

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**Plaintiff-Appellee,**

**v.**

**CASE NO.: 2017-1046**

**EDWARD KEITH MARLAND,**

**Defendant-Appellant.**

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**ON APPEAL FROM THE COURT OF APPEALS  
LOGAN COUNTY, OHIO  
CASE NO. 8-04-03**

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**MEMORANDUM IN RESPONSE TO SUPREME COURT JURISDICTION**

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**EXPLANATION OF WHY THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

This Court should decline to accept jurisdiction of this case because Defendant-Appellant Edward Marland fails to present a substantial constitutional question. The issues raised by the Defendant are all factual issues. Whether or not the Defendant consented to a blood draw is a factual issue, not a legal one. "Voluntariness is a question of fact to be determined from all the circumstances." *Schneekloth v. Bustamonte* (1973), 412 U.S. 218, 248-249, 93 S. Ct. 2041, 36 L. Ed. 2d 854. Whether his blood was drawn within the three hour time limit is a factual issue, not a legal one.

After hearing the testimony and the evidence, the trial court found that the Defendant consented to a blood draw and his blood was drawn within the three hour time limit. The Court of Appeals held that the trial court did not err in finding that the Defendant consented to the blood draw and the evidence was sufficient to show that his blood was drawn within the three hour time limit.

Where the issues raised by the Defendant are factual ones, this Court should deny jurisdiction.

## STATEMENT OF THE CASE

On November 12, 2015 a Logan County Grand Jury indicted the Defendant on the following charges:

- Count I: **OMVI** in violation of R.C. §4511.19(A)(1)(a), a misdemeanor of the first degree.
- Count II: **OMVI**, in violation of R.C. §4511.19(A)(1)(b), a misdemeanor of the first degree.
- Count III: **Aggravated Vehicular Homicide**, in violation of R.C. §2903.06(A)(1)(a), a felony of the first degree.

On December 8, 2015, a Logan County Jury issued an amended indictment charging the Defendant with:

- Count I: **OMVI** in violation of R.C. §4511.19(A)(1)(a), a misdemeanor of the first degree.
- Count II: **OMVI**, in violation of R.C. §4511.19(A)(1)(b), a misdemeanor of the first degree.
- Count III: **OMVI**, in violation of R.C. §4511.19(A)(1)(j)(viii)(I), a misdemeanor of the first degree.
- Count IV: **Aggravated Vehicular Homicide**, in violation of R.C. §2903.06(A)(1)(a), a felony of the first degree.

On July 28, 2016, a hearing was held on the Defendant's motion to suppress evidence. A follow-up hearing was held on August 10, 2016. On August 12, 2016, the trial Court issued its decision, denying the Defendant's motion to suppress.

On September 2, 2016, a plea hearing was held. The State amended Count IV of the amended indictment to reflect the correct degree of felony which was a second degree felony.

The Defendant then entered a No Contest plea to all of the counts and the trial court found him guilty.

A sentencing hearing was held on October 3, 2016. The Defendant was ordered to serve 6 months in jail for each of the three counts of OMVI, and 6 years on the Aggravated Vehicular Homicide. The sentences were ordered to be served concurrently. The Defendant was also ordered to pay a fine of \$375 and his driver's license was suspended for life.

On June 19, 2017, the Third District affirmed the trial court's decision denying the Defendant's motion to suppress.

## STATEMENT OF FACTS

On October 18, 2015, just after midnight, the Defendant Edward Marland, was operating a 2008 Honda Pilot SUV while under the influence of alcohol and drugs. According to Mr. Marland, he had been watching a game at his house with a friend. At the end of the game he drove his friend home to Zanesfield and then proceeded to drive back home. Mr. Marland's residence is listed at 10016 TR East Liberty, OH.

At the time of the crash, Mr. Marland was driving North on State Route 292, north of East Liberty.<sup>1</sup> At the intersection of County Road 12, which is a Y intersection, the Defendant veered to the right to continue on SR 292. However he failed to negotiate the curve and went left of center, striking a motorcycle that was stopped at the stop sign posted at the intersection. The driver of the motorcycle, James Long (20 years old), was knocked off the road into the field where he died from blunt force trauma.

James Long was coming from his girlfriend's residence and was heading home. He was operating a 2007 Kawasaki ZX600 motorcycle. He was traveling South on State Route 292 and had stopped at the intersection of County Road 12.

Joshua VanBuskirk was operating a vehicle following behind Mr. Marland. He came upon the crash scene and stopped to provide help. He checked on the motorcycle driver James Long and found him struggling to breathe. Mr. VanBuskirk observed the Defendant's vehicle which was still running and the Defendant get out of the vehicle and walk towards him. Mr.

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<sup>1</sup> It is not clear why Mr. Marland was driving North on SR 292. If he was heading home from Zanesfield he should have been driving South. When asked by the Judge why he was going the direction he was, Mr. Marland claimed he was lost. (Sept. 2 Tr. at 18-19)

VanBuskirk told the Defendant to get back in his vehicle and then called 911. Law enforcement were dispatched to the scene at 12:19AM, and arrived at 12:36AM. They noted that tire marks and gouges in the road indicated where the point of impact occurred and that Mr. Marland was clearly left of center. Due to a number of unknown variables, they were unable to calculate the speed of Mr. Marland's vehicle, however, the motorcycle he struck was severely damaged and was found approximately 120 feet from the stop sign.

EMS personnel on the scene advised law enforcement that Mr. Marland appeared intoxicated. Trooper Easter asked Mr. Marland to speak with him. Officers noted a strong odor of alcohol coming from his person and bloodshot/glassy eyes. Mr. Marland admitted that he had been drinking alcohol. He stated that he consumed a six pack of Bud Light cans during the game.

Trooper Easter requested Mr. Marland to perform some field sobriety tests. He first administered the HGN test. Mr. Marland exhibited 6 out of 6 clues plus vertical nystagmus indicating possible drug use. The Defendant also exhibited clues on the walk and turn test and the one leg stand test.

Trooper Easter advised Mr. Marland he was under arrest for OMVI. He requested that he provide a blood sample. Initially Mr. Marland declined. He was then transported to Mary Rutan Hospital where the Troopers spoke with him again about getting a blood sample. The Defendant then consented and a blood sample was drawn. The blood was drawn by phlebotomist Ashley Brown at 2:50AM.

The sample was sent to the State Highway Patrol Crime Lab and indicated 0.155 grams by weight of alcohol per one hundred milliliters of whole blood. The sample also tested positive for 9.30 ng/ml of Marihuana Metabolite.

## ARGUMENT

### I. Response to the First Proposition of Law

#### **The blood sample obtained from the Defendant was drawn with his consent.**

The Defendant argues that he did not consent to giving a blood sample to law enforcement. This is a factual issue. Law enforcement testified that they obtained the Defendant's consent at the hospital. The Defendant testified that he did not give consent.<sup>2</sup> The trial court found that the Defendant gave consent at the hospital in the presence of Trooper Easter, Sgt. Clemmons and the phlebotomist. The trial court stated, "the officers and the hospital staff had reason to believe he was consenting and it was not unreasonable for them to draw the blood." Ohio courts have repeatedly held that "[a]t a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the evidence and the credibility of witnesses. *State v. Mattix*, 2014-Ohio-5319, 2014 Ohio App. LEXIS 5144, 2014 WL 6725789 (Ohio Ct. App., Marion County Dec. 1, 2014)

The Defendant's claim that he was "essentially threatened with bodily harm to get him to permit the officers to take his blood," is not supported by the evidence or the record. All of law enforcement's interactions with the defendant at the scene and in the cruiser were recorded on audio and video. Their interaction with the defendant at the hospital was observed by the phlebotomist and his fiancé. There is absolutely no evidence supporting this claim.

After the officer read him the BMV 2255 form, the Defendant was asked if he would give a blood sample. The Defendant responded with a question, "why would I not refuse." (See

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<sup>2</sup> It should be noted that the trial court did not permit the State to question the Defendant about his ability to recall the night in question even though he had been drinking, was intoxicated, didn't know where he was, and didn't even realize he had crashed into another vehicle. (July 28 Tr. at 73).



video from Trooper's Cruiser) The officer then asked him if he was refusing, and he said, "no I'm not saying that." (Id.) The officer told him that they would get a search warrant for his blood and get his blood without his consent. (Id.) The officer then asked him again if he would give his blood and he said, "no." (Id.) Sgt. Clemmons then stepped in to talk to the Defendant and explained that they would have to get a search warrant for his blood if he refused. (Id.) The officers left him alone for a few minutes and then came back and told him they were taking him to Mary Rutan Hospital. (Id.) The Defendant replied, "ok." (Id.) Once at the hospital, the officers asked him again for a blood sample. The Defendant asked to speak to his fiancé. (July 28 Tr. at 45-46) The officers then left him alone to talk to her. (Id.) After this visit, the Defendant consented to the blood draw. (Id.) The phlebotomist testified that Mr. Marland did not express any objections to the drawing of his blood and willingly provided it. (July 28 Tr. at 13). She testified that if he was unwilling, she wouldn't have drawn it. (Id).

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, 23 Ohio B. 144, 491 N.E.2d 333 (12th Dist.1985). Consent may be oral or written. *State v. McLemore*, 197 Ohio App.3d 726, 736, 2012-Ohio-521, 968 N.E.2d 612 (2d Dist.), citing Katz; Ohio Arrest Search and Seizure, Section 19:1 (2008). *State v. Hosko*, 2015-Ohio-570, 2015 Ohio App. LEXIS 530 (Ohio Ct. App., *Seneca County* Feb. 17, 2015).

The issue of whether the Defendant consented to the blood draw is a factual issue and not a legal or constitutional question. The Appellant's First Proposition of Law should be denied.

## **II. Response to Second Proposition of Law**

**The blood sample obtained from the Defendant was drawn within the statutorily imposed 3 hour time limit.**

Revised Code 4511.19(D)(1)(b) states in pertinent part, “[i]n any criminal prosecution . . . for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant’s whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation.”

In this case, the facts established that the crash happened minutes before 12:17AM when the 911 call was made, and the Defendant’s blood was drawn at 2:50AM. A total of 2 hours and 33 minutes plus a few.

Josh VanBuskirk is a pipefitter and volunteer firefighter for the Southeast Hardin Northwest Union Fire District (Aug. 10 Transcript at 5) Josh testified that he was driving home from work and came on the scene of the crash at State Route 292 on October 18<sup>th</sup> of 2015. (Id. at 5-6) He was driving North on State Route 292, which is the same direction the Defendant had been driving. (Id.) He stated that traffic on the road was very light at that time of night. (Id.) He testified that before he came on the scene, he saw a vehicle’s taillights operating in front of him. (Id.) He estimated that they were about 150 yards in front of him and right in the middle of the road. Josh believed that the vehicle with the taillights was the same as the Defendant’s vehicle which caused the crash, but could not say for certain because he was too far back. (Id. at 10-11). On cross examination, Josh stated it would have been odd if the taillights belonged to a

vehicle other than Marland's because if it was another vehicle, they would have had to drive right through the debris and then continue on without stopping to investigate or render aid. (Id.)

When Josh came on the crash scene, he saw a lot of debris in the middle of the roadway. He blocked the roadway with his truck and grabbed a flashlight to examine the scene. He found the motorcyclist first and observed that he was still breathing and grunting. He then saw the driver of the Honda Pilot come out and start walking towards him. Josh asked the driver if he had dialed 911 and he said yes. Josh then asked him to get back in his vehicle and wait. Josh testified that the Defendant's engine was still running when he got to the scene. He also testified that he called 911 himself within a minute of arriving on scene. On cross examination, he was asked if he was one hundred percent sure that the taillights in front of him belonged to Mr. Marland and he said no, but then stated that everything at the scene caused him to believe the crash had happened just prior to his arrival. (Trial Tr. at 12).

Sgt. Ryan Furlong is employed at the Logan County Sheriff's Office and supervises 911 communications. Sgt. Furlong testified that they received a 911 call from Josh VanBuskirk at 12:17AM on October 18, 2015 and that first responders were dispatched at 12:18AM.

Ashley Brown is a phlebotomist at Mary Rutan Hospital in Bellefontaine. She testified that she drew Mr. Marland's blood at 2:50AM on October 18, 2015. (July 28 Tr. at 16)

In summation, the evidence admitted indicates that the crash happened minutes before Josh VanBuskirk called 911, which was at 12:17AM. Mr. Marland's blood was drawn at 2:50AM. Two hours and 33 minutes passed between the time of the 911 call and the actual blood draw. Law enforcement were well within the three hour time limit. Josh VanBuskirk believed he happened on the scene shortly after the crash. This is supported by the fact that the

victim was still breathing, Mr. Marland's engine was still running, Josh VanBuskirk observed Marland come out of his vehicle, no other vehicles had stopped to give aid, and Mr. VanBuskirk's observation of taillights ahead of him prior to the crash. Mr. Marland's own written statement corroborates this time line. When asked what happened after the crash, Mr. Marland wrote: "put my emergency lights on and put the vehicle in park. I walked back toward where I hit something and spoke with an individual." All of this indicates a rapid series of events that would have taken seconds or a couple of minutes at most.

The defendant's argument that the airbag in Mr. Marland's vehicle "**perhaps**" knocked him unconscious is not supported by the evidence or the record. Mr. Marland did not report losing consciousness and had no injuries. (July 28 Tr. at 26 and 29). The Defendant's argument that the vehicle Mr. VanBuskirk saw "**could have**" driven straight through the intersection onto County Road 12 and therefore avoided the debris in the road is also not supported by the evidence or the record. Mr. VanBuskirk never testified that the vehicle went straight. The Defendant is speculating over issues not supported by the evidence.

The trial court's finding that the blood was drawn within three hours of the time the Defendant was operating the vehicle was supported by ample evidence. The trial court determined that "when VanBuskirk arrived on the scene it was within minutes of the time of the accident." The court of appeals is bound to accept factual determinations of the trial court made during a suppression hearing so long as they are supported by competent and credible evidence." *State v. Hines*, 11th Dist. No. 2004-L-066, 2005 Ohio 4208.

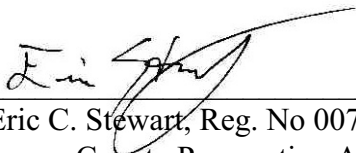
The issue of whether the Defendant's blood was drawn within the three hour time limit is also a factual issue and not a legal or constitutional question. The Appellant's Second Proposition of Law should be denied.

### **CONCLUSION**

Because the Defendant raises no legal issues, only factual ones, his request for this Court to grant jurisdiction should be denied. The State therefore moves this Court to deny jurisdiction and dismiss the appeal.


Respectfully submitted,  
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### **PROOF OF SERVICE**

This is to certify that a copy of this memorandum was served upon attorney Kort Gatterdam, by email this 9th day of August, 2017.

  
Eric C. Stewart