

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-L-134
JACKIE D. MARIANO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000023.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul R. LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} The instant matter emanates from the judgment entry of the Lake County Court of Common Pleas denying Jackie D. Mariano’s, appellant herein, motion to dismiss/quash her indictment. For the reasons discussed below, we affirm.

{¶2} On March 21, 2008, appellant was indicted on one count of operating a vehicle under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree, and one count of driving with a prohibited concentration of alcohol in

bodily substances, in violation of R.C. 4511.19(A)(1)(d). Each of these counts carried a specification alleging that appellant had five or more prior convictions within the last 20 years; appellant was also indicted on one count of driving under financial responsibility law suspension or cancellation, in violation of R.C. 4510.16(A), a misdemeanor of the first degree. Appellant waived her right to be present at arraignment, and pleas of “not guilty” were entered on her behalf.

{¶3} On May 9, 2008, appellant filed a Motion to Dismiss/Quash the Indictment, challenging the use of her prior uncounseled convictions for the purpose of enhancement. In turn, the state filed a memorandum in response. During a hearing on appellant’s motion, the state moved to dismiss the “five in 20” specifications and, instead, pursue only the felony-three OVI which was premised upon appellant’s prior felony OVI conviction. The trial court granted the state’s motion and subsequently overruled appellant’s motion to dismiss/quash based upon the doctrine of res judicata.

{¶4} Following the court’s ruling, appellant withdrew her previous plea of “not guilty” and pleaded “no contest” to the felony-three OVI count. The trial court found appellant guilty and sentenced her to a definite term of incarceration of three years with two years suspended. This appeal followed.

{¶5} On January 9, 2009, after appellant had filed her appellate brief, she filed a “Motion to Supplement the Record Instantly” and a “Supplement to the Record.” Her motion sought to supplement the record with case documents from her 2003 felony OVI case which had not been included in the appellate record filed with this court. This court construed appellant’s motion as a motion to remand the matter to the trial court and, on January 16, 2009, granted the same. The remand order was entered for the limited

purpose of allowing the trial court to determine whether the documents from the 2003 case were before it and relied upon in rendering the underlying judgment. On February 6, 2009, the trial court issued a judgment concluding the documents with which appellant sought to supplement the record were not before it when it rendered its August 20, 2008 judgment. The documents in question were consequently excluded from the record before this court.

{¶6} Appellant's sole assignment of error asserts:

{¶7} "The trial court erred when it overruled the defendant-appellant's motion to dismiss/quash the indictment where the seriousness of the crime was increased due to previous uncounseled convictions in violation of the defendant-appellant's due process rights and rights to counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶8} Under her sole assignment of error, appellant argues the trial court erred in overruling her motion to dismiss/quash the indictment. Her position is two-fold: First, she contends the trial court committed error in applying the doctrine of res judicata in arriving at its conclusion; building upon this argument, she asserts, she is entitled to dismissal of the indictment via application of the Ohio Supreme Court's holding in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533.

{¶9} We first point out that the underlying felony-three conviction was *not* a direct result of the alleged uncounseled misdemeanor convictions appellant now seeks to collaterally challenge. Rather, the underlying conviction is a result of her plea of guilty to felony-four OVI in 2003. As a result, we fail to see how the alleged

uncounseled misdemeanor convictions have any direct bearing upon the conviction under review.

{¶10} In 2003, appellant entered a plea agreement with the state whereby she would plead guilty to one count of felony-four OVI. At the hearing on appellant's motion to dismiss, the prosecutor seemed to suggest that appellant's attorney in her 2003 case did, in fact, collaterally challenge at least one of her prior misdemeanor convictions. Regardless of the actions of her former counsel, appellant's 2003 plea of guilty operated as a complete admission of her guilt. Crim.R. 11(B)(1). By entering a plea of guilty to felony-four OVI in 2003, appellant conceded her guilt as to all elements of the crime to which she pleaded, including her guilt as to the validity of the prior misdemeanor convictions. Nothing in the record suggests that appellant's 2003 felony-four OVI conviction suffered from any infirmities. Therefore, that conviction, upon which the instant felony-three OVI is premised, is valid and final.

{¶11} The doctrine of res judicata provides that "a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Jenkins* (1987), 42 Ohio App.3d 97, 99.

{¶12} Appellant's argument that she is not barred by res judicata hinges upon her evident belief that *Brooke* created a new substantive rule of law that she was unable to assert in 2003. *Brooke* was not revolutionary in this regard.

{¶13} Prior to the Court's release of *Brooke*, Ohio's case law was "replete with examples of criminal defendants who have challenged, often successfully, a prior penalty-enhancing conviction on the basis that the prior conviction was constitutionally infirm because it was uncounseled." *State v. Culberson*, 142 Ohio App.3d 656, 660, 2001-Ohio-326, citing *State v. Hopkins* (Mar. 1, 2000), 9th Dist. No. 98 CA 7159, 2000 Ohio App. LEXIS 725; *State v. Schupp* (1999), 100 Ohio Misc.2d 13; *State v. Cox* (Oct. 29, 1999), 2d Dist. No. 99 CA 28, 1999 Ohio App. LEXIS 5067; *State v. Perkins* (June 22, 1998), 12th Dist. No. CA97-10-047, 1998 Ohio App. LEXIS 2785; *State v. Ocepek* (April 15, 1998), 9th Dist. No. 18542, 1998 Ohio App. LEXIS 1562; *State v. Conley* (Nov. 4, 1997), 4th Dist. No. 97CA2481, 1997 Ohio App. LEXIS 5042; *State v. Carrion* (1992), 84 Ohio App.3d 27; *Columbus v. Carrel* (1990), 70 Ohio App.3d 80; *State v. Brandon* (1989), 45 Ohio St.3d 85; *State v. Adams* (1988), 37 Ohio St.3d 295; *State v. Daniels* (1988), 61 Ohio App.3d 17; *State v. Maynard* (1987), 38 Ohio App.3d 50; *State v. Elling* (1983), 11 Ohio Misc.2d 13.

{¶14} Rather than establish a new right to collaterally challenge prior convictions, *Brooke* clarified the manner in which a defendant could collaterally challenge the constitutionality of a prior OVI conviction where such a conviction is used to enhance the penalty of a later OVI conviction. Clearly, appellant had the opportunity to collaterally challenge the alleged uncounseled convictions in 2003; whether she, via counsel, did so or did not do so, at this point, is of no moment. The 2003 case is over and final. At issue in this matter is her latest plea of guilty to felony-three OVI. Her previous misdemeanor convictions, whether counseled or uncounseled within the meaning of *Brooke*, are irrelevant to this conviction. Because appellant was able to

collaterally challenge her prior convictions on the basis that they were allegedly uncounseled (and the record at the hearing indicates she may have actually done so), any issue regarding the constitutionality of those convictions is res judicata.

{¶15} However, even assuming arguendo that appellant could collaterally attack the convictions she now challenges, she would be unable, given the record, to establish a prima facie case her convictions were “uncounseled” as contemplated by *Brooke*.

{¶16} In *Brooke*, the Court stated “[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 201, citing *Brandon*, supra, at 86. More recently, in *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, the Court held:

{¶17} “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, ***, paragraph one of the syllabus, explained.)” *Thompson*, supra, at syllabus.

{¶18} Accordingly, to meet her burden, appellant would be required to show *both* she was unrepresented by an attorney *and* she did not make a valid waiver of her right to counsel. *Thompson*, supra, at 251-252. Here, in her motion to dismiss, appellant made allegations that she was unrepresented in several of her previous misdemeanor convictions. However, as discussed in *Thompson*, “it is beyond dispute that a person

has a constitutional right to represent him- or herself; therefore it is not possible to establish a constitutional infirmity merely by showing that a person did not have counsel.” Id. at 252. Because appellant failed to set forth a prima facie case alleging her previously alleged uncounseled convictions were unconstitutional, the burden would not have shifted to the state to prove their constitutionality.

{¶19} Regardless of this conclusion, appellant knowingly and voluntarily pleaded guilty in 2003 to the felony-four OVI; there is no evidence in the record nor is there any allegation that appellant’s 2003 plea and subsequent conviction are infirm. That conviction is therefore valid and final. Furthermore, appellant had the opportunity, prior to voluntarily entering her plea of guilty in 2003, to collaterally challenge her prior, allegedly uncounseled, misdemeanor OVI convictions. Whether she did or did not is irrelevant to this appeal. Because *that* conviction is final and valid and it is *that* conviction upon which the instant felony-three OVI is premised, we hold any attempt to challenge the underlying elements of the 2003 charge, i.e., her allegedly uncounseled prior misdemeanor convictions, is necessarily res judicata.

{¶20} Appellant’s sole assignment of error is without merit.

{¶21} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.

