

[Cite as *State v. Rolf*, 2010-Ohio-5699.]

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TODD A. ROLF

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 10-CA-41

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of  
Common Pleas, Case No. 07-CR-00648

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 19, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

BRIAN T. WALTZ  
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*Hoffman, J.*

{¶1} Defendant-appellant Todd A. Rolf appeals the April 2, 2010 Judgment Entry entered by the Licking County Court of Common Pleas, which found him guilty of one count of felony driving under the influence and sentenced him to a term of incarceration of three years, following Appellant's entering a plea of no contest. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On August 16, 2007, during a routine traffic stop for speeding, Appellant was arrested for operating a motor vehicle under the influence of alcohol. The offense was charged as a felony three as Appellant had previously been convicted of felony OVI in Licking County Court of Common Pleas Case No. 02CR00351. The indictment in Case No. 02CR00351 alleged Appellant had been convicted of OVI three times within the six years preceding the offense in Licking County Municipal Court Case No's. 97-TRC-08063, 00-TRC-10426, and 00-TRC-10629.

{¶3} Appellant filed a motion in limine in the instant action requesting the trial court strike the felony OVI conviction in Case No. 02CR00351 for purposes of degree enhancement. Appellant argued the prior felony OVI should be excluded because his first misdemeanor OVI in Case No. 97-TRC-08603 was constitutionally infirm due to the denial of counsel. The trial court conducted an oral hearing on the motion after which it denied Appellant's request.

{¶4} Thereafter, on April 2, 2010, Appellant appeared before the trial court and entered a plea of no contest to the charge. The trial court conducted a Crim.R. 11

colloquy with Appellant, accepted the plea, and found him guilty as charged. The trial court sentenced Appellant to a period of incarceration of three years.

{¶5} It is from the judgment entry memorializing his conviction and sentence Appellant appeals, raising the following assignment of error:

{¶6} “I. THE TRIAL COURT ERRED WHEN IT DENIED ROLF’S MOTION TO STRIKE PRIOR FELONY OVI CONVICTION FOR PURPOSE OF DEGREE ENHANCEMENT.”

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{¶7} “Generally, a past conviction cannot 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. 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.” *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533 at para. 9, citing *State v. Brandon* (1989), 45 Ohio St.3d 85, 86; *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745. Accordingly, pursuant to this exception, in order to determine whether a defendant’s prior convictions are available for penalty enhancement, the prior convictions must be examined as they relate to the defendant’s current offense. *Id.*

{¶8} In the instant action, Appellant argues his 1997 misdemeanor conviction for OVI was invalid as it was unconstitutionally infirm; therefore, that conviction could not operate to form the basis of his 2002 F-4 OVI. As a result, the 2002 F-4 OVI could not be used to enhance the current charge to a felony of the third degree. We disagree.

{¶9} In *State v. Mariano*, 2009-Ohio-5426, the Eleventh District Court of Appeals addressed this exact issue. In *Mariano*, the appellant argued a 2003 felony-four OVI, which was based upon prior, allegedly uncounseled, misdemeanors could not be used to enhance her current felony-three OVI. The *Mariano* Court found the 2003 conviction was valid and final, and the appellant had had the opportunity, prior to voluntarily entering her plea of guilty in 2003, to collaterally challenge her prior, allegedly uncounseled, misdemeanor OVI convictions. The Eleventh District added, “Whether she did or did not is irrelevant to this appeal. Because *that* conviction is final and valid and it is *that* conviction upon which the instant felony-three OVI is premised, we hold any attempt to challenge the underlying elements of the 2003 charge, i.e., her allegedly uncounseled prior misdemeanor convictions, is necessarily res judicata.” Id. at para. 19.

{¶10} We agree with the *Mariano* court. Accordingly, Appellant’s assignment of error is overruled.

{¶11} The Judgment of the Licking County Court of Common pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman  
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HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards  
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HON. JULIE A. EDWARDS

s/ John W. Wise  
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HON. JOHN W. WISE

