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ORIGINAL

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
NO. 66864-1-I

STATE OF WASHINGTON/DEPARTMENT OF LICENSING,

Petitioner,

vs.

LANCE K. HOFFMAN,

Respondent.

RESPONDENT'S BRIEF (SECOND AMENDED)

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A. RESPONSE TO PETITIONER'S ASSIGNMENT OF ERROR

The Skagit County Superior Court properly reversed the Department of Licensing's order of suspension where it determined that the implied consent warnings provided to Mr. Hoffman did not afford him the opportunity to make a knowing and intelligent decision regarding whether or not to invoke his statutory right to refuse the breath test.

B. STATEMENT OF THE CASE

Lance Hoffman was driving his personal vehicle when he was stopped and arrested for suspicion of driving under the influence. After arrest he was given the implied consent warnings as they appear in the Washington State DUI Arrest Report packet. CP 50. Mr. Hoffman holds a Commercial Driver's License (CDL), which was known to the officer at the time. CP 57-58. Relying on the language contained on the warnings form, Mr. Hoffman submitted to the breath test.

Upon receipt of the sworn report of breath test results, the Department of Licensing sought to suspend his personal driving privileges for ninety days, and further to disqualify his CDL for one year. Following an administrative hearing held pursuant to RCW 46.20.308, the Hearing Officer sustained the proposed action and both sanctions were imposed.

Mr. Hoffman filed a timely appeal to the Skagit County Superior Court and the Honorable John M. Meyer, finding he was likely to prevail

and would be otherwise irreparably harmed, granted his motion to stay imposition of the suspension pending a final determination on the merits of his appeal.

After considering the briefing and argument of both parties, the Honorable Michael E. Rickert held that the implied consent warnings precluded Mr. Hoffman from having the opportunity to make a knowing and intelligent decision regarding submission to the breath test, and issued an order reversing the Department of Licensing's suspension and disqualification orders.

C. ARGUMENT AND AUTHORITIES

The warnings provided to Mr. Hoffman did not afford him the opportunity to make a knowing and intelligent decision regarding whether or not to submit to a breath test because they contained inaccurate admonishments as to the consequences to his commercial driving privilege.

Mr. Hoffman was misled because he was told that if he submitted to the breath test and the result was over the legal limit he would incur as little as a ninety-day license suspension, versus a minimum 365-day revocation for refusing the test. In fact, he faced a CDL disqualification of a minimum of one year under either circumstance. In other words, the language implied that there was a lesser sanction to his "license, permit or

privilege to drive” if he submitted to the test than if he refused the test.

While that may have been true for his personal driving privileges, it was incorrect as regards his commercial driving privileges.

Two separate superior court judges, recognizing the misleading context of the warnings read to Mr. Hoffman, reached the same conclusion when they applied the law to the specific facts in Mr. Hoffman’s case. The Department’s appeal is not well taken for the reasons outlined below.

Where the legislature has endowed drivers with implied consent rights, due process and fundamental fairness mandate that those drivers be properly advised of their rights and obligations under the statute. Indeed, as the Washington Supreme Court so aptly stated in Thompson vs. Department of Licensing, 138 Wash.2d 783, 792, 982 P.2d 601 (1999):

In the case of commercial driver’s license disqualification, the stakes may often be higher for the licensee, because his or her livelihood is involved, whereas a noncommercial driver’s license revocation may simply result in nothing more than inconvenience for the licensee. Thus, a proper implied consent warning may be more imperative in commercial license cases.

In determining whether a subject is provided an opportunity to make a knowing and intelligent decision, “the warnings must permit someone of normal intelligence to understand the consequences of his or her actions.” State vs. Whitman County Dist. Court, 105 Wash.2d 278,

286, 714 P.2d 1183 (1986). Jury vs. State, Dept. of Licensing, 114 Wash. App. 726, 731, 60 P.3d 615, 617 (2002). Further, where an officer attempts to clarify a warning or adds additional information that is not accurate, the officer may invalidate warnings that are otherwise correct. State vs. Koch, 126 Wash. App. 589, 595, 103 P.3d 1280, 1283 (2005).

Warnings that are fundamentally unfair violate a driver's constitutional right to due process. State vs. Bostrom, 127 Wash. 2d 580, 590 (1995). Warnings given to a driver that are *implicitly misleading* are fundamentally unfair. Id. (emphasis added)

In June, 2006, the Washington State Legislature amended several RCW sections in an effort to comply with federal regulations surrounding the operation of commercial motor vehicles. Of importance here are the amendments to RCW 46.25.090, which pertain to the disqualification of an individual's commercial driver's license (CDL)¹.

RCW 46.25.090 now imposes, at a minimum, a **one-year** CDL disqualification for any action pursuant to RCW 46.20.308, regardless of whether or not the individual was driving a personal vs. commercial vehicle **and** regardless of whether the individual submitted a breath test

¹ Prior to these amendments, no separate disqualification action was taken against a driver's CDL from an action pursuant to RCW 46.20.308 occurring while the individual was driving his/her personal vehicle.

over the legal limit or refused to provide a breath sample. The Washington State DUI Arrest Packet does not reflect these consequences.

The warnings read to Mr. Hoffman include the language found in RCW 46.20.308, as well as extraneous language added by the State in 2009; they do not contain any language from RCW 46.25.090, which governs CDL disqualifications. The result is that CDL holders such as Mr. Hoffman are not advised of the actual ramifications of their decision under the implied consent laws.

"If the information conveyed confuses the driver about his rights under the statute, the driver may claim that he had no reasonable opportunity to refuse." Ghaffari vs. Department of Licensing, 62 Wash. App. 870, 877, 816 P.2d 66 (1991), *review denied*, 118 Wash.2d 1019, 827 P.2d 1012 (1992); Keefe vs. Department of Licensing, 46 Wash. App. 627, 632, 731 P.2d 1161 (1987).

"The underlying purpose of the implied consent statute is to provide the driver the opportunity to make an intelligent decision as to whether to exercise the statutory right of refusal." Mairs vs. Department of Licensing, 70 Wash. App. 541, 546, 854 P.2d 665,668 (1993). "...[T]he significant inquiry is whether the police supplied the arrestee with information that was not inaccurate or misleading." City of Clyde Hill vs.

Rodriguez, 65 Wash. App. at 785, 831 P.2d 149. Moffitt vs. City of Bellevue, 87 Wash. App. 144, 148, 940 P.2d 695, 697 (1997).

In Cooper vs. Department of Licensing, 61 Wash. App. 525, 810 P.2d 1385 (1991), the Court of Appeals found it improper for an officer to inform a driver that upon refusal his license would be revoked for “probably” at least one year. That statement was deemed misleading as it **implicitly suggested** the possibility that the revocation could be for less than one year, when in fact it would be a legal certainty that his license would be revoked for a minimum of one year.

Here Mr. Hoffman was led to believe that **any** loss of privilege could be as little as ninety days when in fact it was a legal certainty that his CDL would be disqualified for a minimum of one year. Like Mr. Cooper, Mr. Hoffman thus never had the opportunity to make a knowing and intelligent choice. Where the warnings inaccurately state the potential length of suspension, the driver cannot possibly understand the consequences of his decision.

As the Supreme Court noted in State vs. Bartels, 112 Wn.2d 882, 774 P.2d 1183 (1989), the inclusion of specific language, here the length of potential suspension, can result in warnings that are less accurate than had they less detail. While the State is not required to advise drivers of a particular length of the suspension, in choosing to do so the State also

assumes the responsibility for providing accurate information. In this case, the inclusion of specific periods actually makes the warnings less accurate than they otherwise might have been. *See State vs. Bartels*, 112 Wash.2d 882 (1989).

Furthermore, while the purpose of the implied consent law may be threefold,² the purpose of the implied consent warnings is to provide drivers with accurate information about the potential consequences to their privileges when they either produce a breath sample over the legal limit or refuse to submit to the test. Excluding a warning of the mandatory minimum one-year revocation of what is in effect a vocational license, renders the intended purpose of the warnings obsolete.

The warnings simply misadvised Mr. Hoffman as to the true consequences of his decision. Even though the sanctions to Mr. Hoffman's commercial driving privileges under RCW 46.25.090 may have been the same whether he produced a breath test result over .08 or refused the breath test, the failure of the warnings to clearly disclose this consequence impacted his opportunity to make an intelligent decision.

² Generally, the implied consent law is intended to 1) discourage drivers from operating a motor vehicle while under the influence of alcohol, 2) remove the driving privileges from those disposed to do so and, 3) gather reliable evidence of intoxication. *Nowell vs. DOL*, 83 Wn.2d 121, 124 (1973).

Moreover, Mr. Hoffman was prejudiced by the inaccuracies of the implied consent warnings, because the nature of the error related to a relevant consideration for him as a CDL holder. *See* Graham vs. Department of Licensing, 56 Wash. App. 677 (1990). Had he been accurately advised that he would face an identical sanction to his CDL, he would have been in the position intended by the legislature. Because he was not given accurate notice of the true licensing consequences of his decision, he was denied that opportunity and thus actually prejudiced.

Although the Department asserts that in order to establish prejudice a driver must demonstrate how he or she was specifically affected by the erroneous warning, such a proposition has been rejected by Washington courts. As the Court of Appeals reasoned in Gahagan vs. Department of Licensing, 59 Wash. App. 703, 708 (1990):

“In its opening brief, the Department argues that in order to prove actual prejudice the driver must actually be indigent **and** must show that he refused the test because he 1) distrusted the test given, 2) wanted an additional test and 3) believed he would ultimately have to pay for the test...The court in Graham and Gonzalez found that indigency [by itself] demonstrated actual prejudice. *See* Gonzalez, 112 Wash.2d at 899-902, 774 P.2d 1187; Graham 56 Wash. App. at 680-681, 784 P.2d 1295. **In short, the Department’s argument for a higher standard is not supported by precedent.**” (emphasis added).

Additionally, this argument, in a nearly identical factual scenario, was taken up in Thompson vs. Department of Licensing, 138 Wn.2d 783, at 800 FN 8 where the Court held:

“The Court of Appeals also held there was no prejudice because Thompson’s commercial license would have been disqualified for one year no matter what course he took. That is, refusal would have resulted in a one-year disqualification under the statute, and taking the test resulted in a one-year disqualification because his reading was above .04. This analysis is too facile. It depends on the fortuity that a driver’s BAC result will be above .04 and provides no disincentive to law enforcement officials to give improper implied consent warnings.” (emphasis added).

Thus, prejudice is not determined by whether the warning affected a specific driver’s decision to take a breath test, but rather by whether the misleading nature of the warning precluded the driver’s ability to know and understand the consequences of his choice. There need not be a showing as to what a driver’s decision would have been regarding the taking of a breath test if correctly advised. Graham at 681; *See, Cooper vs. Department of Licensing*, 61 Wash. App. 525, 810 P.2d 1385 (1991). Notably, the Assistant Attorney General, *legal counsel for the Department itself*, has represented the following in its legal memoranda to the King County Superior Court:

“Admittedly, the warning that states a .08 or higher BAC level will result in a suspension of ‘at least 90 days’ could lead a CDL holder of normal intelligence to believe that

their CDL may only be suspended for ‘at least 90 days’ as well. If that person actually submitted to the breath test under that impression, then there is a possibility of prejudice in that situation.” (Hantke vs. State/Department of Licensing, 08-2-32514-8 SEA)

In Gonzalez vs. Department of Licensing, 812 Wash.2d 890, 774 P.2d 1187(1989), the Court found actual prejudice where the inaccuracy would have been germane to a driver’s decision. For example, the erroneous inclusion of the “at your own expense” language would not have affected the decision of a non-indigent individual because cost would not be a determinative factor; however for indigent individuals, the error would have been a relevant consideration. As in Gonzalez, the nature of the inaccuracy here is one that would impact a CDL holder’s decision, and therefore prejudicial, even though it would be harmless for non-CDL holders.

State vs. Bostrom, 127 Wn.2d 580 (1995), is often cited for the proposition that as long as the warnings mirror the statutory requirements, they are legally sufficient and non-prejudicial. This conclusion is incorrect for several reasons. First, our appellate courts since have never held that warnings mirroring the statutory language are *de facto* accurate and non-misleading, nor have they advanced a standard of analysis that limits a court’s review to solely that question. For example, in Pattison vs. Department of Licensing, 112 Wash. App. 670, 50 P.3d 295 (2002),

Division One of the Washington Court of Appeals did not end its analysis with its conclusion that the warnings were substantially similar to the statute. Although the Pattison court ultimately found the warnings proper, its treatment of the challenge illustrates that the standard is whether the words on the page are inaccurate or misleading.

Second, the Bostrom court held that the legislature did not intend to advise drivers of potential consequences as a result of *criminal proceedings*, and therefore declined to include such additional warnings. Here however, the legislature did intend to advise drivers about the possible administrative sanctions to their privileges resulting from submission and/or refusal.

Moreover, in recognizing the devastating consequences to CDL holders, the legislature has made clear that special *procedural* protections are mandated where the potential deprivation of a CDL is involved.³ Merseal vs. Department of Licensing, 99 Wash. App. 414, 994, P.2d 262 (2000). Notably, at the time the Bostrom case was decided, individuals faced only the sanction of a probationary license status, not total deprivation of driving privileges, commercial or personal.

Third, the implied consent statute requires that drivers be advised of the mandatory consequences to their **driver's license, permit or privilege**

³ See RCW 46.25.120 and RCW 46.20.334.

to drive; it does not delineate personal or commercial license. Thus, the warnings as read do **not** comply with the statutory requirements because they do not contain correct admonishments *vis a vis* CDL's.

Finally, the Bostrom court also held that warnings that are fundamentally unfair violate an individual's due process rights. Here, the warnings are fundamentally unfair because they provide inadequate notification and misleading information about the consequences to an individual's CDL.

The Department rests its position on the contention that each individual portion of the warnings, including the extraneous language, contains legally correct information. That is not, however, the end of the inquiry; even a technically correct statement can be misleading. For example, if the warnings told a driver that a refusal could result in loss of privilege for at least ninety days, such a statement would be true in the sense that a one-year revocation would encompass "at least ninety days," but it would be misleading because the mandatory minimum length of suspension is 365 days. Although correct in one sense, such a warning creates an unfair expectation that is in fact a legal impossibility.

The same is true here. By telling a driver that a "suspension" or "revocation" will result in disqualification, but not including language such as "for at least one year" in either case, the driver is left to refer only

to the periods of sanction as already described. In fact, the extraneous language actually exacerbates the problem by continuing to use terms that delineate differing lengths of sanction.⁴

While advising drivers of possible “disqualification” is correct, that term in and of itself is not associated with any particular period of time. Indeed, under RCW 46.25.090, a “disqualification” can be as little as sixty days and as long as a lifetime. Simply using that word does not imply any different period than as described in the remaining statements, which misstate the length of sanction for commercial driving privileges.

Likewise, Mr. Hoffman was advised that he “may be eligible to immediately apply for an ignition interlock license,” however Washington law does not provide for such a license for disqualifications of commercial licenses. Thus, although that statement may be true as regards his personal privileges, it is legally impossible for him to apply for an ignition interlock license for commercial driving.

Ultimately, each section cannot be considered in isolation; rather, just as they are presented to a driver as a whole, they must be analyzed as a whole. It is not enough that the warnings contain “technically correct” information; they must also convey the true nature of the consequences

⁴ RCW 46.04.580 defines “suspend” as a term less than one calendar year, while RCW 46.04.480 defines “revoke” as a term of 365 days or longer.

facing a driver such that he is in the position to evaluate his choice. By failing to notify a CDL holder that his commercial driving privileges will be disqualified for “not less than one year,” the State is withholding critical information and instead suggesting a lesser sanction. A person of normal intelligence presented with the set of warnings simply would not reasonably conclude that his CDL was in jeopardy of a minimum one-year disqualification should he produce a breath test over the legal limit.

The Superior Court correctly ruled that Mr. Hoffman was not given the necessary opportunity to make a knowing and intelligent decision, and its ruling is consistent with statutory and constitutional mandates.

D. CONCLUSION

For all of the reasons detailed above, Respondent respectfully requests that this Honorable Court affirm the decision of the Skagit County Superior Court.

Dated this 27th day of September, 2011.



DIANA LUNDIN
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WSBA# 26394

EXHIBIT A

WASHINGTON STATE
DUI ARREST REPORT

CASE / CITATION NUMBER

10-07391

X40232341

IMPLIED CONSENT WARNING FOR BREATH

WARNING! YOU ARE UNDER ARREST FOR:
(check appropriate box[es])

- RCW 46.61.502 OR RCW 46.61.504: Driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.
- RCW 46.61.503: Being under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol.
- RCW 46.25.110: Driving a commercial motor vehicle while having alcohol in your system.

FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION.

1. YOU ARE NOW ADVISED THAT YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE:
 - (A) YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE REVOKED OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST ONE YEAR; AND
 - (B) YOUR REFUSAL TO SUBMIT TO THIS TEST MAY BE USED IN A CRIMINAL TRIAL.
2. YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST, AND THE TEST IS ADMINISTERED, YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE SUSPENDED, REVOKED, OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST NINETY DAYS IF YOU ARE:
 - (A) AGE TWENTY-ONE OR OVER AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.08 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE; OR
 - (B) UNDER AGE TWENTY-ONE AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.02 OR MORE, OR YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE.
3. IF YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE IS SUSPENDED, REVOKED, OR DENIED, YOU MAY BE ELIGIBLE TO IMMEDIATELY APPLY FOR AN IGNITION INTERLOCK DRIVER'S LICENSE.
4. YOU HAVE THE RIGHT TO ADDITIONAL TESTS ADMINISTERED BY ANY QUALIFIED PERSON OF YOUR OWN CHOOSING.

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

FOR THOSE DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOU EITHER (A) REFUSE THIS TEST OR (B) SUBMIT TO THIS TEST AND THE TEST INDICATES AN ALCOHOL CONCENTRATION OF 0.04 OR MORE, YOU WILL BE DISQUALIFIED BY THE DEPARTMENT OF LICENSING FROM DRIVING A COMMERCIAL MOTOR VEHICLE.

I HAVE READ THE ABOVE STATEMENT TO THE SUBJECT

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENT(S)

OFFICER'S SIGNATURE

SUBJECT'S SIGNATURE

DATE / TIME

LOCATION

0012 06/08/10

SKAGIT BAC ROOM

WILL YOU NOW SUBMIT TO A BREATH TEST?

YES NO

Did subject express any confusion regarding the implied consent warnings? If yes, explain below.

YES NO

At the time of this test(s), I was certified to operate the BAC DATAMASTER, the BAC DATAMASTER CDM, and PBT and possessed a valid permit issued by the State Toxicologist.

DO YOU HAVE ANY FOREIGN SUBSTANCE IN YOUR MOUTH? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	MOUTH CHECKED? TIME? 0003 <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	2 ND MOUTH CHECK? (if Necessary) TIME? <input type="checkbox"/> YES <input type="checkbox"/> NO	ANY FOREIGN SUBSTANCES FOUND? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO REMOVED <input type="checkbox"/> YES <input type="checkbox"/> NO	EXPLAIN:
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I observed the subject from the time of the mouth check through the completion of the breath test.

The subject did not vomit, eat, drink, smoke, or place any foreign substance in his/her mouth during the observation time.

I performed the PBT test in accordance with the State Toxicologist's protocols. (Chapter 448-15 WAC)

PBT READING

PBT TIME

BOOKED
 PRD

RELEASED TO: HELD @ SKAGIT E.R. FOR MEDICAL HEALTH

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