

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No.
	:
v.	: On discretionary appeal from the
	: Geauga County Court of Appeals,
TIMOTHY A. NORQUEST,	: Eleventh Appellate District,
	: Case No. 2015-G-0003
Defendant-Appellant.	:

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT TIMOTHY A. NORQUEST**

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TABLE OF CONTENTS

Page No.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS2

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....4

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)......4

CONCLUSION.....5

CERTIFICATE OF SERVICE6

APPENDIX:

State of Ohio v. Timothy A. Norquest, Case No. 2015-G-0003, Geauga County Court of Appeals, Opinion, Judgment Entry (Nov. 2, 2015)..... A-1

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

Timothy A. Norquest was charged with two counts of fourth-degree-felony operating a vehicle under the influence (“OVI”). Both counts included a repeat-OVI-offender specification under R.C. 2941.1413 because Mr. Norquest had been convicted of five or more OVI offenses within the previous 20 years. But under Ohio’s OVI law, that conduct could amount to both the fourth-degree-felony OVI offenses and the bases of the repeat-OVI-offender specifications.

Eventually, Mr. Norquest entered a plea of guilty to one count of fourth-degree-felony OVI with a repeat-OVI-offender specification. He was given a sentence of 12 months for the OVI (plus 60 days, which was vacated on appeal) and a two-year mandatory sentence regarding the specification, to be served consecutively. But the statute providing for the specification is unconstitutional. That is, R.C. 4511.19 provides two very different sets of penalties for the same underlying conduct. Convicted of an OVI offense and having had five previous OVI offenses within the past 20 years, Mr. Norquest faced punishment ranging from community control up to 18 months in prison. But due to the specification, he was given an additional two-year, consecutive prison sentence.

In short, when the State chose to add OVI specifications to the charges against Mr. Norquest, the punishments he faced changed severely. That removed any discretion from the trial court to elect a shorter sentence and subjected Mr. Norquest to punishment greater than that faced by a 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 the right to equal protection. And, this Court has already accepted a case addressing this exact equal-protection argument: the State has appealed to this Court a decision from the Eighth

District Court of Appeals 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.

Mr. Norquest presents here the same issue to be decided in *Klembus*. He has suffered the same equal-protection harm as the defendant in *Klembus*. This Court has already recognized the unsettled state of the law regarding repeat-OVI sentencing. Therefore, Mr. Norquest requests that this Court accept jurisdiction and hold his case for this Court's decision in *Klembus*.

STATEMENT OF THE CASE AND FACTS

Mr. Norquest pleaded guilty to one count of fourth-degree-felony OVI under R.C. 4511.19(A)(1) and R.C. 4511.19(G)(1)(d), having had five prior OVI offenses within the last 20 years, along with a specification under R.C. 2941.1413. *State v. Norquest*, 11th Dist. Geauga No. 2015-G-0003, 2015-Ohio-4541, ¶ 2-3. He was ordered to serve a prison sentence of 12 months on the underlying felony (plus 60 days, which was vacated on appeal) and a two-year sentence regarding the specification, to be served consecutively. *Id.* at ¶ 2-3, 6-9.

Mr. Norquest was granted a delayed appeal and challenged, among other things, the facial constitutionality of the OVI-specification statute. *Id.* at ¶ 4, 16-20. Mr. Norquest argued that the specification under R.C. 2941.1413 is unconstitutional because the penalty enhancement that it calls for violates principles of equal protection.

Applying plain-error analysis, the Eleventh District Court of Appeals affirmed Mr. Norquest's conviction and sentences for both the OVI and the OVI specification:

Appellee asserts that appellant forfeited appellate review of this issue by not raising it below. However, Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” As a result, the Ohio Supreme Court has held that an appellate court has discretion to review constitutional issues not raised in the trial court for plain error. *State v. Noling*, 11th Dist. Portage No. 2014-P-0045, 2015-

Ohio-2454, ¶ 9, citing *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus.

This court recently addressed and rejected appellant’s constitutional argument in *State v. Reddick*, 11th Dist. Lake No. 2014-L-082, 2015-Ohio-1215, ¶ 11. In *Reddick*, we adopted the rationale of the Twelfth District Court of Appeals and found the penalty enhancement set forth in R.C. 2941.1413 is not unconstitutional as it does not violate the Equal Protection Clause. *Reddick, supra*, ¶ 6-11, following *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528, 21 N.E.3d 617. In doing so, we rejected the reasoning of the Eighth District Court of Appeals in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, 17 N.E.3d 603. This issue is now pending before the Ohio Supreme Court as a certified conflict. *State v. Klembus*, Sup. Ct. No. 2014-1557. Following *Reddick*, this court sua sponte certified a conflict on the same issue to the Ohio Supreme Court, which is now being held for the decision in *Klembus*. See *State v. Wright*, 11th Dist. Lake No. 2013-L-089, Sup. Ct. No. 2015-1342.

Appellant asserts our *Reddick* opinion “resulted from a misapplication of the Equal Protection Clauses of the Ohio and U.S. Constitutions and controlling case law.” Appellant further “requests that this Court adopt the reasoning set forth by the Eighth District Court of Appeals in *State v. Klembus*,” but he has not brought anything to this court’s attention that would cause us to vacate our precedent. We do not find that the trial court committed any constitutional plain error.

Id. at ¶ 17-19.

Mr. Norquest asks this Court to accept his case and to hold 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. Norquest was charged with OVI under R.C. 4511.19. That 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 “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, as they were here. 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. Norquest 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 two additional years of mandatory prison for the specification itself. That violated his right to equal protection.

In *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 from that decision. *State v. Klembus*, Case No. 2014-1557. Ohio Courts are divided on whether the OVI-specification statute violates the right to equal protection. Mr. Norquest 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. Norquest was the same as that underlying the OVI specification that added two mandatory years of prison to his sentence. 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. Mr. Norquest 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 TIMOTHY A. NORQUEST** was forwarded by regular U.S. Mail to James R. Flaiz, Geauga County Prosecutor, 231 Main Street, 3rd Floor, Chardon, Ohio 44024, this 16th day of December, 2015.

/s/: Kristopher A. Haines

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