

**OPINION NO. 84-088****Syllabus:**

The cost of a breathalyzer test, used to secure the criminal conviction of a defendant pursuant to R.C. 4511.19, may not be taxed as costs of prosecution and assessed against the defendant.

**To: Vincent E. Gilmartin, Mahoning County Prosecuting Attorney, Youngstown, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, December 21, 1984**

I have before me your request for my opinion as to the propriety of attaching the cost of a breathalyzer test taken in connection with a drunk driving prosecution to court costs, for which the defendant, upon conviction, is responsible.

It is a well-recognized principle of law that the power to assess costs must be expressly granted by statute. As was stated in State ex rel. Commissioners v. Guilbert, 77 Ohio St. 333, 338-39, 83 N.E. 80, 81 (1907):

Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed and included in the judgment or sentence. . . . [Costs] are allowed only by authority of statute. . . . (Emphasis added.)

This principle has been recently reaffirmed. See Centennial Insurance Co. v. Liberty Mutual Insurance Co., 69 Ohio St. 2d 50, 430 N.E.2d 925 (1982). See also 1979 Op. Att'y Gen. No. 79-089; 1958 Op. Att'y Gen. No. 1644, p. 38. Therefore, it must be determined whether the costs at issue are authorized by statute to be included as court costs.

R.C. 4511.19 prohibits driving while intoxicated. See R.C. 4511.191. The breathalyzer, or intoxilyzer, is one means which may be used to provide evidence of

intoxication. See R.C. 4511.19; State v. Emch, 7 Ohio App. 3d 7, 453 N.E.2d 1270 (Hancock County 1982). Neither R.C. 4511.19, nor any other statute of which I am aware, specifically provides for the attachment of the cost of the breathalyzer test to court costs. Cf. R.C. 2301.25 (costs of transcripts may be taxed as court costs); R.C. 2335.08 (witness fees in criminal cases may be taxed as costs); R.C. 2335.11 (fees of magistrates and their officers, witness fees and interpreter's fees may be inserted in judgment of conviction); R.C. 2947.06 (fees of psychologist or psychiatrist appointed by the court may be taxed as costs of the case); R.C. 2949.091(A)(1) ("[t]he court, in which any person is convicted of or pleads guilty to any offense. . . shall impose the sum of seven dollars as costs in the case in addition to any other court costs the court is required by law to impose upon the offender"); R.C. 2949.14 (including in court costs the amount paid "for the arrest and return of the person on the requisition of the governor, or on the request of the governor to the president of the United States, or on the return of the fugitive by a designated agent. . .").

R.C. 2947.23 provides generally for the assessment of costs in all criminal cases and reads as follows:

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

Although R.C. 2947.23 authorizes the judge to assess "the costs of prosecution" against a convicted defendant, court costs do not include the entire expense of prosecution, but, as noted above, include only those specific costs authorized by statute to be assessed against the defendant. See State ex rel. Commissioners v. Guilbert. See also Benda v. Fana, 10 Ohio St. 2d 259, 227 N.E.2d 197 (1967).

Inasmuch as I am unable to discover a statute which provides for the inclusion of the cost of a breathalyzer test in court costs, I conclude that the cost of a breathalyzer test may not properly be taxed against a defendant as court costs.

Therefore, it is my opinion, and you are so advised, that the cost of a breathalyzer test, used to secure the criminal conviction of a defendant pursuant to R.C. 4511.19, may not be taxed as costs of prosecution and assessed against the defendant.