

1
2 IN THE SKAGIT COUNTY DISTRICT COURT

3
4 STATE OF WASHINGTON

5
6 STATE OF WASHINGTON,) Case No.: C845379
7) C898382
8 Plaintiff,) 3Z230621
9) 4Z208824
10 vs.) C932763
11) PA4517
12 JASWINDER GREWAL,) 3Z826142
13 KIMBERLY N. BENJAMIN,) 2Z807231
14 GUY E. DREADIN,)
15 MARK J. KAEDING,)
16 JOSHUA S. LAVELLE,) ORDER DENYING DEFENDANTS' MOTION TO
17 JASON E. MURPHY,) SUPPRESS BREATH TEST RESULTS
18 ROBERT N. SERVOSS,)
19 LARRY G. BURKHART,)
20 Defendants)
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30 THIS MOTION brought pursuant to CrRLJ 3.6 seeks suppression of the
31 breath test results obtained when the defendants submitted to breath tests
32 following advice of their constitutional rights and warnings under
33 Washington's implied consent law (RCW 46.20.308). For purposes of this
34 motion defendants have not raised case specific factual issues such as
35 probable cause to stop or probable cause to arrest. Rather, this motion goes
36 directly to the legal underpinnings of the implied consent law in two
37 regards: First, defendants allege that the law is unconstitutional in that a
38 breath test is a search and under both the Fourth Amendment to the United
39 States Constitution and Article 1 Section 7 of the Washington State
40 Constitution "consent" to such a search cannot be implied. Second,
41 defendants allege that the portion of the warnings advising a defendant that
42 a refusal to submit to breath testing may be used against the defendant in a

1 subsequent trial is an incorrect statement of the law that prevented
2 defendant from making a knowing, intelligent and voluntary decision to submit
3 to the breath test and that the test results should, therefore, be
4 suppressed.

5 THE IMPLIED CONSENT LAW IS CONSTITUTIONAL

6 The implied consent law is based on the principal that anyone operating
7 a motor vehicle in the state of Washington has impliedly consented to provide
8 a sample (as defined by the State Toxicologist) of his or her lung air for
9 testing to determine if he or she may be under the influence of alcohol. At
10 the threshold, the law requires that the officer requesting the sample must
11 have probable cause to believe the person (hereinafter referred to as
12 "defendant") has been operating a vehicle while under the influence of
13 intoxicants. As a further safeguard, the officer is required to read the
14 implied consent warnings to the defendant. The specific purpose of these
15 warnings is to advise the defendant of his or her absolute right to refuse to
16 provide such a sample. A consequence of the refusal is also spelled out -
17 the refusing party's privilege to operate a motor vehicle in the State of
18 Washington will be suspended or revoked. By requiring such advice, the
19 legislature sought to "discourage drunk driving by focusing on the
20 consequences of refusing a breath test" thereby allowing a defendant "to make
21 an informed decision about their right to *refuse* the test." *State v.*
22 *Bostrom*, 127 Wash. 2d 580, 589 (1995).

23 The appellate courts in Washington have ruled on the constitutionality
24 of the implied consent law many times. Given the "menace of the drunken
25 driver" this law constitutes a valid exercise of the state's police power.
26 *State v. Moore*, 79 Wash. 2d 51, 54 (1971). This law also does not run afoul
27 of the constitutional protection against self-incrimination under both the
28 Fifth Amendment of the United States Constitution and Article 1, Section 9 of

1 the Washington State Constitution. *Moore*, supra at 55-58. The implied
2 consent law also does not violate the concept of due process. *Bostrom*, supra
3 at 590.

4 The right to be free from unreasonable searches and seizures stated in
5 the Fourth Amendment is a jealously protected right. It has even greater
6 protection under Article 1, Section 7. In Washington, a warrantless search
7 is unconstitutional unless it is the product of consent, exigent
8 circumstances or search incident to arrest. Neither exigent circumstances
9 nor search incident to arrest exist in these cases. Rather this is a case
10 about consent. Defendants' argument regarding implication of consent is
11 squarely addressed by the Washington Supreme Court in *State v. Moore*:

12 RCW 46.20.308 provides that all drivers upon this state's highways
13 'shall be deemed to have given consent * * * to a chemical test * * *.'
14 Appellant argues that the provision cannot be sustained because the
15 waiver of a constitutional right cannot be implied; rather it must be
16 voluntary. (*citation omitted*). We find no merit in this contention.
17 In the instant case, appellant voluntarily consented to the performance
18 of a Breathalyzer test. Even if he had not so consented, or if it can
19 be argued that his consent was given only to avoid the sanction imposed
20 for nonconsent, the result would not be different...Whether an accused's
21 consent to the chemical test be voluntary or involuntary, the law, with
22 its rights afforded the accused, is constitutionally sustainable as a
23 reasonable exercise of the state's police power, having its purpose the
24 reduction of traffic carnage occasioned by the inebriated driver.
25 *Moore*, supra, at 57-58.

26 THE IMPLIED CONSENT WARNINGS ARE AN ACCURATE STATEMENT OF THE LAW
27 Defendants argue that, since both the Fourth amendment and Art. 1,
28 Sec.7 mandate a search warrant (absent an exception to the warrant

1 requirement), a refusal to submit to a breath test under the implied consent
2 law is an exercise of an accused's constitutional rights which cannot be used
3 against the accused at trial. Washington courts have repeatedly held that
4 refusal to submit to a breath test after proper warnings have been given is
5 not a constitutional right but, rather, a common law right. *State v.*
6 *Zwicker*, 105 Wash. 2d 228, 242 (1986), *Bostrom*, supra at 590. Similarly, the
7 courts have held that the warning that a refusal "may" be used in a
8 subsequent criminal trial is an accurate statement of the law. *Frank v.*
9 *Department of Licensing*, 71 Wash. App. 585 (1993). Accordingly, a breath
10 test refusal may be admissible at a subsequent trial. *State v. Cohen*, 125
11 Wash. App. 220 (2005). Similar logic has been recently applied by Division
12 One of the Court of Appeals to permit evidence of a Field Sobriety Test
13 refusal. *State v. Mecham*, 323 P. 3d 1088 (2014). Defendants rely on
14 *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) to argue that the state of the
15 law has changed (or was previously misunderstood) and that the Fourth
16 Amendment requires a warrant (or recognized exception to the warrant
17 requirement) prior to obtaining a breath sample. Defendants are mistaken.
18 *McNeely* involved a nonconsensual blood draw obtained without a warrant. In
19 that case, the state argued that the natural dissipation of alcohol from a
20 living body created exigent circumstances that resulted in a per se exception
21 to the warrant requirement. In other words, the state argued that a
22 nonconsensual warrantless blood draw was always permitted. The Supreme Court
23 rejected that argument. In reaching its decision the Court noted:

24 As an initial matter, States have a broad range of legal tools to
25 enforce their drunk-driving laws and to secure BAC evidence without
26 undertaking warrantless nonconsensual blood draws. For example, all 50
27 States have adopted implied consent laws that require motorists, as a
28 condition of operating a motor vehicle within the State, to consent to

1 BAC testing if they are arrested or otherwise detained on suspicion of
2 a drunk-driving offense...Such laws impose significant consequences when
3 a motorist withdraws consent; typically the motorist's license is
4 immediately suspended or revoked, and most States allow the motorist's
5 refusal to take a BAC test to be used as evidence against him in a
6 subsequent criminal proceeding. *McNeely*, supra at 1566.

7 DEFENDANTS' MOTION IS DENIED

8 The doctrine of *Stare Decisis* requires a lower court to follow the
9 precedent established by a higher court. Years of precedent have established
10 the constitutional validity of the Implied Consent Law in Washington. It is
11 an appropriate exercise of the State's police powers in response to the issue
12 of alcohol and drug impaired motorists. Defendants' motion is denied.

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14 Dated this Thirtieth of June, 2014

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17 Warren M. Gilbert, Judge

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20 David A. Svaren, Judge