[Cite as *State v. Medinger*, 2012-Ohio-982.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0046**
- vs -	:	
PAUL D. MEDINGER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2010 CR 0458.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder,* Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

David A. Sed, 269 West Main Street, P.O. Box 672, Ravenna, OH 44266, and *Dennis Day Lager,* Portage County Public Defender, 209 South Chestnut Street, #400, Ravenna, OH 44266 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Paul D. Medinger, appeals the judgment of the Portage County Court of Common Pleas denying his motion to dismiss the indictment in which he was charged with felony operating a motor vehicle under the influence of alcohol (OVI), having previously been convicted of three OVI violations within the last six years. At issue is whether one of appellant's prior OVI cases resulted in a final judgment for

purposes of enhancement of his present OVI offense. For the reasons that follow, we affirm.

{¶2} On July 22, 2010, appellant was charged in a two-count indictment with OVI, having previously been convicted of three OVI violations within the last six years, in violation of R.C. 4511.19(A)(1)(a), 4511.19(G)(1)(d), and 2929.13(G)(2), a felony of the fourth degree (Count 1), and operating a motor vehicle with a prohibited breath-alcohol content, having previously been convicted of three OVI violations within the last six years, in violation of R.C. 4511.19(A)(1)(h), 4511.19(G)(1)(d), and 2929.13(G)(2), a felony of the fourth degree.

{¶3} Appellant pled not guilty and subsequently, on September 8, 2010, filed a motion to dismiss the indictment in which he argued that his three prior OVI cases did not result in final judgments so that they could not properly be used to enhance his current OVI offense to a felony.

{¶4} On December 6, 2010, and December 7, 2010, the trial court held an oral hearing on the motion. Appellant submitted certified copies of the records of his three prior OVI convictions. At this hearing, appellant limited the scope of his motion. Instead of arguing that none of his three prior OVI cases resulted in a final judgment, as he argued in his written motion, at the hearing, he contended that only his 2004 OVI case in the Chardon Municipal Court, being Case No. 2004 TRC 7094, did not result in a final judgment. He argued that violation was therefore ineffective to enhance his current OVI offense. Appellant conceded his conviction in 2006 in the Bedford Municipal Court, being Case No. 06 TRC 00689, and his conviction in 2008 in the

Bedford Municipal Court, being Case No. 08 TRC 1496, resulted in final judgment entries.

{¶5} On February 16, 2011, the trial court entered judgment, finding that, pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, the judgment entered by the Chardon Municipal Court in appellant's 2004 OVI case resulted in a final judgment of conviction, and denied his motion to dismiss. In support of its decision, the trial court found that the judgment entry in appellant's OVI case in Chardon contained appellant's guilty plea to R.C. 4511.19(A)(1), a first offense OVI, and the sentence of the court. Further, the court found that the entry was signed by the judge and filed by the clerk of courts.

{¶6} On March 7, 2011, appellant entered a written no contest plea to Count 2, operating a motor vehicle with a prohibited breath-alcohol content, in violation of R.C. 4511.191(A)(1)(h). The trial court nolled Count 1 of the indictment and accepted appellant's no contest plea, finding him guilty of the charge in Count 2.

{¶7} On June 6, 2011, the court held a sentencing hearing. The court placed appellant on intensified, supervised probation for two years, to be followed by standard probation for two years or until he completed all terms of his probation. The court ordered appellant to complete the Northeast Ohio Community Alternative Program, which would serve as his mandatory jail sentence. The court also suspended appellant's driver's license for ten years, and ordered him to pay a fine of $1,350. The court stayed execution of the sentence pending appeal.

{¶8} Appellant appeals the trial court's judgment denying his motion to dismiss, asserting the following as his sole assignment of error:

{¶9} "The trial court erred in not granting defendant-appellant's motion to dismiss or exclude evidence challenging his prior convictions as penalty enhancement."

{¶10} Appellant presents the same argument he advanced at the hearing on his motion held by the trial court. He contends that, due to certain alleged omissions in the judgment entered in the Chardon Municipal Court following his guilty plea in 2004, that entry was not a final judgment. He argues that, because the enhancement of the instant OVI offense was based in part on his OVI conviction in Chardon, the indictment in the present case was ineffective to charge a felony and should have been dismissed. He therefore argues that he has rebutted the prima facie evidence of his prior conviction in the Chardon Municipal Court pursuant to R.C. 2945.75(B)(2), and that he has proven by a preponderance of the evidence the existence of a constitutional defect in his 2004 conviction pursuant to R.C. 2945.75(B)(3).

{¶11} This court has held that "[a] motion to dismiss filed pursuant to Crim.R. 12 tests the sufficiency of the charging document, without regard to the quantity or quality of the evidence that may eventually be produced by the state." *State v. Rode*, 11th Dist. No. 2010-P-0015, 2011-Ohio-2455, ¶14. Therefore, in addressing a defendant's motion to dismiss, the trial court is limited to determining whether the language within the charging instrument alleges an offense. *Id*. We review a trial court's decision on a motion to dismiss pursuant to a de novo standard of review. *Id*.; *State v. Wendel*, 11th Dist. No. 97-G-2116, 1999 Ohio App. LEXIS 6237, *5 (Dec. 23, 1999).

{¶12} Crim.R. 12(C) provides in pertinent part as follows:

{¶13} Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination

without the trial of the general issue. The following must be raised before trial:

{¶14} * * *

{¶15} (2) Defenses and objections based on defects in the indictment * * *.

{¶16} The term “Judgment” is defined at Crim.R. 32(C), which provides:

{¶17} A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. * * * The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

{¶18} R.C. 2945.75(B) provides in pertinent part:

{¶19} (2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions.

{¶20} (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.

{¶21} The Supreme Court of Ohio addressed the criteria of a final judgment of conviction in *Baker*, *supra*, in which the Supreme Court held that "a judgment of conviction is a final appealable order * * * when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *Id*. at 201.

{¶22} Appellant does not address the Supreme Court's holding in *Baker*. Instead, he relies on two appellate court cases decided before *Baker* to support his argument. First, he cites *State v. Ginocchio*, 38 Ohio App.3d 105 (12th Dist.1987), in support of his argument that the 2004 judgment entered by the Chardon Municipal Court is not final because it does not state that the court's finding of guilty was by way of a guilty plea or a no contest plea. He also cites this court's holding in *State v. Todaro*, 11th Dist. No. 2004-A-0002, 2005-Ohio-3400, to support his contention that the judgment entered by the Chardon court was not final for the additional reason that it did not specify the ordinance or statutory violation of which he was convicted. Appellant's argument lacks merit.

{¶23} The judgment of conviction entered by the Chardon Municipal Court is on a form used by that court when the judgment is based either on a guilty plea or on a no contest plea. In the section of the judgment entry entitled "Plea," a box is provided next to either possible plea, one of which is to be checked as appropriate. However, instead of checking the box marked "Guilty," Judge David L. Fuhry wrote in the word "Guilty," indicating that appellant entered a guilty plea, as opposed to a no contest plea. Appellant conceded at the motion hearing that Judge Fuhry wrote in the word "Guilty."

{¶24} Next, with respect to appellant's argument that the Chardon court failed to specify the specific ordinance or statute violated, in the section of the judgment entry form entitled "Offense," the form allows for only three possible offenses: "[1.] 4511.19A1 DUI-ALCOHOL/LIQUOR/DRUGS;" "[2.] 4511.19A7 SERUM OR PLASMA .204%," or "[3.] 4511.33 VIO-TRAF LANES/LINES." The box for 4511.19A1 DUI-ALCOHOL/LIQUOR/DRUGS" is checked, indicating that appellant pled guilty to OVI, in violation of R.C. 4511.19(A)(1). In addition, Judge Fuhry wrote "(A)(1)" and "Guilty," further evidencing that appellant pled guilty to a violation of R.C. 4511.19(A)(1). Moreover, next to the list of the three possible offenses, the judgment entry form includes a section entitled "DWI Offense," which lists the offenses as a "1st," "2nd," "3rd," or "4th" offense. A box is also placed next to each, one of which is to be marked as appropriate. The box for a first offense was checked, indicating that this was appellant's first OVI offense.

{¶25} Therefore, based on our review of the judgment of conviction entered by the Chardon Municipal Court in 2004, that judgment clearly stated that appellant's conviction was based on his guilty plea to OVI, in violation of R.C. 4511.19(A)(1). Since appellant does not dispute the presence of the other criteria for a final judgment as set forth in *Baker*, *supra*, the Chardon judgment entry satisfied the requirements for a final judgment of conviction as pronounced by the Ohio Supreme Court. Appellant has therefore failed to present any evidence that his 2004 OVI case did not result in a final judgment of conviction entered by the Chardon Municipal Court.

{¶26} As a result, contrary to appellant's argument, he did not rebut the prima facie evidence of his prior conviction in the Chardon Municipal Court pursuant to R.C.

2945.75(B)(2), nor did he establish a constitutional defect in that conviction by a preponderance of the evidence pursuant to R.C. 2945.75(B)(3). We therefore hold the trial court did not err in denying appellant's motion to dismiss.

{¶27} For the reasons stated in this opinion, appellant's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.