University of Dayton Law Review

Volume 14 | Number 3 Article 10

5-1-1989

Criminal Procedure: Don't Blow It: The Motion to Suppress Breathalyzer Evidence

Thomas J. Dillon
University of Dayton

CRIMINAL PROCEDURE: DON'T BLOW IT: THE MOTION TO SUPPRESS BREATHALYZER EVIDENCE—*City of Xenia v. Wallace*, 37 Ohio St. 3d 216, 524 N.E.2d 889 (1988).

I. INTRODUCTION

On June 22, 1988, the Ohio Supreme Court rendered its decision in *City of Xenia v. Wallace*.[1] *Wallace* held that the state bears the burden of going forward with evidence to establish probable cause on a motion to suppress breathalyzer evidence.[2] The state's burden is to respond to a motion to supress which challenges the breathalyzer test by contending that it is a warrantless search conducted without probable cause.[3]

The analysis of this case note will discuss four aspects of the Ohio Supreme Court's decision in *Wallace*. The first section suggests that the decision is consistent with the burdens of proof necessary in a motion to suppress hearing which challenges evidence seized through a warrantless search.[4] The second section suggests that the structural logic of *Wallace* allows for a broader application of the principles established by the supreme court.[5] The third section discusses how the opinion fits within the framework of other jurisdictions.[6] The concluding section will briefly discuss the practical effects this case will likely have on current defense attorney practice.[7]

II. FACTS AND HOLDING

In *City of Xenia v. Wallace*,[8] Lamar E. Wallace was stopped for speeding while driving his car in Xenia, Ohio.[9] According to the police officer who stopped Wallace, there was a strong odor of alcohol present while he attended to Mr. Wallace.[10] Wallace was asked to submit to a field sobriety test, which he failed.[11] After taking a breathalyzer test, which resulted in a .124 reading,[12] Mr. Wallace was charged with sev-

1. 37 Ohio St. 3d 216, 524 N.E.2d 889 (1988).
2. *Id.* at 218, 524 N.E.2d at 891.
3. *Id.*
4. *See infra* notes 100–19 and accompanying text.
5. *See infra* notes 120–33 and accompanying text.
6. *See infra* notes 134–54 and accompanying text.
7. *See infra* notes 155–62 and accompanying text.
8. 37 Ohio St. 3d 216, 524 N.E.2d 889 (1988).
9. *Id.* at 217, 524 N.E.2d at 890.
10. *Id.* at 217, 524 N.E.2d at 891.
11. *Id.*
12. *Id.*

eral violations, including Xenia Revised Code section 333.01(A)(3).[13] A pretrial motion to suppress chemical test evidence was filed by the defendant Wallace.[14] The basis for the motion was that the evidence was obtained illegally and that proper state procedure was not followed in administering the breath test.[15]

Defense counsel questioned the arresting officers during the hearing on the motion.[16] The responses elicited by defense counsel tended to show that the officers noticed the defendant accelerated quickly and also noticed that the engine shifted into high gear.[17] There was no cross examination by the prosecution and no state evidence, not even the arrest report, was admitted into the record.[18] During closing arguments, defense counsel argued that the officers did not have probable cause to have Mr. Wallace take the breath test.[19] No closing argument was made by the prosecution.[20] The trial court denied the defendant's motion to suppress the evidence.[21]

At trial, the defendant entered a no contest plea.[22] He was subsequently found guilty and appealed.[23] The Appellate Court for Greene County, Ohio reversed the trial court's decision on the motion.[24] The appellate court held that once a defendant demonstrates the search was conducted without a warrant, the burden of going forward is upon the state to show that it did not violate the fourth and fourteenth amendments of the Constitution of the United States.[25] The court held that

---

13. *Id.*; XENIA REVISED CODE § 333.01(A)(3) (1988)(operating a motor vehicle with a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of breath). Wallace was also charged with violating XENIA REVISED CODE § 333.03(D) (speeding) and § 333.01(A)(1)(operating a vehicle while under the influence of alcohol). *Wallace*, 37 Ohio St. 3d at 217, 524 N.E.2d at 891. Upon request of the prosecutor, both charges were dropped. *Id.* Section 333.01(A)(3) is identical to OHIO REV. CODE ANN. § 4511.19(A)(3) (Anderson 1987), in that both sections statutorily prohibit operating a motor vehicle with concentrations of alcohol equaling ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of breath.

14. *Wallace*, 37 Ohio St. 3d at 217, 524 N.E.2d at 891.

15. *Id.*

16. *Id.*

17. *Id. See generally* Terry v. Ohio, 392 U.S. 1 (1968)(in order to stop a defendant, a police officer must have reasonable suspicion that the defendant is violating the law).

18. *Wallace*, 37 Ohio St. 3d at 217, 524 N.E.2d at 891. The arrest report contained the evidence that there was a strong odor of alcohol and that Wallace failed a field sobriety test. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; City of Xenia v. Wallace, No. 86-CA-65, slip op. (2d App. Dist. Feb. 20, 1987).

24. *Wallace*, 37 Ohio St. 3d at 217, 524 N.E.2d at 891.

25. *Id.*; U.S. CONST. amend. IV, XIV, § 1; *see also* Mapp v. Ohio, 387 U.S. 643, 654–57 (applying the fourth amendment exclusionary rule to the states through the due process clause of the fourteenth amendment).

the state did not meet that burden.[26] The court of appeals then certified the record for review by the Ohio Supreme Court.[27]

In affirming the lower court's decision, the Ohio Supreme Court stated that, "the state has the burden of going forward with evidence to show probable cause once the defendant has demonstrated a warrantless search or seizure and has raised a lack of probable cause as a ground for attacking the legality of the search or seizure."[28]

The *Wallace* decision is divided into three sections. The first section discusses the procedural aspects of the pretrial motion to suppress evidence.[29] In this section, the court presents what it considers necessary prerequisites to challenging evidence obtained through a warrantless search or seizure.[30] Basing its decision on the need for the prosecution to have notice of the grounds upon which a motion to suppress is made,[31] the court held:

> to suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must (1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge.[32]

The second section of the court's opinion addresses who should bear the burden of going forward with evidence at a suppression hearing.[33] Specifically, the court addresses this question with respect to a warrantless search when the challenge presented is based upon a lack of probable cause for the search.[34] In its discussion, the court examined three arguments for placing the burden on the state and three arguments for placing the burden on the defense.[35] The arguments for placing the burden upon the state are presented as follows: First, the party charged with the burden of persuasion on an issue ordinarily has the burden of going forward with evidence on that issue;[36] second, the state is in a better position to go forward in relation to relevant informa-

---

26. *Wallace*, 37 Ohio St. 3d at 217, 524 N.E.2d at 891.

27. *Id.* at 218, 524 N.E.2d at 891. The lower court realized that its judgment was in conflict with the judgment of the Hamilton County Court of Appeals in State v. Banks, C-790217, slip op. (1st App. Dist. Jan. 20, 1980). *Wallace*, 37 Ohio St. 3d at 218, 524 N.E.2d at 891; *see also infra* notes 81–82 and accompanying text.

28. *Wallace*, 37 Ohio St. 3d at 218, 524 N.E. 2d at 891.

29. *Id.* at 217–18, 524 N.E.2d at 891–92.

30. *Id.*

31. *Id.* at 219, 524 N.E.2d at 892.

32. *Id.*

33. *Id.* at 219–20, 524 N.E.2d at 892–93.

34. *Id.*

35. *Id.* at 219–20, 524 N.E.2d at 893.

36. *Id.* at 219, 524 N.E.2d at 893.

tion;[37] third, it is easier for a party to prove the existence of probable cause than for a party to show that probable cause did not exist.[38]

Conversely, the court addressed three arguments in favor of allocating the burden of going forward to the defendant. The first of these arguments states that there is a presumption of legality with respect to any law enforcement action.[39] The second argument is based on a procedural norm that usually requires a movant to put forth evidence to support his motion.[40] The last argument considers the needs of both the prosecution and the court to have notice of the defendant's intended challenges.[41]

The Ohio Supreme Court was persuaded by the arguments in favor of placing the burden of going forward upon the state.[42] In explaining its decision, the court wrote:

> Law enforcement searches and seizures without the authority of a warrant are, . . . as previously mentioned, *per se* unreasonable. Further, the theory that the moving party should go forward with evidence, and the need for the prosecutor and court to be put on notice as to what the defendant is challenging, are accounted for in our holding that the movant is required to establish a warrantless search or seizure and specify the grounds of his challenge before the burden of production falls upon the prosecution.[43]

Next, the court concluded that if a defendant demonstrates a warrantless search and challenges the search's legality upon lack of probable cause, the state will bear the burden of going forward with evidence to show that probable cause existed.[44]

The third section of the opinion applies the two previous sections of the decision to the specific facts of the case.[45] The court recognized that the defendant's motion was unclear.[46] However, the court noted that the trial court allowed the proceedings to continue, and that the prosecution did not raise any objections.[47] Defense counsel's questions made it clear that he intended to prove there was no probable cause to

---

37. *Id.*
38. *Id.*
39. *Id.* at 220, 524 N.E.2d at 893.
40. *Id.*
41. *Id.* The notice will allow the prosecution to prepare its case. Secondly, the court must be informed regarding the basis of the defendant's challenge in order to prepare rulings on evidenciary issues that may arise during the hearing. *See id.* at 218, 524 N.E.2d at 891.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 220–21, 524 N.E.2d at 893–94.
46. *Id.* at 220–21, 524 N.E.2d at 893.
47. *Id.* at 221, 524 N.E.2d at 894.

administer the test.[48] The *Wallace* court determined that these actions were sufficient to place the prosecutor on notice.[49] The prosecution did not put forth any evidence and declined the court's offer to grant additional time to prepare.[50] After considering the situation, the *Wallace* court found that the state failed to meet its burden of proof as to probable cause.[51]

III. BACKGROUND

The *Wallace* opinion raises several important evidentiary issues. In general, the term "burden of proof" encompasses two distinct burdens.[52] The first burden is the burden of going forward with evidence.[53] The party that bears the burden of going forward must either put forth evidence on the particular issue or risk an adverse ruling on the issue if insufficient evidence is produced.[54]

The second burden is the burden of persuasion.[55] "The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced."[56] The burden of persuasion becomes important when a decision must be made by the jury.[57] "When the time for a decision comes, the jury, if there is one, must be instructed how to decide the issue if their minds are left in doubt."[58] Thus, when the party that bears the burden of persuasion has not produced enough evidence to convince the trier of fact that its burden of persuasion has been met, the issue will go against him.[59] To illustrate, once the evidentiary presentations are complete in a criminal trial, the trier of fact must determine whether the state has produced enough evidence on an issue to determine whether the issue is proven beyond a reasonable doubt.[60]

It is this burden of initially going forward with evidence that

---

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. E. CLEARY, MCCORMICK ON EVIDENCE 783–84 (2d ed. 1954).
53. *Id.*
54. *Id.* at 784. Such a ruling is generally a finding or a directed verdict.
55. *Id.* at 783–84.
56. *Id.* at 784.
57. *Id.*
58. *Id.* In a bench trial, the judge must resolve this doubt against the party with the burden of persuasion.
59. *Id.*
60. *Id.* at 798–801; *see also* Speiser v. Randal, 357 U.S. 513, 525–26 (1957)(burden of persuasion at a criminal trial is beyond a reasonable doubt).

caused problems for the Ohio judiciary prior to *Wallace*.[61] A discussion of two appellate court cases is useful to demonstrate the conflict in the lower courts. In the case of *State v. Gasser*,[62] the Court of Appeals for Paulding County, Ohio held that the state has the burden of going forward with evidence on a pretrial motion to suppress the results of a blood alcohol test.[63] In *Gasser*, the defendant was charged with violating Ohio Revised Code Section 4511.19.[64] The defendant moved to suppress the results of the chemical test of his blood alcohol level.[65] The lower county court suppressed the results of the test.[66] The state filed an appeal, contending that the defendant bears the burden of going forward with evidence on a motion to suppress.[67] Neither side produced blood alcohol evidence at the suppression hearing.[68] Therefore, the state argued, the defendant should have received an adverse ruling.[69] In affirming the lower court's decision, the court of appeals wrote: "[t]he State is in a much better position to proceed with affirmative proof . . . ."[70] Continuing, the court stated:

> It is our opinion on the basis of these considerations that the state, as well as having the ultimate burden of proof or persuasion, has at a hearing of a pretrial motion the burden of going forward with the evidence to prove that it has complied with each foundation requirement that the defendant has set forth in his motion to suppress as not having been fulfilled.[71]

In this matter, the *Gasser* court conclusively stated that, on a pretrial motion to suppress breathalyzer evidence, the state is the party that bears the burden of going forward with evidence to establish the legality of its actions.[72]

Compare the decision in *Gasser* to the opinion of the court in

---

61. *See infra* notes 62-82 and accompanying text.

62. 5 Ohio App. 3d 217, 451 N.E.2d 249 (1980).

63. *Id.* at 220, 451 N.E.2d at 252–53.

64. OHIO REV. CODE ANN. § 4511.19(A)(1) (Anderson Supp. 1988)(operating a motor vehicle under the influence of alcohol). This statute amended the previous drunk driving statute which was OHIO REV. CODE ANN. § 4511.19 (Anderson 1982). The defendant in *Gasser* was charged under the old statute.

65. *Gasser*, 5 Ohio App. 3d at 217, 451 N.E.2d at 250.

66. *Id.*

67. *Id.*

68. *Id.* at 218, 451 N.E.2d at 251.

69. *Id.* at 217-18, 451 N.E.2d at 250-51.

70. *Id.* at 220, 451 N.E.2d at 252.

71. *Id.* at 220, 451 N.E.2d at 252–53.

72. This firmly rests the burden of proving proper procedure on the state. It should be noted that the *Gasser* court's decision encompasses a wide scope because the court held that the state has the burden of proof to show that it has not disregarded any of the requirements that defendant has put forth in his motion. *Id.* at 219, 451 N.E.2d at 252.

State v. Halko.[73] In *Halko,* the Court of Appeals for Hamilton County, Ohio placed the burden of going forward on the defendant who filed a pretrial motion to suppress breathalyzer evidence.[74] Gregory K. Halko was arrested and charged with violating Ohio Revised Code section 4511.19(A)(3)[75] which forbids operating a motor vehicle with a breath concentration of more than ten-hundreths of one gram of alcohol per two hundred ten liters of breath.[76] The defendant moved to suppress the following: (1) The arrest, for lack of probable cause; (2) any statements made by him during the arrest; and, (3) the results of the breathalyzer test.[77] Neither the state nor the defendant presented any evidence at the suppression hearing.[78] The trial court suppressed the results of the breathalyzer test.[79]

In reversing the lower court's decision, the court of appeals reasoned that the appellee did not present evidence to support his motion to suppress.[80] Further, the court relied on its previous decision in *State v. Banks*[81] stating,

> Although *State v. Banks* . . . did not arise as a traffic violation, its holding has equal application to all criminal cases. 'A criminal defendant at a motion to suppress hearing has the burden of going forward with evidence to raise the issue that the evidence should be suppressed. The state then bears the burden of persuasion to convince the court that such evidence should not be suppressed.'[82]

The two previous cases illustrate the conflict that the Ohio appellate courts experienced regarding the procedural issue of burden allocation on a motion to suppress breathalyzer evidence. *Gasser* held that the state must move forward to defeat defendants' motions to suppress evidence.[83] Conversely, *Halko* held that in all criminal cases, the defendant-movant has the burden of going forward with evidence at a suppression hearing.[84] In this regard *Wallace* quieted conflict in the lower state appellate courts.

The case of *City of Xenia v. Wallace,*[85] has further significance

---

73. No C-850656, slip op. (1st. App. Dist. July 16, 1986).
74. *Id.*
75. *Id.*; OHIO REV. CODE ANN. § 4511.19(A)(3) (Anderson 1987).
76. OHIO REV. CODE ANN. § 4511.19(A)(3).
77. *Halko,* No. C-850656, slip op. (1st. App. Dist. July 16, 1986).
78. *Id.*
79. *Id.* Parts one and two of the defendant's motion were overruled.
80. *Id.*
81. No. C-790217, slip op. (1st App. Dist. Jan. 20, 1980).
82. *Halko,* No. C-850656, slip op. (1st. App. Dist. July 16, 1986).
83. *Gasser,* 5 Ohio App. 3d at 217, 451 N.E.2d at 249.
84. Halko, No. C-850656, slip op. (1st. App. Dist. July 16, 1986).
85. 37 Ohio St. 3d 216, 524 N.E.2d 889 (1988).

due to a change in the driving while intoxicated laws of Ohio which became effective on March 16, 1983.[86] The prior law[87] was a typical statute that prohibited operation of a motor vehicle while under the influence of alcohol or drugs.[88] The revised statute added subsections one through four to former section 4511.19(A).[89] Subsection one is the old section 4511.19(A).[90] The next three subsections involve the new "presumption offenses" which presume intoxication if a person has a certain percentage of alcohol in his blood, breath,[91] or urine.[92] The *Wallace* case addresses only Ohio Revised Code section 4511.19(A)(3),[93] known as the breath presumption offense. That section provides a presumption of intoxication if a person has ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of breath.[94] In Ohio, there is a preference for a charge under section 4511.19(A)(3). When a defendant is charged with both section 4511.19(A)(1), general intoxication, and section 4511.19(A)(3), dismissal of the section 4511.19(A)(1) charge is proper.[95]

Given this preference for the breath concentration charge, the admissibility of the breathalyzer test results becomes crucial.[96] The ideal defense tactic is to attack the breathalyzer evidence and ruin the prosecution's case. The most obvious avenue of attack would be to suppress the evidence of the test.[97] Confusion has resulted in the appellate

---

86. 1982 Ohio Legis. Serv. 504–06 (Baldwin).

87. The old law contained no specific provisions for breath, blood or urine test levels, *See* OHIO REV. CODE ANN § 4511.19 (Anderson 1982).

88. *Id.*

89. OHIO REV. CODE ANN. §§ 4511.19(A)(1)–(4). The statute provides no person shall operate any vehicle, streetcar, or trackless trolley within the state if any of the following apply:

(1) The person is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse;

(2) The person has a concentration of ten-hundredths of one percent or more by weight of alcohol in his blood;

(3) The person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath;

(4) The person has a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliters of his urine.

Id.

90. *Id.* § 4511.19(A)(1).

91. *Id.* § 4511.19(A)(3).

92. *Id.* § 4511.19(A)(4).

93. *Id.* § 4511.19(A)(3).

94. *Id.*

95. State v. Babb, No. C-860028, slip op. (1st App. Dist. Jan. 30, 1987).

96. This is because of the ease of obtaining the results and because it is the least intrusive. Further, without this evidence the breath concentration charge becomes moot.

97. A suppression of the breathalyzer evidence would destroy the prosecution's ability to prove the breath concentration charge.

courts[98] regarding which party has the burden of going forward with evidence at the suppression hearings.[99] It became necessary for the Ohio Supreme Court to delineate specific guidelines regarding motion to suppress hearings and the applicable evidentiary burden. Thus, the court addressed the conflict in *Wallace*.

IV. ANALYSIS

A. The Wallace Decision is Consistent with Notions of Judicial Fairness

The allocation of the burdens of proof[100] at a motion to suppress hearing can be crucial because in most cases, the party who has the burden of pleading a fact will have both the burden of producing evidence for that issue, as well as the burden of persuasion on the issue.[101] This situation takes on particular significance in *City of Xenia v. Wallace*[102] because, as noted above, the *Wallace* court allocated the burden of going forward to the prosecution, despite the fact that the defendant plead the motion.[103] This decision to place the burden of going forward on the prosecution is judicially fair. As one commentator noted,

> With respect to the issue which is usually central in a motion to suppress hearing—the reasonableness of the challenged search or seizure—most states follow the rule which is utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution.[104]

This warrant/no warrant dichotomy is derived from the nature of the warrant requirement. If a warrant was issued, a magistrate has already independently determined probable cause existed.[105] Conversely, "[s]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment."[106] Therefore, in a case involving a warrantless search, the issue of probable cause becomes significant because it speaks to the reasonableness of the search.[107] Further, the burden of proving or disproving the probable cause issue becomes crucial at a

98. *See supra* notes 65–84 and accompanying text.
99. *See supra* notes 62-82.
100. *See supra* notes 52–60 and accompanying text.
101. *See infra* notes 120-33 and accompanying text.
102. 37 Ohio St. 3d 216, 524 N.E.2d 889 (1988).
103. *Id.* at 219, 524 N.E.2d at 892.
104. W. LAFAVE, SEARCH AND SEIZURE 499 (1978).
105. Malcolme v. United States, 332 A.2d 917, 918 (D.C. 1975).
106. Katz v. United States, 389 U.S. 347, 357 (1967).
107. Under the fourth amendment all searches must be reasonable. U.S. CONST. amend. IV.

motion to suppress hearing.

Realistically it is virtually impossible for a defendant to prove lack of probable cause because it is difficult to prove the nonexistence of a fact.[108] Further, as one court noted, "because the evidence allegedly constituting probable cause is solely within the knowledge and control of the arresting officers, they should bear the additional burden of establishing that probable cause in fact existed."[109]

The *Wallace* decision embraces the warrant/no warrant dichotomy, noting that the state is in a better position to gather information on the issue of probable cause.[110] In determining that "[l]aw enforcement searches and seizures without the authority of a warrant are not entitled to a presumption of legality,"[111] the *Wallace* court exhibited reliance upon the dichotomy. "Fairness demands that this distinction be drawn and that the government bear the burden of proof at least in cases of warrantless searches."[112] Unless the government bears the burden of proof, there would be little incentive for police officers to seek a warrant.[113] In addition to this deterrent effect, common sense dictates that to allocate the burden of going forward with evidence to a defendant would be judicially unfair.[114] A defendant "cannot be expected to prove a lack of some item until he knows on what the government bases its claim of its existence."[115]

The use of the warrant/no warrant dichotomy is judicially fair. It should be the state's burden to show exceptions to the warrant requirement.[116] Thus, the *Wallace* court placed the defendant in a judicially fair position in relation to the burden of going forward.[117] Secondly, the *Wallace* court addressed procedural aspects of the motion to suppress.[118] By holding that the defendant must clarify the grounds on which he challenges the search,[119] the prosecution will receive the notice it needs to prepare its case. This balance between the needs of the

---

108. Comment, *Probable Cause: The Federal Standard*, 25 OHIO ST. L.J. 502, 528 (1964).

109. United States v. Longmire, 761 F.2d 411, 417 (7th Cir. 1985).

110. *Wallace*, 37 Ohio St. 3d at 220, 524 N.E.2d at 893. This can be drawn from the *Wallace* court's acceptance that warrantless searches are *per se* unreasonable, and that the state must prove an exception. *Id.*

111. *Id.*

112. Comment, *supra* note 108, at 528.

113. *Longmire*, 761 F.2d at 417.

114. *See infra* note 116.

115. Comment, *supra* note 108, at 528.

116. It would only seem logical that when the state does not use a warrant, it should prove the exception. *See generally* Coolidge V. New Hampshire, 403 U.S. 443 (1971).

117. To hold otherwise would be to place defendant in a very difficult position. *See supra* notes 38, 110–11 and accompanying text.

118. *Wallace*, 37 Ohio St. 3d at 219, 524 N.E.2d at 891-892.

119. *Id.*

prosecution and the needs of the defendant suggests consistency with notions of judicial fairness.

B. The Structure of the Wallace Opinion Allows a Broader Application in the Future

The structure of the *Wallace* opinion, as well as its language, reveals the court's approach to the issue of suppressing evidence obtained through a warrantless search.

The first part of the *Wallace* opinion is procedural.[120] In this section, the court states that the procedural requirements outlined are designed to suppress evidence obtained through a warrantless search.[121] The court did not require that the challenge must be based on probable cause, although such was the case in *Wallace*.[122] Rather, this section determined that the defendant must "give the prosecutor notice of the basis of the challenge."[123] This section of the opinion confirms the court's acceptance of the warrant/no warrant dichotomy.[124] The court realized that not all warrantless searches are challenged on a lack of probable cause.[125]

Section two of the opinion discusses probable cause.[126] Here, the court addressed the arguments for and against placing the burden of going forward upon the state.[127] The important aspect of this section is the last paragraph in which the court held that the state bears the burden of going forward on the issue of probable cause.[128] Conspicuously absent from this section are any qualifiers or fact applications. It is not until the third section that the court applies the specific facts of this case to the two previous sections.[129]

The structural logic of this opinion indicates that it may be useful in the future as a broad framework and authority for challenging warrantless searches on grounds other than probable cause. Clearly the first part of the opinion is left open to a broad reading since the court

---

120. *Id.* at 218–19, 524 N.E.2d at 891–92.

121. *Id.* at 218, 524 N.E.2d at 891.

122. *Id.* at 219, 524 N.E.2d at 892. The court held in this section that to suppress evidence of a "warrantless" search the defendant must demonstrate a lack of warrant and raise the grounds on which the challenge is based. *Id.*

123. *Id.*

124. *Id.* The court here is accepting the fact that warrantless searches are challenged on other grounds because no qualifiers exist to keep this section within the realm of probable cause.

125. *Id.*

126. *Id.* at 219, 524 N.E.2d at 892.

127. *Id.*; *see also supra* notes 36–41 and accompanying text.

128. *Wallace*, 37 Ohio St. 3d at 219, 524 N.E.2d at 893.

129. For a discussion of the court's application of the facts, see *supra* notes 45–51 and accompanying text.

did not limit the grounds which could be plead.[130] Thus, the logic of the opinion could be applicable to challenges based on lack of exigent circumstances, consent, or hot pursuit.[131] Conceivably, this case has set the standard for all warrantless searches. The court in *Wallace* did not discuss any application of facts until it laid out a path for analysis in its first two sections. Therefore, it is logical that the facts of any given warrantless search could fit into the *Wallace* framework.[132]

In summary, once a defendant proves a warrantless search occurred, the state bears the burden of going forward with evidence to justify the intrusion.[133] Thus, the *Wallace* analysis has the potential to be applied to different fact patterns that meet the particular framework of the opinion. Therefore, the logic of this opinion should not be confined to motions to suppress breathalyzer evidence.

C. *The Decision in Wallace is Consistent with Other Jurisdictions*

Because the *Wallace* court embraced the warrant/no warrant dichotomy,[134] the decision brings Ohio within the majority of other state jurisdictions. The majority of states that have ruled on the issue of burden allocation have accepted that warrantless searches are *per se* unreasonable.[135] Once this basic premise is accepted, the burden is placed upon the state to prove an exception to the warrant requirement.[136]

There is a wealth of case law from the other states which embraces this dichotomy. A discussion of several cases will illustrate how other jurisdictions have employed the warrant/no warrant dichotomy and allocated the burden of proof to the state. In *Commonwealth v.*

---

130. *Wallace*, 37 Ohio St. 3d at 219, 524 N.E.2d at 892.

131. This logic is derived from the case because it forces the state to prove exceptions to the warrant requirement. Once the prosecutor has notice of the grounds of the challenge, the warrant/no warrant dichotomy seems to call for the state to bear the burden of going forward with evidence to prove any exception. *Wallace* held that this is the case with respect to probable cause. *Id.* at 220, 524 N.E.2d at 893. Taking this one step further, the warrant requirement may require that this burden be placed upon the state, regardless of the exception the state puts forth. *See generally* Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Longmire, 761 F.2d 411 (7th Cir. 1985).

132. *See supra* discussion in note 131.

133. *Wallace*, 37 Ohio St. 3d at 220, 524 N.E.2d at 893. Thus, attorneys should be cognizant of the possibility that this case may have broader application than the facts specifically at issue in *Wallace*.

134. *See supra* notes 105–15 and accompanying text.

135. *See generally* State v. Fisher, 141 Ariz. 227, 686 P.2d 750, *cert. denied*, 469 U.S. 1066 (1984)(*per se* unreasonable); People v. Stoppel, 637 P.2d 384, 389 (Colo. 1981)(presumptively invalid); People v. Knapp, 52 N.Y.2d 689, 694, 422 N.E.2d 531, 534, 439 N.Y.S.2d 871, 874 (1981)(*per se* unreasonable). The *Knapp* court stated, "[F]urther to militate against any rationalizing away of these protections, the burden of providing the existence of sufficiently exceptional circumstances is placed squarely on the shoulders of the government." *Id.* (citations omitted).

136. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Longmire, 761 F.2d 411 (7th Cir. 1985).

Rodriquez,[137] the Supreme Judicial Court of Massachusetts held that "[s]earches and seizures conducted outside the scope of valid warrants are presumed to be unreasonable. In such circumstances, the burden is on the Commonwealth to show that the search or seizure falls within a narrow class of permissible exceptions."[138] *Rodriquez* addressed whether evidence seized from a defendant's apartment was outside the scope of the plain view doctrine.[139] The articles that were seized were gathered during a search which was not judicially sanctioned.[140] However, the state was found to have sufficiently proven probable cause.[141]

In *State v. Riley*,[142] the Missouri Court of Appeals for the Eastern District of the Fourth Division held that "[i]n a motion to suppress the burden of going forward with the evidence and risk of nonpersuasion is on the State to show by a preponderance of the evidence that the motion should be overruled."[143] *Riley* addressed whether probable cause to arrest the defendant existed and, if such probable cause did exist, whether it would justify the search.[144] Riley was "arrested" and brought to the police station.[145] There he was held by three officers while one removed a package from his mouth.[146] The contents of the package were later identified as heroin.[147] The defendant filed a motion to suppress the evidence and the trial court denied the motion.[148] Applying the reasoning cited above, the appellate court reversed.[149]

In *State v. Slaughter*,[150] the Supreme Court of Georgia used the warrant/no warrant dichotomy.[151] The court considered the denial of the defendant's motion to suppress evidence.[152] In affirming the lower appellate court's decision, the supreme court stated:

> Because the burden is on those officers who conduct a search without a warrant to show that the search was conducted pursuant to an exception to the Fourth Amendment warrant requirement, it can be said that a search without a warrant is presumed to be invalid and the burden is on

137. 378 Mass. 296, 391 N.E.2d 889 (1979).
138. *Id.* at 303, 391 N.E.2d at 893.
139. *Id.* at 302-04, 391 N.E.2d at 893-94.
140. *Id.* at 304, 391 N.E.2d at 893.
141. *Id.* 304, 391 N.E.2d at 894.
142. 704 S.W.2d 691 (Mo. Ct. App. 1986).
143. *Id.* at 692.
144. *Id.* at 693–94.
145. *Id.* at 693.
146. *Id.*
147. *Id.* at 693.
148. *Id.*
149. *Id.* at 694–95.
150. 252 Ga. 435, 315 S.E.2d 865 (1984).
151. *Id.* at 436–37, 315 S.E.2d at 867.
152. *Id.* at 435, 315 S.E.2d at 866–67.

the state to show that the warrantless search was valid.[153]

Slaughter presented a motion to suppress challenge, claiming that the state did not procure a valid warrant.[154]

These three cases have been chosen to demonstrate how the burden is allocated to the state when there is a motion to suppress evidence seized by a warrantless search. These cases provide a broader and fuller understanding of how the *Wallace* decision mirrors the framework of other jurisdictions. More specifically, these opinions show that other jurisdictions have accepted the warrant/no warrant dichotomy and that analysis of different fact situations may open the *Wallace* opinion to an avenue of wider application in the future.

D. *The Effect of Wallace on Current Defense Practice*

The decision in *Wallace* has several ramifications for practicing defense attorneys. The purpose of a suppression hearing is to decide whether certain evidence will be admitted at trial.[155] Since this process can be crucial to whether the case against a criminal defendant will succeed, several key aspects of the suppression hearing should be kept in the defense attorney's mind, particularly in light of the *Wallace* decision.

First, the *Wallace* court determined that defense counsel must, in a motion to suppress evidence, specifically state the grounds for challenging the warrantless search.[156] This aspect of the opinion is very important. Although the adversarial system compels a defense attorney to keep as much of his case as possible out of the eyes of the prosecution, the defending attorney must be careful to lay out the specific guidelines of his motion. This is important for two reasons. First, *Wallace* specifically requires such pleading.[157] Second, defense counsel must be careful to clarify his motion to avoid losing the right to appeal. "[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal."[158] The reasoning of this position is two-fold. Primarily, this requirement of specificity works directly into the logic of the *Wallace* court's decision.[159] Secondly, it is clear that the concept of

153. *Id.* at 436, 315 S.E.2d at 867.
154. *Id.* at 435, 315 S.E.2d at 866.
155. S. BRENT & S. STILLER, HANDLING DRUNK DRIVING CASES 335 (1985).
156. *Wallace*, 37 Ohio St. 3d at 219, 524 N.E.2d at 892.
157. *Id.*
158. State v. Carter, 707 P.2d 656, 660 (Utah 1985).
159. The *Wallace* court required specificity in pleading for two reasons. The first was to give notice to the prosecution. The second was to avoid waiver of the right to appeal. *Wallace*, 37 Ohio St. 3d at 218, 524 N.E.2d at 892.

judicial economy would be best served by such a holding. It would make no sense to allow defendants to raise appeals on issues that should have been decided at the trial court level. Defense counsel must strike a balance between prudently releasing strategy and meeting the requirement of specificity to insure the right to appeal.[160]

The other important aspect of the *Wallace* decision concerns witnesses. Since the state must move forward with evidence to show probable cause,[161] the prosecution will have to call witnesses. This is an effective time for defense counsel to attack the state's case. "Often, defense counsel's best opportunity to make inroads in the prosecution's case comes from cross-examining the prosecution witnesses, rather than presenting a defense case."[162] Because the defense attorney will now be aware that the prosecution will be bringing forth evidence to show probable cause, a good counter strategy can be delivered for victory at the suppression hearing.

V. CONCLUSION

The decision in *City of Xenia v. Wallace*[163] was a judicially fair opinion. The *Wallace* court placed both parties in the best possible position in relation to the burden of proof. Secondly, the structure of the *Wallace* opinion, and the logic which can be derived from it, may allow application of this reasoning to other areas in the future. Further, the *Wallace* opinion fits into the general framework of other jurisdictions. The acceptance of the warrant/no warrant dichotomy by the *Wallace* court allows its analogy with other warrantless search opinions. Lastly, the court's decision in *Wallace* should be recognized by practicing defense attorneys to assure effective drafting of motions to suppress evidence in relation to this and possibly other warrantless search issues.

Thomas J. Dillon

160. Careful drafting will be the key to this challenge.
161. *Wallace*, 37 Ohio St. 3d at 220, 524 N.E.2d at 893.
162. S. BRENT & S. STILLER, *supra* note 155, at 338.
163. 37 Ohio St. 3d 216, 524 N.E.2d 889 (1988).