

**IN THE LYNNWOOD MUNICIPAL COURT
COUNTY OF SNOHOMISH, STATE OF WASHINGTON**

CITY OF LYNNWOOD,)	
)	
Plaintiff,)	NO. C 036158
)	C 035907
)	C 035025
)	C 036194
)	C 035968
)	C 035684
)	C 034469
)	
vs.)	COURT'S DECISION ON
)	NUMEROUS DUI MOTIONS
BRETT W. MEEKS,)	
LANCE C. ANDERSON,)	
ROBERT GREENE,)	
KENNETH G. HABERMAN,)	
CARL P. ERSFELD,)	
BARRY L. PERLE SR.,)	
TSONG MEI CHU, et al.,)	
)	
Defendants.)	
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The parties, whose cases are consolidated for the purpose of these many motions, have banded together like the Hanseatic League. The hegemonious leader of this band has been Mr. Vernon Smith, counsel for Defendant Meeks.

The individual goal of each defendant is the suppression of the breath test results in his or her DUI case. The corporate goal of these defendants is

the invalidation of the amendments to Washington's *per se* DUI law effected by SHB 3055 as enacted by the Legislature in 2004.

The City of Lynnwood, like King Waldemar IV of Denmark, has struggled valiantly against these many motions and the many moving parties, to preserve the breath test results in each case and to uphold the DUI *per se* law.

There have been five principal assaults on the DUI law launched by the Defendants in these cases:

1. That the amendments violate Article IV, Section 1, of the Washington Constitution.
2. That the amendments violate Article II, Section 19, of the Washington Constitution.
3. That the Implied Consent warnings given in these cases were inadequate, misleading and prejudicial.
4. That the Implied Consent warnings given in these cases were incomplete.
5. That, as regards breath tests administered before 10 June 2004, no approved thermometers existed at that time and therefore the tests cannot be valid.

The Separation of Powers

The Washington Constitution provides that “The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the Legislature may provide.” Art. IV, sec. 1.

The admission of evidence is a function shared between the courts and the legislature. The Supreme Court governs the admission of evidence by enacting the Washington Rules of Evidence (ER). Since 1979, the Supreme Court has asserted that “[t]hese rules govern proceedings in the courts of the state of Washington ...” ER 101. The legislature has the power to enact rules of evidence. *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940). There are limitations on the legislature’s power to enact rules of evidence. “Rules of evidence are subject to legislative control so long as defendant is given a fair and impartial trial and so long as no constitutional limitation is violated.” *Sears* at 215.

RCW 46.61.506(4), as enacted by SHB 3055 provides:

(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

This amendment seeks to invade the judicial province by mandating the admission of evidence which the courts might otherwise find prejudicial, unreliable, and/or inaccurate. ER 104, 401, 402, 403.

This court holds RCW 46.61.506(4) and SHB 3055 unconstitutional insofar as this law attempts to mandate the admission of breath test results and to require the court to view them “in a light most favorable to the prosecution.” The legislature simply may not legislate fairness out of the courts.

The Single-Subject Rule

The Washington Constitution provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” Art. II, sec. 19.

SHB 3055 was enacted by the legislature in 2004, effective 10 June 2004. Its title is “AN ACT relating to the admissibility of DUI tests.” This act contains provisions governing the issuance of search warrants to obtain blood and breath samples (section 2), the administration of blood tests in medical facilities (section 2), changes to the Implied Consent warnings (section 2), the circumstances governing the issuance of notices of the right to administrative hearings before the Department of Licensing (section 2), the circumstances under which the Department of Licensing may suspend a driver’s license (section 3), changes to who may draw an admissible blood test (section 4), the admissibility of breath and blood test results in prosecutions for crimes other than DUI (section 4), and the admissibility of independent tests (section 4).

Division II of the Court of Appeals recently reviewed the law which governs such challenges as are made by the defendants to this law. *State v. Lanphar*, 124 Wn.App. 669, ___ P.3d ___ (2004). The constitutionality of the act is to be presumed by the reviewing court, which presumption will not be overcome by less than a showing that it is unconstitutional beyond a reasonable doubt. *Lanphar* at 673, citing *State v. Simmons*, 117 Wn.App. 682, 688, 73 P.3d 380 (2003) *affd.* 152 Wn.2d 450, 98 P.3d 789 (2004).

Titles to bills may be general or restrictive. General titles are broad while restrictive titles are narrow. *Citizens for Responsible Wildlife Mgmt. V. State*, 149 Wn.2d 622, 632-33, 71 P.3d 644 (2003). General titles permit the inclusion of any germane subject in an act. Restrictive titles address only part of a subject and are required to identify all of the contents of a bill. The appellate courts have not been particularly helpful in more fully defining the difference.

Had the 2004 legislature wished to confer a general title on SHB 3055, it could have been named “AN ACT about the dangers of motorists drinking alcohol” or “AN ACT about the evils of drinking and driving.” The title in this case is restrictive.

As a restrictive title, it is required to enumerate with specificity the subjects contained in the bill. In this it fails, thereby violating Article II, section 19.

Because that bill/act contained neither a savings nor a severability clause, the whole of the act is unconstitutional.

Implied Consent Warnings

All of the defendants in these cases were advised of their rights under the Implied Consent law, in material part, as follows:

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: (a) If you are age twenty-one or over and the test indicates the alcohol concentration of your breath is 0.08 or more; or (b) if you are under age twenty-one and the test indicates the alcohol concentration of your breath is 0.02 or more; or (c) if you are under age twenty-one and you are in violation of RCW 46.61.502, Driving Under the Influence, or RCW 46.1.504, Physical Control of Vehicle Under the Influence.

This advisal was mandated by RCW 46.20.308(2), which requires, in material part:

The officer shall warn the driver, in substantially the following language, that: (c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

The history of the advisal of arrestees for DUI in Washington counsels strongly in favour of conforming such advisals in the language of the statute, which is precisely what law enforcement did in this case.

Defendants herein argue that law enforcement committed no error in informing them of their rights under the Implied Consent law but that the legislature, in dictating that advisal, did.

Implied consent warnings may violate a defendant's right to due process if they create a situation which is fundamentally unfair. *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 923, 74 L.Ed.2d 748 (1983). Implied consent warnings which are misleading are fundamentally unfair. *Neville*, 459 U.S. at 565, 103 S.Ct. at 923; *State v. Bostrom*, 127 Wash.2d 580, 590-92, 902 P.2d 157 (1995).

The warnings required by the legislature create the impression and invite the inference that drivers over 21 years of age who are convicted of DUI will not have their driver's licenses suspended.

This court holds that implied consent warnings which contain incorrect information violate due process. The court further finds that the warnings given in this case convey, by omission, misinformation.

The motions to suppress the breath test results in all of these cases are therefore granted.

The Other Motions

The Implied Consent warnings given in the Ersfeld and Perle cases having been found defective for the foregoing reason, their motion to find them defective for their failure to address the admissibility of independent tests is moot.

The Implied Consent warnings given in the Chu case having been found defective for the reason already stated, his motion to suppress his breath test on the ground that no approved thermometers existed at the time of the test is also moot.

Conclusion

The Court having held the *per se* DUI law doubly unconstitutional and further having suppressed the breath test results in all of the cases joined for purposes of hearing these motions, orders that the cases may continue to trial on that portion of the DUI law not held unconstitutional: RCW 46.61.502(1)(b) or RCW 46.61.502(1)(c)

DONE this 19th day of March, 2005, being the Feast of Saint Joseph and a rainy Saturday in Lynnwood.

STEPHEN E. MOORE
Judge