ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. _____

15-2065

STATE OF OHIO,	)	
Plaintiff-Appellee,	)	On Appeal from the Lake County Court of Appeals, Eleventh Appellate District
-vs-	)	
CORNELIUS A. VALENTYN,	)	
Defendant-Appellant.	)	Court of Appeals Case No. 2015-L-072

MEMORANDUM IN SUPPORT OF JURISDICTION
OF
DEFENDANT-APPELLANT CORNELIUS A. VALENTYN

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FILED
DEC 23 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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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. 4511.199(G)(1)(d). 3

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State v. Valentyn, Lake App. No. 2015-L-072, 2015-Ohio-4834
(November 23, 2015)

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

Cornelius A. Valentyn was charged with three counts of Operating a Vehicle Under the Influence, in violation of various subsections of R.C. 4511.19(A). The charges were fourth-degree felonies because Mr. Valentyn had five or more previous convictions of the same OVI statute within the last twenty years. Attached to each OVI count were Repeat OVI Offender Specifications per R.C. 2941.1413. These specifications were based upon the exact same prior convictions that elevated the underlying OVI charges to fourth-degree felonies.

Because he committed six OVI offenses within twenty years, Mr. Valentyn faced two radically different sets of penalties under R.C. 4511.19. For the fourth-degree felonies, he could receive community control or up to eighteen months, non-mandatory prison time. For the specifications, he faced mandatory prison terms of one to five years.

This meant that when the State chose to add Repeat OVI Offender Specifications to Mr. Valentyn's indictment, the punishments he faced changed severely. This decision by the State removed any discretion that would have permitted the trial court to impose a shorter sentence. Now, Mr. Valentyn faced a prison sentence five times greater -- from eighteen to ninety months-- than the punishment faced by another similarly situated individual accused of the same conduct but not charged with the Repeat OVI Offender Specification.

This severe difference in sentences between similarly situated individuals is a violation of Mr. Valentyn's Equal Protection rights. This Court already has accepted a case addressing this exact argument. *See State v. Klembus*, Case No. 2014-1557. This Court also has already accepted and stayed briefing in another 11th District Court of Appeals case addressing the same

issue. *See State v. Wright,* Case Nos. 2015-1341 and 2015-1342 (determining that a conflict exists).

Mr. Valentyn's case mirrors those of *Klembus* and *Wright*. He has suffered the same Equal Protection violation. He therefore requests this Court accept jurisdiction and hold his case for this Court's decision in *Klembus*.

STATEMENT OF THE CASE AND FACTS

On May 14, 2015, Mr. Valentyn pled "no contest" to a fourth-degree felony count of Operating a Vehicle Under the Influence. That "no contest" plea encompassed a Repeat OVI Offender Specification. The trial court permitted the "no contest" plea in order to preserve Mr. Valentyn's right to challenge the trial court's overruling of his motion to dismiss the Repeat OVI Offender Specifications.

The trial court sentenced Mr. Valentyn to eighteen months in prison for the OVI count consecutive to one year in prison for the Repeat OVI Offender Specification. It then stayed the sentence pending appeal. However, on October, 14, 2015, following Mr. Valentyn's violation of a bond condition, the trial court revoked the bond, lifted the stay and ordered that Mr. Valentyn immediately begin serving his prison sentence.

In the meantime, Mr. Valentyn had appealed the trial court's denial of his motion to dismiss, asserting that the Repeat OVI Offender Specification violated equal protection on its face. The Eleventh District Court of Appeals, applying its reasoning from *Wright*, affirmed the trial court's overruling of the motion to dismiss. *State v. Valentyn*, Lake App. No. 2015-L-072, 2015-Ohio-4834.

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. 4511.199(G)(1)(d).

Mr. Valentyn asserts that the Repeat OVI Offender Specification violates his constitutional right to equal protection. This Court has held that equal protection is violated when a statutory scheme is such that two different applications of the criminal law can prescribe different penalties while still requiring the State to prove identical elements. *State v. Wilson*, 58 Ohio St.2d 52, 56, 388 N.E.2d 745 (1979). Sentencing a person under the statute with the higher penalty violates the Equal Protection Clause. *Id.*

Mr. Valentyn was charged with violating various subsections of R.C. 4511.19(A) because he operated a vehicle under the influence of alcohol. The charges were fourth-degree felonies because he had previously been convicted of five or more OVI violations within the previous 20 years. Attached to each OVI charge was a Repeat OVI Offender Specification, which arose due to those exact same prior convictions.

The State of Ohio utilized the exact same prior OVI convictions to (1) charge Mr. Valentyn with fourth-degree felonies and (2) attach Repeat OVI Offender Specifications to each felony in order to obtain a greater punishment for the same conduct. It is clear that the specification is what triggers the additional punishment.

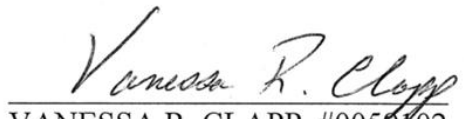
The Eighth District Court of Appeals has held that the Repeat OVI Offender Specification facially violates the right to equal protection. *State v. Klembus*, 8th Dist. Cuy. No. 100068, 2014-

Ohio-1830, 10 N.E.3d 811. This Court has accepted the State of Ohio's appeal of that decision with oral arguments held this past month. *State v. Klembus*, Case No. 2014-1557. Ohio courts are divided on this issue. *See, e.g. State v. Hartsook*, 12th Dist. Warren No. CA2014-010-020, 2014-Ohio-4528; *State v. Wright*, 11th Dist. Lake No. 2013-L-089, 2015-Ohio-2601. Consequently, Mr. Valentine requests this Court to accept his case and hold it for its decision in *Klembus.*

CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest and a substantial constitutional question. The issue raised in the instant case has already has been accepted for review by this Court. Mr. Valentine thus requests this Court to accept his case and hold it for its decision in *Klembus.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant Cornelius A. Valentyn is on this 22nd day of December, 2015, sent by inter-office mail to Charles Coulson, Lake County Prosecutor, at 105 Main Street, Painesville, Ohio 44077.

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APPENDIX

Opinion and Judgment Entry of the Eleventh District Court of Appeals.

State v. Valentyn, Lake App. No. 2015-L-072, 2015-Ohio-4834
(November 23, 2015)

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

CORNELIUS A. VALENTYN,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2015-L-072

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Costs are taxed against appellant.

Thomas R Wright

JUDGE THOMAS R. WRIGHT

FOR THE COURT

FILED
COURT OF APPEALS
NOV 23 2015
MARY ANN KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2015-L-072**
- vs -	:	
CORNELIUS A. VALENTYN,	:	
Defendant-Appellant.	:	

FILED
COURT OF APPEALS
NOV 23 2015
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY OHIO

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 14 CR 000612.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Charles R. Grieshammer, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Cornelius A. Valentyn, timely appeals the May 19, 2015 sentencing entry arising from his guilty plea for operating a motor vehicle under the influence ("OVI") and his no contest plea to the R.C. 2941.1413 repeat offender specification. Appellant challenges the constitutionality of the repeat offender specification and alleges that it authorizes double punishments without proof of

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additional elements, facts, or circumstances. He also claims that it authorizes unfettered prosecutorial discretion in charging similarly situated offenders in contravention to the U.S. and Ohio Equal Protection Clauses. For the following reasons, we affirm.

{¶2} The Lake County grand jury indicted appellant on three counts of operating a vehicle while under the influence of alcohol, drugs, or a combination of the two. Each count was a fourth degree felony in violation of R.C. 4511.19(A)(1)(a) based on appellant's prior five similar violations within 20 years. Each of the three counts also contained a habitual offender specification under R.C. 2941.1413. These specifications were based on appellant's five, identical violations within 20 years that elevated his underlying OVI charges to fourth degree felonies.

{¶3} Appellant eventually entered a guilty plea to the first count and specification in exchange for the dismissal of the other two counts and specifications. Thereafter, and with the court's permission, he withdrew his guilty plea to assert an equal protection challenge to the repeat offender specification. Appellant moved to dismiss the repeat OVI offender specification to count one based on the Ohio Supreme Court's acceptance of the appeal in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, 17 N.E.3d 603, *appeal allowed*, Sup. Ct. No. 2014-1557, 141 Ohio St.3d 1473, 2015-Ohio-554, 25 N.E.3d 1080, which addresses the constitutionality of R.C. 2941.1413. The trial court denied his motion to dismiss.

{¶4} Appellant subsequently pleaded guilty to count one and no contest to the attendant specification under R.C. 2941.1413. The trial court sentenced him to 18 months in prison on count one to run consecutive to a one-year prison term for the

specification, in addition to costs and a fine. It also ordered the forfeiture of his 2003 Ford truck involved in the offense.

{¶5} Appellant was released on bail pending this appeal. His sole assignment of error asserts:

{¶6} "The trial court erred by imposing a consecutive prison term under the repeat OVI offender specification in violation of the Defendant-Appellant's rights to Equal Protection and Due Process as guaranteed by the Fifth and Fourteenth Amendment to the U.S. Constitution and Section 2 and 16, Article I of the Ohio Constitution."

{¶7} Appellant claims that the repeat offender specification requiring mandatory prison time bestows complete discretion on the state as to when to include the specification in an indictment. He further contends that this discretion violates his right to equal protection under the law because it permits an arbitrary and unequal application of the specification on similarly situated repeat OVI offenders. Appellant is not alleging that the state has discriminated against him individually or as a member of a suspect class; instead he claims that the repeat offender specification is unconstitutional on its face.

{¶8} "All statutes have a strong presumption of constitutionality. * * * Before a court may declare unconstitutional an enactment of the legislative branch, 'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" (Citations omitted.) *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N E 2d 420, ¶25. The rational-basis "test requires that a statute be upheld if it is rationally related to a legitimate government purpose. * * *

Under such a review, a statute will not be invalidated if it is grounded on a reasonable justification, even if its classifications are not precise * * *." (Citations omitted.) *Id.* at ¶66.

{¶9} Appellant's argument primarily relies on the Eighth District's opinion in *Klembus*, which held in part that the repeat OVI offender specification violates the equal protection clause because it is not rationally related to a legitimate state interest. It explained, "R.C. 2941.1413(A) provides no requirement that the specification be applied with uniformity, and there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others without requiring proof of some additional element to justify the enhancement, especially since the class is composed of offenders with similar histories of OVI convictions." *Id.* at ¶23.

{¶10} In addressing this precise issue in two other appeals, we have rejected the rationale in *Klembus* in favor of the Twelfth District's analysis in *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-0201, 2014-Ohio-4528. *State v. Reddick*, 11th Dist. Lake No. 2014-L-082, 2015-Ohio-1215, ¶10-11; *State v. Wright*, 11th Dist. Lake No. 2013-L-089, 2015-Ohio-2601, ¶13. *Hartsook* applied the rational-basis test to review to the repeat offender specification and concluded:

{¶11} "We disagree with [appellant's] contention that R C. 2941.1413 denies equal protection of the law to repeat OVI offenders simply because the law leaves it to the prosecutor's discretion to insert—or not insert—the specification into the indictment. It is axiomatic that the decision about what charge to file or bring before the grand jury generally rests within the discretion of the prosecutor. * * * It will not be presumed that a prosecutor's discretion to prosecute has been invidious or in bad faith, and [appellant]

has offered no argument that would call into question the rationale for the discretion that our legal system traditionally affords the prosecutor. * * * Moreover, [appellant] has failed to offer an argument that would suggest the cumulative punishment the legislature sought to impose under R.C. 4511.19 and R.C. 2941.1413 does not serve a legitimate government interest." (Citations omitted.) *Id.* at ¶47-48; *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1085, ¶36-38.

{¶12} Like the appellant in *Hartsook*, appellant in the instant case has not offered any reason reflecting that the punishments arising under R.C. 4511.19 and R.C. 2941.1413 do not serve a legitimate government interest.

{¶13} Accordingly, and based on the strong presumption that a statute is constitutional, the analysis set forth in *Hartsook*, and our precedent, we reject appellant's sole assignment of error. The mere *possibility* that a prosecutor may arbitrarily enforce the repeat OVI offender specification in R.C. 2941.1413 does not cause the statute to violate the Equal Protection Clause as a whole. *Id.*

{¶14} For the foregoing reasons, appellant's sole assignment of error lacks merit It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.