

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant

vs.

DANIEL ILG,

Defendant-Appellee.

CASE NO. 2013-1102

On Appeal From The Court of Appeals,
First Appellate District

Court of Appeals
Case No. C-120667

MERIT BRIEF OF *AMICUS CURIAE*
OHIO PROSECUTING ATTORNEY'S ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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INTRODUCTION 2

STATEMENT OF AMICUS INTEREST 3

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT 4

Proposition of Law: 5

I. A DEFENDANT CANNOT ATTACK THE GENERAL RELIABILITY OF BREATHALYZER MACHINES APPROVED BY THE DEPARTMENT OF HEALTH, WHEN IT HAS BEEN GRANTED SUCH POWER BY THE OHIO LEGISLATION 5

A. The legal concept of *stare decisis* has helped guide this court for over 150 years and its application here in favor of following *State v. Vega* and its progeny is paramount to the lifeblood of predictable jurisprudence in Ohio courts 5

B. R.C. 4511.19(D)(1)(b) is not a trap door to sneak past *Vega* or expand Crim. R. 16 8

C. An unreasonable burden would be placed upon the workhorse courts that deal with the OVI cases at the grass roots level, as the level of related cases are voluminous 10

CONCLUSION 12

CERTIFICATE OF SERVICE 12

INTRODUCTION

On July 25, 1854, this court emphasized its understanding of the value of the basic faith of mankind and his ability to rely on certain settled law. This court, in *Sheldon's Lessee v. Newton*, 3 Ohio St. 494 (1854), syllabus, stated "if ever an urgent case for the application of *stare decisis*, existed, this is one." Further, On June 16, 1858, Abraham Lincoln gave his "house divided" speech in hopes "that it may strike home to the minds of men in order to rouse them to the peril of the times." Both echo the importance of the issue at hand.

This case tests the established precedent regarding the ability of a defendant to attack the general reliability of breath tests in alcohol related offenses. Moreover, this case has far reaching consequences for many levels of law enforcement agencies within our state as the undue burden placed upon every grass roots court. Their "tip of the spear" fight against drunk driving would be hindered by overruling *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984) and would return Ohio's roads to the alcohol impaired. This cannot come to pass, as Ohio had an increase in fatalities of 24% between 2011 and 2012 and the danger to the public remains imminent. Upholding *Vega* and leaving in place the dictate that vests the Department of Health the authority of adoption of breath testing devices and the procedures for their use is critical for success.

Amicus Curiae Ohio Prosecuting Attorney's Association respectfully requests that this Court affirm its holding in *State v. Vega*, and uphold the long standing precedent defining the accepted methodology that one may use to question the presumptively reliable breath test results from machines like the Intoxilyzer 8000. One method is not an open attack on the general

reliability of an approved breath testing machine—either with COBRA data or any other means—when the machine is properly utilized by a trained user.

STATEMENT OF AMICUS INTEREST

The First District Court of Appeals decision in *State v. Ilg*, 1st Dist. No. C-120667, 2013-Ohio-2191, recently held that the discovery materials sought by defendant Ilg—COBRA database information of the Intoxilyzer 8000 used in the case—were relevant to the defendant's defense and failure to provide them amounted to a violation of his fundamental right to a fair trial. This decision was incorrect given the holdings of *State v. Vega*, *State v. Yoder*, and their progeny of cases along with the basic concept of *stare decisis*.

It should be decidedly affirmed by this Court in the best interest of stability through congruity of all Ohio's courts, that the state must only do what can only be reasonably deducted that it must do, by declaring that it does not have to defend the general reliability of the Department of Health approved breath testing machines. Many cases each year will make their way to the courts of common pleas from lower courts throughout the state, and hindering prosecution is at issue. In addition, the protection of the public cannot be overlooked as this issue comes to pass.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the Ohio Prosecuting Attorney's Association, fully adopts the Statement of Case and Facts as contained in the Appellant, City of Cincinnati's brief.

ARGUMENT

Amicus Curiae O.P.A.A. Proposition of Law: A DEFENDANT CANNOT ATTACK THE GENERAL RELIABILITY OF BREATHALYZER MACHINES APPROVED BY THE DEPARTMENT OF HEALTH, WHEN IT HAS BEEN GRANTED SUCH POWER BY THE OHIO LEGISLATION.

The interpretation of the 1st District's ruling is an expansion of *Vega* not accepted by any district in the State of Ohio. By rule, a defendant is afforded certain avenues from which to attack his specific test result. A defendant may "attack the reliability of a specific testing procedure and the qualifications of the operator," he "may not make a general attack upon the reliability and validity of the breath testing instrument." *Vega* at 189-90. This Court has consistently upheld and explained the distinction between permissibly attacking the reliability of a specific procedure or operator and impermissibly attacking the reliability and validity of the breath testing instrument. *See, e.g., State v. Tanner*, 15 Ohio St.3d 1, 6, 472 N.E.2d 689 (1984) ("The defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels.").

Here, Ilg was provided with the necessary documentation to do just that, his failure to receive documents not relevant did not prejudice him in his fight. He was afforded the opportunity to view the information, and cross-examine the operator of the machine in an attempt to discredit its results. However, his inability to perhaps achieve a successful attack through the normal course, does not somehow create a violation of his Due Process rights.

I. A DEFENDANT CANNOT ATTACK THE GENERAL RELIABILITY OF BREATHALYZER MACHINES APPROVED BY THE DEPARTMENT OF HEALTH, WHEN IT HAS BEEN GRANTED SUCH POWER BY THE OHIO LEGISLATION.

- A. The legal concept of *stare decisis* has helped guide this court for over 150 years and its application here in favor of following *State v. Vega* and its progeny is paramount to the lifeblood of predictable jurisprudence in Ohio courts.**

In *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), this Court held that R.C. 4511.19 replaced common law foundational evidence for the admissibility of BAC results by statute and legislatively determining that these results are reliable. This Court then upheld this result as applied to per se OVI offenses in *State v. Tanner*, 15 Ohio St.3d 1, 472 N.E.2d 689 (1984), syllabus.

Ohio appellate courts have consistently applied *Vega* in denying attacks on the general reliability of approved breath testing instruments. See, e.g., *State v. Fisher*, 1st Dist. No. C-080497, 2009-Ohio-2258, ¶ 27-28 (noting R.C. 4511.19 replaced common-law foundational requirements for admissibility); *State v. Massie*, 2d Dist. No. 2007 CA 24, 2008-Ohio-1312, ¶ 15-18, 36 (distinguishing unenforceable memorandum from promulgated regulation); *State v. Columer*, 3d Dist. No. 9-06-05, 2006-Ohio-5490, ¶ 12-16 (finding expert's proffered testimony was impermissible attack on general reliability of breath testing instrument); *State v. Davis*, 4th Dist. No. 03CA16, 2004-Ohio-1226, ¶ 24 (cannot challenge general reliability of machine); *State v. Birkhold*, 5th Dist. No. 01CA104, 2002-Ohio-2464 (April 22, 2002) (noting attack on accuracy and credibility of breath test devices in general is prohibited); *State v. Faykosh*, 6th Dist. No. L-01-1244, 2002-Ohio-6241, ¶ 33-34, 41 (noting court's long history of accepting chemical tests in drunk-driving cases); *City of Lakewood v. Horvath*, 8th Dist. No. 75135, (Nov.

4, 1999) (finding defendant's challenge of Director of Health's acceptance of Intoxilyzer 5000, '66' series, was an impermissible general attack); *State v. Schwarz*, 9th Dist. No. 02CA0042-M, 2003-Ohio-1294, ¶ 8-10 (lower courts bound by *stare decisis* to apply *Vega*); *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶ 9, 22-26 (reversing trial court's suppression of test results that was based on "gatekeeper" function); *State v. Davis*, 12th Dist. No. CA89-04-006, (Dec. 18, 1989) (restricting cross-examination directed at general reliability of breath testing equipment).

Regarding *Vega*'s application to the admissibility of BAC test results from the Intoxilyzer 8000, the Fourth and Twelfth Districts recently joined the Eleventh District in holding that *Vega*, prevents a defendant from making a general attack on the reliability and validity of this breath testing instrument. *State v. Reid*, 4th Dist. No. 12CA3, 2012-Ohio-562, ¶ 15; *State v. Dugan*, 12th Dist. No. CA2012-04-081, 2012-Ohio-447, ¶ 28; *State v. Johnson*, 11th Dist. No. 2012-P-0008, 2013-Ohio-440, ¶ 27, 34.

"The doctrine of *stare decisis* is a doctrine applying to future cases where the facts of a subsequent case are substantially the same as a former case." *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989). "Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled[.]" *Krause v. State*, 31 Ohio St.2d 132, 148, 285 N.E.2d 736 (1972), (Corrigan, J., concurring), overruled. "In light of the principle of *stare decisis*, we decline to ignore the precedent set down by the Supreme Court of Ohio." (Defendant was attacking the general reliability of the BAC Datamaster single tests.

State v. Schwarz, 9th Dist., No.02CA0042-M, 2003-Ohio-1294, Cert. denied, 99 Oh.St.3d 1468, ¶ 10.)

Further, in *State v. Harding*, 2d Dist, No. 20801, 2006-Ohio-481, ¶ 35, Cert denied 109 Ohio St. 3d 1497, the Appellate court in rejecting defendant's argument stated, "* * * the doctrine of *stare decisis* prevents us from declaring clear and unequivocal precedent handed down by the Ohio Supreme Court unconstitutional." Adding, "The doctrine of *stare decisis* is designed to provide continuity and predictability in our legal system. We adhere to *stare decisis* as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs. Id. at ¶ 36.

Vega and its progeny are relevant and decisive on the issue of the trial court's role in the admissibility of BAC results from a breath testing instrument. The state of Ohio does not have the burden of going forward in a hearing on a motion to suppress when there is a challenge to the general reliability of the Intoxilyzer 8000, a breath testing instrument approved by the Director of the Ohio Department of Health. When a defendant moves a trial court to suppress the results from an Intoxilyzer 8000, the state is not required to present evidence to establish the scientific reliability of the machine. A review of the record in this case demonstrates error with the Court of Appeals' decision affirming the trial court's suppression of Ilg's BAC test results. The trial court's decision suppressing the results of this test was error because it disregarded Ohio statutes and case law. If the First District's decision is allowed to stand, this Court's decision in *Vega* will be meaningless.

B. R.C. 4511.19(D)(1)(b) is not a trap door to sneak past *Vega*.

The General Assembly has also addressed the admissibility of breath test results. R.C. 4511.19(D)(1)(b) states, in relevant part:

In any criminal prosecution * * * for a violation of division (A) or (B) of this section * * * the court may admit evidence on the concentration of alcohol * * * in the defendant's * * * breath * * * or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance * * *

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 of the Revised Code.

While the State agrees that the trial court is a "gatekeeper," granted with the duty of controlling its scientific evidence, to expand this to the generally reliability of the Intoxolyzer 8000 is wholly unnecessary. *See, e.g., Miller v. Bike Ath. Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735. While the term "may" appears in the text of (D)(1)(b), as pointed out by the dissent in *State v. Lucarelli*, 11th Dist. No. 2012-P-0065, 2013-Ohio-1606, ¶ 41-58, it does not create an end around to the basic authority that has been granted to the Director of Health. Ohio has decided that the director has both the skill and knowledge to complete this task and courts should give deference. (There is no equal protection or due process violation since it is presumed that all breath testing instruments approved by the director of health to measure a person's breath alcohol concentration are valid, reliable, and accurate. *Vega* at 188, 190; *State v. Yoder*, 66 Ohio St. 3d 515, 613 N.E.2d 626 (1993).)

Consistently, Ohio courts have applied the correct application of R.C. 4511.19 in its cases and have over turned the incorrect rulings. Such suppression issues regarding the Intoxilyzer 8000 breath test results began in Portage County (11th District) on January 6, 2011, when a

Municipal Court suppressed breath test results from this device ignoring the deference due to the Director of Health and the Supreme Court's decision in *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984). *State v. Johnson*, Portage Cty. M.C. No. R2011 TRC 4090 (Jan. 6, 2011). Defense counsel in R.C. 4511.19(A)(1)(d), cases launched general attacks on the scientific reliability of the Intoxilyzer 8000 in motions to suppress test results from the device. These "Johnson challenge" motions argued the state had the burden of convincing the trial court of the scientific reliability of the Intoxilyzer 8000 as a threshold matter in these types of OVI cases. Two of the three municipal courts in Portage County enforced *Johnson* in 57 OVI cases and suppressed the breath test results in those cases. The state appealed the decisions.

Of the 58 cases appealed by the state, 56 opinions of the Eleventh District Court of Appeals have reversed the decisions of the trial courts suppressing the breath test results from the Intoxilyzer 8000 and remanded the cases under the authority of *Vega. Johnson*, 2013-Ohio-440 (Wright, J., dissenting), appeal not accepted, 135 Ohio St.3d 1470, 2013-Ohio-2512, 989 N.E.2d 70. (*State v. Charette*, 11th Dist. No. 2012-P-0045, 2012-Ohio-5937, was dismissed as untimely filed and *State v. O'Neill*, 11th Dist. No. 2012-P-0116, 2013-Ohio-2619, was affirmed on grounds unrelated to the *Johnson* challenge.)¹

While this is but one county's example, this court can see the vast number of cases that *Vega* affects and how important it is to affirm.

¹ Provided by Portage County Assistant Prosecutor, Pamela Holder.

C. An unreasonable burden would be placed upon the workhorse courts that deal with the OVI cases at the grass roots level, as the number of related cases is voluminous.

As of January 21, 2014, the OSHP had enforced 1,079 OVI violations. In 2012 there were 482 OVI related fatalities reported by the OSHP, up 16% from year before. OVI related crashes in 2012 totaled 12,168. There were 24,526 OVI arrests in 2012, up 3%. See Trooper Shield, 2012 Operational Report, OSHP.

The good news is that for the time period of 2001-2011, alcohol impaired driving fatalities per 100,000 of Ohio population decreased by 34.7%. (See The Century Council, with data from NHTSA/FARS, January, 2013.)

In *Virginia v. Harris*, 558 U.S. 978, 979-980, 130 S. Ct. 10, 175 L. Ed. 2d 322 (U.S. 2009), Chief Justice Roberts and Justice Scalia, of the United States Supreme Court, wrote about drunk driving in their dissent of a refusal to grant certiorari. They also cited cases which included other measures that lead to OVI convictions. They stated:

There is no question that drunk driving is a serious and potentially deadly crime, as our cases have repeatedly emphasized. See, e.g., *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion"). The imminence of the danger posed by drunk drivers exceeds that at issue in other types of cases. * * *. Drunk driving is always dangerous, as it is occurring. This Court has in fact recognized that the dangers posed by drunk drivers are unique, frequently upholding anti-drunk-

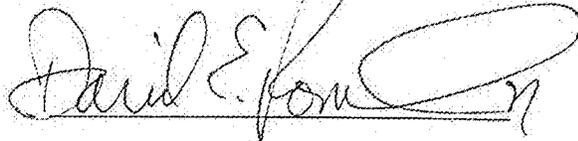
driving policies that might be constitutionally problematic in other, less exigent circumstances. See, e.g., *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (approving use of field-sobriety checkpoints of all approaching drivers, despite fact that over 98 percent of such drivers were innocent); *South Dakota v. Neville*, 459 U.S. 553, 554, 560, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (upholding state law allowing a defendant's refusal to take a blood-alcohol test to be introduced as evidence against him at trial); *Mackey v. Montrym*, 443 U.S. 1, 17-19, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (upholding state law requiring mandatory suspension of a driver's license upon a drunk-driving suspect's refusal to submit to a breath-analysis test); see also *Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (noting that in the Fourth Amendment context the Court has upheld government measures "aimed at removing drunk drivers from the road," distinguishing such measures from those with the primary purpose of "detect[ing] evidence of ordinary criminal wrongdoing").

The numerous arrests anticipated this year must go through the courts of smaller, limited jurisdiction to start the legal process. As such, any burdens placed upon the lower court—including potential costs for defending each breath test machine used—is unnecessary given the law in Ohio. Costs can come in the form of time or money, neither of which are in abundance at the lower grass roots levels. The law must remain unchanged in order for the same judicial economy to continue and for the fight against drunk driving to remain a constant force.

CONCLUSION

The O.P.A.A. asks this Court to decidedly restate that the law of *State v. Vega* and the protocols of the Director of Health are upheld throughout the State of Ohio.

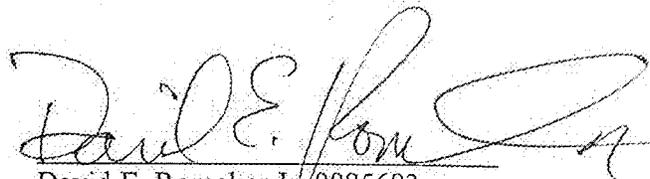
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PROOF OF SERVICE

I hereby certify that on this 12th day of June, 2012, I have sent a copy of the foregoing Merit Brief of Amicus Ohio Prosecuting Attorney's Association, by regular United States mail, addressed to the following: JENNIFER BISHOP, Asst. Pros. City of Cincinnati, 801 Plum St., Ste. 226, Cincinnati, OH 45202; MARGUERITE SLAGE, The Law Office of Steven R. Adams 8 W. Ninth St., Cincinnati, OH 45202.



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