

ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 11-0632

STATE OF OHIO

Appellee

v.

JEFFREY L. GWEN

Appellant

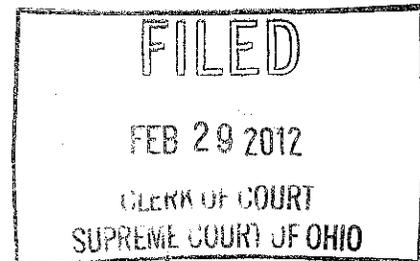
On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 25218

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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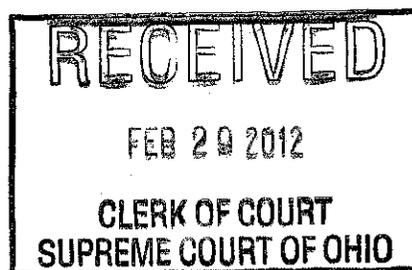


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STATEMENT OF FACTS

In March 2009, Akron Police Officer Vincent Tersigni responded to a call regarding a domestic violence fight. (Tr. 231). The officer testified that, when he arrived at the residence, he briefly spoke with Jeffrey Gwen, who was inside the home, and the victim, Monee Fannin, who arrived at the residence behind the officer. (Tr. 231).

Officer Tersigni stated that, upon entering the home, he detected: "a real strong odor of Marijuana, like someone just got done smoking marijuana." (Tr. 233; 274). The officer further attested that, when asked, Gwen acknowledged that he had just smoked Marijuana. (Tr. 233-234; 274).

Officer Tersigni testified that, after investigating the incident, Gwen was arrested for Domestic Violence and was searched. (Tr. 246). During the search, law enforcement discovered a black digital scale in the pocket of Gwen's pants. (Tr. 246). Officer Tersigni said that the digital scale contained a residue that the officer believed to be Marijuana based on its appearance and odor. (Tr. 247-248). Officer Tersigni also attested that this type of scale is commonly used for weighing illegal drugs. (Tr. 249).

Officer Tersigni attested that while he was at the residence, he also spoke with Fannin, who he said was crying and had a small visible injury beneath her

eye. (Tr. 235). Officer Tersigni averred that Fannin's eye appeared to be red and bloodshot and had some swelling. (Tr. 235).

Officer Tersigni stated that Fannin reported that she sustained the injury when Gwen threw her onto the couch and rubbed his arm in her face. (Tr. 235; 267). The officer further testified that Fannin also told him Gwen punched her in the stomach, causing an injury that she did not wish to show to the law enforcement officers. (Tr. 236).

Officer Tersigni further attested that, when he initially spoke to Fannin, she wanted to press charges against Gwen. (Tr. 237). Later, after Gwen was placed in handcuffs and escorted from the home by law enforcement officers, Fannin asked the officer if Gwen was going to be taken to jail. (Tr. 237). Officer Tersigni explained that, after he told Fannin that Gwen was going to be transported to the jail, she indicated that she no longer wanted to press charges. (Tr. 238; 267). In addition, when a supervisor arrived on scene to photograph Fannin's injuries, the victim refused to allow the officers to enter the home and refused to speak with members of law enforcement. (Tr. 238; 276).

At trial, Fannin recanted and was called as a Court's witness during the State's case-in-chief. (Tr. 148-149). She testified at trial that she and Gwen have four children in common, but they were not residing together at the time of the

incident because she lived in AMHA housing which prohibited such a living arrangement. (Tr. 150-151).

Fannin recalled that, on the date of the incident, March 24, 2009, she returned to her residence and discovered Gwen and another woman talking. (Tr. 151-152). Fannin was outraged to find another woman in her home. (Tr. 155).

Fannin attested that she asked the female some questions. (Tr. 154). She further said that, when the woman did not answer her questions, Fannin hit the other woman. (Tr. 155). Fannin said that a physical altercation ensued between the two women. (Tr. 155). Fannin said that Gwen attempted to break up the fight. (Tr. 191; 214).

According to Fannin, when the fight ended, the other woman left in her vehicle and Fannin followed. (Tr. 156-157). Fannin testified that, after she lost sight of the other woman's vehicle, she called the police and reported that her boyfriend had jumped on her. (Tr. 158-159).

At trial, Fannin acknowledged that she, in fact, told the 911 dispatcher that her boyfriend jumped on her and punched her in the face and lip; however, Fannin explained that she just said those things because she "was angry" and she "wanted him hurt like [she] hurt. (Tr. 161; 215). Fannin testified that she made a false 911 call because she wanted to "punish" Gwen for having another woman in her home. (Tr. 183; 195).

Fannin further testified that, when law enforcement officers arrived at her home, she refused to allow photographs to be taken of her injuries and averred that she told the officers that Gwen “didn’t try to fight me or jump on me or anything.” (Tr. 168; 200; 202). Fannin averred that she does not want Gwen to go to jail. (Tr. 179).

Gwen testified on his own behalf and admitted that the small digital scale belonged to him and admitted that he had smoked Marijuana prior to the police arriving at the residence. (Tr. 340-341). Gwen further admitted that the scale was used as drug paraphernalia. (Tr. 341).

Gwen was convicted of Domestic Violence and Illegal use of Possession of Drug Paraphernalia. Gwen’s convictions were affirmed on appeal, however, the enhancement on the domestic violence was reversed from a felony of the fourth degree to a felony of the third degree because the Court found that the State failed to prove that Gwen had two or more prior domestic violence convictions. *State v. Gwen*, 9th Dist. No. 25218, 2011-Ohio-1512 (2011).

The Ninth District Court of Appeals certified a conflict. The matter is before this Court to determine whether, for purposes of enhancing the offense level in domestic violence case, the State is required to prove convictions by providing a judgment of conviction that complies with Crim.R. 32(C).

PROPOSITION OF LAW

FOR THE PURPOSE OF ENHANCING THE OFFENSE LEVEL IN A DOMESTIC VIOLENCE CASE, THE STATE IS REQUIRED TO PROVE THE PRIOR DOMESTIC VIOLENCE CONVICTIONS BY PROVIDING A JUDGMENT OF CONVICTION EXECUTED IN CONFORMITY WITH CRIM.R. 32(C).

LAW AND ARGUMENT

Gwen argues that, for purposes of enhancing the offense level of a conviction for Domestic Violence, the State is required to prove the prior convictions were executed in conformity with Crim.R. 32(C).

Specifically, Gwen argues that State's Exhibits Three and Four, which were journal entries from Gwen's two prior Domestic Violence convictions, did not comport with Crim.R. 32(C). The State disagrees.

The State argues that, pursuant to the plain language of R.C. 2919.25(D), for purposes of enhancing the level of a Domestic Violence conviction, the State may prove either that the defendant previously "pled guilty" or was "convicted" of a prior offense. Therefore, the State need not introduce journal entries that comport with Crim.R. 32(C).

Furthermore, the General Assembly's choice of language in R.C. 2919.25 demonstrates that, for purposes of enhancing a Domestic Violence conviction, the word "convicted" has been placed on the level as the phrase "pleaded guilty to."

The Ninth District Court of Appeals recently examined similar statutory language to determine the legislature's intent in using this language for enhancement purposes. The Ninth District Court of Appeals determined that, when statutory language requires proof that the defendant has previously been convicted of or pleaded guilty to an offense, "the General Assembly placed 'convicted' on equal footing with a guilty plea[.]" *State v. McCumbers*, 9th Dist. No. 25169, 2010-Ohio-6129, at ¶ 12, considering similar language in R.C. 2941.14.13(A), quoting *State ex rel. Watkins v. Fiorenzo*, 71 Ohio St.3d 259, 260 (1994).

The Ninth District Court of Appeals explained that "the word 'convicted' refers only to a determination of guilt and not a judgment of conviction. Contrary to [the defendant's] argument, compliance with Criminal Rule 32(C) is not a prerequisite to proving a prior offense for purposes of increasing a subsequent charge * * *." (Citations omitted.) *McCumbers* at ¶ 13.

In *Gwen*, the Ninth District Court of Appeals again held that the word convicted referred only to a determination of guilty and not a judgment of conviction. Thus, for purposes of increasing a subsequent Domestic Violence charge, compliance with Crim.R. 32(C) is not required. *State v. Gwen*, 9th Dist. No. 25218, 2011-Ohio-1512, at ¶ 36 (2011).

The State argues that, the word “convicted” in R.C. 2919.25(D) refers only to a determination of guilt and not a judgment of conviction. As such, compliance with Criminal Rule 32(C) is not a prerequisite to proving a prior offense for purposes of increasing a subsequent charge. As explained by the Ninth District Court of Appeals, “[t]his is true for two reasons. First, the State may prove a prior conviction using evidence other than the sentencing entry from the prior case. Second, for the above described reasons, this Court believes that the General Assembly did not intend for the State to prove prior convictions by proving that the courts in each prior case had included all the elements required for satisfaction of Criminal Rule 32(C).” *McCumbers*, at 13.

One way that the State may prove a prior conviction is set forth in R.C. 2945.75(B)(1), which provides that, “[w]henver in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.” R.C. 2945.75(B)(1). However, R.C. 2945.75(B)(1) is not the exclusive method for proving prior convictions. See, e.g., *McCumbers* at ¶ 13, “citing *State v. Pisarkiewicz*, 9th Dist. No. CA 2996-M, 2000 WL 1533916 at *2 (Oct. 18, 2000);(citing *State v. Frambach*, 81 Ohio App.3d 834, 843 (1992); see also *State v. Jarvis*, 11th Dist. No. 98-P-0081, 1999 WL 1313645 at *2 (Dec. 23, 1999) witness

testimony may be sufficient to prove prior convictions); *State v. Chaney*, 128 Ohio App.3d 100, 105-06 (1998) (certified copies of docket sheets compared to current docket sheets may be sufficient to prove same person committed crimes); *State v. Cyphers*, 2d Dist. No. 97-CA-19, 1998 WL 184473 at *1 (Apr. 10, 1998).” *McCumbers*, at ¶ 13.

The Ninth District Court of Appeals holding, in both *Gwen* and *McCumbers*, that where the statutory language requires proof that the defendant has previously been convicted of or pleaded guilty to an offense, the word conviction refers to a determination of guilt and not a judgment of conviction which, therefore, does not require compliance with Crim.R. 32(C), is consistent with the Supreme Court of Ohio’s recent decision in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204.

In *Lester*, the Supreme Court of Ohio held that “when the substantive provisions of governing rule are contained in judgment of conviction, the trial court’s omission of how the defendant’s conviction was effected, i.e., the ‘manner of conviction,’ does not prevent the judgment of conviction from being an order that is final and subject to appeal.” *Id.*, at paragraph three of the syllabus.

The State acknowledges that a conflict has been certified in this case; however, the *Finney* case is distinguishable from the instant case. In *Finney*, the Sixth District Court of Appeals determined that the trial court correctly granted *Finney*’s motion to dismiss the prior-offense specifications in the indictment due to

insufficient evidence. See, *State v. Finney*, 6th Dist. No. F-06-009, 2006-Ohio-5770 at ¶ 18.

The Sixth District Court of Appeals in *Finney* held that “the state was required to prove the prior convictions by providing a judgment of conviction executed in conformity with Crim.R. 32(C).” *Id.* The Court relied, in part, on *State v. Henderson*, 58 Ohio St.2d 171 (1979).

In *Henderson*, the Ohio Supreme Court held that, “[t]o constitute a prior conviction for a theft offense, there must be a judgment of conviction, as defined in Crim.R. 32(B), for the prior offense.” *State v. Henderson*, 58 Ohio St.2d 171, paragraph two of the syllabus (1979). The statutory language that was interpreted by the Ohio Supreme Court in *Henderson* differs significantly from the language at issue here.

In *Henderson*, the Court examined a theft statute that provided, in relevant part, that a violation of the statute was a misdemeanor petty theft offense unless one of the specifically articulated conditions was satisfied. *Id.*, at 172-73, quoting former R.C. 2913.02(B). Specifically, in *Henderson*, the condition at issue was “if the offender has previously been convicted of a theft offense, then violation of this section is grand theft, a felony of the fourth degree.” *Id.* at 173, R.C. 2913.02(B).

In contrast, in this case, the statutory language at issue states “if the offender has pleaded guilty to or been convicted of ***.” R.C. 2919.25(D)(3) and (D)(4).

It is clear that, in choosing this specific language at issue in this case, the General Assembly placed 'convicted' on equal footing with a guilty plea. See, e.g., *State ex rel. Watkins v. Fiorenzo*, 71 Ohio St.3d 259, 260 (1994).

Since the General Assembly specifically said that evidence of a prior guilty plea is sufficient to enhance the level of the offense under the Domestic Violence statute, it is very unlikely that the legislature intended for the word "convicted" in the same phrase to require evidence to establish all of the elements of Crim.R. 32(C). The State argues that, to hold otherwise, would place a much higher burden on the State to prove prior offenses of a defendant who had the foresight to plead no contest or not guilty, than it would to prove those of an offender who pleaded guilty to prior charges. The legislature could not have intended for this result.

In this case, Gwen was charged with Domestic Violence, a felony of the third degree. As such, the State had the burden of showing that Gwen had either pled guilty or was convicted in two prior cases.

Prior to trial, Gwen filed a motion to stipulate to his prior convictions and to prevent the State from introducing evidence of those convictions, on September 21, 2009. (See, Trial Docket Number 33). On the date of trial, Gwen orally withdrew his motion. (Tr. 303).

The matter proceeded to trial and the State presented its case and sought to introduce State's Exhibits Three and Four, which contained the journal entries of

Gwen's prior convictions, into evidence. Gwen objected and challenged the admissibility of these journal entries.

Gwen was convicted of Domestic Violence, in violation of R.C. 2919.25(A), a felony of the third degree, based on two prior convictions. However, the appellate court reversed the enhancement from a felony of the third degree to a felony of the fourth degree, holding that State's Exhibit Three was insufficient, under R.C. 2945.75(B)(1), for purposes of proving a prior Domestic Violence conviction because "it is unclear how the court disposed of the case[,] noting that the trial court did not indicate whether the defendant had pled guilty, was found guilty, or if the case was disposed of by other means." *State v. Gwen* (2011), 9th Dist. No. 25218, 2011-Ohio-1512, at ¶ 28.

State's Exhibit Three included a journal entry from Akron Municipal Court. The certified copy of the Akron Municipal Court journal entry contains a handwritten notation of Domestic Violence Menacing, a fourth degree misdemeanor. The handwritten notation next to Count One appears as follows: "2/01 [illegible word] to D.V.-M4 Menacing." The entry reflects that Gwen was ordered to complete the "Time Out" program and that Gwen was ordered to pay \$140.00 for the charge of contempt contained in Count Two. The trial court judge signed and dated the journal entry on the area of the preprinted form where there is a blank space for a second count.

The State contends that State's Exhibit Three is a final appealable order, subject to appeal, because it contains evidence of the four requirements set forth by the Supreme Court of Ohio, to wit: (1) the fact of a conviction; (2) the sentence; (3) the judge's signature; and (4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester, supra*, at ¶ paragraph one of the syllabus, explaining Crim.R. 32(C), and modifying *State v. Baker*, 119 Ohio St.3d 197 (2008).

The journal entry contains a handwritten notation as to the charge of "DV Menacing." (App. A-9). Immediately before the handwritten notation of the charge, there is an illegible word which appears to have been cut off. (App. A-9). The trial court noted that the word was cut off and guessed that it could have said: amended, modified or pled. (Tr. 300). The trial court further noted that the trial court judge acted as if a guilty plea had been entered since a sentence was pronounced. (Tr. 300).

A review of the journal entry shows that the trial court clearly sentenced Gwen on the Domestic Violence charge, ordering a fine and suspended a term of incarceration of thirty days on the condition that Gwen complete the Time Out program. The entry is signed by the judge and is journalized by the clerk of courts.

In accordance with *Lester*, the journal entry was a final appealable order because it complies with the purpose of Crim.R. 32(C), which is to ensure that a defendant is on notice that a final appealable order has been issued against him and

the time for filing an appeal had begun to run. *Lester*, supra, at ¶ 10. The Supreme Court of Ohio has held that “when the substantive provisions of Crim.R. 32(C) are contained in a judgment of conviction, the trial court’s omission of how the defendant’s conviction was effected, i.e., the ‘manner of conviction,’ does not prevent the judgment of conviction from being an order that is final and subject to appeal. Criminal R. 32(C) does not require a judgment entry of conviction to recite the manner of conviction as a matter of substance, but it does require a judgment entry of conviction to recite the manner of conviction as a matter of form. The identification of the particular method by which a defendant was convicted is merely a matter of orderly procedure rather than of substance.” *Id.* ¶ 12.

In this case, the journal entry in State’s Exhibit Three recited the manner of conviction as a matter or form. Consequently, the court of appeals conclusion that the exhibit was insufficient because it was unclear how the court disposed of the case since the trial court did not indicate whether the defendant had pled guilty, was found guilty, or if the case was disposed of by other means was improper in light of *Lester*; however, the appellate court’s analysis was based on *Baker* which was the law at the time that the case was decided.

Furthermore, the State argues that, if the municipal court journal entry was not a final, appealable order and if Gwen had raised the issue prior to the

conclusion of the State's case, the trial court could have corrected the error. The Ninth District Court of Appeals had held that when a sentencing order fails to comply with Crim.R. 32(C), the order is not final and the trial court therefore can reconsider its earlier decisions where it had not yet entered a final, appealable order pursuant to Crim.R. 32(C). *State ex. rel. Cordray v. Burge*, Ohio App. Ninth Dist. No. 09 Ca 09724, 2010-Ohio-3009, at ¶ 18 (2010). Thus, the Akron Municipal Court judge could have reconsidered its decision and issued a decision that clearly identified the type of plea entered by Gwen.

Turning to State's Exhibit Four, Gwen argues that it was inadmissible because it contained a typographical error and he argues that the State should have had corrected the error by obtaining a nunc pro tunc journal entry to correct the level of the Domestic Violence charge set forth in the journal entry. Gwen presents no authority for the proposition that a typographical error of the level of the offense renders the conviction to be null and void. Moreover, even if the journal entry was not evidence of a "conviction," it is evidence that Gwen pled guilty to a domestic violence offense in accordance with R.C. 2919.25(D)(4).

At trial, Gwen admitted that he pled guilty to the Domestic Violence charge involving Fannin in 2002. (Tr. 343). And, Fannin testified that Gwen pled guilty to Domestic Violence as reflected in State's Exhibit 4. (Tr. 215-218). Therefore, the State presented sufficient evidence that Gwen had pled guilty in that case.

The State respectfully asks that this Court reject Gwen's Proposition of Law and to instead hold that, when statutory language requires proof that the defendant has previously been convicted of or pleaded guilty to an offense, the word "convicted" is on equal footing with the phrase "guilty plea" which means that the word "convicted" refers only to a determination of guilt and not a judgment of conviction. Therefore, compliance with Criminal Rule 32(C) is not a prerequisite to proving a prior offense for purposes of increasing a subsequent charge.

Moreover, the journal entries in this case were final orders subject to appeal. The judgments set forth: (1) the fact of a conviction; (2) the sentence; (3) the judge's signature; and (4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester, supra*, at ¶paragraph one of the syllabus, explaining Crim.R. 32(C), and modifying *State v. Baker*, 119 Ohio St.3d 197 (2008).

"A nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken." *Id.* at paragraph two of the syllabus. Therefore, even a nunc pro tunc journal entry had been sought to correct any clerical omissions, the final appealable order would have been the entries that were contained in State's Exhibits Three and Four.

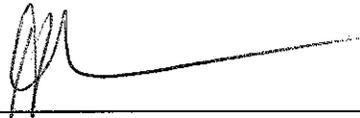
Gwen's Proposition of Law should be rejected.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Neil P. Agarwal, 3766 Fishcreek Road, #289, Stow, Ohio 44224-4379 on the 28th day of February, 2012.



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