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No. 92930-1
(consolidated with No. 92944-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

JUDITH MURRAY, and
DARREN ROBISON,

Respondents.

FILED E
SEP 21 2016
WASHINGTON STATE
SUPREME COURT

12/6

BRIEF OF AMICUS CURIAE
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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE.

Amicus Curiae, the Washington State Association of Municipal Attorneys (hereinafter "WSAMA"), is the organization of municipal attorneys representing the cities and towns across the state. It has an interest in the above referenced case because the police officers of the cities and towns across the state are engaged in enforcing, and their prosecutors are engaged in prosecuting, the laws relating to Driving Under the Influence (DUI), including but not limited to Section 46.61.502 of the Revised Code of Washington (RCW), and the Implied Consent Warnings statute, RCW 46.20.308.

The cities and towns of this state would be affected, as would all prosecuting jurisdictions, if Division One's decision in this case¹ is allowed to stand. Division One's decision would impose a harsh penalty on any of their cases if there is any deviation in the Implied Consent Warnings from the "full," express language of the statute, regardless of the deviation and regardless of the prejudice or lack thereof. That is not consistent with existing court decisions and is not consistent with the language of the Implied Consent Warnings statute.

¹ *State v. Robison*, 192 Wn. App. 658, 369 P.3d 188 (2016).

II. STATEMENT OF FACTS.

WSAMA adopts and incorporates herein the Statement of Facts as set forth in the pleadings of the Petitioner, State of Washington (hereinafter the "State") in *State of Washington v. Darren Robison*, Supreme Court Cause No. 92944-1.

Amicus also notes that it is consistent throughout the pleadings of Petitioner and Respondent, and the decision of the Court of Appeals, that the Implied Consent Warnings given by Washington State Patrol Trooper Hyatt to the Respondent, Darren Robison (hereinafter the "Defendant"), included those parts relative to the test of the Defendant's breath, but did not include parts of the implied consent warnings unrelated to the intended test and/or unrelated to the defendant's age (in so far as the test of the Defendant's breath would not detect the presence of THC, and the Defendant is over the age of twenty-one).

The same fact pattern appears to exist with the case that has been consolidated with the *Robison* case – *State of Washington v. Judith Murray*, Supreme Court Cause No. 92930-1. For the purposes hereof, unless the context indicated otherwise, the term "Defendant" shall refer to Judith Murray, as well.

III. ISSUE.

The issue before the Court can be distilled down to whether the officer advising a DUI suspect of his or her Implied Consent Warnings must give those warnings without deviation or departure from the exact language of the statute. This issue is important to all cities and towns and prosecuting jurisdictions that prosecute DUI offenses particularly where the penalty for deviation or departure is suppression of the breath (or blood) test results at trial.

IV. ARGUMENT.

As the Court of Appeals noted,² this Court recognized in *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 281, 714 P.2d 1183 (1986), *Gonzales v. State Dept. of Licensing*, 112 Wn.2d 890, 897, 774 P.2d 1187 (1989), and *State v. Bostrom*, 127 Wn.2d 580, 586, 902 P.2d 157 (1995), that the legislature intended the implied consent statute to provide drivers with an opportunity to make an informed decision about taking a breath test. In these regards, advising a DUI suspect of portions of the implied consent warnings that do not apply to him or her contributes nothing to the suspect's ability to make an informed decision about whether or not to take the requested test. Rather, advising a DUI suspect of the

² *State v. Robison*, 192 Wn. App. at 666-67.

consequences related to defendants who are under the age of 21 may actually create more confusion or instill a sense that the warnings are not valuable, and certainly not related to the suspect's case. Likewise, a suspect who has been drinking alcohol but not using marijuana may be more confused by warnings that speak to marijuana test results. Ironically, according to the approach taken by the Court of Appeals, the advice of a warning, albeit precisely as stated in the statute, may subvert the intended legislative purpose - affording a suspect the opportunity to make an informed decision about the [breath] test the suspect is being requested to take.

A. Mandatory Language of the Statute.

The Court of Appeals, and the Defendant, focused on the mandatory language of RCW 46.20.308(2), which states that "[t]he officer *shall* warn the driver" (Emphasis added.) But, with all due respect, the language of the statute doesn't merely say that. It stays that "[t]he officer shall warn the driver, *in substantially the following language*, that" (Emphasis added.)

Implicit in the words of "in substantially the following language" is the concept that the language does not have to be identical with what follows. The *Merriam Webster Dictionary*

(Intranet)³ defines the word "substantial" as "being largely but not wholly that which is specified." The word 'substantially' has been equated with the words 'about' and 'essentially.' *Gilmore v. Red Top Cab Co. of Washington*, 171 Wash. 346, 17 P.2d 886 (1933). See also *Janzen v. Phillips*, 73 Wn.2d 174, 437 P.2d 189 (1968). Also, the word "about" is employed to modify terms intended to be close approximations and, as such, their existence in a writing does not make it too indefinite to evidence a contract. 1 A. Corbin, *Contracts* 448 n. 57 (1963); Annot, 58 A.L.R. 2d 377 (1958).

The Implied Consent Warnings given by the officer should be satisfactory so long as they are in conformity with what needs to be given to the DUI suspect - accurate in terms of the parts of the Implied Consent Warnings statute and applicable to the test(s) being requested.

Any permissible deviation (consistent with *in substantially the following language*) should defeat the argument that the language has to be identical, without any deviation or departure from the language of the statute.

The Court of Appeals stated that:

"the *Bostrom* opinion expressly disapproves of any suggestion that Washington courts will approve

³ <http://www.merriam-webster.com/dictionary/substantially>.

warnings in language other than that stated in the statute because the statutory language denies an arrested driver the opportunity to exercise an intelligent judgment.

Bostrom, 127 Wn.2d at 587, 902 P.2d 157.⁴ But *Bostrom* was a 1995 decision, preceding many of the amendments and changes to the Implied Consent Warnings, including, particularly, those relating to marijuana and THC. Moreover, *Bostrom's* focus was on adding extra language onto the warnings. "We are . . . not free to graft onto the implied consent statute any additional warnings not contained in the plain language of that statute." *Id.* In addition to that, the same Division One of the Court of Appeals in *Pattison v. State Department of Licensing*, 112 Wn. App. 670, 674, 50 P.3d 295 (2002), stated that:

The purpose for the [Implied Consent] warning requirement is to ensure that the driver is afforded "the opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test." *Gonzales v. Department of Licensing*, 112 Wn.2d 890, 897, 774 P.2d 1187 (1989). *There is no requirement that the warnings exactly match the statutory language.* A warning is neither inaccurate nor misleading as long as "no different meaning is implied or conveyed". *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785, 831 P.2d 149 (1992).

(Emphasis added.)

⁴ *Robison*, 192 Wn. App. at 667.

In that same vein, Division 3 likewise stated, in *Jury v. State, Dept. of Licensing*, 114 Wn. App. 726, 732, 60 P.3d 615 (2002), that the warnings need not exactly match the statutory language, just so long as the meaning implied or conveyed is not different from that required by the statute.

In reaching its decision in *Robison*, the Court of Appeals noted several cases where officers giving the Implied Consent Warnings departed – or were requested to depart – from the language of the statute, which resulted in or could have resulted in test results being suppressed.

In *Whitman County Dist. Court*, 105 Wn.2d at 285,⁵ the officer warned the driver that a refusal to submit to the breath test “shall” be used against the driver at trial, instead of the statutory language “may” (. . . refusal to take the test “may” be used in a criminal trial). In this case, the breath tests were suppressed.

This Court, in *Bostrom*, 127 Wn.2d at 586,⁶ ruled that additional warnings (warnings related to administrative consequences - not included in the statute) were not required, and the failure to give those additional warnings did not warrant suppression of test results.

⁵ *Robison*, 192 Wn. App. at 665-66.

⁶ *Robison*, 192 Wn. App. at 665-66.

In *State v. Richardson*, 81 Wn.2d 111, 499 P.2d 1264 (1972),⁷ this Court ruled that the implied consent statute does not require the officer to advise a driver not only:

“. . . of his right to have additional tests administered by a qualified person of his own choosing, but also that such a person may be a physician, qualified technician, chemist or registered nurse.”

Id. at 112. Although the statute did not require the second warning, the drivers claimed they needed it to understand their rights. The court held sufficient a warning in the language of the statute.

Other cases addressing this issue include *Connolly v. Department of Motor Vehicles*, 79 Wn.2d 500, 487 P.2d 1050 (1971) (holding that the omission of the statutorily required warning that drivers have the right to have additional tests administered by the qualified person of their choosing renders any license revocations invalid), and *State v. Bartels*, 112 Wn.2d 882, 774 P.2d 1183 (1989) (holding that officers cannot supplement the statutory warnings by informing drivers that they may have additional tests taken “at your own expense”).

When it comes right down to it, Washington courts have found warnings were inaccurate or misleading in only a limited

⁷ *Robison*, 192 Wn. App. at 667-68.

number of cases, such as: in *Connolly v. Dep't of Motor Vehicles*, (supra), where the arresting officer failed to inform driver of the right to take additional tests; in *Whitman County Dist. Court*, (supra), where the arresting officer stated that a refusal "shall," as opposed to "may," be used in a criminal trial; in *Mairs v. Dep't of Licensing*, 70 Wn. App. 541, 854 P.2d 665 (1993), where the arresting officer attempted to clarify the warnings by telling the driver that her license would "probably" be suspended if she refused the test, in *Cooper v. Dep't of Licensing*, 61 Wn. App. 525, 810 P.2d 1385 (1991) where the arresting officer told the driver that if he refused to take the test, his license would be revoked "probably for at least a year," (which the court found to be inaccurate because it implied that a possibility existed that the driver's license might be revoked for less than 1 year); and in *State v. Bartels*, (supra), where the arresting officer informed the driver that additional tests would be at his own expense, failing to inform the driver that, if the driver were indigent, the costs would be waived.

In each of these cases, the inadequate warnings either omitted a portion of the warnings the implied consent statute mandated (related to the requested test) or were legally inaccurate. On the other hand, our courts have held that the warnings provided

were not inaccurate or misleading when, (1) in addition to the implied consent statute's required warnings, the officer informed the driver of the RCW section and description of the offense for which he was arrested, *Grewal v. Dept. of Licensing*, 108 Wn. App. 815 821-22, 33 P.3d 94 (2001), and (2), the warnings provided contained all the statutorily required warnings, as well as additional information about what would happen if the driver violated the criminal statutes that prohibit driving while under the influence. *Pattison v. Dep't of Licensing*, 112 Wn. App. 670, 676-77, 50 P.3d 295 (2002).

Clearly, adding language that is not in the statute or omitting language necessary for a person to make an informed decision on whether to take the requested alcohol or marijuana test is different than accurately conveying [only] those parts of Implied Consent Warnings that relate to the test being requested.

In *Grewal*,⁸ the Court of Appeals noted that after the officer gave the appropriate, required Implied Consent Warnings to the defendant, the officer also advised the defendant of the particulars of the charge against him. 108 Wn. App. at 822. The defendant, in that case, argued that this deprived him of the opportunity to make

⁸ *Robison*, 192 Wn. App. at 669.

a knowing and informed decision about whether to take the test. *Id.* The court concluded that the information was not incorrect, and, at any rate, the defendant failed to show any prejudice. *Id.* The ultimate result was that suppression was not appropriate, even though the officer advised the defendant of more than just the statutory Implied Consent Warnings. *Id.*

With all of the various changes to the Implied Consent Warnings statute, and the significant distinction between the types of tests and other factors covered by the Implied Consent Warnings, it is appropriate that this Court recognized that the different components of the Implied Consent Warnings are not all necessary for every test and do not all relate to every type of test that could be involved. The measure should be whether the Implied Consent Warnings language given to a DUI suspect in advance of his or her decision to submit to the test being requested is accurate and consistent with the statute as to the relevant test. That is the only way a suspect could make an informed decision about the test requested of him or her.

The decision of the Court of Appeals in this case leaves these suspects with inconsistent information, some of which might apply and some of which would not apply. Admittedly, if the

advising officer is not diligent about making sure that the warnings given relate to the test being requested, or making sure that the warnings are accurately stated as to the test, the court could be expected to suppress the results of such a test. But under this framework, the officers who give the Implied Consent Warnings would be able to focus on making sure that the warnings a suspect receives are those that he or she needs to make an informed decision, and on making sure that the warnings given are accurately stated and consistent with the law.

B. Issue of Prejudice.

In this case, the State argued that the defendant failed to show any prejudice. The Court of Appeals rejected the application of prejudice, stating that “[t]he defendant has no obligation to present evidence or show prejudice.” *Robison*, 192 Wn. App. at 671.

But prejudice was a factor in a number of other cases. For instance, in *Lynch v. State, Dept. of Licensing*, 163 Wn. App. 697, 700, 262 P.3d 65 (2011), the court (Div. II) held “that the warnings [in that case] were not inaccurate or misleading and that Lynch has not shown actual prejudice” And in *Allen v. State, Dept. of*

Licensing, 169 Wn. App. 304, 309, 279 P.3d 963 (2012), the court (Div. I) stated:

The result of a breath test must be suppressed if an inaccurate warning deprives the driver of the opportunity to make a knowing and intelligent decision, *and the driver demonstrates that he was actually prejudiced by the warning.*

Allen, 169 Wn. App. at 309, (emphasis added.)

Also, in *Martin v. State Dept. of Licensing*, 175 Wn. App. 9, 12, 306 P.3d 969 (2013), the court (Div. II) held “that the implied consent warnings given to Martin were not inaccurate or misleading and that Martin has not shown actual prejudice.”

Likewise, in *Pattison*, 112 Wn. App. at 677, the court (Div. I) held as follows:

Because the drivers were given accurate warnings that provided them with the opportunity to knowingly and intelligently decide whether to submit to the test, the drivers were not prejudiced. Suppression of the breath test was not required.

Interestingly, in that simple statement, the court in *Pattison* distilled the issues that are now before this Court quite succinctly: if the implied consent warnings were accurate, they give the test subjects the opportunity to make a knowing and intelligent decision, and that being done, there is no prejudice.

Additionally, in *Grewal v. Dept. of Licensing*, 108 Wn. App. 815, 822-23, 33 P.3d 94 (2001), also a Division 1 case, the court held that "even if the warnings were inaccurate or misleading, Grewal cannot demonstrate that he was prejudiced. *Id.* He asserts that it is "obvious" that the misleading warning prejudiced his ability to make an informed decision, but does not explain how his decision was affected. See also *Gonzales*, 112 Wn.2d at 901 (where the arresting officer gave all the required implied consent warnings, but they contained additional language which under certain circumstances was inaccurate, the driver must demonstrate that he was actually prejudiced by the inaccurate warnings).

Notwithstanding the court's decision in *Robison*, according to the above cases, the Court of Appeals and this Court recognized the propriety of measuring whether the implied consent warnings resulted in any prejudice. With that, where the implied consent warnings given to the defendant, and in this case, were accurate and related specifically to the test being requested, the warnings would have been sufficient to afford the defendant to make a knowing and informed decision on whether to submit to the test, and there could not be any prejudice.

All in all, the measure of the validity of Implied Consent Warnings should be whether they are an accurate statement of the law related to the test or tests being requested, so that the subject can make an informed and knowing decision whether or not to take the test(s). If that is done, it should be presumed (officers should be able to rely upon the fact) that the warnings are sufficient and that there is no prejudice.

V. CONCLUSION.

For all the reasons set forth herein and set forth in the pleadings of the State, WSAMA respectfully requests that this Court reversed the ruling of the Court of Appeals.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

A handwritten signature in black ink, appearing to read 'Daniel B. Heid', written over a horizontal line.

Daniel B. Heid, WSBA #8217

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Dear Mr. Carpenter:

Attached hereto please find an electronic copy of a Motion for Leave to file Brief of Amicus Curiae and a proposed Brief of Amicus Curiae of the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter. Also, in addition to mailing our pleadings to counsel of record, per the certificate of mailing (appended to the Brief), for their convenience, I am also cc'ing them with this e-mail.

Please let me know if you have any questions. Thank you.

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