

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

-vs-

MICHAEL HASSLER

Appellee.

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: Case No. 2006-1517
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MERIT BRIEF
OF APPELLEE MICHAEL HASSLER

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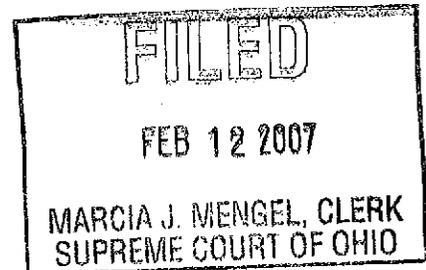


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STATEMENT OF FACTS

The Defendant-Appellee was indicted on March 25, 2005, for Aggravated Vehicular homicide pursuant to Ohio Revised Code Section 2903.06(A), alleging that on January 12, 2005, he operated a motor vehicle and was involved in a single car accident in which Leondra Mayo, was killed. This occurred on an evening where there was torrential rain storms that swept through the area and caused a flooding of the road that the accident occurred on (T. 36). On March 30, 2005 the Defendant-Appellee sought a Bill of Particulars to determine the theory that the State was relying upon. That Motion was never answered. In response to Discovery Requests made by the Defendant-Appellee at the same time it became apparent that the State of Ohio intended to introduce evidence concerning a blood test that was taken at Saint Ann's Hospital between seven and eight hours after the accident. (T. at 64) and analyzed at the Ohio State University several days later. (T. at 66). After receiving discovery in this matter, on July 25, 2005, the Defendant-Appellee filed a Motion to Suppress and Motion in Limine relating to a test of the Defendant-Appellee's whole blood/serum taken on January 28, 2005 at Ohio State University Medical Center as well as to the State of Ohio's reconstruction of the accident. The Motion to Suppress specifically challenged the chemical tests of the Appellee's alcohol level based on the two hour requirement of 4511.19(D)(1) as well as a number of Administrative requirements OAC Sections 3701-53-01; 3701-53-03; 3701-53-05; 3701-53-06; 3701-53-07; 3701-53-08 and 3701-53-09. The State of Ohio did not respond to either Motion prior to the evidentiary hearing which was held on November 10, 2005. This hearing was less than three weeks before the date this matter was set to proceed to Trial. Following the evidentiary hearing, the Court sustained both the

Defendant-Appellee's Motion to Suppress and the Defendant-Appellee's Motion in Limine. The State of Ohio Appealed the Court's decision of November 21, 2005.

The State of Ohio filed a Notice of Appeal to the Fifth District Court of Appeals, and raised two assignments of error: that the Trial Court erred in holding that *State v. Mayl* precluded evidence of a Defendant-Appellee's blood alcohol level in a prosecution for a violation of 2903.06 if the sample was obtained outside the two hour limit set forth in R.C. 4511.19(D); and that the Trial Court erred in finding the testimony of the accident investigators inadmissible as expert testimony. On June 29, 2006, the Fifth District Court of Appeals issued its decision affirming the Trial Court's decision as to both the chemical test of the Appellee's blood and as to the alleged expert testimony relating to the speed of the vehicle. It is from this Decision that the State of Ohio has appealed the Fifth District's ruling on the issue of the admissibility of the blood test only. The State elected not to pursue its appeal of the Fifth District's decision on the issue of the State's purported expert testimony as to the accident reconstruction.

ARGUMENT

A. Introduction

The State of Ohio's Proposition of Law, as set forth in its Merit Brief, states:

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.

For the reasons which follow, it is respectfully submitted that the Appellant's arguments pertaining to its proposition of law are not well taken and, as a result, the decision of the Fifth District Court of Appeals must be affirmed.

In the first instance, it appears on its face that the State of Ohio's argument is that it should be able to present evidence of any blood test taken outside the time limit set forth in R.C. 4511.19(D) in a prosecution for an alleged violation of R.C. 2903.06 provided it can show that the administrative requirements of OAC 3701-53-01, et.seq., are substantially complied with and expert testimony is offered to support the testing. Essentially, the State's argument is that any blood test, regardless of when it was taken should be admissible, provided that the administrative requirements were substantially complied with and expert testimony accompanies the evidence.

Implicit in the State's argument is that this Court should retreat from its recent holding in *State v. Mayl* (2005), 106 Ohio St.3d 207, in which paragraph one of the Syllabus states as follows:

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. (emphasis added) *Id.* at Syllabus Paragraph 1.

In *Mayl*, this Court made it clear that both the two hour requirement of 4511.19(D)(1) and the OAC requirements must be substantially complied with for a blood-alcohol test to be admissible in an aggravated-vehicular-homicide prosecution. The State of Ohio does not present any sound basis for this Court to change its very recent and proper holding in *Mayl*.

It should be noted that neither the Trial Court, nor the Fifth District Court of Appeals ruled that the State of Ohio could not present evidence of a blood draw taken outside of the two hour requirement of R.C. 4511.19(D) for pursuing either a “per se” or an “under the influence” prosecution of R.C. 2903.06. Rather, the Trial Court, in the first instance, ruled that the State of Ohio in this case did not show substantial compliance with either R.C. 4511.19(D)(1) or Ohio Adm. Code Chapter 3701-53. (See Judgment Entry of November 21, 2005 at p. 2). In its decision, the Court pointed out that the State of Ohio’s position at the time of the Motion hearing was that *Mayl* did not even address the two hour requirement for aggravated-vehicular homicide cases, but instead, only addressed the need for hospitals to comply with ODH regulations in taking and analyzing blood. (See Judgment Entry of November 21, 2005 at p. 1). Clearly, at the time of the Suppression Hearing, the State of Ohio misconstrued this Court’s decision in *Mayl*, and the Trial Court understood the importance of the State’s burden to show substantial compliance with R.C. 4511.19(D)(1).

Additionally, in its decision, the Fifth District Court of Appeals recognized that in this case, the State of Ohio failed to show substantial compliance with R.C. 4511.19(D)(1) and the applicable ODH regulations. (See Judgment Entry of June 29, 2006 at p. 7). Neither the Trial Court nor the Fifth District issued a decision that the State couldn't ever use a test outside of two hours in a prosecution under either a “per se” or “under the influence” theory, simply that the State of Ohio could not do so in the case at bar because it did not meet its burden at the suppression hearing.

As will later be discussed, the State of Ohio had both the burden of proof and the burden of going forward at the time of the Motion Hearing, and the Trial Court’s decision simply made clear the fact that the State of Ohio did not demonstrate substantial compliance with the testing requirements, nor was expert testimony presented, or any testimony for that matter, despite the State’s clear burden. It was a lack of substantial compliance which both the Trial Court and the Fifth District Court of Appeals found was the basis for suppression of the blood test herein.

Finally, although not explicit in its Proposition of Law, the State of Ohio’s brief argues that even if the Trial Court’s ruling on the admissibility of the blood test was proper, that the State of Ohio should nonetheless be permitted to present evidence at trial about the blood test, provided the state proceeds on an “under the influence” rather than a “per se” theory. It is respectfully submitted, that the position taken by the State of Ohio’s is without merit and as such, this Court should affirm the decisions of the Fifth District Court of Appeals and the Delaware County Court of Common Pleas.

B. The Burden of Proof and Burden of Going Forward

This Court has made it clear which party has the burden of going forward when a defendant files a motion to suppress the results of a chemical test in *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889. This court held that “to suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must (1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge.” *Id.* at paragraph one of the syllabus. From that point, the prosecutor bears the burden of proof, including the burden of going forward with evidence. *Id.* at 220.

Likewise, in OVI prosecutions Ohio Courts have applied a burden-shifting procedure to govern the admissibility of alcohol-test results. The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion “waives the requirement on the state to lay a foundation for the admissibility of the test results.” *State v. French* (1995), 72 Ohio St.3d 446, 451, 650 N.E.2d 887. After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. (emphasis added) *State v. Burnside* (2003) 100 Ohio St.3d 152, *157, 797 N.E.2d 71, **75. There is no question that the Defendant-Appellee herein met its requirements for purposes of shifting the burden of proof and the burden of going forward to the State of Ohio.

It is important for this Court to be mindful of the fact that prior to concluding the hearing on the Appellee’s Motion to Suppress, the parties entered into a stipulation that the blood draw performed on the Defendant-Appellee occurred long after the Two-Hour

time limit set forth in §4511.19(D)(1). In fact, the State of Ohio conceded that it happened seven or eight hours after that occurred. Further, at the time of the Suppression Hearing, the State of Ohio presented no evidence which would demonstrate any sort of substantial compliance with the administrative requirements, nor was any sort of expert testimony offered by the State of Ohio relating to the blood test, despite the fact that the Defendant-Appellee's Motion to Suppress specifically challenged both the two hour requirement of 4511.19(D)(1) and the Administrative requirements set forth in OAC Sections 3701-53-01; 3701-53-03; 3701-53-05; 3701-53-06; 3701-53-07; 3701-53-08 and 3701-53-09.

It is respectfully submitted that the State of Ohio failed to show substantial compliance with R.C. 4511.19(D)(1), or any compliance for that matter, and the Trial Court's decision, in keeping with this Court's decision in *Mayl* properly found that the test did not substantially comply with the two hour testing requirement of R.C. 4511.19(D)(1). The parties had stipulated that the test was performed between seven and eight hours after the accident, and it is respectfully submitted that in doing so, the State of Ohio, in essence, stipulated that the test was not performed in substantial compliance with the statutory guidelines set forth in the Revised Code. The Trial Court determined that such a significant delay showed a of lack substantial compliance with R.C. 4511.19(D)(1). That alone, was sufficient for the Trial Court to base its decision to suppress the results of the blood test.

C. The applicable statutory language does not distinguish between "per se" and "under the influence" cases.

Revised Code §4511.19(D) states in pertinent part that:

(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, 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 two hours of the time of the alleged violation. R.C. § 4511.19 (emphasis added).

The briefest perusal makes it clear that the text of Ohio Revised Code Section 4511.19(D)(1) makes no distinction between “per se” violations and “under the influence” violations. Instead, that section directs that bodily substances “shall be analyzed in accordance with methods approved by the Director of Health by an individual possessing a valid permit issued by the Director of Health” in any case alleging a violation of R.C. 4511.19(A) or (B). *Id.*

The first rule of statutory construction is that a statute which is unambiguous and definite on its fact is to be applied as written and not construed. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584; *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266. Courts must give effect to the words explicitly used in a statute or rule rather than deleting words used, or inserting words not used, in order to interpret an unambiguous statute or rule. *State v. Taniguchi* (1995), 74 Ohio St.3d 154, 156; *State v. Waddell* (1995), 71 Ohio St.3d 630, 631.

Further, it is a basic tenet of statutory construction that “the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.” *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 479, 8 O.O.2d 480, 482, 159 N.E.2d 756, 759.

As such, it is not proper to assume that the General Assembly in passing on R.C. 4511.19 intended there to be a distinction between a “per se” and an “under the influence” prosecution.

Of perhaps even greater significance, recent modifications to R.C. 4511.19(D)(1) by the General Assembly clearly demonstrates its intention for the time requirement to apply to both “per se” and “under the influence” cases. Following the adoption of 2006 SB 8, which was effective August 17, 2006 the General Assembly expanded the time requirement in 4511.19(D)(1) to three hours. However, it maintained the express requirement that this time requirement applied to prosecutions under both 4511.19(A) and 4511.19(B). In other words the General Assembly clearly had every opportunity to specifically modify the statute to exempt “under the influence” prosecutions in the wake of this Court’s decision in *Lucas* and *Mayl*, however, it opted not to do so. This adds significant support to the notion that with regard to chemical testing requirements, the General Assembly did not intend to use a different time frame for cases relying on a so-called “per se” violations and “under the influence” prosecutions.

D. Applicable case law does not differentiate between “per se” and “under the influence” prosecutions.

The State of Ohio attempts to draw a distinction between prosecutions for Aggravated Vehicular Homicide under “per se” theories and “under the influence” theories, and argues that despite the Trial Court’s ruling on the admissibility of the blood test, the two hour limit should not affect the admissibility of test results in a prosecution based on an “under the influence” theory. This argument is directly contrary to both the plain statutory language of R.C. 4511.19(D)(1) as was discussed *supra*, and by this

Court's prior decisions in *Mayl* and *Burnside*. It is respectfully submitted that there are sound reasons to decline to judicially create such a distinction between "per se" violations and "under the influence" violations.

Much of the State of Ohio's argument is based upon this Court's decision in *City of Newark vs. Lucas* (1988) 40 Ohio St.3d 103. It is important to recognize that the holding in *Lucas* as to the admissibility of test results taken beyond the two-hour limitation in RC 4511.19(D)(1) does not automatically sanction such tests' admissibility. Additionally, *Lucas* does not suggest that tests which were otherwise in violation of OAC regulations are admissible in prosecutions in "under the influence" cases.

Additionally, this Court has consistently applied the statutory and administrative requirements for admissibility of bodily substance tests offered in support of both "per se" and "under the influence" charges. This line of cases was recently summarized and reaffirmed in this Court's decision in *Burnside*. As in the instant case, in *Burnside*, the defendant, who was charged with violating both the "per se" and the "under the influence" provisions of Ohio Revised Code Section 4511.19, challenged the admissibility of his blood test as not having been conducted in accordance with Ohio Department of Health regulations. After finding that the State had not demonstrated substantial compliance with those regulations, this Court held that the motion to suppress should have been granted. The Court made no distinction between the "per se" charge and the "under the influence" charge. See also, *State v. French*, which held that the requirements for the admissibility of blood alcohol test results, including substantial compliance with ODH regulations, apply to both "per se" as well as "under the influence" charges.

Furthermore, it is respectfully submitted that reliability of scientific evidence is essential, no matter what subsection of Ohio Revised Code Section 4511.19 is relied upon to make their charge. The Ohio Department of Health regulations and the two hour limit set forth in Ohio Revised Code Section 4511.19(D)(1) are to help ensure the scientific reliability of tests of bodily substances. Adopting the State's position would substantially erode the goal of Ohio Revised Code Section 4511.19(D)(1). That, coupled with the statutory text of Ohio Revised Code Section 4511.19 alone would provide this Court with all necessary information to reject the State's position. However, there is also the well established precedent of this and other Courts of this State, most recently in *Mayl*, which demand such a result.

The arguments of the State of Ohio in its efforts to distinguish *Mayl* from the instant case should be rejected by the Court. It cannot seriously be suggested that this Court was not aware of its own prior ruling in *City of Newark v. Lucas*, inasmuch as that was the centerpiece of the arguments that were made by the State of Ohio and rejected by the Court in the *Mayl* case. As the Trial Court pointed out in its well reasoned ruling in this case the syllabus of the Court in the *Mayl* case, as in all cases is dispositive. *State ex rel Donahey v. Edmondson* (1913), 89 Ohio St. 93, 107, 105 N.E. 269. The syllabus in *Mayl* points out that:

“1. 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.”

It is respectfully submitted that this Court was certainly aware of its own holding in *Lucas* that is relied upon by the State of Ohio and did not and should not have

restricted its syllabus as the State would have this Court do now. Furthermore, the Fifth Appellate District has long ago rejected this very type of argument. *State vs. Klein* 1985 WL 8272. In *Klein*, the Fifth District was faced with a situation where the Trial Court suppressed the result of a breathalyzer test for purposes of 4511.19(A)(3) but admitting it for purposes of 4511.19(A)(1). In that case, this Court held that:

Having determined that the test results were inadmissible as to one charge, it was reversible error on the part of the trial court to admit the tainted evidence as to the alleged (A)(1) violation. Very simply put, evidence can't "be a little bit inadmissible." *Klein* at 1.

It is respectfully submitted that the State of Ohio is essentially arguing that this Court should disregard the clear language of Ohio Revised Code Section 4511.19 and the precedent recently established by this Court in *Mayl*. For all of the reasons set forth above, it is respectfully submitted that these arguments should be rejected by this Court and this Court should Affirm the Decision of the Fifth District Court of Appeals in this matter.

E. The State of Ohio has not provided notice to the Appellee of what theory under R.C. 4511.19(A) it intends to pursue.

The Defendant-Appellee, by and through counsel filed a Motion requesting a bill of particulars in the Trial Court in March of 2005. At no time was that request complied with. As a result, at the time of the Motion hearing, the Defendant-Appellee had no way of knowing whether the State of Ohio intended to rely upon a "per se" theory or an "under the influence theory" to attempt to make its case. Now the State of Ohio is essentially asking this Court to authorize it to not choose or declare a theory of their case until after the Trial Court has effectively eliminated one of the potential theories. This was not something that was even argued to the Trial Court.

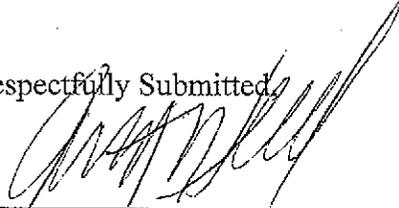
It is respectfully submitted, that due process requires that an accused have notice of what acts the state will seek to prove to support a conviction. *State v. Siferd* 151 Ohio App.3d 103, 783 N.E.2d 591 (Ohio App. 3 Dist.,2002). The State has not complied with the Defendant-Appellee's request for a Bill of Particulars under Criminal Rule 7(E). The primary reason that the Bill of Particulars was requested in the instant case was because the Indictment only alleged a violation of R.C. 4511.19(A), without any further indication or notice of whether the State intended to pursue a "per se" or "under the influence" theory. It is respectfully submitted, that the State of Ohio went into the motion hearing, not having responded to the Defendant-Appellee's request and as such, with both potential theories still as possibilities. Only after the Trial Court found the blood test inadmissible, the State of Ohio tried to manufacture a theory under which it can provide an alternative justification for the use of this evidence, despite the fact that it clearly does not follow the requirements of the statute.

It is respectfully submitted that the Defendant-Appellee's due process guarantees should prevent this Court from allowing the State of Ohio to effectively refuse to notify the Defendant-Appellee of the acts which they intend to rely upon to support a conviction.

CONCLUSION

The State of Ohio's Merit Brief largely argues that it should be permitted to present results from a blood test taken from the Defendant-Appellee for purposes of showing a violation of R.C. 4511.19(A)(1)(a). The State's argument seems to be that it should now have the opportunity to show that the ODH administrative requirements were complied with by presenting expert testimony. It is of great importance for this Court to recall that the admissibility of this very test was challenged by a proper Motion to Suppress, and that at the evidentiary hearing on that motion, the parties did nothing more than stipulate that the test was performed outside of two hours. No other evidence was offered by the State, who clearly had the burden at the motion hearing. It is respectfully submitted that the State of Ohio had its chance to present evidence about the test and they chose not to do so. This Court has previously held that substantial compliance with both 4511.19(D)(1) and the applicable OAC provisions are necessary for a test to be admissible. The Trial Court found the test to be inadmissible on the basis that the State did not substantially comply with the two hour requirement of R.C. 4511.19(D)(1). Similarly, the Fifth District Court of Appeals ruled in favor of the Appellee. It is respectfully submitted that this Court should affirm the decisions of the Fifth District Court of Appeals and the Court of Common Pleas of Delaware County.

Respectfully Submitted



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CERTIFICATE OF SERVICE

The undersigned attorney at law hereby certifies that a true copy of the foregoing Merit Brief of Appellee was served this 12th day of February, 2007 upon David A. Yost and Paul Scarsella, 140 North Sandusky Street, Delaware, Ohio 43015, by hand delivery.



Anthony M. Heald (0002095)

Not Reported in N.E.2d, 1985 WL 8272 (Ohio App. 5 Dist.)
(Cite as: Not Reported in N.E.2d)

C

STATE v. KLEIN, Ohio App., 1985. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.

STATE OF OHIO, Plaintiff-Appellee

v.

JEFFREY W. KLEIN, Defendant-Appellant
Case No. CA-6617.

CA-6617

July 15, 1985.

Criminal Appeal from the Massillon Municipal Court Case No. 84-TRC-10064.
REVERSED and FINAL JUDGMENT ENTERED.

For Plaintiff-Appellee ROBERT A. ZEDELL, Assistant Police Prosecutor, Massillon City Hall, Massillon, Ohio 44646.

For Defendant-Appellant RICHARD T. KETTLER, Duncan Plaza, 30 First Street S.E., Massillon, Ohio 44646.

OPINION

Before Hon. John R. Milligan, P.J., Hon. John R. Hoffman, J., Hon. Earle E. Wise, J.

HOFFMAN, J.

*1 This is an appeal from a judgment of the Massillon Municipal Court finding Defendant-Appellant herein, Jeffrey W. Klein, guilty of driving under the influence in violation of R.C. 4511.19(A)(1).

After being apprehended by police and taking the standard "field tests," appellant was charged with driving under the influence in violation of R.C. 4511.19(A)(1) and 4511.19(A)(3).

After taking a B.A.C. verifier (intoxilyzer) test, appellant's result showed .154 grams of alcohol per 210 liters of breath.

Appellant subsequently filed a motion to suppress on the grounds that "the results were not obtained in accordance with the regulations promulgated by the Department of Health."

After a hearing on the motion, the trial court granted the motion to suppress with regard to the (A)(3) charge. However, the court ruled that the test results could be admitted into evidence on the remaining (A)(1) charge.

Although there is no entry before this court specifying why the motion was granted, appellee maintains it is the clerical error of writing "17 Oct 86" as the calibration reference date instead of "84."

After ruling as it did on the (A)(3) element of the statute, the court requested written arguments of law "with regard to the admissibility of the test results" at trial.

Appellant filed such a memorandum of law on January 29, 1985. The State did not so respond to the court's request.

On the date of trial, the court overruled appellant's motion as to the (A)(1) charge and ordered that the test results would be admissible to the same.

After trial, appellant was found guilty as stated above.

He now raises the following two assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN PERMITTING THE RESULTS OF THE INTOXILYZER TEST

Not Reported in N.E.2d, 1985 WL 8272 (Ohio App. 5 Dist.)
(Cite as: Not Reported in N.E.2d)

TO BE INTRODUCED FOR PURPOSES OF
ATTEMPTING TO PROVE A VIOLATION OF
O.R.C. 4511.19 (A)(1) AFTER SUPPRESSING IT
FOR PURPOSES OF O.R.C. 4511.19(A)(3).

ASSIGNMENT OF ERROR NO. II

THE JUDGMENT OF THE TRIAL COURT IS
AGAINST THE MANIFEST WEIGHT OF THE
EVIDENCE.

I

As argued in his Memorandum of Law of January 29, 1985, appellant, under this assignment of error, objects to the admission of any test results which have been deemed erroneous. This court agrees and this assignment of error is well taken.

Having determined that the test results were inadmissible as to one charge, it was reversible error on the part of the trial court to admit the tainted evidence as to the alleged (A)(1) violation.

Very simply put, evidence can't "be a little bit inadmissible."

When the trial court found that there was a seminal error in the record-keeping of the calibration of the instant test, and ruled as it did, the instant test was rendered inadmissible.

We find the admission of any evidence of the intoxilyzer test to be inherently prejudicial to appellant and this assignment of error is sustained.

II

Having ruled as we have done under the first assignment of error, we review whether there was sufficient, probative evidence adduced by the State to convict appellant of violating R.C. 4511.19(A) (1) without the benefit (to the State) of the test result. We find there was not sufficient evidence.

*2 The record is nearly devoid of competent

evidence relating to appellant "driving under the influence." Appellant was observed "rolling" through a stop sign, and not for any erratic or any "garden variety" drunk driving characteristics such as weaving or moving left of center.

Nor has appellee provided this court with a satisfactory argument under this assignment of error as to why the judgment of guilty should be upheld upon the (A)(1) charge, lacking the test result as evidence.

This assignment of error is sustained.

Both of appellant's assignments of error are sustained and the judgment of the Massillon Municipal Court is reversed.

Milligan, P.J. and Wise, J. concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, we reverse the judgment of the Massillon Municipal Court of Stark County, Ohio, and enter final judgment of acquittal of the appellant, Jeffrey W. Klein, of a violation of R.C. 4511.19(A) (1).

Ohio App., 1985.

State v. Klein

Not Reported in N.E.2d, 1985 WL 8272 (Ohio App. 5 Dist.)

END OF DOCUMENT

3701-53-01 Techniques or methods.

(A) Tests to determine the concentration of alcohol may be applied to blood, breath, urine, or other bodily substances. Results shall be expressed as equivalent to:

(1) Grams by weight of alcohol per one hundred milliliters of whole blood, blood serum or plasma (grams per cent by weight);

(2) Grams by weight of alcohol per two hundred ten liters of deep lung breath;

(3) Grams by weight of alcohol per one hundred milliliters of urine (grams per cent by weight).

The results of the tests shall be retained for not less than three years.

(B) At least one copy of the written procedure manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other bodily substance tests shall be on file in the area where the analytical tests are performed.

In the case of breath tests using an approved evidential breath testing instrument listed in paragraphs (A) and (B) of rule 3701-53-02 of the Administrative Code, the operational manual provided by the instrument's manufacturer shall be on file in the area where the breath tests are performed.

HISTORY: Eff 3-1-68; 2-1-76; 3-15-83 (Emer.); 6-13-83; 1-1-87; 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.143, 3701.13

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-02 Breath tests.

(A) The instruments listed in this paragraph are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19, 1547.11, 2903.06, 2903.08, 4506.15, and/or 4506.17 of the Revised Code, or any other statute or local ordinance equivalent to those in this paragraph prescribing a defined or prohibited breath-alcohol concentration. The approved evidential breath testing instruments are:

- (1) BAC DataMaster, BAC DataMaster cdm;
- (2) Intoxilyzer model 5000 series 66, 68 and 68 EN.

(B) The instruments listed in this paragraph are approved as additional evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 1547.11 and/or 1547.111 of the Revised Code, or any other statute or local ordinance equivalent to those defined by sections 1547.11 and/or 1547.111 of the Revised Code prescribing a defined or prohibited breath alcohol concentration. The approved evidential breath testing instruments are;

- (1) Alco-sensor RBT III; and
- (2) Intoxilyzer model 8000.

(C) Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule. Breath samples shall be analyzed according to the operational checklist for the instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.

HISTORY: Eff 3-1-68; 2-1-76; 3-15-83 (Emer.); 6-13-83; 1-1-87; 5-5-90; 12-12-94; 9-14-95 (Emer.); 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.143, 3701.13

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-03 Blood, urine and other bodily substance tests.

(A) Alcohol in blood, urine and other bodily substances shall be analyzed based on approved techniques or methods. The technique or method must have documented sensitivity, specificity, accuracy, precision and linearity. The technique or method can be based on procedures which have been published in a peer reviewed or juried scientific journal or thoroughly documented by the laboratory. Approved techniques or methods include:

- (1) Gas chromatography; and
- (2) Enzyme assays.

(B) Drugs of abuse in blood, urine, and other bodily substances as defined in section 3719.011 of the Revised Code shall be tested using an analytical technique or method approved by the director of health as part of the permit process as specified in rules 3701-53-07 and 3701-53-09 of the Administrative Code. The approved analytical techniques or methods are:

- (1) Immunoassay;
- (2) Thin-layer chromatography;
- (3) Gas chromatography;
- (4) Mass spectroscopy;
- (5) High performance liquid chromatography;
- (6) Spectroscopy.

All positive results of presumptive tests specified in paragraph (B) of this rule must be confirmed by one or more dissimilar analytical techniques or methods and must be part of a testing procedure. The analytical techniques or methods used for confirmation must have similar or improved sensitivity, specificity, accuracy, precision and linearity. The approved techniques or methods can be based on procedures which have been published in a peer reviewed or juried scientific journal or thoroughly documented by the laboratory.

(C) The results of tests to determine the concentrations of delta-9-tetrahydrocannabinol (THC), cocaine, or their metabolites must be expressed as positive if the following apply:

(1) In blood or other bodily substances if >5 ng/ml THC or >25 ng/ml 11-nor-delta-9-tetrahydrocannabinol carboxylic acid (THC-COOH) or > 50 ng/ml cocaine or > 100 ng/ml benzoylecgonine.

(2) In urine if > 15 ng/ml 11-nor-delta-9-tetrahydrocannabinol carboxylic acid (THC-COOH) or > 150 ng/ml cocaine or benzoylecgonine.

HISTORY: Eff 3-1-68; 3-15-83 (Emer.); 6-13-83; 1-1-87; 5-5-90; 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143

Rule amplifies: RC 3701.143

3701-53-04 Instrument check.

(A) A senior operator shall perform an instrument check on approved evidential breath testing instruments and a radio frequency interference (RFI) check no less frequently than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

(1) The instrument shall be checked to detect RFI using a hand-held radio normally used by the law enforcement agency. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.

(2) An instrument shall be checked using an instrument check solution containing ethyl alcohol approved by the director of health. An instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that instrument check solution. An instrument check result which is outside the range specified in this paragraph shall be confirmed by the senior operator using another bottle of approved instrument check solution. If this instrument check result is also out of range, the instrument shall not be used until the instrument is serviced.

(B) An instrument check shall be made in accordance with paragraph (A) of this rule when a new evidential breath testing instrument is placed in service or when the instrument is returned after service or repairs, before the instrument is used to test subjects.

(C) An instrument check solution shall not be used more than three months after its date of first use, or after the manufacturer's expiration date (one year after manufacture) whichever comes first. After first use, instrument check solutions shall be kept under refrigeration when not being used. The instrument check solution container shall be retained for reference until the instrument check solution is discarded.

(D) Each testing day, the analytical techniques used in rule 3701-53-03 of the Administrative Code shall be checked for proper calibration under the general direction of the designated laboratory director. General direction does not mean that the designated laboratory director must be physically present during the performance of the calibration check.

(E) Results of instrument checks, calibration checks and records of service and repairs shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

HISTORY: Eff 3-1-68; 2-1-76; 3-15-83 (Emer.); 6-13-83; 1-1-87; 7-7-97; 3-30-01; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-05 Collection and handling of blood and urine specimens.

(A) All samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable.

(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic.

(C) Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.

(D) The collection of a urine specimen must be witnessed to assure that the sample can be authenticated. Urine shall be deposited into a clean glass or plastic screw top container which shall be capped, or collected according to the laboratory protocol as written in the laboratory procedure manual

(E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:

- (1) Name of suspect;
- (2) Date and time of collection;
- (3) Name or initials of person collecting the sample; and
- (4) Name or initials of person sealing the sample.

(F) While not in transit or under examination, all blood and urinespecimens shall be refrigerated.

HISTORY: Eff 3-1-68; 3-15-83 (Emer.); 6-13-83; 1-1-87; 5-5-90; 9-14-94 (Emer.); 12-12-94; 1-4-96 (Emer.); 3-19-96 (Emer.); 6-13-96; 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-06 Laboratory requirements.

(A) Chain of custody and the tests results for evidential alcohol and drugs of abuse shall be identified and retained for not less than three years, after which time the documents may be discarded unless otherwise directed in writing from a court. All positive blood, urine and other bodily substances shall be retained in accordance with rule 3701-53-05 of the Administrative Code for a period of not less than one year, after which time the specimens may be discarded unless otherwise directed in writing from a court.

(B) The laboratory shall successfully complete a national proficiency testing program using the applicable technique or method for which the laboratory personnel seek a permit under rule 3701-53-09 of the Administrative Code.

(C) The laboratory shall have a written procedure manual of all analytical techniques or methods used for testing of alcohol or drugs of abuse in bodily substances. Textbooks and package inserts or operator manuals from the manufacturer may be used to supplement, but may not be used in lieu of the laboratory's own procedure manual for testing specimens.

(D) The designated laboratory director shall review, sign, and date the procedure manual as certifying that the manual is in compliance with this rule. The designated laboratory director shall ensure that:

(1) Any changes in a procedure be approved, signed, and dated by the designated laboratory director;

(2) The date the procedure was first used and the date the procedure was revised or discontinued is recorded;

(3) A procedure shall be retained for not less than three years after the procedure was revised or discontinued, or in accordance with a written order issued by any court to the laboratory to save a specimen that was analyzed under that procedure;

(4) Laboratory personnel are adequately trained and experienced to perform testing of blood, urine and other bodily substances for alcohol and drugs of abuse and shall ensure, maintain and document the competency of laboratory personnel. The designated laboratory director shall also monitor the work performance and verify the skills of laboratory personnel;

(5) The procedures manual includes the criteria the laboratory shall use in developing standards, controls, and calibrations for the technique or method involved; and

(6) A complete and timely procedure manual is available and followed by laboratory personnel.

(E) Any time the designated laboratory director is replaced, another permitted laboratory director or applicant shall be designated.

HISTORY: Eff 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-07 Qualifications of personnel.

(A) Blood, urine, and other bodily substance tests for alcohol shall be performed in a laboratory by an individual who has a laboratory director's permit or, under his or her general direction, by an individual who has a laboratory technician's permit. General direction does not mean that the laboratory director must be physically present during the performance of the test. Laboratory personnel shall not perform a technique or method of analysis that is not listed on the laboratory director's permit.

(1) An individual who is employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought and who possesses at least two academic years of college chemistry and at least two years of experience in a clinical or chemical laboratory and possesses a minimum of a bachelor's degree shall meet the qualifications for a laboratory director's permit.

(2) An individual who is employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought, has been certified by the designated laboratory director that he or she is competent to perform all procedures contained in the laboratory's procedure manual for testing specimens and meets one of the following requirements shall meet the qualifications for a laboratory technician's permit:

(a) Has a bachelor's degree in laboratory sciences from an accredited institution and has six months experience in laboratory testing;

(b) Has an associate's degree in laboratory sciences from an accredited institution or has completed sixty semester hours of academic credit including six semester hours of chemistry and one year experience in laboratory testing;

(c) Is a high school graduate or equivalent and has successfully completed an official military laboratory procedures course of at least fifty weeks duration and has held the military enlisted occupational specialty of medical laboratory specialist (laboratory technician); or

(d) Is a high school graduate or equivalent and was permitted on or before July 7, 1997.

(B) Blood, urine and other bodily substances tests for drugs of abuse shall be performed in a laboratory by an individual who has a laboratory director's permit or, under his or her general direction, by an individual who has a laboratory technician's permit. General direction does not mean that the laboratory director must be physically present during the performance of the test. Laboratory personnel shall not perform a technique or method of analysis that is not listed on the laboratory director's permit.

(1) An individual who is employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought, who possesses at least two academic years of college chemistry and meets one of the following requirements shall meet the qualifications for a laboratory director's permit:

(a) Has at least five years of experience in a clinical or chemical laboratory and possesses a minimum of a bachelor's degree in laboratory sciences;

(b) Has at least three years of experience in a clinical or chemical laboratory and possesses a minimum of a master's degree; or

(c) Has at least two years of experience in a clinical or chemical laboratory and possesses a minimum of an earned doctoral degree.

(2) An individual who is employed by a laboratory, which has successfully completed a proficiency examination administered by a national program for proficiency testing for the approved technique or method of analysis for which the permit is sought, has been certified by the designated laboratory director that he or she is competent to perform all procedures contained in the laboratory's procedure manual for testing specimens and meets one of the following requirements shall meet the qualifications for a laboratory technician's permit:

(a) Has a bachelor's degree in laboratory sciences from an accredited institution and has one year experience in laboratory testing;

(b) Has an associate's degree in laboratory sciences from an accredited institution or has completed sixty semester hours of academic credit including six semester hours of chemistry and two years experience in laboratory testing;

(c) Is a high school graduate or equivalent and has successfully completed an official military laboratory procedures course of at least fifty weeks duration and has held the military enlisted occupational specialty of medical laboratory specialist (laboratory technician) and two years experience in laboratory testing; or

(d) Is a high school graduate or equivalent and was permitted on or before July 7, 1997.

(C) Breath tests used to determine whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19, 4511.191, 1547.11, 1547.111, 2903.06, 2903.08 and/or 4506.15 of the Revised Code, or any other statute or local ordinance prescribing a defined or prohibited breath alcohol concentration shall be performed by a senior operator or an operator. A senior operator shall be responsible for the care, maintenance and instrument checks of the evidential breath testing instruments.

(D) An individual meets the qualifications for a senior operator's permit by:

(1) Being a high school graduate or having passed the "General Education Development Test" and

(2) Having demonstrated that he or she can properly care for, maintain, perform instrument checks upon and operate the evidential breath testing instrument by having successfully completed a basic senior operator, upgrade or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit.

(E) An individual meets the qualifications for an operator's permit by:

(1) Being a high school graduate or having passed the "General Education Development Test"; and

(2) Having demonstrated that he or she can properly operate the evidential breath testing instrument by having successfully completed a basic operator or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit.

HISTORY: Eff 3-1-68; 1-1-87; 5-5-90; 9-14-94 (Emer.); 12-12-94; 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143
Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-08 Surveys and proficiency examinations.

(A) Individuals desiring to function as laboratory directors and laboratory technicians who apply for or are issued permits under rule 3701-53-09 of the Administrative Code shall be subject to surveys and proficiency examinations by representatives of the director of health. A survey or proficiency examination may be conducted at the director's discretion.

(1) A survey shall consist of a review of the permit holder's or applicant's compliance with the requirements of this chapter.

(2) A proficiency examination shall consist of an evaluation of the permit holder's, applicant's or laboratory's ability to test samples provided by a representative of the director using the techniques or methods for which the permit is held or sought. Proficiency examination samples may be:

(a) Mailed to the facility at which the permit holder or applicant uses or plans to use the permit; or

(b) Presented in person by a representative of the director at the facility where the permit holder or applicant uses or plans to use the permit.

(B) During proficiency examinations, laboratory directors, laboratory technicians and applicants shall accept samples, perform tests, and report all test results to a representative of the director. During surveys and proficiency examinations, permit holders and applicants shall grant the director's representatives access to all portions of the facility where the permit is used or is intended to be used and to all records relevant to compliance with the requirements of this chapter.

(C) Individuals desiring to function as senior operators and operators who apply for or are issued permits under rule 3701-53-09 of the Administrative Code, shall be subject to surveys and proficiency examinations by representatives of the director of health. A survey or proficiency examination shall be conducted at the director's discretion.

(1) A survey shall consist of a review of the permit holder's or applicant's compliance with the requirements of this chapter.

(2) A proficiency examination shall consist of an evaluation of the permit holder's or applicant's ability to test samples provided by a representative of the director using the evidential breath testing instrument for which the permit is held or sought. Proficiency samples are presented to the permit holder or applicant in person by representatives of the director.

(D) During proficiency examinations, senior operators, operators and applicants shall accept samples, perform tests and report all results to a representative of the director. During surveys and proficiency examinations, permit holders and applicants shall grant the director's representatives access to all portions of the facility where the permit is used or is intended to be used, and to all records relevant to compliance with the requirements of this chapter.

HISTORY: Eff 3-1-68; 5-5-90; 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

3701-53-09 Permits.

(A) Individuals desiring to function as laboratory directors or laboratory technicians shall apply to the director of health for permits on forms prescribed and provided by the director. A separate application shall be filed for a permit to perform tests to determine the amount of alcohol in a person's blood, urine or other bodily substance, and a separate permit application shall be filed to perform tests to determine the amount of drugs of abuse in a person's blood, urine or other bodily substance. A laboratory director's and laboratory technician's permit is only valid for the laboratory indicated on the permit.

(1) The director shall issue appropriate permits to perform tests to determine the amount of alcohol in a person's blood, urine or other bodily substance to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code or under paragraph (A) of this rule. Laboratory personnel holding permits issued under this rule shall use only those laboratory techniques or methods for which they have been issued permits.

(a) The laboratory where the permit holder is employed shall have successfully completed a proficiency examination from a national program for proficiency testing using the applicable techniques or methods, and provide to representatives of the director all proficiency test results.

(b) Permit holders shall successfully complete proficiency examinations by representatives of the director using the techniques or methods for which they have been issued permits.

(2) The director shall issue appropriate permits to perform tests to determine the amount of drugs of abuse in a person's blood, urine or other bodily substances to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code or under paragraph (A) of this rule. Laboratory personnel holding permits issued under this rule shall use only those laboratory techniques or methods for which they have been issued permits.

The laboratory where the permit holder is employed shall have successfully completed a proficiency examination from a national program for proficiency testing using the applicable techniques or methods, and provide to representatives of the director all proficiency results.

(B) Individuals desiring to function as senior operators or operators shall apply to the director of health for permits on forms prescribed and provided by the director of health. A separate application shall be filed for each type of evidential breath testing instrument for which the permit is sought.

The director of health shall issue appropriate permits to perform tests to determine the amount of alcohol in a person's breath to individuals who qualify under the applicable provisions of rule 3701-53-07 of the Administrative Code. Individuals holding permits issued under this rule shall use only those evidential breath testing instruments for which they have been issued permits.

(C) Permits issued under paragraphs (A) and (B) of this rule shall expire one year from the date issued, unless revoked prior to the expiration date. An individual holding a permit may seek renewal of an issued permit by the director under paragraphs (A) and (B) of this rule by filing an application with the director no sooner than six months before the expiration date of the current permit. The director shall not renew the permit if the permit holder is in proceedings for revocation of his or her current permit under rule 3701-53-10 of the Administrative Code.

(D) To qualify for renewal of a permit under paragraphs (A) or (B) of this rule:

(1) A permit holder shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the applicable provisions of rule 3701-53-07 of the Administrative Code for issuance of the type of permit sought.

(2) If the individual seeking a renewal permit currently holds a laboratory technician or laboratory director permit, the permit holder shall meet the requirements of paragraph (A) of this rule.

(3) If the individual seeking a renewal permit currently holds an operator or senior operator permit, the permit holder shall have completed satisfactorily an in-service course for the applicable type of evidential breath testing instrument which meets the requirements of paragraph (B) of this rule, which includes review of self-study materials furnished by the director.

HISTORY: Eff 3-1-68; 1-1-87; 5-5-90; 9-14-94 (Emer.); 12-12-94; 7-7-97; 9-30-02

Rule promulgated under: RC 119.03

Rule authorized by: RC 3701.13, 3701.143

Rule amplifies: RC 3701.143

R.C. 119.032 review dates: 7/1/2002 and 09/01/2007

CrimR 7. The Indictment and the Information.

(A) Use of indictment or information. A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment shall be signed, in accordance with Crim. R. 6 (C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect

or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

HISTORY: Amended, eff 7-1-93; 7-1-00