

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 2007-2295
Plaintiff-Appellant,	:	On Appeal from the Union County Court of Appeals Third Appellate District
vs.	:	
COREY A. HOOVER	:	Court of Appeals Case No. 14-07-11
Defendant-Appellee.	:	

MOTION FOR RECONSIDERATION OF APPELLEE-CROSS APPELLANT,  
COREY HOOVER

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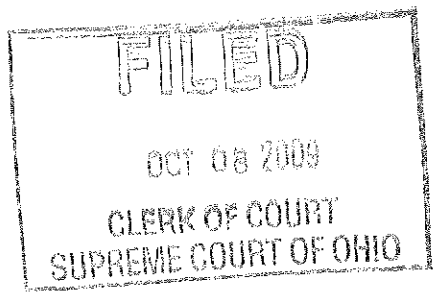
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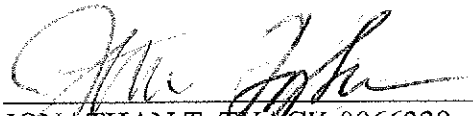
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## MOTION FOR RECONSIDERATION

Now comes Defendant-Appellee, Corey A. Hoover, to respectfully request this Court to reconsider its decision on the merits in this case pursuant to Rule XI of The Ohio Supreme Court Rules of Practice. A Memorandum in Support is attached hereto.

Respectfully submitted,

  
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## MEMORANDUM IN SUPPORT

**I. This Court recognizes that R.C. §4511.19(A)(2) imposes criminal punishment for refusing a warrantless chemical test.**

In paragraph 13 of this Court's decision in this case, this Court acknowledges that "a refusal to submit to a warrantless chemical test while under arrest for the current DUI" is an element of the offense set forth by the legislature in R.C. 4511.19(A)(2). In paragraph 21 of the decision on the merits in this case, this Court indicated that a "person's refusal to take a warrantless chemical test is simply an additional element that must be proven beyond a reasonable doubt along with the person's previous DUI conviction to distinguish the offense from a violation of Revised Code 4511.19(A)(1)(a)." This Court continued in paragraph 21 of its decision on the merits in this case by recognizing that a conviction under Revised Code 4511.19(A)(2) meant that the mandatory minimum jail term in this case increased from 10 days, to 20 days. Therefore, in its decision on the merits in this case, this Court recognized the fact

that but for Corey Hoover's refusal and/or revocation of his consent to a warrantless chemical test of his blood, breath, or urine, Corey Hoover would not be subject to the additional 10 days of mandatory jail time. Put simply, this Court in its decision recognized the fact that Corey Hoover, and any similarly situated person, faces criminal punishment as a result of their refusal or revocation of consent to a warrantless chemical test of their blood, breath, or urine, under R.C. 4511.19(A)(2).<sup>1</sup>

## II. This Court's reliance on Westerville v. Cunningham is misplaced.

Although this Court recognizes in its decision that R.C. 4511.19(A)(2) imposes criminal punishment for the refusal or revocation of consent to a chemical test of one's blood, breath or urine, this Court found that such a punishment does not violate a defendant's constitutional rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. In this Court's present interpretation of its previous decision in Westerville v. Cunningham(1968), 15 Ohio St. 2d 121, this Court rules that individuals like Corey Hoover do not have the Fourth Amendment right to refuse or revoke consent to a warrantless chemical test of one's blood, breath or urine. This case is ripe for reconsideration based upon this Court's erroneous interpretation and application of its previous decision in Westerville v. Cunningham, supra.

This Court in Westerville v. Cunningham, supra stated the following at p. 120.

“Unlike in Griffin vs. California, supra, the admission of evidence of defendant's refusal to take a chemical test for intoxication and comment by counsel thereon would not dilute any constitutional right of Defendant. As stated by Traynor, Chief Justice, in People v. Sudduth, supra (665 Cal. (2d) 543), at p. 546, with respect to reliance on

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<sup>1</sup>This point was never contested by the State of Ohio.

the *Griffin* case, *supra*.

“\*\*\*The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent.\*\*\*”

*Schmerber v. California*(1966), 384 U.S. 757, 16 L.Ed. (2d) 908, 86 S.Ct. 1826, held that a Defendant had no constitutional right to refuse to take a chemical test for intoxication.

Hence, we conclude that the admission of evidence, that one accused of intoxication refused to take a reasonably reliable warrantless chemical test for intoxication, and comment on such report by counsel do not violate any constitutional privilege against self-incrimination.”

This Court in *Westerville v. Cunningham, supra*, relied on *Schmerber* for the principle that individuals have no Fifth Amendment right to refuse a warrantless chemical test of their blood, breath or urine, nor are any Fifth Amendment rights violated when a person’s refusal of the warrantless chemical test is introduced against them at trial. This Court’s decision in *Westerville v. Cunningham, supra*, discusses the “non-testimonial” nature of a warrantless chemical test. It is important to note that this Court in *Westerville v. Cunningham, supra*, never cited to a specific page or passage of the *Schmerber* decision in support of the declaration that a “defendant had no constitutional right to refuse to take a warrantless chemical test for intoxication.” Although *Schmerber* is often cited for its Fourth Amendment analysis, we must remember that in 1968, *Schmerber* also stood as an important Fifth Amendment case.

A careful review of the *Schmerber* decision clearly shows that the Armando Schmerber made a Fifth Amendment challenge to the introduction into evidence of his refusal to consent. The Fifth Amendment challenge was rejected by the Supreme Court because the Fifth

Amendment privilege “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case do not involve compulsion to these ends.” *Schmerber v. California*, (1966), 384 U.S. 757, 761. *Schmerber* continues by declaring, “It is clear that the protection of the [Fifth Amendment] privilege [against self incrimination] reaches an accused’s communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one’s papers.” *Schmerber, supra*, at 763-64. “On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.” *Id.* at 764. “The distinction which has emerged, often expressed in different ways, is that the [Fifth Amendment] privilege is a bar against compelling “communications” or “testimony,” but that compulsion which makes a suspect or accused the source of “real or physical evidence” does not violate it.” *Id.*

It is clear that this Court in *Westerville v. Cunningham* was relying on the Fifth Amendment analysis of the *Schmerber* decision to resolve the similar Fifth Amendment question presented in that case. This Court in *Westerville v. Cunningham* did not resolve any Fourth Amendment questions, nor were any Fourth Amendment questions presented for review in that case.

This Court’s present interpretation of *Westerville v. Cunningham* conflicts with this Court’s prior analysis. In the case of *Maumee v. Anistik* (1994), 69 Ohio St. 3d 339, at 342, this Court interpreted *Westerville v. Cunningham* as follows:

“In Cunningham, supra, the defendant was found guilty by a jury of operating a motor vehicle while intoxicated. At trial, defendant gave no reason for refusing to take a warrantless chemical test. In reversing the Court of Appeals, and upholding defendant’s conviction, this Court concluded that defendant’s unequivocal refusal to take a warrantless chemical test for intoxication would have probative value on the question of whether he was intoxicated at the time, and that the admission of defendant’s refusal and comment by counsel on the refusal would not violate defendant’s Fifth Amendment privilege against self-incrimination.”

Maumee v. Anistik, supra, at 342-43.

Until the decision in this case came out, this Court has never construed the case of Westerville v. Cunningham, supra, as a case addressing Fourth Amendment issues. However, as set forth above, this Court has acknowledged in the past that the decision in Westerville v. Cunningham, supra, resolves a Fifth Amendment question that had been presented to the Court.

This Court’s interpretation of its previous decision in Westerville v. Cunningham is also inconsistent and contrary to the well-established case law from both this Court and federal courts across the country. This Court, in Maumee v. Anistik (1994), 69 Ohio St. 3d 339, recognized at p. 342 of its decision that individuals have an absolute right to refuse to take a chemical test of one’s blood, breath, or urine. Likewise, federal courts have recognized that “[t]he Fourth Amendment gives citizens the right to refuse to consent to warrantless searches and seizures.” Gasho v. United States (9th Cir. 1994), 39 F.3d 1420, 1431 (citing United States v. Prescott (9th Cir. 1978), 581 F2d 1343, 1351). In fact, the United States Supreme Court, as recently as 2002, in the case of United States v. Drayton (2002), 536 U.S. 194, has reaffirmed the existence of an

absolute right to refuse consent to a warrantless search.

In *Drayton, supra*, the United States Supreme Court reiterated the test for determining whether consent to a warrantless search is voluntary for Fourth Amendment purposes. In discussing the approach necessary to determine the voluntariness of a consent, the United States Supreme Court declared that, “[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the Government need not establish such knowledge as the sine qua non of an effective consent.” *Drayton, supra*, at 206 (quoting *Schneckloth v. Bustamonte*(1973), 412 U.S. 218, 227). Federal courts across the country, including the Sixth Circuit Court of Appeals, have continually recognized an individual’s Fourth Amendment right to refuse consent to a warrantless search by considering a defendant’s knowledge of his Fourth Amendment right to refuse as a factor when determining whether a consent is voluntary when it is given. See *United States v. Haynes*(6th Cir. 2002), 301 F3d 669, 682-83; *United States v. Ivy*(6th Cir. 1998), 165 F3d 397, 402; *United States v. Jones*(6th Cir.1989), 846 F2d 358, 360; *United States v. Van Shuttles*(6th Cir. 1998), 163 F3d 331, 335; *United States v. Worley*(6th Cir. 1999), 193 F3d 380, 386-87. Moreover, the Federal Sixth Circuit has ruled that the question of “whether the person was informed consent could be refused,” is a “key test of the validity of a consent to a search given by a person in custody.” *United States v. Calhoun*(6th Cir. 1995), 49 F3d 231,235, fn. 4.

Given this Court’s decision in this case, the question must be asked: Can any consent to a warrantless search of one’s blood, breath, or urine in Ohio be voluntary under *Drayton, supra*, and other well-established United States Supreme Court precedent, if the right to refuse or revoke consent does not exist in the State of Ohio? Likewise, can a defendant’s consent to a warrantless search of his blood, breath, or urine, be voluntary under *Drayton, supra*, when that person consents instead of being jailed for refusing consent to the search?

Courts of Appeals throughout Ohio have also recognized an individual's Fourth Amendment right to refuse consent to a warrantless search. State v. Crawford(2003), 151 Ohio App. 3d 784; State v. Mack(1997), 118 Ohio App. 3d 516, 519 *dism.* 79 Ohio St. 3d 1418; State v. Arrington(1994), 96 Ohio App. 3d 375; State v. Rojas(1993), 92 Ohio App. 3d 336. Ohio Courts of Appeals have even recognized an individual's Fourth Amendment right to refuse consent to a warrantless search in the context of prosecutions for obstruction of justice and obstruction of official business. See, e.g., State v. Howard(1991), 75 Ohio App. 3d 760, 768, 772-74 ("Appellant's assertion of his constitutional right to refuse consent to the entry and search cannot be a crime and cannot be used as evidence against him for purposes of establishing the elements of obstruction of justice."); Middleburg Heights v. Theiss(1985), 28 Ohio App. 3d 1, 4 (noting that the assertion of a constitutional right to refuse to consent to an entry and search cannot be a crime).

Finally, this Court's interpretation of its previous decision in Westerville v. Cunningham ignores the well-settled rule of law articulated by the United States Supreme Court in Florida v. Jimeno(1991), 500 U.S. 248. In Jimeno, the United States Supreme Court declared, "A suspect may \*\*\*delimit has he chooses the scope of the search to which he consents." Jimeno, supra at 252. In other words, even after consent is given, individuals like Corey Hoover have an absolute Fourth Amendment right to revoke that consent. This right to revoke a previously given consent under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, has also been recognized by this Court in the case of Lakewood v. Smith(1965), 1 Ohio St. 2d 128, 130-31.

**III. This Court's reliance on State v. Gustafson is misplaced.**

In its decision on the merits of this case, this Court relies on the case of State v. Gustafson(1996), 76 Ohio St. 3d 425. In Gustafson, supra, this Court maintained that the ALS suspension imposed by R.C.§4511.191 did not violate double jeopardy protections contained in the federal and state constitutions because the license suspensions imposed under R.C.§4511.191 were civil and remedial in nature, and did not constitute a criminal “punishment”. Gustafson, supra, at 440-41.

However, in paragraphs 24 and 25 of its decision in this case, this Court misapplies the holding in Gustafson. Here, this Court cites Gustafson for the proposition that “both administrative regulation and criminal prosecution play part in insuring safety.” This Court, in paragraph 25 of its decision, further says that the Court in Gustafson ruled “that the punishment allowed under Ohio’s Implied-Consent Law did not violate the constitutional principle of double jeopardy.” This Court continues in paragraph 25 of its decision by stating, “Both an ALS as well as a criminal prosecution may result from driving under the influence of drugs or alcohol and refusing to take a warrantless chemical test.” Therefore, in its decision on the merits of this case, this Court relies on Gustafson for the proposition that criminal “punishment” may be imposed against a defendant for refusing to consent to a warrantless chemical test without any infringement on the defendant’s constitutional rights.

This interpretation and application of the Gustafson decision is erroneous because it fails to recognize the fact that Gustafson was reviewing a different statute that, according to this Court’s decision in Gustafson, was only imposing civil and remedial sanctions. Gustafson, supra, at 440-42. If, as this Court indicates in its decision here, the ALS suspension constitutes “punishment”, then Corey Hoover has a right under the double jeopardy protections of both the

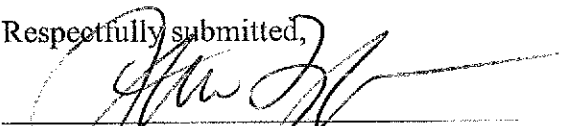
federal and state constitutions to have this charge against him dismissed. Therefore, if this Court is in fact ruling that the ALS suspension imposed against Mr. Hoover is a “punishment”, then Defendant-Appellee requests this Court to remand this matter to the Trial Court with instructions to dismiss the case against Mr. Hoover on double jeopardy grounds since Mr. Hoover has, in fact, been subject to an ALS suspension under R.C.4511.191.

#### **IV. Conclusion.**

Since individuals like Corey Hoover have an absolute Fourth Amendment right to refuse and/or revoke consent to a warrantless search, and since Revised Code 4511.19(A)(2) imposes a criminal punishment for said refusal and/or revocation of consent, Revised Code 4511.19(A)(2) violates Defendant’s rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. *Camara v. Municipal Court*(1967), 387 U.S. 523, 540; *Wilson v. Cincinnati*(1976), 46 Ohio St. 2d 138, 143-45.

WHEREFORE, Defendant-Appellee, Corey Hoover, respectfully requests this Court to reconsider its decision in this case, and to modify its decision finding that R.C.§4511.19(A)(2) violates his rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution. Moreover, Defendant-Appellee, Corey Hoover, respectfully requests this Court to remand this matter to the Trial Court with instructions to dismiss the case against Mr. Hoover.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion for Reconsideration has been forwarded to the following on this 8<sup>th</sup> day of October, 2009 by U.S. Regular Mail:

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