[Cite as *State v. Hill*, 2009-Ohio-2468.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-0011
ADAM HILL	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Coshocton Municipal Court, Case No. TRC0800273B
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 22, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT A. SKELTON Assistant Law Director 760 Chestnut Street Coshocton, OH 43812	JEFFREY G. KELLOGG Assistant Public Defender 239 North Fourth Street Coshocton, OH 43812

Gwin, J.

{¶1} Defendant-appellant Adam Hill appeals his convictions and sentences in the Coshocton County Municipal Court on one count of Driving under the Influence of Alcohol or Drugs, Refusal, in violation of R.C. 4511.19 (A) (2) and one count of Lanes of Travel Upon Roadways in violation of Ohio Revised Code Section 4511.25(A). The appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE[1]

{¶2} The undisputed facts are as follows:

{¶3} On February 7, 2008 an automobile operated by appellant was stopped after making a wide turn and crossing over into the oncoming lane of traffic. Upon speaking with appellant, the arresting officer detected an odor of alcohol on his breath. The appellant was ordered from his vehicle to perform roadside sobriety tests. The Deputy performed a horizontal gaze nystagmus test where he observed six clues. Appellant refused any further tests and was arrested for Driving Under the Influence of Alcohol or Drugs.

{¶4} Upon arrival at the Coshocton Jail appellant was read the BMV 2255, advising him of the consequences of refusing a blood alcohol test. Appellant signed documents confirming he was advised of his rights and he was read the BMV 2255 form as required by law. He was offered a BAC Datamaster test but refused.

{¶5} Appellant was originally charged with one count of Driving Under the Influence of Alcohol or Drugs in violation of 4511.19(A)(1)(a), one count of Driving

[1] A Statement of the Facts underlying appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in appellant's assignment of error shall be contained therein.

Under the Influence of Alcohol or Drugs, Refusal, in violation of 4511.19(A)(2), and one count of Lanes of Travel Upon Roadways in violation of 4511.25(A).

{¶6} On April 4, 2008 appellant entered pleas of no contest to Driving Under the Influence of Alcohol or Drugs, Refusal and the lane violation. Appellant was found guilty and sentenced to serve one hundred twenty days in jail. One hundred days was suspended. The trial court ordered appellant to serve ten days in jail and thirty-six days on electronically monitored house arrest. Appellant orally objected to the sentencing for the Driving Under the Influence of Alcohol or Drugs, Refusal claiming that the sentence violated his right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution. Appellant argued that the sentence imposed an additional minimum jail term on him for refusing to take a chemical test to measure his blood alcohol level. The trial court overruled appellant's oral objections.

{¶7} Appellant has timely appealed raising as his sole assignment of error:

{¶8} "I. THE TRIAL COURT ERRED AND THE DEFENDANT-APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT SENTENCED THE DEFENDANT TO AN ADDITIONAL TEN DAYS INCARCERATION PURSUANT TO R.C. 4511.19(G)(1)(B)(ii) SOLELY BECAUSE HE REFUSED TO SUBMIT TO A BREATH ALCOHOL TEST AFTER HIS ARREST."

I.

{¶9} In his sole assignment of error, appellant argues that the trial court erred when it sentenced him for refusing to submit to a chemical test to determine the amount of alcohol in his system at the time he was arrested for operating a motor vehicle while

under the influence of alcohol. Appellant argues, in essence, that that a breathalyzer test is a warrantless search in violation of the Fourth Amendment, and the law cannot penalizes him for refusing the warrantless search by way of chemical test. We disagree.

{¶10} The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. The Fourth Amendment does not proscribe all searches and seizures; it proscribes unreasonable ones. *Skinner v. Ry. Labor Exec. Ass'n (*1989*),* 489 U.S. 602, 618, 109 S.Ct. 1402, 1413.

{¶11} Usually, a search or seizure is not reasonable unless it is accomplished pursuant to a warrant issued upon probable cause. Id*.* at 619, 109 S.Ct. at 1414. However, the Supreme Court has recognized certain exceptions to the general rule when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin* (1987)*,* 483 U.S. 868, 873, 107 S.Ct. 3164, 3168 (quoting *New Jersey v. T.L.O*. (1985), 469 U.S. 325, 351, 105 S.Ct. 733, 747). "When faced with such special needs, [the Court has] not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context." *Skinner,* 489 U.S. at 619, 109 S.Ct. at 1414.

{¶12} Withdrawal of a sample of blood from the body of a criminal accused in order to determine its alcohol or drug content for the purpose of proving a criminal charge is a search and seizure within the meaning of the Fourth Amendment. *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. In the

absence of a judicial warrant, the withdrawal of blood is *per se* unreasonable and illegal unless the state demonstrates an exception to the warrant requirement that renders the search reasonable under the circumstances. *State v. Sisler* (1995), 114 Ohio App.3d 337, 341, 683 N.E.2d 106, 109.

{¶13} In *Schmerber,* a physician, at the direction of a police officer, drew a blood sample from the defendant without his consent to test the level of alcohol in his blood. *Schmerber,* 384 U.S. at 758, 86 S.Ct. at 1829. The Supreme Court concluded that a warrantless search that involved an intrusion into the body, such as the extraction of a blood sample, would be upheld only if there were exigent circumstances that made it impracticable to obtain a warrant prior to the search. Id. at 770-771, 86 S.Ct. at 1835-1836. The *Schmerber* Court rejected the claim that the seizure of blood was an unreasonable search and seizure, and identified three requirements deemed critical to the reasonableness of the intrusion in question. First, there must be a "clear indication" that in fact the desired evidence will be found. Second, the test chosen to measure defendant's blood alcohol level must be a reasonable one. Third, the test must be performed in a reasonable manner. 384 U.S. at 770-71, 86 S.Ct. at 1835-36; *Burnett v. Municipality of Anchorage* (9th Cir .1986), 806 F.2d 1447, 1449.

{¶14} The Ohio Supreme Court has "considered the holding of the United States Supreme Court in *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, as authorizing the administration, over objection by the accused, of the kinds of tests specified in Section 4511.191(A), Revised Code." *State v. Starnes* (1970), 21 Ohio St.2d 38, 43, 254 N.E.2d 675, 678. [Citing *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121, 239 N.E.2d 38]. The Court in *Starnes* further explained that

the holding in *Westerville* "was that one accused of intoxication has no constitutional right to refuse to take a reasonably reliable chemical test, and the admission into evidence that one accused of intoxication refused to take such a test, and comment upon that fact by counsel are not violative of any constitutional privilege against self-incrimination." 21 Ohio St.2d 38, 43, 254 N.E.2d 675, 678. Accordingly, the Supreme Court in *Starnes* held that implied consent statute does not compel one to be a witness against himself in violation of the self-incrimination clause of the Fifth Amendment.

{¶15} The Supreme Court has stated, "subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, implicates concerns about bodily integrity" and "should be deemed a search." *Skinner,* 489 U.S. at 616-17, 109 S.Ct. at 1412. Courts have noted that breathalyzer tests are less intrusive than blood tests, and the Courts have upheld blood tests as not violating the Fourth Amendment. *Skinner,* 489 U.S. at 625, 109 S.Ct. at 1417. "Although the *Schmerber* holding was strictly limited to its facts, Id. at 771-72, 86 S.Ct. at 1836, a breathalyzer test seems even less intrusive than the extraction of blood samples, and thus less deserving of protection under the fourth amendment than is a blood extraction." *Burnett v. Anchorage* (D. Alaska 1986), 634 F.Supp. 1029, 1035-37 aff'd, 806 F.2d 1447 (9th Cir.1986); See also, *Skinner,* supra, 489 U.S. at 625, 109 S.Ct. at 1417.

{¶16} As is evident from the development of the law in this area, there is no constitutional right to refuse a chemical test, and a person's right to refuse a forced chemical test exists only if the forced test is unreasonable under the Fourth Amendment. *McNulty v. Curry* (1975), 42 Ohio St.2d 341, 345. The choice to submit to

or refuse the test is not a constitutional right, but rather a matter of legislative grace. *South Dakota v. Neville,* supra, 459 U.S. at 565; *State v. Bostrom* (1995), 127 Wash.2d 580, 590, 902 P.2d 157, 161.

{¶17} The question in this case, therefore, is not whether the state can require an individual to submit to a chemical test when the person is suspected of operating a car while under the influence of alcohol or controlled substances; rather the question is whether the state can impose a jail sentence upon any individual for the act of refusing to allow such a test to be conducted.

{¶18} Under the Ohio law, a person who drives a motor vehicle in the state implicitly consents to submit to a breath test to determine the amount of alcohol in his blood if he is lawfully arrested for driving while intoxicated. R.C. 4511.191(A) (2). Appellant argues that the minimum criminal penalty for OVI is doubled solely because he revoked his consent to the warrantless search. One convicted under R.C. 4511.19(A) (1) (a) through (e) who has a prior conviction within six years, as appellant has, must serve a mandatory jail term of not less than ten days. R.C. 4511.19(G) (1) (b) (i). That same defendant would be required to serve a minimum mandatory jail term of 20 days if he or she were to revoke the consent to search. R.C. 4511.19(G) (1) (b) (ii). Thus, the minimum criminal penalty to be imposed is doubled merely because a defendant revokes his or her consent to search. *State v. Hoover,* 173 Ohio App.3d 487, 2007 Ohio 5773, 878 N.E.2d 1116.

{¶19} At least one court has found that phrasing the argument in terms of appellant's revocation of *consent* to a chemical test is not an accurate characterization, because appellant's *consent* in the true sense of the word is not necessary. "Appellants'

argument regarding consent and cooperation is misplaced. The argument confuses a legal concept, 'consent,' with a factual concept, 'cooperation.' The two are substantially different. Consent in the constitutional sense is only required where the defendant has a legal right to refuse. As per *Schmerber,* a legally arrested defendant has no constitutional right to refuse a breathalyzer examination. True, he may fail to cooperate, but failure to cooperate does not create a legal right where it would otherwise not exist." *Burnett v. Municipality of Anchorage,* supra 806 F.2d at 1450. [Citations omitted]. The United States District Court in *Burnett* noted, simply, "Just as a driver's failure to cooperate in the search is no impediment to the classification of the proceeding as a search incident to arrest, the absence of cooperation is no bar to the characterization of the taking of breath as a consent search for which consent has already been supplied by the act of driving on Alaska roads, though this second conclusion is not necessary to a resolution of this matter. In the simplest terms, the driver stopped on probable cause for driving while intoxicated has no consent to withhold, at least for purposes of this fourth amendment analysis." *Burnett v. Municipality of Anchorage*, supra, 634 F.Supp at 1038. [Footnote omitted]. In reality, two of the exceptions to the warrant requirement existed when appellant was arrested which made the request to undertake a breathalyzer test reasonable under the Fourth Amendment: (1) exigent circumstances, and (2) search incident to a lawful arrest. Either of these theories would support a finding that a warrantless search of appellant was reasonable. *United States v. Reid* (4th Cir 1991), 929 F.2d 990, 994-995.

{¶20} In the implied consent statutes, the legislature has gone to great lengths to avoid authorizing the police to forcibly take blood alcohol tests from defendants charged

with driving while intoxicated. The legislature has, instead, provided extremely strong incentives to a defendant to take a breath test for blood alcohol by providing criminal penalties. “[G]iven, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice.” *South Dakota v. Neville* (1983), 459 U.S. 553, 563-564 103 S.Ct. 916, 922. A potentially longer jail sentence is simply another consequence of a defendant's refusal. *Commonwealth v. Hernandez-Gonzalez* (Ky. 2002), 72 S.W.3d 914, 917. “Since Ohio has long accepted the principle that a defendant's refusal may be used in considering whether the defendant is under the influence, we see no distinction in the use of that same refusal as an element to enhance a minimum term of imprisonment.” *Middleburg Hts. v. Henniger,* 8th Dist. No. 86882, 2006-Ohio-3715, at ¶ 21.

{¶21} In the case at bar, appellant concedes that the officer had probable cause to believe he was under the influence of alcohol. Therefore, there existed a clear indication that a breath test would show appellant had consumed quantities of alcohol. Likewise, the method of blood alcohol testing requested by the officer was a reasonable one. In addition, the breath test sought by the officer is clearly a less objectionable intrusion than the compulsory blood samples allowed under *Schmerber.* It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellant had no constitutional right to refuse.

{¶22} Thus, no improper condition has been placed on the exercise of appellant’s rights under the Fourth Amendment.

{¶23} Appellant’s sole assignment of error is denied.

{¶24} For the foregoing reasons, the judgment of the Municipal Court of Coshocton County is affirmed.

By Gwin, J.,

Farmer, P.J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS

WSG:clw 0417

[Cite as *State v. Hill*, 2009-Ohio-2468.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ADAM HILL	:	
Defendant-Appellant	:	CASE NO. 2008-CA-0011

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Coshocton County is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS