

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO

CASE NO 2014-1557

Plaintiff-Appellant

ON APPEAL FROM CUYAHOGA
COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT

v.

DEAN KLEMBUS

COURT OF APPEALS CASE NO. 100068

Defendant-Appellee

**APPELLANT-STATE OF OHIO'S BRIEF IN OPPOSITION TO MOTION FOR
RECONSIDERATION**

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION FOR RECONSIDERATION

Appellee-Dean Klembus filed a motion to reconsider this Court's unanimous decision in *State v. Klembus*, Slip Opinion No. 2016-Ohio-1092. A review of oral argument and briefs show no reason to grant Appellee's motion for reconsideration. Appellee argues he contributed this Court's opinion which distinguished *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745, and calls the distinction one that makes no difference¹. This is confusing given that Appellee argued in his brief that the United States Supreme Court's decision in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979) was inapposite. One of the arguments advanced by Klembus was that *Batchelder* was distinguishable in part because that case dealt with two separate statutes. (Appellee's Brief, pg. 8). As argued in the State's reply, this argument seems to undermine any reliance upon *State v. Wilson*, 58 Ohio St.2d 52 (1979). *Batchelder* itself questions the continued applicability of *Wilson*.

Three Ohio appellate districts have rejected *Klembus* and have upheld the constitutionality of the repeat OVI specification provisions. See *State v. Ballard*, 1st Dist. Hamilton No. C-140755, C-140690, 2016-Ohio-364, *State v. Valentyn*, 11th Dist. Lake No. 2015-L-072, 2015-Ohio-4834, *State v. Norquest*, 11th Dist. Lake No. 2015-G-0003, 2015-Ohio-4541, *State v. Sprague*, 3rd Dist. Auglaize No. 2-15-03, 2015-Ohio-3526, *State v. Burkhart*, 12th Dist. Clermont No. CA2015-01-004, 2015-Ohio-3409, *State v. Wright*, 11th Dist. Lake No. 2013-L-089, 2015-Ohio-2601, *State v. Snowden*, 11th Dist. Trumbull No. 2014-T-0092, 2015-Ohio-2611, *State v. Reddick*, 11th Dist. No. 2014-L-082, 2015-Ohio-1215. The Court's opinion is in line with the reasoning of *State v. Hartsook*, 12th Dist. No. CA2014-01-020, 2014-Ohio-4528. See *Hartsook*, ¶52. Indeed, there are several

¹ *Wilson* was the basis for the Eighth District's decision in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227 for the proposition that two statutes that prohibit identical activity, with identical proof yet impose different penalties is unconstitutional. *Klembus*, ¶20.

different avenues that require the reversal of the Eighth District's opinion in *Klembus*, and this Court took one of them.

Moreover, Klembus' arguments which were briefed and the request for reconsideration is flawed for another reason: Klembus reference to defendant Jones receiving 7 ½ years as opposed to defendant Smith is a hypothetical example that has no bearing on whether Klembus suffered unconstitutional discrimination. There is no instance in this hypothetical that Jones received a 7 ½ year sentence because of his race, and this overgeneralization ignores a myriad of factors that could have led to such a hypothetical sentence. See generally *Ballard*, 1st Dist. Hamilton No. C-140755, C-140690, 2016-Ohio-364 (noting Ballard's argument faces an uphill battle due to the situations where a defendant's sentence depends on the discretion of a prosecutor). Neither Smith nor Jones are defendants in this case, and hypothetical examples of how different sentences can be imposed under the repeat OVI sentencing scheme does not rise to the level of an Equal Protection violation. Nor should this Court agree with Klembus that a sentencing provision should be struck down because of the mere possibility of differential treatment. As this Court recognized, "Klembus's objections do not reveal differential treatment of OVI offenders in his circumstances based on arbitrary standards." *Klembus*, ¶21. This recognition is the plain reason why the Equal Protection challenge fails in this case.

The State need not reiterate the argument that prosecutors can exercise its discretion when charging and determining appropriate resolutions to its cases. It is only when the State *arbitrarily* discriminates against a defendant based upon an unjustifiable standard could there perhaps be a claim under the Equal Protection Clause. This is not the case here, and this Court appropriately reversed the Eighth District's decision in *Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, 17 N.E.3d 603. The motion for reconsideration should be denied.

CONCLUSION

Dean Klembus fails to raise any reason that would compel this Court to reverse its unanimous decision in *State v. Klembus*, Slip Opinion No. 2016-Ohio-1092. The Court should deny the motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 11th day of April 2016 to the following via U.S. Mail to: John Martin, 310 Lakeside Avenue, Suite 200, Michael P. Walton, 373 S. High Street, 13th Floor, Columbus, Ohio 43215 and Hannah Wilson, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215

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