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NO. 92944-1 (Robison - Consolidated)
NO. 92930-1 (Murray)

4/5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DARREN J. ROBISON,
JUDITH E. MURRAY,

Respondent(s).

SUPPLEMENTAL
BRIEF OF PETITIONER

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ORIGINAL

TABLE OF CONTENTS

I. ISSUES..... 1

II. ARGUMENT..... 1

 A. THE TROOPER SUBSTANTIALLY COMPLIED WITH THE
 IMPLIED CONSENT STATUTE..... 1

 B. THE LEGISLATURE'S 2004 ADDITION OF "SUBSTANTIALLY
 THE FOLLOWING LANGUAGE" TO THE IMPLIED CONSENT
 STATUTE WAS MOTIVATED BY A PREFERENCE FOR
 ADMISSION OF BREATH TEST RESULTS IN DUI CASES. 3

 C. EVEN IF THE TROOPER VIOLATED THE STATUTE BY
 OMITTING THE THC WARNINGS, NOT ALL STATUTORY
 VIOLATIONS REQUIRE SUPPRESSION. THE COST OF
 SUPPRESSION OUTWEIGHS ITS BENEFITS IN CASES
 LACKING ANY PREJUDICE TO THE DEFENDANT..... 9

III. CONCLUSION 15

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Allen v. State, Dep't of Licensing</u> , 169 Wn. App. 304, 279 P.3d 963 (2012).....	10
<u>City of Seattle v. St. John</u> , 166 Wn.2d 941, 215 P.3d 194, (2009) ..	5
<u>Dep't of Licensing v. Lax</u> , 125 Wn.2d 818, 888 P.2d 1190 (1995)...	5
<u>Dolman v. Dep't of Labor & Indus.</u> , 105 Wn.2d 560, 716 P.2d 852 (1986).....	9
<u>Humphrey Indus., Ltd. v. Clay St. Associates, LLC</u> , 170 Wn.2d 495, 242 P.3d 846 (2010).....	2
<u>James v. Kitsap County</u> , 154 Wn.2d 574, 588, 115 P.3d 286 (2005)	4
<u>Jury v. Dep't of Licensing</u> , 114 Wn. App. 726, 60 P.3d 615 (2002) .	2
<u>Merseal v. State Dep't of Licensing</u> , 99 Wn. App. 414, 994 P.2d 262 (2000).....	2
<u>Nowell v. Dep't of Motor Vehicles</u> , 83 Wn.2d 121, 516 P.2d 205 (1973).....	5
<u>Rozner v. City of Bellevue</u> , 116 Wn.2d 342, 804 P.2d 24 (1991)	7
<u>State v. Aase</u> , 121 Wn. App. 558, 89 P.3d 721 (2004).....	13
<u>State v. Barker</u> , 98 Wn. App. 439, 990 P.2d 438 (1999), <u>rev'd</u> , 143 Wn.2d 915, 25 P.3d 423 (2001)	11, 12
<u>State v. Bonds</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982).....	9, 10
<u>State v. Bowman</u> , 8 Wn. App. 148, 504 P.2d 1148 (1972).....	13
<u>State v. Eaton</u> , 168 Wn.2d 476, 229 P.3d 704, 706 (2010).....	4
<u>State v. Harris</u> , 66 Wn. App. 636, 833 P.2d 402 (1992)	14
<u>State v. Kern</u> , 81 Wn. App. 308, 914 P.2d 114 (1996)	13
<u>State v. Krieg</u> , 7 Wn. App. 20, 497 P.2d 621 (1972)	10
<u>State v. Linder</u> , 190 Wn. App. 638, 360 P.3d 906 (2015).....	12
<u>State v. Long</u> , 113 Wn.2d 266, 778 P.2d 1027 (1989)	6
<u>State v. Pavelich</u> , 153 Wash. 379, 279 P. 1102 (1929).....	6
<u>State v. Sears</u> , 4 Wn.2d 200, 215, 103 P.2d 337 (1940).....	6
<u>State v. Storhoff</u> , 133 Wn.2d 523, 946 P.2d 783 (1997).....	6

FEDERAL CASES

<u>Missouri v. McNeely</u> , 133 S.Ct. 1552, 185 L.Ed.2d 696 (April 17, 2013).....	8, 9
<u>Seatrain Shipbuilding Corp. v. Shell Oil Co.</u> , 444 U.S. 572, 100 S.Ct. 800, 63 L.Ed.2d 36 (1980).....	7

WASHINGTON STATUTES

Laws of 2004, ch. 68, §1	5
--------------------------------	---

Laws of 2004, ch. 68, § 2	2
Laws of 2015, ch. 3, §5(5)(d)(ii)	7
RCW 9.73.030.....	10
RCW 9.73.050.....	10
RCW 9.73.080.....	11
RCW 9.73.260(6)(a).....	11
RCW 10.79.060.....	13
RCW 10.79.110(1).....	13
RCW 10.79.140(2).....	14
RCW 10.79.170.....	13
RCW 10.93.090.....	11, 12
RCW 46.20.308.....	7, 8
RCW 46.20.308(2).....	2, 8
RCW 46.20.517.....	6
RCW 46.61.506(4).....	6
<u>COURT RULES</u>	
CrR 2.3(d)	12

I. ISSUES

The court granted review of the following issue: In giving implied consent warnings, a police officer omitted language that could not possibly have any rational impact on a person's decision to take the test. Does this omission require suppression of the ensuing test results? The issue is can be analyzed in two distinct parts:

- a) Did the officer in this case substantially comply with the implied consent statute?
- b) Even if the officer violated the implied consent statute, is suppression the appropriate remedy when the defendant can show no prejudice from the violation, and when admission of breath test results has been the clear and consistent preference of the legislature?

II. ARGUMENT

A. THE TROOPER SUBSTANTIALLY COMPLIED WITH THE IMPLIED CONSENT STATUTE.

The arrest in this case took place shortly after a legislative change in the implied consent warnings. As a result, the arresting officer omitted the portion of the warning that referred to blood tests for marijuana. The issue in this case is what effect this omission has on the admissibility of the ensuing breath test results.

RCW 46.20.308(2) requires arresting officers to give warnings "in substantially the following language." This language was added to the statute in 2004. Laws of 2004, ch. 68, § 2. No reported decision has yet construed that phrase. This court should now do so.

The 2004 amendment represents the legislature's insertion of the substantial compliance doctrine into the implied consent statute. But Washington's courts had already applied the doctrine four years earlier. Merseal v. State Dep't of Licensing, 99 Wn. App. 414, 422-23, 994 P.2d 262 (2000) ("Under the 'substantial compliance doctrine,' we will not reverse for a merely technical error that does not result in prejudice. The doctrine applies in this case."). A party substantially complies with a statutory directive when it satisfies the substance essential to the purpose of the statute. Humphrey Indus., Ltd. v. Clay St. Associates, LLC, 170 Wn.2d 495, 504, 242 P.3d 846 (2010). The purpose of the implied consent statute is to "permit someone of normal intelligence to understand the consequences of his or her actions." Jury v. Dep't of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002).

The Trooper in this case substantially complied with the statute because the language he omitted would have been more

confusing than helpful. He was not seeking a blood test, and therefore was not seeking to measure the defendant's THC levels. The omitted warnings would not have aided the defendant's opportunity to knowingly and intelligently decide to take or refuse the breath test. In fact, inclusion of the THC warning would likely result in confusion by calling the defendant's attention to an untested substance (THC) and an unrequested test (blood). The Trooper did not violate the implied consent statute; he substantially complied with it.

B. THE LEGISLATURE'S 2004 ADDITION OF "SUBSTANTIALLY THE FOLLOWING LANGUAGE" TO THE IMPLIED CONSENT STATUTE WAS MOTIVATED BY A PREFERENCE FOR ADMISSION OF BREATH TEST RESULTS IN DUI CASES.

The phrase "in substantially the following language" carries within its plain meaning a measure of flexibility in the words officers use to deliver implied consent warnings. The 2004 amendment simply codified what has long been the practice of arresting officers, who are in the best position to know which warnings do not apply to a given suspect's investigation. For example, as the Court

of Appeals noted at oral argument,¹ for more than 20 years officers have routinely omitted the warnings applicable to drivers under 21 years old when dealing with suspects over that age. Despite this apparent failure to recite the entire implied consent warning, the practice has become widely accepted and has never been the subject of a published opinion in Washington. The notion that officers can omit the "under 21" language if their suspect is over 21 is an uncontroversial interpretation of the statute's plain meaning.

The purpose in interpreting a statute is to determine and carry out the intent of the legislature. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704, 706 (2010). The insertion of the phrase "in substantially the following language" into the implied consent statute also inserted the doctrine of substantial compliance into any attempt to interpret that statute. "Substantial compliance" has been defined by case law as "whether a statute has been followed sufficiently so as to carry out the intent for which the statute was adopted." James v. Kitsap County, 154 Wn.2d 574, 588, 115 P.3d 286 (2005).

¹ Wash. Court of Appeals oral argument, State v. Robison, No. 72260-3-1 (Nov. 2, 2015), at 06:53 – 07:05 (available at <https://www.courts.wa.gov/content/OralArgAudio/a01/20151102/1.%20State%20v.%20Robison%20%20%20722603.wma>).

This Court has, multiple times, determined the legislative intent behind the implied consent statute:

The three goals of the implied consent statute are (1) discouraging DUI, (2) removing driving privileges from those individuals disposed to DUI, and (3) providing an efficient means of gathering reliable evidence of intoxication.

City of Seattle v. St. John, 166 Wn.2d 941, 947, 215 P.3d 194, (2009) (citing Dep't of Licensing v. Lax, 125 Wn.2d 818, 824, 888 P.2d 1190 (1995), and Nowell v. Dep't of Motor Vehicles, 83 Wn.2d 121, 124, 516 P.2d 205 (1973)). In other words, the legislature's intent shows a decidedly pro-law enforcement approach to reducing the rate of DUI by removing drunk drivers from the roads, which can only be reliably accomplished through the collection and admission of breath test results. This very sentiment was expressed by the Legislature, again, when it added "in substantially the following language" to the implied consent statute in 2004. See Laws of 2004, ch. 68, §1.²

² "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.

To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance

An objective review of the entire DUI statutory scheme shows that at nearly every opportunity, the Legislature has expressed its desire for evidence of the breath testing process to be admissible in DUI trials. See RCW 46.20.517 (refusal evidence is admissible at trial); RCW 46.61.506(4) (breath test results *shall* be admissible upon prima facie evidence of 8 foundational facts, with no reference to Implied consent warnings).

In contrast, the Court of Appeals' decision to suppress the valid breath test in this case, without any credible theory for how the omitted THC warning could have prejudiced the defendant's choice to provide a breath sample, carries out the exact opposite of the Legislature's intent. It allows DUI drivers to "escape punishment due to minor procedural errors that did not actually prejudice them." See State v. Storhoff, 133 Wn.2d 523, 531, 946 P.2d 783 (1997). It is quite clear from both the statutory scheme and the periodic expressions of legislative intent in this area that the legislature staunchly opposes suppression of breath test results, especially in

procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

The legislature's authority to adopt standards governing the admissibility of evidence involving alcohol is well established by the Washington Supreme Court. See generally State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989); State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law")."

cases where the defendant suffered no prejudice from a missing warning that had no bearing on the choice he was facing.

Even though the legislature's intent was clearly expressed in 2004, the 2015 amendments to the implied consent statute remove any doubt that the legislature anticipated officers omitting the sections of the warning that do not apply to any given defendant. Subsequent amendments are entitled to significant weight when determining a legislature's intent. See Rozner v. City of Bellevue, 116 Wn.2d 342, 347–48, 804 P.2d 24 (1991)(citing Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596, 100 S.Ct. 800, 63 L.Ed.2d 36 (1980)).

The substantive implied consent warnings are all contained in subsection (2) of RCW 46.20.308. The 2015 amendment changed the phrase "after receipt of the warnings required by subsection (2)" into "after receipt of *any applicable* warnings required by subsection (2)." Laws of 2015, ch. 3, §5(5)(d)(ii). This change provides definitive proof that, according to the legislature, DUI suspects need not always receive the statute's entire list of warnings. Instead, the legislature only expects a DUI suspect to receive "any applicable warnings," i.e., only those warnings which

apply to that suspect's situation. Some of the warnings will apply, others will not.

It is also important to remember why the implied consent statute required frequent legislative modification between 2012 and 2015. The combination of I-502's passage in 2012, followed closely by the U.S. Supreme Court's 2013 McNeely case prohibiting blood draws via implied consent, created two separate and somewhat conflicting demands for a redrafted implied consent statute. See Missouri v. McNeely, 133 S.Ct. 1552, 1563, 185 L.Ed.2d 696 (April 17, 2013). Before I-502 and McNeely, the implied consent statute provided warnings about one drug (alcohol) being measured in two possible ways (breath or blood). 2010 RCW 46.20.308(2). As of 2012, I-502 required additional warnings about THC content, which made sense when blood draws via implied consent were still legal, pre-McNeely. However, post-McNeely the implied consent warnings could no longer justify a warrantless blood draw, and as a consequence law enforcement could no longer measure a suspect's THC levels under the statutory framework of implied consent. The THC warning became an irrelevant vestige of the blood draw era. Although the legislature removed this vestige in

2015, this case and many others occurred before the legislature could respond to the shifting legal landscape caused by McNeely.

This is not a case in which the State is asking the Court to "fix" a poorly drafted statute, but rather to harmonize changes required by two independent factors occurring in short succession: a 2012 voter initiative requiring warnings about THC concentration, and a 2013 U.S. Supreme Court case eliminating the only means to measure THC via implied consent. Harmonizing ambiguous or conflicting provisions of a statute is well within the purview of this Court. Dolman v. Dep't of Labor & Indus., 105 Wn.2d 560, 564–65, 716 P.2d 852 (1986). By acknowledging that the Trooper substantially complied with the implied consent statute, this Court will restore the intended effect of the implied consent warnings and acknowledge the legislature's clear preference for admission, not suppression, of breath test results.

C. EVEN IF THE TROOPER VIOLATED THE STATUTE BY OMITTING THE THC WARNINGS, NOT ALL STATUTORY VIOLATIONS REQUIRE SUPPRESSION. THE COST OF SUPPRESSION OUTWEIGHS ITS BENEFITS IN CASES LACKING ANY PREJUDICE TO THE DEFENDANT.

Washington's exclusionary rule has generally called for suppression of evidence obtained in violation of a defendant's state or federal constitutional rights. State v. Bonds, 98 Wn.2d 1, 9, 653

P.2d 1024 (1982). The implied consent warnings do not implicate constitutional rights; the choice to take or refuse a breath test is a "matter of legislative grace." Allen v. State, Dep't of Licensing, 169 Wn. App. 304, 308, 279 P.3d 963 (2012). While the exclusionary rule has also been employed to sanction statutory violations which fall short of a constitutional violation, the facts have always included a discernable element of prejudice upon the defendant. See State v. Krieg, 7 Wn. App. 20, 23, 497 P.2d 621 (1972) (officer did not provide implied consent warnings at all, depriving defendant of notice that he could refuse the test). The State asserts that the exclusionary rule is inappropriately applied in cases involving statutory violations resulting in no prejudice to the defendant.

The legislature does not always stay silent as to the evidentiary remedy for violating a statute. For example, it is illegal to record a private communication in Washington without the consent of all parties to that communication. RCW 9.73.030. The legislature drafted an exclusionary remedy as part of the statutory scheme, but carved out an exception for prosecution of crimes that "jeopardize national security." RCW 9.73.050. As an additional remedy, the legislature criminalized the recording of conversations in violation of the statute, including exposing police officers to

criminal liability for obtaining pen register information without seeking judicial approval. RCW 9.73.080, RCW 9.73.260(6)(a). The legislature could have included suppression of evidence as part of the implied consent statute, yet it declined to do so.

But when the legislature is silent as to the remedy for a statutory violation, courts do not always resort to the exclusionary rule as the remedy. For example, in State v. Barker an Oregon State Police trooper observed the defendant driving over 100 mph on the Oregon side of the Columbia River. The officer gave chase, but the defendant did not pull over until he was on the Washington side of the river. The roadside interactions between the driver and the trooper, all occurring in Washington, led to the defendant's arrest for DUI. The defendant was charged with DUI in Washington. State v. Barker, 98 Wn. App. 439, 442, 990 P.2d 438, 440 (1999), rev'd, 143 Wn.2d 915, 25 P.3d 423 (2001). The defendant argued a technical violation of RCW 10.93.090; specifically, that the OSP trooper lacked authority to stop his vehicle in Washington because this particular trooper had not attended "a course of basic training prescribed or approved ... by the Washington State Criminal Justice Training Commission." Id. at 443. The court agreed that the trooper violated RCW 10.93.090

because she lacked the training course required by the statute, but declined to apply the exclusionary rule as a remedy. Id. at 446. The court found that the Legislature's intent in creating RCW 10.93.090 was to modify "current artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state, and federal agencies..." The Legislature specifically "did not intend that individuals be able to invoke the exclusionary rule as the remedy" for violations of the statute. Id. at 451-52. Although this court later reversed the decision on other grounds, it did not overrule the Court of Appeals on the application of the exclusionary rule. State v. Barker, 143 Wn.2d 915, 922 fn.4 (2001).

Similarly, courts have stopped short of suppression in cases involving violations of the court rules governing search warrant procedures. In State v. Linder, 190 Wn. App. 638, 651, 360 P.3d 906 (2015), a police sergeant searched a metal box pursuant to a search warrant, but violated the requirement of CrR 2.3(d) by failing to conduct the search in the presence of at least one other person. Id. at 642. The Court of Appeals surveyed seven different cases involving similar procedural violations, and concluded that "the touchstone of the courts' decisions is prejudice." Id. at 649. In Linder, there was prejudice and therefore suppression because the

trial court lacked confidence that the sergeant's inventory was accurate. Id. at 651. However, most of the cases in which the court rules were violated involved no prejudice, so suppression was unwarranted. See State v. Bowman, 8 Wn. App. 148, 150, 504 P.2d 1148 (1972) ("the officer's substantial compliance with its terms did not result in any disadvantage to the defendant"); State v. Kern, 81 Wn. App. 308, 318, 914 P.2d 114 (1996) ("Kern alleges no prejudice resulting from Sisk's premature filing. Thus, suppression is not appropriate."); State v. Aase, 121 Wn. App. 558, 568, 89 P.3d 721 (2004) ("Aase does not argue that he was prejudiced by the several-minute delay.... Suppression is not required.").

A third example of statutory violations not requiring suppression arises from the legislature's detailed procedural requirements for law enforcement officers seeking to conduct strip searches. RCW 10.79.060 – RCW 10.79.170. This statutory scheme goes into great detail expressing which situations require a warrant and which do not, the exact procedures and personnel attending the search, and extensive written documentation requirements. The legislature even included a civil remedy (a suit for damages) if police violate the statutes. RCW 10.79.110(1).

"Damages" in the civil context is comparable to "prejudice" in the criminal context.

Even so, courts have resisted suppression as a remedy for violations of this statutory scheme. In State v. Harris, the defendant sought suppression of contraband found during a strip search. Among his complaints was the fact that the officer did not obtain written permission from his supervisor as required by RCW 10.79.140(2). State v. Harris, 66 Wn. App. 636, 642-43, 833 P.2d 402 (1992). The Court of Appeals held "suppression of evidence is not an appropriate remedy for violation of the writing requirement of RCW 10.79.140(2)." The reason given was that oral permission satisfied the purpose of the statute, even though the language of the statute calls for "specific prior written approval." Id. at 644.

Taken together, these cases all demonstrate that suppression of evidence does not necessarily have to follow a statutory violation, and in fact is a disfavored remedy in cases where a defendant cannot demonstrate prejudice. This is such a case, as neither the defendant nor the Court of Appeals was able to articulate a credible theory explaining how the omitted warnings deprived the defendant of an opportunity to make a knowing and intelligent decision to take or refuse the breath test. The omitted

warning had nothing to do with the breath test the Trooper was seeking.

It is not hyperbole to say that the cost of suppressed breath tests can be measured in lives lost on Washington's roads. Defendants who evade DUI convictions due to procedural technicalities despite no prejudice to their case receive an unjust windfall at the expense of public safety. The Court of Appeals' decision must be reversed in order to give meaning to the legislative purpose behind the implied consent statute, but also to prevent the proliferation of suppressed BAC results which will inevitably follow if prejudice is removed from the analysis.

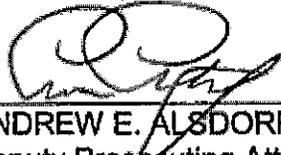
III. CONCLUSION

The decision of the Court of Appeals should be reversed, and prejudice restored as an essential burden for defendants to carry in DUI suppression motions.

Respectfully submitted on August 31, 2016.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner,

v.

DARREN J. ROBISON,
JUDITH E. MURRAY,

Respondent(s).

No. 92944-1 (Consolidated)

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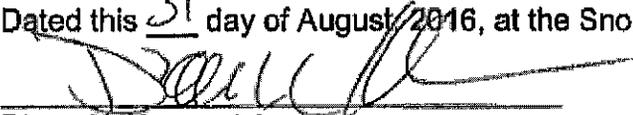
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Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

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