

[Cite as *State v. Fairchild*, 2017-Ohio-9075.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 17 MA 0095
	)	
PLAINTIFF-APPELLANT	)	
	)	
VS.	)	OPINION
	)	
BRIAN S. FAIRCHILD	)	
	)	
DEFENDANT-APPELLEE	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 15 CR 325
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:

For Plaintiff-Appellant:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503
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For Defendant-Appellee:	Atty. Edward A. Czopur DeGenova & Yarwood, Ltd. 42 North Phelps Street Youngstown, Ohio 44503
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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 12, 2017

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WAITE, J.

{¶1} The state appeals a May 17, 2017 Mahoning County Common Pleas Court decision to grant Appellee Brian S. Fairchild's motion to exclude evidence of a prior conviction. Appellant was charged with operating a motor vehicle under the influence, and the state sought to enhance his charges due to an earlier conviction. The state argues that Appellee failed to present a *prima facie* case demonstrating that he was unrepresented in the prior matter and that he did not validly waive counsel. Assuming *arguendo* that Appellee did present a *prima facie* case, the state argues that it successfully rebutted Appellee's claims and established that Appellee was appointed counsel to represent him in the prior conviction. For the reasons that follow, the state's argument has merit and the judgment of the trial court is reversed. The matter is remanded for further proceedings.

Factual and Procedural History

{¶2} On May 7, 2015, Appellee was indicted on four counts of OVI, a felony of the fourth degree in violation of R.C. 4511.19(A)(1)(a), (G)(1)(d) and on OVI, a felony of the fourth degree in violation of R.C. 4511.19(A)(1)(h), (G)(1)(d). The degree of the charges was enhanced because Appellee had been convicted of OVI in 1996.

{¶3} On November 20, 2015, Appellee filed a motion to exclude his prior conviction. In his motion, he claimed that he was unrepresented in the prior case and did not validly waive counsel. The trial court held an evidentiary hearing and granted Appellee's motion. On appeal, we reversed the trial court's decision. See *State v. Fairchild*, 7th Dist. No. 16 MA 0047, 2016-Ohio-8218. (*"Fairchild I"*.) We held that a

defendant seeking to exclude a prior conviction holds the initial burden of demonstrating that he was unrepresented and did not validly waive his right to counsel. *Id.* at ¶ 12. Only when the defendant successfully meets this burden does the burden shift to the state to prove either that the defendant was represented or had validly waived counsel. *Id.*

{¶4} On remand, Appellee filed a second motion to exclude his prior conviction based on the same argument. The trial court held a second evidentiary hearing where Appellee testified that he was not represented in the prior case and did not validly waive counsel. Appellee also presented the testimony of Attorney Anthony Meranto. Attorney Meranto represented Appellee prior to his appeal in *Fairchild I* and was the prosecutor in the OVI matter Appellant seeks to exclude. Attorney Meranto testified that he had no recollection of the prior case, but that in general he had never heard the trial court judge who presided over Appellee's first conviction ever inform a defendant of their right to counsel. The court granted Appellee's motion to exclude his prior conviction. This timely appeal followed.

ASSIGNMENT OF ERROR

THE TRIAL COURT SHOULD HAVE DENIED DEFENDANT'S MOTION TO EXCLUDE, BECAUSE THE BURDEN NEVER SHIFTED TO THE STATE TO PROVE DEFENDANT'S PRIOR OVI CONVICTION WAS CONSTITUTIONALLY SOUND AFTER DEFENDANT FAILED TO PRESENT A PRIMA FACIE SHOWING

THAT HE WAS UNCOUNSELED AND DID NOT VALIDLY WAIVE HIS RIGHT TO COUNSEL.

{¶5} Pursuant to R.C. 4511.19(G)(1)(d):

[A]n offender who, within ten years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or 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.

{¶6} If the state attempts to enhance an offense pursuant to R.C. 4511.19, the state must first establish a prior conviction exists. “[A] certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.” R.C. 2945.75(B)(1).

{¶7} A defendant who seeks to exclude this prior conviction then bears the initial burden of demonstrating that he was unrepresented at the time of conviction and that he did not validly waive his right to counsel. *Fairchild I, supra*, ¶ 12. If the defendant provides such evidence, the burden shifts to the state to prove either that the defendant was represented or that he validly waived counsel. *Id.* Without evidence to the contrary, a reviewing court must presume the regularity of the proceedings underlying the original case. *State v. Lowe*, 7th Dist. No. 08 CO 37, 2010-Ohio-2788, ¶ 28.

{¶18} The state argues Appellee failed to establish a *prima facie* case that he did not validly waive counsel in his earlier conviction. Because Appellee and Attorney Meranto each testified that they did not recall whether the trial court advised Appellee of his right to counsel, the state argues that lack of recollection is insufficient to establish a *prima facie* case.

{¶19} Even if Appellee had presented sufficient evidence to establish his *prima facie* case, the state argues that a series of judgment entries filed in Appellee's prior case shows that he was, in fact, provided counsel. The state cites to the arraignment entry, which reflects that the trial court determined that he would appoint counsel. The state also cites to that portion of the record which shows Appellee paid the indigent defendant fee. The state highlights that the sentencing entry contains the initials "W.K." next to the line delineating "defense attorney." Although there is no record as to who W.K. may be, the state contends that this provides evidence that Appellant was represented by counsel.

{¶10} In response, Appellee claims that in our Opinion in *Fairchild I* we held that he had established he was unrepresented in his earlier case. He argues that we determined only that he failed to prove he did not validly waive counsel. Based on Appellee's interpretation of our Opinion, he believes that on remand he was required only to show that he did not validly waive counsel in his first OVI conviction. Appellee maintains that the trial court failed to appoint counsel for him and that he was not represented on the day of his plea.

{¶11} Contrary to Appellee's argument, he misreads our decision in *Fairchild* I. We did not, in fact, determine on appeal that he had proven he was unrepresented in his earlier OVI matter. In fact, we held that Appellee had failed to provide any evidence to meet either requirement of the test: that he was unrepresented and that he had not validly waived representation.

{¶12} Because Appellee incorrectly assumes he was not required on remand to provide evidence that he was unrepresented in his earlier OVI conviction, Appellee moves directly to the second prong of the test. Appellee argues that the trial court failed to advise him of his right to counsel. In support of his argument, Appellee offers Attorney Meranto's testimony that he has no recollection of Appellee's specific case but that, as a general matter, he never specifically heard this judge inform a defendant of his right to counsel. Appellee also cites several cases in an attempt to support his argument. However, none of these cases are relevant, as they all involve a question pertaining to a written waiver of counsel. All parties acknowledge that this case does not involve a written waiver of counsel. See *State v. Bigelow*, 5th Dist. No. 15CA49, 2016-Ohio-1073; *State v. Coleman*, 8th Dist. No. 99369, 2013-Ohio-4792; *State v. Chiomento*, 11th Dist. No. 2007-L-138, 2008-Ohio-3393, reversed by *State v. Chiomento*, 121 Ohio St.3d 606, 2009-Ohio-1905, 906 N.E.2d 1111.

{¶13} In determining whether a defendant validly waived counsel in a prior case, a court must first look to whether the prior case was a serious offense or a petty offense. *State v. Meyers*, 6th Dist. Nos. E-15-042, E-15-043, 2015-Ohio-5499, ¶ 14, citing *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024,

¶ 13. A petty offense is “a misdemeanor other than a serious offense.” Crim.R. 2(D). A serious offense is “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Crim.R. 2(C). “In petty offense cases, waiver of counsel shall be made in open court and recorded. See Crim.R. 22; Crim.R. 44(C). In serious offense cases the waiver shall be in writing, made in open court and recorded.” *Meyers* at ¶ 14, citing Crim.R. 22; Crim.R. 44(C). Because Appellant faced a maximum penalty of no more than six months of confinement, he was charged with a petty offense and any waiver of counsel was only required to be made in open court and recorded. No written waiver was necessary. Hence, cases dealing with lack of a written waiver of counsel in serious cases are entirely inapplicable to Appellee’s case.

{¶14} At the May 16, 2017 evidentiary hearing, Appellee and Attorney Meranto provided the only testimony. Appellee testified that in his prior case, the trial court did not appoint him counsel and he did not independently retain counsel. (5/16/17 Motion Hrg. Tr., p. 5.) When asked if he was informed of his right to counsel, he stated “[n]o, I do not recall any conversation about counsel.” (*Id.* at pp. 5-6.) Attorney Meranto testified that he previously represented Appellee in this matter, however, he later discovered that he served as prosecutor in Appellee’s prior OVI case. He testified that while he did not specifically remember Appellee’s earlier case, he could not recall ever hearing the trial court judge who presided over Appellee’s case ever inform a defendant of their right to counsel. (*Id.* at p. 11.)

{¶15} Neither Appellee nor Attorney Meranto definitively testified that the trial court failed to inform Appellee of his right to counsel. Pursuant to established Ohio law, a mere inability to recall information is insufficient to establish a *prima facie* case. See *State v. King*, 3d. Dist. No. 16-11-07, 2012-Ohio-1281; *State v. Biazzo*, 8th Dist. No. 93792, 2010-Ohio-4485; *State v. Sartain*, 11th Dist. No. 2007-L-167, 2008-Ohio-2124. Appellee presented no other evidence to support his claim. Contrary to Appellee's argument, this matter does not involve a question of credibility. This record reflects the absence of evidence altogether. The "evidence" presented by Appellee fails as a matter of law, as it was merely evidence that neither Appellee nor Attorney Meranto had sufficient recall of the prior matter. As such, Appellee failed to establish a *prima facie* case.

{¶16} Assuming *arguendo* that Appellee had established a *prima facie* case, the record shows that the state successfully overcame its burden in response. At trial, the state produced the "jacket" from Appellee's prior case. Among the entries in the jacket was an arraignment entry. It contains a handwritten note stating that the court would appoint counsel. A second note shows that Appellee paid a \$25 indigent defendant fee. Additionally, the jacket contained a sentencing entry, which listed the parties present at sentencing. According to the entry, Appellee was present and the document lists "A.M.," or Anthony Meranto as prosecutor. Tellingly, the space for the defendant's attorney was not left blank, but contained the initials "W.K."

{¶17} The trial court found that by containing merely the initials W.K. the entry failed to demonstrate that Appellant was represented. However, the judgment entry

gave only initials for both attorneys, prosecutor and defense. The space for defense attorney was not left blank. As we know the identity of the prosecutor, we know that these initials represent a specific person. As such, it is reasonable to assume that the initials used for the defense attorney also refer to a specific person. These initials, combined with the notations that the court intended to appoint counsel and that Appellee paid the indigent defendant fee, rebut Appellee's claim that he was unrepresented.

{¶18} Appellee failed to present any evidence that he was unrepresented or that he failed to validly waive counsel in his earlier conviction. Even if he and his witness' failed memory and speculative comments rose to the level Appellee wishes, the state clearly refuted Appellee's claims. The state's argument has merit and the assignment of error is sustained.

Conclusion

{¶19} The state argues that Appellee failed to present a *prima facie* case demonstrating that he was unrepresented and did not validly waive counsel in the prior case. Based on this record, the state is correct. As such, the judgment of the trial court is reversed and remanded for further proceedings.

DeGenaro, J., concurs.

Robb, P.J., concurs.