

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : 10-0465

Appellee : On Appeal from the Delaware County

vs. : Court of Appeals, Fifth Appellate District

GARY L. ADKINS, : Court of Appeals

Appellant : Case No 09 CAA 02 0012

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, GARY L. ADKINS

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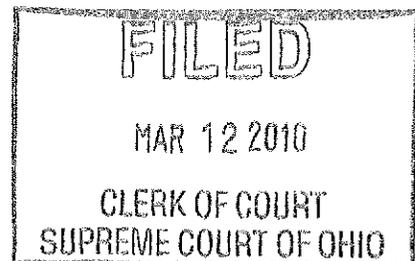


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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST,
AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents three critical issues involving the law governing collateral attacks on prior convictions which are utilized to enhance a charge of OVI to a felony level:

(1) Whether this Court's recent decision in *State vs. Brooke*, 113 Ohio St.3rd 199, 863 N.E.2nd 1024, 2007-Ohio-1533 (2007), which affirmed the right to collaterally attack a prior conviction in which an accused was not afforded a right to counsel as guaranteed under the Sixth Amendment to the United States Constitution also applies to the right of speedy trial, which is likewise guaranteed under the Sixth Amendment;

(2) Whether the right to mount a successful collateral attack on a prior conviction can be based upon imposition of sentence in the prior case by the trial court some two and one-half years after a Magistrate's recommendation on sentencing, where neither the accused nor his counsel is given notice of such judgment and afforded the opportunity to be present, and is thereby further denied the right to file a timely appeal upon the obvious issue of speedy trial;

(3) Whether R.C. 2901.08 can be applied retroactively to convert a finding that the accused was a juvenile traffic offender to a conviction for OVI or its equivalent, when the legislature did not include a retroactive provision in the statute.

In the *instant* case, Appellant filed a Motion to Dismiss upon the basis that his conviction in the Delaware Municipal Court for DUI on August 9, 2002, and/or the finding of the Delaware County Juvenile Court on November 19, 1987, could not be utilized to support the present charge of felony OVI under the twenty year lookback provision. Appellant collaterally challenged the Delaware Municipal Court conviction and the Juvenile Court "conviction" by following the procedure set forth in *State vs. Brooke*, cited *supra*. The record contains Appellant's Affidavit and

certified court records as *prima facie* evidence which was undisputed by the State. The trial court ruled, and the Fifth District Court of Appeals sustained the conclusion that a successful collateral attack under the Sixth Amendment to the United States Constitution was limited to the right to counsel, and denial of the right to speedy trial, also guaranteed under the Sixth Amendment, could not constitute the basis for a successful collateral attack.

This conclusion has some merit, upon the basis that if an accused is represented by counsel or knowingly and intelligently waives such right, the right to a speedy trial has either been sufficiently protected or waived by the accused during proceedings in the former conviction.

However, both the trial court and the Fifth Appellate District ignored the undisputed fact that on March 7, 2005, without notice to Appellant or his counsel, filed the following Judgment Entry:

Judgment Entry

The Court confirms and adopts the Magistrate's Decision filed August 9, 2002, a copy of which is attached and made a part of this Order. The Court accepts the Defendant's plea, enters a finding of guilty, and enters Judgment on the terms and conditions ordered by the Magistrate.

Significantly, a certified copy of the Court docket in the Delaware Municipal Court case, which Appellant submitted in the *instant* case in support of his Motion to Dismiss, had never been mailed to Appellant or the Attorney that represented him in August of 2002. Appellant's Affidavit in support of his Motion to Dismiss confirms he had no knowledge of this Judgment until it surfaced sometime after the indictment in the *instant* case had been filed.

It is obvious Appellant was entitled to be present in open court, with counsel, on March 7, 2005, when Judgment and Sentence was imposed by the trial court. Prior to this date, Judgment and Sentence, based solely upon the recommendation of a Magistrate, did not exist and was void. In the case of *State vs. Long*, 49 Ohio App.3rd 1, 550 N.E.2nd 522 (1989), the Court of Appeals

for Hamilton County held that although the Sixth Amendment guarantee of speedy trial extended to sentencing, defendant waived challenge to trial court's delay in imposing sentence when he stipulated to an entry of judgment *nunc pro tunc* to date of trial [Headnote 3]. In the *instant* case, there was no prior judgment and the Appellant could not, and did not exercise any waiver regarding delay. Likewise, Federal courts have held the right to speedy trial extends to the time of sentencing [See *Juarez-Casares vs. United States*, 496 Fed. Reporter2nd 190 (1974)].

In its Opinion, the Fifth Appellate District stated the following:

Contrary to Appellant's assertion, we do not find the August 2002, conviction is void because of the trial court's failure to timely sign the Magistrate's report.

This conclusion ignores the fact that a trial court has the exclusive responsibility to impose judgment and sentence. It is not simply a matter of signing off on a Magistrate's Report. The Fifth Appellate District goes on to say that the Appellant could file a Notice of Appeal when he received a copy of the Judgment Entry which occurred sometime in late 2009, while the *instant* case was pending.

The Supreme Court of Ohio should accept jurisdiction on the merits in order to avoid a precedent that would require, a condition precedent to a collateral attack, an accused must attempt to re litigate the prior conviction which forms the element of enhancement in a felony OVI case. To require this is contrary to this Court's hold in *Brooke*, cited *supra*, which requires an accused only to demonstrate by a *prima facie* showing that he was effectively deprived of the right to counsel in a prior case.

R.C. 4511.19 is an extensive piece of legislation, to which the legislatures adds provisions and modifications nearly every session. As Judge Painter has reflected in his lectures at continuing legal education courses, it is convoluted and grows like topsy. This creates an

atmosphere in which courts can fall into rationalizations which are no more than judicial legislation. As yet, the legislature has not seen fit to burden defendants and their counsel in the manner suggested by the Fifth Appellate District. As witnessed by the parade of legislative amendments, OVI law continues to be a matter of great public interest. It is not an area of criminal law in which confusion should prevail.

The Court should also consider whether the majority in the Fifth Appellate District have become involved in judicial legislation by ruling that R.C. Section 2901.08 should be retroactively applied in the absence of a retroactive provision in the statute itself. This Court should review the persistent dissenting opinions of Judge Hoffman, who recognizes this statute should be strictly construed in light of the fact that it is designed to modify the traditional protection which has historically been preserved in the juvenile justice system.

STATEMENT OF THE CASE AND FACTS

On September 14, 2007, the Appellant was indicted by the Delaware County Grand Jury on one count of driving under the influence of alcohol or drugs, in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree.

The indictment specified six prior convictions of driving under the influence within the past twenty years. On February 5, 2008, Appellant filed a Motion to Dismiss the indictment, asserting it lacked a necessary element of the offense. Specifically, Appellant argued the indictment lacked the sufficient number of prior convictions to support the felony charge. Appellant directed his collateral attack upon the following three prior convictions: (1) November 19, 1987, Case No. 14075 in Delaware County Juvenile Court, (2) August 10, 1993, Case No. 93 TRC 226 in

Muskingum East County Court, and (3) August 9, 2002, Case No. 02 TRC 09606 in Delaware Municipal Court.

The collateral attack on these three cases were in accordance with the procedure adopted by the Supreme Court of Ohio in *State vs. Brooke*, by filing the affidavit of Defendant in support of these challenges, together with certified records of these prior convictions, none of which was challenged by the Appellee, State of Ohio.

The trial court upheld Appellant's challenge to the Muskingum East County Court conviction of August 10, 1993, and denied Appellant's challenge to the juvenile court case of November 19, 1987, and the Delaware Municipal Court conviction of August 9, 2002.

The facts and circumstances surrounding each of the remaining prior convictions which were challenged by the Appellant are as follows:

(1) As to the conviction of August 9, 2002, Case No. 02 TRC 09606 in the Delaware Municipal Court

On August 9, 2002, Appellant appeared before a Magistrate in the Delaware Municipal Court with his counsel of record, and entered a plea of no contest. The Magistrate found Appellant guilty and he sentenced Appellant to jail for a period of 30 days, which he served shortly thereafter. However, the trial court failed to enter a Judgment on this decision by the Magistrate. Some two and one-half years later, on March 7, 2005, the trial court filed a Judgment Entry confirming and adopting the Magistrate's Decision filed on August 9, 2002. Appellant's affidavit filed in the *instant* case substantiates that neither he nor his counsel received a copy of this Judgment Entry. In the *instant* case, Appellant argued he was deprived of his right to counsel at the time of sentencing. Had notification been given, with or without a scheduled hearing, Appellant could have exercised his right of appeal based upon lack of a speedy trial, which

extends to the time of sentencing. Thus, Appellant was effectively denied his right to a speedy trial and his right to counsel, which would have enabled him to exercise his right to a speedy trial through the process of appeal.

(2) The finding of the Delaware County Juvenile Court on November 18, 1987, that defendant was a juvenile offender and defendant challenged the juvenile finding of November 18, 1987, upon the basis that this was not a criminal conviction for purposes of enhancement under R.C. 4511.19(A)(1)(a), again submitting the same information by affidavit and certified court records as in the Delaware Municipal Court case, and in accordance with the procedure established in *Brooke*. The Judgment Entry in the juvenile case, in relevant part, simply stated the following:

The Court adjudicates Gary Adkins to be a juvenile traffic offender as a result of a violation of alcohol concentration, fleeing an officer and failure to maintain assured distance.

In addition to the failure of the Judgment Entry to properly identify a prior DUI offense, or its equivalent, this Judgment was entered prior to the enactment of R.C. Section 2901.08, the effective date of which was January 1, 1996.

Thereafter, Appellant entered a plea of no contest in the Common Pleas Court of Delaware County to the indictment, thereby preserving his right of appeal regarding the issue surrounding his unsuccessful collateral attack on the prior juvenile finding and conviction in the Delaware Municipal Court.

Appellant timely filed a Notice of Appeal with the Fifth Appellate District alleging the following Assignment of Error:

“The trial court erred in denying relief under a motion to dismiss upon the basis of concluding that the defendant’s conviction in the Delaware Municipal Court on August 2, 2002, was admissible and that the findings

of the Delaware Juvenile Court on November 18, 1987, that defendant was a juvenile offender was likewise admissible as the equivalent of a prior conviction under the OVI felony statute.”

The Fifth District Court of Appeals affirmed the conviction, and held that the conviction in the Delaware Municipal Court and the finding that defendant was a juvenile offender in the Delaware Juvenile Court were properly determined to be prior convictions for purposes of enhancement under R.C. 4511.19(A)(1)(a). A member of the panel, Judge Hoffman, dissented from that portion of the majority’s Opinion relating to the Delaware Juvenile Court case, based upon his previous dissenting Opinion in *State vs. Glover*, (August 19, 1999), Fifth District Court, Case No. 99 CA 30. Judge Hoffman remains of the opinion that R.C. Section 2901.08, effective January 1, 1996, is not retroactive.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I:

In a prosecution under the felony OVI statute, R.C. 4511.19(A)(1)(a), a prior conviction is subject to collateral attack when the defendant was un-counseled at the time judgment and sentence was imposed by the trial court, without notice or hearing, some two and one-half years after defendant entered his plea before a Magistrate and served a recommended jail sentence.

Although Appellant appeared before a Magistrate on August 9, 2002, entered a plea of no contest and was advised in written Magistrate’s Decision, he was sentenced to 30 days in jail, which shortly thereafter he served, the trial court did not enter Judgment adopting the Magistrate’s Decision until March 7, 2005, some two and one-half years after the Magistrate rendered his Decision. The Decision of the Magistrate did not amount to a conviction. The limited authority of a Magistrate is governed under Rule 19 of the Ohio

Rules of Criminal Procedure. Specifically, under Rule 19(C)(c), such authority is limited in pertinent part as follows:

(c)(ii) In misdemeanor cases, accept and enter guilty and no contest pleas, determine guilt or innocence, receive statements in explanation and in mitigation of sentence, **and recommend a penalty to be imposed.** [emphasis supplied].

The final authority to render a Judgment and impose a penalty is exclusively vested in the Judge.

Under subsection (D) of Criminal Rule 19, the following is stated:

(D)(2)(i) Nature of Order

Subject to the terms of the relevant reference, a Magistrate may enter pretrial orders without judicial approval **if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.** [emphasis supplied]

In the case of *City of Youngstown, OH vs. Waselich*, 2005 Ohio App. LEXIS 5796, 2005 Ohio 6449 (2005), the Court of Appeals held that in the absence of a pronouncement of sentence, there was no right to appeal. The court in this case cited Rule 19(C)(1)(c)(ii) of the Ohio Rules of Criminal Procedure to support the conclusion that a sentence had to be adopted by the trial court to become effective. The same conclusion was adopted in *State vs. Dixon*, Ohio App. LEXIS 4861, 2006 Ohio 4932 (2006).

The fact that an Order of Commitment was issued shortly thereafter, and Appellant served a jail sentence of thirty days does not convert a Magistrate's Decision and Recommendation to a Judgment and Sentence, which can only be imposed by the trial court.

A certified copy of the Delaware County Municipal Court docket substantiates the conclusion that Appellant was never notified regarding the Judgment and Sentence entered by the trial court on March 7, 2005. Appellant was thus sentenced in *absentia*, and without benefit of counsel for waiver of the right to counsel.

In the case of *Juarez-Casares vs. United States*, 496 Fed Reporter2nd 190 (1974), the Fifth Circuit United States Court of Appeals held as follows:

Imposition of sentence is part of trial for purposes of Sixth Amendment's speedy trial guarantee. U.S.C.A. Const. Amd. 6

The Fifth Circuit pointed out that although the time for sentencing a defendant is within the sound discretion of the trial judge, that discretion is not totally unfettered. The Court also indicated that a trial court is bound both by the speedy trial requirement and the applicable criminal rule regarding sentence to be imposed without unreasonable delay [at pg. 192].

At the very least, Appellant was entitled to notice of the Entry of Judgment on March 5, 2005, in order that he would have the opportunity to raise the issue of speedy trial. It should be noted in *State vs. Brooke*, cited *supra*, the Ohio Supreme Court held that, for purposes of enhancing an OVI conviction to the status of a felony, prior convictions were subject to collateral attack where an accused was deprived of the constitutionally guaranteed right to counsel. The same guarantee should apply to the right of an accused to a speedy trial. However, it is not necessary in this case to reach this conclusion. Rather, it is clear the Appellant was deprived of his right to counsel which was necessary in order that he could exercise his right of appeal on the constitutional issue of speedy trial.

When a sentence is imposed in *absentia*, it is conclusively demonstrated Appellant was denied his Sixth Amendment right to counsel or the opportunity to intelligently and understandingly waive such right.

Proposition of Law II:

R.C. 2901.08, effective January 1, 1996, is not retroactive for purposes of classifying a finding in juvenile court that a child is a juvenile traffic offender for purposes of establishing a prior OVI conviction under R.C. 4511.19(A)(1)(a).

On its face, the Judgment Entry of the Delaware County Juvenile Court, rendered on November 19, 1987, does not specifically refer to a finding that Appellant was driving while intoxicated. As a matter of law, a judgment concluding the juvenile traffic offender committed a violation of alcohol concentration is not the equivalent of a prior "conviction" for O.V.I. As a separate issue, R.C. Section 2152.02(N) distinguishes juvenile traffic offenders from delinquent children and from adults. In the case of *In Re C.*, an alleged juvenile traffic offender, 43 Ohio Misc. 98, 334 N.E.2nd 545, the Juvenile Court of Ross county held that a proceeding in which a child was alleged to be a juvenile traffic offender was neither criminal nor civil. In reaching this conclusion, the Court stated the following:

. . . The child is not a criminal by reason of such adjudication . . . the disposition of a child under judgment rendered or any evidence given in court **is not admissible** as evidence against the child in any other case or proceeding. In any other court, **except** that the judgment rendered in the **disposition** of such child may be considered by any court **only as to the matter of sentence or the granting of probation** . . . [emphasis supplied]

Prior to January 1, 1996, juvenile traffic offenders' adjudications were not classified as convictions and could not be used to enhance the penalty of a subsequent adult OVI conviction. However, the Ohio Legislature enacted R.C. 2901.08, effective January 1, 1996, which changed the law with respect to the effect of juvenile adjudications on subsequent offenses. Pursuant to R.C. 2901.08 a prior juvenile adjudication is now considered a conviction for purposes of determining subsequent offenses, enhancements or punishments, as stated in the attached Opinion of the Fifth District Court of Appeals. Significantly, the State Legislature did not provide in this statute that it would operate retroactively.

There has been an ongoing difference of opinion in the Fifth District Court of Appeals as to whether courts may interpret this statute as having retroactive application when the Legislature did

not see fit to include a retroactive provision. The majority in the Fifth District Court of Appeals ruled in the *instant* and in two prior cases that R.C. 2901.08 should be applied retroactively [See also *State vs. Glover*, (1999) Licking App.No. 99 CA 30, unreported and *In Re: Fogle*, Stark App. No. 2006 CA 00131, 2007-Ohio-553]. In each case, Judge Hoffman has dissented, and stated his reasons for dissenting in *Glover* and *Fogle*. Judge Hoffman points out the Legislature could have, but specifically did not, include a retroactive provision, and for the Court to apply this statute retroactively amounts to judicial legislation in a area where the law has traditionally protected the rights of the children and restricted the effect of juvenile dispositions as they would affect a child when he becomes an adult.

CONCLUSION

For the reasons stated above, this case involves matters of public and great general interest and a substantial constitutional question.

The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,


Robert E. Cesner, Jr. (#0016125)
COUNSEL OF RECORD and
COUNSEL FOR APPELLANT

CERTIFICATION OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail, postage prepaid, to counsel for Appellee, Alison M. Skinner Peters, Delaware County Prosecutor's Office, 140 N. Sandusky St., 3rd Floor, Delaware, OH 43015, this 12th day of March, 2010.


Robert E. Cesner, Jr. (#0016125)
COUNSEL FOR APPELLANT

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GARY L. ADKINS

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CAA 02 0012

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 07-CRI-090506

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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JAN ANTONOPLOS
CLERK

2010 JAN 28 PM 3:20

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED

Court of Appeals
Delaware Co., Ohio
I hereby certify the within be a true
copy of the original on file in this office.
Jan Antonoplos, Clerk of Courts
By PNCLms Deputy

Delaney, J.

{¶1} Defendant-Appellant Gary L. Adkins appeals his conviction and sentence entered by the Delaware County Court of Common Pleas, on one count of driving under the influence of alcohol or drugs, in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree, after the trial court found him guilty upon his entering a plea of no contest. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On September 14, 2007, the Delaware County Grand Jury indicted Appellant on the aforementioned charge. The count was charged as a felony of the fourth degree based upon the allegation Appellant had previously been convicted of or pled guilty to five or more similar offenses within the last twenty years. The Indictment also contained a specification of enhancement which was also based upon the identical prior convictions which had enhanced the offense to a fourth degree felony. Appellant appeared before the court for arraignment on September 25, 2007, and entered a plea of not guilty to the charge.

{¶3} On October 15, 2007, Appellant filed a Motion to Dismiss Specification to the Charge in Indictment, asserting the specification was based upon the same prior convictions which enhanced the penalty and was merely a duplicate of an element of the original offense. The trial court overruled the motion. The State subsequently dismissed the specification pursuant to a plea agreement. On February 5, 2008, Appellant filed a Motion to Dismiss Indictment, asserting the Indictment lacked a necessary element of the offense. Specifically, Appellant argued the Indictment lacked

the sufficient number of prior convictions to support the felony charge. Appellant explained two of the prior offenses were not "convictions" for purposes of proving a felony OMVI. The trial court conducted a hearing on the motion. The trial court found the August 10, 1993 conviction from the Muskingum East County Court was inadmissible. However, the trial court found the August 9, 2002 conviction from the Delaware Municipal Court, and the November 19, 1987 finding Appellant was a juvenile traffic offender from the Delaware County Court of Common Pleas, Juvenile Division, were admissible. Pursuant to its findings, the trial court denied Appellant's motion to dismiss.

{¶4} Appellant appeared before the trial court on October 28, 2008, and entered a plea of no contest to the charge. As part of the plea negotiations, the State dismissed the specification. The trial court found Appellant guilty, and deferred sentencing pending the preparation of a pre-sentence report. On December 17, 2008, the trial court sentenced Appellant to a period of imprisonment of twelve months, the first sixty days of which were mandatory. The trial court imposed a mandatory fine of \$800.00 and suspended Appellant's driver's license for a period of three years commencing upon his release from prison. The trial court memorialized the sentence via Nunc Pro Tunc Judgment Entry on Sentence on January 16, 2009.

{¶5} It is from this conviction and sentence Appellant appeals, raising as his sole assignment of error:

{¶6} "I. THE TRIAL COURT ERRED IN DENYING RELIEF UNDER A MOTION TO DISMISS UPON THE BASIS OF CONCLUDING THAT THE DEFENDANT'S CONVICTION IN THE DELAWARE MUNICIPAL COURT ON AUGUST 2, 2002, WAS

ADMISSIBLE, AND THAT THE FINDING OF THE DELAWARE COUNTY JUVENILE COURT ON NOVEMBER 18, 1987, THAT DEFENDANT WAS A JUVENILE OFFENDER WAS LIKEWISE ADMISSIBLE AS THE EQUIVALENT OF A PRIOR CONVICTION UNDER THE OVI FELONY STATUTE."

{17} In his sole assignment of error, Appellant maintains the trial court erred in denying his motion to dismiss after finding defendant's August 2, 2002 conviction in the Delaware County Municipal Court and November 18, 1987 Finding of the Delaware County Juvenile Court were valid prior convictions for purposes of enhancement of his present offense.

Delaware Municipal Court Case No. 02TRC09606, August 9, 2002

{18} On August 9, 2002, Appellant entered a plea of no contest to the offense of driving while intoxicated in Delaware Municipal Court Case No. 02TRC09606. After the magistrate found Appellant guilty, he was sentenced to thirty days in jail, commencing August 16, 2002, followed by ninety days of electronically monitored house arrest, and a \$500.00 fine. The trial court did not approve and adopt magistrate's order until March 7, 2005, over 2½ years later.

{19} Appellant asserts, because the magistrate's order failed to comply with Crim. Rule 19 and Crim. Rule 32, he was deprived of his due process right to a speedy trial under the Sixth Amendment of the United States and the Ohio Constitutions. Appellant submits this 2002 conviction can be collaterally attacked on this basis. In support of his position, Appellant relies upon the Ohio Supreme Court's decision in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533.

{¶10} In *Brooke*, the Ohio Supreme Court noted, “Generally, a past conviction cannot be attacked in a subsequent case. However, there is a limited right to collaterally attack a conviction when the state proposes to use the past conviction to enhance the penalty of a later criminal offense. *Id.* at para. 9. Specifically, the *Brooke* Court held: “A conviction obtained against a defendant who is without counsel, or its corollary, an uncounseled conviction obtained without a valid waiver of the right to counsel, has been recognized as constitutionally infirm. *Id.*, citing, *State v. Brandon* (1989), 45 Ohio St.3d 85, 86, 543 N.E.2d 501; *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745.

{¶11} Contrary to Appellant’s assertion, we do not find the August, 2002 conviction is void because of the trial court’s failure to timely sign the magistrate’s report. A defendant has a right to have his sentence timely imposed. This right was not violated in Appellant’s case. Appellant was timely sentenced, jail time was imposed and served. Appellant may have been entitled to a Writ of Habeas Corpus while he was incarcerated or could have sought mandamus relief if the trial court refused to enter a final judgment and sentence. He did neither. Appellant also failed to file a Notice of Appeal after he received the trial court’s signed March 7, 2005 Judgment Entry. Accordingly, we find Appellant does not have the right to collaterally attack the conviction pursuant to *Brooke*, and the trial court properly considered the conviction for enhancement purposes.

Delaware County Court of Common Pleas, Juvenile Division,

Case Nos. 14, 073 thru 14, 079, November 18, 1987

{¶12} The trial court herein found the November 18, 1987 Judgment Entry was sufficient to establish a violation of OMVI or its equivalent. The trial court explained, when the original traffic ticket and the judgment entry were viewed together, the juvenile court did, in fact, journalize a finding of guilt on a violation of R.C. 4511.19(A)(3); therefore, such was valid for enhancement purposes.

{¶13} Prior to January 1, 1996, juvenile traffic offenders' adjudications were not classified as convictions and could not be used to enhance the penalty of a subsequent adult OMVI conviction. However, the Ohio Legislature enacted R.C. 2901.08, effective January 1, 1996, which changed the law with respect to the effect of juvenile adjudications on subsequent offenses. Pursuant to R.C. 2901.08, a prior juvenile adjudication is now considered a conviction for purposes of determining subsequent offenses, enhancements, or punishments.

{¶14} Appellant asserts R.C. 2901.08 has no retroactive effect on juvenile findings prior to its effective date of January 1, 1996. We disagree.

{¶15} This Court has previously considered and rejected this argument in *State v. Glover* (August 19, 1999), Licking App. No. 99CA30, unreported and in *In re: Fogle*, Stark App. No. 2006 CA 00131, 2007-Ohio-553. For the reasons set forth therein, we also overrule this portion of Appellant's assigned error.

{¶16} Appellant's assignment of error is overruled.

{¶17} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney J.

Edwards, J. concurs

Hoffman, P.J. dissents


HON. PATRICIA A. DELANEY


HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

Hoffman, P.J., concurring in part and dissenting in part

{¶18} I concur in the majority's analysis and disposition of that portion of Appellant's assignment of error as it relates to his prior conviction in the Delaware Municipal Court.

{¶19} I respectfully dissent from that portion of the majority's opinion as it relates to Appellant's Delaware juvenile court case for the reasons set forth in my dissents in both *Glover* and *Fogle*.


HON. WILLIAM B. HOFFMAN

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

GARY L. ADKINS

Defendant-Appellant

JUDGMENT ENTRY

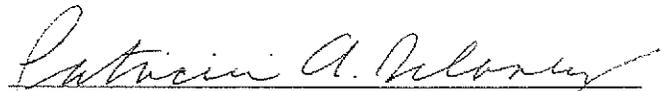
Case No. 09 CAA 02 0012

JAN ANTONIO PLOS
CLERK

2010 JAN 28 PM 3:20

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED

For the reasons stated in our accompanying Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.


HON. PATRICIA A. DELANEY


HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN