

IN THE SUPREME COURT OF OHIO

08-0810

STATE OF OHIO)
Appellee,)
)
v.)
)
)
WILLIAM J. PRICE)
Appellant.)

On Appeal from the
Geauga County
Court of Appeals
Eleventh Appellate District
Case No. 2007G002785

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT WILLIAM J. PRICE

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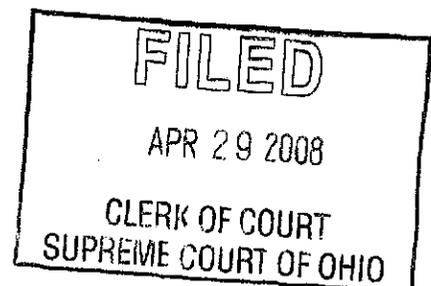


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW.....	5
Proposition of Law No. I: A court of appeals deprives a defendant of due process when it sua sponte avails the state of an issue the state waived in the trial court and on appeal and then the appellate court eliminates the state’s burden of substantial compliance with 3701-54-04(E) at a suppression hearing	5
Proposition of Law No. II: The overall goal of the alcohol testing procedures set forth in 3701-53-01 et seq. of the Ohio Administrative Code is to ensure the accuracy and reliability of alcohol testing results. Failure to provide any evidence of substantial compliance with 3701-53-01(A) and (B), 3701-53-04(E) and 3701-53-06(C) and (D) precludes a finding of substantial compliance.....	11
Proposition of Law No. III: A trial court is required to apply the consistency principles found in R.C. 2929.11 since <i>State v. Foster (2006) 109 Ohio St. 3d 1</i> did not eliminate that obligation.....	14
CONCLUSION	15
PROOF OF SERVICE	15
APPENDIX	<u>Appendix Page</u>
Opinion and Judgment Entry of Court of Appeals for Geauga County (March 17, 2008)	1

EXPLANATION OF WHY THIS CASE IS A CASE THAT INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND MATTERS OF GENERAL AND PUBLIC INTEREST.

In a split decision the court of appeals found that the result of a blood-alcohol test is admissible although the state provided no evidence of substantial compliance with the Ohio Department of Health (“ODH”) regulations governing blood alcohol testing. The Eleventh District seeks a departure from the precedent firmly established by this Court in *State v Burnside* (2003) 100 Ohio St. 3d 152 which was reaffirmed in *State v Mayl* (2005) 106 Ohio St. 3d 207. Those significant holdings require proof of substantial compliance with the rules promulgated by the ODH for blood alcohol tests to be admissible.

This case is primarily about the right, power, and duty of courts of appeals. Appellant asserts that this case presents a substantial constitutional question of great general and public interest because it necessitates consideration of whether the court of appeals violated Mr. Price’s due process rights on his direct appeal under Article I, section 16 of the Ohio Constitution and XIV of the United States Constitution . The Eleventh District sua sponte created an issue on direct appeal that was waived by the state in the trial court and on appeal. Specifically, the state never claimed that appellant’s motion to suppress, his discovery demands, or cross-examination at a suppression hearing, failed to provide adequate notice of challenges to particular ODH regulations. Since the state waived this argument, the trial court never determined that the state or that the court was not aware of the specific challenges at the suppression hearing. Moreover, the state’s answer brief to appellant’s direct appeal does not contend it was unaware of specific challenges to ODH regulations prior to or during the suppression hearing. However, the Eleventh District sua sponte created this issue for the state and held that the state did not receive adequate notice about a challenged ODH regulation. This miscarriage of justice was compounded when

the majority eliminated any burden of compliance upon the state concerning the issue created by the appellate court. The dissent opined that a reversal was warranted. This activism by the majority threatens the very structure of due process and the constitutional guarantees in the Ohio and United States Constitutions. The ruling undermines and ignores *Burnside*, and *Mayl, supra*, and the unambiguous requirements of the ODH regulations that pertain to blood-alcohol tests.

Appellant urges this Court to examine how antithetical the Eleventh District split decision is and how this new exception to *Burnside* and *Mayl, supra*, will undermine the procedural process this Court has provided lower courts and practitioners. This Court has achieved significant success toward creating a reasonably coherent and cohesive body of case law encompassing numerous issues that could arise related to the admissibility of chemical tests in R.C. 4511.19 cases and the delegation of authority to the Director of Health in that regard. *Burnside* not only reflects the basic principles espoused by this Court on the primacy of the Ohio Director of Health's authority, it also serves as a mild rebuke to those lower courts who, in the face of the legislative delegation of such authority to the Director, have presumed that the judiciary retained some independent authority to judge the accuracy and reliability of chemical test evidence. This Court has also provided practitioners and lower courts with a reasonably thorough, and not unduly complicated, procedural structure through which the issue of whether a chemical test is properly admissible can be addressed, litigated, and decided in a timely and expeditious manner. This Court has never succumbed to a suggested reinterpretation of R.C. 4511.19(D)(1) that is contradictory to this Court's prior decisions. Due process requires the State of Ohio to prove substantial compliance with every element of a challenged ODH regulation without exception. This Court has pointedly refused to engage in creative reinterpretation even

when it was argued such refusal would unduly hamper the prosecution in the most serious cases.

State v. Smorgala (1990), 50 Ohio St.3d 222.

The majority opinion carves out an exception to procedures where the accuracy and reliability of results are at issue. Their decision is unfortunate and is a drastic retreat from the firm, longstanding rule that ODH rules are always applicable and each and every element of a challenged regulation must be proved.

Finally, this case concerns an issue of great public importance of establishing an appellate court's role in obtaining consistency in sentences pursuant to R.C. 2929.11 post *State v.*

Foster(2006) 109 Ohio St.3d 1.

STATEMENT OF THE CASE AND FACTS

On August 13, 2006 William Price ("Price") was involved in a car accident in Geauga County, Ohio. Appellant operated his car on Ravenna Road in Chardon, Ohio and collided with a motorcycle that travelled in the opposite direction. The driver of the motorcycle died and the passenger was injured. Appellant was also severely injured from the impact. Trooper Smith of the Ohio State Highway Patrol ("OSHP") was dispatched to the accident scene. Price's injuries necessitated transporting him to a local hospital. Price consented to a blood draw since Trooper Smith suspected that Price was intoxicated. Although the specimen was collected on August 13, 2006 it did not arrive at the Ohio State Patrol Crime Lab for eight days. Criminalist Jeffrey Turneau determined that Price's blood alcohol level was .244 grams at the time of the blood draw.

On September 22, 2006 appellant was indicted by a Geauga County Grand Jury for one count of aggravated vehicular homicide; one count of aggravated vehicular assault; one count of involuntary manslaughter; one count of violating R.C. 4511.19; one count of DUI, and one count for a traffic lane violation. On September 28, 2006 Price filed a Demand for Discovery. On October 25, 2006 Price filed a Supplemental Demand for Discovery. The supplemental demand specifically requested the following: copies of all technical manuals, operator manuals, troubleshooting guides, and maintenance manuals and any other written materials utilized by the Ohio State Highway Patrol, or any other law enforcement agency or their agents relating to the administration of blood tests, or any written materials, including correspondence received by the Ohio State Highway Patrol from the manufacturer or vendor of the machine that was used in the testing process; a copy of all guides, manuals, policies or protocols in the possession of the Ohio State Highway Patrol concerning the collection and the chain of custody of blood samples; and a copy of all maintenance records of the equipment used for the testing of defendants blood during the past twelve months. On November 21, 2006 Price filed a Motion to Suppress alleging that there was not substantial compliance with the blood testing procedures contained in OAC 3701-53-01 et seq. On January 24, 2007 a suppression hearing was held before the trial court. Price challenged the state's substantial compliance with the ODH regulations for blood alcohol testing. Jeffrey Turneau, a criminalist, testified for the state of Ohio as its witness to attempt to demonstrate compliance. By coincidence he was also the state's witness in *Burnside, supra*. The state failed to elicit any testimony or documentary evidence that it complied with O.A.C. 3701-53-01 et seq. on direct examination. The state also never complained that it was not on notice of appellant's challenges to specific requirements contained in the O.A.C. Despite the state's failure of submission of any evidence on the specific issues, the trial court denied the motion to

suppress. On February 20, 2007 appellant entered a no contest plea and was found guilty of the following offenses: count one- aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a felony of the second degree; count two- aggravated vehicular assault in violation of R.C.2903.08(A)(1)(a), a felony of the third degree; and count four- operating a vehicle under the influence in violation of RC 4511.19 (A)(1)(f), a misdemeanor of the first degree. On April 16, 2007 the trial court sentenced Price to six years imprisonment for Aggravated Vehicular Homicide and three years for Aggravated Vehicular Assault. The sentences were ordered to be served consecutively. Price also was ordered to serve one hundred and eighty days jail for the 4511.19 violation. On May 10, 2007 Price timely filed a Notice of Appeal in the Eleventh District Court of Appeals arguing that the trial court erred in finding substantial compliance with O.A.C. 3701-53-01 et seq. The state's answer brief is devoid of any argument that it was denied notice of specific challenges to O.A.C. 3701-53-01 et seq. On March 17, 2008, in a split decision, the court of appeals affirmed the judgment of the trial court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I.

A court of appeals deprives a defendant of due process when it sua sponte avails the state of an issue on appeal that it waived at the trial court and then eliminates the burden of the state of proving substantial compliance with ODH regulations.

The Court of Appeals was created to ensure judicial review and every appellate opinion is a statement of public policy. The correctness of its decisions impacts the fate of criminal justice and public confidence. Integrity in the appellate process requires that errors should be corrected and those prejudiced by its mistakes must have a recourse to relief. Embodied in the Due Process concept is the basic right of a criminal defendant to a fair trial. Constitutional Due Process and

fundamental fairness is mandated in criminal proceedings at the trial and appellate levels. It is a violation of due process when an appellate court sua sponte creates an issue that was waived by the State of Ohio and bases its decision upon that issue. *State ex rel. Chagrin Falls v. Geauga Cty. Bd. of Commrs.* (2002), 96 Ohio St. 3d 400, *Barnett v. Ohio Adult Parole Auth.* (1998), 81 Ohio St.3d 385, *State v. Ishmail* (1978), 54 Ohio St.2d 402. For example, this Court has clearly expressed its disapproval of activist appellate courts raising sentencing errors sua sponte on behalf of criminal defendants. See, *State v. Saxon*, (2006) 109 Ohio St.3d 176.

In State ex rel. Quarto Mining Co. v. Foreman et al. (1997), 79 Ohio St.3d 78, 679 N.E.2d 706. this Court explained the interplay between the waiver doctrine and due process rights:

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error. Id. at 81. See *Martin v. Estate of Martin* (Mar. 22, 2004), 3rd Dist.No. 1-03-55, 2004-Ohio-1397.

Appellant challenged the state's compliance with the record retention requirements that are proscribed in 3701-53-04(E). The regulation requires: "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." O.A.C. 3701-53-01(A) requires the records to be retained for three years.

Appellant raised this challenge in discovery demands and during the cross-examination of Jeffrey Turneau. The state never attempted to present compliance with 3701-53-04(E) during

direct examination and never contended that it was not on notice of this issue prior to the suppression hearing. The following exchange occurred during cross-examination of Turneau:

“Q. Did you bring any of the maintenance records for the 8500?

A. No.

Q. Has the 8500 ever been out of service since its use at the lab?

A. Oh yes. It has been out of service a couple of times for repairs.”

During the state’s re-direct of Turneau there was an attempt by the state to introduce a letter that purportedly may have addressed a portion of the issue. However, the trial court barred the introduction of this letter into evidence since the court perceived that there may have been a discovery violation committed by the state of Ohio. The state never addressed the record retention issue again during the suppression hearing and failed to provide any evidence, either general or specific of substantial compliance with this requirement. The state’s answer brief during the direct appeal does not contain an argument that it did not have notice of a challenge to 3701-53-04(E). The appellate court never provided Mr. Price with any notice that this issue was a consideration on appeal, let alone a determinative issue.

Although the issue of a lack of notice was waived by the state at the trial court level and in their answer brief in the court of appeals, the majority unilaterally availed the state of this issue and eliminated the state’s burden of compliance with 3701-53-04(E). The dissent was dismayed that the majority erroneously determined that appellant waived the challenge to 3701-53-04(E) since it was not specifically stated in his brief.

Judicial activism is an ill-advised practice and the *appellate court*, not the state, proactively and unilaterally availed the state of a new issue on appeal. This inexcusable violation of due process should be remedied by this Court. By analogy this court has held, “[T]he general

rule is that ‘an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.’ *State v. Childs* (1968), 14 Ohio St.2d 56 ; *State v. Glaros* (1960), 170 Ohio St. 471 ; *State v. Lancaster* (1971), 25 Ohio St.2d 83; *State v. Williams* (1977), 51 Ohio St.2d 112, 117. Likewise, ‘[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time.’ *Childs, supra*.

The majority based their decision on the appellant’s failure to frame the challenge of a violation of 3701-53-04(E) in the motion to suppress. However, the majority ignored appellant’s discovery request for the records and the cross examination of Turneu. In its zealously to avail the state of an issue that it waived, the majority also created a conflict in its own district and their decision is in conflict with other appellate courts. In *State v. Hernandez-Rodriguez*, (Sept. 28, 2007) *Portage App. No. 2006-P-0121, unreported*, the Eleventh District held:

“Unless an accused, *either through discovery or cross-examination at the hearing*, points to facts to support the allegations that specific health regulations have been violated in some specific way, the burden on the state to show substantial compliance with those regulations remains general and slight.” (citing *State v. Embry, Warren* (Nov. 29, 2004) *App. No. CA2003-11-110*,) (Emphasis added). See, also, *City of Norwood v. Kahn*, 1st Dist. Nos. C-060497, C-060498, and C-060499, 2007-Ohio-2799, at ¶ 8-9 adopting the holding in *Embry*).

Since Hernandez-Rodriguez failed to request discovery of records pursuant to 3701-53-04 the court affirmed the suppression. Contrary to those facts, the trial court in the instant case sanctioned the state for a discovery violation and no evidence was submitted to support compliance with the ODH regulation. In *State v. Eyer*, (Mar. 17, 2008) *Warren App. No. CA2007-06-071 unreported*, the state committed a discovery violation and the court adopted the holding of *Embry, supra*. The court observed that discovery and cross examination can formally

place the state on notice of a challenge and the motion to suppress does not specifically need to state the exact violation. The court noted that although the records may be public it did not obviate the state's duty to satisfy discovery requests. The Eleventh District abandoned this logic in the instant case and rewarded the state for its failures.

The dissent in the instant case noted the abandonment of precedent by the majority and concluded that a reversal was warranted. Judge O'Toole wrote :

“Mr. Price failed to raise the recordkeeping issue in his initial motion, but specifically raised it thereafter in his supplemental demand for discovery. Certainly, the state was aware of the issue, having failed to respond to the supplemental request. The state attempted, at the suppression hearing, to introduce a letter on the subject from the director of the Ohio State Patrol Crime Lab.

The Eleventh District previously held that retention of records of calibration checks is essential to the regulatory scheme because it provides the only basis to determine whether a machine is being operated in compliance with 3701-53-04. *State v. Hominsky*, (1995)107 Ohio App. 3d 287. The Ninth District in *State v. Griffith*, (Sept. 21, 1988) Summit App. No. 13551, Interestingly, these cases predate *Burnside* and demonstrated the judiciary's understanding of adhering to the director of health's rulemaking authority to ensure reliability and accuracy of test procedures. In the instant case appellant would have no specific knowledge about the records of repair, service, maintenance, and calibration history of the gas chromatograph that was used to test his blood but for the ability of Jeffrey Turneau to accurately recall those occurrences and relate them truthfully. The Ohio Department of Health has promulgated regulations which avoid this contingency and require proof of the records at a hearing.

In *State v. Horner*, (Dec. 6, 2001) Jackson App. No. 01CA6, unreported, a motion to suppress failed to include a challenge to calibration solution records however, the issue was raised during

a Trooper's cross-examination. The Trooper admitted that he did not have the records with him at the hearing and the court reversed the suppression and remanded for further discovery. .

Several appellate courts have elected to remand cases for further discovery if a specific challenge to an ODH regulation was not raised in a motion to suppress but was raised at the suppression hearing. These courts have determined if a discovery issue arises during the suppression hearing it is improper to deny a suppression motion. In *State v. Plunkett* (Mar. 10, 2008) *Warren App. No. 2007-01-012, unreported* the court determined a remand was necessary due to unaddressed discovery issues. The court held:

* * * [W]hen a defendant files a motion to suppress containing only general claims and specific issues are joined during the suppression hearing, it is proper for the trial court to continue the hearing in progress to allow the state the opportunity to present evidence to address the specific issues. Likewise, during the period of the continuance, the defendant will be permitted to gather and present rebuttal evidence on these specific issues." *Id.* at ¶ 24. Because the state failed to comply with appellant's discovery request, however, the circumstances of this case dictate that a new suppression hearing is warranted and the trial court should not have proceeded with the hearing. In response, we adopt the remedy imposed by the Second Appellate District in the case *In re J.C.*, 173 Ohio App.3d 405, 2007-Ohio-5763, ¶ 15, and remand the present matter for an additional hearing on appellant's suppression motion on the issue of whether the results of the BAC test should be suppressed due to the age of the calibration solution.

Despite the foregoing precedent the appellate court violated appellant's constitutional rights to due process since the state waived the issue at the trial court and in the answer brief on appeal. Even if the requisite particularity was absent from Appellant's motion to suppress, which it was not, it was present in the discovery demands and cross-examination Turneau. In accord with the *Embry, supra* and its progeny, including *Hernandez-Rodriguez, supra*, the issue was soundly before the court. The state was sanctioned by the trial court for a perceived discovery violation and, without a request, the appellate court redeems the state and rewards it for failing prove any compliance with 3701-53-04(E). The misapplication of precedent in the Eleventh

District and from this Court now serves as a platform from which activist courts can erect a bar to defense efforts to require the state to prove substantial compliance when addressed with a discovery violation that the trial court did not condone.

PROPOSITION OF LAW NO. II:

A motion to suppress must be granted when the state fails to present any testimony or proffer documentary evidence to prove substantial compliance with the Ohio Administrative Code blood alcohol testing requirements.

The state of Ohio provided no evidence on direct examination of substantial compliance with OAC 3701-53-01(A) and (B), 3701-53-06(C) and (D) and 3701-53-04(E). 3701-53-06 provides in pertinent part:

(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;

(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.

OAC 3701-53-01(B) requires a written procedure manual for performing the substance tests to be kept in the area where the analytical tests are performed.

The state never attempted to demonstrate substantial compliance with the foregoing ODH regulations on direct examination of the state lab criminalist, Jeffrey Turneau. During cross-examination of Turneau it was exposed that an OSHP procedure manual that was supplied in discovery by the state of Ohio but not offered as an exhibit by the state on direct examination was not the manual for the specific gas chromatograph that was used to test appellant's blood. The manual that was identified on cross-examination by Turneau details procedures for two different gas chromatographs. The manual identifies procedures for a Perkin-Elmer 8410 and a Perkin Elmer AutoSystem XL but does not mention the machine used for appellant's blood test. The machine used to test appellant's blood was a Perkin Elmer 8500 gas chromatograph. The court of appeals determined that this difference is insignificant and the state substantially complied with the ODH requirement. This is an unacceptable deviation from the procedural requirements established by the director of health and a misapplication of *Burnside* and *Mayl*. There is no evidence that the OSHP has a written procedure manual for the machine used to test appellant's blood as required by the director of health. The record is also devoid of any evidence that the designated laboratory director "certified" the procedure manual that was admitted into evidence for different the different gas chromatographs and that the manual was in compliance with 3701-53-06. This language is not discretionary, it is mandatory. The distinction between the machine used to test appellant's blood and the machines specifically mentioned in the manual is not a matter of semantics. If the lab director specifically included two different gas chromatographs in the procedure manual but omitted the machine that was used to test

appellant's blood, the manual cannot be considered to be in substantial compliance with the ODH regulations.

In *Burnside, supra*, this Court stated that judges do not have the authority or scientific background to second-guess the regulations promulgated by the director of health. The General Assembly instructed the Director of Health to determine "techniques or methods for chemically analyzing a person's blood, urine, breath or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, or alcohol and a drug of abuse in the person's blood, urine, breath or other bodily substance." These same requirements are referenced in R.C. 4511.19(D)(1), the statute under which appellant was charged. R.C. 4511.19(D)(1) proscribes, "the bodily substance withdrawn shall be analyzed in accordance with *methods* approved by the director of health by an individual possessing a valid permit issued by the director of pursuant to section 3701.143 of the Revised Code."

In *State v. Monaghan (August 5, 2005) Hamilton App. No. C-04-0655, unreported*, the First District Court of Appeals affirmed the suppression of an alcohol test result due to the failure of the state to demonstrate compliance with OAC 3701-53-06. Since the record lacked any evidence of compliance with 3701-53-06 the appellate court affirmed the suppression of the test results.

In the instant case the Eleventh District ignored the failure of the state to proffer the procedure manual for the machine that was used to test appellant's blood. The ODH regulations do not permit a substitution procedure manual if it is not certified by the lab director. If the machine that was used to test appellant's blood was intended to be incorporated into the manual that was in evidence, the lab director easily could have amended the manual and certified the

incorporation. The Eleventh District overlooked the admonition of this Court in *Burnside, supra* and this miscarriage of justice exemplifies why a judge cannot replace the determinations and rules made by the Director of Health with equal efficacy. It is axiomatic that this Court and the Department of Health consider noncompliance not to be de minimis.

PROPOSITION OF LAW No. III

A trial court is required to apply the consistency principles found in R.C. 2929.11 and *State v. Foster (2006) 109 Ohio St. 3d* I did not eliminate that obligation.

The court of appeals misconstrued *Foster* and refused to engage in applying consistency principles found in R.C. 2929.11(B). Appellant supplied the trial court with approximately fifteen similar cases from various jurisdictions in a sentencing memorandum to establish a sentencing benchmark for the court. The Eleventh District held that appellant failed to demonstrate that the trial court failed to properly consider the factors and guidelines contained in R.C. 2929.12, R.C. 2929.13, R.C. 2929.14.

Issues regarding felony sentencing were a major concern to the legislature under Senate Bill 2 and the amendments thereto. R.C. 2929.11(B) requires that a criminal sentence be “consistent with sentences imposed for similar crimes committed by similar offenders.” Ohio trial courts no longer have to make specific findings pertaining to what remains of post-*Foster* statutes, so it is difficult for any appellant to establish inconsistency, and impossible for an appellate court to review the trial court's decision. Accordingly, this Court should accept jurisdiction to resolve the conflict between the appellate courts, as well as to define the post-*Foster* role of appellate courts in enforcing R.C. 2929.11. Consideration of the opinions rendered in other cases is the most effective means of ensuring uniformity. While it is impossible to cite cases that are factually identical, it is possible to draw conclusions about the relevant details.

Because *Foster* removed many of the protections in R.C. 2929.14 and 2929.19, it is even more important that trial and appellate courts comply with their duty under R.C. 2929.11(B). The court of appeals decision defeats one of the purposes of Senate Bill 2, which is to create a “body of appellate decisions [that] will provide substantial guidance to sentencing courts....” Katz and Griffin, *Ohio Felony Sentencing Law*, 2004 ed., at 43.

CONCLUSION

Based upon the foregoing, this case involves constitutional questions and matters of public and great interest. Appellant requests this court grant jurisdiction and allow this case so the issues can be presented and reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via regular U.S. Mail, postage prepaid this ____ day of April 2008 to the counsel for Appellee, Geauga County Prosecutors Office, Courthouse Annex, 231 Main Street, Suite 3-A, Chardon, Ohio 44024.

Craig T. Weintraub, Esq.

APPENDIX

FILED

IN COURT OF APPEALS

MAR 17 2008

STATE OF OHIO

COUNTY OF GEAUGA

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

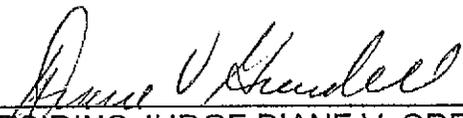
WILLIAM J. PRICE,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2007-G-2785

For the reasons stated in the Opinion of this court, the assignments of error are without merit. The order of this court is that the judgment of the Geauga County Court of Common Pleas is affirmed. Costs to be taxed against appellant.


PRESIDING JUDGE DIANE V. GRENDALL

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

12/521

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS
MAR 17 2008
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2007-G-2785
WILLIAM J. PRICE, :
Defendant-Appellant. :

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 06 C 000103.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Janette M. Bell*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Craig T. Weintraub, 23220 Chagrin Boulevard, #360, Beachwood, OH 44122 (For Defendant-Appellant).

DIANE V. GRENDALL, P.J.

{¶1} Defendant-appellant, William J. Price, appeals the judgment of the Geauga County Court of Common Pleas, sentencing him to a total term of imprisonment of nine years, following his no contest pleas to one count of Aggravated Vehicular Homicide, a felony of the second degree in violation of R.C. 2903.06(A)(2)(a); one count of Aggravated Vehicular Assault, a felony of the third degree in violation of R.C. 2903.08(A)(1)(a); and one count of Operating a Vehicle Under the Influence of

Alcohol, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a) and (f). We affirm the judgment of the court below.

{¶2} At 2:47 p.m., on August 13, 2006, Price was involved in an automobile accident in which the SUV he was driving struck a motorcycle driven by Raymond Long. Long was killed instantly; his girlfriend, Patricia Morgan, suffered extensive and permanent injuries; Price himself was also severely injured.

{¶3} Trooper James Smith of the Ohio State Highway Patrol, who was working the 3:00 to 11:00 p.m. shift that day, was en route from his home to the Chardon Patrol Post when he was dispatched to the accident scene. Upon arrival, Smith was met by Sergeant Biskup of the State Highway Patrol, who had also been called to the scene. Trooper Smith observed Price sitting on a guardrail where emergency personnel were attending to his injuries. While questioning Price prior to his transport to Geauga Hospital, Trooper Smith began to suspect that Price might be intoxicated, due to his unresponsiveness, his glassy, bloodshot eyes, and slurred speech. During the course of the accident investigation, it was discovered that Price had three bottles of vodka in his vehicle. Based upon these findings, Trooper Smith and Sergeant Biskup determined that Price should be tested for intoxication.

{¶4} Trooper Smith followed the rescue vehicle carrying Price to Geauga Hospital, stopping at his patrol post briefly to pick up two blood sampling kits, since his patrol vehicle was only carrying one at the time and State Highway Patrol regulations required each vehicle to be equipped with two kits per shift. Smith arrived at the hospital at approximately 3:29 p.m., at which time he informed Price he was under arrest, and read Price his rights, as outlined in Ohio BMV form 2255, which was

required procedure prior to requesting a blood specimen. After having acknowledged his rights, Price consented to having blood drawn. At approximately 3:35 p.m., Nurse Roberta Hammonds drew a sample of Price's blood using the State Highway Patrol's standard specimen kit.

{¶5} Trooper Smith subsequently took custody of the sample and returned to the accident scene to investigate further. During this time, the sample remained in his patrol vehicle. According to Smith's testimony, the sample remained in his custody until he was finally able to mail it to the Ohio State Patrol Crime Lab at approximately 10:00 p.m., on August 13, 2006. In contrast, the property control form filled out and mailed by Smith along with Price's blood sample indicated that the time of the mailing, which is presumed to be when a transfer in the chain of custody occurs, was listed as 3:50 p.m., on that date. The specimen arrived at the crime lab on August 21, 2006, eight days later. Criminalist Jeffrey Turnau tested the sample on that date, and determined that Price's blood alcohol level was .244.

{¶6} On September 22, 2006, the Geauga County Grand Jury returned a six count indictment against Price charging him as follows: Count One, Aggravated Vehicular Homicide, a second degree felony in violation of R.C. 2903.06(A)(1)(a); Count Two, Aggravated Vehicular Assault, a third degree felony in violation of R.C. 2903.08(A)(1)(a); Count Three, Involuntary Manslaughter, a third degree felony in violation of R.C. 2903.04(B); Counts Four and Five, Operating a Vehicle Under the Influence of Alcohol, first degree misdemeanors, in violation of R.C. 4511.19(A)(1)(a) and (f); and Count Six, Failure to Operate a Motor Vehicle in a Lane of Travel, a minor misdemeanor in violation of R.C. 4511.25(A).

{¶7} On September 25, 2006, Price waived his right to a separate arraignment and entered a plea of "not guilty" to the charges.

{¶8} On November 21, 2006, Price filed a Motion to Suppress the results of his blood alcohol test. The state opposed, and, on January 24, 2007, a hearing was held on Price's motion. On January 31, the trial court filed a judgment entry denying Price's Motion to Suppress.

{¶9} On February 20, 2007, Price entered into a written plea agreement with the state, in which he agreed to enter pleas of "no contest" to Counts One, Two, and Four of the indictment.

{¶10} On April 16, 2007, the trial court held a sentencing hearing, in which it sentenced Price to six years imprisonment for Aggravated Vehicular Homicide and three years imprisonment for Aggravated Vehicular Assault, to be served consecutively. The trial court further ordered Price to serve one hundred days imprisonment for OVI, to be served concurrently with the other sentences. Additionally, the trial court ordered Price to pay restitution in the amount of \$9,000; imposed fines totaling \$23,500; and ordered Price to pay court costs.

{¶11} It is from this judgment that Price timely appeals, assigning the following as error for our review:

{¶12} "[1.] The trial court erred in overruling appellant's Motion to Suppress the results of appellant's blood alcohol test where the evidence failed to establish substantial compliance with the rules established by the Ohio Department of Health.

{¶13} “[2.] The trial court erred in imposing consecutive sentences and imposed a sentence that is contrary to the consistency and proportionality guidelines of R.C. 2929.11(B).

{¶14} “[3.] The trial court erred in sentencing appellant to a harsher sentence for exercising his Fifth Amendment right against self[-]incrimination.

{¶15} “[4.] The trial court erred to the prejudice of the defendant-appellant when it ordered fines and costs without consideration of his ability to pay financial sanctions.”

{¶16} In his first assignment of error, Price asserts that the trial court erred in failing to suppress the admission of his blood test evidence, since the state failed to make a showing that it substantially complied with various rules promulgated by the Director of Health with regard to the testing of blood for alcohol content.

{¶17} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 208, 1996-Ohio-222. Since the trial court is in the best position to resolve the factual issues, an appellate court is bound to accept the trial court's factual determinations as long as they are supported by competent and credible evidence. *State v. Searls* (1997), 118 Ohio App.3d 739, 741, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts. *Id.*

{¶18} In any prosecution premised upon a violation of R.C. 4511.19, the result of a blood alcohol test is presumed valid unless the defendant first challenges the validity

"by way of a pretrial motion to suppress." *Burnside*, 2003-Ohio-5372, at ¶24. Failure to file such a motion "waives the requirement on the state to lay a foundation for the admissibility of the test results." *Id.*, quoting *State v. French*, 72 Ohio St.3d 446, 451, 1995-Ohio-32. However, if the defendant challenges the validity of the test results by means of a pretrial suppression motion, the burden shifts to the state "to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health." *Id.* If the state satisfies this burden and creates a presumption of admissibility, "the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance." *Id.*, citing *State v. Brown* (1996), 109 Ohio App.3d 629, 632.

{¶19} Price first asserts that the results of his blood tests were not admissible and should have been suppressed, since the state failed to prove it complied with Ohio Adm.Code 3701-53-01(B), and 3701-53-06(C) and (D), when his blood sample was tested. These rules require that a written procedural manual containing the analytical techniques used in testing for the presence of alcohol or drugs in bodily substances be kept on file in the area where such tests are performed, and that the manual be maintained and updated in a specified fashion. Price specifically argues that the state failed to prove that (1) the test manual was on file in the lab where the test was performed, and (2) that the onsite manual applied to a different model of gas chromatograph than that which was used to test his blood sample.

{¶20} At the hearing on Price's motion to suppress, Criminalist Jeff Turnau testified on behalf of the state. Turnau testified that he performed the test on Price's blood sample using a Perkin-Elmer Model 8500 gas chromatograph. Despite Price's

assertion that the onsite manual did not comply because it referenced the Perkin-Elmer Model 8410 gas chromatograph, Turnau testified the same manual is used for all Perkin-Elmer 8000 series machines, and is kept on a shelf near the bench where he performs the blood tests. Based upon this testimony, the state provided sufficient evidence of substantial compliance with ODH regulations. Price's first argument lacks merit.

{¶21} Price next challenges whether the state complied with the provisions of Ohio Adm.Code 3701-53-01(A) and 3701-53-04(E), which require the results of instrument checks, calibration checks, and maintenance of the equipment used for the testing of blood samples be kept for a period of not less than three years. We reject this argument.

{¶22} At the hearing, Turnau was able to testify about instrument and calibration checks and records associated with each, he was unable to testify from personal knowledge with regard to maintenance records. "The failure of the state to adduce any evidence as to compliance with the recordkeeping requirement" as mandated by the Director of Health, may be grounds for granting a motion to suppress. *State v. Lipsky*, 1st Dist. No. C-010473, 2002-Ohio-1141, 2002 Ohio App. LEXIS 1159, at *5. However, it is well-settled that "[a] motion to suppress must state its legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Nicholson*, 12th Dist. No. CA2003-10-106, 2004-Ohio-6666, at ¶9, citing *State v. Shindler*, 70 Ohio St.3d 54, 58, 1994-Ohio-452; accord *State v. Barnett*, 11th Dist. No. 2006-P-0017, 2007-Ohio-4954, at ¶28 ("[A]n accused's failure to provide any specificity in his motion to suppress relieve[s] the state of the duty to specifically

address the litany of regulatory violations" asserted in the motion.); *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, at ¶24 ("If a criminal defendant wishes to increase the burden on the prosecution to something beyond merely responding in general, the issues raised must have some specific factual basis to support them.").

{¶23} In the instant case, a review of Price's motion to suppress reveals that he not only failed to raise the issue of a failure to comply with Ohio Adm.Code 3701-53-01(A) and 3701-53-04(E) with any degree of specificity; he failed to raise this issue at all.¹ Price's argument that the state failed to demonstrate substantial compliance with these particular Administrative Code regulations is, therefore, without merit.

{¶24} Price next challenges whether the state substantially complied with Ohio Adm.Code 3701-53-05, which requires all blood and urine samples to be refrigerated "[w]hile not in transit or under examination." Ohio Adm.Code 3701-53-05(F). With regard to this section, Price points to Trooper Smith's testimony, in which he admitted to not mailing the sample until after 10:00 p.m. on August 13, 2006, over six hours after the time indicated on the property control form and to the fact that it took his specimen approximately eight days from the time it was mailed to arrive at the crime lab. Price also challenges whether the state substantially complied with Ohio Admin.Code 3701-53-05(C), which requires the sample vial used to collect blood samples contain "solid

1. On October 26, 2006, after the state had responded to Price's initial Demand for Discovery, Price filed a "Supplemental Demand for Discovery," in which he requested "copies of all maintenance records of the equipment used for the testing of defendant[']s blood during the past twelve months." The state did not respond to this request. Prior to filing his motion to suppress, however, Price did not file a motion to compel. This court has held that "[i]n order to require the state to respond specifically and particularly to issues raised in a motion, an accused must raise the issues that can be supported by facts, *either known or discovered*, that are specific to the issues raised." *State v. Hernandez-Rodriguez*, 11th Dist. No. 2006-P-0121, 2007-Ohio-5200, at ¶51 (citations omitted) (emphasis added). The combination of Price failing to file a motion to compel discovery of this information, and failing to address this issue in his motion to suppress, renders the state's "burden *** to show substantial compliance with those regulations *** general and slight." *Id.* (citations omitted).

anticoagulant,” or whether the vial contained a preservative to prevent degeneration of blood specimens while unrefrigerated.

{¶25} With regard to the question of whether an anticoagulant or chemical preservative was present in the vacuum tube containing Price’s blood sample, the state elicited testimony from Turnau, who stated that the tube containing Price’s sample had a grey cap, which indicates the tube in question contained both potassium oxalate, an anticoagulant, and sodium fluoride, a preservative. Both Douglas Rohde, Senior Forensic Chemist for the Lake County Crime Lab, who testified on behalf of the state, and Robert Williams, Price’s own expert, corroborated Turnau’s testimony in this regard. Williams further testified that it would not be routine for a laboratory to test for the presence of these substances if the top of the vial in question was grey. Consequently, Price’s argument that the state did not substantially comply with these requirements must fail.

{¶26} With regard to the second issue of non-refrigeration, we note that while non-refrigeration for the six hour period of time between when the sample was taken from Price and the time it was actually mailed does raise some concerns, the Fifth Appellate District has noted, “the issue is the reliability of the test results not the performance requirements of the Ohio Administrative Code.” *State v. Brush*, 5th Dist. No. 04CA92, 2005-Ohio-3767, at ¶24 (citation omitted). Rohde’s testimony indicated that, due to the presence of the preservative in the blood sample, the lack of refrigeration would not affect the reliability of the test results, even if bacteria were present in the blood. Furthermore, the Ohio Supreme Court, in *State v. Plummer* (1986), 22 Ohio St.3d 292, found no violation of Ohio Adm.Code 3701-53-05(F) when a

urine specimen went unrefrigerated for a period of one hour and twenty-five minutes prior to mailing, and again went unrefrigerated for a period of three to four hours after the specimen had been delivered to the laboratory. *Id.* at 294-295. Consequently, we cannot conclude that Trooper Smith's retention of the blood specimen in an unrefrigerated state for six hours before mailing was a violation. "[W]ere we to agree *** that any deviation whatsoever from the regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible." *Burnside*, 2003-Ohio-5372, at ¶34 (citation omitted).

{¶27} Nor do we conclude that an eight-day period required for the mailing of the specimen in this case was unreasonable. Turnau testified that such delays are not uncommon, and may range as high as 10 to 12 days. Furthermore, while in the U.S. mail, the specimen is clearly "in transit," within the contemplation of Ohio Admin.Code 3701-53-05(F), and thus, did not require refrigeration for that period.

{¶28} For the foregoing reasons, the trial court did not err in denying Price's motion to suppress. His first assignment of error is, therefore, without merit.

{¶29} In his second assignment of error, Price alleges that the trial court erred when imposing his sentence by failing to follow R.C. 2929.11(B), which requires a felony sentence to be "consistent with sentences imposed for similar crimes committed by similar offenders." Relying on former R.C. 2929.14(B), Price argues that, as a first time offender, he was entitled to a presumption of a minimum sentence, unless the court made a determination that the shortest prison term would demean the seriousness of the offender's conduct, or would not adequately protect the public from future crimes. Citing to authority from other appellate districts, Price further argues that the trial court

was required to engage in a case-by-case comparison between similarly-situated offenders prior to imposing sentence. We disagree.

{¶30} Pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court severed R.C. 2929.14(B), which required the trial court to make factual findings prior to imposing a more-than-the-minimum sentence, and R.C. 2929.14(E)(4), which required the trial court to make factual findings prior to imposing consecutive sentences. *Id.* at paragraphs one through four of the syllabus. Subsequent to *Foster*, courts now "have full discretion to impose a prison sentence within the statutory range and are no longer, *required* to make findings or give their reasons for imposing *** consecutive, or more than the minimum sentences." *Id.* at paragraph seven of the syllabus (emphasis added).

{¶31} The overriding purposes of felony sentencing in Ohio "are to protect the public from future crime by the offender *** and to punish the offender." R.C. 2929.11(A). In addition to being consistent with other sentences imposed for similar crimes, a felony sentence must be "reasonably calculated" to achieve the overriding purposes of felony sentencing and be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim." R.C. 2929.11(B). A trial court possesses "broad discretion to determine the most effective way to comply with the purposes and principles of sentencing within the statutory guidelines." *State v. Smith* (June 11, 1999), 11th Dist. No. 98-P-0018, 1999 Ohio App. LEXIS 2632, at *8.

{¶32} In the case sub judice, the trial court sentenced Price to six years imprisonment for Aggravated Vehicular Homicide and three years imprisonment for Aggravated Vehicular Assault, to be served consecutively. Both of these sentences fall

within the mid-range of sentences authorized by R.C. 2929.14(A)(2) and (3), respectively. As a general rule, sentences that fall within the statutory range do not violate the constitutional provision regarding excessive punishments. *State v. Gladding* (1990), 66 Ohio App.3d 502, 513, citing *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69.

{¶33} This court has stated that, although “a trial court is required to engage in the analysis set forth by R.C. 2929.11(B), to ensure the consistency of sentences,” a court is not required “to make specific findings on the record” in this regard. *State v. Newman*, 11th Dist. No. 2002-A-0007, 2003-Ohio-2916, at ¶10. “[I]t is not the trial court's responsibility to research prior sentences from undefined, and largely unavailable, databases before reaching its sentencing decision.” *State v. Quine*, 9th Dist. No. 20968, 2002-Ohio-6987, at ¶12. “In short, a consistent sentence is not derived from a case-by-case comparison; rather, it is the trial court’s proper application of the statutory sentencing guidelines that ensures consistency.” *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, at ¶58. “Thus, the only way for Appellant to demonstrate that his sentence was ‘inconsistent’ *** is if he establishes that the trial court failed to *** consider the *** guidelines contained in [Ohio’s sentencing statutes].” *State v. Romig*, 11th Dist. No. 2007-L-096, 2008-Ohio-525, at ¶75 (citation omitted).

{¶34} Price fails to meet this burden. Our review of the sentencing transcript shows that the trial court explicitly considered the relevant statutory factors before imposing sentence, including the purposes and principles of felony sentencing. While this may have been the first accident caused by Price while driving under the influence, the record shows that he had three previous convictions for that offense. Long was

killed; Morgan was permanently injured. Morgan's son, Colin Stinson, testified to his deep affection for Long, the renewed joy he had brought to his mother's life, and the grief his loss has caused her family. Morgan testified to her own sense of loss, and the damage Long's death had caused to her children.

{¶35} There is also evidence that the trial court appropriately considered the seriousness and recidivism factors of R.C. 2929.12 prior to the imposition of sentence. R.C. 2929.12(B), setting forth factors making a crime more serious, requires trial courts to consider whether the victims of a crime suffered "serious physical, psychological, or economic harm as the result of the offense." R.C. 2929.12(B)(2). The harm suffered by Long and Morgan, death, and permanent injury/loss of a loved one, respectively, were obviously enormous.

{¶36} R.C. 2929.12(D), setting forth factors which make recidivism more likely, requires trial courts to consider whether an offender has responded to previous sanctions for criminal conduct; whether an offender's conduct was related to alcohol and drug abuse which he or she has refused to acknowledge; and, whether an offender has shown genuine remorse for his actions. R.C. 2929.12(D)(3), (4) and (5). With regard to these factors, the court found recidivism more likely based on the fact that Price's prior convictions for OVI failed to cause any change in his behavior, and based upon the fact that Price claimed his erratic driving that day was caused by being hit in the head by a golf ball, rather than intoxication.

{¶37} In sum, there is plentiful evidence in the record indicating the trial court considered the appropriate factors prior to imposing greater than the minimum

sentences, and ordering that such sentences be served consecutively. Price's second assignment of error is without merit.

{¶38} In his third assignment of error, Price claims the trial court deprived him of his Fifth Amendment right against self-incrimination during sentencing, by referencing his written statement to the Adult Parole Authority as a basis for its finding that he refused to acknowledge his drinking problem and lacked remorse for his actions. This alleged statement to his probation officer suggested that his erratic driving was caused by being hit in the head by a golf ball and lack of sleep, rather than intoxication.

{¶39} As an initial matter, we note that Price pled no contest to the charges. Pursuant to Crim.R. 11(B)(2), "[t]he plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment." In the case sub judice, Price pled no contest to Aggravated Vehicular Homicide, and Aggravated Vehicular Assault, both of which require the crime be "the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code [Driving While Under the Influence of Alcohol or Drugs]." R.C. 2903.06(A)(1)(a) and 2903.08(A)(1)(a). Thus, Price's plea, while not a statement of his guilt, served as an admission to the truth of the fact that he had operated his vehicle while under the influence when the crimes were committed.

{¶40} Price has failed to demonstrate how his alleged "refusal to admit he drank alcohol prior to the accident" resulted in a harsher sentence than he would have otherwise received. Pursuant to App.R. 9(B), it is an appellant's duty to include within the record any material pertinent to the errors assigned. *State v. Fritz*, 11th Dist. No. 2005-P-0094, 2006-Ohio-5173, at ¶6 (citation omitted). In the instant case, the record

includes neither the PSI report nor any other material from the adult parole authority. Consequently, we are "obligated to presume the validity of the trial court's proceedings and affirm." *Id.* at ¶7, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199 and *Lile v. Snider* (Mar. 8, 1985), 11th Dist. No. 3464, 1985 Ohio App. LEXIS 6017, at *4.

{¶41} Price's third assignment of error is without merit.

{¶42} In his fourth assignment of error, raised by means of a supplemental brief, Price asserts that the trial court erred by ordering him to pay fines totaling \$23,500.00 and costs, without considering his present and future ability to pay, as required by R.C. 2929.19(B)(6). The state counters that the trial court stated it had read the PSI report, which contained Price's financial information, and that this was sufficient to meet the criteria of R.C. 2929.19(B)(6), pursuant to this court's holding in *State v. Ankrom*, 11th Dist. No. 2006-L-124, 2007-Ohio-3374.

{¶43} Although the trial court made no mention in the transcript of the sentencing hearing that it had considered Price's present and future ability to pay financial sanctions, it did state that it had considered the PSI report. The court also stated that it considered both the PSI report and Price's ability to pay in the judgment entry of sentence. This court has held that "the requirements of R.C. 2929.19(B)(6) are met when the trial court indicates in its judgment entry that it has considered the offender's present and future ability to pay." *State v. Anderson*, 172 Ohio App.3d 603, 2007-Ohio-3849, at ¶24 (citation omitted). Furthermore, in view of the absence of any information allowing us to review Price's alleged error, as noted in our disposition of his

third assignment of error, we are bound to affirm the lower court's judgment on the basis of the record before us.

{¶44} Price's fourth, supplemental assignment of error is without merit.

{¶45} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶46} I respectfully dissent regarding the majority's disposition of the first assignment of error. The motion to suppress should have been granted, due to the state's failure to introduce any maintenance records for the equipment used in testing Mr. Price's blood sample, as required by Ohio Admin.Code 3701-53-01(A) and 3701-53-04(E).

{¶47} In overruling the assignment of error on this issue, the majority relies on case law obligating a defendant to state with specificity his or her objections in a motion to suppress. In this case, Mr. Price failed to raise the recordkeeping issue in his initial motion, but specifically raised it thereafter in his supplemental demand for discovery. Certainly, the state was aware of the issue, having failed to respond to the supplemental

request. The state attempted, at the suppression hearing, to introduce a letter on the subject from the director of the Ohio State Patrol Crime Lab.

{¶48} The majority contends Mr. Price should have moved to compel. Strictly speaking, true. But it is the state's burden to prove the elements of its case, particularly regarding substantial compliance with the Director of Health's rules regarding blood alcohol testing. *Burnside*, supra, at ¶24. Minor procedural errors by the defense should not relieve the state of this burden, when it seeks to imprison a man – particularly in situations such as that instant, where, due to the mandatory nature of the Director of Health's rules, the state should *always* be prepared to show substantial compliance.

{¶49} Thus, I respectfully dissent.