

**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.	:	

FOURTH BRIEF OF APPELLEE-CROSS APPELLANT, COREY HOOVER

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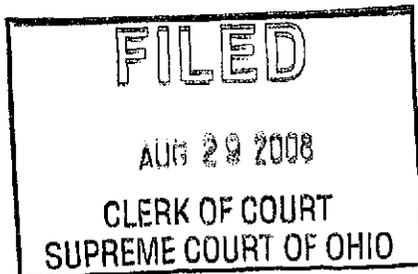


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INTRODUCTION

In its third brief, the flaws in the logic set forth by the State of Ohio continue. This case is not about the constitutionality of a particular search. No such search ever occurred in this case.

This case raises the question of whether the legislature can criminalize the act of refusing or revoking consent. When law enforcement asks an individual person to consent to a search, that individual person has a constitutional right under the Fourth Amendment to the United States Constitution and under Article I, Section 14 of the Ohio Constitution to say “no”. Any action that the police may take after a refusal or revocation of consent would then have to be evaluated on a case by case basis looking at the totality of the circumstances to determine whether any such police conduct was reasonable under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. However, there is no need for this Court to review any such police conduct because no such police conduct occurred. Corey Hoover, said “no” to the breath test, and the police took no further action. Therefore, since the State of Ohio does not dispute the fact that R.C.§4511.19(A)(2) criminalizes the act of refusing or revoking consent, the question before this Court can be narrowed down to one of simply determining whether an individual person has the constitutional right under the Fourth Amendment to the United States Constitution and, Article I, Section 14 of the Ohio Constitution, to refuse or revoke consent to a search of one’s breath.

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.

The State of Ohio does not dispute the fact that R.C.§4511.19(A)(2) criminally punishes someone for refusing the breath test. It is clear from the statute in question that one of the elements of the offense created under R.C.§4511.19(A)(2) requires the State of Ohio to prove beyond a reasonable doubt that a defendant refused to submit to a chemical test of the suspect's blood, breath, or urine. In other words, the State of Ohio does not dispute the fact that the act criminalized by this statute is the act of refusing the chemical test, after operating a motor vehicle under the influence of alcohol with a prior conviction some time in the last 20 years. The State of Ohio apparently concedes that the statute imposes criminal punishment for this refusal of the chemical test, but instead takes the position that such a refusal can be criminally punished because no constitutional right exists to refuse or revoke consent to such a search.

A. All suspects in a criminal investigation have the constitutional right to refuse or revoke consent to a search, regardless of whether the police may constitutionally continue with the search contrary to the suspect's wishes.

In its briefs, the State of Ohio mixes up an individual's right to refuse or revoke consent, with the ability of police to continue with the search based upon probable cause, exigent circumstances, the search incident to arrest doctrine, or any of the other exceptions to the warrant requirement that permit a warrantless search by police. When the police ask for a suspect's consent to search, the suspect has an absolute and constitutional right to say "no". Depending on the totality of the circumstances in any particular situation, the police might then continue with a search, even without a suspect's consent, and such a search may or may not be permitted under

the constitutions of the United States and the State of Ohio, depending on the specific totality of the circumstances in any given case.

This case is not raising an issue regarding any specific search. Instead, this case is challenging a statute that criminally punishes a suspect, like Corey Hoover, for saying “no” when they are asked for consent to search. Such a denial of consent cannot be criminally punished.

This Court in Wilson v. Cincinnati(1976), 46 Ohio St. 2d 138, could not have been more clear when it ruled that the constitution prohibits the legislature from placing an individual in a situation where he “ must agree to a warrantless inspection *** or face a criminal penalty.” Wilson, supra at 145. Moreover, if a person is faced with a choice between consenting to a search, or facing criminal punishment, the consent is necessarily invalid. This Court has held that “a valid consent involves a waiver of constitutional rights and cannot be lightly inferred.” Wilson, supra at 143-44. Consent must be voluntary and uncoerced, either physically or psychologically. Id. at 144. So, it stands to reason that even if consent is given, in order to avoid the criminal punishment imposed pursuant to R.C.§4511.19(A)(2), said consent cannot be deemed voluntary and uncoerced.

The State of Ohio attempts to distinguish Wilson, and the United States Supreme Court case of Camara v. Municipal Court(1967), 387 U.S. 523, by indicating that the Government officials in those cases did not have other grounds to proceed with the search in the absence of the defendant’s consent. However, an individual person’s right to refuse or revoke consent to a search is not dependent on the totality of the circumstances surrounding the request by law enforcement for said consent. A defendant’s right to refuse or revoke consent is bestowed upon him by the Constitutions of the United States and the State of Ohio.

The State of Ohio continues by citing a Delaware County Municipal Court case that refuses to follow the decision of the Third District Court of Appeals in this case. In that decision, and in the State's brief, reliance is made upon the United States Supreme Court case of South Dakota v. Neville(1983), 459 U.S. 553. However, the reliance on Neville by the State of Ohio, and in turn by the Delaware County Municipal Court, is misplaced.

Neville, supra, is not a case addressing Fourth Amendment issues. Instead, the Neville decision addresses Fifth Amendment issues raised by drunk driving prosecutions and the use at trial of a suspect's refusal of a chemical test. Appellee/Cross-Appellant, Corey Hoover, is not raising a Fifth Amendment challenge to R.C.§4511.19(A)(2). Corey Hoover is raising a Fourth Amendment challenge, and accordingly, a challenge under Article I, Section 14 of the Ohio Constitution, to the statute in question.

A Fifth Amendment challenge would be fruitless because a blood sample is physical evidence, rather than testimonial evidence, and thus unprotected by the Fifth Amendment privilege. Neville, supra, at 559 (citing Schmerber v. California(1966), 384 U.S. 757). Due to the "non-testimonial" nature of blood evidence, a person's constitutional rights under the Fifth Amendment to the United States Constitution are not infringed by using evidence of said refusal at trial. In order to understand the decision in Neville, this Court must look beyond the limited quotation of footnote 10 contained in the State's brief. Footnote 10 of the Neville decision reads in its entirety as follows:

"FN10. Griffin held that a prosecutor's or trial court's comments on a Defendant's refusal to take the witness stand impermissibly burdens the defendant's Fifth Amendment right to refuse. Unlike the defendant's situation in Griffin, a person suspected of drunk driving has no constitutional right to refuse to take a

blood-alcohol test. The specific rule of Griffin is thus inapplicable.”

Neville, supra at FN10. Therefore, the statement quoted by the Delaware County Municipal Court and by the State of Ohio in its third brief is taken out of context. When the Supreme Court in Neville indicated that “a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test,” the United States Supreme Court was discussing a person’s rights under the Fifth Amendment of the United States Constitution, not the Fourth Amendment to the United States Constitution. At that juncture, the United States Supreme Court in Neville, supra, was comparing the facts of Neville with the analysis in the case of Griffin v. California(1965), 380 U.S. 609. Griffin was not a Fourth Amendment case.

Moreover, the reliance on Neville is also misplaced because Neville addresses a situation involving a blood test, not a breath test. Under Schmerber, supra, the police may take a blood sample, even over a suspect’s objection, so long as the totality of the circumstances justifies such a search. The fact that the constitution might permit such a search by law enforcement does not eliminate a suspect’s absolute right to refuse or revoke consent. Under Schmerber, a suspect who says “no” to a request for a blood test, may still have his blood taken over his objection. However, even in light of the Supreme Court’s decision in Schmerber, the suspect has an absolute right to sit there and do nothing. If the police then proceed to stick a needle in the suspect’s arm and draw blood, so be it. But, a defendant having an involuntary withdrawal of his blood still has a constitutional right to say “no” even if the police can take the blood without consent.

All suspects have the right to refuse or revoke consent. In the case of a requested breath test, the suspect must lean forward, place his mouth on the intake tube, and blow vigorously into

the Breathalyzer machine. In other words, a breath test requires more than the mere consent of the suspect. A breath test requires the cooperation and effort of the Defendant in providing the incriminating evidence. A suspect in a criminal investigation has the Fourth Amendment constitutional right to deny police his consent, and hence, his cooperation when faced with a request by police for permission to engage in a chemical search of his body.

The State of Ohio counters this argument by citing the case of Hiibel v. Sixth Jud Dist. Ct. of Nev.(2004), 542 U.S. 177. However, the State of Ohio's reliance on Hiibel is also misplaced.

The Supreme Court in Hiibel, supra, found that a Nevada statute requiring a person to identify themselves did not violate a person's Fifth Amendment right to remain silent. Again, Corey Hoover is not challenging R.C.§4511.19(A)(2) on Fifth Amendment grounds.

The Supreme Court further found that such a statute does not offend or contravene the guarantees of the Fourth Amendment. The Court's finding in this regard was based upon the fact that "interrogation relating to one's identity or request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." Hiibel, supra, at 185 (quoting INS v. Delgado(1984), 466 U.S. 210,216). A request for identity does not alter the nature of the stop itself, it does not change the duration of the stop, nor does it change the location of the stop. Hiibel, supra, at p.188. After all, "[e]ven witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." Id. a 191. Therefore, because a request for one's identity does not constitute a "Fourth Amendment seizure," a statute requiring a suspect to disclose his name does not implicate the Fourth Amendment.

On the other hand, a chemical test of a person's blood, breath, or urine clearly implicates very specific expectations of privacy that are protected by the Fourth Amendment. Schmerber,

supra, at 767-68; *Skinner v. Rlwy. Labor Executive's Association*(1989), 489 U.S. 602, 616.

Therefore, any reliance on the *Hiibel* decision is misplaced. Individuals subject to police investigation have an absolute constitutional right to refuse or revoke consent to a warrantless search by police, and such denial of consent cannot be criminally punished. *Wilson, supra*, *Camara, supra*.

CONCLUSION

WHEREFORE, for the reasons set forth in the briefs of Appellee/Cross-Appellant, Corey Hoover, the decision of the Third District Court of Appeals should be reversed, and the conviction and sentence imposed upon Corey Hoover by the Union County Municipal Court should be vacated due to the unconstitutionality of R.C.§4511.19(A)(2).

Respectfully submitted,



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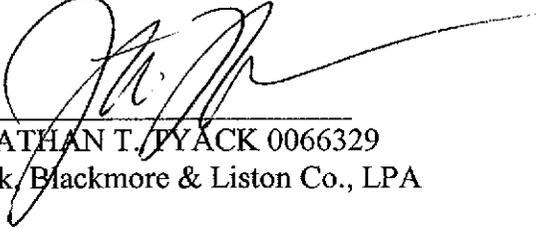
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