

In the
Supreme Court of Ohio

07-2295

STATE OF OHIO,

Plaintiff-Appellant,

v.

COREY HOOVER,

Defendant-Appellee.

: Case No. 07-2295
:
:
: On Appeal from the
: Union County
: Court of Appeals,
: Third Appellate District
:
:
: Court of Appeals Case
: No. 14-07-11
:
:

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO

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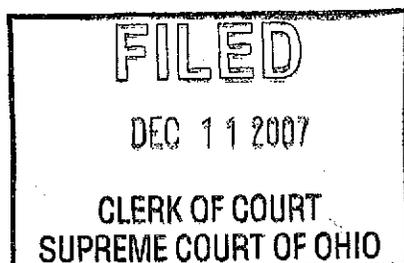


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	3
A. The trial court denied Hoover’s motion to dismiss, accepted Hoover’s no contest plea to violating R.C. 4511.19(A)(2), and sentenced him under the corresponding sentencing statute, R.C. 4511.19(G)(1)(b)(ii).....	3
B. The Third District Court of Appeals reversed the trial court judgment, concluding that R.C. 4511.19(A)(2), in conjunction with R.C. 4511.19(G)(1)(b)(ii), is unconstitutional.....	4
THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST.....	5
A. The Third District’s decision struck down an Ohio statute on the basis of a new rule of federal constitutional law	5
B. The Third District’s decision erects an obstacle to Ohio’s important policy of deterring repeat DUI offenses.....	6
ARGUMENT	8
<u>Appellant State of Ohio’s Proposition of Law:</u>	
<i>R.C. 4511.19(G)(1)(b)(2), which enhances the sentence to repeat DUI offenders who refuse to submit to a chemical test, is not constitutional because there is no Fourth Amendment right to refuse a breath test to measure a suspect’s blood alcohol content</i>	<i>8</i>
A. The Third District erred by analyzing Hoover’s claim under the consent exception to the Fourth Amendment’s warrant requirement, both because exigent circumstances justified the breath test and because police sought the breath test after a valid arrest.....	8
1. Because the exigency exception applied, Hoover’s consent was irrelevant.....	9
2. Because police sought to test Hoover’s breath as a search incident to a valid arrest, Hoover’s consent was irrelevant.....	11
B. Even if this case were properly analyzed under the consent exception to the warrant requirement, the Fourth Amendment does not provide suspects with any right to withdraw consent.....	11

C. Because there is no Fourth Amendment right to decline a breath test, the Third District erred by concluding that enhancing a sentence for such a refusal is unconstitutional.....13

CONCLUSION.....15

CERTIFICATE OF SERVICEunnumbered

INTRODUCTION

This case concerns the constitutionality of a sentencing statute that targets repeat offenders of Ohio's statute prohibiting driving a motor vehicle under the influence of alcohol ("DUI"). Despite having a prior DUI conviction, Defendant-Appellee Corey Hoover drove while intoxicated again. When police pulled him over, he refused to take a breathalyzer test, even though under Ohio's implied-consent statute, any person who operates a motor vehicle on public roads is deemed to have consented to such a test. See R.C. 4511.191(A)(2). Hoover was charged and convicted of violating R.C. 4511.19(A)(2), which applies to people with prior DUI convictions and prohibits them from refusing to take a breath test after being stopped for a DUI violation. Because Hoover was convicted of violating this provision of Ohio's DUI statute, he received an enhanced minimum sentence of twenty days in jail. But an appeals court has now thrown out Hoover's sentence, finding the statute unconstitutional because it punished Hoover for refusing to take a breath test. That ruling warrants review, as it improperly struck down a statute that is critical to reducing drunk driving in Ohio.

Drunk driving is both dangerous and, unfortunately, common. To prevent it, legislatures have passed strict laws against intoxicated drivers, a stance the federal government also supports. See, e.g., *South Dakota v. Dole* (1987), 483 U.S. 203, 209. Legislatures have taken special steps to punish repeat offenders, who are responsible for a significant number of DUI offenses. Among these laws are the Revised Code provisions under which Hoover was convicted and sentenced.

The Third District's decision undermines Ohio's efforts at reducing drunk driving by striking down a sentencing statute that disincentivizes repeat DUI offenses, and thereby provides substantial and tangible benefits to public safety. Further, the decision is incorrect because the Fourth Amendment provides no right to refuse a breath test when a police officer has probable

cause to believe that a motorist is driving under the influence. Although the Fourth Amendment's warrant requirement covers blood-alcohol-content ("BAC") testing, this requirement is not absolute. Instead, various exceptions exist, including the exigency exception, which permits a warrantless search when a delay will result in the "destruction of evidence." *Schmerber v. California* (1966), 384 U.S. 757, 770 (citing *Preston v. United States* (1964), 376 U.S. 364, 367). Because the body rapidly rids itself of alcohol, BAC evidence quickly dissipates, and the United States Supreme Court and various other courts, accordingly, have held that a warrant is not necessary in such circumstances. Instead, a warrantless BAC test is justified when the officer has probable cause to believe that the suspect has been driving under the influence, exigent circumstances exist, and the police use reasonable measures to administer the BAC test. *Id.*; *State v. King* (1st Dist.), 2003-Ohio-1541 ¶ 26. Noticeably absent from this list of factors is a consent requirement. Similarly, warrantless searches are permissible when, as here, they follow a valid arrest.

Although the Third District Court of Appeals was correct in finding that BAC testing is subject to the Fourth Amendment, consent is irrelevant to the constitutional analysis because both the exigency and valid-arrest exceptions justified a warrantless search and seizure of Hoover's breath. Further, even if consent were relevant, the Third District erred by manufacturing a right to revoke previously given consent. No such right exists under the Fourth Amendment. Because Hoover had no constitutional right to refuse a breath test, subjecting him to an enhanced penalty for refusing the test raises no constitutional concerns. The Third District erred by holding otherwise.

The Third District's incorrect decision will hamper the State's important efforts to prevent DUI offenses. By creating a new rule of constitutional law that is entirely out of step with

precedent, the Third District has removed an important disincentive for people with prior DUI convictions to offend again. To correct this misstep and thereby enhance the safety of all Ohioans, this Court should grant review.

STATEMENT OF THE CASE AND FACTS

A. The trial court denied Hoover's motion to dismiss, accepted Hoover's no contest plea to violating R.C. 4511.19(A)(2), and sentenced him under the corresponding sentencing statute, R.C. 4511.19(G)(1)(b)(ii).

On September 8, 2006, a Union County Sheriff's Deputy stopped Corey Hoover while he was driving his vehicle. Believing that Hoover had been drinking, the Deputy asked Hoover to submit to a breath test. Even though Hoover had impliedly consented to such a test by driving on a public road, see R.C. 4511.191(A)(2), he refused to take the breath test and consequently received a citation for a DUI violation.

Two different sections of Ohio's DUI law are relevant to this case: R.C. 4511.19(A)(1) and R.C. 4511.19(A)(2). An R.C. 4511.19(A)(1) violation is a plain-vanilla DUI charge. An R.C. 4511.19(A)(2) violation, by contrast, is an enhanced R.C. 4511.19(A)(1) violation. It has the same elements of an R.C. 4511.19(A)(1) violation, but in addition, the defendant must have (1) been convicted of a prior DUI offense within the past twenty years, and (2) refused to submit to a chemical test such as a breathalyzer. See R.C. 4511.19(A)(2).

Aside from these different elements, R.C. 4511.19(A)(1) and R.C. 4511.19(A)(2) violations carry different minimum penalties. Offenders convicted of violating R.C. 4511.19(A)(1) who have received a prior DUI conviction within the past six years are subject to a mandatory minimum jail sentence of ten days. R.C. 4511.19(G)(1)(b)(i). However, a defendant found guilty of violating (A)(2) who has received a prior DUI conviction within the past six years receives a mandatory minimum *twenty*-day sentence. R.C. 4511.19(G)(1)(b)(ii).

Hoover pleaded not guilty to the R.C. 4511.19(A)(2) charge and later moved to dismiss, claiming that R.C. 4511.19(A)(2) violated his constitutional rights. More specifically, Hoover claimed that the statute violated: (1) the Fourth Amendment of the United States Constitution, and Article I, Section 14 of the Ohio Constitution; and (2) the Fifth and Fourteenth Amendments of the United States Constitution, and the comparable provisions of the Ohio Constitution. Marysville Municipal Judge Michael J. Grigsby denied the motion to dismiss. *Id.* ¶ 2. Hoover then pleaded no contest. Judge Grigsby accepted Hoover's plea, found him guilty of violating R.C. 4511.19(A)(2), and sentenced Hoover pursuant to R.C. 4511.19(G)(1)(b)(ii). *Id.* ¶¶ 2, 4. Hoover indicated he would appeal, and Judge Grigsby granted Hoover's Motion for Stay of Sentence Enforcement pending the appellate decision. *Id.* ¶ 2.

B. The Third District Court of Appeals reversed the trial court judgment, concluding that R.C. 4511.19(A)(2), in conjunction with R.C. 4511.19(G)(1)(b)(ii), is unconstitutional.

On appeal, the Third District Court of Appeals reversed the municipal court's judgment. Although the Third District correctly upheld the municipal court's denial of Hoover's motion to dismiss, it erroneously concluded that the enhanced sentence for violating R.C. 4511.19(A)(2) punished Hoover for asserting a constitutional right. *Id.* ¶¶ 4-6.

According to the Third District, Hoover's enhanced sentence violated the Fourth Amendment because it punished him for asserting a constitutional right to withhold consent to a chemical test. The court recognized that a chemical test is considered a search under the Fourth Amendment of the United States Constitution. *Id.* ¶ 4 (citing *Schmerber v. California* (1966), 384 U.S. 757). It then proceeded to analyze Hoover's case under the consent exception to the Fourth Amendment's warrant requirement, concluding that Hoover could revoke his implied consent to a breathalyzer triggered by his operating a vehicle on a public road. The Third District, however, did not consider other exceptions to the warrant requirement, such as the

exigency exception or the valid-arrest exception. (The court did not address Hoover's Fifth Amendment challenge.)

**THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS
OF PUBLIC AND GREAT GENERAL INTEREST**

This case warrants the Court's review because the Third District's decision manufactures a new right found nowhere in this Court's or other courts' Fourth Amendment jurisprudence and because this new rule undermines the State's efforts to reduce the devastating effects of Ohio's high volume of intoxicated drivers.

A. The Third District's decision struck down an Ohio statute on the basis of a new rule of federal constitutional law.

The proper application of the Fourth Amendment's reasonableness standard in the context of DUI arrests presents a substantial constitutional question ripe for this Court's resolution. Under Fourth Amendment doctrine, "the reasonableness of [a] . . . search depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in obtaining the evidence." *State v. Troyer* (9th Dist.), 2003-Ohio-536, *7. The Third District ignored Ohio's paramount interest in obtaining evidence of Hoover's BAC and concluded that Hoover had a Fourth Amendment right to revoke his consent, provided under Ohio's implied-consent statute, to a breath test. This Fourth Amendment holding, as illustrated below, lacks support in this Court's or other courts' jurisprudence. Further, if extended to its logical conclusion, this holding will have wide-reaching consequences. For instance, if criminal suspects have a Fourth Amendment right to withdraw their consent to a search, suspects carrying contraband at airports could potentially revoke their implied consent to being searched by agreeing to leave the airport to avoid being searched. The debilitating consequences for drug enforcement and national security are obvious.

B. The Third District's decision erects an obstacle to Ohio's important policy of deterring repeat DUI offenses.

Intoxicated driving presents a nationwide crisis. Approximately two in every five Americans will be involved in an alcohol-related crash at some point in their lives. Elizabeth F. Rubin, Comment: *Trying to be Reasonable about Drunk Driving: Individualized Suspicion and the Fourth Amendment*, 62 U. Cin. L. Rev. 1105, 1105 & n.3 (1994). Additionally, on average, one person is injured from an alcohol-related crash every one and one-half minutes. *Id.* at 1105 & n.2. While these human costs are tragic, the monetary costs are also alarming. The direct costs of alcohol-related accidents are estimated to be \$46 billion per year. *Id.* at 1105 & n.4. Yet, only one in five hundred to two thousand drivers who drive with a blood alcohol level above the legal limit are arrested for driving under the influence. *Id.* at 1105 & n.5. These figures illustrate both the difficulty and necessity of detecting drunken driving.

Both Ohio and United States DUI statistics are striking. Between January 1, 1980, and August 23, 2005, there have been 1,562,299 DUI convictions in Ohio—a figure that amounts to more than 60,000 per year. See Ohio Insurance Institute's Office, 2005 Annual Report, at "OVI Repeat Offender Statistics," available at http://www.ohioinsurance.org/factbook/2006/chapter3/chapter3_d.asp. Even more alarming is the prevalence of repeat offenders. From January 1, 1980, through August 23, 2005, repeat offenders were responsible for 60% of all DUI convictions. *Id.* Currently, nearly 36,000 Ohio drivers have five or more DUI arrests. Editorial, *Focus on stopping repeat offenders*, Cincinnati Enquirer, May 6, 2007, at 2E.

Most disturbing are the consequences of intoxicated driving. Forty-one percent of all fatal vehicular crashes nationwide are alcohol-related. See National Highway Traffic and Safety Administration, Motor Vehicle Traffic Crash Fatality Counts and Estimates of People Injured for 2006, at 67, available at http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=

/staticfiles/DOT/NHTSA/NCSA/Content/PDF/810837.pdf. Nationally, 17,602 people lost their lives in alcohol-related accidents in 2006 alone. *Id.* Also in 2006, 16,082 alcohol-related vehicular crashes occurred in Ohio, resulting in 495 deaths and 9,751 injuries. See Ohio Department of Public Safety's Office, 2006 Traffic Crash Facts Report, at "Chapter 6 Alcohol Statistics," available at <http://www.publicsafety.ohio.gov/publicat/HSY7606/HSY7606-2006.pdf>.

As shown above, society's interests in ending intoxicated driving are weighty. The public is in danger every time a drunk driver gets behind the wheel, and it is in the public's interest to curb drunken driving. The General Assembly has shown its concern regarding the substantial number of alcohol-related vehicular accidents by increasing penalties against intoxicated drivers and repeat offenders. Strict laws—especially those targeting repeat offenders, such as R.C. 4511.19(A)(2) and its corresponding sentencing statute—deter motorists from driving drunk and maintain the safety of Ohio's roads. This paramount concern is precisely the reason the General Assembly passed these laws.

It is also critical that Ohio's traffic laws "be applicable and uniform throughout this state." R.C. § 4511.06. If courts are unsure of the constitutionality of this law, differing opinions are likely to arise, which will create a disparity in enforcement throughout the State. Prosecutors, defense attorneys, defendants, and judges of Ohio's lower courts will all benefit from an opinion on this law's constitutionality, as DUI charges are common, and the more court personnel know about the law, the more effectively and efficiently they can perform their duties. Therefore, the Ohio Supreme Court should provide an opinion on this question of public importance, as the decision will affect and benefit prosecutors, defense attorneys, judges, and the public.

ARGUMENT

Appellant State of Ohio's Proposition of Law:

R.C. 4511.19(G)(1)(b)(2), which enhances the sentence for repeat DUI offenders who refuse to submit to a chemical test, is not unconstitutional because there is no Fourth Amendment right to refuse a breath test to measure a suspect's blood alcohol content.

The crux of the Third District's decision—that Hoover had a Fourth Amendment right to refuse to submit to a breath test—was in error. First the court should not have reached the issue of consent because both exigent circumstances and a valid arrest justified an immediate breath test. Accordingly, Hoover's consent was wholly irrelevant to the Fourth Amendment analysis. Further, even if the Fourth Amendment inquiry were properly analyzed under the consent exception to the warrant requirement, suspects have no Fourth Amendment right to revoke consent once given, even if the consent is implied rather than express. Because Hoover had no Fourth Amendment right to decline a breath test, his enhanced sentence for refusing to submit to such a test raises no constitutional concerns.

A. The Third District erred by analyzing Hoover's claim under the consent exception to the Fourth Amendment's warrant requirement, both because exigent circumstances justified the breath test and because police sought the breath test after a valid arrest.

The “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” *Schmerber*, 384 U.S. at 767. Typically, warrants are required for searches “of dwellings, and absent an emergency, no less can be required where intrusions into the human body are concerned.” *Id.* at 770. When determining whether a warrant is necessary, “the question is not whether the public interest justifies the type of search in question, but whether . . . the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.” *Camara v. San Francisco Mun. Court* (1967), 387 U.S. 523, 533.

1. Because the exigency exception applied, Hoover's consent was irrelevant.

Courts have recognized various exceptions to the Fourth Amendment's warrant requirement. One such exception, called the exigency exception, applies when a police officer reasonably believes that he is confronted with an "emergency, in which the delay necessary to obtain a warrant, under the circumstances, threaten[s] the 'destruction of evidence.'" *Schmerber*, 384 U.S. at 770 (quoting *Preston*, 376 U.S. at 367).

The exigency exception applies in DUI cases because BAC evidence is evanescent in nature. In *Schmerber*, the United States Supreme Court held that because the "percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system," a police officer can obtain a blood sample even without an intoxicated driver's consent. 384 U.S. at 770; see also *State v. Schulte* (11th Dist.), 1996 Ohio App. Lexis 4675, *22. In *King*, an expert witness testified that "alcohol dissipates from the blood at a rate of .02 percent per hour." 2003-Ohio-1541 ¶ 7. This Court has noted that BAC decreases by .01% for each hour of drinking after the first hour. *State v. Tanner* (1984), 15 Ohio St. 3d 1, 4. Therefore, due to the rapid manner in which the body rids itself of alcohol, the time it would take to obtain a warrant would frustrate the government's purpose for the warrant, as the alcohol would likely already be out of the person's system or the person's BAC could potentially decrease enough to drop below the legal limit.

Courts apply a three-prong test "to determine whether blood alcohol evidence can be take[n] from a suspect without consent and without a warrant." *King*, 2003-Ohio-1541 ¶ 26. A warrantless chemical test comports with the Fourth Amendment when (1) exigent circumstances exist such that the delay necessary to obtain a warrant would threaten destruction of the evidence; (2) the officer has probable cause to believe the suspect was driving under the

influence of alcohol; and (3) the testing procedures used are reasonable. *Id.*; see also *Troyer*, 2003-Ohio-536, *7 (noting these same factors).

When the exigency exception applies, a warrantless search is justified regardless of whether the suspect consents. Courts have applied this principle to justify blood tests, which are notably more invasive than the breath test at issue in this case. The *King* court noted the widespread agreement among courts that “a warrantless extraction of blood from a driver lawfully suspected of DUI does not violate the Fourth Amendment even in the absence of an arrest or actual consent.” 2003-Ohio-1541 ¶ 26. Accordingly, the court held that “regardless of the issues involving consent and the application of Ohio’s implied-consent law, the seizure of King’s blood by the police was justified under *Schmerber* given the evanescent nature of the evidence and that the police had probable cause to arrest King for driving under the influence.” *Id.* ¶ 29. Similarly, the California Supreme Court recently upheld a warrantless intrusion into a DUI suspect’s *home* to arrest him and then administer a BAC test. *People v. Thompson* (2006), 38 Cal. 4th 811. Citing U.S. Supreme Court precedent, the *Thompson* court reasoned, “[b]ecause the delay necessary to procure a warrant may result in the destruction of valuable evidence, blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible.” *Id.* at 825 (quoting *Skinner v. Ry. Lab. Executives’ Ass’n* (1989), 489 U.S. 602, 623 (internal quotation marks and alteration omitted)).

Because the exigency exception applies in DUI cases, whether Hoover consented to the officer’s reasonable search of his breath is irrelevant. The evanescent nature of the BAC evidence at issue justified the breath test, regardless of Hoover’s consent.

2. Because police sought to test Hoover's breath as a search incident to a valid arrest, Hoover's consent was irrelevant.

Another exception to the Fourth Amendment's warrant requirement is a search incident to a valid arrest. Under this exception, officers may search a suspect's person after arresting the suspect. See *Chimel v. California* (1969), 395 U.S. 792. This Court has long recognized that police may constitutionally search suspects who have been arrested for traffic offenses. See, e.g., *State v. Ferman* (1979), 59 Ohio St. 2d 216, 218-19 (per curiam) (citing *United States v. Robinson* (1973), 414 U.S. 218). When, as here, a police officer has probable cause of a DUI violation and lawfully arrests the motorist, the Fourth Amendment permits police to take samples of the suspect's breath. *Burnett v. Anchorage* (9th Cir. 1986), 806 F.2d 1447, 1449-50. In such a scenario, the suspect's consent is irrelevant, for "a legally arrested defendant has no constitutional right to refuse a breathalyzer examination." *Id.* at 1450.

B. Even if this case were properly analyzed under the consent exception to the warrant requirement, the Fourth Amendment does not provide suspects with any right to withdraw consent.

Even if the Third District did not err by analyzing this case under the consent exception rather than the exigency or valid-arrest exceptions, it erred by recognizing a Fourth Amendment right to withdraw previously given consent. Under Ohio's implied-consent statute, anyone in the state "who is in physical control of a vehicle . . . shall be deemed to have given consent to a chemical test or tests of the person's . . . breath . . . to determine the alcohol . . . content of the person's . . . breath." R.C. 4511.191(A)(2). Thus, Hoover consented to the breath test by driving on Ohio's roads.

Such consent cannot be revoked, and the Third District erred by holding otherwise. The Third District cited no authority supporting a Fourth Amendment right to revoke consent to a search. The only case it cited—*Maumee v. Anistik* (1994), 69 Ohio St. 3d 339—states that *Ohio*

law permits a suspect to decline consent. *Id.* at 342. *Anistik*, however, does not cite any provision of Ohio law giving DUI suspects such a right. Further, *Anistik* explicitly notes that, “if certain statutorily prescribed procedures are complied with, such a refusal does not go unpunished.” *Id.* (citing R.C. 4511.191(C), (D), & (E)). *Anistik*, more fundamentally, does not address the Fourth Amendment issue that this case presents. Instead, it concerns only the propriety of instructing the jury on a DUI suspect’s refusal to submit to a chemical test, and this Court unanimously concluded that such an instruction was permissible. For these reasons, *Anistik’s* dicta does not support the Third District’s conclusion that criminal suspects have a Fourth Amendment right to revoke previously given consent to a search.

Federal case law confirms that once a suspect consents to a search, he has no constitutional right to revoke that consent. In *United States v. Wallace* (10th Cir. 2005), 429 F.3d 969, the Tenth Circuit rejected the defendant’s argument that a search was invalid because he had revoked his consent shortly after the search began. *Id.* at 975-76. The same result attaches when the defendant’s consent is implied, rather than express. In *United States v. Prevo* (11th Cir. 2006), 435 F.3d 1343, the defendant impliedly consented to a search by driving onto prison grounds, past signs notifying her that any vehicle on prison property is subject to a search. *Id.* at 1344. When officers approached her to conduct a search, she attempted to revoke this implied consent by telling the officers that she wanted to leave. *Id.* at 1345. The Eleventh Circuit rejected this argument, concluding “that the Fourth Amendment protects individuals from unreasonable searches and seizures; it does not assure them that they will not get caught when violating the law.” *Id.* at 1349; see also *United States v. Herzbrun* (11th Cir. 1984), 723 F.2d 773 (suspect at airport may not revoke implied consent by leaving the airport and forfeiting his

ticket). These authorities confirm that that Fourth Amendment provides no right to revoke previously issued consent, even if that consent was implied rather than express.

By manufacturing a right to revoke previously given consent, the Third District's opinion renders Ohio's implied-consent statute toothless. As the Virginia Court of Appeals recently recognized, allowing a motorist's implied consent "to be unilaterally withdrawn would 'virtually nullify the Implied Consent Law.'" *Rowley v. Commonwealth* (Va. Ct. App. 2006), 48 Va. App. 181, 187 (quoting *Deaner v. Commonwealth* (1969), 210 Va. 285, 293). Consequently, the *Rowley* court rejected the same argument on which Hoover and the Third District rely. *Id.*

These authorities establish that even if the Third District correctly analyzed Hoover's case under the consent exception to the Fourth Amendment's warrant requirement, the court reached the wrong result.

C. Because there is no Fourth Amendment right to decline a breath test, the Third District erred by concluding that enhancing a sentence for such a refusal is unconstitutional.

The Third District correctly observed that Hoover's "criminal penalty [wa]s doubled solely because Hoover revoked his [implied] consent to the warrantless search." 2007-Ohio-5773, ¶ 6. Had Hoover submitted to the breath test, he could have been found guilty only of an R.C. 4511.19(A)(1) violation because a necessary element of an R.C. 4511.19(A)(2) violation—refusing a breath test—would not have been present. In such a scenario, he would have been subject to only a ten-day, rather than a twenty-day, mandatory minimum sentence. Compare R.C. 4511.19(G)(1)(b)(i) with R.C. 4511.19(G)(1)(b)(ii).

But this enhanced penalty does not violate the Constitution because the Fourth Amendment does not give suspects the right to refuse a breath test. See, e.g., *Rowley*, 48 Va. App. at 187 (finding "no Fourth Amendment violation in punishing a DUI suspect for refusing to provide a breath sample under" Virginia's implied-consent statute). This sentencing scheme creates a

disincentive for repeat offenders to withhold evidence of their drunken driving from police officers. It thereby further disincentivizes repeat offenses and protects Ohio motorists from drunken drivers. Because there is no constitutional obstacle to this sentencing enhancement, the General Assembly acted within its discretion by passing this sentencing scheme. The Third District erred by concluding otherwise.

CONCLUSION

For the above reasons, the Court should grant review and reverse the decision below.

Respectfully submitted,

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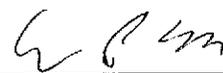
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant State of Ohio was served by U.S. mail this 11th day of December 2007 upon the following counsel:

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EXHIBIT 1

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-11

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

COREY HOOVER,

DEFENDANT-APPELLANT.

Paula Stinson
CLERK

2007 OCT 29 PM 3:44

COURT OF APPEALS
UNION COUNTY

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is reversed at the costs of the appellee for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

John B. Williamson
[Signature]
Vernon L. Ruston
JUDGES

DATED: October 29, 2007

FILED PROCT

EXHIBIT 2

COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-11

PLAINTIFF-APPELLEE,

v.

OPINION

COREY HOOVER,

DEFENDANT-APPELLANT.

Paula S. Williams
CLERK

2007 OCT 29 PM 3:44

COURT OF APPEALS
UNION COUNTY

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: October 29, 2007

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134 PRO0372

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Willamowski, J.

{¶1} Defendant-appellant Corey A. Hoover (“Hoover”) brings this appeal from the judgment of the Marysville Municipal Court denying his motion to dismiss.

{¶2} On September 8, 2006, Hoover was stopped while driving his automobile by a Union County Sheriff’s Deputy. Hoover refused to submit to a warrantless search to determine alcohol content, i.e. breath test in this case. As a result of the stop, Hoover was cited under R.C. 4511.19(A)(2) for driving while under the influence of alcohol. Hoover subsequently filed a motion to dismiss the charge by claiming that the statute violated his constitutional rights. On February 1, 2007, the trial court overruled the motion to dismiss. Hoover changed his plea to no contest on March 1, 2007, and the trial court, having found that Hoover was operating a motor vehicle while impaired, had a prior OVI conviction within six years, and refused to take the chemical test to determine alcohol content, ruled that Hoover was guilty of violating R.C 4511.19(A)(2). The trial court then sentenced Hoover pursuant to the mandate of R.C. 4511.19(G)(1)(b)(ii). Hoover appeals from this judgment and raises the following assignment of error.

The trial court erred in overruling [Hoover’s] motion to dismiss the single charge of drunk driving filed against [Hoover] pursuant to R.C. 4511.19(A)(2).

{¶3} This court notes that although the assignment of error claims that the trial court erred in denying the motion to dismiss, the arguments raised by both Hoover and the State concern the sentence to be imposed due to a violation. Both parties argued at oral argument the constitutionality of R.C. 4511.19(A)(2) as it is incorporated into R.C. 4511.19(G)(1)(b)(ii), which is the relevant sentencing statute.

{¶4} Hoover's assignment of error concerns his motion to dismiss. Hoover in essence claims that the charge should have been dismissed because it criminalizes the refusal to take a chemical test to determine his alcohol content. Hoover was charged with violating R.C. 4511.19(A)(2) which provides as follows.

No person who, within twenty years of the conduct described in (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 * * * 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 * * *, being asked by a law enforcement officer to submit to a chemical test or tests under [R.C. 4511.191], and being advised by the officer in accordance with [R.C. 4511.192] of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.**

R.C. 4511.19(A)(2). The statute requires proof of more than just a refusal of the test. The basis for the criminal offense is not that the test was refused; but that the

driver was under the influence at the time and that the driver had a prior OVI within the last 20 years. Since there was evidence before the trial court that Hoover was operating the motor vehicle while under the influence in addition to the other elements, the trial court did not err in denying the motion to dismiss. Thus, the assignment of error as specified is overruled.

{¶5} Although the motion to dismiss need not be granted, the arguments raised by counsel throughout the case have raised the issue of the constitutionality of increasing the sentence merely for refusing the warrantless search by way of chemical test. This is a matter of first impression in the state.¹ This court initially notes that “[a]ny person who operates a vehicle * * * upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle * * * shall be deemed to have given consent to a chemical test or tests of the person’s whole blood, blood serum or plasma, breath, or urine to determine the alcohol, * * * content of the person’s whole blood, blood serum or plasma, breath, or urine if arrested for a violation of [R.C. 4511.19(A) or (B)] * * *. R.C. 4511.19.1(A)(2). By driving a vehicle upon the road, the driver consents to a search to determine his or her alcohol content upon probable cause of the officer. At the time of the stop, Hoover withdrew his implied consent to search. A withdrawal of this consent results in a suspension of

¹ This is probably a matter of first impression because defendants in cases such as this are typically charged under both R.C. 4511.19(A)(1) and (A)(2).

the driver's license to drive. R.C. 4511.19.1(B). This statute has been reviewed and found to be constitutional by the Ohio Supreme Court. See *McNulty v. Curry* (1975), 42 Ohio St.2d 341, 328 N.E.2d 798; *Hoban v. Rice* (1971), 25 Ohio St.2d 111, 267 N.E.2d 311; and *State v. Starnes* (1970), 21 Ohio St.2d 38, 254 N.E.2d 675. Specifically, the implied consent statute was found not to violate the fourth or fourteenth amendments of the U.S. Constitution. *Starnes*, supra.

{¶6} Hoover argues that in this case, his criminal punishment is enhanced solely because he withdrew his consent. The only difference between a charge pursuant to R.C. 4511.19(A)(2) and R.C. 4511.19(A)(1) is the defendant's revocation of the consent to the warrantless search to determine alcohol content, i.e. breath test in this case. The U.S. Supreme Court has previously held that the use of a chemical test to determine alcohol content of a person is a search under the Fourth Amendment. *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. As discussed above, there are administrative consequences for revoking one's consent to the warrantless search which have been found to be constitutional. However, in this case, the minimum criminal penalty is doubled solely because Hoover revoked his consent to the warrantless search. One convicted under R.C. 4511.19(A)(1)(a-e) who has a prior conviction within six years must serve a mandatory jail term of not less than ten days. R.C. 4511.19(G)(1)(b)(i). That same defendant would be required to serve a minimum

mandatory jail term of twenty days if he or she were to revoke the consent to search. R.C. 4511.19(G)(1)(b)(ii). Thus, the minimum criminal penalty to be imposed is doubled merely because a defendant revokes his or her consent to search.²

{¶7} The question of whether a breath test is a search under the fourth amendment has been decided in the affirmative. *Schmerber*, supra. A state is permitted to require consent to this search in order to obtain a drivers license. *Id.* As discussed above, R.C. 4511.191 does require a motorist to give consent or face administrative penalties. However, the statute does not force a person to submit to a test. *Maumee v. Anistik* (1994), 69 Ohio St.3d 339, 342, 632 N.E.2d 497. A person may revoke his or her implied consent to the warrantless search to determine alcohol content after being informed of the consequences of doing so by the officer. *Id.* The Ohio Supreme Court has previously held that the Fourth Amendment prohibits placing a defendant in a position of choosing between allowing a warrantless search or facing criminal penalties. *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 346 N.E.2d 666. Although the facts in *Wilson* concerned a property inspection, the underlying philosophy is that a defendant cannot be criminally penalized for exercising a constitutional right to revoke consent. *State v. Scott M.* (1999), 135 Ohio App.3d 253, 733 N.E.2d 653 (citing

² This court notes that the State is not prohibited from conducting the search, just from conducting the search without a court order. The State can still obtain a court order for a chemical test and the defendant

Camara v. Mun. Court of San Francisco (1967), 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930). A suspect may limit or revoke consent to a warrantless search even after the search has begun. *State v. Riggins*, 1st Dist. No. C-030626, 2004-Ohio-4247 ¶27. The use of the implied consent statute can constitutionally require one to consent to a warrantless search or face administrative consequences. It cannot require that one comply or face criminal sanctions. “[T]he act of refusing a chemical test for alcohol, standing alone, does not constitute a criminal ‘offense’ of any kind.” *State v. Gustafson* (1996), 76 Ohio St.3d 425, 439, 668 N.E.2d 435. “[The Ohio Supreme Court] has historically and repeatedly characterized driver’s license suspensions imposed pursuant to Ohio’s implied consent statutes as being civil in nature and remedial in purpose.” *Id.* at 440. To apply a criminal penalty to the exercise of a constitutional right, the right to refuse a warrantless search by the government, is improper. See *State v. Morris*, 159 Ohio App.3d 775, 2005-Ohio-962, 825 N.E.2d 637 (finding it improper to increase sentence due to defendant’s exercise of right to a jury trial); *State v. Glass*, 8th Dist. No. 83950, 2004-Ohio-4495 (holding it improper for trial court to use exercise of constitutional right as an aggravating factor in sentencing); and *State v. Scott*, 4th Dist. No. 06CA3, 2006-Ohio-4731 (holding it improper for trial court to increase a sentence due to exercise of a right to trial). Since the only difference between a

would be compelled to comply.

minimum mandatory sentence of ten days and a minimum mandatory sentence of twenty days is the revocation of the consent to a warrantless search, a criminal penalty is being imposed for the refusal, which is not in and of itself a criminal offense.³

{¶8} Having found a constitutional problem with the application of the sentencing portion of the statute, the next question is what to do about the problem. “If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.” R.C. 1.50. Severance is only appropriate when 1) the constitutional and unconstitutional parts are capable of separation so that each may be read and may stand by itself; 2) that the unconstitutional part is not so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken; and 3) the insertion of words or terms is not necessary to give effect only to the constitutional portion. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶95, 845 N.E.2d 470 (citing *Geiger v. Geiger* (1927), 117 Ohio St. 451, 160 N.E.2d

³ A review of the statute seems to indicate that a similar problem may be found in R.C. 4511.19(G)(1)(a)(ii). However, this issue was not raised in this matter and is not addressed by this court.

28). A review of the statute in question indicates that severance in this case is appropriate. The statute as written currently reads as follows.

(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.

R.C. 4511.19(G)(1)(b)(ii). This court severs the phrase “or division (A)(2)” from the statute.⁴ By doing so, the minimum mandatory criminal penalty is not increased due to the refusal to consent to search without a warrant. The result is that a conviction under R.C. 4511.19(A)(2) with a prior conviction in the past six years does not have a listed sentence. Since no sentence is provided, the statute must be interpreted against the state, and the defendant is entitled to the lesser sentence of all of the offenses, which are sentenced pursuant to R.C. 4511.19(G)(1)(b). Because of the prior conviction, the defendant will properly be sentenced under R.C. 4511.19(G)(1)(b)(i). This statute provides for a minimum, mandatory jail term of ten consecutive days for one who has a previous conviction for OVI within the last six years. R.C. 4511.19(G)(1)(b)(i).⁵ Thus,

⁴ The statute in question was in effect from August 17, 2006, until April 4, 2007. However, this court notes that the current version of the statute contains the same language as the one in effect at the time of Hoover’s offense.

⁵ Although this court realizes that some could argue that this severance might encourage offenders to refuse the test, the constitution requires that their right to exercise their constitutional rights be protected without threat of punishment by the government for doing so. A refusal still results in administrative penalties and does not prevent the State from using the refusal to infer intoxication at trial. Thus, the ruling does not affect the State’s ability to obtain a conviction for operating a motor vehicle while under the influence, which is the purpose of the statute. The sole effect of this ruling is to prevent the state from criminally penalizing the exercise of a constitutional right.

Case No. 14-07-11

this is the sentence which should be imposed for a violation of R.C. 4511.19(A)(2) when the prior OVI occurred within the last six years.

{¶9} For the reason set forth above, the judgment of the Marysville Municipal Court is reversed and the matter is remanded for resentencing consistent with this opinion.

*Judgment reversed and cause
remanded.*

ROGERS, P.J., and PRESTON, J., concur.
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