

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93792

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN BIAZZO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521491

BEFORE: Blackmon, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: September 23, 2010

ATTORNEY FOR APPELLANT

Thomas A. Rein
526 Superior Avenue
Leader Building, Suite 940
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

Daniel A. Cleary
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant John Biazzo appeals the trial court's denial of his motion to suppress and assigns the following error for our review:

"I. The trial court committed reversible error in determining that the prior, uncounseled convictions of the defendant-appellant were sufficient to enhance the instant charge to a felony offense."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On March 3, 2009, a Cuyahoga County Grand Jury returned a one-count indictment charging Biazzo with a fourth degree felony, operating a vehicle under the influence (“OVI”), in violation of R.C. 4511.19(A)(1)(a). This offense is ordinarily a misdemeanor; however, it was charged as a fourth degree felony since the indictment specified that within twenty years of the present offense, Biazzo had previously been convicted of five or more OVI violations. The indictment specified that Biazzo had six prior OVI convictions. In addition, the indictment indicated that Biazzo refused to submit to a chemical test under R.C. 4511.191.

{¶ 4} On March 13, 2009, Biazzo pleaded not guilty at his arraignment, and several pretrials followed. On April 23, 2009, Biazzo filed a motion to suppress three of the six prior OVI convictions. Biazzo argued that his prior convictions in Sandusky, Avon Lake, and Ottawa Municipal Courts, that were being used to enhance the present OVI offense to a felony under R.C. 4511.19(G)(1)(d), were uncounseled.

{¶ 5} On June 10, 2009, the trial court conducted a hearing on Biazzo’s motion to suppress. At the hearing, Biazzo testified that he had an attorney for three of the six OVI convictions and that he had served jail time for all six convictions. Biazzo testified that he could not recall if he was ever told that the prior convictions could result in enhanced penalties. Biazzo further testified

that he could not remember what the trial court had said to him prior to taking his plea in the three cases that he was not represented by an attorney.

{¶ 6} On June 19, 2009, the trial court issued a written opinion denying Biazzo's motion to suppress. On July 1, 2009, Biazzo pleaded no contest to the charges, and the trial court found him guilty. On July 22, 2009, the trial court sentenced

{¶ 7} Biazzo to 120 days and two years to be served consecutively.

Motion to Suppress

{¶ 8} In the sole assigned error, Biazzo argues the trial court erred when it overruled his motion to suppress three of his prior OVI convictions. Specifically, Biazzo alleges the three prior convictions, which were used to enhance this OVI offense to a felony under R.C. 4511.19(G)(1)(d), were uncounseled; therefore, they cannot be used as prior convictions to enhance this offense.

{¶ 9} When a prior conviction does not simply enhance a penalty, but increases the degree of the offense, the prior conviction is an essential element of the crime, which the state must prove. *State v. Brooke*, 113 Ohio St.3d 199, 201, 2007-Ohio-1533, 863 N.E.2d 1024. "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.* At the very least, any waiver of counsel must be

made on the record in open court, and in cases involving serious offenses where the penalty includes confinement for more than six months, the waiver must also be in writing and filed with the court. *Id.* at 203, 863 N.E.2d 1024.

{¶ 10} Recently, in *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, 903 N.E.2d 618, the Ohio Supreme Court held:

“For 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 resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived. (*State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024 * * *, paragraph one of the syllabus, explained.)” *Id.* at syllabus.

{¶ 11} In the instant case, at the hearing on the motion to suppress, the state presented entries from the various municipal courts for Biazzo’s six prior OVI convictions. Three showed convictions with retained counsel and three without. In the trial court’s written opinion overruling Biazzo’s motion to suppress, the court stated in pertinent part as follows:

“* * * Second, the evidence is less than clear if Defendant was counseled or even asked if he wanted counsel. As to each of the three cases, the evidence shows the Defendant can’t remember what was said, to him or by him, with regard to counsel.

Third, the record is replete with Defendant’s responses of ‘I can’t remember’ with regard to validly waiving his right to counsel. State Exhibits 2-4 relating to the convictions at issue reflect ‘undocumented’ as to waiver of attorney. By comparison, State Exhibit 1 reflects the same

‘undocumented’ waiver of attorney. The testimony, however, reflects that Defendant was represented by counsel on that occasion.” Journal Entry June 18, 2009.

{¶ 12} At the suppression hearing, Biazzo testified in pertinent part as follows regarding his prior OVI convictions:

“Q. We can agree, right, that you have been convicted of each of these six DUI’s in your past?

A. Yes.

Q. That [are] the ones named in that indictment?

A. Yes, sir.

Q. Okay. Now, we’re talking about three specific times where you did not have an attorney, correct?

A. Correct.

Q. Let’s start with the Sandusky Municipal Court that was in ‘92.

A. Yeah, sounds about it.

*** * ***

Q. They have you sign any paperwork that day?

A. No.

Q. The court didn’t have you sign anything?

A. No, not that I recall.

Q. Could you have signed some things? You’re pleading to a DUI, correct?

A. Correct.

*** * ***

Q. Do you remember anything that the judge said to you that day?

A. After I did the no contest the judge found me guilty.

Q. Prior to pleading no contest did he say anything to you that you remember?

A. I don't remember.

Q. Because you were aware that you could have --- you did have a right to an attorney. You knew you could have one?

A. Yeah, I just made a dumb decision or it could have been I didn't have any money. It's hard to remember.

Q. * * * Can you remember whether or not the judge talked to you about having an attorney, if you can remember?

A. I can't recall." Tr. 19-21.

{¶ 13} The above excerpt, specifically regarding a conviction in Sandusky Municipal Court, supports the trial court's conclusion that Biazzo could not recall whether he was uncounseled or validly waived his rights. In fact, Biazzo testified that he exercised poor judgment in not retaining an attorney for the case in Sandusky Municipal Court.

{¶ 14} The record also indicates that when questioned about the convictions in Avon Lake Municipal Court and in Ottawa County, Biazzo could not recall anything relevant to being uncounseled or about waiving his right to an attorney. In addition, regarding the conviction in Avon Lake Municipal Court, Biazzo testified that he chose not to have an attorney. Tr. 22.

{¶ 15} Here, the record clearly indicates that Biazzo could not recall whether he validly waived his right to counsel. “Where 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. Once a prima facie showing is made that prior convictions were uncounseled, the burden shifts to the state to prove that there was no constitutional infirmity.” *State v. Jackman*, Cuyahoga App. No. 89835, 2008-Ohio-1944, quoting *Brooke*, at 202, 863 N.E.2d 1024.

{¶ 16} In raising his constitutional question concerning his prior convictions, Biazzo had to present sufficient evidence to establish a prima facie showing of constitutional infirmity. *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361. To establish a prima facie case, a defendant need only provide an affidavit or testimony supporting his allegation. *State v. Putich*, Cuyahoga App. No. 89005, 2008-Ohio-681.

{¶ 17} Consequently, Biazzo had the burden of challenging his prior convictions with some evidence that showed he was not afforded his right to counsel. *State v. Maynard* (Apr. 6, 1987), Cuyahoga App. No. 51994. At oral argument, Biazzo's counsel argued that once Biazzo took the stand, the burden shifted to the state to prove there was no constitutional infirmity. However, as discussed above, although Biazzo testified at the suppression hearing, he

could not recall any facts germane to the issue of whether the three convictions were uncounseled or whether he validly waived his right to counsel. As such, Biazzo has not presented the threshold evidence to establish his prima facie showing.

{¶ 18} In *Putich*, this court held that a defendant did not establish a prima facie showing because he had not submitted any evidence in support of his contention that his prior convictions were uncounseled. *Putich*, supra. Other appellate districts have reached similar conclusions when faced with an appellant's inability to establish that he was uncounseled or that he did not make a valid waiver of his right to counsel. See, *State v. Mariano*, 11th Dist. No. 2008-L-134, 2009-Ohio-5426; *State v. Tanner*, 9th Dist. No. 24614, 2009-Ohio-3867; and *State v. McCallum*, 9th Dist. No. 08CA0037-M, 2009-Ohio-1424.

{¶ 19} We are mindful that the three proceedings at issue took place more than 15 years ago and that we have no transcripts from the various municipal courts. However, given Biazzo's inability to recall whether the three convictions were uncounseled or that the counsel waivers were improper, he has not established a prima facie showing. Consequently, the trial court did not err in overruling his motion to suppress the three prior convictions at issue. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR