[Cite as *State v. Schulz*, 2015-Ohio-2252.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 26875
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ERIC SCHULZ	AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2012 TRC 9708

DECISION AND JOURNAL ENTRY

Dated: June 10, 2015

CARR, Presiding Judge.

{¶1} Appellant, Eric Schulz, appeals the judgment of the Akron Municipal Court. This Court affirms.

I.

{¶2} This matter arises out of a traffic stop in Akron, Ohio, on the evening of June 27, 2012. The parties stipulated to the following facts. At approximately 11:20 p.m., Trooper Petit of the Ohio State Highway Patrol observed a black Toyota Solara on South Arlington Street. Trooper Petit checked the vehicle's registration plate and discovered that the plate was expired. After initiating a traffic stop, Trooper Petit approached the vehicle and detected the odor of marijuana. Trooper Petit asked both the driver, Schulz, and the passenger if they had been smoking marijuana, and both occupants responded in the affirmative. Trooper Petit asked Schulz to exit the vehicle and walk back to the cruiser. Once at the cruiser, Trooper Petit detected the odor of marijuana emanating from Schulz. Though Schulz was placed in handcuffs,

he was not advised of his *Miranda* rights. After placing Schulz in handcuffs, Trooper Petit asked Schulz how recently he had smoked marijuana. Schulz responded that he had smoked a "one hitter" approximately an hour before the stop.

{¶3} After Trooper Petit performed a search of Schulz' person and found nothing, he then performed a search of Schulz' vehicle and found a blue and white glass smoking device in the center console. Trooper Petit then proceeded to administer three standard field sobriety tests. Though Trooper Petit observed 0 of 6 possible clues of impairment on the Horizontal Gaze Nystagmus Test, he did notice that Schulz' pupils were dilated. With the remaining two tests, Trooper Petit observed 4 of 8 possible clues of impairment on the Walk and Turn Test, and 3 of 4 possible clues of impairment on the One Leg Stand Test. No other field sobriety tests were administered.

{¶4} At that point Schulz was placed under arrest for operating a vehicle while impaired. Trooper Petit read Schulz a copy of the BMV 2255 form, and Schulz provided a urine sample to police within one hour of the traffic stop. Trooper Petit sent the bottled and sealed urine sample to the Ohio State Highway Patrol Crime Lab. The test results indicated 252.07 nanograms per milliliter of 11-nor-9-Carboxy-Tetrahydrocannabinol (Marijuana Metabolite) in Schulz' urine. Trooper Petit also sent a sealed plastic bag containing the smoking device containing burnt plant residue for testing. After the plant residue substance was analyzed, it was confirmed that it was marijuana residue weighing .02 grams.

{¶5} Schulz was initially charged with the crime of driving under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a), and driving with an expired registration in violation of R.C. 4503.11. Several months after the incident, on November 14, 2012, Schulz was also charged with driving with a prohibited concentration of marijuana metabolites in

violation R.C. 4511.19(A)(1)(j)(viii). Schulz filed a motion to suppress, arguing that the field sobriety tests utilized during the stop were unreliable, that his post-custodial statements were unlawfully obtained, and that the urinalysis evidence was invalid. Schulz also filed a motion to dismiss in which he challenged the constitutionality of the charge of operating a vehicle with a prohibited concentration of marijuana metabolites. The parties entered into a stipulation of facts and the trial court held a hearing on the pending motions. The parties' stipulations included evidence regarding the scientific validity of the marijuana metabolites standard contained in R.C. 4511.19(A)(1)(j)(viii). On February 26, 2013, the trial court issued a journal entry addressing both motions. The trial court granted the motion to suppress with respect to the field sobriety tests as well as Schulz's post-custodial statement that he had "smoked a one hitter" an hour before the stop, but denied the motion to suppress regarding the urinalysis results. The trial court also denied the motion to dismiss on constitutional grounds. Schulz subsequently entered a plea of no contest to operating a vehicle with a prohibited concentration of marijuana metabolites. The remaining charges were dismissed. Schulz was ordered to serve 180 days in jail, 177 of which were suspended on the condition that he pay a fine of $375.00 and complete a driver intervention program. The trial court also ordered a suspension of his driver's license for six months.

{¶6} Schulz filed a timely notice of appeal. Due to the fact that the appellate record did not contain the motion to dismiss as well as other relevant documents, this Court issued an opinion affirming Schulz' conviction on March 19, 2014. *State v. Schulz*, 9th Dist. Summit No. 26875, 2014-Ohio-1037. Schulz filed a motion for reconsideration, explaining that the issues in the appellate record stemmed from an uncharacteristic docketing irregularity. Schulz filed an

affidavit in support of his motion. In the interest of justice, this Court granted the motion and allowed Schulz to supplement the appellate record.

{¶7} Now before this Court, Schulz raises one assignment of error.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS BECAUSE R.C. 4511.19(A)(1)(j)(viii)(II) VIOLATES THE EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION AND OF THE OHIO CONSTITUTION.

{¶8} In his assignment of error, Schulz contends that R.C. 4511.19(A)(1)(j)(viii)(II) violates the equal protection clauses of the U.S. Constitution and the Ohio Constitution. This Court disagrees.

{¶9} Schulz challenges the constitutionality of R.C. 4511.19(A)(1)(j)(viii)(II), which states:

> No person shall operate any vehicle * * * if, at the time of the operation * * * the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that * * * [a]s measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

{¶10} The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause in the Ohio Constitution states that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." Section 2, Article I, Ohio Constitution. The Supreme Court of Ohio has "construed these provisions as

being 'functionally equivalent,' necessitating the same analysis." *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, ¶ 11, quoting *Am. Assn. of Univ Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 59 (1999); *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, ¶ 11.

{¶11} "In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment * * * [courts] apply different levels of scrutiny to different types of classifications." *Thompson* at ¶ 13, quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Ohio courts use the same analytic approach in determining whether a statutory classification violates Section 2, Article I of the Ohio Constitution. *Thompson* at ¶ 13, citing *State v. Williams*, 88 Ohio St.3d 513, 530 (2000). Thus, all Ohio statutes are, at a minimum, subject to rational basis review. *Id.*

{¶12} When a statute does not implicate a fundament right or a suspect classification, courts employ a rational basis review, and a statute will not violate equal protection principles if it is rationally related to a legitimate government interest. *Eppley* at ¶ 15. Ohio courts grant substantial deference to the legislature when conducting a rational basis review and the State has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 91. "The rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational." *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, ¶ 19, quoting *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶ 9; *State v. Stull*, 9th Dist. Summit No. 27036, 2014-Ohio-1336, ¶ 22. However, the preliminary step in conducting any equal protection analysis is to examine the classifications

created by the statute in question. *Burnett v. Motorists Mut. Ins. Co.* 118 Ohio St.3d 493, 2008-Ohio-2751, ¶ 31; *Conley v. Shearer*, 64 Ohio St.3d 284, 290 (1992).

{¶13} The Supreme Court of Ohio has routinely held that where there is no classification, there is no discrimination which would offend the equal protection clauses of either the United States or Ohio Constitutions. *Burnett* at ¶ 31; *Conley*, 64 Ohio St.3d at 290. Moreover, when an appellant "fail[s] to identify the appropriate class, we need not construct one for her in order to proceed with the analysis." *Burnett* at ¶ 37. This Court has repeatedly rejected equal protection challenges when the appellant has failed to correctly identify the classification created by the statute. *Gerak v. Dentice*, 9th Dist. Summit No. 19767, 2000 WL 372316, *4-5 (Apr. 12, 2000); *Clement v. Grange Mut. Cas. Co.*, 9th Dist. Medina No. 2698-M, 1998 WL 195904, *4 (Apr. 22, 1998). "Only when it is shown that the legislation has a substantial disparate impact on classes defined in a different fashion may analysis continue on the impact of those classes." *Beagle v. Walden*, 78 Ohio St.3d 59, 63 (1997), quoting *Califano v. Boles*, 443 U.S. 282, 294 (1979).

{¶14} In his merit brief, Schulz contends that the express language of R.C. 4511.19(A)(1)(j)(viii)(II) "creates a classification by punishing unimpaired drivers for OVI offenses, solely based on prior marijuana use, while simultaneously having no effect on other unimpaired drivers." Schulz insists that the statute makes "no effort to distinguish between impaired and unimpaired drivers."

{¶15} Though Schulz claims that R.C. 4511.19(A)(1)(j)(viii)(II) is designed to draw an arbitrary distinction between similarly situated classes of unimpaired drivers, it is readily apparent from the language of the statute, its legislative history, and its practical application that the statute aims to distinguish between unimpaired motorists and motorists who are under the

influence of marijuana.[1] The principal purpose of the statutory scheme set forth in R.C. 4511.19 is to criminalize the act of driving a motor vehicle while impaired. Driving is a privilege, not a constitutional right, and, by enacting R.C. 4511.19(A)(1)(j)(viii)(II), the General Assembly has "set a prohibited amount of marihuana, an illegal substance in Ohio, which may be in one's system while operating a motor vehicle." *State v. Ossege*, 12th Dist. Clermont Nos. CA2013-11-086, CA2013-11-087. 2014-Ohio-3186, ¶ 33. By proscribing the act of driving a motor vehicle with more than 35 nanograms of marijuana metabolites per milliliter of the driver's urine, R.C. 4511.19(A)(1)(j)(viii)(II) places a uniform restriction on all motorists in Ohio. In this case, lab results revealed that Schulz had 252.07 nanograms per milliliter of marijuana metabolite in his urine, more than seven times the statutory limit.

{¶16} As Schulz notes in his merit brief, the addition of the "metabolite" language in the current version of R.C. 4511.19 stemmed from the legislature's acknowledgment that proving that someone was driving while under the influence of marijuana presents a set of challenges which are separate and distinct from those inherent in proving someone was driving under the influence of alcohol. It is a well-established legal principle that "[t]he legislature is the primary judge of the needs of public welfare, and this court will not nullify the decision of the legislature

[1] While Schulz presented certain scientific evidence in support of his motion, the evidence does not support the proposition that R.C. 4511.19(A)(1)(j)(viii)(II) makes no effort to distinguish between impaired and unimpaired drivers. Schulz' evidence is aimed at supporting the proposition that theoretical scenarios exist where past marijuana use could possibly result in a driver having 35 nanograms of marijuana metabolites per milliliter of his or her urine, yet the driver would not be functionally impaired. The evidence does not, however, demonstrate that there is no rational connection between the statutory marijuana metabolites standard and impairment. We are mindful that "[o]ur equal protection review does not require us to conclude that the state has chosen the best means of serving a legitimate interest, only that it has chosen a rational one." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 354 (1994).

except in the case of a clear violation of a state or federal constitutional provision." (internal quotations omitted) *Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, ¶ 22, quoting *Williams v. Scudder*, 102 Ohio St. 305 (1921), paragraphs three and four of the syllabus. Schulz attempts to demonstrate that R.C. 4511.19(A)(1)(j)(viii)(II) lacks a scientific foundation by highlighting certain factual stipulations pertaining to the science of marijuana metabolites, as well as the stipulated testimony of a forensic toxicologist. The First District recently discussed the General Assembly's commitment to establishing a credible scientific standard while addressing a series of constitutional challenges to R.C. 4511.19(A)(1)(j)(viii)(II), noting:

> [U]nlike some other states, Ohio does not prohibit driving with *any* amount of a marihuana metabolite in one's body but rather sets certain maximum limits that may not be exceeded. *Compare People v. Gassman*, 251 Ill.App.3d 681 (1993); *State v. Phillips*, 178 Ariz 368 (1994). The General Assembly, in constructing the per se statute, expressly considered the arguments of those who claimed that the law lacked a direct correlation between the prohibited amount of marihuana and its metabolite in a driver's system and impairment. Senators Steve Austria and Patricia Clancy, two of the bill's sponsors, noted during deliberations on the bill that they had worked closely with forensic toxicologists to establish the precise levels at which driving is prohibited in the statute and that the levels in the bill were not only consistent with federal standards, but that the forensic toxicologists who had participated in setting those levels had unanimously agreed that anyone driving with the levels of the substance listed in the bill definitely would be impaired. *See* 2005 OH Sub.S.B. 8, Third Consideration, available at http://www.ohiochannel.org Ohio Senate Session (February 16, 2005) 14:15:57 (accessed May 1, 2013).

State v. Whalen, 1st Dist. Hamilton No. C-120449, 2013-Ohio-1861, ¶ 16, fn 2. The State has a legitimate interest in promoting highway safety and keeping impaired drivers off public roadways. *Whalen* at ¶ 17, citing *State v. Tanner*, 15 Ohio St.3d 1, 3-4 (1984). It is axiomatic that the General Assembly acts in furtherance of that goal by enacting legislation which prevents individuals under the influence of marijuana from operating motor vehicles on public roadways. *Id*.

{¶17} Differences in treatment based on the use of marijuana before operating a motor vehicle does not impinge upon a fundamental right or burden a suspect class. Moreover, the rational basis standard unquestionably supports the General Assembly's endeavor to maintain safety on public roadways by providing a mechanism by which to prosecute individuals who operate a motor vehicle while under the influence of marijuana.

{¶18} Schulz' sole assignment of error is overruled.

III.

{¶19} Schulz' assignment of error is overruled. The judgment of the Akron Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

KIRK A. MIGDAL, Attorney at Law, for Appellant.

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