

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2007-2389  
Plaintiff-Appellant : On Appeal from the Hamilton County  
Court of Appeals, First Appellate  
vs. : District  
BILLY THOMPSON : Court of Appeals  
Case Number 07 CA 06  
Defendant-Appellee :

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MERIT BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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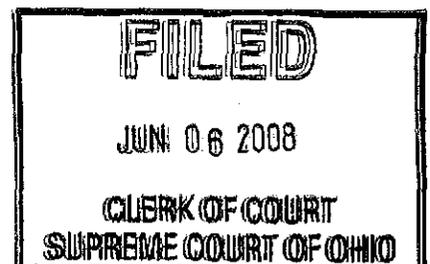


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## STATEMENT OF FACTS

The Fairfield County Grand Jury issued an indictment charging the defendant-appellee Billy J. Thompson with two counts of driving under the influence of alcohol or drugs ("DUI") in violation of R.C. 4511.19(A)(1)(a) and (b). The two counts were enhanced to fourth degree felonies based on Thompson's three prior R.C. 4511.19 convictions within six years. The indictment properly listed the three previous convictions.

Thompson filed a pre-trial "motion to strike prior uncounseled convictions from the indictment." Thompson did not submit any evidence by way of affidavits, transcripts, or testimony in support of his motion. The State of Ohio responded to the motion by submitting filed copies of the written acknowledgment and waiver of rights forms Thompson signed in each of his prior cases. The trial court found that Thompson was either represented by counsel or waived counsel in each of the prior convictions and overruled the motion.

Thompson waived his right to a jury and the matter proceeded to a bench trial. He was found guilty as charged in the indictment and was sentenced to two years incarceration. The trial court suspended all but sixty days of the period of incarceration with the condition that Thompson successfully complete an inpatient treatment program.

On appeal, Thompson claimed that his conviction was based on insufficient evidence because the prior R.C. 4511.19 convictions used to enhance his offense were uncounseled. The Fifth District Court of Appeals reversed Thompson's felony conviction. The court of appeals found that by merely filing and arguing a "motion to strike prior uncounseled convictions from the indictment," Thompson made a prima facie showing that his three prior convictions were unconstitutional because they were

uncounseled and resulted in confinement. In support of its decision, the court of appeals relied on this Court's decision in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024.

The Ohio Prosecuting Attorneys Association ("OPAA") submits this merit brief urging reversal of the Fifth District Court of Appeals' decision. The Ohio Revised Code contains approximately thirty-four offenses where a prior conviction will increase the level of an offense.<sup>1</sup> Therefore, it is imperative that prosecutors, defense attorneys, and judges have a clear standard to apply when a prior conviction is used to enhance the level of an offense.

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<sup>1</sup>See R.C. 2903.34; R.C. 2903.341; R.C. 2905.05; R.C. 2907.04; R.C. 2907.32.2; R.C. 2911.32; R.C. 2913.02; R.C. 2915.02; R.C. 2915.03; R.C. 2915.04; R.C. 2915.05; R.C. 2919.12; R.C. 2919.12.1; R.C. 2919.12.3; R.C. 2919.22; R.C. 2919.25; R.C. 2923.12; R.C. 2923.21; R.C. 2925.31; R.C. 2927.02; R.C. 4511.19; R.C. 4511.21; R.C. 4511.63; R.C. 4511.76.1; R.C. 4511.76.2; R.C. 4511.76.4; R.C. 4511.77; R.C. 4513.99; R.C. 4931.55; R.C. 4549.01; R.C. 4549.08; R.C. 4549.10; R.C. 4549.11; R.C. 4549.12.

## ARGUMENT

**Amicus Curiae 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.**

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.* "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, 543 N.E.2d 501, at paragraph one of the syllabus. "When a defendant raises a constitutional question concerning a prior conviction, he must lodge an objection as to the use of this conviction and he must present sufficient evidence to establish a prima facie showing of a constitutional infirmity." *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, at paragraph two of the syllabus.

With regard to a past uncounseled conviction, 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. *Brandon* at 87-88. In *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, 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." Since *Brooke* was decided, the Eighth and Tenth District Courts of Appeals have clearly indicated that "a defendant cannot rely on a silent record and, thus, has the burden of challenging an apparently constitutional prior conviction with some evidence that he was not afforded his right to counsel." *State v. Putich*, 8<sup>th</sup> Dist. No. 89005, 2008-Ohio-681, at ¶24; see also *State v. Volpe*, 10<sup>th</sup> Dist. No. 06AP-1153, 2008-Ohio-1678, at ¶57. Similarly, the Eleventh District Court of Appeals determined that since the defendant "provided no affidavit, testimony, or other evidence in support of his motion to dismiss," he "did not make a prima facie showing that his past conviction was unconstitutional." *State v. Neely*, 11<sup>th</sup> Dist. No. 2007-L-054, 2007-Ohio-6243, at ¶18.

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. Thompson did not attach an affidavit or submit transcripts from his prior convictions and he did not provide any testimony that his prior convictions were uncounseled. 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.

**Amicus Curiae OPAA's Proposition of Law No. 2: Where a written acknowledgment and waiver of rights records what occurred during a misdemeanor plea hearing, is signed by the defendant, and 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.**

In *State v. Brooke*, 113 Ohio St.3d 199, 863 N.E.2d 1024, at ¶6, this Court analyzed three different written waivers, two of which were accompanied by transcripts of the plea hearings, and determined that "in some cases a written and filed waiver does not suffice . . . At other times, however, it may." In the present case, 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. There were no transcripts from the prior plea hearings.

In *Brooke*, the one written waiver of counsel that was not accompanied by a transcript of the plea hearing was found 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, and his signature appears on the waivers. The written waivers signed by Thompson and filed in the court are sufficient under the analysis this Court provided 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 appeals from a conviction where prior convictions were used to increase the current offense.

Since Ohio has many criminal offenses that may be enhanced if a defendant has a prior conviction, it is crucial that the state be able to rely upon written waivers if indeed a defendant makes a prima facie showing that a prior conviction was uncounseled. This is especially true for offenses other than DUIs where there is no definitive "look-back" time period for prior convictions.

The OPAA urges this Court to reverse the Fifth District Court of Appeals and hold that where a written acknowledgment and waiver of rights records what occurred during a misdemeanor plea hearing, is signed by the defendant, and 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.

CONCLUSION

For the above reasons, this Court should reverse the Fifth District Court of Appeals' decision in this case.

Respectfully,

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Prosecuting Attorney

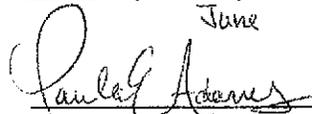


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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellant, by United States mail, addressed to Devon C. Harmon (0074360), 118 West Chestnut Street, Suite B, Lancaster, OH 43130, counsel of record, this 5<sup>th</sup> day of ~~May~~ <sup>June</sup>, 2008.



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