

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	)	OHIO SUPREME COURT
	)	CASE NO. 2015-2022
Plaintiff-Appellee,	)	
	)	On Appeal from the
v.	)	Geauga County Court of Appeals
	)	Eleventh Appellate District
TIMOTHY A. NORQUEST,	)	
	)	CASE NO. 2015-G-0003
Defendant-Appellant.	)	

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**MEMORANDUM IN RESPONSE TO JURISDICTION  
OF APPELLEE STATE OF OHIO**

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JAMES R. FLAIZ (#0075242)  
GEAUGA COUNTY PROSECUTOR  
Nicholas A. Burling (#0083659)  
Assistant Prosecuting Attorney  
Courthouse Annex  
231 Main Street, 3<sup>rd</sup> Floor  
Chardon, Ohio 44024  
(440) 279-2100

*Counsel for Appellee, State of Ohio*

Kristopher A. Haines (#0080558)  
Assistant State Public Defender  
Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394

*Counsel for Appellant, Timothy A. Norquest*

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION NOR A  
QUESTION OF GREAT GENERAL OR PUBLIC INTEREST**

Appellee State of Ohio acknowledges that this Honorable Court has accepted jurisdiction in the case of *State v. Klembus*, Supreme Court Case No. 2014-1557, concerning the constitutionality of R.C. 2941.1413, the Repeat OVI Offender Specification. The State also acknowledges that this same issue is being raised by Appellant, Timothy A. Norquest, in this case. However, Norquest's case differs from the *Klembus* case in one significant detail. He did not preserve the issue of the OVI specification for appeal.

The case law is well settled in this area. A defendant forfeits an issue for appeal when the "defendant could have but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Combs*, 11th Dist. No.2007-P-0075, 2008-Ohio-4158, ¶ 37, citing *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986).

"Under Crim.R. 52(B), [the Appellate Court has] power to recognize '[p]lain errors or defects involving substantial rights \* \* \* although they were not brought to the attention of the court.' However, this rule may be invoked only in rare cases." *State v. Campbell*, 69 Ohio St.2d 38, 41, 630 N.E.2d 339 (1994), citing *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus (1978).

Norquest's sentencing took place on May 14, 2014, and *State v. Klembus*, 17 N.E.3d 603, 2014-Ohio-3227 (8<sup>th</sup>Dist.) was not decided until July 24, 2014. However, the OVI specification had been challenged previously on claims it violated the constitutional protection against double jeopardy claims and had been upheld as constitutional by the appellate courts that considered the issue. See e.g. *State v. Midcap*, 9<sup>th</sup> Dist. Summit No. 22908, 2006-Ohio-2854; *State v. Zampini*,

11<sup>th</sup> Dist. Lake No. 2007-L-109, 2008-Ohio-531; *State v. Kennedy*, 2<sup>nd</sup> Dist. Champaign No. 2011-CA-3, 2011-Ohio-4291 (recognizing 11<sup>th</sup> District holding). No case law existed to even suggest this was a matter that could be considered under the plain error doctrine.

The issue presented by this case, then, is a standard case of a defendant forfeiting an issue for appeal. Because the case law on the issue of forfeiture is well established, no substantial constitutional question or question of great general or public interest exists in this case.

### **ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

#### **APPELLANT'S 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).

#### **First Issue Presented for Review**

*Norquest's failure to raise this issue at the trial court level forfeits it for purposes of appeal.*

Appellant Norquest's assignment of error is forfeit because he failed to bring it to the trial court's attention. An appellate court will not consider any error that "a defendant could have but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Combs*, 11th Dist. No.2007-P-0075, 2008-Ohio-4158, ¶ 37, citing *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986).

"Under Crim.R. 52(B), [the Appellate Court has] power to recognize '[p]lain errors or defects involving substantial rights \* \* \* although they were not brought to the attention of the court.' However, this rule may be invoked only in rare cases." *State v. Campbell*, 69 Ohio St.2d

38, 41, 630 N.E.2d 339 (1994), citing *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus (1978).

Thus, there are “three limitations on a reviewing court’s decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. \* \* \* Second, the error must be plain. To be ‘plain’ within the meaning of Crim.R. 52(B), an error must be an ‘obvious’ defect in the trial proceedings. \* \* \* Third, the error must have affected ‘substantial rights.’ We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial.” *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, 950 N.E.2d 931, at ¶13, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

It should be noted that this issue fails on the first and second prongs of the plain error analysis. While Norquest claims the specification under R.C. 2941.1413 violates the Equal Protection clauses of the Ohio and Federal Constitutions, the Eleventh District had considered that issue and ruled that it does not. *State v. Reddick*, 11<sup>th</sup> Dist. Lake No. 2014-L-082, 2015-Ohio-1215 at ¶11. In doing so, the Court recognized the same ruling in *State v. Hartsook*, 12<sup>th</sup> Dist. Warren No. CA2014-01-020, 2014-Ohio-4528. While Norquest cites to *State v. Klembus*, 17 N.E.3d 603, 2014-Ohio-3227 (8<sup>th</sup>Dist), in support of his argument, it should be noted that the Eighth District is the only court in Ohio to have concluded that the specification is unconstitutional.

Given that two separate districts have upheld the specification against this challenge, including this district, it cannot be said that an error occurred at the trial court level, let alone an “obvious” error. Therefore, this argument was forfeited by Norquest and cannot be raised on appeal.

## Second Issue Presented for Review

*The OVI specification under R.C. 2941.1413 does not violate the equal protection clause under either the Ohio or the Federal Constitutions.*

“Repeat OVI offenders are not a suspect class, and an individual does not possess a fundamental right to operate a vehicle, on multiple occasions, under the influence of alcohol or drugs.” *Hartsook*, 2014-Ohio-4528 at ¶45. Therefore, the OVI specification must be analyzed under a rational basis standard when an individual claims it violates equal protection. *Id.*

Under a rational basis standard, equal protection is only violated by a statute when its classifications “are based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no grounds can be conceived to justify them.” *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). The burden of proof rests with the individual challenging the statute. *State v. Williams*, 88 Ohio St.3d 513, 531, 728 N.E.2d 342 (2000).

The *Klembus*, *supra*, decision, to which Norquest cites, based its decision holding the OVI specification unconstitutional on the Ohio Supreme Court’s decision in *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979). *Wilson* 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. *Id.* at 55-56.

However, the *Wilson* analysis does not apply to the OVI specification. As the dissent in *Klembus* pointed out, R.C. 2941.1413 does not prohibit an activity. *Klembus*, 2014-Ohio-3227 at ¶36 (McCormack, J. dissenting). The specification is simply a penalty enhancement, not a criminal prohibition on conduct.

The OVI statute and the specification also address different goals. The legislature intended “to create a penalty for an individual who has been convicted of or pleaded guilty to five or more OVI offenses within twenty years over and above the penalty imposed for the

underlying OVI conviction itself.” *Id.* at ¶45 (McCormack, J. dissenting). The underlying OVI offense seeks to punish the conduct of driving under the influence of alcohol. While the level of offense is enhanced by the number of prior convictions a defendant has, the actual prohibited conduct is that of driving under the influence. The specification, on the other hand, is a stiffened penalty for the crime, as it is considered a repetitive one. *See U.S. v. Rodriguez*, 553 U.S. 377, 386, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008).

As stated above, this Court has already ruled that the OVI specification does not violate equal protection. *Reddick*, 2015-Ohio-1215 at ¶11. In doing so, this Court relied upon the reasoning of *State v. Hartsook*, 2014-Ohio-4528. “[T]he reasoning behind a sentencing regime that finds the latest offense for repeat OVI offenders to be an aggravated offense because it is a repetitive one is perfectly sound.” *Hartsook*, 2014-Ohio-4528 at ¶48, citing *Rodriguez*, 553 U.S. at 386.

Norquest also cites to *Klembus* for the proposition that the prosecutor’s discretion in applying the OVI specification results in unequal treatment because some defendants are subject to the specification, while others are not. However, “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 decision to prosecute has been invidious or in bad faith.” (Citations omitted) *Hartsook*, 2014-Ohio-4528 at ¶47. The claim that a prosecutor’s discretion will result in non-uniform application of the specification is insufficient to “question the rational for the discretion that our legal system traditionally affords the prosecutor.” *Id.*, citing *State ex rel. Nagle v. Olin*, 64 Ohio St.2d 341, 347, 415 N.E.2d 279 (1980).

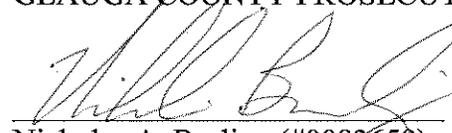
Therefore, because there is a rational basis for the OVI specification, and because the prosecutor has the discretion in determining when to apply the specification, Norquest's argument concerning equal protection must fail.

**CONCLUSION**

Based upon the foregoing argument, Appellee State of Ohio respectfully requests this Honorable Court decline jurisdiction in this matter because Appellant Norquest did not preserve the issue for appeal.

Respectfully submitted,

JAMES R. FLAIZ (#0075242)  
GEAUGA COUNTY PROSECUTOR



Nicholas A. Burling (#0083659)  
Assistant Prosecuting Attorney  
Courthouse Annex  
231 Main Street, 3<sup>rd</sup> Floor  
Chardon, Ohio 44024  
(440) 279-2100

**CERTIFICATE OF SERVICE**

A copy of the foregoing APPELLEE'S JURISDICTIONAL MEMORANDUM was forwarded by regular U.S. mail, postage prepaid, to the following:

Kristopher A. Haines  
Assistant State Public Defender  
Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
*Counsel for Appellant, Timothy A. Norquest*

on this 5 day of January, 2016.

  
\_\_\_\_\_  
Nicholas A. Burling (#0083659)  
Assistant Prosecuting Attorney