Supreme Court of Ohio Clerk of Court - Filed August 14, 2015 - Case No. 2015-1342

FILED
COURT OF APPEALS
JUN 30 2015
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2013-L-089
- vs -	:	
THOMAS WRIGHT, JR.,	:	
Defendant-Appellant.	:	

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Criminal Appeal from the Lake County Court of Common Pleas.
Case No. 12 CR 000326.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Richard J. Perez, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, Suite 240, Willoughby, OH 44094-9204 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} The instant matter emanates from a judgment entry of the Lake County Court of Common Pleas denying appellant, Thomas Wright, Jr.'s, motion in limine to exclude evidence of his 1995 conviction for operating a vehicle while impaired and his motion to dismiss the prior offense specification. The indictment charged appellant with felony operating a motor vehicle under the influence of alcohol ("OVI"), having previously been convicted of five OVI violations within the last 20 years. At issue is

whether appellant's 1995 conviction for operating a vehicle while impaired was an uncounseled conviction for purposes of enhancement of his present OVI offense. For the reasons discussed below, we affirm the trial court's ruling.

{¶2} On November 13, 2012, appellant was indicted on two counts of OVI, of alcohol, a drug of abuse, or a combination of them, both fourth-degree felonies, in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(h), respectively. Both counts carried a specification of five or more prior violations of R.C. 4511.19 or an equivalent offense within the last 20 years. *See* R.C. 2941.1413. Appellant was also indicted on one count of driving under OVI suspension, a first-degree misdemeanor, in violation of R.C. 4510.14(A), and one count of aggravated menacing, a first-degree misdemeanor, in violation of R.C. 2903.21. Appellant pled not guilty.

{¶3} As noted, the indictment charging appellant under R.C. 4511.19 alleged that he previously had been convicted of five similar OVI offenses within 20 years of the instant offense, to wit: Medina Municipal Court, Case No. 93TRC11571, dated April 22, 1994; Willoughby Municipal Court, Case No. 95TRC06016, dated July 12, 1995; Willoughby Municipal Court, Case No. 98TRC01658, dated March 10, 1998; Euclid Municipal Court, Case No. 00TRC03186, dated June 1, 2000; and Willoughby Municipal Court, Case No. 11TRC04802, dated September 14, 2011.

{¶4} R.C. 4511.19(G)(1)(d) provides, in part, that "an 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." Appellant filed a motion in limine and a motion to dismiss the prior offense specification, arguing that one of his convictions, to wit: his prior OVI conviction in Willoughby Municipal Court, Case

No. 95TRC06016, resulted from an uncounseled conviction, and as a result, the state could not use this conviction to enhance his underlying OVI charge to a felony of the fourth degree.

{¶5} After a hearing, the trial court denied appellant's motion in limine to prohibit the introduction of evidence of his conviction for OVI from Willoughby Municipal Court, Case No. 95TRC06016. The trial court also denied his motion to dismiss the prior offense specifications to Counts One and Two.

{¶6} Appellant pled no contest to Count One and to the specification, in violation of R.C. 4511.19(A)(1)(a). Appellant was found guilty and sentenced to a term of incarceration of 24 months in prison, with an additional three-year mandatory term, to be served consecutively, for an aggregate five-year term of imprisonment. Appellant's driver's license was also suspended for a ten-year term; a fine of $1350 was imposed; and appellant's driving record was assessed six points.

{¶7} Appellant filed a timely notice of appeal and asserts the following assignments of error:

> [1.] The trial court erred when it overruled the defendant-appellant's motion to dismiss the indictment where the seriousness of the crime was increased due to a previous uncounseled conviction, in violation of the defendant-appellant's due process rights and rights to counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> [2.] The trial court erred when it required the defendant-appellant to prove by a preponderance of the evidence that the prior conviction was uncounseled in violation of his right to due process.

{¶8} With leave of this court, appellant also filed a supplemental brief, assigning the following error on appeal:

> Ohio Revised Code §2941.1413 violates appellant's constitutional right to Equal Protection under Article I, Section 2 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution because the specification is based solely upon the same information required to establish a fourth-degree felony under Ohio Revised Code §4511.19(G)(1)(d).

{¶9} We first address appellant's supplemental assignment of error. To support his argument on appeal, appellant cites to *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶23, *appeal accepted*, Sup.Ct. No. 2014-1557, an opinion of the Eighth Appellate District holding the repeat OVI offender specification violates equal protection. In *Klembus*, the appellant argued that R.C. 4511.19(G)(1)(d) and 2941.1413 allowed the prosecutor to "arbitrarily obtain a greater prison sentence for the underlying offense without proof of any additional element, fact, or circumstance. Thus, [the appellant was] challenging the repeat OVI offender specification on its face, not as it was personally applied to him." *Id.* at ¶7.

{¶10} The majority in *Klembus* reasoned that a repeat OVI offender may be subjected to an increased penalty solely on the prosecutor's discretion when deciding whether to present the grand jury with the repeat OVI offender specification; "the increased penalty does not depend upon the jury finding any additional elements, facts, or circumstances beyond a reasonable doubt." *Id.* at ¶19. The majority cited to the Ohio Supreme Court's decision in *State v. Wilson*, 58 Ohio St.2d 52 (1979), in support of its decision. In *Wilson*, the Ohio Supreme Court held that prosecutorial discretion, standing alone, does not violate equal protection. *Klembus*, *supra*, at ¶20, citing *Wilson*, *supra*, at *55. But, if two statutes "prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause." *Klembus*, *supra,* citing

Wilson, *supra*, at *55-56. The court in *Klembus*, therefore, concluded that, in light of a prosecutor's discretion, as well as the fact there is no requirement the specification will be applied uniformly to all offenders, the repeat OVI specification is not rationally related to a legitimate state purpose. *Klembus*, *supra*, at ¶21-23.

{¶11} The dissent in *Klembus* stated, "Ohio courts have repeatedly upheld the R.C. 2941.1413 enhanced penalty specification within R.C. 4511.19, relying on legislative intent as authorization of such cumulative punishment." *Klembus*, *supra*, at ¶39. The dissenting judge cited to this court's opinion:

> The Eleventh District Court of Appeals determined that a 'careful reading' of the R.C. 2941.1413 specification demonstrates that the mandatory prison term must be imposed in addition to the sentence for the underlying offense. * * * 'Therefore, R.C. 4511.19(G)(1)(d)(ii) and R.C. 2941.1413 "clearly reflect the legislature's intent to create a penalty for a person who has been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the OMVI offense over and above the penalty imposed for the OMVI conviction itself * * *."'

Id. at ¶40, quoting *State v. Stillwell*, 11th Dist. Lake No. 2006-L-010, 2007-Ohio-3190, ¶26 (internal citations omitted).

{¶12} The Twelfth Appellate District subsequently released *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528, where it disagreed with the majority opinion in *Klembus*. The *Hartsook* Court reasoned that *Wilson* involved an appellant who was charged under both a simple burglary and an aggravated burglary statute, inapposite to the scenario at issue – an individual who has been charged with a single OVI offense. *Id.* at ¶52. The *Hartsook* Court concluded, "we believe the language of the respective statutes clearly indicates that the General Assembly

intended R.C. 4511.19 and R.C. 2941.1413 to authorize cumulative punishments for a single OVI offense by a repeat offender." *Id.*

{¶13} We adopt the rationale of the Twelfth District Court of Appeals in *Hartsook* and therefore do not find the penalty enhancement set forth in R.C. 2941.1413 to be unconstitutional. *See State v. Reddick*, 11th Dist. Lake No. 2014-L-082, 2015-Ohio-1215.

{¶14} Consequently, appellant's supplemental assignment of error is without merit.

{¶15} We now address appellant's first assignment of error. Appellant argues the trial court erred in finding that the state proved he was represented by counsel in the 1995 conviction for OVI in Willoughby Municipal Court, Case No. 95TRC06016. Appellant argues the state should not be allowed to use the 1995 OVI conviction to enhance the penalty for the current offense, as the prior conviction is constitutionally infirm. Absent five prior valid OVI convictions, appellant's most recent OVI conviction could not have been prosecuted as a felony. In *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶9, the Ohio Supreme Court held that "[a] conviction obtained against a defendant who is without counsel, or its corollary, an uncounseled conviction obtained without a valid waiver of the right to counsel, has been recognized as constitutionally infirm."

{¶16} Generally, a past conviction cannot be attacked in a subsequent case; there is, however, "a limited right to collaterally attack a conviction when the state proposes to use the past conviction to enhance the penalty of a later criminal offense." *Id.* The Ohio Supreme Court, in *Brooke* and later in *State v. Thompson*, 121 Ohio St.3d

250, 2009-Ohio-314, explained that when a defendant challenges a prior conviction as unconstitutional, a burden-shifting analysis occurs. In *Brooke*, *supra*, at ¶11, the Court held:

> 'Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a prima-facie showing of constitutional infirmity.' *State v. Brandon*, 45 Ohio St.3d 85, syllabus. Once a prima facie showing is made that a prior conviction was uncounseled, the burden shifts to the state to prove that there was no constitutional infirmity. *Id.* at 88. For purposes of penalty enhancement in later convictions under R.C. 4511.19, when the defendant presents a prima facie showing that prior convictions were unconstitutional because they were uncounseled and resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

{¶17} Subsequently, in *Thompson*, *supra*, at ¶6, the Court clarified its decision in *Brooke*, stating:

> [N]othing in the body of *Brooke* can be construed as suggesting that 'a prima facie showing that prior convictions were unconstitutional' can be established merely by stating that the defendant had not been represented in the prior convictions and that the convictions had resulted in confinement[.] * * * [F]or purposes of penalty enhancement in later convictions under R.C. 4511.19, after the defendant presents a prima facie showing that the prior convictions were unconstitutional because the defendant had not been represented by counsel and had not validly waived the right to counsel and that the prior convictions had resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

{¶18} At the hearing, appellant testified that when he entered into a no contest plea in the Willoughby Municipal Court, he was not represented by counsel. Appellant stated that he did not waive his right to an attorney orally or in writing and that he was also not advised of his right to an attorney. Appellant submitted an affidavit, which averred, in part:

> At no time did the Judge personally advise me of my right to an attorney or discuss any waiver of attorney or discuss any of my rights. Basically I met with the prosecutor and pled 'no contest' to the charges. I never waived my right to an attorney before the Judge nor did I sign any documents waiving an attorney.
>
> I was not represented by an attorney, nor did I understand my constitutional rights including my absolute right to have an attorney represent me nor was I advised of the ramifications and effect of entering a plea of guilty or no contest.

{¶19} The court file for Willoughby Municipal Court, Case No. 95TRC06016 was admitted into evidence. It demonstrates that appellant was arrested for OVI on the evening of July 5, 1995, and was arraigned the next day. The judgment entry indicated that "Defendant appeared. Constitutional rights and pleas explained."

{¶20} The court file also shows that appellant was appointed a public defender, David Farren, Esq. Although Attorney Farren was appointed, appellant testified that Attorney Farren did not represent him in the matter. Attorney Farren testified at the Lake County hearing, but had no recollection of representing appellant in this matter. Attorney Farren noted that he represented, on average, 10 clients per day as the public defender assigned to Willoughby Municipal Court.

{¶21} Appellant testified that he spoke with the prosecutor without an attorney present. Court records show that a pre-trial hearing was held on July 12, 1995. The "Report of Pre-Trial Discussion" documented the recommendation by the prosecutor. That form was signed by the prosecutor, and although there was a signature line for "Attorney for Defendant," the line was left blank. The trial court noted that "there is no indication whether the public defender or the defendant was present at the pretrial hearing."

{¶22} Lisa Mastrangelo, the Clerk of the Willoughby Municipal Court, testified that the absence of a signature on the "Report of Pre-Trial Discussion" form is not conclusive evidence that a defense attorney was not present. She both testified and averred that she reviewed the records of the court, and there was no audio tape or transcript of the change of plea hearing on July 12, 1995, in appellant's case. Further, Ms. Mastrangelo testified that if appellant had waived the presence of an attorney, it would have been accomplished through writing. She further testified that the written waiver of attorney is used on all such cases if the defendant proceeds without an attorney. The court file did not contain a written waiver.

{¶23} R.C. 2945.75(B)(3), enacted after *Brooke*, but before *Thompson,* indicates that appellant must establish his prima facie case "by a preponderance of the evidence." The trial court found that appellant "met his burden of presenting a prima facie showing that he was not represented by counsel and had not waived the right to counsel." Although the trial court did not expressly state appellant established by a preponderance of the evidence that he met his burden, it can be reasonably inferred, by the court's statement regarding appellant's "prima facie showing" of a constitutional infirmity, that appellant did, indeed, meet his burden of production.

{¶24} Once the trial court determined that appellant established his prima facie case by a preponderance of the evidence, the state was then required to present evidence to rebut the contention. In essence, the state must establish it is more likely than not that appellant either (1) properly waived counsel or (2) was represented by counsel in the prior case.

{¶25} The trial court accurately assessed this burden and stated:

> The burden now shifts to the state to show that Wright either was represented by counsel or that his right to counsel was properly waived. * * * [T]here is no written evidence that [appellant] waived his right to counsel or that he waived it on the record as required by *Brooke*. However, neither of the above is required if the state can show that [appellant] was represented by counsel during the change of plea and sentencing on July 12, 1995. If he was represented by counsel, then his OVI conviction is not constitutionally infirm and it may be used to enhance his punishment in his current case. Essentially at issue is whether [appellant] was represented by an attorney when he pled no contest and was sentenced in the 1995 conviction. The court concludes he was.

{¶26} The trial court cited to appellant's testimony that having an attorney was important to him; that appellant was represented in the preceding OVI case and in the three subsequent OVI cases; and that when appellant was arraigned, he promptly requested an attorney. Although this request was initially denied, the court records demonstrate that appellant renewed his request for appointment of counsel, which was granted. The form granting appellant an attorney indicates it was personally served on Attorney Farren, the public defender. Attorney Farren was appointed at 8:45 a.m., the same day the pretrial hearing took place at 9:00 a.m. Attorney Farren's testimony notes that he was able to resolve cases quickly when the prosecutor's offer was reasonable and the client consented. The record indicates that the case was resolved the same day Attorney Farren was appointed: two separate judgment entries filed at the same time on July 12, 1995, at 11:35 a.m. illustrate that appellant withdrew his not guilty plea and entered a plea of no contest to OVI and other charges. The trial court recognized that the absence of a written waiver of counsel suggests appellant had an attorney present at the change of plea and sentencing hearing.

{¶27} The determination of whether appellant was represented by an attorney is not a legal question but a factual determination. Because the trial court had the ability to judge the credibility of the witnesses, we defer to the trial court's finding that appellant's "testimony is suspect because he was unable to recollect many details," including his second attempt at requesting legal counsel and his residence at the time of the prior proceedings. If the findings are supported by some competent, credible evidence, the findings will not be disturbed.

{¶28} After reviewing the record, we conclude that the trial court's decision to overrule appellant's motion was supported by the evidence in the record. The testimony, as well as the prior court record, indicates that appellant was represented by counsel at the time of his plea. As noted by Ms. Mastrangelo, the significance of not having a "waiver of counsel" form in the file "would suggest that there was an attorney." Indeed, appellant sought court-appointed counsel on two occasions. Appellant's second request, made July 12, 1995, was granted, and Attorney Farren was appointed the same day the pretrial was scheduled. The trial court recognized that Attorney Farren's signature was not on the "Report of Pre-Trial Discussion" form. However it did not consider this fact dispositive as to whether he was present. Further, while Attorney Farren did not recollect representing appellant, there was evidence that he represented countless clients over the past 18 years, and from that, the trial court was able to conclude his lack of recollection was inconsequential. We find the trial court had sufficient competent, credible evidence upon which it could base its determination that appellant's 1995 OVI conviction was counseled and could be used by the prosecution to

enhance the degree of appellant's current offense from a misdemeanor to a felony of the fourth degree.

{¶29} Appellant's first assignment of error is without merit.

{¶30} Under his second assignment of error, appellant argues that R.C. 2945.75 is unconstitutional based on the following: (1) it places the burden of going forward, as well as the burden of proof, on a defendant challenging the constitutionality of a prior conviction in a criminal case; (2) it shifts the burden of proof of an element of the offense, thereby relieving the state from having to prove that element, in enhancing OVI cases, beyond a reasonable doubt; and (3) it requires the defendant to prove a constitutional infirmity by a preponderance of the evidence. We disagree.

> The ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases. That power, therefore, is circumscribed by the rule that laws are entitled to a strong presumption of constitutionality and that a party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.

Yajnik v. Akron Dept. of Health, Hous. Div., 101 Ohio St.3d 106, 2004-Ohio-357, ¶16, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus.

{¶31} Contrary to appellant's argument that the state is relieved from its burden of proof, the Ohio Supreme Court has stated, in cases where "existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by increasing its degree, the prior conviction is an essential element of the crime and must be proved by the state." *Brooke*, *supra*, at ¶8. The state is neither relieved from its burden of proof nor is the burden of proof shifted to the defendant. *See* R.C. 2945.75 (B)(1) & (2). R.C. 2945.75(B)(2) requires the state to make a prima facie showing of the

defendant's prior convictions. *See State v. Curtis*, 10th Dist. Franklin No. 09AP-1199, 2011-Ohio-3298, ¶49 ("Appellant has not presented an argument as to how this subsection of the statute would fail under a rational basis review and we fail to see how R.C. 2945.75(B)(2) implicates appellant's constitutional rights.").

{¶32} The statute then allows the defendant to allege a constitutional defect in the prior conviction. If the defendant does allege a constitutional defect, "the defendant has the burden of proving the defect by a preponderance of the evidence." R.C. 2945.75(B)(3). The fact that a defendant must establish his plea was uncounseled and that a proper, valid waiver did not occur, does not mean the burden to establish an element of the offense shifted to the defendant. The state clearly must establish the fact of the *conviction.* If the defendant contends there is a problem with the conviction, the statute merely requires he or she establish a prima facie case of that defect. This is simply a defense to an element of the charge, not unlike many other defenses to elements of other offenses.

{¶33} Appellant's second assignment of error is without merit.

{¶34} The judgment of the Lake County Court of Common Pleas is hereby affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

THOMAS WRIGHT, JR.,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2013-L-089

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LAKE COUNTY, OHIO

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.

PRESIDING JUDGE TIMOTHY P. CANNON

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.