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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I**

COA No.60257-8-1

CITY OF SEATTLE,
Respondent/Plaintiff,

v.

ROBERT ST. JOHN,
Petitioner/Defendant.

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BRIEF OF RESPONDENT

Rebecca C. Robertson
WSBA #30503
Assistant City Attorney
Attorney for Respondent
City of Seattle Attorney's Office
700 Fifth Avenue, #5350
Seattle, Washington 98104
206-684-7757

ORIGINAL

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I. RESPONSE TO ISSUES PRESENTED FOR REVIEW

- A. Relevant history of the Implied Consent Statute**
- B. A search warrant for a defendant's blood pursuant to a DUI investigation is allowable under the Washington State Constitution, statutes, and case law.**
- C. Under the rules of statutory construction, the Implied Consent Statute does not limit the ability to obtain a search warrant for a DUI defendant's blood.**
 - 1. The intent of the legislature was to prevent DUP's and make evidence gathering easier.**
 - 2. The plain language of the statute does not limit the ability to obtain search warrants.**
 - 3. The two sections do not conflict.**
- D. The Implied Consent Warnings do not violate principles of fundamental fairness because they warn the defendant of all the consequences of refusal.**
- E. Equitable estoppel does not apply in this case**

II. STATEMENT OF THE CASE

The defendant is asking this court to reverse a decision by King County Superior Court which reversed Seattle Municipal Court's dismissal of his Driving Under the Influence charge. King County Superior Court found that the defendant's blood test was admissible, the implied consent warnings (ICW's) regarding breath and blood tests did not prevent service of a search warrant for the defendant's blood, and the ICW's are not statutorily or constitutionally defective.

III. ARGUMENT

A. Relevant history of the Implied Consent Statute

The defense argues that DUI defendant's have greater Fourth

Amendment rights granted to them under the Implied Consent Statute, specifically, that if they refuse to voluntarily provide evidence of their intoxication, that the police are therefore forever proscribed from seeking a search warrant for that evidence. However, in a seminal decision, the United States Supreme Court considered the constitutionality of the withdrawal of a blood sample from an objecting patient in a hospital who had previously been placed under arrest. Schmerber v. California, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966). The Schmerber court, in rejecting claims that this practice violated the petitioner's right of due process, his privilege against self-incrimination, and his right to counsel, held that taking a blood sample under exigent circumstances was not an illegal search and seizure under the Fourth and Fourteenth Amendments.

Id.

In the wake of Schmerber, most states enacted "implied consent laws." These laws recognized that search warrants were not required to extract blood, but provided citizens with the right to refuse a *warrantless* seizure of their blood. Most of these statutes also stated a preference for less invasive alcohol tests, such as breath or urine tests. Where such procedural statutes exist, warrantless collection of breath or blood for alcohol or drug testing must comply fully with the statutes.

Washington's Implied Consent Statute is similar in many respects to those found in other states. Under our statute an officer can ask a driver to submit to a breath test without a warrant:

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 or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood 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 motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503.

RCW 46.20.308(1).

In crafting an officer's authority under the statute, the Legislature required that "the test administered shall be of the breath only;" however, the Legislature established several exceptions to allow an officer to obtain a blood test either with or without a driver's consent. RCW 46.20.308(3); see RCW 46.20.308(2) & (4) and Kent v. Beigh, 145 Wn.2d 33, 41, 32 P.3d 258 (2001) (discussing when an officer may obtain a blood sample under RCW 46.20.308). In addition, the Legislature required that when an officer exercises his or her authority to request a warrantless breath test under the implied consent statute, and the driver refuses, "no test shall be given except as authorized under subsection (3) or (4) of this section."

RCW 46.20.308(5).

Under the implied consent statute, the driver must be provided the specific warning stated within the implied consent statute before the sanctions of the implied consent statute may be levied. Leininger v. Dept. of Licensing, 120 Wn. App. 68 (2004). St. John does not contest he received the exact warning prescribed by the statute.

In the Laws of 2004, Chapter 68, the Washington Legislature passed Substitute House Bill 3055 amending, among other things, RCW 46.20.308. SHB 3055, 58th Leg., Reg. Sess. (Wa. 2004). In the first paragraph of SHB 3055, the Legislature stated the following:

The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers have reached unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to insure swift and certain punishment for those who drink and drive.

SHB 3055. In its efforts to achieve this goal, the Legislature added the following language to RCW 46.20.308(1):

Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

SHB 3055 (sec. 2).

The addition of this language to RCW 46.20.308(1) indicates that the Legislature did not intend for the Implied Consent Statute to curtail a law officer's authority to seek a search warrant for an individual's breath or blood.

Similarly, the synopsis of the passed bill in Final Bill Report upon SB 3055 states:

Summary:

Search Warrants

Nothing in the implied consent law prevents a police officer from getting a search warrant in order to obtain breath or blood evidence samples.

With these amendments, Washington joins a number of other jurisdictions authorizing officers to pursue test evidence outside the restrictions of their implied consent statute. See e.g. Oregon v. Shantie, 92 P.3d 746 (2004)(Oregon officer may pursue search warrant for blood when defendant refuses breath test under implied consent); Koller v. Arizona DOT, 988 P.2d 128 (1999)(Arizona implied consent statute does not preclude officer from seeking warrant for blood evidence); Beeman v. Texas, 863 W.3d 613 (2002)(Texas implied consent statute allows officers to obtain blood test by search warrant); Brown v. Indiana, 774 N.E.2d 1001 (2002)(Indiana implied consent statute does not prevent an officer from obtaining evidence pursuant to a search warrant); Michigan v. Calon,

256 Mich. App. 312 (2003)(Michigan implied consent statute does not prohibit officer seeking blood test by search warrant); Cook v. Kentucky, 129 SW.3d 351, 359 (2004)(Kentucky officer may obtain warrant for blood test after refusal under implied consent statute); State v. Baker, 502 A.2d 489 (1985)(Maine permits warrantless seizure of blood evidence when probable cause and exigent circumstances even over defendant's refusal and despite implied consent statute); State v. Sisler, 683 N.E.2d 106 (1995)(Ohio Officer may take blood test despite refusal and implied consent statute if there is risk of loss of evidence, test may be warrantless if difficulty or delay in obtaining a warrant); State v. Faust, 682 NW.2d 371 (2004)(Wisconsin police not precluded by implied consent statute from obtaining warrantless blood test after defendant provides consensual breath test).

The changes in the DUI statutes that the defendant challenges have been found constitutional. City of Fircrest v. Jensen, 158 Wn.2d 384 (2006). The "rights" established under the Implied Consent Statute are a matter of legislative grace. State v. Zwicker, 105 Wn.2d 228, 242, 713 P.2d 1101 (1986). The Legislature, while making it clear that consent is assumed, has chosen to give DUI defendant's right to refuse to give a voluntary sample of their breath or blood with the requisite penalties in an

effort to encourage cooperation. As stated by the Final Bill Report and the express language of RCW 46.20.308(1), the Implied Consent Statute has nothing to do with evidence seized by search warrant.

B. A search warrant for defendant's blood pursuant to a DUI investigation is allowable under the Washington State Constitution, statutes, and case law.

In Washington State, there are two mutually exclusive methods for law officers to obtain breath or blood alcohol evidence. One method, as detailed above, is authorized under the Implied Consent Statute. The other is an officer's authority, granted under the Washington State Constitution, to execute a search warrant. The application of one method is exclusive of and does not preclude application of the other method.

Under article 1 § 7 of Washington State Constitution, an officer may obtain a valid search warrant granted by authority of law. RCW 10.79.015; see also City of Seattle v. McCready, 123 Wn.2d 260, 271-72, 868 P.2d 134 (1994). Therefore, a valid search warrant based on probable cause is constitutionally sufficient to obtain a blood sample from a defendant. Washington v. Kalakosky, 121 Wn.2d 525, 532-33, 852 P.2d 1064 (1993). In addition, where exigent circumstances exist, an officer is authorized to obtain a blood sample without a search warrant. Washington v. Komoto, 40 Wn. App. 200, 208-9, 214, 697 P.2d 1025 (1985) cert.

denied 474 U.S. 1021, 106 S.Ct. 572 (1985) (applying a four-part test to determine if an officer may enter a home and obtain a blood sample to determine blood alcohol concentration where exigent circumstances exist, the court held the need for immediate taking of a blood sample under the circumstances was a sufficient exigency to justify proceeding without a warrant, or without attempting to obtain a telephonically authorized warrant).

Division One of the Court of Appeals considered a case where a driver was arrested for negligent homicide caused by a car accident, was not given implied consent warnings, and was then required to submit to a breath test; the driver sought to suppress the breath test evidence because he did not receive implied consent warnings and did not have an opportunity to decide to take or refuse the test. State v. Krieg, 7 Wn. App. 20, 497 P.2d 621 (1972). In Krieg, the State argued that if implied consent warnings were applied to a prosecution for negligent homicide, “a conflict would exist with RCW 10.79.015, which empowers a magistrate to issue a search warrant authorizing a search and seizure of any evidence material to an investigation or prosecution of any felony.” Krieg, 7 Wn. App. at 22.

The court rejected this argument:

An axiomatic rule of statutory construction is that when two statutes relate to the same subject matter and are

not actually in conflict, they should be interpreted to give meaning and effect to both, even though one statute is general in operation and the other is special . . . The implied consent statute is a limiting statute specially enacted to govern the chemical or blood testing of a driver suspected of being intoxicated. In this narrow situation, the implied consent statute controls. The search warrant statute controls in all other situations when it is not specially limited.

Id. at 23. The court suppressed the breath test evidence. Id. at 26.

It is important to note that at the time Kreig was decided, the law of Washington only authorized warrants for felonies.

Twenty-five years after Krieg, Division One revisited the issue of whether the Implied Consent Statute operates as statutory means to limit an officer's authority to obtain a blood sample. State v. Smith, 84 Wn. App. 813, 815, 929 P.2d 1191 (1997), review denied 133 Wn.2d 1005 (1997). In Smith the court addressed the question of whether evidence of blood alcohol is admissible in a vehicular assault prosecution where a blood sample was taken at a hospital for purposes of treatment, rather than by police pursuant to their authorities under the Implied Consent Statute. Id. at 815. The court found that where a person is not under arrest, an officer is not authorized to act under the Implied Consent Statute. Id. at 818. The court ultimately ruled that the blood alcohol evidence was admissible because an officer is not limited by the Implied Consent Statute

when other valid means of obtaining evidence are available:

Absence of authorizing language in a statute does not convert it into a rule of exclusion. While the implied consent statute does not authorize seizure or admission of Smith's blood sample, neither does the statute prevent its seizure or admission on other grounds.

Smith, 84 Wn. App. at 819.

Here, St. John asserts that with SHB 3055 the implied consent statute was modified and included a substantial change in the State's power to obtain evidence under the law. His assertion presumes that the Implied Consent Statute is the sole authority for an officer to obtain a breath or blood sample from a driver, and that prior to SHB 3055 the Legislature curtailed the scope of article 1 § 7 when it passed the Implied Consent Statute.

The Legislature, however, cannot modify the State constitution through statutory fiat. Moreover, the language added to RCW 46.20.308 does not announce a "substantial change in the State's power to obtain evidence under law"; rather, the language added to RCW 46.20.308(1) expressly clarifies the Legislature's intent that *nothing* under the Implied Consent Statute limits or modifies any law authorizing officers from obtaining search warrants for blood or breath and explicitly states what the law has always allowed.

Here, the officer's authority to obtain a search warrant for a blood test is not granted under the Implied Consent Statute; rather, it is granted under article 1 § 7 of the Washington State Constitution. While the Legislature provides St. John the right to refuse the officer's request to submit to a warrantless breath test under the Implied Consent Statute, the statute does not curtail that officer's authority to obtain a search warrant to secure blood or breath alcohol evidence. To rule otherwise would allow St. John to use his refusal as a sword to defeat a law officer's constitutionally permissible means of conducting criminal investigations. Such a ruling would provide DUI defendant's with greater Fourth Amendment Rights than any other defendant, putting them in an exalted status that allows them to preclude the police from gathering the most important evidence against them. Defendant's who are charged with much more serious crimes, for which the penalty might be life in prison or death, are not allowed this protection. It runs contrary to logic and the principles of the Fourth Amendment that defendants charged with a mere gross misdemeanor would be allowed greater Constitutional protection than a defendant subject to the death penalty.

Outside the framework of the implied consent statute, this circumstance is not novel. In State v. Ferrier, 136 Wn.2d 103 (1998) our

court outlined the analysis to apply when an officer seeks voluntary consent to enter and search a home without a warrant. The Ferrier court required the officer to advise the homeowner of the right to refuse entry and the right to terminate the search at any time. Despite the requirement that the homeowner be advised of their constitutional right to refuse entry during a voluntary entry, our court's have not required that such notice include the range of options available to the officer if the homeowner refuses consent. For instance, in State v. Johnson, 104 Wn. App. 489, 504-06, 17 P.3d 3 (2001) the court affirmed a voluntary search where the officers not only did not inform the person that they could get a warrant if he refused entry, the officers already had a warrant in their possession and did not reveal that fact. Under St. John's analysis, the initial advice that the homeowner had a "right to refuse" entry was a sham. In fact, as the defendant in Johnson illustrates, the advice to the homeowner was completely correct. The homeowner had the right to refuse *voluntary* entry. The homeowner was never advised that this was the *only* means available to law enforcement.

Just as the defendant in Johnson had a constitutional right to refuse voluntary entry into his house, St. John has the legislatively created "right" to refuse a voluntary blood or breath alcohol test. But just as the defendant

in Johnson could still be served with a search warrant after a refusal, with no notice of that possibility, so could St. John. St. John was advised in precisely the terms required by the statute. His blood was obtained pursuant to a validly issued search warrant, allowable under search and seizure doctrine.

St. John's argument that he and other DUI defendant's should be afforded greater Fourth Amendment protection than murderers must fail. The ability to obtain a search warrant for evidence is governed by the United States Constitution, the Washington State Constitution, case law, and statute. The Implied Consent Statute cannot and does not take away rights of law enforcement to gather evidence.

C. Under the rules of statutory construction, the Implied Consent Statute does not limit the ability to obtain a search warrant for a DUI defendant's blood.

The first factor that the court must look to when interpreting a statute is the intent of the legislature. Williams v. Pierce County, 13 Wn.App. 755, 537 P.2d 856 (1975) (The fundamental objective in construing ordinances and statutes is to ascertain the legislative intent), State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) (The court's primary duty in interpreting any statute is to discern and implement the intent of the legislature), State v. C.G., 150 Wn.2d. 604, 80 P.3d 594 (2003) (The

court's goal is to determine the legislature's intent and carry it out). Only after determining the intent of the legislature should the court look to the principles of statutory construction. The court must determine if the plain meaning of the statute may be discerned from what the Legislature's intent was, and avoid reading a statute such that the results would be absurd.

State v. J.P., 149 Wn.2d at 450. Only if the above mechanisms are insufficient to determine the meaning of a statute and two provisions conflict should the court apply two canons of statutory construction to resolve the conflict: 1) the statutory provision that appears latest in order of position prevails unless the first provision is more clear and explicit than the last, and 2) the latest enacted provision prevails when it is more specific than its predecessor. Id., at 452.

Here, the intent of the legislature is clear and the plain meaning of the statute makes it obvious that officers maintain the right to obtain search warrants for a defendant's blood. The two provisions of the statute do not conflict because they govern two different scenarios. The first explicitly states that DUI defendants are subject to search warrants just like any other defendant, and the second governs the legislatively created right of refusal to provide a voluntary test.

1. The intent of the legislature was to prevent DUI's and make evidence gathering easier.

St. John argues that excluding search warrants from the implied consent statute renders the right to refuse a test under the law meaningless. While the *defendant's purpose* in refusing the test may be to prevent the state from obtaining evidence—that purpose is nowhere adopted by the legislature. To the contrary, such a purpose would run counter to all three stated goals in the statute.

The stated goals of the statute are to discourage intoxicated individuals from driving, to suspend the privilege of intoxicated drivers; and to provide an efficient means of gathering reliable evidence of intoxication or non-intoxication. Lax v. Dept. of Licensing, 125 Wn.2d 818, 824 (1995). Assuring officers the authority to pursue BAC evidence by search warrant furthers each and every stated goal. The collection of BAC evidence by warrant provides DOL and the court with an objective basis for calculating the length of the defendant's license suspension in both civil and criminal proceedings. The collection of BAC evidence by warrant encourages persons to cooperate with the most efficient means of collecting BAC evidence—breath testing. With the knowledge that a refusal will result in license suspension, the incentive to refuse is diminished and suspects are encouraged to cooperate. Importantly, the

availability of a search warrant does not compel the officer to seek one.

The right to refuse under the ICW is not “meaningless” to the defendant. Just as before under the amendments to the ICW statute, the suspect is provided the proverbial carrot-and-stick choice. He may voluntarily provide test evidence to demonstrate his sobriety. Or he may refuse. Under the implied consent statute, defendants still control whether or not they cooperate and whether or not they are sanctioned for failing to cooperate by refusing tests.

If one follows St. John’s argument to its logical conclusion, police officers would just get a search warrant for a defendant’s blood and bypass the Implied Consent Warnings altogether. This is not what the legislature intended.

2. The plain language of the statute does not limit the ability to obtain search warrants.

The 2004 Amendments to RCW 46.20.308 added a provision stating:

Neither consent nor this section precludes a police officer from obtaining a search warrant for a person’s breath or blood.

This new language lists two specific circumstances that do *not* affect an officer’s ability to obtain a search warrant for a person’s breath or blood. The statute states that “consent” does not limit an officer’s ability

to seek a search warrant. Thus, for example, the fact an officer has consent for a breath test does not prevent the officer from pursuing a blood test by search warrant. Similarly, the new language expressly states “this section” does not preclude an officer from obtaining a search warrant for a person’s breath or blood. The word “section” means the entirety of the Implied Consent Statute. Kent v. Beigh, 145 Wn.2d at 38-39. The 2004 Amendment could not more plainly state its intention to utterly exclude considerations under the Implied Consent Statute when considering breath or blood tests obtained by search warrant. The provision is clear and unambiguous. The Legislature merely codified in the statute what was already existing law: the ability of law enforcement officers to obtain search warrants for blood was not restricted by the Implied Consent Statute. The placement of the new language at the preamble of the statute makes it clear that the language applies to the statute in its entirety.

3. The two sections do not conflict.

St. John argues that the two sections conflict. However, the two sections can be harmonized. Statutes are to be construed so that all language used is given effect. State v. J.P., 149 Wn.2d at 450. RCW 46.20.308(1) states unequivocally that “Neither consent nor this section precludes a police officer from obtaining a search warrant for a person’s

breath or blood.” This is a specific statement that allows the *taking* of evidence pursuant to all other applicable law, regardless of the administrative consequences of a refusal, rather than the *giving* of a test that only legislative grace has allowed the defendant. RCW 46.20.308 (5). As stated in section (1), a person is deemed to have given consent. The legislature has provided an incentive to cooperate by specifying different sanctions for forcing a police officer to obtain a search warrant for the quickly dissipating evidence of intoxication. Drivers have a statutory right to refuse a breath test, which the Washington Supreme Court has held is a right granted as “simply a matter of legislative grace.” State v. Zwicker, 105 Wn.2d 228, 242, 713 P.2d 1101 (1986). As a result, “[a]ttaching penalties to the exercise of the statutory right of refusal is not inherently coercive where the Legislature could withdraw this privilege altogether.” Id.; Stalsbrotten, 138 Wn.2d at 236 (“[g]iven that the State could require suspects to take the test, the State can also legitimately offer suspects the option of refusing the test, with attendant penalties”). However, if a defendant refuses a breath test, the opportunity to avoid certain license consequences and having the refusal used against him in trial shall no longer be *given*. This does not preclude an officer under section (1) from *taking* the evidence anyway.

Therefore, the two sections do not conflict. The defendant maintains his right of refusal, and cannot change his mind. The legislature has deemed he will face sanctions for not cooperating with the investigation. However, this has nothing to do with the ability of police officers to obtain search warrants.

D. The Implied Consent Warnings do not violate principles of fundamental fairness because they warn the defendant of all the consequences of refusal.

St. John alleges the officer violated his due process rights by omitting reference to the possibility a warrant could be sought if he refused a blood test. We find no record St. John raised this argument below in the trial court. Accordingly, we find no basis for his new claim and distinguish City v. Beck, 130 Wn. App. 481 (2005). We address the argument should the court find the issue was preserved for appeal.

St. John argues that excluding notice of the possibility of a search warrant from the implied consent statute renders the right to refuse a test under the law meaningless.

In State v. Bostrom, 127 Wn.2d 580 (1995), our court discussed this area of law. The Bostrom court unambiguously held the State has no obligation to provide warnings not required by the text of the statute. Id., at 586-87. Bostrom explained that the prohibition on “misleading or

misstated” warnings are limited to analyzing warning required by the statute. Id., at 589-90. In other words, the statute is not misleading by failing to discuss issues not required by the statute.

In Bostrom, the court notes that a State is not free to give any warning it wishes without fear of contravening due process, citing South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983). Id., at 590. In Neville, the defendant argued that warning him about possible administrative sanctions from a refusal without mentioning any criminal sanctions from the refusal implied that no criminal sanctions would arise. The Neville court disagreed, holding that advising a defendant regarding the licensing consequence for refusal and not informing him of the possible criminal consequences of refusing was not misleading because it did not assure the driver that the refusal would *not* be used against him at trial. Bostrom, 127 Wn.2d at 591, citing Neville, 459 U.S. at 555-56. The court held, “such a failure to warn was not the sort of implicit promise to forgo use of evidence that would unfairly trick respondent if the evidence were later offered against him at trial.”

In addition, the Neville court noted the defendant was warned that a refusal to take the test would result in loss of his driving privileges for one year. The court concluded this warning “made it clear that refusing

the test was not a 'safe harbor' free of adverse consequences." Bostrom, at 591 citing Neville, 459 U.S. at 566.

Similar analysis is seen in the search warrant cases, as noted above. A defendant only must be told that he has the right to refuse a voluntary search and if he does consent it can be revoked at any time. However, he does not need to be warned that a search warrant may be obtained. State v. Johnson, 104 Wn. App. 489, 504-06 (2001)

In our own case, St. John was advised of the direct civil *and* criminal consequences of refusing a breath test. No mention was made of blood testing. No mention was made upon what effect a breath test refusal might have on blood testing. In other words, St. John was not given any indication that refusing a breath test would mean no blood test could be sought. And, like Neville, he was warned that refusing the test had consequences—which was sufficient to warn him that refusal was not a safe harbor.

Contrary to St. John's unsupported assertions, the police report reflects St. John was simply advised with the standard warning, that he had a right to seek independent testing. The warnings mandated by RCW 46.62.308 are not "fundamentally unfair" and St. John fails to establish beyond a reasonable doubt a constitutional due process violation.

E. Equitable estoppel does not apply in this case.

St. John also claims that under the principles of equitable estoppel, the authorities cannot compel a blood test from him via search warrant if they do not inform him of that possibility.

To raise an equitable estoppel argument in this court, the defendant would have had to raise it at the trial court level, or establish that what occurred is a “manifest error affecting a constitutional right.” State v Foulkes, 63 Wn.App. 643, 649, 821 P.2d 77 (1991). The defendant did not raise this issue in the lower court. Therefore they have to prove by clear, cogent, and convincing evidence that there was manifest error affecting a constitutional right committed by the police officer. Mercer v. State, 48 Wn.App. 496, 500, 739 P.2d 703 review denied, 108 Wn.2d 1037 (1987).

Equitable estoppel against the government is disfavored.

Kramarevsky v. DSHS, 64 Wn.App. 14, 19, 822 P.2d 1227 (1992).

Equitable estoppel is applied against the government only when necessary to prevent a manifest injustice and the exercise of governmental powers will not be impaired. Foulkes, 63 Wn.App. at 649. Equitable estoppel will also not be applied to the government if its application would therefore thwart the purpose of the laws. State v. O’Connell, 83 Wn.2d

797, 827, 523 P.2d 872 (1974).

The elements of equitable estoppel are: 1) an admission, statement, or act inconsistent with the claim afterwards asserted; 2) action by another in reliance upon that act; and 3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or omission. Shafer v. State, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). The defendant must prove each of these elements must be established by clear, cogent, and convincing evidence. Mercer v. State, 48 Wn.App. 496 at 500.

To satisfy the first element, the defendant must prove by clear, cogent, and convincing evidence that the officer made a statement or acted in a manner inconsistent with a claim later asserted. The defendant cannot show that this occurred. The officer read the defendant his the implied consent warnings, which are a correct statement of the law. The service of a search warrant for the defendant's blood was not inconsistent with any information provided in the implied consent warnings. Thus, the defendant cannot prove the first element of equitable estoppel.

To satisfy the second element, the defendant would have to prove by clear, cogent, and convincing evidence that he actually relied on the officer's statement in making any decision to refuse the blood test. In a

criminal case, the defendant must, at a minimum, show that his reliance on misleading information by the government was objectively reasonable.

State v. Locati, 111 Wn.App. 222, 227, 43 P.3d 1288 (2002).

There is nothing in the record to support this element. The defendant cannot prove that the information provided by the officer was misleading or mislead him in any way. There is nothing from the trial court record which speaks to the defendant's understanding of the law or that if informed of the possibility of a search warrant he would not have refused the breath test.

The defendant also cannot prove the third element, which was that he was injured. The search warrant was validly obtained, and evidence of the crime of Driving Under the Influence discovered. Discovery of incriminating evidence alone does not constitute injury under the principles of equitable estoppel.

The defendant has also failed to show that there was a manifest error affecting an important constitutional right. There is nothing that bars an officer from obtaining a search warrant after a defendant refuses a voluntary blood test. This is a search and seizure case, just like any other. DUI defendants are not afforded extra protections under the Fourth Amendment. (See arguments above). Although the defendant cites to

Raley v. Ohio, 360 U.S. 324, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), that case is distinguishable. In Raley, the defendants were essentially entrapped into committing a crime by the government, which failed to inform them that they could not invoke their Fifth Amendment privilege while testifying before an Ohio state commission investigating “Un-American” activities. Believing that they were therefore protected and not subject to criminal prosecution, they invoked the Fifth Amendment and refused to answer questions, thus committing a crime.

Here, the defendant had already completed the crime of Driving Under the Influence, before he ever encountered the officer or was advised of any rights or methods of collecting evidence. The officer did not inform him that he could freely drink a gallon of vodka and then freely drive in the State of Washington, and then arrest him for doing so. The officer properly informed him of his legislatively created “right” to refuse a breath test, and then obtained a search warrant when he refused. This sequence of events has been upheld under the Fourth Amendment. See State v. Johnson, 104 Wn.App. 489, 17 P.3d 3 (2001).

If equitable estoppel were to be applied in these kinds of cases, it would hamper the legitimate function of the government in lawfully gathering evidence of criminal activity. Just as the government can and

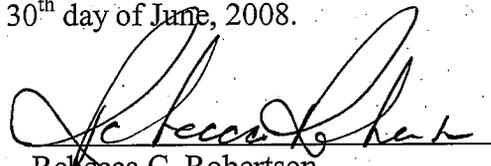
should lawfully obtain search warrants to obtain evidence in any other kind of case, its ability to do so should not be constrained in DUI cases. Without the evidence of breath or blood alcohol levels, prosecution in this case and many others would be severely impaired, subverting the goals of the DUI laws.

The defendant did not raise this issue in the trial court, cannot prove any element of equitable estoppel, and cannot show there was a manifest error affecting an important constitutional right. Therefore, this court should decline to hear his appeal on this matter.

IV. CONCLUSION

For the foregoing reasons the Court should affirm the ruling of the King County Superior Court.

Respectfully submitted this 30th day of June, 2008.



Rebecca C. Robertson,
WSBA# 30503
Assistant City Attorney
Attorneys for Respondent