

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

**Plaintiff-Appellant,**

**v.**

**BILLY J. THOMPSON, II,**

**Defendant-Appellee.**

**CASE NO. 07-2389**

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

**Court of Appeals  
Case No. 2007-CA-00006**

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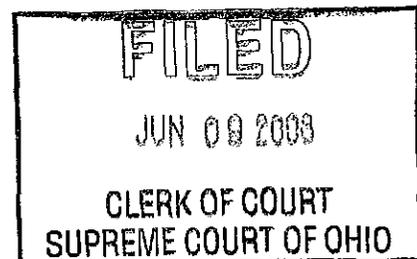
**MERIT BRIEF OF APPELLEE STATE OF OHIO**

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## STATEMENT OF FACTS

Billy Thompson II, was arrested for his fourth DUI offense after Trooper Rusty Lanning observed him driving erratically. (Tr.P. 14-20). Appellee struck the curb several times, repeatedly drove out of his lane, failed field sobriety tests, and refused to give a blood sample. (Tr.P. 16-18). A warrant was required to obtain a blood sample, which showed the alcohol level in Appellee's blood at 0.134. (Tr.P. 18-20).

Due to Appellee's three (3) prior convictions, this new DUI offense was a felony of the fourth degree under R.C. 4511.19(A)(1)(a), R.C. 4511.19(A)(1)(b), and R.C. 4511.19(G)(1)(d) and Appellee was properly indicted by the Fairfield County Grand Jury on June 16, 2006. The State relied upon copies of the prior convictions to prove the prior convictions. (Tr. P. 5-6).

Without attaching any documentary evidence, Appellee filed a motion to strike prior convictions from the indictment. Although Appellee failed to provide any evidence such as affidavits, transcripts, or testimony, that the prior convictions were uncounseled and resulted in confinement, the State produced evidence to rebut Appellee's argument. The State filed a Memorandum Contra on August 18, 2006 and attached the written waiver of rights forms for each of the Appellee's three prior DUI convictions.

The Acknowledgment of Rights waiver for Appellee's third DUI offense was signed by both Appellee and his counsel and had a hand-written note stating this was Appellee's third offense. (Ex.3) The Judge's signature is not on the page with the rights waiver, but is on the other portions of the Court's Entry that were simultaneously filed by the Court. (Ex.3, P.1-4). The Acknowledgement of Rights waiver for Appellee's second DUI offense was signed by Appellee, had numerous handwritten notes, in what appears to be the Judge's handwriting, included notifications of the right to counsel, the right to a continuance to obtain counsel, and an

acknowledgment that Appellee knew and understood his rights and voluntarily chose not to be represented by an attorney. (Ex. 2, P. 2). The waiver was filed with the Court simultaneously with the Journal Entry signed by the Judge. Similarly, Appellee executed a written waiver in his first DUI offense in which he stated with his signature that he knew and understood his rights and voluntarily chose not to be represented by an attorney. (Ex.1 P.2). This waiver also had handwritten notes that appear to be from the Judge, and was filed simultaneously with the Journal Entry signed by the Judge. (Ex.1 P.1-4).

In the instant case, the Trial Court found from the pleadings that Appellee had been represented by counsel on the third prior offense, and had validly waived representation on the other two prior DUI convictions. (Journal Entry Aug. 30, 2006). The Trial Court overruled Appellee's motion. Id.

Appellee waived his right to a jury trial and the current matter was heard before Judge Martin on November 6, 2006. (Tr.P. 4). Appellee stipulated to the admissibility and authenticity of Appellee's prior convictions, but reserved the right to object based on constitutional grounds. (Tr.P. 5-7). The Trial Court found Appellee guilty as charged and sentenced him to 24 months in a state penal institution. (Tr.P. 37-39).

The Fifth District Court of Appeals reversed the conviction. The State of Ohio filed a notice of appeal and Memorandum in Support of Jurisdiction in this Court on December 21, 2007. An Amicus brief was filed in support of Appellant by the Ohio Prosecuting Attorney's Association. This Court accepted the appeal and the Clerk of Courts for Fairfield County filed the record on April 28, 2008.

## ARGUMENT

### Proposition of Law No. 1:

**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.**

The Fifth District erred in reversing the Trial Court's finding that Appellee's three prior convictions were valid. Ohio Revised Code §2945.75(B)(1) provides that a certified copy of the entry of judgment for the prior convictions along with sufficient evidence to identify the defendant named in the entry as the current offender, is sufficient to prove the prior convictions. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024 at ¶8. A waiver filed with the entry is part of the Court's findings and constitutes evidence that the State needs to rely upon in determining what occurred at the Court proceedings.

Ohio Revised Code §2945.75(B)(1) states as follows "whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction." As this Court has stated, "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 Syllabus. Currently before the General Assembly is S.B. 17, which will amend R.C. 2945.75 to put the burden of proof on a defendant to prove any constitutional infirmity in prior convictions. The bill has cleared committee hearings and is expected to be passed by the House on June 10, 2008.

Waiver of counsel must be in open court and recorded for petty offenses. Crim.R.22 and Crim.R.44. Written waivers are only required for serious offenses. Crim.R. 44(C). All portions of proceedings must be recorded for serious offenses. Crim.R.22. The Ohio Rules of Criminal Procedure are silent as to how long the recordings must be maintained or whether they must be transcribed. The Court is responsible for making certain the rules are followed at the time it decides whether to accept a defendant's waiver of counsel and/or guilty plea. The Court speaks through its entries. *State ex rel. Nelson v. Griffin*, 103 Ohio St.3d 167, 2004-Ohio-4754, 814 N.E.2d 866 at ¶7. A reviewing court "must presume all underlying proceedings were conducted in accordance with the rules of law." *Brandon* at Syllabus.

All three of Appellee's Journal Entries were filed along with Appellee's written waiver of rights. The written waiver for Appellee's third conviction was signed by Appellee and a defense attorney. The Journal Entry and Acknowledgment of Rights form for Appellee's second prior offense were filed simultaneously on August 21, 2002 at 10:19am. The Misdemeanor Rights Waiver signed by Appellee for Appellee's second prior convictions states "I have been informed by the court and fully understand my rights set forth above." (Ex 2 pg 2). The rights listed include the right to counsel or a continuance to obtain counsel. The handwriting on the Journal Entry, the signature by the Judge on the Journal Entry and the writing on the Acknowledgment of Rights form, including the note that this was Appellee's second offense within six (6) years, all appear to have been in the same handwriting. (Ex 2 pg 2, 4-6). Similarly, Appellee's first prior had a written waiver filed by the Court with the OMVI First Offense Sentence filled out by the Judge. (Ex 2 pg 1-2).

The written waivers filed with the Journal Entries are sufficient for the State to prove a knowing, intelligent and voluntary waiver of counsel, the written waiver; even if Appellee had

presented a prima facie case and the burden had shifted. The handwriting demonstrates Court involvement, the language in the waivers demonstrates a knowing, intelligent and voluntary waiver, and the filing with the Journal Entry demonstrates the Court acceptance in accordance with the Criminal Rules.

**Proposition of Law No. 2:**

**A criminal defendant claiming that a prior conviction was constitutionally infirm must 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 Fifth District erred in ignoring Appellee's burden to present evidence sufficient to establish a prima facie showing of a constitutional infirmity to challenge the use of his prior convictions. *Brooke* at ¶1 of Syllabus, *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, and *Brandon* at Syllabus. This Court made the prima facie burden on all Defendants clear in the Syllabus of three of its decisions by stating:

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. *Brooke* at ¶1 of Syllabus.
2. When a defendant raises a constitutional question concerning a prior conviction, he must lodge and objection as to the use of this conviction and he **must** present sufficient evidence to establish a prima facie showing of a constitutional infirmity. *Adams* at ¶2 of Syllabus, emphasis added.
3. 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. *Brandon* at Syllabus.

In the *Brooke* case, the defendant filed a motion to dismiss along with an affidavit stating that for each of her three previous convictions that she had been unrepresented by counsel,

pleaded guilty and received jail time. In addition, she filed copies of the transcript of the plea hearings from two of the prior convictions and an affidavit from a court bailiff stating that no court record was available for the third. *Id.* at ¶3.

Unlike the defendant in *Brooke*, Appellee failed to produce any evidence with his motion showing a constitutional infirmity for any of his prior convictions. (Motion to Strike). No affidavits, testimony, transcripts, or court recordings were produced by Appellee to satisfy his burden in making a prima facie case to challenge his prior convictions as constitutionally infirm; in fact, Appellee had counsel for one of his convictions in which the Entry noted that it was his third conviction. (Motion to Strike and Ex.3).

The Eighth and Eleventh District adopted a better interpretation of this Court's ruling in *Brooke* requiring defendants to make a prima facie showing of constitutional infirmity prior to shifting the burden to the State. *State v. Neely*, 11<sup>th</sup> Dist. No. 2007-L-054, 2007-Ohio-6243 at ¶18, *State v. Jackman*, 8<sup>th</sup> Dist. No. 89835, 2008-Ohio-1944 at ¶16, and *State v. Putich*, 8<sup>th</sup> Dist. No. 89005, 2008-Ohio-681 ¶5, footnote 2.

The assumption in the Ohio Revised Code and the case law that prior convictions are assumed constitutionally valid is necessary for the efficient operation of law enforcement officers in identifying the appropriate charges. The assumption is also necessary for prosecutors in the preparation of indictments for criminal charges. Prosecutors, judges, law enforcement officers, and the general public need to rely upon certified copies of prior convictions to establish their validity.

Officers are unable to access transcripts or full court files when making an arrest for DUI; Officers must rely upon the computer records based solely upon convictions. Similarly, without the necessary assumption that prior convictions are valid until properly challenged, the State

would be required to obtain transcripts and written waivers from both local and distant courts to reevaluate old proceedings that comprise the Defendant's record. Ignoring the assumption that prior convictions are valid absent evidence to the contrary could also encourage overly zealous defense attorneys to make claims that priors were unconstitutional when they know the opposite is true. Similarly, ignoring the assumption of valid prior convictions could encourage some defense attorneys to advise their clients to go into Municipal Courts unrepresented for enhanceable offenses in order to avoid enhancement in the future.

Defendants are in a better position to know whether there was an irregularity in any of the prior proceedings for their prior convictions as they were necessarily present. Prosecutors and law enforcement are not generally present for a defendant's prior convictions and would not be able to identify any impropriety in the prior proceedings without extensive research. If defendants are unwilling or unable to produce any evidence, such as their own testimony, that the prior conviction was constitutionally infirm, there is no reason to invalidate the necessary assumption that the prior proceedings were proper. R.C. 2945.75(B)(1) and *Brandon* at 87.

### **CONCLUSION**

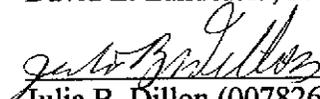
Eliminating the Appellee's prima facie burden as the Fifth District did in its opinion would require this Court to overrule *Adams* and *Brandon* and render R.C. 2945.75(B)(1) meaningless. The State would be required to defend all of the lower court Judges and find evidence to support the entries signed by the Judges with additional evidence. In cases where the additional evidence either cannot be located or cannot be obtained in a timely and cost-effective manner, the State would be forced to decline prosecution at the felony level thereby frustrating the legislative intent to hold repeat offenders accountable for their actions and protect the public from drunk drivers who are not rehabilitated with penalties imposed at the municipal court level.

If prosecutors must obtain the full record of all priors used to enhance the degree of misdemeanor offenses to a felony then the office would need to pay for, obtain, and review transcripts, recordings of the proceedings, and all of the filings in all of the priors regardless of where they were obtained and the price of obtaining the records. In cases where there is no challenge presented by the defendant, there is no logical reason for the State to question the prior proceedings and reevaluate the prior proceedings.

The significantly higher burden on the State would be present in other areas of the law, such as domestic violence, creating the same conflict between the statutory obligations and the practicalities of prosecution. Appellant respectfully requests that this Court reverse the Fifth District Court of Appeals and re-instate Appellee's conviction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee State of Ohio was served upon Devon Harmon, Attorney for Defendant-Appellee, by placing a copy of the same in his designated mail box at the Hall of Justice, this 9th day of June, 2008.

  
\_\_\_\_\_  
Julia B. Dillon (0078268)  
Assistant Prosecuting Attorney

## **APPENDIX**

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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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

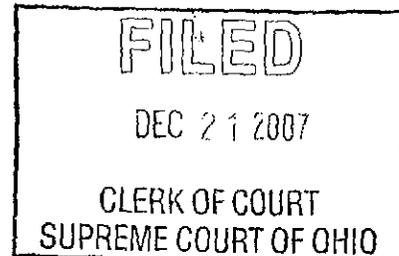
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Notice of Appeal of Appellant State of Ohio

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Fairfield County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2007-CA-00006 on November 8, 2007.

This case raises a substantial constitutional question, involves a felony, and is one of public or great general interest.

Respectfully submitted,

By: Gregg Marx  
Gregg Marx, Counsel of Record

COUNSEL FOR APPELLANT,  
STATE OF OHIO

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel for Appellee, Devon Harmon, Burkett & Sanderson, 118 W. Chestnut Street, Suite B, Lancaster, Ohio 43130, on December 21<sup>st</sup>, 2007.

Gregg Marx  
Gregg Marx

COUNSEL FOR APPELLANT,  
STATE OF OHIO

**ORIGINAL**

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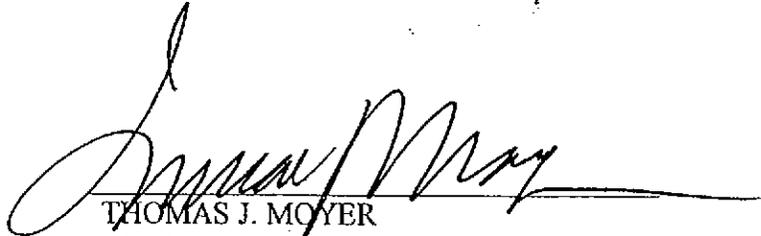
v.

ENTRY

Billy J. Thompson, II

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Fairfield County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Fairfield County Court of Appeals; No. 2007CA00006)

  
THOMAS J. MOYER  
Chief Justice

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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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:

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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;

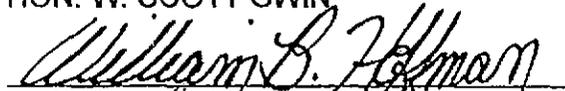
Hoffman, J., concurs

separately



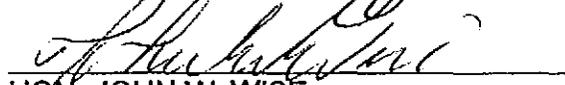
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HON. W. SCOTT GWIN



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HON. WILLIAM B. HOFFMAN



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HON. JOHN W. WISE

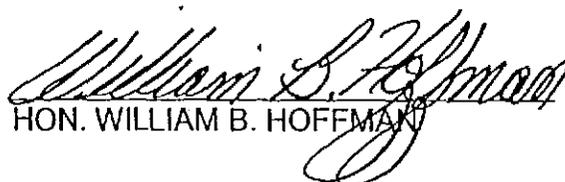
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*Hoffman, J., concurring*

{¶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 COURT  
FAIRFIELD COUNTY  
OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

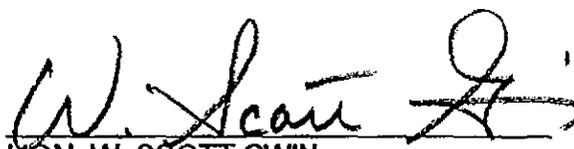
BILLY J. THOMPSON, II.

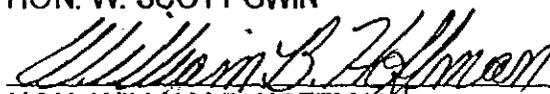
Defendant-Appellant

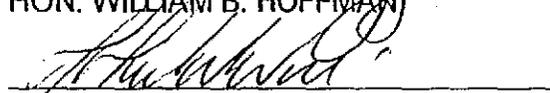
JUDGMENT ENTRY

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

**FILED**

**IN THE COURT OF COMMON PLEAS  
FAIRFIELD COUNTY, OHIO**

2006 AUG 30 AM 10: 23

DEB. W. SHALLEY  
CLERK OF COURTS  
FAIRFIELD CO. OHIO

**State of Ohio,** :

Plaintiff,

**v.** :

**Case No.: 06-CR-226**

**Billy J. Thompson, II,** :

Judge Chris A. Martin

Defendant. :

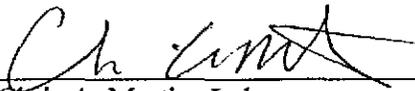
**JOURNAL ENTRY**

This matter came on for consideration on the Defendant's Motion to Strike Prior Uncounseled Convictions from the Indictment for the Purpose of Felony Enhancement filed August 11, 2006 and the State's Memorandum Contra filed August 18, 2006.

The Court finds from the pleadings that the defendant was either represented or waived representation on all three prior cases.

The Court overrules the Defendant's Motion. This matter shall proceed to trial.

It is so Ordered.

  
Chris A. Martin, Judge

Copy:  
David N. Stansbury, Attorney for Defendant  
Paul D. Morehart, Assistant Fairfield County Prosecuting Attorney

**Ohio Crim. R. 22 (2008)**

**Rule 22. Recording of Proceedings**

In serious offense cases all proceedings shall be recorded.

In petty offense cases all waivers of counsel required by Rule 44(B) shall be recorded, and if requested by any party all proceedings shall be recorded.

Proceedings may be recorded in shorthand, or stenotype, or by any other adequate mechanical, electronic or video recording device.

**Ohio Crim. R. 44 (2008)**

**Rule 44. Assignment of Counsel**

**(A) Counsel in serious offenses.**

Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.

**(B) Counsel in petty offenses.**

Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.

**(C) Waiver of counsel.**

Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing.

**(D) Assignment procedure.**

The determination of whether a defendant is able or unable to obtain counsel shall be made in a recorded proceeding in open court.

**ORC Ann. 2945.75 (2008)**

§ 2945.75. Degree of offense; charge and verdict; proof of prior conviction

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

(B) (1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

**ORC Ann. 4511.19 (2008)**

§ 4511.19. Operation while under the influence of alcohol or drug of abuse or with specified concentration of alcohol or drug in certain bodily substances; chemical test; penalties

(A) (1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

(b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.

(g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.

(h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.

(i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.

(j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

(i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

(ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration

of cocaine in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

(iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

(vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(viii) Either of the following applies:

(I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ix) The person has a concentration of methamphetamine in the person's urine of at least five hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, division (A)(1) or (B) of this section, or a municipal OVI offense shall do both of the following:

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 [4511.19.1] of the Revised Code, and being advised by the officer in accordance with section 4511.192 [4511.19.2] of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.

(D) (1) (a) In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section or for an equivalent offense, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense, the court may admit evidence on the

concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 [4511.19.2] of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under section 4511.191 [4511.19.1] of the Revised Code or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 [3701.14.3] of the Revised Code.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for an equivalent offense, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

If the chemical test was obtained pursuant to division (D)(1)(b) of this section, the person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. The form to be read to the person to be tested, as required under section 4511.192 [4511.19.2] of the Revised Code, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4) (a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under 96 Stat. 2415

(1983), 49 U.S.C.A. 105.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the blood, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

(i) The officer may testify concerning the results of the field sobriety test so administered.

(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

(c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.

(E) (1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:

(a) The signature, under oath, of any person who performed the analysis;

(b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;

(c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

(d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(F) Except as otherwise provided in this division, any physician, registered nurse, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(G) (1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

(a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and the court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under section 3793.10 of the Revised Code. The court also may suspend the execution of any part of the

three-day jail term under this division if it places the offender under a community control sanction pursuant to section 2929.25 of the Revised Code for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction pursuant to section 2929.25 of the Revised Code, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than three hundred twenty-five and not more than one thousand seventy-five dollars;

(iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3)

of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a drivers' intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court may require the offender to attend a driver's intervention program that is certified pursuant to section 3793.10 of the Revised Code. If the operator of the program determines that the offender is alcohol dependent, the program shall notify the court, and, subject to division (I) of this section, the court shall order the offender to obtain treatment through an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than four hundred seventy-five and not more than one thousand six hundred twenty-five dollars;

(iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with section 4503.233 [4503.23.3] of the Revised Code and impoundment of the license plates of that vehicle for ninety days.

(c) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d),

(e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the Revised Code, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than eight hundred and not more than two thousand seven hundred fifty dollars;

(iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 [4503.23.4] of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty

consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of one hundred twenty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the one hundred twenty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than one thousand three hundred nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 [4503.23.4] of the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by

section 3793.02 of the Revised Code, subject to division (I) of this section.

(vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to section 2929.17 of the Revised Code, may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding section 2929.18 of the Revised Code, a fine of not less than one thousand three hundred nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code. The court may grant limited driving privileges relative to the suspension under sections 4510.021 [4510.02.1] and 4510.13 of the Revised Code.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with section 4503.234 [4503.23.4] of

the Revised Code. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, participation in an alcohol and drug addiction program authorized by section 3793.02 of the Revised Code, subject to division (I) of this section.

(2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of section 4511.191 [4511.19.1] of the Revised Code.

(3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen consecutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house

arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if section 4510.13 of the Revised Code permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under section 4503.231 [4503.23.1] of the Revised Code, except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of section 4503.231 [4503.23.1] of the Revised Code.

(5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as follows:

(a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.

(b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (N) of section 4511.191 [4511.19.1] of the Revised Code.

(d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four

hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(e) Seventy-five dollars of the fine imposed under division (G)(1)(a)(iii), one hundred twenty-five dollars of the fine imposed under division (G)(1)(b)(iii), two hundred fifty dollars of the fine imposed under division (G)(1)(c)(iii), and five hundred dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be transmitted to the treasurer of state for deposit into the indigent defense support fund established under section 120.08 of the Revised Code.

(f) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of section 4503.234 [4503.23.4] of the Revised Code applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national auto dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in section 2929.01 of the Revised Code.

(H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code.

(2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code.

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1416 [2941.14.16] of the Revised Code and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of section 2929.24 of the Revised Code.

(I) (1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 3793. of the Revised Code by the director of alcohol and drug addiction services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's indigent drivers' alcohol treatment fund.

(J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.

(K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of section 2923.16 of the Revised Code in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(M) All terms defined in section 4510.01 of the Revised Code apply to this section. If the meaning of a term defined in section 4510.01 of the Revised Code conflicts with the meaning of the same term as defined in section 4501.01 or 4511.01 of the Revised Code, the term as defined in section 4510.01 of the Revised Code applies to this section.

(N) (1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of section 2937.46 of the Revised Code, do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.

(2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.