

ORIGINAL

IN THE SUPREME COURT OF OHIO

15-2019

State of Ohio	:	
	:	
Appellant	:	On Appeal from the
	:	Lake County Court of
v.	:	Appeals, Eleventh
	:	Appellate District
Dennis I. Baird	:	
	:	Court of Appeals
Appellee	:	Case No. 2014-L-098

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, THE STATE OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents a critical issue concerning Ohio's doctrine of judicial discretion, the application of U.S. Supreme Court decisions on the Federal Rules of Evidence and the authority of trial courts to limit the state from introducing, during a jury trial, evidence of an essential element of a crime.

In this case the court of appeals adopted the decision in a U.S. Supreme Court decision, *Old Chief vs. United States* (1997), 519 U.S. 172; 117 S. Ct. 644; 136 L. Ed. 2nd 574, and found that it "controlled" the appellate issue and thereby denied the state from introducing evidence of an essential element of an offense. The appellate court's decision concerned an OVI prosecution in which the Appellee was accused of violating, not only R.C. 4511.19(A)(1) but also R.C. 4511.19(A)(2)(a) and (b). The Appellee requested the trial court to accept his stipulation that he had one prior OVI conviction within twenty (20) years. The state refused to so stipulate and choose to introduce evidence of the Appellee's prior convictions. The trial court permitted the state to present its evidence. Following his conviction the Appellee appealed arguing that Ohio Rule of Evidence 403 required the trial court to accept such stipulation over the state's objection and to refuse to do so constituted an abuse of discretion.

The appellate court agreed and overruled the trial court's decision. By doing so the appellate court misapplied the rule stated in *Old Chief*, overturned a series of cases concerning the state's right to present the evidence it feels necessary to convict an accused of all the essential elements of a crime beyond a reasonable doubt and deprived the trial courts of Ohio any leeway in determining within their judicial discretion whether such stipulations ought, or ought

not, to be accepted.

The appellate court's decision is of great general and public interest because, if it is allowed to stand the appellate court's decision would logically elevate federal court decisions on federal rules of evidence to controlling authority for Ohio's courts concerning the interpretation of the Ohio Rules of Evidence. Neither the courts of Ohio or, indeed, of any other state of the union, have ever adopted such a position and should not now.

Furthermore, if allowed to stand this decision would undermine the general and public expectation that the state will fully and effectively execute the public's laws as passed by the legislature. So long as the state proceeds lawfully the decision to introduce or not introduce evidence on the elements of a crime are best left to the state. A trial court should not be placed in a position of prohibiting, against its better judgment, the introduction of evidence establishing a violation of an essential element of a crime.

Finally, this case concerns a substantial constitutional issue, i.e. the legislature's right to adopt legislation pursuant to Art. II, Section 1 of the Ohio Constitution, the Judiciary's right pursuant to Article IV, Section 5 to adopt rules governing the courts of Ohio, and the state's right to vigorously enforce such legislation and rely upon the rules adopted by the Ohio Supreme Court.

STATEMENT OF THE CASE AND FACTS

This case arises from the criminal prosecution of appellee, Dennis I. Baird. The Appellant was stopped while operating his motor vehicle on February 1, 2014. He was provided with field sobriety tests and ultimately arrested and charged with violations of R.C. 4511.19(A)(1) and because of two prior OVI convictions within twenty (20) years and a refusal he was also charged with violations of R.C. 4511.19(A)(2)(a) and (b).

The trial went forward on August 1, 2014. Prior to trial Mr. Baird offered to stipulate to one, but not both, of his prior OVI convictions in order to prevent the state from producing the evidence of two prior convictions. Mr. Baird, through counsel, argued that the introduction of such evidence would be unfairly prejudicial pursuant to Evid. R. 403 and, therefore, the state should not be permitted to introduce it. The trial court disagreed, ruling that the evidence was not so prejudicial that the court could mandate, in light of the state's refusal, the state to accept such stipulation.

The state refused to so stipulate and during the trial the arresting officer testified that Mr. Baird had two prior OVI convictions and identified certified copies of the Willoughby Municipal Court judgement entries of these convictions (trial t.p. pages 64-65). The jury returned verdicts on all counts of the complaint.

Mr. Baird appealed this issue in his third appellate issue arguing that pursuant to Ohio Evid. R. 403 the prejudicial value of his two prior OVI convictions, in light of his offer to stipulate, outweighed the evidence's probative value.

The appellate court agreed, and reversed and remanded accordingly. It stated on page 7 of its decision; "We find this assignment of error is controlled by *Old Chief v. United States*, 519

U.S. 172 (1997).” The appellate court went on to state “Pursuant to *Old Chief*, the admission into evidence of Mr. Baird’s prior OVI conviction, when he was willing to stipulate he had a prior conviction, was unfairly prejudicial, as it gave the jury an improper basis for the instant verdict.” Appendix 1, page 7.

The court of appeals erred in its decision. Introduction of any evidence of any element of any crime is prejudicial to the accused. That is the whole point of introducing evidence by the state. However, evidence providing material facts concerning an essential element of a crime cannot be considered unduly or unfairly prejudicial simply because it is evidence of a prior conviction. If this is the law of Ohio the appellate court’s decision will have ramifications far beyond OVI prosecutions. There are many criminal offenses that require proof of a prior conviction of one type or another. The affirmation of the court of appeals decision will effect more than R.C. 4511.19(A) (2) prosecutions.

In support of its position, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: *Old Chief vs. United States (1997), 519 U.S. 172; 117 S. Ct. 644; 136 L. Ed. 2nd 574* is not controlling authority for Ohio courts and cannot mandate a trial court’s acceptance, over the state’s objection, of a proffered stipulation of a prior OVI conviction during a R.C. 4511.19(A)(2)(a) and (b) prosecution

In *Old Chief vs. United States (1997), 519 U.S. 172; 117 S. Ct. 644; 136 L. Ed. 2nd 574* the U.S. Supreme Court considered a federal questions involving the interpretation of Federal

Rule of Evidence 403. Johnny Old Chief, after an affair involving at least one gun shot, was accused and tried for a violation of 18 U.S.C., Section 92(g)(1) which prohibits possession of a firearm by anyone with a prior felony conviction. The accused offered to, “*** stipulate section 922(g)(1)’s statute’s prior-conviction element, arguing that his offer rendered evidence of the name and nature of his prior offense—assault causing serious bodily injury— inadmissible because its ‘probative value [was] substantially outweighed by the danger of unfair prejudice***.’” *Old Chief*, supra, at page 178. The United States refused to stipulate and admitted evidence of his prior assault causing serious bodily injury.

In discussing this fact scenario in relation to Fed. R. of Evid. 403 the Supreme Court stated; “The term ‘unfair prejudice’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. *** So, the Committee Notes to Rule 403 explain, ‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Old Chief*, supra, at page 180, citing Advisory Committee’s Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860.

The fundamental distinction between the facts in *Old Chief* and the case herein is the identity of the prior conviction. In *Old Chief* any felony conviction would suffice, no specific prior conviction was an elements of the charge. In this instance a prior OVI conviction was necessary to be named in the complaint and proved to the jury. The prior OVI conviction herein was, unlike the facts in *Old Chief* an essential element of the charge.

Ohio courts have previously considered *Old Chief* in deciding similar issues and have

found that since the prior OVI conviction(s) were essential elements of the offense *Old Chief* was distinguishable. Indeed, the Eleventh District Court of Appeals considered a similar issue and ruled contrarily to its present position: In *State of Ohio vs. Jeffrey Payne*, (1999) *Eleventh Dist. Court of Appeals Case No. 97-L-284*; 1999 *Ohio App. LEXIS 1433* the appellate court considered the introduction of three prior OVI convictions. It stated: “The instant case is distinguishable from *Old Chief*. In *Old Chief*, the defendant was charged with assault with a dangerous weapon and a violation of 18 U.S.C.922(6)(1), which makes it unlawful for anyone ‘who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year [to] possess *** any firearm.’ Id. The U.S. Supreme Court found that the judgment entry should have been excluded pursuant to Evid. R. 403 because the minimal probative value of the judgment entry was substantially outweighed by the danger of unfair prejudice.*** The Court reasoned that: ‘the issue is not whether concrete details of the prior crime should come to the juror’s attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. ‘A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, ***, to the most aggravated murder.’ The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun.’

*** In the instant case, pursuant to R.C. 4511.99(A)(4)(a), ***the prosecution was required to prove beyond a reasonable doubt that appellant had three or more prior driving while under the influence convictions.*** ***. Unlike the federal statute in *Old Chief*, evidence concerning the

name and nature of appellant's prior convictions was necessary in order for the jury to find appellant guilty of the charged offense." *State of Ohio vs. Jeffrey Payne*, (1999), *Lake County Court of Appeals Case No. 97-L-284*, 1999 *Ohio App. LEXIS 1433*(emphasis added).

The Twelfth District interpreted *Old Chief* in a similar vein. *In State v. Russell* (1998), *Butler County Court of Appeals, Case No. CA 98-02-018*; 1998 *Ohio App. LEXIS 5374* the court of appeals considered the introduction of a prior domestic violence conviction in relation to *Old Chief* and ruled; "Initially, we note that since *Old Chief* only construed federal law and the Federal Rules of Evidence, the holding in *Old Chief* is not controlling authority for the construction of Ohio law and the Ohio Rules of Evidence. In addition, even if the Supreme Court's decision was controlling, we do not believe that the holding in *Old Chief* compelled the exclusion of the evidence concerning the name and nature of appellant's prior conviction for domestic violence." *In State v. Russell* (1998), *Twelfth Dist. Court of Appeals Case No. CA 98-02-018*; 1998 *Ohio App. LEXIS 5374*, at page 7-8. The appellate court went on to rule that a prior conviction of domestic violence was an essential element and, therefore, "***, the prosecution must prove the prior conviction of domestic violence beyond a reasonable doubt. ***. Accordingly, Ohio courts have found that the prosecution is not required to accept a defendant's stipulation to a prior conviction. ." *State v. Russell* (1998), 1998 *Ohio App. LEXIS 5374*, at page 4, citing *State v. Plas*, (Aug. 23, 1995), *Lorain App. No. 95 CA 006046*, unreported, citing *State v. Smith* (1990), 68 *Ohio App. 3d* 692, 695; 589 *N.E. 2d* 454.

In *City of Parma vs. Kevin Benedict* (2015), 2015-Ohio-3340; 2015 *Ohio App. LEXIS 3252* the accused was charged with violation of both R.C. 4511.19(A) (1) and (A) (2). Benedict appealed, arguing that the introduction into evidence of his prior conviction was prejudicial

because the conviction only enhanced the degree of the sentence and did not enhance the degree of the offense under R.C. 4511.19(A) (2). The Eighth District Court of Appeals affirmed the trial courts admission of the prior conviction relying on *State v. Hoover*, 123 Ohio St. 3d 418, 2009-Ohio-4993, 916 N.E. 2d 1056. It ruled; “In accordance with Hoover and Miller, we find that a prior OVI conviction within 20 years is now an essential element of the charge under R.C. 4511.19(A) (2). Thus, the City was required to prove that element beyond a reasonable doubt and the court did not err when it permitted the City to present evidence of Benedict’s prior OVI conviction.” *City of Parma vs. Kevin Benedict* (2015), 2015-Ohio-3340; 2015 Ohio App. LEXIS 3252.

All of the above cited authority supports the proposition that the court of appeals in this instance misinterpreted both *Old Chief* and Evid. R. 403 which reads, in pertinent part; “Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice ***.” Whether Mr. Baird herein stipulated to his prior conviction or the jury heard it through testimony, the same evidence was admitted. The unavoidable fact remains that the legislature mandated the proof of a prior OVI conviction. To hold that the introduction of evidence is unfairly prejudicial as opposed to a stipulation which the jury must also be informed of is illogical. In addition, the court of appeals decision misapplies the case law concerning judicial discretion. In its decision the court of appeals comments; “Regarding this standard, we recall the term ‘abuse of discretion’ is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. ***. An abuse of discretion may be found when the trial court ‘applies the wrong standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” Appendix 1, page 6, citing

Thomas v. Cleveland, 176 Ohio App. 3d 401, 2008-Ohio-1720.

In what possible way did the trial court's decision constitute an abuse of discretion pursuant to the standards set forth by the court of appeals? Indeed, the trial court's decision was, as set forth above, based upon a thorough understanding of the statutes and case law of Ohio. The state was obligated to prove a prior conviction for an OVI and was not obligated to accept an accused's stipulation, nor was the court authorized to force the acceptance of a stipulation to an essential element of the charge.

CONCLUSION

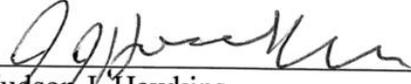
For all the reasons set forth above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests this court to accept jurisdiction in this case so that these important issues presented will be reviewed on the merits.

Respectfully submitted,


Judson J. Hawkins, Counsel of Record
For the Appellant

Certificate of Service

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail on the 14th day of December, 2015 to counsel for appellee, Ms. Judith M. Kowalsky, Attorney for Appellant, 333 Babbit Road, Suite 323, Euclid, Ohio 44123.



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IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

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COURT OF APPEALS
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MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2014-L-098
DENNIS I. BAIRD, :
Defendant-Appellant. :

Criminal Appeal from the Willoughby Municipal Court, Case No. 14 TRC 00727.

Judgment: Reversed, sentence vacated, and remanded.

Judson J. Hawkins, City of Eastlake Prosecutor, 37811 Lake Shore Boulevard, Eastlake, OH 44095 (For Plaintiff-Appellee).

Judith M. Kowalski, 333 Babbitt Road, #323, Euclid, OH 44123 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Dennis Baird appeals from the judgment of the Willoughby Municipal Court, entered on a jury verdict, convicting him of driving under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), and failing to submit to chemical testing, having been previously convicted of driving under the influence in the past 20 years, in violation of R.C. 4511.19(A)(2)(a) and (b). We reverse, vacate the sentence, and remand.

Appendix 1

JOURNALIZED 11/2/15

{¶2} Shortly after 8:30 p.m. on February 1, 2014, Officer Richard Isabella of the Eastlake Police Department was parked in his cruiser in a commercial lot off Lakeshore Boulevard in Eastlake, when he received a message from dispatch. Dispatch told him an anonymous tipster had called to say that Dennis Baird, possibly drunk, and driving a green pickup truck, had left a bar in the City of Willoughby, and was headed eastbound on Lakeshore. Dispatch further advised that Mr. Baird was driving under license suspension. Moments later, Officer Isabella saw the green pickup, and recognized Mr. Baird, with whom the officer had previous encounters. Mr. Baird was not speeding. Officer Isabella began following. He saw Mr. Baird drift over the white line into an adjoining bicycle path. He saw Mr. Baird twice cross the center line. After a minute or two, Officer Isabella stopped Mr. Baird on a side street.

{¶3} Officer Isabella approached the truck. He testified that Mr. Baird had slurred speech, red, glassy eyes, and smelled of alcohol. On cross examination, the officer admitted that a smell of alcohol emanating from a person cannot help identify how much, or when, a person drank. Officer Isabella testified Mr. Baird stated, "I almost made it home – I think I was set up." Officer Isabella also testified he asked Mr. Baird to recite the alphabet twice, and Mr. Baird made mistakes each time. Mr. Baird admitted to having two drinks, and driving under suspension. Officer Isabella asked Mr. Baird the time of day, which was actually about 8:40 p.m. Mr. Baird replied it was 1:30 p.m.

{¶4} Officer Isabella had Mr. Baird exit the truck. The driver's door does not function: Mr. Baird had to leave through the passenger's door. Officer Isabella admitted Mr. Baird had no difficulty in doing this, nor in standing when he got out. Officer Isabella asked Mr. Baird to perform field sobriety tests, to which Mr. Baird replied he could not,

due to medical issues. Mr. Baird was badly beaten by his father when young, and suffered a fractured skull. He has a problem with his balance, due to damage to his inner ear. He takes several medications, including a muscle relaxer, and blood thinner.

{¶5} Nevertheless, Officer Isabella administered the horizontal gaze nystagmus test, which Mr. Baird failed completely.

{¶6} There is no dash cam video of this encounter, since the camera in Officer Isabella's cruiser was disabled.

{¶7} Mr. Baird was arrested, and taken to the police station for booking. Over defense objection, the CD of the booking was entered into evidence at trial. The objection stemmed from the quality of the CD. There are numerous glitches; frequently, the audio and visual do not match at all.

{¶8} Mr. Baird refused to take a breathalyzer test. He was asked twice again to recite the alphabet. Each time, he ran through it very quickly, and seemed to miss the letter "w." The second time, he added it immediately after "z." Generally, he sat quietly on a bench. Several times, however, he became agitated, and gesticulated, raising his voice. Twice he clapped, evidently when accusing the officers of persecuting a severely disabled man such as himself. When asked if he would like to try the field sobriety tests, he replied he could not do them sober. He stated he had three drinks over several hours. He was non-cooperative when his mug shots were taken, sticking out his tongue. Interestingly, his eyes do not appear at all red in the mug shots. He answered most questions quickly and without difficulty, and participated intelligently, if somewhat vigorously, in a discussion of the effect of two prior OVI convictions he had sustained.

{¶9} Mr. Baird's gait is somewhat shambling. His voice is very gruff, and his speech pattern sometimes moves from fast to slow without warning or apparent reason. At the trial in this matter, his mother Judy Baird, with whom he lives, testified. She stated this was his normal manner of speech. She also testified that on the day of arrest, she returned home at 4:00 p.m., and left again at 7:30 p.m., an hour before the arrest, and that Mr. Baird drank nothing during that time.

{¶10} Mr. Baird was charged with the two aforementioned violations. April 17, 2014, he filed a motion to suppress, which was denied by the trial court after hearing. Jury trial was held August 1, 2014. Defense counsel offered to stipulate that Mr. Baird had a prior OVI conviction. The state refused the stipulation, and the judgments against him for two prior OVI convictions were entered into evidence.

{¶11} The jury found Mr. Baird guilty of both charges. The trial court merged the convictions for sentencing purposes, sentencing Mr. Baird to 365 days in jail, 215 being suspended, credit for time served, and two years probation. His driver's license was suspended for five years.

{¶12} This appeal timely ensued, Mr. Baird assigning five errors:

{¶13} "[1.] Appellant's right to be free from unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution was violated when the police conducted an investigatory stop based on an anonymous tip without first corroborating the allegations of criminal conduct.

{¶14} "[2.] The trial court abused its discretion to the prejudice of the appellant by admitting into evidence the appellant's booking video, as the recording's probative value is substantially outweighed by the danger of unfair prejudice.

{¶15} “[3.] The trial court erred to the prejudice of the appellant in admitting evidence of the appellant’s two prior convictions, in that the evidence’s probative value was outweighed by unfair prejudice.

{¶16} “[4.] The verdict of guilty is against the manifest weight of the evidence.

{¶17} “[5.] The trial court erred to the prejudice of the appellant in denying the motion for dismissal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure, in that the evidence presented was insufficient as a matter of law.”

{¶18} We commence with assignment of error three, finding it dispositive of this appeal.

{¶19} In October 2008, Mr. Baird pled guilty to two counts of OVI, in separate cases, in the trial court. In this case, he refused a breathalyzer test, and was charged not merely with OVI, but with violating R.C. 4511.19(A)(2)(a) and (b), which provides, in pertinent part:

{¶20} “(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

{¶21} “(a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

{¶22} “(b) Subsequent to being arrested for operating the vehicle * * * as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code

of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.”

{¶23} Defense counsel offered to stipulate that Mr. Baird had a prior OVI conviction. The state refused the offer, and both judgment entries of his prior convictions came into evidence. Mr. Baird argued then, as now, that this violated Evid.R. 403(A) which provides, in pertinent part: “Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice * * *.” Mr. Baird asserts the evidence he had two prior OVI convictions was not necessary for the state to prove its case, since he was willing to stipulate to one. He argues it was prejudicial, as it tended to show not merely that he is a repeat offender, but an habitual, chronic offender. We agree.

{¶24} We review a trial court's evidentiary rulings for abuse of discretion. *Musson v. Musson*, 11th Dist. Trumbull No. 2013-T-0113, 2014-Ohio-5381, ¶34. Regarding this standard, we recall the term “abuse of discretion” is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶25} “With regard to the risk of prejudice [under Evid.R. 403(A)], it must be shown that the prejudicial effect was unfair because it might have provided the jury with an improper basis for rendering its decision.” *State v. Comstock*, 11th Dist. Ashtabula No. 96-A-0058, 1997 Ohio App. LEXIS 3670, *30 (Aug. 15, 1997).

{¶26} We find this assignment of error is controlled by *Old Chief v. United States*, 519 U.S. 172 (1997). In that case, Old Chief was willing to stipulate he had previously been convicted of a crime requiring imprisonment for more than one year, which was an element of one of the crimes with which he was newly charged. *Id.* at 174. The United States refused the stipulation, and the district court agreed, allowing in the judgment entry regarding the prior conviction. *Id.* at 177. The Ninth Circuit Court of Appeals affirmed. *Id.* The U.S. Supreme Court granted Old Chief's petition for a writ of certiorari, and reversed. *Id.* at 178. Analyzing the case under Fed.R.Evid. 403, the court concluded that when the sole issue pertaining to a prior conviction is a defendant's legal status – i.e., whether a defendant is subject to prosecution and conviction for the presently charged crime due to a prior conviction – then, the government is required to accept a defendant's stipulation regarding the prior conviction, to avoid unfair prejudice. *Old Chief* at 190-192. We have previously applied *Old Chief* in interpreting Ohio Evid.R. 403. See, e.g., *State v. Hatfield*, 11th Dist. Ashtabula No. 2006-A-0033, 2007-Ohio-7130, ¶142-148.

{¶27} Pursuant to *Old Chief*, the admission into evidence of Mr. Baird's prior OVI conviction, when he was willing to stipulate he had a prior conviction, was unfairly prejudicial, as it gave the jury an improper basis for the instant verdict.

{¶28} The third assignment of error has merit. We decline to reach the remaining assignments of error, finding them moot. App.R. 12(A)(1)(c).

{¶29} The judgment of the Willoughby Municipal Court is reversed, Mr. Baird's sentence is vacated, and this matter is remanded for further proceedings consistent with this opinion.

THOMAS R. WRIGHT, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

{¶30} Because I disagree with the majority's analysis and disposition with respect to the third assignment of error, which is the only assigned error the majority addresses in its opinion, I respectfully dissent.

{¶31} I agree with the majority that the trial court erred by admitting evidence of appellant's prior OVI convictions, on the basis that admission of said evidence violated Evid.R. 403(A) and *Old Chief, supra*. However, even an *Old Chief* violation does not automatically warrant reversal of an otherwise valid conviction where the error committed by the trial court is otherwise harmless beyond a reasonable doubt. See *State v. Riffle*, 5th Dist. Muskingum No. 2007-0013, 2007-Ohio-5299, ¶¶32-35, citing *Old Chief*. In *Old Chief*, the United States Supreme Court did not remand the case to the trial court for a new trial; rather the Court remanded the case to the Ninth Circuit Court of Appeals. *Id.* at 192. In a footnote, the United States Supreme Court stated, “[i]n remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.” *Id.* at n. 11. On remand, the Ninth Circuit held: “[t]he judgment of

this court has been reversed * * *, and this case is remanded to the district court for further proceedings in light of the Supreme Court's opinion in *Old Chief*, *supra*.] The district court may consider whether any error found by the Supreme Court was harmless." 121 F.3d 448.

{¶32} Error is harmless unless the defendant's substantial rights are affected. Crim.R. 52(A); *State v. Hicks*, 6th Dist. Ottawa No. L-83-074, 1991 Ohio App. LEXIS 3856, *13 (Aug. 16, 1991).

{¶33} Ohio courts have discussed two standards for harmless error in criminal cases, depending on whether the rights affected by the error are constitutional or non-constitutional rights. For non-constitutional errors in the admission of evidence, the test is whether "there is substantial other evidence to support the guilty verdict." *State v. Webb*, 70 Ohio St.3d 325, 335 (1994).

{¶34} The Ohio test * * * for determining whether the admission of inflammatory and otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is not other substantial evidence, then the error is not harmless and a reversal is mandated. *State v. Davis*, 44 Ohio App.2d 335, 347 (8th Dist.1975).

{¶35} In contrast, "[w]here constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence,

standing alone, constitutes overwhelming proof of the defendant's guilt." *State v. Williams* 6 Ohio St.3d 281 (1983), paragraph six of the syllabus.

{¶36} Here, there was only one error committed by the court -- the admission of appellant's prior OVI convictions. In addition, the state presented ample evidence that appellant was under the influence before he was booked. Officer Isabella testified that appellant: (1) crossed the center line twice; (2) had slurred speech, glassy eyes, and smelled of alcohol; (3) admitted he had had two drinks that evening; (4) said it was 1:30 p.m. when in fact it was 8:40 p.m., in responding to the officer's question asking him the time; (5) failed the one field sobriety test he agreed to take, the horizontal gaze nystagmus test; and (6) was unable to correctly recite the alphabet twice. A review of the record reveals that, after leaving out the disputed evidence, the remaining evidence presented by the state satisfied both standards for harmless error. I would therefore affirm the trial court's judgment.

{¶37} For the foregoing reasons, I respectfully dissent.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

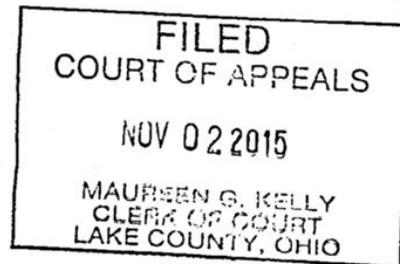
STATE OF OHIO,
Plaintiff-Appellee,

JUDGMENT ENTRY

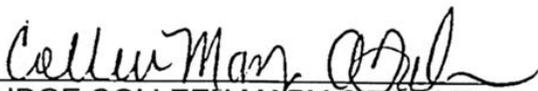
CASE NO. 2014-L-098

- vs -

DENNIS I. BAIRD,
Defendant-Appellant.



For the reasons stated in the Opinion of this court, the third assignment of error has merit. We decline to reach the remaining assignments of error, finding them moot. The order of this court is that the judgment of the Willoughby Municipal Court is reversed, the sentence is vacated, and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.


JUDGE COLLEEN MARY O'TOOLE

THOMAS R. WRIGHT, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with a Dissenting Opinion.

Appendix 2