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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000304-MR

COMMONWEALTH OF KENTUCKY, EX REL. LOGAN COUNTY ATTORNEY — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 17-CI-00218

HON. KENNETH WILLIAMS, LOGAN DISTRICT COURT JUDGE; AND ELADIO ORTIZ — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND K. THOMPSON, JUDGES.

NICKELL, JUDGE: The Commonwealth appeals a Logan Circuit Court order denying its petition for a writ of prohibition to prevent enforcement of a suppression order. The underlying issue is whether the Logan District Court properly suppressed a blood alcohol concentration ("BAC") result collected from Eladio Ortiz, a Spanish-speaking person suspected of drunk driving who was read

Kentucky's implied consent law in English before submitting to a blood draw. The ultimate question is how law enforcement officers inform suspected drunk drivers of the right to refuse blood, breath or urine testing and the consequences of submitting to and refusing such testing as required by KRS[1] 189A.105. The district court found Ortiz did not have sufficient command of the English language to be "informed" of his rights under Kentucky's implied consent law by an officer's reading of the warning to him in English and suppressed the BAC result, a decision with which the circuit court agreed and denied the Commonwealth's petition for a writ of prohibition. Following review of the briefs, record and law, we disagree with both lower courts and reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

In the early morning hours of September 10, 2016, a citizen reported seeing a vehicle operating on the wrong side of Hopkinsville Road in Logan County. Russellville Police Officer Chad Eggleston responded, observed the vehicle drop off the right-hand shoulder of the road, and stopped the car around 2:20 a.m. As Officer Eggleston—wearing a body camera—approached the vehicle, he noticed a strong odor of alcohol on both the driver, Ortiz, and the car.

[1] Kentucky Revised Statutes.

According to Officer Eggleston, when Ortiz—the sole occupant—exited the vehicle, he was "very unsteady" on his feet, appeared to be highly intoxicated, and had an open alcoholic beverage container in the car. When the officer asked Ortiz, "Do you understand what I'm saying," Ortiz responded, "Yes." After Ortiz said he had consumed "a little [cerveza]"[2] at work, Officer Eggleston said, "well, we're gonna do some tests. Can you understand me enough to do the tests," to which Ortiz responded, "I understand." Ortiz was unable to complete the walk-and-turn test. When directed to do the one-leg stand, he attempted to repeat the walk-and-turn test, prompting this exchange:

> Officer: Did you understand what I asked you to do? Yes?
>
> Ortiz: Yes.
>
> Officer: You did understand me?
>
> Ortiz: Yeah, Yeah.
>
> Officer: OK, you did understand me? You didn't do it.

Thereafter, Ortiz failed the horizontal gaze nystagmus test even though a second officer demonstrated how it was to be performed. Although unable to follow verbal commands to successfully complete the three field sobriety tests, Ortiz stated—in English—he understood the officer's directions. A preliminary breath

[2] Spanish for beer.

test showed the presence of alcohol. Believing Ortiz to be highly intoxicated, Officer Eggleston placed him under arrest, handcuffed him, and transported him to Logan Memorial Hospital where he read Kentucky's implied consent warning aloud in English and Ortiz agreed to have his blood drawn by medical personnel. The test revealed a BAC of .233. Ortiz was charged with operating a motor vehicle under the influence of alcohol—first offense—and having no operator's license.[3]

Six months after the traffic stop, on March 9, 2017, arguing Ortiz did not understand English and did not understand he could refuse testing, counsel moved to suppress Ortiz' BAC result. Alternatively, counsel moved to exclude evidence of the failed field sobriety tests.

A suppression hearing was convened during which Officer Eggleston testified as previously recounted. Kimberly Guzman, a friend and former co-worker of Ortiz, testified Ortiz routinely nods, smiles and agrees when he hears English, but the arresting officer should have known Ortiz clearly did not understand his instructions. Her testimony was unrefuted.

After watching body camera video of both the traffic stop (showing Ortiz' occasional responses in English, body language and demeanor) and the

[3] KRS 189A.010(5)(a); KRS 186.410(1).

subsequent blood draw at the hospital during which Ortiz spoke about his family in English, and hearing argument of counsel, the Logan District Court found Ortiz was unable to sufficiently understand English to have been "informed" of the implied consent law and its associated rights. The district court described the video as rife with:

> [the officer] using body language and hand gestures to communicate with [Ortiz]; [the officer] speaking slowly, in broken English and with a smattering of Spanish; [Ortiz] answering questions in Spanish that were unresponsive and incongruous; [Ortiz'] repeated responses of, "yeah", "huh", or "um"; and [Ortiz] mumbling in Spanish.

The district court further found the arresting officer "knew" Ortiz could not speak English or "had a very limited grasp of the English language which would prevent [him] from informing [Ortiz] of the implied consent law and rights contained therein." The district court found the arresting officer used the tools provided to him but violated the implied consent statute by not "informing" Ortiz in a way that "might" have avoided the search or resulted in a less abusive search. The district court suppressed the BAC result, writing:

> All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature and all words and phrases shall be construed according to the common and approved usage of language. KRS 446.080(1) & (4). If the law does not afford non-English speakers the same right to be informed then the result would render the statute and the Legislature's mandate to inform meaningless and would

> incentivize law enforcement and judicial practices that do not conform to the notions of fair play and substantial justice.

While suppressing the BAC result, the district court found Officer Eggleston had probable cause to make both the stop and the arrest because he had personally observed Ortiz drive the vehicle off the right-hand shoulder of the roadway in a careless or reckless manner. The district court allowed the prosecution to go forward based on Officer Eggleston's lay opinion of Ortiz' level of intoxication.

Alleging irreparable injury, the Commonwealth petitioned the Logan Circuit Court for a writ of prohibition to prevent enforcement of the suppression order. After hearing argument, the circuit court affirmed the district court's ruling, noting KRS 189A.105 does not merely require information be recited in English, but specifically requires the person suspected of drunk driving be "informed" of the consequences of submitting to testing as well as refusing testing. In denying the writ, the circuit court wrote,

> [w]here it is clear a person is not comprehending the officer, further inquiry and a new approach may be warranted. Judicial notice is taken that computer programs and cell phone apps are currently available to translate messages into most languages. If the person is deaf, written communications may be necessary to insure that the person is informed. Investigation of those who may be impaired sometimes [sic] a flexible approach.
>
> Any other interpretation would make meaningless the statutes [sic] direction to actually inform the person. This requirement not only pertains to those who do not

> speak English, but also the deaf, mentally ill or medically impaired. The officer must take reasonable measures to be certain the person is actually informed of the consequences of a decision to refuse the test or take it, and, perhaps most importantly, the right to attempt to contact counsel prior to making that decision.

Against this backdrop we consider how a person is "informed" by law enforcement of the implied consent law and its consequences, and whether suppression was necessary.

ANALYSIS

Granting or denying a writ of prohibition is within the sound discretion of the court weighing the petition. *Commonwealth v. Peters*, 353 S.W.3d 592 (Ky. 2011) (citing *Haight v. Williamson*, 833 S.W.2d 821, 823 (Ky. 1992)). We review the Logan Circuit Court's denial of the petition for abuse of discretion. If challenged, we would review its factual findings for clear error. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). Because interpreting KRS 189A.105 "is purely a legal issue, our review [of the court's application of the law] is *de novo*." *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003).

> On review, it is our duty to construe the statute so as to effectuate the plain meaning and unambiguous intent expressed in the law. Moreover, we understand that the judiciary is not at liberty to add or subtract from the legislative enactment . . . or to attempt to cure any omissions.

Id. (internal quotation marks and citations omitted). In conducting our review, "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" KRS 446.080(1). Throughout our analysis we are mindful the purpose of the implied consent law is to "facilitate obtaining evidence of driving while under the influence." *Beach v. Commonwealth*, 927 S.W.2d 826, 828 (Ky. 1996). BAC begins dissipating upon full absorption in the body and continues declining until eliminated. *Missouri v. McNeely*, 569 U.S. 141, 152, 133 S.Ct. 1552, 1560-61, 185 L.Ed.2d 696 (2013) (collecting cases). Prompt collection is necessary for the sample to have value.

Kentucky's implied consent law is codified in KRS 189A.103.[4] By operating or physically controlling a vehicle in Kentucky, a person consents—upon

[4] The following provisions shall apply to any person who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth:

> (1) He or she has given his or her consent to one (1) or more tests of his or her blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which may impair one's driving ability, if an officer has reasonable grounds to believe that a violation of KRS 189A.010(1) or 189.520(1) has occurred;
>
> (2) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided in subsection (1) of this section, and the test may be given;
>
> (3) The breath, blood, and urine tests administered pursuant to this section shall be administered at the direction of a peace officer having reasonable grounds to believe the person has committed a violation of KRS 189A.010(1) or 189.520(1).
>
> (a) Tests of the person's breath, blood, or urine, to be valid pursuant to this section, shall have been performed according

request of an officer—to the testing of his blood, breath or urine—or any combination of the three—to determine alcohol concentration or impaired driving ability when drunk driving[5] is reasonably suspected. *Commonwealth v. Brown*,

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> to the administrative regulations promulgated by the secretary of the Justice and Public Safety Cabinet, and shall have been performed, as to breath tests, only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes.
>
> (b) All breath tests shall be administered by a peace officer holding a certificate as an operator of a breath analysis instrument, issued by the secretary of the Justice and Public Safety Cabinet or his or her designee;
>
> (4) A breath test shall consist of a test which is performed in accordance with the manufacturer's instructions for the use of the instrument. The secretary of the Justice and Public Safety Cabinet shall keep available for public inspection copies of these manufacturer's instructions for all models of breath testing devices in use by the Commonwealth of Kentucky;
>
> (5) When the preliminary breath test, breath test, or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both, may be required in addition to a breath test, or in lieu of a breath test;
>
> (6) Only a physician, registered nurse, phlebotomist, medical technician, or medical technologist not otherwise prohibited by law can withdraw any blood of any person submitting to a test under this section; and
>
> (7) After the person has submitted to all alcohol concentration tests and substance tests requested by the officer, the person tested shall be permitted to have a person listed in subsection (6) of this section of his or her own choosing administer a test or tests in addition to any tests administered at the direction of the peace officer. Tests conducted under this section shall be conducted within a reasonable length of time. Provided, however, the nonavailability of the person chosen to administer a test or tests in addition to those administered at the direction of the peace officer within a reasonable time shall not be grounds for rendering inadmissible as evidence the results of the test or tests administered at the direction of the peace officer.

[5] Identified in KRS 189A.103(1) as KRS 189A.010(1) or KRS 189.520(1).

560 S.W.3d 873, 878 (Ky. App. 2018) (citing KRS 189A.103; *Helton v. Commonwealth*, 299 S.W.3d 555, 559 (Ky. 2009)). Considering the citizen's report of a vehicle being operated on the wrong side of the road, and Officer Eggleston's personal observation of the vehicle dropping off the right-hand shoulder of the road, Ortiz was reasonably suspected of drunk driving.

The real focus of this appeal is KRS 189A.105 which reads in relevant part:

> (2) (a) At the time a breath, blood, or urine test is requested, the person shall be **informed**:
>
> 1. That, if the person refuses to submit to such tests, the fact of this refusal may be used against him in court as evidence of violating KRS 189A.010 and will result in revocation of his driver's license, and if the person refuses to submit to the tests and is subsequently convicted of violating KRS 189A.010(1) then he will be subject to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence imposed if he submits to the tests, and that if the person refuses to submit to the tests his or her license will be suspended by the court at the time of arraignment, and he or she will be unable to obtain an ignition interlock license during the suspension period; and
>
> 2. That, if a test is taken, the results of the test may be used against him in court as evidence of violating KRS 189A.010(1), and that although his or her license will be suspended, he or she may be eligible immediately for an ignition interlock license allowing him or her to drive

during the period of suspension and, if he or she is convicted, he or she will receive a credit toward any other ignition interlock requirement arising from this arrest; and

3. That if the person first submits to the requested alcohol and substance tests, the person has the right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103 within a reasonable time of his arrest at the expense of the person arrested.

. . . .

(3) During the period immediately preceding the administration of any test, the person shall be afforded an opportunity of at least ten (10) minutes but not more than fifteen (15) minutes to attempt to contact and communicate with an attorney and shall be **informed** of this right. Inability to communicate with an attorney during this period shall not be deemed to relieve the person of his obligation to submit to the tests and the penalties specified by KRS 189A.010 and 189A.107 shall remain applicable to the person upon refusal. Nothing in this section shall be deemed to create a right to have an attorney present during the administration of the tests, but the person's attorney may be present if the attorney can physically appear at the location where the test is to be administered within the time period established in this section.

4) Immediately following the administration of the final test requested by the officer, the person shall again be **informed** of his right to have a test or tests of his blood performed by a person of his choosing described in KRS 189A.103 within a reasonable time of his arrest at the expense of the person arrested. He shall then be asked "Do you want such a test?" The officer shall make reasonable efforts to provide transportation to the tests.

(Emphases added.) The specific question we address is how law enforcement officers inform one suspected of drunk driving of the right to refuse testing and its attendant consequences.

The Commonwealth acknowledges it may be preferable to inform a non-English-speaker suspected of drunk driving of the implied consent warning in his native language, but maintains it is not statutorily required. The Commonwealth contends it is adequate to read the warning to the driver in English because there is no requirement he understand the warning. Relying on *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992) (citing *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)), the Commonwealth notes whether a suspected drunk driver voluntarily consents to testing "is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality." Here, there is neither a suggestion nor a finding Officer Eggleston overreached during his interaction with Ortiz. Moreover, viewing the body camera footage, we heard Ortiz converse with the officer in English and respond appropriately in English indicating he had some understanding of Officer Eggleston's words. Citing *Commonwealth v. Bedway*, 466 S.W.3d 468 (Ky. 2015), the Commonwealth further argues even if Ortiz' statutory rights were violated, suppression was not automatically required. In contrast, Ortiz posits to satisfy KRS 189A.105(2)(a) and (3), officers must make a

reasonable effort to inform a non-English-speaker of the implied consent warning in a manner and language reasonably calculated "to actually inform him of his rights" so he can understand them. We hold reading of the implied consent warning in English satisfies KRS 189A.103 and 189A.105.

We are not the first panel of this Court to analyze KRS 189A.105(2)(a). In *Commonwealth v. Rhodes*, 308 S.W.3d 720, 722-23 (Ky. App. 2010), a woman was suspected of drunk driving. She became "combative" while being placed in a police cruiser convincing the officer it was impossible for him to read the implied consent warning to her despite multiple attempts. The panel determined even though Rhodes was not listening to the officer, he was statutorily mandated to "read" the implied consent warning to her. Because the officer never read the warning to her, she never refused testing. *Rhodes* explains:

> the implied consent warning is an integral part of the DUI statutes. It informs defendants of important rights and duties that are involved in such cases, as well as the consequences of their particular actions. The legislature has recognized the importance of the implied consent warning by the use of the mandatory language "shall." While reading the implied consent warning to the defendant is mandatory, **there is no statutory requirement that the defendants understand or acknowledge the reading of the implied consent warning. The statute merely requires that the officer read the implied consent warning.**
>
> The Commonwealth asks this Court to substitute the legislature's mandatory language with its own permissive language. We decline to do so in light of the clear

> language utilized in the statute that this warning shall be read to all arrestees or defendants. "[T]he courts have a duty to accord statutory language its literal meaning unless to do so would lead to an absurd or wholly unreasonable result." *Holbrook v. Kentucky Unemployment Ins. Com'n*, 290 S.W.3d 81, 86 (Ky. App. 2009) (quoting *Kentucky Unemployment Ins. Com'n v. Jones*, 809 S.W.2d 715, 716 (Ky. App. 1991)).
>
> A review of the evidence in this case indicates that although Rhodes was belligerent, the officers could have still read the warning to her. **Nothing requires that Rhodes listen to the warning, instead only that the officers read it to her.** Only once the warning is read can Rhodes then be deemed to have impliedly or explicitly refused. *See Cook v. Commonwealth*, 129 S.W.3d 351, 360 (Ky. 2004) ("In order for there to be a refusal, there must first be a specific request that the person take the test, not just an inquiry whether the person would like to take it.") (Internal citation omitted).

Rhodes, 308 S.W.3d at 722-23 (emphases added). The underlying question in *Rhodes* was whether the driver refused testing. The arresting officer testified he neither read the complete implied consent warning to Rhodes, nor requested she submit to testing because "he 'felt' like Rhodes would refuse to submit to the intoxilyzer testing[.]" *Id.* at 721. Under those circumstances, the panel concluded Rhodes did not refuse testing. On the strength of *Rhodes*, the Commonwealth argues Officer Eggleston satisfied KRS 189A.105(2)(a) in this case by simply reading the implied consent warning to Ortiz in English because the statute did not require Ortiz to understand it.

Interestingly, the word "read"—or some version of it—appears fourteen times in the *Rhodes* opinion, but never appears in KRS 189A.105. This fact distinguishes Kentucky's implied consent law from that adopted by Georgia. The Commonwealth cites *State v. Stewart*, 286 Ga. App. 542, 543, 649 S.E.2d 525, 526 (2007), in support of its position but we ascribe *Stewart* little weight because Ga. Code Ann. § 40-5-67.1(b) specifically directs: "At the time a chemical test or tests are requested, the arresting officer shall select and **read** to the person the appropriate implied consent notice from [three choices.]" (Emphasis added.) Thus, it is no surprise Georgia courts have held Georgia's implied consent law is satisfied by mere reading of the implied consent warning. However, Georgia's approach supports the belief "reading" the warning aloud is adequate to convey the implied consent law to a suspected drunk driver.

Unlike the *Rhodes* panel, Ortiz does not equate the word "read" with the word "informed."

> "The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (citing *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000)). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005) (citing *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)). Thus, we are "to ascertain the intention of the legislature from words used in enacting statutes rather

> than surmising what may have been intended but was not expressed." *Stopher v. Conliffe*, 170 S.W.3d 307, 309 (Ky. 2005), *overruled on other grounds by Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008).

Hall v. Hosp. Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). While Kentucky's General Assembly could have easily directed officers to "read" the implied consent warning to suspected drunk drivers, it did not. It chose the word "informed" which does not appear to be a particularly technical word with special legal meaning, but the word does appear in other statutes and judicial opinions. KRS 189A.005 provides definitions for KRS Chapter 189A but the word "informed" is not included. Hence, we set upon a quest to find its common, ordinary meaning as KRS 446.080(4) directs us to do.

In a medical context, the Supreme Court of Kentucky has described "informed consent" as:

> a medical treatment provider [satisfies] the duty to obtain the patient's consent only if . . . the physician's action in disclosing the risks [is] "in accordance with the accepted standard of medical . . . practice among members of the profession with similar training and experience" as stated in Subsection (1), it is further required that the information imparted by the physician be stated so as to provide "a reasonable individual" with "a general understanding of the procedure . . . [any] acceptable alternative[s] . . . [the] substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures."

Sargent v. Shaffer, 467 S.W.3d 198, 207-08 (Ky. 2015). The focus of "informed consent" is the facts given to the patient, not the patient's grasp or understanding of the facts.

Miranda v. Arizona, 384 U.S. 436, 467-68, 86 S.Ct. 1602, 1624-25, 16 L.Ed.2d 694 (1966), specifies:

> if a person in custody is to be subjected to interrogation, he must first be **informed** in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise.

(Emphasis added.) Police officers traditionally read *Miranda* rights to individuals.

A frequent source for defining terms is the dictionary. Merriam-Webster.com, defines the word "informed" as "having information," "based on possession of information," and "educated, knowledgeable[.]" *Informed*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/informed (last visited May 2, 2019). Again, the focus is on providing relevant facts, not the recipient's ability to process the facts provided. Considering these common, ordinary uses of the word "informed," we cannot say it was unreasonable for the *Rhodes* panel to equate the word "informed" with the word "read."

A nagging concern throughout this case is the district court's belief Officer Eggleston "knew that [Ortiz] could not speak English or, at best, had a very limited grasp of the English language[.]" We cannot identify the basis of this

finding. Ortiz never objected during the stop. He gave no indication he did not understand what was happening or what he was being asked to do. Other than occasionally shrugging his shoulders—which could easily have been interpreted as "I have no choice," "I don't know what to do," or "What should I do?"—Ortiz never stated, "no entiendo inglés" or "no comprendo inglés."[6] Officer Eggleston had stopped Ortiz on suspicion of drunk driving. How was he to distinguish conduct resulting from Ortiz' state of heavy intoxication from his potential inability to speak and understand English, especially when Ortiz often shook his head up and down—indicating "yes"—and responded both verbally and appropriately in English? We will not require an officer to assume what is not communicated to him.

Ortiz and the lower courts focus on what the officer did *not* do—he did not read the implied consent warning to Ortiz in Spanish. They completely ignore what he did—he read the implied consent warning to Ortiz in English which we recognize in this Commonwealth is a traditional method of conveying information. Considering Ortiz' level of intoxication, it cannot be said Ortiz would have grasped the extent of his rights—and would have refused testing or called an attorney—had he received the warning in Spanish. In *Oregon v. Elstad*, 470 U.S.

[6] Spanish translation of "I do not understand English."

298, 316, 105 S.Ct. 1285, 1297, 84 L.Ed.2d 222 (1985), the United States Supreme Court wrote, "[t]his Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *See California v. Beheler*, 463 U.S. 1121, 1125-26, n. 3, 103 S.Ct. 3517, 3520, n. 3, 77 L.Ed.2d 1275 (1983); *McMann v. Richardson*, 397 U.S. 759, 769, 90 S.Ct. 1441, 1448, 25 L.Ed.2d 763 (1970).

When asked whether he wanted to call an attorney, Ortiz deliberated.

Officer:	Do you wish to [contact an attorney] at this time?
Ortiz:	Is that for jail?
Officer:	Huh?
Ortiz:	I have a question for her for jail.
Officer:	How far for jail?
Ortiz:	Yeah.
Officer:	It just depends on court. Do you want to call an attorney or no?
Ortiz:	For what?
Officer:	OK. Yes or No. Do you know an attorney to call?
Ortiz:	Yeah. Uh. (a few seconds pass). I don't know.

The officer then requested Ortiz submit to having his blood drawn with a needle, to which Ortiz freely shook his head up and down—indicating "yes." It would have reasonably appeared to Officer Eggleston Ortiz understood he had the right to call an attorney but chose not to do so and submitted to testing.

In reality, the basis of counsel's suppression motion is nothing more than Monday-morning quarterbacking—claiming, six months after the fact, Ortiz did not understand Officer Eggleston's directives—a claim never communicated to Officer Eggleston in the heat of the moment. Ultimately, during the roadside stop, and later at the hospital, Ortiz did not act vastly different from highly intoxicated fully English-speaking persons suspected of drunk driving.

Suppression of evidence redresses a search violative of a person's constitutional rights. *Copley v. Commonwealth*, 361 S.W.3d 902, 905 (Ky. 2012). But *Bedway*, 466 S.W.3d at 477, confirms KRS 189A.105 involves no constitutional right. We quote at length from *Bedway*.

> First, pursuant to KRS 189A.103, when Bedway chose to drive on the roads of the Commonwealth he consented to "one (1) or more tests of his . . . blood, breath, and urine, or [a] combination thereof, for the purpose of determining alcohol concentration or [the] presence of a substance which may [have] impair[ed] [his] driving ability." Therefore, even if a Constitutional right to attempt to contact counsel existed, Bedway waived that right by operating a motor vehicle in the Commonwealth. *Id.*

> Second, KRS 189A.105(3) provides that the inability to contact an attorney does not relieve a person of the obligation to submit to testing. Thus, Bedway was obligated to submit to testing, or suffer the consequences, whether he contacted an attorney or not.
>
> Third, as we noted in *Beach v. Commonwealth*, "[e]xclusion of evidence for violating the provisions of the implied consent statute is not mandated absent an explicit statutory directive." 927 S.W.2d 826, 828 (Ky. 1996). There is no statutory directive to that effect.
>
> Fourth, Bedway did submit to the mandatory testing. Thus, he did not suffer the automatic, and in his case significantly more egregious, consequences that follow refusal to submit. . . .
>
> Finally, in *Copley* we held that:
>
> > [W]hen a criminal procedur[al] rule is violated but the defendant's constitutional rights are not affected, suppression may still be warranted if there is (1) prejudice to the defendant, in the sense that the search might not have occurred or been so abusive if the rule had been followed or (2) if there is evidence of deliberate disregard of the rule.
>
> 361 S.W.3d at 907 (footnote omitted). We now extend this rule to a violation of the statutory mandate in KRS 189A.105. Thus, if the police deliberately disregard the mandate to permit a defendant to attempt to contact an attorney or the defendant is prejudiced as a result of that deliberate disregard, i.e. the defendant might have refused the testing and thereby received a lesser sentence, evidence seized thereafter may be suppressed.

Bedway, 466 S.W.3d at 477.

We could easily substitute the name "Ortiz" for that of "Bedway" in the preceding quote and reach the same result. Ortiz chose to drive on Kentucky roads while intoxicated, thereby impliedly consenting to the collection of blood, breath or urine samples, or any combination of the three, if he was reasonably suspected of drunk driving. When given the option, Ortiz weighed whether to contact an attorney, ultimately choosing not to do so. No statutory directive requires suppression of test results flowing from a violation of the implied consent law. Finally, because Ortiz submitted to testing, he is not subject to the harshest penalty.

On the strength of *Rhodes*, we hold law enforcement officers satisfy KRS 189A.105(2), which requires a suspected drunk driver be "informed" of specific rights and consequences associated with Kentucky's implied consent law as expressed in KRS 189A.103, by reading the warning aloud in English to the suspect. There being no statutory requirement for the suspect to understand the implied consent warning, there is no requirement it be provided to him in his native tongue. Because of *Bedway*, even if Ortiz' statutory rights were violated, suppression of his BAC result was not mandatory.

Finally, the Commonwealth challenges the circuit court's taking of judicial notice of the availability of electronic devices and cell phone apps to translate foreign languages. First, as previously noted, we are unwilling to say

Officer Eggleston "knew" Ortiz lacked understanding due to a language barrier rather than extreme intoxication. Second, KRE[7] 201 permits a court to take judicial notice of adjudicative facts—those generally known in the venue or those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE 201(b)(2). We are unwilling to trust—without question—a foreign language translation just because it was found on the internet. The internet, and access to it via cell phone, is a fantastic advancement, but by no means is it perfect and unquestionably accurate such that it is a proper basis on which to take judicial notice. Unless someone with knowledge of the particular foreign language thoroughly investigates the computer program, website or cell phone app, and assures its accuracy, we cannot endorse reliance on it. Languages have various dialects, and while citizens of several different countries speak Spanish, not all speak the same version. Even trained interpreters may disagree as to the proper translation of a phrase or paragraph. At some point, reliance on a foreign language translation computer program or cell phone app may be appropriate, but we have not been cited to one in this case. Thus, the circuit court erred in taking judicial notice of the fact of computer programs and cell phone apps being available to accurately translate foreign languages.

[7] Kentucky Rules of Evidence.

For the foregoing reasons, we REVERSE the Logan Circuit Court and REMAND for further action consistent with this Opinion.

MAZE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and result of the majority opinion, but I write separately to address some of the points raised in the dissenting opinion. Our panel delayed releasing this opinion pending the decision of the United States Supreme Court in *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S. Ct. 2525, 204 L.Ed.2d 1040 (2019). The specific question on appeal in *Mitchell* concerned the application of Wisconsin's implied consent law to a DUI suspect who was unconscious and incapable of revoking consent to a blood test.

Under the Wisconsin statute,[8] like KRS 189A.103, a person is deemed to have consented to a blood test by accepting the privilege of operating a motor vehicle on the state's highways. The Wisconsin statute, like KRS 189A.105, also requires that an individual suspected of driving under the influence be advised of the right to withdraw that consent and of the consequences of doing so. Finally,

[8] Wis. Stat. § 343.305.

that statute, like KRS 189A.103(2), provides that a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn his consent to blood testing.

A plurality of the Wisconsin Supreme Court concluded that the statutory presumption of consent did not violate Fourth Amendment requirement that consent to a search be voluntarily given. *State v. Mitchell*, 383 Wis.2d 192, 914 N.W.2d 151 (2018). The U.S. Supreme Court accepted *certiorari* to determine whether such implied consent may be constitutionally applied to an unconscious DUI suspect who can neither understand the required warning nor make a conscious decision to withdraw consent. However, the Supreme Court decided the case on narrower, fact-specific grounds. A plurality of four justices held that the exigent-circumstances exception will generally apply to justify a warrantless blood test on an unconscious DUI suspect. *Mitchell v. Wisconsin*, 139 S. Ct. at 2535-39.

Unfortunately, the Supreme Court declined to address the question which would have been relevant to this case—whether a DUI suspect must be able to understand the implied consent warning in order for his consent to be considered voluntary for purposes of the Fourth Amendment. As both the majority and the dissent correctly point out, the prior case law from the United States Supreme Court has not categorically rejected the presumptions required by implied consent statutes. However, the Court has held that a blood draw constitutes a search for

purposes of the Fourth Amendment, and consequently, will require either a warrant or a recognized exception to the warrant requirement. *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160, 2173, 195 L.Ed.2d 560 (2016). As a result, the Court has limited the scope of implied consent statutes when a withdrawal of consent results in enhanced criminal penalties or separate criminal charges. *Id.* at 2186.

Thus, the question remains whether a statutorily-implied consent to a warrantless search meets the requirements of the Fourth Amendment. Until such time as the Kentucky Supreme Court or the United States Supreme Court squarely addresses the issue, I must agree with the majority that the statutory presumption of consent remains in place, subject to certain constitutional limitations. To invoke the presumption, the Commonwealth must present evidence that: (1) there was probable cause to believe that the defendant was operating a motor vehicle under the influence of an intoxicant; *and* (2) the defendant was advised of his or her right to withdraw consent to a blood test as required by KRS 189A.105(2)(a). Once the Commonwealth presents such evidence, the burden then shifts to the defendant to show that his or her consent was not knowing or voluntary.

Notwithstanding the provisions of KRS 189A.103(2), I would not hold that the mere recitation of the implied consent warning to an individual who is clearly incapable of understanding is sufficient to meet the requirements of the

Fourth Amendment. In the case of an unconscious individual, a different exception to the warrant requirement may apply. But this case involves a person who was conscious but claims to have been unable to understand the implied consent warning given in the English language. Under such circumstances, I would hold that the burden shifts to the defendant to establish that his lack of understanding prevented him from making a knowing and voluntary decision to consent to a blood test. Furthermore, I would hold that the reasonableness of the officer's efforts to communicate the implied consent warning must be judged based upon the facts available to the officer *at the time*.

The dissent takes the majority opinion to task for failing to give proper deference to the district court's factual findings. I certainly agree that the trial court's factual findings should not be disturbed unless they are clearly erroneous. However, the district court improperly placed the burden on the Commonwealth to show that Ortiz actually understood the implied consent warning. Moreover, the district court's findings are difficult to reconcile with the evidence presented at the suppression hearing.

Most notably, Officer Eggleston had the opportunity to observe Ortiz both at the time of the traffic stop and during the observation period prior to the blood test. During the traffic stop, Ortiz stated that he understood "a little" English, although his responses suggested that his understanding was limited. But

at the hospital, Ortiz was able to engage with Officer Eggleston in a simple conversation about Ortiz's family. Officer Eggleston read the implied consent warning to Ortiz immediately prior to the administration of the blood test. At all relevant points, Ortiz gave every impression that he understood Officer Eggleston.

It may be true that Ortiz was actually unable to fully understand the implied consent warning given by Officer Eggleston. But if Ortiz was feigning such understanding, it would not have been immediately apparent to Officer Eggleston. Thus, I agree with the majority that the district court's factual findings were clearly erroneous. Considering the totality of the circumstances as they existed at the time of the test, Officer Eggleston reasonably believed that Ortiz understood the implied-consent warning read in English. Consequently, I agree with the majority. The trial court clearly erred by granting the motion to suppress the blood test evidence and the circuit court erred in affirming the district court.

THOMPSON, K., JUDGE, DISSENTING: I respectfully dissent. I believe the majority opinion errs by: usurping the district court's role as the finder of fact, misinterpreting how the law applies to the facts by confusing implied consent with actual consent and misinterpreting our implied consent law.

Eladio Ortiz moved to suppress the evidence of his blood alcohol concentration (BAC) testing on the basis that the officer did not inform him of his implied consent rights as required by Kentucky Revised Statutes (KRS) 189A.105

where he was read his rights in English and could not understand English.[9] The district court found as follows:

> Based on the totality of this evidence, this Court finds [Ortiz] is unable to sufficiently understand the English language for purposes of being informed of the implied consent law and rights therein. In addition, this Court finds from the video evidence that [the police officer] knew that [Ortiz] could not speak English or, at best, had a very limited grasp of the English language which would prevent [the police officer] from informing [Ortiz] of the implied consent law and the rights contained therein.

The finding as to Ortiz's English proficiency and the officer's knowledge of it were pure findings of fact but the conclusions as to whether this lack of proficiency meant that Ortiz was not informed as required by the informed consent statutes hinges upon the legal interpretation to be given our informed consent law.

When reviewing a motion to suppress evidence, we defer to the trial court's findings of fact if not clearly erroneous and we review its application of the law to the facts *de novo*. *Cobb v. Commonwealth*, 509 S.W.3d 705, 708 (Ky. 2017). "Findings of fact are not clearly erroneous if they are supported by substantial evidence. Substantial evidence is evidence of substance and relevant

[9] Ortiz did not argue that under the Fourth Amendment his consent was not voluntary. Therefore, the district court did not consider or decide this issue. Arguably under the totality of the circumstances (putting aside what was required under our implied consent law), Ortiz's consent may not have been voluntary. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968); *Krause v. Commonwealth*, 206 S.W.3d 922, 925-26 (Ky. 2006); *Commonwealth v. Brown*, 560 S.W.3d 873, 876 (Ky. App. 2018).

consequence having the fitness to induce conviction in the minds of reasonable men." *Commonwealth v. Jennings*, 490 S.W.3d 339, 346 (Ky. 2016) (internal quotation marks and citations omitted).

Upon appellate review of a motion to suppress, we must defer to the trial court's role as the fact-finder because the trial court properly acts within its discretion in assessing the credibility of the witnesses and drawing reasonable inferences from their testimony. *Neal v. Commonwealth*, 449 S.W.3d 370, 376 (Ky.App. 2014). In reviewing findings of fact for clear error, we must "giv[e] due deference to the inferences drawn from those facts by the trial judge." *Perkins v. Commonwealth*, 237 S.W.3d 215, 218 (Ky.App. 2007). When a trial court's findings of fact are supported by substantial evidence, they are conclusive. *Gomez v. Commonwealth*, 152 S.W.3d 238, 241 (Ky.App. 2004). Accordingly, it is improper for an appellate court to reevaluate the evidence or substitute its judgment for that of the fact-finder as to the credibility of the witnesses and the inferences to be given to their testimony; instead the appellate court must properly defer to the trial court unless its factual findings are clearly erroneous. *Neal*, 449 S.W.3d at 376.

The Commonwealth did not challenge the sufficiency of the district court's factual findings that "[Ortiz] is unable to sufficiently understand the English language" or that "[the officer] knew that [Ortiz] could not speak English

or, at best, had a very limited grasp of the English language[.]" Instead, it took the position that reading the warnings in English was sufficient for compliance with our implied consent law and Ortiz was deemed not to have withdrawn his consent because under KRS 189A.103(2) his lack of understanding made him someone "otherwise in a condition rendering him or her incapable of refusal" like a person who is dead or unconscious and, thus, "deemed not to have withdrawn . . . consent[.]"

The majority opinion errs by disregarding the district court's findings of fact, reinterpreting the evidence and wrongfully substituting its own contrary factual finding, that Ortiz understood English sufficiently to understand the implied consent warnings. The district court's findings were supported by substantial evidence based upon the district court's assessment of the credibility of the witnesses and interpretation of the video and must be upheld.

The majority's own factual recitation demonstrates an abundance of evidence demonstrating that despite Ortiz's professions of understanding, he did not understand English sufficiently to follow the officer's directions or understand the implied consent warnings and the officer was aware Ortiz was having difficulty understanding him as shown by his conduct. There was also testimony at the hearing that Ortiz routinely nods, smiles and agrees when he hears English, but the officer should have known from his conduct that Ortiz did not understand. It was

fully in the district court's purview to weigh the evidence and conclude that Ortiz established his lack of understanding of the refusal warnings.[10]

In reviewing the interpretation the majority opinion gives to our implied consent laws, it is important to establish what implied consent laws can actually do within the confines of the Fourth Amendment. Although implied consent laws throughout the United States might appear to provide automatic consent for breath and blood testing of drivers, their name is a misnomer. Implied consent laws do not provide actual consent, which can satisfy the Fourth Amendment's prohibition against warrantless searches and seizures.

Instead, implied consent laws serve the purpose of incentivizing consent to testing that can be used in a criminal action against a defendant by providing penalties for refusing testing. Implied consent warnings state what the penalties are for refusing to consent and explain how test results will be used against a defendant in criminal prosecutions. Typically, refusal results in the suspension or loss of a driver's license.

[10] I dissented from *Delacruz v. Commonwealth*, 324 S.W.3d 418, 421 (Ky.App. 2010), a case in which the majority held that *Miranda* warnings given in English could not sufficiently inform a predominantly Spanish speaking defendant, on the basis that there was substantial evidence to uphold the trial court's finding that the defendant did in fact understand the *Miranda* warnings but feigned not understanding English. Here, there was evidence that Ortiz pretended to understand English when he did not. In each circumstance, I would defer to the trial court's factual findings on whether the defendant sufficiently understood English to be informed of his rights and consent.

The Fourth Amendment applies to the taking and testing of blood for BAC. "[A] compelled physical intrusion beneath [a suspect's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation . . . [is] an invasion of bodily integrity [which] implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 1616, 84 L.Ed.2d 662 (1985)). It is well established that the taking of such a sample "constitutes a search for real or physical evidence which implicates and activates the Fourth Amendment to the United States Constitution." *Farmer v. Commonwealth*, 6 S.W.3d 144, 145-46 (Ky.App. 1999).

"Under the Fourth and Fourteenth Amendments, a search conducted without probable cause is '*per se* unreasonable' subject only to a few specifically established and well-delineated exceptions." *Speers v. Commonwealth*, 828 S.W.2d 638, 641 (Ky. 1992) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973)). "[O]ne 'jealously and carefully drawn' exception . . . recognizes the validity of searches with the voluntary consent[.]" *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S.Ct. 1515, 1520, 164 L.Ed.2d 208 (2006) (quoting *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958)). Another "well-recognized exception applies

when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 2414, 57 L.Ed.2d 290 (1978)).

As recent United States Supreme Court decisions have shown, implied consent as provided through statutes is not the same as actual consent for Fourth Amendment purposes. The Court in *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), examined whether criminal penalties could properly be imposed for refusal to consent to breath and BAC testing. The Court held that breath tests could properly be administered pursuant to lawful arrest, but blood tests could not and refusal to consent to blood testing could not be punished with criminal penalties.[11] In making this ruling, the Court examined the differences between breath and blood testing and stated that "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." *Id.* at 2184. It

[11] I note that KRS 189A.105(2)(a)1 is potentially problematic under *Birchfield* because it provides for double the mandatory minimum sentence if testing is refused. However, our Court has held that because this law does not provide for a separate criminal penalty for refusing that *Birchfield* does not apply and no Fourth Amendment violation occurs from a warning about a potential enhanced mandatory minimum sentence if testing is refused. *Commonwealth v. Brown*, 560 S.W.3d 873, 878 (Ky.App. 2018).

concluded that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Id.* While the Court acknowledged that "a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries[,]" it proceeded to opine, "we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." *Id.* at 2184-85.

The Court then examined how implied consent laws play into a refusal to consent to blood testing:

> Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents and that sometimes consent to a search need not be express but may be fairly inferred from context. Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.
>
> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There

> must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Id. at 2185 (citations omitted).

In *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S.Ct. 2525, 2532 (2019) (quoting from Pet. for Cert. ii.), the United States Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement[.]" Before its discussion, the Court summarized:

> Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

Id. at 2531. Unlike a categorical exception linked solely to the dissipation of evidence through the body's metabolism, the plurality explained that something additional is needed: "[E]xigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious[.]" *Id.* at 2537.

The Court recounted how exigency existed in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), where the police could not seek a warrant because a car accident had to be addressed. It explained that a "driver's unconsciousness . . . is *itself* a medical emergency" and the necessity of arranging urgent medical care along with dealing with a possible accident scene would create rival priorities for the officer. *Mitchell*, 139 S.Ct. at 2537-38 (citation footnote omitted).

> In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

Id. at 2538.

Although neither the *Birchfield* nor *Mitchell* opinions explicitly held that implied consent laws cannot provide actual consent to seize blood for BAC testing, they cannot be read in any other way. There would be no need for a warrant for blood testing after a DUI suspect is arrested as mandated by *Birchfield*, or any need for the Court to carve out a general exigency exception to support warrantless blood testing of unconscious DUI suspects in *Mitchell*, unless implied consent laws do not grant actual consent. So, while implied consent statutes continue to have the effect of allowing administrative punishments for refusals, they cannot provide actual consent to satisfy the Fourth Amendment right to be free from unreasonable searches and seizures if a warrant is not obtained.

There is no intimation here that there was any other basis besides consent which could justify the taking of Ortiz's blood without a search warrant. As the *Mitchell* opinion reiterated, there is no categorical exigency based on only the dissipation of BAC evidence and Ortiz's arrest did not have any accompanying factor which created "pressing health, safety, or law enforcement needs that would take priority over a warrant application" as necessary to allow the warrantless seizing of Ortiz's blood. *Mitchell*, 139 S.Ct. at 2537.

Because taking blood from a conscious suspect cannot be justified based on a statutory enactment granting consent, Kentucky's implied consent law

must be interpreted in such a manner as will protect a defendant's Fourth Amendment rights. Any other interpretation should be rejected.

Accordingly, some of our Kentucky cases interpreting our implied consent law incorrectly interpret what the Fourth Amendment allows and should be limited in light of *Birchfield* and *Mitchell*. In *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914, 915 (Ky. 2002), the Kentucky Supreme Court interpreted the statutory language of KRS 189A.103(1) "has given his consent" as meaning that "a suspected drunk driver must submit to a test to determine blood alcohol concentration" and as stated in *Commonwealth v. Wirth*, 936 S.W.2d 78, 82 (Ky. 1996), has no "lawful right to refuse such testing." The Court then proceeded to determine that while the implied consent warning of KRS 189A.105 might not be completely accurate for every suspect depending upon the particular facts involved that "KRS 189A.105 is not so defective as to prejudice, as a matter of law, a suspected drunk driver's decision-making process since there is no constitutional right to refuse to submit to a test to determine blood alcohol concentration." *Hernandez-Gonzalez*, 72 S.W.3d at 917-18. Clearly, though, the United States Supreme Court has established that there is a Fourth Amendment right to refuse BAC testing.

In *Commonwealth v. Brown*, 560 S.W.3d 873, 877-78 (Ky.App. 2018) (citations and footnote omitted), the Court stated that based on existing precedent

"the purpose of KRS 189A.103(2) is to create a presumption that the testing is lawful" and "[a]n explicit refusal . . . operates as a withdrawal of the implied consent which every driver gives by their mere presence behind the wheel on a Kentucky road." While this may be its purpose, I disagree that testing can be justified under implied consent laws where a defendant did not explicitly consent as the Fourth Amendment requires an actual consent rather than one implied by law.

In *Helton v. Commonwealth*, 299 S.W.3d 555, 564 (Ky. 2009), the Court held that when an officer has reasonable grounds (interpreted as probable cause) to believe a DUI has been committed that blood may be drawn for a BAC test from a person, whether conscious or unconscious without violating the Fourth Amendment. This holding cannot survive *Birchfield* and *Mitchell*, though of course the presumption of exigency from *Mitchell* where the defendant was unconscious would likely permit the same action to be taken.

I completely disagree with the majority opinion's interpretation that reading Kentucky's implied consent warning in English always satisfies the statutory requirement that the person from whom a breath, blood or urine test is requested "shall be informed" about the consequences of refusal of consent mandated by the General Assembly in KRS 189A.105(2)(a). I do not doubt that on most occasions reading warnings in English is sufficient to inform and then actual

consent may follow. However, it does not follow that because reading the implied consent warning in English to an English-speaking driver satisfies the statute that, ergo, reading the implied consent warning in English should suffice for everyone.[12] What informs an English speaker does not inform someone who cannot understand the English language.[13] Making such a leap is untenable and makes a mockery of the General Assembly's intent in choosing to use the word "inform."

In interpreting statutes, we are not to "interpret a statute at variance with its stated language" and "literal interpretation" but to "lend words of a statute their normal, ordinary, everyday meaning" and "reject a construction that is

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[12] By failing to provide translations of the implied consent warnings to limited English proficient (LEP) persons, police departments who are beneficiaries of federal funding may run afoul of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Based on guidance provided by the Department of Justice and more specific regulations enacted pertaining to other agencies in interpreting Title VI, it can constitute national origin discrimination to fail to provide translation services for LEP persons. *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 FR 41455-01 (providing DOJ guidance); 45 C.F.R. § 92.201 (explaining duty to provide LEP persons meaningful access to health programs and activities).

[13] I would reject any attempt to assert that being a LEP person would render someone "otherwise in a condition rendering him or her incapable of refusal" like a person who is dead or unconscious and, thus, "deemed not to have withdrawn the consent[.]" KRS 189A.103(2). *See Commonwealth v. Delahanty*, 2006-CA-000046-MR, 2007 WL 3228062, *2 (Ky.App. Nov. 2, 2007) (unpublished) (discussing Commonwealth's argument that a non-English speaker falls into this category). I believe some exigency would have to be linked to a person being in such condition before testing without a warrant would be allowed under *Birchfield* and *Mitchell*. Therefore, I do not believe that the failure to affirmatively withdraw statutorily implied consent can provide actual consent for Fourth Amendment purposes; instead exigency must be relied on to justify the taking of blood in such a circumstance.

unreasonable and absurd, in preference for one that is reasonable, rational, sensible and intelligent." *Monumental Life Ins. Co. v. Department of Revenue*, 294 S.W.3d 10, 19 (Ky.App. 2008) (internal quotation marks and citations omitted). It is absurd to interpret the word "inform" as meaning "read." These two words are not equivalent; the literal meaning of "inform" is not "read."

In *Commonwealth v. Rhodes*, 308 S.W.3d 720 (Ky.App. 2010), the Court ruled that the defendant could not refuse to take a breath test where she was never informed of her rights under Kentucky's informed consent law by being read the entire informed consent warnings and then being asked whether she consented. While the majority opinion makes much of the fact that the *Rhodes* opinion repeatedly states that the informed consent warnings must be read, *Rhodes* provides the minimum threshold of what must be done to comply with the statute and does not constrain us from affirming. In fact, a proper analysis of *Rhodes* provides strong support for affirming.

In *Rhodes*, the difficulty in communicating the required information was based on the defendant's behavior, and the officer made multiple attempts to read the warnings to the defendant but ultimately failed to complete reading them. *Id*. at 720. Our Court observed that the statute could not be satisfied if the information was never conveyed to the defendant. *Id*. at 722-23. Essentially it

ruled that "shall be informed" in fact means what it says and partially informing the defendant was insufficient.

In *Ferguson v. Commonwealth*, 362 S.W.3d 341 (Ky.App. 2011), we examined what was required to allow a suspect to contact an attorney after learning of such a right from the implied consent warnings. In determining that it was proper to allow access to the suspect's cell phone in order for the suspect to retrieve her attorney's cell phone number, we stated "[i]t is not unreasonable to require some minimal police assistance . . . in order to exercise one's right as provided by KRS 189A.105(3)." *Ferguson*, 362 S.W.3d at 344. Therefore, informing suspects about their informed consent rights is not sufficient if they are not able to exercise them.

When *Rhodes* and *Ferguson* are considered together, it quickly becomes evident that the warnings Ortiz received were insufficient. Reading the warnings in English to Ortiz could not inform him or allow him to exercise his rights. Ortiz was fully cooperative; the difficulty was that Ortiz did not understand English. However, despite knowledge of such difficulty, the officer made absolutely no attempt to communicate the implied consent warnings to Ortiz in Spanish, though the officer must have known that without such an effort, there would be no way for Ortiz to exercise his rights. The effect was identical to the informed consent warnings never being read to Ortiz at all or, at best, only partially

being read to him which was insufficient in *Rhodes*. Essentially, the officer decided not to use even a minimal effort to allow Ortiz the opportunity to exercise his rights, which was deemed violative in *Ferguson*. This, alone, should be enough to establish that Ortiz was denied his statutory rights under our implied consent law.

However, I find additional support for an expansive reading of the word "inform" in *State v. Marquez*, 202 N.J. 485, 998 A.2d 421 (2010), which is very persuasive, informative and on-point. The Court in *Marquez* was faced with reviewing a conviction for refusal under the following facts:

> [T]he police arrested defendant German Marquez for drunk driving. Defendant spoke no English, and the police had no reason to believe that he did. Yet in a good faith, but surreal, effort to inform defendant of the consequences of refusing to submit to a breath test, a police officer read aloud a detailed, eleven-paragraph, standard statement—all in English. When defendant confirmed in Spanish that he did not understand, the bizarre encounter continued as the officer read yet another two paragraphs in English to defendant.
>
> The police later candidly acknowledged that defendant did not understand what was read to him. Defendant was nonetheless convicted of refusing to submit to a breath test both in municipal court and on de novo review at the trial court, and his conviction was affirmed by the Appellate Division.

Id. at 489-90, 998 A.2d at 423.

New Jersey's implied consent statute, N.J. Stat. Ann. §39:4-50.2(e) (West 2008), requires officers to "inform" defendants of the consequences of refusing to submit to a chemical breath test by reading a standard statement to the person under arrest. *Marquez*, 202 N.J. at 506, 998 A.2d at 434.

In interpreting the word, "inform" the Court came to the opposite conclusion of the majority here, starting with a very similar dictionary definition:

> To determine what that means in the context of a driver who does not speak or understand English, we again begin with the plain language of the statute. "To inform" means "to communicate knowledge to" and "make acquainted." *Webster's Third New International Dictionary* 1160 (3d ed. 1993). "Inform implies the imparting of knowledge, especially of facts or events necessary to the understanding of a pertinent matter." *Ibid.*
>
> By its own terms, therefore, the statute's obligation to "inform" calls for more than a rote recitation of English words to a non-English speaker. Knowledge cannot be imparted in that way. Such a practice would permit Kafkaesque encounters in which police read aloud a blizzard of words that everyone realizes is incapable of being understood because of a language barrier. That approach would also justify reading aloud the standard statement to a hearing-impaired driver who cannot read lips. We do not believe that the Legislature intended those absurd results. Rather, its directive that officers "inform," in the context of the implied consent and refusal statutes, means that they must convey information in a language the person speaks or understands.

Id. at 506-07, 998 A.2d at 434.

> In essence, reading the standard statement to motorists in a language they do not speak is akin to not reading the statement at all. The latter scenario renders a conviction defective. It makes no sense that English speakers will be acquitted if incomplete warnings are read to them in English, *see ibid.*, yet foreign-language speakers can be punished on the basis of empty warnings that fail to inform them. Such an approach is not faithful to the text of section 50.2(e).

Id. at 508, 998 A.2d at 435 (citation omitted). Ultimately, the Court held as follows: "[W]e find that to 'inform,' within the meaning of the implied consent and refusal statutes, is to convey information in a language the person speaks or understands." *Id.* at 509, 998 A.2d at 436. When discussing the practical implications of its ruling, the Court further explained:

> Obviously, reading the standard statement in English to motorists who speak English will suffice. If people cannot hear or do not speak or understand English, however, some other effort must be made to "inform" them "of the consequences of refusing to submit." *N.J.S.A.* 39:4-50.2(e). Providing a written document to hearing-impaired individuals in a language they understand will ordinarily suffice. Addressing non-English speakers, though, is more complicated.

Id. at 510, 998 A.2d at 436. After discussing the myriad languages spoken in New Jersey and the need to collect breath samples quickly, the Court determined it was more appropriate for the executive branch to remedy the situation, noting that its attorney general had already arranged for certified translations in the nine foreign languages in which its written driver's tests were administered and declined to

require interpreters to read the standard statement in a particular language. *Id.* at 510-13, 998 A.2d at 436-38. In summation, the Court stated:

> It is no defense to a refusal charge for drivers to claim that they were too drunk to understand the standard statement. In other words, it is not necessary for the State to prove that a driver actually understood the warnings on a subjective level. If properly informed in a language they speak or understand while sober, drivers can be convicted under the implied consent and refusal statutes. Voluntary, excessive drinking cannot and does not void the statutes. Indeed, that type of voluntary behavior is fundamentally distinct from a person's utter lack of ability to understand a foreign language.
>
> To that end, warnings given in English will presumably be competent. Police, though, may choose to ask if a suspect speaks English.
>
> Whether there is sufficient evidence to sustain a conviction will depend on the facts of a particular case. Once again, the State is required to prove the four elements of refusal beyond a reasonable doubt. Thus, if a person established that she spoke only Italian, and was not informed of the consequences of refusal in that language, she could not be convicted under the refusal statute. Nonetheless, she could be convicted of the independent offense of DWI based on the observations of the officer and any other relevant evidence—as occurred in this case.
>
> Defendants who claim that they do not speak or understand English must bear the burden of production and persuasion on that issue. That information is peculiarly within the possession of the defendant, not the State. In addition, this approach will help separate feigned claims from real ones.

Id. at 513-14, 998 A.2d at 438-39 (citations omitted).

Marquez provides a common sense interpretation of what "inform" means in the context of implied consent laws. We would do well to adopt this interpretation.

The majority opinion confuses the issue of what "informed" means by considering informed consent in the medical context. This analysis is fraught with peril as "informed consent" in the medical context involves civil law and torts and a "reasonable person" standard has no place in criminal law.[14]

More relevant is the majority's discussion of "informed" pertaining to a quotation in *Miranda v. Arizona*, 384 U.S. 436, 467-68, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966), which explains that a person in custody subject to interrogation "must first be informed in clear and unequivocal terms that he has the right to remain silent." The majority notes that "[p]olice officers traditionally read *Miranda* rights to individuals." However, the majority fails to take the next step in examining how *Miranda* rights are conveyed to people who do not speak English.

In *Delacruz v. Commonwealth*, 324 S.W.3d 418, 420 (Ky.App. 2010), our Court determined that a cooperative Spanish speaking defendant who spoke at least some English and who was read his *Miranda* rights in English and communicated in English that he did not understand was entitled to have his

[14] If looking far afield, I can easily point to other examples of "informed consent" which show that for someone to be informed a matter must be explained rather than just read. *See* KRS 199.011(17)(h); Kentucky Rules of Professional Conduct, Supreme Court Rule 3.130(1.0)(e).

statement suppressed. The majority explained that "[a]bsent a showing by the Commonwealth by a preponderance of the evidence that Delacruz understood all of his *Miranda* rights, including his rights with respect to counsel, any waiver of rights by Delacruz was not knowingly and intelligently made, and should have been suppressed." *Id.* Clearly then, reading *Miranda* rights in English is not sufficient to inform everyone.

I have no difficulty in concluding that the district court was correct in its assessment that Ortiz was not sufficiently informed by being read warnings in English given the court's finding that he did not understand English. While Ortiz's verbalized consent for a BAC test may have satisfied the Fourth Amendment, our implied consent law requires more than simply voluntary consent.[15] It requires that specific information be conveyed to DUI suspects in a way that will allow them to be informed of and exercise those rights. There is nothing knowing and voluntary about consenting to a test that can be used to support a conviction, without understanding what the test will be used for, that there is a right to refuse and what other rights are provided. The key to being able to exercise such rights lies in being adequately informed in a way that the suspect can understand.

[15] I agree with the sentiment that, "it goes without saying that a person 'consenting' to something must know what she/he is consenting *to*." *Cook v. Commonwealth*, 826 S.W.2d 329, 333 (Ky. 1992) (Combs, J., dissenting)

Given an appropriate interpretation of what the Fourth Amendment and our implied consent laws require, the district court acted appropriately in suppressing the BAC test after determining that Ortiz was not sufficiently informed and the police officer was aware of that fact. Under *Commonwealth v. Bedway*, 466 S.W.3d 468, 477 (Ky. 2015), suppression is appropriate for a violation of the implied consent warnings "if the police deliberately disregard [a] mandate [of the statute] . . . or the defendant is prejudiced as a result of that deliberate disregard, *i.e.* the defendant might have refused the testing and thereby received a lesser sentence, evidence seized thereafter may be suppressed." We are bound by the district court's factual finding that the officer knew that Ortiz did not understand the warnings and made no attempt to communicate the warnings in a method in which Ortiz would understand. I agree with the district court that this was a deliberate disregard of what Ortiz was entitled to receive.

As the Commonwealth admits, Ortiz would suffer worse consequences if convicted as a result of his blood being taken than if he refused testing. As Ortiz's blood test revealed a BAC of .233, this constituted an aggravated DUI with increased mandatory jail time, KRS 189A.010(5)(a), (11)(d), while as a first-time offender if he had refused testing, he would not have any additional mandatory jail time, KRS 189A.010(5)(a), KRS 189A.105(2)(a)1.

Additionally, as Ortiz did not have a license, he had no license to be suspended for refusing the test.

The district court found prejudice in that if Ortiz had been properly informed that he might have contacted an attorney and been advised to refuse because it was his first DUI and then the search might not have occurred or even if it did, he might have secured his own testing which might have been more favorable. Under these circumstances, suppression was appropriate.

Police have many ways to collect evidence in DUI cases. If there is probable cause for an arrest, a breathalyzer test can be required. If a blood test is desired, normally reading the implied consent warnings in English will be sufficient to allow for actual consent which satisfies both the Fourth Amendment and the statutory warnings required by our implied consent law. If faced with a person who speaks a different language or is deaf, other means should be used to inform the suspect of his or her statutory rights. If consent is not obtained, either because a suspect has not been sufficiently informed or refuses, in appropriate cases a search warrant may be secured.[16]

[16] A search warrant may not be available in Kentucky to require a blood draw if a suspect refuses to consent in an ordinary drunk driving case. In *Commonwealth v. Duncan*, 483 S.W.3d 353, 359 (Ky. 2015), the Court noted that *McNeely* held that there was no automatic exigency exception for the collection of a suspect's blood sample because alcohol was dissipating and a warrant was required, but expressed concern that a warrant might not be available in the ordinary DUI case based on the interpretation of KRS 189A.105(2)(b) given in *Combs v. Commonwealth*, 965 S.W.2d 161 (Ky. 1998). The *Combs* decision relied not simply upon the language contained in KRS 189A.105(2)(b) which still survives to this day, but on the now defunct language of the

Finally, I believe it was entirely proper for the circuit court, in dicta, to take judicial notice of the fact that technology exists which can translate English into other languages. "[C]ourts may take judicial notice of facts beyond the scope of reasonable dispute which either are of common knowledge within the territorial limits of the court's jurisdiction, or are susceptible to immediate and accurate determination by resort to readily accessible and indisputable sources[.]" *Pattie A. Clay Infirmary Ass'n v. First Presbyterian Church of Richmond*, 551 S.W.2d 572, 574 (Ky. 1977).

Thus, it was entirely appropriate in the 1980's for a court to "take judicial notice, based on modern human experience, that the technology exists for producing a copy of a movie film on disc, of a phonograph record on tape, and of a book on microfiche." *Comptroller of the Treasury v. Equitable Tr. Co.*, 296 Md. 459, 476, 464 A.2d 248, 257 (1983). In our era, translation programs and apps are similarly well known current technology.

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original KRS 189A.105(1) which provided that "no person shall be compelled to submit to any test or tests, as specified in KRS 189A.103." *Combs*, 965 S.W.2d at 164. *See* 1991 Kentucky Acts Ch. 15 § 7(1) (H.B. 11) (providing original language of KRS 189A.103). It interpreted KRS 189A.105(2)(b) as providing an exception to the "explicit and clear prohibition" contained in KRS 189A.103. *Combs*, 965 S.W.2d at 164. It does not appear that this issue has been revisited since the change in the statutory language. I also note that it could be problematic to permit blood collection based on exigency if a warrant could not be obtained per the statute if there was no exigency.

The majority opinion spends some time in discussing the fact that translation programs and apps may not be entirely accurate in the translations they provide. The circuit court, in discussing these programs and apps, did not take judicial notice that they provided perfect translations. It simply noted that the officer who did not speak Spanish and apparently did not have access to an official translated version of the implied consent warnings, had other possible alternatives to try to "inform" Ortiz rather than having to rely exclusively on reading the warnings to him in English. Whether or not these programs and apps would have provided a sufficient translation to inform a defendant is a question that is not before us and cannot be answered categorically.

Our implied consent law provides DUI suspects with additional rights beyond what is required under the Fourth Amendment before their blood can be seized. Being properly "informed" is an important right. With some foresight, the vast majority of people driving within our Commonwealth can be properly informed should they be suspected of DUI and blood be requested of them, so that a proper consent may be obtained. A variety of means can be used to inform suspects of their rights and technology can aid in this endeavor. *See Rivera-Reyes v. Commonwealth*, 2005-SC-000488-MR, 2006 WL 2986495, *6-7 (Ky. Oct. 19, 2006) (unpublished) (determining that a Spanish version of *Miranda* form which varied from the English form but still adequately informed the suspect of his rights,

was sufficient). Because Ortiz was not properly informed, he could not knowingly and voluntarily consent to the blood draw and there was no other basis on which it could be justified, the majority should have upheld the district court's suppression of these results and affirmed the circuit court's denial of the writ of prohibition.

While I agree that suppression was appropriate, this does not mean that a criminal prosecution for DUI cannot proceed against Ortiz. As the district court noted in its order granting the motion to suppress, there was plenty of evidence to support the stop and the subsequent DUI investigation. Ultimately there was probable cause to effectuate a DUI arrest. The prosecution can properly proceed against Ortiz based on the officer's testimony regarding his personal observations, including Ortiz failing the field sobriety tests, and the video of the stop. There is more than enough evidence to allow a jury to consider the DUI charge pursuant to KRS 189A.010(1)(b) which provides that "[a] person shall not operate or be in physical control of a motor vehicle anywhere in this state . . . [w]hile under the influence of alcohol[.]"[17] Accordingly, I dissent.

[17] The lack of a BAC changes which section of the statute must be satisfied and eliminates an aggravator, but this has little substantive effect. Having the BAC result would have allowed a conviction pursuant to KRS 189A.010(1)(a) for having a BAC of .08 or above, with the aggravator in KRS 189A.010(11)(d) of having a BAC above 0.15. As this was Ortiz's first offense, this aggravator would only change his mandatory minimum jail term if convicted from being 48 hours to four days. KRS 189A.010(5)(a).

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