[Cite as *State v. Rockburn*, 2002-Ohio-4923.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80903

STATE OF OHIO	:	ACCELERATED DOCKET
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
ROBERT ROCKBURN	:	
	:	
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	SEPTEMBER 19, 2002
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	the Cuyahoga County
	:	Court of Common Pleas
	:	Case No. CR-408503
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGE TERRENCE O'DONNELL:

{¶1} Robert Rockburn appeals following his plea of no contest to the charge of driving under the influence of alcohol with specifications of three prior D.U.I. convictions.

{¶2} On appeal, he claims that the trial court erred in denying his motion to dismiss the third specification, a previous D.U.I. conviction in the Mayor's Court of Valley View, Ohio, because he presented unrebutted evidence that he did not knowingly, voluntarily, and intelligently waive his right to counsel in that case. He further argues that the trial court erred in finding him guilty of a fourth degree felony because the state failed to present any evidence of the three prior D.U.I convictions.

{¶3} After careful review of the record, we have determined that Rockburn presented unrebutted evidence that he was not afforded his right to counsel in the Valley View case, and therefore, the court erred in finding him guilty of a felony. Accordingly, we reverse the judgment of conviction and remand this matter for further proceedings consistent with this opinion.

{¶4} The record before us reveals that, on June 11, 2001, a grand jury indicted Rockburn for driving under the influence of alcohol with specifications of three prior D.U.I. convictions, to wit, January 26, 2000, in the Cleveland Municipal Court; January 5,

1999, in the Cleveland Municipal Court; and January 12, 1995, in the Valley View Mayor's Court.

{¶5} On August 21, 2001, Rockburn filed a motion to dismiss the specification of the Valley View Mayor's Court conviction. In support of his motion, he submitted his affidavit, stating in part, "* * * I was not afforded the right to legal counsel nor did I knowingly, voluntarily and intelligently waive said right." The state did not file a brief in opposition to this motion or otherwise rebut his allegations, and the court, although it stated that it intended to deny the motion, never journalized a ruling on this motion.

{¶6} Thereafter, Rockburn entered a plea of no contest to the indictment containing specifications of the three prior D.U.I. convictions, elevating the D.U.I. charge to a felony of the fourth degree. On January 29, 2002, the court sentenced him to a 24-month prison term, forfeited his Ford Taurus automobile, ordered him to pay court costs, and suspended his driver's license for life.

{¶7} Rockburn now appeals and raises two assignments of error for our review. The first states:

{¶8} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANT'S MOTION TO DISMISS SPECIFICATIONS OF THE INDICTMENT."

{¶9} Rockburn argues that the trial court should have granted his unopposed motion to dismiss the third specification, which

involved a previous D.U.I. conviction in Valley View Mayor's court, because he presented unrebutted evidence that he did not knowingly, voluntarily, and intelligently waive his right to counsel in that case. He further argues that the trial court erred in accepting his no contest plea and finding him guilty of a felony because the state failed to present any evidence on the three prior D.U.I cases.

{¶10} R.C. 4511.99 establishes penalties for D.U.I. cases based on the offender's prior convictions; pursuant to R.C. 4511.99(A)(4)(a), if, within six years of the underlying offense, an offender has been convicted of or pleaded guilty to three or more D.U.I. violations, the offense is a felony of the fourth degree. Here, however, Rockburn challenges one of the three prior convictions claiming he did not waive his right to counsel in the Valley View case.

{¶11} In *State v. Maynard* (1987), 38 Ohio App.3d 50, 52-53, 526 N.E.2d 316, we stated:

{¶12} "As we said in *McKinley*, an uncounseled conviction cannot ordinarily serve to enhance the penalty for a later conviction. See *United States v. Tucker* (1972), 404 U.S. 443, 447-448. Further, a silent record cannot establish that the defendant waived his right to counsel. *Boykin v. Alabama* (1969), 395 U.S. 238, 242.

{¶13} "However, the defendant has the burden of challenging an apparently constitutional prior conviction with some evidence that

he was not afforded his right to counsel. Cf. *Robards v. Rees* (C.A.6, 1986), 789 F.2d 379, 385-386; *State v. Wang* (Jan. 25, 1984), Hamilton App. No. C-830287, unreported, at 6-7; *State v. Roundtree* (June 16, 1983), Cuyahoga App. Nos. 45683, 45755 and 45756, unreported, at 14-16. *If the defendant raises that issue with some evidence, the state has the burden of proving the constitutional validity of the prior conviction.* A silent record will not satisfy the state's burden of proof. *Id.* (Emphasis added.)"

{¶14} Similarly, in *State v. Vales* (Feb. 24, 2000), Cuyahoga App. No. 75653, we stated:

{¶15} "However, when challenging a prior conviction, a defendant must present prima facie evidence of a constitutional violation. *Brandon*, 45 Ohio St.3d at 86, 543 N.E.2d at 503. See also, *State v. Adams* (1988), 37 Ohio St.3d 295, 297, 525 N.E.2d 1361, 1363. Once such a prima facie showing is made, the burden shifts to the state to prove that the defendant was afforded his right to counsel. *State v. Conley* (Nov. 4, 1997), Scioto App. No. 97CA2481, unreported, citing *State v. Maynard* (1987), 38 Ohio App.3d 50, 52-53, 526 N.E.2d 316, 319. If the state shows that the defendant knowingly, voluntarily and intelligently waived his right to counsel, the defendant's conviction will not be deemed an uncounseled conviction. *Conley*, citing *State v. Carrion* (1992), 84

Ohio App.3d 27, 31, 616 N.E.2d 261, 264; *State v. Hayes* (July 25, 1997), Meigs App. No. 96CA23, unreported."

{¶16} Here, Rockburn attached an affidavit to his motion to dismiss the specification for the Valley View D.U.I. conviction, stating in part, "* * * I was not afforded the right to legal counsel nor did I knowingly, voluntarily and intelligently waive said right." This affidavit constitutes prima facie evidence of an uncounseled conviction in that court, which shifts the burden to the state to prove its validity. The state failed to file a brief in opposition to Rockburn's motion or otherwise challenge his contentions at the plea hearing.

{¶17} In this case, the state alleged in its indictment that Rockburn either had counsel or waived counsel in the Valley View case; we recognize that, pursuant to Crim.R. 11(B)(2), a plea of no contest is an admission of the truth of the facts alleged in an indictment. Nevertheless, Crim.R. 12(I) provides that a no contest plea does not preclude a defendant from asserting upon appeal that the trial court erred in ruling on a pretrial motion.

{¶18} In this case, Rockburn filed such a pretrial motion to dismiss the Valley View specification. The transcript of the plea hearing reveals that the court intended to deny this motion, but neither the docket nor the record contains any journalization of that entry. However, it is well established that if a court fails to rule on a motion, that motion is presumed to be denied. See,

e.g., *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329, 692 N.E.2d 198. Therefore, pursuant to Crim.R. 12(I), Rockburn can appeal from the denial of his pretrial motion to dismiss the Valley View specification even though he entered a no contest plea.

{¶19} Based on the foregoing, the trial court erred in finding Rockburn guilty of a fourth degree felony. On remand, because Rockburn has alleged his Valley View plea was uncounseled, the state must prove the validity of that conviction; otherwise, the court must dismiss that specification. Accordingly, his first assignment of error is well taken, and we therefore reverse the judgment of conviction and remand this matter for further proceedings.

{¶20} Rockburn's second assignment of error states:

{¶21} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN ACCEPTING APPELLANT'S CHANGE OF PLEA TO NO CONTEST ON THE CHARGE OF FELONY D.U.I. IN THE ABSENCE OF EVIDENCE OF THREE PRIOR D.U.I. CONVICTIONS."

{¶22} Our disposition of Rockburn's first assignment of error renders his second argument moot, and pursuant to App.R. 12(A)(1)(c), we decline to address it.

Judgment reversed. Matter remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TERRENCE O'DONNELL

JUDGE

TIMOTHY E. McMONAGLE, A.J., CONCURS,

COLLEEN CONWAY COONEY, J., DISSENTS (WITH SEPARATE DISSENTING OPINION).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E)unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶23} I respectfully dissent.

{¶24} Although the State failed to oppose Rockburn's motion to dismiss in the trial court and has failed to oppose this appeal by way of brief or argument, I would nevertheless affirm the trial court's decision.

{¶25} Rockburn admits that his D.U.I. in Valley View in 1995 resulted in a $500 fine and credit for one day served in jail. He also recognizes that the U.S. Supreme Court has determined that where an uncounseled conviction results in some form of incarceration, the prior conviction may not be used to enhance penalties imposed for a subsequent conviction. *Nichols v. United States* (1994), 511 U.S. 738, 128 L.Ed.2d 745, 114 S.Ct. 1921.

{¶26} Rockburn was arrested for D.U.I. in 1995 and spent one day in jail, in pretrial confinement, prior to entering a plea in the Valley View mayor's court. His conviction did not *result* in "some form of incarceration" and therefore this 1995 conviction could be used to enhance the penalty for his fourth D.U.I.[1]

{¶27} Moreover, the only evidence he submitted in support of his claim that his 1995 plea was uncounseled was a self-serving affidavit with legal conclusions that he did not "knowingly, voluntarily and intelligently waive" his right to counsel. I do not find this bare assertion constitutes sufficient evidence to make a prima facie showing that his plea was uncounseled six years earlier. Rockburn made no

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[1] His 1995 conviction did not result in the minimum three-day incarceration.

statement concerning his attempt to search the Valley View court records or his efforts at Cleveland Municipal Court to be considered a "first offender" in 1999 and a second-time offender in 2000. Although it is quite possible no records still exist six years later in a mayor's court, the Cleveland court records would be readily available in the same building — the Justice Center — where his plea was entered in the instant case. Thus, I find that he failed to meet his burden and I would affirm the court's denial of his motion to dismiss.