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No. 60257-8-I

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COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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CITY OF SEATTLE,

Respondent,

v.

ROBERT ST. JOHN,

Appellant,

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 AUG -5 AM 11:57

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

Robert St. John presents the following reply brief to respond to specific arguments raised by the City in its response brief.

## II. REPLY TO STATE ARGUMENT

1. DUI Defendants Do Not Receive Greater 4<sup>th</sup> Amendment Rights Under The Implied Consent Statute.
2. Other States' Implied Consent Laws Do Not Uniformly Permit Compulsory Testing Following A Person's Decision To Refuse A Breath/Blood Test.

## III. ARGUMENT

### **1. DUI Defendants Do Not Receive Greater 4<sup>th</sup> Amendment Rights Under The Implied Consent Statute.**

DUI defendants do not have, and do not receive, greater 4<sup>th</sup> Amendment rights under the implied consent statute than defendants prosecuted for other crimes. To counsel's knowledge, no other statute addresses the collection of evidence specific to a particular crime, other than the implied consent statute. General search and seizure rules apply to other crimes because the legislature has not regulated the collection of evidence to the extent it has, by statute, with the DUI offense. The implied consent statute does not enhance 4<sup>th</sup> Amendment rights; it merely regulates how evidence is gathered.

The implied consent statute does more than just regulate the collection of breath and blood alcohol evidence; it actually creates “refusal” evidence in the event a person refuses a test. See RCW 46.61.517.<sup>1</sup> The statute binds the driving privilege to consent to a warrantless search (i.e. breath/blood test) If the person consents to the test, the State obtains evidence to prosecute the DUI crime. If the person refuses the test, the act of refusal becomes evidence as well. A test refusal under the implied consent statute does more than lead to enhanced licensing and sentencing sanctions, the refusal is evidence. The refusal is admissible as evidence of consciousness of guilt that the driver knew he/she would fail the breath/blood test. State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989); State v. Cohen, 125 Wn. App. 220, 104 P.3d 70 (2005).

This is a striking contrast to the general principle that “refusal” to consent to a voluntary warrantless search under the 4<sup>th</sup> Amendment may not be used as evidence at trial. See, U.S. v. Prescott, 581 F.2d 1343 (9<sup>th</sup> Circ. 1978) “If the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the

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<sup>1</sup> **46.61.517. Refusal of test--Admissibility as evidence** - The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial.

assertion of a constitutional right and future consents would not be ‘freely and voluntarily given.’” U.S. v. Prescott, 581 F.2d at 1351.

The City cites to cases such as State v. Johnson, 104 Wn. App. 489, 17 P.3d 3 (2001), for the proposition that a DUI defendant’s refusal to a warrantless search under the implied consent statute acts as a “sword” against further compulsory testing by warrant. However, the City fails to attempt to contrast the most glaring difference between Johnson and the present case; Mr. St. John’s initial test refusal was (and is) admissible evidence and a DUI trial, whereas Mr. Johnson’s refusal was not. Further, Mr. St. John faced immediate consequences to his license for refusing a blood test, whereas Mr. Johnson faced no negative consequences for refusing to consent to a search. Refusing a test under the implied consent statute is hardly a shield to protect oneself from providing damaging evidence. It can be argued it provides the driver with less 4<sup>th</sup> Amendment protections, rather than more.

**2. Other States’ Implied Consent Laws Do Not Uniformly Permit Compulsory Testing Following A Person’s Decision To Refuse A Breath/Blood Test.**

The City refers to nine states (BOR, pg. 5-6) arguing the search warrant amendment to Washington’s implied consent law follows a national trend implementing search warrant authorization for blood testing

following a refusal. Each cited state and case, however, is uniquely distinguishable from the issue presented in this appeal. Further, following a review of a much larger sample of states' implied consent laws, it is clear there is no national uniformity concerning the use of search warrants, and in fact several states prohibit the use of search warrants following a defendant's refusal of a test offered under the implied consent law using statutory language similar to Washington's law.

In Oregon, §813.100(2), if a driver suspected of DUI refuses a test, "No chemical test ... shall be given." However, in State v. Shantie, 92 P.3d 746 (Ore. 2004), the court held police may seek a search warrant to obtain a blood test following a DUI defendant's refusal to submit to a test under the implied consent law. The distinction under Oregon law, however, was found at §813.320(2). There, the legislature wrote the implied consent law could not be used as a means to prevent admission of blood alcohol evidence in a DUI prosecution where such evidence was obtained pursuant to a search warrant. The court in Shantie clearly found itself constricted by this statutory language. The court acknowledged the clear language under §813.100(2), that no tests shall occur upon a person's refusal. However, this language at best only "implied" the remedy of suppression if violated. At 748-749. Conversely, §813.320(2) "expressly"

rejected suppression of tests occurring pursuant to a search warrant. At 749. Noting that the latter statute “dilutes the effectiveness of the prohibition on chemical testing without consent,” the court concluded it was the legislature’s choice to draft the statute. Therefore, there was no basis to “suppress” a compulsory search warrant test.

Washington has no corresponding statute prohibiting suppression of a test administered pursuant to a search warrant. Thus, the basis for the Oregon court’s ruling renders the case irrelevant.

In Indiana and Wisconsin, courts have held the State may seek search warrants for blood alcohol testing following a defendant’s refusal. However, these states’ laws are missing the critical language stating where a driver refuses a test, “no test shall be given.” See §9-30-6-7 (Indiana); §343.305 (Wisconsin) In Indiana, in Brown v. Indiana, 774 N.E.2d 1001 (2002), the court found the implied consent law contained no language limiting a police officer’s ability to seek a warrant. At 1007. However, the court noted that where other states laws had prohibited search warrants, such laws contained the phrase, “no test shall be given.” Therefore, absent that language, the court would find no limitation to a warrant. Similarly, in Wisconsin, in State v. Faust, 682 N.W.2d 371 (2004), with an implied consent warning specifically authorizing “one or more tests,” the court

found the existence of exigent circumstances permitted the State to seek more than one test from the defendant – without addressing a warrant.

In Ohio and Kentucky, courts have found the language “no test shall be given” prohibited search warrants for blood tests in DUI cases; leading each legislature to remove this language from the statutes. In Ohio, §4511.191 previously stated where a driver refused a test, “no chemical test shall be given.” In State v. Kutz, 622 N.E.2d 362 (1993), the court found this language applied to drivers under arrest for DUI. Thus, the implied consent statute precluded any compulsory testing following a refusal, even with a search warrant. At 365. Following this decision, the Ohio legislature removed the “no test shall be given” language from the statute.<sup>2</sup>

In Kentucky, §189A.105(2)(b) previously stated, No person shall be compelled to submit to any test ... .” In Combs v. Kentucky, 965 S.W.2d 161 (1998), the court affirmed a trial court suppression of a blood test pursuant obtained pursuant to a search warrant where the driver was arrested for DUI and refused a test under the implied consent law. This

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<sup>2</sup> The State cites to State v. Sisler, 683 N.E.2d 106 (1995). This case concerned a driver who consented to a blood test under the implied consent law. The only material issue in the case was whether the officers took unreasonable efforts to remove the blood. The case is inapplicable to this appeal.

language directed police “not to seek a search warrant.” At 163. The implied consent law regulated and limited when a search warrant may be issued. At 163. The Kentucky legislature removed this language from the statute in 2000. The City cites to Cook v. Kentucky, 129 S.W.3d 351 (2004). However, there, the defendant was arrested for vehicular homicide. §189A.105(2)(b) expressly authorizes police to seek a warrant for a compulsory blood test in cases involving death or serious bodily to another person. The statute does not authorize search warrants for DUI cases. Washington law expressly authorizes a warrantless compulsory blood test under similar circumstances. RCW 46.20.308(3).

Only Arizona, Texas, and Michigan present analysis on search warrants supporting the City’s position. In Arizona, §28-1321(D)(1) states that following a refusal, “The test shall not be given, except ... pursuant to a search warrant.” The City cites to Kollar v. Arizona, 988 P.2d 128 (1999), but the more relevant case is Arizona v. Stanley, 172 P.3d 848 (2007). There, the court held that the State’s authority to use a search warrant was not predicated on the driver’s refusal of a test under the implied consent law. At 853. Noticeably absent from Arizona’s implied consent law, however, is any authorization for compulsory testing (i.e. warrantless testing) for cases involving death or serious bodily injury

to another. Therefore, a warrant is a necessary tool for obtaining evidence in vehicular assault and homicide cases, whereas in Washington police may lawfully obtain this evidence without a warrant.

In Texas, §724.013 prohibits testing if a person refuses, except under §724.012(b). §724.012(b) compels the officer to obtain a blood test in DUI cases where another person dies or there is serious bodily injury. The statute is silent concerning warrants. In Beeman v. Texas, 86 S.W.3d 613 (2002), the defendant was arrested for DUI and refused a breath test. While causing no death or serious bodily injury, the officer sought a warrant and obtained a blood test. The court drew a distinction between tests under the implied consent law and through a warrant. The implied consent law operates in the absence of a warrant, but when a warrant is issued the “implied” consent of a driver to submit to a test becomes moot. At 616.

In Michigan, §257.625d(1) states if a person refuses a test, “a test shall not be given without a court order, but the officer may seek to obtain a court order.” The City cites to Michigan v. Callon, 662 N.W.2d 501 (2003), but this case only addresses whether statutory foundational standards for admission of a blood test, found in the implied consent law, apply to a blood test obtained pursuant to a warrant. Interestingly, the

Michigan implied consent law requires the officer to advise each driver that if they refuse a test, the officer may seek a court order for a blood test. §257.625a(6)(b)(iv).

Last, the City cites a Maine case, State v. Baker, 502 A.2d 489 (1989). This case is not relevant to this appeal, as the case addresses the state's ability to seek a warrantless blood test where the driver is not under arrest. The court found the court could seek a warrantless test, citing to Schmerber v. California. In Washington, however, our courts have rejected this proposition. See State v. Wetherell, 82 Wn.2d 865, 514 P.2d 1069 (1973).

In contrast to these states, Alabama, Iowa, Rhode Island, and West Virginia either currently, or in the recent past, prohibited the use of a search warrant to compel blood alcohol evidence based upon similar statutory language found in Washington's statute. In Alabama, §32-5-192(c) states where a driver is arrested for DUI and refuses a test, "none shall be given."<sup>3</sup> In Thrower v. State, 539 So.2d 1127 (1988), the defendant was arrested for vehicular homicide and refused a blood test.

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<sup>3</sup> Per §32-5-200, police are authorized to seek a court order to compel a blood test where a person causes an accident resulting in death or serious bodily injury to another. This was not in effect at the time of Thrower.

The officers, however, administered a blood test anyways. The court reversed his conviction, stating, “[t]he Alabama statute is clear that a law enforcement agency does not have the right, after refusal by the arrested party, to go forward over their refusal and take a blood sample.” At 1128. The proper remedy is to admit the blood test refusal as evidence at trial, and suspend Thrower’s license according to the implied consent law. *Id.*

In Iowa, §321J.9(1) states where a driver is arrested for DUI and refuses a test, “a test shall not be given.” In State v. Hitchens, 294 N.W.2d 686 (1980), the defendant was arrested for vehicular homicide and refused a blood test. Police sought a search warrant and obtained a compulsory blood test. The court held the test results inadmissible. This ruling was based upon the plain language of the statute, mandating that no test be given following a refusal. At 688. The court further responded to the argument that prohibiting a search warrant gave a DUI suspect greater rights under the 4<sup>th</sup> Amendment: the statute does not simply expand the rights of an allegedly drunken driver, it also extracts a price from the driver for recognizing the power to refuse testing. At 688.

In Rhode Island, §31-27-2.1(b) states where a driver is arrested for DUI and refuses a test, “none shall be given.” In State v. DiStefano, 764 A.2d 1156 (2000), the defendant was arrested for vehicular homicide and

refused a blood test. The court ruled to suppress a blood test obtained by a search warrant, holding, “The words ‘none shall be given’ are plain and unambiguous, and evince the intent of the [legislature] that consent to a test is the lynch pin to admissibility.” At 1163.

In West Virginia, §17C-5-7(a) states where a driver is arrested for DUI and refuses a test, “the tests shall not be given.” In State v. McClead, 566 S.E.2d 652 (2002), the defendant was arrested for DUI and refused to submit to a breath test. The officer threatened to get a warrant, and the defendant consented to a test. The court held it was error to admit the test results at trial. The statute is explicit and clear in that it does not authorize any testing where a driver refuses a test. At 655.

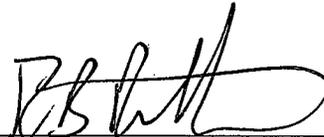
In the following states, the implied consent laws expressly state where a driver is arrested for DUI and refuses a test, no test shall be given, and further permit a search warrant of a warrantless test only in situations where the driver is involved in an accident resulting in death or serious bodily injury to another: New Mexico (§66-8-111A); New York (§1194); Hawaii (§291E-15); Maryland (§16-205.1(b)&(c)); Minnesota (§169A.52); Mississippi (§63-11-8&21); New Hampshire (§265-A:14&16); Oklahoma (§753); Tennessee (§55-10-406); Vermont (§1202); and Wyoming (§31-6-102).

IV. CONCLUSION

For the reasons stated herein, Mr. St. John asks the Court to reverse the superior court RALJ decision, and reinstate the trial court decision to dismiss the DUI charge.

RESPECTFULLY SUBMITTED this 5 day of August, 2008.

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