

NO. 41718-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROGER R. MARTIN,

Respondent,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Appellant.

**APPELLANT'S REPLY BRIEF
AND
RESPONSE BRIEF ON CROSS-REVIEW**

ROBERT M. MCKENNA
Attorney General

ERIC A. SONJU
WSBA No. 43167
Assistant Attorney General
Attorneys for Respondent
PO Box 40110
Olympia, WA 98504-0110
Phone: (360) 664-2475
Fax: (360) 664-0174
E-mail: LALolyEF@atg.wa.gov

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT	2
	A. <i>Lynch</i> is directly on point and properly holds that the implied consent warnings given to Martin were not misleading	2
	B. The continuance of the administrative hearing did not violate Martin’s due process rights because it allowed him to confront the witness against him.	5
	C. WAC 308-103-070(10) does not violate guarantees of equal protection because the safety risk posed by the operation of commercial motor vehicles is a rational basis for different treatment of commercial driver’s license holders.....	9
III.	CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Gahagan v. Dep't of Licensing</i> , 59 Wn. App. 703, 800 P.2d 844 (1990).....	5
<i>King County v. Mansour</i> , 131 Wn. App. 255, 128 P.3d 1241 (2006).....	7
<i>Lynch v. Dep't of Licensing</i> , 163 Wn. App. 697, 262 P.3d 65 (2011).....	1, 2, 3, 4
<i>Lytle v. Dep't of Licensing</i> , 94 Wn. App. 357, 971 P.2d 969 (1999).....	5, 6, 7
<i>Merseal v. Dep't of Licensing</i> , 99 Wn. App. 414, 994 P.2d 262 (2000).....	9, 10
<i>State ex rel. Nugent v. Lewis</i> , 93 Wn.2d 80, 605 P.2d 1265 (1980).....	7, 8
<i>State v. Bostrom</i> , 127 Wn.2d 580, 902 P.2d 157 (1995).....	4

Statutes

RCW 46.20.308(8).....	8
RCW 46.25.090	3

Rules

Justice Court Criminal Rule 3.08.....	7, 8
---------------------------------------	------

Regulations

WAC 308-103-070.....	10
WAC 308-103-070(10).....	1, 2, 6, 7, 8, 9, 10

Constitutional Provisions

U.S. Const. amend. VI; Const art. I, § 22 7

I. INTRODUCTION

Roger Martin received accurate implied consent warnings that allowed him to make a knowing and intelligent decision about whether to take the breath test. As required by statute, he was warned that his license would be (1) revoked or denied for at least one year if he refused the test or (2) suspended, revoked, or denied for at least ninety days if he submitted to and failed the test. Informing his decision even further, Martin was also accurately advised: For those not driving a commercial motor vehicle at the time of arrest: If your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified.

In *Lynch v. Dep't of Licensing*, 163 Wn. App. 697, 262 P.3d 65 (2011), this Court addressed the exact issue raised by Martin under identical factual circumstances and properly held that the implied consent warnings were not misleading, provided an opportunity to make a knowing and intelligent decision about whether to take the breath test, and did not result in actual prejudice to the driver. *Lynch* is directly on point here, and Martin has not raised any new arguments that warrant this Court's reversal of its well-reasoned opinion in that case.

The superior court also correctly affirmed the Department's decision that the hearing examiner did not offend Martin's due process rights by continuing his administrative hearing when the subpoenaed trooper did not appear, as required under WAC 308-103-070(10). Martin successfully cross-examined the arresting trooper at the continued hearing, and his license was not suspended while the hearing was pending.

Nor does WAC 308-103-070(10) undermine constitutional guarantees of equal protection. The unsafe operation of commercial vehicles poses a unique risk to public safety. This risk constitutes a rational basis for requiring procedural safeguards in license suspension actions involving CDL holders that are stronger than those in actions involving holders of personal driver's licenses alone.

Given that Martin received accurate implied consent warnings and the opportunity to cross-examine the arresting trooper, this Court should reinstate the Department's order suspending Martin's driver's license.¹

II. ARGUMENT

A. *Lynch* is directly on point and properly holds that the implied consent warnings given to Martin were not misleading.

Regarding the challenged implied consent warnings, this case presents nothing that this Court did not already consider and resolve in *Lynch*. In fact, the parties agreed to stay proceedings in this appeal pending the decision in *Lynch*, recognizing that the cases presented the same question. Stipulated Mot. to Stay Proceedings. Despite this understanding, Martin failed to address or attempt to distinguish *Lynch* in his brief. But *Lynch* cannot be ignored. The facts of that case are identical to those presented here. The driver in *Lynch* and the driver in this case were arrested for driving their personal vehicles under the

¹ Included herein are both the Department's Reply Brief and Response Brief on Cross-Review. The Department has omitted a counterstatement of the issues and a counterstatement of the case because the corresponding sections of its Opening Brief sufficiently address these matters.

influence. Both received the same implied consent warnings, expressed no confusion about them, took the breath test, and blew over the legal limit. *Lynch*, 163 Wn. App. at 701-02, 711; CP at 42, 48, 54. This Court held that the warnings given in both cases are not misleading, do not deprive the driver of the opportunity to make a knowing and intelligent decision whether to take a breath test, and do not result in actual prejudice. *Lynch*, 163 Wn. App. at 706-07, 711. Martin has offered no new argument that would warrant this court overruling itself in *Lynch*.

Without mentioning *Lynch*, Martin asks this Court to overrule it. For Martin to prevail, he must demonstrate that this Court was wrong in *Lynch* and (1) the warnings that he received were so misleading as to deprive him of the opportunity to making a knowing and intelligent decision and (2) he was actually prejudiced by the inaccurate warnings. *Id.* at 706-07. As noted in the Department's opening brief, Martin received accurate implied consent warnings that were statutorily required to be given. An arresting officer may provide warnings in addition to those required by statute as long as they are not inaccurate or misleading. *Id.* at 708. Here, the warning that a license suspension or revocation will result in a CDL disqualification was an accurate statement of the law, drawn directly from RCW 46.25.090. *Id.* at 709. No court has ever held that a legally accurate warning was misleading, and Martin cites to no authority to support this position. *Id.*

Nothing in the warning implied that the duration of the CDL disqualification would be tied to the length of the personal driver's license

suspension or revocation. *Id.* As the Court noted in *Lynch*, “[t]he CDL notification referred to CDL ‘disqualification’ as opposed to personal driver’s license ‘suspension or revocation,’ correctly implying that it is a separate consequence.” *Id.* The warnings “were not confusing or overly wordy” and “did not imply that such disqualification would be for the same period of time as [the] driver’s license suspension.” *Id.* at 709.

Martin also argues that he was not advised of the actual ramifications of his decision whether to take the breath test because the warning did not clarify that his CDL would be disqualified for one year. But arresting officers are not required to inform drivers of all of the consequences that will result from refusing or submitting to a breath test. *State v. Bostrom*, 127 Wn.2d 580, 586, 902 P.2d 157 (1995). Here, the officer gave Martin all of the warnings required by statute as well as an additional, legally accurate warning about the consequence to his commercial driver’s license. The officer added more than was required to Martin’s “body of knowledge to use in deciding whether to take the breath test or refuse it.” *Lynch*, 163 Wn. App. at 709.

Even assuming for the sake of argument that the warnings were misleading, Martin failed to prove that he suffered actual prejudice. Martin provided no evidence that he was misled by the warnings that he received or that any such misconception actually influenced his decision to submit to a breath test. He did not testify that he chose to submit to the breath test because of a mistaken belief that his CDL would be disqualified for 90 days if he produced a result over the legal limit.

Martin incorrectly argues that Washington courts have rejected a standard requiring a driver to show that a misleading warning influenced his decision. He provides de-contextualized excerpts from *Gahagan* to support this proposition. In reality, the quoted language is limited to those cases in which a driver is incorrectly informed that he has a right to take an additional breath test at his own expense. The court noted that precedent did not support a higher standard for proving actual prejudice that would require a driver to show that he communicated to the arresting officer a desire for an additional breath test. *Gahagan v. Dep't of Licensing*, 59 Wn. App. 703, 709-10, 800 P.2d 844 (1990). This limited holding is without force here. The applicable standard requires a showing of *actual* prejudice, not simply possible prejudice. As such, Martin must prove that the warning here affected his decision to submit to the breath test. He provided no evidence of this, thus he has not established actual prejudice.

B. The continuance of the administrative hearing did not violate Martin's due process rights because it allowed him to confront the witness against him.

Martin argues that, under due process, he was entitled to a dismissal when the arresting trooper did not appear at the first administrative hearing for which the trooper had been subpoenaed. Due process affords no such right. The only relevant due process issue here is whether Martin had an opportunity to cross-examine the witness against him, as recognized in *Lytle*. *Lytle v. Dep't of Licensing*, 94 Wn. App. 357,

361, 971 P.2d 969 (1999). As required under WAC 308-103-070(10), the hearing examiner here continued the administrative hearing when the trooper did not appear. CP at 123-125. The trooper then appeared at the second hearing, and Martin's counsel cross-examined him. CP at 127-134. His right to confront a witness against him was satisfied by the hearing examiner's continuance. *Lytle*, 94 Wn. App. at 361.

Martin notes that the court in *Lytle*, after reversing the Department's revocation decision, did not remand the case to the Department for a new hearing at which the appellant could cross-examine the officers. Resp't's Resp. Br. and Opening Br. on Cross-Review at 14. But *Lytle* is not like this case. In *Lytle*, the subpoenaed officers did not appear at the hearing, but the hearing examiner denied the driver's motion to dismiss and proceeded to make a decision based on the absent officers' reports. *Lytle*, 94 Wn. App. at 359-60. The court held that, because *Lytle* was precluded from cross-examining the evidence used against him, his due process rights were violated. *Id.* In contrast, here, the hearing examiner did not make a decision without first affording Martin the opportunity to cross-examine the arresting officer at the rescheduled hearing. Martin was thus afforded the due process protections with which the *Lytle* court was concerned.

Martin correctly notes that the court in *Lytle* did not remand with instructions to the hearing officer to reconvene a hearing with the trooper in attendance. *Id.* at 363. This is not relevant. The driver in that case was not a CDL holder, and no regulation required the hearing examiner to

continue the hearing. *Id.* at 359. In contrast, WAC 308-103-070(10) required a continuance here because Martin is a CDL holder. Even if due process permits a dismissal, it does not follow that it is offended by a continuance. Due process is adequately protected by either resolution.

Martin also relies on *King County v. Mansour*, 131 Wn. App. 255, 128 P.3d 1241 (2006). But, again, that case is not on point. In *Mansour*, Division I held that the rules of the King County Board of Appeals violated the due process clause because they did not afford a party the right to subpoena witnesses and records. *Id.* at 269. Here, not only did Martin have the right to subpoena witnesses, but he took advantage of that right, subpoenaed the trooper, and had the opportunity to cross-examine him. The requirements of *Mansour* were met.

Martin also alludes to a right to a timely hearing and a speedy determination. But the constitutional right to a speedy trial is reserved for criminal defendants, not petitioners in civil administrative hearings. U.S. Const. amend. VI; Const art. I, § 22.

On a related point, Martin refers to *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 605 P.2d 1265 (1980) to suggest that a defendant is entitled to a dismissal when the state's witness is absent from a hearing without excuse. Resp't's Resp. Br. and Opening Br. on Cross-Review at 15. But *Nugent* is relevant only in a criminal case in which JCrR 3.08 applies. The *Nugent* court held that "[t]he unexcused absence of a subpoenaed witness at the time of trial is not good cause for a continuance under JCrR 3.08." *Nugent*, 93 Wn.2d at 84. Under JCrR 3.08 and *Nugent*, only a *criminal*

defendant is entitled to a dismissal when a subpoenaed witness fails to appear without being excused. Martin is not a criminal defendant, thus the good cause requirement for granting a continuance under JCrR 3.08 and *Nugent* and its underlying principle do not apply here. The automatic continuance requirement of WAC 308-103-070(10) controlled and adequately accommodated Martin's due process rights.

The legislature has provided by statute that an administrative hearing is to be held within sixty days following the date of arrest, unless otherwise agreed to by the Department and the driver. RCW 46.20.308(8). Here, the original administrative hearing was scheduled for November 24, 2009, within 60 days of the arrest on September 27, 2009. CP at 83. Martin's counsel requested a continuance of this hearing until December 28, 2009, and waived the 60-day requirement. CP at 67. The December 28 hearing was continued to January 25, 2010. CP at 75. This hearing fell outside of the 60-day period following the arrest, but Martin had already waived that requirement, and his temporary license remained in effect throughout this period.

Martin cross-examined the arresting trooper. He was afforded a full opportunity to exercise his constitutionally-protected right to confront a witness against him. The hearing examiner did not offend his right to due process by continuing the administrative hearing under WAC 308-103-070(10), and Martin cites no authority holding to the contrary. The constitutional protections of due process and the right to confront witnesses do not exist to allow a driver to capitalize on a

trooper's scheduling conflict. The superior court correctly determined that no due process violation occurred here, and this Court should affirm its ruling.

C. WAC 308-103-070(10) does not violate guarantees of equal protection because the safety risk posed by the operation of commercial motor vehicles is a rational basis for different treatment of commercial driver's license holders.

Martin mischaracterizes the Department's position as simply a desire to prevent drivers from escaping sanction because an officer is unable to appear at the administrative hearing. The actual rational basis for the different treatment of commercial driver's license holders under WAC 308-103-070(10) is far more compelling.² Commercial drivers present a more serious safety risk than do drivers of personal vehicles, and the Court of Appeals has stated that this risk to the public is a sufficient basis for distinguishing between them. *Merseal*, 99 Wn. App. at 422.

Subsection (10) treats commercial drivers differently by requiring a hearing examiner to continue an administrative hearing involving a CDL holder if a subpoenaed officer does not appear. Otherwise, if the driver is not a CDL holder, a continuance is discretionary. WAC 308-103-070(10). The mandatory continuance of a hearing for a CDL holder is an extra procedural safeguard to ensure the consideration of the merits of a commercial license suspension action and its attendant safety implications.

² Courts apply the rational basis test when reviewing statutory classifications that distinguish between CDL holders and holders of other licenses. They uphold the classification if the government points to a rational relationship between the classification and the legislative purpose. *Merseal v. Dep't of Licensing*, 99 Wn. App. 414, 421, 994 P.2d 262 (2000).

Logically, continuing a hearing rather than dismissing a case will prevent commercial drivers who are prone to driving under the influence from getting behind the wheel. In satisfaction of the requirements of *Merseal*, WAC 308-103-070(10)'s continuance requirement is rationally related to the purpose of protecting the public from the serious risk posed by the operation of commercial vehicles by impaired drivers. *Id.* at 421.

Martin argues that commercial driver's license holders are entitled to greater procedural protections. He notes that a CDL disqualification is automatically stayed on appeal to superior court and is subject to *de novo* review on appeal. Martin misses the point. These protections are provided in acknowledgment of the financial impact of having one's CDL disqualified. *Id.* at 421. In contrast, the continuance of a hearing involving a CDL holder when an officer does not appear is required in acknowledgement of the serious safety risks posed by commercial vehicles. These procedural protections are not mutually exclusive; they support different goals. And contrary to Martin's argument, WAC 308-103-070 does not "impermissibly impinge[] on the right of a driver to confront witnesses against him." Resp't's Resp. Br. and Opening Br. on Cross-Review at 18. Rather, it ensures that a driver's right to confront witnesses against him will be preserved by continuing the hearing to secure an officer's presence. This satisfies the procedural protections for CDL holders that Martin seeks.

The operation of commercial vehicles presents a unique and serious risk, and the state has a legitimate interest in taking measures to

protect against this risk. WAC 308-103-070(10) furthers this goal of making the public safer by requiring a hearing examiner to reschedule a hearing rather than dismiss it because of a scheduling conflict. This Court should affirm the superior court's decision finding the same.

III. CONCLUSION

The Department respectfully requests that this Court reverse the superior court order, thereby affirming the hearing examiner's suspension order.

RESPECTFULLY SUBMITTED this 10th day of May, 2012.

ROBERT M. MCKENNA
Attorney General


ERIC A. SONJU, WSBA # 43167
Assistant Attorney General
Attorneys for Respondent

NO. 41718-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROGER R. MARTIN,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING,

Appellant.

DECLARATION OF
SERVICE OF
APPELLANT'S REPLY
BRIEF AND
RESPONSE BRIEF ON
CROSS-REVIEW

I, Bibi Shairulla, certify that I caused a copy of **Appellant's Reply Brief and Response Brief on Cross-Review** to be served on all parties or their counsel of record on the date below as follows:

**Via e-mail and US Mail via
Consolidated Mail Service:**

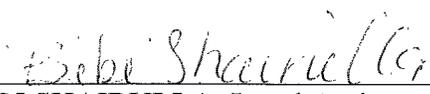
Diana Lundin
Phillipson & Lundin, PLLC
710 Tenth Ave. E.
Seattle, WA 98102
DLundin@PhillipsonLundin.com

Original e-filed with:

Court of Appeals Division II
Coa2filings@courts.wa.gov

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 10th day of May, 2012.


BIBI SHAIRULLA, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

May 10, 2012 - 3:16 PM

Transmittal Letter

Document Uploaded: 417189-DeclServReplyBr-RespBrOnCrossReview.pdf

Case Name: Roger R. Martin v. State/DOL

Court of Appeals Case Number: 41718-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: Declaration of Service of Reply/Response Brief on Cross-Review

Sender Name: Bibi S Shairulla - Email: **BibiS@atg.wa.gov**

A copy of this document has been emailed to the following addresses:

dlundin@phillipsonlundin.com

LALOLyEF@atg.wa.gov

WASHINGTON STATE ATTORNEY GENERAL

May 10, 2012 - 3:14 PM

Transmittal Letter

Document Uploaded: 417189-Reply Brief.pdf

Case Name: Roger R. Martin v. State/DOL

Court of Appeals Case Number: 41718-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Bibi S Shairulla - Email: **BibiS@atg.wa.gov**

A copy of this document has been emailed to the following addresses:

Dlundin@phillipsonlundin.com

LALOLyEF@atg.wa.gov