

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 :  
 Appellee, :  
 :  
 -vs- : Case No. 2006-1517  
 :  
 MICHAEL HASSLER :  
 :  
 Appellant. :

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**APPEAL FROM THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT  
DELAWARE COUNTY CASE NO. 05 CAA 11 0078**

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**BRIEF OF APPELLANT THE STATE OF OHIO**

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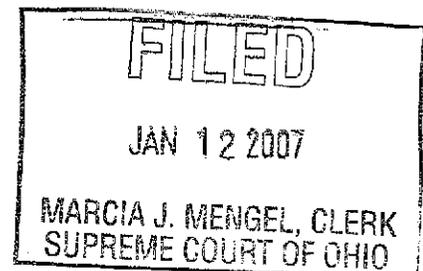
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## STATEMENT OF FACTS

On January 12, 2005, around 3:00 a.m., Defendant, Michael Hassler, and Christopher Treboni brought Leondra Mayo to the emergency room of St. Anne's Hospital with fatal injuries. She was pronounced dead at approximately 3:20 a.m. The Westerville Police Department was notified of her death and of a vehicle accident, suspected to have caused her injuries and death, at 3:38 a.m.

Based upon the cell phone records recovered as a result of the investigation, officers determined that the crash happened sometime between Ms. Mayo's last phone call at 2:37 a.m. and Hassler's phone call to Christopher Treboni at 2:45 a.m. Mr. Treboni informed the investigators that he and a friend, Chuck, were called to assist Hassler after his car had crashed on Cleveland Avenue just south of Polaris Parkway in Delaware County.

Hassler had initially told the hospital staff and the first responding officers that Ms. Mayo was driving when the crash occurred. However, when the police located the vehicle, it became clear that the damage to the vehicle and injuries suffered by Ms. Mayo were inconsistent with Hassler's version of events.

Circumstances observed by Westerville Police led officers to believe that Hassler was operating the vehicle at the time of the crash and may have been under the influence of alcohol at that time. Officers requested that Hassler submit to a blood, breath, or urine test to determine whether alcohol was present in his system. Hassler requested permission to speak with counsel, which he did. After speaking with counsel, Hassler became evasive about the request and, at 4:56 a.m., officers interpreted his evasiveness as a refusal. A search warrant was obtained and blood was drawn by a registered nurse at 10:58 a.m., 8 hours after the accident is believed to have occurred. The result of the blood test showed Hassler's blood alcohol level to be a .062.

## STATEMENT OF THE CASE

A Delaware County Grand Jury Indicted Hassler on two counts of Aggravated Vehicular Homicide, violations of R.C 2903.06(A)(1)(a) and (A)(2)(a), respectively, on March 28, 2006. On July 25, 2005, Hassler, through counsel, filed a motion to suppress evidence, including tests of his coordination and sobriety. The trial court held a hearing on the motion to suppress, November 10, 2005, after this court's decision in *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216. The trial court determined that the two hour requirement in R.C. 4511.19(D) applied to all cases alleging a violation of R.C. 4511.19 as the proximate cause of death under R.C. 2903.06. The Court therefore suppressed Hassler's blood alcohol content, determining that no additional evidence on substantial compliance with testing procedures was necessary.

The State of Ohio appealed the decision of the trial court to Ohio's Fifth District Court of Appeals, which upheld the suppression. Upon a timely notice of appeal filed by the State of Ohio, this Court accepted jurisdiction.

## FIRST PROPOSITION OF LAW

In the prosecution for a violation of R.C. 2903.06, Aggravated Vehicular Homicide, alleging a violation of R.C. 4511.19(A), a blood sample taken outside the time limit set out in R.C. 4511.19(D) is admissible to prove that “the person is under the influence of alcohol,” as proscribed by R.C. 4511.19(A)(1)(a), so long as the administrative requirements are substantially complied with and expert testimony is offered.

The Aggravated Vehicular Homicide Statute, found at R.C. 2903.06, was amended in October of 2003 to include the offense for which the defendant in this case was indicted: causing the death of another as the proximate result of committing a violation of R.C. 4511.19. In passing this amendment the Ohio Legislature effectively incorporated all of R.C. 4511.19 into the aggravated vehicular homicide statute. That incorporation logically includes all case law interpreting R.C. 4511.19.

In order to fully grasp the issue it is important to look at the case law interpreting R.C. 4511.19, including *City of Newark v. Lucas* (1988), 40 Ohio St.3d 103, 532 N.E.2d 130, and this Court’s recent decision in *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216. The operating a vehicle while under the influence (hereinafter “OVI”) statute, found in R.C. 4511.19, has undergone numerous revisions in the past several years. The most notable amendment happened in 2004 when the prohibited concentration of alcohol in the blood, breath, or urine was reduced from .1 percent to .08 percent. At that time the, offenses contained within R.C. 4511.19 were renumbered but unchanged, notwithstanding the concentration levels.

Section 4511.19(A)(1)(a) of the revised code makes operating a motor vehicle while under the influence a crime in the State of Ohio. R.C. 4511.19(A)(1)(b) – (i), criminalizes the operation of a vehicle with a prohibited concentration of alcohol, regardless of whether or not the person is “under the influence.” This distinction, as interpreted by the last twenty-five years of case law, has created two theories of guilt under the same statute.

Prior to the 1983 amendment of the OVI statute, having a concentration of alcohol in the blood, breath, or urine above the proscribed limit created only a *presumption* that a person was under the influence of alcohol. The presumption language has been deleted from the code and now it is a criminal offense to have a prohibited concentration, regardless whether the person charged is actually “under the influence.” This distinction in the code has continually been upheld in the analysis of the statute in the Ohio Supreme Court as well as Ohio’s Courts of Appeals.

The most thorough discussion of this distinction takes place in this Court’s *City of Newark v. Lucas* decision. In *Lucas*, the Court held that test results taken outside the two hour limit were inadmissible in a per se violation, but were admissible for a violation of the driving under the influence theory. In *Lucas*, this Court considered whether blood results may be properly suppressed “when the sole basis for suppression was that the blood was not withdrawn within two hours of the time of her alleged violations of the ordinance.” *Lucas* at 102. This Court suppressed the blood results as to an alleged violation of operating a vehicle with a prohibited concentration of alcohol in the blood, but held that “the test results were improperly suppressed as to her alleged violation of the ordinance relating to operating a motor vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse.” *Id.*

In deciding *Lucas*, this Court differentiated between the “per se” offenses and the operating a motor vehicle while under the influence section. This Court stated that, by amending R.C. 4511.19 in March 1983, making it illegal to operate a motor vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, the Ohio Legislature defined “the point . . . an individual cannot drive without posing a substantial danger, not only to himself, but to others.” *Lucas* at 103, citing *State v. Tanner* (1984), 15 Ohio St. 3d 1. The Court went on to

state that the only question for the trier of fact in a per se offense is whether the defendant operated a vehicle with the prohibited concentration. It is not necessary to show that the defendant was under the influence at the time, but only that the defendant operated a vehicle above the prohibited concentration level. “The critical issue at trial is accuracy of the test, not the behavior of the accused.” *Id.*

The “accuracy” requirement in a per se violation is the basis for this Court’s holding in *Mayl*. *Mayl* confirms the fact that the administrative requirements contained in R.C. 4511.19(D) are set out so as to ensure the accuracy of the evidence. “These regulations have been designed to ensure the accuracy of bodily substance test results.” *Mayl*, 2005-Ohio-4629, at ¶40, citing *State v. Dickerson* (1986), 25 Ohio St.3d 64, 495 N.E.2d 6.

The accuracy required in *Mayl* is not essential in a prosecution for violation the “under the influence” portion of the statute, R.C. 4511.19(A)(1)(a). “In prosecutions for violations of such sections, the amount of alcohol found as a result of the chemical testing of bodily substances is only of secondary interest. . . . The defendant’s ability to perceive, make judgments, coordinate movements, and safely operate a vehicle is at issue in the prosecution of the defendant under such section. . . . The accuracy of the test is not the critical issue as it is in prosecutions for per se violations. . . . Thus no presumptive weight can be given to the test results under these sections. The test results, if probative, are merely considered in addition to all other evidence of impaired driving in a prosecution for this offense.” *Lucas*, at 104. “[T]he results of a properly administered bodily substance test presented with expert testimony may be admitted in evidence despite the fact that the bodily substance was withdrawn more than two hours from the time of the alleged violation.” *Id.* at 105.

In the present situation, a defendant was involved in a crash which resulted in the death of Leondra Mayo. During the investigation at the hospital the responding officers suspected that the defendant may have been under the influence of alcohol and thus requested that he submit to a test of his blood, breath, or urine. Those tests were deemed to have been refused by the defendant's evasiveness regarding whether he would submit to the testing, and the officers then obtained a search warrant to test his blood. The blood was drawn at the hospital by a registered nurse and the tests were conducted at the Ohio State University Hospital Laboratory.

At the suppression hearing the trial court ruled that because the blood was drawn outside of the two hour limit the results were inadmissible under *Mayl*. The State of Ohio concedes that a prosecution for the violation of R.C. 2903.06, under a "per se" theory (R.C. 4511.19(A)(1)(b) through (i)) the State is strictly bound by the administrative requirements of R.C. 4511.19(D). However, the factual distinctions between *Mayl* and the present case leave the blood sample available for prosecution under the general "under the influence" section; R.C. 4511.19(A)(1)(a). In the present prosecution under R.C. 2903.06, limited to proving a violation of R.C. 4511.19(A)(1)(a), the State must show substantial compliance with the collection, testing and retention of the sample prior to the admission of this evidence, even if it is collected outside the time frame set out by the statute. The State must also offer expert testimony concerning the effects of alcohol on a person's ability to judge, react and coordinate movements in order to safely operate a motor vehicle. The State has indicated its willingness to provide such testimony.

This Court, in *Mayl*, acknowledged that the appellate court "was not asked to consider whether the regulations apply depending upon which DUI section was charged: driving with a prohibited concentration (R.C. 4511.19(A)(1)(b) through (i) and (B)) or the general driving under the influence (R.C. 4511.19(A)(1)(a)." *Mayl*, at ¶14. It went on to state that it would

clarify the issues, but the opinion fails to mention the distinction between the per se offenses, as alleged in the specific facts of the *Mayl* case, and the general driving under the influence offenses. The State believes, based on the principle of Stare Decisis, that no clarification was necessary in *Mayl*. Based upon this Court's precedent in *Lucas*, so long as the blood is collected, tested and retained in substantial compliance with the administrative requirements of R.C. 4511.19(D), the blood is admissible in a prosecution for R.C. 2903.06, despite having been collected outside of the two hour time period, so long as its admissibility is limited to proving a violation of R.C. 4511.19(A)(1)(a).

Here, Stare Decisis holds despite the amendments made since this Court's decision in *Lucas*. Where "a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as part of the law, unless express provision is made for a different construction." *Johnson v. Microsoft Corp* (2005), 106 Ohio St.3d 278, 283-284, 2005-Ohio-4985, 834 N.E.2d 791, at ¶12, quoting *Spitzer v. Stillings* (1924), 109 Ohio St.297, 142 N.E.365.

A review of the statute prior to the amendment in 2004, which reduced the limit of alcohol concentration from .1 to .08, shows that the portion of the statute regarding the time limitation was unchanged. It is to be presumed that the legislature was aware of the distinction between per se offenses and under the influence offenses created by this Court in *Lucas*. However, the legislature made no attempt to remove the distinction. The mere fact that the legislature incorporated R.C. 4511.19 into the Aggravated Vehicular Homicide at R.C. 2903.06

does not change the previous interpretations and the distinction between per se offenses and under the influence offenses.

*Mayl* and *Lucas* can actually be read to compliment each other. The holding in *Mayl*, that the State must show substantial compliance with R.C. 4511.19(D) in order to admit evidence of blood tests in a prosecution for R.C. 2903.06, was based upon the necessity of ensuring the accuracy of the test results. This is also the holding in *Lucas*. However, *Lucas* further addressed the factual distinction between the per se offenses and the under the influence offenses contained in R.C. 4511.19. *Lucas* drew the distinction between what was in a person's system and how a person was behaving in determining that the two hour time limit is not in and of itself a bar to the admission of blood test evidence.

#### CONCLUSION

The principle of Stare Decisis dictates that reviewing courts give deference to precedent as a way of establishing some order and sense of predictability to the legal system. The precedent in this case is this Court's holding in *Lucas*, which clearly explains the distinction between per se offenses under R.C. 4511.19(A)(1)(b) through (j) and the traditional under the influence offense under R.C. 4511.19(A)(1)(a). The most important distinction is the evidence necessary to prove the separate offenses. One is evidence of a scientific nature -- the amount of alcohol in ones blood stream. The other is the ability of a person to safely operate a motor vehicle based upon his or her coordination, reaction time and judgment. Overruling *Lucas* may only be justified if there has been some substantial change in the law, requiring a new or different analysis. Nothing about the Legislature's incorporation of 4511.19 into 2903.06 would require this Court to abandon the distinction made in *Lucas*.

The need to ensure the accuracy of blood tests such as those in question, as explained in *Mayl*, is not diminished by allowing the State of Ohio to admit evidence taken outside the two hour time frame. As *Lucas* explains, the accuracy is not nearly as crucial in a general “under the influence” prosecution as a “per se” prosecution. Therefore, the State respectfully requests that this Court overturn the decision of the lower court and remand this for further action, consistent with the holding that blood collected outside the two hour time frame, which otherwise substantially complies with all administrative requirements, is admissible in a prosecution for the violation of R.C. 2903.06 that alleges a violation of the under the influence R.C. 4511.19, so long as its use is limited to proving only a violation of subsection (A)(1)(a).

Respectfully Submitted:

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served upon Anthony Heald, Attorney for Defendant, by U.S. Mail, 125 N. Sandusky Street, Delaware, Ohio 43015, this \_\_\_\_\_ day of January, 2007.

A handwritten signature in black ink, appearing to read "Paul Scarsella", written over a horizontal line.

Paul Scarsella (0068661)  
Assistant Prosecuting Attorney

APPENDIX A

IN THE SUPREME COURT OF OHIO

06-1517

STATE OF OHIO,

Appellant,

v.

MICHAEL HASSLER,

Appellee.

On Appeal from the  
Delaware County Court of  
Appeals, Fifth Appellate  
District

Court of Appeals  
Case No. 05 CAA 11 0078

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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COUNSEL FOR APPELLEE, MICHAEL HASSLER

FILED  
AUG 10 2006  
MARCIA J MENGEL, CLERK  
SUPREME COURT OF OHIO

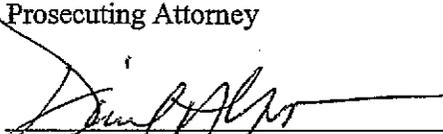
Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Delaware County Court of Appeals, Fifth Appellate District, entered in the Court of Appeals case No. 05 CAA 11 0078 on June 29, 2006.

This case presents questions of such constitutional substance and is of such great public interest as would warrant further review by this Court. Reasons why the Court should accept jurisdiction are more fully laid out in the memorandum in support of jurisdiction.

Respectfully submitted,

David Yost (0056290)  
Prosecuting Attorney

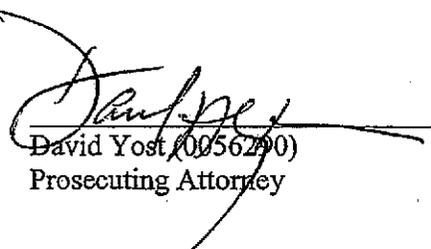


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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Michael Hassler, Anthony M. Heald, 125 N. Sandusky Street, Delaware, Ohio, 43015 on August 10, 2006.



---

David Yost (0056290)  
Prosecuting Attorney

APPENDIX B

IN THE COURT OF APPEALS DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

MICHAEL HASSLER

Defendant-Appellee

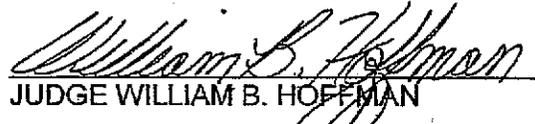
JUDGMENT ENTRY

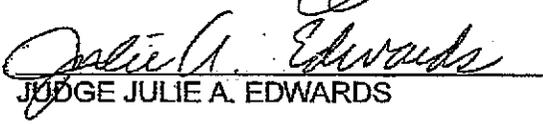
CASE NO. 05 CAA 11 0078

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Common Pleas Court, Delaware County, Ohio, is affirmed. Costs assessed to Appellant.

DELAWARE COUNTY, OHIO  
COURT OF APPEALS  
FILED  
JUN 29 AM 10:46  
JAN ANTONOPLOUS  
CLERK

  
JUDGE JOHN F. BOGGINS

  
JUDGE WILLIAM B. HOFFMAN

  
JUDGE JULIE A. EDWARDS

APPENDIX C

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

MICHAEL HASSLER

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Julie A. Edwards, J.

Hon. John F. Boggins, J.

Case No. 05 CAA11 0078

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from Delaware County  
Common Pleas Court, Case No. 05 CRI 03  
0160

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
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JAN ANTONIOPLOS  
CLERK

Court of Appeals  
Delaware Co., Ohio  
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copy of the original on file in this office.  
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By Jan Antonoplos Deputy

*Boggins, J.*

{¶1} Appellant State of Ohio appeals the November 21, 2005, Judgment Entry of the Delaware County Common Pleas Court's granting Appellee's motion to suppress and motion in limine.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On March 25, 2005, Appellee Michael Hassler was indicted on one count of Aggravated Vehicular Homicide, in violation of R.C. 2903.06(A). Said indictment alleged that he was operating a motor vehicle which was involved in a one-car accident in which Leondra May was killed on January 12, 2005.

{¶3} The State wanted to introduce as evidence the results of a blood test taken seven to eight hours after the accident as well as testimony from two patrol officers as to the speed of Appellee's vehicle at the time of the accident. The delay in performing the blood test was caused by Appellee's refusal of same, requiring the police to first obtain a search warrant for the collection of such evidence.

{¶4} On July 25, 2005, Appellee filed a Motion to Suppress the blood-alcohol concentration test which was taken from Appellee and a Motion in Limine with regard to two Westerville Police Officers giving their opinion as to the speed of Appellee's vehicle at the time of the accident.

{¶5} The State of Ohio did not file a response to either motion.

{¶6} On November 10, 2005, an evidentiary hearing was held on said motions.

{¶7} Following such evidentiary hearing, the trial court sustained both the Motion to Suppress and the Motion in Limine.

{¶18} It is from such decision that Appellant State of Ohio now appeals, assigning the following errors for review:

**ASSIGNMENTS OF ERROR**

{¶19} "I. THE TRIAL COURT ERRED WHEN IT HELD THAT THE SUPREME COURT DECISION IN STATE V. MAYL PRECLUDED EVIDENCE OF A DEFENDANT'S BLOOD ALCOHOL LEVEL IN A PROSECUTION FOR A VIOLATION OF 2903.06 IF THE SAMPLE WAS OBTAINED OUTSIDE THE TWO HOUR LIMIT SET OUT IN 4511.19(D).

{¶10} "II. THE TRIAL COURT ERRED IN DETERMINING THAT THE TESTIMONY OF THE ACCIDENT INVESTIGATORS WAS INADMISSIBLE AS EXPERT TESTIMONY."

I.

{¶11} In his first assignment of error, Appellant argues that the trial court erred when it granted Appellee's motion to suppress based on *State v. Mayl*. We disagree.

{¶1} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *State v. Gurry* (1994), 95 Ohio App.3d 93, 96; *State v.*

Claytor (1993), 85 Ohio App.3d 623, 627; *State v. Guysinger* (1993), 86 Ohio App.3d 592.

{¶2} In the instant appeal, Appellant State of Ohio argues that the trial court should have denied Appellee's Motion to Suppress based on *Newark v. Lucas* (1988), 40 Ohio St.3d 100, wherein the Ohio Supreme Court held that in a criminal prosecution for violation of R.C. §4511.19(A)(1), the results presented with expert testimony may be admissible despite the fact that the bodily substance was withdrawn more than two hours from the time of the alleged violation. *Id.* at paragraph two of the syllabus. However, it further held that in a criminal prosecution for a violation of R.C. §4511.19(A)(2), (3) or (4),<sup>1</sup> the results of a properly administered bodily substances test are admissible only if the bodily substance is withdrawn within two hours of the time of the alleged violation.

{¶12} The Court in *Lucas* explained the reasoning for this distinction by noting:

{¶13} "In prosecutions for violations of such sections [as R.C. 4511.19(A)(1) ], the amount of alcohol found as a result of the chemical testing of bodily substances is only of secondary interest. See Taylor, *Drunk Driving Defense* (2 Ed.1986) 394, Section 6.0.1. The defendant's ability to perceive, make judgments, coordinate movements, and safely operate a vehicle is at issue in the prosecution of a defendant under such section. It is the behavior of the defendant which is the crucial issue. The accuracy of the test is not the critical issue as it is in prosecutions for per se violations." *Id.* at 104, 532 N.E.2d 130.

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<sup>1</sup> R.C. 4511.19(A)(1), (2), (3), and (4) were amended on September 23, 2004. They are now contained in R.C. 4511.19(A)(1)(a), (b), (c), and (d).

{¶14} More recently, in *State v. Mayl*, 106 Ohio St.3d 207, 833 N.E.2d 1216, 2005-Ohio-4629, the Supreme Court held:

{¶15} "When results of blood-alcohol tests are challenged in an aggravated vehicular-homicide prosecution that depends upon proof of an R.C. 4511.19(A) violation, the state must show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm. Code Chapter 3701-53 before the test results are admissible.

{¶16} In reaching its holdings, the Court examined R.C. 4511.19(D)(1) and the regulations set out in the Administrative Code describing how bodily substance samples should be collected (Ohio Adm. Code 3701-53-05) and tested (Ohio Adm. Code 3701-53-03(A)), along with regulations requiring certification of personnel (Ohio Adm. Code 3701-53-07(A)) and laboratory requirements (Ohio Adm. Code 3701-53-06(A)). The Court noted that these regulations have been designed to ensure the accuracy of bodily substance test results. *Id.* at 212.

{¶17} Revised Code §4511.19(D)(1) provides:

{¶18} "In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense, the court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them in the defendant's \* \* \* blood \* \* \* or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within two hours of the time of the alleged violation.

{¶19} "When a person submits to a blood test at the request of a law enforcement officer \* \* \*, only a physician, a registered nurse, or a qualified technician,

chemist, or phlebotomist shall withdraw blood for the purpose of determining the alcohol, drug, or alcohol and drug content \* \* \*

{¶20} "The bodily substance withdrawn shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code."

{¶21} In *Mayl*, supra, the Supreme Court examined the evidence presented at the suppression hearing and concluded that the burden was on the State to show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm. Code Chapter 3701-53 before the test results were admissible. *Id.* at 214. In discussing substantial compliance, the Court, quoting from *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71 stated:

{¶22} "[R]igid compliance with the Department of Health regulations is not necessary for test results to be admissible. \* \* \* To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial compliance standard set forth in [*State v.*] *Plummer* [ (1986), 22 Ohio St.3d 292, 490 N.E.2d 902] to excusing only errors that are clearly de minimis. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as "minor procedural deviations." " ' *Id.* at 214.

{¶23} The Court concluded that in several instances where *Mayl* alleged deviations from the ODH regulations, there was substantial compliance. These deviations included the failure to refrigerate the sample for one hour and 45 minutes prior to testing and the use of a gel anticoagulant as a solid. *Id.* at 215.

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{¶24} The Court did, however, conclude that two of the alleged deviations did not meet the substantial compliance standard: the lack of permits from the Director of Health and the lab's failure to maintain the blood sample for one year. The Court concluded, "[w]e cannot excuse the absence of the proper permits and the disposal of the sample within a matter of days as minor procedural deviations. Consequently, the state has not shown substantial compliance with ODH regulations." *Id.* at 215.

{¶25} Finally, and more importantly for purposes of this appeal, the Court noted that R.C. §4511.19(D)(1) applies to all prosecutions requiring proof of a violation of R.C. §4511.19(A) or (B). The Court stated that it does not matter whether the prosecution is pursued as a "per se"<sup>2</sup> violation or an "under the influence"<sup>3</sup> violation. *Id.* at 217.

{¶26} Thus, in this case the State was required to show substantial compliance with R.C. §4511.19(D)(1) and the applicable ODH regulations in order for the blood test results to be admissible. The state failed to do so.

{¶27} While it is disturbing that an individual can hypothetically escape the consequences of his actions by refusing to submit to a chemical test, thus requiring the need for law enforcement to obtain a search warrant within the required two-hour time period, barring legislative action, we are bound by the Supreme Court's strict application of such statute as stated in *Mayl*, *supra*.

{¶28} Based on the foregoing, this Court finds Appellant's first assignment of error not well-taken. Appellant's first assignment of error is overruled.

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<sup>2</sup> R.C. 4511.19(A)(1)(b) through (i) and (B).

<sup>3</sup> R.C. 4511.19(A)(1)(a).

II.

{¶29} In his second assignment of error, Appellant State of Ohio argues that the trial court erred in holding that testimony of the accident investigators was inadmissible. We disagree.

{¶30} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court and that court's ruling as to such matters will not be reversed absent an abuse of discretion. *See: Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66, 567 N.E.2d 1291; *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d.

{¶31} In the case sub judice, the trial court conducted an Evid.R. 104 hearing in relation to Appellee's Motion in Limine to determine whether the testimony of the police officers as to the speed of Appellee's vehicle would be admissible at trial.

{¶32} The trial court heard testimony from both officers as to their qualifications and experience. The trial court further heard testimony as to the method employed by the officers in calculating the measurements at the scene of the accident wherein they used a drag sled.

{¶33} The trial court also heard testimony from Appellee's expert who is a Professional Engineer who works in the area of accident reconstruction on a regular basis. He testified that it was his opinion that the method employed by the officers in this case was not suited to this type of accident in that (1) the weight of the sled was not the same as the weight of the vehicle; (2) the weather conditions were different; (3) the

vehicle path was curved showing that the tires were moving; and (4) the tires were not covered in mud. Based on the foregoing, said expert testified that an accurate estimation of Appellee's speed could not have been determined by the use of a drag sled.

{¶34} Evidence Rule 702 provides:

{¶35} "A witness may testify as an expert if all of the following apply:

{¶36} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶37} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶38} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶39} "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶40} "(2) The design of the procedure, test, or experiment reliably implements the theory;

{¶41} "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶42} This Court discussed admission of scientific evidence in *Abon Ltd. v. Transcontinental Insurance Co.*, Richland App. No.2004-CA-0029, 2005-Ohio-3052:

{¶43} "An extremely thorough and well researched analysis on the admissibility of scientific evidence in Ohio was conducted by the Fourth District Court of Appeals in *Valentine v. Valentine* (2001), 158 Ohio App.3d 615, 2004-Ohio-4521, 821 N.E.2d 580, appeal allowed 104 Ohio St.3d 1438, 2004-Ohio-7033, 819 N.E.2d 1122. In *Valentine*, the court noted: "[I]n general, courts should admit expert testimony whenever it is relevant and satisfies Evid.R. 702. *State v. Nemeth* (1998), 82 Ohio St.3d 202, 207, 694 N.E.2d 1332; see, also, *State v. Williams* (1983), 4 Ohio St.3d 53, 58, 4 OBR 144, 446 N.E.2d 444. Thus, the trial judge must perform a 'gatekeeping' role to ensure that expert testimony is sufficiently (a) relevant and (b) reliable to justify its submission to the trier of fact. See *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167, 143 L.Ed.2d 238; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469; *Nemeth*, 82 Ohio St.3d at 211, 694 N.E.2d 1332; *Douglass*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107, at ¶ 32.

{¶44} "In performing its gatekeeping function, the trial court's starting point should be Evid.R. 702, which provides that a witness may testify as an expert if all of the following apply: '(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons'; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) The witness' testimony is based on reliable, scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) The theory upon which the procedure, test, or experiment is based is objectively

verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.'

{¶45} " \* \* \* \*The court made it clear in *Kumho Tire Co.* that the reliability analysis adopted in *Daubert* for scientific experts also applied to experts with other types of technical or specialized knowledge. But it is critical to realize that the analysis of reliability is flexible and its indicators may vary from discipline to discipline. *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786, 125 L.Ed.2d 469; see, also, *Moore v. Ashland Chem., Inc.* (C.A.5 1997), 126 F.3d 679, at 686-688. Thus, the court should proceed in a two-step process that first identifies the indicators of reliability that are appropriate for the discipline involved and then applies them....

{¶46} "In order to determine reliability, a court must assess whether the reasoning or methodology underlying the testimony is valid. *Miller*, 80 Ohio St.3d at 611, 687 N.E.2d 735, citing *Daubert*, 509 U.S. at 592-593, 113 S.Ct. 2786, 125 L.Ed.2d 469. Thus, an expert may not base an opinion upon 'subjective belief or unsupported speculation.' *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786, 125 L.Ed.2d 469; see, also, *State v. Hurst* (Mar. 7, 2000), Franklin App. No. 98AP-1549, 2900 WL 249110. Instead, the expert's opinion must be based on methods and procedures that meet the level of intellectual rigor demanded by the relevant discipline. See *In re: Paoli* (C.A.3, 1994), 35 F.3d 717, 742, citing *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786, 125 L.Ed.2d 469. The '[p]roposed testimony must be supported by appropriate validation-i.e., 'good grounds,' based on what is known.' *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786, 125 L.Ed.2d 469.

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And 'where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, \* \* \* the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.' ' *Kumho*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238, quoting *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786, 125 L.Ed.2d 469; see, also, Daniel J. Capra, *The Daubert Puzzle* (1998) 32 Ga.L.Rev. 699, 705 ('In deciding the question of admissibility, trial judges must consider the degree to which the accuracy of scientific information has been established. The less certain the scientific community is about information, the less willing courts should be to receive it'). In other words, '[s]cientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment.' *Bragdon v. Abbott* (1998), 524 U.S. 624, 653, 118 S.Ct. 2196, 141 L.Ed.2d 540; see, also, *Gen. Elec. Co. v. Joiner* (1997), 522 U.S. 136, 144-146, 118 S.Ct. 512, 139 L.Ed.2d 508. However, [t]he grounds for the expert's opinion merely have to be good [;] they do not have to be perfect. *Paoli*, 35 F.3d at 744.

{¶147} "A court resolving a reliability question should consider the 'principles and methods' the expert used 'in reaching his or her conclusions, rather than trying to determine whether the conclusions themselves are correct or credible.' *Nemeth*, 82 Ohio St.3d at 210, 694 N.E.2d 1332; see, also, *Miller*, 80 Ohio St.3d 607, 687 N.E.2d 735, paragraph one of the syllabus. As the *Daubert* court stated, in assessing reliability, '[t]he focus \* \* \* must [generally] be \* \* \* on principles and methodology, not on the conclusions that they generate.' *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786, 125 L.Ed.2d 469.

{¶48} In the instant case, the trial court found that while the officers met the requirements as to qualifications and training, and that while their testimony was based on reliable scientific principles, the State failed to meet its burden by a preponderance of the evidence that such testing reliably implemented the theory or that the test was conducted in a way that would yield an accurate result. (See 11/21/05 Judgment Entry at 4.

{¶49} Upon review, we do not find that the trial court's decision to exclude the above testimony of the officers was an abuse of discretion.

{¶50} Appellant State of Ohio's second assignment of error is overruled.

{¶51} Accordingly, the judgment of the Delaware County Common Pleas Court is affirmed.

By: Boggins, J.

Hoffman, P.J. concurs separately

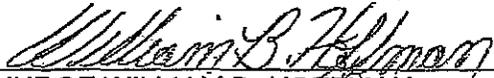
Edwards, J. concurs.

  
\_\_\_\_\_  
JUDGE JOHN F. BOGGINS

JUDGE WILLIAM B. HOFFMAN  
  
\_\_\_\_\_  
JUDGE JULIE A. EDWARDS

*Hoffman, P.J., concurring*

{¶52} I concur in the majority's analysis and disposition of appellant's first and second assignments of error. I write separately with respect to the first assignment only to urge the Ohio Supreme Court to reconsider this issue and specifically to address whether the distinction drawn in *Newark v. Lucas* (1988), 40 Ohio St.3d 100, is still viable and whether it should apply in prosecutions under R.C. 2903.06 (A).

  
JUDGE WILLIAM B. HOFFMAN

APPENDIX D

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO,  
Plaintiff

-vs-

MICHAEL R. HASSLER,  
Defendant.

Case No. 05 CR I 03 016

EVERETT H. KRUEGER, JUDGE

JAN ANTONIOPLOS  
CLERK

2005 NOV 21 PM 4:11

COMMON PLEAS COURT  
DELAWARE COUNTY, OHIO  
FILED

**JUDGMENT ENTRY GRANTING DEFENDANT'S MOTION TO SUPPRESS AND  
MOTION IN LIMINE FILED JULY 25, 2005**

This matter came before the Court on November 10, 2005 for purposes of a hearing on a Suppression Motion filed July 25, 2005 and an in Limine motion filed July 25, 2005. The State of Ohio did not respond to either motion. Following the hearing, the Court permitted closing arguments to be filed in response to the testimony.

I. The suppression motion seeks to exclude the blood test taken after the fatality accident because the test was conducted outside the two hour limit set forth in R.C. 4511.19(D)(1) and pursuant to State v. Mayl (2005), 106 Ohio St.3d 207, 833 N.E.2d 1216, decided on September 21, 2005.

The State maintains that the Ohio Supreme Court's Decision in Mayl, Id. does not address the two hour requirement for aggravated-vehicular homicide cases; only the need for hospitals to comply with Ohio Department of Health regulations in the taking of blood.

It has long been the rule in Ohio that the syllabus of the Court is the ruling of the Court and the stated law of the case. State ex. rel. Donahey v. Edmondson (1913), 89 Ohio St. 93,107, 105 N.E. 269.

The Mayl syllabus states:

*"When results of blood-alcohol tests are challenged in an aggravated-vehicular homicide prosecution that depends upon proof of an R.C. 4511.19(A) violation, the state must show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm. Code Chapter 3701-53 before test results are admissible." Mayl, 106 Ohio St. 3d at 207.*

Revised Code Section 4511.19(D)(1) provides in pertinent part that:

*In any criminal prosecution ... for a violation of division (A) or (B) of this section ...the Court may admit evidence on the concentration of alcohol...as shown by chemical analysis of the substance withdrawn within two hours of the time of the alleged violation.*

The Mayl Court, in paragraph 56 of its Opinion addresses the two hour issue in 4511.19 prosecutions. The Court says that there is no distinction between prosecutions for "per se" or "under the influence" violations in the admission of alcohol tests. In either, the tests have to be performed within two hours. Here, the parties stipulated that the tests were conducted on the Defendant outside two hours.

The Defendant's Motion to Suppress is GRANTED. The blood test results shall not be admissible at trial of this case.

II. The Defendant's second motion sought a "Daubert" hearing under Evid. R. 104 to determine whether Police Officers' opinions on speed are admissible at trial. Testimony was taken from two officers and the Defendant presented the testimony of his expert.

Both Officers testified as to their qualifications, including many classes in accident reconstruction, and both had investigated hundreds of accidents. Corporal Rudd calculated the measurements at the scene of the accident using a drag sled.

Both Officers relied on those measurements in calculating speed, utilizing the coefficient of friction formula.

Defendant's expert, Lawrence Du Bois, testified that he is a Professional Engineer who regularly works in the area of accident reconstruction. His opinion, after reviewing the measurements and photos of the scene, and methodology of the Officers, was that their method was not suited for this type of accident. He opined that: 1) the weight of the sled was different than the vehicle; 2) the conditions at the time of the tests were not the same as at the time of the accident; 3) the vehicle path was curved, showing that the tires were turning. Also, the tires were not covered in mud. He testified that if the tires are moving, then the method does not work to determine speed. No alternative method would work. An accurate estimation on the speed of the vehicle cannot be done because the conditions of torrential rain prevent any formula from working as intended.

The burden of proof is on the Prosecution to establish, by a preponderance of the evidence, the admissibility of its expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 113 S.Ct. 2786(1993). This is a "more likely than not" standard that the Prosecution expert witnesses meet the Evid.R. 702 requirements.

Evidence Rule 702 sets forth the conditions under which an expert may testify.

*A Witness may testify as an expert if all of the following apply:*

- A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;*
- B) The witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony;*
- C) The witness' testimony is based on reliable scientific, technical or other specialized information. To the extent that the testimony reports the result of a procedure, test or experiment, the testimony is reliable only if all of the following apply:*

1. *The theory upon which the procedure, test, or experiment is based, is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles;*
2. *The design of the procedure, test, or experiment reliably implements the theory;*
3. *The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.*

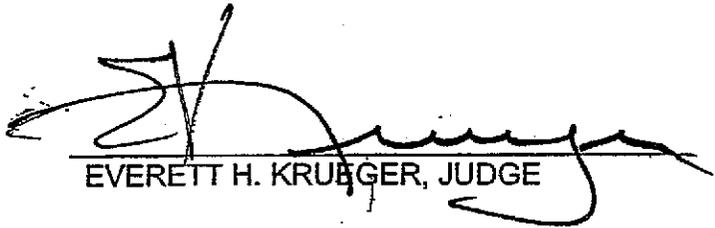
Certainly the Officers met the requirement that this is something beyond the common knowledge of lay persons and that the Officers are qualified due to experience and training. Also, their testimony is based on reliable scientific principles as Mr. Du Bois himself admitted. However, the Officers were required to perform tests to implement the formula. They were required to reliably implement the theory through the test, and the test must be conducted in a way to yield an accurate result.

Based on all the testimony presented at the hearing, this Court cannot say that the Prosecution met its burden of proof by a preponderance of the evidence, that the testing reliably implemented the theory, nor that the test was conducted in a way that would yield an accurate result. Under the conditions existing at the time of the test, to try to replicate the conditions at the time of the accident, may not have been possible.

Therefore, the Officers' opinion on the speed of the Defendant's vehicle is not admissible at trial. Certainly the Officers are able to testify as fact witnesses. The Motion in Limine is GRANTED.

DATE: November 21, 2005

The Clerk of the Court is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel by:



EVERETT H. KRUEGER, JUDGE

Regular U.S. Mail

Attorney mailbox at the Delaware County Courthouse

Facsimile transmission Paul Scarsella, Assistant Prosecuting Attorney  
Anthony M. Heald, Attorney for Defendant

**APPENDIX E**

B-1

**R.C. 2903.06. Aggravated vehicular homicide; vehicular homicide; vehicular manslaughter; effect of prior convictions; penalties**

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:

(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) Recklessly;

(b) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person whose death is caused or whose pregnancy is unlawfully terminated is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (F) of this section.

(3) In one of the following ways:

(a) Negligently;

(b) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person whose death is caused or whose pregnancy is unlawfully terminated is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (F) of this section.

(4) As the proximate result of committing a violation of any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor or of a municipal ordinance that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

(B)(1) Whoever violates division (A)(1) or (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(2) and (3) of this

section.

(2)(a) Except as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the second degree. Aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the first degree if any of the following apply:

(i) At the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code.

(ii) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(iii) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(iv) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(v) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(vi) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(vii) The offender previously has been convicted of or pleaded guilty to three or more violations of any combination of the offenses listed in division (B)(2)(a)(iv), (v), or (vi) of this section.

(viii) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of section 4511.19 of the Revised Code.

(b) In addition to any other sanctions imposed pursuant to division (B)(2)(a) of this section for aggravated vehicular homicide committed in violation of division (A)(1) of this section, the court shall impose upon the offender a class one suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(1) of section 4510.02 of the Revised Code.

(3) Except as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. Aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the second degree if, at the time of the offense, the offender was driving under a

suspension imposed under Chapter 4510. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division for a violation of division (A)(2) of this section, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code.

(C) Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree. Vehicular homicide committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension or revocation imposed under Chapter 4507. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of that section.

(D) Whoever violates division (A)(4) of this section is guilty of vehicular manslaughter. Except as otherwise provided in this division, vehicular manslaughter is a misdemeanor of the second degree. Vehicular manslaughter is a misdemeanor of the first degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division, the court shall impose upon the offender a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of that section.

(E) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section. The court shall impose a mandatory jail term of at least fifteen days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3)(b) of this section and may impose upon the offender a longer jail term as authorized pursuant to section 2929.24 of the Revised Code. The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) or (3)(a) of this section or a felony violation of division (A)(3)(b) of this section if either of the following applies:

(1) The offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.08 of the Revised Code.

(2) At the time of the offense, the offender was driving under suspension under Chapter 4510. or any other provision of the Revised Code.

(F) Divisions (A)(2)(b) and (3)(b) of this section do not apply in a particular construction zone unless signs of the type described in section 2903.081 of the Revised Code are erected in that construction zone in accordance with the guidelines and design specifications established by the director of transportation under section 5501.27 of the Revised Code. The failure to erect signs of the type described in section 2903.081 of the Revised Code in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1), (A)(2)(a), (A)(3)(a), or (A)(4) of this section in that construction zone or the prosecution of any person who violates any of those divisions in that construction zone.

(G)(1) As used in this section:

(a) "Mandatory prison term" and "mandatory jail term" have the same meanings as in section 2929.01 of the Revised Code.

(b) "Traffic-related homicide, manslaughter, or assault offense" means a violation of section 2903.04 of the Revised Code in circumstances in which division (D) of that section applies, a violation of section 2903.06 or 2903.08 of the Revised Code, or a violation of section 2903.06, 2903.07, or 2903.08 of the Revised Code as they existed prior to March 23, 2000.

(c) "Construction zone" has the same meaning as in section 5501.27 of the Revised Code.

(d) "Reckless operation offense" means a violation of section 4511.20 of the Revised Code or a municipal ordinance substantially equivalent to section 4511.20 of the Revised Code.

(e) "Speeding offense" means a violation of section 4511.21 of the Revised Code or a municipal ordinance pertaining to speed.

(2) For the purposes of this section, when a penalty or suspension is enhanced because of a prior or current violation of a specified law or a prior or current specified offense, the

reference to the violation of the specified law or the specified offense includes any violation of any substantially equivalent municipal ordinance, former law of this state, or current or former law of another state or the United States.

(2004 H 52, eff. 6-1-04; 2003 H 50, § 4, eff. 1-1-04; 2003 H 50, § 1, eff. 10-21-03; 2002 S 123, eff. 1-1-04; 1999 S 107, eff. 3-23-00; 1996 S 269, eff. 7-1-96; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1993 S 62, § 4, eff. 9-1-93; 1992 S 275; 1990 S 131; 1989 S 49, H 381; 1986 S 262, H 428, S 356, H 265; 1982 S 432; 1973 H 716; 1972 H 511)

**APPENDIX E**

**R.C. 2903.06. Aggravated vehicular homicide; vehicular homicide; vehicular manslaughter; effect of prior convictions; penalties**

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:

(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) Recklessly;

(b) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person whose death is caused or whose pregnancy is unlawfully terminated is in the construction zone at the time of the offender's commission of the reckless

operation offense in the construction zone and does not apply as described in division (F) of this section.

(3) In one of the following ways:

(a) Negligently;

(b) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person whose death is caused or whose pregnancy is unlawfully terminated is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (F) of this section.

(4) As the proximate result of committing a violation of any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor or of a municipal ordinance that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

(B)(1) Whoever violates division (A)(1) or (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(2) and (3) of this section.

(2)(a) Except as otherwise provided in this division, aggravated vehicular homicide committed in

violation of division (A)(1) of this section is a felony of the second degree. Aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the first degree if any of the following apply:

(i) At the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code.

(ii) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(iii) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(iv) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(v) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(vi) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(vii) The offender previously has been convicted of or pleaded guilty to three or more violations of any combination of the offenses listed in division (B)(2)(a)(iv), (v), or (vi) of this section.

(viii) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of section 4511.19 of the Revised Code.

(b) In addition to any other sanctions imposed pursuant to division (B)(2)(a) of this section for aggravated vehicular homicide committed in violation of division (A)(1) of this section, the court shall impose upon the offender a class one suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(1) of section 4510.02 of the Revised Code.

(3) Except as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. Aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the second degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510, or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division for a violation of division (A)(2) of this section, the court shall impose upon the offender a class two suspension of the

offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code.

(C) Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree. Vehicular homicide committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension or revocation imposed under Chapter 4507. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of that section.

(D) Whoever violates division (A)(4) of this section is guilty of vehicular manslaughter. Except as otherwise provided in this division, vehicular manslaughter is a misdemeanor of the second

degree. Vehicular manslaughter is a misdemeanor of the first degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed pursuant to this division, the court shall impose upon the offender a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of that section.

(E) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section. The court shall impose a mandatory jail term of at least fifteen days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3)(b) of this section and may impose upon the offender a longer jail term as authorized pursuant to section 2929.24 of the Revised Code. The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) or (3)(a) of this section or a felony violation of division (A)(3)(b) of this section if either of the following applies:

(1) The offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.08 of the Revised Code.

(2) At the time of the offense, the offender was driving under suspension under Chapter 4510. or any other provision of the Revised Code.

(F) Divisions (A)(2)(b) and (3)(b) of this section do not apply in a particular construction zone unless signs of the type described in section 2903.081 of the Revised Code are erected in that construction zone in accordance with the guidelines and design specifications established by the director of transportation under section 5501.27 of the Revised Code. The failure to erect signs of the type described in section 2903.081 of the Revised Code in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1), (A)(2)(a), (A)(3)(a), or (A)(4) of this section in that construction zone or the prosecution of any person who violates any of those divisions in that construction zone.

(G)(1) As used in this section:

(a) "Mandatory prison term" and "mandatory jail term" have the same meanings as in section 2929.01 of the Revised Code.

(b) "Traffic-related homicide, manslaughter, or assault offense" means a violation of section 2903.04 of the Revised Code in circumstances in which division (D) of that section applies, a

violation of section 2903.06 or 2903.08 of the Revised Code, or a violation of section 2903.06, 2903.07, or 2903.08 of the Revised Code as they existed prior to March 23, 2000.

(c) "Construction zone" has the same meaning as in section 5501.27 of the Revised Code.

(d) "Reckless operation offense" means a violation of section 4511.20 of the Revised Code or a municipal ordinance substantially equivalent to section 4511.20 of the Revised Code.

(e) "Speeding offense" means a violation of section 4511.21 of the Revised Code or a municipal ordinance pertaining to speed.

(2) For the purposes of this section, when a penalty or suspension is enhanced because of a prior or current violation of a specified law or a prior or current specified offense, the reference to the violation of the specified law or the specified offense includes any violation of any substantially equivalent municipal ordinance, former law of this state, or current or former law of another state or the United States.

(2004 H 52, eff. 6-1-04; 2003 H 50, § 4, eff. 1-1-04; 2003 H 50, § 1, eff. 10-21-03; 2002 S 123, eff. 1-1-04; 1999 S 107, eff. 3-23-00; 1996 S 269, eff. 7-1-96; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1993 S 62, § 4, eff. 9-1-93; 1992 S 275; 1990 S 131; 1989 S 49, H 381; 1986 S 262, H 428, S 356, H 265; 1982 S 432; 1973 H 716; 1972 H 511)

**R.C. § 4511.19. Driving while under the influence of alcohol or drugs; tests; presumptions; penalties; immunity for those withdrawing blood**

(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

- (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.
- (b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.
- (c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.
- (d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.
- (e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.

(g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.

(h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.

(i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.

(j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

(i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

(ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in the

person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

(iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6- monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter

of the person's whole blood or blood serum or plasma.

(vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(viii) Either of the following applies:

(I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ix) The person has a concentration of methamphetamine in the person's urine of at least five

hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, division (A)(1) or (B) of this section, or a municipal OVI offense shall do both of the following:

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.

(D)(1) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense, the court may admit evidence on the

concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section.

When a person submits to a blood test at the request of a law enforcement officer under section 4511.191 of the Revised Code, only a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist shall withdraw blood for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this

section or for an equivalent offense, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

The person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. The form to be read to the person to be tested, as required under section 4511.192 of the Revised Code, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4)(a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an

administration of the United States department of transportation under 96 Stat. 2415 (1983), 49 U.S.C.A. 105.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the blood, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

(i) The officer may testify concerning the results of the field sobriety test so administered.

(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier

of fact considers to be appropriate.

(c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.

(E)(1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:

(a) The signature, under oath, of any person who performed the analysis;

(b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;

(c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

(d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(F) Except as otherwise provided in this division, any physician, registered nurse, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(G)(1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

(a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and the court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to

both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under section 3793.10 of the Revised Code. The court also may suspend the execution of any part of the three-day jail term under this division if it places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or

division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction imposed under section 2929.25 of the Revised Code, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than two hundred fifty and not more than one thousand dollars;

(iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of

section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by

section 3793.02 of the Revised Code.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a driver's intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than three hundred fifty and not more than one thousand five hundred dollars;

(iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with section 4503.233 of the Revised Code and impoundment of the license plates of that vehicle for ninety days.

(c) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the

cumulative jail term imposed for the offense shall not exceed one year.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than five hundred fifty and not more than two thousand five hundred dollars;

(iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 of the Revised Code.

Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail

term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of one hundred twenty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the one hundred twenty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13

of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than eight hundred nor more than ten thousand dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to section 2929.17 of the Revised Code, may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the

mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than eight hundred nor more than ten thousand dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial

driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of section 4511.191 of the Revised Code.

(3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the

sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen consecutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if section 4510.13 of the Revised Code permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven

subject to the privileges restricted license plates that are issued under section 4503.231 of the Revised Code, except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of section 4503.231 of the Revised Code.

(5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as follows:

(a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.

(b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d),

(e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (N) of section 4511.191 of the Revised Code.

(d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(e) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of section 4503.234 of the Revised Code applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national auto dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in section 2929.01 of the Revised Code.

(H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code.

(2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code.

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1416 of the Revised Code and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of section 2929.24 of the Revised Code.

(I)(1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order

that the cost be paid from the court's indigent drivers' alcohol treatment fund.

(J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.

(K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of section 2923.16 of the Revised Code in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(M) All terms defined in section 4510.01 of the Revised Code apply to this section. If the meaning of a term defined in section 4510.01 of the Revised Code conflicts with the meaning of the same term as defined in section 4501.01 or 4511.01 of the Revised Code, the term as defined in section 4510.01 of the Revised Code applies to this section.

(N)(1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of section 2937.46 of the Revised Code, do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.

(2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.

(2006 S 8, eff. 8-17-06; 2004 H 163, eff. 9-23-04; 2003 H 87, § 4, eff. 1-1-04; 2003 H 87, § 1, eff. 6-30-03; 2002 S 163, § 3, eff. 1-1-04; 2002 S 163, § 1, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 123, eff. 1-1-04; 1999 S 22, eff. 5-17-00; 1994 S 82, eff. 5-4-94; 1990 H 837, eff. 7-25-90; 1990 S 131; 1986 S 262; 1982 S 432; 1974 H 995; 1971 S 14; 1970 H 874; 132 v H 380; 130 v S 41; 125 v 461; 1953 H 1; GC 6307-19)