

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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JUDITH MURRAY, and
DARREN ROBISON,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent
The Honorable George N. Bowden

SUPPLEMENTAL BRIEF OF RESPONDENTS
JUDITH MURRAY AND DARREN ROBISON

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A. ISSUE PRESENTED FOR REVIEW

The warnings contained in the Implied Consent Waiver (ICW) statute, RCW 46.20.308, are required to be given prior to a breath test people arrested for Driving While Under the Influence (DUI). Where troopers advised Judith Murray and Darren Robison of all the required warnings except that involving THC concentration, did the Court of Appeals properly conclude that the failure to give this warning required suppression of the resulting breath tests?

B. STATEMENT OF THE CASE

The facts are largely not in dispute.

1. Judith Murray

On December 9, 2013, Judith Murray was stopped by Washington State Trooper (WSP) Ernest Gerrer for suspicion of DUI. CP 25. Upon contacting Ms. Murray, Gerrer stated he could smell the odor of alcohol coming from inside the car and Ms. Murray's eyes were watery and bloodshot. CP 25. Gerrer asked Ms. Murray if she had taken any prescription medications, to which she responded that she had taken a Xanax¹ earlier that day. CP 26; 12/9/2013RP 6. Gerrer had Ms.

¹ Xanax (alprazolam) belongs to a group of drugs called benzodiazepines. It works by slowing down the movement of chemicals in the brain that may become unbalanced. This results in a reduction in nervous tension (anxiety). Xanax is used to

Murray perform field sobriety tests, at the conclusion of which, the trooper arrested Ms. Murray and read her the statutory ICW prior to the administration of a breath test. CP 26-27. It is undisputed that Gerrer failed to advise Ms. Murray of the portion required in RCW 46.20.308 dealing with Tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana. CP 28. While examining Ms. Murray's mouth as part of the breath test protocol, the trooper observed evidence of marijuana use by Ms. Murray. CP 28.

During a subsequent inventory search of Ms. Murray's car, Gerrer discovered a small baggie of marijuana and a pipe in the passenger seat. CP 27. Ms. Murray admitted she had smoked some marijuana earlier in the day. CP 27.

Ms. Murray was charged with DUI in violation of RCW 46.61.502. She moved to suppress the results of the breath test on the basis, among other things, that she was given inaccurate and incomplete ICW. Following an evidentiary hearing, the district court commissioner denied the motion to suppress, concluding that since the breath test cannot test for the THC concentration in the blood, it would

treat anxiety disorders, panic disorders, and anxiety caused by depression.
<http://www.drugs.com/xanax.html>.

be misleading and/or incomplete to advise Ms. Murray of the marijuana related warnings. CP 30-33.

Ms. Murray appealed the commissioner's ruling to the superior court. The RALJ court reversed the commissioner's ruling and ordered the breath test suppressed. CP 5-6. The RALJ court found that the marijuana related warnings were required as part of the implied consent warnings, and police officers did not have discretion to decide which of the warnings should be given.

2. Darren Robison

On June 29, 2013, Darren Robison was stopped by Washington State Trooper (WSP) B.S. Hyatt for failure to stop and failure to yield. CP 148. Upon contacting Mr. Robison, Hyatt stated he could smell the odor of marijuana emanating from the interior of the car. CP 149. Hyatt arrested Mr. Robison for suspected DUI and read him the ICW prior to the administration of a breath test. *Id.* As in Ms. Murray's case, it is undisputed that Hyatt failed to advise Mr. Robison of the warnings required in RCW 46.20.308 dealing with THC concentration. CP 5, 9.

Mr. Robison was charged with DUI in violation of RCW 46.61.502. CP 58. He moved to suppress the results of the breath test

on the basis that he was given an inaccurate and incomplete ICW.² CP 65-76. Following an evidentiary hearing, the district court commissioner denied the motion to suppress, concluding that since the breath test cannot test for the THC concentration in the blood, it would be misleading to advise Mr. Robison of the marijuana related warnings. CP 155-57.

Mr. Robison appealed the commissioner's ruling to the superior court. The RALJ court reversed the commissioner's ruling and ordered the breath test suppressed. CP 6, 9-15. The RALJ court found that the marijuana related warnings constituted a significant portion of the required implied consent warnings, and the officer's failure to give these warnings rendered the implied consent warnings given misleading and incomplete. CP 5-6, 14-15. This was especially true in light of the fact, at the time of his arrest, the officer smelled marijuana in Mr. Robison's car and Mr. Robison admitted he had smoked marijuana. CP 6, 9.

² Mr. Robison also challenged the legality of the traffic stop but abandoned that issue in the RALJ appeal.

3. Court of Appeals decision.

The Court of Appeals affirmed the suppression of the results of the breath tests in both cases, agreeing with the RALJ courts that the THC portion of the ICW was required, and the failure to advise an arrestee of the THC portion rendered the warnings incomplete and required suppression of the breath test results. *State v. Robison*, 192 Wn.App. 658, 369 P.3d 188, *review granted*, 185 Wn.2d 1033 (2016); *State v. Murray*, 192 Wn.App. 1040 (No. 72501-7-I, February 16, 2016).

C. ARGUMENT

The Court of Appeals properly found that, pursuant to RCW 46.20.308 (2)(c)(i), the THC concentration portion of the ICW was required.

1. *A person arrested for DUI must be advised of all of the implied consent warnings included in RCW 46.20.308.*

It is illegal to drive while under the influence of alcohol, marijuana, or other drugs. RCW 46.61.502.³ The necessity for advisement of the implied consent is triggered once there is a valid DUI arrest. *City of Seattle v. St. John*, 166 Wn.2d 941, 950, 215 P.3d 194 (2009); *O'Neill v. Dep't of Licensing*, 62 Wn.App. 112, 116, 813 P.2d 166 (1991).

³ RCW 46.61.502 states in relevant part:

- (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
 - (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
 - (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
 - (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
 - (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Drivers in Washington are presumed to have consented to a breath or blood test to determine alcohol concentration if arrested for DUI, but drivers may refuse the test. RCW 46.20.308(1). “The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace.” *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). “A driver must be afforded an opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test.” *Gonzales v. Dep’t of Licensing*, 112 Wn.2d 890, 894, 774 P.2d 1187 (1989).

Implied consent warnings must strictly adhere to the plain language of the statute. *Bostrom*, 127 Wn.2d at 587. Courts review the warnings provided by arresting officers to ensure that all of the required warnings were provided and that they were not inaccurate or misleading. *Gonzales*, 112 Wn.2d at 896-98. The exact words of the implied consent statute are not required “so long as the meaning implied or conveyed is not different from that required by the statute.” *Jury v. Dep’t of Licensing*, 114 Wn.App. 726, 732, 60 P.3d 615 (2002) (emphasis added). The officer must relate the law correctly and not mislead. *Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 791-92, 982 P.2d 601 (1999).

The validity of any implied consent warning is a question of law that is reviewed *de novo*. *Martin v. State Dep't of Licensing*, 175 Wn.App. 9, 18, 306 P.3d 969 (2013); *Jury*, 114 Wn.App. at 731.

2. *The implied consent warnings given here were deficient since they omitted the THC concentration provision required by the statute.*

RCW 46.20.308(2) states in relevant part:

The officer *shall warn* the driver, in substantially the following language, that:

...

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if:

- (i) The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver's breath is 0.08 or more *or that the THC concentration of the driver's blood is 5.00 or more;*

(Emphasis added).⁴ The term "shall" indicates a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Here, it is undisputed that the warnings given by the officers did not include all of the statutory language, omitting the marijuana-related

⁴ RCW 46.20.308 was amended in 2015 eliminating the THC or "any other drug" reference. 2015 2nd sp.s. c 3 § 5, eff. Sept. 26, 2015.

warnings highlighted above. The State claimed that the officers had discretion to omit what it described as “irrelevant” information:

The State reasons that because the breath test administered to Robison could not measure THC levels, the THC warning was irrelevant[.]

Robison, 192 Wn.App. at 665.

Unambiguous statutes are not subject to judicial interpretation; this Court determines the meaning of the statute based on the statutory language. *Harmon v. Dep't of Soc. & Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998). “Washington case law has consistently required strict adherence to the plain language of the implied consent statute.” *Bostrom*, 127 Wn.2d at 587, citing *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 revocation invalid); *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 284-88, 714 P.2d 1183 (1986) (holding that officers cannot diverge from the statutory language and advise drivers that their refusal to take a breath test “shall” be used against them when the statute requires that they be told that it “may” be used against them); *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”).

In *Spokane v. Holmberg*, the defendants were not advised that a refusal to submit to a breath or blood test may be used at a subsequent criminal trial. 50 Wn.App. 317, 319, 745 P.2d 49 (1987), *reversed on other grounds*, *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997). The statute in effect at that time stated: “The officer *shall* warn the driver that (a) his or her privilege to drive will be revoked or denied if he or she refuses to submit to the test, and (b) *that his or her refusal to take the test may be used against him or her in a subsequent criminal trial.*” *Holmberg*, 50 Wn.App. at 322 (emphasis in original). Once again applying the rules of statutory construction, the Court held the failure to advise the defendants of this warning was error:

The use of the word “shall” in a statute generally and presumptively operates to create a duty rather than confer discretion. *State v. Bartholomew*, 104 Wn.2d 844, 710 P.2d 196 (1985). Unless there is legislative intent to the contrary, the word should be given its usual and ordinary meaning. *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 605 P.2d 1265 (1980). While “shall” may be directory or mandatory depending on legislative intent, *see Nugent*, at 82, 605 P.2d 1265, both the language and purpose of RCW 46.20.308 appear to be mandatory and we so hold it to be. Therefore, there is a mandatory affirmative duty placed upon police officers to inform

drivers of the consequences of refusing to consent, and one of those consequences is that refusal may be used against him or her in a subsequent criminal action.

Ibid.

Here, the Court of Appeals correctly concluded that established caselaw required that Mr. Robison and Ms. Murray be advised of all of the statutory requirements including the THC concentration portion of RCW 46.20.308. *Robison*, 192 Wn.App. at 667-68. This Court should agree and hold that the troopers' failure to advise them of the THC portion of the statute was error.

3. *The failure to provide the required warnings must result in suppression of the blood tests without any showing of prejudice.*

In *Whitman County Dist. Court*, this Court affirmed the suppression of a breath test where the police officer failed to strictly comply with the implied consent warning. 105 Wn.2d at 285-88. The defendants in *Whitman* were advised that the refusal to submit to the test "shall" be used at trial instead of "may" be used. *Id.* at 280. This Court agreed with the district court's order suppressing the alcohol test:

The warnings received by the defendants in the "shall" category present a similar issue as that in *Welch*. The implied consent statute requires that the officer *shall* warn the driver that his refusal to take the test *may* be used against him in any subsequent criminal trial. RCW 46.20.308(1) (now codified under subsection (2)). The

defendants in this category were advised by the officer “that your refusal to take the test *shall* be used against you in a subsequent criminal trial.” The implied consent statute is worded in the mandatory sense as noted by the court in *Connolly*. Therefore, the officer had no discretion with regard to the wording he used to warn the accused. In addition, as in *Welch*, the change in wording operated to convey a different meaning than that specified in the statute. The word “may” merely expresses a contingency that may be possible, nothing more. It suggests that there is a possibility that his refusal will be used against him. The word “shall” conveys to the accused absolute certainty that his refusal would be subsequently used against him. As a result, the warning actually read to the accused by the officer contains a more coercive impact than that required by statute.

Whitman, 105 Wn.2d at 285-86 (emphasis in original). As a result the Court ruled: “We find that the defendants in the ‘shall’ category of cases were denied the opportunity of exercising an intelligent judgment concerning whether to exercise the statutory right of refusal. The suppression of the results of the Breathalyzer test in this category of cases is the appropriate remedy.” *Id.* at 286-87.

Similarly, in *State v. Krieg*, the officer failed to advise the defendant of his right to refuse the test and his right to have additional testing by his own qualified person. 7 Wn.App. 20, 21, 497 P.2d 621 (1972). The Court of Appeals agreed with the trial court and ordered the alcohol test suppressed:

Thus, consent is no longer an issue in this state, since all drivers have consented *in advance* to testing for the presence of alcohol. The issue becomes one of deciding whether the officer complied with the statute in such a fashion as to adequately apprise the driver of his right to *withdraw* his consent. Since no statutory warnings were given in this case, the officer did not meet that burden.

Krieg, 7 Wn.App. at 23.

Finally, the latest word by this Court on the failure to comply with the statutory requirements of the implied consent law resulted in suppression of a blood test without any additional showing of prejudice. *State v. Morales*, 173 Wn.2d 560, 577, 269 P.3d 263 (2012). In *Morales*, the State failed to prove that an interpreter correctly advised a defendant, who had been arrested for vehicular assault and required to submit to a blood test, of his right to additional testing of the blood sample. *Id.* at 568-69. The defendant was subsequently charged with vehicular assault, hit and run, and DUI. *Id.* at 565. After finding the State failed to prove that the blood test warning was given, the Supreme Court required a showing of prejudice regarding the vehicular assault and hit and run counts. *Morales*, 173 Wn.2d at 273. However, regarding the DUI count, the Court reversed without a specific showing by the defendant of prejudice:

Admission of the blood alcohol test results did not prejudice Morales in the hit and run charge; indeed,

Morales did not contest that charge. *The blood alcohol test results obviously infected the charge of "driving while under the influence of intoxicating liquor."* RCW 46.61.502(1). "Morales's blood alcohol level was per se evidence that Morales drove under the influence of alcohol." *Morales*, 154 Wn.App. at 58, 225 P.3d 311 (Bridgewater, J., dissenting); RCW 46.61.502(4). Accordingly, we reverse Morales' DUI conviction. We see equal prejudice in the vehicular assault by the DUI conviction; it too is reversed.

Morales, 173 Wn.2d at 577 (emphasis added).

These cases stand for the proposition that the statutory terms of the ICW have meaning and must be strictly complied with in giving the implied consent warning to the arrested person. Where the terms are not included, or where the terms are modified, the result must be the suppression of the breath test. Here, the trooper failed to comply with the specific terms of RCW 46.20.308, and as a result, the RALJ courts were correct in ordering the suppression of the results of Mr. Robison's and Ms. Murray's breath tests.

Thus, this Court has consistently held that the failure of the police to provide all of the warnings included in the ICW required suppression of the breath test results without the defendant establishing some sort of prejudice. This was so because inaccurate or incomplete warnings to do not allow the defendant to make a an adequate decision on whether or not to take the breath test. The Court should reaffirm its

prior holdings and find the Court of Appeals was correct in reversing the convictions and ordering the breath test results suppressed without any further showing by Mr. Robison and Ms. Murray.

4. *This Court should reaffirm its earlier rulings and adopt a bright-line rule requiring advisement of all of the statutory requirements in RCW 46.20.308.*

Accepting the State's premise that police officers in the field have the right to edit the ICW where they deem language irrelevant based upon the facts of the individual case puts the police in the unenviable position of having all of their decisions second guessed by the courts, thus wasting money as well as the courts', attorneys', and individual citizen's time. The State's argument should be rejected and a bright-line rule adopted: the warnings included in RCW 46.20.308 *must* be given and officers do not have discretion to edit them absent a contrary ruling by the appellate courts or an amendment of the statute by the Legislature.

The rationale behind the adoption of a bright-line rule requiring advisement of all of the statutory requirements is simple:

A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith' (Fna)*, 43 U.Pitt.L.Rev. 307, 320-21 (1982), quoting LaFave, 'Case-by-Case Adjudication' Versus 'Standardized Procedures': *The Robinson Dilemma*, 1974 Sup.Ct.Rev. 127, 141.

This need for a bright-line rule is illustrated in *State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014). An Iowa statute allowed those arrested for DUI the right to consult with an attorney confidentially prior to taking a breath test. *Id.* at 360-61. In that case, the officer allowed the defendant to consult an attorney but stayed in the room during the consultation. *Id.* at 359. In overturning the defendant's conviction, the Iowa Supreme Court interpreted the statute and adopted a bright-line rule requiring the police to advise the arrestee that the consultation with the attorney is confidential:

We prefer the clarity of bright-line rules in time-sensitive interactions between citizens and law enforcement, such as during informed-consent procedures. *Welch*, 801 N.W.2d at 601 ('Clarity as to what the law requires ... is especially beneficial when the law governs interactions between the police and citizens. Law enforcement officials have to make many quick decisions as to what the law requires where the stakes are high.... A clear, teachable rule is a high priority.').

Id. at 364.

As found by the Iowa Supreme Court, bright-line rules provide clarity and make it easier for police officers in the field who frequently have to make split-second decisions. As a consequence, Mr. Robison and Ms. Murray urge this Court to adopt a simple bright-line rule requiring police officers to advise those arrested for DUI of *all* of the requirements of RCW 46.20.308(2)(i) prior to deciding whether to take the breath test.

D. CONCLUSION

For the reasons stated, Ms. Murray and Mr. Robison ask this Court to affirm the Court of Appeals decision entered in their respective cases and order the results of the breath tests suppressed.

DATED this 29th day of August 2016.

Respectfully submitted,

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