

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2009-1183
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
MARK A. FISHER	:	Court of Appeals Case Number C-0800497
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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TABLE OF CONTENTS

	<u>PAGE</u>
<u>EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION</u>	1
<u>STATEMENT OF THE CASE AND FACTS</u>	1
<u>ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW</u>	2
<u>Proposition of Law No. 1:</u>	
A motion to suppress is not a method of discovery.	2
<u>ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW</u>	3
<u>Proposition of Law No. 2:</u>	
The trial court has discretion to limit cross-examination.....	3
<u>CONCLUSION</u>	5
<u>PROOF OF SERVICE</u>	5

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

The First District Court of Appeals considered the assignment of error presented by Fisher below, and resolved the case according to the current state of the law. The Court held that a defendant does not have an unlimited right to confront and cross-examine witnesses, and that the trial court has discretion to decide the scope and extent of cross-examination.¹

This is not a case of great public or general interest, and it does not involve a constitutional question. It was resolved with the straightforward application of the law, and there are no grounds upon which this Court should retain jurisdiction.

STATEMENT OF THE CASE AND FACTS

On September 4, 2006, at approximately 11:45 a.m., Ohio State Trooper Christopher Krantz stopped Mark A. Fisher for driving 76 m.p.h. in a 55-m.p.h. zone. When Krantz approached Fisher's car, he smelled a strong odor of alcohol on Fisher and saw that he had slightly bloodshot eyes. Fisher took 15 to 20 seconds longer than the average person to produce his license for Krantz.

Krantz asked Fisher to exit his car, and Fisher complied. Fisher eventually admitted to drinking the night before. Krantz administered three field sobriety tests to Fisher, and he observed sufficient clues from the Horizontal Gaze Nystagmus, One-Leg-Stand, and Walk-and-Turn tests to arrest Fisher for OVI. At the police department, Fisher took the offered breath test, which showed his BAC was .135 grams of alcohol per 210 liters of breath.

Krantz charged Fisher with speeding, and two counts of OVI under R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(d).

¹ *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431; *State v. Faulkner* (1978), 56 Ohio St.2d 42, 381 N.E.2d 934.

Fisher's trial counsel filed a notice of appearance on September 29, 2006. On October 5, 2006, Fisher's counsel filed two motions to suppress, a jury demand, and a demand for discovery. The State responded to Fisher's request for discovery in November 2006. After a hearing on the motion in November 2007, the trial court denied Fisher's motions to suppress, and filed an entry explaining its decision.

In May 2008, a Hamilton County Jury convicted Fisher of the OVI charge under 4511.19(A)(1)(d). The court had previously found him guilty of the speeding charge.

The First District Court of Appeals affirmed the trial court's decision on May 15, 2009.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A motion to suppress is not a method of discovery.

The First District Court of Appeals upheld the trial court's ruling that Fisher should have obtained information which he sought at the motion to suppress through discovery measures prior to. In his memorandum in support of jurisdiction, Fisher still argues that the information he was seeking through cross-examination at the motion to suppress supported his "allegation that the health regulations may have been violated in some way." (Defendant's memorandum, p.7) But, Fisher should have known whether or not the regulations were violated before the hearing on his motion to suppress.

Fisher's counsel filed a motion to suppress at the same time that he filed a demand for discovery. The motion challenged every regulation promulgated by the Director of Health. Additionally, none of Fisher's allegations were supported by anything that actually occurred in his case.

Because Fisher's motion was specific enough to put the state on notice that he was challenging each and every OAC regulation, the court granted Fisher a hearing on his motion to

suppress.² But, since Fisher had filed a shotgun motion, the court held the state to a general burden of proving that it had substantially complied with the regulations. Then, the court shifted the burden back to Fisher. This comports with many Ohio decisions that require a defendant to have some factual basis for filing his motion.³

Here, Fisher not only filed a shotgun motion to suppress, he also made general assertions at the hearing and continues to make arguments based on what might be instead of what he knows from having performed diligent discovery. As the First District Court of Appeals stated in its decision, “absent some indication that the recalibration was defective in some way, information that Fisher could have obtained in discovery, he had no factual basis for inquiring about the calibration records. Therefore, they were irrelevant to the issues in this case.”⁴ The First District’s decision is in accord with the current state of the law of Ohio.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 2: The trial court has discretion to limit cross-examination.

The trial court reasonably limited the scope of his cross-examination, and Fisher failed to demonstrate to the First District Court of Appeals how the trial court’s decision was unreasonable, arbitrary, or unconscionable. He ignores this part of the First District’s decision in his memorandum in support of jurisdiction.

An appellate court will not reverse a trial court's decision to admit or exclude certain evidence, absent an abuse of discretion.⁵ An abuse of discretion is more than an error of law or

² *State v. Shindler* (1994), 70 Ohio St.3d 54, 636 N.E.2d 319; *City of Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, 524 N.E. 2d 889.

³ *State v. Burnside* (2003), 100 Ohio St.3d 152, 797 N.E.2d 71; *State v. Neuhoﬀ* (1997), 119 Ohio App.3d 501, 695 N.E.2d 825; *State v. Hensley* (1992), 75 Ohio App. 3d 822, 600 N.E. 2d 849; *City of Norwood v. Kahn*, 1st Dist. Nos. C-060497, C-060498, C-060499, 2007-Ohio-2799; *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324.

⁴ *State v. Fisher*, 1st Dist. No. C-080497, 2009-Ohio-2258, ¶23.

⁵ *State v. Hand* (2006), 107 Ohio St.3d 378, 840 N.E.2d 151, at ¶92.

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.⁶ Trial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, and interrogation that is only marginally relevant.⁷

At Fisher's motion to suppress hearing, Montgomery Police Officer Dennis Wells testified that he was a senior operator of the Intoxilyzer, and that he had performed the instrument check on the machine on the day of Fisher's test. Wells testified that the instrument check had complied with the Ohio Department of Health's approved procedure. Wells also testified that during the check, he had made sure that the results were within a particular range, and that when the Intoxilyzer had previously been out of range, he would "down the unit and send it back to CMI and have them recalibrate the unit."⁸

When Fisher asked about the records relating to when the machine was out of range, the State objected and the court sustained the objection.

On appeal, the First District held that further inquiry into these particular areas was irrelevant, absent some indication that the recalibration was defective in some way, which Fisher should have determined through discovery, and that the trial court did not abuse its discretion in so limiting the scope of Fisher's cross-examination. In his memorandum in support of jurisdiction, Fisher fails to show how the Court of Appeals erred in its decision or how the decision is not in accord with the current state of the law in Ohio.

⁶ *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

⁷ *Delaware v. Van Arsdall*, supra at 679, 106 S.Ct. 1431; *State v. Green* (1993), 66 Ohio St.3d 141, 147, 609 N.E.2d 1253, 1259.

⁸ *Fisher*, supra at ¶18.

CONCLUSION

For the reasons discussed above, this case was properly decided by the First District Court of Appeals. The Plaintiff-Appellee requests that jurisdiction be denied.

Respectfully,

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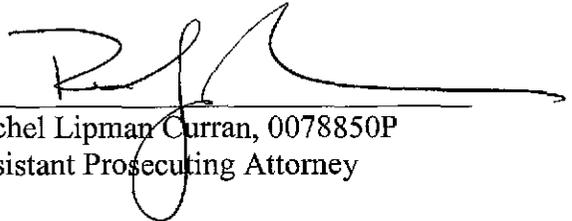
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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Robert H. Lyons, 8310 Princeton-Glendale Road, West Chester, Ohio 45069, counsel of record, this 28 day of July, 2009.



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