FILED
August 14, 2015
Court of Appeals
Division I
State of Washington

72501-7

No. 72501-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Appellant,

v.

JUDITH MURRAY,

Respondent.

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

The Honorable Richard T. Okrent

BRIEF OF RESPONDENT

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WASHINGTON CASES

A. ISSUES ON REVIEW

1. Whether the RALJ Court correctly concluded the mandatory nature of RCW 46.20.308(2)(c)(i), noting the arresting officer *shall warn*, required the trooper here to advise Ms. Murray of the marijuana (THC) warning and the trooper's failure was error?

2. Whether the RALJ Court properly concluded that the failure of the trooper to correctly advise Ms. Murray of the implied consent warning as required by RCW 46.20.308(2)(c)(i) must result in suppression of the alcohol test result?

B. STATEMENT OF THE CASE

The facts are largely 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

[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

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 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

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treat anxiety disorders, panic disorders, and anxiety caused by depression. http://www.drugs.com/xanax.html.

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.

C. ARGUMENT

The trooper failed to advise Ms. Murray regarding the THC concentration portion of the ICW as required by RCW 46.20.308(2)(c)(i).

1. *A person arrested for DUI must be advised of all of the implied consent warnings.*

It is illegal to drive while under the influence of alcohol, marijuana, or other drugs. RCW 46.61.502.[2] The necessity for

[2] RCW 46.61.502 states in relevant part:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
>
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or

advisement of the implied consent is triggered once there is a valid DUI arrest. *City of Seattle v. St. John*, 166 Wn.2d 941, 950, 215 P.3d 194 (2009); *O'Neill v. Dep't of Licensing*, 62 Wn.App. 112, 116, 813 P.2d 166 (1991).

Drivers in Washington are presumed to have consented to a breath or blood test to determine alcohol concentration if arrested for DUI, but drivers may refuse the test. RCW 46.20.308(1). "The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). "A driver must be afforded an opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test." *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 894, 774 P.2d 1187 (1989).

Implied consent warnings must strictly adhere to the plain language of the statute. *Bostrom*, 127 Wn.2d at 587. Courts review the warnings provided by arresting officers to ensure that all of the required warnings were provided and that they were not inaccurate or

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> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
>
> (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

misleading. *Gonzales*, 112 Wn.2d at 896-98. 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*." *Jury v. Dep't of Licensing*, 114 Wn.App. 726, 732, 60 P.3d 615 (2002) (emphasis added). The officer must relate the law correctly and not mislead. *Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 791-92, 982 P.2d 601 (1999). But, substantial compliance, as relied upon by the district court commissioner here, is not sufficient. *State v. Morales*, 173 Wn.2d 560, 577, 269 P.3d 263 (2012).

The validity of any implied consent warning is a question of law that is reviewed *de novo*. *Martin v. State Dep't of Licensing*, 175 Wn.App. 9, 18, 306 P.3d 969 (2013); *Jury*, 114 Wn.App. at 731. When reviewing a decision following a CrR 3.6 suppression motion, the Court determines whether substantial evidence supports the challenged findings of fact and whether those findings of fact support the challenged conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are considered verities on appeal. *State v. Lohr*, 164 Wn.App. 414, 418, 263 P.3d 1287 (2011). The trial court's conclusions of law regarding suppression of evidence suppression are reviewed *de novo*. *Garvin*, 166 Wn.2d at 249.

2. *The implied consent warning here was deficient as the trooper omitted the marijuana warning required by the statute.*

RCW 46.20.308(2) states in relevant part:

> 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*;

(Emphasis added).[3] The term "shall" indicates a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994); *Our Lady of Lourdes Hosp. v. Franklin Cy.*, 120 Wn.2d 439, 446, 842 P.2d 956 (1993) (same).

Here, it is undisputed that the warnings given by the officer did not include all of the statutory language, omitting the marijuana-related warnings highlighted above. CP 28. The district court commissioner

[3] The recreational use of marijuana was legalized in the successful passage of Initiative Measure No. 502. 2013 c 3 § 31, approved November 6, 2012, effective December 6, 2012. This particular subsection was part of that initiative.

ruled that the police officer, on his or her initiative, can determine which parts of the implied consent warning will be given despite the mandatory language of the ICW statute. CP 31. In its opening brief in this Court, the State in various forms claims that this was not an erroneous ruling and the RALJ Court was incorrect in finding that it was. The State contends that the failure to advise Ms. Murray of the THC concentration part of the ICW did not render the advisement incomplete or misleading. The issue is not whether the advisement was incomplete or misleading but, rather, whether the statutorily required warnings were given. In addition, the State is correct that the trooper's advisement here was incomplete because it left out the THC portion of the ICW. The language of the statute controls here and the State's arguments to the contrary ignore well established law and should be rejected.

In accordance with the rules of statutory construction, "Washington case law has consistently required strict adherence to the plain language of the implied consent statute." *Bostrom*, 127 Wn.2d at 587, *citing Connolly v. Department of Motor Vehicles*, 79 Wn.2d 500, 487 P.2d 1050 (1971) (holding that the omission of the statutorily required warning that drivers have the right to have additional tests

administered by the qualified person of their choosing renders any license revocation invalid); *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 284-88, 714 P.2d 1183 (1986) (holding that officers cannot diverge from the statutory language and advise drivers that their refusal to take a breath test "shall" be used against them when the statute requires that they be told that it "may" be used against them); *State v. Bartels*, 112 Wn.2d 882, 774 P.2d 1183 (1989) (holding that officers cannot supplement the statutory warnings by informing drivers that they may have additional tests taken "at your own expense").

In *State v. Whitman County Dist. Court*, the Supreme Court affirmed the suppression of a breath test where the police officer failed to strictly comply with the plain wording of the implied consent warning. 105 Wn.2d at 285-88. The defendants in *Whitman County* were advised that the refusal to submit to the test shall be used at trial instead of may be used. *Id.* at 280. The Court of Appeals agreed with the district court's order suppressing the alcohol test:

> The warnings received by the defendants in the "shall" category present a similar issue as that in *Welch*. The implied consent statute requires that the officer *shall* warn the driver that his refusal to take the test *may* be used against him in any subsequent criminal trial. RCW 46.20.308(1) (now codified under subsection (2). The defendants in this category were advised by the officer "that your refusal to take the test *shall* be used against

> you in a subsequent criminal trial." The implied consent statute is worded in the mandatory sense as noted by the court in *Connolly.* Therefore, the officer had no discretion with regard to the wording he used to warn the accused. In addition, as in *Welch,* the change in wording operated to convey a different meaning than that specified in the statute. The word "may" merely expresses a contingency that may be possible, nothing more. It suggests that there is a possibility that his refusal will be used against him. The word "shall" conveys to the accused absolute certainty that his refusal would be subsequently used against him. As a result, the warning actually read to the accused by the officer contains a more coercive impact than that required by statute.

Whitman, 105 Wn.2d at 285-86 (emphasis in original). As a result the Court ruled: "We find that the defendants in the 'shall' category of cases were denied the opportunity of exercising an intelligent judgment concerning whether to exercise the statutory right of refusal. The suppression of the results of the Breathalyzer test in this category of cases is the appropriate remedy." *Id.* at 286-87.

Similarly, in *Spokane v. Holmberg*, the defendants were not advised that a refusal to submit to a breath or blood test may be used at a subsequent criminal trial. 50 Wn.App. 317, 319, 745 P.2d 49 (1987), *reversed on other grounds, Storhoff, supra*, 133 Wn.2d at 531. The statute in effect at that time stated: "The officer *shall* warn the driver that (a) his or her privilege to drive will be revoked or denied if he or she refuses to submit to the test, and (b) that his or her refusal to take

the test may be used against him or her in a subsequent criminal trial." *Holmberg*, 50 Wn.App. at 322 (emphasis in original). Once again applying the rules of statutory construction, the court held the failure to advise the defendants of this warning was error:

> The use of the word "shall" in a statute generally and presumptively operates to create a duty rather than confer discretion. *State v. Bartholomew*, 104 Wn.2d 844, 710 P.2d 196 (1985). Unless there is legislative intent to the contrary, the word should be given its usual and ordinary meaning. *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 605 P.2d 1265 (1980). While "shall" may be directory or mandatory depending on legislative intent, *see Nugent*, at 82, 605 P.2d 1265, both the language and purpose of RCW 46.20.308 appear to be mandatory and we so hold it to be. Therefore, there is a mandatory affirmative duty placed upon police officers to inform drivers of the consequences of refusing to consent, and one of those consequences is that refusal may be used against him or her in a subsequent criminal action.

Ibid.

Finally, in *State v. Krieg*, the officer failed to advise the defendant of his right to refuse the test and his right to have additional testing by his own qualified person. 7 Wn.App. 20, 21, 497 P.2d 621 (1972). This Court agreed with the trial court and ordered the alcohol test suppressed:

> Thus, consent is no longer an issue in this state, since all drivers have consented *in advance* to testing for the presence of alcohol. The issue becomes one of deciding whether the officer complied with the statute in such a

> fashion as to adequately apprise the driver of his right to *withdraw* his consent. Since no statutory warnings were given in this case, the officer did not meet that burden.

Krieg, 7 Wn.App. at 23.

These cases dictate that the statutory terms of the ICW have a specific meaning and must be strictly complied with when advising one of the implied consent warning. Where statutorily required terms are not included in the advisement, or where the terms are modified, the result is the suppression of the alcohol test. Here, the trooper failed to comply with the specific terms of RCW 46.20.308, and as a result, the RALJ Court was correct in ordering the suppression of the results of Ms. Murray's alcohol test.

The district court commissioner's ruling is directly contrary to the plain language of RCW 46.20.308 and the established caselaw. The Commissioner ruled:

> The first motion is that the plain language of the implied consent statute requires reading all portions of the implied consent statute including the THC concentration warnings that were in effect a few days or a couple of days before this particular stop. The court has on a number of occasions ruled that providing THC concentration warnings to a subject not being asked to submit to a test that can obtain such readings would be confusing. *And that the implied consent statute has not required that all warnings are read*, only those warnings that would be needed to provide the Defendant with the opportunity to make a knowingly, intelligent, voluntary

> decision ether to take the breath test. *Warning a subject about the level of THC concentration in their blood when they are not being asked to take a test that could obtain such information is not required by the plain language of that statute.* Motion to suppress the BAC as a result of not strictly reading all the warnings in the implied consent statute, that motion is denied.

12/9/2013RP 36-37 (emphasis added).

The commissioner's ruling is simply wrong. As explained above, the statutory terms in the implied consent statute *are* required to be given. Further, allowing the arresting officer to determine which portions of the implied consent warning he or she will give is plainly contrary to established caselaw, and will undoubtedly lead to inconsistent warnings and ultimately lead to abuses the statutory warnings were designed to prevent. This Court should hold, consistent with the established caselaw that the statutorily required language in the implied consent statute must be given absent a ruling from the Court of Appeals or the Supreme Court to the contrary.

3. *Since the implied consent warnings were deficient, the proper remedy was suppression of the breath test result.*

The State contends that even if the failure to advise Ms. Murray of the correct warnings was erroneous, she has not shown actual prejudice. Once again, the State's arguments are contrary to established law. The RALJ Court's decision was correct and should be affirmed.

"[A] showing of actual prejudice to the driver is appropriate in a *civil* action where the arresting officer has given all of the warnings, but merely failed to do so in a 100 percent accurate manner." *Thompson v. Dep't of Licensing,* 138 Wn.2d 783, 797 n. 8, 982 P.2d 601 (1999). However, in a *criminal* matter, the "[f]ailure to give a proper implied consent warning will result in suppression of the results of the [B]reathalyzer test." *State v. Trevino,* 127 Wn.2d 735, 747, 903 P.2d 447 (1995), *citing Whitman County,* 105 Wn.2d at 287. [4] *See also State v. Elkins,* 152 Wn.App. 871, 877, 220 P.3d 211 (2009) (this Court citing same quote from *Trevino*).

In a recent case, the failure to comply with the statutory requirements of the implied consent law resulted in suppression of a blood test without any additional showing of prejudice. *Morales,* 173 Wn.2d at 577. In *Morales,* the State failed to prove that an interpreter correctly advised a defendant, who had been arrested for vehicular assault and required to submit to a blood test, of his right to additional testing of the blood sample. *Id.* at 568-69. The defendant was subsequently charged with vehicular assault, hit and run, and DUI. *Id.*

[4] *State v. Storhoff,* 133 Wn.2d 523, 530-31, 946 P.2d 783 (1997), purported to reject the criminal/civil case distinction, but courts have continued to rely on the language from *Trevino* requiring suppression when the officer fails to give a proper implied consent warning. *See e.g., Morales,* 173 Wn.2d at 273.

at 565. After finding the State failed to prove that the blood test warning was given, the Supreme Court required a showing of prejudice regarding the hit and run count. *Morales*, 173 Wn.2d at 273. However, regarding the DUI and vehicular assault counts, the Court reversed without a specific showing by the defendant of prejudice:

> Admission of the blood alcohol test results did not prejudice Morales in the hit and run charge; indeed, Morales did not contest that charge. The blood alcohol test results obviously infected the charge of "driving while under the influence of intoxicating liquor." RCW 46.61.502(1). "Morales's blood alcohol level was per se evidence that Morales drove under the influence of alcohol." *Morales*, 154 Wn.App. at 58, 225 P.3d 311 (Bridgewater, J., dissenting); RCW 46.61.502(4). Accordingly, we reverse Morales' DUI conviction. We see equal prejudice in the vehicular assault by the DUI conviction; it too is reversed.

Morales, 173 Wn.2d at 577.

Here too the trooper failed to correctly advise Ms. Murray of the implied consent law warnings that were statutorily required. As in *Morales*, Ms. Murray's blood alcohol level was *per se* evidence that she drove under the influence, thus, as in *Morales*, she was entitled to suppression of the blood test. *Morales*, 173 Wn.2d at 577. As a consequence, the RALJ Court's order suppressing the blood test was the correct ruling and this Court should affirm that ruling.

D. CONCLUSION

For the reasons stated, Ms. Murray asks this Court to affirm the RALJ Court's order reversing the district court's denial of the motion to suppress the BAC test, and suppressing the breath test.

DATED this 14th day of August 2015.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
	)	NO. 72501-7-I
	)	
	)	
JUDITH MURRAY,	)	
	)	
Respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 14TH DAY OF AUGUST, 2015.

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