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Washington State
Supreme Court

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 16-2-00215-8

Chelan County District Court
Cause No. C00029482 CHS

STATE OF WASHINGTON,
Plaintiff/Petitioner,

v.

CHELAN COUNTY DISTRICT COURT,
Respondent;

HON. ROY S. FORE,
Respondent; and

ROBERT J. BOWIE,
Defendant/Respondent (real party in interest).

MOTION FOR DISCRETIONARY REVIEW

Douglas J. Shae
Chelan County Prosecuting Attorney

Andrew B. Van Winkle, WSBA #45219
Deputy Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
P.O. Box 2596
Wenatchee, Washington 98807-2596
(509) 667-6204

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I. Identity of Petitioner

The State of Washington, petitioner, petitions this Court for direct review of the decision in *State of Washington v. Chelan County District Court, et al.*, Chelan County Superior Court No. 16-2-00215-8.

II. Decision Below

The State seeks direct review of the Chelan County Superior Court's decision denying the State's Petition for a Statutory Writ of Certiorari, which sought review of Chelan County District Court's decision in *State of Washington v. Robert Bowie*, No. C00029482 CHS. A copy of the superior court decision is attached at Appendix A. A copy of the district court decision is attached at Appendix B.

III. Issues Presented for Review

1. What did the Legislature intend in 2004 when it amended RCW 46.20.308(2) so that the implied consent warnings need only be "in substantially the following language"?
2. As a matter of law, is the word "voluntary" synonymous with or otherwise substantially the same as the phrase "right to refuse" as used in the implied consent warnings?
3. If not, is the appropriate standard for suppression constitutional harmless error or statutory harmless error?

4. Under the appropriate standard for suppression, was any error harmless?

IV. Statement of the Case

At the District Court level, the defendant in a DUI prosecution sought pre-trial suppression of evidence of his refusal to submit to a breath alcohol test.¹ Appendix C. The defendant argued that the arresting deputy violated RCW 46.20.308 (Implied Consent Warnings) by using the word “voluntary” in conjunction with the defendant’s choice to submit to a breath test for alcohol. Appendix C. The court granted the motion to suppress and entered findings of fact and conclusions of law. Appendix D. The State filed a motion for reconsideration, arguing that the court had missed relevant case law. Appendix E. In the meantime, the court of Appeals decided *Robison*. *State v. Darren Robison*, 192 Wn. App. 658, ___ P.3d ___ (2016), pet’n for rev’w pending, no. 92944-1.² Relying on *Robison*, the district court found as a matter of law that RCW 46.20.308 was violated. Appendix B. The court further found that the State had failed to show a lack of prejudice beyond a reasonable doubt, in spite of uncontroverted

¹ In DUI cases, the refusal to submit to a breath test is generally admissible as evidence of consciousness of guilt and is also a special allegation for the jury to find beyond a reasonable doubt in order to impose the sentencing enhancements for refusal of a breath test in RCW 46.61.5055.

² *State v. Murray*, a case involving the exact same issue presented in *Robison*, also has a petition for review pending under Supreme Court case no. 92930-1.

evidence that the defendant knew what he was doing by refusing as demonstrated by evidence in the record that this was the defendant's third refusal within seven years and that the defendant had previously been subjected to the penalties warned of if he refused the test. Appendix B.

The State sought a writ of certiorari under chapter 7.16, RCW, in Chelan County Superior Court. Appendices F (Application for Writ) and G (Memorandum in Support of Writ). The Superior Court held a hearing on the petition, for which the State does not yet have a transcript. However, as indicated in the Court Clerk's minutes and the Court's order denying certiorari, the Court did state that although it would have reached the opposite decision had it been the court of first instance, it felt that the State could only show possible error (and not probable error) based on the apparent conflicts in the current case law. Appendices H and A. It appears from this decision that the Superior Court was under the misperception that the applicable standard was an abuse of discretion, and not a question of law reviewed *de novo*.

While a petition for review of some of the same questions is pending right now in *Robison*, this case is sufficiently different from *Robison* that it is not necessarily controlled by the outcome in that case. Both cases involve the proper interpretation of Washington's DUI implied consent statute, RCW 46.20.308(2). Within that question, *Robison* asks whether an officer

can substantially comply with that RCW when he or she *omits* irrelevant and potentially misleading language in that statute. This case, however, presents the opposite question of whether an officer substantially complies with RCW 46.20.308(2) when he or she inadvertently makes a statement that *overlaps with or adds information* provided by RCW 46.20.308(2), but is not in the same language as provided by RCW 46.20.308(2). Following those related questions, both cases ask what the appropriate standard of suppression is assuming a violation of RCW 46.20.308(2) occurred—constitutional harmless error or non-constitutional harmless error.

V. Grounds for Discretionary Review

The State seeks discretionary review under RAP 2.3(d) (considerations governing acceptance of review of superior court decision on review of decision of court of limited jurisdiction). Within RAP 2.3(d), the State specifically relies on RAP 2.3(d)(1) (superior court conflict with higher court decisions), RAP 2.3 (d)(3) (issue of public interest), and RAP 2.3(d)(4) (departure from accepted and usual course of judicial proceedings).³

A. Conflict Among Decisions

³ Pursuant to RAP 17.3(c) the State has also filed a statement of grounds for direct review detailing the considerations laid out in RAP 4.2(a).

When seeking review of a superior court decision on review of a district court decision, discretionary review is appropriate if the superior court's decision conflicts with a decision of the court of appeals or Supreme Court. RAP 2.3(d)(1).

Under these guidelines, review of Issues 3 and 4 (designated above in section IV) are appropriate because the main cases relied on by the lower court *State v. Robison*, 192 Wn. App. 658, ___ P.3d ___ (2016) and its underlying authority, *State v. Bartels*, 112 Wn.2d 882, 774 P.2d 1183 (1989), conflict with *Lynch v. Dep't of Lic.*, 163 Wn. App. 697, 707, 262 P.3d 65 (2011), and *Grewal v. Dep't of Lic.*, 108 Wn. App. 815, 822, 33 P.3d 94 (2001).

Robison and *Bartels* hold that when an error occurs in the provision of the implied consent warnings, the onus is on the State to disprove any prejudice beyond a reasonable doubt (i.e. the constitutional harmless error standard). *Robison*, 192 Wn. App. at 670 (2016); *Bartels*, 112 Wn.2d at 890. In *Lynch* and *Grewal*, also implied consent cases, the reviewing courts held that the defendant must "demonstrate that he was actually prejudiced by the inaccurate warning" (i.e. non-constitutional harmless error). *Lynch*, 163 Wn. App. at 707, quoting *Grewal*, 108 Wn. App. at 822. Before all four of those cases, the court of appeals held in *Cooper* that when an error occurs in the provision of the implied consent warnings, suppression is

automatic and the error is not subject to a harmless error analysis. *Cooper v. Dep't of Lic.*, 61 Wn. App. 525, 810 P.2d 1385 (1991).

None of these cases have been explicitly overruled, nor have any cases attempted to explain why one prejudice standard is more appropriate than any other. Accordingly, there is a three-way conflict of authorities. At the district court level, the judge explicitly agreed that there was a conflict of authorities. Appendix I at 23-25.

Not only is there a conflict among implied consent cases, but *Robison* and *Bartels* (the cases relied on by the lower court in this case) also conflict with this Court's recent guidance on when to apply the constitutional harmless error standard versus the non-constitutional harmless error standard. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015). By applying the constitutional harmless error standard to a statutory error, *Robison* and *Bartels* explicitly conflict with *Barry* and the authorities relied on therein. *Robison* and *Bartel* similarly conflict with this Court's opinion in another DUI case, *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632, 645 (2002) (holding that non-constitutional harmless error standard applied to BAC suppression hearings for violations of CrRLJ 3.1).

B. Departure from Accepted and Usual Course of Judicial Proceedings

Related to the split of appellate authorities, the superior court's decision denying the writ of certiorari as to each of issues 1 through 4 designated above is also in conflict with appellate authorities. This also coincides with the superior court's departure from the accepted and usual course of judicial proceedings under RAP 2.3(d)(4). By acknowledging that the superior court would have reached the opposite result if it had been the court of first instance, but ultimately finding that the State had only shown possible error for purposes of RCW 7.16.040, the superior court departed from established case law. Appendices A and H.

Under RCW 7.16.040, a statutory writ of certiorari "shall be granted" if, *inter alia*, the petitioner shows the lower court "acted illegally." This Court has interpreted that phrase to mean "probable error" as that term is used in RAP 2.3(b)/RAP 13.5(b). *City of Seattle v. Holifield*, 170 Wn.2d 230, 245, 240 P.3d 1162 (2010).

The proper interpretation of RCW 46.20.308, whether the deputy's language substantially complied with that statute, the appropriate error standard to apply, and whether any error was harmless are all questions of law reviewed *de novo*. See *Berger v. Sonneland*, 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001) (Statutory interpretation is a question of law which this court reviews *de novo*.); *State v. Bird*, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006) (holding that harmless error analysis is a question of law

reviewed *de novo*). In order for the superior court to say that it would have reached a different result if it had been the court of first instance the superior court necessarily had to have found probable error because the State was not challenging the district court's findings of fact, only the district court's interpretation of the law.

Even if there had been a matter of discretion involved, “[i]t is an abuse of discretion for a court to use an incorrect legal standard. Determining the appropriate legal standard and assessing whether the trial court applied the correct legal standard are both issues of law that we review *de novo*.” *In re Dep. of M.H.P.*, 184 Wn.2d 741, 752-53, 364 P.3d 94 (2015); *see also Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (“If the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.”).

C. Issue of Public Interest

When seeking discretionary review of a superior court decision on review of a district court decision, review is appropriate if “the decision involves an issue of public interest which should be determined by an appellate court.” RAP 2.3(d)(3).

In 2004, the Legislature amended RCW 46.20.308(2) so that the implied consent warnings need only be “in substantially the following

language.” The WSP’s Impaired Driving Section has already incorporated that amendment into its statewide training that every law enforcement officer in this state receives. *See, e.g.*, WSP Breath Test Program Training Manual, p. 16 (11/18/14 rev.).⁴ However, this language has never been interpreted by any appellate court. Furthermore, this language directly conflicts with prior appellate decisions in *Cooper* and its progeny, which required strict compliance with RCW 46.20.308. Whether the *Cooper* line of cases can survive in the face of the 2004 amendments is a matter of broad public importance because it impacts the training that every law enforcement officer in this state receives. Accordingly review of Issues 1 and 2 (designated above in section IV) is also appropriate.

This is also a matter of broad public interest because every time an officer processes a DUI, he or she is faced with decisions of whether to eliminate irrelevant and potentially misleading language from the implied consent warnings and also risks inadvertently adding language that could be construed as nullifying otherwise full and accurate implied consent warnings. Importantly, these are decisions that get made tens of thousands of times each year in this state. *E.g.* RCW 45.55.350(b) (finding that in 2011 there were approximately 39,000 DUI/Physical Control arrests in

⁴ The manual is available at <http://www.wsp.wa.gov/breathtest/btpindex.php#calib> (last visited 4/27/16).

Washington, 200 of which involved fatalities).⁵ To put this number in context, there were only 58,874 felony counts filed in this state in 2015.⁶ Accordingly, the sheer number of DUI cases alone as a percentage of overall cases in this state makes each of the issues designated above issues of broad public importance meriting discretionary review.

Historically, this Court has agreed that issues that have the potential to affect every single DUI in this state are worthy of discretionary review. This Court and the Court of Appeals have accepted discretionary review in at least 11 other DUI cases. *E.g. State v. Baird*, No. 90419-7 (Wash. 2016) (Arg. 5/12/15, decision pending); *City of Seattle v. Holifield*, 170 Wn.2d 230, 240 P.3d 1162 (2010); *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004); *City of Kent v. Beigh*, 145 Wn.2d 33, 32 P.3d 258 (2001); *City of Mount Vernon v. Mount Vernon Municipal Court*, 93 Wn. App. 501, 504, 973 P.2d 3 (1998); *State v. Trevino*, 127 Wn.2d 735, 903 P.2d 447 (1995); *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 280, 714 P.2d 1183 (1986); *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824, 675 P.2d 599 (1984); *State v. King County Dist. Court W. Div.*,

⁵ AOC's caseload reports for courts of limited jurisdiction show that this number dropped to around 27,000 in 2015, available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=Statewide&fileID=trend05> (last visited 4/27/16).

⁶ See AOC Superior Court caseload report available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=criminal&fileID=crmoctyr> (last visited 4/27/16).

175 Wn. App. 630, 307 P.3d 765 (2013); *State v. Mackenzie*, 114 Wn. App. 687, 60 P.3d 607 (2002); *Seattle v. Keene*, 108 Wn. App. 630, 31 P.3d 1234 (2001).

VI. Conclusion

Based on the foregoing argument and authorities, the State respectfully requests this Court to grant discretionary review in this case to resolve the conflict among decisions and among RCW 46.20.308, and because the case presents questions of substantial public interest, affecting every law enforcement officer in this State and a substantial percentage of all prosecutions in this state.

DATED this 2nd day of May, 2016.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Andrew B. Van Winkle WSBA #45219
Deputy Prosecuting Attorney

Appendix

A

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KIM MORRISON
CHELAN COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,

Petitioner,

vs.

CHELAN COUNTY DISTRICT COURT,
HON. ROY S. FORE, and
ROBERT JAMES BOWIE (real party in interest),

Respondents.

No. 16-2-00215-8
DC No. C00029482 CHS

ORDER DENYING PETITIONER'S
APPLICATION FOR WRIT OF
CERTIORARI

This matter, having come before the undersigned on petitioner's application for a statutory Writ of Certiorari, and having considered the affidavit of counsel for petitioner with appendices, petitioner's memorandum of law, respondent Bowle's brief opposing issuance of the writ, and the arguments of counsel on March 15, 2016, this court finds, concludes, and orders as follows:

FINDINGS:

1. The findings below are unchallenged and accepted as verities by this court.

CONCLUSIONS:

1. Under established case law, the standard for issuing a statutory writ of certiorari is probable error;

ORDER DENYING PETITIONER'S APPLICATION
FOR WRIT OF CERTIORARI

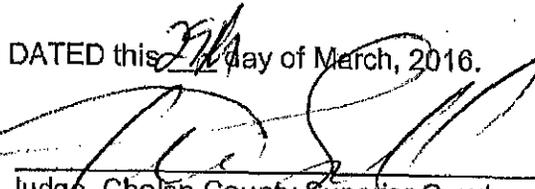
DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

- 1 2. Based on the current nature of the law in the area of DUI implied consent and breath
2 testing, the State has only shown possible error;
3
4 3. Therefore, the petitioner has failed to meet its burden under RCW 7.16.040; and
5
6 4. Because the legal issues before the court are debatable, the respondent's motion for
7 CR 11 sanctions is not warranted.

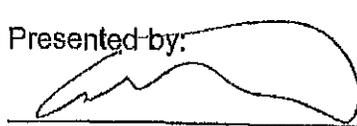
8 **NOW THEREFORE, IT IS HEREBY ORDERED:**

- 9 1. The petitioner's motion for a statutory writ of certiorari is denied;
10 2. The respondent's motion for sanctions is denied;
11 3. The stay of proceedings grant by this court is vacated and the matter remanded to district
12 court for further proceedings.

13 DATED this 27th day of March, 2016.

14 
15 Judge, Chelan County Superior Court

16 Presented by:

17 
18 Andrew B. Van Winkle, WSBA #45219
19 Deputy Prosecuting Attorney

20 Approved as to form and
21 Notice of presentation waived:

22 
23 John M. Brangwin, WSBA #27166
24 Attorney for Respondent Robert Bowie
25

ORDER DENYING PETITIONER'S APPLICATION
FOR WRIT OF CERTIORARI

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 6th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

Appendix

B

DISTRICT COURT OF THE STATE OF WASHINGTON

COUNTY OF CHELAN

STATE OF WASHINGTON,)	
Plaintiff,)	
)	No. C 29482 CHS
)	
vs.)	Amended Findings of Fact,
)	Conclusions of Law, and Order
ROBERT JAMES BOWIE,)	Granting Motion to Suppress
Defendant.)	
_____)	

On January 28, 2016 this matter came on for hearing upon the defendant's motion to suppress. On February 23, 2016 the matter was heard upon the state's motion for reconsideration. The court having considered the defendant's original motion and supporting memorandum, the testimony of Deputy Morrison, the exhibits admitted herein, the motion for reconsideration and the defendant's response, and the arguments of counsel, makes the following:

FINDINGS OF FACT

1. The defendant was arrested for Driving Under the Influence on June 14, 2015.
2. The defendant was properly advised of his constitutional rights and the implied consent warning for breath pursuant to RCW 46.20.308, including advice that the defendant had the right to refuse the breath test.
3. The defendant invoked his right to counsel, stating that he wanted to talk with his attorney. Good faith, though unsuccessful, attempts were made to place defendant in contact with his attorney. There were no attempts, or offers, to place defendant in contact with any other attorney, including the on-call public defender.
4. The defendant asked no questions about the implied consent warnings, nor did he express any confusion about them.
5. The defendant initially stated that he would submit to the breath test.
6. Prior to administration of the test, however, the defendant applied Chapstick, or a similar product, to his lips causing Deputy Morrison to restart the 15 minute observation period.
7. Upon completion of the second observation period, Deputy Morrison asked the defendant if he would provide a voluntary sample, to which time the defendant answered "no." Deputy Morrison's statement was not in response to any question by the defendant.

8. Upon the defendant's answer of "no," a refusal was entered by Deputy Morrison.
9. The defendant has previously been asked to submit to tests pursuant to the implied consent statute: in 2010 and 2008. Though those instances involved requests for blood samples, the implied consent warnings given in those instances were substantially the same as the warning given herein, there were no material differences relative to the right to refuse the tests.
10. The defendant refused to submit to the test in 2010 and, as a consequence, his license was suspended.

Based upon the foregoing findings, the court enters the following:

CONCLUSIONS OF LAW

1. The right to refuse a breath test pursuant to the implied consent law does not render the breath test voluntary. Rather, the law is coercive in that an exercise of the right to refuse comes at the cost of suspension or revocation of one's driving privilege and the fact of refusal may be used in a criminal trial.
2. The purpose of implied consent law is to afford a defendant the opportunity to make a knowing and intelligent decision whether to submit to testing.

3. Washington cases have consistently required strict adherence to the plain language of the implied consent statute.
4. RCW 46.20.308 does not dictate the precise language to be used. The warning must afford a person arrested for driving under the influence the opportunity to make a knowing and intelligent decision regarding submission to the test. The warning must be complete, accurate, and not misleading.
5. Deputy Morrison's initial explanation of the implied consent warning complied with RCW 46.20.308. However, the subsequent statement inaccurately characterized the test as voluntary. In the context of the implied consent law, the "right to refuse" is not synonymous with "voluntary."
6. Use of the term "voluntary" impacts the core purpose of the implied consent law and potentially effects a driver's ability to make a knowing and intelligent decision regarding submission to the breath test.
7. Pursuant to *State v. Robison*, No. 72260-3-1, and *State v. Bartels* 112 Wn.2d 882 (1992), the giving of an inaccurate implied consent warning may be harmless. The State bears the burden of establishing that an inaccurate or misleading implied consent warning was harmless.
8. The defendant's prior experience in similar circumstances involving the implied consent law suggests a basis upon which he could have understood the consequences of declining the breath test, in spite of the inaccurate reference to it being voluntary. Gauging the impact of the past warnings on the defendant's

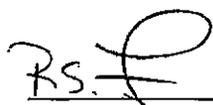
ability to make a knowing and intelligent decision herein on June 15, 2015 would be difficult and speculative. This difficulty, coupled with the defendant's initial agreement to submit to the test, made immediately after proper notice, and his later refusal, after the test was described as voluntary, causes the court to conclude that the State has not shown the error was harmless, under either a "preponderance" or "beyond a reasonable doubt" standard.

9. Accordingly, evidence that the defendant refused to submit to the breath test should be suppressed.
10. The practical effect of this ruling does not effectively terminate the case for purposes of RALJ 2.2 because there is still sufficient admissible evidence for the State to try the charge of Driving Under the Influence.

ORDER

Based on the foregoing, it is hereby ordered that Motion to Suppress is granted.

Dated this 10th day of March, 2016.

A handwritten signature in black ink, appearing to read "R.S. Fore", written over a horizontal line.

Roy S. Fore, Judge
Chelan County District Court

Appendix

C

RECEIVED
DEC 02 2015
CHELAN COUNTY
DISTRICT COURT

1 CERTIFICATE OF TRANSMITTAL
2 I DECLARE UNDER THE LAWS OF THE STATE OF WASHINGTON THAT ON
3 THE 2ND DAY OF DECEMBER, 2015, I SENT A COPY OF THE DOCUMENT
4 TO WHICH THIS IS AFFIXED TO THE ATTORNEY(S) OF RECORD FOR ALL
5 PARTIES BY FACSIMILE, ELECTRONIC MAIL, U.S. MAIL, POSTAGE PRE-
6 PAID, ATTORNEY MESSENGER SERVICE.

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WENATCHEE, WASHINGTON

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,)
) NO. C 00029482 CHS
)
) Plaintiff,)
) MOTION & BRIEF TO SUPPRESS BAC
)
 vs.)
)
)
) ROBERT JAMES BOWIE,)
)
)
) Defendant.)
)

I. MOTION

COMES NOW, the Defendant, ROBERT JAMES BOWIE, by and through his attorney of record, JOHN M. BRANGWIN of Woods & Brangwin, PLLC, and hereby requests an Order from this Court suppressing the Breath Test Results (Refusal) obtained in this matter based upon the Deputy's categorization of the breath test as "voluntary" during BAC processing.

II. PERTINENT FACTS IN SUPPORT OF MOTION

On June 14, 2015, Mr. Bowie was arrested and processed for DUI. While the arresting officer, Deputy Michael Morrison, processed Mr. Bowie for the BAC, the Deputy incorrectly characterized the breath test to be "voluntary" on many occasions. Deputy Morrison's report reads as follows:

WOODS & BRANGWIN, PLLC
Attorneys at Law
PO Box 4378
Wenatchee, WA 98807-4378
(509) 663-3915
FAX (509) 663-6064

1 I later started the BAC test at 0253 hrs. ... As I went to offer BOWIE the opportunity to
2 provide voluntary samples he pulled out a tube of chapstick and applied it to his lips. .. I
3 collected the tube of chapstick, cancelled the BAC test and re-started the observation
4 period at 0255 hrs.

5 ...

6
7 At 0314 hrs I started my second attempt at the BAC test. ... When it came time to
8 collect a sample I asked BOWIE if he would be willing to provide a voluntary sample,
9 which he refused.

10 Incident Report for Incident 15C06301, Page 5 of 9 (emphasis added).

11 On August 13, 2015, an administrative hearing was held before the Department of Licensing.

12
13 At this hearing, Deputy Michael Morrison was sworn in and testified. Deputy Morrison's testimony
14 was consistent with his report. He testified that he asked Mr. Bowie to submit to a "voluntary" breath
15 sample. Based upon his testimony, the Department of Licensing dismissed the action before it did not
16 suspend Mr. Bowie's license. See Order of Dismissal, Attached as Exhibit A.
17

18
19 Counsel has provided an audio recording of this testimony and submits it with this motion.

20
21 Attached as Exhibit B.

22
23 **III. LEGAL ARGUMENT – THE BAC REFUSAL EVIDENCE SHOULD BE**
24 **SUPPRESSED BASED UPON THE MISLEADING STATEMENTS BY**
25 **DEPUTY MORRISON**

26 The administration and admissibility of breath and blood tests in DUIs is governed by RCW
27 46.20.308, the "Implied Consent Law". The law was passed in 1968 as Initiative 242 and has been
28 amended several times by the Washington legislature. In conjunction with RCW 46.61.506, it alone
29 governs the administration and admissibility of breath and blood test results in the State of
30 Washington. *State v. Fritts*, 6 Wn. App 233, 241 (1977), *Strand v. DMV*, 8 Wn. App 877 (1973),
31
32
33
34

1 | *State v. Franco*, 96 Wn. 2d 816 (1982), *State v. Brayman*, 110 Wn. 2d 183 (1988). The portions of
2 |
3 | RCW 46.20.308 relevant to this motion provide as follows:

4 | (1) Any person who operates a motor vehicle within this state is deemed to have
5 | given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or
6 | her breath for the purpose of determining the alcohol concentration, ...

7 | (2) The test or tests of breath shall be administered at the direction of a law
8 | enforcement officer having reasonable grounds to believe the person to have been
9 | driving or in actual physical control of a motor vehicle within this state while under
10 | the influence of intoxicating liquor ... The officer shall inform the person of his or
11 | her right to refuse the breath test, and of his or her right to have additional tests
12 | administered by any qualified person of his or her choosing as provided in RCW
13 | 46.61.506. The officer shall warn the driver, in substantially the following language,
14 | that:

15 | (a) If the driver refuses to take the test, the driver's license, permit or
16 | privilege to drive will be revoked for one year, and

17 | (b) If the driver refuses to take the test, the driver's refusal to take the
18 | test may be used in a criminal trial...

19 | RCW 46.20.308.

20 |
21 | Under the clear mandate of RCW 46.20.308, a person arrested for DUI has a statutory right
22 | to refuse to submit to a breath or blood test; however, the test is not "voluntary". The law sets forth
23 | the consequences of refusing: revocation of the person's driver's license and the use of the refusal at
24 | trial. Due to the seriousness of refusal, a driver "shall" be told of such consequences before he or
25 | she is asked to make a decision whether to take or refuse the test.
26 |
27 |

28 | Throughout the 45 year history of the Implied Consent Law, the appellate courts have
29 | adhered to a basic principle: due process requires that a person being asked to submit to a breath or
30 | blood test under the Implied Consent Law must be given the opportunity to make a "*knowing and*
31 | *intelligent*" decision concerning taking or refusing the test.
32 |
33 |
34 |

1 "The statute [RCW 46.20.308] requires the arresting officer to give specific warnings
2 to the driver as to the consequences of the breath or blood test. The purpose of the
3 warning requirement is to ensure that the driver is afforded 'the opportunity to make a
4 knowing and intelligent decision whether to take [the breath or blood] test.'

5 (Emphasis added). *Pattison v. DOL*, 112 Wn. App 670, X (2002). See also *State v.*
6 *Turpin*, 94 Wn. 2d 820 (1980), *Welch v. DMV*, 13 Wn. App 591 (1975), *Mairs v.*
7 *DOL*, 70 Wn. App 541 (1993).

8 Thus, in order to have an opportunity to make a knowing and intelligent decision, the person
9 must be clearly and unambiguously informed of the consequences which flow from each choice and
10 the person must be able to make such a knowing and intelligent choice. See *Spokane v. Holmberg*,
11 50 Wn. App 317 (1987), *DMV v. McElwain*, 80 Wn. 2d 624 (1972), *Hering v. DMV*, 13 Wn. App
12 190 (1975). Whether conduct amounts to a refusal of a breath test is a question of fact. *Wolf v.*
13 *Department of Motor Vehicles*, 27 Wn. App. 214 (1980).
14
15
16
17

18 Here, Mr. Bowie was told two conflicting bits of information: both in regards to the BAC
19 test. These conflicting advisements were given to Mr. Bowie, based upon Deputy Morrison's
20 statements and report immediately before Mr. Bowie "refused" the BAC and after he was not placed
21 in touch with an attorney. Thus, Deputy Morrison's incorrect statement that the BAC was
22 "voluntary" prevented Mr. Bowie from making a knowing and intelligent decision to "refuse" the
23 BAC.
24
25
26

27 At the motion hearing, the evidence is expected to show that based upon Officer Morrison's
28 conflicting statements, Mr. Bowie believed the BAC was "voluntary" as he was told. Given Officer
29 Morrison's own report, it was a reasonable and logical conclusion for Mr. Bowie to draw. Since the
30 purpose of the implied consent warning is to give a defendant an "opportunity to make a knowing
31 and intelligent decision", Mr. Bowie's ability to make such an intelligent choice was frustrated by
32
33
34

1 Officer Morrison's conflicting and inaccurate statements. Therefore, the BAC refusal in this case
2
3 demands suppression.

4
5 **IV. CONCLUSION**

6 For the reasons set forth above, the Defense requests suppression of the BAC refusal in this
7 case. Mr. Bowie was not afforded an opportunity to make a knowing and intelligent decision
8 regarding the BAC; thus, the refusal cannot now be used as evidence against him. *See Cooper v.*
9 *Dep't of Licensing*, 61 Wn.App. 525 (1991).
10
11

12
13 DATED this 2nd day of December, 2015.

14
15 WOODS & BRANGWIN, PLLC

16
17 By: Paul W. Brangwin FOR:
18
19 JOHN M. BRANGWIN, WSBA #27166
20 Attorney for Defendant
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Appendix

D

DISTRICT COURT OF THE STATE OF WASHINGTON

COUNTY OF CHELAN

STATE OF WASHINGTON,)	
Plaintiff,)	
)	No. C 29482 CHS
)	
vs.)	Findings of Fact, Conclusions
)	of Law, and Order Granting
ROBERT JAMES BOWIE,)	Motion to Suppress
Defendant.)	
_____)	

On January 28, 2016 this matter came on for hearing upon the defendant's motion to suppress. The court having considered the defendant's motion and supporting memoranda, the testimony of Deputy Morrison, the exhibits admitted herein, and the arguments of counsel, makes the following:

FINDINGS OF FACT

1. The defendant was arrested for Driving Under the Influence on June 14, 2015.
2. The defendant was properly advised of his constitutional rights and the implied consent warning for breath pursuant to RCW 46.20.308, including advice that the defendant had the right to refuse the breath test.
3. The defendant invoked his right to counsel, stating that he wanted to talk with his attorney. Good faith, though unsuccessful, attempts were made to place defendant in contact with his attorney. There were no attempts, or offers, to place defendant in contact with any other attorney, including the on-call public defender.
4. The defendant asked no questions about the implied consent warnings, nor did he express any confusion about them.
5. The defendant initially stated that he would submit to the breath test.
6. Prior to administration of the test, however, the defendant applied Chapstick, or a similar product, to his lips causing Deputy Morrison to restart the 15 minute observation period.
7. Upon completion of the second observation period, Deputy Morrison asked the defendant if he would provide a voluntary sample, to which time the defendant answered "no." Deputy Morrison's statement was not in response to any question by the defendant.

8. Upon the defendant's answer of "no," a refusal was entered by Deputy Morrison.
9. The defendant has previously been asked to submit to tests pursuant to the implied consent statute: in 2010 and 2008. Though those instances involved requests for blood samples, the implied consent warnings given in those instances were substantially the same as the warning given herein, there were no material differences relative to the right to refuse the tests.
10. The defendant refused to submit to the test in 2010 and, as a consequence, his license was suspended.

Based upon the foregoing findings, the court enters the following:

CONCLUSIONS OF LAW

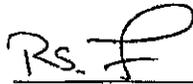
1. The right to refuse a breath test pursuant to the implied consent law does not render the breath test voluntary. Rather, the law is coercive in that an exercise of the right to refuse comes at the cost of suspension or revocation of one's driving privilege and the fact of refusal may be used in a criminal trial.
2. The purpose of implied consent law is to afford a defendant the opportunity to make a knowing and intelligent decision whether to submit to testing.

3. Washington cases have consistently required strict adherence to the plain language of the implied consent statute.
4. Deputy Morrison's initial explanation of the implied consent warning complied with RCW 46.20.308. However, the subsequent statement inaccurately characterized the test as voluntary.
5. Use of the term "voluntary" impacts the core purpose of the implied consent law and potentially effects a driver's ability to make a knowing and intelligent decision regarding submission to the breath test.
6. Though the defendant's past history suggests that the defendant may, nonetheless, have understood the consequences of declining the breath test, the policy interests described in *Cooper v. Department of Licensing*, 61 Wn. App 525 (1991) require strict compliance such that a harmless error analysis is inappropriate where, as herein, language used inaccurately alters the meaning of the right to refuse the test and such inaccuracy could impact a driver's ability to make a knowing and intelligent decision regarding the test.
7. Accordingly, evidence that the defendant refused to submit to the breath test should be suppressed.
8. The practical effect of this ruling does not effectively terminate the case for purposes of RAJ 2.2 because there is still sufficient admissible evidence for the State to try the charge of Driving Under the Influence.

ORDER

Based on the foregoing, it is hereby ordered that Motion to Suppress is granted.

Dated this 10th day of February, 2016.

A handwritten signature in black ink, appearing to read "R.S. Fore". The signature is written in a cursive style with a large, looped "F".

Roy S. Fore, Judge
Chelan County District Court

Appendix

E

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FEB 12 2016

CHELAN COUNTY
DISTRICT COURT

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT JAMES BOWIE,

Defendant.

No. C00029482 CHS

MOTION FOR RECONSIDERATION

COMES NOW Douglas J. Shae, prosecuting attorney for Chelan County, by and through his deputy, Andrew Van Winkle, and moves the court for an order reconsidering its February 10, 2016, Order Granting Motion to Suppress.

In granting the defendant's motion, this court relied on *Cooper v. Dep't of Lic.*, 61 Wn. App. 525, 810 P.2d 1385 (1991), and the policy interests stated in that case. However, in light of subsequent legislative enactments, *Cooper* lacks precedential value.

When the Court of Appeals decided *Cooper*, RCW 46.20.308 read:

The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by a qualified person of his or her choosing as provided in RCW 46.61.506. 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 in a criminal trial.

MOTION FOR RECONSIDERATION

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

1 RCW 46.20.308 as enacted and amended by LAWS OF 1989, c 22, § 8. At that time, the implied
2 consent warnings were essentially black and white, with no explicit room for divergence.

3 In 2004, the Legislature completely rewrote RCW 46.20.308 through Substitute House
4 Bill 3055, a bill entitled DUI Test Admissibility. Following this amendment, the statute read:

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

7 (a) If the driver refuses to take the test, the driver's license, permit, or
8 privilege to drive will be revoked or denied for at least one year; and

9 (b) If the driver refuses to take the test, the driver will not be eligible for
10 an occupational permit; and

11 (c) If the driver refuses to take the test, the driver's refusal to take the
12 test may be used in a criminal trial; and

13 (d) If the driver submits to the test and the test is administered the
14 driver's license, permit, or privilege to drive will be suspended, revoked, or
15 denied for a least ninety days if the driver is age twenty-one or over and the
16 test indicates the alcohol concentration of the driver's breath or blood is 0.08
17 or more, or if the driver is under age twenty-one and the test indicates the
18 alcohol concentration of the driver's breath or blood is 0.02 or more, or if the
19 driver is under age twenty-one and the driver is in violation of RCW 46.61.502
20 or RCW 46.61.504.

21 LAWS OF 2004, c 68, § 2 (emphasis added).¹ By adding this language that only required warnings
22 in substantially similar form, the Legislature expressed a clear intent contrary to the policy set
23 forth by the majority in *Cooper*.

24 This new relaxed policy is further supported by the Legislature's statement of intent when
25 it enacted SHB 3055 (2004). Section 1 of the law states:

The legislature finds that previous attempts to curtail the incidence of
driving while intoxicated have been inadequate. . . . 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

¹ For the court's convenience, the State has appended to this motion copies of the
legislative documents cited herein.

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

4 LAWS OF 2004, c 68, § 1 (emphasis added). Furthermore, the Legislature's Final Bill Report also
5 states that once amended, "The implied consent warning to be given at the time of arrest **need**
6 **only be 'substantially' the same** as the wording of the implied consent statute." FINAL BILL
7 REPORT, SHB 3055 (2004) (emphasis added). These two statements of intent could not be
8 clearer in their meaning: the Legislature was fed up with pretrial challenges to admissibility and
9 intended such questions to go to the weight that the jury assigns the evidence at trial.
10 Accordingly, the policy in this State today is not the policy that existed when *Cooper* was decided
11 back in 1991.

12 Furthermore, in the years since *Cooper*, Washington's courts have created a more
13 nuanced standard for suppression. Even in cases where the warnings deprive the driver of the
14 opportunity to make a knowing and intelligent decision, the defendant must still "demonstrate
15 that he was actually prejudiced by the inaccurate warning." *Lynch v. Dep't of Lic.*, 163 Wn. App.
16 697, 707, 262 P.3d 65 (2011) (quoting *Grewal v. Dep't of Lic.*, 108 Wn. App. 815, 822, 33 P.3d
17 94 (2001)). Furthermore, "The exact words of the implied consent statute are not required 'so
18 long as the meaning implied or conveyed is not different from that required by the statute.'" *Lynch*,
19 163 Wn. App. at 707, quoting *Jury v. Dep't of Lic.*, 114 Wn. App. 726, 732, 60 P.3d 615
20 (2002). As is clear from *Lynch*, *Grewal*, and *Jury*, the court must now engage in a 2-part inquiry
21 before a breath test can be suppressed based on inaccurate or misleading implied consent
22 warnings.
23

24 Applying that two-part standard here, this court cannot say, based on the totality of the
25

MOTION FOR RECONSIDERATION

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

1 circumstances and Mr. Bowie's unique history, that he was in any way prejudiced by the
2 synonymous statement made by Dep. Morrison more than 20 minutes after going through the
3 implied consent warnings. Nor can this court say that the extra word stated here implied or
4 conveyed a meaning different from the exact language of the statute. The statement that the
5 test was voluntary has no meaningful difference from the warning in the statute that the
6 defendant has the right to refuse the test; to a reasonable person of ordinary intelligence the
7 phrases are merely synonymous. Even in the technical sense, this court is well aware from
8 *Stalsbroten* that other voluntary tests, even when refused, have consequences in subsequent
9 criminal proceedings. See *City of Seattle v. Stalsbroten*, 91 Wn. App. 26, 957 P.2d 260 (1998).

11 Furthermore, the law that has developed in Washington in the decades since *Cooper*
12 comports with the majority interpretation of implied consent warnings in other Western states.²
13 *Oregon v. Herndon*, 116 Ore. App. 457, 841 P.d 667 (1992) (BAC not subject to suppression
14 even though the arresting officer erroneously informed the defendant that based on the officer's
15 review the defendant's driving history that he would be eligible for a pretrial diversion); *Arizona*
16 *v. Brito*, 183 Ariz. 535, 905 P.2d 544 (1995) (BAC not subject to suppression even though
17 defendant was informed that Arizona law "required" him to submit to a test, rather than the
18 statutorily mandated "a violator shall be requested"); *Head v. Idaho*, 137 Idaho 1, 43 P.3d 760
19 (2002) (BAC refusal not subject to suppression even though defendant was read implied consent
20 warnings that were not presently in effect because the record clearly indicated that the defendant
21 refused for other, unrelated, reasons); *Idaho v. Decker*, 152 Idaho 142, 267 P.3d 729 (2011)
22 (officer's paraphrasing of implied consent warnings and omission of some of the warnings did
23

24
25 ² The State has only reviewed case law from the 12 other Western states and has not reviewed cases from
anywhere east of Montana.

MOTION FOR RECONSIDERATION

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

1 not amount to a due process or statutory violation that would lead to suppression in the criminal
2 case, but could lead to the denial of license suspension in an administrative proceeding);
3 *Anderson v. Montana*, 339 Mont. 113, 168 P.3d 1042 (2007) (refusal not subject to suppression
4 even though officer read the Montana-resident-defendant the license suspension warning for
5 non-residents instead of the license suspension warning for residents); *Hall v. Charnes*, 42 Colo.
6 App. 111, 590 P.2d 516 (1979) (refusal not subject to suppression even though officer
7 erroneously informed defendant that his license "might" be revoked); *Stieghorst v. Charnes*, 676
8 P.2d 1227 (Colorado Court of Appeals 1983) (Implied Consent Warnings were not improper
9 even though officer told defendant his licensed would be suspended, when in fact it would be
10 revoked, where defendant failed to show prejudice); *Olson v. Wyoming*, 698 P.2d 107 (Wyoming
11 1985) (BAC not subject to suppression where defendant could not show that the imprecise
12 language used by the arresting officer was either misleading or not entirely clear); *Decker v.*
13 *Rolfe*, 180 P.3d 778 (Utah Court of Appeals 2008) (refusal not subject to suppression even
14 though officer told defendant that he would not take the test if he were in defendant's position).
15 As the court can see from these other states, there is a clear trend in favor of assessing prejudice
16 when a defendant challenges the presentation of statutorily required implied consent warnings.
17

18 Based on the foregoing arguments and authorities, the State respectfully requests the
19 court to reconsider its Order Granting Motion to Suppress.
20

21
22
23 RESPECTFULLY SUBMITTED this 12th day of February, 2016.

24
25 Presented by:

MOTION FOR RECONSIDERATION

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202



Andrew B. Van Winkle, WSBA #45219
Deputy Prosecuting Attorney

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MOTION FOR RECONSIDERATION

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

contractors, the director shall give preference to nonprofit corporations. The director shall establish the criteria for the contract, which shall include but not be limited to species, size of smolt, stock composition, quantity, quality, rearing location, release location, and other pertinent factors.

NEW SECTION, Sec. 5. A new section is added to chapter 75.08 RCW to read as follows:

Nothing in this act shall authorize the practice of private ocean ranching. Privately contracted smolts become the property of the state at the time of release.

NEW SECTION, Sec. 6. A new section is added to chapter 75.08 RCW to read as follows:

The department may make available to private contractors salmon eggs in excess of department hatchery needs for the purpose of contract rearing to release the smolts into public waters. The priority of providing eggs to contract rearing shall be higher than providing eggs to aquaculture purposes which are not destined for release into Washington public waters.

NEW SECTION, Sec. 7. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the Senate April 22, 1989.

Passed the House April 21, 1989.

Approved by the Governor May 11, 1989.

Filed in Office of Secretary of State May 11, 1989.

CHAPTER 337

[Substitute Senate Bill No. 5443]

DEPARTMENT OF LICENSING—MOTOR VEHICLE AND DRIVERS' LICENSING PROGRAM REVISIONS

AN ACT Relating to programs administered by the department of licensing; amending RCW 46.04.302, 46.12.290, 46.12.370, 46.20.205, 46.20.300, 46.20.308, 46.20.510, 46.65.065, 46.70.011, 46.70.027, 46.70.070, 46.70.101, 46.80.110, 46.82.320, 46.82.360, and 82.50.010; reenacting and amending RCW 46.12.020; adding new sections to chapter 46.04 RCW; adding new sections to chapter 46.70 RCW; creating a new section; prescribing penalties; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 4, chapter 231, Laws of 1971 ex. sess. as amended by section 1, chapter 22, Laws of 1977 ex. sess. and RCW 46.04.302 are each amended to read as follows:

"Mobile home" or "manufactured home" means a structure, originally constructed to be transportable in one or more sections, ((which)) that is ((thirty-two body feet or more in length and is eight body feet or more in width, and which is)) built on a permanent chassis, and designed to be used

Sec. 7. Section 46.20.300, chapter 12, Laws of 1961 as last amended by section 150, chapter 158, Laws of 1979 and RCW 46.20.300 are each amended to read as follows:

The director of licensing ~~((may))~~ shall suspend, revoke, or cancel the vehicle driver's license of any resident of this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be ground for the suspension or revocation of the vehicle driver's license. The director may further, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws of this state, forward a certified copy of such record to the motor vehicle administrator in the state of which the person so convicted is a resident; such record to consist of a copy of the judgment and sentence in the case.

Sec. 8. Section 1, chapter 22, Laws of 1987 and RCW 46.20.308 are each amended to read as follows:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcoholic content of his or her breath or blood if arrested for any offense where, at the time of the arrest, the 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.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor. However, in those instances where: (a) The person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample; or (b) as a result of a traffic accident the person is being treated for a medical condition in a hospital, clinic, doctor's office, or other similar facility in which a breath testing instrument is not present, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(4). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. 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 in a criminal trial.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident

adult family homes licensed under chapter 70.128 RCW, boarding homes licensed under chapter 18.20 RCW, or similarly licensed caregiving facilities must comply with the licensing requirements of this chapter.

(2) The rules adopted under this section take effect July 1, 2004.

Passed by the Senate February 12, 2004.

Passed by the House March 2, 2004.

Approved by the Governor March 22, 2004.

Filed in Office of Secretary of State March 22, 2004.

CHAPTER 67

[Senate Bill 6586]

BOILERS—ELECTRICAL WORK

AN ACT Relating to requirements for electrical work on boilers; and amending 2003 c 399 s 701 (uncodified).

Be it enacted by the Legislature of the State of Washington:

Sec. 1. 2003 c 399 s 701 (uncodified) is amended to read as follows:

(1) Until July 1, (~~2004~~) 2005, the department of labor and industries shall cease to administer and enforce licensing requirements under RCW 19.28.091, certification requirements under RCW 19.28.161, and inspection and permitting requirements under RCW 19.28.101, as applied only to maintenance work on the electrical controls of a boiler performed by an employee of a service company.

(2) The electrical board and the board of boiler rules shall jointly evaluate whether electrical licensing, certification, inspection, and permitting requirements should apply to maintenance work on the electrical controls of a boiler performed by an employee of a service company. The electrical board shall report their joint findings and recommendations for legislation or rule making, if any, to the commerce and labor committee of the house of representatives and the commerce and trade committee of the senate by December 1, (~~2003~~) 2004.

(3) This section expires July 1, (~~2004~~) 2005.

Passed by the Senate February 12, 2004.

Passed by the House March 2, 2004.

Approved by the Governor March 22, 2004.

Filed in Office of Secretary of State March 22, 2004.

CHAPTER 68

[Substitute House Bill 3055]

DUI TEST ADMISSIBILITY

AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. I. 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 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").

Sec. 2. RCW 46.20.308 and 1999 c 331 s 2 and 1999 c 274 s 2 are each reenacted and amended to read as follows:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the 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. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility ~~((in which a breath testing instrument is not present))~~ or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506~~((4))~~ (5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. ~~((The officer shall warn the driver that:~~

~~(a) His or her license, permit, or privilege to drive will be revoked or denied if he or she refuses to submit to the test;~~

~~(b) His or her license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of the person's breath or blood is 0.08 or more, in the case of a~~

~~person age twenty-one or over, or in violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a person under age twenty-one; and~~

~~(e) His or her refusal to take the test may be used in a criminal trial.)~~ The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver will not be eligible for an occupational permit; and

(c) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(d) 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 the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) 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.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or ~~((is in violation of RCW 46.61.502, 46.61.503, or 46.61.504))~~ 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

FINAL BILL REPORT

SHB 3055

C 68 L 04
Synopsis as Enacted

Brief Description: Providing uniformity for admissibility of alcohol tests.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Holmquist, Carrell and O'Brien).

House Committee on Judiciary
Senate Committee on Judiciary

Background:

Any person who operates a motor vehicle in this state is deemed to have given consent for a blood or breath alcohol concentration (BAC) test if he or she is arrested for driving while under the influence of alcohol or drugs (DUI). This provision in the state's motor vehicle code is known as the implied consent law.

A so-called "per se" violation of the DUI law consists of operating a motor vehicle while having a BAC of 0.08 or more for persons over the age of 21, or having a BAC of 0.02 or more for younger drivers. (The BAC measurement is of either grams of alcohol per 210 liters of breath, or grams of alcohol per 100 milliliters of blood.) A per se violation may result in criminal or civil sanctions, or both.

If an arresting officer has reasonable grounds to believe a driver has committed DUI, the officer may request that the driver take a BAC test. If the driver refuses the test, his or her driver's license will be administratively suspended or revoked by the Department of Licensing (DOL). If the driver submits to the test and fails it, i.e., registers above the legal BAC limit, the DOL will also administratively suspend or revoke the license.

The arresting officer is required to inform the driver of his or her right to refuse the BAC test and of the right to have an independent test done. The officer is also required to warn the driver of some of the consequences of his or her decision regarding taking or refusing the test. Specifically, the driver must be told:

- his or her license will be revoked if the driver refuses the test; and
- his or her license will be suspended or revoked if the driver takes the test and fails it by having a BAC of over 0.08 in the case of a person 21 or older or over 0.02 in the case of a person under 21.

The implied consent law also allows the police to offer a blood test instead of a breath test under certain circumstances. The consequences for refusal of such a blood test are the same as for refusing a breath test. The circumstances under which a person may be offered a blood test instead of a breath test include:

- The driver is incapable of providing a breath test due to physical injury, incapacity, or limitation.
- The driver is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility where a breath testing instrument is not present.
- There are reasonable grounds to believe the driver is under the influence of drugs.

The implied consent law also allows the police to administer a breath or blood test against the will of a driver under certain circumstances. These circumstances include:

- The driver is unconscious.
- The driver is under arrest for vehicular assault or homicide.
- The driver is under arrest for DUI and was involved in an accident in which another person suffered serious bodily injury.

Withdrawal of blood for a blood test may be done only by a physician, registered nurse or qualified technician. Analysis of blood must be done in accordance with methods approved by the state toxicologist and must be done by a person with a permit from the state toxicologist.

The BAC test results, or the fact of refusal to take a test, are admissible in any civil or criminal action arising out of an alleged DUI incident. Even if the test results show a BAC below 0.08 (or below 0.02 for a person under 21), the results may be introduced along with other evidence to prove that the driver was under the influence.

Summary:

Search Warrants

Nothing in the implied consent law prevents a police officer from getting a search warrant in order to obtain breath or blood evidence samples.

Absence of Breath Testing Equipment

The absence of a breath testing device is no longer necessary before a police officer may request a blood test in lieu of a breath test when a driver is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility.

Implied Consent Warning

The implied consent warning to be given at the time of arrest need only be "substantially" the same as the wording of the implied consent statute.

Drawing Blood

The category of person who may withdraw blood samples is expanded to include licensed practical nurses, nursing assistants, physician assistants, first responders, emergency medical technicians, health care assistants, or any trained technician.

Admissibility of Breath Test Results

Breath test results are admissible in a judicial or administrative proceeding if the test was performed by an instrument approved by the state toxicologist, and prima facie evidence is presented that:

- the test was done by a person authorized by the toxicologist;
- the person tested did not vomit, eat, drink, smoke, or have any foreign substance in his or her mouth for at least 15 minutes before the test;
- the temperature of the test simulator solution was at the appropriate level as measured by a thermometer approved by the toxicologist;
- the internal standard test produced a "verified" message;
- two samples agreed to within a specified limit;
- the simulator test was within a specified range; and
- blank tests showed a .000 result.

A prima facie showing is one that provides evidence "of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved." Any prosecution evidence regarding the foundational facts of a breath test will be assumed to be true, and all reasonable inferences from that evidence are to be construed in a light most favorable to the prosecution.

Defense challenges to the reliability or accuracy of a breath test may not be used to prevent the introduction of the evidence once the prosecution has made a prima facie case. However, evidence presented by the defense in making such a challenge may be considered by the trier of fact in determining the weight to be given to the breath test results.

Votes on Final Passage:

House 93 0

Senate 48 0

Effective: June 10, 2004

Appendix

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FILED
MAR 11 2016
Kim Morrison
Chelan County Clerk

TWS #3 16-2 00215 8

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

16-2-00215-8

STATE OF WASHINGTON,

Petitioner,

vs.

CHELAN COUNTY DISTRICT COURT,
HON. ROY S. FORE, Judge, and
ROBERT JAMES BOWIE, Real Party in Interest,

Respondents.

No. S
DC No. C00029482 CHS

APPLICATION FOR WRIT OF
REVIEW, RCW 7.16, AND
REQUEST FOR STAY

A. APPLICATION

Comes now the petitioner, State of Washington, through its attorney undersigned and petitions this court, pursuant to RCW 7.16.030, et seq., for issuance of a statutory writ of certiorari directed to respondents Judge Roy S. Fore and Chelan County District Court, regarding the matter of *State of Washington v. Robert James Bowie*, No. C00029482 CHS, commanding the same to certify fully to Chelan County Superior Court at a specific time a transcript of the record and proceedings in Chelan County District Court cause number C00029482 CHS and that the same may be reviewed by the Chelan County Superior Court.

APPLICATION FOR WRIT OF REVIEW AND
REQUEST FOR STAY

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 867-6202

1 At the end of the second mandatory 15 minute waiting period, Dep. Morrison handed Mr.
2 Bowie the breath tube from the BAC Datamaster and said words to the effect of "Will you
3 now provide a voluntary sample?" At that time, Mr. Bowie refused to provide a breath
4 sample.

5 On January 2, 2016, Mr. Bowie filed a motion under CrRLJ 3.6 to suppress the
6 refusal. The motion came on for a hearing on January 28, 2016. At that hearing, the court
7 heard testimony from Dep. Morrison and admitted six exhibits from the State, including
8 pages 1, 2, and 3 from the DUI arrest report, a certified copy of Mr. Bowie's driving record,
9 and the DUI report packets from Mr. Bowie's 2010 and 2008 DUI cases (both refusals). At
10 that hearing, the court orally granted the motion to suppress. On February 10, 2016, the
11 District Court entered findings and conclusions mirroring its oral ruling.
12

13 Following suppression, the State moved for reconsideration. After moving for
14 reconsideration, the Court of Appeals issued an opinion directly impacting the issues in this
15 case. The lower court heard the motion on February 23rd, and issued amended findings
16 and conclusions on March 10th.

17 The lower court also concluded that the practical effect of the ruling did not terminate
18 the underlying case such that the State would qualify for appeal under RALJ 2.2(c)(2).
19 Furthermore, there is no plain, speedy, and adequate remedy at law to challenge the District
20 Court's decision. If this case proceeds to trial and the defendant is found not guilty, then the
21 State would not be able to pursue an appeal. Even if the defendant were found guilty, the
22 State still could not appeal the trial court's decision suppressing all evidence of the refusal
23 and striking the accompanying special allegation because the issue would be moot and a
24 prevailing party cannot appeal.
25

APPLICATION FOR WRIT OF REVIEW AND
REQUEST FOR STAY

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

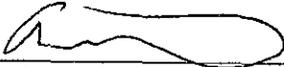
1 Jury trial is currently scheduled for March 30, 2016, with a readiness hearing on
2 March 22, 2016. "Time for Trial" expiration under CrRLJ 3.3 is April 1, 2016. Accordingly,
3 time is of the essence.

4 **C. Relief Requested**

5 Because the lower court committed probable error and because no appeal is
6 possible, the State respectfully requests this Court to grant the application for a writ of review
7 and stay proceedings pending this Court's resolution on their merits of the issues presented.
8

9 DATED this 10~~th~~ day of March, 2016.

10 Presented by:

11 

12 Andrew B. Van Winkle, WSBA #45219
13 Deputy Prosecuting Attorney

Appendix

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FILED
MAR 11 2016
Kim Morrison
Chelan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,

Petitioner,

vs.

CHELAN COUNTY DISTRICT COURT,
HON. ROY S. FORE, Judge, and
ROBERT JAMES BOWIE, Real Party in Interest,

Respondents.

16 - 2 00215 8
No.
DC No. C00029482 CHS

STATE'S MEMORANDUM OF LAW
IN SUPPORT OF ISSUANCE OF
WRIT OF CERTIORARI AND IN
SUPPORT OF RELIEF ON THE
MERITS

A. STATEMENT OF RELIEF REQUESTED

The State of Washington respectfully requests this Court to grant the State's petition for a statutory writ of review, grant a stay of further proceedings in the underlying case pending a review of the suppression ruling on the merits, and reversal of the District Court's February 10th and March 10th Orders Granting Motion to Suppress.

B. Exceptions to Findings of Fact and Conclusions of Law

In conjunction with relief on the merits, the State takes exception to and seeks reversal of the lower court's Amended Conclusions of Law: 1, 5, 6, 7, 8, and 9.

C. STATEMENT OF RELEVANT FACTS

STATE'S MEMORANDUM OF LAW IN SUPPORT
OF ISSUANCE OF WRIT OF REVIEW AND IN
SUPPORT OF RELIEF ON THE MERITS

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

1 On June 15, 2015, Chelan County Sheriff's Deputy Michael Morrison arrested
2 defendant Robert Bowie for driving under the influence of intoxicating liquor. During the
3 BAC testing process, Dep. Morrison read Mr. Bowie the implied consent warnings for breath
4 from the DUI Arrest Report. Mr. Bowie signed the warnings, acknowledging that they had
5 been provided to him, and also stated he would provide a breath sample. Mr. Bowie did not
6 express any confusion about the warnings or the BAC process, and he did not ask any
7 questions about the warnings or process. Dep. Morrison had Mr. Bowie wait the mandatory
8 15 minutes prior to administering the breath test, but during this time Mr. Bowie applied
9 chapstick. Dep. Morrison then performed another mouth check and restarted the 15 minute
10 waiting period. At the end of the second mandatory 15 minute waiting period, Dep. Morrison
11 handed Mr. Bowie the breath tube from the BAC Datamaster and said words to the effect of
12 "Will you now provide a voluntary sample?" At that time, Mr. Bowie refused to provide a
13 breath sample.
14

15 On January 2, 2016, Mr. Bowie filed a motion under CrRLJ 3.6 to suppress the
16 refusal. The motion came on for a hearing on January 28, 2016. At that hearing, the court
17 heard testimony from Dep. Morrison and admitted six exhibits from the State, including
18 pages 1, 2, and 3 from the DUI arrest report, a certified copy of Mr. Bowie's driving record,
19 and the DUI report packets from Mr. Bowie's 2010 and 2008 DUI cases (both refusals). At
20 that hearing, the court orally granted the motion to suppress. On February 10, 2016, the
21 District Court entered findings and conclusions mirroring its oral ruling.
22

23 Essentially, the court found that the use of the word "voluntary" violated the implied
24 consent statute (RCW 46.20.308) because the word does not appear there, and that
25 violations of RCW 46.20.308 are not subject to any harmless error or prejudice analysis.

1 The court also concluded that the practical effect of the ruling did not terminate the
2 underlying case such that the State would qualify for appeal under RALJ 2.2(c)(2).

3 On February 12, 2016, the State moved for reconsideration based on additional legal
4 authorities it had discovered in the course of preparing this petition. On February 16th, to
5 make matters more complicated, the Court of Appeals (Division I) published a decision that
6 directly impacted some of the issues in this case. *State v. Robison*, No. 72260-3-1 (2016).¹
7 On February 23rd, the parties argued the motion for reconsideration and the effect of
8 *Robison* on this case. Following argument, the court orally granted reconsideration to
9 amend its conclusions of law, but ultimately affirmed its earlier order.
10

11 In particular, the court changed its mind about how to interpret RCW 46.20.308, but
12 still concluded that a violation of the statute had occurred. The court also changed its mind
13 about whether violations of RCW 46.20.308 are subject to any prejudice analysis, but still
14 concluded that Mr. Bowie was prejudiced by use of the word "voluntary."

15 Jury trial is currently scheduled for March 30, 2016, with a readiness hearing on
16 March 22, 2016. "Time for Trial" expiration under CrRLJ 3.3 is April 1, 2016.

17 **D. ARGUMENT IN SUPPORT OF ISSUANCE OF WRIT AND RELIEF ON THE MERITS**

18 In the following sections, the State presents (1) the standard of review for issuance
19 of a statutory writ of certiorari, (2) an explanation of why the lower court committed probable
20 error (i.e. acted illegally), (3) an explanation of how the decision substantially altered the
21 status quo and/or substantially limited the State's freedom to act, (4) an explanation of why
22

23
24 ¹ The Snohomish County Prosecutor's Office is currently seeking review of this decision at the Supreme
25 Court. Conservatively, the earliest that we will know whether the Supreme Court will review *Robison* will be
the May petition for review calendar. There is also another case pending at the Supreme Court with the
potential to impact the law as it relates to this case; an opinion is expected any time now. *State v. Baird*, No.
90419-7 (Wash. 2016) (Arg. 5/12/15).

1 the State has no other right to appeal or other plain, speedy, and adequate remedy at law,
2 and (5) a request for this Court to stay the district court proceedings pending review.

3 **1. Standard for Issuance of Statutory Writ of Certiorari**

4 RCW 7.16.040 governs issuance of the statutory writ of review when the petitioner
5 meets the requirements of the statute. RCW 7.16.040 provides:

6 A writ of review *shall* be granted . . . when an inferior tribunal, board or officer,
7 exercising judicial functions, has exceeded the jurisdiction of such tribunal,
8 board or officer, or one acting illegally, or to correct an erroneous or void
9 proceeding, or a proceeding not according to the course of the common law,
and there is no appeal, nor in the judgment of the court, any plain, speedy and
adequate remedy at law.

10 (emphasis added).

11 The Supreme Court has interpreted "acting illegally" to have the same meaning as
12 RAP 2.3(b)/RAP 13.5(b), which set the standards for interlocutory review in the Court of
13 Appeals of Superior Court decisions and interlocutory review in the Supreme Court of Court
14 of Appeals decisions, respectively. *City of Seattle v. Holifield*, 170 Wn.2d 230, 245, 240
15 P.3d 1162 (2010). Specifically, an inferior tribunal acts illegally when it:

17 (1) has committed an obvious error that would render further proceedings
18 useless; (2) has committed probable error and the decision substantially alters
19 the status quo or substantially limits the freedom of a party to act; or (3) has
so far departed from the accepted and usual course of judicial proceedings as
to call for the exercise of revisory jurisdiction by an appellate court.

20 *Id.* at 244-45.

21 The second part of the RCW 7.16.040 standard, requiring evidence that there is
22 neither an ability to appeal, nor a plain, speedy and adequate remedy at law, is plain on its
23 face, and does not require interpretation.

24 **2. The lower court committed probable error.**

1 The State argues that the district court's decision was in probable error and that the
2 decision substantially altered the status quo and/or substantially altered the State's freedom
3 to act. The State believes that the lower court erred by (i) misinterpreting RCW 46.20.308
4 (the implied consent statute), (ii) finding that the deputy's use of the word "voluntary" applied
5 to the implied consent warnings and misinterpreting "right to refuse" as not being
6 synonymous with "voluntary," and (iii) finding that the use of the word "voluntary" prejudiced
7 Mr. Bowie.

8
9 **i. The district court erred by misinterpreting RCW 46.20.308.**

10 The decision was in error because in 2004, when the Legislature rewrote the implied
11 consent warnings found in RCW 46.20.308, it eliminated the strict standard of compliance
12 that had been imposed by prior case law. RCW 46.20.308 plainly states "[t]he officer shall
13 warn the driver, in **substantially** the following language." (emphasis added). The statute
14 does not say that the warnings need to be provided in *exactly* the following language.

15 Prior to 2004, RCW 46.20.308 read:

16 The officer shall inform the person of his or her right to refuse the breath or
17 blood test, and of his or her right to have additional tests administered by a
18 qualified person of his or her choosing as provided in RCW 46.61.506. The
19 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 in a criminal trial.

20 RCW 46.20.308 as enacted and amended by LAWS OF 1989, c 22 § 8. As this Court can
21 see from the plain language of this prior statute, the implied consent warnings were
22 essentially black and white, with no explicit room for divergence.

23 In accordance with that plain language, the Supreme Court and the Court of Appeals
24 have both "consistently required strict adherence to the plain language of the implied
25

1 consent statute." *State v. Bostrom*, 127 Wn.2d 580, 587, 902 P.2d 157 (1995); *Cooper v.*
2 *Dep't of Lic.*, 61 Wn. App. 525, 810 P.2d 1385 (1991). Most recently, in *Robison*, the Court
3 of Appeals relied on this quote from *Bostrom* to hold that the complete implied consent
4 warnings need to be given in every case, without room for the administering officer to omit
5 language he deems irrelevant. *Robison*, No. 72260-3-1, slip op. at 7-8.

6
7 However, *Bostrom* and *Cooper* were decided long before the 2004 amendment to
8 RCW 46.20.308. This was a fact that was never argued to the Court of Appeals in *Robison*²
9 and to the best of the State's knowledge has never been argued to or addressed by any
10 court in this State (other than the District Court in this case). Accordingly, this Court is the
11 first court to exercise revisory authority over the meaning and effect of the Legislature's
12 intentional use of the phrase "in substantially the following language."

13 The meaning of this phrase is a question of law that this court reviews *de novo*.
14 *Berger v. Sonneland*, 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001) (Statutory interpretation is
15 a question of law which this court reviews *de novo*). "The court's duty in statutory
16 interpretation is to discern and implement the legislature's intent." *Lowy v. PeaceHealth*,
17 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). "Where the plain language of a statute is
18 unambiguous and legislative intent is apparent, we will not construe the statute otherwise."
19 *Id.*

20
21 By blindly adhering to cases decided under the old statute, and ignoring the addition
22 of the word "substantially," *Robison* effectively rewrote RCW 46.20.308, rendering that word
23 superfluous. However, "[s]tatutes must be interpreted and construed so that all the language

24
25 ² See Amended Br. of Pet'r and Br. of Resp., available at
<<http://www.courts.wa.gov/content/Briefs/A01/722603%20Appellant's.pdf>> and
<<http://www.courts.wa.gov/content/Briefs/A01/722603%20Respondent%20's%20.PDF>>.

1 used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom*
2 *County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).³ To give meaning
3 to this phrase, the State draws this Court’s attention to the history of the 2004 changes to
4 the implied consent warnings. This particular amendment was part of a broader bill, SHB
5 3055 (2004), relaxing across the board, the standards for admissibility of breath tests. As a
6 statement of policy, section 1 of the law states:

7
8 The legislature finds that previous attempts to curtail the incidence of
9 driving while intoxicated have been inadequate. . . . To that end, the legislature
10 seeks to ensure swift and certain consequences for those who drink and drive.

11 To accomplish this goal, the legislature adopts standards governing the
12 admissibility of tests of a person’s blood or breath. These standards will
13 provide a degree of uniformity that is currently lacking, and will reduce the
14 delays caused by challenges to various breath test instrument components
15 and maintenance procedures. **Such challenges, while allowed, will no
16 longer go to admissibility of test results. Instead, such challenges are to
17 be considered by the finder of fact in deciding what weight to place upon
18 an admitted blood or breath test result.**

19 LAWS OF 2004, c 68, § 1 (emphasis added). Furthermore, the Legislature’s Final Bill Report
20 states that once amended, “The implied consent warning to be given at the time of arrest
21 **need only be ‘substantially’ the same as the wording of the implied consent statute.”**

22 FINAL BILL REPORT, SHB 3055 (2004) (emphasis added). These two statements of intent
23 could not be clearer in their meaning: the Legislature was fed up with pretrial challenges to
24 admissibility and intended such questions to go to the weight that the jury assigns the
25 evidence at trial. Accordingly, the policy in this State today is not the policy that existed
when *Cooper* and *Bostrom* were decided in the early 1990s.

ii. **The district court erred by concluding that use of the word
“voluntary” applied to the implied consent process and that the word**

³ See also *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (“Courts do not amend statutes by
judicial construction, nor rewrite statutes to avoid difficulties in construing and applying them.”) (citations and
quotations omitted).

1 **“voluntary” does not substantially comply with the implied consent**
2 **warnings.**

3 Because the implied consent wording that the arresting officer gives “needs only be
4 ‘substantially’ the same as the wording in the implied consent statute,” the question for this
5 court is whether the lower court erred when it held that Dep. Morrison did not provide
6 warnings that were substantially the same as the approved warnings.

7 As the lower court’s findings of fact state, Dep. Morrison did provide the statutory
8 warnings in exactly the language provided by statute. The problem arose approximately 20
9 minutes later when Dep. Morrison finally handed Mr. Bowie the breath tube. We do not
10 know what Dep. Morrison said exactly at that point, other than that he used the word
11 “voluntary” when he asked Mr. Bowie if he would provide a sample of his breath.

12 In deciding the impact of this particular word, the lower court erred in a number of
13 ways. First, the court erred by finding that this word was a part of the implied consent
14 warnings and was thus a deviation from the exact language of the statute. The use of the
15 word “voluntary” plainly did not occur until long after the implied consent process was
16 complete. In no case cited by the defense and in no case found by the State has a court
17 ever held that words said or discussion occurring long after the warnings can somehow
18 relate back to the warnings required under RCW 46.20.308. There are cases where
19 prejudicial discussion has occurred contemporaneously with the giving of the implied
20 consent warnings such that the discussion became a part of the warnings given by the
21 officer; however, that is not the case here. Simply put, no court has ever held that words
22 that occur after a long interruption can somehow have any relation back to the warnings
23 provided earlier. Accordingly, the district court’s decision in this respect is clearly unlawful.
24
25

1 Even assuming the court can impose some sort of relation back doctrine, the lower
2 court erred by finding that the word "voluntary" does not substantially comply with the
3 language of the prescribed warnings. The implied consent form used in every DUI in this
4 state reads: "You have the right to refuse." This phrase is plainly synonymous with
5 "voluntary." But, relying on unstated legal authority for the proposition that the word
6 "voluntary" has special legal meaning, the lower court ruled that the two were not
7 substantially the same. Again, the court's decision was contrary to law because there is no
8 legal authority stating that the word "voluntary" is a legal term of art meaning a decision with
9 no consequences. Every decision has consequences, even decisions that the law deems
10 "voluntary."
11

12 Contrary to the lower court's view, the courts of this state first and foremost rely on
13 common dictionaries, not legal dictionaries, when defining and discerning the practical effect
14 of terms. "It is well settled that [w]e may discern the plain meaning of nontechnical statutory
15 terms from their dictionary definitions." *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470
16 (2010). Only when a term is obviously used in a technical sense does the court look to
17 technical dictionaries. *Prostov v. Dep't of Lic.*, 186 Wn. App. 795, 806, 349 P.3d 874 (2015)
18 (citing *Tingey v. Haisch*, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007)). Where "[t]here is no
19 indication that the legislature intended to use the legal definition of [a] term . . . [r]eliance on
20 a legal dictionary definition is thus improper." *Prostov*, 186 Wn. App. at 806; see also
21 *Citizens All. for Prop. Rights Legal Fund v. San Juan Cnty.*, 184 Wn.2d 429, 443, 359 P.3d
22 753 (2015) ("While we typically ascertain plain meaning from standard English dictionaries,
23 it is helpful to examine legal dictionaries when words are used in a legal context.").
24
25

1 By treating the word "voluntary" as having some special legal significance in this
2 scenario, the lower court clearly erred. The implied consent warnings are not legal terms of
3 art. They were specifically worded by the Legislature to be read by non-lawyers to the
4 common person, who has little or no legal training, with the hopes that they would be simple
5 enough to be understood during a period where the person is obviously inebriated and not
6 functioning at full mental capacity. In this context, this Court cannot say that the words "right
7 to refuse" or "voluntary" were intended to signify anything other than their ordinary meaning.⁴

8
9 Moreover, in every DUI case, officers also tell suspects that the field sobriety tests
10 are "voluntary." Despite the use of this particular word, refusal to submit to voluntary field
11 sobriety testing still has consequences; specifically, the fact of refusal can be used against
12 them at trial. *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 978 P.2d 1059 (1999); *State v.*
13 *Mecham*, 181 Wn. App. 932, 331 P.3d 80 (2014). Simply put, the idea that the word
14 "voluntary" when used earlier in the DUI process can have no special meaning, but that
15 when used later in the process it transforms into meaning a decision without ramifications
16 does not follow logically and goes against established case law.

17 In other search contexts officers must provide individuals with the so-called *Ferrier*
18 warnings in order for a reviewing court to find a warrantless search to be "voluntary." *State*
19 *v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). Notably, one of the warnings is informing
20 the person "of their right to refuse consent." *Ferrier*, 136 Wn.2d at 116. In this context, the
21 Supreme Court has clearly found that the phrase right to refuse consent is synonymous with
22

23
24 ⁴ Even if we were to treat "voluntary" as a legal term of art in this context, it does not mean what the lower
25 court thinks it means. The lower court treated the term as meaning a decision without consequences. Yet, Black's simply defines "voluntary" as "Done by design or intention <voluntary act>." BLACK'S LAW DICTIONARY 1710 (9th ed. 2009). The word voluntary places no value on the events that may or may not follow from an intentional act.

1 the word voluntary. *Id.* How the phrase “right to refuse consent” can be synonymous with
2 “voluntary” in one legal context and not another also defies logic.

3 As further authority, even the Supreme Court characterizes implied consent testing
4 as “voluntary.” *E.g. City of Seattle v. St. John*, 166 Wn.2d 941, 944, 215 P.3d 194 (2009)
5 (“Michl arrested St. John for driving under the influence of intoxicating liquor and gave him
6 the statutory warning regarding implied consent blood alcohol tests. **St. John refused the**
7 **voluntary blood alcohol test.**”) (emphasis added); *State v. Moore*, 79 Wn.2d 51, 57, 483
8 P.2d 630 (1971) (Supreme Court held defendant “voluntarily consented to the performance
9 of a breathalyzer test” by taking the test after receipt of the implied consent warnings); see
10 also *Roethle v. Dep’t of Lic.*, 45 Wn. App. 607, 609, 726 P.2d 1001 (1986) (“The fundamental
11 issue here is whether the officer’s failure to inform Ms. Roethle that she would lose her
12 license for 1 year deprived her of the opportunity to make a knowing, intelligent and voluntary
13 decision.”). Considering that the Supreme Court does not treat the word “voluntary” as a
14 legal term of art in the implied consent context (or other contexts), and has furthermore
15 treated the word as being synonymous with the phrase “right to refuse,” the lower court
16 erred.
17

18 **iii. The lower court erred by concluding that Mr. Bowie was prejudiced**
19 **by the use of the word “voluntary.”**

20 Assuming, *arguendo*, that there is a relation back and that the term voluntary is not
21 synonymous with a right to refuse, the lower court still erred by finding that that State had
22 not proven a lack of prejudice.

23 When an officer provides inaccurate or potentially misleading implied consent
24 warnings, the court engages in a prejudice analysis. Previous cases have held that the onus
25

1 is on the defendant to prove actual prejudice. *Lynch v. Dep't of Lic.*, 163 Wn. App. 697, 707,
2 262 P.3d 65 (2011) (quoting *Grewal v. Dep't of Lic.*, 108 Wn. App. 815, 822, 33 P.3d 94
3 (2001) (the defendant must still "demonstrate that he was actually prejudiced by the
4 inaccurate warning")). *Robison*, however, held that the onus is on the State to prove that
5 the error was harmless beyond a reasonable doubt. *Robison*, slip op. at 13-14.

6
7 This creates a split of authorities. When confronted with such a split, this court is not
8 bound by any particular decision, and is instead to decide which it believes to be the correct
9 rule. See *Grisby v. Herzog*, 190 Wn. App. 786, 810, 362 P.3d 763 (2015). Harmless beyond
10 a reasonable doubt is the standard that courts use on appeal when confronted with a
11 constitutional error, but when confronted with a non-constitutional error, courts use the
12 former prejudice standard:

13 Our standard of review depends on whether the court's error was
14 constitutional or nonconstitutional. The Supreme Court held in *Chapman v.*
15 *California* a federal constitutional error can be held harmless, the court must
16 be able to declare a belief that it was harmless beyond a reasonable doubt.
17 State bears the burden of demonstrating harmlessness.

18 Where the error is not of constitutional magnitude, we apply the rule
19 that error is not prejudicial unless, within reasonable probabilities, had the error
20 not occurred, the outcome of the trial would have been materially affected.
21 Under this nonconstitutional harmless error standard, an accused cannot avail
22 himself of error as a ground for reversal unless it has been prejudicial.

23 *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015) (citations and quotations omitted).

24 Similar to here, a different panel of Division I of the Court of Appeals recently applied
25 the non-constitutional harmless error standard to a claimed violation of statutory rights and
26 accompanying motion to suppress. *State v. Sinclair*, No. 72103-0-1, slip op. at 3 (2016)
(reviewing violation of Washington Privacy Act, chapter 9.73 RCW, under the non-
constitutional harmless error standard). How the same Division of the Court of Appeals

1 (including the author of *Robison*) could apply two different prejudice standards to claimed
2 violations of statutory rights is not immediately apparent. But, it gives rise to a strong
3 presumption that one of those two cases invoked an improper standard of review.
4 Reviewing the Supreme Court's explicit discussion in *Barry*, and the fact that in no other
5 case has the State found the Court to apply the constitutional harmless error standard to a
6 violation of a statutory right, it is clear that the *Robison* court erred.

7
8 More importantly, in *Templeton* the Supreme Court explicitly held that the
9 constitutional harmless error standard did not apply to BAC suppression rulings in DUI cases
10 where it was alleged that the officer violated CrRLJ 3.1 (advisement of right to counsel).
11 *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632, 645 (2002). Instead, the Court
12 applied the non-constitutional harmless error standard. Because the issue here is a potential
13 violation of RCW 46.20.308 (i.e. a statutory right) this court should apply the standard of
14 review from *Lynch*, *Grewal*, *Sinclair*, and *Templeton*.

15 Furthermore, when suppression is sought not on constitutional grounds, but on
16 statutory grounds, the Supreme Court has cautioned that suppression "is an extraordinary
17 remedy and should be applied narrowly." *Templeton*, 148 Wn.2d 221. To insist on form
18 over substance in this matter "would be taking advantage of a technicality to suppress the
19 most reliable evidence of driving while intoxicated." *Id.* at 220-21. To that end, the Supreme
20 Court has required that lower courts when ruling on a non-constitutionally based suppression
21 motion should consider:

- 22
23 (1) the effectiveness of the less severe sanctions, (2) the impact of
24 suppression on the evidence at trial and the outcome, (3) the extent to which
25 the objecting party will be surprised or prejudiced by the evidence, and (4)
whether the violation was willful or in bad faith.

1 *Id.* at 221; *see also Seattle v. Koch*, 53 Wn. App. 352, 357-58, 767 P.2d 143 (1989) (holding
2 that alleged violation of CrRLJ 3.1 does not merit suppression of BAC where—as in the
3 present case—defendant failed to allege that any specific prejudice resulted). Considering
4 (1) that any error here could be remedied by re-instructing Dep. Morrison regarding proper
5 procedure for future cases and by allowing defense to argue confusion to the jury, (2) that
6 suppression eliminates the State's most reliable evidence of intoxication, (3) that allowing
7 the evidence would not surprise or prejudice the defense where the evidence has been
8 known by both sides since the inception of the case, and (4) that the lower court explicitly
9 found that Dep. Morrison did not willfully violate RCW 46.20.308, the lower court clearly
10 erred in granting suppression.
11

12 Regardless of the standard that this Court applies, and on which party this Court puts
13 the onus, the State presented overwhelming evidence of harmlessness. Whether that error
14 was harmless presents a question of law that this court reviews *de novo*. *State v. Bird*, 136
15 Wn. App. 127, 133, 148 P.3d 1058 (2006).

16 Reaching the merits of the harmless error analysis, this case presents Mr. Bowie's
17 third refusal in the last 7 years. As shown by Mr. Bowie's certified driving record, he has felt
18 the brunt of the consequences of refusing those prior breath tests. As a consequence of his
19 last refusal, DOL administratively revoked his license for 3 years per RCW 46.61.5055(9)(c).
20 Considering Mr. Bowie's repeated history of being provided with essentially the same implied
21 consent warnings that he was given here and his unique familiarity with the consequences
22 of refusing a breath test, it is impossible to say that Dep. Morrison's use of the word
23 "voluntary" approximately 20 minutes after going through the implied consent warnings in
24 any way implied to Mr. Bowie that this time around there would be no consequences for
25

1 refusing the breath test. See *State v. Hutchinson*, 85 Wn. App. 726, 938 P.2d 336 (1997)
2 (in 12 preceding years, defendant had been *Mirandized* on at least five separate occasions,
3 and on each occasion had acknowledged those rights, waived them, and answered
4 questions). Considering that a defendant's substantial experience with the criminal justice
5 system can support the conclusion that he appreciated the gravity of the *Miranda* warnings—
6 constitutionally-based rights—logic would dictate that Mr. Bowie's substantial experience
7 with lesser, statutorily-based, rights and warnings would also support a finding that he
8 appreciated the gravity of those warnings.

9
10 **3. The decision substantially altered the status quo and/or substantially altered
the State's freedom to act.**

11 In order to obtain relief, it is not enough that the lower court erred. The State must
12 also show that the court's decision substantially altered the status quo and/or substantially
13 altered the State's freedom to act.

14 In *State v. Haydel*, 122 Wn. App. 365, 95 P.3d 760 (2004), the court concluded the
15 "substantially alters the status quo" language was met where the trial court allowed the
16 defendant to withdraw a guilty plea. The *Haydel* court reasoned that the defendant must
17 now go to trial, and if he was convicted, the issues regarding the guilty plea would be moot,
18 and if he was acquitted, double jeopardy would bar reinstatement of his guilty plea. In *Dep't*
19 *of Revenue v. Nat'l Indem. Co.*, 45 Wn. App. 59, 723 P.2d 1187 (1986), the court granted
20 review under RAP 2.3(b)(2) "because the superior court's decision is probably erroneous
21 and might deprive the Departments of bond proceeds." At issue in *National Indem. Co.* was
22 simply the loss of interest while two departments awaited the end of the bond period. In
23 other words, the court construed the "change in the status quo" to be a simple matter of
24
25

1 establishing harm. Accordingly, the requirement that the decision substantially alters the
2 status quo is not a high bar.

3 Here, the lower court substantially altered the status quo because its decision to
4 suppress the fact of refusal also struck the special allegation of BAC refusal. Under RCW
5 46.61.5055, Mr. Bowie's mandatory minimum sentence *with the refusal* for a third DUI within
6 seven years was 120 days in jail, an additional 150 days of electronic home monitoring
7 (EHM), fines and fees totaling \$2895.50, and an administrative 4 year license revocation.
8 Without the refusal, Mr. Bowie's mandatory minimum sentence goes down to 90 days in jail,
9 an additional 120 days of EHM, fines and fees totaling \$2045.50, and an administrative 3
10 year license revocation.
11

12 Furthermore, if forced to go to trial and the State loses, the State would not be able
13 to appeal the decision due to principles of double jeopardy. And, if the State prevailed at
14 trial, the suppression issue would be mooted.

15 The decision also substantially altered the State's freedom to act because it prevents
16 the State from introducing any evidence at trial about the refusal and the BAC testing
17 process. This means that the jury will not hear about a BAC or the lack of a BAC. The State
18 will not even be able to say that it took Mr. Bowie in for the BAC testing process. Because
19 the public widely knows about the *per se* BAC limit in Washington and the ability to perform
20 breath testing, the lack of this information necessarily impugns Dep. Morrison's DUI
21 investigation skills and his general credibility, giving rise to an inference and belief that Dep.
22 Morrison is an inept officer. By logical extension, this may then easily bleed over into the
23 jurors' opinions of his ability to administer field sobriety tests and the credibility of his
24 observations as to signs of impairment. Without this evidence, the State is forced to try this
25

1 case using only incomplete and skewed evidence that does not accurately portray the truth
2 of what happened on June 14th. *Bushman v. New Holland Div. of Sperry Rand Corp.*, 83
3 Wn.2d 429, 432, 518 P.2d 1078 (1974) ("[T]he trial court's alleged erroneous interpretation
4 of the discovery rules would greatly hinder the plaintiff in her investigation of the case and
5 greatly restrict her ability to present evidence at trial. In such an instance, the remedy by
6 appeal could hardly be said to be adequate.") (granting writ of review). In accordance with
7 *Bushman*, the suppression of key evidence in this case clearly meets the standard of
8 substantially altering the State's freedom to act.

9
10 **4. There is neither an ability to appeal, nor a plain, speedy and adequate remedy
at law.**

11 The final part of the standard for issuance of a writ of review is that the State must
12 prove there is neither an ability to appeal, nor a plain, speedy and adequate remedy at law.

13 Absent review by writ, no remedy exists to reverse the erroneous suppression of
14 evidence in this case. The suppression below did not terminate the prosecution's case,
15 therefore an appeal prior to trial is precluded. RALJ 2.2. If this case proceeds to trial and
16 the defendant is found not guilty, then the State also cannot appeal because of principles of
17 double jeopardy. Even if the defendant were found guilty, the State still could not appeal
18 the trial court's decision suppressing all evidence of the refusal and striking the
19 accompanying special allegation and sentencing enhancement because the prevailing party
20 may not appeal. RALJ 2.1(a).

21
22 Other courts agree that a writ of review is the only avenue of review open to the State
23 under these circumstances. In at least 11 cases the State has obtained review of orders
24 suppressing breath tests/refusals in DUI cases through the statutory writ of review. *State v.*
25

1 *Baird*, No. 90419-7 (*Wash. 2016*) (Arg. 5/12/15, decision pending); *City of Seattle v. Holifield*,
2 170 Wn.2d 230, 240 P.3d 1162 (2010) (admissibility of breath test); *City of Seattle v. Clark-*
3 *Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004) (admissibility of breath test); *City of Kent v. Beigh*,
4 145 Wn.2d 33, 32 P.3d 258 (2001) (admissibility of breath test); *City of Mount Vernon v.*
5 *Mount Vernon Municipal Court*, 93 Wn. App. 501, 504, 973 P.2d 3 (1998) (admissibility of
6 breath test); *State v. Trevino*, 127 Wn.2d 735, 903 P.2d 447 (1995) (admissibility of breath
7 test); *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 280, 714 P.2d 1183 (1986)
8 (admissibility of breath test); *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824,
9 675 P.2d 599 (1984) (admissibility of breath test); *State v. King County Dist. Court W. Div.*,
10 175 Wn. App. 630, 307 P.3d 765 (2013) (admissibility of breath test); *State v. Mackenzie*,
11 114 Wn. App. 687, 60 P.3d 607 (2002) (admissibility of breath test); *Seattle v. Keene*, 108
12 Wn. App. 630, 31 P.3d 1234 (2001) (admissibility of breath test); see also *City of Auburn v.*
13 *Hedlund*, 165 Wn.2d 645, 201 P.3d 315 (2009) (DUI accomplice liability); *State v. Wicklund*,
14 96 Wn.2d 798, 638 P.2d 1241 (1982) (jurisdiction under chapter 10.77, RCW); *State ex rel.*
15 *Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 621 P.2d 115 (1980) (review of DUI
16 deferred prosecution statute); *State v. Cook*, 84 Wn.2d 342, 525 P.2d 761 (1974) (challenge
17 to Rule 9 program); *State v. Whitney*, 69 Wn.2d 256, 418 P.2d 143 (1966) (admissibility of
18 fingerprint evidence); *State ex rel. Foley v. Yuse*, 191 Wash. 1, 70 P.2d 797 (1937) (DUI
19 double jeopardy).
20
21

22 **5. The State requests this Court to stay proceedings in district court pending**
23 **resolution of the request for a writ of review.**

24 CrRLJ 3.3 (b)(2) requires that a defendant released from jail be brought to trial not
25 later than 90 days after the date of arraignment, unless a period of time is excluded under

1 to CrRLJ 3.3(e). A new commencement date may be established upon the acceptance of
2 review or grant of a stay by an appellate court, or the issuance of a writ of review. CrRLJ
3 3.3(c)(2)(iv). Should the court issue a writ of review, RCW 7.16.070 requires such a writ to
4 require the party to whom it is directed "to desist from further proceedings in the matter to
5 be reviewed." Additionally, without a stay, the power of the inferior court is not superseded.
6 See RCW 7.16.080.

7
8 The State expressly requests a stay of proceedings pending review of the trial court's
9 decision as permitted under RCW 7.16.080 to prevent time for trial concerns that may arise
10 from seeking review from the Superior Court. See *State v. Redd*, 51 Wn. App. 597, 754 P.2d
11 1041 (1988) (Where the state sought discretionary review of trial court order, the court of
12 appeals properly stayed the proceedings below; defendant's argument that the state willfully
13 misused the appeal process, thereby compromising his speedy trial right, was rejected.).

14 **E. CONCLUSION**

15 Based on the foregoing arguments and authorities, the State respectfully requests this
16 Court to (1) issue the writ of certiorari based on a finding that the lower court committed probable
17 error and the decision substantially altered the status quo and/or substantially limited the State's
18 freedom to act and that there is neither an ability to appeal, nor a plain, speedy and adequate
19 remedy at law, (2) stay proceedings below pending review on the merits before this Court, and
20 (3) reverse the lower court's suppression order based on an ultimate finding that the lower court
21 erred by granting suppression.
22

23
24 DATED this 10th day of March, 2016.

25 Presented by:

STATE'S MEMORANDUM OF LAW IN SUPPORT
OF ISSUANCE OF WRIT OF REVIEW AND IN
SUPPORT OF RELIEF ON THE MERITS

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202



Andrew B. Van Winkle, WSBA #45219
Deputy Prosecuting Attorney

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STATE'S MEMORANDUM OF LAW IN SUPPORT
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PROSECUTING ATTORNEY
401 Washington Street, 5th Floor
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

Appendix

H

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**KIM MORRISON
CHELAN COUNTY CLERK**

CHELAN COUNTY SUPERIOR COURT
** PREPARED **
03-10-16 08:06
JUDICIAL CALENDAR 3
TUESDAY, MARCH 15, 2016
JUDGE T W SMALL/SB

16-2-00215-8

WASHINGTON, STATE OF

VAN WINKLE, ANDREW BRYAN -P

VS

CHELAN COUNTY DISTRICT COURT

BOWIE, ROBERT JAMES -P

BRANGWIN, JOHN -P

STAY PROCEEDINGS/WRIT OF REVIEW 2:00

MTHRG

Statements of counsel. The Court recessed at 2:47 p.m. until 3:05 p.m. The Court also reviewed the Roberson decision and Bosrum decision. The Court found the State has burden of showing probable error that substantially altered the status quo. The Court found state met burden of possible error and that the status quo was altered but has not shown probable error or was substantially altered.

The Court made clear that this C may not rule the same way if faced with the same facts, but there was a higher burden for issuing a writ. The Court denied defendant's CR 11 request.

Mr. Brangwin to prepare an order.

Appendix

I

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IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

STATE OF WASHINGTON)
Plaintiff,) No.
) Dt. Ct. No. C29482 CHS
v.)
ROBERT BOWIE,)
Defendant.)

THE HONORABLE ROY FORE
MOTION FOR RECONSIDERATION
February 23, 2016
(Pages 1 - 27)

APPEARANCES:

FOR THE PLAINTIFF: ANDREW B. Van WINKLE, DPA
Chelan County Prosecuting
Attorney's Office
PO Box 2596
Wenatchee, WA 98807-2596

FOR THE DEFENDANT: JOHN M. BRANGWIN
Woods & Brangwin, PLLC
PO Box 4378
Wenatchee, WA 98807-4378

1 Tuesday, February 23, 2016 at 5:41 p.m.

2 THE COURT: I, I just want to keep it as straight as
3 we can for the record, if needed.

4 MR. Van WINKLE: Okay.

5 THE COURT: Does that work for you, Mr. Brangwin?

6 MR. BRANGWIN: Yes.

7 THE COURT: Alright.

8 MR. Van WINKLE: So we next have Robert Bowie, number
9 1 on the 3:30 calendar, C29482 CHS, on for the State's mo-
10 tion for reconsideration.

11 THE COURT: Okay. So this matter had a little bit of
12 thought because part of the reason we didn't take it earli-
13 er is that I think you said that you had a long argument,
14 Mr. Van Winkle.

15 MR. Van WINKLE: I was hoping to, but in light of the
16 hour I'm willing to truncate it.

17 THE COURT: Okay. Well, during some of this, to be
18 honest, when I've had a moment or two of thought I kind of
19 go, "Well, wait a minute," it's a motion to reconsider, if
20 this was an appeal before the Superior Court under R-A-L-J,
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you'd only get 10 minutes --

MR. Van WINKLE: Fair enough.

THE COURT: -- and back before I came here, in the Court of Appeals you'd only get 20 minutes. Now, the Court of Appeals has since changed and it basically says, "We'll give you the time that we want to give you." Is there any reason you can't keep this to 10 minutes?

MR. Van WINKLE: It would be in Your Honor's sound discretion and I don't think it would be an abuse of discretion. I will abide by your ruling.

THE COURT: What I want to know, though, is if you think it would --

MR. Van WINKLE: But, yes, 10 minutes is acceptable.

THE COURT: -- unfairly prejudice you in your argument?

MR. Van WINKLE: (no audible response)

THE COURT: I mean, I want to give you a reasonable amount of time, but I don't want to rehash everything about the case and stuff. How about 15 minutes?

MR. Van WINKLE: I, I think I might be able to keep it

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to that, Your Honor.

THE COURT: Alright. We'll call it 15. If you think you get near that 15 and that you feel it would be fair to get more time, you can make the pitch and, of course, Mr. Brangwin, you'll get the same amount of time.

MR. BRANGWIN: Perfect.

MR. Van WINKLE: Okay.

THE COURT: Alright.

For the record, obviously I've reviewed my prior -- the materials, including the original defense brief, reviewed my notes and such and, of course, the written findings, and I now have reviewed the State's motion for reconsideration, as well as the defense response received yesterday, and I will throw in that in particular I, I've read some other cases, in particular, though, I read the newest case from, I think it was Division I, *State v. Robison*, which is 72260-3-I, I don't think it has any sort of volume or page in the Washington Reports yet.

Alright, so with that, you're on the clock, Mr. Van Winkle.

1 MR. Van WINKLE: Thank you, Your Honor.

2 Before reaching the merits of this, the State
3 does object to the addition in the response to the State's
4 motion for consideration transcripts from the DOL hearing;
5 those were not offered and admitted, they are substantive
6 testimonial evidence, I don't think they're properly before
7 the Court. I'll leave it at that with regard to that.
8

9 Since *Robison* does throw apparently a monkey
10 wrench into things, I will dedicate my argument to explain-
11 ing why it supports my argument when, in fact, it does. So
12 briefly, *Robison*, I finally got around to reading the whole
13 thing today. Before today I hadn't read the whole thing, I
14 just listened to what other people had said about it and
15 read summaries. It does not say at any means what people
16 think it means, and let me explain that.
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18 So the first part is the first issue as stated on
19 the top of page 4 of the slip opinion, the question is
20 whether an officer has discretion to tailor warnings by
21 omitting language he decides is irrelevant. That is not
22 the issue here. To the extent that *Robinson* (sic) is ap-
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1 plicable, it is distinguishable on that basis. We are not
2 talking about here where language was omitted; we are talk-
3 ing about a different situation where language, while I
4 disagree to it being stating that it was added, the Court
5 has previously characterized it as being added, even though
6 it occurred 20-some minutes later after a couple mouth
7 checks, that it somehow relates back to the implied consent
8 warnings. So we're not talking about language being omit-
9 ted from the implied consent warnings; we're talking about
10 language being added 20-some minutes later, one word, vol-
11 untary, 20-some minutes later, that is not similarly situ-
12 ated and *Robinson* is not controlling on those grounds, it
13 is distinguishable.
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17 What we have here is really a situation where the
18 warnings are altered, where somewhere, you know, the case
19 that gets tossed around inside it is the one that we all
20 know where it's a shall but the officer said may. The
21 State's argument, based upon the legislative authority, is
22 that the statute now requires, since the amendments in,
23 when was it, 2004 to be in substantially the following lan-
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1 guage. May and shall, that's not substantially similar.
2 That case -- I would agree with that case and I'd say that
3 it is consistent here and not applicable here because the
4 difference between may and shall has real import. Shall is
5 obligatory and even counted upon when shall is a command,
6 may is a request. Every second grader knows that when they
7 say, "Teacher, can I go to the bathroom," and the teacher
8 says, "I don't know, can you?" "May I go to the bathroom,"
9 everyone knows that; that has real import. Voluntary,
10 though, does not have the same difference. It is synony-
11 mous with the statement in the warning, "You have the right
12 to refuse." That is synonymous, there is no significant
13 import or difference, it does not change it, it is -- does
14 substantially comply.
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18 Now, getting to *Robinson*, *Robinson* did touch on
19 that issue. *Robinson*, when you get to page 7 of the slip
20 opinion and following spent a lot of time talking about
21 *State v. Bostrom* and also *State v. Whitman County District*
22 *Court*. Now, those cases, I would note, are cases that pre-
23 date the 2004 amendment. Those cases are in the same posi-
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1 tion as *Cooper v. DOL*. In neither *Whitman* or *Bostrom* did
2 the implied consent warnings say, "The warnings need to be
3 given in substantially the following language." That is
4 not something that any Court has taken up yet and is some-
5 thing that *Robinson* didn't take up. I took the time to re-
6 view the briefs of the Respondent and the Appellant in *Rob-*
7 *inson*, that issue is not brought up, the change in statute
8 has never been brought up in a Court of this state, and I
9 don't think that the Court could find that the State is
10 bound on an issue that no Court has ever decided. You,
11 Your Honor, here today are the first Court, the first Judge
12 to be deciding in the first instance whether or not the
13 2004 amendment substantially altered the legislative in-
14 tent. That has not been decided, there is no *stare decisis*
15 impact on that because no one's argued it before; no one
16 has weighed in on that. So that is what I have to say
17 about that here today.

18 The other thing, the Court in *Robinson*, going
19 back to page 7 of the slip opinion, talks about those cases
20 that, "We have consistently required strict adherence to
21

1 the plain language of the implied consent statute," and
2 talking about that, the Court goes on, assuming that that's
3 required and that there actually was an error, the Court in
4 *Robinson* actually corroborates the State's alternative ar-
5 gument, subsequent argument that assuming there was an er-
6 ror, the Court is still to engage in a prejudice analysis.
7 The State in its motion cited to *Lynch v. Department of Li-*
8 *ensing*, which said the Defendant must still quote "demon-
9 strate that he was actually prejudiced by the inaccurate
10 warning," end quote, which was quoting from *Graywall v. De-*
11 *partment of Licensing* (phonetic). Those are again cases,
12 *Lynch* was a 2011 case, a very recent case, *Graywall* was a
13 2001 case, we're talking about cases that are afterwards.
14 *Lynch*, of course, is after the 2004 amendment saying that
15 yes, the Defendant does have to establish prejudice.
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19 Now, we go on, there is a discussion of a preju-
20 dice analysis. I respectfully disagree with Judge Leach,
21 I'm kind of surprised that he said, in response to the
22 State's argument on page 14 of the slip opinion, pages 13
23 and 14, the State asks about... It says -- It's the sec-
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1 tion for consequence of warning omission, Judge Leach puts
2 the burden on the State, he says that the State has the
3 onus beyond a reasonable doubt to find that the error was
4 harmless. I respectfully disagree, the harmless beyond a
5 reasonable doubt standard is one that is applied to Consti-
6 tutional errors, there are many appellate decisions to that
7 effect, I'm surprised that he would state that, but neither
8 here nor there, it does create a conflict in the divisions
9 of the Court of Appeals. We have one Court that says -- in
10 *Lynch* that says the Defendant has to show that he was actu-
11 ally prejudiced, that's a 2011 decision that has not been
12 overturned, it has not been otherwise disagreed with, and
13 now we have this 2016 decision ignoring the 2011 decision
14 saying, "There still a prejudice analysis, but it has to be
15 the State who proves it and it has to be beyond a reasona-
16 ble doubt." Either way, I'd ask the Court to follow one of
17 these two decisions, I, of course, have my preference, but
18 either way, the State believes that it has established that
19 there was no prejudice beyond any reasonable doubt based
20 upon Mr. Bowie's prior DUIs.
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1 In *Robinson* when they discussed it, they stated
2 that the State cannot prove that the incomplete warning was
3 harmless because, as the Superior Court concluded, *Robison*
4 smelled of marijuana when arrested, admitted smoking mari-
5 juana to the arresting officer. Under these circumstances
6 we cannot conclude beyond a reasonable doubt that *Robison*
7 would have agreed to take a breath test had he received a
8 THC warning. They actually -- Right there, there it is,
9 that his the harmless error, that is the prejudice analy-
10 sis, Division I agreed to it, they applied a improper
11 standard, but we also have the decision of *Lynch* applying a
12 different standard to prejudice, the Defendant having to do
13 it, but I think these cases show upon a further review
14 there is more out there than just *Cooper v. DOL*; there's a
15 plethora of cases that do, as the State has quoted and has
16 been conveyed in these cases, do engage in a prejudice
17 analysis.
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22 And that also continues on in the discussion on
23 page 14, into page 15 stating that the Defendant has no ob-
24 ligation to present evidence or show prejudice, but because
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1 the State cannot show it, we're affirming the Superior
2 Court's reversal. So, yes, we now know, as has been reaf-
3 firmed in *Robison*, it is subject to a prejudice analysis;
4 whether it is one that is the State's burden or the Defend-
5 ant's burden is subject to this Court's decision on which
6 division of the Court of Appeals it's choosing to follow,
7 there is now a split in authorities, so the Court is going
8 to have to decide which one it finds to be more persuasive
9 and apply *stare decisis* to that extent. But most im-
10 portantly, this Court is not bound by any precedent regard-
11 ing the import of the 2004 amendment. No decision has re-
12 viewed that, no one has even come up with it; it's some-
13 thing that simply hasn't been discussed yet, and with that
14 I will leave my argument there.

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18 THE COURT: One question. Prior to the amendments in
19 2004, as I recall, there was still authority stating that
20 there was no particular mandated language. The warnings
21 that were given had to comply with the requirements of the
22 statute, and accurately and without misstating, each of the
23 required elements of the implied consent warnings. So to
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1 me it kind of -- if that's true, it kind of seems that the
2 language that you're citing merely recognized in the statu-
3 tory language that which the law was, so my question is:
4 Is there any case before 2004 that specifically said you
5 have to word it exactly as the statute was written or any-
6 thing like that?
7

8 MR. Van WINKLE: I believe that's pretty much what
9 Cooper held. And also there's the case that was relied on
10 by Division I primarily, it was, so we get back here, the
11 *Whitman* case, when they were citing it they were actually
12 quoting it towards the beginning of their opinion, here we
13 are, "Consistently required strict adherence to plain lan-
14 guage of the implied consent statute," that's them quoting
15 in *Bostrom*, 127 Wn.2d at 587 --
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18 THE COURT: Right.

19 MR. Van WINKLE: -- so, again, a 1995 case, so *Cooper*
20 and *Bostrom*, there are a couple of cases that before the
21 2004 amendment did say, "Yeah, there needs to be strict
22 compliance. You can't omit anything. You can't add any-
23 thing," but since then, since these 1990s cases, you get
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1 into the 2000s' case laws (sic), it's different. The 2000s
2 cases and the cases now have been saying -- some of them
3 have been following that strain and some of them have been
4 going, "Well, the Defendant has to show prejudice if
5 they're inaccurate." Other ones have been talking about --
6 Primarily these cases are about omitted warnings, not when
7 something is added. There are not many cases out there
8 about words that are added, other than the... other than
9 really *Cooper*. *Cooper's* the only one that I can think of.
10 Most of them are ones where people have argued these other
11 things should be added and the Court has said, "Well, no,
12 we don't need anything else added," where people say, "I
13 want more information on the CDL warnings," or, "I want
14 more information about minor DUI," so there's a couple cas-
15 es there where the Defendant has argued that there should
16 be additional warnings, that's not an analogous situation,
17 but by and large the decisions in the cases have been where
18 they give different warnings or omit part of the warnings,
19 not where extra warnings are added.

24 THE COURT: Okay. Thank you.

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Mr. Brangwin.

MR. BRANGWIN: Your Honor, I'll admit, when *Robison* came out I really felt that this would end the State's quest to overturn this decision because I think it couldn't be more clear that you made the correct decision. This Court is pretty conservative on granting defense motions, they don't get granted too often, and so perhaps that's where the State has trouble with living with this, and I had hoped that when he read *Robison* it would be like, "Oh, Judge Fore is clearly, crystal clearly correct. He couldn't be more correct," and yet here we are.

MR. Van WINKLE: And, Your Honor --

MR. BRANGWIN: There's --

MR. Van WINKLE: -- I would object to personalizing the argument.

THE COURT: Alright. Well, overruled, it is argument and obviously I can put the weight on it that Court deems appropriate.

MR. BRANGWIN: The State's failure to recognize that voluntary in the law has a complete difference than the im-

1 plied consent statute in that it has no place in an implied
2 consent case is baffling to me. You can't read someone all
3 these warnings and then say, "Do you want to do something
4 that's voluntary?" The forms themselves have right in
5 them, "This is the implied consent, this is voluntary," we
6 just had it in the last case, a voluntary consent to give
7 blood versus implied consent. They couldn't be more dif-
8 ferent. And the closest cases we have are the cases in
9 which an officer reads the implied consent warnings cor-
10 rectly, and then starts saying other stuff they shouldn't
11 say, and there is nothing, no case reported that is more
12 egregious than telling someone, "Do you want to take a vol-
13 untary test?" And absolutely the State cannot prove beyond
14 a reasonable doubt that there wasn't prejudice, because we
15 will never know what my client would've done had the of-
16 ficer just said, "It's time to take the test." Instead, he
17 said, "Do you want to take a voluntary test," and the evi-
18 dence is replete with that.

19 There was testimony at the hearing as to what he
20 said at the Department of Licensing, there's what he said
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1 in his report and there's what he said here, and every time
2 he said, "I asked him if he wanted to take a voluntary
3 test." It couldn't be more clear what the facts are. The
4 Deputy's been consistent that he used the word voluntary
5 and the case law is clear that he should not have had he
6 wanted to get this evidence admitted.
7

8 The State -- To believe the State's argument,
9 you have to ignore all common sense, you have to conster-
10 nate (phonetic) a decision in *Robison* that defies the plain
11 reading of the case, and you also have to say that some
12 2004 amendments concerning admissibility of breath tests
13 has anything to do with the implied consent warnings. I'd
14 urge this Court to decline to take a constrained, and I
15 think bizarre, view of *Robison*, ignoring all of the cases
16 that supports the Court's decision. I think the Court can
17 have the utmost confidence that the Court made the correct
18 decision and that *Robison* just puts an exclamation mark on
19 it.
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23 So I'm happy to answer any questions, but I real-
24 ly think there's nothing for this Court to decide and
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1 there's certainly no basis for the Court to change its rul-
2 ing.

3 THE COURT: Thank you.

4 Mr. Van Winkle?

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6 MR. Van WINKLE: A brief rebuttal. For the Court to
7 find that the 2004 amendment that actually did amend the
8 implied consent statute has no meaning and to find that the
9 word substantially has no meaning would be to render that
10 superfluous and that would violate every canon of statutory
11 construction, and it's centuries, and at this point 200
12 years of precedent saying that we construe every word in
13 the statutes have meaning. If that doesn't mean that there
14 is room for variation, then what does it mean? Otherwise
15 the legislature just put it in there willy-nilly and we
16 don't interpreter statutes that way.

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18 THE COURT: Alright.

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20 Well, I'm not going to say that the 2004 amend-
21 ment here doesn't have meaning. Obviously I can't do that.
22 But the Court does feel like the law has been consistent in
23 that the warnings that are given to a person arrested for
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1 DUI must permit that person to make a knowing and intelli-
2 gent decision about whether or not to submit to the test.
3 And that means the warnings have to be complete, they can-
4 not be inaccurate or misstate things. I don't think that
5 the exact wording has ever really been mandated; only man-
6 dated that they be complete and accurate. And, so, to me,
7 I think the amendment that you're referring to, Mr. Van
8 Winkle, reinforces that there is no magic set of words that
9 have to be said exactly this way, but the warning does have
10 to be complete, it cannot be inaccurate, it can't be mis-
11 leading, it can't misstate the warnings. And I think
12 that's necessary for a Defendant to be able to exercise a
13 knowing and intelligent decision about whether or not to
14 take the test. I, I don't think the amendments that re-
15 sulted in the admission standards for the test results
16 themselves under 46.61.506 actually changed the application
17 of 46.23.08, and I did note a case that basically said the
18 same thing, that, that subsequent changes in other statutes
19 don't affect implied consent warning.

20 So I think the Court is to review the warnings
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1 that were given by the arresting officer to ensure that the
2 officer provided all the required warnings and that they
3 were not inaccurate misleading. Here the Deputy initially
4 fully, fairly, accurately advised Mr. Bowie of the implied
5 consent warnings; no question about that. The problem oc-
6 curred when Mr. Bowie applied ChapStick, necessitating the
7 officer's restarting the observation period. And, so, that
8 had to occur, and I don't know the exact amount of time
9 that went by, but 15 to 20 minutes. And once that amount
10 of time passed, as the Court understood the Deputy's testi-
11 mony, he basically handed the breath tube to the Defendant
12 and made a statement which indicated that it was a volun-
13 tary choice whether to blow or not. Now the Court's some-
14 what handicapped because I don't know exactly what the Dep-
15 uty actually said on that occasion, I don't believe he ac-
16 tually remembered, but he did concede multiple times that
17 he referred to it as voluntary. And to me the right to re-
18 fuse, as it comes under the implied consent warning, and
19 voluntary are not synonymous. To me they have substantial-
20 ly different meanings in the context of a DUI arrest and
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1 the consequent request for a breath test.

2 Submission to testing in the implied consent con-
3 text, as already held in this case on another motion, is
4 coerced. I mean, you're told that you have the right to
5 refuse, but if you do refuse, your license is going to be
6 revoked for at least a year and that that refusal evidence
7 can be used against you in a criminal case. And I also
8 considered this this time and before the use of the term
9 voluntary in the legal criminal law sense by looking at the
10 Constitutional analysis that goes into whether or not con-
11 sent to a search is voluntary, and I did that because to me
12 breath testing is a search within the meaning of the Con-
13 stitution. Absent the implied consent law, to get a breath
14 test, voluntary consent -- or to do a breath test, the De-
15 fendant would have to either voluntarily agree to it, which
16 means he's made a knowing and voluntary decision, one free
17 of duress or coercion, or the State would have to get a
18 warrant, one way or -- one thing or the other. And, so, in
19 that context, consent to the breath test, after being
20 warned that if you refuse your license is going to be re-

1 voked for at least a year and the evidence will be used
2 against you, is not voluntary and, in fact, this Court has
3 had to hold in other cases that consent under those circum-
4 stances was not voluntary for a blood draw.
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6 Here the choice of whether or not to submit to
7 the test has legal consequences, and so this Court does not
8 believe that using the word voluntary is the same as saying
9 you have the right to refuse, particularly where that sub-
10 sequent statement wasn't immediately coupled to, "but if
11 you do," and then the consequences of that. And as I said,
12 and I'll say it again, I do not believe that this officer
13 had at all intended to mislead, but where you have the ob-
14 servation period restarted under these circumstances, where
15 when the Defendant was properly advised of the implied con-
16 sent warning and then asked if he would submit to the test
17 and he said, "I will," and then you wait 15 to 20 minutes
18 and you just hand the tube and say it's voluntary, to me
19 that's a different situation, and so it was inaccurate to
20 rephrase it to voluntary, it was misleading, I don't think
21 it was done intentionally at all, but from a person in the
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1 Defendant's shoes, it does change the warning.

2 So that gets the Court to the question of harm-
3 less error analysis and what the burden is and what that
4 burden... what level of burden is imposed. *Robison* termed
5 it harmless beyond a reasonable doubt, which, to be honest,
6 when I read that was somewhat surprising, for two -- for
7 one reason, there is a number of cases since *Bartells* (pho-
8 netic) that talked about as to what I think are more proce-
9 dural, minor procedural issues about implied consent warn-
10 ings in other cases, talked about Defendant having to show
11 prejudice. I mean, there's several of those cases and it
12 seems like they expressly put the burden on the Defendant.
13 I didn't do that the first time around because to me the,
14 the whole thing about the implied consent warning is to ad-
15 vise them that if you don't do this, this is what's going
16 to happen, and so we're talking about the core purposes
17 here. So it surprised me to see that sort of language used
18 in light of those other cases that I'm thinking of.

19 In addition, I think Mr. Van Winkle is right or-
20 dinarily. I mean the only other times I can think of see-
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1 ing the burden being to prove the error was harmless beyond
2 a reasonable doubt has come as to Constitutional questions
3 and we're talking about a statutory requirement. Anyway, I
4 went back and looked at prior cases, focusing on the State
5 Supreme Court, and the one consistent case that is cited
6 when talking about harmless error is *Bartells* from 1989, so
7 well before these amendments. And *Bartells* did hold at the
8 end that the cases would be remanded and the State would be
9 allowed to attempt to establish that the Defendants at the
10 time had financial ability to pay for tests of their own,
11 and that if the State could establish this, the results of
12 that Defendant's test should be admitted, as the erroneous
13 warning to such Defendant would be harmless beyond a rea-
14 sonable doubt.
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18 *Robison* is consistent with that, but it is incon-
19 sistent in that there were intervening appellate level de-
20 cisions that did suggest that the burden was actually on
21 the Defendant to show, but the combination of *Robison* with
22 the language in *Bartells* at least convinces me that at a
23 minimum the burden is on the State to show that the mis-
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1 leading language in this case was harmless. In this case
2 the State presented evidence I'd consider substantial evi-
3 dence that the Defendant has some familiarity with the im-
4 plied consent warning, but those were in the context of re-
5 quests for blood and one was five years ago and the other
6 one was seven years ago. The State also presented evidence
7 that established that the Defendant had actually had his
8 license revoked in at least the most recent of those cases
9 for refusal. It seems difficult to gauge the actual effect
10 this would've had on any individual, let alone the Defend-
11 ant, where, as I said earlier, he's correctly advised of
12 the implied consent warning, initially says that he will
13 take the test, there's a new observation period and the
14 passage of perhaps 20 minutes' time, and then merely handed
15 the tube with the statement that it's voluntary. And,
16 then, you have the passage of five years or so between
17 these tests, or this refusal and the priors.

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21 And, so, the Court first would say if the stand-
22 ard truly is a burden of proof beyond a reasonable doubt, I
23 just don't see how there's any way to say that that's been
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1 shown. Even a lesser standard I cannot say that it was
2 harmless in this case. Again, this just goes to the heart
3 of what a person's to be advised of when they've been ar-
4 rested for DUI and are being asked to submit to the test.
5 So the Court is not going to change the original decision.
6 I mean, both, both you did really good arguments on this
7 and made it a tougher call than maybe I thought it would be
8 when I first saw *Robison*, and I think maybe the first reac-
9 tion that both of you might've seen with regard to *Robison*
10 maybe, maybe you feel the same, I don't know.

13 So the Court's decision -- As pointed out by
14 *Robison*, it's not really a suppression issue; it's just
15 that you can't get it admitted because you can't show com-
16 pliance with, with that -- with the implied consent law.
17 But the bottom line is at this point that the Court is un-
18 willing to admit the evidence of refusal.

20 MR. BRANGWIN: Alright, let's make the 22nd of March
21 for readiness.

23 (END OF HEARING - 6:16:06 p.m.)

