

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellant,

v.

Billy J. Thompson, II,

Appellee.

On Appeal from the Fairfield  
County Court of Appeals,  
Fifth Appellate District

07-2389

Court of Appeals  
Case No. 2007-CA-00006

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT STATE OF OHIO**

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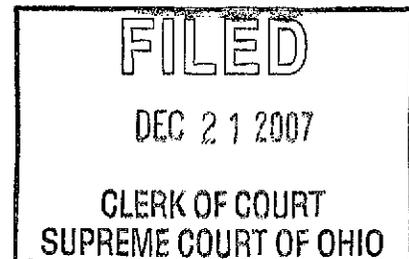


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST, INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED.**

The Ohio legislature has enacted legislation that enhances penalties for certain crimes if the criminal defendant has prior convictions for the same or similar crimes. See 4511.19, 2919.25, 2903.21, 2919.22, and 2919.21. Chapter 29 of the Revised Code is replete with statutes that increase the degree of the offense when an offender has a prior conviction. The ruling of the Fifth District Court of Appeals, if permitted to stand, will jeopardize the efforts of the judicial system to properly punish offenders and hold them accountable.

On April 18, 2007, this Court decided *State v. Brooke* (2007), 113 Ohio St.3d. 199, 2007-Ohio-1533. That case was accepted by this Court “to determine the significance of written waivers of the right to counsel and to clarify when uncounseled misdemeanor convictions can be used to enhance penalties for later offenses under R.C. 4511.19.” *Id.* at ¶1. Despite this Court’s best efforts, *State v. Brooke* supra has already been interpreted differently by appellate courts in two jurisdictions.

A comparison of the decisions rendered in the cases of *State v. Thompson*, (November 8, 2007), Fairfield App. Case No. 2007-CA-00006, 2007-Ohio-6098, and *State v. Neely*, (November 21, 2007) Lake App. Case No. 2007-L-054, 2007-Ohio-6243, demonstrate two completely different interpretations of *State v. Brooke* supra by appellate courts within a fourteen day period. It is respectfully submitted that this Court should accept this case to provide additional guidance to courts on the issues of the sufficiency of written waivers of the right to counsel and when a defendant legally shifts the burden to the State to prove the constitutionality of a prior conviction.

This issue is of vital importance to the people living in Ohio. The Ohio legislature has determined that for the violations of many criminal statutes, penalties may be enhanced when a defendant has prior convictions. These statutes must of course be balanced with the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. Many people prefer to represent themselves and voluntarily waive their right to counsel. The judges in the State of Ohio are compelled to accept guilty pleas only in those situations when they are certain that the defendant knowingly, intelligently and voluntarily waived their right to counsel. This Court discussed these issues in *State v. Brooke* supra.

[¶11] "Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a prima-facie showing of constitutional infirmity." *State v. Brandon*, 45 Ohio St.3d 85, 543 N.E.2d 501, syllabus. Once a prima facie showing is made that a prior conviction was uncounseled, the burden shifts to the state to prove that there was no constitutional infirmity. *Id.* at 88, 543 N.E.2d 501. For purposes of penalty enhancement in later convictions under R.C. 4511.19, when the defendant presents a prima facie showing that prior convictions were unconstitutional because they were uncounseled and resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

*Id.* at ¶11.

It is not uncommon for Municipal Courts to not retain transcripts of hearings when there is a change of plea. It will be helpful to those courts if this Court would clarify the importance of written waivers of the right to counsel and stress the importance of having those waivers filed. The presumption of regularity should apply to a waiver that is in writing and filed with a court. *Id.*

The acceptance of this case would permit this Court an opportunity to clarify its ruling in *State v. Brooke* supra and give more guidance to the significance of written waivers of the right to counsel that are filed in a criminal case. Granting leave to appeal would also permit the Court

to clarify when a defendant has made a prima facie showing that a prior conviction is constitutionally infirm. The ruling of the Fifth District Court in *State v. Thompson*, if permitted to stand, will likely result in greatly increasing the burden on the court system and frustrate the efforts of the legislature to enhance penalties for repeated violations of the same criminal statute.

### **STATEMENT OF THE CASE AND FACTS**

On June 7, 2006, Rusty Lanning, a trooper employed by the Ohio State Highway Patrol, observed Billy Thompson II, (“Appellee”) operating his car in an unsafe manner, striking the curb several times and repeatedly driving out of his marked lane. After the trooper administered several tests, Appellee was arrested and refused a chemical test for blood. A search warrant was obtained, blood was drawn, and the laboratory report ultimately established that Appellee had been driving while the alcohol level in his blood was 0.134 grams of alcohol per 100 milliliters of whole blood.

Trooper Lanning checked Appellee’s criminal history and discovered that Appellee had been convicted three times within the last six years for offenses of driving while under the influence of alcohol. Appellee was indicted by the Fairfield County Grand Jury for two counts of driving while under the influence of alcohol or drugs. Each count referenced three prior convictions within the last six years. Appellee filed a motion to strike prior uncounseled convictions from the Indictment and the State of Ohio, (“Appellant”) filed a memorandum contra. The trial court overruled Appellee’s motion finding that Appellee either was represented by counsel or waived representation in each prior conviction.

Appellee waived his right to trial by jury and a bench trial occurred wherein Appellee’s attorney continued to try to challenge the use of his prior convictions. Appellee did not testify at

the trial. The record contains no affidavits signed by Appellee claiming that his waivers were obtained improperly. After considering the evidence presented and the arguments of counsel, the trial court found Appellee guilty of two counts of driving while under the influence of alcohol or drugs. During the bench trial the three waivers from Appellee's prior convictions were presented as exhibits without objection to their authenticity.

When announcing its verdicts, the trial court discussed Appellee's prior convictions:

Each of the acknowledgment of rights forms advises the Defendant of his statutory and constitutional rights in misdemeanor cases. Each of these forms in each of those three misdemeanor cases indicates essentially that the Defendant has the right to retain counsel. You have a right to have counsel assigned without cost if you are unable to employ counsel where such right exists. You have a right to a reasonable continuance in the proceeding to secure counsel.

Each of these forms . . . in all three cases state that the Defendant acknowledges that he has a right to counsel and "I choose not to be represented by an attorney in this case." Each of those waivers appears to have been signed by Billy J. Thompson, II.

After briefly discussing legal issues the trial court found Appellee guilty of the offense of operating a vehicle while under the influence under § 4511.19(A)(1)(a) of the Ohio Revised Code, and guilty of the offense of operating a vehicle while under the influence of alcohol under § 4511.19(A)(1)(b).

Appellee was sentenced to twenty-four months in the state penal institution with sixty days of mandatory incarceration. Appellee timely appealed raising one assignment or error:

The conviction of the Defendant-Appellant was obtained without sufficient evidence being presented to establish each and every element of the offense in question. Specifically, the trial court committed harmful error in determining that the prior uncounselled convictions of the Defendant-Appellant were sufficient to enhance the instant charge to a felony offense.

The Fifth District Court of Appeals sustained Appellee's assignment of error holding:

"In the case at bar the record contains no evidence that the prior waivers of the right to counsel were made on the record in open court, nor shown through the court's colloquy with the appellant to have been knowingly and voluntarily made.

*Brooke*, supra, 113 Ohio St.3d. at 206, 2007-Ohio-1533 at ¶54, 863 N.E.2d. at 1031.”

*State v. Thompson*, (November 8, 2007) Fairfield App. Case No. 2007-CA-00006, 2007-Ohio-6098, at ¶48.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**PROPOSITION OF LAW NO. I: A misdemeanor conviction that is obtained after a written waiver of the right to counsel is made on the record in open court may be used by the State to enhance penalties for later offenses if the waiver was filed.**

Appellee, at the time of his misdemeanor convictions, was either represented by counsel or executed valid waivers. The trial court properly convicted Appellee for the commission of a felony. Appellee in his appeal conceded the propriety of the conviction for operating a vehicle while intoxicated, but argued the trial court improperly used uncounseled misdemeanor convictions in order to find Appellee guilty of felony operating a vehicle while intoxicated. The three waivers that Appellee signed were provided to the trial court and the Court of Appeals. Appellee presented no sworn testimony or affidavit challenging the propriety of his prior convictions. Appellee did not provide a transcript of his pleas to the trial court.

In Case No. 2000 TRC 07690, Appellee signed an acknowledgement and waiver form that was filed and sets out Appellee’s rights. This form explicitly advised defendants that they had the right to be represented by court appointed counsel if they could no afford to hire an attorney. Immediately above his signature is the following paragraph:

“Knowing and understanding this, I now voluntarily state that I choose not to be represented by an attorney in this case. I further voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a judge of the Court in which the case is pending and enter a plea of guilty to the charge.”

Appellee was sentenced by the trial judge in that case to a sentence of 90 days in the Fairfield County jail with 80 days suspended. No appeal was taken from that conviction.

The waiver form used in 02-TRC-11344 B, C, D, E, F, and G is more extensive.

Paragraph 3 reads

“3. You have a right to retain counsel. You have a right to have counsel assigned without cost if you are unable to employ counsel where such right exists. You have a right to a reasonable continuance in the proceeding to secure counsel.”

Paragraph 8 states:

“8. A conviction may enhance or increase the penalties of any future charges brought against you.”

Immediately above his signature the document reads:

Knowing and understanding this, I now voluntarily state that I choose not to be represented by an attorney in this case. I voluntarily waive and relinquish my right to a trial by jury, where such right exists, and elect to be tried by a judge of the court in which the case is pending and enter a pleas of guilty to the charge(s)

This waiver also instructs a defendant to read the rights carefully and question the judge if they have any questions. Appellee was sentenced in that case for a second offense within six years and received a sentence of one hundred eighty days in the Fairfield County jail with one hundred fifty days suspended. No appeal was taken from that conviction.

In Case No. 03 TRC 5174 Appellee was represented by counsel. This format was the same as used in the 2002 case and Appellee and his counsel signed an acknowledgment of rights form that was filed. All three documents were signed and filed in the Fairfield County Municipal Court and the presumption of regularity applies. *State v. Brooke* (2007), 113 Ohio St.3d.199, 2007-Ohio-1533. The conviction in this case states that it was Appellee’s third offense for operating a vehicle while intoxicated. Appellee was sentenced in that case to serve thirty days in the Fairfield County Jail.

The waivers approved by the trial court were at least as detailed as the waivers that were approved by this Court in *State v. Brooke* supra. No transcript showing that the trial court failed

to comply with its duties to ensure that the waivers of Appellee's right to counsel were properly obtained were presented to the trial court or the Court of Appeals. The transcript of the plea that was discussed in *State v. Brooke* supra demonstrated that the trial court did not comply with its duties. *State v. Brooke* supra at ¶49-52. As will be discussed in the next section, the decision in *State v. Thompson* supra improperly shifted the burden to the State before the Appellee had made a prima facie showing of unconstitutionality. Even if this Court rules the burden had been shifted, the extensive waivers that were filed, and the presumption of regularity were sufficient so that the trial court properly enhanced Appellee's conviction to a felony.

**PROPOSITION OF LAW NO. II: A criminal defendant claiming that a prior conviction was constitutionally infirm has a burden to provide the trial court with a transcript, testimony under oath, or an affidavit that convinces a trial court there may have been a Sixth Amendment violation before any burden shifts to the State to prove the validity of a prior uncounseled conviction.**

The Appellate Court's reliance on this Court's decision in *State v. Brooke* (2007), 113 Ohio St.3d. 199, 2007-Ohio-1533 was misplaced. In the *Thompson* appeal, the Fifth District Court of Appeals held this Court's decision in *State v. Brooke* supra to be controlling:

{¶29} "1. For purposes of penalty enhancement in later convictions under R.C. 4511.19, when the defendant presents a prima facie showing that prior convictions were unconstitutional because they were uncounseled and resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

{¶30} "2. Waiver of counsel must be made on the record in open court, and in cases involving serious offenses where the penalty includes confinement for more than six months, the waiver must also be in writing and filed with the court. (Crim.R. 44(C), applied.)"

*Thompson* supra at ¶29, 30.

Although the waivers in *Thompson* were all in writing and all filed in the respective records the *Thompson* court held:

{¶47} As the Ohio Supreme Court held in *State v. Wellman* (1974), 37 Ohio St.2d. 162, 66 O.O.2d. 353, 309 N.E.2d. 915, at paragraph two of the syllabus, “[p]resuming a waiver of the Sixth Amendment right of an accused to the assistance of counsel from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. (*Camley v. Cochran*, 369 U.S. 50-6 [82 S.Ct. 884, 8 L.Ed.2d 701], followed.)” *Brooke*, supra, 113 Ohio St.3d. at 203-204, 2007-Ohio-1533 at ¶25, 863 N.E.2d. at 1029.

{¶48} In the case at bar the record contains no evidence that the prior waivers of the right to counsel were made on the record in open court, nor shown through the court’s colloquy with the appellant to have been knowingly and voluntarily made. *Brooke*, supra, 113 Ohio St.3d. at 206, 2007-Ohio-1533 at ¶54, 863 N.E.2d. at 1031.

*Thompson* supra at ¶47, 48.

The Eleventh Appellate District’s analysis of *State v. Brooke* supra in *State v. Neely* supra resulted in a different conclusion:

[\*P36] In *Brooke* the Supreme Court considered the written waiver signed by the defendant in one of her prior cases from 1998. In that case there was no transcript available. However, in the written waiver produced by the state, the waiver indicated that Brooke had been advised of the nature of the charges and of her right to an attorney. It indicated Brooke understood these things, but wished to waive her right to counsel. The Court held:

[\*P37] “\*\*\* [W]e can presume from this written and filed entry, which is part of the record of her case, that the court accurately explained to Brooke that she was waiving her right to counsel \*\*\*. The court speaks through its journal entries. \*\*\* Here the entry has recorded what occurred during the plea hearing of this misdemeanor. There is evidence that the court made a finding that the right to counsel was knowingly and voluntarily waived. We therefore determine that this uncounseled plea may be counted toward enhancing a later penalty.” Id. at P47.

*Neely* supra at ¶36, 37.

The Court in *Neely* permitted the waiver to be used for enhancement purposes holding:

[\*P39] The Supreme Court in *Brooke* also considered a waiver of counsel the defendant had signed in a second prior OVI case from 2001. That waiver stated, “I, the defendant in the above-captioned case, hereby voluntarily waive my right to have an attorney, private or court-appointed, present at the time of my plea to criminal charges and my sentencing \*\*\*.” Id. at P38 and P52. The Court held that

because there was no indication by Brooke either in her colloquy with the judge or in this written waiver that she understood her right to counsel and chose to waive it, this prior conviction could not be used to enhance the degree of the defendant's current crime. *Id.* at P53.

[\*P40] The written waiver signed by appellant in the case sub judice is substantially similar to the one found to be sufficient by the Supreme Court in *Brooke*. In these circumstances, we hold [\*\*14] the Arraignment, Judgment Entry on Sentence and written Waiver entries evidence that appellant's waiver of the right to counsel was made in open court on the record and in writing and further was knowingly, intelligently, and voluntarily made. Appellant's 1987 conviction could therefore be used to enhance the degree of his present offense.

*Neely supra* at ¶39, 40

Contrary to the lower court's decision in *Thompson, State v. Brooke* (2007), 113 Ohio St.3d. 199, does not mandate that a written waiver of the Sixth Amendment right to counsel is *per se* insufficient if it is unaccompanied by a transcript of the hearing. The lower court's reliance on *Brooke* is inappropriate for two reasons: first, this Court has held that if no record of the transcript is provided at all then strong deference should be given to the trial court's discretion in accepting the waiver; *State v. Brandon supra*; *State v. Brooke supra* and second, the waiver in the present case is more comprehensive than the waiver signed in *Brooke*.

This Court in *Brooke supra* held that the last of the defendant's prior convictions were insufficient to support the present felony conviction on grounds that the transcript provided did not adequately show that the defendant understood the rights she was waiving. *Brooke* at ¶53. The signed waiver in *Brooke* stated in its entirety: "I, the defendant in the above captioned case, hereby voluntarily waive my right to have an attorney, private or Court appointed, present at the time of my plea to criminal charges and my sentencing on those charges." *Id.* at ¶38. The colloquy recounted in the provided transcript in *Brooke* was silent on whether the waiver was signed intelligently, and for this, this Court ruled the waiver to be invalid. *Id.* at ¶25.

If a transcript of the hearing is not provided or does not exist, appellate courts have held that “when portions of the transcript necessary to resolve issues are not a part of the record, we must presume the regularity in the trial court proceedings and affirm.” (citing *State v. Untied* (March 5, 1998), Muskingum App. No. CT-97-0018, 1998 Ohio App. LEXIS 1339 ¶7); *State v. Bartley* (May 24, 2007), Licking App. 06-CA-90, 2007 Ohio 2543 at ¶52. These holdings do not contradict the reasoning in *Brooke*. For the defendant’s second OVI conviction in *Brooke*, there was a complete lack of an oral record. *Brooke*, at ¶40. The Court did not simply invalidate the waiver; but instead, this Court looked to the strength of the language itself, and deferred to the trial court’s discretion in finding that the waiver was knowingly and voluntarily signed. *Brooke* at ¶47.

There is a difference between a transcript which does not exist, and an existing transcript that is silent on establishing voluntariness and understanding. When a provided transcript shows a giant hole where the trial court failed to address whether the signed waiver was voluntary and knowing, then invalidating the waiver is justifiable. Just because a transcript does not exist for benign and unrelated reasons does not mean that appellate courts should *automatically* conclude that the trial court abused its discretion. In *Thompson* Appellee did not provide a transcript, and the Court of Appeals should not have viewed the absence of a transcript as indicative of a trial court error. *Bartley* should have guided the lower court in deferring to “the regularity in the trial court proceedings,” which in this case means that the trial court properly enhanced the conviction. See *Bartley* at ¶52.

This case is not a situation where the absence of a transcript invalidates the written waiver because this waiver was accompanied by an acknowledgement of rights. This Court in *Brooke* determined the first and third waiver statements as sufficient to support an intelligent

waiver. *Brooke* at ¶55. Those two waivers were not as descriptive as the waivers relied on by the trial court in this case. However, in this case, both the “intelligent” component and the “voluntarily” component were combined into one waiver which was freely signed by the Appellee. Also, the waiver was personalized to the Appellee’s own case, and was not an unspecific, general waiver statement. *Id.* All three of Appellee’s prior convictions were for petty offenses

This Court’s adherence to the “regularity in trial court proceedings” indicates that the gap left open by a destroyed transcript should be filled by deferring to the discretion of the trial court. Deferring on the trial court’s acceptance of the Appellee’s knowing and voluntary waiver is justified in this case, since the waiver the Appellee signed was comprehensive and personalized to him. Furthermore, the waivers Appellee signed are strikingly similar to the waiver this Court held to be valid. See *Brooke* at ¶40-47. The written waivers were filed and Appellee did not introduce evidence to the contrary. See *Brooke* at ¶11. Also see *State v. Brandon* (1989), 45 Ohio St.3d. 85. Therefore, the Appellee’s felony conviction should have been affirmed.

This Court should reaffirm its syllabus in *State v. Brandon* “Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a prima-facie showing of constitutional infirmity.” *State v. Brandon* (1989), 45 Ohio St.3d. 85, 1989 Ohio-LEXIS-202 Syllabus.

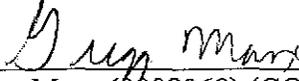
### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and presents a substantial constitutional question. Leave to appeal should be granted in this felony case that will permit this Court to establish a bright line rule clarifying when a

defendant has met his burden to show that a prior conviction should not be utilized for enhancement of a felony conviction.

Respectfully submitted,

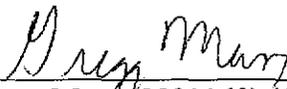
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was hand delivered upon Burkett and Sanderson, Attorneys for Appellee, this 21st day of December, 2007.

  
\_\_\_\_\_  
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**APPENDIX**

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

2007 NOV -8 AM 8:47

STATE OF OHIO

Plaintiff-Appellee

-vs-

BILLY J. THOMPSON, II.

Defendant-Appellant

JUDGES:

Hon: W. Scott Gwin, P.J.  
Hon: William B. Hoffman, J.  
Hon: John W. Wise, J.

Case No. 2007-CA-00006

OPINION

CHARACTER OF PROCEEDING:

Criminal appeal from the Fairfield County  
Court of Common Pleas, Case No.  
06CR226

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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*Gwin, P.J.*

{¶1} Defendant-appellant Billy J. Thompson appeals his conviction and sentence from the Fairfield County Court of Common Pleas on one count of driving while under the influence of alcohol or drugs, a felony of the fourth degree. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On June 7, 2006 an officer of the Ohio Highway Patrol encountered appellant operating a motor vehicle in an erratic manner. [T. at 14-15.] Based on several factors, the officer believed appellant to be under the influence of an alcoholic beverage and, eventually, obtained a warrant authorizing a blood sample to be withdrawn from appellant. [T. at 15-19.] The analysis of appellant's blood sample showed him to have a prohibited level of alcohol in his blood at the time of his encounter with the trooper. [T. at 20.]

{¶3} Further testimony was presented and exhibits entered to show that appellant was previously convicted of three prior violations of R.C. 4511.19. Specifically, State's exhibit 1, 2, and 3 demonstrated appellant's prior convictions. [T. at 20-23.] Each of these convictions occurred within the six years preceding the instant offense. [T. at 24.]

{¶4} Appellant was indicted on two counts of driving under the influence, felonies of the fourth degree. Count 1 alleged a violation of R.C. 4511.19(A) (1) (a), driving while under the influence. Count 2 alleged a per se violation pursuant to R.C. 4511.19(A) (1) (B). Both counts set forth appellant's three prior convictions in the Fairfield Municipal Court.

{¶5} On August 18, 2006, a motion was filed on behalf of appellant challenging the constitutionality of the prior convictions identified in the indictment as predicate offenses to enhance the current charges to a felony level. After a proper acceptance of a waiver of jury trial executed by appellant, a bench trial was held on the matter on November 6, 2006. Throughout the trial, counsel for appellant continued to challenge the use of the prior convictions to enhance the instant charge. [T. at 5-7, 27, 28, 29-30].

{¶6} After the trial, the trial court judge announced his decision:

{¶7} "The Court makes the following factual findings: In this case, Trooper Rusty Laming of the State Highway Patrol, with seven and a half years of experience, on June the 7th, 2006, while on duty in Lancaster, Fairfield County, Ohio, and in uniform in a marked vehicle . . . observed the Defendant operate a vehicle on Pierce Avenue striking the curb several times and being out of his marked lane several times . . .

{¶8} "The Defendant had fictitious license tags on the vehicle. The Defendant's eyes were red and glassy. He had slurred speech. The trooper noticed a odor of an alcoholic beverage ... on the Defendant's breath.

{¶9} "Several tests were performed by the trooper and Appellant was arrested. After Appellant refused a chemical test, a search warrant was obtained for blood. The blood was drawn at the Fairfield Medical Center. The blood sample was mailed to the Ohio State Patrol Crime Lab.

{¶10} "The State Highway Patrol Crime Lab's laboratory report showed an alcohol result of 0.134 grams of weight of alcohol per 100 milliliters of whole blood. The initial arrest was based on the officer's training, experience, and ability to notice impaired drivers." [T. at 34-36].

{¶11} The trial court then discussed appellant's prior convictions:

{¶12} "Each of the acknowledgment of rights forms advises the Defendant of his statutory and constitutional rights in misdemeanor cases. Each of these forms in each of those three misdemeanor cases indicates essentially that the Defendant has the right to retain counsel. You have a right to have counsel assigned without cost if you are unable to employ counsel where such right exists. You have a right to a reasonable continuance in the proceeding to secure counsel.

{¶13} "Each of these forms - - at least under - - the acknowledgment and waiver form and the acknowledgment of rights forms in all three cases state that the Defendant acknowledges that he has a right to counsel and 'I choose not to be represented by an attorney in this case.' Each of those waivers appears to have been signed by Billy J. Thompson, II." [T. at 37-38].

{¶14} The Court made the following findings in this case:

{¶15} "The Court, in this case, finds that the Defendant, Billy J. Thompson, II, is guilty of the offense of operating a vehicle while under the influence under Section 4511.19(A)(1)(a) of the Ohio Revised Code, and is guilty of the offense of operating a vehicle while under the influence of alcohol under Section 4511.19(A) (1) (b) .

{¶16} "The Court finds the Defendant guilty of each of these two offenses and finds that the State has proved by proof beyond a reasonable doubt the Defendant's guilt based on the factual findings made by the Court here on the record.

{¶17} "...the Court finds that the State has demonstrated evidence by proof beyond a reasonable doubt that the Defendant, Billy J. Thompson, II, was previously convicted of three—previous to the filing of this case, three charges of operating a

motor vehicle or a vehicle while under the influence. All three cases being in Fairfield County Municipal Court: One Case No. 00-TRC7690, July 5th, 2000; the second, 02-TRC-11344, August 21, 2002; and Fairfield County Municipal Court Case No. 03-TRC-5174, September 15, 2003. And that the documentation, the exhibits, demonstrate that the Defendant had pled guilty to an offense of 4511.19 of the Ohio Revised Code, at least one of the subsections; and I believe in some cases, several of the subsections.

{¶18} "And the Court makes those additional findings in support of the Court's decisions to find the Defendant guilty of a felony offense. So the Court finds that this would be the --specifically, that these two offenses in this case before the Court today are felony offenses, being a fourth offense within a six-year time period." [T. at 37-39; 40-41].

{¶19} On December 11, 2006, the appellant was sentenced to twenty-four (24) months in prison, with sixty (60) days of that to be mandatory and the balanced suspended in exchange for the defendant entering into and successfully completing an inpatient treatment program. The trial court merged the two OVI counts for sentencing purposes. [T. Dec. 11, 2006 at 8].

{¶20} It is from the trial court's findings that appellant has timely appealed raising as his sole assignment of error:

{¶21} "I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS OBTAINED WITHOUT SUFFICIENT EVIDENCE BEING PRESENTED TO ESTABLISH EACH AND EVERY ELEMENT OF THE OFFENSE IN QUESTION. SPECIFICALLY, THE TRIAL COURT COMMITTED HARMFUL ERROR IN DETERMINING THAT THE

PRIOR, UNCOUNSELLED CONVICTIONS OF THE DEFENDANT-APPELLANT WERE SUFFICIENT TO ENHANCE THE INSTANT CHARGE TO A FELONY OFFENSE.”

I.

{¶22} At the outset, we note that appellant was represented by counsel in Fairfield County Municipal Court Case No. 2003TRC5174. Accordingly, appellant concedes that this conviction can be counted toward enhancing a later penalty. The instant appeal concerns appellant’s prior convictions in Fairfield County Municipal Court Case Nos. 2000TRC7690 and 2002TRC11344.

{¶23} In his sole assignment of error appellant maintains that the trial court erred in determining that his prior uncounseled convictions are valid prior conviction for penalty-enhancement purposes. We agree.

{¶24} In general, a prior conviction cannot be collaterally attacked in a subsequent criminal case. However, a conviction cannot be used to enhance the degree of a subsequent offense if the prior conviction was obtained without assistance of counsel. *Nichols v. United States* (1994), 511 U.S. 738; see, also, *State v. Brandon* (1989), 45 Ohio St.3d 85, 86.

{¶25} The gravamen of the issue in this case is whether appellant’s two prior OVI convictions can be used to enhance the charge sub judice.

{¶26} The Sixth Amendment right to counsel extends to misdemeanor criminal cases that could result in the imposition of a jail sentence. See *State v. Caynor* (2001), 142 Ohio App.3d 424, 427-428, 755 N.E.2d 984. A criminal defendant may waive this right to counsel either expressly or impliedly from the circumstances of the case. *State v. Weiss* (1993), 92 Ohio App.3d 681, 684, 637 N.E.2d 47. An effective waiver requires

the trial court to " \* \* \* make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right." *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, paragraph two of the syllabus. In order to have a valid waiver, the trial court must be satisfied that the defendant made an intelligent and voluntary waiver with the knowledge that he will have to represent himself, and that there are dangers inherent in self-representation. *State v. Ebersole* (1995), 107 Ohio App.3d 288, 293, 668 N.E.2d 934, citing *Faretta v. California* (1975), 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562. A written waiver of counsel is not a substitute for a waiver in open court. *City of Garfield Heights v. Gipson* (1995), 107 Ohio App.3d 589, 669 N.E.2d 264; *State v. Songer*, 5<sup>th</sup> Dist. No. 01 CA 82, 2002-Ohio-2894.

{¶27} Normally, the proceedings in a lower court are deemed correct in the absence of a transcript of those proceedings. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385-386. It is appellant's duty to provide a transcript or, in its stead, one of the acceptable alternatives provided in App.R. 9. However, the waiver of a constitutional, statutory, or other substantial or fundamental right must affirmatively appear in the record. *Id.*, citing *State v. Haag* (1976), 49 Ohio App.2d 268, 271, 360 N.E.2d 756, 759. Since the recording of waiver of counsel is mandatory and the presumption is against a waiver of counsel, the state has the burden to show compliance with the rules. *Id.* See, also, *State v. Dyer* (1996), 117 Ohio App.3d 92, 96, 689 N.E.2d 1034, 1036.

{¶28} We find the recently decided case of *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, syllabus, 863 N.E.2d 1024 to be controlling:

{¶29} "1. For purposes of penalty enhancement in later convictions under R.C. 4511.19, when the defendant presents a prima facie showing that prior convictions were unconstitutional because they were uncounseled and resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

{¶30} "2. Waiver of counsel must be made on the record in open court, and in cases involving serious offenses where the penalty includes confinement for more than six months, the waiver must also be in writing and filed with the court. (Crim.R.44(C), applied.)"

{¶31} In *Brooke*, the defendant filed a motion to dismiss the indictment or for alternative relief, along with an affidavit stating that for each of her three previous OVI convictions she had been unrepresented by counsel, pleaded guilty, and received jail time. She alleged that because the earlier convictions were uncounseled and led to incarceration, they could not be used to enhance her pending misdemeanors to felonies. The defendant also filed copies of the transcripts of the plea hearings from the two Chardon convictions and an affidavit from a court bailiff in Willoughby Municipal Court, who confirmed that no court record was available for the July 1, 1998 plea hearing in that court. The state responded with copies of three written and filed waivers of counsel signed by the defendant. 113 Ohio St.3d at 200, 2007-Ohio-1533 at ¶3, 863 N.E.2d at 1026-1027. Of relevance to the case at bar is the Ohio Supreme Court's analysis of Brooke's second OVI conviction. In that instance, "[a] court bailiff testified by affidavit that no oral record or transcript of the hearing existed because any such record had been disposed of in accordance with the court's 'standard record retention policy.' The state, however, produced a written "waiver of counsel" signed by Brooke at her

plea hearing...." 113 Ohio St.3d at 205, 2007-Ohio-1533 at ¶40, 863 N.E.2d at 1030. In the case at bar, the record contains neither testimony nor explanation concerning the availability of transcripts of the plea hearings concerning the two prior convictions.

{¶32} The written waiver in *Brooke* provided:

{¶33} "Defendant appeared in open court this 1st day of July, 1998 and was advised by this Court

{¶34} "(1) of the nature of the charge against him: [sic, throughout]

{¶35} "(2) that he has the right to an attorney and the right to a reasonable continuance in the proceedings to secure one, and pursuant to Rule 44, the right to have counsel assigned without cost to himself if he is unable to obtain one.

{¶36} "Moreover, *Defendant was asked if he understood all of these things, and satisfied this court that he did and that he wishes to waive his right to counsel.*

{¶37} "THEREFORE, I affix my signature below with that of Defendant to attest that the foregoing procedure was observed and that Defendant hereby waives his right to an attorney."

{¶38} "The entry was signed by both Brooke and the judge and filed with the court." 113 Ohio St.3d at 205, 2007-Ohio-1533 at ¶41-46, 863 N.E.2d at 1029. [Emphasis added].

{¶39} In finding that this uncounseled plea may be counted toward enhancing a later penalty, the Court stated:

{¶40} "Here the entry has recorded what occurred during the plea hearing of this misdemeanor. There is evidence that *the court made a finding* that the right to counsel

was knowingly and voluntarily waived." 113 Ohio St.3d at 205, 2007-Ohio-1533 at ¶47, 863 N.E.2d at 1031. [Emphasis added].

{¶41} In the case at bar, the written waiver filed in Case No. 02TRC11344, admitted as State's Exhibit A, begins with the following recitation: "The following are your rights in court. Read them carefully. If you have questions about any of these rights ask the judge when your case is called."

{¶42} The waivers in the case at bar simply recite that the appellant was "informed by the court." Although the forms purported to explain the appellant's constitutional rights, each form concludes: "Knowing and understanding this, I now voluntarily state that I choose not to be represented by an attorney in this case. I [further] voluntarily waive and relinquish my right to a trial by jury [where such right exists], and elect to be tried by a judge of the Court in which the case is pending and enter a plea of (no contest) (guilty) to the charge(s) of:..."

{¶43} The word "guilty" is circled on each plea form. The appellant's signature but neither counsel for appellant nor the trial court's signatures appear on either form.

{¶44} Unlike the waiver in *Brooke*, the two waivers in the case at bar contain no finding by the trial court that the right to counsel was knowingly and voluntarily waived.

{¶45} The waiver forms do not indicate that the appellant was "asked if he understood all of these things, and satisfied this court that he did and that he wishes to waive his right to counsel." In addition, neither waiver form was signed by the trial court.

{¶46} In all cases where the right to counsel is waived, the court "must make sufficient inquiry to determine whether defendant fully understands and intelligently

relinquishes that right." *State v. Gibson* (1976), 45 Ohio St.2d 366, 74 O.O.2d 525, 345 N.E.2d 399, paragraph two of the syllabus.

{¶47} As the Ohio Supreme Court held in *State v. Wellman* (1974), 37 Ohio St.2d 162, 66 O.O.2d 353, 309 N.E.2d 915, at paragraph two of the syllabus, "[p]resuming a waiver of the Sixth Amendment right of an accused to the assistance of counsel from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. (*Camley v. Cochran*, 369 U.S. 506 [82 S.Ct. 884, 8 L.Ed.2d 70], followed.)" *Brooke*, supra, 113 Ohio St.3d at 203-204, 2007-Ohio-1533 at ¶25, 863 N.E.2d at 1029.

{¶48} In the case at bar the record contains no evidence that the prior waivers of the right to counsel were made on the record in open court, nor shown through the court's colloquy with the appellant to have been knowingly and voluntarily made. *Brooke*, supra, 113 Ohio St.3d at 206, 2007-Ohio-1533 at ¶54, 863 N.E.2d at 1031.

{¶49} Accordingly, the appellant's sole assignment of error is sustained. The judgment of the Fairfield County Court of Common Pleas is reversed and this matter is remanded for further proceedings.

By Gwin, P.J., and

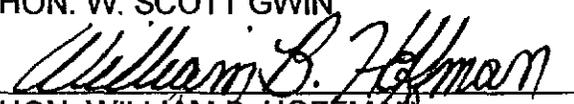
Wise, J., concurs;

Hoffman, J., concurs

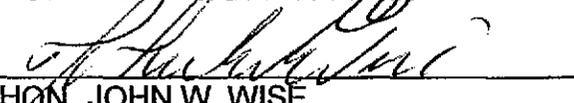
separately



HON. W. SCOTT GWIN



HON. WILLIAM B. HOFFMAN



HON. JOHN W. WISE

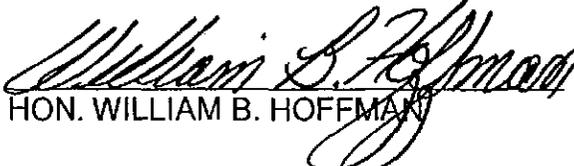
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*Hoffman, J., concurring*

{¶50} I concur in the majority's analysis and disposition of Appellant's sole assignment of error. I write separately only to emphasize a waiver of the right to counsel must be knowingly, intelligently and voluntarily made. While the waiver in the case sub judice may demonstrate the waiver was knowingly and voluntarily made, I do not find it demonstrates the waiver was intelligently made in compliance with the dictates of *State v. Gibson* (1976), 45 Ohio St.2d 366. Understanding the right to counsel or appointed counsel is not the same as understanding the dangers inherent in self-representation and the value an attorney can provide. There is a fundamental difference between understanding what you are waiving as opposed to why you should or should not waive that right.

{¶51} I concur in the majority's analysis of *State v. Brooke* (2007), 113 Ohio St.3d, and the majority's application of *Brooke* to the facts in the case sub judice. Upon my review of *Brooke*, I note two justices concurred in judgment only. I am left to speculate whether they did so because they may have disagreed with the majority's conclusion approving the use of the July 1, 1998 Willoughby Municipal Court conviction as a predicate conviction. The *Brooke* Court found the record demonstrated the waiver was knowingly and voluntarily made. I agree. But does the record show it was intelligently made per *Gibson*?

Although I do not believe it does, I, nevertheless, recognize the Ohio Supreme Court has determined otherwise and such decision is controlling.

  
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

2007 NOV -8 AM 8:47  
CLERK OF COURTS  
FAIRFIELD COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

BILLY J. THOMPSON, II.

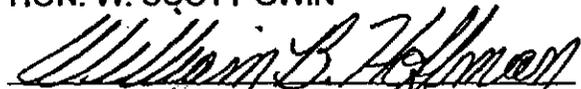
Defendant-Appellant

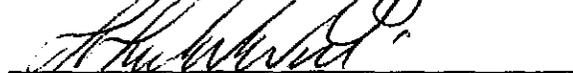
JUDGMENT ENTRY

CASE NO. 2007-CA-00006

For the reasons stated in our accompanying Memorandum-Opinion, The judgment of the Fairfield County Court of Common Pleas is reversed and this matter is remanded for further proceedings. Costs to appellee.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE