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SUPERIOR COURT

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2 2014 DEC -1 PM 1:34

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4 DEPT. OF THE COURT

5 **IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6	COMMONWEALTH OF THE)	TRAFFIC CASE NO. 14-02029
7	NORTHERN MARIANA ISLANDS,)	
8	Plaintiff,)	
9	v.)	ORDER GRANTING DEFENDANT'S
10	HANK JR. PUA ARURANG,)	MOTION TO SUPPRESS
11	Defendant.)	BREATHALYZER EVIDENCE BASED
)	ON VIOLATION OF 9 CMC § 7106

12 **I. INTRODUCTION**

13 The Court held an evidentiary hearing on November 26, 2014 at 9:00 a.m. in Courtroom
14 220A on two motions to suppress, including Defendant's Motion to Suppress Breathalyzer
15 Evidence Based on Violation of 9 CMC § 7106. Defendant Hank Jr. Pua Arurang was present and
16 represented by Assistant Public Defenders Eden Schwartz and Michael Sato. The Commonwealth
17 was represented by Assistant Attorneys General Clayton Graef and Emily Cohen.

18 Defendant filed this motion on November 7, 2014, alleging that but for misinformation
19 provided by Officer Daniel Smith, that Defendant would be in "big trouble" if he refused the breath
20 test, Defendant would have refused such a test, pursuant to 9 CMC § 7106(c). As a result,
21 Defendant argues that suppression of the breath test results is warranted. Defendant cited persuasive
22 case law from other states with implied consent laws where the state statutes have been interpreted
23 to include a right to refuse a breath test free from police coercion. On November 20, 2014, the
24 Commonwealth filed a five sentence opposition to the motion, arguing that because Officer Smith

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1 Officer Smith supplied and read the Department of Public Safety's standard implied consent form
2 to Defendant, the motion to suppress should be denied.

3 Based on the evidence presented at the hearing, the filings, arguments of counsel, and
4 applicable law, the Court grants Defendant's motion to suppress the breath test results. The Court
5 finds that, to have any meaning, the right to be informed of the consequence of refusing a breath
6 test under 9 CMC § 7106(c), is necessarily the right to be accurately informed of that consequence.

7 **II. FINDINGS OF FACT**

8 During the hearing, the Court heard testimony from Officer Daniel Smith and Defendant
9 Arurang. The Court found both witnesses to be credible. There was only one major point of
10 divergence in the accounts told by the two witnesses, and that was whether Officer Smith informed
11 Defendant Arurang that he would be in "big trouble" if he refused the breath test and was later
12 convicted of driving under the influence. On this point, the Court finds Defendant Arurang's
13 testimony to be more credible as he had a clear memory of the event and Officer Smith only
14 remembered that there was some discussion between the two men, but could not recall the specifics
15 about what was said. The Court makes the following findings of fact.

16 On June 28, 2014, after arresting Defendant Arurang and taking him to the Department of
17 Corrections, Officer Smith provided Defendant Arurang with a copy of the Department of Public
18 Safety's "Breathalyzer Report" form. The form states the following:

19 I am advising you that any person who operates a motor vehicle upon a highway in
20 the Northern Mariana Islands is deemed under the law to have given his/her consent
21 to a test of his/her breath sample to determine blood alcohol concentration. The law
22 allows you to withdraw this consent to [sic] refuse to submit to a test. However,
upon your refusal to submit to a test a Superior Court Judge following a court
hearing, will suspend your driver license for six (6) months.

23 Officer Smith also read this statement to Defendant Arurang. After reading the statement,
24 Defendant Arurang and Officer Smith had a conversation about the consequences of submitting to

1 or refusing the breath test. During that conversation, Officer Smith communicated to Defendant
2 Arurang that if he took the breath test and had a blood alcohol content (BAC) of less than .08% he
3 would be escorted home with only a traffic citation. Officer Smith also told Defendant something to
4 the effect that if Defendant Arurang refused the test, but was later convicted of driving under the
5 influence of alcohol, he would be in “big trouble.” Defendant Arurang’s understanding of this
6 warning was that he would face a penalty greater than a six-month drivers license suspension if he
7 refused the breath test. Defendant Arurang wanted to refuse the breath test, but decided to consent
8 based on the information provided to him by Officer Smith.

9 III. DISCUSSION

10 Under Commonwealth statute, a person who operates a motor vehicle within the
11 Commonwealth is deemed to have given consent to a breath test subject to the provisions of 9 CMC
12 § 7106. 9 CMC § 7106(a). A person may refuse to submit to a breath test, but “shall be warned by
13 the police officer requesting the test that a refusal to submit to the test will result in revocation of
14 his or her license to operate a motor vehicle for six months.” 9 CMC § 7106(c). The CNMI
15 Supreme Court has recognized that police coercion inducing consent to a breath test violates 9
16 CMC § 7106 and may result in the suppression of breath test results. *Commonwealth v. Adlaon*, 4
17 NMI 171, 176 (1994).

18 In *Adlaon*, the defendant alleged that a police officer “slapped him into submitting to the
19 [breath] test” and that his car keys were withheld by the police until after he signed a form stating
20 that he had consented to the test. *Id.* at 172. In *Adlaon*, the government appealed the trial court’s
21 decision to dismiss the criminal case due to discovery violations, and the Supreme Court vacated
22 the dismissal and remanded the case to the trial court. *Id.* at 172, 176. Although the topic of whether
23 to suppress the breath test results was not at issue on the appeal, the CNMI Supreme Court
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1 instructed the trial court on remand to determine whether Adlaon’s allegations of coercion had
2 merit, and if so, to consider suppressing the results of the breath test. *Id.* at 176.

3 The CNMI Supreme Court has not considered whether anything short of physical coercion
4 violates 9 CMC § 7106, but this issue has been considered by the CNMI Superior Court and courts
5 in other states with implied consent laws.

6 In *Commonwealth v. Hutian*, the CNMI Superior Court considered whether 9 CMC § 7106
7 was violated when the defendant did not understand the warning mandated in 9 CMC § 7106(c)
8 because he was Chinese and spoke only limited English, and the warning was given only in
9 English. Traffic No. 98-6353 (NMI Super. Ct. Apr. 5, 1999) (Order Denying Defendant’s Motions
10 to Dismiss and to Suppress). The *Hutian* Court found that reading the implied consent form aloud
11 to the defendant in English, despite his inability to understand English, constituted “substantial
12 compliance” with the requirements of the statute. ¹ *Id.* at 5.

13 Defendant Arurang points to decisions in several other United States jurisdictions where
14 misstatements of the consequences of refusing a breath test were found to violate the state’s implied
15 consent law. For example, in *State v. Sells*, the officer told the defendant that he would be
16 “automatically charged and incarcerated” if he refused. 798 S.W.2d 865, 866 (Tex. App. 1990). In
17 *Hall v. State*, a case concerning jury instructions, there was an issue of voluntariness where the
18 defendant alleged that the officer said he would be “automatically convicted of a DUI” if he
19 refused. 649 S.W.2d 627, 628 (Tex. App. 1983). In *State v. Wilson*, the Supreme Court of Hawaii
20 affirmed the trial court’s exclusion of the results of a breathalyzer test where the officer told the
21 driver that his license would be suspended for three months on refusal (where really it could be
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23 ¹ The *Hutian* court also made a finding that the implied consent statute included no requirement of intelligent voluntary
24 consent. *Id.* at 5. However, that finding is in direct contradiction with the CNMI Supreme Court’s concern about
coercion in *Adlaon*. See *Adlaon*, 4 NMI at 176. Thus, this Court follows the position of the CNMI Supreme Court that
there is an element of voluntariness in 9 CMC § 7106 that may be violated by police coercion.

1 suspended for up to 1 year). 987 P.2d 268, 274, 277 (Haw. 1999). And, in *People v. Stone*, the
2 police department's policy that people who consented would get a desk appearance, while people
3 who did not would be incarcerated and have to wait for arraignment, coupled with the defendant's
4 known fear of incarceration, was found to be coercive, and the breathalyzer results were excluded.
5 491 N.Y.S.2d 921, 923-25 (Crim. Ct. 1985).

6 In this case, although Officer Smith read the implied consent form, which includes an
7 accurate statement of the law, to Defendant Arurang, Officer Smith also provided additional
8 information that was inaccurate. Officer Smith told Defendant Arurang that he would be allowed to
9 go home if the results of the breath test showed that Defendant's BAC was within the legal limits,
10 and that Defendant Arurang would be in "big trouble" if he refused the breath test and was later
11 convicted of driving under the influence of alcohol. Both of these statements were inaccurate, and
12 both encouraged Defendant Arurang to submit to the breath test. Unlike *Hutian*, where a reading of
13 the form was found to constitute "substantial compliance" with the requirements of 9 CMC § 7106,
14 the information supplied by Officer Smith deviated from the requirements of the statute. *See* Traffic
15 No. 98-6353 at 5.

16 The additional information provided by Officer Smith was not only inaccurate, but it was
17 selective. Smith did not include additional information about what would happen if Defendant
18 Arurang consented to the breath test and was over the legal limit, or the possibility that Defendant
19 Arurang would still be charged with driving under the influence if he did not submit to the breath
20 test, and that the consequence upon conviction would be exactly the same whether or not Defendant
21 Arurang submitted to the breath test (the only difference being, of course, the six-month drivers
22 license suspension). By overstating the negative effects of refusing a breath test and the possible
23 positive effects of submitting to one, Officer Smith, in effect, made a sales pitch to convince
24 Defendant Arurang to sign the form to consent to the breath test.

1 While the facts of this case do not include any physical coercion, given the CNMI Supreme
2 Court's recognition of an element of voluntariness, the Court agrees with the view expressed in
3 Texas, Hawaii, and New York, that an inaccurate statement of the law that incentivizes consenting
4 to a breath test violates the mandatory warning provision of the implied consent law. *See Adlaon*, 4
5 NMI at 176; *Sells*, 798 S.W.2d at 867; *Wilson*, 987 P.2d at 273-74, 277 (citing similar decisions in
6 several other jurisdictions); and *Stone*, 491 N.Y.S.2d at 923-25.

7 **IV. CONCLUSION**

8 Accordingly, the Court finds that 9 CMC § 7106(c) was violated here, and that the results of
9 the breath test should be suppressed. Thus, the Court grants Defendant's motion to suppress the
10 breath test results.

11 **IT IS SO ORDERED** this ^{1st} day of December, 2014.

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16 JOSEPH N. CAMACHO
17 Associate Judge
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