

No. 40041-3 II

FILED
COURT OF APPEALS

14 JUL 20 AM 9:55

COURT OF APPEALS DIVISION TWO
STATE OF WASHINGTON

See
COURT

STATE OF WASHINGTON,

Petitioner,

v.

LEESA M. LYNCH,

Respondent,

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT

Respondent is Ms. Leesa M. Lynch.

II. INTRODUCTION

For decades, drivers arrested for DUI have been advised, in one form or another, implied consent warnings taken from RCW 46.20.308. For as long as the warnings have been read, they have been challenged. In theory, a proper advisement of the required warnings is not difficult; it merely requires a recitation of the language contained in the statute. However, when additional language outside the statute is added, the question becomes whether a different meaning is implied.

In 2009, the Washington State Patrol amended the language in the implied consent warnings read to drivers arrested for DUI. Specifically, the additional language was directed at persons with commercial driver's license (CDL) endorsements. Although the additional language is an accurate statement of law, when read in conjunction with the language from RCW 46.20.308, a misleading and ultimately inaccurate implication occurs. The Superior Court correctly found that when these two separate provisions of law are read together as drafted in the current warning, a meaning different than that intended by the legislature is at least implied.

A careful review of the warning and the applicable case law supports the decision reached below.

III. PROCEDURAL HISTORY

On direct appeal, the Honorable Judge Frank Cuthbertson of the Pierce County Superior Court held that the implied consent warnings provided to Ms. Lynch on the date of her arrest were misleading. Furthermore, Judge Cuthbertson found that the misleading nature of the warnings prejudiced Ms. Lynch's ability to make a knowing and intelligent decision whether to take the breath test. The order was entered on October 9, 2009. The appellant sought reconsideration, which was denied on October 30, 2009.

The lower court found that the implied consent warnings provided were misleading in two respects: 1) the warning implied that the availability of the ignition interlock license could serve as a remedy for the loss of a commercial driver's license, (CDL); and 2) the warning implied that the loss of CDL would track with the loss of the personal driver's license, thereby encouraging a CDL to holder to take the breath test so as to avoid a longer loss of CDL associated with a refusal.

The State sought discretionary review, which was granted by this Court. Brief of Appellant was filed and this response follows.

IV. STATEMENT OF THE CASE

1. Statement of the Case.

Ms. Lynch was arrested for DUI on March 27, 2009. (DOL, pg. 50-53). The facts and circumstances surrounding the traffic stop and arrest are not at issue. Ms. Lynch was ultimately transported to a police station for processing and was read the following implied consent warning:

Warning, you are under arrest for RCW 46.61.502 or RCW 46.61.504: driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.

Further, you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently, to determine alcohol concentration.

1. You are now advised that you have the right to refuse this breath test; and that if you refuse:

(A) Your driver's license, permit, or privilege to drive will be revoked or denied by the Department of Licensing for at least one year; and

(B) Your refusal to submit to this test may be used in a criminal trial.

2. You are further advised that if you submit to this breath test, and the test is administered, your driver's license, permit, or privilege to drive will be suspended, revoked, or denied by the Department of Licensing for at least 90 days if you are:

(A) Age twenty-one or over and the test indicates the alcohol concentration of your breath is 0.08 or more, or you are in violation of

RCW 46.61.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence;

Or

(B) Under age twenty-one and the test indicates the alcohol concentration of your breath is 0.02 or more, or you are in violation of RCW 46.61.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence.

3. If your driver's license, permit, or privilege to drive is suspended, revoked, or denied, you may be eligible to immediately apply for an ignition interlock driver's license.

4. You have the right to additional tests administered by any qualified person of your own choosing.

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT TIME OF ARREST: If your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified.

DOL, pg. 46).

Ms. Lynch chose to submit to submit to the breath test, and forego her right to refuse, after the implied consent warning advisement. The results of the test exceeded the legal limit and the Department's action commenced from there.

The Department found against Ms. Lynch and suspended her driver's license for 90 days. (DOL, pg. 1). As a result, Ms. Lynch's CDL endorsement was disqualified for one year. Ms. Lynch appealed to the Pierce County Superior Court, where she ultimately prevailed.

1. Standards on Review.

A. Factual Determinations

An appellate court reviews findings of fact using a substantial evidence standard. State v. Halstein, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). The State does not assign any error to the factual determinations made by the trial court. Unchallenged findings are verities on appeal. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

B. Legal Rulings

The legal sufficiency of implied consent warnings is a question of law, and so, appellate review is de novo. Pattison v. DOL, 112 Wn. App. 670 (2002); Jury v. DOL, 114 Wn. App. 726 (2002).

2. Applicable Law

The State must provide a driver with the opportunity to make a knowing and intelligent decision whether to take a breath test or refuse under the implied consent law. Pattison v. Dept of Licensing, 112 Wn. App. 670, 674, 50 P.3d 295 (2002). Drivers have a right to accurate warnings phrased so that one of normal intelligence would understand the consequences of his or her actions. Gibson v. Dept of Licensing, 54 Wn.

App. 188, 194, 773 P.2d 110 (1989). Generally, the State discharges its burden once it provides statutory warnings under RCW 46.20.308(2). State v. Bostrom, 127 Wn.2d 580, 586, 902 P.2d 157 (1995).

Police are not free to graft onto the implied consent warning any additional warnings not contained in the plain language of the statute. City of Bellevue v. Moffitt, 87 Wn. App. 144, 149, 940 P.2d 695 (1997). A warning need not exactly match the statutory language, so long as no other meaning is implied or conveyed. Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 785, 831 P.2d 149 (1989). [Emphasis added] Warnings which are inaccurate or misleading contravene the purpose of the implied consent warning and thus require suppression of the test results. Moffitt, at 148. A warning is misleading where it inaccurately conveys “a more coercive impact” related to the decision to either take the test or refuse than is permitted under statute, as it may lead the driver to make the choice that avoids that negative consequence. State v. Whitman Cty, 105 Wn.2d 278, 286, 714 P.2d 1183 (1986).

Courts have reviewed a number of situations where textual differences in the warning have misled drivers. See, State v. Whitman County, *supra* (Warning incorrectly stated a refusal “shall” be used as

evidence at trial); Welch v. Dept of Motor Vehicles, 13 Wn. App. 591, 592, 536 P.2d 172 (1975) (Warning incorrectly stated driver “could” lose license if test refused); Cooper v. Dept of Licensing, 61 Wn. App. 525, 528, 810 P.2d 1385 (1991) (Driver prejudiced by inaccurate that advised him he may lose his license for less than a year if he refused test.); and Mairs v. Dept of Licensing, 70 Wn. App. 541, 546, 854 P.2d 665 (1993) (Warning incorrectly stated driver would “probably” lose license if test refused); but see Bellevue v. Moffitt, supra (reading statutory language to drivers regarding additional test not misleading)

Although the purpose of the warning is to ensure the driver is afforded the opportunity to make a knowing and intelligent decision, the emphasis is not upon what the driver understood, but rather, upon the content of the information provided to the driver. See Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778 (1992). There is a difference between confusion expressed and misinformation provided; the issue here being the latter.

A subject’s right to fundamental fairness is built in to the implied consent procedure. State v. Canaday, 90 Wn.2d 808 (1978). The requirement that a suspect be informed of right under the implied consent statute is important to protect the right to fundamental fairness by enabling

the accused to make an informed decision about how to exercise his or her statutory right. State v. McNichols, 128 Wn.2d 242 (1995).

3. Why the warning is misleading.

In the case at hand, Ms. Lynch was read a warning that advised of her of several matters. She was informed that:

- She had the statutory right to refuse.
- She was advised of the circumstances under which her personal driver's license would be suspended, revoked or denied, and the probable lengths of suspension depending on the decision made.
- She was advised that if his license was suspended, revoked or denied that she may be eligible for an ignition interlock driver's license.
- She was advised that if her driver's license was suspended or revoked, her commercial driver's license would be disqualified even though she was not driving a commercial vehicle.

This last provision does not come from the implied consent statute and was grafted onto the warning by the Washington State Patrol. The last two provisions are accurate statements of law, but when read in conjunction with the entirety of the warning, a meaning not intended by the legislature is made clear to the driver with a CDL endorsement.

The warning is initially misleading because it falsely encourages CDL license holders to submit to the breath test. Much like State v. Whitman Cty., supra, the added language, read in conjunction with the statutory language, disfavors refusing the test in order to avoid a false negative consequence associated with refusing. This is accomplished by implying the CDL disqualification will last for as long as the personal license is suspended, revoked, or denied. It is acknowledged by all that, in reality, a CDL endorsement shall be disqualified for one year should a driver fail a breath test or refuse. See RCW 46.25.090(1) The language the State grafted onto the warning only states the CDL endorsement will be disqualified if the driver's license is "suspended or revoked." Linking the terms "suspension" and "revocation" together, the reasonable conclusion is that the CDL endorsement will be disqualified for the same period of time the personal license is suspended or revoked. This implies a CDL disqualification for as short as 90 days if the driver takes the breath test. A CDL holder in this situation will certainly agree to take the test, and risk a suspension/disqualification for as short as 90 days, rather than refuse and suffer a revocation/disqualification for at least one year. The driver in this situation is making a decision based on a misleading warning that fails to

warn the driver he or she faces the same one year disqualification regardless of the choice.

While it seems counterintuitive to suggest a person would be better off refusing a test, the decision to refuse a test is an important decision that affects the simultaneous criminal prosecution the driver faces following his or her DUI arrest. A recognized purpose of the implied consent statute (and warning) is to give the driver notice concerning both civil administrative and criminal penalties associated with failing or refusing a test. Jury v. Dept of Licensing, 114 Wn. App. 726, 734, 60 P.3d 615 (2002). Refusing a breath test may cause substantial consequences to the driving privilege, but it may also make the criminal prosecution more difficult to prove, and thus serves other interests important to the driver.

A CDL holder is further misled by this warning since it states a driver whose license is suspended or revoked may be eligible for an ignition interlock license. Losing the driver's license is a condition precedent to CDL disqualification. However, the warning provides a remedy for the loss of the driver's license, which by direct implication leads one to believe they will not lose their driver's license. To the average person, receiving a state sanctioned privilege to drive is tantamount to rescinding the underlying suspension or revocation. How can a driving

privilege be suspended or revoked while simultaneously being restored? The logical conclusion that follows is that if the ignition interlock license restores the driving privilege, then the suspension/revocation is no longer in effect. Since a CDL disqualification is dependent on a personal license suspension/revocation, granting an ignition interlock license further rescinds the CDL disqualification.

This of course is false. The ignition interlock license is a remedy that only applies to the personal license; not the CDL. The false hope created by the warning implies a meaning different than that intended by the legislature, and as such, meets the case law definition of a warning that is inaccurate and misleading.

In sum, the misleading nature of the warnings provides CDL holders false hope with a non-applicable remedy and misinformation with respect to length of CDL disqualification; all of which unduly influences the driver's decision in favor of taking the breath test and waiving the statutory right of refusal. At a minimum, the misinformation at least implies a meaning different than that intended by the legislature.

4. The State's position on the warning

The State has spent considerable time pointing out that the two provisions in question are accurate statements of the law. This is true.

When taken separately, in isolation, both provisions are accurate statements of law. Ms. Lynch has never argued anything to the contrary, however, when the two provisions are read in conjunction with one another a different meaning is conveyed. It is the mixture of the provisions that creates the problem. It should be remembered that a driver only need be warned of the information contained in the implied consent statute, RCW 46.20.308. There is no authority that even suggests a driver need be informed of any additional language not contained in the implied consent statute. Both of the problems here are created by the additional language grafted onto the warning. Had the warning simply contained the required language from the implied consent statute, we would not be here.

The State has pointed out that a CDL is not a stand alone license and that the CDL has no viability apart from a personal license. (State's motion for discretionary review, pg. 12). The State went further and indicated that if a personal driver's license is impaired, a CDL endorsement will suffer from the same disability. (State's motion for discretionary review, pg. 12). The State actually goes along way in making Ms. Lynch's argument for her. Common sense alone dictates that an endorsement on a license is dependent upon validity of the license

itself. The State is correct in that the warning signals that a CDL endorsement will suffer from the same impairment as that of the personal driver's license, however, that conclusion is misleading. The CDL will be lost for one year regardless of the decision made, but the warning, in accordance with even the State's logic, implies a lesser period of loss if one chooses to submit to the breath test.

The State has pointed out that an officer is not required to inform a driver of all the consequences that will flow from refusing or submitting to a breath test and cited to State v. Bostrom, 127 Wn.2d 580 (1995) in support thereof. While it is certainly true that a driver need not be informed of all potential consequences, when the State chooses to graft additional language on to the warning, that additional language cannot create a misleading result.

The State has further pointed out that officers are not required to tailor the warnings to every driver stopped and cited to Jury v. DOL, 114 Wn. App. 726 (2002). While officers are not required to tailor warning to each driver, once additional language is provided to a particular driver, the additional language cannot imply a meaning different than that intended by the legislature. Consequently, if an attempt at "tailoring" is made, the result cannot be misleading. Although the State does not have

to “tailor” warnings or inform of all potential consequences, it should not be able to hide behind such authority once it has on its own accord opened the door to the type of additional language it now complains it does not have to provide. The State essentially wants to provide unnecessary additional language in an apparent attempt to anticipate future defense arguments, but then not be held accountable if the addition results in a misleading advisement.

If the State decides to provide additional warnings, directed at a particular class of drivers, fundamental fairness demands that the advisement at least be comprehensive enough to afford the opportunity for a knowing and intelligent decision. Here, the State has added a partial statement of law regarding consequences to a CDL endorsement that fails to adequately advise the true nature of the consequences being faced. While the State does not have to advise a driver of all potential consequences, if they do, fundamental fairness surely dictates the advisement must be adequate.

The State has further argued that the ignition interlock license language must be given as it is a part of the implied consent statute, and that the warning does not promise eligibility because it uses the language “may apply.” Finally, the State has argued that the warning does not state

that the ignition interlock license applies to a CDL endorsement. The State then claimed that the Superior Court's findings conflict with State v. Whitman Co. Dist. Ct., 105 Wn.2d 278 (1986), essentially because that case surrounded use of the word "may," or lack thereof, in the warning at issue. (Brief of Appellant, pg. 16-17).

As noted above, the Whitman Co. case involved the coercive use of the word "shall" as it related to use of refusal evidence at trial. The State apparently believes that the appropriate use of the statutory term "may" somehow provides a similarity that creates a conflict between the lower court's findings and the Whitman Co. case. The comparison is strained and off base.

As discussed above, it is not the language from the implied consent statute that creates the problem, rather it is this language in combination with the additional verbiage outside the implied consent context that creates the misleading result.

The State then claimed that the lower court's findings conflict with Bostrom because the ignition interlock language comes from the statute and is unambiguous. Again, the point is missed entirely. It is not the statutory language itself, rather, it is the combining of the statutory language with the additional language outside the implied consent

context. The State seemingly refuses to address the real issue: the misleading result created by combining implied consent warnings with non-essential additional language related to CDL endorsement.

The State relies heavily on Pattison v. DOL, 112 Wn. App. 670 (2002) in its argument. However, a closer look finds the case easily distinguishable. First, when additional language outside the implied consent statute is added to the warning, the test is not merely whether there is a misstatement of law. Rather, the test is whether the warning, as presented, implies a meaning different than that intended by the legislature. The argument in Pattison stemmed from the added language “in violation of.” Drivers were essentially told that their license would be suspended if they were in violation of DUI and related statutes. The driver argued that the term “in violation of” would lead a reasonable person to believe their license would be suspended for merely being arrested for DUI. The court defined the term “in violation of” to mean conviction and as a result held the warning was not misleading. Furthermore, the warning in Pattison, unlike this case, did not encourage one choice over another by misleading implication.

The State has argued that the use of the term “disqualified,” with respect to loss of CDL, somehow distinguishes that action from

suspension or revocation of the personal driver's license. (Brief of Appellant, pg. 21). The term "disqualified" merely connotes the loss of use as a consequence. Any CDL holder knows going in that the life of the CDL endorsement is entirely dependent upon the life of the underlying personal driver's license. Damage to the driver's license inevitably spells damage to the CDL. Therefore, it is natural to assume that as goes the driver's license, so goes the CDL. Drivers are specifically informed about the potential damage to the driver's license—"suspension" means at least 90 days; "revocation" means at least one year. The term "suspension" is only used in association with taking the breath test.

The driver is essentially told that if their license is suspended for 90 days or revoked for one year the CDL will be disqualified, but the term "disqualified" is undefined. It is just a term used to point out the obvious: impairment to a CDL endorsement follows with that which occurs to the personal driver's license. This returns us to the problem with the current warning: if a driver's license is reinstated after a 90 day suspension, and the CDL is dependent upon the validity of the driver's license, why would the CDL not also be reinstated? The answer to this question is what the warning fails to advise—the CDL is gone for one year no matter what decision is made.

Contrary to the State's assertion, applying the superior court's ruling would not require law enforcement to inform CDL holders of the precise nature of all consequences. (Brief of Appellant, pg. 23). Again, the state did not have to advise CDL holders of anything outside the implied consent statute. What the superior court's ruling does do is require the state to provide adequate advisements of law when it does decide to inform a driver of additional consequences. The superior court's ruling properly adheres to principles of fundamental fairness by ensuring that drivers are afforded the opportunity to make a knowing and intelligent decision.

5. The Prejudice Standard

While it seems counterintuitive to suggest a person would be better off refusing a test, the decision to refuse is an important decision that affects the simultaneous criminal prosecution the driver faces following his or her DUI arrest. A recognized purpose of the implied consent statute (and warning) is to give the driver notice concerning both civil administrative and criminal penalties associated with failing or refusing a test. Jury v. Dept of Licensing, 114 Wn. App. 726, 734, 60 P.3d 615 (2002). Refusing a breath test may cause substantial consequences to the

driving privilege, but it may also make the criminal prosecution more difficult to prove, and thus serves other interests important to the driver.

Case law holds a driver can be prejudiced by submitting to a breath test. See State v. Whitman Cty, *supra*. The issue wasn't whether they were better off taking the test; it was not for the Court to decide. At issue was the fact they were denied the opportunity to make a knowing and intelligent choice to refuse the test.

A driver must establish the warning prejudiced his decision. See Gonzales v. Dept of Licensing, 112 Wn.2d 890, 774 P.2d 1187 (1989). Cases subsequent to Gonzales have held that a driver establishes "prejudice" resulting from an inaccurate warning when they fall into a class of drivers negatively affected by the inaccurate language. See Graham v. Dept of Licensing, 56 Wn. App. 677, 784 P.2d 1295 (1990); Gahagan v. Dept of Licensing, 59 Wn. App. 703, 800 P.2d 844 (1990). No case addressing "prejudice" from an inaccurate warning requires the driver to prove what he or she would have done if correctly advised.

Gonzales, Graham, and Gahagan share identical facts. Drivers were given a warning stating if they wanted to obtain an independent test,

it would be at their own expense. Gonzales, at 893; Graham, at 678; and Gahagan, at 704-705.

Gonzales explained why the warning was misleading;

As we explained in [State v. Bartels, 112, Wn.2d 882, 774 P.2d 1183 (1989)], this language is inaccurate as to indigent drivers. Under our court rules, an indigent driver may in the appropriate case obtain reimbursement for the costs of an additional test. Costs for which one is reimbursed are not “at your own expense”. The inclusion of this language in an implied consent warning could, therefore, deny an indigent driver the opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test. Gonzales, at 898-899. [Emphasis added]

The driver had the burden to prove he or she was indigent in order to meet the standard of “actual prejudice” standard. Gonzales, at 901. The driver was not required to prove what he would have done if properly advised in the warning.

In Graham, the question of actual prejudice was strictly factual. Graham, at 680.

The question to be addressed is whether Ms. Graham was actually prejudiced by inclusion of the “at your own expense” language. ...To obtain reversal on remand, therefore, Ms. Graham must demonstrate that she would have been eligible, at the time she made her decision to refuse the breath test, for public payment for services under CrRLJ 3.1(f). Graham, at 680-681.

In Gahagan, the State attempted to create a “prejudice” standard deviating from Gonzalez, arguing the driver had to prove he:

- 1) distrusted the test given;
- 2) wanted an additional test and;
- 3) believed he would ultimately have to pay for the test.

Gahagan, at 709.

The State’s argument was rejected. The Court re-affirmed “indigency” demonstrated actual prejudice. Gahagan, at 710. Here, the State is making the same argument, seemingly pretending that it hasn’t been previously rejected.

A later case, Thompson v. Dept of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999), addressed the “actual prejudice” standard from Gonzales. The trial court dismissed a commercial vehicle DUI charge where the driver was read both the implied consent warning and the warning for commercial drivers. Thompson, at 786-787. Thompson sought dismissal of the DOL commercial license disqualification using the trial court decision as collateral estoppel. Thompson, at 788.

The issue arose whether the trial court correctly determined Thompson was prejudiced by the two warnings. Thompson, at 790. The Supreme Court held it would not re-visit the issue. Thompson, at 798.

However, in reviewing the arguments the Court rejected the State's argument that since Thompson faced a commercial license disqualification whether he took the test or not, he could not be prejudiced by the two warnings. Thompson, at 797.

The Supreme Court rejected the "damned if you do, damned if you don't" analysis:

This analysis is too facile. It depends on the fortuity that a driver's BAC result will be above 0.04, and provides no disincentive to law enforcement officials to give improper implied consent warnings. As Thompson correctly notes, "If the Court of Appeals is correct as to the meaning of prejudice, then the trooper did not need to give Thompson *any* implied consent warnings, because no matter what Thompson's decision, the penalty would be the same, and therefore, no prejudice." Pet. for Review at 7. In the apt words of Judge Munson, "The City and County both argued that suppression of these results would penalize society simply because the officers derogated from the statute's mandate and since the defendants were not prejudiced by this derogation. We disagree. Society is penalized when officers derogate from the mandates of the Legislature." City of Spokane v. Holmberg, 50 Wash.App. 317, 323-24, 745 P.2d 49 (1987), *rev. denied*, 110 Wash.2d 1013 (1988), *overruled on other grounds by State v. Storhoff*, 133 Wash.2d 523, 946 P.2d 783 (1997). Thompson, at 797, fn. 8.

Courts have repeatedly rejected imposing a standard requiring the driver to prove what he or she would have done if correctly advised. Courts are concerned with the impact a warning has on a driver's decision

making process, not what the end result of the test is. If this really were the standard, there would never be any review of the warnings unless a driver who refused a test could establish he was under the legal limit. Any person who took the test could never challenge the warning because the option to refuse the test would lead to the same license revocation. This type of “prejudice” analysis has been soundly rejected by the Supreme Court.

Thompson explains that creating a prejudice standard requiring the driver to prove what he would have done if not given a misleading warning creates a standard that in reality can never be met. Further, our courts have already declined to require a driver to specify why an inaccurate warning was prejudicial. See Cooper v. Dept of Licensing, 61 Wn. App. at 528;

In light of the inaccuracy, the question then is whether Mr. Cooper was prejudiced by the advice. Prejudice is determined by considering whether the inaccurate information **may** have encouraged Mr. Cooper *not* to take the Breathalyzer. See Graham v. Dept of Licensing, 56 Wn. App. 677, 680, 784 P.2d 1295 (1990). If Mr. Cooper thought it was possible his license would be revoked for less than 1 year, he might have been more willing to risk revocation by refusing the Breathalyzer. We conclude the information was misleading and prevented Mr. Cooper from making a knowing and intelligent decision. [Emphasis added]

In the case at hand, the warning contained misleading language that encouraged one decision over another. Further, it is undisputed Ms. Lynch was a member of the class of driver's that would be affected by the misleading warning, i.e., she was a CDL holder on the date of arrest.

The State's position on prejudice misrepresents over twenty years of established case law. The State cited to State v. Storhoff, 133 Wn.2d 523 (1997), which involved a procedural question regarding deadlines for requesting a hearing to contest habitual traffic offender status. It is both factually and legally off point. (Brief of Appellant, pg. 29). The State then twists Gonzales, supra, to fit its own self serving premise on actual prejudice. The State is aided in this effort by ignoring the line of cases that came subsequent to Gonzales, which are discussed at length above. There is clearly a disconnect between what the State wants "actual prejudice" to mean and how the term has been defined in case law. The State's position on prejudice is simply wrong.

The Gonzales court used the term "actual prejudice," but to establish this it only needed to be shown that the driver was indigent at the time of the test, that is, that the driver was a member of the class of drivers affected by the misleading warning. It is important to note that the Gonzales court stated merely that the warning **could** have prevented the

driver from making a knowing and intelligent decision. The Cooper court indicated that the warning **may** have encouraged one decision over another.

6. Conclusion

The State chose to provide additional warnings outside the implied consent statute. It did not have to, it chose to. In so doing, the State combined two provisions of law in a manner that created a misleading result. The misleading nature of the overall warning served to encourage one decision over another when read to a CDL holder. This served to deny the opportunity to make a knowing and intelligent decision and accordingly violated principles of fundamental fairness. CDL holders comprise the class of drivers affected by the warning.

The superior court correctly held that the warning was misleading and that prejudice was established. Ms. Lynch respectfully asks this Court to affirm the decision of the Superior Court.

Respectfully submitted this 30th day of July, 2010.



Michael R. Frans
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Writing on behalf of Respondent's attorney:
Barbara A. Bowden/WSBA #15591

FILED
COURT OF APPEALS

10 JUL 30 AM 9:56

STATE OF WASHINGTON

BY _____
DEPUTY

NO: 40041-3
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LEESA M. LYNCH,
Respondent,

vs.

DEPARTMENT OF LICENSING,
Petitioner.

NO: 40041 – 3 II

DECLARATION OF SERVICE

I, Patricia L. Maerkl, declare as follows:

That at all times mentioned herein, I am over 18 years of age; that I am a citizen of the United States; that I am a resident of the State of Washington;

I further state that on July 29, 2010, I faxed a written BRIEF OF RESPONDENT to the Attorney General's Office in Olympia and to the Court of Appeals, Division II. I personally served a written BRIEF OF RESPONDENT on the Tacoma Attorney General's Office and the Court of Appeals, Division II on July 30, 2010. A true and correct copy of the BRIEF OF RESPONDENT that was served is attached to this affidavit.

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

DATED this 30th day of July, 2010.

By:


PATRICIA L. MAERKL