

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-L-082
COLENE MARIE REDDICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas.
Case No. 13 CR 000925.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Charles R. Grieshammer, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Colene Marie Reddick, appeals the judgment of the Lake County Court of Common Pleas, denying her motion to dismiss a specification from the indictment charging her with, inter alia, operating a vehicle while intoxicated (“OVI”). The issue before the court is the constitutionality of the specification. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} In February 2014, appellant was charged by way of a six-count indictment: (1) OVI, in violation of R.C. 4511.19(A)(1)(a), a third-degree felony; (2) OVI, in violation of R.C. 4511(A)(1)(d), a third-degree felony; (3) driving under OVI suspension, in violation of R.C. 4510.14(A), a first-degree misdemeanor; (4) open container, in violation of R.C. 4301.62(B)(4), a minor misdemeanor; (5) failure to obey a traffic control device, in violation of R.C. 4511.12(A), a minor misdemeanor; and (6) failure to drive within marked lanes, in violation of R.C. 4511.33(A)(1), a minor misdemeanor. Both OVI charges were accompanied by an R.C. 2941.1413 specification (“repeat OVI offender specification”), appellant having been convicted of five or more felony OVI offenses within the last 20 years of the date of the current offense.

{¶3} Appellant initially pled not guilty to all six counts but subsequently entered into a counseled plea bargain with appellee, the state of Ohio. Prior to the change of plea hearing, appellant moved to dismiss the repeat OVI offender specifications based on a recent decision issued by the Eighth District Court of Appeals. See *State v. Klembus, infra*. The motion was denied by the trial court.

{¶4} On May 13, 2014, appellant entered a counseled written plea of no contest to one count of OVI with a repeat OVI offender specification. The state entered a nolle prosequi on the remaining five counts. On July 22, 2014, the trial court sentenced appellant to an 18-month term of imprisonment for the underlying OVI offense and a three-year term of imprisonment for the specification, to run consecutively to each other.

{¶5} Appellant timely appealed and assigns one assignment of error for our review:

The trial court erred by imposing a consecutive prison term under the repeat OVI offender specification in violation of the Defendant-Appellant's rights to Equal Protection and Due Process as guaranteed by the Fifth and Fourteenth Amendment[s] to the U.S. Constitution and Sections 2 and 16, Article I of the Ohio Constitution.

{¶6} Appellant asserts the trial court erred in denying her motion to dismiss the repeat OVI specification. She argues it is unconstitutional to impose a consecutive prison term under the repeat OVI offender specification because "R.C. 4511.19 and R.C. 2941.1413 permit two radically different sets of penalties for those who have committed six OVI offense[s] within twenty years, yet does not place any additional burden upon the prosecution to achieve additional punishment." In support of her argument, appellant cites to a recent Eighth Appellate District opinion, which held the repeat OVI offender specification is unconstitutional as a violation of equal protection. *See State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, *appeal accepted*, Sup. Ct. No. 2014-1557, 2015 Ohio LEXIS 368.

{¶7} In *Klembus*, the appellant argued that R.C. 4511.19 and R.C. 2941.1413 allow the prosecutor to "arbitrarily obtain a greater prison sentence for the underlying offense without proof of any additional element, fact, or circumstance. Thus, [the appellant was] challenging the repeat OVI offender specification on its face, not as it was personally applied to him." *Id.* at ¶7. Agreeing with appellant, the majority in *Klembus* reasoned that a repeat OVI offender may be subjected to an increased penalty solely at the prosecutor's discretion when deciding whether to present the repeat OVI offender specification to the Grand Jury. *Id.* at ¶19. "The increased penalty does not depend upon the jury finding any additional elements, facts, or circumstances beyond a reasonable doubt." *Id.*

{¶8} The *Klembus* majority cited to an Ohio Supreme Court decision in support of its holding: *State v. Wilson*, 58 Ohio St.2d 52 (1979). In *Wilson*, the Ohio Supreme Court held that prosecutorial discretion, standing alone, does not violate equal protection. *Id.* at 55. However, if two statutes “prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause.” *Id.* at 55-56. Therefore, the majority in *Klembus* concluded that, in light of the prosecutor’s discretion and the fact there is no requirement to apply the specification uniformly to all offenders, the repeat OVI specification is not rationally related to a legitimate state purpose. *Klembus, supra*, at ¶21-23.

{¶9} The dissent in *Klembus* stated, “Ohio courts have repeatedly upheld the R.C. 2941.1413 enhanced penalty specification contained within R.C. 4511.19, relying on legislative intent as authorization of such cumulative punishment.” *Id.* at ¶39. The dissenting judge also cited to an opinion from this court, stating: “The Eleventh District Court of Appeals determined that a ‘careful reading’ of the R.C. 2941.1413 specification demonstrates that the mandatory prison term must be imposed in addition to the sentence for the underlying offense[.]” *Id.* at ¶40.

‘The language and interplay of R.C. 4511.19[] and R.C. 2941.1413 demonstrate that the legislature specifically authorized a separate penalty for a person who has been convicted of or pleaded guilty to five or more OVI offenses within twenty years which shall be imposed in addition to the penalty for the underlying OVI conviction. Therefore, R.C. 4511.19[] and R.C. 2941.1413 “clearly reflect the legislature’s intent to create a penalty for a person who has been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the OMVI offense over and above the penalty imposed for the OMVI conviction itself * * * .”’

Id., quoting *State v. Stillwell*, 11th Dist. Lake No. 2006-L-010, 2007-Ohio-3190, ¶26 (internal citations omitted).

{¶10} The Twelfth Appellate District subsequently released an opinion in which it disagreed with the Eighth Appellate District's majority opinion in *Klembus*. *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528. The *Hartsook* Court reasoned that the Ohio Supreme Court's opinion in *Wilson* was inapposite to the situation in *Klembus* and *Hartsook*. *Id.* at ¶52. *Wilson* involved a defendant who was charged under both a simple burglary statute and an aggravated burglary statute; *Klembus* and *Hartsook* involved individuals charged with a single OVI offense. *Id.* The *Hartsook* Court concluded: "we believe the language of the respective statutes clearly indicates that the General Assembly intended R.C. 4511.19 and R.C. 2941.1413 to authorize cumulative punishments for a single OVI offense by a repeat offender." *Id.*

{¶11} We adopt the rationale of the Twelfth District Court of Appeals in *Hartsook* and therefore find the penalty enhancement set forth in R.C. 2941.1413 is not unconstitutional.

{¶12} Appellant's assignment of error is without merit.

{¶13} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.