72501-7

72507-1

NO. 72501-7-I

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

STATE OF WASHINGTON,

Appellant,

v.

JUDITH E. MURRAY.

Respondent.

REPLY BRIEF OF APPELLANT

MARK K. ROE
Prosecuting Attorney

ANDREW E. ALSDORF
Deputy Prosecuting Attorney
Attorney for Appellant

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ARGUMENT IN REPLY

The defendant apparently concedes that the omission of warnings relating to a blood test for THC content did not render the warnings given to her inaccurate or misleading. Br. of Resp. at 8. The concession flows naturally from the fact that the WSP Trooper was only asking the defendant to provide a breath sample to measure alcohol content. Neither the withdrawal of the defendant's blood nor the discovery of any THC therein was a possible outcome of the Trooper's request.[1] Instead of arguing that the Trooper's warnings were inaccurate or misleading, the defendant argues simply that the rote recitation of the irrelevant marijuana language was mandatory because the warnings "must strictly adhere to the plain language of the statute." Id. at 5. The defendant's argument is flawed for two primary reasons.

A. THE LEGISLATURE AND COURTS ALLOW OFFICERS TO TAILOR IMPLIED CONSENT WARNINGS TO FIT THE INVESTIGATION.

The defendant's argument ignores the 2004 change in the law that specifically removed the obligation to provide warnings with strict verbatim adherence to the statute. LAWS OF 2004, ch. 68, § 2

[1] The Legislature has recognized the inapplicability of the THC / blood warnings to a request for a breath test, by striking the THC / blood warnings from the implied consent warnings for breath. This change in the law will go into effect on September 26, 2015. LAWS OF 2015, ch. 3, §5.

(adding the following language to RCW 46.20.308(2): "The officer shall warn the driver, *in substantially the following language*, that:")(*emphasis* added). The following cases cited by the defendant in support of strict compliance with the statutory language all predate the 2004 change in the law. See State v. Bostrom, 127 Wn.2d 580, 902 P.2d 157 (1995); Connolly v. Dep't of Motor Vehicles, 79 Wn.2d 500, 487 P.2d 1050 (1971); State v. Whitman County Dist. Court, 105 Wn.2d 278, 714 P.2d 1183 (1986); State v. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989); Spokane v. Holmberg, 50 Wn. App. 317, 745 P.2d 49 (1987); State v. Krieg, 7 Wn. App. 20, 497 P.2d 621 (1972). While those older cases emphasized strict, verbatim compliance with the warnings contained in the statute, the emphasis has been replaced with a focus on whether a person of normal intelligence could understand the consequences of the choice presented, or at least inquire about further details if confused. See Allen v. Dep't of Licensing, 169 Wn. App. 304, 306, 279 P.3d 963 (2012); Lynch v. Dep't of Licensing, 163 Wn. App. 697, 705, 262 P.3d 65 (2011).

Here, the record contains no evidence that Ms. Murray was confused or misled by the warnings she received, and she does not argue as much to this Court. The choice presented to the

defendant was whether to take or refuse a test of her breath for alcohol content, and she elected to take the test after receiving every relevant warning applicable to that test. 1 RP 10.

This Court has previously indicated that an officer may alter the statutory language as long as the change does not render the warning inaccurate or misleading. In Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 782, 831 P.2d 149 (1992), this Court recognized that the warnings related to breath tests and blood tests will be different and both warnings will not always apply. The Rodriguez court interpreted the State Supreme Court's opinion in State v. Bartels, 112 Wn.2d at 866, as "not mandating that both tests be mentioned every time the warning is given." Rather, "the police shall inform the driver that he or she has a right to refuse the type of test the police actually intend to administer. It would be both confusing and unavailing to do otherwise." Town of Clyde Hill v. Rodriguez, 65 Wn. App. at 782. The court in Rodriguez held that suppression of breath test results was not justified simply because the officer substituted a "linguistic equivalent" for the statutorily required advisement that a defendant is entitled to seek additional tests on their own. Id. at 786. The officer in this case employed the

Rodriguez rationale by omitting information about the test he was not requesting.

The Superior Court correctly observed that an officer can omit irrelevant warnings in cases when they obviously do not apply.[2] The defendant does not assign any error to the Superior Court's legal conclusion on this point, even though it directly contradicts her argument that verbatim recitation of the statutory warnings is mandatory in every case.

At the heart of the Superior Court's misapplication of the law is the faulty premise that an officer's mere suspicion of both alcohol and THC consumption automatically means that the officer will or must seek confirmation of his suspicions through all available testing options. But officers have wide discretion on how to investigate their cases and may have valid law enforcement reasons for not seeking a blood test for THC content even though the defendant may have admitted to consuming marijuana. The trooper in this case testified that he decided not to seek blood test confirmation of the Xanax and marijuana the defendant admitted

[2] The Superior Court's Conclusion of Law #5 reads as follows: "When the officer knows that certain warnings do not apply, under Lynch v. Dep't 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." 1 CP 6.

consuming, but only after he saw that her breath test revealed alcohol content in excess of the legal limit. 1 RP 13. In other words, the trooper decided that he had already obtained evidence sufficient to support the DUI he was investigating. This is a valid law-enforcement reason for ceasing his investigation.

The defendant argues that officers have no choice but to read the THC language from the implied consent warnings even when the officer knows he or she is not seeking the test related to that warning. The argument is that officer discretion in this area will "ultimately lead to abuses." Br. of Resp. at 13. Yet the defendant does not complain that the officer exercised inappropriate discretion in sparing her the blood test he was legally entitled to request (or compel via search warrant), or even that the omitted THC warning would have altered her choice to take the breath test if that warning had been given. Rather, the defendant's vague speculation about potential future abuses in other cases is a distraction from the reality that no abuse, or prejudice, occurred here.

B. THE DEFENDANT MUST DEMONSTRATE PREJUDICE, AND THE ADMISSION OF THE BAC RESULT AT TRIAL DOES NOT DEMONSTRATE PREJUDICE PER SE.

The defendant acknowledges in a footnote that the State Supreme Court has demanded a showing of actual prejudice before

deficiencies in implied consent warnings will justify suppression of evidence. Br. of Resp. at 14, fn. 4, citing State v. Storhoff, 133 Wn.2d 523, 530-31, 946 P.2d 783 (1997).[3] Though Storhoff is still good law, the defendant claims that State v. Morales, 173 Wn.2d 560, 269 P.3d 263 (2012), is an example of a court allowing suppression of evidence without a specific showing of prejudice. Br. of Resp. at 15.

The defendant's argument relies on a misreading of Morales, a case with very different facts from this case. The defendant in Morales did not have the option of refusing a blood test because he had been arrested for vehicular assault, a crime for which the officer may obtain a blood sample without the defendant's consent. Id. at 564; RCW 46.20.308(3). Mr. Morales did, however, retain the statutory right to be advised of his ability to rebut the blood test results with independent tests obtained on his own. Id. at 569. Due to a language barrier the arresting officer used an interpreter to

[3] The relevant portion of the Storhoff opinion cited by defendant reads: "The real issue-in both Bartels and Gonzales, as well as the present case-is whether persons charged with serious criminal traffic offenses should escape punishment due to minor procedural errors that did not actually prejudice them. Ultimately, our opinions in both Bartels and Gonzales required a showing of prejudice. We have never actually approved or followed the Holmberg rule, and we find no rationale to recommend adoption of the rule in this case." State v. Storhoff, 133 Wn.2d 523, 531, 946 P.2d 783 (1997) (citing State v. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989); Gonzales v. Department of Licensing, 112 Wn.2d 890, 774 P.2d 1187 (1989); City of Spokane v. Holmberg, 50 Wn. App. 317, 745 P.2d 49 (1987).

translate the implied consent warnings, which Mr. Morales purportedly signed and waived. Id. at 564-565. Yet the State failed to produce both the interpreter and the signed document at a suppression hearing, and thereby failed to carry its burden of proving that Mr. Morales had been advised of *any* implied consent warnings at all. Id. at 575.

Contrary to the defendant's assertion, the Morales court did require a showing of prejudice and identified that prejudice with particularity. The prejudice to Mr. Morales was the deprivation of his "opportunity to gather potentially exculpatory evidence," which the court described as "an important protection of the subject's right to fundamental fairness." Id. at 569. The court stressed the importance of maintaining the defendant's "right to proof," and, without deciding so, implied that such a deprivation could infringe on a defendant's constitutional due process right to gather evidence in his own defense. Id. at 575-576. Thus, Mr. Morales suffered the prejudice of being unable to rebut the evidence against him.

The defendant is incorrect that the Morales court required a showing of prejudice on one of the three counts but not the other two. See Br. of Resp. at 15. Rather, the Court recognized that the admission of blood alcohol test results had no impact, and thus no

prejudice, on the hit and run count. Id. at 577. The defendant did not even challenge the legality of his hit and run conviction, a crime for which blood alcohol test results did nothing to prove the elements of that crime. See RCW 46.52.020. The prejudice to Mr. Morales was clear on the vehicular assault and DUI counts because the blood alcohol test results were an essential, and prejudicially unrebuttable, component of the State's proof on those charges.

The defendant's situation here is much different than that of Mr. Morales. The defendant in this case does not dispute that she received proper warnings about her ability to obtain independent tests to rebut the test of the breath sample she voluntarily provided. She received that warning, as well as the warning that the test results might be used against her at trial. She was properly advised of the consequences of refusal. The only warnings the defendant did not receive related to the consequences of having THC found in her blood, yet the officer was not attempting to demonstrate that she had any THC in her blood.

The closest analogy to the defendant's situation is the prospect of a non-indigent defendant complaining that the implied consent warnings' reference to independent tests "at your own

expense" might mislead an indigent person. Only indigent persons can establish the required prejudice to successfully advance such a claim. See State v. Bartels, 112 Wn.2d at 890. Similarly, this defendant has no ability to demonstrate how the omitted THC warnings prejudiced her decision to provide a breath sample, or hampered her ability to present a defense. The Superior Court's challenged findings and conclusions were made in error because they conflict with the legal authority in this State.

II. CONCLUSION

The State respectfully requests that this court grant the State's appeal, reverse the decision of the Superior Court, and remand the case to the District Court for proceedings consistent with this opinion.

Respectfully submitted on September 1, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

ANDREW E. ALSDORF, #35574
Deputy Prosecuting Attorney
Attorney for Appellant

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

THE STATE OF WASHINGTON, Appellant, 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 September, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Lila J. Silverstein, and Thomas M. Kummerow of Washington Appellate Project, tom@washapp.org; lila@washapp.org and wapofficemail@washapp.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 September, 2015, at the Snohomish County Office.

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