WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

December 2016

Law enforcement officers: Thank you for your service, protection and sacrifice.

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WASHINGTON STATE SUPREME COURT

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IMPLIED CONSENT WARNINGS: IMPLIED CONSENT WARNINGS FOR A BREATH TEST THAT OMITTED THE STATUTORY LANGUAGE FOR THC LIMITS SUBSTANTIALLY COMPLIED WITH THE STATUTE AND THE DRIVER'S BREATH TEST RESULTS ARE ADMISSIBLE.
State v. Murray, __ Wn.2d __, __ P.3d __, 2016 WL 7166585 (December 8, 2016).

In 2012, Initiative 502 (I-502) decriminalized recreational marijuana usage and amended the Implied Consent Warning statute. Under the I-502 amendments, the Implied Consent Warning statute provided in relevant part: "The driver is age twenty-one or over and the test indicates

either that the alcohol concentration of the driver's breath or blood is 0.08 or more *or that the THC concentration of the driver's blood is 5.00 or more.*"

Troopers read Implied Consent Warnings to suspected impaired drivers. Since the breath test instrument did not test for THC concentration, the Implied Consent Warnings did not include the language regarding THC. The drivers submitted to the breath test. The drivers were charged with Driving Under the Influence. Before trial, the drivers moved to suppress the breath test results. The drivers argued that since the Implied Consent Warnings did not include the statutory language regarding THC, the warnings were inadequate. The trial court denied the motion to suppress. The Washington State Supreme Court agreed with the trial court.

The Supreme Court found that the Implied Consent Warnings read to the drivers (without the language regarding THC) substantially complied with the statute and the results are admissible evidence because "the warnings did not omit any relevant part of the statute, accurately expressed the relevant parts of the statute, and were not misleading." The Supreme Court further reasoned:

> [A]n implied consent warning substantially complies with the statute when it (1) does not omit any relevant portion of the statute, (2) accurately expresses the relevant portions of the statute, and (3) is not otherwise misleading.
> . . .
> [In these cases], the breath test could not ascertain THC levels in the blood. Therefore, the troopers did not omit any *relevant* portion of the statute by not mentioning THC any more than a trooper omits a relevant portion of the statute by failing to warn a 50-year-old of the consequences of underage drinking. The warnings given accurately expressed the relevant portions of the statute and were not otherwise misleading.

As a result, the Supreme Court affirmed the trial court's denial of the suppression motion.

<u>LED EDITORIAL NOTE</u>: The Implied Consent Warning statute has been amended since 2013. At this time, RCW 46.20.308(2) does not require an officer to warn an impaired driving suspect that his/her driving privileges "will be suspended, revoked, or denied for at least ninety days" if the test indicates that the THC concentration of the driver's blood is 5.00 or more.

The February 2016 LED summarized the Court of Appeals opinion for this case. The Court of Appeals held that the breath test results were inadmissible because the officers did not read the complete Implied Consent Warning (i.e., did not read the language regarding THC). The Supreme Court's opinion has reversed the Court of Appeals.

The February 2016 LED Editorial Note for the Court of Appeals opinion noted that some criminal defendants were filing motions to suppress their breath tests on grounds that the officer did not read the section of the Implied Consent Warnings that contains warnings to drivers who are under the age of twenty-one (when the arrested driver is over the age of twenty-one). However, the Supreme Court's opinion (reversing the Court of Appeals) reasoned that "the troopers did not omit any *relevant* portion of the statute by not mentioning THC any more than a trooper omits a relevant portion of the statute by failing to warn a 50-year-old of the consequences of underage drinking." As such, officers are encouraged to check with their local prosecuting attorney to see whether the under twenty-one warnings should be read to all drivers, or only those who are clearly under the age of twenty-one. As always, officers are encouraged to discuss these issues with their agency legal advisors.

SEARCH AND SEIZURE: WARRANTLESS BREATH TEST (OBTAINED IN COMPLIANCE WITH THE IMPLIED CONSENT WARNING STATUTE) FALLS UNDER THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE WARRANT REQUIREMENT.
State v. Baird, __ Wn.2d __, __ P.3d __, 2016 WL 7421395 (December 22, 2016).

Dominic Baird was arrested for driving under the influence. The arresting officer read Baird implied consent warnings to request him to submit to a breath test. Baird consented to the breath test and the results measured above the legal limit.

Collette Adams was arrested for driving under the influence. The arresting officer read Adams implied consent warnings to request her to submit to a breath test. Adams refused to submit to a breath test.

Both Baird and Adams were charged with driving under the influence. Before trial, Baird moved to suppress his breath test result and Adams moved to suppress her refusal. Both argued that a breath test is search and no exception to the warrant requirement authorized the search. Adams also argued that since she had a constitutional right to refuse a search, her refusal could not be introduced into evidence at trial. The trial court granted the motions. The prosecution appealed to the Washington State Supreme Court.

The Washington State Supreme Court held that a breath test is a search. Under the Fourth Amendment to the United States constitution and Article I, section 7 to the Washington state constitution, a warrant or an exception to the warrant requirement must authorize the search. Relying on the recent United States Supreme Court decision in *Birchfield v. North Dakota* [June 2016 LED], the Washington State Supreme Court found that the search incident to arrest exception to the warrant requirement authorized the search of the arrested driver's breath. As such, Baird and Adams had no constitutional right to refuse the breath test.

However, the Washington State Supreme Court recognized that an arrested driver has a statutory right to refuse a breath test under the Implied Consent Warning statute. An officer may not conduct a breath test *unless* the officer reads the arrested driver the Implied Consent Warnings and the arrested driver consents to the breath test. If the arrested driver refuses the breath test (after the officer reads the Implied Consent Warnings), then the refusal may be used as evidence in a criminal trial and the arrested driver's privilege to drive will be revoked or denied for at least one year. Since Implied Consent Warnings were read to Baird and Adams, Baird's breath test result is admissible evidence and Adams' refusal is admissible evidence.

As a result, the Washington State Supreme Court reversed the trial court's suppression orders and remanded the cases back to the trial court for further proceedings.

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WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: AFTER A HOMCIDE SUSPECT WAS ARRESTED OUTSIDE OF HIS HOME, THE OFFICERS HAD NO ARTICUABLE FACTS THAT THE HOUSE HARBORED A DANGEROUS PERSON TO JUSTIFY A WARRANTLESS PROTECTIVE SWEEP. State v. Chambers, __ Wn. App. __, __ P.3d __, 2016 WL 7468214 (December 19, 2016).

Officers arrived at Lovett James Chambers' home to arrest him for shooting and killing Michael Hood. After the officers knocked on the front door, "Chambers opened the door and stepped out onto the porch." The officers placed in Chambers in handcuffs, frisked him for weapons, and escorted him to a patrol car.

The home's front door remained open and the officers observed Chambers' wife in the living room. Four officers entered the home "to perform a cursory sweep for other suspects." During the sweep, officers observed "a .45 caliber handgun, car keys, [and] a bullet magazine on a table."

The prosecution charged Chambers with murder in the second degree. Before trial, Chambers moved to suppress the evidence found during the sweep. The trial court denied the motion. Chambers was convicted of the lesser included offense of manslaughter in the first degree. Chambers appealed the denial of his suppression motions (and other issues) to the Court of Appeals, Division One. The Court of Appeals held that the trial court should have suppressed the evidence found during the sweep.

Under the Fourth Amendment to the United States constitution and Article I, section 7 to the Washington state constitution, a warrant or an exception to the warrant requirement must authorize the search of a home. A protective sweep is an exception to the warrant requirement. A protective sweep is "a limited cursory search incident to arrest and conducted to protect the safety of police officers or others." A protective sweep "is narrowly confined to a cursory visual inspection of those places in which a person might be hiding."

Protective sweeps involve two circumstances: (1) when a suspect is arrested inside his home, officers may "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched"; and (2) when officers have articulable facts that there is another person in the house "who might pose a threat to the police."

Since Chambers was arrested outside of his home, the officers must point to "articulable facts that warrant a police officer in believing the area to be swept harbors an individual posing a danger to those on the arrest scene." The Court of Appeals found that there were no such articulable facts in this situation. The Court of Appeals reasoned:

> The police had information that only Chambers shot Hood and was alone when he drove away. The . . . only individual in the house when police arrested Chambers was his spouse[.] The front door was open after the arrest and the police could see [his spouse] sitting on the living room couch watching television[.]

While the Court of Appeals found that the officers entry into the house was a warrantless search, and the trial court should have suppressed the evidence, the trial court's error was

harmless. Even without the evidence from the house, there was "overwhelming untainted evidence" to support the jury's verdict.

As a result, the Court of Appeals affirmed the conviction.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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