

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant

vs.

MELISSA CUTLIP

Appellee

CASE NO. 08-2212

**ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 08CA009353**

**MEMORANDUM OF APPELLEE, MELISSA CUTLIP,
IN OPPOSITION TO JURISDICTION**

DENNIS P. WILL, #0038129
Prosecuting Attorney
Lorain County, Ohio
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389

W. ZACK DOLYK, #0007560
Attorney at Law
1513 State Route 60
Vermilion, Ohio 44089
(440) 967-6136

By:

BILLIE JO BELCHER, #0072337
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT

COUNSEL FOR APPELLEE

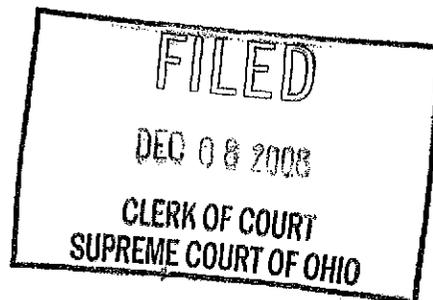


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**EXPLANATION OF WHY THIS FELONY CASE IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

Despite its claim, the States Memorandum presents nothing more than its disagreement with the application of the underlying facts in this case to well-established law.

The State's allegations that the trial court and the unanimous panel of the Ninth District Court of Appeals decision "Violates public policy and produces an unjust result" does not demonstrate a "case of great general or public interest" or a "substantial constitutional question". The State apparently challenges the lower court's application of the long standing burden shifting standard which must be applied to a motion to suppress. The facts and the law overwhelmingly support the lower courts decisions. Section 2(B)(2)(e) of Article IV of the Ohio Constitution mandates that this Court's discretionary jurisdiction is reserved for "cases of public or great general interest". This Court's discretionary jurisdiction is reserved for cases addressing areas of the law that are unsettled, not to apply settled law to the facts of any particular case.

There is no doubt that OVI cases and to a greater degree aggravated vehicular assault cases where an OVI is also alleged are very emotionally and politically charged. In State v. Smorgala, 9th District No. 4282 1988 WL 134238. The Court of Appeals rejected a public policy argument when it stated in no uncertain terms, "This court is unconvinced that the legislature intended for such judicial policy preferences to override a valid legislative enactment".

This Court, in reviewing Smorgala on appeal, upheld the lower court decision. This Court stated "Where the words of a statute are free of ambiguity and express plainly and distinctly the sense of the lawmaking body, the courts should look no further in their efforts to interpret the intent of the General Assembly." State v. Smorgala, 50 Ohio St 3d 222, 223 (1990).

The State, in Smorgala, like the appellant here argued, that this Court's decision would "impede enforcement of drunk driving laws". This Court responded by pointing out the many "tools" the legislature had given the State to combat drunk driving. This Court declared, "Before the state raises the specter of being disarmed by judicial fiat in its war against drunk drivers, it should use the tools supplied by the General Assembly. *Id* at 225".

It should also be remembered that the suppression of a blood test was upheld by this Court in Mayl, an aggravated vehicular homicide case. Obviously, that is the most difficult underlying fact situation a court can encounter.

As this Court stated, "Where the General Assembly has spoken, and in so speaking violated no constitutional provision, [courts] must not contravene the legislator's expression of public 'Policy.'" Painter v. Graley, 70 Ohio St. 3d 377, 385 (1994). "Judicial policy preferences may not be used to override valid legislative enactments for the General Assembly should be the final arbiter of public policy." *Id.* (quoting State v. Smogala, 50 Ohio St. 3d 222, 223 (1990)). The General Assembly has specifically delegated authority to the Director of Health to determine standards for the collection and analysis of bodily substances.

Under Supreme Court Rule III § 6(C)(1), this court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

This appeal is from a case pending in the Lorain County Court of Common Pleas. On February 8, 2007, Appellee filed a Motion to Suppress the results of her blood alcohol test. On February 21, 2008, the matter was heard before Judge James M. Burge of the Lorain County Court of Common Pleas. On February 28, 2008, the trial court granted Appellee's Motion to Suppress.

On September 30, 2008, the Ninth District Court of Appeals unanimously affirmed the trial court's suppression of the Appellee's blood alcohol test. State v. Cutlip, 9th Dist. No. 08CA009353, 2008 Ohio 4999. In October 2008, the State of Ohio filed a discretionary appeal with this Honorable Court.

On December 11, 2005, Appellee was involved in a motor vehicle accident. Ms. Cutlip was injured in the collision and was taken by ambulance to the Avon Emergency Care Center. As part of the hospital's trauma protocol, blood was drawn from Ms. Cutlip at 8:35 p.m. on December 11, 2005 for medical purposes.

According to Carlene Kennedy, the registered nurse who drew the blood, she probably used chloroprep or an alcohol swab to disinfect Ms. Cutlip's skin prior to drawing her blood. In any event both the chloroprep or alcohol swabs contained 70% alcohol. The blood was drawn prior to the police officer arriving at the hospital. If the nurse knew that it would be a "legal draw" she would have used a special test kit that contains a betadine swab. The nurse's notes do not show a "legal draw" or the use of betadine.

When a Sheffield Village policeman arrived at the accident scene, he saw Ms. Cutlip bleeding profusely from the face. She had a head injury. Due to her injuries, the officer did not request that Ms. Cutlip do any physical tests. The weather that day was snowy and the roads icy. The officer admitted that, just because there was an accident, it didn't necessarily mean either driver was intoxicated. However, he went to the hospital for the express purpose of getting Ms. Cutlip to submit to a blood test.

When he arrived at the hospital, Ms. Cutlip was wrapped up for Life Flight, strapped to a guernsey and the helicopter was waiting. The nurse had already drawn Ms. Cutlip's blood, not

using the officer's test kit. However, the officer, in his official Sheffield Village police report wrote, "I then had the nurse draw blood samples for me." At the Hearing, he admitted during cross-examination that this statement contained in his official report was not true.

BMV Form 2255 states that the Defendant is under arrest. The officer testified that he read BMV Form 2255 to Ms. Cutlip. However, he admitted that Ms. Cutlip was actually not under arrest at that time. He said it would take a couple of minutes to read the form. However, the hospital records clearly state that the officer arrived at 2104 and one minute later, at 2105, Ms. Cutlip had reported to Life Flight for transfer to Metro Hospital. Ms. Cutlip did not sign the form due to the fact that she was unable to. The officer testified that the extent of his conversation with Ms. Cutlip was only one question to obtain her alleged consent. On BMV Form 2255, the officer only wrote "crash" as his reasonable grounds for belief that there was an OVI. The blood sample was first sent to MedTox, a laboratory in Minneapolis for analysis. MedTox is not certified by the Ohio Department of Health to do blood tests. The parties have stipulated to that fact. Many months later, on March 6, 2006, the blood sample was sent back to Ohio for testing at another lab. The sample was inexplicably unrefrigerated in transit for eight (8) days before it was finally received in Lorain County on March 14, 2006. The blood was then tested again at a lab in Lorain County. The trial court suppressed the test results from this blood test and the Court of Appeals unanimously upheld the Trial Court's decision.

LAW & ARGUMENT

FIRST PROPOSITION OF LAW

I. THE STATE OF OHIO DID NOT SUBSTANTIALLY COMPLY WITH OHIO ADMINISTRATIVE CODE SECTION 3701-53-05

A trial court's decision on a Motion to Suppress contains both factual and legal findings. "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. State v. Mills (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. State v. Fanning (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. State v. McNamara (1997), 124 Ohio App.3d 706, 707 N.E.2d 539." State v. Burnside, 100 Ohio St.3d 152, 154-55, 2003-Ohio-5372. 797 N.E.2d 71.

This case involves a prosecution for Aggravated Vehicular Assault in violation of R.C. 2903.08. In order for the State to obtain a conviction it must prove that the "serious physical harm" is the proximate result of a violation of R.C. 4511.19(A).

As this Court has stated:

"The General Assembly established the threshold criteria for the admissibility of alcohol-test results in prosecutions for driving under the influence and driving with a prohibited concentration of alcohol in R.C. 4511.19(D). That section, which governs the admissibility of alcohol-test results, provides that a defendant's blood, breath, or urine 'shall be analyzed in accordance with methods approved by the Director of Health by an individual

possessing a valid permit issued by the Director of Health pursuant to section 3701.143 of the Revised Code. “State v. Burnside, 100 Ohio St3d 152, 155.

In accordance with R.C. 3701.143, the Director of the Ohio Department of Health (“ODH”) has promulgated regulations which set forth the qualifications for laboratories and personnel who may draw and test blood for alcohol, as well as the techniques or methods for chemically analyzing “blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, or alcohol and a drug of abuse” therein. See Ohio Admin. Code 3701-53-01 et seq.”

Therefore RC 4511.19(D) is a gatekeeping statute. As this court has stated, “the State must show substantial compliance with R.C. 4511.19(D)(1) and the Ohio Administrative Code Chapter 3701-53 before the results are admissible”. State v. Mayl 106 Ohio St.3d 27 paragraph one of syllabus.

The State must demonstrate that it complied with the applicable Ohio Department of Health regulations. The regulation that controls how blood shall be collected is Ohio Administrative Code 3701-53-05:

(A) All samples shall be collected in accordance with division (D) of section 4511.19...”

(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic. (Emphasis added).

(C) Blood shall be drawn with a sterile dry needle into a vacuum

container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.

These regulations have been designed to ensure the accuracy of bodily substance test results. See State v. Dickerson (1986), 25 Ohio St.3d 64, 65-66. It is incumbent on the State to prove that the blood was drawn in accordance with the applicable Ohio Department of Health regulations. Clearly the State is unable to satisfy its mandatory burden.

At the Motion to Suppress there was substantial testimony by the registered nurse who drew the blood, that an alcohol swab or alcohol based swab was used to cleanse the skin of Ms. Cutlip prior to the blood being drawn. The trial court in its Judgment Entry of February 28, 2008, made a "Finding of Fact" that "4. The site for the draw of the Defendant's blood was cleaned with an alcohol-based antiseptic". The trial court's "Conclusions of Law" also contained the following finding, "4. In the case sub judice, an alcohol-based antiseptic was used to clean the skin at the injection site".

Despite that fact, the Appellant, as it did in the Court of Appeals, continues to argue that "The State of Ohio substantially complied with Ohio Administrative Code Section 3701-53-05".

This Court's recent decision in State v. Burnside, 100 Ohio St. 3d 152, 2003-Ohio-5372 is already dispositive of the issue the Appellant is attempting once again to raise. In Burnside, this Court affirmed the reversal of a trial court's denial of a Defendant's Motion to Suppress on the basis of lack of compliance with O.R.C, § 4511.19(D) and testing regulations promulgated by the Ohio Director of Health. Specifically, the Court determined that the failure to use a solid anticoagulant when drawing a

blood sample, which is required by O.A.C. § 3701-53-05(C), is not substantial compliance with the regulations. Burnside, supra, ¶ 36.

In Burnside, this Court did state that strict compliance with the ODH regulations is not required for blood results to be admissible. 100 Ohio St.3d 152, 159, citing State v. Plummer (1986), 22 Ohio St.3d 292, 490 N.E.2d 902. However, this Court has limited the substantial compliance standard "to excusing only errors that are clearly de minimus," meaning those errors which are "minor procedural deviations." Id. This Court emphasized that the criterion for admissibility under R.C. 4911.19 is compliance with the regulations, not a judicial determination that the alcohol test results are reliable. Id. at 158. This Court further explained; "A court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required".

Apparently, what the State is suggesting is that compliance with ODH regulations is unnecessary so long as the actual method of collection and testing that is used is shown to be reliable. This approach, however, was definitely rejected by this Court in Burnside, supra. In Burnside, the unanimous Court held, at Paragraph 32, that;

"a judicial determination that an alcohol test, although not administered in strict compliance with the alcohol-testing regulations, is reliable and therefore admissible may subvert the rule-making authority and the statutory mandate of the Director of Health".

Moreover, the approach suggested by Appellant herein, "further precipitates conflicting decisions from lower courts and impedes the public policy of achieving uniformity and stability in the law". Id., ¶ 33.

In essence, then, it remains the law of Ohio that “ ‘[t]he methods and means of chemical analysis provided in section (D) of {R.C. 4511.19} are mandatory and exclusive.’ ” State v. Ripple (1994), 70 Ohio St. 3d 86, 88-89, 1994-Ohio-170.

The use of the alcohol swab is clearly a violation of Ohio Adm. Code 3701-53-05. It is not a minor procedural violation and therefore, obviously, not a de minimus violation. Under the burden shifting procedure outlined in State v Burnside, 100 Ohio St.3d 152, the State must show substantial compliance with Ohio Department of Health Regulations. It is only after the State has satisfied its burden that the Defendant needs to show prejudice. This Court in Burnside, supra at 159 held that “[g]iven that the state failed to establish substantial compliance, its insistence that the defendant did not show prejudice is immaterial; rather, any evidence of prejudice **78 would have been relevant only after the state demonstrated substantial compliance with the alcohol-testing regulation in Ohio Adm. Code 3701-53-05(C)”. Obviously, the State did not clear its initial hurdle so there was no reason for testimony regarding prejudice to be presented to the trial court by the Defendant. The trial court correctly concluded that the blood samples were not drawn in substantial compliance with the Ohio Administrative Code. The Court of Appeals unanimously upheld its decision also citing State v. White, 12th Dist. No. CA 2006-05-111, 2007-OHIO-350 which also upheld the suppression of a blood test where isopropyl alcohol had been used to clean the injection site.

Appellant’s First Proposition of Law is without merit and does not present grounds warranting jurisdiction from this Court.

APPELLANT’S SECOND PROPOSITION OF LAW

- II. THE HOLDING IN BURNSIDE SHOULD NOT BE MODIFIED TO PERMIT THE ADMISSION OF BLOOD TEST RESULTS WHERE AN ALCOHOL SWAB HAS BEEN USED. SUCH ACTION IS NOT A DE MINIMIS ERROR AND DOES NOT DEMONSTRATE**

**SUBSTANTIAL COMPLIANCE WITH OHIO ADMINISTRATIVE
CODE SECTION 3701-53-05.**

The State next argues that Burnside should be “modified” to allow the admission of blood test results when an alcohol swab was used. In reality the State is demanding that this court reverse a long line of recent cases and reverse its own recent decisions.

Once again, the Ohio Department of Health regulations could not be any clearer, “No alcohols shall be used as a skin antiseptic.” 3701.53-05(B). The State wants this Court to ignore the clear mandate of this unambiguous regulation and ignore numerous judicial precedents. State v. Burnside 100 Ohio St.3d 152 clearly holds that the judiciary does not have independent authority to judge accuracy and reliability of blood tests given the legislative delegation of such authority to the Ohio Director of Health. In State v Burnside 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, this Court found that there was no substantial compliance with the alcohol-testing regulations due to the failure to establish the use of a solid anticoagulant. This Court stated:

“Ohio Adm. Code 3701-53-05(C) declares in no uncertain terms that “blood shall be drawn * * * into a vacuum container with a solid anticoagulant.”* (Emphasis added.) This language does not *advise* the use of a solid anticoagulant when drawing a blood sample; it *demand*s it. Indeed, the state failed to produce any evidence that it complied with Ohio Adm. Code 3701 -53-05(C). As a result, we cannot conclude that such an error is de minimis and therefore permissible under the substantial-compliance standard. Given that the state failed to establish substantial compliance, its insistence that the defendant did not show prejudice is immaterial; rather, any evidence of prejudice **78 would

have been relevant only after the state demonstrated substantial compliance with the alcohol-testing regulations in Ohio Adm. Code 3701 -53-05(C).

Finally, we address the State's argument that the alcohol-test results in the instant case should be admissible because the use of a solid anticoagulant was not necessary to ensure the reliability of the alcohol testing. This argument is properly directed not to us but to the Director of Health, whose charge it is to promulgate regulations that will ensure the reliability of alcohol-test results. To hold otherwise would be to speculate, with neither the requisite expertise nor the statutory authority, whether the failure to use a solid anticoagulant affected the reliability of the alcohol-test results in the instant case". Id. At 159.

See also the decision in State v. Perez, a vehicular homicide where the Court, after citing Mayl and Burnside, went on to declare, "In order for the blood-alcohol test results to be admissible, the State was required to demonstrate that the blood was drawn and tested in accordance with R.C. 4511.19(D)(1) (emphasis added). State v. Perez, 9th District C.A. No. 23419 2007-Ohio-2897. ¶ 13.

The facts of our case are even stronger. In no uncertain terms the regulation states, "no alcohols shall be used". The language cannot be any clearer. The State is unable to prove that an alcohol swab was not used. The Ohio Administrative Code makes the use of a non-alcohol swab a prerequisite to establishing a legally admissible blood test. The State, as the trial court correctly ruled and the Court of Appeals unanimously agreed, did not meet its burden.

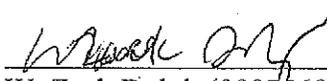
Appellant's Second Proposition of Law is without merit and does not present grounds warranting jurisdiction from this Court.

CONCLUSION

After a careful review of the evidence and the applicable case law, the trial court found that the State failed to establish substantial compliance with the Ohio Department of Health regulations governing the collection of a blood alcohol sample, namely Ohio Adm. Code 3701-53-05(B), when an alcohol swab was used prior to the blood draw. The Court of Appeals following this Court's recent decision upheld the trial Court decision.

For the reasons discussed above, Appellee, Melissa Cutlip, respectfully requests that this Court refuse to grant jurisdiction to hear this discretionary appeal.

Respectfully submitted,

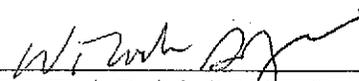


W. Zack Dolyk (0007560)
Attorney for Appellee

PROOF OF SERVICE

A copy of the forgoing Memorandum of Appellee, Melissa Cutlip, In Opposition to Jurisdiction was sent by regular U.S. mail to the following on this 4th day of December, 2008.

Dennis P. Will, Prosecuting Attorney
Billie Jo Belcher, Assistant Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035



W. Zack Dolyk (0007560)
Attorney for Appellee