

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

v.

BILLY J. THOMPSON, II,

Defendant-Appellee.

CASE NO. 07-2389

On Appeal from the Fairfield  
County Court of Appeals,  
Fifth Appellate District

Court of Appeals  
Case No. 2007-CA-00006

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REPLY BRIEF OF APPELLEE STATE OF OHIO

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David L. Landefeld (0000627)  
Fairfield County Prosecuting Attorney  
Julia B. Dillon (0078268)(COUNSEL OF RECORD)  
Assistant Prosecuting Attorney  
Gregg Marx (0008068)  
Assistant Prosecuting Attorney  
201 S. Broad Street, Ste. 400  
Lancaster, Ohio, 43130  
(740) 653-4259  
Fax No. (740) 653-4708  
[jdillon@co.fairfield.oh.us](mailto:jdillon@co.fairfield.oh.us)

COUNSEL FOR APPELLANT, STATE OF OHIO

Andrew Sanderson (0066327)  
Burkett & Sanderson  
118 W. Chestnut Street, Ste. B  
Lancaster, Ohio, 43130  
(740) 687-5645

COUNSEL FOR APPELLEE, BILLY J. THOMPSON, III

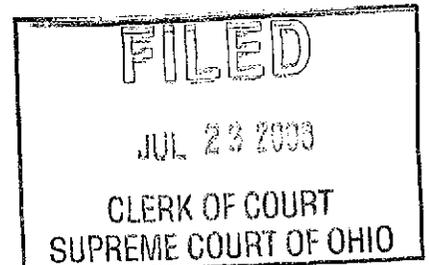


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## ARGUMENT

### Proposition of Law No. 1:

**A misdemeanor conviction that is obtained after a written waiver of the right to counsel is made on the record in open court may be used by the State to enhance penalties for later offenses if the waiver was filed.**

The trial court did not abuse its discretion in finding that the defendant was either represented or waived representation on all three prior cases (Journal Entry filed Aug. 30, 2006). Appellee argued that the State did not present sufficient evidence to sustain Appellee's conviction; this would require the Fifth District to find the trial court abused its discretion. Appellee's Brief pg 5-6, *State v. Jenks* (1991), 61 Ohio St.3d 259 at syllabus ¶2, *State v. Conway*, 109 Ohio St.3d 412, 2006 Ohio-2815, 848 N.E.2d 810 at ¶62. Since the admission of evidence is within the broad discretion of the trial court, a reviewing court should not disturb a decision absent an abuse of discretion which is limited to cases in which the trial court acted unreasonably, arbitrarily, or unconscionably in deciding the evidentiary issue. *Conway* at ¶62.

The Fifth District would have been required to find that the trial court's decision was "so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias," to show an abuse of discretion. *Wilson v. Wellman*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59 at ¶12 quoting *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254 at 256-7, 1996-Ohio-159, 662 N.E.2d 1.

Even if, as Appellant contests, Appellee met his prima facie showing and the burden shifted to the State, there was ample evidence before the trial court to find that Appellee was guilty as charged under R.C. 4511.19(G)(1)(d), a felony of the fourth degree. Trooper Rusty Lanning observed Appellee driving erratically, strike the curb several times, repeatedly drive out

of his lane, fail field sobriety tests, and refuse to give a blood sample. (Tr.P. 14-20). A warrant was required to obtain a blood sample, which showed the alcohol level in Appellee's blood was 0.134. (Tr.P. 18-20). Trooper Lanning also testified regarding the prior convictions, noting the social security numbers were the same as Appellee's to identify Appellee as the same person who had received the prior convictions. (Tr.P 20-24).

There was a stipulation as to the admissibility of the three prior convictions with a reservation for argument about their constitutionality. (Tr.P.6). The only defense raised at trial was identical to the written pretrial motion, that the State failed to show the constitutionality of the prior convictions. (Tr.P. 27). No evidence of constitutional infirmity was ever presented by the defense. (Tr.P. 1-45).

The State presented the three entries as evidence of the prior convictions as required in accordance with R.C. 2945.75(B)(1). In addition, the State presented the three written waiver of rights forms including the waiver of counsel in the two cases in which Appellee was unrepresented. As this Court explained in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶1 of Syllabus, only the third DUI offense was a serious offense for which a written waiver is required. *Brooke* at ¶25. However, written waivers were used in all three of Appellee's prior convictions. (Ex 1, 2, and 3). In *Brooke*, this Court only had one prior offense to consider where a transcript was not available and the only evidence of the actions taken at the underlying proceeding was the written waiver, and that was for Brooke's second offense which was valid. *Brooke* at ¶40-47.

In this case, Appellee was represented by counsel for the third offense, which was the only serious offense of the three prior convictions. The Acknowledgment of Rights waiver for Appellee's third DUI offense was signed by both Appellee and his counsel and had a hand-

written note stating this was Appellee's third offense. (Ex.3). The Judge's signature is not on the page with the rights waiver, but is on the other portions of the Court's Entry that were simultaneously filed by the Court. (Ex.3, P.1-4).

The Acknowledgement of Rights waiver for Appellee's second DUI offense was signed by Appellee, had numerous handwritten notes, in what appears to be the Judge's handwriting, included notifications of the right to counsel, the right to a continuance to obtain counsel, and an acknowledgment that Appellee knew and understood his rights and voluntarily chose not to be represented by an attorney. (Ex. 2, P. 2). The waiver was filed with the Court simultaneously with the Journal Entry signed by the Judge. The second prior waiver form again described Appellee's rights in written form and in the paragraph above Appellee's signature stated "I have been informed by the court and fully understand my rights set forth above. (Ex 2).

The waiver for Appellee's first offense specifically acknowledged that the Court advised Appellee of his right to counsel and the right to a continuance to either obtain counsel or have counsel appointed. Ex 1. The language is very similar to the written waiver found sufficient in *Brooke*. *Brooke* at ¶47 and Ex 1. This waiver also had handwritten notes that appear to be from the Judge, and was filed simultaneously with the Journal Entry signed by the Judge. (Ex.1 P.1-4). The handwritten notes on each of the waiver forms are indicative of action taken by the trial judge at the time of the pleas for the prior convictions.

As in *Brooke*, the written waivers are part of the record of each of the prior cases and filed with the entry signed by the judge. *Brooke* at ¶47 and Ex 1, 2, and 3. As in *Brooke*, the predicate court spoke through its entry, the written waivers constitute evidence that the court made a finding that the right to counsel was knowingly and voluntarily waived and there is no evidence to the contrary. *Id.* The standard language on the waivers alone is sufficient to show a

knowing and intelligent waiver. In addition, the handwritten notes and the fact that each of the waivers was filed with the Entries signed by the judge further shows the interaction between the judge and Appellee at the time of the plea. Therefore, the written waivers are sufficient evidence to show that Appellee knowingly and voluntarily waived his right to counsel.

**Proposition of Law No. 2:**

**A criminal defendant claiming that a prior conviction was constitutionally infirm must provide the trial court with a transcript, testimony under oath, or an affidavit that convinces a trial court there may have been a Sixth Amendment violation before any burden shifts to the State to prove the validity of a prior uncounseled conviction.**

- 1. Imposing the burden on the State to demonstrate a knowing and intelligent waiver of the right to counsel before a prima facie showing of constitutional infirmity would reverse a long line of precedent from this Court and invalidate R.C. 2945.75(B)(1)**

Upholding the Fifth District as Appellee requests with its stated rationale in reversing the trial court would overrule portions of *Brooke*, ¶1 of Syllabus; *State v. Brandon* (1989), 45 Ohio St.3d 85, 543 N.E.2d 501, Syllabus; *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, ¶2 of Syllabus; and declare R.C. 2945.75(B)(1) unconstitutional. In each of these cases, this Court has consistently explained that there is an assumption that prior proceedings were constitutional absent a prima facie showing to the contrary. *Id.*

The assumption that the predicate offenses are constitutional absent a prima facie showing of constitutional infirmity is consistent with this Court's holding in *Brooke*, so it is not contrary to the existing state of the law and would not require this Court to reverse the decision in *Brooke*. (c.f. Appellee's Brief pg 13). In *Brooke*, this Court reiterated the assumption that all underlying proceedings were conducted in accordance with the rules of law absent evidence introduced by the defendant to the contrary. *Brooke* at ¶11 quoting *Brandon* at Syllabus. In *Brooke*, this Court did not overrule *Adams* holding that "When a defendant raises a constitutional

question concerning a prior conviction, he must lodge an objection as to the use of this conviction and he must present sufficient evidence to establish a prima facie showing of a constitutional infirmity.” *Adams* at Syllabus. Similarly, in *Brooke* this Court did not invalidate R.C. 2945.75(B)(1), rather the code section was quoted as current and valid law. *Brooke* at ¶8. In *Brooke*, this Court also reiterated the holding in *Brandon* that concerning prior convictions the reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant **must** introduce evidence to the contrary in order to establish a prima facie showing of constitutional infirmity. *Brooke* at ¶11 quoting *Brandon* at Syllabus, emphasis added.

Despite ample opportunity, Appellee did not present any evidence to demonstrate a constitutional infirmity in the three underlying proceedings for each of his three prior convictions. Appellee’s original motion to strike prior uncounseled convictions from the indictment for the purpose of felony enhancement was not supported with an affidavit of Appellee or transcripts of any of the prior proceedings. (Motion to Strike and Transcript of Bench Trial). Appellee did not testify at the bench trial regarding a constitutional infirmity in any of the prior convictions. *Id.* Only legal argument from counsel was presented. *Id.* Furthermore, there is nothing in the record to suggest that Appellee ever challenged his convictions or sought to withdraw his guilty pleas. Appellee, the only person involved in the case who was present at each of his prior convictions, never said in a sworn statement that he did not knowingly, intelligently, and voluntarily waive his right to counsel.

This is in stark contrast with *Brooke*, where the prima facie showing was made with a sworn affidavit that the defendant was unrepresented by counsel and sentenced to confinement

along with transcripts of the proceedings for two of the prior convictions and an affidavit as to the unavailability of a transcript for the third. *Brooke* at ¶3 and 12.

While the Fifth District ignored Appellee's burden, other districts have interpreted this Court's holding in *Brooke* in a manner that requires defendants to make a prima facie showing of constitutional infirmity prior to shifting the burden to the State. *State v. Neely*, 11<sup>th</sup> Dist. No. 2007-L-054, 2007-Ohio-6243 at ¶18, *State v. Jackman*, 8<sup>th</sup> Dist. No. 89835, 2008-Ohio-1944 at ¶16, and *State v. Putich*, 8<sup>th</sup> Dist. No. 89005, 2008-Ohio-681 ¶5, footnote 2. The analysis and interpretation of the Eighth and Eleventh districts follow *Brooke* and do not invalidate R.C. 2945.75(B)(1). They are also consistent with the holdings in *Brooke*, *Adams*, and *Brandon* that require the defense to make a prima facie showing of constitutional infirmity before shifting the burden to the State.

In *Neely*, the defendant filed a motion to dismiss arguing that the prior DUI convictions were uncounseled, but did not testify or produce any evidence. *Neely* at ¶7. The State produced written waivers and the Eleventh District followed this Court's standard in *Brooke* and found that the Defendant failed to make a prima facie showing of constitutional infirmity but that even if he had that the written waivers would be sufficient to show a knowing, intelligent and voluntary waiver. *Neely* at ¶7, 18, and 33-42.

In *Jackman*, the Defendant filed a motion to quash claiming that the State failed to prove the prior convictions were counseled. *Jackman* at ¶7 and 13. The State presented entries that his first three convictions were counseled and written waivers for his fourth and fifth convictions. *Id* at ¶12-13. The Eighth District found that the defendant failed to make his prima facie showing and the burden never shifted to the State. *Id* at ¶16.

In *Putich*, the Defendant filed a motion to dismiss and attached a certified copy of the municipal court file for his prior convictions but did not present an affidavit or testimony. *Putich* at ¶22. The Eighth District followed *Brooke* and *Brandon* in holding that the defendant failed to meet the prima facie standard and the burden never shifted to the State. *Id* at ¶27-32.

The decisions from these three cases are well reasoned. Therefore, Appellant, State of Ohio, asks this Court to reverse the Fifth District's misinterpretation of *Brooke* and clarify the burden on a defendant to challenge a prior conviction for purposes of subsequent felony enhancement. Therefore, even if the burden had shifted to the State, reversing the Fifth District would not require this Court to overrule its decision in *Brooke*; this Court held in *Brooke* that a written waiver alone may be sufficient after a prima facie showing of constitutional infirmity. *Brooke* at ¶6 c.f. Appellee's Brief pg 13-14.

**2. The validity of the prior convictions is necessarily presumed without a sufficient challenge and therefore is not an element of the offense.**

While prior convictions are an element of the offense; the constitutionality of the prior convictions is not an element and only becomes an issue after a prima facie showing of constitutional infirmity is presented by the defense. R.C. 4511.19(G)(1)(d), R.C. 2945.75(B)(1), *Brooke* at ¶8 and ¶1 of Syllabus, *Brandon* at Syllabus, *Adams* ¶2 of Syllabus, and Crim.R. 7(B) c.f. Appellee's Second Proposition of Law. While Appellee did challenge the sufficiency of the indictment in citing to Crim.R.12(C) in his original motion to strike, he did not argue that the indictment was defective for failing to include the waiver of counsel as an element. In reviewing prior conviction cases, this case has not concluded that the waiver is an element required as part of the indictment.

The prior conviction elements, as facts the State must prove beyond a reasonable doubt, are governed by R.C 2945.75(B)(1) which clearly states that the certified copies of prior

judgment entries along with evidence showing the defendant's identity is sufficient to prove a prior conviction. A defendant's claim of constitutional infirmity due to an invalid waiver of the right to counsel is a limited right to collaterally attack a past conviction when it is being used to enhance the penalty of a later criminal offense. *Brooke* at ¶9 citing *Brandon* at 86.

The existence of the prior convictions in this case is undisputed. (Appellee's Brief pg 6). There was a stipulation to the admission of the certified copies of the prior convictions with a reservation to challenge the constitutionality of those prior convictions. Tr.P. 6 A constitutional infirmity in the prior conviction is a defense challenge to the evidence presented by the State more akin to an affirmative defense than a claim of insufficient evidence, the Defendant must show that his/her constitutional rights were violated in accepting the plea for the prior conviction. *Brooke* at ¶9 citing *Brandon* at 86.

All elements must be proved beyond a reasonable doubt and found by the finder of fact. If the constitutionality of the prior conviction was an element, then that issue would have to routinely be presented to the jury for a factual determination as to whether the predicate courts followed all of the proper procedures. This would confuse the factual versus the legal issues in cases where prior convictions are elements of the crime. The State proved all of the elements beyond a reasonable doubt, Appellee failed to present any evidence to show a constitutional infirmity in any of the prior convictions, and the Trial Court was well within its discretion in admitting the evidence and making its findings following the bench trial. Therefore, the Fifth District should be reversed and Appellee's conviction should be reinstated.

Respectfully submitted,

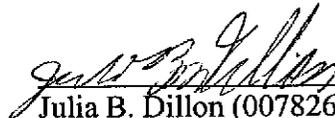
By: David L. Landefeld, Prosecuting Attorney

By:   
\_\_\_\_\_  
Julia B. Dillon (0078268)  
Assistant Prosecuting Attorney  
Counsel of Record

COUNSEL FOR APPELLANT  
STATE OF OHIO  
201 S. Broad Street, Ste. 400  
Lancaster, Ohio, 43130  
(740) 653-4259 Fax (740) 653-4708

**PROOF OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee State of Ohio was served upon Andrew Sanderson, Attorney for Defendant-Appellee, by placing a copy of the same in his designated mail box at the Hall of Justice, this 22<sup>nd</sup> day of July, 2008.

  
\_\_\_\_\_  
Julia B. Dillon (0078268)  
Assistant Prosecuting Attorney

## **APPENDIX**

**ORC Ann. 2945.75 (2008)**

§ 2945.75. Degree of offense; charge and verdict; proof of prior conviction

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

(B) (1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

**ORC Ann. 4511.19 (2008)**

§ 4511.19. Operation while under the influence of alcohol or drug of abuse or with specified concentration of alcohol or drug in certain bodily substances; chemical test; penalties

(A) (1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

(b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.

(g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.

(h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.

(i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.

(j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

(i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

(ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration

of cocaine in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

(iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

(vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(viii) Either of the following applies:

(I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ix) The person has a concentration of methamphetamine in the person's urine of at least five hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

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

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 [4511.19.1] of the Revised Code, and being advised by the officer in accordance with section 4511.192 [4511.19.2] of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.

(D) (1) (a) In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section or for an equivalent offense, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense, the court may admit evidence on the

concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 [4511.19.2] of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under section 4511.191 [4511.19.1] of the Revised Code or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 [3701.14.3] of the Revised Code.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for an equivalent offense, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

If the chemical test was obtained pursuant to division (D)(1)(b) of this section, the person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. The form to be read to the person to be tested, as required under section 4511.192 [4511.19.2] of the Revised Code, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4) (a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under 96 Stat. 2415

(1983), 49 U.S.C.A. 105.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the blood, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

(i) The officer may testify concerning the results of the field sobriety test so administered.

(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

(c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.

(E) (1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:

(a) The signature, under oath, of any person who performed the analysis;

(b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;

(c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

(d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(F) Except as otherwise provided in this division, any physician, registered nurse, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(G) (1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

(a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and the court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under section 3793.10 of the Revised Code. The court also may suspend the execution of any part of the

three-day jail term under this division if it places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code for part of the three days, requires the offender to attend for the suspended part of the term a drivers' Intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

(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 at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction pursuant to section 2929.25 of the Revised Code, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than three hundred twenty-five and not more than one thousand seventy-five dollars;

(iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3)

of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(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. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a driver's intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than four hundred seventy-five and not more than one thousand six hundred twenty-five dollars;

(iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with section 4503.233 [4503.23.3] of the Revised Code and impoundment of the license plates of that vehicle for ninety days.

(c) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d),

(e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(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, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than eight hundred and not more than two thousand seven hundred fifty dollars;

(iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 [4503.23.4] of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty

consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(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, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of one hundred twenty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the one hundred twenty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than one thousand three hundred nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 [4503.23.4] of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by

section 3793.02 of the Revised Code, subject to division (I) of this section.

(vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to section 2929.17 of the Revised Code, may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(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, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than one thousand three hundred nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 [4503.23.4] of

the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of section 4511.191 [4511.19.1] of the Revised Code.

(3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen consecutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house

arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if section 4510.13 of the Revised Code permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under section 4503.231 [4503.23.1] of the Revised Code, except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of section 4503.231 [4503.23.1] of the Revised Code.

(5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as follows:

(a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.

(b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (N) of section 4511.191 [4511.19.1] of the Revised Code.

(d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four

hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(e) Seventy-five dollars of the fine imposed under division (G)(1)(a)(iii), one hundred twenty-five dollars of the fine imposed under division (G)(1)(b)(iii), two hundred fifty dollars of the fine imposed under division (G)(1)(c)(iii), and five hundred dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be transmitted to the treasurer of state for deposit into the indigent defense support fund established under section 120.08 of the Revised Code.

(f) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of section 4503.234 [4503.23.4] of the Revised Code applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national auto dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in section 2929.01 of the Revised Code.

(H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code.

(2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code.

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1416 [2941.14.16] of the Revised Code and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of section 2929.24 of the Revised Code.

(I) (1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's indigent drivers' alcohol treatment fund.

(J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.

(K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of section 2923.16 of the Revised Code in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(M) All terms defined in section 4510.01 of the Revised Code apply to this section. If the meaning of a term defined in section 4510.01 of the Revised Code conflicts with the meaning of the same term as defined in section 4501.01 or 4511.01 of the Revised Code, the term as defined in section 4510.01 of the Revised Code applies to this section.

(N) (1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of section 2937.46 of the Revised Code, do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.

(2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.

**Rule 7. The Indictment and the Information**

**(A) Use of indictment or information.**

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

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

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

**(B) Nature and contents.**

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

**(C) Surplusage.**

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

**(D) Amendment of indictment, information, or complaint.**

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the

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

**(E) Bill of particulars.**

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

## **Ohio Crim. R. 12 (2008)**

### **Rule 12. Pleadings and Motions Before Trial: Defenses and Objections**

#### **(A) Pleadings and motions.**

Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

#### **(B) Filing with the court defined.**

The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

- (1)** the complaint, if permitted by local rules to be filed electronically, shall comply with Crim. R. 3.
- (2)** any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.
- (3)** a provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.
- (4)** any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

#### **(C) Pretrial motions.**

Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

- (1)** Defenses and objections based on defects in the institution of the prosecution;
- (2)** Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);
- (3)** Motions to suppress evidence, including but not limited to statements and

identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

**(4)** Requests for discovery under Crim. R. 16;

**(5)** Requests for severance of charges or defendants under Crim. R. 14.

**(D) Motion date.**

All pretrial motions except as provided in Crim. R. 7(E) and 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

**(E) Notice by the prosecuting attorney of the intention to use evidence.**

**(1)** At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.

**(2)** At the request of the defendant. At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

**(F) Ruling on motion.**

The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

**(G) Return of tangible evidence.**

Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

**(H) Effect of failure to raise defenses or objections.**

Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

**(I) Effect of plea of no contest.**

The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

**(J) Effect of determination.**

If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

**(K) Appeal by state.**

When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

- (1) the appeal is not taken for the purpose of delay;
- (2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on his or her own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.