[Cite as *State v. Wilson*, 2009-Ohio-5663.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-4
AMBER R. WILSON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton County Court of Common Pleas Case No. TRC 0701753B
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 23, 2009

APPEARANCES:

For Plaintiff-Appellee

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Assistant Law Director
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For Defendant-Appellant

JEFFREY G. KELLOGG 0067914
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Delaney, J.

{¶1} Defendant-Appellant, Amber Wilson, appeals from the judgment of the Coshocton Municipal Court, finding her guilty of one count of operating a vehicle while intoxicated (OVI), in violation of R.C 4511.19(A)(2). The State of Ohio is Plaintiff-Appellee.

{¶2} The facts giving rise to the current appeal are as follows:

{¶3} On September 7, 2007, Appellant was arrested for one count of OVI and for a marked lanes violation, for swerving out of her lane of traffic while driving. When the police officer initiated the traffic stop, he noticed an odor of alcohol on Appellant's breath and ordered Appellant to exit her vehicle. The officer administered field sobriety tests, which Appellant failed.

{¶4} Upon being transported to the Coshocton Jail, Appellant was read the BMV 2255 form, wherein she was advised of the consequences of refusing a blood alcohol test. Appellant signed documents confirming that she was advised of her rights and confirming that she was read the BMV 2255 form as required by law. She then refused to consent to the blood alcohol test.

{¶5} Appellant was subsequently charged with one count of OVI, in violation of R.C 4511.19(A)(1)(a), one count of OVI, in violation of R.C. 4511.19(A)(2), and one count of marked lanes, in violation of R.C. 4511.25(A).

{¶6} On January 4, 2008, Appellant entered a guilty plea to OVI, in violation of R.C. 4511.19(A)(2). On February 28, 2008, she was sentenced to serve 10 days in jail and 36 days on electronically monitored house arrest.

{¶7} Appellant raises one Assignment of Error:

{¶8} "I. THE TRIAL COURT ERRED AND THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT SENTENCED THE DEFENDANT TO AN ADDITIONAL TEN DAYS INCARCERATION SOLELY BECAUSE SHE REFUSED TO SUBMIT TO A BREATH ALCOHOL TEST AFTER HER ARREST."

I.

{¶9} In her sole assignment of error, Appellant argues that her Fourth Amendment rights were violated when the trial court sentenced her, pursuant to R.C. 4511.19(G)(1)(b)(ii), to an additional ten days in jail solely because she refused to submit to a blood alcohol level test after being arrested for OVI. In so arguing, Appellant relies upon *State v. Hoover* (2007), 173 Ohio App.3d 487, 2007-Ohio-5773, 878 N.E.2d 1116.

{¶10} The Third District, in *Hoover*, held that the enhanced sentencing under R.C. 4511.19(G)(1)(b)(ii) for a violation of R.C. 4511.19(A)(2) was unconstitutional, as it punished Hoover for asserting his right to decline a search. The Third District then severed the portion of the statute that set forth the penalty for a violation of R.C. 4511.19(A)(2) and held, "Since no sentence is provided, the statute must be interpreted against the state, and the defendant is entitled to the lesser sentence of all of the offenses which are sentenced pursuant to R.C. 4511.19(G)(1)(b). Because of the prior conviction, the defendant will be properly sentenced under R.C. 4511.19(G)(1)(b)(i)." *State v. Hoover*, 173 Ohio App.3d 487, at ¶8.

{¶11} Both parties appealed the case to the Ohio Supreme Court, who accepted the case in order to determine the constitutionality of R.C. 4511.19(A)(2) and to

determine whether the enhanced sentencing under R.C. 4511.19(G)(1)(b)(ii) violates the Fourth Amendment.

{¶12} The Supreme Court, in rejecting the Third District's finding of unconstitutionality, held that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution. *State v. Hoover*, Slip Opinion No. 2009-Ohio-4993, ¶29. In so holding, the Court found that R.C. 4511.19(A)(2) contains references to R.C. 4511.191, Ohio's implied-consent statute, which states that as part of obtaining the privilege to drive in Ohio, a drive implicitly consents to a search, through means of a chemical test, to determine the amount of intoxicating substances in a driver's body upon the arrest of the driver for OVI.

{¶13} Under R.C. 4511.191(B), the court noted that every driver, regardless of previous offenses, also faces an administrative license suspension (ALS) for failing to submit to the required chemical test when an officer has reasonable belief of an OVI violation. *Hoover*, supra, at ¶16. Under R.C. 4511.191(B), there is also a range of penalties for persons who have had an OVI conviction within six years of the current offense.

{¶14} The Supreme Court found the implied consent statute to be constitutional in *State v. Starnes* (1970), 21 Ohio St.2d 38, 254 N.E.2d 675, paragraph one of the syllabus. Moreover, the Supreme Court has held that "one accused of intoxication has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication." *Hoover*, supra, at ¶19, quoting *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121, 239 N.E.2d 40, paragraph two of the syllabus.

{¶15} The *Hoover* court stated, with respect to overruling the Third District,

{¶16} "It is crucial to note that the refusal to consent to testing is not, itself, a criminal offense. The activity prohibited under R.C. 4511.19(A)(2) is operating a motor vehicle while under the influence of drugs or alcohol. A person's refusal to take a chemical test is simply an additional element that must be proven beyond a reasonable doubt along with the person's previous DUI conviction to distinguish the offense from a violation of R.C. 4511.19(A)(1)(a).

{¶17} "Hoover contends, however, that he has a constitutional right to revoke his implied consent and that being forced by threat of punishment to submit to a chemical test violates his rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, which provide that persons, houses, and effects are protected against unreasonable search and seizure. However, Hoover has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication. See *Cunningham*, 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, paragraph two of the syllabus; *Schmerber*, 384 U.S. at 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908. Asking a driver to comply with conduct he has no right to refuse and thereafter enhancing a later sentence upon conviction does not violate the constitution.

{¶18} "Furthermore, the request to comply with a chemical test does not occur until after probable cause to arrest exists. In this case, the arresting officer pulled Hoover over after she saw him drive across the center line. She smelled a strong odor of intoxicants as she approached his car. Hoover admitted that he had been drinking. He then performed poorly on field sobriety tests. Because R.C. 4511.19(A)(2) requires that an officer have probable cause to arrest for DUI before requesting that a driver undergo chemical testing and because the United States Supreme Court has held that

exigent circumstances justify the warrantless seizure of a blood sample in DUI cases, *Schmerber*, it is clear that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Article I, Section 14 of the Ohio Constitution." Id., at ¶¶21-23.

{¶19} Because the issue raised in the case below is identical to the issue addressed by the Supreme Court in *Hoover*, we find Appellant's argument to be without merit.

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

By: Delaney, J.

Gwin P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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-vs-	:	JUDGMENT ENTRY
	:	
AMBER R. WILSON	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-4
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Coshocton County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN