[Cite as *State v. Kaiser*, 2002-Ohio-610.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 00-CO-65
	)	
MARIE A. KAISER,	)	O P I N I O N
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Northwest Area County Court Case No. 99-TR-C-2279
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Robert L. Herron Prosecuting Attorney Virginia M. Barborak Assistant Prosecuting Attorney 3rd Floor, Columbiana County Courthouse Lisbon, Ohio 44432
For Defendant-Appellant:	Atty. Earl A. Schory, II 288 East State Street Salem, Ohio 44460

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: February 12, 2002

[Cite as *State v. Kaiser*, 2002-Ohio-610.]
DONOFRIO, J.

{¶1} Defendant-appellant, Marie A. Kaiser, appeals her conviction in the Columbiana County Court, Northwest Area, for DUI.

{¶2} Prior to the case at hand, appellant had been convicted of DUI twice within the past six years – on January 3, 1996, and again on August 7, 1998. According to appellant, the August 7, 1998 conviction was amended from second-offense DUI to first-offense DUI.

{¶3} On September 21, 1999, appellant was again stopped and charged with third-offense DUI. Appellant filed a motion to have the charge amended to second-offense DUI, arguing that since her August 7, 1998 conviction was amended to first-offense DUI the present charge could only be considered second-offense DUI. Plaintiff-appellee, represented by the Columbiana County Prosecutor's Office, filed a memorandum in opposition. The trial court denied appellant's motion.

{¶4} Pursuant to a negotiated plea agreement, appellant pled no contest to third-offense DUI on October 16, 2000. The court sentenced appellant to 180 days in jail, suspending 150 of those days on certain conditions. This appeal followed.

{¶5} Appellant's sole assignment of error states:

{¶6} "THE TRIAL COURT ERRORED [*sic*] WHEN THE COURT FOUND THAT THE DEFENDANT'S CHARGE WAS THE THIRD OFFENSE WITHIN 6 YEARS WHEN THE COURT RECORD PRESENTED TO JUDGE ROBERTS SHOWED THE SECOND OFFENSE WAS DEFINED AS A FIRST OFFENSE BY A PRIOR TRIBUNAL."

{¶7} Appellant attempts to analogize her case to those where it was found that a defendant's uncounseled prior DUI conviction could not be used to enhance the penalty for a

subsequent conviction. Appellant's concern lies with the mandatory thirty-day term of imprisonment that goes along with a conviction for third-offense DUI.

{¶8} R.C. 4511.99(A)(3)(a) provides, in part:

{¶9} "[I]f, within six years of the offense, the offender has been convicted of or pleaded guilty to two violations [of a DUI], the court shall sentence the offender to a term of imprisonment of thirty consecutive days and may sentence the offender to a longer definite term of imprisonment of not more than one year."

{¶10} In *State v. Allen* (1987), 29 Ohio St.3d 53, the Ohio Supreme Court held that where the existence of a prior conviction enhances the penalty for a subsequent offense, but does not elevate the degree thereof, the prior conviction is not an essential element of the subsequent offense, and is strictly a sentencing consideration for the court.

{¶11} As the statute indicates, the existence of appellant's prior convictions does not elevate the degree of the offense and serves only as a sentencing consideration for the court in her present case. Therefore, the trial court did not err in denying her motion to amend the charge.

{¶12} Furthermore, appellant has never maintained that her two prior convictions were uncounseled. Simply because the court in appellant's August 7, 1998 case amended the charge from second-offense to first-offense does not mean that appellant's January 3, 1996 conviction was uncounseled. The amendment could have just as likely been the result of a negotiated plea agreement. In addition, R.C. 4511.99(A)(3)(a) specifically refers to two violations (of a DUI) and that is exactly what occurred here.

{¶13} Accordingly, appellant's sole assignment of error is without merit.

{¶14} The judgment of the trial court is hereby affirmed.

Vukovich, J., concurs
Waite, J., concurs