[Cite as *State v. Hosko*, 2015-Ohio-570.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 13-14-23**

v.

STEVEN A. HOSKO, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Tiffin-Fostoria Municipal Court
Trial Court No. 13 TRC 1544 A

Judgment Affirmed

Date of Decision: February 17, 2015

APPEARANCES:

Kent D. Nord **for Appellant**

SHAW, J.

{¶1} Defendant-appellant Steven A. Hosko ("Hosko") appeals the August 1, 2014 judgment of the Tiffin-Fostoria Municipal Court sentencing Hosko to 30 days in jail with all 30 days conditionally suspended after Hosko pled no contest to the charge of OVI in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor.

{¶2} The facts relevant to this appeal are as follows. On June 3, 2013, Hosko was driving home from work when, according to his statement, he fell asleep, went off the road and then struck a mailbox and a telephone pole. As a result of the accident, Hosko was taken via ambulance to the hospital.

{¶3} At the hospital Hosko spoke with Trooper Nunez of the Ohio State Highway Patrol, who indicated that an oxycodone pill bottle was found in Hosko's car and that, according to the prescription, Hosko should have had twelve pills left in the bottle but the bottle was empty. Hosko told Trooper Nunez that he did not know where the remaining pills were. Hosko was then asked by Trooper Nunez to submit a blood sample for drug testing. According to Trooper Nunez, Hosko gave verbal consent to the blood draw. Hosko's blood results showed that Hosko was under the influence of marihuana.

{¶4} On June 3, 2013, Hosko was charged with OVI in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor, OVI in violation of R.C.

4511.19(A)(1) & (7), a first degree misdemeanor, OVI in violation of R.C. 4511.19(A)(1)(j), a first degree misdemeanor, and Failure to Control in violation of R.C. 4511.202, a minor misdemeanor. (Doc. 1). The charging instrument indicated that Hosko was operating his vehicle under the influence of marihuana. (*Id.*)

{¶5} On July 13, 2013, Hosko was arraigned and pled not guilty to the charges.

{¶6} Multiple motions for continuance were then filed in this case, and Hosko waived his speedy trial time.

{¶7} On June 9, 2014, Hosko filed a motion to suppress evidence, arguing, *inter alia*, that Hosko did not give valid consent to the blood draw.[1]

{¶8} On July 2, 2014, a hearing was held on the suppression motion. The court heard the testimony of Trooper Sexton and Trooper Nunez of the Ohio State Highway Patrol. Hosko then called each of his parents to testify on his behalf, who were present at the hospital at the time of the blood draw and testified to whether Hosko consented to the blood draw. After hearing the arguments of the parties, the trial court overruled Hosko's suppression motion. An entry reflecting this was filed that same day, July 2, 2014.

[1] On June 16, 2014, the suppression motion was amended to add another issue that is not the subject of this appeal.

{¶9} On August 1, 2014, the court held a change of plea hearing. Hosko pled no contest to OVI in violation of R.C. 4511.19(A)(1)(a), in exchange the State dismissed the remaining charges against him. The court then proceeded immediately to sentencing and sentenced Hosko to serve 30 days in jail, with all 30 days conditionally suspended. An entry reflecting this, as modified by a later *nunc pro tunc* entry, was filed on August 1, 2014.

{¶10} It is from this judgment that Hosko appeals, asserting the following assignment of error for our review.

ASSIGNMENT OF ERROR

THE TRIAL COURT VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN IT FAILED TO SUPPRESS THE "BLOOD DRAW" OF APPELLANT.

{¶11} In Hosko's assignment of error, he argues that the trial court erred in overruling Hosko's motion to suppress. Specifically, Hosko contends that his consent to the blood draw was not voluntary.

{¶12} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-55, 2003-Ohio-5372, ¶ 8 (2003). When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *Id*. citing *State v. Mills*, 62 Ohio St.3d

357, 366 (1992). Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Burnside* citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara*, 124 Ohio App.3d 706, 707 (4th Dist.1997).

{¶13} The Fourth Amendment to the U.S. Constitution and Section 14, Article I of the Ohio Constitution prohibit the government from conducting unreasonable searches and seizures of persons or their property. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). Specifically, the Fourth Amendment protects persons against unjustified or improper intrusions into a person's privacy, including bodily intrusion. *See Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966).

{¶14} It is well established that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967). The U.S. Supreme Court has recognized that the Fourth Amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper

manner." *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611 (1985). However, a suspect, upon request of a police officer, may voluntarily consent to submit to a blood test to determine the concentration of alcohol and/or drugs in his or her blood. *State v. Hill*, 2d Dist. Montgomery No. 25717, 2014-Ohio-1447, ¶ 12. Such consent constitutes actual consent. *Id*. citing *Fairfield v. Regner,* 23 Ohio App.3d 79 (12th Dist.1985). Consent may be oral or written. *State v. McLemore*, 197 Ohio App.3d 726, 736, 2012–Ohio–521 (2d Dist.), citing *Katz*; *Ohio Arrest Search and Seizure*, Section 19:1 (2008).

{¶15} At the suppression hearing in this case, the State first called Trooper Montel Sexton of the Ohio State Highway Patrol. Trooper Sexton testified that on the night of June 3, 2013, he was dispatched to a crash scene on State Route 4, just inside of Seneca County. (Tr. at 12). Trooper Sexton testified that when he arrived he observed Hosko's car and the damage it had done to a mailbox and a utility pole when it went off the roadway. (*Id*.) Trooper Sexton testified that the fire department and an ambulance were already on the scene when he arrived and that Hosko had been loaded into the ambulance. (*Id*. at 13). Trooper Sexton testified that he briefly spoke with Hosko to get information for the crash report, but Hosko was "already strapped into the ambulance" so there was very little communication before Hosko was taken to the hospital. (*Id*. at 13).

{¶16} Trooper Sexton testified that he then investigated the crash site. He testified that Hosko's vehicle had to be towed so an inventory was done on the vehicle. (Tr. at 14). Trooper Sexton testified that while doing inventory he found several pill bottles, one of which was Oxycodone and completely empty. (*Id*.) According to Trooper Sexton, based on the prescription there should have been twelve pills left in the bottle, so that "sparked an interest" in him. (*Id*.) Trooper Sexton testified that he then contacted the on-duty sergeant and requested a unit to go to the hospital and ask Hosko to submit a voluntary blood sample.

{¶17} On cross-examination Trooper Sexton testified that he was not present for Hosko's blood draw, or for Hosko giving consent for the blood draw to be done. (Tr. at 18).

{¶18} The State next called Trooper Ivan Nunez of the Ohio State Highway Patrol. Trooper Nunez testified that he came into contact with Hosko at the Bellevue Hospital after being advised that Hosko had been involved in a crash. (Tr. at 21-22). Trooper Nunez testified that he was advised to get a statement from Hosko and to see if Hosko would consent to a blood draw. (*Id*.)

{¶19} Trooper Nunez testified that he obtained a written statement from Hosko detailing what had happened. The following exchange then took place between Trooper Nunez and the prosecutor.

> **Q: Okay. After obtaining the witness statement what did you do?**

> **A: At this point Trooper Sexton had made contact with me, let me know that they [sic] he had actually found Oxycodone pill [sic], if I could ask for consent for a blood draw from Mr. Hosko.**
>
> **Q: And what did you do?**
>
> **A: I asked for consent for the blood draw from Mr. Hosko.**
>
> **Q: And what happened?**
>
> **A: Mr. Hosko supplied or, you know, agreed to the blood draw.**

(Tr. at 23-24). Trooper Nunez testified that Hosko's blood was then drawn.

{¶20} Trooper Nunez testified that at the time of the blood draw "Trooper Lawson" was there with him. As to whether anyone else was present, he testified initially that he did not recall but there could have been and he just did not remember. (Tr. at 24, 27). When he was shown Hosko's statement from the incident, Trooper Nunez recalled that Hosko's mother had written out Hosko's narrative statement, had signed it for him and that she was present with Hosko. (Tr. at 34).

{¶21} Trooper Nunez testified that he could not recall any objections from Hosko regarding the blood draw and that he could not recall Hosko's demeanor at the time. (Tr. at 25). Trooper Nunez testified that because the incident was over a year prior to the suppression hearing and because there were no witness statements

to aid in his recollection he "[p]retty much just showed up, got the blood and left [which] kind of limits the scope of my involvement in that area." (Tr. at 25).

{¶22} On cross-examination Trooper Nunez testified that he did not recall Hosko making any requests to be removed from his backboard. (Tr. at 28). He also testified that he did not recall how many times he asked Hosko about giving a blood sample, stating that it "could have been" more than once. (Tr. at 28).

{¶23} Trooper Nunez also testified on cross that he did not believe he had a consent form for Hosko to sign but he was not certain of that. (Tr. at 31). Trooper Nunez testified that he believed Hosko was cooperative and answered all of his questions. (Tr. at 32).

{¶24} Trooper Nunez was then asked, "And you don't have a clear recollection of the particulars with regards to the consent, correct?" (Tr. at 34). Trooper Nunez responded, "Correct." (Tr. at 34).

{¶25} On re-direct, Trooper Nunez testified that a 2255 consent form was not used in this case because it was used when someone was under arrest, and Hosko was not under arrest at the time Trooper Nunez was seeking consent. (Tr. at 34-35).

{¶26} At the conclusion of Trooper Nunez's testimony the State rested.

{¶27} Hosko then called his mother, Sandra Lee Hosko ("Sandra"), who testified that she met with Hosko at the Bellevue hospital. Sandra testified that

Hosko was on a backboard, was wearing a neck brace, and that he was very uncomfortable. (Tr. at 38). Sandra testified that an officer at the scene asked her to write a statement for Hosko because he could not write at the time, and she did. (Tr. at 39).

{¶28} Sandra testified that she was present while the trooper spoke with Hosko. Regarding the contents of the discussion Sandra testified that "[the officers] were trying to get a blood sample from [Hosko] because they said Oxycodone was missing from the car and they wanted to make sure of how much he had taken." (Tr. at 39). Sandra testified that Hosko wanted to read "the paperwork" and the officers would not let him and that the officers told Hosko to "sign it," to which Hosko replied "I'm not signing anything that I didn't read." (Tr. at 40). Sandra testified the paperwork alluded to was "[a] consent" but she never saw it as it was on a clipboard. (Tr. at 40).

{¶29} Sandra testified that Hosko had said to the officers, "You get me off the backboard and I'll sign your papers" because he was so uncomfortable. (Tr. at 41). Sandra testified that ultimately when Hosko was asked about consenting to the blood test he stuck his arm out and said, "You're gonna do what you're gonna do." (Tr. at 40). Sandra testified that five to ten minutes had passed from the time the officer arrived to the time Hosko stuck out his arm. (Tr. at 41).

{¶30} Hosko next called his father, Richard Hosko ("Richard"). Richard testified that he was also at the hospital along with Sandra when the officers were present. Richard testified that Hosko was in a lot of pain and was agitated because of the neck brace and backboard. (Tr. at 57). Richard testified that Hosko had back problems in the past and his back was bothered. (*Id*.)

{¶31} Richard testified that he was present the whole time the officers were there. Regarding the blood test/sample, Richard testified that,

> **At the time [the officer] asked [Hosko], he says, I need to get a blood test for you. We had found prescription bottle of Oxycodone in there, and he asked [Hosko], he says, "When was the last time you had taken it?"**
>
> **And [Hosko] says, "I took it at lunch with my dinner, with my meal at lunchtime."**
>
> **And he said, "well, I needed to have a blood sample for the Oxycodone."**[2]
>
> **And [Hosko] was irritant [sic] about it. And he says that he wouldn't give them a blood test right then because the fact that he wanted off the backboard and that and he wanted to get the neck brace off because he was having a hard time breathing and that.**
>
> **And the officer told him, he said, no, I can't do that for you. The hospital has to do that for you and that he couldn't do that for [Hosko].**
>
> **And [the officer] asked again for the blood test and [Hosko] –**

[2] The scope of the blood draw was another issue at the suppression hearing decided by the trial court. The trial court's decision on that issue was not appealed.

> **Q: Who asked him?**
>
> **A: The officer asked [Hosko] for the blood test again. And finally, [Hosko], just irritant [sic] with everything, he just put his arm out and he says, "you're gonna do what you're gonna do, do what you gotta do" and he put his arm out for them to take the blood test.**

(Tr. at 60).

{¶32} Richard was then asked about whether there was any discussion with regard to Hosko signing a consent form and Richard testified, "I don't remember seeing anything like that being said to me or hearing anything like that being said, no." (Tr. at 61). However, Richard did testify that Hosko was asked at least two or three times to submit to the blood draw and on the third time Hosko "was irritant and just threw his arm out and he says, 'you're gonna do what you're gonna do. Do what you gotta do.' " (Tr. at 62).

{¶33} At the conclusion of Richard's testimony, Hosko rested and the parties made closing arguments. After hearing the parties' arguments, the trial court made the following determination.

> **The first issue is the consent issue. Okay. What is consent? There's a lot of different factors. * * ***
>
> **And one of the things that [the prosecutor] was talking about was, you know, intelligence, education, age. If you're real young, you know, Trooper Sexton[3] could be an intimidating guy. If you're maybe kind of a simpleton, you're not the smartest**

[3] The trial court likely meant Trooper Nunez here, as Trooper Nunez would have been the officer seeking the consent at the hospital.

guy, you could look at him and you might be intimidated by the uniform, some of the things that he was saying.

*** * ***

But you have to look at all those other factors; education, voluntariness, setting, dialogue between the two. It's pretty clear to me, based on the dialogue – now Trooper Nunez didn't really contribute much from that. It was a year ago. I get that, but your mom and dad I'm sure, you know, they were focused in.

Mom was a little more fuzzy, although there were a few things that were similar, you know, like, "you're gonna do what you're gonna do." Dad added, "You're gonna do what you're gonna do so do what you wanna do, or do what you're gonna do."

It's not kind of the glowing consent that a court would like to generally see, that's more like acquiescence; yeah, go ahead. Yeah. You're gonna do what you wanna do anyway so go ahead.

Uhm, and I understand that this is less than ideal circumstances. You are not comfortable. But I think taken and looked under the totality of the circumstances, I think it's enough. It's barely enough. It's very close. But if you had persisted with, no – and the other thing, too, this kind of bargaining about, oh, well, if you take me off the board I'll consent. You know, these guys aren't doctors, okay? They're not trauma specialist[s]. They're not gonna be able to say, oh, of course, take the young man off the board. Take that neck brace off so we can do a blood draw for him. They don't have the availability. [sic] * * *

I think in light of all the circumstances I do believe that there was valid consent, not great, it was acquiescence as much as anything, it was begrudging but I do think that there was consent.[4]

[4] The trial court's judgment entry indicated that the suppression motion was being overruled for the reasons stated on the record, thus we do not cite to the entry.

(Tr. at 71-72).

{¶34} On appeal, Hosko argues that the trial court erred in making its ruling on the suppression motion and that the State failed to meet its burden of establishing "by 'clear and positive' evidence that consent was 'freely and voluntarily given.' " *State v. Posey*, 40 Ohio St.3d 420 (1988). In support of his argument, Hosko argues that he was "irritant" and in pain and had to be asked multiple times to consent to a blood draw. Hosko also argues that he never signed a consent form. In addition, Hosko contends that Trooper Nunez could not remember the details surrounding Hosko's consent.

{¶35} Despite Hosko's arguments, Trooper Nunez did testify that Hosko provided consent. This was clarified by Hosko's parents who testified that, when Hosko was asked, he ultimately stuck out his arm and said "you're gonna do what you're gonna do. Do what you gotta do." The phrase "do what you gotta do," certainly could be considered as freely and voluntarily given consent. This is especially true in light of the fact that Hosko was apparently not against the idea of consenting to a blood test *per se* since he attempted to bargain with Trooper Nunez in order to get out of the backboard and neck brace. After Trooper Nunez stated that he could not help Hosko, Hosko stuck his arm out, indicating a voluntary action, and then verbally stated "you're gonna do what you're gonna do. Do what you gotta do." Those two things, the verbalization and the voluntary action of

sticking out his arm, when taken together, could certainly be found to constitute valid consent.

{¶36} Moreover, Hosko cites us to no case law where consent similar to that provided in this case was found invalid. Consent has been found to be invalid by other appellate courts in instances such as an individual being read a document informing him that he was under arrest when he actually was not, creating some "inherent[] coercion[,] [which] precludes a finding that subsequent consent to the taking of a specimen of bodily fluid is voluntary." *State v. Roar*, 4th Dist. Pike No. 13CA842, 2014-Ohio-5214, ¶ 32 citing *State v. Whitt,* 5th Dist. Licking No. 10–CA–3, 2010–Ohio–3761 (multiple additional citations omitted). No such inherent coercion is present or even alleged in this case.

{¶37} Rather, this case is more similar to *City of Fairfield v. Regner*, 23 Ohio App.3d 79, 80, 491 N.E.2d 333, 335 (12th Dist.1985), wherein the Twelfth District Court of appeals found that the defendant's statements of " 'You can do anything you want. You can take anything you want' " constituted valid consent.

{¶38} Furthermore, we would note that there was a complete absence in this case of any evidence that Hosko ultimately refused to give consent. *State v. Neely*, 11th Dist. Lake No 2004-L-197, 2005-Ohio-7045, ¶ 35 (11th Dist.) ("Absent was any evidence that appellant refused consent.").

{¶39} In sum, the trial court's finding is supported in the record as Hosko both verbally and physically indicated his consent to a blood draw, which was established not only by the State's witness but also by Hosko's own witnesses. In addition, Hosko has provided us no law showing this consent is invalid, and Hosko further makes no claim that he ultimately refused to give consent. Accordingly, Hosko's assignment of error is overruled.

{¶40} Having found no error in the particulars assigned Hosko's assignment of error is overruled and the judgment of the Tiffin-Fostoria Municipal Court is affirmed.

Judgment Affirmed

PRESTON, J., concurs.

/jlr

ROGERS, P.J., DISSENTS.

{¶41} I respectfully dissent from the majority and would find that the evidence against Hosko should be suppressed.

{¶42} The State has the burden of proving, by clear and convincing evidence, that consent was freely and voluntarily given. *State v. Aguirre*, 3d Dist. Seneca Nos. 13-11-19, 13-11-20, 2012-Ohio-2014, ¶ 12. Clear and convincing evidence is "[t]he measure or degree of proof that will produce in the mind of the

trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases." *In re Estate of Haynes*, 25 Ohio St.3d 101, 104 (1986). "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 549, 88 S.Ct 1788 (1968).

{¶43} "Whether a consent to search was voluntary or the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the circumstances." *State v. Lett*, 11th Dist. Trumbull No. 2008-T-0116, 2009-Ohio-2796, ¶ 32, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249, 93 S.Ct. 2041 (1973) *and State v. Chapman*, 97 Ohio App.3d 687, 691 (1st Dist.1994). Factors a trial court should consider to determine whether consent was voluntarily given include:

> (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was given in public or at a police station; (3) the presence of threats, promises, or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a "newcomer to the law"; and (7) the suspect's education and intelligence.

State v. Fry, 4th Dist. Jackson No. 03CA26, 2004-Ohio-5747, ¶ 23.

{¶44} The majority states that "Trooper Nunez did testify that Hosko provided consent." Majority Opin., ¶ 35. However, nowhere in the record does

Trooper Nunez testify as to how Hosko consented. He merely states "Mr. Hosko supplied, or, you know, agreed to the blood draw." Suppression Hearing Tr., p. 24. It is not enough the Hosko *agreed* to the blood draw, he must have *voluntarily consented* to the blood draw.

{¶45} In a suppression hearing where the defendant has properly alleged that a search was conducted without a warrant, "the prosecutor bears the burden of proof, *including the burden of going forward with evidence*, on the issue of whether probable cause existed for the search or seizure." (Emphasis added.) *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 220 (1988).

{¶46} Here, Trooper Nunez provided *nothing* to the court to allow it to make this determination as he admitted he had limited recollection of the events because he took no notes and there were "no witness statements or anything like that written to help aide me in my recollection of the situation." Suppression Hearing Tr. at 25. He could not remember whether he read a consent form to Hosko before the request, whether anyone else was in the room, or how many times he asked for the blood before he obtained consent, although he admitted it could have been more than once. He could not remember what he said to obtain consent, whether he indicated that it would only be to test for Oxycodone or for any indicia of impairment. He could not recall Hosko's demeanor or whether he objected to the request. Trooper Nunez was unable to remember *any* of the

attendant circumstances necessary to provide the trial court enough information to determine that the consent was voluntarily given as he had no "clear recollection of the particulars with regards to consent * * *." *Id.* at 34.

{¶47} Further, the trial court admits that the State did not present sufficient evidence to determine the issue. When deciding the suppression motion, it stated "[i]t's pretty clear to me, based on the dialogue - - now Trooper Nunez didn't really contribute much from that. It was a year ago. I get that, *but your mom and dad* I'm sure, you know, they were focused in." (Emphasis added.) *Id*. at 71. The trial court goes on to state how it used the testimony of Hosko's parents to make its decision. As Trooper Nunez in essence provided nothing in the way of how Hosko's consent was voluntary and the trial court had to rely on Hosko's parents to fill in the gap, the State clearly failed its burden of *producing any evidence* that the consent was voluntary. The majority also utilizes the witnesses provided by Hosko to determine that he voluntarily consented to the blood draw, but by that point in the hearing the State had already failed its burden.

{¶48} However, assuming, arguendo, that it is proper to use Hosko's witnesses to meet the State's burden of proof, it does not change the result. The majority states that "the phrase 'do what you gotta do,' certainly could be considered as freely and voluntarily given consent." Majority Opin., ¶ 35. However, the trial court found that this statement was "more like acquiescence;

yeah, go ahead. Yeah. You're gonna do what you wanna do anyway so go ahead." Suppression Hearing Tr., p. 71-72. The trial court again stated that this statement "was acquiescence as much as anything * * *." *Id.* at 72. The trial court's finding that Hosko acquiesced precluded it from finding that he voluntarily consented. The two are mutually exclusive. Further, that Hosko acquiesced is supported by competent, credible evidence in the record and should not be overturned by this court on appeal. Even assuming that acquiescence amounts to consent under the circumstances, the trial court stated that the circumstances were "barely enough. It's very close." *Id.* "Very close" and "barely enough" are indicative of a preponderance standard. A "very close" case must be decided in Hosko's favor as the state is required to prove, by clear and convincing evidence, that he consented.

{¶49} The majority also states that "there was a complete absence in this case of any evidence that Hosko ultimately refused to give consent." Majority Opin., ¶ 38. However, "officers may not continue to question [a defendant] until they receive the responses they want." *In re Parks*, 10th Dist. Franklin No. 04AP-355, 2004-Ohio-6449, ¶ 30. When asked how many times Hosko refused the blood draw, his father testified "I know at least two times, yes. It wasn't until the third time that [Hosko] was irritant [sic] and he just threw his arm out and he says, 'you're gonna do what you're gonna do. Do what you gotta do.' " Suppression

Hearing Tr., p. 62. Once a request for a search is denied, repeated requests take on a coercive tone. *State v. DeCaminada*, 148 Ohio App.3d 213, 2002-Ohio-2917, ¶ 39 (2d Dist.).

{¶50} In *Decaminada*, the defendant was sitting alone in her car in a high crime, poorly lit area late at night. *Id.* at ¶ 4. Upon approaching the vehicle and talking to its occupant, a police officer saw a pill bottle through the window. *Id.* at ¶ 7. When he initially requested to see the bottle, he was denied, but the defendant handed the bottle over when the officer asked again. *Id.* at ¶ 15. While the trial court overruled the motion to suppress, the appellate court reversed, finding that

> [i]t is reasonable to infer that she refused because the bottle contained evidence that could result in criminal charges against her. That fact supports a finding that the subsequent acquiescence to the officer's renewed demand was involuntary, not a consent that was the product of the [defendant's] own free will. Stated conversely, existence of those facts, on this record, precludes a finding that the voluntariness of [the defendant's] "consent" is demonstrated by clear and convincing evidence.

Id. at ¶ 43.

{¶51} In *State v. Rice*, 129 Ohio App.3d 91 (7th Dist.1998), the appellate court found that consent could not be voluntarily given "when all of the evidence in the record indicates that appellant was writhing in pain so great that the officer was unable to conduct field sobriety tests at the scene or at the hospital due to those injuries." *Id.* at 95. Here, Hosko was strapped to a board in a hospital room. He could not leave even if he wanted to. He was irritated and in pain so great that

he was willing to do whatever the officers wanted if they would remove him from the board. He refused their initial requests for blood. The repeated refusals coupled with the pain Hosko was clearly experiencing from his injuries rendered any consent involuntary under the totality of the circumstances.

{¶52} The majority likens this case to *City of Fairfield v. Regner*, 23 Ohio App.3d 79 (12th Dist.1985). However, in *Regner*, the officer advised the defendant "that she could refuse to allow a sample to be withdrawn and that her consent must be voluntary." *Id.* at 80. There is no evidence indicating that such a warning was given here. Further, in *Regner*, the defendant stated "[y]ou can do anything you want. You can take anything you want" after a single request. *Id.* In contrast, Hosko refused the police officer's request twice and never said that the officer could take blood or that he didn't care.

{¶53} Finally, there is a dispute as to whether the Trooper Nunez told Hosko that he would only test for Oxycodone when drawing the blood. Had Trooper Nunez promised that the test would be limited when he had no authority to limit the scope would render any consent involuntary. *See In re Parks*, 2004-Ohio-6449 at ¶ 32 (finding that officers telling suspect they could obtain a warrant when they had no authority to obtain a warrant rendered a consent to search invalid).

{¶54} I believe the State failed to meet its burden of production and its burden of persuasion to show by clear and convincing evidence that Hosko voluntarily consented to the blood draw. Consequently, I would sustain Hosko's sole assignment of error.