

ORIGINAL

NO. 2014-1295

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR ASHTABULA COUNTY, OHIO  
NO. 2013-A-0020

STATE OF OHIO

Plaintiff-Appellant

-vs-

MICHAEL D. BAKER

Defendant-Appellee

**MEMORANDUM OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION  
IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT PUBLIC INTEREST**

This Court has addressed the collection and handling of blood and urine samples in *State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902, 22 O.B.R. 461 (1986) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71 and *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216. The administrative rules governing the collection of blood are found in OAC 3701-53-05. At issue in this case is the requirement that blood specimens be refrigerated while not in transit or under examination. OAC 3701-53-05(F).

In the case below, the blood specimen remained unrefrigerated for approximately four hours and ten minutes before it was mailed to a laboratory for testing. In *Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902, this Court concluded that up to a five hour window, where a urine samples went without refrigeration did not render the test results inadmissible and held that absent a showing of prejudice, the results were admissible. Despite *Plummer* and numerous intermediate appellate court decisions which have found substantial compliance despite various deviations from the refrigeration requirement, the Eleventh District's highly fractured opinion requires either strict compliance or expert testimony to prove reliability. This holding is inconsistent with precedent and creates an entirely unworkable standard.

The decision in *State v. Baker*, 11<sup>th</sup> Dist. Ashtabula No. 2013-A0020, 2014-Ohio-2873, demonstrates confusion on the viability of *Plummer* in light of *Burnside*, 100 Ohio St.3d 152, where three of the five judges of the Eleventh Appellate District provided three different opinions on how to treat the approximate four hour period of time in which defendant Baker's blood sample remained unrefrigerated prior to its mailing. Troubling in

*Baker* is that it undermines any notion that non-compliance with the refrigeration requirement can be *de minimis*. Instead the lead opinion holds that prosecutors must always demonstrate the reliability of any blood alcohol test while the concurring opinion holding that the non-compliance with the refrigeration requirements mandates exclusion of the blood alcohol test.

Uniformity and resolution of any confusion must be resolved because any rule of law reached by this Court would go beyond the mere admissibility and exclusion of evidence. Placing an additional requirement that any deviation from OAC 3701-53-05(F), that the state introduce evidence of reliability to admit the blood samples increases the burden placed on the state at the preliminary stage of prosecution. Any decision could also impact how law enforcement officers are trained statewide in the handling of blood and urine samples.

Amicus Curiae in support of Appellant-State of Ohio urges reversal of *State v. Baker*, 11<sup>th</sup> Dist. Ashtabula No. 2013-A0020, 2014-Ohio-2873 and would ask this Court to accept review in this case.

#### **STATE OF AMICUS INTEREST**

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus brief in support of the State of Ohio’s memorandum in support of jurisdiction regarding substantial compliance in OVI cases.

The OPAA is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: “To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to

provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing educations of its members.”

The effective prosecution of intoxicated drivers is a matter of great importance to prosecutors throughout Ohio. This goal is frequently accomplished by the admission of blood alcohol tests. The decision of the Eleventh District Court of Appeals misconstrued this Court’s precedent, is in conflict with decisions from other courts throughout the state, and weakens cases against drunk drivers. Prosecutors need uniformity in order to combat this often deadly epidemic. Therefore, the OPAA respectfully joins the State in its request for jurisdiction.

#### **STATEMENT OF THE CASE AND FACTS**

Amicus adopts by reference the statement of case and statement of facts contained in the State of Ohio’s memorandum in support of jurisdiction.

The OPAA highlights the fractured opinion set forth in *Baker*, 11<sup>th</sup> Dist. Ashtabula No. 2013-A0020, 2014-Ohio-2873 to demonstrate the need for review. The lead opinion agreed with the exclusion of the blood test results on the basis that the prosecution did not establish that the results were *reliable*. The lead opinion indicated that the prosecution need not establish a foundation only where there is compliance with the regulation. The lead jurist opined that this analysis was completely consistent with this Court’s decision in *Burnside*. *Baker*, ¶14, 16-18 (Cannon, J.) Absent from the analysis was a discussion of *Plummer*. This opinion suggests that substantial compliance is reached through evidence of reliability rather than any determination of whether deviations were de minimis.

The concurring opinion recognized this Court's decision in *Plummer* and opined that the focus of the analysis should not be on whether the blood results were *reliable* but whether the deviation from the refrigeration requirement was *de minimis*. Without expansive analysis, the concurring judge agreed with the trial court that the violation was not *de minimis* and agreed that the evidence be excluded. *Baker*, ¶¶39-42 (O'Toole, J., concurring in judgment with separate opinion).

The dissent relied upon the Eleventh District's prior decision in *State v. Price*, 11<sup>th</sup> Dist. Geauga No. 2007-G-2785, 2008-Ohio-1134, for the proposition that a delay of four hours constitutes substantial compliance and that the analysis should end there with Baker's blood test deemed admissible. *Baker*, ¶54 (Grendell, J., dissenting).

It must also be noted that this is not a case where the blood sample remained unrefrigerated at all times. Testimony provided at the hearing, that in typical course, once specimens are received by the lab they are stored in a pre log-in secure refrigerator and that the specimens remain refrigerated unless they are in transit or being tested.

### **LAW AND ARGUMENT**

In support of Appellant-State of Ohio's proposition of law, amicus curiae submits to this Court:

**AMICUS CURIAE'S PROPOSITION OF LAW: IN ORDER TO SUBSTANTIALLY COMPLY WITH OHIO ADM. CODE 3701-53-05(F), THE STATE DOES NOT NEED TO ESTABLISH RELIABILITY OF THE BLOOD OR URINE SAMPLE. NON-COMPLIANCE WITH OHIO ADM. CODE 3701-53-05(F) MAY BE DE MINIMIS AND ADMISSIBLE ABSENT A SHOWING OF PREJUDICE TO THE DEFENDANT.**

#### ***I. Summary of Argument***

**"[W]e are cognizant that if 'we were to agree \*\*\* that any deviation whatsoever from th[e] regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not**

**always realistically or humanly possible.”** *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶49 citing *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986).

For over thirty years this Court has maintained that “rigid compliance with Department of Health regulations in regard to alcohol testing was not necessary in order for test results to be admissible.” *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986) citing *State v. Steele*, 52 Ohio St.2d 187, 370 N.E.2d 740 (1977). The Eleventh District Court of Appeals has upended this longstanding principle by refusing to consider the *de minimis* nature of the error that occurred in this case. *State v. Baker*, 11<sup>th</sup> Dist. Ashtabula No. 2013-A-0020, 2014-Ohio-2873, ¶22. While the reasons for this conclusion will be discussed in greater detail below, it is apparent that there was a great deal of confusion in the Eleventh District as evidenced by the highly fractured opinion. This Court’s guidance is necessary to ensure consistent and reliable prosecution of intoxicated drivers. Uniformity benefits the courts, practitioners, and the citizens of Ohio. Therefore, this Court should grant jurisdiction and review this important issue of public interest.

**II. Baker’s blood test was deemed inadmissible because of an error in compliance with Ohio Adm. Code 3701-53-05. Because his blood sample was legally obtained, the exclusionary rule does not apply.**

At the outset, it bears noting that neither the United States nor Ohio constitutions were violated in the seizure of Baker’s blood sample. *Baker*, 2014-Ohio-2873 (O’Toole, concurring) at ¶28. Therefore, the exclusionary rule does not apply. *State v. Jones*, 121 Ohio St.3d 103, 902 N.E.2d 464, 2009-Ohio-316; *State v. French*, 72 Ohio St.3d 446, 450, 650 N.E.2d 887 (1995) (“[m]oreover, challenges to the admissibility of chemical test results on the basis of noncompliance with Department of Health regulations do not present a question of constitutional magnitude.”). In *Jones*, this Court found that “[t]he United States

Supreme Court's decision in [*Virginia v. Moore*, [553 U.S. 164, 128 S.Ct. 1598 (2008)],...removed any room for finding that a violation of a state statute...in and of itself, could give rise to a Fourth Amendment violation and result in the suppression of evidence." *Id.* at ¶15.

The trial court suppressed Baker's blood sample, finding that the failure to refrigerate the sample for a little over four hours was not a *de minimis* shortcoming. *Baker*, 2014-Ohio-2873 at ¶7. The lead opinion in *Baker* found that "reliability" was the touchstone issue and held that the state failed to meet its burden. *Id.* at ¶15-16, 18-20. The concurring opinion in *Baker* found that the failure to comply with Ohio Adm. Code 3701-53-05 rendered his sample inadmissible. *Id.* at ¶39, 42. Neither of the reversing judges found a constitutional violation.

In *State v. French*, 72 Ohio St.3d 446, 650 N.E.2d 887 (1995), this Court found that the proper method for challenging noncompliance with statutory and Ohio Department of Health regulations is through a pretrial motion to suppress. In doing so, this Court noted that "a subtle distinction exists between the exclusionary rule, which is relied upon when evidence is improperly seized, and the Rules of Evidence, which generally apply to procedural questions concerning the admissibility of evidence at trial." *Id.* at 450. This context is important because it provides additional support for the substantial compliance standard previously announced by this Court and its application to inconsequential errors.

**II. This Court should clarify its decisions in *Plummer*, *Burnside*, and *Mayl*. The lower court's decision reflects confusion over the interpretation and application of substantial compliance with regards to blood alcohol testing.**

Each judge of the lower court issued an opinion and each opinion applied a different analysis to the question that was presented. It appears that this was the result of confusion

over this Court's precedent in *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986), *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, and *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216.

In *Plummer*, the defendant was transported to the hospital after being involved in one car accident. A State Highway Patrol trooper responded to the hospital where he observed physical signs consistent with intoxication. The trooper collected a urine sample from the defendant which he mailed to a crime lab approximately an hour and twenty-five minutes later. The urine sample was not refrigerated during that time and may not have been refrigerated when received at the lab. Applying *State v. Steele*, 52 Ohio St.2d 187, 370 N.E.2d 740 (1977), this Court found that the state substantially complied with the administrative regulation and agreed with the lower court's reasoning "that the storage temperature requirement of Ohio Adm. Code 3701-53-05 contemplates cases involving longer periods of specimen retention, rather than a relatively slight delay between receipt and testing as in this case." *Plummer* at 295.

The *Plummer* Court additionally found that the defendant neither alleged nor demonstrated prejudice as a result of the noncompliance. In fact, this Court noted that "the alleged failure to keep appellant's urine sample refrigerated may have benefited rather than harmed him." *Id.* at Footnote 2 citing Porter, *The Impact of Chemical Test for Intoxication (Senate Bill 432) Considered, The New Ohio Drunk Driving Laws (1983)*, at 159; *Columbus v. Kilts*, 10<sup>th</sup> Dist. Franklin App. Nos. 81AP-222 & 223 (Sept. 15, 1981).

The *Plummer* substantial compliance standard was revisited in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. The certified question was whether the state satisfies substantial compliance when there is no evidence that a solid anticoagulant

was used as required by the administrative code. In reviewing applicable law, this Court was concerned that the two methods for review (reliability vs. prejudice) “often requires judges to speculate why the Director of Health adopted a given regulation.” *Burnside* at ¶29. In doing so, the *Burnside* court noted that “a judicial determination that an alcohol test, although not administered in strict compliance with the alcohol-testing regulations, is reliable and therefore admissible may subvert the rule-making authority and the statutory mandate of the Director of Health.” *Id.* at ¶32.

Even after the above analysis, substantial compliance was retained as the standard to judge the state’s actions. *Id.* at ¶34. However, *Burnside*’s conviction was ultimately reversed because the state failed to use a solid anticoagulant for the blood sample. This Court decided it was unnecessary to consider prejudice because of the lack of substantial compliance and found that reliability was more appropriately addressed by the Director of Health. *Id.* at ¶36-37. Although *Plummer* and *Burnside* both discussed substantial compliance, the opinions vary significantly in their analysis. For example, the *Burnside* court refused to find the noncompliance *de minimis*, noting that the administrative code used the word “shall” with respect to the use of a solid anticoagulant. But the administrative code also uses the word “shall” with respect to refrigerating the sample and this Court affirmed despite noncompliance in *Plummer*.

Any confusion after *Burnside* was likely compounded by this Court’s decision in *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216. Mayl hit and killed a woman with his vehicle. As part of his emergency care, the hospital performed a blood test which indicated that Mayl was intoxicated. A second blood test was later performed by request of law enforcement. This Court was asked to review several issues regarding the

admissibility of Mayl's blood test. As it is relevant here, this Court, citing *Plummer*, found substantial compliance despite the lack of refrigeration of the blood sample. *Id.* at ¶50.

This Court has consistently only required substantial compliance. The lead opinion of the lower court instead demands that the state establish reliability despite the fact this Court has twice found substantial compliance despite deviation from the refrigeration requirement. The concurring judge would have held Baker's blood sample wholly inadmissible because of the noncompliance, but that position is contrary to a substantial compliance analysis. Much of this confusion comes from this Court's holding in *Burnside*. Although the violation in *Burnside* was of a different nature, at least one of the judges below read *Burnside* to require suppression for any deviation from the administrative requirements.

The Eleventh District has expressed significant confusion over the appropriate standard of review for the admissibility of blood samples. This confusion and misapplication of precedent will make it unnecessarily difficult to prosecute these important cases. The state will be held to a burden of strict compliance which is "not always realistically or humanly possible." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶49 citing *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986). Defendants, prosecutors, and lower courts need a standard of review that is applied consistently throughout the state. This Court's clarification is necessary to combat this pervasive problem.

### **III. Failure to refrigerate Baker's blood sample for four hours and ten minutes prior to mailing is a *de minimis* deviation from the administrative code.**

Suppression was unwarranted in this case because the noncompliance was trivial. Baker was involved in a fatal crash. He consented to a blood sample which was drawn in

compliance with the administrative code at approximately 1:50 am. The Ohio State Highway Patrol trooper maintained custody of the sample until it was mailed at 6:00am. There was a period of approximately 4 hours and 10 minutes where Baker's blood sample was not refrigerated. Again it must be noted that this is not a case where the specimen remained unrefrigerated at all times. Testimony from a witness explained the refrigeration procedure once the specimen was received by Ohio State Highway Patrol Crime Lab.

This Court and other appellate courts have found substantial compliance where there was deviation from the refrigeration requirement. As previously discussed, this Court has found substantial compliance where samples were not refrigerated for a period of five hours. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216; *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986). Other courts have affirmed shorter and longer periods of time. See *State v. Schneider*, 1<sup>st</sup> Dist. Hamilton No. C-120786, 2013-Ohio-4789 (19 hours); *State v. Curtis*, 10<sup>th</sup> Dist. Franklin No. 09AP-1199, 2011-Ohio-3298 (4 hours); *State v. Rauscher*, 3<sup>rd</sup> Dist. Marion No. 9-06-42, 2007-Ohio-3339 (2 hours 10 min); *Village of Gates Mills v. Wazbinski*, 8<sup>th</sup> Dist. Cuyahoga No. 81863, 2003-Ohio-5919 (3 hours); *State v. Schell*, 5<sup>th</sup> Dist. Stark No. CA-7884, 1990 WL 83992 (June 18, 1990) (5 hours). *But see State v. Mullins*, 4<sup>th</sup> Dist. Ross No. 12CA3350, 2013-Ohio-2688 (finding 12 hours lack of refrigeration was not *de minimis*); *State v. DeJohn*, 5<sup>th</sup> Dist. Perry No. 06-CA-16, 2007-Ohio-163 (finding 17 hour lack of refrigeration was not minor).

As the First District noted in *Schneider*, the period of non-refrigeration while the sample is "in transit" can encompass a period of days. It is difficult to see how an additional four hours would be a substantial deviation from the rule. There are any number of reasons why it might be necessary to have a slight deviation from the administrative code.

Substantial compliance must be broad enough to encompass minor violations like the one that occurred here.

Because the error in this case was clearly *de minimis*, this Court should grant jurisdiction and reverse the holding of the Eleventh District.

**CONCLUSION**

Amicus Curiae Ohio Prosecuting Attorneys Association respectfully urge this Court to accept jurisdiction over this important issue of great public interest. Intoxicated driving is a deadly and widespread problem. Effective and consistent prosecution is necessary to keep the citizens of Ohio safe. For these reasons, Amicus Curiae asks that this Court accept jurisdiction of this case, adopt its Proposition of Law, and reverse the decision of the appellate court which requires more than substantial compliance with Ohio Adm. Code 3701-53-05.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Amicus Curiae Ohio Prosecuting Attorneys Association Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 14th day of August 2014 to:

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