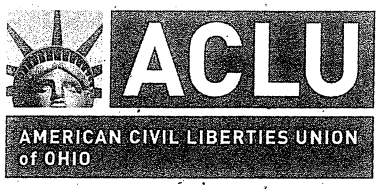

TO: House Criminal Justice Committee

FROM: Jeffrey M. Gamso, Legal Director, ACLU of Ohio

DATE: May 21, 2008

RE: SB 17 – Opponent Testimony

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Representatives:

My name is Jeffrey M. Gamso. I am the Legal Director of the American Civil Liberties Union of Ohio (ACLU of Ohio), the Ohio Affiliate of the ACLU, the oldest and largest civil liberties organization in the world with over 500,000 members nationwide and nearly 30,000 members and supporters across Ohio. The ACLU and ACLU of Ohio are non-profit, non-partisan membership organizations devoted to protecting basic civil rights and civil liberties for all Americans and all Ohioans.

The ACLU of Ohio opposes Senate Bill 17, though not in its entirety, and certainly not in its concerns for highway and boating safety and its goal of reducing drunk driving and drunk boating. The problem, rather, is that in the effort to advance these laudable goals, the bill goes where the Constitution and the rights of the accused do not allow.

Because we understand that the current version of the bill may be a work in progress and that further revisions are likely to occur, I want to address only two provisions at this time, provisions which have been in the bill from the beginning. Specifically, I want to address additions to the Revised Code of Sections 1547.111(B)(2) and section 4511.191(A)(5)(b).

<u>What 1547.111(B)(2) and 4511.191(A)(5)(b) do</u>

Proposed Revised Code Sections 1547.111(B)(2), which concerns those operating watercraft, and 4511.191(A)(5)(b), addressing those operating motor vehicles, are essentially identical. What each provides is that a person arrested for operating watercraft or motor vehicles while under the influence, who has been adjudicated guilty of a similar offense three times in the past, must accede to an officer's request for a blood, urine, or breath sample or will have a blood sample taken by force. (Related provisions provide the officer with civil immunity from damages for assault or battery unless the officer's actions are willful or wanton.)

Why 1547.111(B)(2) and 4511.191(A)(5)(b) are unconstitutional

There is no question that when government or its agents take a person's bodily fluids such as blood or urine for purposes of criminal investigation constitutional protections against unreasonable searches are implicated.[1] Such searches may, with few exceptions, be conducted only with the benefit of a search warrant based on probable cause.[2] Indeed, searches conducted without benefit of a search warrant are per se unconstitutional except in a few specific and well-delineated circumstances.[3]

In Ohio, only seven sorts of searches may be conducted without warrants:

1. search incident to a lawful arrest;
2. consent search;
3. stop-and-frisk;

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[1] See Schmerber v. California (1966), 384 U.S. 757; Skinner v. Railway Labor Executives' Ass'n. (1989), 489 U.S. 602, 617; Fourth Amendment, United States Constitution; Section 14, Artcile I, Ohio Constitution.
[2] Skinner, at 619.
[3] See California v. Acevedo (1991), 500 U.S. 565, 580.

4. hot pursuit searches;
5. search based on probable cause accompanied by exigent circumstances;
6. plain view searches;
7. administrative searches.[4]

Any other search, absent a warrant issued by a neutral magistrate upon a showing of probable cause, is unconstitutional.

Forcibly taking blood from a person whom a police officer has determined has been three times previously convicted of some form of OVI offense falls within none of these exceptions. It is clearly not a search incident to a lawful arrest, as that is simply a search for weapons. It is not a stop and frisk, which is a rough pat-down search for officer safety. It is not a search of premises at the end of a hot pursuit. It is not a search of what is in plain view. It is not an administrative search.

The only exceptions which could apply, even arguably, are consent and probable cause accompanied by exigent circumstances. But neither is applicable.

As we have always understood regarding the implied consent laws, there must be an option to refuse that consent in practice. Indeed, changing that law is precisely the point here. Refusal need not be without consequence. It is not now. But it must be an option because consent which is not voluntarily and freely given is not consent at all but is, rather, submission to authority.[5]

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[4] The first six of these exceptions were identified in State v. Akron Airport Post No. 8975 (1985), 19 Ohio St. 3d 49. The last was added to the list in Stone v. Stow (1992), 64 Ohio St.3d 156.

[5] E.g., Florida v. Royer (1983), 460 U.S. 491, 497 ("where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily

Nor is this a case where probable cause is accompanied by exigent circumstances which require the search. The existence of probable cause isn't the issue. Since the forced blood draw occurs only on a person who has been arrested, there must be probable cause or the arrest itself was invalid. But the fact of probable cause does not itself provide an exigency. Nor does the number of prior convictions. Exigent circumstances exist when officer or public safety is at risk absent the search or when there is a reasonable likelihood of the destruction or hiding of contraband and a warrant cannot be obtained in time to prevent that.

But warrants can, in fact, be promptly obtained - even over the telephone - in these cases. And there is no danger to the officer or others from failure to test the blood of the arrested person. Nor, finally, is there a danger that contraband will be destroyed or hidden. Blood, even alcohol or drug-laden blood, is simply not contraband.

Consequences of unlawful searches

The fruits of a search conducted without warrant or other constitutional justification are to be suppressed. That is, they cannot be used as evidence in court. Thus, the results of a blood test from a person who is subjected to a forced unconstitutional blood draw cannot be used in the prosecution of that person for operating a motor vehicle or watercraft while under the influence or with a prohibited blood alcohol content or the like. Since the evidence will be inadmissible, taking the blood serves no legitimate law-enforcement purpose.

Further, and while the proposed statute purports to immunize officers from civil liability for assault and battery for obeying its dictates, it cannot immunize them from damages for invading the person's well-established constitutional right to be free from

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given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority").

unlawful search and seizure. Indeed, the law that mandates invasion of rights is itself a likely target of constitutional challenge.

Conclusion

The ACLU of Ohio recognizes the problems caused by intoxicated drivers and boaters. It understands the special dangers caused by repeat violators of the law. We, too, want safe streets and waterways. But we do not achieve greater public safety by feel good legislation that accomplishes nothing but violates the Constitution.

Accordingly, and whatever else happens with S.B. 17, the ACLU of Ohio strongly urges the elimination of new sections R.C. 1547.111(B)(2) and 4511.191(A)(5)(b)

Respectfully submitted,

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American Civil Liberties Union of Ohio