

**IN THE  
SUPREME COURT OF OHIO**

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

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**MERIT OF BRIEF OF APPELLEE-CROSS APPELLANT, COREY HOOVER**

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JONATHAN T. TYACK (0066329)  
Tyack, Blackmore & Liston  
Co., L.P.A.  
536 South High Street  
Columbus, Ohio 43215  
614-221-1341  
Counsel for Defendant-Appellee

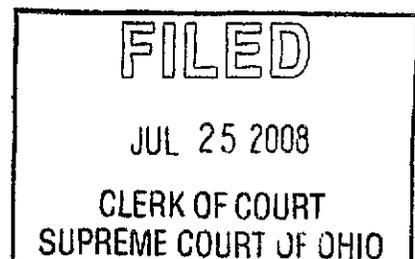
TIM M. ASLANER (0068928)  
Assistant Prosecuting Attorney  
110 S. Court Street  
Marysville, Ohio 43040-0266  
Counsel for Plaintiff-Appellant  
937-644-8151

NANCY H. ROGERS(0002375)  
Attorney General of Ohio  
30 E. Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
614-466-8980

WILLIAM P. MARSHALL\*(0038077)  
Solicitor General  
*\*Counsel of Record*

MICHAEL DOMINIC MEUTI (*pro hac vice  
application pending*)  
Deputy Solicitor

KELLY A. BORCHERS (0081254)  
Assistant Solicitor



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## STATEMENT OF THE CASE AND FACTS

On September 8, 2006, Appellant was subject to a traffic stop by a deputy of the Union County Sheriff's Department and cited for drunk driving in violation of R.C. §4511.19(A)(2). (R.2,3). No other charges were filed against Appellant arising out of said traffic stop. *Id.*

On October 20, 2006, Appellant filed a Motion to Dismiss the charge against him alleging that R.C. §4511.19(A)(2) violated Appellant's constitutional rights under the Fourth Amendment to the United States Constitution, and Article I Section 14 of the Ohio Constitution and further violated Appellant's right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Ohio Constitution. (R.22). The matter was briefed to the Court, and by Judgment Entry filed February 1, 2007, the trial court overruled Appellant's Motion to Dismiss. (R.25). On March 1, 2007, Appellant entered a no contest plea to the charge stated on the ticket, and the Court found Appellant guilty accordingly. (R.33,34). Appellant was sentenced, and the Court graciously granted a request for a stay of enforcement of said sentence pending review of this matter by the Court of Appeals. (*Id.*; R.35).

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

Third District Court of Appeals, in support of its position on these issues, the Appellant presents the following argument.

## ARGUMENT

**I. Proposition of Law No. 1: R.C.§4511.19(A)(2) is unconstitutional in violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.**

**A. R.C.§4511.19(A)(2) criminally punishes people for refusing the breath test.**

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

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

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

The offense defined in R.C.§4511.19(A)(2) clearly contains as elements therein the requirement that the State of Ohio proved beyond a reasonable doubt a defendant's refusal of a breath test or other bodily tests for alcohol as described in R.C.§4511.191 and R.C.§4511.192. Therefore, the offense, as defined by the legislature, inherently punishes someone for refusing the breath test.

Although an Administrative License Suspension imposed pursuant to R.C.§4511.191 and R.C.§4511.192 is remedial in purpose and civil in nature, State v. Gustafson(1996), 76 Ohio St. 425, 440, the mandatory jail time, license suspension, and fines imposed for a violation of R.C.§4511.19(A)(2) are clearly criminal punishments. In other words, the statute in question here does not impose some civil remedy or administrative sanction. Instead, the statute in question here criminalizes the conduct of refusing the breath test, and imposes criminal punishment, including mandatory incarceration, upon the perpetrator.

**B. Corey Hoover had a constitutional right to refuse the breath test.**

It is well settled that the taking of a blood, breath, or urine specimen falls within the search and seizure protections of the Fourth Amendment. Schmerber v. California(1966), 384 U.S.757, 767-68; Skinner v. Rlwy. Labor Executives' Association(1989), 489 U.S.602, 616. The State of Ohio cannot argue otherwise.

The Fourth Amendment to the United States Constitution, and in turn, Article I, Section 14 of the Ohio Constitution, guarantee a criminal suspect the absolute right to refuse consent to a search. Camara v. Municipal Court(1967), 387 U.S. 523, 540; Wilson v. Cincinnati(1976), 46 Ohio St. 2d 138, 143-45. Hence, the Fourth Amendment, and Article I, Section 14 of the Ohio

Constitution prohibit placing a defendant in a position where he “must agree to a warrantless inspection\*\*\*or face a criminal penalty.”Wilson, supra at 145; State v. Scott M.(1999), 135 Ohio App. 3d 253, 260(holding that a person has an absolute right to refuse consent to a search, “and the assertion of that right cannot be a crime”). See also, Lefkowitz v. Cunningham(1977), 431 U.S. 801, 805-06 (holding “that Government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.”).

Although a search will generally meet Fourth Amendment requirements when consent is given voluntarily, Katz v. United States(1967), 389 U.S. 347, 348, “ a valid consent involves a waiver of constitutional rights and cannot be lightly inferred.” Wilson, supra at 143-44. Thus, consent must be voluntary and uncoerced, either physically or psychologically. Id. at 144. Here, Corey Hoover never expressly consented to the search in question. Instead, the legislature “consented” for Corey Hoover by enacting R.C.§4511.191. Even in light of this purported “consent” by the legislature, Corey Hoover had a constitutional right to refuse the breath test because he is free to revoke consent at any time.

The United States Supreme Court has stated, “A suspect may\*\*\*delimit as he chooses the scope of the search to which he consents.” Florida v. Jimeno(1991), 500 U.S. 248, 252. The prevailing rule among Ohio Courts, pursuant to Jimeno, supra, is that consent to a search may be limited in time, duration, area, and intensity, or may be revoked at any time, even after the search has begun. Lakewood v. Smith(1965), 1 Ohio St. 2d 128, 130; State v. Crawford(2003), 151 Ohio App. 3d 784; State v. Mack(1997), 118 Ohio App. 3d 516, 519 app. disp., 79 Ohio St. 3d 1418; State v. Arrington(1994), 96 Ohio App. 3d 375; State v. Rojas(1993), 92 Ohio App. 3d

336. Likewise, the Federal Courts have supported such an interpretation of Jimeno, supra. Painter v. Robertson(6th Cir. 1999), 185 F3d 557, 567. In other words, the Fourth Amendment to the United States Constitution, and Article I, Section 14 of the Ohio Constitution, provide a constitutional guarantee that individuals may revoke consent, even if already given, and even if the search has already begun.

In the past, this Court has recognized the absolute right to refuse to take a chemical test of a person's blood, breath, or urine. Maumee v. Anistik(1994), 69 Ohio St. 3d 339, 342. Likewise, Federal Courts have also recognized the right of an individual to refuse the breath test. McVeigh v. Smith(6th Cir. 1989), 872 F2d 725, 727 (distinguishing the United States Supreme Court's decision in Schmerber v. California(1966), 384 U.S. 757, by acknowledging the right of individuals to refuse a breath test.).

The State of Ohio argues that the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, do not confer to Corey Hoover the right to refuse or revoke consent to a chemical test of his breath because consent was given, not by Corey Hoover, but by the legislature through the Implied Consent Statute enacted in R.C.§4511.191. In other words, the State of Ohio argues that the legislature may eliminate a citizen's Fourth Amendment protections through a statute that legislatively consents to a search or a seizure on behalf of individual citizens.

On top of that, the legislature then criminalizes that act of asserting one's constitutional rights by refusing or revoking consent to the search. This is exactly the same type of legislative structure that was found to be unconstitutional in Camara v. Municipal Court, supra, and Wilson v. Cincinnati, supra. Both Camara and Wilson did not deal with drunk driving cases, however,

the structure of the analysis is identical to the issues in the case at bar. In particular, the analysis in Wilson, supra, is directly applicable to the legislation in question here.

In Wilson, the City of Cincinnati enacted an ordinance that required a seller of real property to permit a warrantless inspection of the premises in order to obtain a “Certificate of Housing Inspection” in order to tender said certificate to the prospective buyer. If a seller of real property failed to comply with this requirement, then the seller faced criminal penalties. In other words, the legislation in Wilson, supra, required a citizen to consent to a warrantless search or face criminal punishment.<sup>1</sup>

In Wilson, the person had to consent to a warrantless search of his property. Here, the citizen has to consent to a search of his person through a breath test. In Wilson, if the person refused to allow the warrantless search, then the person faced criminal penalties and prosecution under Cincinnati Code Section 3-47.03(F). Here, if a citizen refuses to allow to the warrantless search of his breath, he faces criminal penalties and punishment under R.C. §4511.19(A)(2).

In Wilson, this Court relied on Camara v. Municipal Court, supra, in finding the Cincinnati Ordinance to be unconstitutional. This Court in Wilson stated as follows:

“As applicable to the instant facts, the import of *Camara* is that the Fourth Amendment prohibits placing Appellant in a position where she must agree to a warrantless inspection of her property or face a criminal penalty. Therefore, where a Municipal Ordinance requires the owner of real property to tender a certificate of housing inspection to a prospective buyer, and such certificate may be obtained only by allowing a warrantless inspection of the property, the imposition of a criminal penalty upon the owner’s failure to tender the certificate violates the owner’s rights under Fourth

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<sup>1</sup>It is important to note that in this case, as in Wilson, the legislation is not providing a civil remedy or administrative sanction, but instead criminal punishment.

Amendment to the United States Constitution.”

Wilson v. Cincinnati, *supra* at 145.

This case is not a case where Corey Hoover is facing some civil obligation or administrative sanction based on his refusal to submit to a breath test. Corey Hoover is not challenging an administrative license suspension imposed pursuant to R.C. §4511.192. This is a case where Corey Hoover is facing a criminal charge, criminal prosecution, and criminal punishment under R.C. §4511.19(A)(2) because he asserted his constitutional right to refuse and revoke consent to a warrantless search. A statute that imposes criminal penalties for the assertion of a constitutional right cannot stand. Camara, *supra*, Wilson, *supra*, Lefkowitz, *supra*.

**C. Corey Hoover cannot be criminally punished for asserting a constitutional right even if the police search was permitted by the Constitution.**

The State of Ohio argues that because evidence of alcohol consumption dissipates quickly in the human body, and because Corey Hoover was subject to a lawful arrest, a police search of Corey Hoover’s breath, urine, or blood, is permissible under certain exceptions to the warrant requirement. Hence, the State argues that Corey Hoover had no right to refuse and revoke consent to the breath test because a chemical test by police was permitted by the Constitution. However, such an argument turns logic on its head.

As discussed above, drunk driving suspects have an absolute right to refuse and revoke consent to a chemical test. This is true whether the requested test is for breath, urine or blood. The act of refusing and revoking consent is constitutionally protected, and cannot be criminally punished regardless of whether the police can constitutionally continue with the search.

A breath test, by its very nature, requires the consent and cooperation of the suspect

before the test can be administered. A breath test only works if the individual suspect cooperates and consents to the search by blowing vigorously into the breath analysis machine. However, the chemical testing of urine or blood can be administered without the consent or cooperation of a suspect.

Pursuant to Schmerber v. California, *supra*, the Constitution does not prohibit law enforcement officers from extracting bodily substances for the purpose of testing alcohol content when the evidence is gathered appropriately, with probable cause, and otherwise in compliance with the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. This is true even if no warrant is obtained and even if the drunk driving suspect objects to the test. Schmerber, *supra*. Obviously, through an intravenous line, or a urinary catheter, bodily fluids such as blood and urine can be extracted without the consent or cooperation of a drunk driving suspect.

The question of whether such a search of Corey Hoover's blood or urine would comport with constitutional requirements is beyond the scope of this case. No bodily fluids were ever taken from Corey Hoover. Whether an extraction of bodily fluids from Corey Hoover was justified under the "Exigency Exception" to the warrant requirement, or the "Search Incident to Arrest Exception" to the warrant requirement, is irrelevant to the question of whether Corey Hoover can be punished for asserting his constitutional rights by refusing and revoking consent to a chemical test.

The State of Ohio argues that because law enforcement would have been justified and constitutionally permitted to extract bodily fluids from Corey Hoover in this case, then Corey Hoover has no constitutional right to refuse or revoke consent. However, such an argument

ignores Corey Hoover's absolute right to refuse and revoke consent to a search regardless of whether that same search by the police is constitutionally permitted under some other exception to the warrant requirement.

Maybe the facts of this case justified the taking of Corey Hoover's blood or urine over his objection, or maybe the facts of this case did not justify such a search. Regardless, such a question is beyond the scope of this appeal. Law enforcement never asked Corey Hoover to consent to a blood or urine test, nor did law enforcement make any attempt to collect blood or urine over Corey Hoover's objection, as law enforcement did in the Schmerber case. Here, law enforcement simply asked Corey Hoover if he was willing to consent to a breath test, and Corey Hoover exercised his constitutional rights under the Fourth Amendment to the United States Constitution and under Article I, Section 14 of the Ohio Constitution, by refusing and revoking consent to a breath test.

It is Corey Hoover's refusal and revocation of consent to the breath test that is protected by the constitutions of the United States and the State of Ohio. It is the assertion of Corey Hoover's constitutional rights, by virtue of the refusal and revocation of consent, that the State of Ohio seeks to punish through R.C. §4511.19(A)(2).

**D. Public Policy against drunk driving can be advanced without infringing on the individual right to refuse and revoke consent to a search.**

Obviously, the public policy against drunk driving is very strong. However, the Bill of Rights protects individual liberty even if it comes at the expense of public policy. Nevertheless, the public policy against drunk driving can still be advanced without infringing on the individual right of each person to refuse and revoke consent to a search under the Fourth Amendment to the

United States Constitution and Article I, Section 14 of the Ohio Constitution.

First, some counties and municipalities have shown that the process of acquiring a search warrant for the purposes of extracting blood or urine is a feasible and practical alternative that protects both sides of the drunk driving investigation. In fact, several Government entities in Central Ohio have recently had “no refusal” weekends whereby they have a Judge available to review and sign search warrants, and a nurse available to draw blood. See e.g., *Holiday DUI Suspects Risk Forced Blood Test*, Columbus Dispatch, July 3, 2008; *Drunks are Losing Blood, Not Rights*, The Other Paper, July 10, 2008.

Alternatively, if obtaining a warrant is not possible, the Ohio Revised Code permits the taking of blood for the purpose of performing a chemical test to determine a concentration of alcohol whenever a person is dead or unconscious, or otherwise in a condition rendering the person incapable of refusal. R.C. §4511.191(A)(4). Moreover, although the Ohio Revised Code does not specifically provide for the warrantless taking of blood or urine under any other circumstances, the facts of a particular case may constitutionally permit the taking of blood or urine under the doctrine created in Schmerber v. California, *supra*. Obviously, the constitutionality of any particular chemical test administered over a suspect’s objection would need to be evaluated by the courts based upon the totality of the circumstances to determine the reasonableness of the search.

Therefore, the public policy against drunk driving can be enforced through the administration of appropriate chemical tests after a warrant is issued, or even in some circumstances without a warrant. This Court, by protecting an individual’s constitutional right to refuse and revoke consent to a chemical test, will not materially interfere with the ability of

police to obtain chemical tests in their effort to keep drunk drivers off the road. By finding R.C. §4511.19(A)(2) unconstitutional in violation of Corey Hoover's constitutional right to refuse and revoke consent to the breath test, this Court will only prevent the State of Ohio from criminally punishing people for asserting their constitutional rights.

**E. A slippery slope awaits if R.C. §4511.19(A)(2) is found to be constitutional.**

If this Court finds R.C. §4511.19(A)(2) to be constitutional, then every citizen of Ohio must be concerned by the slippery slope that awaits. Under such authority, the legislature could literally eliminate many specific expectations of privacy by enacting laws that require all citizens to impliedly consent to a variety of specific searches. Secondly, the legislature could then enact statutes punishing any person who attempts to assert his constitutional rights under the Fourth Amendment by refusing or revoking consent to the search.

Obviously, an infinite number of examples could be set forth illustrating this problem. However, it is not unreasonable to think that an active legislature, fueled by a variety of important public policies, could go forward and enact statutes where citizens impliedly consent to warrantless searches of their home, vehicle, personal belongings, and body, as a condition to participating in or benefitting from a variety of protections and privileges provided by law. Then, the legislature could enforce these "implied consent" statutes by criminally punishing people who fail to consent and cooperate with the warrantless search, even if the legislature has already imposed other civil remedies or administrative sanctions for a person's refusal to consent and cooperate with a warrantless search.

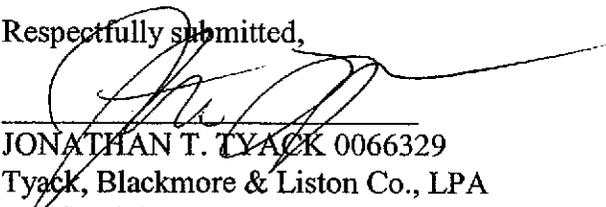
A person's constitutional right to refuse and revoke consent to a search must be protected.

Camara, supra; Wilson, supra; Jimeno, supra. This is especially true when the State of Ohio attempts to criminally punish people for asserting their constitutional rights.

**CONCLUSION**

For the reasons set forth above, this Court should overrule the decision of the Third District Court of Appeals, and find R.C.§4511.19(A)(2) unconstitutional. This Court should then dismiss the charge against Appellee/Cross-Appellant, Corey Hoover, accordingly.

Respectfully submitted,



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

**PROOF OF SERVICE**

I hereby certify that the foregoing Merit Brief has been forwarded to

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

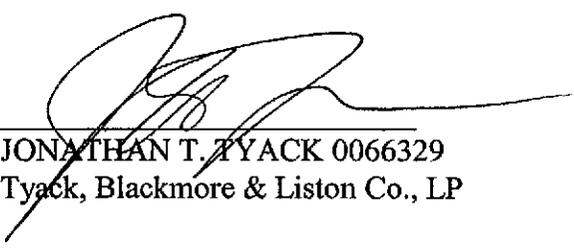
NANCY ROGERS (0002375 )  
Attorney General of Ohio  
30 E. Broad St, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

VICTOR R. PEREZ  
Chief Prosecutor  
Bridget Hopp  
Certified Legal Intern  
City of Cleveland  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44114  
Counsel for *Amicus Curia*  
City of Cleveland

WILLIAM P. MARSHALL (0038077)  
Solicitor General

KELLY A. BORCHERS (0081254)  
Assistant Solicitor

MICHAEL DOMINIC MEUTI (*pro hac vice  
application pending*)  
Deputy Solicitor



---

JONATHAN T. TYACK 0066329  
Tyack, Blackmore & Liston Co., LP

**APPENDIX**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :  
Plaintiff-Appellee, :  
vs. :  
COREY A. HOOVER :  
Defendant-Appellant. :

07-2295

Case No. 14-07-11

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NOTICE OF APPEAL OF APPELLANT, COREY HOOVER

---

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

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

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CLERK OF COURT  
SUPREME COURT OF OHIO

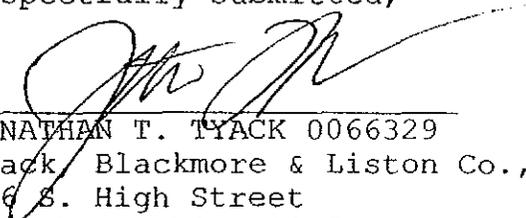
**Notice of Appeal of Appellant, Corey Hoover**

Appellant, Corey Hoover hereby gives notice of appeal to the Supreme Court of Ohio from the judgment and decision of the Union County Court of Appeals, Third Appellate District, entered in Court of Appeals case number 14-07-11 on October 29, 2007.

This case raises a substantial constitutional question and is one public and great general interest.

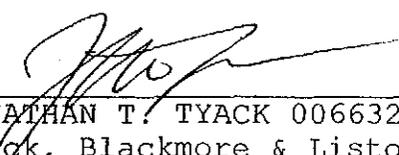
Respectfully submitted,

By:

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

**Proof Of Service**

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee, Tim M. Aslaner, Esq., City Law Director, 110 S. Court Street, P.O. Box 266, Marysville, Ohio 43040 on December 12, 2007.

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

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 D. Washington*  
CLERK

2007 OCT 29 PM 3:44

COURT OF APPEALS  
UNION COUNTY

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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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ATTORNEYS:

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

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

**Willamowski, J.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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would be compelled to comply.

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

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

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

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

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

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

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

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

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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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JONATHAN T. TYACK

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.

*[Signature]*  
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.

*[Signature]*

*[Signature]*

JUDGES

DATED: October 29, 2007

Case No. 14-07-11

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*Judgment reversed and cause remanded.*

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

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**Oh. Const. Art. I, § 14**

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO  
GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE  
THROUGH JUNE 23, 2008 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 15, 2008  
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CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

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Oh. Const. Art. I, § 14 (2008)

§ 14. Search warrants and general warrants

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

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U.S.C.A. Const. Amend. IV-Search and Seizure

United States Code Annotated Currentness  
Constitution of the United States

▣ Annotated

▣ Amendment IV. Searches and Seizures (Refs & Annos)

➔ **Amendment IV. Search and Seizure**

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