ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
Appellee,

v.

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

MERIT BRIEF OF APPELLEE, THE STATE OF OHIO

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STATEMENT OF THE FACTS

In 1992, Appellant, Jason T. Bode, appeared in Franklin County Juvenile Court regarding a charge of operating a motor vehicle under the influence. Franklin J.C. T2905072; Fairfield C.P. No. 2012-CR-6, Entry, (Apr. 2, 2012) (hereinafter "Trial Court Entry"). Appellant was not represented by counsel at any stage of the proceedings. Trial Court Entry. When Appellant first appeared, he was granted a one month continuance in order to have an opportunity to obtain counsel. Trial Court Entry. After the continuance, Appellant appeared again, still without counsel, and admitted to the offense. Trial Court Entry. He was not sentenced to a period of incarceration, either imposed or suspended. Trial Court Entry. He was ordered to pay $50 for fines and costs, received a one-year license suspension, and was referred to the Teenage Impact Program. Trial Court Entry.

The Teenage Impact Program was a three-day treatment program "designed to address substance abuse and dependence in persons between the ages of thirteen and eighteen years old." Trial Court Entry. 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." Trial Court Entry. 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." Trial Court Entry.

On May 28, 2011, Appellant was arrested on suspicion of Operating a Motor

Vehicle under the Influence of Drugs or Alcohol (OVI). *State v. Bode*, 5th Dist. No. 2012-CA-33, 2013-Ohio-2134, ¶ 2. A complaint was filed in the Fairfield County Municipal Court, and he was released on bond. *Id.* On December 29, 2011, Appellant was again arrested on suspicion of OVI. *Id.* at ¶ 3. On January 6, 2012, the Fairfield County Grand Jury indicted Appellant 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, 2012. One of the five previous offenses was Appellant's adjudication in Franklin County Juvenile Case T2905072. Counts One through Three of the Indictment related to Appellant's conduct on May 28, 2011. Indictment, Jan. 6, 2012. Counts Four and Five related to Appellant's conduct on December 29, 2011. Indictment, Jan. 6, 2012.

On March 1, 2012, Appellant filed a motion asking the trial court to exclude or suppress evidence of Appellant's 1992 OVI adjudication in Franklin County Juvenile Court case number T2905072. *Bode*, 2013-Ohio-2134, ¶ 11. Following an evidentiary hearing, the trial court overruled this motion. *Id.* at ¶ 12; Trial Court Entry.

After the trial court's decision, Appellant entered pleas of "no contest" to Counts Three and Five of the Indictment and to the specification to each count. *Bode* at ¶ 15. Appellant was sentenced to three years of mandatory prison time followed by five and a half years of non-mandatory prison time. *Id.* at ¶ 16. The trial 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. *Id.*

The Fifth District Court of Appeals affirmed the trial court's decision. *State v. Bode*, 5th Dist. No. 12-CA-33, 2013-Ohio-2134. Regarding the use of the uncounseled juvenile OVI adjudication to enhance the subsequent conviction, the Fifth District Court of Appeals explained that Appellant "was never imprisoned for the juvenile OVI adjudication." *Id.* at ¶ 32. The appellate court correctly determined that the Franklin County Juvenile Court did not impose incarceration, a suspended term of incarceration, or a probation sanction, and did not reserve the right to impose a term of incarceration. *Id.* at ¶ 32-34. "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." *Id.* at ¶ 32. The Fifth District Court of Appeals denied Appellant's motion to certify a conflict. *State v. Bode*, 5th Dist. No. 12-CA-33, Entry, Jul. 12, 2013.

This Court accepted jurisdiction of the appeal regarding whether an uncounseled juvenile adjudication for OVI can be used to enhance subsequent OVI charges when the juvenile is ordered to complete a three-day treatment program. *11/6/2013 Case Announcements*, 136 Ohio St.3d 1556, 2013-Ohio-4861.

ARGUMENT

Proposition of Law: A juvenile ordered to attend a three-day treatment program has not been sentenced to confinement, therefore, the uncounseled juvenile adjudication that resulted in that order may be used to enhance the penalty or increase the degree of a subsequent conviction.

A prior conviction may be used to enhance the penalty or increase the degree of a subsequent offense where no violation of the Sixth Amendment occurred. *Nichols v. United States*, 511 U.S. 738, 748-49, 114 S.Ct. 1921 (1994). When a defendant challenges the use of a previous conviction in a subsequent criminal case, the trial court determines whether a Sixth Amendment violation occurred. *State v. Brandon*, 45 Ohio St.3d 85, 543 N.E.2d 501 (1989); *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶ 11. A defendant's ability to collaterally attack past convictions that are used to enhance the penalty or increase the degree of a new crime is limited to convictions that "resulted in a sentence of confinement," either in jail or in prison. *Brooke* at ¶ 8-9, 12.

In petty offenses, a court has the discretion to appoint counsel to a defendant but cannot impose a term of incarceration unless the defendant is either represented by counsel or properly waives his right to counsel. Crim.R. 2; Crim.R. 44; R.C. 2151.352; *State v. Smith*, 5th Dist. No. 2010-CA-00335, 2011-Ohio-3206, ¶ 49. If a defendant is not represented by counsel and does not waive his right to counsel, the Sixth Amendment is not violated if the court does not impose a jail or prison term. *Brandon*, 45 Ohio St.3d at 86. Confinement occurs when the defendant is sentenced to either a jail or prison term. *See Scott v. Illinois*, 440 U.S. 367, 373, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Alabama v.*

Shelton, 535 U.S. 654, 674, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). The dividing line is the imposition of a jail term because, as the United States Supreme Court explained, "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Scott*, 440 U.S. at 373.

When a court has the option to impose a jail or prison term, but does not do so, the defendant is not entitled to counsel because the court did not sentence him to confinement. *Scott*, 440 U.S. at 368. When a court imposes a suspended prison term, which implicates the possibility of future incarceration, a defendant is entitled to counsel. *Shelton*, 535 U.S. at 674. A suspended term is considered an imposed term of incarceration for the offense because if the sentence is later imposed, the defendant is imprisoned in relation to the original offense. *Id.* at 672. Correspondingly, an uncounseled conviction that resulted in the imposition of a suspended jail sentence could not be used to enhance a subsequent conviction, because a suspended jail sentence is considered incarceration. *State v. Williams*, 5th Dist. No. 02CA00017, 2002-Ohio-4244, ¶ 4, 19.

In the present case, Appellant attempted to collaterally attack his 1992 OVI adjudication in Franklin County Juvenile Court Case T2905072 when it was used to enhance the penalty and increase the degree of the 2011 OVI offenses charged in the Fairfield Count Court of Common Pleas. The Fairfield County Court of Common Pleas found that Appellant was unrepresented by counsel and had not properly waived his right to counsel when he was convicted of OVI in Franklin County Juvenile Court Case

T2905072. Trial Court Entry. But, because Appellant was not subjected to confinement in Juvenile Court Case T2905072, both the trial and appellate courts held that Appellant's right to counsel was not violated, and the uncounseled misdemeanor adjudication may be used to enhance subsequent offenses. Trial Court Entry; *Bode*, 2013-Ohio-2134 at ¶ 35.

In Juvenile Court Case T2905072, Appellant was ordered to attend a three-day treatment program, the Teenage Impact Program. Trial Court Entry. The treatment program was not confinement in itself. As the trial court stated, the Teenage Impact Program "was designed to address substance abuse and dependence in persons between the ages of thirteen and eighteen years old." Trial Court Entry. 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." Trial Court Entry. 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." Trial Court Entry.

Appellant's sentence in Juvenile Court Case T2905072 is distinguishable from the sentences ordered in the cases considered by the Eighth and Ninth District Courts of Appeal in *City of Parma v. Romain*, 8th Dist. No. 87133, 2006-Ohio-3952; and *State v. Noble*, 9th Dist. No. 07CA009083, 2007-Ohio-7051. In *City of Parma v. Romain*, the defendant was placed in a three-day alcohol treatment program pursuant to a statute which mandated that the defendant either receive jail time or receive time in the

program. *City of Parma* 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 Ninth District reached the same conclusion regarding a sentence where the defendant was allowed to substitute a three day treatment program for three days in jail. *Noble* at ¶ 13. In both of those cases, the consequence of not attending the treatment program was incarceration, so the defendants' only options were to complete the program or go to jail.

Those were not the options available to Appellant in Juvenile Court Case T2905072 because he was only ordered to attend the treatment program. Trial Court Entry. The Franklin County Juvenile Court did not reserve the right to reinstate suspended time or place him on community control or probation that could result in future incarceration. *Bode* at ¶ 34. When Appellant did not comply with the court's orders and "failed to appear for a court hearing to discuss his participation in the aftercare program, the juvenile court forwarded his driver['s] license and the ticket to the Ohio Bureau of Motor Vehicles and closed the case." *Id.* at ¶ 32. Because Appellant did not establish that the sentence to a treatment program in case T2905072 was a sentence of confinement, the uncounseled misdemeanor adjudication may be used to enhance subsequent offenses, as both the trial and appellate courts held. Trial Court Entry; *Bode*, 2013-Ohio-2134 at ¶ 35.

The previous decisions of this Court and of the United States Supreme Court have given trial courts a definite direction; when determining if the Sixth Amendment right to counsel was violated, the trial court should not ask "what could have happened?" but "what did happen?" Adopting the State's proposition of law would not change that inquiry. Trial courts would continue to ask the same three questions about previous convictions that they now do: (1) was the defendant represented by counsel, (2) if not, did he properly waive the right to counsel, (3) if not, what penalty was imposed.

Appellant's proposition of law would require courts to ask a fourth question: what possible penalties the defendant could have been subjected to. This fourth question would require courts to examine the previous statutory and case law in place at the time of the previous convictions to determine what could have happened, a more complex determination than simply looking at what penalties the defendant was subjected to. For example, in Juvenile Court Case T2905072, if Appellant had been represented by counsel or properly waived his counsel, Appellant could have faced additional penalties. In order to impose the additional penalties, the Franklin County Juvenile Court would have had to determine that Appellant failed to comply with the court's orders, then conduct a hearing and determine that he created a danger to himself and to others by his operation of a motor vehicle. *See* R.C. 2151.356(A)(7) (predecessor section to R.C. 2152.21(A)(6)). But the Franklin County Juvenile Court never subjected Appellant to the potential additional penalties in Case T2905072. Trial

Court Entry; *Bode* at ¶ 32. Because the trial court and the appellate court both asked the correct question - "what did happen?" - both courts properly determined that the adjudication in Juvenile Court Case T2905072 could be used to enhance the penalty or increase the degree of the 2011 offenses.

CONCLUSION

Appellant's proposition of law would complicate the clear directive from this Court and the United States Supreme Court - a defendant cannot collaterally attack a previous conviction if he was not sentenced to a jail or prison term for the previous conviction. Both the trial court and the appellate court correctly found that Appellant was not sentenced to a term of confinement in Franklin County Juvenile Court Case T2905072. Because the juvenile adjudication did not result in confinement, the trial court and the Fifth District both properly found that it can be used to enhance subsequent offenses.

The State requests that this Court affirm the decision of the Fifth District Court of Appeals. The State also requests that this Court adopt the State's proposition of law and hold that a juvenile ordered to attend a three-day treatment program has not been sentenced to confinement, therefore, the uncounseled juvenile adjudication that resulted in that order may be used to enhance the penalty or increase the degree of a subsequent conviction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee, The State of Ohio, was served upon Scott Wood and Alyssa Parrot, Counsel for Defendant-Appellant, via USPS delivery to 144 East Main Street, P.O. Box 667, Lancaster, Ohio, 43130, this 10th day of March, 2014.

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