

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, : Case Number 10-0465

Appellee, : On Appeal from the Delaware County

: Court of Appeals, Fifth Appellate District

:

vs. :

: Court of Appeals

: Case Number 09-CAA-02-0012

Gary L. Adkins, :

Appellant. :

APPELLEE, STATE OF OHIO'S
MEMORANDUM IN OPPOSITION TO APPELLANT, GARY L. ADKINS'
MEMORADUM IN SUPPORT OF JURISDICTION

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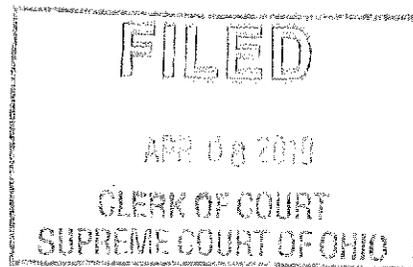
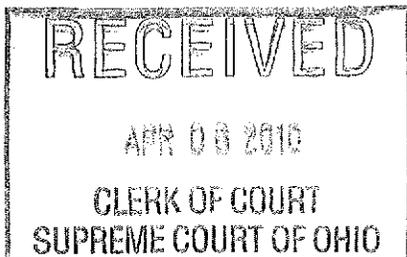


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EXPLANATION OF WHY THERE IS NOT A SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED AND WHY THE CASE IS NOT OF PUBLIC INTEREST OR GREAT GENERAL INTEREST AND WHY THE COURT SHOULD NOT GRANT JURISDICTION TO HEAR THIS CASE

The Appellant, in his Brief, claims there are “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 courts recent decision in *State v. 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.” See Appellant’s Brief, p. 1.

“[A] defendant may collaterally attack a prior conviction used for purposes of sentence enhancement only if (1) such attack is provided by statute, or (2) such attack is a constitutional one premised on a lack of counsel.” *U. S. v. Reed* (1998), 141F.3d 644, 652 (C.A.6 Ohio)

Neither *Reed*, nor *Brooke*, *Supra*, indicates that a prior conviction may be collaterally attacked for anything other than, one premised on a lack of counsel. The Appellant attempts to include, in this very narrowly defined exception, the right of speedy trial, merely because both are included as guarantees under the Sixth Amendment. There is no merit to the argument, nor any case law in support, that sets forth or establishes that the Sixth Amendment, right to a speedy trial, could or should be able to be used as grounds to collaterally attack as a prior conviction, in a subsequent proceeding using that conviction for enhancement purposes.

The Appellant, claims that he should be able to collaterally attack this prior conviction because the entry of his imposition of sentence, signed by the judge, was signed and filed in the Court, approximately two and one half years following the filing of the Magistrate's Report and recommendation. The Appellant, in that case never filed:

1. A motion to set aside the Magistrate's Order under Crim. R. 19(D)(2)(b),
2. An objection to the Magistrate's Decision under Crim. R. 19(D)(3)(b), or
3. A request for findings of facts and conclusions of law under Crim. R. 19(D)(2)(a)(ii),

Ordinarily, if neither party files a motion to set aside the Magistrate's Order, an objection to the Magistrate's Decision or a request for findings of facts and conclusions of law, and the Court, itself, does not reject the Magistrate's decision, either in part or in whole, then, there is

no necessity for a separate Court Hearing, conducted by the Judge, with the parties and their Attorneys present, adopting the Magistrate's Decision, by the Court. Further, under Crim. R. 19, there is no specific time frame required for the Court to adopt the Magistrate's Decision. In the Appellant's Memorandum in Support of Jurisdiction, he claims that he was denied "the opportunity to be present" represented by counsel. See Appellant's Brief, p. 1. Again this argument is without merit, because there is an affirmative duty on behalf of the defendant, to monitor the docket in his case, especially if he may wish to appeal the decision. *In re Sulzer* (March 14, 2006), 2007 WL 1455996 at 2 (N.D. Ohio) and he must act with due diligence in following his case, *Wilson v. Sheets* (Oct. 1, 2008) 2008 WL 4503027 at 12 (S.D. Ohio), the Appellant, in the case in which he now collaterally attacks, did neither.

The Appellant also argues that R. C. 2901.08 Status of juvenile adjudication as prior conviction should not be applied retroactively to a prior OVI conviction, that preceded the effective date of the statute. Numerous courts have previously decided this very issue. In *State v. Glover*, this exact same issue was brought, and the Fifth Appellate District Court, held Defendant-Appellant's position was without merit, in that that R.C. 2901.08 does apply retroactively to allow juvenile adjudications to count as prior convictions for purposes of enhancement. *State v. Glover* (August 19, 1999), Ohio App. 5 Dist. No. 99CA30, unreported, and in, *In Re: Fogle*, Stark App. No. 2006 CA 00131, 2007-Ohio-553, unreported.

STATEMENT OF THE CASE

On September 14, 2007, Defendant-Appellant Gary Adkins was indicted for Operating a Vehicle Under the Influence of Alcohol, a Drug of Abuse, or a Combination of Them (“OVI”) in violation of R.C. 4511.19(A)(1)(a), with an additional finding and a specification pursuant to R.C. 2941.1413 that Defendant-Appellant, “within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more” OVI or equivalent offenses. Therefore, R.C. 4511.19(G)(1)(d) provides the charge is a fourth degree felony.

The indictment alleged six prior OVI offenses based on Defendant-Appellant’s prior record:

- (1) November 19, 1987 in Delaware County Juvenile Court in Case No. 14,075;
- (2) August 9, 2002 in Delaware Municipal Court in Case No. 02-TRC-09606;
- (3) August 29, 1995 in Franklin County Municipal Court in Case No. 95/124258-2;
- (4) March 25, 1996 in Franklin County Municipal Court in Case No. 95/135896-1;
- (5) August 10, 1993 in Muskingum East County Court in Case No. 93TRC226;
- (6) December 14, 1995 in Circleville Municipal Court in Case No. TRC 9508255-A;

Defendant-Appellant filed a pretrial motion to dismiss, challenging the validity of three of his six prior OVI convictions: (1) the August 9, 2002 conviction in Delaware Municipal Court; (2) the August 10, 1993 conviction in Muskingum East County Court; and (3) the November 19, 1987 adjudication as a juvenile traffic offender in Delaware County Juvenile Court. The trial court granted in part and denied in part Defendant-Appellant’s motion, ruling the August 10, 1993 conviction from Muskingum East County Court was not a valid prior conviction because it was uncounseled, but the November 19, 1987 adjudication from Delaware County Juvenile Court and the August 9, 2002 conviction from Delaware Municipal Court were

admissible as valid prior convictions for purposes of enhancement. In total, five prior OVI convictions were deemed admissible by the trial court, thereby still rendering Defendant-Appellant's charge a felony of the fourth degree pursuant to R.C. 4511.19(G)(1)(d). *See Judgment Entry Denying Defendant's Motion To Dismiss.*

On October 28, 2008, Defendant-Appellant entered a "no contest" plea to the crime of Operating a Vehicle Under the Influence of Alcohol, a Drug of Abuse, or a Combination of Them ("OVI") in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree, without the specification.

Defendant-Appellant was sentenced to twelve month's imprisonment. Defendant-Appellant now appeals, alleging the trial court erred in ruling that his August 9, 2002 conviction from Delaware Municipal Court and his November 19, 1987 adjudication as a juvenile traffic offender by Delaware County Juvenile Court were admissible as valid prior convictions for purposes of enhancement.

The Fifth District Court of Appeals affirmed the judgment of the Delaware Common Pleas Court.

ARGUMENT IN OPPOSITION OF APPELLANT'S 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 only subject to collateral attack when the defendant was uncounseled and he did not voluntarily waive counsel.

On August 9, 2002, Defendant-Appellant pleaded “no contest” and was found guilty of DWI in Delaware Municipal Court by Magistrate Kevin Pelanda. Defendant-Appellant was sentenced to thirty days in jail to commence on August 16, 2002, ninety days of electronically monitored house arrest, and a \$500 fine. The magistrate’s order was adopted by the judge on March 7, 2005. This is a valid prior conviction for purposes of enhancing the instant offense to a felony of the fourth degree because: (A) Crim. R. 19 and Crim. R. 32 were complied with; and (B) the conviction cannot be collaterally attacked.

A. Defendant-Appellant’s August 9, 2002 conviction for DWI is a valid prior conviction because it complied with both Crim. R. 19 and Crim. R. 32.

Defendant-Appellant’s August 9, 2002 conviction complied with Crim. R. 19 and Crim. R. 32 and, even if it did not, it cannot be collaterally attacked on that basis (see II, below). Defendant-Appellant makes numerous erroneous arguments regarding the application of Crim. R. 19 in regard to his August 9, 2002 DWI conviction but they are without merit and the trial court’s ruling should be affirmed.

Crim. R. 19 sets forth the powers of the magistrate. Specifically, Crim. R. 19(D)(4)(a) provides a magistrate’s order must be signed by a judge in order to be effective. Also in Crim.

R. 19 (D)(4)(c), “if no timely objections are filed, the court may adopt a magistrate’s decisions, unless it determines that there is an error of law, or other defect...” Crim. R. 19(D)(4)(e)(i) provides “[t]he court may enter a judgment either during the fourteen days permitted by Crim. R. 19(D)(3)(b)(i) for the filing of objections to a magistrate’s decision or after the fourteen days have expired.” There is no specific time period during which a magistrate’s order must be adopted to be effective. The issuance of the magistrate’s order on August 9, 2002 and its subsequent adoption by the judge on March 7, 2005 were consistent with Crim. R. 19.

However, Crim. R. 19(D)(4)(b) provides that a magistrate’s recommended sentence must be adopted by the judge before being enforced. In this case, Defendant-Appellant served his sentence before the magistrate’s decision was adopted by the judge. However, Defendant-Appellant provides no authority for the proposition that a deviation in this regard invalidates the conviction itself and, even if it did, the issue should have been raised on direct appeal, not in a collateral attack. Although it is unfortunate that it took more than two years for the judge to adopt the magistrate’s order, the delay does not render the conviction itself invalid and neither does the fact that the sentence was served prior to adoption by the judge.

Defendant-Appellant argues that if he had been given sufficient notice of the judgment entry of March 7, 2005, he would have been able to file an appeal within thirty days, but because he was not notified, he was denied his right to appeal and therefore denied his right to appellate counsel. It is in this way that Defendant-Appellant attempts to couch his argument as one implicating the Sixth Amendment right to counsel, thereby allowing for a collateral attack. This argument is without merit. First, there is no evidence that Defendant-Appellant was not given proper notice of the March 7, 2005 judgment entry from Delaware Municipal Court.

Second, even if Defendant-Appellant was not given proper notice, it was his duty to monitor the court's docket to inform himself of an entry he may wish to appeal. "The law is clear that parties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal." *In re Sulzer* (March 14, 2006), 2007 WL 1455996 at 2 (N.D. Ohio). In *Wilson v. Sheets*, the United States District Court for the Southern District of Ohio states "though some twenty-three months had passed since the filing date and though the petitioner had received no notice as to the disposition of his case, he appears to have 'passively awaited' the decision and to have made no attempt to stay informed as to the status of his application. The petitioner did not act reasonably in this respect and, thus, has not demonstrated due diligence in protecting his rights." *Wilson v. Sheets* (Oct. 1, 2008) 2008 WL 4503027 at 12 (S.D. Ohio). The Northern and Southern District Courts of Ohio determined it is the duty of the defendant to exercise due diligence in following his case. The same principle applies here. The judge did not adopt the magistrate's decision for twenty three months, and when it was adopted, Defendant-Appellant claims he did not receive notice of it. It was Defendant-Appellant's duty to monitor the status of his case, and if his right to appeal was lost, it was due to a lack of vigilance on his part.

Third, Defendant-Appellant attempts to couch this issue as a denial of his Sixth Amendment right to counsel by claiming that a denial of his right to appeal led to a denial of his right to appellate counsel, but there is no merit to this argument.

Defendant-Appellant's sentence was also consistent with Crim. R. 32. Crim. R. 32 requires that a sentence be carried out without unnecessary delay. As Defendant-Appellant states in his brief, he began his sentence just one week after conviction so there could not possibly be an issue of unnecessary delay. *See* Appellant's brief at p. 7. However, Defendant-Appellant

erroneously argues that the fact that he began his sentence prior to the magistrate's order being adopted by the judge invalidates the conviction itself. Crim. R. 32 speaks to the actual and real initiation of the sentence, which started just one week after Defendant-Appellant was found guilty by the magistrate, without delay. Defendant-Appellant is correct in noting that his sentence was not yet adopted by the judge prior to him serving the sentence, but that does not invalidate the conviction itself and the issue is now moot because the magistrate's order was ultimately adopted by the judge.

There was no deviation from Crim. R. 19 or Crim. R. 32 that prevents Defendant-Appellant's August 9, 2002 DWI conviction from being a valid prior conviction for purposes of enhancement.

B. Defendant-Appellant's August 9, 2002 DWI conviction cannot be collaterally attacked.

Defendant-Appellant's August 9, 2002 DWI conviction cannot now be attacked because of an alleged deviation from the Ohio Rules of Criminal Procedure or an alleged violation of his right to a speedy trial. Although Defendant-Appellant tries to couch this collateral attack as a Sixth Amendment violation, what is really being alleged here is a violation of his right to a speedy trial and/or a violation of the Ohio Rules of Criminal Procedure, which cannot be the basis for a collateral attack. *See State v. Brooke*, 113 Ohio St.3d 199, N.E.2d 1024, 2007-Ohio-1533.

"Generally, the law does not permit a criminal defendant to attack a previous conviction in a subsequent case." *Id.* at ¶ 9. "[A] defendant may collaterally attack a prior conviction used for purposes of sentence enhancement only if (1) such attack is provided by statute, or (2) such attack is a constitutional one premised on a lack of counsel." *U.S. v. Reed* (1998), 141 F.3d 644, 652 (C.A.6 Ohio). Unless the prior convictions have previously been ruled invalid or were

obtained without attorney representation, a defendant may not collaterally attack the constitutional validity of a prior conviction at sentencing. *Custis v. United States* (1994), 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517; *State v. Brooke*, 113 Ohio St.3d 199, N.E.2d 1024, 2007-Ohio-1533, at ¶ 9; *State v. Dowhan* (2009), 2009-Ohio-684 ¶11; *State v. Culberson*, 142 Ohio App.3d 656, 756 N.E.2d 734, 2001-Ohio-3261.

There is an exception “when the state proposes to use the past conviction to enhance the penalty of a later criminal offense.” *Id.* “In that situation, a defendant may attack the constitutionality of a prior conviction if it was obtained in violation of the defendant’s Sixth Amendment right to counsel.” *Id.*; *State v. Baker*, 2009-Ohio-111. “An uncounseled conviction is one where the defendant was not represented by counsel nor made a knowing and intelligent waiver of counsel.” *State v. Neely*, 11th Dist. No.2007-L-054, 2007-Ohio-6243 ¶ 13, citing *State v. Carrion* (1992), 84 Ohio App.3d 27, 31, 616 N.E.2d 261.

Both *Custis* and *Brooke* set forth one and only one basis for a criminal defendant to collaterally attack a previous conviction and that is if the defendant was without counsel. Although Defendant-Appellant would like to expand the *Brooke* holding to allow for constitutional violations of the right to a speedy trial, there is no case law to support that proposition. *Brooke* and *Custis* specifically state that violations of the Sixth Amendment right to counsel are the only constitutional violations that can be used to attack previous convictions in a subsequent case. *Custis* at ¶ 17; *Brooke* at ¶ 9. Because Defendant-Appellant presents no evidence that his August 9, 2002 DWI conviction was uncounseled, he cannot now attack the conviction on constitutional grounds. If Defendant-Appellant wanted to allege a violation of his right to a speedy trial, he should have done so by filing objections to the magistrate’s order or on direct appeal in that case.

Additionally, there is no statute allowing a collateral attack on a prior conviction because the Ohio Rules of Criminal Procedure were not complied with. This Court should affirm the trial court's ruling which allowed the August 9, 2002 conviction to be used as a valid prior conviction for purposes of enhancement.

Proposition of Law II:

R. C. 2901.08, effective January 1, 1996, is retroactive for purposes of establishing a prior OVI conviction under R. C. 4511.19 (A)(1)(a)

Defendant-Appellant's November 19, 1987 adjudication as a juvenile traffic offender is a valid prior conviction for purposes of enhancement because: (A) R.C. 2901.08 is retroactive in application; and (B) the judgment entry meets the requirements of Crim. R. 32.

A. R.C. 2901.08 is retroactive.

R.C. 2901.08 provides that juvenile adjudications can be used as prior convictions for purposes of enhancing a subsequent charge. That statute became effective on January 1, 1996, and Defendant-Appellant argues that since his juvenile adjudication occurred prior to the effective date of R.C. 2901.08, the statute does not apply to him. That argument is without merit.

In *State v. Glover*, the exact same issue was brought before the Fifth Appellate District and that court held that the Defendant-Appellant's position to be without merit. *State v. Glover* (August 19, 1999), Ohio App. 5 Dist. No. 99CA30. In *Glover*, the defendant was an adult facing an enhanced OVI charge based on a juvenile adjudication which occurred prior to the effective date of R.C. 2901.08. *Id.* at 2. The defendant argued that R.C. 2901.08 did not apply retroactively to allow for his juvenile adjudication to be used for purposes of enhancement. *Id.*

The Court held that R.C. 2901.08 does apply retroactively to allow juvenile adjudications to count as prior convictions for purposes of enhancement.

In *In re Fogle*, the Fifth Appellate District, once again held that a juvenile adjudication can be used to enhance a misdemeanor charge to a felony charge. (February 08, 2007) No. 2006CA00131 ¶43 – 7. Citing the holding in *Glover*, the Appellate Court reaffirmed that R.C. 2901.08 applies retroactively to juvenile adjudications occurring prior to January 1, 1996, and that juvenile adjudications generally can be used as prior convictions for enhancement purposes. *Id.*

Here we have an identical situation to those presented in *Glover* and *In re Fogle*. In each instance it was argued that R.C. 2901.08 did not apply retroactively to juvenile adjudications occurring prior to January, 1996 and that juvenile adjudications generally could not count as prior convictions that can be used to enhance a subsequent charge. Here, Defendant-Appellant's juvenile adjudication occurred prior to the January 1, 1996 effective date of R.C. 2901.08, but the statute is clearly retroactive in application based on this Court's decisions in *Glover* and *In re Fogle*.

In *Fogle*, at p. 5, *Supra*, Judge Wise in a concurring opinion wrote, "I concur with the majority opinion. I would add that the Ohio Supreme Court's decision in *In re Russell* 1984, 12 Ohio St. 3rd 304, 466 N.E. 2nd 553, supports the majorities conclusion. In that case, the Court faced the question of whether a prior delinquency adjudication, predicated on a juvenile's earlier theft offense, would constitute a previous theft "conviction" so as to enhance the degree of the juvenile's subsequent theft offense for dispositional purposes under former R.C. 2151.355. *id* at 305. The Court answered that question in the affirmative, even though R.C. 2913.02(b) stated

that a theft charge rose to a felony “***if the offender has previously been convicted of a theft offense ***” Id, emphasis added.

I recognize that *Russell* predates R. C. 2901.08. However, the Supreme Court of Ohio, through the *Russell* opinion, has indicated that the use of an adult term such as “conviction” does not foreclose the application of such statutes to juvenile court matters, at least as to enhancement of the juveniles charge for disposition.”

Finally, the language of R.C. 2151.357 (H) contemplates that the juvenile court judgment and disposition may be used against him in a subsequent proceeding “the disposition of a child under the judgment rendered or any evidence given in court is admissible as evidence for or against the child in any action or proceeding in any court... and may also be considered by any court as to the matter of sentence... a court may consider the judgment rendered and the disposition of a child under that judgment for purposes of determining whether the child, for a future criminal conviction or guilty plea, is a repeat violent offender,....

The adjudication can therefore properly be used to enhance the instant charge. This Court should affirm the trial court’s decision allowing the juvenile adjudication to be used as a valid prior conviction for purposes of enhancement.

B. The Delaware County Juvenile Court clearly journalized its findings of guilt and the judgment entry meets the requirements of Crim. R. 32.

The Delaware County Juvenile Court’s judgment entry complied with the requirements of Crim. R. 32. Crim. R. 32 requires a sentence to be imposed without untimely delay, and the judgment entry to contain (1) the plea, (2) the verdict or findings, (3) and the sentence.

Crim.R.32 (C). It must also be signed by the judge and entered on the journal by the clerk.

Crim.R. 32(C). “We now hold that a judgment of conviction is a final appealable order under

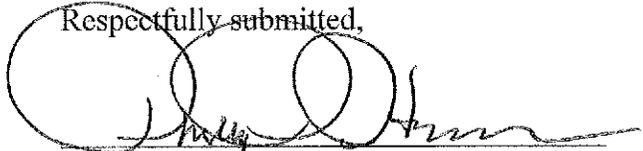
R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence.” *State v. Baker* (2008) 119 Ohio St.3d 197, 201, 893 N.E.2d 163, 167.

The Judgment Entry of the Delaware County Juvenile Court clearly meets the standards of Crim. R. 32, as interpreted by *Baker*. The Delaware County Juvenile Court adjudicated Defendant-Appellant a juvenile traffic offender as a result of a violation of “Alcohol Concentration” satisfying prong (1) of *Baker*. The juvenile court imposed a sentence of indefinite probation, numerous fines, driver’s license suspension, random drug tests and counseling, satisfying prong (2) of *Baker*. Prong (3) of *Baker* requires a judge’s signature and is satisfied on page two of the judgment entry. Finally, prong (4) of *Baker* is satisfied by the “clerk of court” stamp on page two of the judgment entry. The Delaware County Juvenile Court Judgment Entry satisfies the standards of Crim. R. 32 as interpreted in *Baker*. Therefore, this Court should affirm the decision of the trial court, which allowed the juvenile adjudication of Defendant-Appellant to be used as a valid prior conviction for purposes of enhancement.

CONCLUSION

For the reasons stated above, this case does not involve matters of public and great general interest nor does it involve a substantial constitutional question. Therefore, the Appellee, The State of Ohio respectfully requests that this Court not accept jurisdiction in this case.

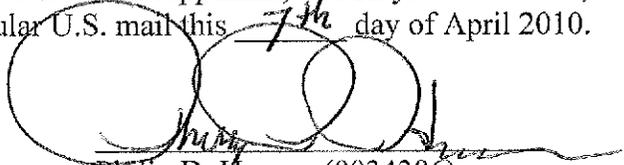
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CERTIFICATE OF SERVICE

This document certifies that a true copy of the foregoing Plaintiff-Appellee's Brief was served upon Robert E. Cesner, Jr., Attorney for Defendant-Appellant, 456 Haymore Avenue, North, Worthington, Ohio 43085-2445, by regular U.S. mail this 7th day of April 2010.



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APPENDIX

9.HTM

99-LW-3425 (5th)

STATE OF OHIO, Plaintiff-Appellee
v.
JACOB GLOVER, Defendant-Appellant

Case No. 99CA30
5th District Court of Appeals of Ohio, Licking County.
Decided August 19, 1999

Appeal from the Licking County Court of Common Pleas, Case No. 98CR449

Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Julie A. Edwards, J.

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OPINION

Gwin, P. J.

Defendant Jacob Glover appeals a judgment of the Court of Common Pleas of Licking County, Ohio, convicting and sentencing him for driving under the influence in violation of R.C. 4511.19, after appellant changed his plea from not guilty to no-contest. The indictment alleged it was appellant's fourth DUI offense in the last six years, the first of which occurred when appellant was a juvenile. Appellant assigns two errors to the trial court:

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE STATE OF OHIO TO RELY ON THE DEFENDANT-APPELLANT'S PRIOR JUVENILE CONVICTION TO ENHANCE THE CHARGE HEREIN TO A FELONY OFFENSE.

II. THE FAILURE OF TRIAL COUNSEL TO ADEQUATELY PRESERVE THE DEFENDANT-APPELLANT'S APPELLATE RIGHTS WITH RESPECT TO THE USE OF HIS PRIOR ADJUDICATION TO ENHANCE THE INSTANT CASE TO A FELONY DENIED THE DEFENDANT-APPELLANT HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

I

In his first assignment of error, appellant urges the trial court should not have relied on appellant's juvenile conviction to enhance the present charge to a felony offense. Pursuant to R.C. 4511.19 and 4511.99, a fourth OMVI offense in six years is enhanced to a felony. Appellant argues his adjudication as a juvenile traffic offender by the Licking County Juvenile Court on September 21, 1995, does not constitute a conviction, and should not be used to enhance his present offense. 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, see *State v. Blogna* (1990), 60 Ohio App. 3d 141. However, the Ohio General Assembly enacted R.C.2901.08 effective January 1, 1996, changing 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. Appellant argues because his juvenile adjudication occurred prior to the enactment of R.C.2901.08, the

court should not have applied the statute to the instant case. Appellant cites us to R.C. Section 1.48, which provides a statute is presumed to be prospective in its operation unless expressly made retrospective. Appellant urges R.C.2901.08 does not specifically state it applies to juvenile adjudications prior to its effective date. Appellant argues R.C. 2901.08 is not a remedial statute, because it expressly changes the nature of juvenile adjudications. We find R.C.2901.08 does not change the characterization or status of a prior juvenile offense. The statute has no effect whatsoever on the juvenile offense, but rather affects the enhancement provisions for subsequent offenses. As the Seventh District noted in State v. Vermillion (June 24, 1999), Belmont App. No. 98CA16, unreported, the effect of the enhancement provisions is to re-define the second offense, not the prior offense, Vermillion, at 5, citing Akron v. Kirby (1996), 113 Ohio App. 3d 452 at 461. We find the trial court did not err in considering appellant's juvenile adjudication a conviction for enhancement purposes. Accordingly, the first assignment of error is overruled.

II

Next, appellant urges if we find the trial counsel did not adequately preserve the argument set forth in I, supra, then trial counsel was ineffective. In light of our discussion above, we find the second assignment of error is moot, and accordingly, it is overruled. For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed, and the cause is remanded to that court for execution of sentence.

Gwin, P.J., and Edwards, J., concur, Hoffman, J., dissents.

Hoffman, J., dissenting.

I respectfully dissent from the majority opinion. Appellee aptly identifies the issue presented in this appeal, i.e., "may a prior juvenile adjudication, Driving Under the Influence of Alcohol, entered prior to January 1, 1996, be utilized to enhance a subsequent adult Driving Under the Influence offense to a felony?" I conclude it may not. My reason follows. I begin by noting both parties represent the issue raised herein to be one of first impression. The trial court made the same observation in its February 19, 1999 Judgment Entry. This Court previously held, in State v. Blogna (1990), 60 Ohio App.3d 141, an adjudication as a juvenile traffic offender could not be used to enhance a subsequent Driving Under the Influence conviction as an adult. However, as argued by appellee in its brief to this Court, and as found by the trial court in its Judgment Entry denying appellant's motion in limine, the law changed on January 1, 1996, when the legislature enacted R.C. 2901.08. That statute provides: If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child or juvenile traffic offender for a violation of a law or ordinance, the adjudication as a delinquent child or as a juvenile offender is a conviction for a violation of law or ordinance for the purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea.

In light of the enactment of R.C. 2901.08, the issue becomes does the statute "reach back" to appellant's September 21, 1995 adjudication as a juvenile traffic offender? The trial court found the statute does reach back because the triggering mechanism is not the prior adjudication as a juvenile traffic offender, but rather the new Driving Under Influence charge. I do not disagree with this conclusion. Furthermore, I do not disagree with the case law cited by appellee which holds a law cannot be considered retroactive when it merely apprises one enhanced penalties will accompany new crimes. However, R.C. 2901.08 does more than merely apprise appellant of enhanced penalties for future crimes; it changes the underlying nature of the juvenile case from an "adjudication" into a "conviction." In addition to apprising of enhanced penalties for future offenses, R.C. 2901.08 changes the "status" of the prior juvenile offense. R.C. 1.48 provides a statute is presumed to be prospective in its operation unless expressly made retrospective. R.C. 2901.08 makes no mention it is to be applied to juvenile adjudications prior to its effective date; therefore, it is presumed to be prospective in nature. Accordingly, I find the trial court erred in allowing appellant's September 21, 1995 juvenile adjudication to be considered a conviction for enhancement purposes. I would sustain appellant's first assignment of error and reverse the trial court's judgment and remand the case for further proceedings.