

In the
Supreme Court of Ohio

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

THIRD BRIEF OF APPELLANT/CROSS-APPELLEE STATE OF OHIO

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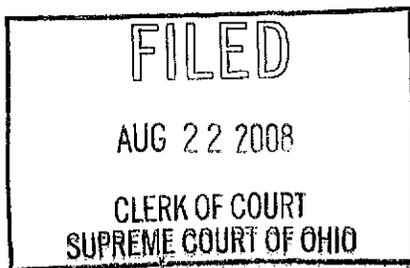


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INTRODUCTION

R.C. 4511.19(A)(2) (the “Refusal Provision”) and its companion sentencing statute, R.C. 4511.19(G)(1)(b)(ii), double the jail time for repeat DUI offenders who refuse to submit to a breath test. Defendant/Appellee/Cross-Appellant Corey Hoover (“Hoover”), a repeat offender, violated the Refusal Provision and was sentenced under R.C. 4511.19(G)(1)(b)(ii). He successfully challenged his enhanced sentence, convincing the Third District that these statutes punish a defendant for asserting his right to refuse a breath test.

In its opening brief, the State showed that Hoover had no right to refuse a breath test for three reasons. First, under R.C. 4511.191(A)(2) (the “Implied-Consent Statute”), he gave his implied consent to such a test by driving under the influence on Ohio’s roads. Second, the exigency exception to the Fourth Amendment’s warrant requirement permits an immediate, warrantless search of the suspect for evidence of blood alcohol content if officers have probable cause of a DUI violation. And third, once a suspect is arrested lawfully for a DUI offense, as Hoover was, a breath test is a constitutionally permissible search incident to arrest.

Rather than dispute these showings directly, Hoover asserts—but does not support—an “absolute right” to refuse a breath test. But none of the authorities he cites supports such a right. Next, Hoover insists that upholding the Implied-Consent Statute and the Refusal Provision will enable the General Assembly to run roughshod over Ohioans’ constitutional rights. But this fear cannot come to pass, because the Implied-Consent Statute applies only in situations where a search is constitutionally authorized and defendants thus have no right of refusal.

Finally, Hoover cites, with no analysis, the Ohio Constitution’s Article I, Section 14 as a basis for upholding the Third District’s judgment. But this Court’s precedent instructs that Article I, Section 14 and the Fourth Amendment are to be construed in parallel fashion, absent a compelling reason to conclude otherwise. Because Hoover fails to provide any reason, let alone

a compelling one, to read Article I, Section 14 more expansively than the Fourth Amendment, the Ohio Constitution provides him no refuge.

For each of these reasons, the Court should reverse the Third District's erroneous judgment.

ARGUMENT

Appellant State of Ohio's First Proposition of Law:

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

A. Hoover had no right to refuse to submit to a chemical test.

As the State showed in its opening brief, Hoover had no right to refuse a breath test, so punishing this refusal cannot raise any Fourth Amendment concerns. First, Hoover consented to a breath test. Under Ohio's Implied-Consent Statute, motorists consent to breath tests by driving under the influence on public roads. (Merit Br. of Appellant State of Ohio ("State's Merit Br.") at 6-8.) In this regard, Ohio's statute is no different from the implied-consent statutes in each other State in the Union. (State's Merit Br. at 10-12.) And as other States' and federal courts have recognized, DUI suspects have no right to withdraw or circumscribe this consent, for if they did, the implied-consent statutes would be meaningless. (State's Merit Br. at 8-10, 12-14.)

Second, even if Hoover had not consented to the breath test, officers still would have the right to conduct a breath test, and Hoover would have had no constitutional right to refuse. Other exceptions to the Fourth Amendment's warrant requirement—specifically, the exigency and the valid-arrest exceptions—justified an immediate warrantless search. When these exceptions to the warrant requirement apply, suspects have no right to decline or to circumscribe that consent. (State's Merit Br. at 15-18.)

B. Hoover's arguments to the contrary are unavailing.

In response, Hoover offers nothing to disturb this conclusion and thus no basis for concluding that R.C. 4511.19(G)(1)(b)(ii)'s enhanced punishment for refusing to submit to a breath test violates the Constitution.

1. Hoover fails to establish an “absolute right” to withdraw or circumscribe consent to a breath test.

Throughout his merit brief, Hoover asserts an “absolute right” to refuse a breath test, but he provides no authority to support this assertion. Instead, the authorities upon which he relies are easily distinguishable.

First, neither *Camara v. Municipal Court of San Francisco* (1967), 387 U.S. 523, nor *Wilson v. Cincinnati* (1976), 46 Ohio St. 2d 138, addressed a scenario in which the government officials had probable cause to believe that a law was violated. Instead, both cases addressed municipal ordinances that criminally punished homeowners who refused to consent to warrantless, administrative searches of their homes. In both instances the searches were intended to supplement enforcement of the city’s housing code. The ordinance in *Camara* called for “routine annual inspection[s] for possible violations of the city’s Housing Code.” *Camara*, 387 U.S. at 526. The *Wilson* ordinance called for inspections whenever a homeowner entered into a contract to sell residential property. *Wilson*, 46 Ohio St. 2d at 143. Neither ordinance required probable cause of any criminal violation—or even a violation of the local housing code, for that matter. Both *Camara* and *Wilson* thus stand in stark contrast to this case. Here, Deputy Nawman had probable cause that Hoover violated Ohio’s DUI laws, and she arrested him upon this probable cause. At that point, Hoover had no right to refuse a search, under either Ohio’s Implied-Consent Statute or under longstanding Fourth Amendment doctrine. See R.C. 4511.191(A)(2) (providing that a motorist’s implied consent becomes effective once the motorist is arrested for a DUI violation); *United States v. Robinson* (1973), 414 U.S. 218, 235 (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional

justification.”); *Schmerber v. California* (1966), 384 U.S. 757, 770-72 (the evanescent nature of blood alcohol evidence justifies an immediate chemical test conducted by a reasonable method).

Similarly, *State v. Scott M.* (6th Dist. 1999), 135 Ohio App. 3d 253, is distinguishable. It addressed a warrantless, unconsented search of a home, and the officers—like those in *Camara* and *Wilson*—did not arrest the defendant before the search. Thus, *Scott M.* does not support Hoover’s assertion that DUI suspects have a post-arrest right to refuse a breath test.

Next, Hoover cites a variety of cases for the proposition that “consent to a search may be limited in time, duration, area, and intensity, or may be revoked at any time.” (Merit Br. of Appellee/Cross-Appellant Corey Hoover (“Hoover’s Merit Br.”) at 5.) All but one of these cases are distinguishable because each addresses *express*, not implied, consent. See *Florida v. Jimeno* (1991), 500 U.S. 248, 249-51 (express consent to search a car extends to consent to search packages found within the car); *State v. Crawford* (2d Dist.), 151 Ohio App. 3d 784, 2003-Ohio-902, ¶¶ 8-10, 20-21 (express consent to a pat-down search, as well as to the removal of an object from defendant’s shirt); *State v. Mack* (6th Dist. 1997), 118 Ohio App. 3d 516, 518, 520 (express consent to search a vehicle’s ashtray for evidence of marijuana use); *State v. Arrington* (12th Dist. 1994), 96 Ohio App. 3d 375, 378 (express consent to search a purse for weapons); *State v. Rojas* (8th Dist. 1993), 92 Ohio App. 3d 336, 338 (express consent to search a suitcase); *Painter v. Robertson* (6th Cir. 1999) 185 F.3d 557, 563-65 (express consent to search a restaurant, followed by a search of the suspect’s person without consent). And the final case, *Lakewood v. Smith* (1965), 1 Ohio St. 2d 128, did not even address withdrawal or delimiting of consent. In sum, none of these cases supports Hoover’s assertion that suspects who have *impliedly* consented to a search have the right to revoke, or to limit the scope of, that consent. As the State showed in its opening brief, suspects have no such right. (State’s Merit Br. at 8-9, 12-14.)

Finally, Hoover cites two cases offering unsupported dicta stating that suspects can revoke consent to a breath test. But as the State showed in its opening brief, *Maumee v. Anistik* (1994), 69 Ohio St. 3d 339, 342, is unpersuasive because it (1) provides no authority to support its assertion that Ohio law permits a DUI suspect to decline consent, (2) does not address the Fourth Amendment, and (3) acknowledges that the State may punish such a refusal. (State's Merit Br. at 9-10.) Similarly, in *McVeigh v. Smith* (6th Cir. 1989), 872 F.2d 725, the Sixth Circuit stated that the DUI suspect had the right to refuse to submit to a breath test. Yet the court cited no authority for this proposition. *Id.* Further, the case did not address the Fourth Amendment, as the petitioner raised only Fifth and Sixth Amendment challenges to the chemical test. *Id.* at 727-28.

In addition to citing these inapposite cases, Hoover argues that he had a right of refusal because breath tests—unlike blood and urine tests—require cooperation from the suspect. Hoover thus paradoxically suggests that less-invasive breath tests are more constitutionally problematic than more-invasive blood tests. But this cannot be. As a federal court has recognized, “a breathalyzer test seems even less intrusive than the extraction of blood samples, and thus less deserving of protection under the [F]ourth [A]mendment than is a blood extraction.” *Burnett v. Anchorage* (D. Ak. 1986), 634 F. Supp. 1029, 1037. And insofar as Hoover implies that the volitional nature of a breath test provides an absolute right to refuse, regardless of circumstances, he is similarly mistaken. The U.S. Supreme Court has affirmed that suspects have no Fourth Amendment right to refuse to identify themselves—a volitional act—when an officer so requests (and state law so requires). *Hiibel v. Sixth Judicial Dist. Court of Nev.* (2004), 542 U.S. 177, 189.

Accordingly, Hoover is wrong to claim an “absolute right” to refuse consent to a breath test. Indeed, the U.S. Supreme Court has flatly rejected this position: “[A] person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test.” *South Dakota v. Neville* (1983), 459 U.S. 553, 560 n.10 (rejecting a Fifth Amendment challenge to evidence of defendant’s refusal to take a breath test).

2. Hoover’s argument against the sentencing enhancement is meritless.

Hoover’s assertion that he “cannot be criminally punished for asserting a constitutional right even if the police search was permitted by the Constitution” is baseless. (Hoover’s Merit Br. at 8.) As the State explained throughout its opening brief, because the circumstances of Hoover’s case justified an immediate blood alcohol test, Hoover had no constitutional right of refusal to assert. (State’s Merit Br. at 6-19.) Accordingly, as the Delaware Municipal Court recognized in rejecting the Third District’s position, a sentence enhancement cannot raise any constitutional problems when it punishes someone for refusing that which he has no constitutional privilege to refuse. *State v. Sigrist* (Del. Muni. Ct. Feb. 28, 2008), No. 07-TRC-14494, at 6 (attached as Exhibit A).

3. Hoover’s assertion of a slippery slope misapprehends both the State’s position and the Implied-Consent Statute.

Finally, Hoover incorrectly argues that finding the Refusal Provision to be constitutional will create a slippery slope undermining the Fourth Amendment. According to Hoover, reversing the Third District would send the message that “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.” (Hoover’s Merit Br. at 12.) This argument misapprehends both the State’s position and the Implied-Consent Statute.

First, Hoover’s argument misconstrues the State’s position. The State does not contend that the General Assembly can erase citizens’ legitimate expectations of privacy merely by passing an implied-consent statute. For example, the State does not insist that an implied-consent statute would be valid if it gave government officials the authority to search Ohioans’ homes at any time for any reason. Instead, the State’s position is that implied-consent statutes are valid when they imply consent to *reasonable* searches—since reasonableness is the touchstone of the Fourth Amendment. E.g., *Bd. of Educ. v. Earls* (2002), 536 U.S. 822, 828.

Second, Hoover’s argument misapprehends the Implied-Consent Statute, which implies consent only to searches that are already constitutionally permissible. Under the Implied-Consent Statute, a motorist “shall be deemed to have given consent to a chemical test” only after he is “*arrested* for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance.” R.C. 4511.191(A)(2) (emphasis added). Accordingly, no implied consent attaches until a search is already constitutionally permissible under the valid-arrest exception to the warrant requirement. And because, as the State showed in its opening brief, evidence of blood alcohol content is evanescent in nature, the exigency exception applies as well. (State’s Merit Br. at 15-17.) The Implied-Consent Statute implies consent only to searches that are reasonable, and thus constitutionally permissible, so affirming the constitutionality of the statute cannot lead the State down a slippery slope.

For each of these reasons, Hoover’s arguments fail to disturb the State’s showings that Hoover had no Fourth Amendment right to refuse a breath test, and thus was not punished for asserting a constitutional right.

Appellant State of Ohio’s Second Proposition of Law:

Just as DUI suspects have no Fourth Amendment right to refuse a breath test, they also have no right to refuse a breath test under the Ohio Constitution, Article I, Section 14.¹

Because Hoover has failed to show that his enhanced punishment offends the Fourth Amendment, he also has failed to show a violation of Article I, Section 14 of the Ohio Constitution. “The language of Section 14, Article I of the Ohio Constitution and the Fourth Amendment is virtually identical,” *State v. Robinette* (1997), 80 Ohio St. 3d 234, 238, so it is unsurprising that generally, courts view their protections as “coextensive,” *id.* at 238, 245. In light of this textual parity, this Court has also held that the federal judiciary’s Fourth Amendment decisions “should be very persuasive” in interpreting Article I, Section 14. *Id.* at 239 (quoting *Nicholas v. Cleveland* (1932), 125 Ohio St. 474, 484).

This Court has acknowledged, however, that Article I, Section 14 may provide greater protections than the Fourth Amendment when “there are persuasive reasons to find” as much. *State v. Brown*, 99 Ohio St. 323, 2003-Ohio-3931, ¶ 22. Accordingly, the Court has held that Article I, Section 14 “provides greater protection than the Fourth Amendment to the U.S. Constitution against warrantless arrests for minor misdemeanors.” *Id.* *Brown* appears to be an outlier. Hoover cites—and the State has been able to find—no case other than *Brown* that expands the protections of Article I, Section 14 beyond the boundaries of the Fourth Amendment.

Here, Hoover identifies no “persuasive reasons” to conclude that the Ohio Constitution provides any greater protections than the Fourth Amendment against post-arrest breath tests.

¹ This proposition of law responds to Hoover’s reference to Article I, Section 14 of the Ohio Constitution in his Proposition of Law. The State did not address Article I, Section 14 in its proposition of law because the Third District premised its holding solely upon the Fourth Amendment to the United States Constitution.

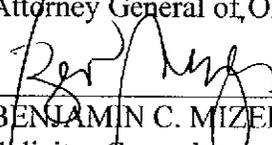
Indeed, he offers no explanation at all for departing from established Fourth Amendment doctrine in interpreting Article I, Section 14 in this context. Accordingly, the Court should follow its recent admonition to avoid “expand[ing] constitutional rights under the Ohio Constitution, particularly when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the Supreme Court,” and should reverse the Third District’s judgment. *State v. Gardner*, 118 Ohio St. 3d 420, 2008-Ohio-2787, ¶ 76.

CONCLUSION

For the above reasons, the Court should reverse the decision below.

Respectfully submitted,

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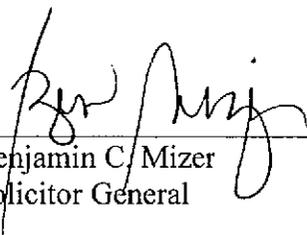
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Third Brief of Appellant/Cross-Appellee State of Ohio was served by U.S. mail this 22nd day of August 2008 upon the following counsel:

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EXHIBIT A

IN THE DELAWARE MUNICIPAL COURT
DELAWARE COUNTY, OHIO

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MUNICIPAL COURT
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CINDY DIHOVO
CLERK

STATE OF OHIO

vs.

Case No. 07-TRC-14494

JOHN J. SIGRIST

**JOURNAL ENTRY
DENYING THE DEFENDANT'S
CONSTITUTIONAL CHALLENGE TO
THE MANDATORY PENALTIES IN R.C. 4511.19(G)
FOR VIOLATIONS OF R.C. 4511.19(A)(2)**

The defendant has been charged with a violation of R.C. 4511.19(A)(2), which bars any motorist who has previously been convicted of Operating a Vehicle While Under the Influence of Alcohol from (a) committing the same offense again within 20 years after committing the first offense and (b) refusing to submit to a chemical test after being arrested for that second offense. If the prior offense occurred more than six years earlier, any person convicted for the new OVI offense who refused to submit to a chemical test when arrested for that new offense faces a mandatory minimum of 6 days in jail (or 3 days in jail and 3 days in a drivers' intervention program) under R.C. 4511.19(G)(1)(a)(ii). If convicted in this case on the R.C. 4511.19(A)(2) charge, the defendant faces that mandatory minimum penalty. And if the prior offense occurred within the past six years, any person convicted for the new OVI offense who refused to submit to a chemical test when

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arrested for that new offense faces a mandatory minimum of 20 days in jail under R.C. 4511.19(G)(1)(b)(ii).

Those mandatory minimum penalties are double those that would be imposed for a first OVI offense within six years (a mandatory minimum penalty of 3 days in jail under R.C. 4511.19(G)(1)(a)(i)) or for a second OVI offense within six years (a mandatory minimum of 10 days in jail under R.C. 4511.19(G)(1)(b)(i)) absent the refusal.

The defendant filed a motion on November 21, 2007 challenging -- on Fourth Amendment grounds -- the constitutionality of the additional minimum penalties that the statute imposes on prior OVI offenders who refuse to consent to a chemical test when arrested for a new OVI offense. In support of that challenge, he cites *State v. Hoover*, 173 Ohio App.3d 487, 2007-Ohio-5773 (3rd Dist. 2007), in which the court of appeals held that application of "a criminal penalty to the exercise of a constitutional right, the right to refuse a warrantless search by the government, is improper." *Id.* at ¶ 7.

Our own court of appeals for Delaware County has not addressed the issue decided in *Hoover*. Because I believe that *Hoover* was wrongly decided, I decline to follow it.

First, of course, "acts of the General Assembly enjoy a strong presumption of constitutionality," and "a statute will be upheld unless proven beyond a

reasonable doubt to be clearly unconstitutional." *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶ 29 (2007). I find insufficient proof before me of the statute's alleged unconstitutionality.

To be sure, "a compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616 (1989) (quotations omitted). And "[s]ubjecting a person to a breathalyzer test . . . should also be deemed a search," as should the "collection and testing of urine." *Id.* at 616-17.

The government's search of a person without a warrant is "per se unreasonable" except in a few well-defined and carefully circumscribed instances. *Katz v. United States*, 389 U.S. 347, 357 (1967). "Several criteria are to be considered in determining the reasonableness of an intrusive search: (1) the government must have a clear indication that incriminating evidence will be found; (2) the police officers must have a warrant, or, there must be exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and (3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner." *State v. Jackson*, 2006-Ohio-4453, ¶ 26 (5th Dist. 2006).

That three-part reasonableness test was the one applied by the Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, a police

officer had ordered an OVI suspect to submit to a warrantless blood test at a hospital. The warrantless seizure of the suspect's blood was justified, the Court held, because of the evanescent nature of the evidence in the body and the fact that the level of alcohol in the blood decreases with the passage of time. *Schmerber*, 384 U.S. at 770-71.

The Court's rejection of a Fourth Amendment claim in *Schmerber* and its recognition that the government has a reasonable interest in the speedy collection of breath or bodily fluids in drunk-driving cases suggests to me that the General Assembly has not violated the Fourth Amendment by establishing the mandatory minimum penalties that the defendant challenges in this case. As the Supreme Court has said, "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *South Dakota v. Neville*, 459 U.S. 553, 560 n. 10 (1983). In holding that the admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend the defendant's Fifth Amendment privilege against self-incrimination, the Court explained in *Neville* that "the offer of taking a blood-alcohol test is clearly legitimate, [and] the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *Id.*, 459 U.S. at 563. The "right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by" some state legislatures, *id.*, 459 U.S. at 565, and the fact that our General Assembly has

chosen to bestow that grace does not bar the General Assembly from imposing consequences -- including penal consequences -- on those who refuse those tests.

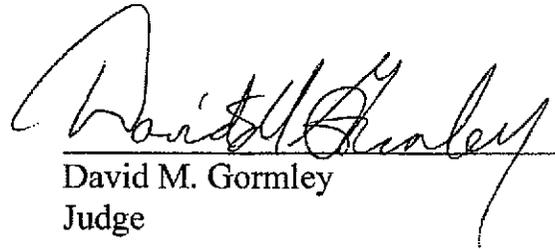
Some other States in fact treat OVI suspects' refusal to take a chemical test as a separate crime that carries direct penalties. See, e.g., Alaska Stat. 28.35.032(f) ("refusal to submit to a chemical test . . . is a class A misdemeanor" punishable by mandatory jail time and a mandatory fine); Minn. Stat. 169A.20(2), 169A.26(1), and 169A.03(8) ("[i]t is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine," and those who violate the law may be sentenced to "imprisonment for not more than one year"); Neb. Rev. Stat. 60-6,197(5) ("refusal to submit to such test or tests is a separate crime"); R.I. Gen. Laws 31-27-2.1(b) (delineating penalties -- including fines and jail time -- for those who "having been placed under arrest[,] refuse[] . . . the request of the law enforcement officer to submit to the tests"); Vt. Stat. Ann. tit. 23, § 1202(d)(6) (explaining when a person may be "charged with the crime of criminal refusal"). And the Minnesota Court of Appeals has rejected various constitutional challenges -- including a Fourth Amendment challenge -- to the criminal refusal statute in that State. See *State v. Mellett*, 642 N.W.2d 779, 785 (Minn. App. 2002) (explaining that *Schmerber's* express approval of the government's "power to take a blood sample, by force if need be" does not foreclose the government from pursuing

other means -- including the enactment of new laws -- that have the effect of coercing citizens into submitting to chemical tests in OVI cases).

In light of the decisions cited above, I respectfully conclude that the Third District erred when it described the right to refuse a chemical test as "a constitutional right." *State v. Hoover*, 173 Ohio App.3d 487, 2007-Ohio-5773, ¶ 7. Indeed, the Supreme Court in *Neville* flatly rejected that view.

When the facts available to a law enforcement officer give the officer probable cause to believe that a motorist has committed an OVI offense, *Schmerber* makes clear that the motorist has no Fourth Amendment right to prevent the government from conducting a warrantless search for evidence in the motorist's breath or bodily fluids, and *Neville* explains that the motorist has no constitutional right to refuse a chemical test. If there is no Fourth Amendment violation in the warrantless extraction of an OVI suspect's bodily fluids, and if there is no constitutional right on the part of that suspect to refuse consent to that search, I see no reason why the government may not impose criminal penalties on those who -- by refusing consent -- impede the government's collection of that evidence. That is particularly true where, as in Ohio, all of us who operate vehicles on our roadways are "deemed to have given consent" to chemical tests of our blood, breath, or urine. R.C. 4511.191(A)(2).

For the reasons explained above, I find no Fourth Amendment violation in the penalties imposed by R.C. 4511.19(G) for violations of R.C. 4511.19(A)(2). The defendant's request that I find those penalties unconstitutional is therefore denied.



David M. Gormley
Judge

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