ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Supreme Court Case No.: 13-1044**
Appellee,	:	On Appeal from the Fairfield County Court of Appeals, Fifth Appellate District
v.	:	
JASON T. BODE,	:	
Appellant.	:	

MERIT BRIEF OF APPELLANT, JASON T. BODE

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SUPREME COURT OF OHIO

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STATEMENT OF FACTS

On May 28, 2011, Appellant Jason T. Bode (hereinafter "Bode") was arrested by Officer David Thompson of the Lancaster Police Department and charged with operating a vehicle under the influence of alcohol ("OVI"), in violation of O. R.C. §4511.19(A)(1)(A), and was cited into the Fairfield County Municipal Court under Case Number TRC-11-5042.

On December 29, 2011, while the Fairfield County Municipal Court case number TRC-11-5042 was still pending, Bode was arrested by Officer Brian St. Clair of the Lancaster Police Department and again charged with an OVI, in violation of O.R.C. §4511.19(A)(1)(A). This second case was filed as a felony complaint in the Fairfield County Municipal Court under case number CRA-11-3348, but was subsequently dismissed by the State for future indictment.

On January 6, 2012, Bode was indicted by the Fairfield County Grand Jury under case number 12-CR-6 and charged with five counts of OVI with specifications to each of those counts. Counts 1, 2 and 3 related to Bode's arrest on May 28, 2011, and Counts 4 and 5 related to Bode's arrest on December 29, 2011. The specifications to all counts in the Indictment alleged 5 OVI convictions within the 20 years prior, which subjected Appellant Bode to one to five years of additional, mandatory prison time pursuant to O.R.C. §2941.1413. Four of Bode's prior OVI convictions were as an adult in the years of 1996, 1997, 1998 and 1998. The remaining OVI conviction was a juvenile adjudication in 1992 in Franklin County Juvenile Court.

At his arraignment, Bode entered pleas of not guilty to all counts and specifications in the Indictment.

On March 1, 2012, Bode filed a Motion in Limine/Motion to Suppress to exclude or suppress Bode's prior OVI juvenile adjudication in 1992 on the basis that Bode did not have legal counsel nor did Bode validly waive his right to legal counsel at the time of the juvenile adjudication in 1992.

On March 14, 2012, an oral hearing was held on Bode's Motion in Limine/Motion to Suppress, which was overruled by the trial court by written decision filed April 2, 2012. A copy of the Entry Overruling Appellant's Motion in Limine/Motion to Suppress is attached hereto and marked Exhibit A-1.

On May 2, 2012, pursuant to a plea agreement with the State of Ohio, Bode entered pleas of no contest to, and was found guilty by the trial court of, Counts 3 and 5 of the Indictment, with the specifications. The remaining counts and specifications in the Indictment were dismissed by the State pursuant to the plea agreement.

On June 8, 2012, the trial court sentenced Bode to a total of 8-1/2 years in prison, with 5-1/2 years suspended for community control and 3 years to serve of mandatory prison time. A copy of the Judgment Entry of Sentence is attached hereto and marked Exhibit A-2.

On June 27, 2012, Appellant appealed a number of issues to the Fifth District Court of Appeals.

On May 22, 2013, the Fifth District Court of Appeals affirmed the trial court. A copy of the Opinion and Judgment Entry are attached hereto and marked Exhibit A-3.

Bode is currently in a state penal institution serving the sentence imposed by the trial court and upheld by the Fifth District Court of Appeals. Appellant has already served nearly 2 years of the imposed mandatory prison sentence.

ARGUMENT

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.**

Both the United States Supreme Court and this Court have held that an uncounseled conviction without a valid waiver of counsel can not be used to enhance a sentence of a later conviction. *Baldasar v. Illinois* (1980), 446 U.S. 222; *Nichols v. United States* (1994), 511 U.S. 738; *State v. Brandon* (1989), 45 Ohio St. 3d 85; *State v. Brooke* (2007), 113 Ohio St. 3d 199. As a result, this Court has recognized the ability of a defendant to collaterally attack a prior uncounseled conviction as constitutionally infirm. *Brooke, supra.*

In this case, the State enhanced the OVI charges against Bode to the felony level and indicted him with specifications by using, in part, Bode's prior juvenile adjudication in Franklin County Juvenile Court in 1992 for OVI.

In his Motion in Limine/Motion to Suppress, Bode requested the trial court to exclude or suppress his juvenile OVI adjudication for OVI in 1992 on the basis that the adjudication was uncounseled and without a valid waiver of counsel. In its decision, the trial court found that Bode's juvenile OVI adjudication in 1992 was uncounseled and without a valid waiver of counsel. However, the trial court went on to find that the juvenile court's order to complete a 3-day Driver Intervention Program ("DIP") was not confinement and, therefore, although uncounseled and without a valid waiver of counsel, the juvenile adjudication could be used by the State to enhance the OVI's to the felony level and pursue the specifications.

An uncounseled conviction cannot be used to enhance the penalties for a later conviction if the earlier conviction resulted in a sentence of confinement. *Nichols, supra; Brooke, supra*. So the issue presented in this case is whether a juvenile court order to complete a Driver Intervention Program is considered confinement.

Bode submits that the juvenile court order to complete a Driver Intervention Program is confinement. Although this Court has not addressed this specific issue, several appellate districts have held that a sentence of suspended jail time with an order to complete a Driver Intervention Program is confinement because the failure to complete the Driver Intervention Program can result in actual incarceration. *State v. Williams* (2002), Ohio App. Fifth Dist., 2002-WL-1902879; *City of Parma v. Romain* (2006), Ohio App. Eighth Dist., 2006-WL-2170600; *State v. Noble* (2007), Ohio App. Ninth Dist., 2007-WL-4554247.

Bode concedes that a disposition in juvenile court for a juvenile traffic offender does not permit a juvenile court to order a "suspended" incarceration, as is possible in the adult court system. *See* O.R.C. §2152.21 and former O.R.C. §2151.356. However, if a juvenile fails to comply with any dispositional order of the juvenile court for a juvenile traffic offense, including failing to complete a Driver Intervention Program for a juvenile OVI offender, a juvenile court can make any disposition available for a delinquency case, including detention in a juvenile detention facility. *See* R.C. §2152.21(A)(6) and former R.C. §2151.356(A)(7). In essence, a juvenile court order to complete a Driver Intervention Program is a suspended sentence since, if the juvenile fails to complete the program, the juvenile is subject to confinement in a juvenile detention facility.

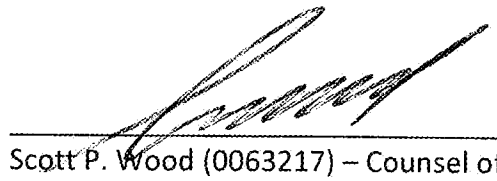
As set forth by the Eighth District in *Parma v. Romain, supra*, at ¶20:

> "While it is true the three day alternative to jail is served in a hotel setting rather than a jail, and the focus is on education and treatment, not punishment, participants are not free to leave and must comply with the program format. Under *Alabama v. Shelton, supra*, suspended sentences amount to "actual imprisonment" where there is the possibility that there may be an actual deprivation of a person's liberty. Since Appellant had no options other than to either complete the three day program or serve the time in jail, a deprivation of his liberty did occur."

Since Bode's juvenile adjudication for OVI in 1992 was uncounseled with no valid waiver of counsel and since the failure to complete the Driver Intervention Program subjected Bode to the potential punishment of detention, the lower courts erred in not excluding or suppressing that adjudication.

CONCLUSION

Bode requests the Court to reverse his felony convictions and remand the case back to the trial court for Bode to be sentenced for two misdemeanor violations of operating a vehicle under the influence of alcohol.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief was provided by Ordinary U.S. Mail Service, postage prepaid, to Jocelyn Kelly/Gregg Marx, Fairfield County Prosecutor's Office, 239 West Main Street, Suite 101, Lancaster, Ohio 43130, on this 17th day of January, 2014.

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APPENDIX

APPX. PG

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Judgment Entry of Sentence, filed June 26, 2012.....A-2

Fifth District Court of Appeals Opinion and Judgment Entry, filed May 22, 2013.....A-3

FILED

IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY, OHIO

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DEBORAH SHALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

THE STATE OF OHIO	:	
Plaintiffs,	:	Case No. 12 CR 6
v.	:	Judge Berens
JASON T. BODE,	:	ENTRY Overruling Defendant's Motion in Limine/Motion to Suppress
Defendants.	:	

This matter is before the Court upon Defendant's Motion in Limine/ Motion to Suppress, filed March 1, 2012. The Court held an oral hearing on that motion on March 14, 2012, at which time the Court heard the testimony of Defendant and Mary Sue Taub, a court reporter for the Franklin County Juvenile Court. The parties have filed written arguments, which the Court has considered. For the following reasons, Defendant's motion is **OVERRULED**.

STATEMENT OF THE CASE

Defendant stands indicted in this case for Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, a felony of the fourth degree, in violation of R.C. 4511.19. The indictment contains a specification that Defendant has previously been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the currently alleged offense. The motion currently before the Court pertains to one of those alleged previous convictions, Franklin County Juvenile Court Case Number T295072 on February 13, 1992.

FINDINGS OF FACT

From the evidence adduced at the oral hearing, including the testimony of Defendant Jason T. Bode and Mary Sue Taub, and the exhibits admitted into evidence, the Court makes the following findings of fact:

EXHIBIT
A-1

1. In 1992, Defendant appeared before the Franklin County Juvenile Court for a juvenile adjudication for operating a motor vehicle under the influence in Case Number T295072.
2. On January 14, 1992, Defendant was granted a continuance of the hearing in that matter to February 13, 1992 in order to have an opportunity to obtain counsel.
3. On February 13, 1992, Defendant admitted to the offense in Case Number T2905072. Defendant was sentenced on that date to pay $50 for fines and costs, was referred to the TIP (Teenage Impact Program) Program, was ordered to complete any recommended aftercare, and received a one-year suspension of his driver's license. The court further stated that it would review Defendant's participation in the TIP Program in May 1992 to consider reducing the length of the driver's license suspension. **Defendant was not sentenced to a period of incarceration or suspended incarceration in Case Number T2905072.**
4. Defendant was not represented by counsel at any stage of the proceedings in Case Number T2905072.
5. There was no credible testimony on whether the court in Case Number T2905072 strictly or substantially complied with Juv.R. 29(D) or whether the court advised defendant of any Constitutional or statutory right to counsel. Defendant signed no written waiver of rights.
6. At the time, Defendant was on juvenile probation arising from another juvenile adjudication. Defendant was later given a 90-day period of incarceration in the Department of Youth Services as a condition of that probation, in part as a result of the conviction in Case Number T2905072.

7. Defendant attended the TIP Program at Maryhaven for either an overnight program or for a three-day program. During that time, Defendant was not confined in the facility, was not under the supervision of guards, and was permitted to wear his ordinary clothes and carry personal effects. In addition, Defendant's person and belongings were subject to search during his participation in the program for the limited purpose of maintaining an intoxicant-free environment.

8. The TIP Program was designed to address substance abuse and dependence in persons between the ages of thirteen and eighteen years old.

CONCLUSIONS OF LAW

Defendant has been indicted for Operating a Motor Vehicle Under the Influence of Drugs or Alcohol as a felony of the fourth degree. One of the essential elements of that offense is the number of Defendant's prior convictions for similar offenses. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 8. At any trial on this matter, the State would have the burden of proving the existence of those convictions beyond a reasonable doubt. *Id.* Defendant's motion does not challenge the existence of previous convictions, but seeks to limit the State's use of evidence pertaining to those convictions.

Defendant's motion asserts that his conviction in Case Number T290572 as constitutionally infirm because Defendant was not represented by an attorney and was not properly advised of his right to such representation. In so doing, Defendant is exercising his limited right to attack a prior conviction on Constitutional grounds under *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, and its progeny. The Ohio Supreme Court has stated that *Nichols* stands for the proposition that "[a]n uncounseled conviction cannot be used to enhance the penalty for a later offense if the earlier conviction resulted in a sentence of confinement."

Brooke, at ¶ 12. Although the burden of proving the prior convictions beyond a reasonable doubt would fall upon the State at any trial on this matter, R.C. 2945.75(B)(3) states that the defendant has the burden of proving any "constitutional defect in any prior conviction" by a preponderance of the evidence.

The Court recognizes that the type of offense involved in the prior conviction bears upon the analysis of whether any right to counsel was properly advised and waived. *See Brooke* at ¶ 13 (highlighting the distinction between pleas to "serious" and "petty" offenses). Therefore, the Court must be mindful that the offense at issue in this case was a juvenile adjudication. Decisions of the U.S. Supreme Court have established the existence of a right to counsel in juvenile proceedings in cases where the juvenile faces commitment to an institution. *See e.g. In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967). That right is not identical to an adult's right to counsel; it arises not under the 6th Amendment (because juvenile proceedings are not considered criminal proceedings), but under Due Process. *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 80. Therefore, the relevant inquiry as it pertains to juvenile adjudications is whether the procedure followed "ensure[d] order and fairness." *Id.* at ¶ 82.

The juvenile right to counsel has been codified in two places in Ohio law. First, R.C. 2151.352 provides (and provided at the time of Defendant's adjudication in Case Number T290572) that a juvenile has a right to counsel at all stages of a juvenile proceeding. However, courts have recognized that R.C. 2151.352 establishes a right to counsel in juvenile proceedings that goes beyond the Constitution's requirements. *In re C.S.* at ¶ 83. In addition, Juv.R. 4(A) states that every party in a juvenile proceeding has a right to counsel, and Juv.R. 29(B) sets forth the procedure relating to waiver of that right.

Strict compliance with Juv.R. 29(D) is the preferred practice for accepting an admission

from a juvenile, but substantial compliance will suffice "absent a showing of prejudice or a showing that the totality of the circumstances does not support a finding of a valid waiver." *In re A.E.*, 5th Dist. 10-CA-107, 2011-Ohio-4746, ¶ 29. For purposes of accepting a juvenile admission, "substantial compliance means that in the totality of the circumstances, the juvenile subjectively understood the implications of his plea." *In re C.S.* at ¶ 113.

The evidence adduced at the hearing on the issue of whether the court complied with Juv.R. 29 was not credible. Both witnesses were testifying about events that happened twenty years prior and neither witness was able to claim accurate recall of the events on that date. Defendant stated that he was sure that he had not been advised of his right to an attorney, but he testified as to a lack of recall about other events during that same hearing. Mary Sue Taub testified that the magistrate who presided over the hearing had a regular practice of advising juveniles of their right to counsel almost to the point of "overkill," but acknowledged that it was possible he had not done so with respect to Defendant. It was established, however, that Defendant was unrepresented by counsel in the proceedings in Case Number T290572.

The Court is therefore faced with the question of whether Defendant waived his right to representation. As in an adult case, "an effective waiver of the right to counsel by a juvenile must be voluntary, knowing, and intelligent." *Id.* at ¶ 106. In addition, in juvenile cases and adult, "there is a strong presumption against waiver of the constitutional right to counsel." *Id.* at ¶ 105. Finally, it is well-settled that waiver of the right to counsel cannot be assumed from a silent record. *Brooke* at ¶ 25 (quoting *State v. Wellman*, 37 Ohio St.2d 162, 309 N.E.2d 915, at paragraph two of the syllabus). Although R.C. 2945.75(B)(3) places the burden of proving any Constitutional defect on Defendant, the Court finds that, where the evidence does not present facts from which the Court finds that Defendant made a knowing and intelligent waiver of is

rights, the Defendant may rest upon the strong presumption against waiver. In this instance, where the parties presented no evidence that the Court finds credible on the issue of waiver, the Court finds that Defendant established lack of waiver by a preponderance of the evidence. Therefore, the Court finds that Defendant's adjudication in Case Number T295072 was uncounseled and without a valid waiver of counsel.

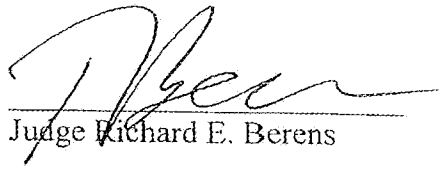
But that is not the end of the matter. The right to collaterally attack a prior conviction under *Nichols* and the later cases is limited. In *Brooke*, the Ohio Supreme Court noted the right of collateral attack is limited to cases in which the uncounseled conviction "resulted in a sentence of confinement." *Brooke*, at ¶ 12. Therefore, the Court must consider whether Defendant's juvenile adjudication in Case Number T295072 resulted in a sentence of confinement.

The Court finds that Defendant has not established that the adjudication in Case Number T295072 resulted in a sentence of confinement. First, the judgment entered against Defendant in that case did not order him to incarceration directly; in simple terms, Defendant was not sentenced to jail, prison, or incarceration in the Department of Youth Services. Defendant has argued that his participation in the TIP Program constituted incarceration or confinement, citing *State v. Williams*, 5th Dist. No. 02CA00017, 2002-Ohio-4244, *City of Parma v. Romain*, 8th Dist. No. 87133, 2006-Ohio-3952, and *State v. Noble*, 9th Dist. No. 07CA009083. However, in reviewing those decisions, the Court notes that each decision was based on the fact that the sentencing court had ordered the completion of a treatment program and the suspension of a period of incarceration. In fact, the *Williams* decision rested squarely on the proposition that a suspended sentence of incarceration is a term of confinement for purposes of determining the right to counsel. *Williams* at ¶ 18–19. This Court finds, based on the evidence from the hearing,

that in Case Number T295072 the court ordered no term of incarceration, whether actual or suspended, as a result of the adjudication of Defendant's conduct. Instead, the Juvenile Court ordered Defendant to participate in the TIP Program, which the Court does not find constituted incarceration. In addition, the 90-day confinement in the Department of Youth Services Defendant testified he served arose because the adjudication of Case Number T295072 resulted in a violation of Defendant's pre-existing juvenile probation. Therefore, that period of incarceration resulted from Defendant's probation and was not the result of a sentence imposed in Case Number T295072.

For that reason, the Court finds that Defendant's adjudication in Case Number T295072 did not result in a sentence of confinement. Therefore, the Court concludes that adjudication, although uncounseled and without a valid waiver of counsel, may be used to enhance the penalty for the offense for which Defendant currently stands indicted. Accordingly, the Court **OVERRULES** Defendant's motion.

IT IS SO ORDERED.



Judge Richard E. Berens

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IN THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

FILED

2012 JUN 26 AM 8:06

DEBORAH SHALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

The State of Ohio,

v.

Jason T. Bode

[redacted]

Defendant.

Case No. 2012-CR-0006

Judge Richard E. Berens

JUDGMENT ENTRY OF SENTENCE

EXHIBIT
A-2

Date of Plea:	May 2, 2012
Date of Sentencing:	June 8, 2012
Offense and Degree:	Count 3: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, F4, with Specification Count 5: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, F4, with Specification
Sentence:	Count 3: Twenty-four (24) mos., CRC, consecutive to Count 5, suspended for community control Specification as to Count 3: Mandatory one (1) year, CRC, consecutive to Count 3 Count 5: Thirty (30) mos., CRC, consecutive to Count 3, and Specification to Count 3, suspended for community control Specification as to Count 5: Mandatory two (2) years, CRC, consecutive to Count 5, Count 3, and Specification to Count 5 Lifetime Driver's License Suspension
Fine:	$1,350.00 on each Count, for a total of $2,700.00 Court costs, $25.00 application fee
Jail Credits:	169 days
Community Control:	Five (5) years

On June 8, 2012, Darren L. Meade, Assistant Prosecuting Attorney of Fairfield County, Ohio, appeared on behalf of the State of Ohio, and the Defendant, Jason T. Bode, appeared with his counsel, Scott Wood.

On January 12, 2012, the Defendant was indicted by the Grand Jury of Fairfield County, Ohio, during the First Part of the 2012 Term, for Count 1: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, in violation of §4511.19(A)(1)(a) and (G)(1)(d)(i) of the Ohio Revised Code, a felony of the fourth degree, with Specification

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to Count 1, in violation of §2941.1413 of the Ohio Revised Code; Count 2: Operating a Motor Vehicle under the Influence of Drugs or Alcohol, in violation of §4511.19(A)(2) and (G)(1)(d)(ii) of the Ohio Revised Code, a felony of the fourth degree, with Specification to Count 2, in violation of §2941.1413 of the Ohio Revised Code; Count 3: Operating a Motor Vehicle under the Influence of Drugs or Alcohol, in violation of §4511.19(A)(1)(f) and (G)(1)(d)(ii) of the Ohio Revised Code, a felony of the fourth degree, with Specification to Count 3, in violation of §2941.1413 of the Ohio Revised Code; Count 4: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, in violation of §4511.19(A)(1)(a) and (G)(1)(d)(i) of the Ohio Revised Code, a felony of the fourth degree, with Specification to Count 4, in violation of §2941.1413 of the Ohio Revised Code; and Count 5: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, in violation of §4511.19(A)(1)(h) of the Ohio Revised Code, a felony of the fourth degree, with Specification to Count 5, in violation of §2941.1413 of the Ohio Revised Code.

On January 12, 2012, the Defendant was arraigned on said indictment, and entered a plea of not guilty to the Counts as charged in the indictment.

On May 2, 2012, a plea hearing was held. The Defendant appeared with his counsel and withdrew his previously entered plea of not guilty to Count 3, with Specification, and Count 5, with Specification, as charged in the indictment and entered a plea of no contest to Count 3, with Specification, and Count 5, with Specification as charged. Defendant stipulated there were facts sufficient for a finding of guilt on both Counts and Specifications. Prior to the Court's acceptance of the Defendant's pleas, the Court personally addressed the Defendant and advised the Defendant of all the information and rights as required by Rule 11 of the Ohio Rules of Criminal Procedure. The Defendant indicated to the Court that he understood these rights and waived them orally and in writing. The Defendant indicated on the record that he is a citizen of the United States.

The Court then advised the Defendant of the sentences that could be imposed upon him in the event of a conviction on two counts of the offense of Operating a Motor Vehicle under the Influence of Drugs or Alcohol, with Specification to each count. The Court advised the Defendant that he was eligible for community control sanction or a combination of community control sanctions. The Court further advised the Defendant that violations of any community control sanctions could lead to a more restrictive sanction, a longer sanction, or a prison term as imposed at the sentencing hearing.

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The Court then determined that the Defendant was voluntarily, knowingly and intelligently pleading no contest to two counts of Operating a Motor Vehicle under the Influence of Drugs or Alcohol, with Specification to each count. Based on the plea and stipulation of sufficient facts for a finding of guilt, the Court found Defendant guilty of Count 3 and Count 5, as well as the Specification to each count.

The Court then dismissed Count 1, Count 2 and Count 4 of the Indictment.

The Court further notified the Defendant that he may be eligible to earn days of credit under the circumstances specified in Revised Code §2967.193, and further notified the Defendant that the days of credit are not automatically awarded under that section, but rather that they must be earned in the manner specified within that section and pursuant to Administrative Rules of the Ohio Department of Rehabilitation and Correction. The Defendant was advised that the total aggregate days of potential earned credit shall not exceed eight percent (8%) of the total number of days in Defendant's stated prison term.

The Court notified the Defendant that post-release control is **optional** in this case for a period of **three (3) years**, as well as the consequences for violating conditions of post-release control proposed by the Parole Board. The Court further notified the Defendant of all the items contained in Revised Code §2929.19(B)(2)(c), (d), (e) and (f). The Court further notified the Defendant that if a period of supervision by the Parole Board is imposed following the Defendant's release from prison and if the Defendant violates that supervision, or conditions of post-release control, that the Parole Board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the Defendant. The Defendant is ordered to serve as part of his sentence any term of post-release control imposed by the Parole Board and any prison term for violation of that post-release control.

On the date first mentioned above, a sentencing hearing was held. Darren L. Meade, Assistant Prosecuting Attorney, and Scott Wood, Counsel for the Defendant, were present, as was the Defendant, Jason T. Bode, who was afforded all rights, pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any victim impact statement, and pre-sentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code §2929.12.

The Court finds that the Defendant has been convicted on Count 3: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, in violation of

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§4511.19(A)(1)(f) and (G)(1)(d)(ii) of the Ohio Revised Code, a felony of the fourth degree, with Specification to Count 3, in violation of §2941.1413 of the Ohio Revised Code; of the Indictment and Count 5: Operating a Motor Vehicle Under the Influence of Drugs or Alcohol, in violation of §4511.19(A)(1)(h) of the Ohio Revised Code, a felony of the fourth degree, with Specification to Count 5, in violation of §2941.1413 of the Ohio Revised Code, of the Indictment.

The Defendant was sentenced, as to Count 3, to be confined in the Correctional Reception Center, Orient, Ohio, for a period of twenty-four (24) months. Said sentence was suspended for community control. As to the Specification to Count 3, the Court ordered the Defendant to serve a mandatory sentence of one (1) year, consecutive to Count 3. As to Count 5, the Defendant was sentenced to be confined in the Correctional Reception Center, Orient, Ohio, for a period of thirty (30) months. Said sentence was suspended for community control. As to the Specification to Count 5, the Defendant was ordered to serve a mandatory sentence of two (2) years, consecutive to Count 5. The sentences as to Count 3 and Count 5 are to be served consecutive to each other, for a total sentence on the underlying OVI offenses of fifty-four (54) months. Sentences as to the Specifications for Count 3 and Count 5 are to be served consecutive to each other, for a total mandatory sentence on the Specifications of three (3) years, which is to be served consecutively to and prior to the fifty-four (54) month sentence on the underlying OVI offenses in Count 3 and Count 5. Further, the Court imposed a lifetime driver's license suspension, as to Count 3 and Count 5, pursuant to §2925.03(D)(2), of the Ohio Revised Code.

The Court found that consecutive sentences were necessary pursuant to R.C. §2929.14(C)(4)(a), (b), and (c).

The Defendant is therefore ordered conveyed to the custody of the Ohio Department of Rehabilitation and Corrections. The Defendant shall be given credit for 169 days spent on these cases in the Fairfield County Jail, Lancaster, Ohio, as of June 8, 2012, and shall be given credit for any other days spent in the Fairfield County Jail, Lancaster, Ohio awaiting transport to the state penal institution.

It is further ordered that the Defendant shall forfeit to the Lancaster Police Department all interest, if any, which he may have in the 1994 Chevrolet SW Motor Vehicle (VIN No. 1GNFK16K8RJ440145).

Upon release from prison as to the mandatory sentences ordered by the Court on the Specifications to Count 3 and Count 5, the Court finds that a community control

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sanction will adequately punish the Defendant and will protect the public and that a community control sanction will not demean the seriousness of the offense. It is therefore ORDERED that for the total fifty-four (54) month sentence on Count 3 and Count 5, Defendant shall be sentenced to five (5) years of community control to begin after his release from prison, subject to the general supervision of the Adult Probation Department under any terms and conditions that it deems appropriate. The Defendant shall abide by all laws including, but not limited to, the laws related to firearms and dangerous ordinances. The Court further ORDERS specific sanctions and conditions upon the Defendant, a copy of which is attached hereto and made a part of this Entry as fully as if written herein. The Court advised the Defendant that failure to follow the rules of community control could result in revocation of community control and the prison term as setout herein ordered into execution.

The Court specifically ordered the following additional terms to Defendant's community control.

1. Defendant shall be evaluated for and successfully complete a community based correction facility program.

2. Defendant shall be monitored by GPS as the State's expense.

3. The Court further ordered Defendant to pay a $1,350.00 fine on Count 3 and a $1.350.00 fine on Count 5, for a total fine of $2,700.00.

Further, the Court ordered that if the Defendant was represented by a Court appointed attorney, then he is required to pay the $25.00 application fee for the Financial Disclosure/Affidavit of Indigency Form, which was processed, and the costs shall be added as court costs, if not already paid.

Defendant is to pay the costs of prosecution of this case as determined by the Fairfield County Clerk of Court. Judgment is hereby granted for the State of Ohio against the Defendant for those costs.

Richard E. Berens
Judge Richard E. Berens

Approved by:

Darren L. Meade (0063660)
Assistant Prosecuting Attorney

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CLERK OF COURTS
FAIRFIELD CO. OHIO

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Book 20 Pgs. 67-87

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 12-CA-33
JASON T. BODE	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Criminal appeal from the Fairfield County Court of Common Pleas, Case No. 12-CR-0006

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

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DARREN MEADE
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For Defendant-Appellant

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EXHIBIT
A-3

Gwin, P.J.

{¶1} Appellant Jason Bode ["Bode"] appeals from his convictions and sentences in the Fairfield County Court of Common Pleas on two counts of OVI, each with a specification that he had previously been convicted of or pleaded guilty to five or more equivalent offenses. The appellee is the State of Ohio.

Facts and Procedural History

{¶2} On May 28, 2011, Bode was arrested by Officer David Thompson of the Lancaster Police Department and charged with an OVI, in violation of R.C. 4511.19(A)(1)(1). He was cited into Fairfield County Municipal Court under Case Number TRC-11-5042.

{¶3} On December 29, 2011, while Case Number TRC-11-5042 was still pending in the Fairfield County Municipal Court, Bode was arrested by Officer Brian St. Clair of the Lancaster Police Department and charged with an OVI, in violation of R.C. 4511.19(A)(1)(A). This case was filed as a felony complaint in the Fairfield County Municipal Court under Case Number CRA-11-3348, but was subsequently dismissed by the state for future indictment.

{¶4} On January 6, 2012, Bode was indicted by the Fairfield County Grand Jury under Case Number 12-CR-6 and charged with five counts of OVI with specifications to each of those counts. Counts one, two and three related to Bode's arrest on May 28, 2011, and Counts four and five related to Bode's arrest on December 29, 2011.

{¶5} Count one of the Indictment was an OVI charge from May 28, 2011, based on Bode being under the influence, with an allegation of five OVI convictions in the 20 years prior, which made the charge a felony of the fourth degree. The specification to

Count one also alleged five OVI convictions in the 20 years prior, which subjected Bode to one to five years of additional, mandatory prison time pursuant to R.C. 2941.1413. Four of Bode's prior OVI convictions were as an adult in 1996, 1997, 1998 and 1998. The remaining OVI conviction was a juvenile adjudication in 1992 in Franklin County Juvenile Court.

{¶6} Count two was an OVI charge from May 28, 2011, based on Bode's refusal to submit to a chemical test, with an allegation of five OVI convictions in the 20 years prior, which made the charge a felony of the fourth degree. Count two also had a specification pursuant to R.C. 2941.1413.

{¶7} Count three was an OVI charge from May 28, 2011, based on Bode having a prohibited level of alcohol in his system as measured by a blood test, with an allegation of five OVI convictions in the 20 years prior, which made the charge a felony of the fourth degree. Count three also had a specification pursuant to R.C. 2941.1413.

{¶8} Count four was an OVI charge from December 29, 2011, based on Bode being under the influence with an allegation of five OVI convictions in the 20 years prior, which made the charge a felony of the fourth degree. Count four also had a specification pursuant to R.C. 2941.1413.

{¶9} Count five was an OVI charge from December 29, 2011, based on Bode having a prohibited level of alcohol in his system as measured by a breath test, with an allegation of five OVI convictions in the 20 years prior, which made the charge a felony of the fourth degree. Count five also had a specification pursuant to R.C. 2941.1413.

{¶10} 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. Bode did not object. The trial court granted this motion by Judgment Entry filed May 2, 2012.

{¶11} On March 1, 2012, Bode filed a Motion in Limine/Motion to Suppress to exclude or suppress Bode's prior OVI juvenile adjudication in 1992 on the basis that Bode did not have legal counsel nor did Bode validly waive his right to legal counsel at the time of the juvenile adjudication in 1992.

{¶12} On March 14, 2012, an oral hearing was held on Bode's Motion in Limine/Motion to Suppress, which was overruled by the trial court by written decision filed April 2, 2012.

{¶13} On April 5, 2012, Bode filed a Motion to Dismiss Counts 1, 2 and 3 of the Indictment due to the State's failure to bring Bode to trial within the statutory time limits prescribed by R.C. 2945.71.

{¶14} On April 23, 2012, an oral hearing was held on Bode's Motion to Dismiss, which was overruled by the trial court pursuant to a written decision filed May 2, 2012.

{¶15} On May 2, 2012, pursuant to a plea agreement with the state, Bode entered pleas of no contest to, and was found guilty by the trial court of, Counts 3 and 5 of the Indictment, with the specifications. The remaining counts and specifications in the Indictment were dismissed by the state pursuant to the plea agreement.

{¶16} On June 8, 2012, a contested sentencing hearing was held by the trial court. Bode argued that he should be sentenced on the OVI's as misdemeanors only and not sentenced on the specifications on the basis that a juvenile adjudication for OVI is not an "equivalent offense," pursuant to R.C. 4511.181, and based on double

jeopardy. The trial court rejected these arguments and sentenced Bode to a total of 8-1/2 years in prison, with 5-1/2 years suspended for community control and 3 years to serve of mandatory prison time. Further, the trial court refused to grant Bode 30 days of jail time credit for 30 days he spent in the Fairfield County Jail on the pending charges in the Indictment and for a misdemeanor probation violation.

Assignments of Error

{¶17} Bode raises four assignments of error,

{¶18} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION IN LIMINE/MOTION TO SUPPRESS.

{¶19} "II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS.

{¶20} "III. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THE OVI'S AS FELONIES OF THE FOURTH DEGREE AND IN SENTENCING APPELLANT ON THE SPECIFICATIONS.

{¶21} "IV. THE TRIAL COURT ERRED IN NOT GRANTING 30 ADDITIONAL DAYS OF JAIL TIME CREDIT TO APPELLANT."

I.

{¶22} In his first assignment of error, Bode argues an uncounseled conviction cannot be used to enhance the penalties for a later conviction if the earlier conviction resulted in a sentence of confinement.

{¶23} In the landmark decision of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799(1963), the United States Supreme Court held an indigent defendant was entitled to court appointed counsel. Subsequently, the High Court narrowed this

Right, holding "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense." *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed. 2d 383(1979). *Accord, Nichols v. United States*, 511 U.S. 738, 743 114 S.Ct. 1921, 128 L.Ed.2d 745(1994); *State v. Brandon*, 45 Ohio St.3d 85, 86, 543 N.E.2d 501, 503(1989). ("This is not to say that counsel is required in all instances. Indeed, in *Scott, supra*, the court essentially held that uncounseled misdemeanor convictions are constitutionally valid if the offender is not actually incarcerated."); *State v. Smith*, 5th Dist. No. 2010-CA-00335, 2011-Ohio-3206.

{¶24} In *Scott*, the court stated that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment * * * and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. * * * 440 U.S. at 373-374, 99 S.Ct. 1161-1162.

{¶25} In *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888(2002), the United States Supreme Court did find that a "suspended sentence that may end up in actual deprivation of a person's liberty may not be imposed unless the defendant was accorded the guiding hand of counsel." Id., syllabus.

{¶26} In *Nichols*, supra the court recognized that there is a distinction concerning the right to have counsel appointed noting, "In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived. *Gideon v.*

Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)." 511 U.S. at 743, n. 9. Ohio likewise has recognized such a distinction.

{¶27} Crim.R. 2(C) defines "serious offense" as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months," while Crim.R. 2(D) defines "petty offense" as "a misdemeanor other than a serious offense." In the case at bar, the charge against appellant was a "petty" offense.

{¶28} The scope of the application of the right to counsel is recognized in Crim.R. 44, which sets forth the basic procedure for the assignment of counsel in Ohio criminal cases.

{¶29} Crim.R. 44 states:

> (B) Counsel in petty offenses
>
> Where a defendant *charged with a petty offense* is unable to obtain counsel, the court *may* assign counsel to represent him. When a defendant charged *with a petty offense* is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel. (Emphasis added)

{¶30} The word "shall" is usually interpreted to make the provision in which it is contained mandatory. *Dorrian v. Scioto Conservancy District*), 27 Ohio St. 2d 102, 107, 271 N.E. 2d 834(1971). In contrast, the use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary. *Id.* The words "shall" and "may" when used in statutes are not automatically interchangeable or

synonymous. *Id.* To give the "may" as used in a statute a meaning different from that given in its ordinary usage, it must clearly appear that the Legislature intended that it be so construed from a review of the statute itself. *Id.* at 107– 108, 271 N.E. 2d 834. *In re: McClanahan,* 5th Dist. No. 2004AP010004, 2004–Ohio–4113, ¶ 17.

{¶31} Pursuant to that rule, the trial court has discretion whether to appoint counsel where a defendant is charged with a petty offense. However, the trial court could impose a term of imprisonment for a petty offense under only two circumstances: (1) appellant was actually represented by counsel during his change of plea; or (2) he decided to represent himself and properly waived his right to counsel. *Smith,* 5th Dist. No. 2010-CA-00335, 2011-Ohio-3206 at ¶49.

{¶32} Our review of the trial court 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 license and the ticket to the Ohio Bureau of Motor Vehicles and closed the case. (T. March 14, 2012 at 87-88).

{¶33} Thus, no cognizable violation of the Sixth Amendment right to appointed counsel occurred in the case at bar because, as the Supreme Court of Ohio has held, "uncounseled misdemeanor convictions are constitutionally valid if the offender is not actually incarcerated." *State v. Brandon,* 45 Ohio St.3d 85, 86, 543 N.E.2d 501(1989). (Citing *Scott v. Illinois,* 440 U .S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383(1979)).

{¶34} Further, there is no evidence that Bode was given a term of incarceration which was unconditionally suspended. 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. Accordingly, Bode did not suffer any actual incarceration or the threat of future incarceration on his juvenile OVI conviction.

{¶35} Therefore, because Bode's prior uncounseled misdemeanor conviction in the juvenile case did not result in incarceration or a suspended sentence it is valid under *Scott*, and thus, it may be used to enhance a subsequent conviction. *Nichols v. U.S.*, 511 U.S. 738, 749, 114 S.Ct. 1921, 128 L.Ed.2d 745(1994).

{¶36} Bode's first assignment of error is overruled.

II.

{¶37} In his second assignment of error, Bode contends the trial court erred in overruling his motion to dismiss on speedy trial grounds. Specifically, Bode filed a motion to dismiss Counts one, two and three of the Indictment because the state failed to bring Bode to trial within the statutory speedy trial limits.

{¶38} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. Pursuant to these constitutional mandates, R.C. 2945.71 through R.C. 2945.73 prescribes specific time requirements within which the State must bring an accused to trial. *State v. Baker*, 78 Ohio St.3d 108, 110, 1997–Ohio–229, 676 N.E.2d 883. R.C. 2945.71 provides, in pertinent part:

(C) A person against whom a charge of felony is pending:

(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

* * *

(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

{¶39} Subsequent charges made against an accused are subject to the same speedy-trial constraints as the original charges, if the additional charges arose from the same facts as the first indictment. *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025, 1027 (1989). However, the state is not subject to the speedy-trial timetable of the initial indictment when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment. *Baker*, supra, at syllabus.

{¶40} As set forth in the trial court's decision, for purposes of Bode's speedy trial claim, the state and Bode agreed and conceded the speedy trial dispute was limited to a period of 17 days, running from February 13, 2012 to March 1, 2012.

{¶41} Bode submits he was entitled to have all of the 17 days subjected to the triple count provisions of R.C. 2945.71(E), which would put the speedy trial calculation over 270 days. However, the State argued that the triple count provisions of R.C. 2945.71(E) only applied for three days (February 13 through February 16, 2012). The State argued the remaining 14 days should not be tripled, in spite of the fact that Bode was in jail, because the multiple counts in the single Indictment were severed into two separate trials on February 16, 2012.

{¶42} The trial court agreed with the state's argument that Bode was not entitled to the triple count provisions of R.C. 2945.71(E) because the cases were severed.

{¶43} The trial judge's handwritten notation contained within the Pretrial Entry: Criminal Case filed February 22, 2102 states,

> State has made oral motion for separate trial date re Counts 1, 2 & 3 from Counts 4 & 5. Defense does not object. Motion sustained.

{¶44} In the case at bar, Counts one, two and three arise from Bode's arrest on a charge of OVI on May 28, 2011. Bode was released on bond in this case on May 30, 2011.

{¶45} Counts four and five arise from Bode's arrest on a charge of OVI on December 29, 2011. Bond was set at $10,000.00 secured and $5,000.00 unsecured. (State's Exhibit B, Fairfield Municipal Court docket, Case Number CRA1103348). However, a probation violation holder was placed on Bode. (State's Exhibit C, Fairfield

Municipal Court Case Number CRB092086A). By entry filed December 30, 2011, the trial court found probable cause and ordered Bode held without bail. (Id.)

{¶46} The incidents leading to the two separate arrests occurred nearly seven months apart. The charges clearly do not arise from a single incident or course of conduct. *State v. Dach*, 11th Dist. Nos. 2005-T-0048, 2005-T-0054, 2006-Ohio-3428, ¶31; *State v. Sydnor*, 4th Dist. No. 10CA3359, 2011-Ohio-3922, ¶23. The court granted the motion to sever the charges on February 16, 2012. At this point, Bode was no longer held in jail on solely the charges in Counts one, two and three, as the charges were severed from the remaining charges. The triple count provision applies only when the defendant is being held in jail solely on the pending charge. *State v. Sanchez,* 110 Ohio St.3d 274, 277, 853 N.E.2d 283, 2006-Ohio-4478. Thus, the triple-count provision does not apply when a defendant is being held in custody pursuant to other charges. *Id.* Therefore, once Counts one, two and three, which involve the May 28, 2011 arrest, were severed from the Counts four and five, which involved the December 29, 2011 arrest, Bode was no longer held in jail solely on Counts one, two and three and the triple count provision no longer applied. *State v. Kasler*, 5th Dist. No. 11-CA-59, 2012-Ohio-6073, ¶46.

{¶47} Therefore, Bode's pretrial incarceration on the multiple charges does not constitute incarceration on the "pending charge" for the purposes of the triple-count provision of the speedy-trial statute, R.C. 2945.71(E).

{¶48} Bode's second assignment of error is overruled.

III.

{¶49} In his third assignment of error, Bode makes two claims. First, the trial court could not sentence him for felony OVI's and could not sentence him on the specifications contined in the Indictment because his juvenile adjudication for OVI is not an "equivalent offense." Second Bode argues that the trial court's sentence for both the felony OVI's and the specifications violated his protection against double jeopardy.

A. Juvenile adjudication for OVI as an equivalent offense.

{¶50} *In State v. Adkins,* 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766, the Ohio Supreme Court noted,

> R.C. 4511.19(G)(1)(d) employs a 20–year look-back to previous convictions and enhances an OVI charge if a defendant has five or more previous, similar violations: "[A]n offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree."
>
> Effective January 1, 1996, R.C. 2901.08 includes prior juvenile adjudications as previous convictions for purposes of enhancement of subsequent charges:
>
> "(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, * * * 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."

Although Ohio juvenile proceedings do not result in criminal convictions—a juvenile court proceeding is a civil action, *In re Anderson* (2001), 92 Ohio St.3d 63, 748 N.E.2d 67, syllabus, and juveniles are "adjudicated delinquent" rather than "found guilty," *State v. Hanning* (2000), 89 Ohio St.3d 86, 89, 728 N.E.2d 1059—R.C. 2901.08 provides that an offender's juvenile adjudication for OVI-type offenses can be used against him under the five-convictions threshold of R.C. 4511.19(G)(1)(d). Id. at ¶¶ 8-10.

{¶51} Bode was adjudicated a juvenile traffic offender for a violation of 4511.19. Applying R.C. 2901.08(A) and *Adkins* , this adjudication is a conviction for a violation of 4511.19 for purposes of determining that Bode should be charged and sentenced under 4511.19(G)(1)(d) for a felony of the fourth degree.

B. Double jeopardy

{¶52} Bode next argues in sentencing Bode on the OVI and the specifications for the exact same conduct, the trial court imposed multiple punishments for the same conduct in violation of the prohibition against double jeopardy.

{¶53} The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. It is well settled, however, that sentence enhancement provisions do not subject a defendant to multiple punishments for the same offense. *Witte v. United States*, 515

U.S. 389, 399, 115 S.Ct. 2199, 2206, 132 L.Ed.2d 351 (1995) (*citing Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258-59, 92 L.Ed. 1683 (1948)).

{¶54} In *Monge v. California*, the Unites States Supreme Court noted although the Constitution prohibits multiple criminal punishments for the same offense, double jeopardy principles generally have no application in the sentencing context,

> Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, see *Bullington*, 451 U.S., at 438, 101 S.Ct., at 1857-1858, because the determinations at issue do not place a defendant in jeopardy for an "offense," *see, e.g., Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 1927, 128 L.Ed.2d 745 (1994) (noting that repeat-offender laws "'penaliz[e] only the last offense committed by the defendant'"). Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." *United States v. Watts*, 519 U.S. 148, 154, 117 S.Ct. 633, 636, 136 L.Ed.2d 554 (1997) (*per curiam*); *see also Witte v. United States*, 515 U.S. 389, 398-399, 115 S.Ct. 2199, 2205-2206, 132 L.Ed.2d 351 (1995). An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258, 92 L.Ed. 1683 (1948); *cf. Moore v. Missouri*, 159 U.S. 673, 678, 16 S.Ct.

> 179, 181, 40 L.Ed. 301 (1895) ("[T]he State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence").

524 U.S. 727, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615(1998). Of relevance to Bode's case, the Court has specifically made clear that sentence enhancement is not double punishment,

> In *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), we explained that "'[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.'" Id., at 747, 114 S.Ct. 1921 (quoting *386 *Baldasar v. Illinois*, 446 U.S. 222, 232, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980) (Powell, J., dissenting)). When a defendant is given a higher sentence under a recidivism statute—or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history—100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's "status as a recidivist." The sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948).

{¶55} *United States v. Rodriquez*, 553 U.S. 377, 385, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008). *Rodriquez's* rationales apply with equal force in the context of Bode's case.

{¶56} Accordingly, Bode's third assignment of error is overruled.

IV.

{¶57} On December 29, 2011, a probation holder was placed on Bode by the Fairfield County Municipal Court probation officer supervising him. The following day, the municipal court found probable cause to revoke his probation and ordered him held without bond pending a hearing. On January 23, 2012, the municipal court revoked Bode's probation and ordered him to serve 30 days in jail, with credit for the 25 days he had already served.

{¶58} In his fourth assignment of error, Bode contends since the 30-day jail sentence on the revocation was for a misdemeanor violation, and Bode was sentenced by the trial court in this case to multiple felonies, the two sentences should be served concurrent to each other and, therefore, Bode should have been granted credit for the 30 days he served against the ultimate prison sentence imposed by the trial court on the felony convictions.

{¶59} Although it is the adult parole authority's duty to reduce the term of incarceration by the number of days served prior to sentencing, it is the responsibility of the sentencing court to properly calculate the amount of days for which such credit may be extended. *State ex rel. Corder v. Wilson*, 68 Ohio App.3d 567, 589 N.E.2d 113(1991); *State v. Barkus*, 5th Dist. No. 2002 CA 0052, 2003-Ohio-1757 at ¶ 12.

{¶60} R.C. 2967.191 requires that an offender's prison term be reduced "by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced [.]"

{¶61} R.C. 2949.12, which addresses the calculation of time, conveyance, and incarceration assignments of convicted felons exclusively, is also applicable here. This section states that the prisoner's sentencing order should also reflect, " * * * pursuant to section 2967.191 of the Revised Code * * * the total number of days, if any, that the felon was confined *for any reason* prior to conviction and sentence." R.C. 2949.12. (Emphasis added).

{¶62} In *State v. Olmstead*, this court observed,

> The Court of Appeals for Franklin County has recognized the difficulty in calculating jail-time credit when a defendant had both a probation violation and a new criminal charge, "[a]lthough the principle of crediting time served seems fairly simple on its face, in practice, it can be complicated when, inter alia, the defendant is charged with multiple crimes committed at different times, or when the defendant is incarcerated due to a probation violation. Generally speaking, days served following arrest on a probation violation can only be credited toward the sentence on the original charge i.e., the one for which he was sentenced to probation. In addition, a defendant is not entitled to jail-time credit for any period of incarceration arising from facts that are separate or distinguishable from those on which the current (or previous) sentence was based. See, e.g., *State v. Smith* (1992), 71 Ohio App. 3d 302, 304; *State v. Mitchell*, Lucas App. No. L-05-1122, 2005-Ohio-6138, at ¶ 8. A sentence for any offense committed after the offense on which the defendant's probation is based is not entitled to jail-time credit. *Id.; State ex rel. Gillen v. Ohio Adult Parole*

Auth. (1995), 72 Ohio St.3d 381; *State v. Peck*, Franklin App. No. 01AP-1379, 2002-Ohio-3889. This is an important distinction because a probation violation usually occurs when the defendant commits a new crime. For example, a first offender is convicted of petty theft pursuant to a shoplifting incident. If the court sentences that defendant to six months in jail, and suspends the sentence in lieu of a period of one years [sic] probation, the defendant will go free. During the months that follow, if that same defendant is arrested for OVI, he will likely not be permitted to be released on bail because the jail will place a probation hold on the prisoner. Irrespective of the OVI charge, which would ordinarily allow the defendant to post bail and be released, under these circumstances, the defendant would have to be taken before the trial judge who sentenced him on the theft charge. Whatever time the defendant spent in jail between his arrest and the probation violation hearing could only be credited towards the sentence for the theft conviction." *State v. Chafin*, Franklin App. No. 06AP-1108, 2007-Ohio-1840 at ¶ 9.

{¶63} The 30 days, which Bode contends he should have received credit for, were a sentence for an offense separate and apart from the one for which the trial court imposed a felony sentence in this case. Bode did receive credit for all 30 days on the probation violation misdemeanor case. That sentence was completed before Bode was sentenced under the felony convictions.

{¶64} Accordingly, we conclude that the trial court did not err by denying Bode credit for jail time served on the misdemeanor probation violation against his subsequent, unrelated felony sentence.

{¶65} Bode's fourth assignment of error is overruled.

{¶66} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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FILED

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2013 MAY 22 PM 12: 58

DEBORAH J. MALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JASON T. BODE	:	
Defendant-Appellant	:	CASE NO. 12-CA-33

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER