

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : **07-2295**  
Plaintiff-Appellee, :  
vs. : On Appeal from the Union  
 : County Court of Appeals, Third  
 : Appellate District  
COREY A. HOOVER : Court of Appeals  
 : Case No. 14-07-11  
Defendant-Appellant. :

---

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT, COREY HOOVER, AND MEMORANDUM IN  
RESPONSE TO THE STATE OF OHIO'S MEMORANDUM  
IN SUPPORT OF JURISDICTION

---

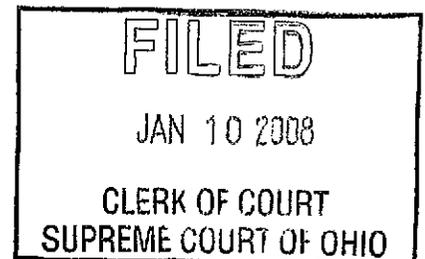
JONATHAN T. TYACK (0066329)  
Tyack, Blackmore & Liston  
Co., L.P.A.  
536 South High Street  
Columbus, Ohio 43215  
Attorney for Appellant

TIM M. ASLANER (0068928)  
Assistant Prosecuting Attorney  
110 S. Court Street  
Marysville, Ohio 43040-0266  
Attorney for Appellee

WILLIAM P. MARSHALL (0038077)  
Solicitor General  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

KELLY A. BORCHERS (0081254)  
Assistant Solicitor  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

MARC DANN (0039425)  
Attorney General of Ohio  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215



**TABLE OF CONTENTS**

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW <u>Proposition of Law No.1</u> : R.C.\$4511.19(A)(2) is unconstitutional in violation of the Fourth Amendment to the United States Constitution in Article I, Section 14 of the Ohio Constitution.....	5
CONCLUSION.....	13
PROOF OF SERVICE.....	14
APPENDIX	<u>Appx. Page</u>
Opinion of the Court of Appeals Third Appellate District Court Union County.....	1
Judgment Entry of the Court of Appeals Third Appellate District Court Union County.....	11

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES  
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This cause presents a critical constitutional question with regard to the criminal statute that defines the offense of drunk driving in Ohio. Specifically, this case provides this Court with an opportunity to review the decision of the Third District Court of Appeals to determine if the remedy provided by the Third District Court of Appeals is appropriate in this case.

Specifically, the Third District Court of Appeals found that the statutory scheme created by the legislature was unconstitutional due to the fact the statutory scheme punished a defendant, like Corey Hoover, for refusing to consent, or alternatively revoking consent, to the breath test when asked to do so by law enforcement as a suspect of a drunk driving offense. The Court of Appeals found that defendants like Mr. Hoover have a constitutional right to refuse consent, or put in the alternative to revoke a consent to the breath test when requested to submit to such a test by law enforcement. The Court of Appeals continued by ruling that because the defendant had a constitutionally protected right to refuse the breath test under the Fourth Amendment to the United States and under Article I, Section 14 of the Ohio Constitution, that a suspect could not be punished by virtue of said refusal or revocation of consent.

However, the Court fell short of granting Appellant the

appropriate remedy in this case. The Court of Appeals simply held that the provisions providing for an enhanced minimum penalty were unconstitutional given the fact that the offense was based upon the refusal/revocation of consent to a search. However, the Court of Appeals failed to hold R.C.§4511.19(A) (2) unconstitutional in its entirety. Consequently, the Court of Appeals erred by leaving R.C.§4511.19(A) (2) in the Revised Code, instead of ruling it to be unconstitutional and thus, unenforceable.

This case involves a question of great public or general interest, and further involves a substantial constitutional question due to the fact that the Court of Appeals in this case failed to properly correct the errors of the legislature by holding R.C.§4511.19(A) (2) unconstitutional. Instead, the Court of Appeals simply ordered that the mandatory minimum penalty should not be enhanced, and remanded the matter for re-sentencing before the trial court, thus authorizing the trial court to still impose punishment for a criminal offense that inherently requires as an element the refusal/revocation of consent to a search. Hence, this case involves a substantial constitutional question and a question of great general and public interest that warrants further review by this Court.

### STATEMENT OF THE CASE AND FACTS

On September 8, 2006, Appellant was subject to a traffic stop by a deputy of the Union County Sheriff's Department and cited for drunk driving in violation of R.C.§4511.19(A)(2). (Traffic ticket filed September 8, 2006). No other charges were filed against Appellant arising out of said traffic stop. Id.

On October 20, 2006, Appellant filed a Motion to Dismiss the charge against him alleging that R.C.§4511.19(A)(2) violated Appellant's constitutional rights under the Fourth Amendment to the United States Constitution, and Article I Section 14 of the Ohio Constitution and further violated Appellant's right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Ohio Constitution. (Motion to Dismiss filed October 20, 2006). The matter was briefed to the Court, and by Judgment Entry filed February 1, 2007, the trial court overruled Appellant's Motion to Dismiss. (Judgment Entry filed February 1, 2007). On March 1, 2007, Appellant entered a no contest plea to the charge stated on the ticket, and the Court found Appellant guilty accordingly. (Judgment Entry filed March 1, 2007). Appellant was sentenced, and the Court graciously granted a request for a stay of enforcement of said sentence pending review of this matter by the Court of Appeals. (Id.; Judgment Entry filed March 1, 2007 granting request for stay).

The Court of Appeals, for the Third Appellate District, issued an opinion and entry on October 29, 2007, finding that the overall statutory scheme that enhances the mandatory minimum punishment for people in Appellant's situation violated the constitutional protections against unreasonable searches and seizures as provided by the United States Constitution and the Ohio Constitution. However, the Court of Appeals in its decision fell short of finding R.C. §4511.19(A)(2) unconstitutional, and instead simply ruled that the enhancement of the mandatory minimum penalty was unconstitutional. Appellant now appeals the decision of the Third District Court of Appeals, in support of its position on these issues, the Appellant presents the following argument.

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: R.C. §4511.19(A)(2) is unconstitutional in violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.**

It is well settled that the taking of a blood, breath, or urine specimen falls within the search and seizure protections of the Fourth Amendment. Schmerber v. California (1966), 384, U.S. 757. The United States Supreme Court, in Camara v. Municipal Court (1967), U.S. 523, held that it was unconstitutional to prosecute and convict a person for a crime when the criminal offense was defined as a defendant's refusal to permit a search or seizure. In other words, the United States Supreme Court in Camara, supra, clearly held that the State of Ohio, or any other governmental entity, cannot criminalize the act of refusing consent to a warrantless search or seizure. Id. Here, the State of Ohio, seeks to punish Defendant for his refusal to consent to a warrantless search and seizure via a breath test. Such punitive action by the State of Ohio violates Defendant's State and Federal constitutional rights.

In fact, the Supreme Court of Ohio has in the past followed Camara in Wilson v. Cincinnati, (1976), 46 Ohio St. 2d 138. The Ohio Supreme Court in Wilson declared, "As applicable to the instant facts, the import of Camara is that the Fourth Amendment prohibits placing Appellant in a position where he must agree to a warrantless inspection of his property or face a criminal

penalty." Wilson v. Cincinnati(1976), 46 Ohio St. 2d at 145; See also, State v. Scott M.(1999), 135 Ohio App. 3d 253,260(holding that a person has an absolute right to refuse consent to a search, "and the assertion of that right cannot be a crime"). Notwithstanding the requirements of the implied consent law articulated R.C.§4511.191, Defendants such as Appellant have a constitutional right to refuse or revoke consent to any search. State v. Mack(1997), 118 Ohio App. 3d 516,519, app. disp. 79 Ohio St. 3d 1418(prevaling rule is that a suspect may revoke or limit his consent even after the search has begun); State v. Rojas(1992), 92 Ohio App. 3d 336.

Under the present statutory scheme, R.C.§4511.19(A)(2) criminally punishes a defendant for the mere assertion of his constitutional rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. Consequently, R.C.§4511.19(A)(2) is unconstitutional, and the charge filed against Defendant under that statute must be dismissed.

The State's arguments in their Memorandum in Support of Jurisdiction are without merit. First, the State of Ohio argues that somehow an exigency exception to the warrant requirement justifies punishing someone for refusing or revoking consent to a breath test. Such an argument defies simple logic.

The exigency exception to the warrant requirement is an

exception for law enforcement that will render a warrantless search legal, even without consent, when certain exigent circumstances exist. In the case at bar, this Court is not being asked to review the propriety of a warrantless search. Instead, this Court is simply being asked to evaluate whether the State of Ohio can criminalize the act of refusing or revoking consent to a search. The propriety of any subsequent search after the refusal/revocation of consent is not before this Court. Therefore, the exigency exception to the warrant requirement is inapplicable to this case.

Next, the State of Ohio argues that a BAC test is actually a search incident to arrest. Again, the State's argument defies simple logic.

The search incident to arrest doctrine is another exception to the warrant requirement that legally justifies a search, even if made without a Defendant's consent, under the Fourth Amendment to the United States Constitution and under Article I, Section 14 of the Ohio Constitution. Again, this case does not require this Court to review the propriety of a particular search, but instead it asks this Court to review the constitutionality of a criminal offense that contains, as an element therein, the element of refusing or revoking consent to a search. The State of Ohio does not dispute the fact that in order to convict a Defendant under R.C. §4511.19(A)(2) the State of Ohio would have to prove beyond a

reasonable doubt that Defendant refused consent to a search. Consequently, the State of Ohio cannot rationally argue that the refusal of consent is not an element of the offense. As stated, in Camara, supra, and Wilson, supra, the legislature cannot criminalize the act of refusing consent.

As the State of Ohio points out, procedures are in place for law enforcement to obtain blood alcohol evidence without the requirement of a breath test. The law enforcement officials in this case chose not to exercise those options, and instead requested that Defendant consent to a breath test. Defendant refused consent, and no additional steps were taken by law enforcement at that time. If additional steps had been taken by law enforcement, then the search of Defendant's body for the purposes of capturing blood alcohol evidence may or may not have been permitted under the exigency exception and the search incident to arrest exception to the warrant requirement. However, this case does not require this Court to review the potential propriety of such action, because law enforcement never took such action. Instead, this case is merely about determining whether the legislature can enact a criminal statute that criminalizes the act of asserting a constitutional right by refusing or revoking consent to a search.

Finally, the State of Ohio argues that a Defendant like Mr. Hoover has no right to revoke consent once it is given. Such an

argument flies in the face of prevailing case law. Painter v. Robertson (C.A. 6, 1999), 185 F.3d 557, 567 (citing Florida v. Jimeno (1991), 500 U.S. 248, 251-52, United States v. Gant (C.A., 6, 1997), 112 F. 3d 239, 242, and United States v. Mitchell (C.A. 7, 1996), 82 F. 3d 146, 151); Mack, supra; Rojas, supra, (citing Florida v. Jimeno (1991), 500 U.S. 248, 252, Mason v. Pulliam (C.A. 5, 1977), 557 F 2d 426, 429, and United States v. Milian-Rodriguez (C.A. 11, 1985), 759 F 2d 1558, 1563, along with other secondary sources such as 3 LaFave, Search and Seizure (2 Ed. 1987) 172-174, Section 8.1(C), and Katz, Ohio Arrest, Search and Seizure (3 Ed. 1992) 274, Section 16.04).

The Third District Court of Appeals, while finding that a suspect like Appellant cannot be punished for asserting a constitutional right to refuse or revoke consent to a search, fell short of its constitutional mandate in this case. The Court of Appeals should have held R.C.§4511.19(A) (2) unconstitutional, and struck it from the code, thus rendering it unenforceable. Such a remedy would have resulted in the ultimate dismissal of the charge against defendant. Instead, the Court of Appeals upheld defendant's conviction on the charge, and simply remanded the matter for sentencing ordering the trial court not to consider the enhanced mandatory minimum penalty above and beyond that punishment that is imposed for a violation of R.C.§4511.19(A) (1). However, the Court of Appeals erred by

allowing R.C.§4511.19(A)(2) to remain a part of the Ohio Revised Code.

It is well settled law that crimes are defined by statute, as are the penalties for those crimes. Colegrove v. Burns (1964), 175 Ohio St. 437, 438. Here, R.C.§4511.19(A)(2) reads as follows:

"No person who, within 20 years of the conduct described in Division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, Division (A)(1) or Division (B) of this section, or a municipal OVI offense shall do both of the following:

- (a) Operate any vehicle, street car, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;
- (b) subsequent to being arrested for operating a vehicle, street car, or trackless trolley as described in Division (A)(2)(a) of this section, being asked by law enforcement officer to submit to a chemical test or tests under Section 4511.191 of the Revised Code, and being advised by the officer in accordance with Section 4511.192 of the Revised Code of the consequences of the person's refusal or submission of the test or tests, refuse to submit to the test or tests.

Therefore, the offense defined in R.C.§4511.19(A)(2) clearly contains as elements therein the requirement that the State of Ohio prove beyond a reasonable doubt that defendant refused or revoked consent to a breath test or other bodily tests for

alcohol as described in R.C.§4511.191 and R.C.§4511.192.

Therefore, the offense, as defined by the legislature, inherently punishes someone for refusing or revoking consent to the breath test, just as Appellant in this case refused and revoked consent to the breath test.

If, as the Third District Court of Appeals ruled, Appellant has a constitutional right to refuse or revoke consent to the breath test in this case, then Appellant cannot be constitutionally punished for said refusal. Consequently, the Court of Appeals erred when it did not hold R.C.§4511.19(A)(2) unconstitutional.

Moreover, the trial court erred by severing a portion of the sentencing section of the statute because it creates a statutory scheme that is not consistent with the legislative intent of the statute. This Court, in Geiger v. Geiger(1927), 117 Ohio St. 451, 466 sets forth a test for determining whether an unconstitutional provision may in fact be severed. In that case, the questions for such an evaluation are as follows:

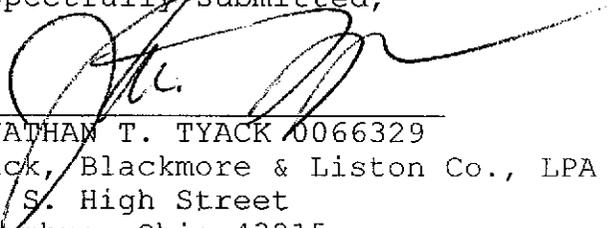
1. Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
2. Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give affect to the apparent intention of the legislature if the closet or part is stricken out?
3. Is the insertion of the words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give affect to the former only?

Here, the legislature was clearly attempting to create an OVI offense defined, at least in part, by a defendant's refusal to submit to the breath test. Such a criminal offense cannot withstand constitutional scrutiny. Therefore, the Third District Court of Appeals erred by not holding the offense created under R.C.§4511.19(A)(2) unconstitutional in its entirety.

**CONCLUSION**

For the reasons discussed above, this case involves a matter of great public and general interest, and a substantial constitutional question. The Appellant requests that this Court grant jurisdiction allow the case so that these important issues can be reviewed on the merits.

Respectfully submitted,



JONATHAN T. TYACK 0066329  
Tyack, Blackmore & Liston Co., LPA  
536 S. High Street  
Columbus, Ohio 43215  
Phone: 614-221-1341  
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that the foregoing Memorandum of Jurisdiction has been forwarded *on January 10, 2008* to

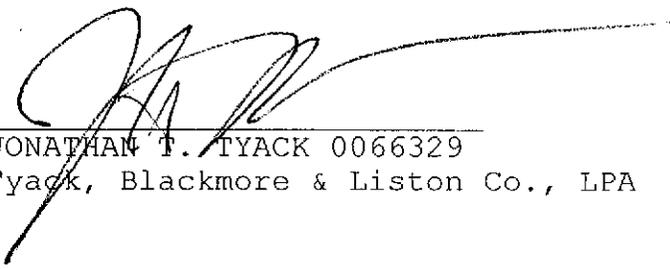
TIM M. ASLANER (0068928)  
Tyack, Blackmore & Liston  
Co., L.P.A.  
536 South High Street  
Columbus, Ohio 43215  
Attorney for Appellant

Assistant Prosecuting Attorney  
110 S. Court Street  
Marysville, Ohio 43040-0266  
Attorney for Appellee

WILLIAM P. MARSHALL (0038077)  
Solicitor General  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

KELLY A. BORCHERS (0081254)  
Assistant Solicitor  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

MARC DANN (0039425)  
Attorney General of Ohio  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

  
\_\_\_\_\_  
JONATHAN T. TYACK 0066329  
Tyack, Blackmore & Liston Co., LPA

## **APPENDIX**

COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-11

PLAINTIFF-APPELLEE,

v.

OPINION

COREY HOOVER,

DEFENDANT-APPELLANT.

*Carol Robinson*  
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

---

**ATTORNEYS:**

**JONATHAN TYACK**  
Attorney at Law  
Reg. #0066329  
536 South High Street  
Columbus, OH 43215-5605  
For Appellant.

**TIM M. ASLANER**  
City Law Director  
Reg. #0068928  
110 South Court Street  
P.O. Box 266  
Marysville, OH 43040  
For Appellee.

**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.<sup>1</sup> 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

---

<sup>1</sup> 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.<sup>2</sup>

{¶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

---

<sup>2</sup> 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*, 1<sup>st</sup> 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*, 8<sup>th</sup> 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*, 4<sup>th</sup> 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.<sup>3</sup>

{¶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

---

<sup>3</sup> 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.<sup>4</sup> 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).<sup>5</sup> Thus,

---

<sup>4</sup> 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.

<sup>5</sup> 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.**  
r

RECEIVED

NOV 01 2007

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

JONATHAN T. TYACK

UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-11

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

COREY HOOVER,

DEFENDANT-APPELLANT.

*Jonathan T. Tyack*  
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*  
*Vernon Z. Boston*  
JUDGES

DATED: October 29, 2007

JLA P60871

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.**  
r