

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24614

Appellant

v.

ROGER L. TANNER, JR.

Appellee

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR-2008-10-3362

DECISION AND JOURNAL ENTRY

Dated: August 5, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} The Grand Jury indicted Roger Tanner for domestic violence. It asserted that, because he had two prior convictions for violent offenses against family members, the offense was a felony of the third degree. Mr. Tanner moved to dismiss or amend the indictment, arguing that his prior convictions could not be used for enhancement purposes. The trial court agreed regarding one of the convictions, concluding he had not knowingly and voluntarily waived his right to a lawyer in that case. It, therefore, reduced the domestic violence charge to a felony of the fourth degree. The State has appealed, arguing that the trial court incorrectly reduced the charge. Because Mr. Tanner did not present sufficient evidence to support the trial court's decision, this Court reverses.

FACTS

{¶2} In May 2004, Mr. Tanner pleaded guilty in Akron Municipal Court to one count of domestic violence. The parties stipulated in the trial court that a recording or transcript of that proceeding is not available. Presumably, the audio tape of the municipal court proceeding was destroyed after three years in accordance with the municipal court's local rules. Mr. Tanner, however, also signed a written "Plea of Guilty to Charge and Waiver of Rights." The form listed a number of "rights and points of law," but did not advise Mr. Tanner that his conviction could be used for enhancement purposes in a subsequent case.

{¶3} In October 2008, the Grand Jury indicted Mr. Tanner for domestic violence. Because of the May 2004 conviction and another prior conviction, it determined that the offense was a felony of the third degree. Mr. Tanner moved to dismiss or amend the indictment, arguing that the May 2004 conviction could not be used to enhance the offense because he did not have a lawyer at the time he entered his plea in that case and did not voluntarily and intelligently waive his right to a lawyer. In support of his motion, Mr. Tanner submitted a copy of the plea and waiver of rights form that he signed in that case. He argued that his waiver of his right to a lawyer was invalid because he was not warned that his conviction could be used to enhance future domestic violence charges.

{¶4} The trial court agreed with Mr. Tanner. It found it was more likely than not that, when Mr. Tanner waived his right to a lawyer in the May 2004 case, the municipal court did not tell him about the possibility of enhancement. It, therefore, concluded that he "was not properly apprised of all the facts necessary to make a voluntary and knowledgeable waiver of counsel" and that the May 2004 conviction could not "be used for enhancement purposes in the present case." Accordingly, it amended the charge in this case to a felony of the fourth degree. The

State has appealed, assigning as error that the trial court incorrectly reduced the domestic violence count to a felony of the fourth degree.

OFFENSE ENHANCEMENT

{¶5} Section 2919.25(A) of the Ohio Revised Code provides that “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.” If the defendant has two prior convictions for domestic violence or certain other enumerated offenses, a violation of Section 2919.25(A) “is a felony of the third degree” R.C. 2919.25(D)(4).

{¶6} Mr. Tanner pleaded guilty to sexual battery in April 1996 and domestic violence in May 2004. “Generally, a past conviction cannot be attacked in a subsequent case. However, there is a limited right to collaterally attack a conviction when the state proposes to use [it] to enhance the penalty of a later criminal offense.” *State v. Brooke*, 113 Ohio St. 3d 199, 2007-Ohio-1533, 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.* “To be valid [a] waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.” *State v. Gibson*, 45 Ohio St. 2d 366, 377 (1976) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)).

{¶7} “If [a] defendant claims a constitutional defect in any prior conviction, [he] has the burden of proving the defect by a preponderance of the evidence.” R.C. 2945.75(B)(3). For Mr. Tanner to prove that his prior conviction was uncounseled, he had to establish that he was not represented by a lawyer and that he did not validly waive his right to a lawyer. See *State v.*

Thompson, 121 Ohio St. 3d 250, 2009-Ohio-314, at ¶5-6 (clarifying the meaning of “uncounseled”).

{¶8} Assuming, without deciding, that the municipal court had to tell Mr. Tanner about enhancement when he waived his right to a lawyer for his waiver to be valid, this Court notes that the only evidence he presented to support his argument that the municipal court did not tell him was a copy of his written “Plea of Guilty to Charge and Waiver of Rights” from that case. He did not present a transcript of the proceeding or testify about what the municipal court told him at the time he waived his rights. Accordingly, there was no evidence to foreclose the possibility that the municipal court warned him about enhancement in open court. Since the charge in the May 2004 case was a misdemeanor of the first degree with a maximum sentence of 180 days, Mr. Tanner’s waiver of his right to a lawyer did not have to be in writing to be valid. See Crim. R. 44(C) (providing that a waiver of counsel in serious offense cases must be in writing); Crim. R. 2(C) (limiting the definition of “[s]erious offense” to felonies and misdemeanors in which “the penalty prescribed by law includes confinement for more than six months”); R.C. 2929.24(A)(1) (providing that the maximum sentence for a misdemeanor of the first degree is “not more than one hundred eighty days.”).

{¶9} The trial court found that, since the written form Mr. Tanner signed did not warn him about the possibility of enhancement, it was more likely than not that the municipal court did not tell him about that issue in open court. The court’s inference was improper. Just because the written waiver said one thing does not mean that the municipal court did not tell him about other consequences orally. It is especially unreliable to make that inference when a written waiver of the right to a lawyer is not required.

{¶10} Ordinarily, “[a] knowing, voluntary, and intelligent waiver [of the right to a lawyer] cannot be presumed from a silent record.” *State v. Combs*, 9th Dist. No. 07CA009173, 2007-Ohio-7035, at ¶17 (citing *State v. Brooke*, 113 Ohio St. 3d 199, 2007-Ohio-1533, at ¶25). “[If] questions arise concerning a prior conviction, [however,] a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law” *State v. Brandon*, 45 Ohio St. 3d 85, syllabus (1989). Mr. Tanner failed to produce any evidence that the municipal court did not advise him of “all . . . facts essential to a broad understanding of the whole matter” in open court. *State v. Gibson*, 45 Ohio St. 2d 366, 377 (1976) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)). The trial court, therefore, incorrectly concluded that he proved that his waiver of his right to a lawyer in the May 2004 case was invalid and that his conviction in that case could not be used to enhance the present domestic violence charge. The State’s assignment of error is sustained.

CONCLUSION

{¶11} Mr. Tanner failed to present sufficient evidence to meet his burden of proving that the Akron Municipal Court failed to tell him about all essential facts before he waived his right to a lawyer in his May 2004 domestic violence case. The trial court, therefore, incorrectly concluded that his conviction in that case could not be used to increase the offense level of the pending domestic violence charge. The judgment of the Summit County Common Pleas Court is reversed.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellant.

EDDIE SIPPLEN, attorney at law, for appellee.