ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee	:	Case No. 10-0465
vs.	:	On Appeal From the Delaware County Court of Appeals Fifth Appellate District
GARY L. ADKINS	:	

MERIT BRIEF OF APPELLANT, GARY L. ADKINS

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STATEMENT OF FACTS

On September 14, 2007, Appellant was indicted in the Common Pleas Court of Delaware County for the offense of operating a vehicle while under the influence of alcohol [OVI], in violation of Ohio Revised Code, Section 4511.19(A)(1)(a). The offense charged was enhanced under Ohio Revised Code, Section 4511.19(G)(1)(d) to a felony of the fourth degree under the 20 year look-back provision.

Appellant's conviction, upon his plea of "no contest", was based upon five prior "convictions" within 20 years, one of which was that Appellant was adjudicated to be a juvenile traffic offender as the result of " . . . a violation of Alcohol Concentration . . . " [Appx. pg. 18]. On November 20, 1987, Appellant was found to be a juvenile traffic offender in the Delaware County Juvenile Court. It was not until 7 years thereafter the legislature enacted R.C. 2901.08, which authorized the use of juvenile adjudications which were of the same nature as the criminal offense of OVI to be utilized for the purpose of enhancing a misdemeanor OVI charge to a felony OVI.

Appellant filed a Motion to Dismiss based upon a collateral attack on prior convictions, in accordance with the law and procedure adopted by the Ohio Supreme Court in State vs. Brooke, 113 Ohio St.3rd 199, 863 N.E.2nd 1024, 2007-Ohio-1533 (2007). Among other issues raised, the trial court rejected Appellant's collateral challenge of a decision rendered in the Juvenile Court of Delaware County on November 19, 1987, adjudicating the Appellant as a juvenile traffic offender. The trial court held that this juvenile adjudication constituted a prior conviction for purposes of enhancing a charge of OVI to a felony status. The basis for

this ruling was the application of Ohio Revised Code, Section 2901.08, which became effective on January 1, 1996, and provided that a juvenile adjudication for a traffic offense". .. is a conviction for a violation of the law or ordinance for purposes of determining the offense with which the person should be charged . . . ". The trial court thereby followed the majority decision in State vs. Glover, 99 CA 30 (1999 Ohio App. LEXIS 3881) of the Fifth District Court of Appeals, which affirmed the validity of Ohio Revised Code, Section 2901.08(A), and further held that the application of this statute was retroactive, contrary to the dissenting opinion of Judge Hoffman [Appx. pg. 21]. Appellant perfected his appeal to the Court of Appeals for Delaware County, Fifth Appellate District. On January 28, 2010, the Fifth Appellate District rendered its decision [Appx. pg. 3]. As in the cases of State vs. Glover, cited supra and In re: Fogle, Stark App.No. 2006 CA 00131, 2007-Ohio-553, the Appellate Court rejected the argument that Ohio Revised Code, Section 2901.08 has no retroactive effect on juvenile findings prior to its effective date of January 1, 1996. Again, Judge Hoffman dissents, upon the basis of his dissenting opinions in Glover and Fogle. In Glover, Judge Hoffman points out that the legislature could have, but specifically did not, include a retroactive provision, and for the court to apply the statute retroactively amounts to judicial legislation in an area where the law has traditionally protected the rights of children and restricted the effect of juvenile dispositions as they would affect a child when he becomes an adult.

On March 12, 2010, Appellant filed his Notice of Appeal and Memorandum in Support

of Jurisdiction in the Supreme Court of Ohio. Following a dismissal of his appeal by the Supreme Court, Appellant filed a Motion for Reconsideration on June 18, 2010. Thereupon, this Court granted jurisdiction and allowed the appeal on the proposition of law hereafter presented.

ARGUMENT

Proposition of Law No. 1:

1. 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)

Section 28 Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws that reach back and create new burdens, new duties, new obligations, or new liabilities which do not exist at the time the statute becomes effective [see *Miller vs. Hixson* (1901), 64 Ohio St. 39, 51, 59, N.E. 749, 752].

R.C. 1.48 establishes a presumption that statutes are prospective in operation. As this Court stated in *Bielat vs. Bielat,* 87 Ohio St.3rd 350, 721 N.E.2nd 28, 33(Ohio 2000):

> ". . . Our inquiry into whether a statute may constitutionally applied retrospectively (i.e., retroactively) continues only after a threshold find that the General Assembly **expressly intended** the statute to apply retrospectively. . . " [citing *State vs. Cook* 83 Ohio St.3rd at 410, 700 N.E.2nd at 576, and, *Van Fossen,* 36 Ohio St.3rd 100,

522 N.E.2nd 489, at paragraph one of the syllabus]. [Emphasis supplied].

R.C. 2901.08(A) states the following:

> 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, except as provided in division (B) of this section, the adjudication as a delinquent child or as a juvenile traffic offender is a conviction for violation of the law or ordinance for 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. [Section (B) has no application to the issue in this case].

The General Assembly did not expressly provide that the application of this statute was to be retroactive. Since there is a statutory presumption that a statute is prospective from the date of enactment absent an express intent of the General Assembly to the contrary, it is presumed that R.C. 2901.08 may not be applied retroactively.

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 vs. Blogna* (1990), 60 Ohio App.3rd 141, 573 N.E.2nd 1223]. R.C. 2901.08 does not specifically state it applies to juvenile adjudications prior to its effective date.

Black's Law Dictionary, 6th Ed. defines retrospective, i.e., retroactive, law as follows:

> **Retrospective law.** A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing before it came into force. Every statute which takes or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. One that relates

> back to a previous transaction and gives it a **different legal effect from that which it had under the law when it occurred** [citing *Bear Val Mut. Water Co. vs. San Bernadino County,* 242 Cal. App.2nd 68, 51 Cal. Rptr. 53, 56] [pgs. 1317-1318] [Emphasis supplied].

The foregoing definition has been codified in Ohio law under R.C. 1.48, which unambiguously restricts the operation of R.C. 2901.08 to prospective application, in the absence of the express intent of the General Assembly to expressly authorize retroactive application. Notably, the General Assembly never amended the language in R.C. 4511.19(G)(1)(d) to reflect that a juvenile adjudication could be considered in addition to criminal cases in which the offender was previously convicted or pleaded guilty to an offense of the same nature within the 20 year look-back.

The specific language in R.C. 4511.19(G)(1)(d) unambiguously describes enhancement under the 20 year look-back as follows:

> " . . . an offender who, within twenty years of the offense, previously has been **convicted or pleaded guilty** to five or more violations of that nature . . .[Emphasis supplied].

The language of the statute under which Appellant was charged and convicted is clear and unambiguous in the requirement that prior offenses must have resulted from convictions or guilty pleas. R.C. 2901.04, relative to the rules of construction in criminal cases states the following:

> (A) Except as otherwise provided in division (C) of this section, sections of the Revised Code **defining offenses** or penalties shall be **strictly construed against the state and liberally construed in favor of the accused** [Emphasis supplied].

Section (C) of R.C. 2901.04 provides as follows:

> (C) Any provision of a section of the Revised Code that refers to a **previous conviction of or a plea of guilty** to a violation of a section of the Revised Code or of a division of a section of Revised Code shall be construed to also refer to a **previous conviction of or plea of guilty to a substantially equivalent offense** under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance. [Emphasis supplied]

Accordingly, it should be concluded as a matter of law involving statutory interpretation that the language of R.C. 2901.04(A) and (C) precludes the state from convicting Appellant of a felony OVI under the 20 year look-back provision, when a necessary prior "conviction" is not a conviction, but is a juvenile adjudication. Juvenile court does not contemplate convictions or guilty pleas.

In June of 2001, more than five years after the effective date of R.C. 2901.08, the Supreme Court rendered a decision in the case of *In re Anderson,* 92 Ohio St.3rd 63, 2001 Ohio 131, 748 N.E.2nd 67, 2001 Ohio LEXIS 1541. The applicable syllabus set forth in *Anderson* is simply the following:

> A juvenile court proceeding is a civil action.

R. C. 2901.08 did not change the nature of a juvenile court proceeding. As a "civil action", a juvenile adjudication cannot be transposed into a finding of guilt or a conviction as clearly required in the statute under which the Appellant was convicted.

The case of *State vs. Glover,* 1999 Ohio App. LEXIS 3881 (unreported) is one of first impression regarding the same issue as raised by Appellant herein in his proposition of law. [Appx. pg. 20]

In *Glover,* the majority opinion that the trial court did not err in considering appellant's juvenile adjudication, a conviction for enhancement purposes. Judge Hoffman, in his dissenting opinion states the following:

> 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".

The dissenting opinion of Judge Hoffman is consistent with this Court's decision several years later in the case of *In re Anderson*, cited *supra.*

In the majority opinion of *In re Anderson*, Justice Sweeney provides a history of the juvenile court system and its objectives. Quoting from the Law Review article, *Reforming America's "Juvenile Injustice System"* (1995), 22 Pepperdine L.Rev. 907, 911, Justice Sweeney stated the following:

> Because reformers "assumed that the interests of the State, delinquent children, and their families were identical, they eliminated the adversarial atmosphere of criminal courts." id.
>
> "they replaced the cold, objective standards of criminal procedures with informal procedures. id. "A specialized vocabulary was developed. "criminal complaints" gave way to "delinquency petitions". Instead of "trials", "hearing" were held. Juveniles were not given "sentences". They received "dispositions". Juveniles were not "found guilty"; they were "adjudicated delinquent." id. at 912.

The *Anderson* case, which sets forth the history and character of juvenile proceedings, forms the basis for a legal proposition that a juvenile court proceeding traditionally, and by its very nature is a civil proceeding. By judicially interpreting R.C. 2901.08 as retroactively encompassing a prior juvenile determination for purposes of enhancing a misdemeanor

offense into a felony offense, the child, upon reaching adulthood, is burdened with a substantial negative consequence that did not exist at the time of the juvenile disposition. It would violate the historical mission of the juvenile system to convert a civil disposition imposed upon the child into a basis for charging the child with a felony after he reaches the age of majority. The General Assembly did not expressly state that R.C. 2901.08 retroactively included juvenile dispositions which occurred prior to January 1, 1996. The logical application of *Bielat* prohibits a judicial interpretation of retroactivity in the absence an express intention within the statute itself that it should be retroactively applied.

At this time, the lower court has presumptively taken the position that retroactive application is not an issue, upon the basis that Appellant in this case was charged with a felony OVI after the effective date of R.C. 2901.08. This ignores the effect of retroactively enhancing the consequences of a 1987 juvenile disposition in 1995, without the express intent of the General Assembly to create this result. Such a judicial interpretation results in a substantive, rather than a remedial retroactive consequence in the prior juvenile disposition.

R.C. 2901.08 is a substantive statute. A substantive statute is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or **liabilities as to a past transaction**." [See *Bielat* Id. at 354, 721 N.E.2nd 28; *VanFossen vs. Babcock & Wilcox Co.,* 36 Ohio St.3rd 100, 106, 107, 522 N.E.2nd 489. A statute that applies retroactively to create a substantive liability violates Section 28, Article II of the Ohio Constitution [See *Bielat,* cited *supra].* The focus should not be only upon the OVI felony statute, but also on the disposition in Appellant's juvenile case

of November 20, 1987. The constitutional issue thus raised involves the juvenile case, and the unforeseen consequences of liability imposed upon the Appellant long after the juvenile proceedings have terminated. Not only has the lower court misapplied RC. 2901.08 in the absence of any expressed intent of the General Assembly that this statute should be applied retroactively, but, in addition, the lower court failed to taken into account such interpretation retroactively burdened the child with a consequence in later life that did not exist at the time of the juvenile disposition.

The decision of the lower courts in this case challenges the integrity of the juvenile justice system by creating a precedent whereby the rights afforded to a child in a *civil* proceeding can be detrimentally modified after the child reaches adulthood, particularly in the absence of any legislative intent to do so. The issue is whether subsequent legislation or judicial decisions can be utilized to diminish the protection which a child is guaranteed in the juvenile justice system. In this case, the substantial activity and strict interpretation regarding enforcement of OVI law as a matter of public policy, has had the regrettable result of compromising the historical philosophy and principles upon which our juvenile justice system is based. Such a precedent opens the door to future consequences which will only serve to diminish the juvenile justice system.

CONCLUSION

Appellant is entitled to a reversal of his conviction upon the basis that the adjudication of Appellant in November of 1987, as a juvenile traffic offender may not be considered as a

conviction under the 20 year look-back provision. As a consequence, Appellant's present conviction is not supported the required five prior convictions within twenty years.

R.C. 2901.08 cannot be retroactively applied in the absence of the express intent of the General Assembly that it would be retrospective. The present language of the felony enhancement provision precludes the use of a juvenile adjudication for the purpose of establishing a necessary element in the present conviction. Finally, the arguments and legal interpretations herewith submitted on behalf of Appellant supports the conclusion that the General Assembly never intended to change the basic nature and protections assured to children under the present juvenile justice system.

Certainly, Appellant has made his case for reversal under the proposition of law involving retroactive application of R.C. 2901.08(A). Given the interpretation of this statute in light of the other statutes, authorities, and arguments herein submitted, this Court could conclude that R.C. 2901.08 may also not be applied prospectively.

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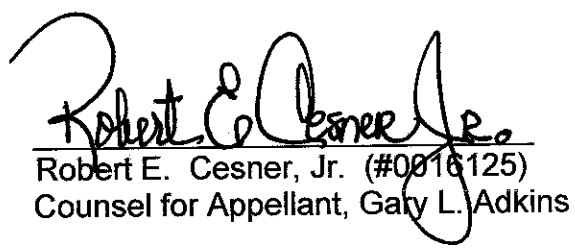
CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellant, Gary L. Adkins has been duly served by U.S. mail, postage prepaid, upon Brian Walter, Esq., Assistant Delaware County Prosecutor, Delaware County Prosecutor's Office, 140 N. Sandusky St., 3rd Floor, Delaware, OH 43015, this 12th day of November, 2010.



Robert E. Cesner, Jr. (#0016125)
Counsel for Appellant, Gary L. Adkins

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	10-0465
Appellee	:	On Appeal from the Delaware County Court of Appeals, Fifth Appellate District
vs.	:	
GARY L. ADKINS,	:	Court of Appeals Case No 09 CAA 02 0012
Appellant	:	

NOTICE OF APPEAL OF APPELLANT, GARY L. ADKINS

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MAR 12 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant, Gary L. Adkins

Appellant, Gary L. Adkins, hereby gives Notice of Appeal to the Supreme Court of Ohio from the Judgment of the Delaware County Court of Appeals, Fifth Appellate District, entered in the Court of Appeals Case No. 09 CAA 02 0012 on the 28th day of January, 2010.

This case raises substantial constitutional questions and questions of public or great general interest.

Respectfully submitted,

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Counsel of Record

Counsel for Appellant
Gary L. Adkins

CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the this Notice of Appeal 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 Street, 3rd Floor, Delaware, OH 43015, this 12TH day of March, 2010.

Robert E. Cesner, Jr. (#0016125)
Counsel for Appellant, Gary L. Adkins

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GARY L. ADKINS

Defendant-Appellant

JUDGES:
Hon. Willilam 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:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
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JAN ANTONOPLOS
CLERK

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 PMCline 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."

I

{¶7} 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

{¶8} 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.

{¶9} 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

Patricia A. Delaney
HON. PATRICIA A. DELANEY

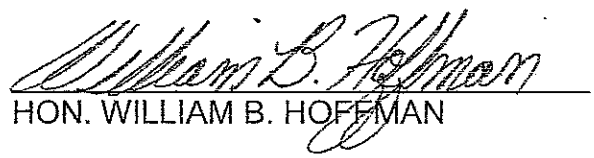
Julie A. Edwards
HON. JULIE A. EDWARDS

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

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2010 JAN 28 PM 3:20
JAN ANTONOPLOS
CLERK

STATE OF OHIO Plaintiff-Appellee -vs- GARY L. ADKINS Defendant-Appellant	:	JUDGMENT ENTRY Case No. 09 CAA 02 0012

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

Patricia A. Delaney
HON. PATRICIA A. DELANEY

Julie A. Edwards
HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO, :

Plaintiff, :

-vs- : Case No. 07CR-I-09-0506

GARY L. ADKINS, :

Defendant.

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2008 JUL -7 PM 2:27
JAN ANTONOPLOS
CLERK

JUDGMENT ENTRY

This case is before the Court on the Defendant's Motion To Dismiss the charges and specification thereto returned by the Grand Jury as a "True Bill". Specifically the Defendant argues that:

1. The enhancement of the charge to a Felony of the Fourth Degree by applying the "Look Back" provision of Section 2941.1413 is submitting the Defendant to Double Jeopardy and

2. The Defendant argues that three of the prior convictions are faulty and cannot be used to enhance under the "Look Back" provision.

Both the Defendant and the State of Ohio have briefed the matter extensively and the Court has heard arguments on the issues.

The Court is not persuaded with the Double Jeopardy argument. The Legislature has specifically authorized cumulative punishment which does not constitute a double jeopardy violation under the 5th and 14th Amendments. State v. Stillwell, 11th Dist. No. 2006-L010, 2007 Ohio 3190 at paragraph 26 quotes State v. Midcap, 9 Dist. No. 22908, 2006 Ohio 2854. The Court therefore OVERRULES the Defendant's Double Jeopardy argument.

The Defendant's second basis for dismissal turns on the validity or lack of validity of three of the six prior convictions listed in both the body of the charge and the specification. The Defendant argues that if two of the three priors are not valid for enhancement purposes that the charge should be dismissed. The Court disagrees with the Defendant's

conclusion. If two of the three are determined to be invalid the case would simply proceed as a Misdemeanor rather than a Felony of the Fourth Degree. It would not be dismissed. The State of Ohio on the other hand argues that a Motion To Dismiss is not the proper tool to address the validity of the predicate convictions. The Court disagrees. If the underlying convictions are invalid on their face and/or are subject to collateral attack as a matter of law, they should be tested prior to Trial with a Motion in Limine, Suppression or Dismissal.

The Three (3) prior convictions being attacked by the Defendant are as follows:

1. The November 19, 1987 convictions as a Juvenile Traffic Offender Case No. 14,074-14,079.

2. The August 10, 1993 East Muskingum Municipal Court Conviction Case No. 92TRC226.

3. The August 9, 2002 Delaware Municipal Court Convictions Case No. 02-TRC-09606.

The East Muskingum Municipal Court conviction on the face of the documents presented was "uncounseled" and the State has not presented any evidence to the contrary. Thus under State v. Brooke, 113 Ohio St. 3d 199, cannot be used to enhance a subsequent offense. The Court will not allow any evidence as to said conviction and the Defendant's Motion as to that conviction is sustained.

As to the other two convictions the Court finds them to be valid and will allow their admission as to both the charges and the specification. It is true that the Delaware County Juvenile Court could have done a better documentation of its findings but when both the Traffic Ticket and Journal Entry of November 19, 1987 and November 20, 1987 are used together the Court did in fact journalize its findings of guilt to the offense in Traffic Ticket 14,075 a violation of Section 4511.19(A)(3). Therefore this conviction is valid for enhancement purposes. See State v. Glover, 99CA30 (1999) Fifth District Court of Appeals.

The Court furthermore finds the August 9, 2002 Delaware Municipal Court conviction to be valid for purposes of enhancement. The Defendant attempts to expand "Brooke" to include an alleged deprivation of a speedy trial because the Magistrate's Decision of August 9, 2002, was not adopted by the Judge until March 7, 2005, long after

the Defendant had served his sentence. The Court is not persuaded by the Defendant's attempt to expand "Brooke". There was no direct appeal asserted by the Defendant, the finding was journalized as required by Criminal Rule 32 and the Court finds that justice cries for a finalization of judgment. Thus the Court will not allow this conviction to be collaterally attached and evidence will be admitted on the merits of the charge as well as the specification.

Dated: July 7, 2008.

W. DUNCAN WHITNEY, JUDGE

cc: Marianne T. Hemmeter, Assistant Prosecuting Attorney
✓Robert E. Cesner, Jr., Attorney for Defendant, 456 Haymore Avenue North, Worthington, Ohio 43085
Adult Court Services
Ohio Adult Parole Authority

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO,	:	Case No. 07CR-I-09-0506
Plaintiff,	:	Honorable Judge W. Duncan Whitney
-vs-	:	DOB: March 10, 1972
GARY L. ADKINS,	:	SSN: XXX-XX-5872
Defendant.	:	

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2009 JAN 16 AM 11:33
JAN ANTONOPLOS
CLERK

NUNC PRO TUNC
JUDGMENT ENTRY ON SENTENCE

This case came before the Court for Sentencing on December 17, 2008 in conformity with the provisions of Section 2929.19 of the Ohio Revised Code. The Defendant, Gary Adkins, was present in Open Court and was accompanied by his counsel, Robert E. Cesner, Jr., and the State of Ohio was represented by William J. Owen, one of the Assistant Prosecuting Attorneys for Delaware County, Ohio. The Court then summarized all of the prior proceedings which had transpired in this case. On October 28, 2008, the Defendant, in Open Court, entered a Plea of No Contest to the crime of Driving While Under The Influence Of Alcohol Or Drugs without the Specification, as set forth in the Indictment, said crime being in violation of Section 4511.19(A)(1)(a) of the Ohio Revised Code, and being a Felony of the Fourth Degree. The Court, in Judgment Entry dated October 30, 2008, accepted the Defendant's plea of No Contest and made a finding that the Defendant committed the crime of Driving While Under The Influence Of Alcohol Or Drugs without the specification, as set forth in the Indictment, on or about September 8, 2007 in Delaware County, Ohio, said offense being a Fourth Degree Felony in violation of Ohio Revised Code Section 4511.19(A)(1)(a). This matter was referred to the Ohio Adult Parole Authority for purposes of a Pre-Sentence Investigation Report which has been prepared. Both the Assistant Prosecutor and Attorney for Defendant acknowledged that they had read the Pre-Sentence Investigation prepared by the Ohio Adult Parole Authority and were afforded the opportunity to make any corrections or additions thereto. The Assistant Prosecuting Attorney and counsel for the Defendant were afforded an opportunity to present information to the Court relevant to Imposition of Sentence in this case. The Assistant Prosecuting Attorney addressed the Court relevant to Sentencing in this case and counsel for the Defendant addressed the Court on behalf of the Defendant.

The Court then inquired of the Defendant in order to determine if the Defendant had anything to

say as to why Sentence should not be imposed upon him, thereby giving the Defendant an opportunity to address the Court on his own behalf. The Defendant spoke to the Court on his own behalf.

Having considered the factual background of this case, the negotiations conducted in this case, the Pre-Sentence Report prepared by the Ohio Adult Parole Authority, the Defendant's counsel's statement, the Assistant Prosecuting Attorney's statement, the Defendant's statement and, having considered the two overriding purposes of felony sentencing set forth in Section 2929.11 of the Ohio Revised Code, and having considered the seriousness and recidivism factors set forth in Section 2929.12 of the Ohio Revised Code, which the Court considers to be advisory only, the Court makes the following **FINDINGS**:

1. Nine previous offenses of the same type.
2. Defendant has capacity to refrain from drinking but has not previously abstained.

It was ORDERED and ADJUDGED by the Court that the Defendant, Gary L. Adkins, as to the crime of Driving While Under The Influence of Alcohol or Drugs without the Specification, as set forth in the Indictment herein filed, the same being in violation of Section 4511.19(A)(1)(a) of the Ohio Revised Code and being a Felony of the Fourth Degree, be imprisoned and confined at the Correctional Reception Center at Orient, Ohio, for a stated prison term of Twelve (12) months, the first Sixty (60) days is a mandatory sentence and to pay the costs of the prosecution of this case, for which execution was awarded. Defendant shall pay a mandatory fine of Eight Hundred Dollars ($800.00) and the Defendant's Drivers License shall be suspended for Three (3) years commencing upon his release from the Department of Rehabilitation and Correction. Defendant shall be credited with Nineteen (19) days of jail time credit. **The Defendant shall not be granted admittance into the Intensive Prison Program without prior approval of the Judge.**

The Court then advised the Defendant of the provisions of Sections 2929.19(B) and 2967.28(B) of the Ohio Revised Code, as follows:

1. **As a part of this Sentence, the Parole Board may extend the stated prison term for certain violations of prison rules for up to one-half of the stated prison term.**

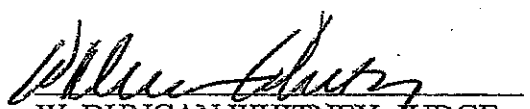
2. **That as a part of this Sentence, post-release control may be imposed for up to three (3) years.**

3. **That if said Defendant violated post-release control, he could be returned to prison for up to nine months, with a maximum for repeated violations to equal fifty percent of the original stated prison term, and if the violation is a new felony, said Defendant could be both returned to prison for the remaining period of control or twelve (12) months, whichever is greater, plus receive a prison term for the new felony.**

Defense counsel asked that the sentence be stayed pending appeal. The Court set bond for purpose of appeal in the sum of Fifteen Thousand Dollars ($15,000.00). All the conditions of previously bond imposed in the entry on Arraignment time-stamped September 26, 2007 shall remain in full force and effect during the appeal including the requirement that the Defendant shall submit himself to the Sunbury Police Department for alcohol testing daily as ordered by the Court on October 28, 2008.

Upon the posting of bond, the execution of the sentence shall be STAYED until the appeal is final.

Dated: January 15, 2009.



W. DUNCAN WHITNEY, JUDGE

cc: Janice L. Hitzeman, Assistant Prosecuting Attorney
Robert E. Cesner, Jr., Attorney for Defendant, 456 Haymore Avenue, Worthington, Ohio 43085
Ohio Adult Parole Authority
Adult Court Services Office

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

MEMO

JUVENILE DIVISION

IN THE MATTER OF:	:	
Gary Adkins 1461 Golf Course Road Sunbury, OH 43074	:	Case No. 14,073 14,077 14,074 14,078 14,075 14,079 14,076
A juvenile traffic offender	:	

JUDGMENT ENTRY - TRAFFIC OFFENSES

Case Numbers 14,073 through 14,079 came on for disposition on November 19, 1987. Present in Court were Gary and Mr. Adkins and John Elliot, Attorney for the defendant.

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.

The Court ORDERS:

A period of indefinite probation. The youth shall report to Nancy Nicolosi, Probation Counselor. The first reporting date is to be determined.

Court costs $120.00, Fines $110.00, Sheriff Fees $18.10, Witness Costs $25.40, for a total of $273.50 in costs. Restitution to be made on both damaged vehicles before Court Costs and fines paid. One hundred and ten dollars($110.00) in fines will be suspended if restitution and other costs paid and probation successfully completed.

MICRO-FILMED

Gary Adkins Case No. 14,073 - 14,079

Driver's license is suspended to the date of March 10, 1993 or as later modified.

Review may occur after September 10,1988.

Youth, and family, are required to participate in an assessment for chemical abuse/dependency and in any treatment recommended by qualified assessor.

Youth will submit to random urinalysis at his expense.

Youth will maintain grades of C or better with no unexcused absences from school or violation of school rules.

Case Numbers 14,073, 14,074, 14,076, 14,078 are dismissed.

THOMAS E. LOUDEN, JUDGE

DELAWARE COUNTY
JUVENILE COURT
1991 NOV 20 PM 3:20

PC: Gary and Mr. and Mrs. Adkins
John Elliot, Attorney for Gary
Steven Laudon, M.S., Central Ohio Counseling, 4100 No. High St. Suite 201, Columbus, OH 4
Nancy Nicolosi, Probation Counselor
Stuart M. Berry, M.S.W., L.I.S.W., Director of Court Services

L.B.
11-20-91

MICRO FILMED

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.

For Plaintiff-Appellee: ROBERT CALESARIC ASSISTANT PROSECUTOR 20 South Second Street, 4th Floor Newark, OH 43055

For Defendant-Appellant: ANDREW T. SANDERSON 21 West Church Street Suite 201 Newark, OH 43055

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 considerated 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, Vermilliion, 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.

C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Stark County.
In re Chad **FOGLE**, Juvenile-Delinquent Appellant.
No. 2006CA00131.

Decided Feb. 8, 2007.

Appeal from the Stark County Court of Common Pleas, Juvenile Division, Case No. J-139447.
John D. Ferrero, Prosecuting Attorney, Ronald Mark Caldwell, Asst. Prosecuting Atty., Canton, OH, for plaintiff-appellee.

Jill Beeler, Ohio Public Defender's Office, Columbus, OH, for defendant-appellant.

BOGGINS, J.

*1 {¶ 1} Appellant Chad Fogle appeals his conviction and sentence entered in the Stark County Court of Common Pleas, Juvenile Division, on a felony charge of domestic violence.

{¶ 2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶ 3} On October 22, 2005, a complaint was filed in the Stark County Juvenile Court, alleging Appellant Chad Fogle, age 16, was a delinquent child for committing domestic violence, in violation of R.C. 2919.25(A) or (B) & (D), a felony of the third degree if committed by an adult.

{¶ 4} The complaint charged Appellant with a felony of the third degree, alleging that Appellant "has been convicted two or more times of domestic violence * * *."

{¶ 5} The initial charge of domestic violence occurred on January 11, 2002, and alleged that Appellant was delinquent for domestic violence, a misdemeanor of the first degree if committed by an adult, when Appellant, " * * *struck [the] victim, Natalie L. Fogle, his mother, in the face as she was enacting corporal punishment on him."

{¶ 6} Appellant was adjudicated delinquent for this offense on January 22, 2002.

{¶ 7} The second charge of domestic violence occurred on February 23, 2003, and alleged that Appellant was delinquent for domestic violence, a misdemeanor of the fourth degree if committed by an adult, when Appellant, "became violent with his mother (Natalie Fogle) and threatened to kill her and other household members."

{¶ 8} Appellant was adjudicated delinquent for this offense on March 28, 2003.

{¶ 9} On November 30, 2005, an arraignment hearing was held on the felony domestic violence charge at issue in the case sub judice.

{¶ 10} At this hearing, defense counsel raised the issue as to whether the domestic violence charge can be enhanced as a felony level offense, arguing that Appellant did not have two or more prior "convictions".

{¶ 11} In response, the court appointed the public defender's office as counsel, and ordered briefing on the legal issue that had been raised.

{¶ 12} On December 22, 2005, the defense filed a "Brief of Juvenile," which addressed the issue, "whether, for a juvenile defendant, a delinquency

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adjudication is sufficient as a "conviction" or "guilty plea" to trigger the felony enhancement provisions of Ohio's domestic violence law."

{¶ 13} The defense argued the enhancement provision allows the State to charge an adult with a domestic violence delinquency adjudication in his past with a felony; but does not allow a juvenile, who has a domestic violence delinquency adjudication, to be charged with a felony level domestic violence in juvenile court.

{¶ 14} On January 6, 2006, the State filed its Response to Juvenile's Brief, arguing that a prior juvenile domestic violence adjudication is sufficient to enhance a subsequent domestic violence charge to a felony in juvenile court.

{¶ 15} On January 30, 2006, the juvenile court magistrate heard arguments on the briefs. (T. at 4-6). At the close of such arguments, the magistrate found, " * * * a prior conviction is a conviction for the purposes of enhancement under the statute, so I am prepared then to proceed today with the felony 3 domestic violence charge." T. at 6-7).

*2 {¶ 16} The defense stipulated to the facts alleged in the complaint, to age and venue, and to the prior domestic violence adjudications. (T. at 7).

{¶ 17} The trial court then adjudicated Appellant delinquent by means of domestic violence, a felony of the third degree if committed by an adult. (T. at 8). For disposition, the trial court suspended an indefinite commitment to the Ohio Department of Youth Services, ordered Appellant be put on a waiting list for court placement, and ordered community control with a number of conditions.

{¶ 18} On February 7, 2006, the defense filed a request for findings of fact and conclusions of law, pursuant to Juv.R. 40(E)(2).

{¶ 19} On February 14, 2006, the magistrate filed a judgment entry that included findings of fact and conclusions of law. In this Entry the magistrate stated that it "applie[d] 2901.08 to this case and finds that pursuant to Ohio Statute and case law, a prior domestic violence adjudication is a conviction for the purposes of felony enhancement of a subsequent domestic violence complaint."

{¶ 20} On February 28, 2006, the defense filed an "Objection to Magistrate's Decision".

{¶ 21} On April 10, 2006, the State filed their Response.

{¶ 22} On April 11, 2006, the juvenile court heard arguments on the Objections.

{¶ 23} On April 12, 2006, the juvenile court adopted the reasoning set for in the magistrate's decision of February 14, 2006.

{¶ 24} On May 12, 2006, Appellant filed his Notice of Appeal and other necessary pleadings.

{¶ 25} On June 28, 2006, the clerk mailed the App.R. 11(B) notice that the record was complete.

{¶ 26} On July 17, 2006, appellant filed a Motion for Extension of Time to File Appellant's Merit Brief.

{¶ 27} On July 21, 2006, this Court granted appellant until August 17, 2006 to file his brief.

{¶ 28} Appellant's appeal is now before this Court, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶ 29} "I. THE JUVENILE COURT VIOLATED R.C. 2919.25, 2901.08, AND CHAD FOGLE'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION, WHEN IT ADJUDIC-

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ATED HIM DELINQUENT FOR DOMESTIC VIOLENCE, A FELONY OF THE THIRD DEGREE IF COMMITTED BY AN ADULT.

{¶ 30} "II. CHAD FOGLE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION".

I.

{¶ 31} In his first assignment of error, Appellant argues that the trial court erred in adjudicating him delinquent by reason of committing a felony domestic violence because the prior delinquency adjudications for domestic violence could not be used to elevate the present charge to a felony. Appellant argues that R.C. 2901.08 applies only to adults charged with crimes, and not to juveniles charged with delinquency by reason of committing criminal offenses. We disagree.

*3 {¶ 32} Revised Code § 2901.08(A) states:

{¶ 33} (A) 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, except as provided in division (B) of this section, the adjudication as a delinquent child or as a juvenile traffic offender is a conviction for a violation of the law or ordinance for 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.

{¶ 34} Revised Code § 2919.25(A) and (D)(4) provide:

{¶ 35} "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

{¶ 36} "(D)(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and a violation of division (C) of this section is a misdemeanor of the first degree."

{¶ 37} Appellant argues that because juveniles are deemed not to be criminals under the statutory historic approach reviewed by the Ohio Supreme Court in *In Re Anderson* (2001), 92 Ohio St.3d 63, and such court's definition of the juvenile court system as civil rather than criminal that R.C. § 2919.25(D) does not apply.

{¶ 38} We agree that the court stated:

{¶ 39} "We have long held that juvenile court proceedings are civil, rather than criminal, in nature. See *Cope v. Campbell* (1964), 175 Ohio St. 475, 26 O.O.2d 88, 196 N.E.2d 457, paragraph one of the syllabus, overruled on other grounds in *In re Agler* (1969), 19 Ohio St.2d 70, 48 O.O.2d 85, 249 N.E.2d 808. See, also, *Agler* at 74, 48 O.O.2d at 87, 249 N.E.2d at 811. To understand why this is so, it is helpful to consider the history of the juvenile justice system."

{¶ 40} However, the Supreme Court in such case also stated: "We recognize that there are criminal aspects to juvenile court proceedings", and cited, among other holdings, *In Re Gault* (1967), 387 U.S. 1.

{¶ 41} *In Re Anderson,* supra, is not really in point as to the issue presented in this case, however, as it was primarily concerned with the appropriate appeal time.

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{¶ 42} Appellant also cites *State v. Prether* (2001), 141 Ohio App.3d 6 for the proposition in that R.C. § 2901.08 was not applicable to the sexual offender classification. Such case is also not supportive of the argument presented in that the court stated:

{¶ 43} "Previous adjudication of juvenile delinquency, which was based on sexually oriented offense, did not qualify as prior conviction for purposes of determining whether defendant was habitual sex offender; statute that permitted juvenile delinquency adjudications to be used in considering crime to be charged or sentence to be imposed was inapplicable, as classification as sexual offender was neither crime nor sentence. R.C. §§ 2901.08, 2950.01(B); § 2151.358(H) (2000)."

*4 {¶ 44} This Court in *State v. Glover* (1999), Licking App. Case No. 99CA30, a case involving a prior juvenile adjudication of a traffic offense enhancing his adult offense, stated:

{¶ 45} "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, 573 N.E.2d 1223. 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 considerated [SIC] a conviction for purposes of determining subsequent offenses, enhancements, or punishments."

{¶ 46} The fact that Glover involved a prior juvenile adjudication being applied to an adult has no bearing as the essence of such case was that the Legislature redefined juvenile adjudications as convictions for purposes of enhancement of subsequent offenses.

{¶ 47} We find that R.C. § 2901.08 by its specific language is clearly applicable to the present enhancement by the Juvenile Court and reject the First Assignment.

II.

{¶ 48} The Second Assignment concerns the assertion of ineffective counsel.

{¶ 49} The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Combs,* supra.

{¶ 50} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶ 51} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley,* supra, at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* It is with this framework in mind that we address the instances of alleged ineffectiveness of counsel raised by appellant in the in-

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stant case.

*5 {¶ 52} Essentially, Appellant argues that since the reasoning in support of the First Assignment was not sufficiently presented to the juvenile court that counsel was therefore inadequate and that Appellant's Constitutional right to effective counsel was denied.

{¶ 53} We agree that juveniles as well as adults are afforded the right to competent legal assistance.

{¶ 54} However, as we have rejected the legal reasoning of Appellant as to the First Assignment, the absence of such argument before the trial court has no relationship to the issue of competent counsel

{¶ 55} The Second Assignment of Error is denied.

{¶ 56} The judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

WISE, J., concurs separately.
HOFFMAN, P.J., dissents.WISE, J., concurring.
{¶ 57} I concur with the majority opinion. I would add that the Ohio Supreme Court's decision in *In re Russell* (1984), 12 Ohio St.3d 304, 466 N.E.2d 553, supports the majority's 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.

{¶ 58} I recognize that *Russell* pre-dates 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 juvenile charge for disposition.

HOFFMAN, P.J., dissenting.
{¶ 59} I respectfully dissent from the majority opinion.

{¶ 60} Although I find settled prior juvenile adjudications can be considered when determining the appropriate charge for an adult under R.C. 2901.08, I do not find the reverse to hold true.

{¶ 61} Juveniles are not charged with criminal offenses. They are charged with being delinquent or unruly; i.e., status offenses. Juveniles are not "sentenced" in the strictest criminal sense; rather, they are given a "disposition". Although juvenile delinquency proceedings may have criminal aspects, they are still civil in nature.

{¶ 62} Although *Prether* is distinguishable in that it involved a sexual offender classification, I disagree with the majority's conclusion the rationale expressed by the court in *Prether* is not supportive of appellant's argument herein. The *Prether* court's decision was based upon the conclusion a classification as a sexual offender is neither a crime nor sentence. I believe such conclusion is supportive of appellant's argument herein by analogy. A finding of delinquency is not a criminal offense, nor is a disposition based upon a finding of delinquency a criminal sentence.

*6 {¶ 63} I would sustain appellant's first assignment of error.[FN1]

FN1. In light of my proposed disposition of appellant's first assignment of error, I would overrule appellant's second assignment of error as moot.

Ohio App. 5 Dist.,2007.
In re Fogle
Not Reported in N.E.2d, 2007 WL 428484 (Ohio App. 5 Dist.), 2007 -Ohio- 553

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§ 28. Retroactive laws.

Ohio Constitution

Article II. Legislative

Current through the November, 2009 Election

§ 28. Retroactive laws

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.48 (2010)

§ 1.48. Statute presumed prospective

A statute is presumed to be prospective in its operation unless expressly made retrospective.

HISTORY:

134 v H 607. Eff 1-3-72.

NOTES:

Related Statutes & Rules

Ohio Constitution

Retroactive laws, *OConst art II § 28.*

Practice Manuals & Treatises

Anderson's Ohio Probate Practice and Procedure § 17.02 Legislative control over succession

Case Notes & OAGs
ANALYSIS Constitutionality Generally Administrative rules Applicability Asbestos claims Authority of general assembly Boards of education Bond of public official or employee Court of claims Crime victim reparations awards Criminal law Divorce Elections Franchises Indemnity Law of the case doctrine Legislative intent Modification Motor vehicle laws Prevailing wage law Product liability Public employees Taxation Termination of parental rights Time limitations Trusts Unemployment compensation Workers compensation

CONSTITUTIONALITY.

§ 2901.04 Rules of construction; references to previous conviction.

(A) Except as otherwise provided in division (C) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

HISTORY: 134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000.

Not analogous to former RC § 2901.04 (GC § 12402-1; 109 v 545; 111 v 77; Bureau of Code Revision, 10-1-53), repealed 13 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

This section codifies the rule that penal statutes must be strictly construed against the state and liberally construed in favor of the accused. See, Harrison v. Ohio, 112 Ohio St. 429, 147 N.E. 650 (1925) aff'd 270 U.S. 632;

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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2901.08 (2009)

§ 2901.08. Status of juvenile adjudication as prior conviction

(A) 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, except as provided in division (B) of this section, the adjudication as a delinquent child or as a juvenile traffic offender is a conviction for a violation of the law or ordinance for 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.

(B) A previous adjudication of a person as a delinquent child or juvenile traffic offender for a violation of a law or ordinance is not a conviction for a violation of the law or ordinance for purposes of determining whether the person is a repeat violent offender, as defined in *section 2929.01 of the Revised Code*, or whether the person should be sentenced as a repeat violent offender under division (D)(2) of *section 2929.14* and *section 2941.149 [2941.14.9] of the Revised Code.*

HISTORY:

146 v H 1. Eff 1-1-96; 151 v H 95, § 1, eff. 8-3-06.

NOTES:

Section Notes

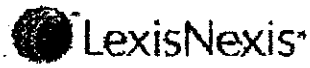
Not analogous to former RC § 2901.08 (GC § 12405; RS § 6812; S&S 266; S&C 415; 58 v 65, § 34; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, Eff 1-1-74.

The effective date is set by section 6 of HB 1.

EFFECT OF AMENDMENTS

151 v H 95, effective August 3, 2006, added (B); and, in present (A), inserted "except as provided in division (B) of this section".

Practice Manuals & Treatises



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TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES
DRIVING WHILE INTOXICATED

Go to the Ohio Code Archive Directory

ORC Ann. 4511.19 (2009)

§ 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.

(xi) The state board of pharmacy has adopted a rule pursuant to *section 4729.041 of the Revised Code* that specifies the amount of salvia divinorum and the amount of salvinorin A that constitute concentrations of salvia divinorum and salvinorin A in a person's urine, in a person's whole blood, or in a person's blood serum or plasma at or above which the person is impaired for purposes of operating any vehicle, streetcar, or trackless trolley within this state, the rule is in effect, and the person has a concentration of salvia divinorum or salvinorin A of at least that amount so specified by rule in the person's urine, in the person's whole blood, or in the person's 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, a violation of division (A)(1) or (B) of this section, or any other equivalent 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 that is vehicle-related, 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 that is vehicle-related, 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*.