

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

PATRICK S. CAMPBELL

## Defendant-Appellant

: JUDGES:

: Hon. John W. Wise, P.J.  
: Hon. Patricia A. Delaney, J.  
: Hon. Earle E. Wise, Jr., J.

: Case No. 17CA105

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court  
of Common Pleas, Case No. 2017 CR  
0266 D

**JUDGMENT:**

AFFIRMED

DATE OF JUDGMENT ENTRY:

September 21, 2018

APPEARANCES:

For Plaintiff-Appellee:

GARY BISHOP  
RICHLAND CO. PROSECUTOR  
JOSEPH C. SNYDER  
38 South Park St.  
Mansfield, OH 44902

For Defendant-Appellant:

DAVID M. WATSON  
3 North Main St., Suite 702  
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*Delaney, J.*

{¶1} Appellant Patrick S. Campbell appeals from the November 16, 2017 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} This case arose on March 24, 2017 when Trooper Nelson of the Ohio State Highway Patrol observed appellant travel off the right side of the roadway when making a left turn. Nelson followed appellant and next observed him drive left of center. Nelson initiated a traffic stop, made contact with appellant, and suspected he was impaired. Nelson launched an OVI investigation including administration of field sobriety tests, which appellant failed. Appellant was arrested for OVI and agreed to submit to a breath test at the Mansfield Post of the Ohio State Highway Patrol. Appellant's BAC test result was .180.

{¶3} Appellant was subsequently indicted as follows: Count I, O.V.I. with three or more priors within six years pursuant to 4511.19(A)(1)(a), a felony of the fourth degree; Count II, O.V.I. with a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of breath and three or more priors within six years pursuant to R.C. 4511.19(A)(1)(h), a felony of the fourth degree; Count III, failure to wear a seat belt pursuant to R.C. 4513.263(B)(1), a minor misdemeanor; and Count IV, driving left of center pursuant to R.C. 4511.25(A), a minor misdemeanor.<sup>1</sup>

{¶4} Appellant entered pleas of not guilty.

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<sup>1</sup> The indictment was amended on September 25, 2017; the counts listed are as amended.

{¶5} Relevant to the instant appeal, appellant filed a motion in limine arguing that his uncounseled misdemeanor convictions could not be used to enhance the penalty level of the OVI offenses in the instant case, and also filed a “Motion to Strike Prior Uncounseled Convictions,” stating in part, “\* \* \* [T]he State has only provided evidence of three (3) convictions for OVI and two (2) were uncounseled, Defendant was incarcerated in both cases.”

{¶6} Appellee responded with a memorandum in opposition, stating in pertinent part:

\* \* \* \*

\* \* \* [Appellant] has three prior convictions for OVI. His first occurred in 2011 in Mansfield Municipal Court Case No. 2011-TRC-11764 and [appellant] pled no contest on November 8, 2011. On the record, [appellant] was advised of his right to counsel and later waived his right to counsel when he entered his no contest plea. (See State’s Exhibit D, Audio Recording from Defendant’s Arraignment and Plea in Mansfield Municipal Court Case No. 2011-TRC-11764). [Appellant’s] second conviction for OVI occurred in 2013 in Mansfield Municipal Court Case No. 2013-TRC—3847. Defendant was represented by counsel, pled guilty and was sentenced on July 22, 2013 (See State’s Exhibit B). Defendant’s third OVI occurred on December 15, 2013 in Shelby Municipal Court Case No. 2014-TRC-00055. Later at his arraignment on December 15, 2013, Defendant pled and executed a written waiver of rights, which included language advising Defendant of his right to counsel (See State’s Exhibit C).

\* \* \* \*

{¶7} On September 13, 2017, the trial court heard the motion to strike the prior convictions and the motion to suppress. Relevant to the instant appeal, the following argument was made:

\* \* \* \*

[PROSECUTOR:] \* \* \* \*. And I do have certified copies today of the defendant's certified convictions as well as oral colloquy from his plea in the 2011TRC764 misdemeanor OVI for the court's consideration.

THE COURT: Okay. As I understand, \* \* \*, what you are saying is, because these were misdemeanors, even though a first degree misdemeanor and not punishable by more than 6 months in jail or confinement [sic], a waiver could be done in court? Or didn't require a written waiver. Is that right?

[PROSECUTOR]: Correct, Your Honor.

THE COURT: So you are saying that each of these cases that he didn't have an attorney, two cases, 2011 and 2014, I believe, that he made those waivers?

[PROSECUTOR]: Correct, Your Honor. And it was in 2013. The 2014 case had a written waiver. The 2013 case, the defendant was represented by [counsel]. Then in the 2011 case, I have the audio recording of the arraignment session where the defendant was advised of his rights and acknowledged those rights when he was brought on the record specifically for his case after waiver.

THE COURT: Do you want to play that?

[PROSECUTOR]: Attached to my memo I had listed as exhibits copies of the certified copies. I don't know if the court will accept those. I do have the certified copies that we attained from the clerk's office regarding [appellant].

THE COURT: I can use the copies as long as there is no challenge to their accuracy. Do you challenge the copies, [defense counsel]?

[DEFENSE COUNSEL]: Pardon? I am sorry.

THE COURT: Do you challenge the copies attached to her motion?

[DEFENSE COUNSEL]: Can I approach?

THE COURT: Yes.

[DEFENSE COUNSEL]: I just wanted to see what... As far as this hearing is concerned, I am not...I have seen these. They are in discovery. They are file stamped. There it is. No, no, not for purposes of this hearing, I don't have any objection, Your Honor.

THE COURT: Okay, so Exhibits A, B, and C are accepted as authentic copies.

[PROSECUTOR]: Thank you, Your Honor. And this would be a copy of State's Exhibit D. I did file the disk for the court. Your Honor, I can play that one rather than the copy, if you prefer.

THE COURT: Okay.

\* \* \* \*

THE COURT: For the record, A, B, and C are attached to your memorandum in opposition to his motion, his collateral challenges. So that's why you can go ahead and use those, is I can see they are attached to your motion.

[PROSECUTOR]: Thank you, Your Honor.

(State's Exhibit D is played a short while.)

[PROSECUTOR]: Your Honor, for the record, this is a proceeding from Mansfield Municipal Court, 2011-TRC-764, the audio recording. And I believe I need to request judicial notice of a prior accompanying court's proceedings, Your Honor.

THE COURT: Okay. I don't hear any challenge to the fact. I know that Phil Naumoff is a magistrate over there in Mansfield Municipal Court, so it sounds like his voice.

[PROSECUTOR]: Thank you, Your Honor.

(State's Exhibit D resumes and concludes.)

[PROSECUTOR]: Your Honor, that is the entirety of State's Exhibit D.

THE COURT: Okay. [Defense counsel], did you have any other evidence that you wanted to offer?

[DEFENSE COUNSEL]: No, Your Honor, that is the evidence of the conviction that I know of. As my memorandum states, it does not constitute a sufficient colloquy to satisfy State versus Brook and also State

versus Thompson; that there is evidence there that merely there was a written waiver, and all that the magistrate did then is just talk about a written waiver and does not go into a... You know, I didn't hear him. Did he sign the rights? Something to that effect? And I think that is it. I think those cases require more than that to constitute a sufficient waiver of constitutional rights.

THE COURT: [Prosecutor]?

[PROSECUTOR]: Your Honor, I believe the first portion where the magistrate goes through the defendant's rights was sufficient and placed him on notice. I believe the case law doesn't require for this type of offense a written waiver. I believe the audio recording is sufficient.

THE COURT: The judgment entry also recites that defendant was told about his right to have counsel appointed if indigent, which I heard him say, and that the defendant knowingly waived his rights and the plea is accepted in light of that. So I find that there is adequate advice or an accurate waiver of counsel to make the misdemeanor conviction for driving under the influence an appropriate prerequisite offense for a felony offense.

What about the other two? Do you have any argument about those, [defense counsel]?

[DEFENSE COUNSEL]: Well, Your Honor, the only thing... I cannot prove the negative. I only have paperwork from Shelby Municipal Court without any oral evidence or any kind of a recording that there was any kind of actual discussion with the defendant. And that one was... One

of them I think even was in March of this year. I believe one of them... No, it was the... No, it was 2012. No, 2013. Just a written waiver, I believe, on that one without any recording that I have been able to find.

THE COURT: Wasn't he represented by an attorney in --

[DEFENSE COUNSEL]: One of them he was; one of them he wasn't.

THE COURT: Well, I thought I was understanding that he was represented by an attorney in 2013. Is that right?

[PROSECUTOR]: Yes, Your Honor. That would be [counsel]. And then the 2014 misdemeanor conviction, there was a written waiver.

THE COURT: Yes.

[DEFENSE COUNSEL]: Yes, only a written waiver on the... It is the '14 that was without counsel. I am sorry. I think [counsel] was on that previous one. Does that sound right?

THE COURT: But there is a written waiver in which he says-  
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[DEFENSE COUNSEL]: Yes, but according to Brook and Thompson, more than a written waiver is required in order to give up your right to counsel.

THE COURT: [Prosecutor]?

[PROSECUTOR]: Your Honor, I believe it is the defendant's burden to establish that the underlying convictions were deficient; that there is a presumption that the trial court correctly executed the constitutional



requirements for the colloquy. I believe in the judgment entry, it's noted that the defendant was advised of his constitutional right to counsel and waived it. And we do have the written waiver that supports that.

THE COURT: What it says is, \* \* \* [The trial court reads State's Exhibit C, appellant's waiver of rights, into the record].

So I think that it would be ill of me to try to question what the judge says in this entry and the witness signature of the defendant himself. So I believe that adequately establishes a knowing waiver of right to counsel.

So I find that each of the three prior misdemeanor convictions are appropriate convictions to be used in enhancing this offense to a felony offense if the offense is proved.

\* \* \* \*.

T. 4-11.

{¶8} On October 18, 2017, the trial court overruled appellant's motion to strike the prior convictions, noting appellee submitted evidence of the prior convictions but appellant "offered no evidence as to the deficiency of [appellant's] prior convictions for Operating a Vehicle While Impaired."

{¶9} Appellant thereupon changed his pleas to ones of no contest. The trial court sentenced appellant to a prison term of 20 months and suspended his operator's license for 3 years.

{¶10} Appellant now appeals from the judgment entry of his convictions and sentence, incorporating the trial court's judgment entry overruling his motion to strike the prior convictions.

{¶11} Appellant raises one assignment of error:

**ASSIGNMENT OF ERROR**

{¶12} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO STRIKE PRIOR UNCOUNSELED CONVICTIONS."

**ANALYSIS**

{¶13} In his sole assignment of error, appellant argues the trial court erred in overruling the motion to strike the 2011 OVI conviction.<sup>2</sup> We disagree.

{¶14} R.C. 2945.75(B)(1) and (3) state:

(1) Whenever in any case 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.

\* \* \* \*

(3) 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.

{¶15} As appellee points out, the burden rests with appellant to make a prima facie showing of a constitutional deficiency. In *State v. Brooke*, 113 Ohio St.3d 199, 2007-

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<sup>2</sup> Appellant does not challenge the trial court's ruling as to the 2013 and 2014 OVI convictions.

Ohio-1533, 863 N.E.2d 1024, at paragraph one of the syllabus, the Ohio Supreme Court held that “[f]or 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.”

{¶16} *Brooke* was modified in *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, 903 N.E.2d 618, a case with a similar procedural history to the instant case. In *Thompson*, the defendant filed a pretrial motion to strike prior uncounseled convictions from the indictment, arguing that the state couldn’t use the prior convictions “absent a showing \* \* \*that he was either represented by counsel or executed a valid waiver of counsel in the prior cases \* \* \*.” The defendant failed to submit any affidavits, transcripts, testimony, or other evidence to support his motion, however, and the state responded with a memorandum contra including copies of the waiver-of-rights forms the defendant executed in the previous OVI convictions. The Ohio Supreme Court approved the trial court’s decision to allow the priors to enhance the penalty in the felony case because the burden of demonstrating a constitutional infirmity rests with the defendant:

[A] defendant cannot establish a prima facie showing as to “uncounseled” merely by establishing that he or she had been convicted without representation. For one thing, it is beyond dispute that a person has a constitutional right to represent himself or herself; therefore, it is not possible to establish a constitutional infirmity merely by showing that a person did not have counsel. See Section 10, Article I, Ohio Constitution; *State v. Gibson*, [45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph one

of the syllabus]. Furthermore, in *State v. Brandon*, [45 Ohio St.3d 85, 543 N.E.2d 501 (1989), syllabus], we stated, “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.” **With respect to “uncounseled” pleas, we presume that the trial court in the prior convictions proceeded constitutionally until a defendant introduces evidence to the contrary.** Thus, we conclude that 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.

*State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, 903 N.E.2d 618, ¶ 6 (emphasis added).

{¶17} The Court noted neither R.C. 2945.75 nor *Brooke* requires the state to prove that a defendant was represented, or validly waived representation, unless the defendant makes a prima facie showing that the prior convictions were uncounseled, i.e. that he was not represented *and* did not validly waive representation. *Id.* at ¶ 7. In a case in which a defendant fails to submit evidence in the form of testimony, affidavits, or transcripts to bolster his argument a waiver of counsel was constitutionally infirm, “[a] bald

allegation of constitutional infirmity is insufficient to establish a prima facie showing with respect to an ‘uncounseled’ plea.” *Id.*

{¶18} In the instant case, as the trial court found, appellant submitted no evidence to bolster his argument that the 2011 plea was uncounseled. Despite his failure to establish a prima-facie showing, appellee responded to the argument with introduction of the audio recording, without objection by appellant. We decline to find an error in admission of the recording when no objection was raised. See, *Condon v. Rockich*, 9th Dist. No. 28479, 2018-Ohio-71, 102 N.E.3d 1233, ¶ 18; *State v. Bennett*, 2nd Dist. Montgomery No. 15854, unreported, 1997 WL 282314, \*3 (May 30, 1997).

{¶19} Appellant now argues the recording “was not authenticated or certified as the record of the proceedings,” but he made no such argument before the trial court. We note that in accepting the exhibit the trial court recognized the voice of the magistrate on the recording, and there is no evidence in the record that the recording is not a fair and accurate representation of appellant’s colloquy in the 2011 case. Evid.R. 901(A) provides that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Absent a specific objection by appellant, we find no error in admission of the recording.

{¶20} In the absence of any of evidence of constitutional infirmity produced by appellant, we find his argument to be “[a] bald allegation of constitutional infirmity” which is insufficient to invalidate the 2011 conviction for the purpose of enhancement of the instant offense. *Thompson*, supra, 2009-Ohio-314 at ¶ 7. Compare *State v. Bigelow*, 5th Dist. Richland No. 15CA49, 2016-Ohio-1073, in which the defendant entered a plethora

of exhibits “substantiat[ing his] position that although he signed a waiver of counsel, he never appeared in open court that day nor was the plea and waiver placed on the record.” When the defendant effectively made a prima facie showing of infirmities in the prior conviction, we found the trial court was correct in its assessment of the waiver being constitutionally defective. 2016-Ohio-1073 at ¶ 11.

{¶21} Moreover, in the instant case we note that on the record at the hearing and in the argument before us, appellant has failed to identify *how* the waiver in the 2011 case is insufficient, beyond the conclusory allegation that the waiver is “legally [in]sufficient.” We therefore must presume all underlying proceedings were conducted in accordance with the rules of law. *Thompson*, supra, 2009-Ohio-314 at ¶ 6. On the basis of the record before us, we find the trial court did not err in overruling appellant’s motion to strike the prior convictions.

{¶22} Appellant’s sole assignment of error is overruled.

**CONCLUSION**

{¶23} Appellant's sole assignment of error is overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Wise, Earle, J., concur.