

In the
Supreme Court of Ohio

STATE OF OHIO, : Case No. 2007-2295
 :
 Plaintiff-Appellant, : On Appeal from the
 : Union County
 v. : Court of Appeals,
 : Third Appellate District
 COREY HOOVER, :
 : Court of Appeals Case
 Defendant-Appellee. : No. 14-07-11
 :
 :

MERIT BRIEF OF APPELLANT STATE OF OHIO

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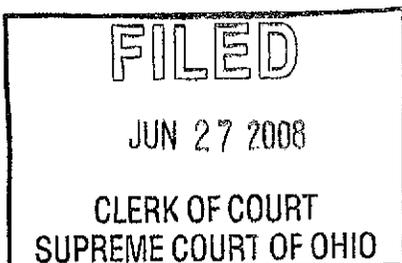


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	3
A. Despite having a previous DUI conviction, Corey Hoover drove drunk and refused to submit to a breath test after police pulled him over.....	3
B. The trial court denied Hoover’s motion to dismiss, accepted Hoover’s no contest plea to violating the Refusal Provision, and sentenced him under the corresponding sentencing statute, R.C. 4511.19(G)(1)(b)(ii).....	4
C. The Third District Court of Appeals reversed the trial court judgment, concluding that the Refusal Provision, in conjunction with R.C. 4511.19(G)(1)(b)(ii), violates the Fourth Amendment.....	5
ARGUMENT.....	6
<u>Appellant State of Ohio’s Proposition of Law:</u>	
<i>Because DUI suspects have no Fourth Amendment right to refuse a breath test to measure their blood alcohol, the enhanced sentence for violating R.C. 4511.19(A)(2) is constitutional.....</i>	
A. Ohio can constitutionally punish Hoover for refusing a blood-alcohol test because he impliedly consented to the test.....	6
1. Ohio’s implied-consent statute requires motorists to submit to a blood-alcohol test, and Ohio law enforces this requirement by subjecting to criminal penalties those who refuse such tests.....	6
2. DUI suspects have no constitutional right to revoke implied consent.....	8
3. Other States have passed similar statutes, and other courts have upheld them	10
B. Even if Hoover had not given his implied consent to a blood-alcohol test, punishing his refusal raises no constitutional concerns because officers were entitled to administer a blood-alcohol test under the circumstances	14
1. Exigent circumstances justified an immediate blood-alcohol test.....	15

2.	The valid-arrest exception to the Fourth Amendment’s warrant requirement also justified a blood-alcohol test.....	18
C.	Because Hoover had no Fourth Amendment right to decline a breath test, the Third Districted erred by concluding that enhancing a sentence for such a refusal is unconstitutional.....	18
	CONCLUSION.....	20
	CERTIFICATE OF SERVICE	unnumbered
APPENDIX OF EXHIBITS		
	Notice of Appeal of Appellant State of Ohio	Apx. 1
	Journal Entry, Third Appellate District	Apx. 4
	Opinion, Third Appellate District.....	Apx. 5
	U.S. Constitution, Amendment 4.....	Apx. 15

TABLE OF AUTHORITIES

Cases	Page
<i>Burnett v. Anchorage</i> (D. Ak. 1986), 634 F. Supp. 1029	13, 16, 18
<i>Camara v. Municipal Court of San Francisco</i> (1967), 387 U.S. 523	14
<i>Chimel v. California</i> (1969), 395 U.S. 792	18
<i>City of Middleburg Heights v. Henniger</i> (8th Dist.), 2006 Ohio App. Lexis 3653, 2006-Ohio-3715	7
<i>Deaner v. Commonwealth</i> (1969), 210 Va. 285	8
<i>Hess v. Pawloski</i> (1927), 274 U.S. 352	9
<i>Howard v. Texas</i> (Tex. Crim. App.), 1989 Tex. App. Lexis 2251	13
<i>Janusch v. Dep't of Motor Vehicles</i> (Cal. Ct. App. 1969), 276 Cal. App. 2d 193	13
<i>Kentucky v. Hernandez-Gonzalez</i> (Ky. 2002), 72 S.W.3d 914	14
<i>Kentucky v. Wirth</i> (Ky. 1996), 936 S.W.2d 78	12
<i>Mackey v. Montrym</i> (1979), 443 U.S. 1	7
<i>Maumee v. Anistik</i> (1994), 69 Ohio St. 3d 339	9
<i>McNulty v. Curry</i> (1975), 42 Ohio St. 2d 341	7
<i>Painter v. Robertson</i> (6th Cir. 1999), 185 F.3d 557	8
<i>Pennsylvania v. Gadley</i> (1988), 49 Pa. D. & C.3d 151	13

<i>People v. Sudduth</i> (Cal. 1966), 65 Cal. 2d 543	12
<i>People v. Thompson</i> (2006), 38 Cal. 4th 811	17
<i>Preston v. United States</i> (1964), 376 U.S. 364	15
<i>Rowley v. Commonwealth</i> (Va. Ct. App. 2006), 48 Va. App. 181	8, 9
<i>Schmerber v. California</i> (1966), 384 U.S. 757	5, 15, 16, 17
<i>Skinner v. Ry. Lab. Executives' Ass'n</i> (1989), 489 U.S. 602	17
<i>South Dakota v. Dole</i> (1987), 483 U.S. 203	2
<i>State v. Ferman</i> (1979), 59 Ohio St. 2d 216 (per curiam)	18
<i>State v. Glass</i> (8th Dist.), 2004 Ohio App. Lexis 4082, 2004-Ohio-4495	19
<i>State v. Hoover</i> (3d Dist.), 2007 Ohio App. Lexis 5070, 2007-Ohio-5773	4
<i>State v. King</i> (1st Dist.), 2003 Ohio App. Lexis 1480, 2003-Ohio-1541	15, 16, 17
<i>State v. Morris</i> (4th Dist.), 159 Ohio App. 3d 775, 2005-Ohio-962	18
<i>State v. Riggins</i> (1st Dist.), 2004-Ohio-4247	9
<i>State v. Schulte</i> (11th Dist.), 1996 Ohio App. Lexis 4675	15, 16
<i>State v. Scott</i> (4th Dist.), 2006 Ohio App. Lexis 4651, 2006-Ohio-4731	18
<i>State v. Scott M.</i> (6th Dist. 1999), 135 Ohio App. 3d 253	19

<i>State v. Tanner</i> (1984), 15 Ohio St. 3d 1	15, 16
<i>State v. Troyer</i> (9th Dist.), 2003 Ohio App. Lexis 529, 2003-Ohio-536	16
<i>State v. Zielke</i> (Wis. 1987), 137 Wis. 2d 39	9, 14
<i>United States v. Herzbrun</i> (11th Cir. 1984), 723 F.2d 773	9
<i>United States v. Prevo</i> (11th Cir. 2006), 435 F.3d 1343	8
<i>United States v. Robinson</i> (1973), 414 U.S. 218	18
<i>Vill. of Oregon v. Feiler</i> (Wis. Ct. App. 1996), 207 Wis. 2d 644, 559 N.W.2d 924	13
<i>Washington v. Smith</i> (Wash. Ct. App. 1997), 84 Wash. App. 813, 929 P.2d 1191	12, 13
<i>Wilson v. Cincinnati</i> (1976), 46 Ohio St. 2d 138	18
<i>Wisconsin v. Gibson</i> (2001), 242 Wis. 2d 267, 626 N.W.2d 73	12
Statutes and Rules	
18 U.S.C. § 3118(a)	11
625 Ill. Comp. Stat. Ann. 5/11-501.1(a) (2008).....	10
75 Pa. Cons. Stat. § 1547(a) (2007).....	11
Ala. Code § 32-5-192(a) (2008).....	10
Alaska Stat. § 28.35.031(a) (2008).....	10
Alaska Stat. § 28.35.032(f) (2008).....	11
Ariz. Rev. Stat. §28-1321(A) (2008)	10
Ark. Code Ann. § 5-65-202(a) (2008)	10
Cal. Vehicle Code § 23612(A) (2007).....	10

Cal. Vehicle Code § 23612(D) (2007).....	11
Colo. Rev. Stat. § 42-4-1301.1(2)(a)(I) (2007).....	10
Conn. Gen. Stat. § 14-227b(a) (2008).....	10
D.C. Code Ann. § 50-1902(a) (2008)	10
Del. Code Ann. tit. 21, § 2740(a) (2008).....	10
Fla. Stat. Ann. § 316.1932(1)(a) (2008).....	10
Fla. Stat. Ann. § 316.1939(1) (2008).....	11
Ga. Code Ann. § 40-5-55(a) (2008).....	10
Haw. Rev. Stat. Ann. § 291E-11(a) (2008).....	10
Idaho Code Ann. § 18-8002(1) (2008)	10
Ind. Code Ann. § 9-30-6-1 (2008)	10
Iowa Code § 321J.6(1) (2008)	10
Kan. Stat. Ann. § 8-1001(a) (2006)	10
Ky. Rev. Stat. Ann. § 189A.103 (2008).....	10
Ky. Rev. Stat. Ann. § 189A.105(2)(a)(1) (2008).....	11
La. Rev. Stat. Ann. § 32:661(A)(1) (2008).....	10
La. Rev. Stat. Ann. § 32:666(A)(1)(c).....	11-12
Mass. Ann. Laws ch. 90F, § 1(A) (2008)	10
Md. Code Ann., Transp. § 16-205.1(a)(2) (2008)	10
Me. Rev. Stat. Ann. tit. 29, §2521(1) (2008).....	10
Me. Rev. Stat. Ann. tit. 29-A, § 2521(3)(c) (2008)	12
Mich. Comp. Laws Serv. § 257.625c(1) (2008)	10
Minn. Stat. § 169A.51(1)(a) (2007).....	10
Minn. Stat. § 169A.51(2)(2) (2007).....	12
Miss. Code Ann. § 63-1-84(1) (2008)	10

Mo. Rev. Stat. § 577.020(1) (2008).....	10
Mont. Code Ann. § 61-8-409(1) (2007).....	10
N.C. Gen. Stat. § 20-16.2(a) (2008).....	10
N.D. Cent. Code § 39-20-01 (2008)	10
N.H. Rev. Stat. Ann. § 265-A:4 (2008)	10
N.J. Rev. Stat. § 39:4-50.2(a).....	10
N.M. Stat. Ann. § 66-8-107(A) (2008).....	10
N.Y. Veh. & Tr. Law § 1194(2)(a)(1) (2008).....	10
Neb. Rev. Stat. Ann. § 60-6.197(1) (2008).....	10
Nev. Rev. Stat. Ann. § 484.383(1) (2007)	10
Okla. Stat. tit. 47, § 751(A)(1) (2008)	10
Or. Rev. Stat. § 813.100(1) (2007)	10-11
R.C. 4511.19(A)(2) (the “Refusal Provision”)	<i>passim</i>
R.C. 4511.19(G)(1)(a)(i).....	7
R.C. 4511.19(G)(1)(b)(i).....	4, 7
R.C. 4511.19(G)(1)(b)(ii)	4, 8
R.C. 4511.191(A)(2).....	1, 7
R.C. 4511.191(A)(3).....	7
R.C. 4511.191(B)(1)	7
R.C. 4511.191(C).....	7
R.I. Gen. Laws § 31-27-2.1(a) (2008)	11
R.I. Gen. Laws § 31-27-2.1(b)(2) (2008).....	12
S.C. Code Ann. § 56-5-2950(a) (2006).....	11
S.D. Codified Laws § 32-23-10 (2008)	11
Tenn Code Ann. § 55-10-406(a)(1) (2008).....	11

Tex. Transp. Code Ann. § 724.011(a) (2007).....	11
Utah Code Ann. § 41-6a-520(1)(a) (2008).....	11
Va. Code Ann. § 18.2-268.2(A) (2008).....	11
Va. Code Ann. § 18.2-268.3(B) (2008).....	12
Vt. Stat. Ann. tit. 23, § 1202(a)(1) (2007).....	11
W. Va. Code Ann. § 17C-5-4(a) (2008).....	11
Wash. Rev. Code Ann. § 46.20.308(1) (2008).....	11
Wis. Stat. § 343.305(2) (2007).....	11
Wyo. Stat. Ann. § 31-6-102(a)(i) (2007).....	11

Other Resources

Article I, Section 14 of the Ohio Constitution.....	4
Fourth Amendment of the United States Constitution.....	<i>passim</i>
Ohio Insurance Institute’s Office, 2005 Annual Report, at “OVI Repeat Offender Statistics,” available at http://www.ohioinsurance.org/factbook/2006/chapter3/chapter3_d.asp	1
<i>Trying to be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment</i> , 62 U. Cin. L. Rev. 1105 (1994).....	1

INTRODUCTION

This case requires the Court to determine whether motorists, after being arrested for a DUI, have a Fourth Amendment right to refuse a blood-alcohol test, despite (1) a statute under which motorists in Ohio give their implied consent to such tests; (2) the exigent circumstances justifying such a test; and (3) a valid arrest for a DUI violation. The simple answer is a resounding “no.”

Corey Hoover had a prior DUI conviction, but he drove drunk again. When police pulled him over, he refused to take a breathalyzer test, even though Ohio’s implied-consent statute provides that any person who operates a motor vehicle on public roads while under the influence of alcohol is deemed to have consented to such a test. See R.C. 4511.191(A)(2). Hoover was charged with and convicted of violating R.C. 4511.19(A)(2) (the “Refusal Provision”), which requires people with prior DUI convictions to take a breath test after being stopped for a DUI violation. Because Hoover was convicted under the Refusal Provision, he received an enhanced minimum sentence of twenty days in jail, instead of ten days.

Drunk driving is both dangerous and, unfortunately, too common. Approximately two in every five Americans will be involved in an alcohol-related crash at some point in their lives. Note, *Trying to be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment*, 62 U. Cin. L. Rev. 1105, 1105 & n.3 (1994). On average, one person is injured from an alcohol-related crash every one and one-half minutes. *Id.* at 1105 & n.2. Even more alarming is the prevalence of repeat offenders—the very group targeted by the statute at issue. From January 1, 1980, through August 23, 2005, repeat offenders were responsible for 60% of all DUI convictions. See Ohio Insurance Institute’s Office, 2005 Annual Report, at “OVI Repeat Offender Statistics,” available at http://www.ohioinsurance.org/factbook/2006/chapter3/chapter3_d.asp. Yet only one in five hundred to two thousand drivers who drive with a blood

alcohol level above the legal limit are arrested for driving under the influence. *Id.* at 1105 & n.5. These figures illustrate both the difficulty and necessity of detecting drunken driving.

To prevent drunk driving, legislatures have passed strict laws against intoxicated drivers—a stance the federal government also supports. See, e.g., *South Dakota v. Dole* (1987), 483 U.S. 203, 209. Among these laws are the Revised Code provisions under which Hoover was convicted and sentenced. Hoover argued, and the Third District concluded, that the statute's enhanced penalties were unconstitutional because they resulted from Hoover's refusal to take a breath test, and therefore he was punished for asserting his Fourth Amendment "right" to refuse the breath test. This position is wrong both as a matter of law and as a matter of policy.

The Third District's decision is incorrect for at least three reasons. First, under Ohio's implied-consent statute, Hoover consented to a blood-alcohol test, and the Fourth Amendment provides no right to revoke such consent after the fact. Second, even if Hoover had not consented to the search, the exigency exception to the Fourth Amendment's warrant requirement justified an immediate blood-alcohol test to preserve evidence of Hoover's blood-alcohol content ("BAC") before it dissipated. And third, the valid-arrest exception to the Fourth Amendment's warrant requirement justified the search at issue. When, as here, the implied-consent, exigency, and valid-arrest exceptions apply, the Fourth Amendment provides no right to refuse a search, so Hoover's enhanced punishment for doing so is perfectly constitutional. Further, the Third District's decision is bad policy because it undercuts a sentencing scheme that deters repeat DUI offenses and thereby provides substantial and tangible benefits to public safety.

In sum, the Third District's opinion creates a new rule of constitutional law that is entirely out of step with precedent and undercuts an important disincentive for people with prior DUI

convictions to offend again. Accordingly, this Court should reverse the judgment below and reinstate Hoover's conviction and sentence.

STATEMENT OF THE CASE AND FACTS

A. Despite having a previous DUI conviction, Corey Hoover drove drunk and refused to submit to a breath test after police pulled him over.

On September 8, 2006, at 2:46 a.m., Deputy Kelly S. Nawman observed a vehicle traveling with windows that were so foggy she could not see inside the car. Supplement to the Merit Brief of Appellant State of Ohio ("State Supp.") at S-4. The vehicle crossed the center line by a "tire's width" and then pulled into a closed business. *Id.* Deputy Nawman activated her emergency lights and the vehicle stopped within the business's parking lot. *Id.* Upon approaching the car, Deputy Nawman smelled a strong alcohol odor. *Id.* She asked Hoover for his license and registration, but he had difficulty retrieving those items, and he dropped his wallet on the floor of his car and did not pick it up. *Id.* The officer noticed that Hoover's eyes were "extremely bloodshot and glassy." *Id.* When she asked him how much he had to drink, Hoover responded that he had "a little." *Id.* Deputy Nawman then requested that Hoover exit the car, and after almost falling, Hoover shut the door slowly while holding on to the side of it. *Id.* Hoover then performed "poorly" on the field sobriety tests. *Id.*; see also State Supp. at S-6.

Deputy Nawman arrested Hoover and read him his *Miranda* rights. State Supp. at S-4. She then patted him down and asked him if he had anything in his pockets. *Id.* In response, Hoover said he had a wallet, but Deputy Nawman reminded him that he had dropped his wallet on the floor of the car when he was trying to get his license. *Id.* Hoover was taken to the Union County Sheriff's Office. There, he was asked to submit to the breathalyzer test. He refused. Notwithstanding this refusal, Hoover received a citation for a DUI violation under R.C. the Refusal Provision, which prohibits drivers with prior DUIs from driving under the influence

again and then refusing to take a blood alcohol test after an officer's request. *Id.*; see also State Supp. at S-2.

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

Hoover pleaded not guilty to the R.C. 4511.19(A)(2) charge and later moved to dismiss, claiming that the Refusal Provision and its corresponding sentence enhancement violated his constitutional rights. State Supp. at S-3, S-7. More specifically, Hoover claimed that the statute violated: (1) the Fourth Amendment of the United States Constitution, and Article I, Section 14 of the Ohio Constitution; and (2) the Fifth and Fourteenth Amendments of the United States Constitution, and the comparable provisions of the Ohio Constitution. State Supp. at S-7. Marysville Municipal Judge Michael J. Grigsby denied the motion to dismiss. State Supp. at S-10. Hoover then pleaded no contest. State Supp. at S-11. Judge Grigsby accepted Hoover's plea and found him guilty of violating the Refusal Provision. *Id.* Accordingly, Judge Grigsby sentenced Hoover to sixty days in jail (with forty days suspended) under R.C. 4511.19(G)(1)(b)(ii), which carries a mandatory-minimum term of twenty days in jail. *Id.*; State Supp. at S-1. Had Hoover been convicted of a run-of-the-mill DUI charge under R.C. 4511.19(A)(1), which does not include as an element refusal to submit to a blood-alcohol test, he would have been sentenced under R.C. 4511.19(G)(1)(b)(i), which carries only a ten-day mandatory minimum.

Hoover indicated that he would appeal, and Judge Grigsby granted Hoover's Motion for Stay of Sentence Enforcement pending the appellate decision. State Supp. at 11-12.

C. The Third District Court of Appeals reversed the trial court judgment, concluding that the Refusal Provision, in conjunction with R.C. 4511.19(G)(1)(b)(ii), violates the Fourth Amendment.

On appeal, the Third District Court of Appeals reversed the municipal court's judgment. *State v. Hoover* (3d Dist.), 2007 Ohio App. Lexis 5070, 2007-Ohio-5773. Although the Third District upheld the municipal court's denial of Hoover's motion to dismiss, *id.* at ¶ 4, it concluded that the enhanced sentence for violating the Refusal Provision punished Hoover for asserting a constitutional right, *id.* at ¶ 7. The Third District did not address Hoover's Fifth Amendment challenge or whether the statute implicates the Ohio Constitution in any way.

According to the Third District, Hoover's enhanced sentence violated the Fourth Amendment because it punished him for asserting a constitutional right to withhold consent to a chemical test. *Id.* The court recognized that a chemical test is considered a search under the Fourth Amendment of the United States Constitution. *Id.* (citing *Schmerber v. California* (1966), 384 U.S. 757). Yet it ignored precedent establishing that motorists have no right to refuse a chemical test, and that suspects may not withdraw implied consent to a search. The Third District also ignored other exceptions to the Fourth Amendment's warrant requirement—namely, the exigency exception and the valid-arrest exception—that justified an immediate blood-alcohol test.

ARGUMENT

Appellant State of Ohio's Proposition of Law:

Because DUI suspects have no Fourth Amendment right to refuse a breath test to measure their blood alcohol content, the enhanced sentence for violating R.C. 4511.19(A)(2) is constitutional.

The Third District erred by concluding that (1) DUI suspects have a Fourth Amendment right to refuse a blood-alcohol test, and (2) Hoover's enhanced punishment for refusing the test accordingly violated the Fourth Amendment. Hoover had no Fourth Amendment protection for at least three reasons. First, under Ohio's implied-consent statute, Hoover consented to the test by driving on Ohio's roadways. As Ohio's courts, as well as courts construing similar statutes, have held, searches pursuant to an implied-consent statute are constitutional, and suspects lack a Fourth Amendment right to withdraw their implied consent to such searches. Second, under the facts of this case, the exigency exception to the Fourth Amendment's warrant requirement justified an immediate blood-alcohol test. And third, the valid-arrest exception also justified the search. For each of these reasons, Hoover had no Fourth Amendment right to refuse. Accordingly, Hoover's enhanced sentence did not punish him for the exercise of any right, and the enhanced sentence therefore raises no Fourth Amendment concerns.

- A. Ohio can constitutionally punish Hoover for refusing a blood-alcohol test because he impliedly consented to the test.**
- 1. Ohio's implied-consent statute requires motorists to submit to a blood-alcohol test, and Ohio law enforces this requirement by subjecting to criminal penalties those who refuse such tests.**

Under Ohio's implied-consent statute, any motorist who operates a vehicle on Ohio's roads consents to a breath test. The statute provides:

Any 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 . . . 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, drug of

abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a [DUI offense].

R.C. 4511.191(A)(2). So long as a police officer has "reasonable grounds" to believe that the suspect was driving under the influence, the implied-consent statute provides that a chemical test "shall be administered at the [officer's] request." R.C. 4511.191(A)(3). As the Eighth District recently noted, the implied-consent statute is like a "bargain between drivers and the state. In exchange for use of the roads within the state of Ohio, drivers consent to have their breath tested if a police officer has reason to believe the driver is intoxicated." *City of Middleburg Heights v. Henniger* (8th Dist.), 2006 Ohio App. Lexis 3653, 2006-Ohio-3715, ¶ 19.

To give teeth to the implied-consent statute, the General Assembly ensured that refusing to submit to a chemical test would not go unpunished. For instance, motorists who refuse such a test suffer an immediate suspension of their driver's licenses. R.C. 4511.191(B)(1); see *McNulty v. Curry* (1975), 42 Ohio St. 2d 341 (upholding this administrative penalty against a due process challenge); *Mackey v. Montrym* (1979), 443 U.S. 1 (same). But a statutory scheme imposing only administrative sanctions leaves a loophole: A drunk driver who refuses a breath test suffers only the same administrative penalties that would apply if he were found guilty of a DUI, see R.C. 4511.191(C), but by refusing the test, he increases the odds that he will avoid *criminal* penalties. This loophole creates a disincentive to submit to a blood-alcohol test, undermining the implied-consent law. This disincentive is especially powerful in the case of repeat offenders, who face enhanced penalties for DUI convictions. Compare R.C. 4511.19(G)(1)(a)(i) (three-day mandatory minimum sentence for first-time offenders), with R.C. 4511.19(G)(1)(b)(i) (ten-day mandatory minimum sentence for offenders with a prior DUI in the preceding six years).

To close this loophole, the General Assembly passed the Refusal Provision and its corresponding sentence enhancement. As noted above, a DUI offender receives an enhanced sentence if he drives drunk and additionally (1) has been convicted of a prior DUI offense within the past twenty years, and (2) refuses to submit to a chemical test (such as a breathalyzer). See R.C. 4511.19(G)(1)(b)(ii). The enhanced sentence thus gives drivers an incentive to submit to the breath test and adds force to the implied-consent statute.

2. DUI suspects have no constitutional right to revoke implied consent.

The Third District circumvented the implied-consent statute by concluding that Hoover revoked his implied consent. But this rule, if adopted, would eviscerate the implied-consent statute. See *Rowley v. Commonwealth* (Va. Ct. App. 2006), 48 Va. App. 181, 187 (recognizing that allowing a motorist's implied consent "to be unilaterally withdrawn would 'virtually nullify the Implied Consent Law'" (quoting *Deaner v. Commonwealth* (1969), 210 Va. 285, 293)). After all, a motorist who may revoke his implied consent to a blood-alcohol test is in the same position as a motorist who had never impliedly consented at all. For this reason, courts have recognized that implied consent, unlike express consent, cannot be revoked.

Although suspects may revoke or circumscribe their express consent to a search, see *Painter v. Robertson* (6th Cir. 1999), 185 F.3d 557, 567, they lack the authority to curtail a search to which they have impliedly consented. Courts have recognized as much in a variety of circumstances. For instance, in *United States v. Prevo* (11th Cir. 2006), 435 F.3d 1343, the defendant impliedly consented to a search by driving onto prison grounds, past signs notifying her that any vehicle on prison property is subject to a search. *Id.* at 1344. When officers approached her to conduct a search, she attempted to revoke this implied consent by telling the officers that she wanted to leave. *Id.* at 1345. The Eleventh Circuit rejected this argument, concluding "that the Fourth Amendment protects individuals from unreasonable searches and

seizures; it does not assure them that they will not get caught when violating the law.” *Id.* at 1349. Similarly, the Eleventh Circuit has recognized that allowing would-be airline passengers to revoke the consent that is implied by arriving at an airport security checkpoint would sanction a game of “heads-I-win, tails-you-lose,” in which a criminal would always win. *United States v. Herzbrun* (11th Cir. 1984), 723 F.2d 773, 776. Accordingly, the court held that the defendant could not revoke this implied consent, even if he agreed to leave the airport and forfeit his ticket. *Id.* at 776-77. These authorities confirm that the Fourth Amendment provides no right to revoke previously issued implied consent.

The same rule applies in the context of an implied-consent law regarding drunk driving. As the Wisconsin Supreme Court recognized more than two decades ago, such laws are “not designed to give greater Fourth Amendment rights to an alleged drunk driver than those afforded to any other criminal defendant.” *State v. Zielke* (Wis. 1987), 137 Wis. 2d 39, 41; see also *Rowley*, 48 Va. App. at 187 (rejecting the argument that DUI suspects have a Fourth Amendment right to revoke implied consent to a blood-alcohol test); *Hess v. Pawloski* (1927), 274 U.S. 352 (upholding against a due process challenge a Massachusetts statute providing that by driving in Massachusetts, a motorist consented to appointment of the state registrar as his agent to receive service of process).

The Third District’s opinion cites no authority supporting a Fourth Amendment right to revoke implied consent to a search. The only cases it cites are distinguishable. *State v. Riggins* (1st Dist.), 2004-Ohio-4247, addresses express consent, not implied consent. And although *Maumee v. Anistik* (1994), 69 Ohio St. 3d 339, 342, states that *Ohio law* permits a DUI suspect to decline consent, it does not (1) provide authority for this proposition; (2) hold that declining

consent must go unpunished (indeed, it notes the opposite); or (3) state that the *Fourth Amendment* provides such a right.

In sum, the Fourth Amendment provides suspects such as Hoover with no right to revoke implied consent, and the Third District erred by holding otherwise.

3. Other States have passed similar statutes, and other courts have upheld them.

Because DUI suspects have no Fourth Amendment right to withdraw their implied consent and therefore no right to refuse a breath test, it is unsurprising that Ohio's efforts to create disincentives for drunk driving are not unique. To the contrary, every State (plus the District of Columbia) has passed an implied-consent statute. See Ala. Code § 32-5-192(a) (2008); Alaska Stat. § 28.35.031(a) (2008); Ariz. Rev. Stat. §28-1321(A) (2008); Ark. Code Ann. § 5-65-202(a) (2008); Cal. Vehicle Code § 23612(A) (2007); Colo. Rev. Stat. § 42-4-1301.1(2)(a)(I) (2007); Conn. Gen. Stat. § 14-227b(a) (2008); Del. Code Ann. tit. 21, § 2740(a) (2008); D.C. Code Ann. § 50-1902(a) (2008); Fla. Stat. Ann. § 316.1932(1)(a) (2008); Ga. Code Ann. § 40-5-55(a) (2008); Haw. Rev. Stat. Ann. § 291E-11(a) (2008); Idaho Code Ann. § 18-8002(1) (2008); 625 Ill. Comp. Stat. Ann. 5/11-501.1(a) (2008); Ind. Code Ann. § 9-30-6-1 (2008); Iowa Code § 321J.6(1) (2008); Kan. Stat. Ann. § 8-1001(a) (2006); Ky. Rev. Stat. Ann. § 189A.103 (2008); La. Rev. Stat. Ann. § 32:661(A)(1) (2008); Me. Rev. Stat. Ann. tit. 29, §2521(1) (2008); Md. Code Ann., Transp. § 16-205.1(a)(2) (2008); Mass. Ann. Laws ch. 90F, § 1(A) (2008); Mich. Comp. Laws Serv. § 257.625c(1) (2008); Minn. Stat. § 169A.51(1)(a) (2007); Miss. Code Ann. § 63-1-84(1) (2008); Mo. Rev. Stat. § 577.020(1) (2008); Mont. Code Ann. § 61-8-409(1) (2007); Neb. Rev. Stat. Ann. § 60-6.197(1) (2008); Nev. Rev. Stat. Ann. § 484.383(1) (2007); N.H. Rev. Stat. Ann. § 265-A:4 (2008); N.J. Rev. Stat. § 39:4-50.2(a); N.M. Stat. Ann. § 66-8-107(A) (2008); N.Y. Veh. & Tr. Law § 1194(2)(a)(1) (2008); N.C. Gen. Stat. § 20-16.2(a) (2008); N.D. Cent. Code § 39-20-01 (2008); Okla. Stat. tit. 47, § 751(A)(1) (2008); Or. Rev.

Stat. § 813.100(1) (2007); 75 Pa. Cons. Stat. § 1547(a) (2007); R.I. Gen. Laws § 31-27-2.1(a) (2008); S.C. Code Ann. § 56-5-2950(a) (2006); S.D. Codified Laws § 32-23-10 (2008); Tenn Code Ann. § 55-10-406(a)(1) (2008); Tex. Transp. Code Ann. § 724.011(a) (2007); Utah Code Ann. § 41-6a-520(1)(a) (2008); Vt. Stat. Ann. tit. 23, § 1202(a)(1) (2007); Va. Code Ann. § 18.2-268.2(A) (2008); Wash. Rev. Code Ann. § 46.20.308(1) (2008); W. Va. Code Ann. § 17C-5-4(a) (2008); Wis. Stat. § 343.305(2) (2007); Wyo. Stat. Ann. § 31-6-102(a)(i) (2007). The federal government has done the same. 18 U.S.C. § 3118(a) (motorists who drive within the special territorial jurisdiction of the United States consent to a blood-alcohol test).

Similarly, various other States have passed statutes that criminally punish a driver's refusal to submit to a blood-alcohol test. The list of such States includes Alaska, California, Florida, Kentucky, Louisiana, Maine, Minnesota, Rhode Island, and Virginia. See Alaska Stat. § 28.35.032(f) (2008) ("Except as provided under (p) of this section, refusal to submit to a chemical test authorized by AS 28.33.031(a) or AS 28.35.031(a) or (g) is a class A misdemeanor."); Cal. Vehicle Code § 23612(D) (2007) ("The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine [as well as] mandatory imprisonment if the person is convicted of [driving under the influence]."); Fla. Stat. Ann. § 316.1939(1) (2008) ("It is a criminal misdemeanor to refuse to submit to a blood alcohol content test when the suspect previously refused a blood alcohol test, had his license previously suspended for such refusal, and probable cause currently exists to believe the suspect was driving drunk."); Ky. Rev. Stat. Ann. § 189A.105(2)(a)(1) (2008) ("[I]f the person refuses to submit to the tests and is subsequently convicted of violating KRS 189A.010(1) then he will be subject to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence imposed if he submits to the tests."); La. Rev. Stat.

Ann. § 32:666(A)(1)(c) (“Any person who refuses to submit to a chemical test as required by the provisions of this Paragraph shall be . . . imprisoned for not less than ten days nor more than six months.”); Me. Rev. Stat. Ann. tit. 29-A, § 2521(3)(c) (2008); (refusing a breathalyzer test shall be “considered an aggravating factor at sentencing if the person is convicted of operating under the influence of intoxicants that, in addition to other penalties, will subject the person to a mandatory minimum period of incarceration”); Minn. Stat. § 169A.51(2)(2) (2007) (DUI suspect must be informed “that refusal to take a test is a crime.”); R.I. Gen. Laws § 31-27-2.1(b)(2) (2008) (anyone who refuses a breathalyzer test and is “convicted for a second violation within a five (5) year period shall be guilty of a misdemeanor, shall be imprisoned for not more than six (6) months and shall pay a fine”); Va. Code Ann. § 18.2-268.3(B) (2008) (“[T]he criminal penalty for unreasonable refusal within 10 years of a prior conviction for driving while intoxicated or unreasonable refusal is a Class 2 misdemeanor, and [] the criminal penalty for unreasonable refusal within 10 years of any two prior convictions for driving while intoxicated or unreasonable refusal is a Class 1 misdemeanor.”).

In upholding such implied-consent statutes, many States’ courts have echoed the conclusion that suspected drunk drivers lack a constitutional right to refuse a BAC test. See *Wisconsin v. Gibson* (2001), 242 Wis. 2d 267, 272, 626 N.W.2d 73, 76 (“[b]y implying consent, the statute removes the right of a driver to lawfully refuse a chemical test”); *Kentucky v. Wirth* (Ky. 1996), 936 S.W.2d 78, 82 (concluding that under Kentucky’s implied consent statute, “one who refuses [a breathalyzer test] will not be physically forced to submit . . . [but i]t does not mean that such person has a lawful right to refuse such testing.”); *People v. Sudduth* (Cal. 1966), 65 Cal. 2d 543, 548 (concluding that defense counsel “incorrectly assumed that defendant had a constitutional right to refuse the test”); *Washington v. Smith* (Wash. Ct. App. 1997), 84 Wash.

App. 813, 820, 929 P.2d 1191, 1195 (providing that a person under arrest has no right to refuse to have his blood tested); *Vill. of Oregon v. Feiler* (Wis. Ct. App. 1996), 207 Wis. 2d 644, 559 N.W.2d 924 (concluding that drivers do have a constitutional right to refuse to answer an officer's questions during a traffic stop, but they do not have a constitutionally protected right to refrain from submitting to blood alcohol testing); *Howard v. Texas* (Tex. Crim. App.), 1989 Tex. App. Lexis 2251, *5 (holding that drivers do not possess a statutory or constitutional right to refuse a chemical breath test); *Janusch v. Dep't of Motor Vehicles* (Cal. Ct. App. 1969), 276 Cal. App. 2d 193, 196 ("It is well settled that the person accused of driving while drunk has no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample or blood or urine."); *Pennsylvania v. Gadley* (1988), 49 Pa. D. & C.3d 151, 156-57 (noting that neither the Fourth Amendment protections against unreasonable search or seizures nor the Fifth Amendment protections against self-incrimination prevent the State from requiring that a driver submit to a test and therefore, the driver does not have a right to refuse the test).

Because DUI suspects have no general Fourth Amendment right to refuse a blood-alcohol test, courts have upheld statutes, like Ohio's, that impose criminal penalties for such a refusal. For instance, a federal district court upheld a statute providing that refusing to take a breath test could result in a misdemeanor punishable by a fine and imprisonment. *Burnett*, 634 F. Supp. at 1038. The *Burnett* court held that a person cannot withdraw his implied consent; he may "choose not to cooperate," but that choice "ought not to be seen as a lack of consent in the legal sense, for that consent was already given." *Id.* Distinguishing consent from cooperation, the court noted that "consent in the constitutional sense is only required where the defendant has a legal right to refuse. As we have seen, a legally arrested defendant has no constitutional right to refuse a breathalyzer examination." *Id.* at 1038, n.7. "In the simplest terms, the driver stopped

on probable cause for driving while intoxicated has no consent to withhold, at least for purposes of . . . Fourth Amendment analysis.” *Id.* at 1038; see also *Kentucky v. Hernandez-Gonzalez* (Ky. 2002), 72 S.W.3d 914 (upholding Kentucky’s statute that doubles the amount of jail time if the accused refuses to consent to the breath test when the underlying offense carries a mandatory jail sentence); *State v. Zielke* (Wis. 1987), 137 Wis. 2d 39, 41 (upholding a statute criminalizing a motorist’s refusal to submit to a chemical test).

As each of these cases illustrates, DUI suspects enjoy no general constitutional right—under the Fourth Amendment or any other provision—to refuse a breath test. Amid the uniformity with which Ohio, federal, and other states’ courts have spoken on this issue, the Third District’s opinion below is the lone dissenter, and it cannot stand against this heavy weight of authority.

B. Even if Hoover had not given his implied consent to a blood-alcohol test, punishing his refusal raises no constitutional concerns because officers were entitled to administer a blood-alcohol test under the circumstances.

Even if Hoover had not impliedly consented to a BAC test, the State would still be within its authority to punish Hoover’s refusal. Under the facts of this case, Hoover had no Fourth Amendment right to avoid the search, so his enhanced punishment could not contravene the Constitution.

The “basic purpose of th[e Fourth] Amendment . . . is to safeguard the privacy and security of individuals against *arbitrary* invasions by government officials.” *Camara v. Municipal Court of San Francisco* (1967), 387 U.S. 523, 528 (emphasis added). Accordingly, the Fourth Amendment generally requires government officials to obtain a warrant before conducting a search or a seizure. When determining whether a warrant is necessary, “the question is not whether the public interest justifies the type of search in question, but whether . . . the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.” *Id.* at 533.

Courts have recognized a variety of exceptions to the Fourth Amendment's warrant requirement. Two of those exceptions, the exigency exception and the valid-arrest exception, apply here and justify the search and seizure of Hoover's breath. Even if Hoover had not consented to a blood-alcohol test, the requested search was constitutional, so the State's decision to punish Hoover's refusal raises no constitutional concerns.

1. Exigent circumstances justified an immediate blood-alcohol test.

The facts of this case render Hoover's consent (or purported lack thereof) unnecessary to the constitutional analysis because exigent circumstances justified an immediate blood-alcohol test. Under the "exigent circumstances," or "exigency," exception to the Fourth Amendment's warrant requirement, a search is reasonable when a police officer reasonably believes that he is confronted with an "emergency, in which the delay necessary to obtain a warrant, under the circumstances, threaten[s] the 'destruction of evidence.'" *Schmerber*, 384 U.S. at 770 (citing *Preston v. United States* (1964), 376 U.S. 364, 367).

The exigency exception applies in DUI cases because BAC evidence is evanescent in nature. In *Schmerber*, the U.S. Supreme Court held that because the "percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system," a police officer can obtain a blood sample even without an intoxicated driver's consent. 384 U.S. at 770; see also *State v. Schulte* (11th Dist.), 1996 Ohio App. Lexis 4675, *22. In *State v. King* (1st Dist.), 2003 Ohio App. Lexis 1480, 2003-Ohio-1541, an expert witness testified that "alcohol dissipates from the blood at a rate of .02 percent per hour." *Id.* at ¶ 7. This Court has noted that BAC decreases by .01% for each hour of drinking after the first hour. *State v. Tanner* (1984), 15 Ohio St. 3d 1, 4. Due to the rapid manner in which the body rids itself of alcohol, the time it would take to obtain a warrant would frustrate the government's purpose for the warrant. The alcohol likely would be out of the person's system already or the person's BAC

could potentially decrease enough to drop below the legal limit. Courts thus apply a three-prong test “to determine whether blood alcohol evidence can be take[n] from a suspect without consent and without a warrant.” *King*, 2003-Ohio-1541 at ¶ 26. A warrantless chemical test comports with the Fourth Amendment when (1) exigent circumstances exist such that the delay necessary to obtain a warrant would threaten destruction of the evidence; (2) the officer has probable cause to believe the suspect was driving under the influence of alcohol; and (3) the testing procedures used are reasonable. *Id.*; see also *State v. Troyer* (9th Dist.), 2003 Ohio App. Lexis 529, 2003-Ohio-536 at *7 (noting the same factors).

In this case, all three circumstances apply, so a warrantless search of Hoover’s breath was appropriate. *First*, as *Schmerber*, *Tanner*, and *Schulte* demonstrate, the evanescent nature of BAC evidence presented an exigent circumstance justifying an immediate search. *Second*, police had probable cause to believe that Hoover was driving drunk. Deputy Nawman saw Hoover’s vehicle swerve left of the center line, and after confronting Hoover, she smelled alcohol and noticed his bloodshot eyes. Hoover nearly fell when exiting his car, and he performed poorly on field sobriety tests. On the basis of these facts, Deputy Nawman had probable cause to, and did, arrest Hoover for a DUI violation. Hoover does not contest the validity of this arrest, effectively conceding that Deputy Nawman had probable cause to believe that he was driving drunk. *Third*, Deputy Nawman requested that Hoover take a noninvasive breath test. The U.S. Supreme Court has expressly approved the extraction of blood samples as a commonplace, safe, non-traumatic, and effective means of determining the degree to which a person is under the influence of alcohol. *Schmerber*, 384 U.S. at 771. A breath test, which is even less invasive than a blood test, accordingly is even less problematic. See *Burnett v. Anchorage* (D. Ak. 1986), 634 F. Supp.

1029, 1038. Under these circumstances, subjecting Hoover to a breath test comports with the Fourth Amendment.

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

The exigency exception applies in DUI cases generally and in Hoover’s case specifically. The evanescent nature of the BAC evidence at issue justified the breath test, regardless of Hoover’s consent. Accordingly, Hoover had no right to refuse such a test, and the Third District erred by holding otherwise.

2. The valid-arrest exception to the Fourth Amendment's warrant requirement also justified a blood-alcohol test.

Another exception to the Fourth Amendment's warrant requirement is a search incident to a valid arrest. A police officer has authority to search a person who has been lawfully arrested. *United States v. Robinson* (1973), 414 U.S. 218, 235; see also *Chimel v. California* (1969), 395 U.S. 792 (holding that pursuant to the search incident to arrest exception, officers may search a suspect's person after arresting the suspect). This Court has long recognized that police may constitutionally search suspects who have been arrested for traffic offenses. See, e.g., *State v. Ferman* (1979), 59 Ohio St. 2d 216, 218-19 (per curiam) (citing *Robinson*, 414 U.S. 218).

When, as here, a police officer has probable cause of a DUI violation and lawfully arrests the motorist, the Fourth Amendment permits the police to take samples of the suspect's breath. *Burnett*, 806 F.2d at 1449-50. In such a scenario, the suspect's consent is irrelevant, for "a legally arrested defendant has no constitutional right to refuse a breathalyzer examination." *Id.* at 1450.

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

The Third District erred by concluding that Hoover's enhanced penalty violated the Constitution, because as shown above, the Fourth Amendment does not give suspects the right to refuse a breath test. The absence of any such right distinguishes this case from the cases the Third District cites, each of which addresses a law punishing defendants for exercising a clearly established constitutional right. See *Wilson v. Cincinnati* (1976), 46 Ohio St. 2d 138 (addressing right to avoid a warrantless search of one's home when the search is not supported by probable cause of a crime or exigent circumstances); *State v. Scott* (4th Dist.), 2006 Ohio App. Lexis 4651, 2006-Ohio-4731 (addressing right to jury trial); *State v. Morris* (4th Dist.), 159 Ohio App.

3d 775, 2005-Ohio-962 (same); *State v. Glass* (8th Dist.), 2004 Ohio App. Lexis 4082, 2004-Ohio-4495 (addressing right to avoid self-incrimination); *State v. Scott M.* (6th Dist. 1999), 135 Ohio App. 3d 253 (addressing right to avoid a warrantless search of one's home when the search is not supported by exigent circumstances). Accordingly, the Third District's governing principle—that defendants cannot be punished criminally for exercising a constitutional right—is fundamentally inapplicable to this case.

The sentencing scheme under review creates a disincentive for repeat offenders to withhold evidence of their drunken driving from police officers. By doing so, it further disincentivizes repeat offenses, and thus operates to protect Ohio's motorists from drunken drivers. Because there is no constitutional obstacle to such a disparity, the General Assembly acted within its discretion by passing this sentencing scheme and the Third District erred by concluding otherwise.

CONCLUSION

For the above reasons, the Court should reverse the decision below and reinstate Hoover's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant State of Ohio was served by U.S. mail this 27th day of June 2008 upon the following counsel:

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William P. Marshall
Solicitor General

In the
Supreme Court of Ohio 07-2295

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

**NOTICE OF APPEAL OF APPELLANT
STATE OF OHIO**

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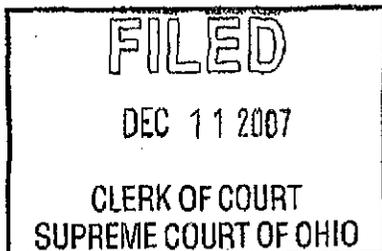
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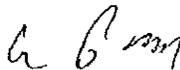
**NOTICE OF APPEAL OF APPELLANT
STATE OF OHIO**

Appellant State of Ohio gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Sections 1(A)(3), from a decision of the Union County Court of Appeals, Third Appellate District, journalized in Case No. 14-07-11 on October 29, 2007. Date-stamped copies of the Third District's Journal Entry and Opinion are attached as Exhibits 1 and 2, respectively, to Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest and presents a substantial constitutional question.

Respectfully submitted,

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

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

UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-11

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

COREY HOOVER,

DEFENDANT-APPELLANT.

Case Records
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 L. Boston
JUDGES

DATED: October 29, 2007

114 PROCTE

EXHIBIT 1

COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-11

PLAINTIFF-APPELLEE,

v.

OPINION

COREY HOOVER,

DEFENDANT-APPELLANT.

Paul S. 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

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EXHIBIT 2

144 0066329

Willamowski, J.

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

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

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

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

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

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

- (a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;**
- (b) Subsequent to being arrested for operating the vehicle * * *, being asked by a law enforcement officer to submit to a chemical test or tests under [R.C. 4511.191], and being advised by the officer in accordance with [R.C. 4511.192] of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.**

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

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

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

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

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

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

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

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

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

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

would be compelled to comply.

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

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

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

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

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days.

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

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

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

Case No. 14-07-11

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

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

*Judgment reversed and cause
remanded.*

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

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Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.