

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-14-28

v.

MICHAEL E. STEPHENS,

OPINION

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 13-CR-0101

Judgment Affirmed

Date of Decision: March 23, 2015

APPEARANCES:

James A. Fruth for Appellant

Stephanie J. Reed for Appellee

SHAW, J.

{¶1} Defendant-appellant, Michael E. Stephens (“Stephens”), appeals the August 26, 2014 judgment of the Seneca County Court of Common Pleas convicting him of operating a vehicle while under the influence of alcohol (“OVI”), with specifications, and of failure to comply with an order or signal of a police officer, also with specification. Stephens received a sentence of two years plus forty-eight months in prison. Stephens assigns as error the trial court overruling his motion to dismiss challenging the constitutionality of the repeat OVI offender specification charged in the indictment, which stated that he had been convicted of five or more prior OVI offenses within the past twenty years.

{¶2} On July 17, 2013, the Seneca County Grand Jury returned an indictment against Stephens charging him with two counts of OVI in violation of R.C. 4511.19(A)(1)(g), (G)(1)(e) and R.C. 4511.19(A)(2),(G)(1)(e), both felonies of the third degree. The record reflects that Stephens had seven prior OVI convictions dating back to 1989 with the last conviction occurring in September of 2011, which was a felony of the fourth degree. As a result, each OVI charge included two specifications stating: (1) that Stephens had previously been convicted of or pleaded guilty to a felony OVI offense and; (2) that Stephens had previously been convicted of or pleaded guilty to five or more equivalent offenses in the last twenty years pursuant to R.C. 2941.1413(A). The indictment also

included a third count charging Stephens with failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B), (C)(5)(a)(ii), a felony of the third degree, with the specification that Stephens' operation of the vehicle caused a substantial risk of serious physical harm to persons or property.

{¶3} The charges stemmed from an episode that took place on June 16, 2013, when Officer Jacob Demonte observed Stephens commit several traffic violations while driving. Officer Demonte attempted to conduct a traffic stop but Stephens failed to comply and led law enforcement on a six minute, 2.3 mile vehicle pursuit through residential streets and alleys while driving at speeds of 50 miles per hour in a 25 mile per hour zone. Stephens was driving while his operator's license was under suspension for his 2011 felony OVI conviction. After the conclusion of the pursuit, Officer Demonte noticed an odor of alcoholic beverage on Stephens' breath and observed Stephens' eyes to be red, glassy and bloodshot. Stephens refused to submit to a chemical test of his breath which led to a sample of his blood being obtained pursuant to a search warrant. The result of the test indicated Stephens had an alcohol content of 0.256 grams per deciliter of plasma.

{¶4} On July 22, 2013, Stephens was arraigned and pleaded not guilty to the charges.

{¶5} On May 22, 2014, pursuant to a negotiated plea agreement, Stephens withdrew his previously tendered not guilty plea and entered a plea of guilty to one count of OVI with specifications and failure to comply with an order or signal of a police officer with specification. The prosecution dismissed the second OVI count as a result of the parties' agreement. The trial court subsequently accepted Stephens' guilty plea.

{¶6} On July 11, 2014, Stephens appeared for sentencing. At the hearing, Stephens orally requested a continuance to allow his counsel to research recently released case law finding the repeat OVI offender specification unconstitutional on the basis that it violated the Equal Protection Clause of the Federal and Ohio Constitutions. *See State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830 (McCormack J., dissenting) reconsidered in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227 (McCormack J., dissenting). The trial court granted the continuance, ordered the parties to brief the issue, and held oral argument on the matter.

{¶7} On August 4, 2014, the trial court overruled Stephens' motion to dismiss finding the *Klembus* decision to be inapplicable to the statutory offense in this case and concluding that the repeat OVI offender specification did not violate Stephens' right to equal protection of the law in any event because it bears a

rational relationship to the legitimate government interest of deterring people from operating a vehicle while under the influence of drugs and alcohol.

{¶8} On August 26, 2014, the trial court sentenced Stephens to two years and twenty-four months on the OVI offense, noting that the two years was a mandatory prison term pursuant to the repeat OVI offender specification, and to a twenty-four month prison term on the failure to comply with an order or signal of a police officer offense, to be served consecutively, for a total prison term of two years and forty-eight months.¹

{¶9} Stephens' now appeals, asserting the following assignment of error.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS SPECIFICATION IN THE INDICTMENT BECAUSE APPELLANT'S CONSTITUTIONAL EQUAL PROTECTION AND DUE PROCESS RIGHTS WERE VIOLATED AND BECAUSE THE SPECIFICATION IS BASED UPON THE SAME INFORMATION OR PROOF REQUIRED TO ESTABLISH A LESSOR FELONY, THEREBY ARBITRARILY GIVING THE STATE THE OPPORTUNITY TO SECURE A GREATER PRISON SENTENCE FOR VIOLATION OF R.C. 4511.19(A)(1)(g), (G)(1)(e) WITHOUT PROVIDING ANY ADDITIONAL ELEMENT, FACT, OR CIRCUMSTANCE.

{¶10} On appeal, Stephens asserts that the repeat OVI offender specification set forth in R.C. 2941.1413 is unconstitutional. Stephens' argument relies entirely on the rationale utilized by the majority opinion in *State v. Klembus*.

¹ The record reflects that Stephens was also before the court on a community control revocation in case number 11 CR 0077, which involved his prior conviction for a fourth degree felony OVI offense. The trial court ordered Stephens to serve a sentence of seventeen months in that case concurrent with the sentence imposed in the instant case.

Klembus, 2014-Ohio-3227 (McCormack J., dissenting). In *Klembus*, the court analyzed the interaction between R.C. 4511.19(G)(1)(d) and the repeat OVI offender specification and found the specification was unconstitutional because it violated the appellant's right to equal protection and due process of law.

{¶11} At the outset, we note our view that the *Klembus* opinion is based upon a fundamental misconstruction of the language and operation of R.C. 4511.19(G)(1)(d) and R.C. 2941.1413 in that case, and in any event, does not address the different charges and specifications set forth in this case.

{¶12} However, it is unnecessary to address our view of the *Klembus* decision or any of the reasoning contained therein, because we find that Stephens' guilty plea and lack of any motion to withdraw that plea in this case, waived any complaint or assignment of error as to claimed constitutional violations not related to the entry of the guilty plea. See *State v. Ketterer*, 111 Ohio St. 3d 70, 82, 2006-Ohio-5283, ¶ 105. “ ‘[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process.’ ” *State v. Spates*, 64 Ohio St.3d 269, 272 (1992), quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). The Supreme Court of Ohio has held that “a defendant who * * * voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel ‘may not thereafter raise independent claims relating to the deprivation of

constitutional rights that occurred prior to the entry of the guilty plea.’ ”. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶ 78, quoting *Tollett* at 267.

{¶13} When a criminal defendant admits to the facts contained in the indictment, all independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea are thereby waived. *See Tollett* at 267. This waiver includes any right to challenge defects in the indictment based on the constitutionality of a state statute. *See, e.g., State v. Quarterman*, 9th Dist. Summit No. 26400, 2013-Ohio-3606, ¶ 3–6.

{¶14} Because Stephens does not challenge the validity of his plea, and there is nothing in the record to suggest that his guilty plea was not voluntarily, knowingly and intelligently made, he waived his right to challenge the constitutionality of R.C. 2941.1413 by pleading guilty. Accordingly and on this basis alone, we overrule Stephens’ assignment of error and affirm the decision of the trial court.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr