

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-1057
Plaintiff-Appellee,	:	(C.P.C. No. 07CR-06-4531)
v.	:	
	:	(REGULAR CALENDAR)
Joseph Preston Kauffer,	:	
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on February 15, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *John H. Cousins, IV*,  
for appellee.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for  
appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Joseph Preston Kauffer, from a judgment of sentence entered by the Franklin County Court of Common Pleas following appellant's entry of a guilty plea to one count of operating a vehicle under the influence of alcohol ("OVI").

{¶2} On June 25, 2007, appellant was indicted on two counts of OVI, in violation of R.C. 4511.19. Each count carried a specification alleging that appellant had been previously convicted of five similar offenses within 20 years of the instant offense, thus serving to enhance the penalty from a misdemeanor to a felony of the fourth degree. Specifically, the indictment alleged similar convictions on the following dates: (1) March 9, 2004 (Madison County Municipal Court); (2) August 15, 2001 (Franklin County Municipal Court); (3) April 16, 1997 (Washington Court House Municipal Court); (4) July 13, 1994 (Franklin County Municipal Court); and (5) June 10, 1991 (Plain City Mayor's Court).

{¶3} Appellant filed a motion to strike the specifications on the ground that his conviction on April 16, 1997 in Washington Court House Municipal Court, had been entered without a valid waiver of the right to counsel. On October 15, 2009, the court conducted a hearing on the motion, and various exhibits were admitted into evidence. The trial court, noting that the evidence included a waiver of counsel form signed by appellant, denied appellant's motion to strike. Also on that date, appellant entered a plea of no contest to one count of OVI, without specification, a stipulated lesser-included offense of Count 1. The trial court entered a nolle prosequi as to Count 2 of the indictment.

{¶4} During the hearing, the state recited the following factual background giving rise to the charge. On May 13, 2007, at approximately 2:00 a.m., an officer observed an individual in a van "drive over a sidewalk and curb" near the Nationwide Arena on Front Street, Columbus. (Tr. Oct. 15, 2009, 14.) The driver then made a turn near a bar, bringing the vehicle to an abrupt stop "because there were pedestrians walking around." (Tr. Oct. 15, 2009, 14.) The officer approached the vehicle, which was driven by

appellant; the officer observed that appellant had "an overwhelming odor of alcohol, glassy, bloodshot eyes." (Tr. Oct. 15, 2009, 14.) After appellant performed poorly on field sobriety tests, the officer arrested him for OVI. Appellant was subsequently administered a breath test, resulting in a reading of .209.

{¶5} The trial court sentenced appellant by entry filed October 16, 2009. The trial court conducted a re-sentencing hearing on November 23, 2009, due to appellant's incarceration on a conviction for the offense of failure to comply with an order of police in Pickaway County. By entry filed November 25, 2009, the court sentenced appellant to 18 months incarceration, to be served consecutive with Count 3, and concurrently with Counts 4 and 5, in Pickaway County case No. 07CR-0270.

{¶6} On appeal, appellant sets forth the following single assignment of error for this court's review:

THE TRIAL COURT ERRED WHEN IT RULED THAT THE DEFENDANT EXECUTED A VALID WAIVER OF COUNSEL BY MERELY EXECUTING A WRITTEN WAIVER WHEN THERE WAS NO EVIDENCE THAT THE WAIVER HAD BEEN MADE ON THE RECORD AND IN OPEN COURT AS REQUIRED BY LAW AND BY *STATE v. BROOKE*, 113 OHIO ST.3d 199, 2007-OHIO-1533, 863 N.E.2d 1024.

{¶7} Under his assignment of error, appellant challenges the trial court's ruling denying his motion to strike the specification from the indictment as constitutionally infirm. As noted, the indictment charging appellant under R.C. 4511.19 alleged that he had been previously convicted of five similar OVI offenses within 20 years of the instant offense. In his motion to strike, appellant asserted a lack of waiver of counsel in open court and on the record in the Washington Court House Municipal Court proceedings. Appellant argues that the dispositive case law necessary for resolution of this issue is set forth in

two Supreme Court of Ohio cases, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, and *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314.

{¶8} 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." In cases in which "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* at ¶8. Pursuant to R.C. 2945.75(B)(1), whenever it is necessary to prove a prior conviction, "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."

{¶9} In the present case, appellant does not dispute the prior 1997 conviction in Washington Court House Municipal Court. Rather, he challenges use of that prior conviction based upon his contention that such conviction was entered without a valid waiver of the right to counsel.

{¶10} In general, a past conviction may not be attacked in a subsequent case; however, "there is 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." *Brooke* at ¶9. In *Brooke*, the 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." *Id.* An "uncounseled conviction" occurs when a defendant is not represented by

counsel and the defendant fails to make a knowing and intelligent waiver of counsel. *State v. Starett*, 4th Dist. No. 07CA30, 2009-Ohio-744, ¶18. Conversely, a defendant who has been afforded the right to counsel but who rejects that right has not suffered from an uncounseled conviction. *Id.*

{¶11} In both *Brooke* and *Thompson*, the Supreme Court discussed a burden-shifting analysis that occurs when a defendant challenges a prior conviction as unconstitutional. Specifically, in *Brooke* at ¶11, the Supreme 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, 543 N.E.2d 501, 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, 543 N.E.2d 501. 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.

{¶12} In *Thompson* at ¶6, the court sought to clarify that "nothing 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." Thus, in *Thompson* at syllabus, the Supreme Court explained its holding in *Brooke* as follows:

For 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.

{¶13} Appellant argues that he made a prima facie case that one of the prior convictions used to enhance his OVI offense to a felony was uncounseled, and that the state failed to rebut this presumption. In support, appellant points to (1) the lack of an available recording with respect to his 1997 proceedings in the Washington Court House Municipal Court; (2) statements made in his affidavit regarding those 1997 proceedings, and (3) the fact that a general rights waiver form admitted as an exhibit contained only appellant's signature. Appellant maintains that the presence of his signature on waiver forms is insufficient to show that those waivers were properly made on the record in open court.

{¶14} As set forth above, both *Brooke* and *Thompson* discuss the requirement that a defendant present a "prima facie showing" that the prior convictions were unconstitutional. The state notes, however, that R.C. 2945.75 was amended, effective September 30, 2008 to add subsection (B)(3), which states: "If the defendant claims a constitutional defect in any prior conviction, the defendant has the burden of proving the defect by a preponderance of the evidence." See also *State v. Tanner*, 9th Dist. No. 24614, 2009-Ohio-3867, ¶7; *State v. Kingery*, 12th Dist. No. CA2009-08-014, 2010-Ohio-1813, ¶16.<sup>1</sup>

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<sup>1</sup> The decision in *Brooke*, citing a prima facie burden, was rendered prior to the amendment of R.C. 2945.75. Further, while the Supreme Court's decision in *Thompson*, was rendered in 2009, the defendant in that case was indicted in 2006, and challenged the constitutionality of his earlier conviction approximately two years prior to the amendment of R.C. 2945.75.

{¶15} In the instant case, in support of his motion to strike, appellant submitted at the hearing his own affidavit, in which he averred in part the following:

\* \* \* I was also the Defendant in case no. TRC 9701278 in the Washington Court House Municipal Court;

\* \* \* That in TRC 9701278 I entered a guilty plea to the charge of D.W.I., a violation of O.R.C. 4511.19A3;

\* \* \* That in TRC 9701278 I did not have counsel;

\* \* \* That to the best of my knowledge, the Judge who took my plea and sentenced me in TRC 9701278 twelve (12) years ago did not review my constitutional rights, including the right to have counsel and the right to a jury trial;

\* \* \* That in TRC 9701278 I was sentenced to 180 days in jail.

{¶16} Admitted as "Exhibit No. 2" was a "waiver of counsel" form, dated April 16, 1997, and titled: "WASHINGTON COURT HOUSE MUNICIPAL COURT." The waiver form, which contains appellant's signature, states in part:

I, the undersigned defendant, having been fully advised of my right to counsel, including the right to have counsel appointed for me under certain conditions do voluntarily waive my right to counsel and submit this case to the court without record.

{¶17} Also admitted as "Exhibit No. 4" was a jury trial waiver form signed by appellant. "Exhibit No. 5," a letter from the clerk of the Washington Court House Municipal Court, states in part: "The Court does not have a recording of the hearing that was scheduled 4-16-97 for Joseph P. Kauffer. All recordings prior to 2003 have been destroyed according to the rules of Retention and Disposal." Finally, "Exhibit No. 6," a document titled, "YOUR RIGHTS IN COURT," contained the following language: "You have a right to an attorney and a right to a postponement up to 7 days in the proceeding to secure an attorney." Appellant's signature also appeared on that document.

{¶18} In denying the motion to strike, the trial court relied in part upon the waiver form, signed by appellant, informing him of his right to counsel. In cases in which a transcript is not available, court pleadings, including a signed waiver of counsel form by a defendant, may be sufficient to show that the court made a finding that the right to counsel was knowingly and voluntarily waived. *State v. Lewis*, 11th Dist. No. 2009-L-138, 2010-Ohio-4288, ¶38, citing *Brooke*. Further, the fact a waiver form does not expressly state that the advisement about right to counsel occurred in open court is not necessarily fatal. *State v. Sartain*, 11th Dist. No. 2007-L-167, 2008-Ohio-2124, ¶25.

{¶19} As indicated above, in addressing appellant's motion to strike, the trial court had before it: (1) appellant's affidavit; (2) a waiver of counsel form signed by appellant; (3) a jury trial waiver form signed by appellant, and (4) a "rights in court" form signed by appellant advising him of the right to an attorney. Upon review, appellant has failed to show, by a preponderance of the evidence, that his conviction in 1997 was constitutionally infirm. Appellant's primary challenge to the prior conviction is set forth in his affidavit; that affidavit, however, is framed in conclusory, qualifying language ("to the best of my knowledge" the trial judge "did not review my constitutional rights"), and falls short of proof that he did not validly waive the right to representation. Rather, considered in conjunction with the other record evidence, the unsupported equivocal representations in appellant's affidavit fail to overcome the presumption that the "underlying proceedings were conducted in accordance with the rules of law." *Brooke* at ¶11.<sup>2</sup> Here, because the

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<sup>2</sup> Even accepting appellant's claim that a prima facie showing is the appropriate burden, we would agree with the state that appellant has also failed to meet this burden. Under Ohio law, "[a] bald allegation of constitutional infirmity is insufficient to establish a prima facie showing with respect to an 'uncounseled' plea." *State v. McCallum*, 9th Dist. No. 08CA0037-M, 2009-Ohio-1424, ¶15, quoting *Thompson* at ¶7 (failure to make prima facie case where defendant gave hedged responses and testified that she "d[id]n't believe" her counsel was in attendance). *Id.* at ¶14.

state established the existence of the prior conviction, and appellant failed to meet his burden of proving that such conviction was constitutionally infirm, the trial court did not err in denying the motion to strike the specification.

{¶20} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

SADLER and TYACK, JJ., concur.

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