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BY RONALD R. CARPENTER

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SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

ROBERT ST. JOHN,

Appellant.

BRIEF OF AMICUS CURIAE WASHINGTON STATE PATROL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Patrol (WSP) enforces criminal and traffic laws throughout the State of Washington. One of WSP's primary missions is to prevent accidents, injury, and death on the state's highways. This mission includes deterring citizens from driving under the influence of alcohol or drugs by enforcing Washington's driving while under the influence laws. RCW 46.20.308 provides that any person who operates a motor vehicle in this state is deemed to have given such consent when an 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).¹ The statute goes on to provide that "[n]either consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood." *Id.*

WSP has a substantial interest in the outcome of this case because of the strong link between deterring driving under the influence of drugs and alcohol and the prevention of injury and death. The ability to seek a search warrant for additional evidence when a suspect refuses to submit to a breath or blood test, or where a test cannot be administered, is an important law enforcement tool. Evidence obtained through the use of a

¹ RCW 46.61.503 relates to drivers under twenty-one years of age consuming alcohol when operating or in physical possession of a motor vehicle.

search warrant will allow a prosecution to proceed (or proceed with stronger evidence) where it might otherwise fail. If the Superior Court decision is reversed, it will preclude or seriously hobble law enforcement officers from obtaining search warrants in cases where the implied consent warnings apply, thereby diminishing WSP's ability to protect the public by preventing accidents, injuries, and death on the state's highways.

II. ISSUE PRESENTED

May a police officer obtain a search warrant for a blood test when (1) an individual is arrested upon probable cause to believe that he or she was 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, and (2) the individual has refused to submit to a breath or blood test?

III. STATEMENT OF THE CASE

Mr. Robert St. John was involved in a motorcycle accident on the Alaskan Way viaduct on July 24, 2005, and Seattle Police Officer Eric Michl responded to the scene. CP at 57-58. Mr. St. John required treatment for injuries and was transported to Harborview Medical Center. CP at 59. While at Harborview, Officer Michl arrested Mr. St. John for driving under the influence. CP at 59-60. Officer Michl read Mr. St. John the implied consent warning for a blood alcohol test, and asked him if he

would submit to the test. CP at 29, 61, 72-74. Mr. St. John refused. CP at 29, 61.

The officer drafted a search warrant affidavit to obtain a sample of Mr. St. John's blood and Seattle Municipal Court Judge Michael Hurtado signed the warrant. CP at 61-62. A registered nurse withdrew Mr. St. John's blood. CP at 26-27. The Washington State Toxicology Laboratory analyzed the blood and found Mr. St. John's blood had an alcohol level of 0.16 g/100 mL. CP at 31. The legal limit in Washington State is 0.08. RCW 46.61.502(1)(a).

The City of Seattle charged Mr. St. John with driving under the influence. CP at 5-6. The Seattle Municipal Court suppressed the results of the blood test and subsequently dismissed the charges with prejudice. CP at 9, 15. On appeal, the King County Superior Court reversed the dismissal, finding that the blood test was admissible, that the implied consent warnings (ICW's) regarding breath and blood tests did not prevent service of a search warrant for Mr. St. John's blood, and that the ICW's are not statutorily or constitutionally defective.² CP at 106, 109.

² The implied consent warnings are set forth in RCW 46.20.308(2)(a), (2)(b), and (2)(c). They require an officer to warn a driver that refusal to take the test will result in revoking the driver's license or permit for at least one year, that the refusal to take a test may be used against the driver in a criminal trial, and that if the driver submits to the test and the test shows that the alcohol concentration is above described limits, the driver's license or permit will be suspended or revoked for at least 90 days. The warnings do not include any language relating to the officer's authority to obtain a search warrant.

IV. ARGUMENT

A. The Trial Court Correctly Found That The Implied Consent Procedure Does Not Foreclose Issuance Of A Search Warrant And Reversed The Seattle Municipal Court's Dismissal Of Mr. St. John's Driving Under The Influence Charge

1. The Statute Expressly Preserves The Authority Of Police Officers To Obtain A Search Warrant For A Person's Breath Or Blood, Without Reference To Whether The Person Has Consented To Such A Test

The primary issue in this case is how to harmonize two sentences in RCW 46.20.308:

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

RCW 46.20.308(1).

and

If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

RCW 46.20.308(5). The interpretation of a statute is a question of law and is therefore reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). In interpreting a statute, the court's primary objective is to ascertain and carry out the intent and purpose of the Legislature in creating it, and the first step towards this goal is to look at the plain meaning of the words of the statute at issue. *Fraternal Order of Eagles*,

Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d at 450, citing *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Mr. St. John in this case wants to read the statute to render meaningless the final sentence of RCW 46.20.308(1).

Mr. St. John has cited *State v. J.P.*, for the proposition that “[w]here two provisions within a statute conflict and may not be harmonized, the court employs two canons of statutory construction: (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.” Appellant’s Opening Brief at 15.

The two portions of the statute at issue here can be readily reconciled, particularly when the court considers the Legislature’s intent in amending the statute, as the court did in *Anderson v. State, Dep’t of Corr.*, 159 Wn.2d 849, 154 P.3d 220 (2007). When the Legislature added the above-quoted portion of RCW 46.20.308(1), it provided an explicit statement of its intent. This above-quoted portion of sub-section (1) was

added in 2004 when the Washington Legislature passed Substitute House Bill 3055, thereby amending RCW 46.20.308.

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 continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

Laws of 2004, ch. 68, § 1 (SHB 3055).

The first change the legislature made in the statutes was the one at the end of RCW 46.20.308(1), the amendment that explicitly states that no portion of the statute is to prevent a police officer from obtaining a search warrant for a person's breath or blood is clearly in line with the Legislature's stated intent. Laws of 2004, ch. 68, § 2(1). Use of search warrants for breath or blood will help officers ensure that "swift certain consequences" come to those who endanger the public by driving while intoxicated. If officers were precluded from seeking search warrants, drivers could "game the system" by strategically refusing to consent to a test, knowing that the automatic license suspension that will result would still be preferable to the likely consequences of being convicted of a drug- or alcohol-related offense.

As RCW 46.20.308(1) plainly states, the police officer always has the option of seeking a search warrant for a person's breath or blood, whether the person has granted or denied consent for a test. Subsections (2) through (5) of the statute describe how the "implied consent" aspects of the statute operate. These subsections constitute an alternative to seeking a warrant under subsection (1). Subsection (2) describes who will administer the test and sets forth the warnings delivered to the individual who is subject to testing. Subsection (3) provides that breath or blood tests can be administered without consent to drivers who are unconscious or under arrest for certain offenses. Subsection (4) provides that a test may be administered to a driver who is dead, unconscious, or incapable of refusing. Finally, subsection (5) provides that if the driver is given the warnings, and refuses the test, and does not fall within the exceptions set forth in subsections (3) or (4), the test will not be administered. Nothing in any of these subsections precludes an officer from seeking a warrant for a breath or blood test however. They describe how and when a test may be conducted *without* a warrant.

Mr. St. John cites *Dep't of Licensing v. Lax*, 125 Wn.2d 818, 888 P.2d 1190 (1995), for the proposition that "[t]he legislature's prohibition against subsequent testing once the driver refuses under sub-

section (5) is clear and unambiguous.” Appellant’s Opening Brief at 14. Mr. St. John implies that *Lax* stands for the rule that subsection (5) clearly and unambiguously prohibits police officers from obtaining a blood or breath sample once the driver has refused. *Lax* stands for no such rule. In *Lax*, the issue was whether a driver who has refused a test may later change his mind and negate the administrative consequence of a refusal, revocation of driving privileges. 125 Wn.2d at 819. The court held that once a driver has refused, “the statute does not *require* an officer to administer a test.” *Id.* at 822 (emphasis added).

If anything, the *Lax* opinion’s analysis contradicts the interpretation suggested by Mr. St. John. In *Lax*, after first refusing the test, the driver later demanded to take a test, and the officer complied. *Id.* at 820. The court expressed no concern that this test was taken after the driver had refused. If *Lax* stood for the proposition that no testing may occur after a driver refuses an initial test, the Court would have ruled that the officer lacked even the discretion to give the test. The Court did not adopt this extreme reading. Furthermore, *Lax* did not involve obtaining a warrant or interpreting RCW 46.20.308(1), and is of limited value in deciding this case.

B. The Warnings Required By The Implied Consent Statute Are Constitutionally Sufficient, And Fundamental Fairness Does Not Require That The Warnings Include Advice That If A Driver Refuses A Test, The Officer May Seek A Warrant

Mr. St. John alleges that the implied consent warnings set forth in RCW 46.20.308(2) are constitutionally inadequate because they do not advise drivers who refuse a test that the officer may seek a warrant-based test. Appellant's Opening Brief at 27. Mr. St. John also alleges that the warnings must provide drivers the opportunity to make a knowing and intelligent decision. *Id.* at 28. This court in *State v. Bostrom*, 127 Wn.2d 580, 902 P.2d 157 (1995), addressed a similar argument—that the statutory warnings were defective because they failed to include warnings that refusal to take the test could lead to enhanced criminal penalties. The court bluntly responded, “[t]his argument is wholly without merit . . . There is no requirement that each and every specific consequence of refusal be enunciated.” *Id.* at 586. If there is no merit to the argument that the warnings should have included reference to enhanced criminal penalties, there is certainly no merit to an argument that the warnings should have included reference to the possibility of seeking a warrant. Any reasonably well-informed citizen knows that his person and property may be searched if law enforcement officers properly obtain a search warrant for that purpose. As the *Bostrom* opinion observed, a court

is “not free to graft onto the implied consent statute any additional warnings that are not contained in the plain language of the statute.” *Id.* at 586-87 (citations omitted).

C. The Trial Court Correctly Found That Equitable Estoppel Did Not Prevent The State From Obtaining A Warrant For A Blood Alcohol Test After Advising Mr. St. John That He Had The Right To Refuse The Test

1. Mr. St. John Has Not Met The Elements Of Equitable Estoppel

In order to establish equitable estoppel, Mr. St. John must show: (1) the officer’s admission, statement, or act, was inconsistent with the claim afterwards asserted; (2) action by Mr. St. John in reliance of such admission, statement, or act; and (3) injury to Mr. St. John resulted from permitting the officer to contradict or repudiate such admission, statement or act. *Kramarevcky v. Dep’t of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993), *citing Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, *cert denied* (1992). Mr. St. John must meet *all three elements* with clear, cogent, and convincing evidence. *Kramarevcky*, 122 Wn.2d at 744. He has not satisfied either the first or third element.

To satisfy the first element, Mr. St. John must show by clear, cogent, and convincing evidence that the officer made a statement or acted in a way that was inconsistent with a claim later asserted. Mr. St. John does not allege that the warnings read by Officer Michl varied in any way

from the warnings required by the statute. These warnings do not address the officer's ability to obtain a search warrant for Mr. St. John's blood. They did not state, or reasonably imply, that Mr. St. John's refusal to take the test would preclude the officer from seeking a warrant. Since the implied consent warning did not address the officer's option of obtaining a warrant, the officer's action to obtain a search warrant was not inconsistent with the implied consent warning. Therefore, Mr. St. John has not satisfied the first element.

To satisfy the third element, Mr. St. John must show by clear, cogent, and convincing evidence that he was injured as a result of the officer contradicting his previous statement. In order to demonstrate injury, Mr. St. John must that he reasonably relied on the actions of the officer, and changed his position to his detriment as the result of this reliance. *Id.* at 747.

The "injuries" alleged by Mr. St. John are that his refusal was introduced into evidence in his DUI case, and that the officer unlawfully obtained a warrant for a blood sample and then entered into evidence the result of the test of that blood sample. Neither "injury" meets the required standard. Mr. St. John was advised in the statutory warnings that his refusal may be used in a criminal trial; the fact that it was admitted is in no way contradicted by the officer's actions or words. Also, as addressed

above, the ICW's do not address the officer's ability to obtain a blood sample by search warrant. The officer's action in obtaining a search warrant was in no way inconsistent with the implied consent warning. Since there was no contradiction, there can be no injury as required to satisfy the element.

2. Mr. St. John Has Not Met The Heightened Standard Required To Apply Equitable Estoppel Against The Government

Since equitable estoppel against the government is not favored, Mr. St. John must meet a heightened standard in order to apply equitable estoppel against the government. *State v. Foulkes*, 63 Wn. App. 643, 649, 821 P.2d 77 (1991). Mr. St. John must satisfy two additional requirements: (1) application of equitable estoppel must be necessary to prevent a manifest injustice, and (2) application of equitable estoppel must not impair the exercise of government function. *Id.* Further, "equitable estoppel will not be applied to the State if its application will thwart the purpose of the laws or public policy." *Id.*

Further, Mr. St. John has not shown that there was a manifest injustice affecting an important constitutional right. Mr. St. John relies upon *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), to support his assertion that he suffered a manifest injustice when the police officer obtained a search to obtain a sample of his blood, as

specifically permitted by RCW 46.20.308(1). The facts of *Raley* are not analogous, and the holding can easily be distinguished.

In *Raley*, the defendants invoked their Fifth Amendment privilege when testifying in front of a state commission investigating “Un-American” activities. *Id.* at 424. They were basically entrapped when the commission led them to believe that they were protected by the Fifth Amendment, but were then subsequently charged and convicted for refusing to answer the commission’s questions. *Id.* at 432-33.

In order for this case to be analogous, Mr. St. John would have had to have been prosecuted for refusing to grant permission for a blood test. Mr. St. John was not prosecuted for this decision; he was prosecuted for driving under the influence of alcohol. Even though Mr. St. John’s refusal resulted in a loss of his license for a period of one year and his refusal was admitted into evidence, he was informed prior to his decision to refuse that these consequences would be the result of a refusal. The government in no sense “entrapped” Mr. St. John into refusing a breath test. The government merely prosecuted him for driving under the influence, based on the ample evidence that he had done so.

Further, the *Raley* defendants’ Fifth Amendment right is not analogous to Mr. St. John’s “right” to refuse a blood test. The “right” established by the implied consent statute is really just a choice between

two options, permitted by legislative grace. *State v. Zwicker*, 105 Wn.2d 228, 242, 713 P.2d 1101 (1986). Those options are (1) submit to a blood alcohol test by breath or blood, or (2) refuse the test and have your license revoked and evidence of the refusal admitted at trial. Applying equitable estoppel against the government would improperly convert legislative grace into constitutional entitlement, and would allow defendants to escape or reduce the consequences of committing dangerous offenses through strategic decisions to grant or withhold consent to breath and blood testing.

V. CONCLUSION

The WSP respectfully asks this Court to uphold the constitutionality of RCW 46.20.308 and the effectiveness of an officer's right to obtain a search warrant under that statute. The Court should affirm the decision of the King County Superior Court.

RESPECTFULLY SUBMITTED this 15th day of April, 2009.

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