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IDENTICAL CONSTITUTIONAL LANGUAGE: WHAT IS A STATE COURT TO DO? *THE OHIO CASE OF STATE V. ROBINETTE*

by

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We are in the era of rediscovery of state constitutional law. In Ohio, there has been an official announcement of this in the syllabus of a highly significant case, *Arnold v. City of Cleveland*.[1] In Ohio, the syllabus is the law of the case. The syllabus of *Arnold* begins with the simple but dramatic statement, "The Ohio Constitution is a document of independent force."[2] It goes on to state, in the remainder of the paragraph, the basic guidepost of federal/state relations in the area of individual rights:

> In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.[3]

This article will analyze the application of these principles in the case of *State v. Robinette* ("Robinette I").[4]

The case of Robert Robinette, as often happens in cases which later become significant precedents, had the most ordinary of beginnings. Robinette was stopped for speeding on an interstate highway near Dayton, Ohio. While driving in a construction zone with a posted speed limit of 45 mile per hour, he was clocked driving 69 miles per hour. Sheriff's Deputy Roger Newsome was stopping speeders at this location for safety reasons. He later testified that he stopped Robinette only to give him a warning, and that he had no other suspicions of criminal activity afoot.

According to the state court of appeals decision,

> [b]efore Newsome gave Robinette a warning, he went back to his cruiser and activated a video camera. He had Robinette stand in front of the cruiser. Immediately after giving Robinette a warning, with no pause or break in the conversation, Newsome

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*Judge, First Appellate District of Ohio, February 1993-February 1999.

[1] 616 N.E.2d 163 (Ohio 1993).

[2] *Id.* at 164.

[3] *Id.*

[4] 653 N.E.2d 695 (Ohio 1995), *rev'd*, 519 U.S. 33 (1996) (hereinafter *Robinette I*).

> asked Robinette if he was carrying any kind of contraband, including drugs, and Robinette said that he was not. Then Newsome asked for and received permission to search Robinette's car.[5]

The search of Robinette's car turned up a small amount of marijuana and one pill of MDMA (known as "Ecstasy"). Robinette was arrested and charged with drug abuse, namely, knowing possession of a controlled substance. Robinette moved to suppress the evidence on the grounds of an illegal search. The motion to suppress was denied, and he was found guilty following a no-contest plea.

On appeal, Robinette argued that the motion to suppress should have been granted because once the purpose for the investigative stop was over, the officer could no longer lawfully detain him for further investigation.[6] The state argued that once the purpose of the investigative stop was over, Robinette was free to go, and that his consent to search was both voluntary and valid.[7] In a 2-1 decision, the appellate court agreed with Robinette that his motion to suppress should have been granted, and it reversed the trial court's decision.[8]

On August 31, 1994, the Ohio Supreme Court agreed to review the case.[9] It is noteworthy that in the appellate court decision there was no discussion of state or federal constitutional law.

The issue, as framed by Justice Pfeiffer, for a 4-3 majority of the Ohio Supreme Court, was "whether the evidence used against Robinette was obtained through a valid search."[10] Concluding that the search was not valid because it was the product of an unlawful detention, the court went on to articulate a bright-line test requiring the police, after a valid detention is completed, to tell citizens they are free to go before attempting any consensual interrogation. The body of the majority opinion then ends with this statement: "The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty."[11]

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[5] State v. Robinette, No. 14074, 1994 WL 147806, at *1 (Ohio Ct. App. Apr. 15, 1994).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] State v. Robinette, 638 N.E.2d 88 (Ohio 1994).
[10] *Robinette I*, 653 N.E.2d at 697.
[11] *Id.* at 699.

As stated above, in Ohio, the syllabus is the law of the case, a fact of some significance in the later review of *Robinette*. The two-paragraph syllabus of *Robinette I* holds:

> 1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.
>
> 2. The right, guaranteed by the *federal and Ohio Constitutions*, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import (emphasis added). [12]

Of significance to this article is the stated reliance in the second paragraph of the syllabus on both the federal and the state constitutions. Despite this statement of dual reliance in the syllabus, all the constitutional analysis in the majority opinion is based on federal precedent. There is only one state supreme court case even cited by the majority, *State v. Chatton*,[13] and that case explicitly grounds its decision in the Fourth Amendment to the United States Constitution.

Similarly, the dissent, expressing disturbance at the bright-line test, states that the majority's test "is contrary to well-established state and federal constitutional law."[14] As in the majority opinion, there is no state constitutional citation or analysis. The only state case cited by the dissent, *State v. Childress*,[15] also relies only on federal precedent. There is a single footnote in the dissenting opinion, which states "Section 14, Article I of the Ohio Constitution is analogous to the Fourth Amendment to the United States Constitution."[16]

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[12] *Id.* at 696. In her separate concurrence in *Ohio v. Robinette*, Justice Ginsburg refers to this as the "first-tell-then-ask-rule." Ohio v. Robinette, 519 U.S. 33, 41 (Ginsburg, J., concurring).

[13] 463 N.E.2d 1237 (Ohio 1984).

[14] *Robinette I*, 653 N.E.2d at 699 (Sweeney, J., dissenting).

[15] 488 N.E.2d 155 (Ohio 1983).

[16] *Robinette I*, 653 N.E.2d at 699 n.1 (Sweeney, J., dissenting). Section 14, Article I of the Ohio Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and

A brief discussion on how the United States Supreme Court reviews state court decisions is in order. The court of last resort in the state court system, which in Ohio is the Ohio Supreme Court, is the final word on the interpretation of state law. However, when state courts interpret federal law, the United States Supreme Court has the power to review these decisions. Thus, it was of great interest when, on March 4, 1996, the United States Supreme Court granted a writ of certiorari in the *Robinette*[17] case, grounded as it was, as stated in the syllabus, in both the state and the federal constitutions. In fact, the oral argument of *Robinette* began with counsel for Robinette suggesting that the writ was improvidently granted, and that the case should be dismissed, because it was decided on adequate and independent state grounds, which were not reviewable by the high court.[18] But is merely saying that there are adequate and independent state grounds enough to defeat federal high court review?

In *Michigan v. Long*,[19] the high court rejected "dual reliance" as a way of defeating federal review. According to *Michigan v. Long*, in the absence of a "plain statement" of adequate and independent state grounds, federal jurisdiction to hear the matter is to be presumed. Under this view, to avoid federal review, state courts must make clear that federal precedents are used only for "guidance, and do not themselves compel the result that the [state] court has reached."[20]

At oral argument in *Ohio v. Robinette* ("Robinette II")[21], Justice O'Connor responded to defense counsel's suggestion of dismissal by pointing out that Ohio has generally followed the federal interpretation of the Fourth Amendment in search-and-

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> no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

OHIO CONST. of 1851, art. I, § 14. The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. CONST. amend. XIV.

[17] 516 U.S. 1157 (1996).

[18] *Search and Seizure; Consensual Interrogation After Traffic Stop*, 65 U.S.L.W. 3320, 3322 (1996).

[19] 463 U.S. 1032 (1983).

[20] *Id.* at 1041.

[21] 519 U.S. 33 (1996) (hereinafter *Robinette II*).

seizure cases. She commented that only when a state court has rejected federal law and adopted something different as a matter of state law would the rule of *Michigan v. Long* come into play.[22] This colloquy was picked up again in the separate concurrence of Justice Ginsburg in the decision in *Robinette II*.[23]

The majority opinion, authored by Chief Justice Rehnquist and joined by six of the justices, began by noting that the Court first had to consider whether it had jurisdiction to review the decision at all.[24] The Chief Justice's opinion gave short shrift to the "independent state grounds"[25] alleged. While acknowledging that in Ohio the syllabus is the law of the case, the Court found the statement in the syllabus that the opinion was based on both the federal and the Ohio Constitutions too general to determine the jurisdictional question. The Court declared it was thus free to turn to the body of the opinion to determine the grounds for the decision, citing *Zacchini v. Scripps-Howard Broadcasting Co.*[26] In doing so, the Court was especially struck by the fact that the opinion relied entirely on federal law, including the one state case cited. The Court reaffirmed the rule of *Michigan v. Long*, which it declined to change, that when the decision appears to rest primarily on federal law, and when there is no adequate or independent ground clear from the opinion, the Court will assume the decision is based on federal precedent and review it accordingly. In short, boldly saying that a case is decided on an independent state ground will not necessarily make it so.

Turning then to the merits, the Court rejected both the analysis in the first paragraph of the syllabus, citing *Whren v. United States*[27] (decided after the state court decision in *Robinette I* and holding that the subjective intentions of a police officer do not make continued detention illegal, so long as detention is justified by the circumstances as viewed objectively), and also the bright-line test in the second paragraph, citing *Schneckloth v. Bustamonte*[28] (voluntariness of consent to search is a question of fact to

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[22] *Search and Seizure: Consensual Interrogation After traffic Stop, supra* note 18, at 3322.

[23] 519 U.S. at 41-44 (Ginsburg, J., dissenting).

[24] *Id.* at 36-37. Interestingly, the sole question asked in the state's petition for certiorari was "[w]hether the Fourth Amendment to the United States Constitution requires police officers to inform motorists, lawfully stopped for traffic violations, that the legal detention has concluded before any subsequent interrogation or search will be found to be consensual?" State v. Robinette, 653 N.E.2d 695 (Ohio 1995), *cert. granted*, 516 U.S. 1157 (1996).

[25] *Robinette II*, 519 U.S. at 37-38.

[26] 433 U.S. 562, 565-566 (1977).

[27] 517 U.S. 806 (1996).

[28] 412 U.S. 218 (1973).

be determined from all the circumstances). The Ohio Supreme Court's judgment was reversed, and the case was remanded for further proceedings.

Justice Ginsburg concurred in judgment, but she wrote separately because she thought the Ohio Supreme Court "may not have homed in on the implication ordinarily to be drawn from a state court's reliance on the Federal Constitution."[29] Justice Ginsburg noted that the majority's reversal of the first-tell-then-ask rule articulated in the second paragraph of the syllabus of *Robinette I* was not a per se rejection of such a rule but was only a rejection pursuant to federal precedent: such a rule might otherwise be perfectly acceptable in Ohio if there really were independent state constitutional grounds for it. She agreed with the majority that both the syllabus and the opinion of the Ohio Supreme Court in *Robinette I* were ambiguous in their stated basis of review, and her concurrence went on to provide a virtual primer on federalism.

While noting that ambiguity will trigger the U.S. Supreme Court's jurisdiction, she wrote the following:

> It is incumbent on a state court, therefore, when it determines that its State's laws call for protection more complete than the Federal Constitution demands, to be clear about its ultimate reliance on state law. Similarly, a state court announcing a new legal rule arguably derived from both federal and state law can definitively render state law an adequate and independent ground for its decision by a simple declaration to that effect.[30]

Justice Ginsburg even went so far as to provide an example of the proper articulation of an independent state ground, using a Montana Supreme Court decision on the scope of an individual's privilege against self-incrimination:

> While we have devoted considerable time to a lengthy discussion of the application of the Fifth Amendment to the United States Constitution, it is to be noted that this holding is also based separately and independently on the [defendant's] right to remain silent pursuant to Article II, Section 25 of the Montana Constitution.[31]

The choice of the Montana case by Justice Ginsburg is a particularly interesting one. While the Supreme Court of Montana emphatically stated in its conclusion that the

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[29] *Robinette II*, 519 U.S. at 42-43 (Ginsburg, J., concurring).

[30] *Id.* at 44.

[31] *Id.* (quoting *Montana v. Fuller*, 915 P.2d 809, 816 (1996), *cert. denied*, 117 S. Ct. 301 (1996) (alteration in original) (emphasis added).

holding was firmly grounded in the state constitution, its rationale, much like *Robinette I*, was based almost exclusively on federal precedent. Further, just as the search-and-seizure language in the Ohio Constitution is virtually identical to its federal counterpart, so too is the Montana constitutional prohibition against self-incrimination virtually the same as the Fifth Amendment to the U.S. Constitution. In this era of "new" states' rights, the challenge for the states will be how to satisfy the "independent state ground" requirement of *Michigan v. Long*, where the language of state and federal constitutional provisions is identical, and the state does not yet have a body of state precedent on which to draw.

On remand from the U.S. Supreme Court, the Ohio Supreme Court (with one change in the court's membership, potentially significant in that the first Robinette case was a 4-3 decision, with one of the members of the majority retiring before the rehearing) first declined to re-examine its earlier decision on independent state constitutional grounds. While acknowledging the basic principle that the "new federalism" permits state courts to provide greater protection for individual rights under their state constitutions than is required under federal constitutional standards, a majority of the court held that the protections under the Fourth Amendment and Section 14, Article I of the Ohio Constitution were the same, apparently because the language is "virtually identical." *State v. Robinette* ("Robinette III").[32] In reaching this conclusion, the court relied principally on two of its own earlier decisions,[33] *Nicholas v. Cleveland*[34] and *State v. Geraldo*.[35]

Having declined to base the decision in *Robinette III* on independent state grounds, the court went on to re-analyze the voluntariness of Robinette's consent to search his car. First, in regard to the lawfulness of the continued detention of Robinette after the original purpose of the investigative stop was completed, the court modified the first paragraph of the syllabus of *Robinette I* to conform to *Whren v. United States*.[36] The officer's subjective motivation for the continued detention was replaced with an objective-justification test. Second, because of the finding that the protections of the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution were coextensive, the bright-line "first-tell-then-ask rule" of the second syllabus paragraph of *Robinette I* was abandoned. Instead, the court specifically

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[32] 685 N.E.2d 762, 766-767 (Ohio 1997) (hereinafter *Robinette III*); *see supra* note 2.
[33] *Robinette*, 685 N.E.2d at 767.
[34] 182 N.E. 26 (Ohio 1932).
[35] 429 N.E.2d 141 (Ohio 1981).
[36] 517 U.S. 806 (1996) (decided after *Robinette I*).

adopted the totality-of-the-circumstances test set forth in *Schneckloth v. Bustamonte*,[37] as the controlling test under Section 14, Article I of the Ohio Constitution to determine whether permission to search a car is voluntary. Finally, the third paragraph of the syllabus of *Robinette III* states:

> Once an individual has been unlawfully detained by law enforcement, for his or her consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave. (*Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), followed.)[38]

On the facts presented, the court applied the totality-of-the-circumstances test. The court was influenced by the fact that after the officer told Robinette he was letting him off with a verbal warning, without any break in the conversation, the officer asked for consent to search the car. Robinette testified that he answered "yes" automatically, because he did not feel that he could refuse the officer or that he was any longer free to go. Finding that these circumstances made the questioning impliedly coercive, the court repeated the following quotation from *Robinette I*:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.[39]

The court majority concluded that Robinette had merely submitted to a claim of lawful authority, not voluntarily consented to the search of his car, and held inadmissible the evidence seized from that search. One justice concurred in the judgment only,[40] and two justices dissented[41] on the grounds that they would find that consent was voluntarily given under the totality-of-the circumstances test.

In conclusion, if *Robinette* began as an experiment in what Justice Ginsburg describes as the states' unique "laboratories" to "explore different means to secure

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[37] 412 U.S. 218 (1973).

[38] *Robinette III*, 685 N.E.2d 762, 763 (Ohio 1997).

[39] 685 N.E.2d at 770-771 (quoting *Robinette I*, 653 N.E.2d 695, 698 (Ohio1995)).

[40] *Id.* at 772 (Cook, J., concurring).

[41] *Id.* at 774 (Sweeney, J., dissenting).

respect for individual rights in modern times" as per *Arizona v. Evans*,[42] it ended outside the laboratory by choosing, for the time being, to stay with federal precedent in this area of the law of search and seizure.

[42] 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting).