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Division I  
State of Washington  
No. 74253-1-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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Joanne Kandler, Appellant,

v.

City of Kent, Respondent.

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BRIEF OF APPELLANT

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<b>TABLE OF CONTENTS</b>	<u>Page(s)</u>
A) Assignment of Error.....	1
No. 1.....	1
B) Issues Pertaining to the Assignment of Error.....	1
No. 1.....	1
C) Statement of the Case.....	1-2
Statement of Facts.....	1-2
Procedural History.....	2
D) Argument.....	3-16
I. THE SUPERIOR COURT ERRED WHEN IT REVERSED THE TRIAL COURT’S ORDER TO SUPPRESS THE RESULTS OF THE BLOOD TEST.....	3-16
A. <b>The Trial Court Properly Suppressed The Blood            Test Because Officer Dexheimer Failed To Advise            Ms. Kandler Of The Mandatory Statutory Implied            Consent Warnings.....</b>	<b>4-12</b>
1. <u>Officer Dexheimer Failed To Advise Ms. Kandler                Of The Statutory Implied Consent.....</u>	<u>6-10</u>
2. <u>In Cases Where The Arrestee Does Not Have The                Right To Refuse, Portions Of The Implied Consent                Warnings Still Apply.....</u>	<u>11-12</u>
B. <b>The City’s Reliance On Goggin, In Support Of            Their Position That Blood Tests Do Not Require            Implied Consent Warnings, Is Misplaced.....</b>	<b>13-16</b>
E) Conclusion.....	16

## TABLE OF AUTHORITIES

Table of Cases	<u>Page(s)</u>
<i>Connolly v. Dep’t of Licensing</i> , 79 Wn.2d 500, 487 P.2d 1050 (1971).....	7
<i>DMV v. McElwain</i> , 80 Wn.2d 624, 496 P.2d 963 (1972).....	7
<i>Erection Co. v. Department of Labor &amp; Indus.</i> , 121 Wn.2d. 513, 518, 852 P.2d. 288 (1993).....	5
<i>State v. Arreola</i> , 176 Wash.2d 284, 291, 290 P.3d 983 (2012).....	3
<i>State v. Avery</i> , 103 Wn. App. 527, 534, 13 P.3d 226 (2000)....	7, 8, 10, 11, 13, 16
<i>State v. Bostrom</i> , 127 Wn.2d 580, 902 P.2d 157 (1995).....	7
<i>State v. Brock</i> , 184 Wn.2d 148, 355 P.3d 1118 (2015).....	5
<i>State v. Goggin</i> , 185 Wn. App. 59, 339, 68 P.3d 983 (2014).....	13, 14, 15
<i>State v. Krall</i> , 125 Wn.2d 146, 148,881 P.2d. 1040 (1994).....	5
<i>State v. Krieg</i> , 7 Wn. App. 20, 21, 497 P.2d 621 (1972).....	11, 16
<i>State v. Morales</i> , 173 Wash.2d 560, 567, 269 P.3d 263 (2012).....	3, 11
<i>State v. Robison</i> , 192 Wn. App. 658, 662-63, 369 P.3d 188 (2016), review granted sub nom., 92944-1, 2016 WL 3909818 (Wash. June 29, 2016).....	8, 9, 10, 12

<i>State v. Turpin</i> , 94 Wash.2d 820, 827, 620 P.2d 990 (1980).....	8, 11, 12
<i>State v. Whitman County Dist. Court</i> , 105 Wn.2d 278, 714 P.2d 1183 (1986). ....	8, 12, 13
<i>State v. Woolbright</i> , 57 Wn. App. 697, 704, 789 P.2d 815 (1990).....	4
<b>Washington Constitutional Provisions</b>	
Const. art. I, § 7.....	5
<b>Statutes</b>	
RCW 46.20.308.....	3, 4, 5, 6, 7, 8, 9, 10, 11, 16
RCW 46.61.502.....	3, 11
RCW 46.64.520.....	3, 11
RCW 46.64.522.....	3, 11
<b>Other Authorities</b>	
WA H.B. 1276 (eff. Sept. 26, 2015).....	6

**A) Assignment of Error**

1. The Superior Court erred when it reversed the trial court's order to suppress the results of the blood test. CP 149.

**B) Issues Pertaining to the Assignment of Error**

1. Whether the Superior Court erred in reversing the trial court's decision to suppress the blood test results when, due to suspicion of marijuana use, the officer arrested Ms. Kandler for DUI and attempted to circumvent the statutory Implied Consent Warnings in order to obtain Ms. Kandler's blood. (Assignment of Errors 1.)

**C) Statement of the Case**

**Statement of Facts**

On January 22, 2015, Ms. Kandler was driving southbound on Military Road S. when she was pulled over by City of Kent Police Officer Dexheimer for expired tabs. CP 72. After Officer Dexheimer's investigation, Ms. Kandler was arrested strictly for a drug-related (marijuana) DUI. CP 73. After transport to the Kent city jail, Officer Dexheimer did not advise Ms. Kandler of her Implied Consent Warnings, but asked Ms. Kandler if she would consent to a voluntary blood draw, to which Ms. Kandler responded, "Sure." CP 73. Certain warnings were given to Ms. Kandler as part of the Voluntary Blood Draw, but Ms. Kandler was never provided the statutorily required Implied Consent Warnings which include the

administrative and criminal ramifications for being over 5ng of THC and .08 BAC for alcohol. CP 28.

### **Procedural History**

On April 1, 2015, Ms. Kandler filed a motion to suppress the evidence of the blood test results. CP 46. On May 19, 2015, the Honorable Glenn M. Phillips at Kent Municipal Court granted the motion. CP 47. On May 20, 2015, the City of Kent filed a motion to reconsider. CP 47. A hearing was held on May 27, 2015, and the judge ruled that the court's previous ruling to suppress the evidence would stand. CP 48. On June 1, 2015, the City of Kent filed an application for a writ of review with the Superior Court and Ms. Kandler answered in opposition to the City's application. CP 14. The Superior Court granted The City of Kent's Writ of Review and ultimately reversed the trial court's ruling thus allowing the blood test to be admitted. CP 149. On December 3, 2015, Ms. Kandler filed a Petition for Discretionary Review with this court. CP 155. On May 12, 2016 this court granted Ms. Kandler's petition.

## D) Argument

### I. THE SUPERIOR COURT ERRED WHEN IT REVERSED THE TRIAL COURT'S ORDER TO SUPPRESS THE RESULTS OF THE BLOOD TEST.

The Superior Court made an error in reversing the trial court's decision and thus resulting in the admittance of the blood test result. The appropriate standard of review for issues of suppression of evidence and validity of implied consent warnings is de novo review. *State v. Arreola*, 176 Wash.2d 284, 291, 290 P.3d 983 (2012); *State v. Morales*, 173 Wash.2d 560, 567, 269 P.3d 263 (2012). First, the trial court made the proper decision to suppress the blood test because Officer Dexheimer failed to follow the mandated Implied Consent warnings requirements set out in RCW 46.20.308. Officer Dexheimer erred because a request for a breath/blood test automatically triggers the implied consent statute and because mandatory<sup>1</sup> blood draws do not extinguish all rights. Second, Officer Dexheimer's request for a voluntary blood test without the implied consent warnings made Ms. Kandler's voluntary consent uninformed, null and void.

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<sup>1</sup> RCW 46.64.520 (vehicular homicide), RCW 46.64.522 (vehicular assault), RCW 46.61.502(6) (felony DUI).

**A. The Trial Court Properly Suppressed The Blood Test Because Officer Dexheimer Failed To Advise Ms. Kandler Of The Mandatory Statutory Implied Consent Warnings.**

Officer Dexheimer failed to follow the mandate set out in RCW 46.20.308 by not reading Ms. Kandler the implied consent warnings. Washington's implied consent law was passed by Initiative 242 in 1968 and codified at RCW 46.20.308. The Implied Consent Statute provides that drivers are deemed to have consented to a sample of their breath/blood and establishes certain guidelines for testing in the event that a test was used or sought to be used. *State v. Woolbright*, 57 Wn. App. 697, 704, 789 P.2d 815 (1990). This statute directs that anyone who operates a vehicle in this state gives consent to submit a breath or blood test in the event they are arrested for suspicion of driving while intoxicated. RCW 46.20.308(1). The Implied Consent Statute mandates that an Officer possessing probable cause that the defendant was operating a motor vehicle while under the influence of alcohol or drugs and is seeking a breath/blood test, **SHALL** inform drivers of their rights in language that is in substantially the same form as the statute. RCW 46.20.308 (2). The use of the term **SHALL** creates a presumption of a mandatory obligation and does not allow for an individual artistic

interpretation, unless contrary legislative intent is apparent. *State v. Krall*, 125 Wn.2d 146, 148,881 P.2d. 1040 (1994); *Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d. 513, 518, 852 P.2d. 288 (1993).

Prior to the September 2015 amendment to the Implied Consent statute, RCW 46.20.308, included references to the testing of a person's blood for purposes of determining the presence of tetrahydrocannabinol (THC) and "any [other] drug" in addition to alcohol testing under the Implied Consent statute. When a driver is arrested on suspicion of a non-alcohol related DUI, the former statute did not provide law enforcement any additional instructions on the procedure to test the presence of THC or other drugs. In this situation, state constitutional protections are triggered and requires law enforcement to adhere to Article I Section 7 of the Washington Constitution and either obtain a search warrant for the suspect's blood, obtain a valid waiver of the warrant requirement, demonstrate exigency, or provide proof that any other authority of law permits the seizure. *State v. Brock*, 184 Wn.2d 148, 355 P.3d 1118 (2015).

Effective September 26, 2015, after this event, the Implied Consent statute eliminated blood and references to THC from the

warning. RCW 46.20.308; WA H.B. 1276 (eff. Sept. 26, 2015). The legislature amended the Implied Consent statute to clarify that law enforcement officers are prohibited from testing a DUI suspect's blood unless it is pursuant to a search warrant, a valid waiver of the warrant requirement, when exigent circumstances exist, or under any other authority of law. RCW 46.20.308(4); WA H.B. 1276 (eff. Sept. 26, 2015). This amendment neither expanded nor narrowed an officer's constitutional or statutory duties in any way – the amendment merely removed the problematic references to blood, THC, and other drugs in the implied consent warning. The current form of the statute was not yet in effect at the time of Ms. Kandler's arrest. CP 72. Had the arrest taken place on or after September 26, 2015 the City's position would be well taken. However, Ms. Kandler's arrest took place a full 8 months prior to the current amendment of the implied consent statute. Thus the statute, at the time of Ms. Kandler's arrest for DUI, automatically triggered an implied consent warning for THC ramifications.

1. Officer Dexheimer Failed To Advise Ms. Kandler Of The Statutory Implied Consent.

RCW 46.20.308. required Officer Dexheimer to read Ms. Kandler the implied consent warning for THC regardless of whether

she performed a breath test or not. To trigger the statute, both reasonable grounds for the arresting officer to suspect that the driver was driving under the influence at the time of the arrest and a valid arrest must exist. *State v. Avery*, 103 Wn. App. 527, 534, 13 P.3d 226 (2000). After arrest, and prior to the administration of the test, the driver must be informed of his or her implied consent warnings that advise the driver of both the consequences of submitting to or refusing the test, potential use of refusal evidence and inform the driver of their right to have additional tests by a qualified person of his or her, own choosing, the criminal and civil ramifications of being over the per se level for alcohol and THC, and the availability of an interlock license. RCW 46.20.308(2); *State v. Bostrom*, 127 Wn.2d 580, 902 P.2d 157 (1995).

The purpose of providing the implied consent warnings after arrest and prior to administering any test is to enable a person to make a knowing and intelligent decision regarding submission to or refusal of the test. *Connolly v. Dep't of Licensing*, 79 Wn.2d 500, 487 P.2d 1050 (1971); *DMV v. McElwain*, 80 Wn.2d 624, 496 P.2d 963 (1972). To be sufficient, the warnings, as read, must permit someone of normal intelligence to understand the consequences of

his or her decision and actions. *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 714 P.2d 1183 (1986). Once a person is under arrest for DUI, physical control, vehicular homicide, vehicular assault or felony DUI, the reading of Implied Consent is not optional, it is mandatory. See *Avery*, 103 Wn. App. at 535; RCW 46.20.308, *State v. Turpin*, 94 Wash.2d 820, 827, 620 P.2d 990 (1980).

This court recently determined that an officer must inform the driver of the THC concentrations even if a blood test is not being requested. *State v. Robison*, 192 Wn. App. 658, 662-63, 369 P.3d 188 (2016), review granted sub nom., 92944-1, 2016 WL 3909818 (Wash. June 29, 2016). In the *Robison* case, in January of 2013 the defendant was pulled over and subsequently arrested for driving under the influence. *Id.* at 661. The trooper, in *Robison*, read the defendant the Implied Consent warning for breath but failed to warn about THC concentration ramifications in his blood, the defendant proceeded to perform two breath tests. *Id.* At trial, Robison moved to suppress the tests because the Trooper failed to give the defendant “all required Implied Consent warnings.” *Id.* The trial court denied the motion to suppress however the Superior Court reversed and

suppressed the test results finding that leaving out the information on marijuana ramifications made the warnings incomplete and misleading. *Id.*

This present court affirmed the superior court's findings in *Robison*. *Id.* at 672. The State had argued, in *Robison*, that the trooper did not need to warn about the blood test because it was irrelevant to that situation because only a breath test was requested and performed. *Id.* at 664-665. However, this court reasoned that the plain language of the statute was clear, which required strict adherence and advisement of the THC blood ramifications. *Id.* at 665. Therefore, this court concluded that RCW 46.20.308 required the Trooper to give the warning about the THC concentration ramifications for Robison's blood regardless of whether a blood test would actually be requested. *Id.* at 664.

In this case, Officer Dexheimer did not provide Ms. Kandler the implied consent warning as required by *Robison*." *Id.* at 662-63. In *Robison* the officer failed to give the full THC warning, and in this case the officer failed to provide any Implied Consent warning at all. CP 28. Therefore, similarly the lack of any Implied Consent warning in this case made the voluntary consent incomplete and

misleading. Even though a different version of RCW 46.20.308 was in place at the time of Ms. Kandler's arrest, the plain language of the September 2015 version still required an Implied Consent warning, which included 5 nanogram THC presumption of impairment as well as civil and criminal ramifications. Similar to how the *Robinson* court found that a blood warning should have been given regardless if a blood test was requested, in this case an Implied Consent for breath and THC warning should have been given regardless of if the breath test was performed. In this case neither the breath nor the blood test warnings were given to Ms. Kandler.

In this case, Ms. Kandler was (a) operating a car; (b) Officer Dexheimer had probable cause to believe that she was under the influence of THC; and (c) Officer Dexheimer *arrested* Ms. Kandler for DUI based upon THC impairment. CP 72-73. According to the plain language of the statute, this is all that is needed to trigger the mandates of RCW 46.20.308. See also *Avery*, 103 Wn. App. at 533. Therefore, Officer Dexheimer was required to read the Implied Consent warning to Ms. Kandler and he failed to do so.

2. In Cases Where The Arrestee Does Not Have The Right To Refuse, Portions Of The Implied Consent Warnings Still Apply.

The reading of some portions of the Implied Consent warning applies to situations where individuals do not have the right to refuse. *Morales*, 173 Wn.2d. at 269; *Turpin*, 94 Wn.2d at 820; *State v. Krieg*, 7 Wn. App. 20, 21, 497 P.2d 621 (1972); RCW 46.64.520 (vehicular homicide), RCW 46.64.522 (vehicular assault), RCW 46.61.502 (6) (felony DUI). Under *Turpin*, exclusion was the appropriate remedy for violation of a defendant's statutory rights. *Turpin*, 94 Wn.2d at 827 (holding that the taking of the driver's blood without informing her of her right to seek additional testing violated RCW 46.20.308(1)). RCW 46.20.308(2) was divided into five sections in 1983, and the relevant language of "additional testing" is found in RCW 46.20.308(2).

Once a person is under arrest for DUI, physical control, vehicular homicide, vehicular assault, or felony DUI, a reading of the entire implied consent, under RCW 46.20.308, is not optional. See *Avery*, 103 Wn. App. at 535; RCW 46.20.308; *Turpin*, 94 Wn.2d at 820. The duty to provide the driver with the entire Implied Consent Warnings is independent of the driver's right to refuse the

test. *Id.* at 824-825. In other words, even where the driver loses the right to refuse the test request, the officer is still required to provide a partial warnings. *Id.* at 824 (finding "...the fact that the defendant cannot object to State testing... does not inexorably, or even logically, follow that the defendant must also be kept ignorant of his right to independent testing."). See CP 26. As such, without providing the implied consent warning, an officer's request for voluntary consent deprives the driver of an opportunity to make a statutorily mandated informed decision regarding submission to or refusal of the test. See *Whitman County District Court*, 105 Wn.2d at 278.

In this case, Ms. Kandler was deprived of the opportunity to make an informed decision because Officer Dexheimer failed to provide Ms. Kandler with the Implied Consent warnings. CP 26. Therefore, similarly to *Turpin* and *Robison*, Officer Dexheimer's failure to comply with the implied consent statute renders the alleged voluntary blood results inadmissible. The inquiry of whether the breath or blood results should be suppressed should end at the finding that Officer Dexheimer failed to advise Ms. Kandler of the implied consent warnings after she was under arrest for DUI.

**B. The City's Reliance On Goggin, In Support Of Their Position That Blood Tests Do Not Require Implied Consent Warnings, Is Misplaced.**

Where the Implied Consent statute applies, the State cannot avoid complying with the statute by obtaining a driver's "voluntary" consent to a blood test. *Avery*, 103 Wn. App. at 535. An official request for voluntary consent without the statutory warnings would deprive the driver of the opportunity to make an informed decision as to whether to consent or not. *Whitman County Dist. Court*, 105 Wn.2d at 278.

A search warrant is justified after the implied consent requirement to inform the defendant of the right to additional tests. *State v. Goggin*, 185 Wn. App. 59, 339, 68 P.3d 983 (2014). In *Goggin*, the defendant "was seen swerving into oncoming traffic, his breath smelled of alcohol, his eyes were bloodshot and watery, he could not maintain his balance, his speech was slurred, he was slow to answer questions, and he failed all of the field sobriety tests." *Id.* at 70. After placing Mr. Goggin under arrest and in attempt to obtain a breath sample, the officer read Mr. Goggin the implied consent warnings, including the right to refuse the test and the right to obtain additional tests. *Id.* at 63-64. Mr. Goggin

ultimately refused to submit to a breath test. The officer, supported by probable cause, then obtained a search warrant for Mr. Goggin's blood in response. *Id.* at 64.

The court held that the search warrant provided independent authority to obtain the blood, and therefore, the Implied Consent statute no longer required the officer to advise Mr. Goggin of the right to additional tests. *Id.* at 68. Even though the search warrant waived the Implied Consent warning requirement, the court found that Mr. Goggin was nevertheless sufficiently informed prior to refusing the breath test and that he understood the right to additional tests as it then related to the blood test via the search warrant. *Id.*

The method that Officer Dexheimer used to obtain a blood sample is distinguishable from the method used in *Goggin*. In *Goggin*, the officer read Mr. Goggin the Implied Consent warnings, acknowledged Mr. Goggin's breath test refusal, and subsequently obtained independent authority to seize the blood via a search warrant supported by probable cause. *Id.* at 68.

First, unlike *Goggin*, in this case, Officer Dexheimer wholly failed to inform Ms. Kandler of the Implied Consent

warnings. CP. 28. This material omission unduly prejudiced Ms. Kandler, because without knowing her rights, she was unable to consider her options or make an informed decision when she voluntarily consented to a blood draw. Also unlike *Goggin*, Officer Dexheimer did not seek or obtain a search warrant for the blood. Instead, he obtained voluntary consent directly from Ms. Kandler, who was uninformed due to this omission. By seeking voluntary consent in lieu of a search warrant, Officer Dexheimer essentially treated the voluntary consent method as an alternative, equal to seeking a search warrant. If voluntary consent and search warrants were treated equally, plenary law enforcement discretion would be created – an entirely erroneous outcome that the legislature certainly did not intend.

Officer Dexheimer's failure to advise Ms. Kandler of the Implied Consent warnings, as required by law, renders Ms. Kandler's voluntary consent null and void because the legislature has mandated that once an individual is under arrest for DUI, Implied Consent warning are required. This failure to advise Ms. Kandler undoubtedly weighs against Ms. Kandler's right to consider all the options available to her after she was arrested, and Ms.

Kandler should not have to suffer from Officer Dexheimer's failure to comply with the Implied Consent Statute. Had Officer Dexheimer advised Ms. Kandler of the statutory Implied Consent warnings, Ms. Kandler would have been in a position of knowledge for voluntary consent to the blood draw, and the consent could then serve as a waiver to the warrant requirement in RCW 46.20.308(3), *Avery*, 103 Wn. App. at 535; *Krieg*, 7 Wn. App 20.

#### **E) Conclusion**

The Superior Court erred when it reversed the trial court's order to suppress the results of the blood test. In this case, Officer Dexheimer failed to provide Ms. Kandler with the mandatory Implied Consent warning as required by RCW 46.20.308. Instead, Officer Dexheimer tried to circumvent the statute by requesting voluntary consent from Ms. Kandler. However the version of RCW 46.20.308, at the time of Ms. Kandler's arrest, required that a request for a breath/blood test automatically triggers the implied consent warning. Without being advised as to the Implied Consent warnings, Ms. Kandler's ability to make a reasoned, intelligent and informed decision as to the options available to her were severely undermined.

For the reasons stated above, this Court should reverse the superior court's decision.

Respectfully submitted this 10<sup>th</sup> day of August, 2016.

By 

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COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

JOANNE KANDLER,

Petitioner,

vs.

Case No.: 74253-1-I

CITY OF KENT,

Respondent.

AFFIDAVIT OF SERVICE

Meggan Hansen, declares as follows:

On August 10, 2016, I served, via e-mail (per agreement of the parties), a true and correct copy of Petitioner's Opening Brief via email to Michelle Walker, City of Kent Prosecuting Attorney at mwalker@kentwa.gov.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT PURSUANT TO RCW 9A.72.085.

Signed and dated on August 10, 2016.

  
Signature