

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

vs.

JASON T. BODE,

Appellant.

CASE NO. 13-1044

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

Court of Appeals
Case No. 12-CA-33

MEMORANDUM IN RESPONSE

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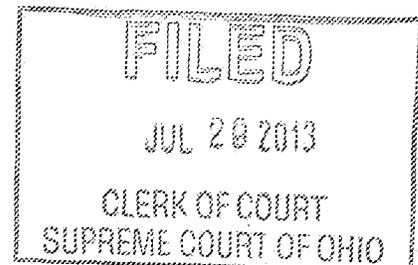


TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN RESPONSE TO APPELLANT’S PROPOSITION OF LAW.....	6
APPELLANT’S PROPOSITION OF LAW.....	6
An uncounseled juvenile adjudication for operating a vehicle under the influence of alcohol (OVI), without a valid waiver of counsel, can not be used to enhance subsequent OVI charges when the juvenile is ordered to complete a 3-day driver intervention program (DIP), subject to potential detention if the DIP is not completed	
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9

**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case does not involve a substantial constitutional question and does not involve a matter of great general or public interest. The issue of when an uncounseled prior conviction may be used to enhance a subsequent offense was considered and decided by the United States Supreme Court in *Scott v. Illinois* (1979), 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 and *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745, overruling *Baldasar v. Illinois* (1980), 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169. In *Scott v. Illinois*, the United States Supreme Court held that the right to counsel does not apply when the sentence imposed does not include actual imprisonment. *Scott v. Illinois*, 440 U.S. 367. In *Scott*, the Illinois statute under which the defendant was convicted set a maximum penalty of a \$500 fine or one year in jail, or both. *Id.* at 368. Following *Scott*, the United States Supreme Court held that an uncounseled conviction may be used to enhance the sentence of a subsequent offense when the uncounseled conviction is valid under *Scott*. *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745, overruling *Baldasar v. Illinois* (1980), 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169.

In the present case, Appellant's juvenile conviction led to him being sentenced to a Teenage Impact Program but no term of confinement was imposed. During his attendance at the Teenage Impact Program, Appellant "was not confined in the facility, he was not under the supervision of guards, and was permitted to wear his ordinary clothes and carry personal affects." Entry, Apr. 2, 2012. The trial court found that in the juvenile adjudication, "the court ordered no term of incarceration, whether actual or suspended, as

a result of the adjudication of [Appellant's] conduct." Entry, Apr. 2, 2012. On appeal, the Fifth District Court of Appeals also found that Appellant was not sentenced to a term of confinement. That court explained:

Our review of the trial record indicates that Bode was never imprisoned for the juvenile OVI adjudication. Nor did the juvenile court impose a sentence of incarceration and then suspend the jail time on the condition that Bode complete a treatment program. When Bode failed to appear for a court hearing to discuss his participation in an aftercare program, the juvenile court forwarded his driver[s] license and the ticket to the Ohio Bureau of Motor Vehicles and closed the case. *State v. Bode*, at ¶ 32.

The trial court and the appellate court both correctly followed the guidance of the United States Supreme Court.

The decision of the Fifth District Court of Appeals is also consistent with the decision rendered by Eighth District Court of Appeals in *City of Parma v. Romain*, 8th Dist. No. 87133, 2006-Ohio-3952. In that case, the defendant was placed in an alcohol treatment program pursuant to a statute which mandated that the defendant either receive jail time or receive time in the program. *Id.* at ¶ 21. Because of that statute, the defendant's only options were to complete the program or serve jail time. *Id.* at ¶ 23. The Eighth District held, "the statute is mandatory, not discretionary, and we find the mandatory nature of the statute controlling. So 'actual imprisonment,' as contemplated by *Alabama v. Shelton*, did occur in this case." *Id.*, citing *Alabama v. Shelton* (2002), 535 U.S. 654, 662, 122 S.Ct. 1764, 152 L.Ed.2d 888.

The present case involved the application of the United States Supreme Court's guidance to the facts at bar. It did not present a substantial constitutional question or a question of great public or general interest and the State requests that this Court decline to accept jurisdiction on Appellant's Proposition of Law.

STATEMENT OF THE CASE AND FACTS

On January 6, 2011, the Fairfield County Grand Jury indicted Appellant, Jason T. Bode, for five counts of OVI, each with a specification that he had previously been convicted of or pleaded guilty to five or more equivalent offense. Indictment, Jan. 6, 2011. On February 16, 2012, the State orally moved the trial court to sever Counts One through Three from Counts Four and Five of the Indictment. Entry, May 2, 2012. There was no objection from Appellant. Entry, May 2, 2012. The trial court granted this motion. Entry, May 2, 2012.

On March 1, 2012, Appellant filed a motion asking the trial court to exclude or suppress evidence of Appellant's prior OVI conviction in 1996 and his juvenile OVI adjudication in 1992. Defendant's Motion in Limine/Motion to Suppress, Mar. 1, 2012. The trial court heard evidence regarding this motion on March 14, 2012. Hearing Transcript (H.Tr.), Mar. 14, 2012. In a written entry, the trial court overruled this motion. Entry, Apr. 2, 2012.

On April 5, 2012, Appellant filed a motion to dismiss Counts One through Three of the Indictment, alleging that the State had failed to bring Appellant to trial within the statutory time period. Defendant's Motion to Dismiss, Apr. 5, 2012. After an oral hearing on the motion to dismiss, the trial court overruled it. Entry, May 2, 2012.

Appellant entered pleas of “no contest” to Count Three and Count Five of the Indictment and to the specification to each count. Judgment Entry of Sentence, June 26, 2012. He was sentenced to a three years of mandatory prison time followed by 54 months of non-mandatory prison. Judgment Entry of Sentence, June 26, 2012. The court suspended the execution of the non-mandatory prison time for a five year period of community control to begin upon Appellant’s release from incarceration. Judgment Entry of Sentence, June 26, 2012. On May 22, 2013, the Fifth District Court of Appeals affirmed the trial court’s decision. *State v. Bode*, Fifth Dist. No. 12-CA-33.

ARGUMENT

RESPONSE TO APPELLANT’S PROPOSITION OF LAW

An uncounseled juvenile adjudication for operating a vehicle under the influence of alcohol (OVI), without a valid waiver of counsel, can not be used to enhance subsequent OVI charges when the juvenile is ordered to complete a 3-day driver intervention program (DIP), subject to potential detention if the DIP is not completed.

In *Scott v. Illinois*, the United States Supreme Court held that the right to counsel does not apply when the sentence imposed does not include actual imprisonment. *Scott v. Illinois* (1979), 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383. In *Scott*, the Illinois statute under which the defendant was convicted set a maximum penalty of a \$500 fine or one year in jail, or both. *Id.* at 368. In *Nichols v. United States*, the United States Supreme Court overruled its decision in *Baldasar v. Illinois*, and held that an uncounseled conviction may be used to enhance the sentence of a subsequent offense when the uncounseled conviction is valid under *Scott*. *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745, overruling *Baldasar v. Illinois* (1980), 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169.

In the present case, Appellant's juvenile conviction led to him being sentenced to a Teenage Impact Program but no term of confinement was imposed. The Teenage Impact Program "was designed to address substance abuse and dependence in persons between the ages of thirteen and eighteen years old." Entry, Apr. 2, 2012. During his attendance at the Teenage Impact Program, Appellant "was not confined in the facility, he was not under the supervision of guards, and was permitted to wear his ordinary clothes and carry personal affects." Entry, Apr. 2, 2012. Appellant's person and belongings "were subject to search during his participation in the program for the limited purpose of maintaining an intoxicant-free environment." Entry, Apr. 2, 2012. The trial court found that in the juvenile adjudication, "the court ordered no term of incarceration, whether actual or suspended, as a result of the adjudication of [Appellant's] conduct." Entry, Apr. 2, 2012.

The Fifth District Court of Appeals affirmed the trial court's decision, finding that the Teenage Impact Program did not amount to confinement. *State v. Bode* at ¶ 35. The appellate court noted, "When Bode failed to appear for a court hearing to discuss his participation in an aftercare program, the juvenile court forwarded his driver license and the ticket to the Ohio Bureau of Motor Vehicles and closed the case." *State v. Bode*, at ¶ 32. "There is no evidence that the juvenile court reserved the right to reinstate suspended time in the future. Bode was not placed on any probation or community control sanction that could subject him to incarceration in the future as punishment for his juvenile OVI conviction." *Id.* at ¶ 34.

The appellate court's decision is consistent with its earlier opinion in *State v. Williams*, Fifth Dist. No. 02CA00017, 2002-Ohio-4244, and the Eight District Court of

Appeals' decision in *City of Parma v. Romain*, Eighth Dist. No. 87133, 2006-Ohio-3952. In *State v. Williams*, the Fifth District Court of Appeals held that a suspended jail sentence is a term of confinement imposed. *State v. Williams*, Fifth Dist. No. 02CA00017, 2002-Ohio-4244, at ¶ 17-19. In that decision, the court relied on the United States Supreme Court's holding in *Alabama v. Shelton* that, "A suspended sentence is a prison term imposed for the offense of conviction." *Williams* at ¶ 18, quoting *Alabama v. Shelton* (2002), 535 U.S. 654, 662, 122 S.Ct. 1764, 152 L.Ed.2d 888. The present case is distinguishable from *Williams* because, in Appellant's juvenile case, he was sentenced to a Teenage Impact Program but no term of confinement was imposed. It is more akin to *Scott*, where confinement may have been an authorized penalty, but was not the imposed penalty. See *Scott*, 440 U.S. at 369. Although confinement in a detention center may have been an option available to the juvenile court if Appellant did not complete the Teenage Impact Program, there were also other, non-detention options available to the juvenile court if Appellant had failed to comply with its order. R.C. 2152.21.

In *City of Parma v. Romain*, the Eighth District Court of Appeals considered whether a three-day alcohol treatment program amounted to incarceration. *City of Parma v. Romain*, 8th Dist. No. 87133, 2006-Ohio-3952. In that case, the defendant was placed in an alcohol treatment program pursuant to a statute which mandated that the defendant either receive jail time or receive time in the program. *Id.* at ¶ 21. Because of that statute, the defendant's only options were to complete the program or serve jail time. *Id.* at ¶ 23. The Eighth District held, "the statute is mandatory, not discretionary, and we find the mandatory nature of the statute controlling. So 'actual imprisonment,' as contemplated by *Alabama v.*

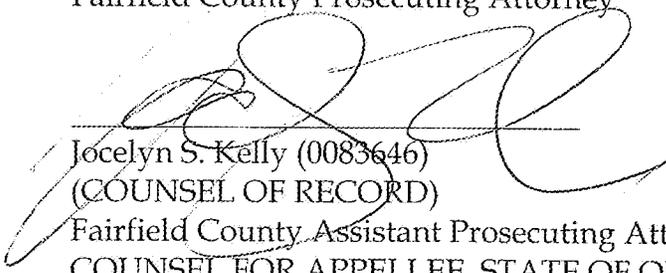
Shelton, did occur in this case.” *Id.*, citation omitted.

The present case involved the application of the United State Supreme Court’s guidance to the facts at bar. It did not present a substantial constitutional question or a question of great public or general interest and the State requests that this Court decline to accept jurisdiction.

CONCLUSION

For the reasons discussed above, this felony case neither involves a matter of public or great general interest nor presents a substantial constitutional question. We respectfully request that this Court deny leave to appeal.

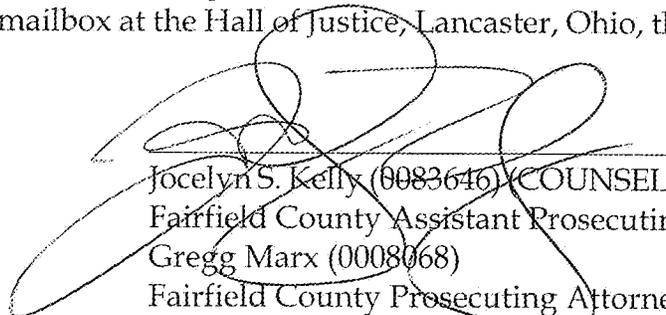
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum in Response was served upon Scott P. Wood, Counsel for Appellant, via delivery to his courthouse mailbox at the Hall of Justice, Lancaster, Ohio, this 29th day of July, 2013.



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