pebley' appearance in court under CrRLJ 3.2 and is otherwise unconstitutional. Butler v. Kato is instructive.

In that case, Butler was charged with DUI after allegedly causing an automobile accident. Butler, 137 Wn. App. at 519. Judge Kato, sitting in district court, released him on the condition he undergo an alcohol evaluation, comply with any recommended treatment, and attend three self-help meetings each week, providing the court with proof of compliance with those conditions. Id. The superior court denied Butler's writ of habeas corpus challenging the conditions. Id. This Court granted Butler's writ, holding the conditions imposed on Butler's pretrial release were not authorized by CrRLJ 3.2 and also violated the United States and Washington constitutions. Id.

In Butler, the self-help meeting condition was not authorized under the court rule as a means to ensure future appearance. Id. at 522-24. Because the record did not show Butler would fail to appear in court, imposing thrice weekly A.A. meetings did not comport with the requirement that the court "shall impose the least restrictive" conditions that will reasonably assure that he do so. Id. at 523.

Judge Kato imposed the A.A. condition on Pebley based on his "criminal history." CP 21. Judge Robinson ruled the A.A. condition was

justified because Pebley's criminal history raised a risk of failure to appear.
CP 36.

Pebley had a criminal history consisting of multiple DUI convictions. The record does not show Pebley had any history of failing to appear in connection with those previous cases. The State had the burden of rebutting the presumption of release with a showing that the condition was necessary to ensure Pebley's future appearance. Butler, 137 Wn. App. at 523. The simple presence of criminal DUI history is not enough to rebut the presumption that an accused is likely to appear.

"Certain crimes are logically related to the likelihood that the accused will not return to court as promised." Id. at 522. Driving under the influence is not among them. Id. "Bail jumping, escape, perjury, and intimidating a judge all have a nexus intimating a disrespect for the judicial process 'relevant to the risk of nonappearance.'" Id. at 522-23. Pebley did not have a record of any of those types of offenses.

Further, Pebley never voluntarily failed to appear in connection with the present case. He involuntarily missed one earlier court date because he was incarcerated elsewhere — a fact recognized by Judge Robinson. CP 14, 35 ("It is not clear whether he was in custody on a subsequent charge for DUI, which has been dismissed, or some other charge."). Pebley's inability to appear in court because he was rendered

incapable of complying through incarceration cannot be used to show a risk of voluntarily failing to appear if he were not required to attend A.A. meetings.

Judge Kato cited Pebley's criminal history as a reason to impose this condition but made no factual finding that Pebley was unlikely to appear. CP 21; cf. State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008) (urinalysis testing as condition of pre-trial release for defendant who had past bail forfeiture unjustified where trial court never found defendant was unlikely to appear for future court dates but instead relied on condition as standard for drug cases).

Judge Robinson determined there was a risk of failure to appear, pointing to Pebley's criminal DUI history and the earlier missed court date in the present case. CP 36. That determination, which is subject to de novo review, is not well taken for the reasons set forth above. This record does not show risk of failure to appear in the absence of A.A. meetings.

Judge Robinson also determined the A.A. meeting requirement was justified because Pebley was a threat to community safety. CP 36. At the writ hearing, defense counsel said she was not disturbing the "trial court's finding of dangerousness" but rather challenged the conditions

"despite the finding of dangerousness." RP 12.² The record does not reveal Judge Kato made any finding of dangerousness.

Assuming Pebley posed a danger under CrRLJ 3.2, the self-help meeting requirement is still unconstitutional and should be stricken. Criminal rules for courts of limited jurisdiction cannot diminish constitutional rights. City of Auburn v. Brooke, 119 Wn.2d 623, 632-33, 836 P.2d 212 (1992) (citing State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (court cannot sustain an interpretation of a court rule which contravenes the constitution)); CrRLJ 1.1 ("These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.").

Butler controls the outcome here. This Court in Butler held the self-help meeting requirement was an unconstitutional condition of pre-trial release. Butler, 137 Wn. App. at 519. Judge Robinson nonetheless concluded Butler did not hold the self-help meeting requirement in and of itself was unconstitutional, apparently believing the A.A. requirement became unconstitutional only when considered in conjunction with an evaluation and treatment requirement. CP 36.

² Judge Robinson did not believe the defense had conceded Pebley was an extreme danger to the community. RP 23.

A trial court's interpretation of case law is reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). Judge Robinson's reading of Butler is flawed.

This Court in Butler recognized CrRLJ(d)(10) permitted the trial court to impose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community. Butler, 137 Wn. App. at 524. However, "[t]he court may not impose onerous or unconstitutional provisions where lesser conditions are available to ensure the public is protected against potential violent acts. To do so is an abuse of judicial discretion." Id.

In Butler, this Court rejected the State's attempted minimization of "the implications of mandatory evaluation and treatment (and the thrice weekly AA meetings) for Butler's rights" because "imposing affirmative requirements, as the court has on Butler, could involve serious restrictions on his constitutional rights." Id. at 525. This Court held both the evaluation/treatment requirement *and* the self-help meeting requirement were unconstitutional: "We conclude that the challenged conditions on pretrial release are not permitted by CrRLJ 3.2 or the federal and state constitutions." Id. at 532.

This Court's legal reasoning encompassed both the evaluation/treatment and self-help meeting conditions of pre-trial release.

The Court was clearly troubled by the mandatory evaluation/treatment condition, but included the mandatory self-help meeting condition in its analysis of why each condition was unconstitutional and needed to be stricken: "The conditions imposed were 'direct commands' and certainly constrained his right to autonomous decision-making, his right against self-incrimination, and his right to confidentiality." Butler, 137 Wn. App. at 532. This Court determined "[r]equiring an accused to undergo alcohol evaluation and treatment, *and to attend three AA meetings a week* is a far greater imposition on personal autonomy than submitting to occasional drug testing. It requires an affirmative undertaking on Butler's part and represents an undue restraint on his liberty, imposed without sufficient due process." Id. at 529 (emphasis added).

As Butler recognized, conditions such as the A.A. requirement amount to postconviction penalties such as might be imposed on a probationer rather than appropriate conditions for pretrial release. Id. at 524, 531. There is a constitutionally significant distinction between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent. Id. at 531 (citing United States v. Scott, 450 F.3d 863, 873 (9th Cir. 2005)). "[P]retrial releasees are not probationers. Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict,

finding, or plea of guilty." Butler, 137 Wn. App. at 531 (quoting Scott, 450 F.3d at 872).

In this context, the doctrine of unconstitutional conditions does not permit the government to grant a benefit on the condition that the beneficiary surrender a constitutional right. Butler, 137 Wn. App. at 530. The doctrine protects those constitutional rights that preserve spheres of autonomy. Id. at 530-31.

Furthermore, requiring Pebley to attend A.A. meetings as a condition of pre-trial release violates the Establishment Clause of the First Amendment. Convicted probationers and parolees cannot be ordered to attend A.A. meetings as a sentencing condition of their liberty because the A.A. program has substantial religious components. Inouye v. Kemna, 504 F.3d 705, 712-14 (9th Cir. 2007) (sentencing requirement that convicted parolee attend Alcoholics Anonymous/Narcotics Anonymous meetings as a condition of his parole violated First Amendment Establishment Clause); Arnold v. Tennessee Board of Paroles, 956 S.W.2d 478, 483-84 (Tenn. 1997) (same); Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1074-76 (2d Cir. 1997) (probation condition requiring attendance at A.A. meetings amounted to forced participation in religious activity in violation of the First Amendment's Establishment Clause).

It necessarily follows pre-trial releasees cannot be required to attend A.A. meetings either without running afoul of the Establishment clause. "For the government to coerce someone to participate in religious activities strikes at the core of the Establishment Clause of the First Amendment." Inouye, 504 F.3d at 712. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992).

This Court has recognized a prison inmate cannot be made to attend A.A. classes as part of chemical dependency treatment without violating the Establishment Clause of the First Amendment. In re Pers. Restraint of Garcia, 106 Wn. App. 625, 630, 24 P.3d 1091 (2001). There was no violation in Garcia because the prisoner was allowed the choice of attending a non-religious class, which meant the Department of Corrections did not coerce a prisoner into attending A.A. classes as a form of treatment. Garcia, 106 Wn. App. at 630, 634-35. But here, Judge Kato specifically ordered Pebley to attend A.A. classes with no provision allowing for a non-religious alternative. CP 12.

The court could not lawfully require Pebley, upon pain of losing his liberty, to attend thrice-weekly A.A. meetings. The State's concession on this point was entirely appropriate. RP 5-6, 24.

2. THE PRE-TRIAL RELEASE CONDITION REQUIRING FORFEITURE OF THE STATUTORY RIGHT TO REFUSE BLOOD/BREATH TESTING IS ILLEGAL.

As a pre-trial condition of release, Judge Kato ordered, "no refusal of blood/breath test on reasonable request by law enforcement." CP 12.

A trial court may not impose "onerous" pre-trial release provisions where lesser conditions are available to ensure the public is protected against potential violent acts. Butler, 137 Wn. App. at 524. The requirement that Pebley submit to blood or breath testing upon reasonable request should be stricken for this reason.

Under the implied consent statute, Pebley has the absolute right to refuse the breath or blood test subject to certain specified exceptions. RCW 46.20.308(2).³ The "no refusal" condition forces Pebley to give up that important right in exchange for his release pending trial.

³ RCW 46.20.308(5) 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." RCW 46.20.308(3) provides in relevant part: "If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested." RCW 46.20.308(4) provides "Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her

In determining the propriety of pre-release conditions, this Court has expressed grave reservations about imposing pre-trial conditions of release that resemble post-conviction conditions of a criminal sentence. Butler, 137 Wn. App. at 530-31 (citing Scott, 450 F.3d at 872-73). Pre-trial releasees, who are presumed innocent, have greater privacy rights than those who have been convicted. Id. The pre-trial release condition at issue here, however, is indistinguishable from a post-conviction sentencing condition. See RCW 46.61.5055(11)(a)(iii) (following DUI conviction, court may impose probation conditions that include "not refusing to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor.").

The "no refusal" condition invades Pebley's privacy interests as a pre-trial releasee. The content of a person's blood and breath are "private affairs" under article I, section 7. See State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010) (searches into body are searches within

incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section."

meaning of article I, section 7). The taking of a breath or blood sample constitutes a bodily intrusion. Garcia-Salgado, 170 Wn.2d at 184-85); State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984); Schmerber v. California, 384 U.S. 757, 767-68, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Tests designed to detect evidence of intoxication are intrusive searches. City of Seattle v. Mesiani, 110 Wn.2d 454, 458-59, 755 P.2d 775 (1988) (techniques used at sobriety checkpoints, which included smelling a driver's breath, were "highly intrusive").

The privacy interests of people like Pebley who are released pending trial are "far greater" than those of a convicted probationer. Scott, 450 F.3d at 873. Pebley has a privacy interest in his bodily integrity. The pre-trial condition that he surrender that privacy interest is an unacceptably burdensome condition of pre-trial release.

The government can constitutionally force a person to submit to a blood alcohol or breathalyzer test. State v. Bostrom, 127 Wn.2d 580, 590, 902 P.2d 157 (1995) (citing Schmerber, 384 U.S. 757). But Pebley has the statutory right to refuse the test and thereby shield himself from invasions into his bodily integrity even where there are reasonable grounds for law enforcement to request the test. Bostrom, 127 Wn.2d 5 at 590; State v. Whitman County Dist. Court, 105 Wn.2d 278, 281, 714 P.2d 1183 (1986).

On appeal, Pebley does not advance the argument that the "no refusal" condition violates his constitutional rights under the Fourth Amendment or article I, section 7. Rather, the condition violates his statutory right to refuse the test. The right to refuse a blood or breath test is specifically protected by statute. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 236, 978 P.2d 1059 (1999).

"[T]he accused has a right under the implied consent statute to be afforded the opportunity to make a knowing and intelligent decision whether to submit to an evidentiary breath test." Whitman County Dist. Court, 105 Wn.2d at 282. Those convicted of DUI can be forced to forfeit this right as a condition of probation. RCW 46.61.5055(11)(a)(iii). But Pebley is presumed innocent.⁴ Butler, 137 Wn. App. at 531. As a pre-trial releasee, Pebley retains far greater privacy interests than those who have been convicted, sentenced and then released into probation. Id. Pebley's statutory right of refusal should not be sacrificed under these circumstances.

Again, a trial court may not impose "onerous" pre-trial release provisions where lesser conditions are available to ensure the public is

⁴ In this regard, Judge Kato's description of the condition as "no *further* criminal law violations" is telling. CP 19 (emphasis added). Her choice of words presumes Pebley has already committed the crime for which he stands charged.

protected against violent acts. Butler, 137 Wn. App. at 524. Lesser conditions are available and were imposed in this case. One condition requires Pebley to not violate any criminal law or commit any alcohol-related infraction, which necessarily encompasses driving while intoxicated. CP 19. Another condition requires Pebley to install an interlock ignition device on *any* vehicle he operates, which effectively prevents him from operating any vehicle while intoxicated. CP 12, 21. Those conditions are sufficient to protect the community. Pebley cannot be presumed to violate them. But the "no refusal" condition presumes the other conditions will be violated. There is no evidence in the record that Pebley has ever violated any pre-trial release condition in earlier cases. The "no refusal" condition is overkill.

According to the superior court and the State, CrRLJ 3.2 allows the requirement that Pebley forfeit his statutory right to refuse the breath/blood test. If true, then imposition of this condition violates the separation of powers doctrine. A separation of powers issue may be raised for the first time on appeal. State v. Tracer, 155 Wn. App. 171, 182, 229 P.3d 847 (2010).

"The doctrine of separation of powers divides power into three coequal branches of government: executive, legislative, and judicial." Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010). The doctrine

ensures "that the fundamental functions of each branch remain inviolate." Waples, 169 Wn.2d at 158 (quoting Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009)). "In general, the judiciary's province is procedural and the legislature's is substantive." City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). A separation of powers violation occurs if "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Waples, 169 Wn.2d at 158 (quoting Jensen, 158 Wn.2d at 394).

Where an apparent conflict between a court rule and a statutory provision can be harmonized, both are given effect if possible. State v. Scherner, 153 Wn. App. 621, 644, 225 P.3d 248 (2009). The "inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule." Washington State Council of County and City Employees v. Hahn, 151 Wn.2d 163, 169, 86 P.3d 774 (2004).

The court rule allowing for any number of pre-trial release conditions and the statute that unambiguously provides for the right to refuse blood/breath tests can be reconciled here. To avoid a separation of powers problem and harmonize CrRLJ 3.2 with RCW 46.20.308, the court rule must be read to prohibit imposition of a requirement that a person forfeit the statutory right to refuse the test. Cf. State v. Blilie, 132 Wn.2d

484, 490-91, 939 P.2d 691 (1997) (separation of powers problem avoided by harmonizing CrR 3.2 with statutory provision that addressed pre-trial release and bail issues). That is a simple and effective way to resolve the separation of powers issue. In this way, trial courts remain free to impose any number of other conditions to protect community safety while respecting the statutory right to refuse invasive testing.

But if the trial court and the State are correct that the court rule allows for imposition of the "no refusal" condition, the court rule cannot prevail under the separation of powers doctrine. Both cannot be given effect.

"Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 980, 216 P.3d 374 (2009) (internal citations omitted). "Substantive law 'creates, defines, and regulates primary rights,' while procedures involve the 'operations of the courts by which substantive law, rights, and remedies are effectuated.'" Putman, 166 Wn.2d at 984 (quoting Jensen, 158 Wn.2d at 394).

The purpose behind the statutory implied consent warnings is to allow drivers "to make an informed decision about their right to *refuse* the test." Bostrom, 127 Wn.2d at 589. The right to refuse under RCW 46.20.308 is a substantive right granted by the Legislature. As such, it prevails over any court rule that allows for the involuntary forfeiture of that right. Putman, 166 Wn.2d at 980.

In this regard, it may be noted that upholding imposition of the "no refusal" requirement as a condition of pre-trial release could have an unintended consequence that the State and perhaps this Court would find quite unpalatable. One of the purposes of the implied consent statute is to provide an efficient means of gathering reliable evidence of intoxication. Nowell v. Department of Motor Vehicles, 83 Wn.2d 121, 124, 516 P.2d 205 (1973). But suppression of evidence is required when the right to make a knowing and voluntary refusal of the test is not honored. State v. Trevino, 127 Wn.2d 735, 747, 903 P.2d 447 (1995). The kind of pre-trial release condition at issue here sets the State up for a failed DUI prosecution.

Judge Robinson did not address Pebley's argument that the breath/blood test requirement impermissibly violated his statutory right to refuse the test. Rather, Judge Robinson only addressed Pebley's Fourth Amendment challenge to the breath-blood test requirement, concluding

"[w]hether the totality of circumstances supports the request can only be determined once the request is made." CP 36-37.

Pebley does not contend the condition violates his Fourth Amendment rights on appeal, but the court's focus on whether a specific request is reasonable under the particular circumstances as a means to duck the issue calls for a response. Pebley's challenge to the "no refusal" condition is ripe for review.

The pre-trial release condition at issue here is indistinguishable from a sentencing condition. RCW 46.61.5055(11)(a)(iii). A pre-enforcement challenge to a community custody condition is ripe for review on direct appeal "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." State v. Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)).

The issue here is primarily legal: is the requirement that Pebley forfeit his statutory right to refuse blood/alcohol testing a permissible condition of pre-trial release? Second, this question is not fact-dependant. Either legal authority permits the condition or it does not. The problematic aspect of the condition is the categorical denial of Pebley's statutory right to refuse the test when there indisputably are reasonable grounds for law enforcement to request the test. The issue does not

require further factual development because the legality of this condition does not turn on whether a particular request to submit to testing is reasonable. Third, the challenged condition is final because Pebley is subject to the condition at issue unless this Court strikes it.

The issue is properly before this Court. The "no refusal" condition of pre-trial release is illegal and should be struck down.

D. CONCLUSION

For the reasons stated, this Court should grant Pebley's writ of habeas corpus and strike the contested pre-trial release conditions.

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Respectfully Submitted,

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