[Cite as *State v. Putich*, 2008-Ohio-681.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89005

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

GEORGE PUTICH

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR- 481496

BEFORE: Boyle, J., Gallagher, P.J., and McMonagle, J.

RELEASED: February 21, 2008

JOURNALIZED:

[Cite as *State v. Putich*, 2008-Ohio-681.]

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BOYLE, M.J., J.:

{¶ 1} Appellant, the state of Ohio, appeals from the November 13, 2006 judgment of the Cuyahoga County Court of Common Pleas granting defendant-appellee's, George Putich's, motion to dismiss the felony OVI indictment against him. After reviewing the record and the pertinent case law, we reverse and remand.

{¶ 2} On June 2, 2006, the Cuyahoga County Grand Jury returned a one-count indictment charging Putich with a fourth degree felony, driving under the influence ("OVI"), in violation of R.C. 4511.19(A)(1)(a). The indictment also

indicated that Putich refused to submit to a chemical test under R.C. 4511.191. Putich entered a plea of not guilty to the offense.

{¶ 3} This offense is ordinarily a misdemeanor; however, it was charged as a fourth degree felony since the indictment specified that Putich had three prior OVI convictions within the past six years.[1] The indictment specified that Putich had previously been convicted of OVI in Parma Municipal Court on or about September 17, 2001; in Avon Mayor's Court on or about September 20, 2000; and in Cleveland Municipal Court on or about May 22, 2000.

{¶ 4} Prior to trial, Putich filed a "motion to dismiss the felony OVI complaint based on prior uncounseled conviction [in Avon Mayor's Court] ([a]lternatively, [m]otion in [l]imine)." He attached a certified copy of his Avon Mayor's Court file to the motion. The trial court held a hearing on November 8, 2006.

{¶ 5} At the evidentiary hearing, the state presented one witness, an employee with the city of Avon, Clerk of Courts, Jill Clements ("clerk").[2] At the time of the hearing, she had been employed there for approximately eight years. She

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[1]Under R.C. 4511.19(G)(1)(d), "*** an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses *** is guilty of a felony of the fourth degree."

[2]We note that since defendant-movant bears the burden to produce prima facie evidence that his prior conviction was constitutionally infirm, Putich was required to present first at the evidentiary hearing. See *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at _11.

testified that as part of her duties, she is present in the courtroom when the magistrate conducts hearings. She described the general court procedures for defendants who are charged with OVI:

{¶ 6} "*** [The defendants] are explained their rights *** because of the possibility of jail. [The magistrate] lets them know all the rights, rights to trial, they don't have to testify against themselves, if they want the right to an attorney and they can't afford it, they can transfer the case to Avon Lake Municipal Court. If not, they can ask for a continuance to obtain an attorney and they will come back."

{¶ 7} The clerk further testified that a "general rights form" is given to all the defendants. She stated that the form explains that the defendants are in court because they were cited for a violation. She testified that the defendants sign the form after the magistrate advises them of their rights and possible penalties.

She then reviewed exhibit A and identified it as the "rights form" signed by Putich. She stated that the form was dated October 25, 2000. The clerk also testified that she saw Putich sign the form.[3] She additionally reviewed exhibit B and identified it as Putich's Avon Mayor's Court "disposition form," and stated that Putich entered a plea of no contest, the magistrate found him guilty, and sentenced

[3]The form states in relevant part, "**You have the right to secure legal counsel to represent you in this case.** (Emphasis sic.) If you do not have counsel, you have the right to request a continuance to secure a lawyer. Every person has the right [to] make his or her own defense without counsel, but, if you are in doubt as to your proper course, you should consult with competent legal counsel."

him. The clerk also indicated that exhibits A and B were true and accurate copies of the records kept in Avon Mayor's Court.

{¶ 8} On cross-examination, the clerk acknowledged that exhibits A and B did not state that Putich knowingly and voluntarily waived his right to counsel. She further stated that Avon Mayor's Court did not record Putich's hearing.

{¶ 9} The state rested its case. Putich rested his case without calling any witnesses.

{¶ 10} The trial court, by journal entry, granted Putich's "motion to dismiss the felony OVI complaint based on prior uncounseled conviction[.]" In the same judgment entry of November 13, 2006, the court also struck the prior conviction in Avon Mayor's Court from the indictment stating, "*** [Putich] did not knowingly, intelligently, and voluntarily waive his right to counsel on the record or in open court as to the Avon conviction."

{¶ 11} It is from this judgment that the state filed its notice of appeal, and raises as its sole assignment of error:

{¶ 12} "The trial court erred in granting the appellee's motion to dismiss felony OVI complaint based on prior uncounseled conviction. (Trials [sic] Court's Journal Entry filed November 13, 2006)."

STANDARD OF REVIEW

{¶ 13} The Ohio Supreme Court has held, "any motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and,

thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such order is a final order and may be appealed pursuant to R.C. 2945.67 and Crim.R. 12(J)." *State v. Davidson*(1985), 17 Ohio St.3d 132, syllabus.

{¶ 14} *In State v. Bewley*, 9th Dist. No. 23693, 2007-Ohio-7026, at _13, the defendant filed a motion to dismiss the indictment or in the alternative to amend the indictment to a misdemeanor; however, the trial court referred to it as a motion in limine or a motion to strike. Id. The appellate court stated that regardless of the title, the defendant sought to prohibit the state from using his prior conviction. Id. The granting of the motion precluded effective prosecution of the felony indictment against the defendant and the motion was treated as a motion to suppress. Id.

{¶ 15} In the instant case, Putich sought to prohibit the state from using his prior conviction to enhance his OVI charge to a felony. The trial court's granting of Putich's motion restricted the state in its presentation of evidence and precluded effective prosecution of the felony indictment against him. Therefore, this court will treat his motion as a motion to suppress.

{¶ 16} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357,

366 ***. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19 ***." *State v. Burnside*, 100 Ohio St.3d 152, at _8. However, with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

PROOF OF PRIOR CONVICTIONS

{¶ 17} The state contends that Putich failed to prove that his prior conviction in Avon Mayor's Court was uncounseled. Putich, however, maintains that his prior conviction was uncounseled and, therefore, it cannot be used to enhance his OVI charge to a felony.

{¶ 18} The Ohio Supreme Court has stated that when a prior conviction does not simply enhance the penalty, but increases the degree of the offense itself, the prior conviction is an essential element of the crime and the state must prove it beyond a reasonable doubt. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at _8, *citing State v. Allen* (1987), 29 Ohio St.3d 53, 54.

{¶ 19} When the state intends to use a past conviction to enhance the penalty of a later criminal offense, a defendant can challenge that past conviction if the conviction was constitutionally infirm. *Brooke*, at _9. "A conviction obtained against a defendant who is without counsel, or its corollary, an uncounseled conviction

obtained without a valid waiver of the right to counsel, has been recognized as constitutionally infirm." Id., citing *State v. Brandon* (1989), 45 Ohio St.3d 85, 86.

{¶ 20} In *State v. Adams* (1988), 37 Ohio St.3d 295, paragraph two of the syllabus, the Ohio Supreme Court held: "[w]hen a defendant raises a constitutional question concerning a prior conviction, he must lodge an objection as to the use of this conviction and he must present sufficient evidence to establish a prima facie showing of a constitutional infirmity." A defendant can present an affidavit, testimony, or other evidence to support his or her argument. *State v. Neely*, 11th Dist. No. 2007-L-054, 2007-Ohio-6243, at _18.

{¶ 21} The Supreme Court stated more recently in *Brooke*: "'[w]here 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.' *Brandon* at the syllabus. Once a prima facie showing is made that a prior conviction was uncounseled, the burden shifts to the state to prove that there was no constitutional infirmity. Id. at 88. For 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." *Brooke* at _11.

{¶ 22} At the outset, we determine that Putich objected to the use of his prior conviction when he filed his motion to dismiss, attaching a certified copy of his Avon Mayor's Court file. However, the record is silent as to whether Putich was in open court with counsel, retained or appointed, at the time of his conviction. Putich asserts that there is no transcript of the hearing and no record of a knowing and voluntary waiver of counsel, which is prima facie evidence that he was uncounseled.

{¶ 23} This court stated in *State v. McKinley* (Feb. 6, 1986), 8th Dist. No. 50016, 1986 Ohio App. LEXIS 5563, at 14: "[w]hen the defendant presents evidence via a silent record that he was denied counsel or that the prior guilty plea is invalid, the burden of proof must shift to the prosecution ***."

{¶ 24} However, this court modified the *McKinley* decision in *State v. Maynard* (1987), 38 Ohio App.3d 50, at syllabus. We stated, "***[a] defendant cannot rely on a silent record and, thus, has the burden of challenging an apparently constitutional prior conviction with some evidence that he was not afforded his right to counsel. Once the defendant has presented some evidence on the issue, the state has the burden of proof to show the constitutional validity of the prior conviction."

{¶ 25} Similar to the instant case, in *State v. Hopkins* (Mar. 1, 2000), 9th Dist. No. 98CA007159, 2000 Ohio App. LEXIS 725, at 3, a recording of the trial court proceeding did not exist. The defendant did not offer evidence that he was uncounseled at his prior conviction. Id. at 5. "Rather, [the defendant] pointed to the court record in the prior case, and asserted that it did not affirmatively show that his

prior conviction was constitutionally sound." Id. at 6. The court concluded that the defendant had not presented prima facie evidence of a constitutional infirmity and, thus, presumed regularity of the proceedings in the prior conviction. Id.

{¶ 26} Also, in *State v. Perkins* (June 22, 1998), 12th Dist. No. CA97-10-047, 1998 Ohio App. LEXIS 2785, at 4, the defendant argued that his prior conviction was uncounseled and in support he offered his sentencing entry, which did not indicate whether he was represented by counsel. The court concluded that Perkins failed to produce evidence that his prior conviction was uncounseled; thus, the court presumed he was counseled. Id.

{¶ 27} In this case, the record reveals that Putich did not submit any evidence to establish a prima facie showing that his prior conviction was constitutionally infirm. He did not submit an affidavit nor testify at the hearing that his prior conviction was uncounseled or that he did not validly waive counsel. Additionally, pursuant to *Maynard*, *Hopkins*, and *Perkins*, Putich cannot rely on the silent record. Absent a prima facie case for constitutional infirmity, "a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law." *Brandon*, supra, at the syllabus.

{¶ 28} The Supreme Court further explained in *Brandon*, that the burden of presenting sufficient evidence to establish a prima facie showing that his prior convictions were uncounseled is not difficult. Id. at 88. "Had [Brandon's] counsel simply asked [him] during testimony whether his prior convictions were counseled, a

negative response would have established a prima-facie showing of constitutional infirmity. This one question and answer would have then placed on the state the burden of proving that [Brandon's] prior convictions were counseled. Because [Brandon] failed to meet his burden, we presume his prior convictions were counseled and that, therefore, the convictions could be used to enhance his penalty in the case before us ***." Id.

{¶ 29} In addition, a defendant may also easily meet this burden by filing a motion prior to trial, along with an affidavit stating he or she was unrepresented by counsel and did not validly waive their right to counsel, or other evidence showing the same. See *Brooke* at _31.

{¶ 30} Since Putich did not establish a prima facie showing, the burden never shifted to the state to prove otherwise. Therefore, this court must presume the prior conviction was constitutionally firm.

{¶ 31} Thus, the state's assignment of error is well taken and sustained.

{¶ 32} Accordingly, the judgment of the Cuyahoga County Court of Common Pleas is reversed and remanded for further proceedings consistent with this decision.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

MARY JANE BOYLE, JUDGE

CHRISTINE T. MCMONAGLE, J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS WITH
SEPARATE CONCURRING OPINION

SEAN C. GALLAGHER, P.J., CONCURRING:

{¶ 33} I concur with the majority opinion; however, I write separately to address the burden-shifting approach and the waiver of counsel issue.

{¶ 34} The majority correctly refers to the most recent Ohio Supreme Court decision concerning prior uncounseled DUI convictions that are used for enhancement purposes, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533. As held in *Brooke*: "An uncounseled conviction cannot be used to enhance the penalty for a later conviction if the earlier conviction resulted in a sentence of confinement." Id. at 202, citing *Nicols v. United States* (1994), 511 U.S. 738, 749.

{¶ 35} In *Brooke*, the court recognized that where questions arise concerning an uncounseled prior conviction, a burden-shifting analysis is required. The initial burden is upon the defendant to establish a prima facie showing that his prior conviction was uncounseled. Id. at 202. This is because "'[w]here 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 some *evidence* to the contrary in order to establish a prima-facie showing of constitutional infirmity.'" Id., quoting *State v. Brandon*, 45 Ohio St.3d 85, syllabus (emphasis added). Thus, in order for the defendant to meet his burden, the defendant must present some evidence showing that his prior convictions were unconstitutional because they were uncounseled and resulted in confinement. See id. It is not until the defendant has met his burden that the burden shifts to the state to prove that the right to counsel was properly waived. See id.

{¶ 36} In *Brooke*, the court found that the defendant met her burden because she had provided an affidavit that she was unrepresented by counsel and sentenced to confinement. Id. The court indicated that this was a sufficient showing to raise the issue of whether or not her waiver was valid and, therefore, the burden shifted to the state to prove that the right to counsel was properly waived. Id. Subsequent to the *Brooke* decision, appellate cases have found a defendant may meet his burden where the parties stipulate that the defendant was not represented by a licensed attorney, where the record reflects that the prior conviction was uncounseled, or where the defendant provides an affidavit, testimony or other evidence to prove that he was uncounseled. See *State v. Bewley*, Summit App. No. 23693, 2007-Ohio-7026; *State v. Combs*, Lorain App. No. 07CA009173, 2007-Ohio-7035; *State v. Noble*, Lorain App. No. 07CA009083, 2007-Ohio-7051; *State v. Neely*, Lake App. No. 2007-L-054, 2007-Ohio-6243. Where the defendant fails to provide any

evidence to prove that his prior conviction was uncounseled, he has failed to establish a prima facie showing of constitutional infirmity and a reviewing court must presume the underlying proceeding was conducted in accordance with the rules of law. *State v. Brandon* (1989), 45 Ohio St.3d 85, 88; *State v. Neely*, supra.

{¶ 37} Nevertheless, I am troubled by the standard applied to challenges of uncounseled convictions, as used in this case. I believe the defendant's initial burden of offering "evidence" is inconsistent with other similar pretrial challenges to the use of state's evidence. In most instances, a motion containing notice with specificity is sufficient to shift the burden. *State v. Crothers,* Clinton App. No. CA2003-08-020, 2004-Ohio-2299; see, also, *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452; and *Xenia v. Wallace* (1988), 37 Ohio St.3d 216.

{¶ 38} In this instance, the majority focuses on *Brooke*'s reference to "presuming regularity in the proceedings below," as a means of supporting the viability of the underlying conviction. We must, however, keep in mind that it is not the underlying conviction that is being challenged, rather it is the *use of that conviction to enhance the current offense that is at issue.* Indeed, we presume the conviction is proper, but it is the evidence of counsel being present, or a valid waiver in counsel's absence, that must be established.

{¶ 39} Significantly, the use of a prior conviction to enhance the degree of the offense is an element of the offense that must be proved by the state. The requirement by the defendant to offer "evidence," rather than simply notice and

specificity, creates a process where the defendant must offer actual "evidence" at a pretrial proceeding to challenge an element of the crime the state must prove by evidence beyond a reasonable doubt. While I find this to be inconsistent with other evidentiary challenges, I nevertheless must apply the law as directed by the Ohio Supreme Court.

{¶ 40} In *Brooke,* the supreme court clearly applied the more stringent standard of "evidence" from the *Brandon* decision. *Brooke*, 113 Ohio St.3d at 202, citing *Brandon*, 45 Ohio St.3d 85. Because of this, I must concur with the majority opinion and analysis.

{¶ 41} The majority correctly determines from the record in this case that "Putich did not submit any evidence to establish a prima facie showing [that] his prior conviction was constitutionally infirm. He did not submit an affidavit nor testify at the hearing that his prior conviction was uncounseled ***." Because Putich failed to establish a prima facie showing for constitutional infirmity, the majority correctly presumes regularity in the proceeding and presumes the prior convictions were counseled.

{¶ 42} Because the burden never shifted to the state to prove that the right to counsel was properly waived, the majority does not address the waiver of counsel issue. However, I am compelled to address this important aspect of the case.

{¶ 43} Had Putich presented evidence to establish that his prior convictions were unconstitutional because they were uncounseled and resulted in confinement,

the burden would have shifted to the state to show that the right to counsel was properly waived. The central question as to this aspect of the case is not whether a signed waiver of counsel exists, it is whether the written waiver signed by Putich established that he knowingly, voluntarily, and intelligently waived his right to counsel.

{¶ 44} While *Brooke* did tell us that we could presume regularity in the proceedings below, this did not extend to proof that a defendant knowingly, intelligently, and voluntarily waived counsel. *Brooke* analyzed the prior convictions in the context of whether they fell into the category of "petty" misdemeanor offenses or "serious" misdemeanor offenses.[4] *Brooke*, 113 Ohio St.3d at 202-203. In this instance, Putich's second conviction, a "petty" misdemeanor offense, was challenged.

{¶ 45} The most striking aspect of the *Brooke* decision is the supreme court's insistence that **all** prior convictions, whether petty or serious, require evidence of a knowing, intelligent and voluntary waiver. Id. at 303. *"'[P]resuming a waiver of the Sixth Amendment right of an accused to the assistance of counsel from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and*

[4]Crim.R. 2(C) defines "serious offense" as any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months, while Rule 2(D) defines "petty offense" as a misdemeanor other than a serious offense.

understandingly rejected the offer. Anything less is not waiver.'" *Brooke*, 113 Ohio St.3d at 204, quoting *State v. Wellman* (1974), 37 Ohio St.2d 162 (emphasis added). This goes beyond the mere completion of a pre-printed form. Only a "serious" offense also requires a written form in addition to the evidence that the waiver was knowingly, intelligently, and voluntarily entered. *Brooke*, 113 Ohio St.3d at 206. The supreme court has, perhaps surprisingly, created a rigid requirement that a colloquy, or its equivalent, must exist to establish a proper waiver. Id.

{¶ 46} This is not to suggest that a written waiver alone can never satisfy the requirement in the face of a silent record that a valid waiver occurred. In fact, in *Brooke*, the second prior conviction, like the conviction here, contained a written waiver. Id. at 205. That waiver, however, was far more detailed than the waiver before us in this case. The second waiver in *Brooke* came from a case out of the Willoughby Municipal Court. Id. The form in that case contained language that established a colloquy, or meaningful dialogue, between the court and Brooke that established a valid waiver. Id.

{¶ 47} In the present case, we have no findings by the court or language in the form establishing a knowing, intelligent, and voluntary waiver. Id. The testimony of the clerk that she remembers Putich signing the form in open court does not satisfy the constitutional requirements. Further, the fact that "defendants are explained their rights" by a mayor's court magistrate does not establish a meaningful colloquy or its equivalent in this specific instance. There is simply no evidence of a valid

waiver in this case, as required by *Brooke*, supra.[5] Nevertheless, because Putich never presented evidence to establish a prima facie showing that his prior conviction was uncounseled, I am compelled to concur with the majority in this case.

[5]It should be noted that the "rights form" that was introduced in this case was dated October 25, 2000. The indictment incorrectly lists Putich's plea and conviction as September 20, 2000.