

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MICHAEL LUPARDUS,

Defendant-Appellant.

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Case No. 2008-2487

On Appeal from the Washington
County Court of Appeals
Fourth Appellate District

Case No. 08 CA 31

MERIT BRIEF OF APPELLANT MICHAEL LUPARDUS

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FILED
JUN 18 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	2
INTRODUCTION	4
APPELLANT’S PROPOSITION OF LAW.....	5
If the State destroys evidence after the defendant has made a discovery request, the burden of proof shifts to the State to prove the evidence was not materially exculpatory. If the State fails to meet its burden, the case must be dismissed. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution	5
CONCLUSION.....	14
CERTIFICATE OF SERVICE	15
APPENDIX:	
<i>State v. Lupardus</i> (December 29, 2008, Notice of Appeal of Appellant Michael Lupardus), Ohio Supreme Court Case No. 08-2487	A-1
<i>State v. Michael Lupardus</i> , 4th Dist. No. 08CA31, 2008-Ohio-5960	A-4
<i>State of Ohio v. Michael Lupardus</i> , Judgment Entry In OVI (NUNC PRO TUNC), Marietta Municipal Court Case No. 06 TRC 3378-1 (Aug. 11, 2008).....	A-14
<i>State of Ohio v. Michael Lupardus</i> , Decision and Entry Motion to Suppress/Dismiss, Marietta Municipal Court Case No. 2006 TRC 3378 (July 26, 2007).....	A-15
<i>State of Ohio v. Michael Lupardus</i> , Judgment Entry In OVI, Marietta Municipal Court Case No. 06 TRC 3378-1 (Aug. 17, 2007)	A-18
Fifth Amendment, United States Constitution.....	A-19
Fourteenth Amendment, United States Constitution	A-20
Article I, Section 16, Ohio Constitution	A-21
R.C. 4511.19	A-22

TABLE OF AUTHORITIES

	Page No.
CASES:	
<i>Arizona v. Youngblood</i> (1988), 488 U.S. 51	4, 6, 11, 14
<i>Brady v. Maryland</i> (1963), 373 U.S. 83	5, 9, 10
<i>California v. Trombetta</i> (1984), 467 U.S. 479.....	6, 7, 10, 14
<i>Columbus v. Forest</i> (1987), 36 Ohio App.3d 169, 173, 522 N.E.2d 52	7, 11
<i>Lisenba v. California</i> (1941), 314 U.S. 219.....	5
<i>State v. Anderson</i> , 1st Dist. No. C-050382, 2006-Ohio-1568.....	7, 8, 9, 10
<i>State v. Benson</i> , 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693	7, 8, 12, 14
<i>State v. Benton</i> (2000), 136 Ohio App.3d 801, 805, 737 N.E.2d 1046.....	4, 6, 7, 8, 9, 14
<i>State v. Durnwald</i> , 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234.....	8, 12, 13
<i>State v. Geeslin</i> , 3rd Dist. No. 10-05-06, 2006-Ohio-1261	12, 13
<i>State v. Geeslin</i> , 116 Ohio St.3d 252, 2007-Ohio-5239.....	6, 9, 11, 12
<i>State v. Hinson</i> , 8th Dist. No. 87132, 2006-Ohio-3831	12
<i>State v. Jackson</i> (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549.....	7
<i>State v. Johnston</i> (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898	6
<i>State v. Lewis</i> (1990), 70 Ohio App.3d 624, 591 N.E.2d 854.....	14
<i>State v. Rivas</i> , 121 Ohio St.3d 469, 2009-Ohio-1354, 905 N.E.2d 618.....	5
<i>State v. Williams</i> , 126 Ohio Misc.2d 47, 2003-Ohio-7294, 802 N.E.2d 195.....	14
<i>United States v. Agurs</i> (1976), 427 U.S. 97	6, 9, 10
<i>United States v. Valenzuela-Bernal</i> (1982), 458 U.S. 858.....	5
CONSTITUTIONAL PROVISIONS:	
Fifth Amendment, United States Constitution.....	5
Fourteenth Amendment, United States Constitution	5, 14

Article I, Section 16, Ohio Constitution5, 14

STATUTES:

R.C. 4511.191

STATEMENT OF THE CASE¹

Michael Lupardus was stopped and arrested for operating a vehicle while under the influence of alcohol, a violation of R.C. 4511.19(A)(1)(a), and a first-degree misdemeanor. Counsel for Mr. Lupardus filed a motion for discovery. (MTD Tr. 10.) Counsel notified the State that she wanted to see the video-recording of the stop, and asked for a continuance so that she could do that. The State agreed to the continuance, but one of its agents then destroyed the tape. (MTD Tr. 11.) Mr. Lupardus filed a motion to dismiss and/or suppress because the State destroyed exculpatory evidence. At the October 23, 2006 hearing on Mr. Lupardus' motion to dismiss/suppress, Mr. Lupardus maintained that the State had the burden to prove that the tape was not materially exculpatory. (MTD Tr. 8.) Over Lupardus' objection, the court continued the hearing for one week because the State's witness, Trooper Forshey, failed to appear at the hearing despite being subpoenaed. (MTD Tr. 18-19.)

The hearing resumed on November 9, 2006. Mr. Lupardus disputed Trooper Forshey's testimony regarding the results of the walk-and-turn and one-leg-stand tests. Mr. Lupardus' passenger, Patricia Frank, testified that Mr. Lupardus was not under the influence of alcohol, although she did not witness the field tests. (Tr. 47-52.) Sgt. McDonald was also with Trooper Forshey when he pulled over Mr. Lupardus, but he did not witness the field tests and could not corroborate Trooper Forshey's testimony. (Tr. 27-32.) The State conceded "that the original tape correctly recorded everything." (MTD Tr. 7.) The court held that the tape was a unique

¹The transcripts consist of one volume containing two proceedings (November 9, 2006, and August 17, 2007) paginated consecutively, i.e., 1-74, and a small volume containing the transcript of the October 23, 2006 hearing on the motion to dismiss, paginated 1-21. References to the larger transcript volume will appear as "Tr." References to the October 23, 2006 Motion to Dismiss hearing transcript will appear as "MTD Tr."

piece of evidence not otherwise obtainable by other means. 7/26/07 Decision and Entry Motion to Suppress/Dismiss at 2.

Subsequently, the court found: (1) no motion to preserve the evidence had been filed but the court's ruling was not dependent on whether such a motion had been filed; (2) the State did not act in bad faith when it destroyed the tape; and (3) defendant's assertions were insufficient to fulfill his burden of showing that the videotape contained apparent exculpatory evidence. The court further noted that "the Ohio Supreme Court on March 14, 2007 heard oral argument in *State v. Geeslin* decided by the 3rd Dist. No. 10-05-06, 2006-Ohio-1261. The Court follows *Geeslin* and as applied to the facts of this case DENIES the Motion."

As a result, Mr. Lupardus pleaded no contest to operating a vehicle while intoxicated, and the trial court found him guilty of that charge. Mr. Lupardus was fined and sentenced to 40 days in jail with 30 days suspended. The Fourth District Court of Appeals affirmed. *State v. Lupardus*, 4th Dist. No. 08CA31, 2008-Ohio-5960.

STATEMENT OF THE FACTS

On June 25, 2006, Ohio Highway Patrol Trooper Luke Forshey and Sergeant Todd McDonald stopped Mr. Lupardus for speeding. (Tr. 5.) When Trooper Forshey activated his lights to pull Mr. Lupardus over, the camera on the dash of his cruiser automatically started recording. (Tr. 6.) After he observed that Mr. Lupardus had glassy and bloodshot eyes, and that he smelled of alcohol, Trooper Forshey conducted a series of field sobriety tests and arrested Mr. Lupardus. (Tr. 7-13.) The camera recorded all of those events.

Near the end of his shift, Trooper Forshey removed the Lupardus video and viewed it while completing his report. (Tr. 13.) Consistent with department procedures, he then placed the tape into evidence at the Highway Patrol Post.

Mr. Lupardus requested a copy of the video tape. Approximately one month later, in compliance with Mr. Lupardus' discovery request, and at the direction of the prosecutor, Trooper Forshey attempted to make a copy of the video. (Tr. 24-25.) The Highway Patrol had recently purchased new equipment specifically to make it easier for the department to meet the increasing volume of requests for copies. (Tr. 32.) Due to his lack of familiarity with the machine, Trooper Forshey's superior, Sgt. McDonald, instructed a more experienced colleague, Trooper Smith, to make the copy and demonstrate for Trooper Forshey how to use the new equipment. (Tr. 32.) Trooper Smith showed Trooper Forshey how to make the copy and then left the room. (Tr. 36.) Unfortunately, Trooper Forshey reversed the necessary procedure, pressing the incorrect button or combination of buttons, and completely destroyed the video. (Tr. 36.)

INTRODUCTION

This case presents the issue whether, when the State destroys evidence after the defendant has requested it, the burden of proof should shift to the State to prove the evidence was inculpatory. This issue has evolved from the landmark United States Supreme Court case *Arizona v. Youngblood* (1988), 488 U.S. 51, that determined that the State violates a defendant's due process rights when it destroys materially exculpatory evidence, or, in bad faith, destroys potentially useful evidence. This issue is particularly compelling because, as observed by other courts, "proving that lost or destroyed evidence is materially exculpatory is a daunting burden[.]" *State v. Benton* (2000), 136 Ohio App.3d 801, 805, 737 N.E.2d 1046. Proving the value of something that one has never seen can be a practical impossibility, but is a legal reality facing many defendants. However, in this case, the State affirmatively imposed this impossibility upon Mr. Lupardus, and has been allowed to benefit from its own malfeasance by relying on the evidence to prepare reports to further its own case.

Trooper Forshey's account of Mr. Lupardus' alleged impairment provided the basis for the conviction. Trooper Forshey's cruiser automatically recorded the entire incident from the moment the lights came on, to the moment Mr. Lupardus was placed in the cruiser. He reviewed the recording when preparing the report that would eventually be used to convict Mr. Lupardus. Mr. Lupardus requested a copy of the tape to assist him in the preparation of his defense that he was not impaired, as further corroborated by his own testimony and another eye-witness who also testified at the hearing. After the request, the Trooper attempted to copy the tape, but instead, destroyed the only objective evidence that could have exonerated Mr. Lupardus. Despite Forshey's misconduct, the trial court forced Mr. Lupardus to prove what was on the destroyed tape and used Trooper Forshey's observations and testimony to convict Mr.

Lupardus. Requiring a defendant to prove that which only the State has seen and unilaterally destroyed creates a perverse incentive for the State to capitalize on its own deficiencies and cannot stand.

APPELLANT'S PROPOSITION OF LAW

If the State destroys evidence after the defendant has made a discovery request, the burden of proof shifts to the State to prove the evidence was not materially exculpatory. If the State fails to meet its burden, the case must be dismissed. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.

A criminal defendant must “be treated with that fundamental fairness essential to the very concept of justice.” *United States v. Valenzuela-Bernal* (1982), 458 U.S. 858, 872. Due process guarantees fundamental fairness in a criminal trial. *Lisenba v. California* (1941), 314 U.S. 219, 236. The State violated Mr. Lupardus’ due process right when it destroyed favorable evidence that was material to the issue of guilt.² Additionally, the trial court committed legal error when it applied the wrong burden of proof when it denied Mr. Lupardus’ motion to dismiss.

Police and prosecutors control the evidence used to prove guilt beyond a reasonable doubt. Therefore, due process requires the State to disclose favorable evidence that is material either to guilt or to punishment. *Brady v. Maryland* (1963), 373 U.S. 83, 87. Due process further compels the State to turn over materially exculpatory evidence with or without a defendant request. *United States v. Agurs* (1976), 427 U.S. 97, 112; *California v. Trombetta* (1984), 467 U.S. 479, 489; *Arizona v. Youngblood* (1988), 488 U.S. 51, 58. This Court has

²This Court recently determined that when the State complies with the defendant’s discovery request, a defendant has the burden of proving that the State provided false, incomplete, adulterated or spoliated evidence. *State v. Rivas*, 121 Ohio St.3d 469, 2009-Ohio-1354, 905 N.E.2d 618. *Rivas* is distinguishable because in that case the State initially complied with the discovery request. The issue was evidence *verification*. *Id.* at ¶12. Here, the State never complied with the discovery request because it destroyed the evidence.

embraced these two seminal statements of law in the area of purposely suppressed evidence. *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898.

“Evidence is materially exculpatory where: (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed, and (2) is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means.”³ *State v. Benton* (2000), 136 Ohio App.3d 801, 805, 737 N.E.2d 1046, citing *Trombetta*, 467 U.S. at 489. Furthermore, the State violates a defendant’s due process rights when it, in bad faith, destroys potentially useful evidence. *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, at ¶9, citing *Youngblood*, 488 U.S. at 58.

I. The State destroyed materially exculpatory evidence.

In order to determine whether evidence is materially exculpatory, the court must analyze whether the evidence possesses an exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. *Benton*, 136 Ohio App.3d at 805, citing *Trombetta*, 467 U.S. at 489. The trial court correctly ascertained that the evidence was unique and that Mr. Lupardus was unable to obtain comparable evidence. However, the court erred in determining that the evidence did not possess exculpatory value. When the United States Supreme Court initially differentiated between evidence that was materially exculpatory and evidence that was only potentially useful for purposes of a due process violation, it was in reference to a breath sample that, in order to have any value, required additional testing, and, even then, had a very low likelihood of being exculpatory. *Trombetta*, 467 U.S. at 489. Thus, the breath samples at issue in *Trombetta* were only potentially useful, rather than materially exculpatory. *Id.*

³ The State conceded the second element - the unique nature of the evidence impossible to recreate. Thus, it is not in dispute.

Contrast that to Mr. Lupardus' case, in which the evidence at issue was an unaltered videotape that a juror could view to objectively determine whether Mr. Lupardus appeared to be impaired. It obviously had significant value, as Trooper Forshey testified that he used it to help him prepare his report. (Tr. 13.) If Trooper Forshey found it useful, certainly Mr. Lupardus would have also. Mr. Lupardus testified that he performed well on the field sobriety tests. (Tr. 41-42.) Patricia Frank testified that Mr. Lupardus was not impaired. (Tr. 47-52.) The only thing to support Trooper Forshey's testimony was the videotape that he erased. Thus, the evidence was materially exculpatory.

A. *Determining materiality - Ohio appellate courts divide.*

The burden of proving the materially exculpatory value of evidence is usually placed on the defendant. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549. However, in certain limited circumstances, courts have shifted the burden to the State to prove that the evidence it destroyed was not exculpatory. *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 173, 522 N.E.2d 52; *Benton*, 136 Ohio App.3d at 805-07; *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693; *State v. Anderson*, 1st Dist. No. C-050382, 2006-Ohio-1568. Ohio appellate courts currently treat the burden of proving evidence as materially exculpatory in three different ways. Some implement a burden-shifting standard; others do not. Of those that employ a burden-shifting approach, some require that the State did not act in good faith while others ignore State motivations. Similarly, courts have shifted different burdens.

Courts have: (1) irrespective of the State's motives, shifted the burden to the State to prove the unobtainable evidence was not solely inculpatory, *Anderson* at ¶16; (2) required that the State did not act in good faith in failing to preserve the evidence, and then shifted the burden to the State to prove the unpreserved evidence was not materially exculpatory, *Benton*, 136 Ohio

App.3d at 805-07; *Benson* at ¶11; and (3) applied the *Trombetta* test, requiring the defendant to prove both the apparentness of exculpatory value before destruction or loss, and the inability to obtain comparable evidence through reasonable means, *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234.

B. *Burden Shifting is the Appropriate Standard.*

The *Anderson* court held that the State has the burden to demonstrate that the unpreserved evidence was not solely inculpatory once the defendant made a specific request to preserve the evidence in question. *Anderson* at ¶3. The specific request component must be addressed in this case.

1. *Mr. Lupardus' general request accompanied by the State's attempted compliance equals a specific request.*

The *Anderson* court held that the burden shift is proper when the “defendant specifically moves to have evidence preserved.” *Anderson* at ¶16. That language requires that the request specifically moves the State to preserve evidence. It does not suggest that the request moves the State to preserve a specific item of evidence. Accordingly, Mr. Lupardus’ general discovery request moved the State to preserve evidence relevant to his arrest and indictment.

More importantly, the State attempted to comply with Mr. Lupardus’ general request to preserve and produce evidence. In that attempt, Sgt. McDonald specifically directed Trooper Smith to preserve and produce the video of Mr. Lupardus’ stop. In fact, it was the failed attempt to preserve and produce that evidence that led to its destruction. Thus, the State interpreted the general request to include the videotape. This is the exact situation that occurred in *Benton*. The Sixth District Court of Appeals ruled that the specific request distinction was immaterial. *Benton*, 136 Ohio App.3d at 806. See also, *Geeslin* at ¶8. The defendant, through a general

discovery request, put “the state on notice that he wishe[d] to examine the evidence,” and had thus, “implicitly asked the state to preserve” the evidence until it was produced. *Id.*

This Court now has the opportunity to address the burden-shifting standards that could not be addressed in *Geeslin*. In *Geeslin*, this Court did not require a specific request to preserve the exact evidence, determining that the short time period in which the tape was destroyed made it impossible for the defendant to make any kind of request. As the State concedes, the “split among the appellate courts is in whether bad faith is necessary to shift the burden and what specific burden is shifted; not in what must be filed to trigger the burden-shifting method in the first place.” 1/28/09 Mem. In Resp. of Appellee at p. 5. Therefore, this Court should follow *Benton*, holding that a general request satisfies the specific request requirement.

2. Anderson correctly determined that bad faith is not required to shift the burden to the State.

Suppression of materially exculpatory evidence violates a defendant’s due process rights, irrespective of good faith or bad faith by the State. *Brady*, 373 U.S. at 87. The State’s failure in this case to provide materially exculpatory evidence because it was destroyed, after originally preserving that evidence, is the functional equivalent of suppression. Moreover, the State’s motive in destroying or losing materially exculpatory evidence is inconsequential to a defendant’s due process rights. *Anderson* at ¶21. Materially exculpatory evidence does not require the defendant to show “bad faith by the police or prosecution.” *Id.* In fact, “[B]ad faith only enters the equation when the evidence is potentially useful, not materially exculpatory.” *Id.*

This determination is consistent with *Brady*, 373 U.S. 83, and *Agurs*, 427 U.S. 97. There is no prerequisite culpable mental state in those holdings. They impose a strict liability standard on the state. When the State fails to provide materially exculpatory evidence to a defendant, it

has suppressed that evidence, violated *Brady* and *Agurs*, and is strictly liable for that violation. Therefore, the burden shifts to the State to prove the destroyed evidence was solely inculpatory.

C. *The State cannot demonstrate that the unpreserved Lupardus video is solely inculpatory.*

Applying the same analysis that makes the video in this case materially exculpatory under *Trombetta*, the State cannot demonstrate that the unpreserved videotape is solely inculpatory. In order to prove the video was solely inculpatory, the State would have to demonstrate that the video could only be interpreted to prove guilt. *Anderson* at ¶16. This is not possible under these facts. Reasonable minds can interpret the same piece of evidence in different ways. The varying interpretive possibilities give the unpreserved video potential to cast doubt on Mr. Lupardus' guilt. Additionally, as cited in *Anderson*, the destroyed tape is "the only possible objective evidence of the events on the night" that Lupardus was stopped. *Anderson* at ¶17. The tape is an objective, contemporaneous reflection of the field sobriety tests that were performed by Mr. Lupardus. Based on the testimony at the hearing, the State could not satisfy its burden of proving the tape was solely inculpatory.

D. *The trial court improperly placed the burden on Mr. Lupardus to prove that the destroyed evidence was materially exculpatory.*

Here, the State destroyed evidence that Mr. Lupardus had previously requested. The trial court erroneously placed the burden of proving the exculpatory value of the destroyed evidence on Mr. Lupardus. July 26, 2007 Decision and Entry Motion to Suppress/Dismiss at 3. ("Defendant's assertion concerning his performance of the field sobriety tests does no more than counter the officer's testimony concerning those same tests. His mere assertion that he passed the tests is *insufficient to fulfill his burden of showing the videotape contained apparent exculpatory evidence.*")(Emphasis added). Because Mr. Lupardus requested the video tape, and

the tape was nonetheless destroyed by the State, “the appropriate remedy is to shift the burden to the state to show that the evidence was not exculpatory.” *Forest*, 36 Ohio App.3d at 173.

Shifting the burden of proof to the State in these circumstances is a logical and just remedy because it would be limited only to those cases in which the State’s conduct reveals the exculpatory nature of evidence - here the State reviewed the tape to assist in its preparation of its case against Mr. Lupardus. See, *Youngblood*, 588 U.S. at 56 (observing that the State never attempted to use the destroyed evidence when finding no due process violation). The trial court’s refusal to shift the burden of proof to the State further compounded the due process violation against Mr. Lupardus.

E. *The trial court improperly applied Geeslin.*

The trial court noted that it was specifically following *Geeslin*, when it denied Mr. Lupardus’ Motion to Dismiss. July 26, 2007 Decision and Entry Motion to Suppress/Dismiss at 3. The court noted that this Court heard oral arguments on *Geeslin* on March 14, 2007. *Id.* On October 11, 2007, this Court issued its decision in *Geeslin*. In *Geeslin*, this Court observed that the evidence in *Geeslin* was only potentially useful, rather than materially exculpatory, because the portion of the videotape that was destroyed only showed the driving that took place prior to the defendant being stopped - the evidence “would not have been used for the purpose of establishing appellant’s guilt or innocence.” *Geeslin* at ¶12. Evidence of Mr. Geeslin’s performance on the field sobriety tests was preserved and provided to the defense. *Id.* This Court specifically observed, “This difference distinguishes this case from several decisions cited by the parties. In those cases, the defendants sought the missing or destroyed videotape evidence to challenge the *substance* of the allegations against them. See *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693; *State v. Durnwald*, 163 Ohio App.3d 361, 2005-

Ohio-4867, 837 N.E.2d 1234.” *Id.* at ¶13 (emphasis in original). In *Benson*, the court of appeals opined, “the tape would have provided the only possible objective view of the events on the night [the defendant] was stopped.” *Benson* at ¶12.

For Mr. Lupardus, the footage that was erased included Mr. Lupardus’ field sobriety tests. (MTD Tr. 7.) The officer even reviewed the footage in order to prepare his report - the report that would also be used to prosecute Mr. Lupardus. (Tr. 13.) Mr. Lupardus’ performance of the field sobriety tests goes directly to the issue of his impairment, i.e., the substance of the charge against him. See *State v. Hinson*, 8th Dist. No. 87132, 2006-Ohio-3831 (“The DUI videotape serves as a vital piece of evidence tending to show the condition of the allegedly impaired driver.”) The video in *Hinson* was direct evidence, as opposed to a videotape of an interview of a citizen not in custody. *Id.* Thus, according to *Geeslin*, this destroyed evidence in Mr. Lupardus’ case was materially exculpatory as it went directly to the substance of the allegations. The trial court erred holding otherwise.

II. In the alternative, the State acted in bad faith when it destroyed potentially useful evidence.

The trial court further erred when it determined that the State did not act in bad faith when it destroyed the videotape. According to the Mercer County Court of Appeals’ decision in *Geeslin*, the case Mr. Lupardus’ trial court - by its own admission - followed:

To be clear, bad faith in this context is not a matter *how* the police destroyed evidence, it is only a question of *when*. When examining bad faith in cases dealing with “potentially useful” evidence, a demonstration that the police failed to follow their own procedures may be sufficient to show they acted in bad faith. When determining who has the burden of proving whether evidence is materially exculpatory, the only way of proving bad faith is establishing that the evidence was destroyed after a specific request by the defendant to preserve the evidence in question.

State v. Geeslin, 3rd Dist. No. 10-05-06, 2006-Ohio-1261, at ¶18, fn 2.

Here, the defense requested the evidence on June 26, 2006. Almost an entire month went by before the State destroyed it on July 25, 2006. The State was aware that the defense wanted to view this specific evidence as it was the Law Director who requested the specific evidence from the State Highway Patrol and the defense had previously sought a continuance in order to view the videotape. (Tr. 25.) Sergeant McDonald ordered Trooper Smith (a more experienced officer), *not* the investigating officer, Trooper Forshey, to copy the video tape. (Tr. 32.) Despite this order, Trooper Smith did not copy the video. (Tr. 36.) He allowed Trooper Forshey to do so. *Id.* Rather than overseeing Forshey's efforts, Trooper Smith left the room because he assumed Trooper Forshey knew what he was doing. *Id.* Forshey testified that he was "completely unsure on what to do[,]” and erased the crucial footage that he had previously viewed. (Tr. 20.) Forshey even testified that once the tape began recording, he realized the screen was blank; however, he continued to let it record over the footage. *Id.* Thus, Forshey, who knew he would be called as a witness to defense against Mr. Lupardus' challenge to the propriety of the stop and field sobriety tests, was allowed to destroy the only direct evidence of his actions proceeding the arrest - even though Smith had been directed to do the copying.

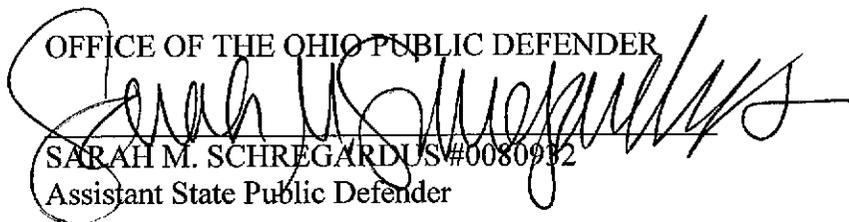
Trooper Forshey destroyed the *only* objective evidence that could contradict his testimony. In a similar case, an officer's "accidental erasure" was found to rise to the level of bad faith. *Durnwald* at ¶36 ("Although the trooper's actions in this case may not have been totally intentional, the video tape erasure was not an accident related to machine malfunction. Rather, the erasure occurred due to the trooper's complete and utter failure to safeguard evidence relevant to the crime and arrest."). It was the State's malfeasance or misfeasance, as opposed to nonfeasance, that resulted in a constitutional violation which warrants reversal. See, also, *State v. Williams*, 126 Ohio Misc.2d 47, 2003-Ohio-7294, 802 N.E.2d 195 at ¶20 ("Malfeasance or

misfeasance in this regard, (see [*State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693] and *Benton*) as opposed to nonfeasance (see *Trombetta*, *Youngblood* and [*State v. Lewis* (1990), 70 Ohio App.3d 624, 634-35, 591 N.E.2d 854]) undermines the fundamental fairness of the proceedings in violation of due process of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and analogous Section 16, Article I of the Ohio Constitution.”) Therefore, Trooper Forshey’s conduct rose to the level of bad faith and violated Mr. Lupardus’ due process rights by destroying potentially useful evidence.

CONCLUSION

Whether this Court determines that the burden should shift to the State to prove the solely inculpatory nature of the destroyed evidence or that the State destroyed the evidence in bad faith, the conclusion is the same: Mr. Lupardus’ due process rights were violated. This Court should reverse and remand for further proceedings.

Respectfully submitted,

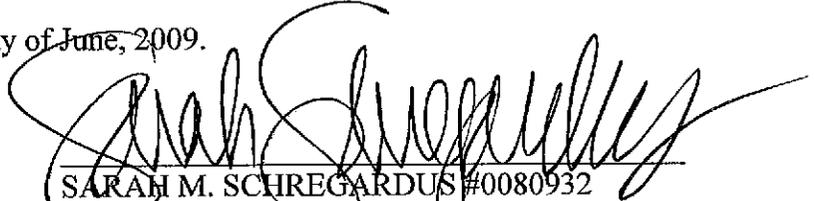
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COUNSEL FOR MICHAEL LUPARDUS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Merit Brief of Appellant Michael Lupardus** has been by regular U.S. mail to Mark Sleeper, Assistant Law Director, 301 Putnam Street, Marietta, Ohio 45750, on this 16th day of June, 2009.



SARAH M. SCHREGARDUS #0080932
Assistant State Public Defender

COUNSEL FOR DEFENDANT-APPELLANT
MICHAEL LUPARDUS

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2008-2487
Plaintiff-Appellee,	:	
	:	On Appeal from the Washington
vs.	:	County Court of Appeals
	:	Fourth Appellate District
MICHAEL LUPARDUS,	:	
	:	Case No. 08 CA 31
Defendant-Appellant.	:	

APPENDIX TO MERIT BRIEF OF APPELLANT MICHAEL LUPARDUS

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MICHAEL LUPARDUS,

Defendant-Appellant.

Case No. **08-2487**

On Appeal from the Washington
County Court of Appeals
Fourth Appellate District

Case No. 08 CA 31

**NOTICE OF APPEAL
OF DEFENDANT-APPELLANT MICHAEL LUPARDUS**

OFFICE OF THE OHIO PUBLIC DEFENDER

MARK C. SLEEPER # 0079692
Assistant Law Director
(COUNSEL OF RECORD)

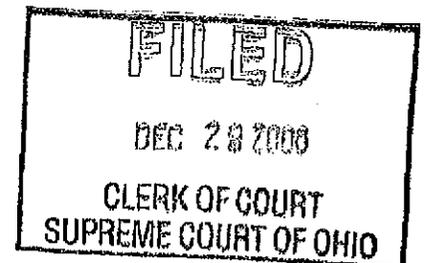
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sarah.schregardus@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLANT
MICHAEL LUPARDUS



NOTICE OF APPEAL OF DEFENDANT-APPELLANT MICHAEL LUPARDUS

Defendant-Appellant Michael Lupardus hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Washington County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 08 CA 31, on November 13, 2008.

This case raises a substantial constitutional question, and is of public or great general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

Sarah M. Schregardus by Kenneth
SARAH M. SCHREGARDUS #0080932 *R. Apicot,*
Assistant State Public Defender *0038804, per*
Counsel of Record *auth.*

8 East Long Street – 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
sarah.schregardus@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLANT
MICHAEL LUPARDUS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL OF APPELLANT MICHAEL LUPARDUS has been sent by regular U.S. mail to Mark Sleeper, Assistant Law Director, 301 Putnam Street, Marietta, Ohio 45750, on this 29th day of December, 2008.

Sarah M. Schregardus by *Kenneth R. Spitt, 0038804,*
SARAH M. SCHREGARDUS #0080930
Assistant State Public Defender *per auth.*

COUNSEL FOR DEFENDANT-APPELLANT
MICHAEL LUPARDUS

NOV 13 2003
COURT OF COURTS
WASHINGTON COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

State of Ohio,

Plaintiff-Appellee,

v.

Michael S. Lupardus,

Defendant-Appellant.

Case No. 08CA31

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

Timothy Young, Ohio Public Defender, and Sarah M. Schregardus, Assistant Ohio Public Defender, Columbus, Ohio, for appellant.

Roland W. Riggs III, Marietta Law Director, and Mark C. Sleeper, Assistant Marietta Law Director, Marietta, Ohio, for appellee.

Kline, J.:

{¶1} Michael S. Lupardus appeals from his operating a vehicle while under the influence ("OVI") conviction in the Marietta Municipal Court. On appeal, Lupardus contends that the trial court erred when it denied his motion to dismiss the charge against him because the State committed a *Brady* violation when it erased the dashboard videotape, which showed some or all of the field sobriety tests leading to his arrest. Because Lupardus failed to show that (1) the erased tape would have changed the outcome of the trial and/or (2) the State acted in bad faith, we disagree. Lupardus next contends that he was denied the effective assistance of counsel in the trial court because his counsel failed to move to preserve the evidence. Because Lupardus failed to show how this motion would have affected the outcome of the trial, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶12} A State Highway Trooper observed Lupardus driving above the speed limit on State Route 7. After his radar confirmed his observation, he then undertook a traffic stop of Lupardus. Upon approaching, the trooper noticed the smell of alcohol and that Lupardus' eyes were glassy and bloodshot. After questioning, Lupardus admitted to drinking eight beers two hours prior to the stop. The trooper conducted several field sobriety tests and administered a breath test, which read .114. The trooper then placed Lupardus under arrest and charged him with speeding and OVI.

{¶13} Lupardus entered a plea of not guilty and then filed a discovery request under Crim. R. 16. However, the State could not supply Lupardus with a copy of the dashboard videotape. The State indicated that the trooper tried to make a copy of the tape. However, the trooper accidentally destroyed the original by copying the blank DVD onto the tape.

{¶14} Lupardus then filed a motion to suppress and dismiss, based on the accidental destruction of the dashboard videotape, which showed some or all of the field sobriety tests. He argued that this amounted to a *Brady* violation. The trial court denied his motion, concluding that the video tape was in "no way exculpatory."

{¶15} Lupardus entered a no contest plea in exchange for the dismissal of the speeding offense. The court found him guilty of OVI in violation of R.C. 4511.19(A)(1)(a) and sentenced him accordingly.

{¶16} Lupardus appeals his OVI conviction and asserts the following two assignments of error: I. "The State violated Mr. Lupardus' due process rights when it

destroyed favorable evidence that was material to the issue of guilt.” And, II. “Mr. Lupardus was denied the effective assistance of counsel when counsel failed to file a motion to preserve evidence, and exculpatory evidence was subsequently destroyed.”

II.

{¶17} Lupardus contends in his first assignment of error that the trial court erred when it denied his motion to dismiss the charge against him.¹ He asserts that the State violated his due process rights when it erased the dashboard videotape, which showed (with sound) some or all of the field sobriety tests. He claims that this amounted to a *Brady* violation.

{¶18} “We review de novo a trial court’s decision involving a motion to dismiss on the ground that the state failed to preserve exculpatory evidence.” (Cites omitted.) *State v. Sneed*, Lawrence App. No. 06CA18, 2007-Ohio-853, ¶19.

{¶19} The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law[.]” To determine if a defendant’s alleged due process rights are violated, courts characterize lost or destroyed evidence as (1) “materially exculpatory” or (2) “potentially useful.” See, *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239. “The Due Process Clause protects a defendant from being convicted of a crime where the state has failed to preserve materially exculpatory evidence or has destroyed, in bad faith, potentially useful evidence.” (Cite omitted.) *Sneed* at ¶20.

A. “Materially Exculpatory” Analysis

¹ Lupardus does not argue that the trial court erred when it denied his alternative motion to suppress.

{¶10} "The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph four of the syllabus, following *Brady v. Maryland* (1963), 373 U.S. 83. The defendant has the burden of proving a *Brady* violation involving a denial of due process. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33.

{¶11} "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense." *Johnston*, supra, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667.

{¶12} Here, we cannot find that "the result of the proceeding would have been different." Even if the court had excluded the videotape evidence where Lupardus allegedly (1) performed poorly on the walk and turn and the one leg stand and (2) admitted that he earlier had eight beers to drink, the record still shows combined factors that supported finding him guilty of violating R.C. 4511.19(A)(1)(a). That is, Lupardus (1) was speeding; (2) had glassy and bloodshot eyes; (3) had a strong odor of alcohol coming from his mouth when he talked; (4) scored six out of six clues on the Horizontal

Gaze Nystagmus ("HGN") test; and (5) recorded .114 on the portable breath test and a .100 on the BAC.

{¶13} Therefore, we find that the erased tape was not "material either to guilt or to punishment."²

B. "Potentially Useful" Analysis

{¶14} "Unless a defendant can show that the state acted in bad faith, the state's failure to preserve potentially useful evidence does not violate a defendant's due process rights." *Geeslin*, supra, syllabus, following *Arizona v. Youngblood* (1988), 488 U.S. 51.

{¶15} Lupardus contends the State acted in bad faith and cites to cases showing that bad faith includes "gross negligence."

{¶16} Here, the trial court found that the State did not act in bad faith when it erased the videotape. Competent, credible evidence supports the trial court's finding. After Lupardus filed a discovery request, the trooper testified that he tried to copy the videotape onto a blank DVD by using new equipment for that very purpose. However, he stated that he accidentally destroyed the original videotape by reversing the process, i.e., he copied the blank DVD onto the videotape. Stated differently, the trooper pushed the wrong button.

{¶17} In addition, Lupardus (through his counsel) did not make a single argument at the motion hearing regarding the "bad faith" of the State. In fact, he made it clear to the trial court at that hearing that he was not contending that the State acted in bad faith.

² Lupardus does not argue that he would have received a lesser sentence based on the evidence contained in the videotape.

As such, Lupardus invited the court to find that the State did not act in bad faith. "A party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Bey* (1999), 85 Ohio St.3d 487, 493, citing *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus; *State v. Seiber* (1990), 56 Ohio St.3d 4, 17. This rule is generally referred to as the "invited error doctrine." *State v. Ellis*, Scioto App. No. 06CA3071, 2007-Ohio-2177, ¶ 27. Therefore, we find that Lupardus invited any alleged error of the court in concluding that the State did not act in bad faith when it erased the videotape.

{¶18} In addition, we note that the record does not show any evidence of this type of problem in the past. The trooper was new and never did this procedure before. He asked for help and another experienced trooper gave him directions on how to copy the videotape. He simply pushed the wrong button. We find that these actions do not reach "gross negligence" or "bad faith."

C. Burden of Proof

{¶19} Lupardus further contends that the trial court erred when it placed the burden of proof on him at the motion hearing. He asserts in his merit brief that *State v. Anderson*, Hamilton App. No. C-050382, 2006-Ohio-1568, places the burden on the State.

{¶20} Because Lupardus invited the court to find that the State did not act in bad faith when it erased the tape, we will only address this issue as it relates to our "materially exculpatory" analysis.

{¶21} As we stated earlier, the defendant bears the burden of proving that the lost or destroyed evidence was materially exculpatory. *Jackson*, supra, at 33. "However, some courts shift the burden of proof regarding the exculpatory value of the evidence where the defendant moves to have the evidence preserved and the state destroys the evidence." *Sneed*, supra, at ¶20, citing *State v. Benton* (2000), 136 Ohio App.3d 801, 805-806. See, also *State v. Benson*, 154 Ohio App.3d 495, 2003-Ohio-1944, ¶11; *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 173.

{¶22} In *Anderson*, supra, the court distinguished its prior holding in *State v. Acosta*, Hamilton App. No. C-020767-71, 2003-Ohio-6503. In *Acosta*, the court held that a general motion for discovery does not change the burden of proof. That is, it remains with the defendant. However, in *Anderson*, the defendant made a general discovery request, and "he also filed a separate motion to preserve 'any video or audio recordings at the station.'" The court held that "[t]his was a specific request for preservation of the evidence[.]" The *Anderson* court stated that its facts were similar to the facts in *Benson*.

{¶23} Here, we find that Lupardus' "REQUEST FOR DISCOVERY" was a general request. It stated, "Now comes * * * counsel of record, and respectfully requests discovery in the above captioned case pursuant to Criminal Rule 16." As such, the facts of this case are similar to *Acosta*, instead of *Anderson*, *Benton* ("specifically requested discovery of the tape"), *Benson* ("motion to preserve any audio-or videotape of the stop"), or *Forest* (motion to preserve "broadcast tapes"). Consequently, the trial court did not err when it placed the burden of proof on Lupardus.

D. Conclusion

{¶24} Therefore, for the above stated reasons, we find that the trial court did not err when it overruled Lupardus' motion to dismiss.

{¶25} Accordingly, we overrule Lupardus' first assignment of error.

III.

{¶26} Lupardus contends in his second assignment of error that he was denied his right to the effective assistance of counsel in the trial court. Specifically, he asserts that his counsel failed to file a motion to preserve evidence and exculpatory evidence was subsequently destroyed.

{¶27} "In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness." *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473, citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, cert. den. (1988), 488 U.S. 975; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * *" which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense* * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Absent both showings, "it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

{¶28} This court “when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action.” *Id.*, citing *State v. Phillips* (1995), 74 Ohio St.3d 72. Instead, this court “must be highly deferential.” *Id.*, citing *Strickland* at 689. Further, “a reviewing court: ‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.*, citing *Strickland* at 689.

{¶29} Here, Lupardus bases his ineffective assistance of counsel claim on the arguments he made in his first assignment of error. However, we found that he failed to show that (1) the outcome of the trial would have been different with the evidence (erased videotape) and/or (2) the State acted in bad faith. Further, even if the State had the burden of proof, our findings would not change. Therefore, under the second prong of the *Strickland* test, we find that Lupardus’ trial counsel’s performance did not affect the outcome of the trial. Consequently, Lupardus did not show that he had the ineffective assistance of counsel in the trial court.

{¶30} Accordingly, we overrule Lupardus’ second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

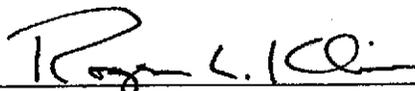
The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: 
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE MARIETTA MUNICIPAL COURT
WASHINGTON COUNTY, OHIO

FILED

2009 AUG 11 AM 9:18

STATE OF OHIO, : Case No. 06TRC 3378-1
vs. : JUDGMENT ENTRY IN OVI
MICHAEL LUPARDUS, : (NUNC PRO TUNC)

Defendant appeared in open Court with counsel and filed a waiver or withdrawal of Jury Demand in writing; and plead no contest of violating ORC 4511.19(A)(1)(a) - impaired. The State dismissed the OVI-per se charge and the speeding charge. Defendant and his attorney were afforded the opportunity to speak pursuant to Criminal Rule 32 (A)(1). Upon consideration of the criteria set forth in Section 2929.22 of the Ohio Revised Code; the following sentence is ORDERED:

- Fine: \$600 and Costs: \$242
- Jail: 40 days
- Credit: 0 days
- 0 days jail suspended for
0 days of EMHA
- 30 days suspended for
Assessment/Counseling
No New Offenses
- No jail suspended for
completion of 72 hour DIP
- Driving Suspension: 2 years
Suspension of all the Defendant's Ohio driving
Rights and privileges: Any occupational
Driving privileges granted under ALS are
Terminated.
- Credit: 1 year 57 days for pretrial suspension
- Vehicle Immobilization and Plate
Impoundment for 0 days
- Credit: 0 days for pretrial immobilization
- No order for Defendant's Vehicle Forfeited
- Ignition Interlock Required

Defendant (if unrepresented) was advised as to his right to appeal pursuant to Criminal Rule 33(B)(1)(2) of the Ohio Rules of Criminal Procedure

10 days (actual) jail shall commence sober at the Washington County Jail by 6:00 p.m. on 9-21-07 and continuing until _____ at checkout.

Upon consideration of the criteria set forth in Section 2951.02, the Court grants probation as to \$____ of the fine and 30 days of the jail sentence for a period of 1 year upon the follow terms and conditions:

Level 2

Date: _____


HONORABLE JANET DYAR WELCH

IN THE MARIETTA MUNICIPAL COURT
WASHINGTON COUNTY, OHIO

2007 JUL 26 PM 3:21

Marietta, Ohio

THE STATE OF OHIO,

Case No. 2006 TRC 3378

Plaintiff,

vs.

MICHAEL S. LUPARDUS,

DECISION AND ENTRY
MOTION TO
SUPPRESS/DISMISS

Defendant.

~~This matter came on for hearing November 9, 2006. Attorney Sleeper appeared~~
with Trooper Forshey and Trooper Smith. Attorney Landaker appeared with the
Defendant and his witness. Thereafter witnesses were sworn and evidence adduced. The
Court took the matter under advisement.

Based on the evidence presented the Court makes the following FINDINGS:

1. Tpr. Forshey made the decision to stop the vehicle driven by Defendant for a violation of §4511.21. This violation was not recorded on videotape.
2. The recording system in the cruiser is activated manually by the officer or automatically when the officer switches on the standard lights to initiate a traffic stop. In this case, the equipment was automatically activated with the emergency lights.
3. The recording system worked and made a videotape. The officer reviewed the videotape to assist him in preparing the Impaired Driver Report and his affidavit of facts submitted with the complaint filed in this Court.
4. Defendant through counsel entered a "not guilty" plea and demanded discovery pursuant to Criminal Rule 16.

I certify the foregoing to be a true
and correct copy of the original.
Carol L. McKittrick, Clerk
Marietta Municipal Court
Marietta, Ohio
Washington County

5. On July 25, 2006 at the request of the Law Director's office, the arresting officer attempted to make a copy of the videotape. The local post had new equipment that recorded the videotape onto a DVD rather than onto a VHS tape.

6. Trooper Forshey was not familiar with the new equipment so he asked Trooper John Smith to instruct him on the proper procedure. This was Tpr. Forshey's first effort to copy a videotape onto DVD.

7. At some point during the copying Trooper Smith noticed the monitor and realized that something was wrong. He stopped Tpr. Forshey's copying and learned that the officer unintentionally reversed the procedure and copied over the evidentiary videotape. Sgt. McDonald also testified concerning Post procedure and facts concerning the stop of Defendant.

8. The final result is that the entire tape was destroyed since Trooper Smith noticed the problem at the end of the tape.

9. The Defendant disputed Tpr. Forshey's testimony regarding the results of the walk and turn and one-leg stand tests.

10. Defendant's fiancé Patricia Frank testified that Defendant was not under the influence of alcohol. The Defendant's witness did not watch the field tests and can neither corroborate nor dispute the Defendant's testimony. The only problem she noticed in a quick observation was a problem related to the Defendant's knee.

11. The tape cannot be restored to its former condition. It is or was a unique piece of evidence not otherwise obtainable by other means.

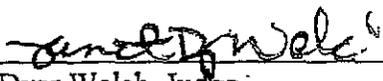
12. No motion to preserve the evidence has been filed but the Court's ruling is not dependent on whether such a motion has been filed.

13. The State in its efforts to comply with Defendant's request for discovery inadvertently destroyed the tape. The Court finds that the State did not act in bad faith.

14. Defendant's assertion concerning his performance of the field sobriety tests does no more than counter the officer's testimony concerning those same tests. His mere assertion that he passed the tests is insufficient to fulfill his burden of showing that the videotape contained apparent exculpatory evidence.

The Court has reviewed the case law submitted by the parties. The Court notes that the Ohio Supreme Court on March 14, 2007 heard oral argument in State v. Geeslin decided by the Mercer County Court of Appeals, 2006-Ohio-1261. The Court follows Geeslin and as applied to the facts of this case DENIES the Motion. Case ordered set for final pretrial and jury trial on Attorney Landaker's next available date.

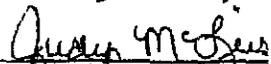
Date: July 26, 2007


Janet Dyar Welch, Judge

cc: Mark C. Sleeper
Shawna Landaker

I:\Decisions\Lupardus 2006TRC3378

I certify the foregoing to be a true and correct copy of the original.
Carol L. McKittrick, Clerk
Marietta Municipal Court
Marietta, Ohio
Washington County

By 

2: done

2007 SEP 17 11:11:47

IN THE MARIETTA MUNICIPAL COURT
WASHINGTON COUNTY, OHIO

State of Ohio

Case No. OS TRC 3378-1

vs.

JUDGMENT ENTRY IN OVI

Michael S. Lupardus

Defendant appeared in open Court with counsel and ~~with counsel~~ and filed a waiver or withdrawal of Jury Demand in writing; and plead no contest (~~guilty~~) of violating ORC 4511.19. Defendant and/or his attorney were afforded the opportunity to speak pursuant to Criminal Rule 32 (A)(1). Upon consideration of the criteria set forth in Section 2929.22 of the Ohio Revised Code; the following sentence is ORDERED:

600.00
242.00
842.00

Fine: 600 and costs

Driving Suspension: 2 year(s)/~~day~~
Suspension of all the Defendant's Ohio driving rights and privileges: Any occupational driving privileges granted under ALS are terminated.

Jail: 40 days

Credit _____ days for jail already served

Credit 14, 57 days for pretrial suspension

_____ days jail suspended for _____ days of EMHA

Vehicle Immobilization and Plate Impoundment for _____ days

30 days suspended for Assessment/Counseling

Credit _____ days for pretrial immobilization

No New Offenses

_____ Order Defendant's Vehicle Forfeited

_____ Suspend execution of 3 days jail for completion of 72 hour DiP

Ignition Interlock Required

Defendant (if unrepresented) was advised as to his right to appeal pursuant to Criminal Rule 33(B)(1)(2) of the Ohio Rules of Criminal procedure.

Actual

10 days jail shall commence sober at the Washington County Jail by 6:00 p.m. on 9-21-07 and continuing until _____ at checkout.

Upon consideration of the criteria set forth in Section 2951.02, the Court grants probation as to \$ _____ of the fine and 30 days of the jail sentence for a period of 145 upon the following terms and conditions:

_____ Level 1

Level 2

ENTER: 8-17-07

Carol L. McKittrick
JUDGE

I have read the above and hereby agree to abide by the conditions of my probation and understand that a violation of any one of these conditions may be considered sufficient cause to revoke my probation.

Dated: 8-17-07

Michael S. Lupardus
Probationer and correct copy of the original.

JOURNAL VOL. _____ PAGE _____
Probation Intake Done By: _____ A-18 _____

Carol L. McKittrick, Clerk
Marietta Municipal Court
Marietta, Ohio
Washington County/

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

*HISTORY: 1912 constitutional convention, am. eff. 1-1-13
1851 constitutional convention, adopted eff. 9-1-1851*

LEXSTAT ORC 4511.19

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH NOVEMBER 8, 2007 ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 ***

TITLE 45. MOTOR VEHICLES – AERONAUTICS – WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS – OPERATION OF MOTOR VEHICLES
DRIVING WHILE INTOXICATED

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ORC Ann. 4511.19 (2007)

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

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

- (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.
- (b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.
- (c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.
- (d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.
- (e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.
- (f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.
- (g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.
- (h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.
- (i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.
- (j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:
 - (i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or

blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

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

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

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

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

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

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

(viii) Either of the following applies:

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

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

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

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

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

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

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under *section*

4511.191 [4511.19.1] of the Revised Code, and being advised by the officer in accordance with section 4511.192 [4511.19.2] of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

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

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

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

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

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

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

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

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

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

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

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

ORC Ann. 4511.19

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

(4) (a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under 96 Stat. 2415 (1983), *49 U.S.C.A. 105*.

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

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

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

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

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

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

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

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

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

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

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding,

other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

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

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

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

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

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

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under *section 3793.10 of the Revised Code*. The court also may suspend the execution of any part of the three-day jail term under this division if it places the offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to *section 3793.10 of the Revised Code*. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

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

programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than two hundred fifty and not more than one thousand dollars;

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

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

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

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

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

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

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

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

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

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

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in *sections 2929.21 to 2929.28 of the Revised Code*, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in *sections 2929.21 to 2929.28 of the Revised Code*, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

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

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

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

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

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

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

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specifi-

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

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

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

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

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

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

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

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

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a commu-

nity control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

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

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

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

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

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

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

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

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

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring

shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HISTORY:

GC § 6307-19; 119 v 766, § 19; Bureau of Code Revision, 10-1-53; 125 v 461; 130 v 1083 (Eff 7-11-63); 132 v H 380 (Eff 1-1-68); 133 v H 874 (Eff 9-16-70); 134 v S 14 (Eff 12-3-71); 135 v H 995 (Eff 1-1-75); 139 v S 432 (Eff 3-16-83); 141 v S 262 (Eff 3-20-87); 143 v S 131 (Eff 7-25-90); 143 v H 837 (Eff 7-25-90); 145 v S 82 (Eff 5-4-94); 148 v S 22 (Eff 5-17-2000); 149 v S 163, § 1, Eff 4-9-2003; 149 v S 123, § 1, eff. 1-1-04; 149 v H 490, § 1, eff. 1-1-04; 149 v S 163, § 3, eff. 1-1-04; 150 v H 87, § 1, eff. 6-30-03; 150 v H 87, § 4, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 151 v S 8, § 1, eff. 8-17-06; 151 v H 461, § 1, eff. 4-4-07.