

2
3 IN THE SUPREME COURT OF THE STATE OF OREGON

4
5
6
7 STATE OF OREGON,

8 Respondent on Review,

9 v.

10 JOSE L. NUNEZ CABANILLA,
11 aka Jose L. Cabanilla Nunez,

12 Petitioner on Review.

13
14 (CC 08071452C; CA A141868; SC S059289)

15
16 En Banc

17
18 On review from the Court of Appeals.*

19
20 Argued and submitted November 10, 2011.

21
22 Zachary Lovett Mazer, Deputy Public Defender, Office of Public Defense
23 Services, Salem, argued the cause for petitioner on review. With him on the brief was
24 Peter Gartlan, Chief Defender.

25
26 Pamela J. Walsh, Assistant Attorney General, Salem, argued the cause for
27 respondent on review. With her on the brief were John R. Kroger, Attorney General, and
28 Mary H. Williams, Solicitor General.

29
30 Kevin Diaz, ACLU Foundation of Oregon, Inc., Portland, filed a brief on behalf of
31 *amicus curiae* ACLU Foundation of Oregon, Inc.

32
33 DE MUNIZ, C. J.

34
35 The decision of the Court of Appeals and the judgment of the circuit court are
36 affirmed.

37
38 *Appeal from Malheur County Circuit Court, J. Burdette Pratt, Judge. 241 Or App
39 351, 250 P3d 38 (2011).

1 DE MUNIZ, C. J.

2 Defendant in this criminal case is a native Spanish speaker whose
3 command of the English language is weak. A witness observed defendant's vehicle leave
4 the road at a high rate of speed, roll over, and come to rest in an onion field. The police
5 officer responding to the event arrested defendant for driving under the influence of
6 intoxicants. The issue presented in the case is whether, for purposes of the implied
7 consent laws, the police officer "informed" defendant of the consequences of refusing to
8 take a breath test when the officer explained those consequences to defendant in English.
9 The trial court concluded that defendant had been adequately informed and declined to
10 suppress evidence of defendant's refusal to take a breath test. A jury convicted defendant
11 of driving under the influence of intoxicants (DUII), ORS 813.010, and the trial court
12 convicted defendant of refusing to take a breath test, ORS 813.095.¹ The Court of

¹ After defendant committed his crimes, the statutes governing driving under the influence of intoxicants, including some of the implied consent statutes at issue here, were amended in various respects. Those amendments do not affect our analysis in any way. For convenience, therefore, in this opinion, we refer to and quote the version of the statutes that are in effect today.

ORS 813.010 provides, in part:

"(1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

"(a) Has 0.08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150;

"(b) Is under the influence of intoxicating liquor, a controlled substance or an inhalant; or

1 Appeals affirmed defendant's convictions without opinion. We allowed defendant's
2 petition for review to consider whether the state was required to prove that defendant
3 understood the statutory advice of the rights and consequences of a driver's refusal to take
4 a breath test before his refusal to take the test could be admitted in evidence against him
5 in his criminal cases. We now hold that evidence of a DUI defendant's refusal to take a
6 breath test is admissible against that defendant even if the state does not establish that the
7 defendant understood the information given about the rights and consequences of
8 refusing to take the breath test.

9 The following facts are not in dispute. On June 28, 2008, defendant and a
10 coworker drank beer together at the end of the workday, and then defendant left the
11 workplace, alone, in his vehicle. Sometime later, a witness saw defendant's car make a
12 turn while at high speed. The witness saw the car hit the side of the road, fly into the air,
13 travel a few hundred feet, roll, and then land in an onion field. The witness, who lived
14 near the scene of the accident, called the sheriff's office and then continued to watch the
15 vehicle until help arrived. She did not observe anyone leave the vehicle. Two officers,
16 Leavitt and Romans, arrived on the scene and found the vehicle in the field. The vehicle
17 was registered to defendant and his wife. Defendant was inside the vehicle, in the
18 passenger seat, wearing a seat belt. Defendant was bleeding from his nose and there was

"(c) Is under the influence of any combination of intoxicating liquor,
an inhalant and a controlled substance."

The text of ORS 813.095 is set out later in this opinion.

1 blood on both the steering wheel and the passenger door of the vehicle. Defendant
2 smelled of alcohol and had bloodshot, glassy eyes, with droopy eyelids.

3 Defendant told Romans that someone else had been driving. He identified
4 the driver as "Juan Martinez," and indicated that the driver had run from the vehicle in the
5 direction of town. The officers looked in the muddy field for footprints but did not find
6 any. Romans did not believe that anyone else had been driving the vehicle.

7 Romans noticed a language barrier in his communication with defendant.
8 Romans spoke a few words of Spanish and used those words and gestures when
9 conveying information and requests to defendant; similarly, defendant responded with
10 gestures and a few words of English. For example, Romans asked defendant to perform
11 various field sobriety tests by asking him in English, using a few Spanish words, and
12 occasionally demonstrating the test. Defendant complied with the request to perform
13 field sobriety tests, although he did not always understand, before Romans demonstrated,
14 exactly what Romans wanted him to do. Defendant performed poorly on the field
15 sobriety tests. Romans concluded that defendant was impaired and arrested him.

16 Romans transported defendant to the police station and took him into a
17 room with an Intoxilyzer machine. Romans read to defendant the Department of Motor
18 Vehicles implied consent form "word for word in English" and then asked defendant
19 whether he would take the breath test.² Defendant responded by asking Romans what he

² As we will explain in more detail below, the implied consent form is a list of the legal consequences of refusing to take a breath test, required by ORS 813.100, and

1 would do. Romans replied that it was defendant's choice whether or not to take the test.
2 At that point, Romans believed that defendant understood that he was being asked to
3 submit to a breath test. According to Romans, defendant then "stated in substance he did
4 not want to take the test." At trial, Romans could not remember whether defendant
5 responded verbally or simply shook his head no in response to the request.

6 Defendant was charged with DUII and refusing to take a breath test.³

7 Before his trial on those charges, defendant moved to suppress the evidence of his refusal
8 to take the breath test, arguing that, because he could not understand English, he was not
9 "informed" of the consequences of refusing the breath test under ORS 813.130, and,
10 therefore, evidence of his refusal was not admissible against him at his trial.⁴ The trial
11 court conducted a hearing on the matter, but ultimately concluded that it was bound by
12 the Court of Appeals decision in *State v. Nguyen*, 107 Or App 716, 813 P2d 569 (1991).
13 In that case, the Court of Appeals held that, despite a language barrier (the defendant
14 spoke only Vietnamese), the statute was satisfied by the sheriff reading the rights and
15 consequences in English aloud. According to that court, the statute requiring the officer

substantially as set out in ORS 813.130. It is commonly referred to (and is referred to in places in the statutes) as the "rights and consequences."

³ Defendant also was charged with one count of careless driving. *See* ORS 811.135 (defining offense). That charge is not at issue in this case. The careless driving charge and the charge of refusing to take a breath test were tried to the court. The DUII charge was tried to a jury.

⁴ We set out the text of ORS 813.130 later in this opinion.

1 to inform the arrestee of the rights and consequences of refusing a blood alcohol test did
2 not require that the arrestee actually understand that information. *Id.* at 720. Based on
3 *Nguyen*, the trial court denied defendant's motion to suppress.⁵ As previously noted,
4 defendant was convicted on all charges,⁶ and the Court of Appeals affirmed without
5 opinion.

6 On review, defendant argues that Romans violated the implied consent
7 statutes by reading the rights and consequences to him in a language that Romans knew
8 he would not understand, and that that statutory violation required suppression of his
9 refusal to take a breath test in his prosecution for DUII and refusing to take a breath test.

10 A brief overview of the relevant statutes provides a framework for our
11 analysis.

⁵ The trial court found that defendant understood that he was being asked to take a breath test and that defendant understood some minimal English, but stated,

"I'm sure not able to make a finding that he knew and completely understood all the rights and consequences, and that's what bothers me here, but the *Nguyen* case doesn't require that."

In addition, in the context of ruling on the charge of refusing to take a breath test, the trial court again concluded that *Nguyen* required admission of evidence of defendant's refusal, notwithstanding its finding

"that [defendant's] English abilities were very limited. The officer was aware that they were very limited, that the officer certainly had to be aware that his ability to understand the implied consent rights were -- in English were slim to none."

⁶ The jury convicted defendant on the DUII charge. The trial court found defendant guilty of careless driving and of the charge of refusing to take a breath test.

1 Under ORS 813.100(1), anyone driving on public roads in Oregon has
2 impliedly consented to a chemical test of his or her breath for purposes of determining
3 the person's blood alcohol content if the person has been arrested for DUII.⁷ ORS
4 813.100(1) provides:

5 "Any person who operates a motor vehicle upon premises open to
6 the public or the highways of this state shall be deemed to have given
7 consent, subject to the implied consent law, to a chemical test of the
8 person's breath, or of the person's blood if the person is receiving medical
9 care in a health care facility immediately after a motor vehicle accident, for
10 the purpose of determining the alcoholic content of the person's blood if the
11 person is arrested for driving a motor vehicle while under the influence of
12 intoxicants in violation of ORS 813.010 or of a municipal ordinance. A test
13 shall be administered upon the request of a police officer having reasonable
14 grounds to believe the person arrested to have been driving while under the
15 influence of intoxicants in violation of ORS 813.010 or of a municipal
16 ordinance. Before the test is administered the person requested to take the
17 test shall be informed of consequences and rights as described under ORS
18 813.130."

19 That means that a driver may not legally refuse to take a breath test. In fact, refusal itself
20 is a violation. ORS 813.095 provides, in part:

21 "(1) A person commits the offense of refusal to take a test for
22 intoxicants if the person refuses to:

23 "(a) Take a breath test when requested to do so in accordance with
24 the provisions of ORS 813.100[.]"

25 A person may, of course, *physically* refuse to take the test, and the

⁷ In addition, under ORS 813.100(1), Oregon drivers have given implied consent to a chemical test of the driver's blood if the driver is receiving medical care after an accident. Moreover, drivers have given implied consent to the testing of their urine in certain circumstances, ORS 813.131, and to the performance of field sobriety tests, ORS 813.135.

1 legislature has chosen to forbid the use of physical force to compel drivers to submit to
2 the test. *See* ORS 813.100(2) ("No chemical test of the person's breath or blood shall be
3 given * * * if the person refuses the request of a police officer to submit to the chemical
4 test after the person has been informed of consequences and rights as described under
5 ORS 813.130.").⁸ At the same time, however, the implied consent statutes mandate that a
6 person who has refused to take the test must suffer certain consequences. Among other
7 things, when a person refuses to take a breath test, the person's driving privileges are
8 subject to suspension, ORS 813.100(3); the length of the suspension is enhanced, ORS
9 813.420; the arresting officer must immediately take custody of the person's driver
10 license, ORS 813.100(3)(a); evidence of the person's refusal may be offered against the
11 person, ORS 813.310; the person is not eligible for a hardship driving permit for at least
12 90 days, ORS 813.520(1); and the person is subject to fines, ORS 813.095.

13 The implied consent statutes also require that the driver be informed of
14 those consequences. ORS 813.100(1) provides that, "[b]efore the test is administered the
15 person requested to take the test shall be informed of consequences and rights as
16 described under ORS 813.130." ORS 813.130, in turn, provides, in relevant part:

17 "This section establishes the requirements for information about
18 rights and consequences for purposes of ORS 813.100 and 813.410. The

⁸ When Oregon's implied consent statutes were adopted, the federal constitution permitted physically compelling a driver to submit to a blood alcohol test. As the United States Supreme Court stated in *South Dakota v. Neville*, 459 US 553, 563, 103 S Ct 916, 74 L Ed 2d 748 (1983), a state could "legitimately compel the suspect, against his will, to accede to the [blood alcohol] test."

1 following apply to the information about rights and consequences:

2 "(1) The information about rights and consequences shall be
3 substantially in the form prepared by the Department of Transportation.
4 The department may establish any form it determines appropriate and
5 convenient.

6 "(2) The information about rights and consequences shall be
7 substantially as follows:

8 "(a) Driving under the influence of intoxicants is a crime in Oregon,
9 and the person is subject to criminal penalties if a test under ORS 813.100
10 shows that the person is under the influence of intoxicants. If the person
11 refuses a test or fails, evidence of the refusal or failure may also be offered
12 against the person.

13 "(b) The person will fail a test under ORS 813.100 for purposes of
14 criminal penalties if the test discloses a blood alcohol content of 0.08
15 percent or more by weight. The person will fail a test for purposes of the
16 Motorist Implied Consent Law if the test discloses a blood alcohol content
17 of:

18 " * * * * [setting out various percentages for various conditions]

19 "(c) If the person refuses or fails a test under ORS 813.100, the
20 person's driving privileges will be suspended. The outcome of a criminal
21 charge for driving under the influence of intoxicants will not affect the
22 suspension. The suspension will be substantially longer if the person
23 refuses a test.

24 "(d) If the person refuses a test or fails a breath test under ORS
25 813.100 and has an Oregon driver license or permit, the license or permit
26 will be taken immediately and, unless the person does not currently have
27 full valid driving privileges, a temporary driving permit will be issued to
28 the person.

29 "(e) If the person refuses a test under ORS 813.100, the person is not
30 eligible for a hardship permit for at least 90 days, and possibly for three
31 years, depending on the following factors set forth in ORS 813.430:

32 " * * * * [setting out factors]

33 "(f) If the person refuses a breath test under ORS 813.100, or refuses
34 a urine test under ORS 813.131 and 813.132, the person is subject to a fine
35 of at least \$500 and not more than \$1,000.

1 "(g) After taking a test under ORS 813.100, the person will have a
2 reasonable opportunity, upon request, for an additional chemical test for
3 blood alcohol content to be performed at the person's own expense by a
4 qualified individual of the person's choosing.

5 "(h) The person has a right to a hearing to challenge the validity of
6 the suspension before the suspension becomes effective. The person must
7 make a written request to the department for such a hearing. If the person
8 wins at the hearing, the person's driving privileges will not be suspended.
9 If the person loses at the hearing, the suspension will remain in effect
10 during any court review of the hearing.

11 "(i) If the person is issued a temporary driving permit under ORS
12 813.100, the information provided to the person shall include the number of
13 hours before the driving permit will be effective and the number of days the
14 permit will be effective.

15 "(j) The information provided to the person shall include the number
16 of days within which a person must request a hearing under ORS 813.410.

17 "(k) The information provided to the person shall include the number
18 of days within which a hearing under ORS 813.410 will be held.

19 "(l) The person may possibly qualify for a hardship permit in 30
20 days if the person fails a test, depending on the person's driving record."

21 In this case, Romans read the rights and consequences of refusing a breath
22 test to defendant at the police station after he arrested defendant.⁹ The issue is whether
23 the obligation stated in ORS 813.100(1) that "the person requested to take the test shall
24 be informed of consequences and rights as described under ORS 813.130" also required
25 the state to prove that defendant -- a person with limited English-speaking skills --

⁹ Romans read from a form prepared by the Department of Motor Vehicles. Defendant has not argued that the form Romans read to him did not contain the information that ORS 813.130 required.

1 understood the oral notice of consequence and rights.¹⁰

2 Defendant argues that the plain words of ORS 813.100 suggest that a
3 defendant must be capable of understanding the rights and consequences before the
4 consequences of a refusal can be used against a defendant at trial. ORS 813.100(1)
5 provides that, before a police officer administers a breath test, the driver "shall be
6 *informed* of consequences and rights as described under ORS 813.130." (Emphasis
7 added.) Defendant argues that the word "inform" means to "to communicate knowledge
8 to : make acquainted : TELL, ADVISE, ENLIGHTEN," *Webster's Third New Int'l*
9 *Dictionary* 1160 (unabridged ed 2002), something that does not happen when a police
10 officer delivers the rights and consequences in a language that the defendant does not
11 understand. And, according to defendant, when a defendant has not been "informed"
12 under ORS 813.100, his or her refusal to take the breath test is not admissible in a
13 subsequent criminal action, because ORS 813.310 provides that only evidence of a
14 person's refusal "to submit to a chemical test *under ORS 813.100*" is admissible in such a
15 proceeding:

16 "If a person refuses to submit to a chemical test under ORS 813.100 * * *,
17 evidence of the person's refusal is admissible in any civil or criminal action,
18 suit or proceeding arising out of acts alleged to have been committed while

¹⁰ *Amicus curiae* ACLU Foundation of Oregon, Inc., argues that admission of defendant's refusal to take the breath test violated his federal right to due process under the Fourteenth Amendment to the United States Constitution and violated the Privileges and Immunities Clause of the Oregon Constitution. Or Const, Art I, § 20. Defendant himself never made those or any other constitutional arguments in the trial court or on appeal in this case. They are not preserved and we do not address them.

1 the person was driving a motor vehicle on premises open to the public or
2 the highways while under the influence of intoxicants."

3 Defendant contends that that conclusion is bolstered by the implication in ORS 813.320
4 that a violation of the implied consent law is grounds to exclude otherwise competent
5 evidence in a criminal action for a violation of ORS 813.010 (driving under the influence
6 of intoxicants). ORS 813.320 provides, in part:

7 "The provisions of the implied consent law, except ORS 813.300 [dealing
8 with use of blood alcohol percentages as evidence], shall not be construed
9 by any court to limit the introduction of otherwise competent, relevant
10 evidence in any civil action, suit or proceedings or in any criminal action
11 other than a violation of ORS 813.010 * * *."

12 Defendant may be correct that the common understanding and dictionary
13 definition of the word "inform" is, generally, to impart information. However, it is not
14 necessary for us to resolve the parties' dispute about the meaning of that term, because
15 even if the term means what defendant contends, a failure to "inform" a driver in that
16 sense does not result in the exclusion of evidence of his refusal to take the breath test.

17 Defendant argues that the primary objective of the rights and consequences
18 advice requirement is to coerce an arrestee into taking the breath test, *State v. Trenary*,
19 316 Or 172, 177-78, 850 P2d 356 (1993) (so stating in context of field sobriety tests), and
20 that the secondary objective is to render a refusal admissible in a DUII trial as evidence
21 of the defendant's guilty mind. *See State v. Fish*, 321 Or 48, 56, 893 P2d 1023 (1995)
22 (state uses evidence of refusal to prove person's belief that results would be
23 incriminating). He contends that neither objective is furthered when the rights and
24 consequences are not provided to the arrestee in a way that the arrestee is capable of

1 understanding. That is, the rights and consequences lose their coercive force if a driver
2 suspected of DUII does not understand them. Likewise, defendant argues, the
3 implication that the driver refused because the driver was cognizant of his or her own
4 guilt is undermined.

5 We agree that informing a driver of the rights and consequences of refusing
6 to take the breath test in a language that the driver does not understand does not further
7 the legislative goal of coercing that driver to take the test. However, it does not change
8 the probative value of the driver's refusal as evidence of his or her guilt. As long as it is
9 clear that the driver knew that he or she was being asked to take a breath test to measure
10 his or her blood alcohol level -- and there is no question that defendant understood that
11 much here -- it is reasonable to infer from the *fact* of the driver's refusal to take that test
12 that the driver believed that he or she would fail it. As this court stated in *Fish*,

13 "In offering an individual's refusal * * * into evidence, the state wants the
14 jury to infer from the fact of an individual's refusal that he or she is saying,
15 'I refuse to perform [the] * * * tests because I believe I will fail them.'
16 Thus, the fact that a person refused or failed to perform * * * tests
17 inferentially may communicate the person's belief -- that the person refused
18 to perform the tests because he or she believed that the performance of the
19 tests would be as incriminating."

20 321 Or at 56. That inference is available whether or not the defendant based his or her
21 decision to refuse on a full understanding of all the consequences of a refusal.

22 More importantly, under the law, a driver *already has consented to the test*.
23 The driver cannot legally refuse. As this court has stated, the purpose of the reference to
24 "refusal" in the implied consent statutes "is not to reinstate a driver's right to choice, let
25 alone a voluntary and informed choice, but rather to nonforcibly enforce the driver's

1 previous implied consent." *State v. Newton*, 291 Or 788, 793, 636 P2d 393 (1981),
2 *overruled in part on other grounds by State v. Spencer*, 305 Or 59, 750 P2d 147 (1988).
3 Thus, when a driver is asked to take a breath test, his or her only decision is whether to
4 physically refuse. That is, "[t]he very concept of implied consent * * * was intended to
5 eliminate the right of choice and to recognize actual choice *only* in the sense of a
6 forbearance of physical resistance." *Id.* at 798 (emphasis added). The driver may choose
7 to physically refuse, and the state will not force the driver to do what he or she is legally
8 obligated to do. However, because the driver has only the physical ability, but not the
9 legal right, to refuse, the legal validity of the driver's refusal does not depend on whether
10 his or her decision to physically refuse is fully informed or voluntary.

11 As is evident from the foregoing, the overarching purpose of the rights and
12 consequences requirement is to coerce a driver's submission to take the tests; it is not to
13 inform the driver of the specifics of the law. As this court stated in *Spencer*,

14 "The history and development of the implied consent law * * * suggest that
15 the advice to be given an arrestee was intended to provide an additional
16 incentive, short of physical compulsion, to induce submission."

17 305 Or at 71. Thus, whether a driver makes a knowing and voluntary choice to refuse is
18 of little or no consequence. "[T]he [implied consent] statute's references to a driver's
19 'refusal' do not evince a legislative concern that the driver make a voluntary and fully
20 informed decision whether to submit to the test."¹¹ *Id.*

¹¹ Context supports the conclusion that, in enacting the implied consent laws in general, and in particular the nature of the rights and consequences, the legislature was

1 Moreover, as the state points out in its brief to this court, the legislative
2 history of ORS 813.130 suggests that the legislature's concern in enacting that statute was
3 mainly with devising a simple form to serve as a persuasive tool to compel submission to

concerned with the collection of evidence, and not the creation of a consensual choice for an arrested driver. ORS 813.140 provides that a police officer may collect the blood or urine of an unconscious person without that person's consent, and without having first advised that person of the rights and consequences of refusing, under certain circumstances:

"Nothing in ORS 813.100 is intended to preclude the administration of a chemical test described in this section. A police officer may obtain a chemical test of the blood to determine the amount of alcohol in any person's blood or a test of the person's blood or urine, or both, to determine the presence of a controlled substance or an inhalant in the person as provided in the following:

"* * * * *

"(2) * * * [F]rom a person without the person's consent if:

"(a) The police officer has probable cause to believe that the person was driving while under the influence of intoxicants and that evidence of the offense will be found in the person's blood or urine; and

"(b) The person is unconscious or otherwise in a condition rendering the person incapable of expressly consenting to the test or tests requested."

That statute permits the police to use an invasive procedure -- a blood or urine draw -- to collect inculpatory physical evidence when the arrested driver is unconscious or incapacitated. Consent to such testing is implicit, and there is no requirement that the person even be aware of the option to refuse. Obviously, an unconscious person would be incapable of understanding the rights and consequences, and requiring the police to inform the driver of the rights and consequences would serve no coercive purpose. And the legislature dispensed with that requirement entirely in that situation. That suggests that the legislature's main purpose in enacting the implied consent statutes was to ensure that evidence of the driver's blood alcohol content was available for a later prosecution, and not to create an occasion for an uncoerced choice by the driver.

1 the tests. When the implied consent laws originally were enacted, they did not specify
2 the form that the advice of rights and consequences should take. Because the legal
3 consequences flowing from a refusal to take the tests were set out in various different
4 statutes, legislators discussed the need to develop a "simplified procedure" to facilitate
5 enforcing the impaired driving laws that would result in a more streamlined process for
6 providing the rights and consequences. Tape Recording, Senate Judiciary Committee
7 Public Hearing, SB 203, Mar 28, 1985, Tape 69, Side B (statement of Sen James M.
8 Simmons). Providing information about the rights and consequences "as described under
9 ORS 813.130" -- that is, in substantially the form set out in that statute, in English --
10 furthers that legislative goal in most situations encountered by the police, even if not
11 every driver is capable of fully understanding the legal consequences of refusing.¹²

12 It follows that, so long as the arresting officer complied with the
13 requirement to read the driver the rights and consequences substantially as set out in ORS
14 813.130, the officer has informed the driver of those rights and consequences "as
15 described under ORS 813.130." ORS 813.100(1). The officer need not make a separate
16 determination whether the driver understood those rights and consequences.

17 Defendant argues that this court's decision in *Fish* suggests that more is

¹² We recognize that, in this digital age, it may be a simple matter for police departments to have computers programmed with prerecorded translations of the implied consent advice in almost any language police officers might encounter in a given jurisdiction. However, this case is about what the statutes require, and not what this court thinks is advisable or convenient for police departments to do.

1 required. In *Fish*, the court stated that "an officer's advice of consequences complies with
2 ORS 813.135 [driver impliedly consents to field sobriety tests] if it adequately informs
3 the driver of the consequences of refusal so as to bring further pressure on the driver to
4 perform the tests." 321 Or at 53. Defendant contends that that is the test that this court
5 should apply here, and advice of rights and consequences that a driver cannot understand
6 because of a language barrier does not "adequately inform the driver of the consequences
7 of refusal."

8 *Fish*, however, dealt with field sobriety tests. The statutes governing field
9 sobriety tests differ in a crucial respect from the statutes governing implied consent to
10 breath tests. Specifically, the field sobriety test implied consent statutes do not mandate
11 that any particular wording be used to inform drivers of the consequences of refusing to
12 submit. ORS 813.135 provides that a driver is deemed to have consented to submit to
13 field sobriety tests, but

14 "[b]efore the tests are administered, the person requested to take the tests
15 shall be informed of the consequences of refusing to take or failing to
16 submit to the tests under ORS 813.136."

17 ORS 813.136, in turn, does not require any particular advice concerning the
18 consequences of refusal. Rather, it simply states:

19 "If a person refuses or fails to submit to field sobriety tests as required by
20 ORS 813.135, evidence of the person's refusal or failure to submit is
21 admissible in any criminal or civil action or proceeding arising out of
22 allegations that the person was driving while under the influence of
23 intoxicants."

24 In *Fish*, the police officer informed the driver that, if he refused to submit
25 to field sobriety tests, that refusal could be used against him "in court." As is evident

1 from the material quoted above, ORS 813.136 provides that a refusal may be admissible
2 in "any criminal or civil action or proceeding arising out of allegations that the person
3 was driving while under the influence of intoxicants." Based on that difference, the
4 defendant moved to suppress evidence of his refusal. After noting that the main purpose
5 of the requirement that drivers be advised of the consequences of refusing to submit to
6 field sobriety tests is to bring pressure on drivers to submit to those tests, and that the
7 reason that the legislature enacted ORS 813.135 and ORS 813.136 was to compel drivers
8 to take those tests, this court held:

9 "an officer's advice of consequences complies with ORS 813.135 if it
10 adequately informs the driver of the consequences of refusal so as to bring
11 further pressure on the driver to perform the tests.

12 "In this case, the advice of consequences given was no less effective
13 in bringing pressure upon defendant than if the deputy had used the exact
14 words of the statute. Under the facts of this case, we conclude that the
15 warning given by the deputy sufficiently informed defendant of the
16 consequences of refusal so as to comply with the requirements of ORS
17 813.135."

18 *Fish*, 321 Or at 53.

19 In contrast, ORS 813.100 requires drivers to be informed of the
20 consequences of refusal "as described under ORS 813.130," and ORS 813.130, in turn,
21 requires that advice to be "substantially" in the words set out in the statute. Thus, when a
22 police officer gives the rights and consequences in the words mandated by ORS 813.130,
23 the officer "informs" the driver "as described under ORS 813.130." That is what
24 happened in this case. And, as we have stated, a police officer need not make a separate
25 determination whether the arrested person fully understands the rights and consequences,

1 or whether the officer has brought further pressure to bear on the driver to submit to the
2 tests, for the driver's refusal to be admissible in a future legal proceeding.

3 Defendant insists that this court's decision in *Trenary* is to the contrary,
4 insofar as the court suggested there that a person has the right to suppression of his or her
5 refusal to submit to tests if he or she was not given information concerning the
6 consequences of refusing. Defendant reads too much into that case. In *Trenary*, the
7 defendant submitted to field sobriety tests without having first been warned of the
8 consequences of refusal, and he later moved to suppress the results of those tests. This
9 court concluded that, like the implied consent statutes dealing with breath tests, ORS
10 813.135 (providing that drivers impliedly consent to field sobriety tests) and ORS
11 813.136 (providing that refusal to take field sobriety tests is admissible at trial) were
12 intended to coerce drivers to submit to field sobriety tests, and that no statute excluded
13 the results of the tests from evidence if an unwarned driver did take the tests.¹³ 316 Or at
14 178. In reaching that conclusion, the court stated:

15 "The only 'right' of a defendant that arguably arose from the
16 enactment of ORS 813.135 and 813.136 is the implied right of a person
17 who has *refused* to submit to the tests to have evidence of his or her refusal
18 suppressed if information concerning the consequences of refusal was not
19 given. The main purpose of the second sentence of ORS 813.135

¹³ The court held that the statutes do not provide for exclusion of an uninformed submission because, in such a case, there is no prejudice to the driver in any legal sense. As the court stated, "[i]n taking the test, the driver is only doing that which he or she has already consented to do." *Trenary*, 316 Or at 178.

1 [providing that the driver 'shall be informed' of the consequences of
2 refusing before field sobriety tests are administered] was not to create a
3 right, but to bring further pressure on suspected intoxicated drivers to take
4 the field sobriety tests. The statute aimed to advise drivers who may be
5 disposed *not* to perform the tests that, if they refused, evidence of the
6 refusal would be admissible, provided that they were warned of the
7 consequences of refusal. The statute is directed at drivers who refuse to
8 take the test, not at drivers who do take the test, consistent with their
9 consent already implied.

10 "The text of ORS 813.135 and 813.136 compels the conclusion that
11 these statutes were enacted for two overriding reasons: First, to provide that
12 operation of a vehicle was a consent to field sobriety tests (thus providing
13 the foundation for admissibility of evidence of a refusal * * *); and, second,
14 to compel drivers to take field sobriety tests. * * *

15 "True, ORS 813.135 and 813.136 contain an implied exclusionary
16 clause. The statutes imply that, if the driver *refuses* the tests and no
17 information concerning the consequences of refusing was given, evidence
18 of refusal is not admissible. That implication follows from the provision
19 that makes evidence of the refusal admissible if the driver is informed of
20 the consequences of refusal."

21 *Id.* at 177-78 (emphasis in original).

22 In this case, as we have held, defendant was provided the rights and
23 consequences as required by ORS 813.130. There is no dispute that Romans read
24 defendant the Department of Motor Vehicles implied consent form, which set out all the
25 rights and consequences included in ORS 813.130. Therefore, the exclusionary clause
26 implied by ORS 813.310 and ORS 813.320 (applicable to evidence of refusal to take a
27 breath test, corresponding to ORS 813.136, dealing with evidence of refusal to submit to
28 field sobriety tests), is not implicated here.

29 The decision of the Court of Appeals and the judgment of the circuit court
30 are affirmed.