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No. 92930-1

COA No. 72501-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JUDITH E. MURRAY,

Respondent.

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

The Honorable Richard T. Okrent

ANSWER TO PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

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RULES

A. ISSUES PRESENTED

1. Whether law enforcement's failure to advise Ms. Murray of the statutorily mandated requirements of the implied consent waiver (ICW) resulting in the suppression of the blood test result, presents an issue of substantial public interest where the State Patrol has amended the ICW form to correctly advise drivers and there have been no other cases presenting the same or similar issue in the other divisions of the Court of Appeals?

2. Whether the decision of the Court of Appeals conflicts with decisions of this Court and other divisions of the Court of Appeals where the decision accurately concluded the language of RCW 46.20.308 is statutorily mandated and must be provided to a driver suspected of DUI and where the opinion is consistent with decisions cited by the State?

3. Whether the Court of Appeals decision here correctly concluded that suppression is the proper remedy where the statutorily mandated ICW warning was not given?

B. STATEMENT OF THE CASE

As the State correctly points out, the underlying facts are not in dispute. On December 9, 2013, Judith Murray was stopped by Washington State Trooper (WSP) Ernest Gerrer for suspected driving while under the influence. CP 25. Upon contacting Ms. Murray, Gerrer stated he could smell the odor of alcohol coming from inside the car and Ms. Murray's eyes were watery and bloodshot. CP 25. Gerrer asked Ms. Murray if she had taken any prescription medications, to which she responded that she had taken a Xanax[1] earlier that day. CP 26; 12/9/2013RP 6. Gerrer had Ms. Murray perform field sobriety tests, at the conclusion of which, the trooper arrested Ms. Murray for suspected driving while under the influence and read her the Implied Consent Warnings (ICW) prior to the administration of a breath test to determine the alcohol concentration of her breath (BAC). CP 26-27. It is undisputed that Gerrer failed to advise Ms. Murray of all of the warnings required in RCW 46.20.308, specifically the portion dealing with Tetrahydrocannabinol (THC), the psychoactive ingredient in

[1] Xanax (alprazolam) belongs to a group of drugs called benzodiazepines. It works by slowing down the movement of chemicals in the brain that may become unbalanced. This results in a reduction in nervous tension (anxiety). Xanax is used to treat anxiety disorders, panic disorders, and anxiety caused by depression. http://www.drugs.com/xanax.html.

marijuana. CP 28. While examining Ms. Gerrer's mouth as part of the breath test protocol, the trooper observed evidence of marijuana use by Ms. Murray. CP 28.

During a subsequent inventory search of Ms. Murray's car, Gerrer discovered a small baggie of marijuana and a pipe in the passenger seat. CP 27. In response to Gerrer's question, Ms. Murray stated she had smoked some marijuana earlier in the day. CP 27.Ms. Murray was charged with driving while under the influence (DUI) in violation of RCW 46.61.502. She moved to suppress the results of the breath test on the basis, among other things, that she was given an inaccurate and incomplete ICW. Following an evidentiary hearing, the district court commissioner denied the motion to suppress, concluding that since the breath test cannot test for the THC concentration in the blood, it would be misleading and/or incomplete to advise Ms. Murray of the marijuana related warnings. CP 30-33.

Ms. Murray appealed the Commissioner's ruling to the superior court. The RALJ court reversed the Commissioner's ruling and ordered the breath test suppressed. CP 5-6. The RALJ court found that the marijuana related warnings are required as part of the implied consent

warnings, and police officers do not have discretion to decide which of the warnings are given:

> Now I'm aware of what I call the situation where the class has been established, i.e. commercial drivers, if you know that the person is or is not a commercial driver, or if you know the person is or is not over 21 years old, they're in a separate class. And I think that the officer, under *State v. Lynch* [sic], probably has some discretion, if he can demonstrate that he knows those facts, not to have to give those complete warnings.
>
> *Lynch* also says you can paraphrase, but you got to give the entire content of the warning. That's the other problem as I read *Lynch*. You can't be super selective. You don't get to make the call. The whole idea of the implied consent warnings is the defendant gets to make the due process choice of whether or not they're going to take the test, and they have to be fully informed of the obligations and the rights and the potential defenses that will come as a result of taking the test, for example, whether or not they take a blood test and so forth.
>
> So who gets to make the call? Is it the discretion of the officer or the discretion of the defendant after being fully informed? Here I believe, quite frankly, that the law is ironclad in this matter, that the implied consent warnings are to be read to defendants, particularly when the officer knows that there is marijuana involved, and he knew that, so that the defendant has the right to make an informed choice. Whether or not she made an informed choice is a different question. The question is, did she have the right to do what she did and was it explained to her so she could make an informed choice? And the answer is no.

7/16/2014RP 3-4.

The State moved for discretionary review of the RALJ Court's decision, which was granted by the Court of Appeals. The Court of Appeals affirmed the reversal of Ms. Murray's conviction, concluding that the trooper's failure to provide the proper warnings as required by RCW 46.20.308 must result in suppression, relying on its decision in *State v. Robison*, __ Wn.App. __ 2016 WL 664111 (72260-3-I, February 16, 2016). Decision at 3-4.

C. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

1. **The State fails to establish the issue regarding its failure to provide Ms. Murray with the required warnings presents an issue of substantial public interest as required by RAP 13.4 (b)(4).**

With great hyperbole and little else, the State claims the decision of the Court of Appeals presents an issue of substantial public interest as that term are used in RAP 13.4 (b)(4). Petition for Review at 17. Two subsequent actions by the Legislature and the State Patrol limit the impact of the decision in *Robison* substantially, thus undercutting any argument that "substantial public interest" exists.

Ms. Murray was arrested in alte-2012. In 2015, the Legislature amended RCW 46.20.308, eliminating the warnings required for THC concentration. RCW 46.20.308(2)(c)(i); *Robison*, slip op at 5. In addition, in August 2014, the State Patrol issued a revised ICW form,

accurately including the warning required by RCW 46.20.308 but also adding language that "The breath test will not test for THC concentration in a breath sample."

In light of these two subsequent actions, the impact of the Court of Appeals is extremely limited. The State makes no claim to the contrary. Further, this issue does not appear to be pending in any other division of the Court of Appeals, again limiting the impact of this decision.

2. **The decisions the State claims this opinion is in conflict with are instead, entirely consistent.**

The State's arguments in support of its petition start from a flawed premise: that the Court of Appeals' decision requires law enforcement to advise driver's of additional and irrelevant information. This argument fails to appreciate that the decision merely requires law enforcement to advise a driver of what is required in RCW 46.20.308 and no more. The decisions of this Court and the Courts of Appeals require just that. The Court of Appeals decision here accurately relies on these decisions and is not in direct conflict with any of them.

a. *This decision is entirely consistent with the decisions of the Court of Appeals cited by the State.*

The State claims the decision here is in conflict with the Court of Appeals in *Merseal v. State Dep't of Licensing*, 99 Wn.App. 414, 994 P.2d 262 (2000). The decisions are not in conflict.

In *Merseal*, the defendant agreed he was given the required warnings, but the trooper failed to check all of the boxes on the ICW form. *Id* at 422-23. The issue was not one of "substantial compliance," as the State claims, but one of "technical error." *Id.*

> Mr. Merseal does not assert he was, in fact, misled. Nor does he say how he was prejudiced by any technical error. Under the "substantial compliance doctrine," we will not reverse for a merely technical error that does not result in prejudice. *Black v. Department of Labor & Indus.*, 131 Wn.2d 547, 552-53, 933 P.2d 1025 (1997). The doctrine applies in this case. *See, e.g., State v. Piskula,* 168 Wis.2d 135, 140, 483 N.W.2d 250 (Ct.App.1992).

Id. Here, the error was not technical but a failure of the trooper to give the statutorily mandated warnings. *Merseal* does not conflict with *Robison.*

The same applies to the decisions in *Lynch v. State Dep't of Licensing*, 163 Wn.App. 697, 262 P.3d 65 (2011), and *State Dep't of Licensing v. Grewel*, 108 Wn.App. 815, 33 P.3d 94 (2001). These decisions, as does the decision here, require law enforcement to advise

the driver of the mandatory portions of the ICW statute. *Lynch*, 163 Wn.App. at 708-09; *Grewel*, 108 Wn.App. 821-22. In both cases, the trooper inserted additional language not required by the statute. *Id.* Here, the trooper failed to comply with the first part of these decisions; inform Ms. Murray of the warnings mandated by the statute. Again, the decision in *Robison* is entirely consist with *Lynch* and *Grewel*.

Finally, the Court of Appeals here accurately rejected the State's claim regarding the decision in *Town of Clyde v. Richardson*, 65 Wn.App. 778, 831 P.2d 149 (1992):

> In *Richardson,* the court considered if the implied consent statute required that an arresting officer advise a driver not only "of his right to have additional tests administered by a qualified person of his own choosing, but also that he advise that such a person may be a physician, qualified technician, chemist or registered nurse." Although the statute did not require the second warning, the drivers claimed they needed it to understand their rights. The court held sufficient a warning in the language of the statute. The case did not involve any claim that an officer can omit from a warning language the statute required. It provides no support for the State's position.

Slip op. at 10 (footnote omitted). Again the claimed conflict does not exist.

b. *The decision here is consist with the cited decisions of this Court claimed by the State to be in direct conflict.*

The State claims the Court of Appeals failed to require a showing of prejudice, citing this Court's decisions in *State v. Bartels*, 112 Wn.2d 882, 774 P.2d 1183 (1989), *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997), and *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006).

This Court has been consistent in holding that, where the warnings are incomplete omitting statutorily mandated language, the remedy is suppression. *State v. Morales*, 173 Wn.2d 560, 576-77, 269 P.3d 263 (2012); *State v. Trevino,* 127 Wn.2d 735, 747, 903 P.2d 447 (1995); *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 287, 714 P.2d 1183 (1986).

Once again, the State's claim that the decision in this case is in conflict with decisions of this Court is based upon a mischaracterization of the issue or a misreading of the opinions. The State claims the opinion here did not require Ms. Murray to show prejudice. This claim is based on the State's characterization of the issue here as law enforcement being required to advise drivers of extraneous warnings. As has been argued, this is untrue; the statute

mandated the warning, thus the language is not extraneous but statutorily required.

Prejudice is required where error does not involve the failure to advise of warnings required by the ICW statute. For instance, in *Gonzales*, the issue involved additional language not contained in the statute. *See also State v. Bostrom*, 127 Wn.2d 580, 585, 902 P.2d 157 (1995); *Bartels,* 112 Wn.2d at 887.

The decision in *Storhoff* is also not inapposite from the decision in this case. The claim in *Storhoff* was a failure to provide the statutorily mandated time limit for requesting an administrative hearing. 133 Wn.2d at 526. This Court found notice was provided, thus a showing of prejudice was necessary because the Department of Licensing had in fact complied with the statute. *Id.* at 531.

The State's arguments regarding an apparent conflict misstate the issue decided by the Court of Appeals. The decisions of this Court are not in conflict. Where ICW warnings are not provided, suppression is required and no prejudice need be shown. *Morales*, 173 Wn.2d at 576-77. This Court should refuse to review the Court of Appeals decision.

D. CONCLUSION

For the reasons stated, Ms. Murray requests this Court deny the petition for review, thus affirming the reversal of her DUI conviction.

DATED this 15th day of April 2016.

Respectfully submitted,

s/Thomas M/ Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project - 91052
Attorneys for Respondent

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 92930-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ petitioner Andrew Alsdorf, DPA
[aalsdorf@snoco.org]
Snohomish County Prosecutor's Office

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 15, 2016

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Answer to Petition for Review

Thomas M. Kummerow - WSBA #21518
Attorney for Respondent
Phone: (206) 587-2711
E-mail: tom@washapp.org

By
Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

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