

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **07-2389**
Plaintiff-Appellant : On Appeal from the Fairfield County
vs. : Court of Appeals, Fifth Appellate
District
BILLY J. THOMPSON, II : Court of Appeals
Defendant-Appellee : Case Number 07 CA 06

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MEMORANDUM IN SUPPORT OF JURISDICTION

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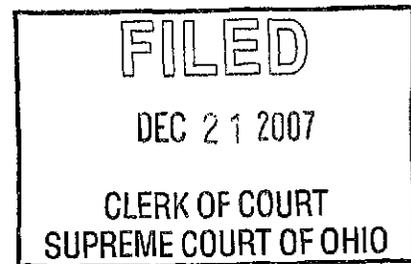


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<u>Amicus Curiae OPAA's Proposition of Law No. 2:</u> Where a court's entry records what occurred during a misdemeanor plea hearing and further indicates that the defendant waives the presence of an attorney, there is sufficient evidence to prove that the defendant's right to counsel was knowingly and voluntarily waived.	3
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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Ohio Prosecuting Attorneys Association ("OPAA") supports Plaintiff-Appellant State of Ohio's Memorandum in Support of Jurisdiction and urges this Court to grant jurisdiction. This case is of public and great general interest in that the Fifth District Court of Appeals has set a dangerous precedent in its interpretation of this Court's decision in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, regarding the use of prior DUI/OVI convictions to increase the degree of a new and subsequent DUI/OVI charge. The prosecuting attorneys from Ohio's eighty-eight counties rely heavily on R.C. 4511.19(G)(1)(d) to effectively prosecute repeat DUI/OVI offenders -- offenders that pose a substantial risk to all Ohioans who use the state's roadways.

This matter is also of public and great general interest because there appears to be a recent conflict between the Fifth and Eleventh Appellate Districts regarding what amounts to a prima-facie showing that a prior conviction was unconstitutional because it was uncounseled and resulted in confinement. In *State v. Neely*, 11th Dist. No. 2007-L-054, 2007-Ohio-6243, at ¶ 18, the Eleventh District Court of Appeals found that without having provided an "affidavit, testimony or other evidence in support of his motion to dismiss to prove that he was uncounseled at the time of his waiver of counsel," the defendant "did not make a prima-facie showing that his past conviction was unconstitutional, and the burden never shifted to the state to prove his waiver was voluntary." In the present case, the Fifth District Court of Appeals held the exact opposite by finding that Thompson's mere filing of a motion challenging the constitutionality of his prior convictions and his continued objection to their use at trial amounted to a prima-facie showing that the prior convictions were

unconstitutional because they were uncounseled and resulted in confinement. *State v. Thompson*, 2007-CA-00006, 2007-Ohio-6098, at ¶ 5.

The Fifth and Eleventh Appellate Districts also disagree as to the sufficiency of the written waivers of counsel. In *Neely*, the court of appeals found sufficient a waiver of counsel signed by the defendant where the defendant was "advised by the court of his right to counsel, retained or appointed; that he understood this right; and that he wished to waive his right to counsel and his right to trial, including jury trial." *State v. Neely*, at ¶ 38. In *Thompson*, the court of appeals found a very similar written acknowledgment and waiver of rights insufficient because there were no transcripts of the proceedings. *State v. Thompson*, at ¶31 and ¶42. Therefore, it is imperative that this Court grant jurisdiction to settle the conflict between these district courts of appeals before the conflict spreads throughout the state.

Additionally, this case involves a substantial constitutional question since it hinges on the constitutional right to counsel. In this regard, the Fifth District Court of Appeals mistakenly relied on a line of cases regarding the "presumption against a waiver of counsel." *Id.* at ¶ 27. The court of appeals' reliance on that line of cases is mistaken because all of those cases were on direct appeal from the conviction involving the waiver of counsel, not on appeal from a conviction where prior convictions were used to increase the current offense. In the present case, the State of Ohio submitted the written waivers for all of Thompson's prior DUI/OVI convictions. The record is unclear as to the existence of the court transcripts from those older convictions. And, it is fundamentally unfair to the State of Ohio to automatically presume that Thompson did not knowingly, intelligently, and voluntarily waive his right to counsel in the older cases when the only evidence before the court indicates that there was indeed such a waiver. As it stands now, the Fifth

District Court of Appeals has created an impenetrable barrier to the use of R.C. 4511.19(G)(1)(d) and its decision provides an incentive for DUI/OVI offenders to waive counsel. Therefore, the OPAA strongly urges this Court to grant jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

The OPAA joins in Plaintiff-Appellant's Statement of the Case and Facts as presented in its Memorandum in Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Amicus Curiea OPAA's Proposition of Law No. 1: Without presenting an affidavit, testimony, or other evidence to prove a conviction was uncounseled and resulted in confinement, a criminal defendant has not made a prima-facie showing that his past conviction was unconstitutional, and the burden does not shift to the state to prove that the waiver of counsel was voluntary, knowing, and intelligent.

Amicus Curiae OPAA's Proposition of Law No. 2: Where a court's entry records what occurred during a misdemeanor plea hearing and further indicates that the defendant waives the presence of an attorney, there is sufficient evidence to prove that the defendant's right to counsel was knowingly and voluntarily waived.

[Argued together]

In *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, at ¶¶7-8, this Court clearly indicated that in the prosecution of a DUI offender pursuant to R.C. 4511.19(G)(1)(d) who has multiple prior DUI convictions, "the prior conviction is an essential element of the crime and must be proved by the state." It is well-established that a misdemeanor conviction cannot be used to enhance a sentence in a later conviction if the defendant was "uncounseled." *State v. Brandon* (1989), 45 Ohio St.3d 85, 543 N.E.2d 501; *Baldasar v. Illinois* (1980), 446 U.S. 222, 100 S.Ct. 1585. A conviction is "uncounseled" if the defendant was not represented by counsel and the defendant did not knowingly and intelligently waive the right to counsel. *State v. Carrion* (1992), 84 Ohio App.3d 27, 31, 616 N.E.2d 261, 263-264. An uncounseled conviction is not per se unconstitutional as a defendant may voluntarily waive the right to counsel and assert the right of self-representation. *Id.*

To challenge a past uncounseled conviction, the defendant must make a prima-facie showing of a constitutional infirmity. *State v. Brandon* at syllabus paragraph. Such a prima-facie showing is easily accomplished upon the defendant providing evidence that he was both uncounseled during the prior conviction and that the prior conviction resulted in incarceration. *Id.* at 87-88. In *State v. Brooke* at ¶ 3, the defendant made her prima-facie showing by submitting "an affidavit stating that for each of her three previous convictions she had been unrepresented by counsel, pleaded guilty, and received jail time" and "she also filed copies of the transcripts of the plea hearings." With regard to making a prima-facie showing, the present case is drastically different from *Brooke* but quite similar to *State v. Neely* at ¶ 18, where the defendant "provided no affidavit, testimony, or other evidence in support of his motion to dismiss." In the present case, Thompson did nothing more than file a "motion to strike prior uncounseled convictions from the indictment" and argue that motion

at the trial. Therefore, Thompson did not make the necessary prima-facie showing that his prior convictions were constitutionally infirm and the burden never shifted to the state to prove that Thompson knowingly, voluntarily, and intelligently waived his right to counsel.

Although the burden had not shifted to the state to prove that Thompson had knowingly, voluntarily, and intelligently waived his right to counsel in his prior convictions, the state responded to Thompson's motion to strike by submitting the written acknowledgment and waiver of rights forms signed by Thompson and filed by the court in his prior cases. In *State v. Brooke* at ¶ 6, this Court recognized that in some cases a written and filed waiver of counsel will suffice to show that it was knowing, intelligent, and voluntary. In fact, this Court found one of the written waivers of counsel in *Brooke* sufficient: "[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." *Id.* at ¶ 47.

Much like the waiver found sufficient in *Brooke*, the waivers at issue in the present case recorded what occurred during a misdemeanor plea hearing and further indicated that after "knowing and understanding" his rights, Thompson "voluntarily" chose not to be represented by an attorney. In *State v. Neely* at ¶¶ 38-40, the court of appeals found the written waiver substantially similar to the one this Court found sufficient in *Brooke*. It is quite evident that the Fifth District Court of Appeals simply found that the written waivers signed by Thompson were insufficient because there were no transcripts of the plea hearings submitted. The Fifth District Court of Appeals did not engage in the same analysis of the written waivers as this Court did in *Brooke* and as the Eleventh District Court of Appeals did in *Neely*. Rather, the Fifth District Court of Appeals relied on a line of cases regarding the "presumption against a waiver of counsel." *State v. Thompson*, at ¶ 27. That

line of cases involved direct appeals of the actual convictions involving the waivers of counsel, not on appeal from a conviction where prior convictions were used to increase the current offense. The written waivers signed by Thompson and filed in the court are sufficient under the analysis this Court provided in *Brooke*.

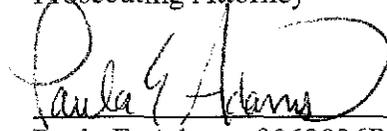
Again, the OPAA urges this Court to accept jurisdiction in this case to settle the conflict between the Fifth and Eleventh District Courts of Appeals before all of Ohio's appellate districts are divided in this important issue.

CONCLUSION

For the above reasons, this Court should grant jurisdiction in this case.

Respectfully,

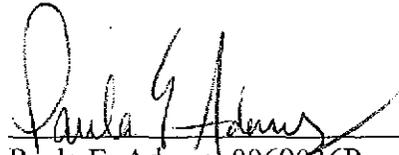
Joseph T. Deters, 0012084P
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A handwritten signature in cursive script that reads "Paula E. Adams". The signature is written in dark ink and is positioned above a horizontal line.

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Support of Jurisdiction, by United States mail, addressed to Devon C. Harmon (0074360), Burkett & Sanderson, Inc., 118 West Chestnut Street, Suite B, Lancaster, OH 43130, counsel of record, this 20th day of December, 2007.



Paula E. Adams, 0069036P

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