

No. 93098-8 RECEIVED E
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE
SUPREME COURT

b/h

STATE OF WASHINGTON,
Plaintiff/Petitioner,

v.

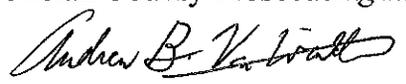
CHELAN COUNTY DISTRICT COURT,
Respondent;

HON. ROY S. FORE,
Respondent; and

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

BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The State assigns error to the trial court's amended conclusion of law 1: "The right to refuse a breath test pursuant to the implied consent law does not render the breath test voluntary."
2. The State assigns error to the trial court's amended conclusion of law 3: "Washington Cases have consistently required strict adherence to the plain language of the implied consent statute."
3. The State assigns error to the trial court's amended conclusion of law 5: "[T]he 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.'"
4. The State assigns error to the trial court's amended conclusion of law 6: "Use of the term 'voluntary' impacts the core purpose of the implied consent law and potentially effects (sic) a driver's ability to make a knowing and intelligent decision regarding submission to the breath test."
5. The State assigns error to the trial court's amended conclusion of law 7: "The State bears the burden of establishing that an inaccurate or misleading implied consent warning was harmless."

6. The State assigns error to the trial court's amended conclusion of law 8: "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."
7. The State assigns error to the trial court's amended conclusion of law 9: "[E]vidence that the defendant refused to submit to the breath test should be suppressed.
8. The State assigns error to the superior court's conclusion 2: "Based on the current nature of the law in the area of DUI implied consent and breath testing, the State has only shown possible error."

Issues Pertaining to Assignments of Error

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"? (Assignment of Error 2, 8)
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? (Assignments of Error 1, 3, 4, 7, and 8)
3. If not, is the appropriate standard for suppression constitutional harmless error or statutory harmless error? (Assignments of Error 5, 6, and 8)
 4. Under the appropriate standard for suppression, was any error harmless? (Assignments of Error 5, 6, 7, and 8)

B. STATEMENT OF THE CASE

The defendant, Robert Bowie, is charged with driving under the influence of alcohol, with a special allegation of BAC refusal. CP 29-30. On June 15, 2015, Chelan County Sheriff's Deputy Michael Morrison arrested Mr. Bowie for driving under the influence of intoxicating liquor. CP 34-35. During the BAC testing process, Deputy Morrison read Mr. Bowie the implied consent warnings for breath from the DUI Arrest Report. CP 35-36, 45. These warnings track the language of RCW 46.20.308(2). Mr. Bowie signed the warnings, acknowledging that they had been provided to him, and also stated he would provide a breath sample. CP 45. However, he also orally qualified that he would only provide a sample "using his own breath test." CP 36. Mr. Bowie also did not express any confusion about the warnings or the BAC process, and he did not ask any questions about the warnings or process. CP 84 (Amended Finding of Fact (AFF) 4).

Deputy Morrison had Mr. Bowie wait the mandatory 15 minutes prior to administering the breath test, but during this time Mr. Bowie applied lip balm. CP 84 (AFF 6). Deputy Morrison then performed another mouth check and restarted the 15 minute waiting period. CP 36, 84 (AFF 6). At the end of this second mandatory 15 minute waiting period, Deputy Morrison handed Mr. Bowie the breath tube from the BAC Datamaster and said words to the effect of “Will you now provide a voluntary sample?” CP 36, 84 (AFF 7).¹ At that time, Mr. Bowie refused to provide a breath sample. CP 36, 41, 84 (AFF 7).

On December 2, 2016, Mr. Bowie filed a motion under CrRLJ 3.6 to suppress the refusal. CP 52-56. Mr. Bowie argued that the arresting deputy violated RCW 46.20.308 (Implied Consent Warnings) by using the word “voluntary” in conjunction with Mr. Bowie’s choice to submit to a breath test for alcohol. The motion came on for a hearing on January 28, 2016. CP 83.

At that hearing, the court heard testimony from Deputy Morrison and admitted six exhibits from the State, including pages 1, 2, and 3 from the DUI arrest report, a certified copy of Mr. Bowie’s driving record, and the DUI report packets from Mr. Bowie’s 2010 and 2008 DUI cases (both

¹ At the motion hearing, Deputy Morrison could not remember the exact sentence he said on the arrest date, other than that he used the word “voluntary.”

refusals). CP 83. These exhibits reflected that this was Mr. Bowie's third refusal within seven years and that Mr. Bowie had previously been subjected to the penalties warned of in the implied consent warnings if he refused the test. CP 85 (AFF 9-10).

After hearing argument, the court orally granted the motion to suppress. On February 10, 2016, the District Court entered findings and conclusions mirroring its oral ruling. CP 62-66. Essentially, the court found that the use of the word "voluntary" violated the implied consent statute (RCW 46.20.308) because the word does not appear there, and that violations of RCW 46.20.308 are not subject to any harmless error or prejudice analysis. CP 66 (CL 5-6).

As a result of the suppression, the State is prohibited from presenting any evidence of Mr. Bowie's refusal to take the breath test—refusal evidence that is normally admissible by statute as substantive evidence of a defendant's consciousness of guilt. RCW 46.61.517; *State v. Long*, 113 Wn.2d 266, 268, 272, 778 P.2d 1027 (1989). The suppression of the refusal also has a substantial impact on the penalties Mr. Bowie faces if convicted. The mandatory minimum penalties for a third offense DUI where the defendant refuses a breath test are 120 days in jail, an additional 150 days of electronic home monitoring (EHM), fines and fees totaling \$2,895.50, and a 4 year license revocation. Without the refusal, Mr. Bowie's

mandatory minimum penalties if convicted are 90 days in jail, an additional 120 days of EHM, fines and fees totaling \$2,045.50, and a 3 year license revocation. RCW 46.61.5055(3) and (9).

On February 12, 2016, the State moved for reconsideration. CP 68-73. On February 16th, to make matters more complicated, the Court of Appeals (Division I) published a decision that directly impacted some of the issues in this case. *State v. Robison*, 192 Wn. App. 658, 369 P.3d 188 (2016), rev'w granted, no. 92944-1. On February 23rd, the parties argued the motion for reconsideration and the effect of *Robison* on this case. CP 83. Following argument, the court orally granted reconsideration to amend its conclusions of law, but ultimately affirmed its earlier order.

In particular, the court changed its mind about how to interpret RCW 46.20.308, but still concluded that a violation of the statute had occurred. CP 86 (ACL 4). The court also changed its mind about whether violations of RCW 46.20.308 are subject to any prejudice analysis, but still concluded that Mr. Bowie was prejudiced by use of the word "voluntary." CP 86-87 (ACL 7-9).

The State then sought a writ of certiorari under chapter 7.16, RCW, in Chelan County Superior Court.² CP 1-4. Specifically, the State took

² The State sought a writ of certiorari because the district court also concluded that the practical effect of the ruling did not terminate the underlying case such that the State would qualify for appeal under RALJ 2.2(c)(2). CP 87 (ACL 10).

exception to the district court's Amended Conclusions of Law: 1, 5, 6, 7, 8, and 9. CP 5-24. On March 15th, the Superior Court held a hearing on the petition. CP 194. On March 29th, the court entered an order denying issuance of the writ. CP 195-96. The court did not make any audio or stenographic recording of the hearing. 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. CP 194-96. It appears from this decision that the Superior Court was under the perception that the applicable standard was an abuse of discretion, and not a question of law reviewed *de novo*. CP 194-96.

On April 27th, the State sought direct, discretionary review in this Court. CP 197-98. This Court then granted the State's petition for direct, discretionary review.

C. ARGUMENT

Broadly, the State presents four issues for review. The first issue requires this Court to determine what the Legislature intended in 2004 when it added the phrase "in substantially the following language" to RCW 46.20.308(2). Within that issue, this Court must also determine the effect that this amendment has on prior precedent. Second, after interpreting

RCW 46.20.308(2), this Court must determine whether the deputy's use of the word "voluntary" in this context was substantially the same as the phrase "right to refuse."

If the Court concludes that the use of the word "voluntary" did not substantially comply with RCW 46.20.308(2), then the third issue for the Court is to decide on the appropriate standard for suppression: constitutional harmless error or statutory harmless error. Within that issue, this Court must also reconcile precedent from multiple conflicting cases. The fourth issue for the Court is to apply that suppression standard to the facts of this case. The remainder of this brief takes up each of those issues in turn.

1. The Legislature intended to relax the requirements of RCW 46.20.308(2) when it added the phrase "in substantially the following language" to the implied consent warnings.

When the district court originally granted the motion to suppress in this case, it did so based on *Cooper*, a court of appeals case that required strict compliance with RCW 46.20.308(2) and which held that any deviation from the wording of that statute was grounds for automatic suppression. *Cooper v. Dep't of Lic.*, 61 Wn. App. 525, 810 P.2d 1385 (1991). CP 65 (CL 6).

After the publication of *Robison* and upon reconsideration, the district court amended its conclusions to suppress based on *Robison*. CP 86-87 (ACL 7-8). *Robison*, currently under review by this Court, also

involves suppression of a breath test, but it does so asking what the proper grounds for suppression are when the officer omits portions of the implied consent warnings—as opposed to the situation here where the officer adds to the warnings.

Robison's authority in turn was *Bostrom*. *State v. Robison*, 192 Wn. App. 658, 667, 369 P.3d 188 (2016) (citing *State v. Bostrom*, 127 Wn.2d 580, 587, 902 P.2d 157 (1995)). *Bostrom* involved a different situation altogether from the situations here and in *Robison*. In *Bostrom*, this Court reviewed the suppression of breath tests and breath test refusals based on a claim that the officers were required to provide the defendants with additional warnings above and beyond those contained in RCW 46.20.308(2). *Bostrom*, 127 Wn.2d at 582.

In 2004, however, the Legislature completely rewrote RCW 46.20.308 (implied consent warnings) through Substitute House Bill (SHB) 3055, a bill entitled DUI Test Admissibility. Notably, *Bostrom* and *Cooper* were decided in the 1990s, under a prior version of the statute. The court of appeals missed this fact when it decided *Robison*. Following the 2004 amendment, the statute read:

The officer shall inform the person of his or her right under this section to refuse the breath [test] . . .
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 a 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 RCW 46.61.504.

LAWS OF 2004, c 68, § 2 (emphasis added).³ By adding this language that only required warnings in substantially similar form, the Legislature expressed a clear intent contrary to the policy set forth by *Cooper, Bostrom*, and their progeny.

Despite this amendment being in effect for over a decade, no appellate court has addressed the addition of the phrase "in substantially the following language." Because the past and current case law conflicts with the current language of RCW 46.20.308(2), this Court has a duty to interpret the statute and reconcile the case law with it. "The court's duty in statutory interpretation is to discern and implement the legislature's intent." *Lowy v.*

³ The warnings in effect today do not meaningfully differ from the warnings quoted above from 2004, other than the fact that the current warnings no longer reference blood testing.

PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). “Where the plain language of a statute is unambiguous and legislative intent is apparent, we will not construe the statute otherwise.” *Id.* “Plain meaning may be gleaned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* (quotation omitted). “Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words.” *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004).

Here, the language of the amendment is unambiguous. The use of the word “substantial” instead of “exact” or instead of having no modifier at all means that the Legislature intended to permit some variance from the language of the statute, so long as the fundamental meaning of the warning remained unchanged.

This new relaxed policy is further supported by the Legislature’s statement of intent when 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 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.

LAWS OF 2004, c 68, § 1 (included at CP 76-77). Furthermore, the Legislature's Final Bill Report states that once amended, "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." FINAL BILL REPORT, SHB 3055 (2004) (included at CP 80). These two statements of intent could not be clearer in their meaning: the Legislature was displeased with frequent pretrial suppression of breath tests/refusals and intended such questions to go to the weight that the jury assigns the evidence at trial. Accordingly, the law and policy in this State today are not the same as they existed when *Cooper* and *Bostrom* were decided in the 1990s.

As such, it is incumbent upon this Court to abandon those prior cases to the extent they conflict with RCW 46.20.308(2) as amended in 2004. To hold otherwise would render superfluous the Legislature's addition of the word "substantially," which this Court does not do. *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must

be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

2. As a matter of law, the word “voluntary” is substantially the same as the phrase “right to refuse” as used in RCW 46.20.308(2).

Provided this Court agrees with the preceding argument, the question then becomes how that amendment applies to this case and what guidance this Court can provide to future courts addressing variances in the statutory warnings. This presents a question of a law that this Court reviews *de novo*. *Jury v. Dep’t of Lic.*, 114 Wn. App. 726, 731, 60 P.3d 615 (2002) (“The legal sufficiency of implied consent warnings is a question of law. And so our review is *de novo*.”).

The State believes this Court can find proper guidance from past implied consent cases. In another string of cases, our courts have held that variances from the exact language of RCW 46.20.308(2) are okay if the fundamental meaning conveyed is not different from that of the statute. “[T]he warnings need not exactly match the statutory language, just so long as the meaning implied or conveyed is not different from that required by the statute.” *Jury*, 114 Wn. App. at 731 (citing *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785-86, 831 P.2d 149 (1992) (holding that use of the phrase “one or more” adequately substituted for the statutory word “additional”)). *See also State v. Whitman Cnty. Dist. Ct.*, 105 Wn.2d 278,

281, 714 P.2d 1183 (1986) (“The issue becomes one of deciding whether the officer complied with the statute in such a fashion as to adequately apprise the driver of his right to withdraw his consent.”) (quoting *State v. Krieg*, 7 Wn. App. 20, 23, 497 P.2d 621 (1972)); *Lynch v. Dep’t of Lic.*, 163 Wn. App. 697, 707, 262 P.3d 65 (2011) (quoting *Jury*).⁴

The *Clyde Hill* case, relied on in *Jury*, is perhaps the most appropriate case to offer as guidance. There, the Court of Appeals stated that our implied consent “cases do not stand for the proposition that use of a linguistic equivalent of the statutory word requires suppression of the test results. Where no different meaning is implied or conveyed, the defendant is not misled. To hold otherwise would exalt form over substance.” *Clyde Hill*, 65 Wn. App. at 785 (holding that use of the phrase “one or more” adequately substituted for the statutory word “additional”). The State asks this Court to adopt that holding as the test to be applied by future courts when determining whether the officer provided the warnings in substantially the same language as RCW 46.20.308(2).

Applying RCW 46.20.308(2) and *Clyde Hill* to this case, this Court should hold that the deputy’s use of the word “voluntary” in this context was substantially the same as or the linguistic equivalent of the phrase “right

⁴ With the exception of *Lynch*, all of these cases predate the 2004 amendments and all seem to stand in direct conflict with the *Cooper* and *Bostrom* line of cases from the same era.

to refuse” as it is used in RCW 46.20.308(2). As the lower court’s findings of fact state, Deputy Morrison did provide the statutory warnings in exactly the language provided by statute. CP 84 (AFF 2). The problem arose approximately 20 minutes⁵ later when Deputy Morrison finally handed Mr. Bowie the breath tube. CP 36, 84. We do not know what Deputy Morrison said exactly at that point, other than that he used the word “voluntary” when he asked Mr. Bowie if he would provide a sample of his breath.

The district court rejected the idea that the two are synonymous in its amended conclusions of law 5 and 6. CP 86. However, it did so without any analysis of the meaning of the words or citation to authority. Contrary to the district court’s bare assumption as to the meaning of these words, this Court and the Court of Appeals in past cases have used “right to refuse” and “voluntary” interchangeably, and have specifically done so in the implied consent context. *E.g. City of Seattle v. St. John*, 166 Wn.2d 941, 944, 215 P.3d 194 (2009) (“Michl arrested St. John for driving under the influence of intoxicating liquor and gave him the statutory warning regarding implied consent blood alcohol tests. St. John refused the *voluntary* blood alcohol

⁵ We do not know exactly how long it was between the advisement of the implied consent warnings and the request for a “voluntary” sample, but we know it was roughly 20 minutes. This is because prior to every breath test, the officer has to subject the defendant to a 15 minute waiting period to ensure that any mouth alcohol or other interferents have dissipated. If the defendant puts anything in their mouth, the waiting period has to restart. Here, Mr. Bowie applied lip balm at some point during the first waiting period, and the deputy had to restart the waiting period. CP 84 (AFF 6).

test.”) (emphasis added); *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) (Supreme Court held defendant “voluntarily consented to the performance of a breathalyzer test” by taking the test after receipt of the implied consent warnings) (emphasis added); see also *Roethle v. Dep’t of Lic.*, 45 Wn. App. 607, 609, 726 P.2d 1001 (1986) (“The fundamental issue here is whether the officer’s failure to inform Ms. Roethle that she would lose her license for 1 year deprived her of the opportunity to make a knowing, intelligent and *voluntary decision*.”) (emphasis added).

In other search contexts, officers must provide individuals with the eponymous *Ferrier* warnings in order for a reviewing court to find a warrantless home search to be “voluntary.” *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). Notably, one of the warnings is informing the person “of their right to refuse consent.” *Ferrier*, 136 Wn.2d at 116. In this context, the Supreme Court has clearly found that the phrase right to refuse consent is synonymous with the word voluntary. *Id.*

In another portion of every DUI case, officers also ask individuals to submit to voluntary field sobriety tests (FSTs). The officers have to tell the suspects that the tests are voluntary. *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 237, 978 P.2d 1059 (1999). Yet, if the individual consents to the tests, the results can be used in determining probable cause to arrest and can be admitted as evidence at trial. If the individual refuses the FSTs, the

fact of refusal is still admissible as consciousness of guilty. *Id.* Notably, when this Court decided *Stalsbrotten*, it equated breath testing with FSTs and characterized the implied consent breath testing process as voluntary:

Like blood alcohol and Breathalyzer tests, it is undisputed that in Washington, FSTs are voluntary and a Driving Under the Influence suspect has no legal obligation to perform an FST. Attaching consequences to the exercise of the common law right to refuse to submit to an FST is no different from attaching consequences to the exercise of a statutory right of refusal.

Id. (citations omitted).

Simply put, the idea that the word “voluntary” when used earlier in the DUI process can have no special meaning, but that when used later in the process it transforms into a misleading statement of the law does not follow logically and goes against established use of the word in prior DUI and non-DUI cases. As such, the lower courts clearly erred.

Even if this Court chooses to revisit its prior use of the word “voluntary” as it relates to “right to refuse,” the words have no special significance in this scenario. “The purpose of the implied consent statute, RCW 46.20.308, is to provide warnings to the defendant which enable him or her to make a knowing and intelligent decision as to whether to submit to a breath test.” *Clyde Hill*, 65 Wn. App. at 780 (citing *State v. Whitman Cnty. Dist. Ct.*, 105 Wn.2d 278, 282, 714 P.2d 1183 (1986)). In order for this Court to find that the words are not synonymous, it would have to be

able to identify some traceable, definable, difference in the definitions of the words that would cause a person to have any more or less material information when given one warning versus the other when making a decision to submit to a breath test.

However, that is not possible in this context because the implied consent warnings are not terms of art. We know this because they were worded by the Legislature to be read by non-lawyers to the common person, who has little or no legal training, with the hopes that they would be simple enough to be understood during a period where the person is obviously inebriated and not functioning at full mental capacity.

We also know they are not terms of art because the phrase “right to refuse” does not appear in Black’s as a legal term of art. The best definition that can be given to the phrase is “a choice, granted by law, to reject to perform an action demanded by another.” This is based on the definition of “right” as “2. Something that is due to a person by just claim, legal guarantee, or moral principle <the right of liberty>,” and the definition of “refusal” as “1. The denial or rejection of something offered or demanded.” BLACK’S LAW DICTIONARY 1436, 1394 (9th ed. 2009).

With regard to “voluntary,” Black’s defines it as “Done by design or intention <voluntary act>.” BLACK’S LAW DICTIONARY 1710 (9th ed. 2009). This is no different than the common Webster’s definition: “1 a :

proceeding from the will: produced in or by an act of choice <~action>.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2564 (1966). As such, the word “voluntary” places no value on the consequences that may or may not follow from that intentional act separate from any value that the phrase “right to refuse” might seem to place on what consequences may or may not follow from the suspect’s choice.

The only apparent difference between these two warnings is that a “voluntary” decision is a choice flowing from one’s will, while a “right to refuse” is a choice granted by law. However, any meaningful distinction between the two is illusory because the decision whether or not to exercise a choice granted by law ultimately flows from one’s will. Furthermore, “voluntary” is just as accurate as “right to refuse” in this situation because it only means that the officer is not going to physically force the person to provide a breath sample.

Given that this Court reviews *de novo* the sufficiency of implied consent warnings and that there is no definable difference in the definitions of the words that would cause a person to make a different decision when given one warning versus the other, this Court should hold that as a matter of law the use of the word voluntary in this context is substantially the same as “right to refuse” as used in RCW 46.20.308(2).

3. Assuming use of the word “voluntary” violated RCW 46.20.308(2), the appropriate standard of suppression is non-constitutional harmless error.

If this Court finds that Deputy Morrison’s use of the word “voluntary,” did not substantially comply with RCW 46.20.308(2), then the question turns to suppression.

Cooper imposed a bright line rule requiring strict compliance with RCW 46.20.308, and refused to consider whether the defendant was prejudiced in any way. *Cooper*, 61 Wn. App. at 528-29. Later in *Bartels* and *Robison*, this Court and the Court of Appeals applied the constitutional harmless error standard to suppression motions based on erroneous implied consent warnings. *State v. Bartels*, 112 Wn.2d 882, 890, 774 P.2d 1183 (1989) (remanding with the burden on the State to demonstrate the defendant’s lack of prejudice); *State v. Robison*, 192 Wn. App. at 670 (quoting *Bartels*). Yet in other implied consent cases, the Court of Appeals has placed the onus on the defendant to prove actual prejudice. *Lynch v. Dep’t of Lic.*, 163 Wn. App. 697, 707, 262 P.3d 65 (2011) (quoting *Grewal v. Dep’t of Lic.*, 108 Wn. App. 815, 822, 33 P.3d 94 (2001) (the defendant must still “demonstrate that he was actually prejudiced by the inaccurate warning”)).

Despite being in direct conflict, the biggest problem with all of these cases is that in none of them have the courts undertaken any discussion or

analysis of when one standard for suppression is appropriate over another. Arguably, the only case to do that in this context is *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997). Although *Storhoff* is not an implied consent case it is still instructive because of its discussion of implied consent cases. The charge there was Driving While License Suspended/Revoked in the First Degree (DWLS 1).⁶ In *Storhoff*, the defendants argued that they could not be prosecuted for DWLS 1 because the Department of Licensing provided them with incorrect notices of license revocation. Agreeing that the Department erred as matter of law, the discussion turned to whether the defendants still had to show prejudice. Citing to implied consent cases that applied the constitutional harmless error standard, the defendants argued they need not show prejudice. *Storhoff*, 133 Wn.2d at 529 (discussing *City of Spokane v. Holmberg*, 50 Wn. App. 317, 745 P.2d 49 (1987) and *Gonzales v. Dep't of Lic.*, 112 Wn.2d 890, 774 P.2d 1187 (1989)).

But, this Court explicitly disagreed with those implied consent cases as either using in-artful language or involving actual prejudice, and explicitly held that the defendants still had to show actual prejudice in order to prevail. *Id.* at 530-31 (citing with approval *State v. Bartels*, 112 Wn.2d

⁶ While suspended license cases are often some of the most minor of all offenses, DWLS 1 cases come with stiffer mandatory minimum penalties than DUIs. A first offense is 10 days, a second is 90 days, and a third or subsequent is 180 days. RCW 46.20.342(1)(a).

882, 774 P.2d 1183 (1989)). Based on the language used, it appears this Court implicitly limited or overruled *Bartels* and related cases on that point:

The real issue — in both *Bartels* and *Gonzales*, as well as the present case — is whether persons charged with serious criminal traffic offenses should escape punishment due to minor procedural errors that did not actually prejudice them. Ultimately, our opinions in both *Bartels* and *Gonzales* required a showing of prejudice. We have never actually approved or followed the *Holmberg* rule,⁷ and we find no rationale to recommend adoption of the rule in this case.

State v. Storhoff, 133 Wn.2d 523, 531, 946 P.2d 783 (1997).

After *Storhoff*, it appears that *Bartels* only stands for the proposition that erroneous implied consent warnings do not automatically require suppression; rather, a showing of prejudice is required. While *Bartels* applied the constitutional harmless error standard, it did so without discussion of why it was applying that burden. *Bartels*, 112 Wn.2d at 890. But in *Storhoff*, which discussed *Bartels* at length, this Court took a different path and ultimately applied the non-constitutional harmless error standard. There, as in *Bartels*, this Court did not undertake an examination of why it was applying the standard in which it did.

Although these two standards have been in use for decades, our courts have not always consciously and consistently applied these standards as

⁷ The *Holmberg* rule was essentially the same as the *Cooper* rule—instituting an irrebuttable presumption of prejudice when the defendant receives inaccurate implied consent warnings.

prescribed. Addressing this issue recently in *Barry*, this Court set forth clear guidance on when each standard is to be used and went on to apply each standard as prescribed:

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

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

State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015) (citations and quotations omitted). Following *Barry*, it is clear that the *Robison* court erred when it imposed the constitutional harmless error standard on the State. As this Court has said over the years, the right of refusal granted in RCW 46.20.308 is a "right[] granted through the statutory process." *State v. Whitman County District Court*, 105 Wn.2d 278, 281, 714 P.2d 1183 (1986). As a statutory right, the non-constitutional harmless error standard applies.

Similarly, a somewhat different panel of Division I of the Court of Appeals recently applied the non-constitutional harmless error standard to

a claimed violation of statutory rights under the Washington Privacy Act, chapter 9.73 RCW. *State v. Sinclair*, 192 Wn. App. 380, 384-85, 367 P.3d 612 (2016), rev'w den. 185 Wn.2d 1034 (2016). How the same court that decided *Robison* could apply two different prejudice standards to claimed violations of statutory rights less than a month from each other is not immediately apparent. But, it gives rise to a strong presumption that one of those two cases invoked an improper standard of review.

In *Templeton*, this Court also held that the non-constitutional harmless error standard applied to breath test suppression rulings in DUI cases where it was alleged that the officer violated CrRLJ 3.1 (advisement of right to counsel). *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632, 645 (2002). While *Templeton* involved a court rule violation instead of a statutory violation, *Barry* dictates that *Templeton*'s application of the non-constitutional harmless error standard should apply with as much force here as it did there.

Additionally, applying the non-constitutional harmless error standard comports with the majority practice among other western states:

- *Oregon v. Herndon*, 116 Ore. App. 457, 841 P.d 667 (1992) (BAC not subject to suppression even though the arresting officer erroneously informed the defendant that based on the officer's

review of the defendant's driving history that he would be eligible for a pretrial diversion);

- *Arizona v. Brito*, 183 Ariz. 535, 905 P.2d 544 (1995) (BAC not subject to suppression even though defendant was informed that Arizona law "required" him to submit to a test, rather than the statutorily mandated "a violator shall be requested");
- *Head v. Idaho*, 137 Idaho 1, 43 P.3d 760 (2002) (BAC refusal not subject to suppression even though defendant was read implied consent warnings that were not presently in effect because the record clearly indicated that the defendant refused for other, unrelated, reasons);
- *Idaho v. Decker*, 152 Idaho 142, 267 P.3d 729 (2011) (officer's paraphrasing of implied consent warnings and omission of some of the warnings did not amount to a due process or statutory violation that would lead to suppression in the criminal case, but could lead to the denial of license suspension in an administrative proceeding);
- *Anderson v. Montana*, 339 Mont. 113, 168 P.3d 1042 (2007) (refusal not subject to suppression even though officer read the Montana-resident-defendant the license suspension warning for non-residents instead of the license suspension warning for residents);

- *Hall v. Charnes*, 42 Colo. App. 111, 590 P.2d 516 (1979) (refusal not subject to suppression even though officer erroneously informed defendant that his license “might” be revoked);
- *Stieghorst v. Charnes*, 676 P.2d 1227 (Colorado Court of Appeals 1983) (Implied Consent Warnings were not improper even though officer told defendant his license would be suspended, when in fact it would be revoked, where defendant failed to show prejudice);
- *Olson v. Wyoming*, 698 P.2d 107 (Wyoming 1985) (BAC not subject to suppression where defendant could not show that the imprecise language used by the arresting officer was either misleading or not entirely clear);
- *Decker v. Rolfe*, 180 P.3d 778 (Utah Court of Appeals 2008) (refusal not subject to suppression even though officer told defendant that he would not take the test if he were in defendant’s position).

As the Court can see from these other states, there is a clear trend in favor of requiring the defendant to prove prejudice when challenging the presentation of statutorily required implied consent warnings, even when the warnings are blatantly incorrect. Although, each state’s implied consent law is unique, Washington has looked to other states in past cases to help resolve implied consent issues. *E.g. Strand v. Dep’t of Motor Vehicles*, 8 Wn. App. 877, 881-83, 509 P.2d 999 (1973); *Gonzalez*, 112 Wn.2d at 901.

As such, this Court should hold that the applicable standard for suppression in implied consent cases is non-constitutional harmless error.

4. Under non-constitutional harmless error, Mr. Bowie has failed to show that he was prejudiced by the deputy's use of the word "voluntary."

Applying the non-constitutional harmless error standard to this case, the question turns to whether Mr. Bowie presented sufficient evidence of prejudice to the trial court. This is a question that this court reviews *de novo*. *State v. Bird*, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006).

Here, Mr. Bowie did not provide any evidence of prejudice. Mr. Bowie did not testify, nor did he present any evidence other than an admission from the deputy that he had used the word "voluntary" prior to administering the BAC test. Furthermore, the court entered a finding of fact stating that Mr. Bowie expressed no confusion at all about the implied consent warnings and that Mr. Bowie did not express any confusion about the warnings. CP 84 (AFF 4). Accordingly, there is no evidence in the record, nor are there findings of fact to support the district court's conclusion that Mr. Bowie might have been prejudiced.

Although the State does not have the burden of disproving prejudice under the non-constitutional harmless error standard, the State presented overwhelming evidence of harmlessness to the trial court. At the trial court, the State presented uncontroverted evidence that this case is Mr. Bowie's

third DUI refusal in the last 7 years. CP 85 (AFF 9). As was shown during the hearing by Mr. Bowie's certified driving record, he has felt the brunt of the consequences of refusing those prior breath tests. As a consequence of his last refusal, DOL administratively revoked his license for 3 years per RCW 46.61.5055(9)(c). CP 85 (AFF 10). The district court explicitly found that Mr. Bowie was properly advised of the implied consent warnings. CP 84 (AFF 2). Although the implied consent warnings given here are not the same warnings in effect in his past two cases, the lower court also found that the implied consent warnings in effect in those past cases contained "no material differences relative to the right to refuse the tests." CP 85 (AFF 9). The implied consent warnings only became an issue for the district court because some 20 minutes after going over the implied consent forms with Mr. Bowie, Deputy Morrison used the word "voluntary" when it came time to have Mr. Bowie provide a breath sample. Furthermore, it was clear from the outset of the testing process that Mr. Bowie was not going to provide a sample. Although he signed that he would provide a sample, he orally qualified that statement by telling Deputy Morrison "he would do so only using his own breath test." CP 36.

Considering Mr. Bowie's prior history with the implied consent warnings, his repeated refusals to submit to breath testing, his unique familiarity with the consequences of refusing testing, his lack of any

confusion about the consequences of submitting to or refusing a breath test, his coy statement that he would only provide a sample using his own breath test, and the attenuation of time between the implied consent warnings and the errant use of “voluntary,” it is impossible to find as a matter of law that that Deputy Morrison prejudiced Mr. Bowie.

This situation is analogous to *State v. Hutchinson*, 85 Wn. App. 726, 739, 938 P.2d 336 (1997), aff’d on this point by 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). In *Hutchinson*, the defendant claimed that his waiver of his *Miranda* rights was not valid because he was inebriated, sleep deprived, and of low IQ. *Hutchinson*, 85 Wn. App. at 739. The Court of Appeals disagreed, emphasizing the fact that the defendant had been Mirandized at least 5 times in the last 12 years and in each instance waived his rights and answered questions. *Id.* Thus, the court held: “This substantial experience strongly supports the conclusion that *Hutchinson* appreciated the warning’s gravity and a waiver’s concomitant peril.” *Id.* The facts of this case are not meaningfully different, and there are no findings of facts or other facts in the record to support a conclusion to the contrary. Thus, the only rational conclusion that can be drawn in this case is that Mr. Bowie appreciated the gravity of his decision, regardless of the extra word used by Deputy Morrison.

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

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

Id. at 221; *see also Seattle v. Koch*, 53 Wn. App. 352, 357-58, 767 P.2d 143 (1989) (holding that an alleged violation of CrRLJ 3.1 does not merit suppression of BAC where—as in the present case—defendant failed to allege that any specific prejudice resulted).

Erroneously adhering to *Robison*, the district court here did not apply the *Templeton* factors. But, when applied to this case, the factors do not support suppression.

- (1) Any error here could have been remedied by re-instructing Deputy Morrison regarding proper procedure for future cases, and by

allowing defense to argue at trial that Mr. Bowie did not express a positive unwillingness to comply with the breath test. *See* WPIC 92.13.

(2) Suppression of the refusal has a disproportionate impact on the case's status and the State's evidence at trial. A breath test refusal is a special allegation that must be pled and proven beyond a reasonable doubt at trial. If proven, Mr. Bowie's mandatory minimum sentence in this case would go from 90 days in jail, an additional 120 days of electronic home monitoring (EHM), fines and fees totaling \$2,045.50, and a 3 year license revocation, and would become 120 days in jail, an additional 150 days of EHM, fines and fees totaling \$2,895.50, and a 4 year license revocation.⁸ Furthermore, RCW 46.61.517 explicitly allows as substantive evidence of guilt at trial evidence of Mr. Bowie's refusal to submit to a breath test under RCW 46.20.308. *See also State v. Long*, 113 Wn.2d 266, 268, 272, 778 P.2d 1027 (1989) (upholding RCW 46.61.517). Without being able to argue the refusal, the State loses its best evidence of intoxication in this case and is put in a position where the jury is needlessly left wondering why there is no breath test and could prejudicially infer that Deputy Morrison failed to offer one.

⁸ RCW 46.61.5055(3) and (9) (jail, EHM, fines, and license revocation); RCW 3.62.085 (fines and fees); RCW 3.62.090 (fines and fees); RCW 46.61.5054 (fines and fees); RCW 46.64.055 (fines and fees); RCW 46.20.3101 (fines and fees).

(3) Allowing the evidence would not surprise the defense because the evidence has been known by both sides since the inception of the case. There is no prejudice because in every refusal case, the State still has to prove that the defendant expressed a positive unwillingness to submit to the breath test and the defendant can argue to the contrary regardless of whether the defendant takes the stand.

(4) The district court did not find that the violation was willful or in bad faith. Furthermore, no evidence in the record could support such a finding.

Based on the fact that the district court placed the burden on the State to disprove prejudice, based on the similarity of *Hutchinson* to this case, and based on the application of the *Templeton* factors in this case, the district court clearly erred in granting suppression of the refusal.

D. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this Court to:

1. Hold that the phrase “in substantially the following language” as used in RCW 46.20.308(2) means that when processing DUIs, officers need not use the exact language of RCW 46.20.308(2), provided the fundamental meaning remains unchanged;

2. Explicitly overrule *Cooper, Bostrom*, and their progeny as contrary to the plain language of RCW 46.20.308(2) as amended;
3. Hold that the word “voluntary” as used in this case has substantially the same meaning as “right to refuse”;
4. If the word “voluntary” does violate RCW 46.20.308(2) then, in the alternative, hold that the appropriate standard for suppression is non-constitutional harmless error;
5. Explicitly overrule *Cooper, Bartels*, and their progeny to the extent they conflict with the non-constitutional harmless error standard;
6. Hold that Mr. Bowie failed, as a matter of law, to demonstrate prejudice and/or that *Hutchinson* and the *Templeton* factors do not support suppression in this case; and
7. Remand to Chelan County Superior Court with instructions to grant the writ of certiorari and reverse the district court’s ruling as contrary to law.

DATED this 7th day of September, 2016.

Respectfully submitted,

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