[Cite as *State v. Caudill*, 2010-Ohio-5965.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-90
v.	:	(C.P.C. No. 08CR-11-8465)
Christopher J. Caudill,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 7, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Christopher J. Caudill ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas convicting him of two counts of operating a vehicle under the influence of alcohol and drugs ("OVI") as fourth-degree felonies. For the following reasons, we affirm.

{¶2} On November 28, 2008, appellant was indicted for two OVI offenses: driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a), and driving under the influence of a prohibited high concentration of alcohol in his blood, in violation of R.C. 4511.19(A)(1)(f). Although OVI is ordinarily a first-degree misdemeanor, the two counts against appellant are fourth-degree felonies, pursuant to R.C. 4511.19(G)(1)(d), because he had three OVI convictions within the previous six years. One of those convictions was a May 2006 OVI offense obtained pursuant to a guilty plea in Jackson County Municipal Court. Appellant filed a motion to dismiss the indictment, claiming that the May 2006 conviction cannot count toward enhancing the new OVI charges because he did not validly waive his right to an attorney before being convicted and sentenced to jail for that prior offense.

{¶3} Appellant attached to his motion a transcript of the guilty plea hearing for the prior offense, and it revealed the following. The court showed appellant a video explaining his rights. The court asked appellant if he understood his rights, as discussed in the video, and appellant indicated that he did. At two different times during the plea hearing, the court asked appellant if he was giving up his right to consult an attorney, and appellant said yes both times. After the court accepted appellant's guilty plea, it imposed the maximum sentence of six months in jail, but it suspended 160 of those days, and, thus, appellant served only 20 days in jail. In the sentencing entry, the court noted that appellant knowingly, intelligently, and voluntarily waived his right to an attorney.

{¶4} The prosecution opposed the motion to dismiss and submitted a waiver form signed by appellant, where he confirmed that he was advised of his rights and that he understood he had a right to an attorney and to have one appointed without cost if he could not afford one. He also verified, "I have intelligently and of my own free will decided to represent myself and do now waive and give up my right to an attorney" and, similarly, "[b]eing fully advised of my right to counsel * * * and to have a lawyer assigned to me without cost if I cannot afford one * * *, I do hereby voluntarily and freely state that I do not wish a lawyer in this case."

{¶5} The trial court denied appellant's motion to dismiss, concluding that appellant validly waived his right to an attorney before he was convicted of the May 2006 OVI offense and that, therefore, the prior conviction counts toward enhancing the current OVI offenses to fourth-degree felonies. Appellant was convicted of those new OVI offenses after pleading no contest.

{¶6} Appellant appeals, raising the following assignment of error:

> The trial court erred by overruling Defendant-Appellant's motion to dismiss an enhancement specification based on a prior uncounseled conviction when the State did not establish a valid waiver of counsel in the prior case.

{¶7} Appellant claims in his single assignment of error that the trial court erred by overruling his motion to dismiss. We disagree.

{¶8} Under the Sixth Amendment to the United States Constitution, a defendant has a right to counsel in prosecutions where a sentence of imprisonment could be imposed. *Argersinger v. Hamlin* (1972), 407 U.S. 25, 92 S.Ct. 2006. A

conviction is unconstitutional when it results in a sentence of incarceration on a defendant who was unrepresented and did not validly waive his right to an attorney. *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, ¶5-6. The unconstitutional conviction cannot be used to enhance the penalty for a subsequent conviction. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶12.

{¶9} "[F]or 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." *Thompson* at ¶6. A valid waiver cannot be presumed from a silent record; the record must show that a defendant knowingly, intelligently, and voluntarily waived his right to an attorney. *Brooke* at ¶25. For a petty offense, which, unlike a serious offense, carries a potential sentence of incarceration for six months or less, the waiver need only be made on the record in open court. Id. at ¶24. For a serious offense, the waiver must also be in writing. Id. We now address appellant's contention that his prior May 2006 petty OVI offense was improperly used toward enhancing the current OVI offenses to fourth-degree felonies because he did not validly waive his right to counsel before being convicted and sentenced to jail for the prior conviction.

{¶10} In *Brooke*, a defendant was charged with OVI offenses enhanced to fourth-degree felonies because of three prior drunk driving convictions within six years. Id. at ¶2. At the guilty plea hearing for one of the prior petty offenses, the court asked

the defendant, in an open and transcribed proceeding, if she wanted an attorney, and she said no. Id. at ¶27-29. The defendant also signed a form verifying that she voluntarily waived her right to an attorney, and she indicated that she understood what she was doing. Id. at ¶38-39. The Supreme Court of Ohio concluded that the defendant validly waived her right to an attorney before being convicted of the prior OVI offense because the transcribed guilty plea hearing and waiver form, together, demonstrated that the waiver was knowingly, intelligently, and voluntarily made. Id. at ¶39. Thus, according to the court, the prior offense was properly counted toward enhancing the defendant's new OVI offenses. Id. at ¶54-55. When the court in *Brooke* also held that the defendant validly waived her right to an attorney before being convicted of a second prior petty drunk driving offense, it considered that the trial court found the waiver was knowingly, intelligently, and voluntarily made. Id. at ¶47.

{¶11} Here, before appellant was convicted for the May 2006 OVI offense, the municipal court showed him a video explaining his rights. Appellant argues that the video was an insufficient method for the court to inform him of his rights. He relies on *State v. Bayer* (1995), 102 Ohio App.3d 172, 179-80, which held that it was improper for a court to give a defendant a pamphlet to inform him about his rights without also personally addressing him to ensure that he understood the information provided in the pamphlet. *Bayer* is inapposite because the municipal court personally asked appellant if he understood his rights, as discussed in the video, and appellant indicated that he did. Appellant also signed a waiver form confirming that he was advised of his rights and, in particular, that he understood he had a right to an attorney. Furthermore, he

twice stated in the open, transcribed guilty plea hearing that he was waiving his right to an attorney, and he verified in the waiver form that he was knowingly, intelligently, and voluntarily waiving that right. Additionally, in the sentencing entry, the court recognized that appellant knowingly, intelligently, and voluntarily waived his right to an attorney. Like *Brooke*, we conclude that appellant knowingly, intelligently, and voluntarily waived his right to an attorney before being convicted of the prior May 2006 OVI offense, based on (1) the evidence of appellant's attorney waiver during the open, transcribed plea hearing, (2) the waiver form signed by appellant, and (3) the municipal court finding a sufficient waiver. Thus, appellant's attorney waiver was valid, and the prior May 2006 conviction was properly used toward enhancing appellant's new OVI offenses to fourth-degree felonies. Consequently, the trial court did not err by denying appellant's motion to dismiss the indictment pertaining to those new offenses.

{¶12} Having upheld the trial court's decision not to grant appellant's motion to dismiss, we overrule his single assignment of error. Therefore, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and HENDRICKSON, JJ., concur.

HENDRICKSON, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.