

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No.
	:
v.	: On discretionary appeal from the
	: Auglaize County Court of Appeals,
SHAWN W. SPRAGUE,	: Third Appellate District,
	: Case No. 2-15-03
Defendant-Appellant.	:

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT SHAWN W. SPRAGUE**

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Proposition of Law:

The repeat-OVI-offender specification in R.C. 2941.1413(A) facially violates a defendant’s right to equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution, because the specification is based solely upon the same information required to establish a fourth-degree felony under R.C. 4511.19(G)(1)(d)......3

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Shawn W. Sprague was charged with two counts of operating a vehicle under the influence (“OVI”), having been convicted of five other OVI violations within the previous 20 years. However, under Ohio’s OVI law, this conduct could amount to both a fourth-degree-felony OVI offense and the basis of a repeat-OVI-offender specification (“OVI specification”).

Ohio Revised Code Section 4511.19 provides two radically different sets of penalties for the same underlying conduct. Accused of an OVI offense and five previous OVI offenses within the past 20 years, Mr. Sprague faced a fourth-degree felony, punishable by either a community control sanction or up to 18 months of non-mandatory incarceration. But, with a specification based on the same conduct, Mr. Sprague faced mandatory prison time of between one and five years, plus an additional 6-to-thirty month sentence for the specification itself.

In short, when the State chose to add an OVI specification to the charges against Mr. Sprague, the punishments he faced changed severely. This removed any discretion from the trial court to elect a shorter sentence. Mr. Sprague was subjected to a prison sentence five times greater—from 18 months to 90 months—than the punishment faced by another similarly situated individual accused of the same conduct but not charged with the specification.

This severe difference in sentences between similarly situated individuals was a violation of Mr. Sprague’s right to equal protection. And, this Court has already accepted cases addressing this exact equal-protection argument: the State has appealed to this Court a decision from the Eighth District declaring the OVI-specification statute unconstitutional as violating the defendant’s right to equal protection. *See State v. Klembus*, Case No. 2014-1557; *see also State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227. Additionally, this Court recently

accepted *State v. Wright*, Case No. 2015-1342, as a certified conflict case, and *State v. Wright*, Case No. 2015-1341, as a jurisdictional appeal, which are being held for a decision in *Klembus*.

Mr. Sprague presents the exact same issue to be decided in *Klembus* and *Wright*. He has suffered the same equal-protection harm as the defendants in *Klembus* and *Wright*. Yet, the Third District came to the opposite conclusion here than the Eighth District did in *Klembus* and the Eleventh District did in *Wright*. This Court has already recognized the unsettled state of the law regarding repeat-OVI sentencing. Therefore, Mr. Sprague requests that this Court accept jurisdiction and hold his case for this Court's decision in *Klembus*.

STATEMENT OF THE CASE AND FACTS

On January 20, 2015 Mr. Sprague pleaded no contest to one count of OVI, with five prior OVI offenses within the last 20 years, a violation of R.C. 4511.19(A)(1)(A) and a felony of the fourth degree. *State v. Sprague*, 3d Dist. Auglaize No. 2-15-03, 2015-Ohio-3526, ¶ 6. He also pleaded no contest to a specification based on the same five prior OVI offenses, which enhanced the penalties for his OVI offense and required an additional mandatory term of imprisonment. *Id.* The other OVI charge against him was nolle. *Id.* Mr. Sprague had filed a motion to dismiss the OVI specification, but when that was denied, he pleaded no contest to both the underlying OVI and the OVI specification. *Id.* at ¶ 5. Mr. Sprague was sentenced to serve 42 months in prison, which consisted of a one-year mandatory term for the specification, and an additional 30-month prison term to be served consecutively to the mandatory one-year prison term. *Id.* at ¶ 6.

Mr. Sprague filed a timely appeal challenging, among other things, the OVI specification. *Id.* at ¶ 7. Mr. Sprague argued that, because the State could arbitrarily choose whether or not to add the specification to the charges against someone and enhance his potential sentence even

before presenting the case to a jury, the use of the specification violated his right to equal protection. *Id.*

The Third District Court of Appeals affirmed Mr. Sprague's conviction for the OVI and the OVI specification. *Id.* at ¶ 29. The court below noted that the Eighth District had come to the opposite conclusion on this exact same issue in *State v. Klembus*, and that *Klembus* was pending in this Court. *See Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227; *Sprague* at ¶ 9. This Court has since accepted *State v. Wright*, Case No. 2015-1342 for review of a certified conflict, and *State v. Wright*, Case No. 2015-1341, as a jurisdictional appeal, which are being held for this Court's decision on *Klembus*. Mr. Sprague asks this Court to remedy the disagreement between the Eighth District, the Eleventh District, and the court below by accepting his case and holding it for a decision in *Klembus*.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

The repeat-OVI-offender specification in R.C. 2941.1413(A) facially violates a defendant's right to equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution, because the specification is based solely upon the same information required to establish a fourth-degree felony under R.C. 4511.19(G)(1)(d).

The use of the OVI specification described in R.C. 2941.1413(A) violates the constitutional right to equal protection. *See State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979). This Court will decide this precise issue in *State v. Klembus*, Case No. 2014-1557.

Mr. Sprague was charged with OVI under R.C. 4511.19. This OVI offense was a felony of the fourth degree by virtue of R.C. 4511.19(G)(1)(d), which says that "an offender who, within twenty years of the [currently charged OVI] 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.” However, the Revised Code also includes a specification for alleged repeat-OVI offenders. If the indictment against a defendant “specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses,” that defendant can be found guilty of an OVI specification. R.C. 2941.1413. When the State includes such a specification, if the defendant is convicted of both the underlying OVI and the specification, the penalties for the underlying OVI offense are enhanced greatly. Such a defendant faces mandatory prison time of between one and five years, plus an additional six-to-30 month sentence for the specification itself, increased from either a community control sanction or up to 18 months of non-mandatory incarceration. Yet, the conduct making the offense a fourth-degree felony and the conduct underlying the specification are the same: five prior OVI offenses within 20 years. The potential penal difference between someone facing the OVI specification and someone facing only the underlying OVI depends only on how the State chooses to prosecute the case.

That is precisely what happened to Mr. Sprague here: because of the State’s decision to include the specification in the charges against him, he faced a harsher sentence for his underlying OVI offense. As a result, he was sentenced to one year of mandatory time for the specification itself. This violated his right to equal protection.

In *State v. Wilson*, this Court held that if two statutes “prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause.” *Wilson*, 58 Ohio St.2d at 55-56, 388 N.E.2d 745. That is precisely what R.C. 2941.1413(A) does: the same conduct that makes an

OVI offense a felony of the fourth degree also supports the OVI specification, greatly enhancing the penalties for someone against whom the State has chosen to level the OVI specification.

The Eighth District Court of Appeals has explicitly held that the OVI specification facially violates the right to equal protection. *Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, at ¶ 25. This Court has accepted an appeal by the State of Ohio from that decision. *See State v. Klembus*, Case No. 2014-1557. Additionally, this Court has accepted *State v. Wright*, Case Nos. 2015-1342 and 2015-1341 on the same issue. Ohio courts are divided on whether the OVI-specification statute violates the right to equal protection. *See, e.g., State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528. Mr. Sprague asks this Court to accept his case and hold it for this Court's decision in *Klembus*.

CONCLUSION

The conduct underlying the fourth-degree-felony OVI charge against Mr. Sprague was identical to the conduct underlying the OVI specification against him. The OVI-specification statute therefore allows the State to pick which similarly situated individuals will receive harsher sentences. This is a violation of the right to equal protection. This Court has undertaken to clarify the law surrounding OVI specifications in *State v. Klembus*. Mr. Sprague asks that this Court accept his case on the same legal issue and hold it pending a decision in *Klembus*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT SHAWN W. SPRAGUE** was forwarded by regular U.S. Mail to Edwin A. Pierce, Auglaize County Prosecutor, P.O. Box 1992, Wapakoneta, Ohio 45895, this 14th day of October, 2015.

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#451866

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