

IN THE SUPREME COURT OF OHIO
CASE NO. 2016-0172 and 2016-0282

CITY OF CLEVELAND	:	
Plaintiff-Appellant	:	On Appeal from the Eighth Appellate
	:	District, Cuyahoga County, Ohio
v.	:	Case No. 102835
	:	
BENJAMIN S. OLES	:	
Defendant-Appellee	:	

**REPLY BRIEF OF AMICI CURIAE CUYAHOGA COUNTY PROSECUTOR'S OFFICE
AND OHIO PROSECUTING ATTORNEY'S ASSOCIATION IN SUPPORT OF
APPELLANT-CITY OF CLEVELAND**

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney

DANIEL T. VAN (#0084614)
ANTHONY MIRANDA (#0090759)
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us
amiranda@prosecutor.cuyahogacounty.us

COUNSEL FOR AMICUS CURIAE,
CUYAHOGA COUNTY PROSECUTOR'S OFFICE
AND OHIO PROSECUTING ATTORNEY'S ASSOCIATION

BARBARA LANGHENRY (#0038838)
Director of Law
KIMBERLY G. BARNETT-MILLS (#0073860)
Interim Chief Prosecutor

JOSEPH PATITUCE (#0081384)
26777 Lorain Road, Suite 708
North Olmsted, OH 44070
(440) 471-7784
attorney@patitucelaw.com

JONATHAN L. CUDNIK (#0077308)
Assistant City Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 664-4850
jcudnik@city.cleveland.oh.us

COUNSEL FOR APPELLEE

***ADDITIONAL COUNSEL LISTED
ON SERVICE***

COUNSEL FOR APPELLANT

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REPLY BRIEF

I. Introduction

The Cuyahoga County Prosecutor's Office and Ohio Prosecuting Attorney's Association asks this Court to limit its review, as to whether Appellee should have received *Miranda* warnings to an analysis under the federal constitution.

II. This Court Should Not Find Greater Protection Under the Ohio Constitution Than That Afforded Under the Fifth Amendment of the United States Constitution at the Case at Bar

The Ohio Association of Criminal Defense Lawyers has filed an amicus brief to ask this Court to consider affirming the decision under the Ohio Constitution as an independent state ground rather than deciding this case under the lens of the federal constitution. The Cuyahoga County Prosecutor's Office and the Ohio Prosecuting Attorney's Association opposes any extension of *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 895. This Court has recognized that the Court should harmonize their interpretations of the Ohio Constitution and the United States Constitution unless there are persuasive reasons to do otherwise. *Farris*, ¶¶47. This Court recognized that *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, that the protections of the Ohio Constitution provided greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors and that the Ohio Constitution provided greater protection than that under the United States Constitution with respect to physical evidence seized as a result of unwarned statements. *Id.* at ¶48. This Court reasoned that, "Only evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded [... because] to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings. This Court did not hold carte blanche that

the self-incrimination provisions of Section 10, Article I always provided greater protection to Ohio's citizens than that under the Fifth Amendment, instead this Court only held that the Ohio Constitution protected evidence derived from un-*Mirandized* statements.

The OACDL's citation to *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E. 2d 163 (1993) does not provide any compelling argument that the Ohio Constitution in general provides greater protection than that under the federal constitution. The decision in *Arnold* was decided before *District of Columbia v. Heller*, 554 U.S. 570 (2008) and dealt with a provision of the Ohio Constitution that stated, "The people have the right to bear arms for their defense and security..." See Article 1, Section 4 of the Ohio Constitution, which was in contrast to the ambiguous language of the Second Amendment.

At issue here is Article I, Section 10 of the Ohio Constitution and the Fifth Amendment of the United States Constitution. Article I, Section 10 provided that, "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel..." which is contrasted with the Fifth Amendment of the United States Constitution that guarantees that no person shall "be compelled in any criminal case to be a witness against himself..." Of course the latter portion of Article I, Section 10 was deemed unconstitutional in *State v. Lynn*, 5 Ohio St. 2d 106 (1966). In *State v. Evans*, 144 Ohio App. 3d 539 (1st Dist. 2001), the First District recognized that the language of the Ohio Constitution and the Fifth Amendment were virtually identical. A plain reading of both the Ohio Constitution and the Fifth Amendment confirms as much.

No compelling, textual or historical argument is made as to why or how the Ohio Constitution provides greater protection in this case. Absent any such textual or historical analysis that demands a departure, this Court should not dramatically change any analysis under *Miranda*.

Although this Court in *Miranda* found greater protections under the Ohio Constitution in *Farris*, with respect to evidence that could be excluded as a violation of *Miranda*, it did not purport to analyze the issue of whether there was a *Miranda* violation under and independent clause of the Ohio Constitution. Instead in *Farris*, this Court carefully analyzed *Miranda* and decisions from the United States Supreme Court.

III. Oles was not in custody within the meaning of Miranda

In *State v. Farris*, 109 Ohio St. 3d 519, 2006-Ohio-3255, this Court recognized that a motorist detained as the subject of an ordinary traffic stop is not “in custody” for the purposes of *Miranda*. *Farris*, ¶13 citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317. Appellee appears to agree with this point. See Appellee’s brief, pg. 2. However, Appellee argues that the warnings are triggered as soon as the suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest’. See Appellee’s brief, pg. 2. Appellee argues that the facts of *Farris* are comparable to the facts here; however, Appellee admits that there is no testimony that keys were taken away from Appellee and that there was no testimony that Appellee had been patted down. However, these very distinguishing factors is why other appellate districts have reached different outcomes in similar cases. See *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674 and *State v. Coleman*, 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573.

Lt. Sheppard’s actions here were minimally invasive considering the detection of a smell of alcohol coming from either Appellee’s car or Appellee’s person. Lt. Sheppard was not searching for illegal narcotics or marijuana, but he was making a determination as to whether Appellee was an impaired driver and thus a risk to others on the road, in addition to the Appellee himself. As recent cases demonstrate, impaired drivers can be prosecuted for felony offenses and

could receive mandatory sentences. See *State v. Klembus*, 146 Ohio St. 3d 84, 2016-Ohio-1092, 51 N.E.3d 61. Impaired drivers can also cause grave physical harm or worse. *State v. Earley*, 145 Ohio St. 3d 281, 2015-Ohio-4615, 49 N.E.3d 266.

Amicus Curiae argues that the removal of a driver to the police cruiser, was not designed to place the driver under formal arrest and in this case was conducted in part to determine the source of the smell of alcohol. Under the facts in this case, Appellee was pulled over. Appellee indicated that he was coming from a wedding in downtown Cleveland and Lt. Sheppard detected an odor of an alcoholic beverage coming from within Appellee's vehicle and observed Appellee's actions to be "very slow and deliberate..." Lt. Sheppard reasonably asked Appellee to exit the vehicle in an effort to determine the source of the alcohol and placed Appellee in the front seat of the police cruiser where Lt. Sheppard was able to smell alcohol from Appellee's breath. It was at this time, that Appellee admitted to having four mixed drinks. Appellee failed field sobriety tests and was taken into custody.

Appellee argues that the only "relevant inquiry" is determining "how a reasonable man in the suspect's position would have understood the situation." Amicus Curiae argues that such an inquiry cannot turn on the Appellee's presence in the front seat of a police cruiser. Here, unlike in *Farris*, any intrusion was minimal. The mere fact that the Appellee was placed in the front seat of the police cruiser does not transform this traffic stop into a custodial interrogation. Accordingly, this Court should reject the argument by Appellee that he was under custodial interrogation and thus any *un-Mirandized* statement should be excluded.

Here, the trial court erred in excluding both the statements and the results of the field sobriety test.

CONCLUSION

Amicus Curiae in support of Appellant-City of Cleveland, urges this Court to reverse the suppression of the field sobriety tests and remand this case to the trial court for further proceedings

Respectfully Submitted,

TIMOTHY J. McGINTY
Cuyahoga County Prosecuting Attorney

By: /s/ Daniel T. Van*
DANIEL T. VAN (#0084614)
ANTHONY MIRANDA (#0090759)
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing *Reply Brief* was filed electronically this 27th day of September, 2016 and served upon the following:

BARBARA LANGHENRY (#0038838)

Director of Law

KIMBERLY G. BARNETT-MILLS (#0073860)

Interim Chief Prosecutor

JONATHAN L. CUDNIK (#0077308)

Assistant City Prosecutor

1200 Ontario Street

Cleveland, Ohio 44113

(216) 664-4850

jcudnik@city.cleveland.oh.us

COUNSEL FOR APPELLANT

JOSEPH PATITUCE (#0081384)

26777 Lorain Road, Suite 708

North Olmsted, OH 44070

(440) 471-7784

attorney@patitucelaw.com

COUNSEL FOR APPELLEE

RUSSELL BENSING (#0010602)

600 IMG Building

1360 E. Ninth Street

Cleveland, Ohio 44114

COUNSEL FOR AMICUS CURIAE

OACDL

By: /s/ Daniel T. Van* _____

DANIEL T. VAN (#0084614)

ANTHONY MIRANDA (#0090759)

Assistant Prosecuting Attorney