

74253-1

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Court of Appeals
Division I
State of Washington

74253-1

No. 74253-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Joanne Kandler, Appellant,

v.

City of Kent, Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS		<u>Page(s)</u>
A) ARGUMENT.....		1-5
I. <u>The City Of Kent Misrepresents The Implied Consent Statute Since The Statute Requires The Warnings Must Be Read Following An Arrest For Driving Under The Influence Regardless Of What Test Is Performed.....</u>		1-5
A. <u>The City Of Kent Misrepresents The Implied Consent Statute.....</u>		1
B. <u>The Implied Consent Statute Requires That, Once The Condition Of A Person Being Arrested For Driving Under The Influence Occurs, The Warnings Must Be Read.....</u>		1-3
C. <u>The Implied Consent Statute Requires The Breath And THC Warning Be Given Regardless Of What Test Is Performed.....</u>		3-5
B) CONCLUSION.....		5

TABLE OF AUTHORITIES **Page(s)**

Table of Cases

Fritts v. Dept. of Motor Vehicles,
6 Wn. App. 233, 238, 492 P.2d 558 (1971).....2

State v. Avery,
103 Wn. App. 527, 534, 13 P.3d 226 (2000).....2,5

State v. Robison,
192 Wn. App. 658, 662-63, 369 P.3d 188 (2016), review granted
sub nom., 92944-1, 2016 WL 3909818 (Wash. June 29,
2016).....3, 4, 5

State v. Turpin,
94 Wash.2d 820, 827, 620 P.2d 990 (1980).....2

State v. Whitman County Dist. Court,
105 Wn.2d 278, 714 P.2d 1183 (1986).2, 3

Williams v. Department of Licensing,
46 Wn. App. 453, 455, 731 P.2d 531 (1986).....2

Statutes

RCW 46.20.308.....1, 2, 3, 4, 5

A) ARGUMENT

I. The City Of Kent Misrepresents The Implied Consent Statute Since The Statute Requires The Warnings Must Be Read Following An Arrest For Driving Under The Influence Regardless Of What Test Is Performed.

A. The City Of Kent Misrepresents The Implied Consent Statute.

The City of Kent has again attempted to direct attention away from statutory language that discredits their breath-test-only position. The City of Kent quoted subsection (1) of the implied consent statute but intentionally excluded the relevant phrase “THC concentration, or presence of any drug” and included an ellipses in its place. Brief of Respondent 5. Although the City of Kent focuses on the emphasis of “breath” testing, the plain language of the statute directly refutes that assertion with the statute referencing blood and THC multiple times. RCW 46.20.308. (2)(c)(i-ii), (3), (5) (a), (5) (c), (5) (d) (ii), (7).

B. The Implied Consent Statute Requires That, Once The Condition Of A Person Being Arrested For Driving Under The Influence Occurs, The Warnings Must Be Read.

RCW 46.20.308. required Officer Dexheimer to read Ms. Kandler the implied consent warning for THC since Ms. Kandler was arrested for driving under the influence. Fifteen years ago the

State attempted to argue that implied consent does not apply to drug cases. *State v. Avery*, 103 Wn. App. 527, 535, 13 P.3d 226 (2000). The State was wrong then and the City is wrong now. In *Avery* the court clearly held that an arrest for “any offense” triggers the Implied Consent Statute. *Id.* at 536; *Fritts v. Dept. of Motor Vehicles*, 6 Wn. App. 233, 238, 492 P.2d 558 (1971); *Williams v. Department of Licensing*, 46 Wn. App. 453, 455, 731 P.2d 531 (1986). To trigger the statute, both reasonable grounds for the arresting officer to suspect that the driver was driving under the influence at the time of the arrest and a valid arrest must exist. *Id.* at 534. Once a person is under arrest for DUI, physical control, vehicular homicide, vehicular assault or felony DUI, the reading of Implied Consent is not optional, it is mandatory. See *Avery*, 103 Wn. App. at 535; RCW 46.20.308, *State v. Turpin*, 94 Wash.2d 820, 827, 620 P.2d 990 (1980).

Furthermore, where the Implied Consent statute applies, the officer must comply with the statute regardless of obtaining a driver’s “voluntary” consent to a blood test. *Avery*, 103 Wn. App. at 535. Complying with the statute is necessary because any consent

without the specified statutory warnings would be uniformed.
Whitman County Dist. Court, 105 Wn.2d at 278.

Finally, the use of the term **SHALL**, in RCW 46.20.308(2) creates a presumption of a mandatory obligation which means the officer has no discretion in supplying or phrasing the Implied Consent Statute. *Id.* at 285.

C. The Implied Consent Statute Requires The Breath And THC Warning Be Given Regardless Of What Test Is Performed.

RCW 46.20.308. Required Officer Dexheimer to read Ms. Kandler the implied consent warning for THC regardless of whether she performed a breath test or not. The City of Kent failed to respond to or recognize the present court's recent ruling that an officer must inform the driver of the THC concentrations even if a blood test is not being requested. *State v. Robison*, 192 Wn. App. 658, 662-63, 369 P.3d 188 (2016), review granted sub nom., 92944-1, 2016 WL 3909818 (Wash. June 29, 2016).

In *Robison*, the State argued a THC warning was irrelevant to that situation because a breath test cannot measure THC Levels. *Id.* at 664-665. The City of Kent in this case makes a similar argument by saying, "the failure of an officer to read the ICWs for

breath, is irrelevant to this case as it involved a blood test for the presence of marijuana.” Brief of Respondent 7. The present court in *Robison*, found the State’s reasoning unconvincing since the plain language of the statute clearly required strict adherence and advisement of the THC blood ramifications. *Id.* at 665. Therefore, the present court concluded that the failure of the officer to read the THC implied consent warnings for breath was not irreverent, as the State claimed, regardless of whether a blood test would actually be requested. *Id.* at 664.

A different version of RCW 46.20.308. was in place at the time of Ms. Kandler’s arrest than the one in *Robison*. However, the plain language of the September 2013 version, the version in effect at the time of Ms. Kandler’s arrest, still required an Implied Consent warning, which included a 5 nanogram THC presumption of impairment as well as civil and criminal ramifications. Therefore, the same relevant aspects of the statute were in effect at the time Ms. Kandler was arrested and thus the conclusion of the *Robison* court still applies.

As specified in *Robison*, the legislature amended the Implied Consent Warning statute in September 2015 by deleting references

to THC. *Id.* at 668. If the City of Kent is correct in suggesting that the warning required in the September 2013 statute was irrelevant in Ms. Kandler's then the September 2015 amendment would have been meaningless. *Id.*

B) CONCLUSION

Based on the holdings in *Avery* and *Robison*, The Superior Court erred when it reversed the trial court's order to suppress the results of the blood test. Before Officer Dexheimer requested a breath test from Ms. Kandler and after arresting her for driving under the influence, he did not provide her with the warning required by RCW 46.20.308. For the reasons stated above, this Court should reverse the superior court's decision

Respectfully submitted this 2nd day of November, 2016.

By 

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11
12
13
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16
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18
19
20
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22
23
24
25
26
27
28

COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

JOANNE KANDLER,

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CITY OF KENT,

Respondent.

AFFIDAVIT OF SERVICE

Hannah Kane, declares as follows:

On November 2, 2016, I served, via e-mail (per agreement of the parties), a true and correct copy of Reply Brief of Appellant via email to Michelle Walker, City of Kent Prosecuting Attorney at mwalker@kentwa.gov.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT PURSUANT TO RCW 9A.72.085.

Signed and dated on November 2, 2016.


Signature