98444-I

IN THE SUPREME COURT

FOR THE STATE OF WASHINGTON

Court of Appeals No 36268-0-III

City of Richland

Respondent

v.

Dean Stenberg

Petitioner

Consolidated with

Court of Appeals No 36337-6-III

City of Pasco

Respondent

v.

Jason Shergur

Petitioner

PETITION FOR REVIEW

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I. IDENTITIES OF PETITIONERS

Dean Stenberg and Jason Shergur request that this court accept review of the decision designated in this petition.

II. DECISION OF THE COURT OF APPEALS

Mr. Stenberg and Mr. Shergur seek review of the decision of the Court of Appeals filed on March 10, 2020. The Court of Appeals erred when it upheld the constitutionality of the government's blood draws and it erred when it determined that the blood draws were authorized by statute. A copy of the Court of Appeals' unpublished opinion is attached to this petition in the appendix.

III. ISSUES PRESENTED FOR REVIEW

1.) Whether the Court of Appeals erred when they found the government's search of the petitioners bodies by blood draw was reasonable under the Fourth Amendment to the United States Constitution and under Article 1 Section 7 of the Constitution of the Washington State even though a less intrusive means, a breath test, was available to the law enforcement which would provide the government with a specimen which would allow the government to determine what was in the petitioner's blood stream.

2.) Whether the Court of Appeals erred when they found that Washington State's implied consent statute gave law enforcement the choice to determine blood alcohol by either breath or blood.

IV. STATEMENT OF THE CASE

The cities of Richland, Washington and Pasco, Washington determined through their city attorneys that the cities would draw blood from everyone suspected of driving under the influence of alcohol. The cities believed they could draw blood provided they a had a warrant.

On October 14, 2016 Petitioner Dean Stenberg was stopped for a traffic infraction. Police suspected he was under the influence of alcohol. The police contacted a Benton County judge and requested a warrant to draw Mr. Stenberg's blood to determine how much alcohol was in his blood stream. The warrant was approved. Mr. Stenberg was taken to a hospital where his blood was drawn.

Petitioner Stenberg moved the Benton County District Court to suppress the evidence of a blood draw because

the blood draw was not reasonable. The Court denied Mr. Stenberg's motion. Mr. Stenberg appealed the decision to the Benton County Superior Court.

On March 23, 2016, Jason Shergur was stopped for a traffic infraction by the Pasco Washington Police Department. Police suspected he had consumed alcohol. Police contacted a Franklin County Judge who authorized the issuance of a warrant to draw blood from Mr. Shergur to determine how much alcohol was in Mr. Shergur' s blood stream.

Mr. Shergur moved the Pasco Municipal Court to suppress the evidence of the blood extracted from his body because the blood draw was not reasonable. The Pasco Municipal Court judge denied Mr. Shergur' s motion. He appealed the decision to the Franklin County Superior Court.

Both Mr. Shergur and Mr. Stenberg's appeals were heard by the Honorable Joseph Burrowes who sits as a

superior court judge in both Benton and Franklin County. Judge Burrowes determined that the searches of the petitioners we reasonable and did not violate Constitutions of the United States or the State of Washington.

Mr. Shergur and Mr. Stenberg petitioned the Court of Appeals Division III for review. Commissioner Wasson granted review and opined as follows:

> "RAP 2.3(d)(2) authorizes discretionary review "[i]f a significant question of law under the constitution of the State of Washington or of the United States is involved." RAP 2.3(d)(3) authorizes discretionary review "[i]f the decision involves an issue of public interest which should be determined by an appellate court:" This Court has determined that the issue presented here - whether drawing blood, even with a warrant, when a less intrusive breath test arguably would suffice, violates constitutional requisites of reasonableness - presents both a significant question of constitutional law and an issue of public interest under RAP 2.3(d)(2) and (3)."

The Washington State Court of Appeals Division III considered the arguments of the Mr. Stenberg and Mr. Shergur and heard the arguments of the cities. On March 10, 2020 the Court of Appeals determined that the searches of Mr. Stenberg and Mr. Shergur were constitutional because "the taking of blood is commonplace, the quantity taken is minimal and the procedure involves virtually no risk, trauma or pain. Schmerber *v. California*, 384 U.S. 757, 771. The Court also cited *Birchfield v. North Dakota* to support its decision that the cities can substitute a blood test for a breath test at its command because "nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances. *Birchfield v. North Dakota*___U.S.___136 S. Ct. 2160, 2184.

V. ARGUMENT

`Under Schmerber *v. California*, 384 U.S. 757, 771 the Supreme Court will accept review if a significant question of law under the Constitution of Washington or the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Here, the Court of Appeals has ruled that a search is made reasonable by the issuance of a warrant. The Court of Appeals has also ruled that a blood test , where a needle is thrust into a persons arm, is a an experience that provides no trauma to a human being and is not an invasion of privacy and therefore warrants little or no constitutional protection. The Supreme Court should review this finding because it is both a significant question of constitutional law and is an issue of substantial public interest.

A blood draw is an invasion of the body.

State of Washington v. Garcia-Salgado, 170 Wn. 2d 576 (2010). In the context of searches that intrude into the body, the United States Supreme Court has held that the interests of human dignity and privacy which the Fourth Amendment protects requires three showings in addition to a warrant. *Schmerber v. California,* 384 U.S. 757m 768 (1966). First, there must be a clear indication that the desired evidence will be found. *Id* at 770. Second, the method of searching must be reasonable. *Id at* 771. Third, the search must be performed in a reasonable manner. *Id* at 772. Here, the State had a warrant, but the warrant allowed for a method of searching which was not reasonable. A blood test is far more intrusive than a breath test. A blood test is a search beyond the body's surface and this search implicates important interests in human dignity and privacy. *Id.* at 769-770. Here, the police could have measured the petitioners blood alcohol with a test, the breath test, which is far less intrusive. The

government's failure to use the less intrusive means violated Mr. Stenberg's and Mr Shergur' s rights to be free from unreasonable searches and seizures.

The United States Supreme Court in Birchfield *v. North Dakota*___U.S.___136 S. Ct. 2160, 2184 makes it clear that blood tests implicate significant privacy concerns. Justice Alito writes as follows:

"Blood tests .... "require piercing the skin" and extract a part of the subject's body. Skinner, supra, at 625, 109 S. Ct. 1402, 103 L. Ed. 2d 639; see also [***40] McNeely, 569 U. S., at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696, 706 (opinion of the Court) (blood draws are "a compelled physical intrusion beneath [the defendant's] skin and into his veins"); id., at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696, 706 (opinion of Roberts , C. J.) (blood draws are "significant bodily intrusions"). And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. See id., at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696, 708 (plurality opinion) (citing Schmerber, 384 U. S., at 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908). Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. Perhaps that is why many States' implied

consent laws, including Minnesota's, specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take. See 1 Erwin §4.06; Minn. Stat. §169A.51, subd. 3. *Id.* at 2178.

The petitioner's rights to privacy were violated when their blood was taken. The blood draws violated the petitioner's rights under the Washington Constitution and the Constitution of the United States.

Washington State has an implied consent statute. It is like the statute in Minnesota which is referred to in the above quoted section from *Birchfield*. The Washington Statute like Minnesota's specifically prescribes that breath tests be administered in the usual drunk driving case instead of a blood test. See *RCW 46.20.308.* The Court of Appeals read the statute to allow for a blood test if there was a warrant. The Court of Appeals reading is contrary to the law. A warrant without more does not make an unreasonable search reasonable. The statute

does not give the State a choice; it gives an individual the choice.

V I CONCLUSION

The Supreme Court should grant review. The Court of Appeals decision is contrary to the Constitutions of the State of Washington and the United States. A blood draw if far more intrusive than a breath test. Needles have caused enormous amounts of trauma to children in each and every generation. No reasonable person young or old would choose a needle over a pill if the medicine in the pill and in the syringe would have the same effect on the person's wellbeing. The state cannot choose a more draconian course just because and because why requires more than a magistrate's signature.

Respectfully submitted this 8th day of April 2020

Gary Metro WSBA 37919
Attorney for Petitioners

DECLARATION OF SERIVCE

I, the undersigned, hereby declare that on this date, I caused a true and correct copy of the foregoing Petition for Review to the following parties in interest by emailing a copy to:

Michael Rio Assistant Prosecuting Attorney for the Cites of Richland and Pasco at michael@bellbrownrio.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8th day of April 2020 at Richland, Washington

Gary Metro

APPENDIX

FILED
MARCH 10, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CITY OF RICHLAND, Respondent, v. DEAN ALLEN STENBERG. Appellant.	)	No. 36268-0-III (consolidated with No. 36337-6-III) UNPUBLISHED OPINION
CITY OF PASCO, Respondent, v. JASON MICHAEL SHERGUR, Appellant.	)	

LAWRENCE-BERREY, C.J. — In this consolidated appeal, we granted discretionary review to answer whether law enforcement must offer a person suspected of driving under the influence a breath test before obtaining a search warrant to draw blood. We answer no and affirm the two trial courts.

FACTS

Dean Stenberg

Officer Bonnie Meyer of the Richland City Police Department stopped Dean Stenberg for a traffic violation. The officer could smell a strong odor of intoxicants from Stenberg's breath. The officer conducted field sobriety tests and thereafter applied for and obtained a search warrant to obtain a sample of Stenberg's blood. Stenberg's blood was drawn, and toxicology results showed the alcohol/blood content to be 0.18g/100ml.

Stenberg moved to suppress the toxicology results and argued the search violated the Fourth Amendment to the United States Constitution, article I, section 7 of the Washington Constitution, and Washington's implied consent statute. The Richland municipal court denied Stenberg's motion. The municipal court, hearing the case on stipulated facts, convicted Stenberg of operating a motor vehicle while under the influence of intoxicating liquor.

Stenberg appealed the Richland municipal court's ruling denying his motion to suppress the toxicology results. A Benton County Superior Court affirmed the municipal court's ruling. Stenberg timely appealed to this court.

Jason Shergur

Officer Thomas Groom of the Pasco City Police Department stopped Jason Shergur for a traffic infraction. The officer could smell an odor of intoxicants coming from Shergur's breath. The officer conducted field sobriety tests and thereafter applied for and obtained a search warrant to obtain a sample of Shergur's blood. Shergur's blood was drawn, and toxicology results showed the alcohol/blood content to be 0.16g/100ml.

Shergur moved to suppress the toxicology results and argued the search violated the Fourth Amendment to the United States Constitution, article I, section 7 of the Washington Constitution, and Washington's implied consent statute. The Pasco municipal court denied Shergur's motion to suppress. The municipal court, hearing the case on stipulated facts, convicted Shergur of operating a motor vehicle while under the influence of intoxicating liquor.

Shergur appealed the municipal court's decision to deny his motion to suppress the toxicology result. A Franklin County Superior Court affirmed the municipal court's ruling. Shergur timely appealed to this court.

We granted discretionary review of both rulings and consolidated Stenberg's and Shergur's appeals. *See* Comm'rs Ruling, *City of Richland v. Stenberg*, No. 36286-0-III consolidated with No. 36337-6-III (Wash. Ct. App. Dec. 31, 2018).

ANALYSIS

Stenberg and Shergur argue law enforcement must offer a person suspected of driving under the influence a breath test before applying for a search warrant. We disagree.

A. WASHINGTON'S IMPLIED CONSENT STATUTE

Stenberg and Shergur argue Washington's implied consent statute makes it perfectly clear that the State can demand a blood draw under only limited circumstances.

We review issues of statutory interpretation de novo. *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002). Our primary goal is to effectuate legislative intent. *In re Custody of Shields*, 157 Wn.2d 126, 140, 136 P.3d 117 (2006). We derive legislative intent from the plain language when its meaning is plain and unambiguous. *City of Seattle v. St. John*, 166 Wn.2d 941, 945, 215 P.3d 194 (2009).

RCW 46.20.308,[1] Washington's implied consent statute, provides in part:

> (1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a

[1] Stenberg and Shergur repeatedly cite "RCW 4620.508" in their brief. There is no such statute. Nor does RCW 46.20.508 exist. The State responds with citations to RCW 46.20.308, which also is the statute cited in the rulings on review.

> motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503.
>
> . . . .
>
> (4) Nothing in subsection (1), (2), or (3) of this section *precludes a law enforcement officer from obtaining a person's blood to test for alcohol*, marijuana, or any drug, *pursuant to a search warrant*, a valid waiver of the warrant requirement, when exigent circumstances exist, or under any other authority of law. . . .

We find Stenberg's and Shergur's argument unpersuasive. Although omitted in their brief, subsection (4) clearly permits a law enforcement officer to obtain a warrant for a person's blood for testing. *See City of Seattle*, 166 Wn.2d at 946 ("[A]n officer may obtain a blood alcohol test pursuant to a warrant regardless of the implied consent statute.").

B. CONSTITUTIONAL ARGUMENTS

Stenberg and Shergur contend the searches were unconstitutional under our state and federal constitutions. We review constitutional issues de novo. *State v. Budd*, 185 Wn.2d 566, 571, 374 P.3d 137 (2016).

Article I, section 7, of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A lawfully issued search warrant complies with the "authority of law" requirement. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008).

The Fourth Amendment provides, in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."

Stenberg and Shergur cite *Schmerber v. California*, 384 U.S. 757, 768, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) and *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016) to support their argument that blood tests are sufficiently invasive that they may not be administered by warrant unless law enforcement first offers the suspect the option of a breath test. Those authorities are contrary. *Schmerber* explains that the taking of blood is commonplace, the quantity taken is minimal, and the procedure involves virtually no risk, trauma, or pain. 384 U.S. at 771. And *Birchfield* notes, "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances." 136 S. Ct. at 2184. Here, law enforcement complied with state and federal constitutional requirements by obtaining warrants for the blood draws.

We conclude the trial courts did not err by denying Stenberg's and Shergur's motions to suppress.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.
Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.
Siddoway, J.

Fearing, J.
Fearing, J.

The Court of Appeals of the State of Washington Division III

CITY OF RICHLAND, Respondent, v. DEAN STENBERG, Petitioner.	)	No. 36268-0-III COMMISSIONER'S RULING

Consol'd W/

CITY OF PASCO, Respondent, v. JASON MICHAEL SHERGUR, Petitioner.	)	No. 36337-6-III COMMISSIONER'S RULING

In these consolidated cases, Dean Stenberg and Jason Michael Shergur seek

discretionary review of the separate superior court decisions, on appeal from municipal court, which affirmed their convictions for driving while intoxicated.

Both men contend that the superior courts erred when they upheld the district courts' denial of their motions to suppress evidence of their blood tests. Even though law enforcement obtained warrants for the blood draws, and even though they stipulated that probable cause to support the warrants existed insofar as the officers reasonably believed they were driving under the influence, they argue that the searches were not reasonable under both the state and federal constitutions because the officers did not first ask them whether they wanted to take a less intrusive breath test. The prosecutor states that both Pasco and Richland have instituted policies in which blood tests, instead of breathalyzers, are administered with a warrant in all instances in which probable cause exists to arrest for that offense.

RCW 46.20.308(4) of Washington's implied consent law provides, as follows:

> (4) Nothing in subsection (1), (2), or (3) of this section precludes a law enforcement officer from obtaining a person's blood to test for alcohol, marijuana, or any drug, *pursuant to a search warrant*, a valid waiver of the warrant requirement, when exigent circumstances exist, or under any other authority of law. *Any blood drawn for the purpose of determining the person's alcohol,* marijuana *levels,* or any drug, *is drawn pursuant to this section when the officer has reasonable grounds to believe that the person is in physical control or driving a vehicle under the influence or in violation of RCW 46.61.503.*

(Emphasis added.)

The superior court entered identical findings in both of these cases, to wit:

> In 2015, the legislature amended the implied consent law to remove the list of circumstances that had previously mandated taking a blood test. Nothing prohibits an officer from obtaining a warrant for a blood draw in any impaired driving case, *regardless of whether or not the officer first offers a breath test.* RCW 46.20.308 (4).
>
> . . .
>
> *Birchfield* held that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstance exception to the warrant requirement when there is not. *Birchfield [v. North Dakota,*136 S.Ct. 2160, 2184, 195 L. Ed.2d (2016)].

(Emphasis added.) Findings and Conclusions at 2. The court concluded that the "Municipal Court was correct in denying the defendant's motion to suppress the blood draw results because RCW 46.20.308 and the case law supports the proposition that a law enforcement officer may obtain a search warrant for blood without first seeking other methods to obtain the same evidence from different means, i.e., a breath sample." *Id.*

This Court observes that the superior court's citation to RCW 46.20.308(4) in support of its finding that "[n]othing prohibits an officer from obtaining a warrant for a blood draw in any impaired driving case, *regardless of whether or not the officer first offers a breath test*", may be an overstatement of what the statute actually provides. And, even if the statute can be read in that manner, it does not escape constitutional scrutiny. Further, the United States Supreme Court case of *Birchfield, supra.*, did not address the situation here in which the police obtain a warrant for a blood draw but do not first offer the defendant the less intrusive option of a breath test.

The parties have not cited, nor has this Court found, a prior case that decides whether law enforcement's failure to offer the breath test as an option renders a warrant unreasonable and therefore unconstitutional even if probable cause exists that the blood draw will produce evidence of intoxication.

RAP 2.3(d)(2) authorizes discretionary review "[i]f a significant question of law under the constitution of the State of Washington or of the United States is involved." RAP 2.3(d)(3) authorizes discretionary review "[i]f the decision involves an issue of public interest which should be determined by an appellate court." This Court has determined that the issue presented here – whether drawing blood, even with a warrant, when a less intrusive breath test arguably would suffice, violates constitutional requisites of reasonableness – presents both a significant question of constitutional law and an issue of public interest under RAP 2.3(d)(2) and (3).

Accordingly, the petitioners' motions for discretionary review are granted. The Clerk of Court is directed to set a perfection schedule in these consolidated matters.

Monica Wasson
Commissioner

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attention to: Washing Ct of Appeal date: April 8, 2020

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