

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO</b>	)	<b>SUPREME COURT CASE</b>
	)	<b>NO. 2015-0600</b>
<b>Plaintiff-Appellee,</b>	)	
	)	
<b>vs.</b>	)	<b>ON APPEAL FROM THE</b>
	)	<b>COURT OF APPEALS,</b>
<b>WILFREDO OSORIO,</b>	)	<b>NINTH APPELLATE</b>
	)	<b>DISTRICT 13CA010355</b>
<b>Defendant-Appellant.</b>	)	
	)	
	)	

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**MEMORANDUM OF APPELLEE IN  
OPPOSITION TO JURISDICTION**

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COUNSELS FOR APPELLEE

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**TABLE OF CONTENTS**

Explanation of Why This Case Does Not Involve A Substantial Constitutional Question  
And Is Not A Case Of Public Or Great General Interest.....1

Statement of the Case.....2

Statement of Facts.....2

LAW & ARGUMENT.....5

RESPONSE TO APPELLANT’S PROPOSITIONS OF LAW

I. THE GUILTY VERDICTS ARE AGAINST THE SUFFICIENCY OF THE  
EVIDENCE IN VIOLATION OF MR. OSORIO’S RIGHTS UNDER THE  
FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED  
STATES CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO  
STATE CONSTITUTION..... 5

II. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT MR. OSORIO WAS  
EITHER UNDER AN ACTIVE SUSPENSION, OR WAS DRIVING WITHOUT  
A VALID LICENSE WHICH COULD NOT BE RENEWED WITHOUT  
EXAMINATION AND, AND [SIC] MR. OSORIO IS ONLY GUILTY OF A  
MISDEMEANOR VEHICULAR HOMICIDE..... 7

Conclusion .....9

Certificate of Service .....9

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

This Honorable Court should not accept jurisdiction for the reasons set forth herein. The decision of the Ninth District Court of Appeals properly affirmed Osorio's convictions for Vehicular Homicide in violation of R.C. 2903.06(A)(3)(a), a felony of the fourth degree, and Operating a Motor Vehicle Under the Influence of Alcohol in violation of R.C. 4511.19(A)(1)(b), a misdemeanor of the first degree based on existing case law.

No issue or substantial constitutional question exists in Osorio's appeal to this Honorable Court. The attempted appeal further presents no viable question of general public interest that warrants the exercise of this Court's jurisdiction.

## **STATEMENT OF THE CASE**

Wilfredo Osorio was convicted of: Vehicular Homicide in violation of R.C. 2903.06(A)(3)(a), a felony of the second degree; Operating a Vehicle While Under the Influence of Alcohol in violation of R.C. 4511.19(A)(1)(b), a misdemeanor of the first degree; and Operating a Motor Vehicle Without a Valid License in violation of R.C. 4510.12(A)(1), a misdemeanor of the fourth degree. Osorio was sentenced to three years in prison.

Osorio filed notice of appeal to the Ninth District Court of Appeals. Appellee, the State Of Ohio, hereby responds.

## **STATEMENT OF FACTS**

Wilfredo Osorio spent the afternoon of December 5, 2010, at his parent's house with his girlfriend, Rachel Frahm. Osorio and Rachel had been drinking that afternoon. After Osorio had been drinking at his dad's house, he got in the car with Frahm and his children. Osorio decided to drive because he felt he was less intoxicated than Frahm.

Osorio dropped his children off and he and Frahm headed for home in Sullivan, Ohio. Meanwhile, Ohio State Highway Patrol Trooper Shawn Kline was working in the Amherst area near State Route 58 and Middle Ridge Road, in Amherst, Ohio. While in that area, Trooper Kline received a dispatch of an injury accident on Middle Ridge Road in Lorain County, Ohio, that occurred at 7:30 p.m.

When Trooper Kline arrived on the scene, the driver, Wilfredo Osorio, Jr., was in the ambulance being treated and the victim, Rachel Frahm, was still in the wrecked car. The car was still in the yard and had not been moved from the point of final rest. Trooper Kline could see that the car struck a pole and a tree. Damage to the right rear quarter panel and the tire matched the

indentation where the car struck the utility pole. There was damage to the side of the car and paint chips on the tree matched damage to the car.

Trooper Kline spoke briefly to Osorio as Osorio was being treated in the ambulance. Trooper Kline could smell a slight odor of alcohol on Osorio. Trooper Kline only spoke briefly with Osorio because Trooper Kline had to collect evidence at the scene and he knew that he would speak to Osorio later at the hospital. Trooper Kline remained at the scene, collected evidence, and took measurements and photographs.

Trooper Kline testified that at the time of the crash, it was snowing and the road was covered with ice and snow. Trooper Kline said that it was safe to drive on the section of the road where the crash occurred as long as you drove very slowly. Trooper Kline also said that from looking at the tracks in the snow it appeared that once the car slid off the road the driver had no control and was unable to make a correction. The car then struck a utility pole and a tree. Trooper Kline was unable to determine the speed of the car at the time of the crash.

Trooper Kline testified that visibility at the time of the crash was three miles on the roadway. Trooper Kline said he saw maybe one to two inches of snow on the roadway right in the area of the crash. Trooper Kline testified that the road was not closed at the time of the crash. Trooper Kline indicated that the roadway was safe, but that drivers would have to use caution. Trooper Kline indicated that the condition of the roadway was typical of December driving conditions in the Cleveland, Ohio area.

Once Trooper Kline completed his investigation at the scene, he went to Amherst Hospital to speak to Osorio. Trooper Kline advised Osorio of his rights and Osorio spoke to Trooper Kline willingly. Trooper Kline had Osorio describe what happened from start to finish. Osorio described what happened.

As Trooper Kline talked with Osorio at the hospital he noticed that Osorio's eyes were glassy and blood shot, and he could smell an odor of an alcoholic beverage coming from Osorio. When Trooper Kline asked Osorio if Osorio was intoxicated at the time of the crash, Osorio said "possibly".

Trooper Kline had Osorio submit to a Horizontal Gaze Nystagmus (HGN). Prior to administering the HGN test, Trooper Kline checked for signs that Osorio was suffering from a head injury that would affect the test. Trooper Kline administered the HGN test and found four out of six clues.

Trooper Kline said at that point he felt Osorio might be impaired so he asked for consent for a blood alcohol test. Trooper Kline said that he indicated on the BMV 2255 form that the reasons he asked Osorio to submit to the blood test were the four clues Osorio exhibited during the HGN, and the odor of alcohol coming from Osorio. Osorio consented to the blood test and his blood was drawn at 9:30 p.m. Trooper Kline testified that an RN at the hospital withdrew Osorio's blood as Trooper Kline stood and watched. Trooper Kline provided the nurse with a blood test kit. After withdrawing Osorio's blood, the nurse then handed Trooper Kline the vials, he and the nurse both signed the forms, put non-tamper labels on each vial, and then Trooper Kline packed the kit and kept it in his possession until he got back to the Highway Patrol Post.

Edward Yingling, a criminalist with the Ohio State Highway Patrol Crime Lab, testified that he performed blood alcohol testing on the sample of Osorio's blood. Yingling said that the sample of blood was shipped to the crime lab by law enforcement. Yingling identified State's Exhibit 4 as the lab report he prepared of Osorio's blood alcohol test results. Yingling testified that Osorio's blood alcohol content was .172 grams per 100 milliliters of whole blood. State's Exhibit 4 was admitted into evidence without objection.

Osorio stipulated to the admission of the medical records of Rachel Frahm. Rachel Frahm died as a result of the injuries she sustained in the crash.

## LAW & ARGUMENT

### RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW

- I. **THE GUILTY VERDICTS ARE AGAINST THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF MR. OSORIO'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO STATE CONSTITUTION.**
  - A. THE EVIDENCE IS INSUFFICIENT TO SHOW THAT MR. OSORIO WAS DRIVING WITH A PROHIBITED BLOOD ALCOHOL CONTENT. R.C. 4511.19(A)(1)(b).

Osorio asserts that his conviction for driving with a prohibited blood alcohol content in violation of R.C. 4511.19(A)(1)(b) was not supported by sufficient evidence. Osorio contends that the State of Ohio failed to prove that his blood was withdrawn within three hours as required by R.C. 4511.19(D)(1)(b). This argument is contradicted by the evidence.

Osorio bases his contention on the fact that the State of Ohio relied upon the BMV Form 2255 to establish the time that Osorio's blood was withdraw and that there was no testimony authenticating the BMV Form 2255. Osorio asserts that because the BMV Form 2255 is testimonial in nature, he was denied the right of cross-examination under the Confrontation Clause of the Sixth amendment to the United States Constitution.

It should be noted that in his direct appeal, Osorio never argued that the BMV Form 2255 was admitted in violation of his right of confrontation.

In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), the United States Supreme Court held that "[w]hen the declarant appears for cross-examination at trial, the Confrontation Clause

places no constraints at all on the use of his prior testimonial statements. *Id.*, citing *California v. Green*, 399 U.S. 149 (1970).

At trial, Trooper Kline testified and identified State's Exhibit 9 as the BMV Form 2255 that he prepared. Trooper Kline did not specifically testify to the time of the blood draw; however, this information was included on the BMV Form 2255. State's Exhibit 9 was admitted in evidence without objection. Moreover, as Trooper Kline was the person who completed the BMV Form 2255, and he testified at trial and was subject to cross-examination, Osorio was afforded his right of confrontation regarding the information on the BMV Form 2255. *Crawford supra*.

The decision of the Ninth District Court of Appeals holding that Osorio's conviction for Operating a Motor Vehicle Under the Influence of Alcohol was supported by sufficient evidence was correct. Osorio's new contention that he was denied the right of confrontation regarding the BMV Form 2255, is contrary to existing case law. Therefore, the decision of the Ninth District Court of Appeals finding there was sufficient evidence to support Osorio's OVI conviction is correct.

Thus, Osorio's first proposition of law is without merit and this Honorable Court should decline to accept jurisdiction of this case.

**RESPONSE TO APPELLANT'S SECOND PROPOSITION OF LAW**

**II. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT MR. OSORIO WAS EITHER UNDER AN ACTIVE SUSPENSION, OR WAS DRIVING WITHOUT A VALID LICENSE WHICH COULD NOT BE RENEWED WITHOUT EXAMINATION AND, AND [SIC] MR. OSORIO IS ONLY GUILTY OF A MISDEMEANOR VEHICULAR HOMICIDE.**

Osorio contends that the State failed to prove the enhancement factor for Vehicular Homicide in violation of R.C. 2903.06(A)(3)(a). This argument is without merit.

R.C. 2903.06(C) provides as follows:

(C) Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree. Vehicular homicide committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

R.C. 2903.06(C).

R.C. 4507.10 provides as follows:

(A) Except as provided in section 4507.11 of the Revised Code, the registrar of motor vehicles shall examine every applicant for a temporary instruction permit, driver's license, or motorcycle operator's endorsement before issuing any such permit, license, or endorsement.

(B) Except as provided in section 4507.12 of the Revised Code, the registrar may waive the examination of any person applying for the renewal of a driver's license or motorcycle operator's endorsement issued under this chapter, provided that the applicant presents either an unexpired license or endorsement or a license or endorsement which has expired not more than six months prior to the date of application.

R.C. 4507.10.

Osorio was convicted of Vehicular Homicide in violation of R.C. 2903.06(A)(3), and at the time of the offense, Osorio did not possess a valid driver's license. Osorio's license expired on February 25, 2009. Osorio had multiple license suspension, which had all expired at the time of the crash on December 5, 2010. In addition to complying with statutory reinstatement requirements, Osorio would also have been required to reapply for a driver's license because his license was expired at the time of the crash. As Osorio's license expired more than six months prior to the date of the offense, he was required to take an examination in order to renew his driver's license pursuant to R.C. 4507.10(B). Consequently, the State proved that Osorio was operating a motor vehicle without a valid license and was required to take an examination before he could renew or reinstate his driver's license. As such, Osorio's conviction for a fourth degree felony violation of R.C. 2903.06(A)(3) is supported by sufficient evidence. Therefore, the Ninth District Court of Appeals correctly held that the State presented sufficient evidence to prove the sentencing enhancement for Vehicular Homicide as a felony of the fourth degree.

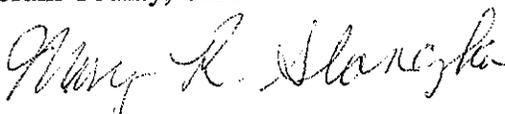
Thus, Osorio's second proposition of law is without merit and this Honorable Court should decline to accept jurisdiction of this case.

**CONCLUSION**

Osorio's attempted appeal presents no viable substantial constitutional question or question of general public interest that warrants the exercise of this Court's jurisdiction. Therefore, the State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

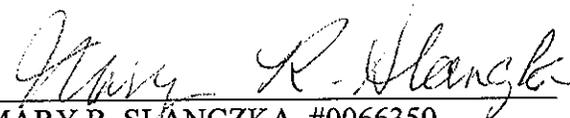
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**PROOF OF SERVICE**

This is to certify that a true and accurate copy of the foregoing Memorandum in Opposition to Jurisdiction was served upon Wilfredo Osorio, Appellant pro se, 1525 Nevada Ave., Lorain, Ohio 44044, by ordinary U.S. Mail, all this 24<sup>th</sup> day of April, 2015.

  
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