**[Cite as *State v. Snowden*, 2015-Ohio-2611.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**TRUMBULL COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2014-T-0092** |
| - vs - | : | |
| WILLIAM SNOWDEN, JR., | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Trumbull County Court of Common Pleas.
Case No. 13 CR 715.

Judgment: Affirmed.

*Dennis Watkins*, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

*Edward A. Czopur* and *Ronald D. Yarwood*, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, OH 44503 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

**{¶1}** Appellant, William Snowden, Jr., appeals the judgment of the Trumbull County Court of Common Pleas finding him guilty of operating a vehicle under the influence and sentencing him to a term of incarceration of two years in prison. Appellant had previously entered a plea of no contest to Count 1, operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them, a felony of the

fourth degree, in violation of R.C. 4511.19(A)(1)(a), with a repeat OVI specification pursuant to R.C. 2941.1413. For the reasons that follow, the judgment is affirmed.

**{¶2}** On July 20, 2013, at approximately 2:25 a.m., appellant was driving on U.S. Route 422 in Girard, Trumbull County, and was stopped by Trooper Kevin Brown of the Ohio State Highway Patrol. Appellant was later charged with Count One, operating a motor vehicle while under the influence of alcohol or drugs, a fourth-degree felony, with a repeat OVI specification and a vehicle forfeiture specification pursuant to R.C. 4511.19(A)(1)(a) & (G)(1)(d)(ii), 2981.02(A)(2)(3)(a), and 2941.1417(A); and Count Two, operating a motor vehicle while under the influence of alcohol or drugs, a fourth-degree felony, with a repeat OVI specification and a vehicle forfeiture specification pursuant to R.C. 4511.19(A)(2)(a) & (b) & (G)(1)(d)(ii), 2981.02(A)(2)(3)(a), and 2941.1417(A). With respect to the OVI specification, the indictment alleged that appellant had, within 20 years of the offense, been previously convicted or pleaded guilty to five or more violations of division (A) or (B) of R.C. 4511.19 or other equivalent offenses, to wit: "on or about 06/04/2009, in Girard Municipal Court, Case No. 2009-TRC-1396; on or about 10/01/2003, in Niles Municipal Court, Case No. 2003-TRC-001418; on or about 03/23/2000, in Warren Municipal Court, Case No. 1999-TRC-08034; on or about 10/21/1997, in Chardon Municipal Court, Case No. 1997-TRC09062; on or about 04/11/1994, in Warren Municipal Court, Case No. 1994-TRC-588."

**{¶3}** On February 24, 2014, appellant filed a motion to suppress, alleging Trooper Brown did not have a sufficient basis to stop his motor vehicle. A hearing was held, and the following was adduced. Trooper Brown testified that he witnessed

appellant drive over the center line and continued weaving until crossing over to the other lane. The state submitted Trooper Brown's dash-cam video into evidence, but the quality of the recording was poor, and the camera was not in a position to clearly show the exact infraction. Trooper Brown testified that he activated his lights to initiate a stop. When Trooper Brown approached appellant, he noticed that appellant was visibly intoxicated and asked him to step out of the vehicle so that he could administer field sobriety tests. Appellant refused and was then placed under arrest.

**{¶4}** In its June 2, 2014 entry, the court held that "the state ha[d] good and credible evidence in the form of eyewitness testimony that [appellant] violated the Ohio Lanes of Travel Statute" and denied appellant's motion.

**{¶5}** Appellant subsequently filed a motion to dismiss the OVI specification of R.C. 2941.1413(A), but this motion was denied by the trial court.

**{¶6}** After pleading no contest to both counts contained in the indictment, over the state's objection, appellant was sentenced. The state elected to proceed to sentencing on Count One, as Count Two merged with Count One for purposes of sentencing. Appellant was sentenced to a two-year term of imprisonment: one-year on Count One and one-year on the specification of repeat OVI offender. The trial court stayed appellant's sentence pending appeal.

**{¶7}** Appellant filed a timely notice of appeal and, as his first assignment of error, asserts:

**{¶8}** "The trial court committed prejudicial error in denying appellant's motion to dismiss the repeat OVI offender specification and finding the same to be constitutional under an equal protection analysis thereby doubling appellant's prison term."

**{¶9}** Appellant argues that R.C. 2941.1413, Ohio's repeat OVI offender specification, is violative of the Equal Protection Clause of Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. To support his argument on appeal, he cites to *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶23, *appeal accepted*, Sup.Ct. No. 2014-1557, an opinion of the Eighth Appellate District holding the repeat OVI offender specification violates equal protection. In *Klembus*, the appellant argued that R.C. 4511.19(G)(1)(d) and 2941.1413 allowed the prosecutor to "arbitrarily obtain a greater prison sentence for the underlying offense without proof of any additional element, fact, or circumstance. Thus, [the appellant was] challenging the repeat OVI offender specification on its face, not as it was personally applied to him." *Id.* at ¶7.

**{¶10}** The majority in *Klembus* reasoned that a repeat OVI offender may be subjected to an increased penalty solely on the prosecutor's discretion when deciding whether to present the grand jury with the repeat OVI offender specification; "the increased penalty does not depend upon the jury finding any additional elements, facts, or circumstances beyond a reasonable doubt." *Id.* at ¶19. The majority cited to the Ohio Supreme Court's decision in *State v. Wilson*, 58 Ohio St.2d 52 (1979), in support of its decision. In *Wilson*, the Ohio Supreme Court held that prosecutorial discretion, standing alone, does not violate equal protection. *Klembus, supra,* at ¶20, citing *Wilson*, *supra*, at *55. But, if two statutes "'prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause."' *Klembus, supra,* citing *Wilson*, *supra,* at *55-56. The court in *Klembus*, therefore, concluded that, in light of a

prosecutor's discretion as well as the fact there is no requirement the specification will be applied uniformly to all offenders, the repeat OVI offender specification is not rationally related to a legitimate state purpose. *Klembus*, *supra*, at ¶21-23.

**{¶11}** The dissent in *Klembus* stated, "Ohio courts have repeatedly upheld the R.C. 2941.1413 enhanced penalty specification contained within R.C. 4511.19, relying on legislative intent as authorization of such cumulative punishment." *Klembus*, *supra*, at ¶39. The dissenting judge cited to this court's opinion:

> The Eleventh District Court of Appeals determined that a 'careful reading' of the R.C. 2941.1413 specification demonstrates that the mandatory prison term must be imposed in addition to the sentence for the underlying offense. * * * 'Therefore, R.C. 4511.19(G)(1)(d)(ii) and R.C. 2941.1413 'clearly reflect the legislature's intent to create a penalty for a person who has been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the OMVI offense over and above the penalty imposed for the OMVI conviction itself[.]'

*Klembus*, *supra*, at ¶40, quoting *State v. Stillwell*, 11th Dist. Lake No. 2006-L-010, 2007-Ohio-3190, ¶26 (internal citations omitted).

**{¶12}** The Twelfth Appellate District subsequently released *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-010, 2014-Ohio-4528, where it disagreed with the majority opinion in *Klembus*. The *Hartsook* Court reasoned that *Wilson* involved an appellant who was charged under both a simple burglary and an aggravated burglary statute, inapposite to the scenario at issue – an individual who has been charged with a single OVI offense. The *Hartsook* Court concluded, "we believe the language of the respective statutes clearly indicates that the General Assembly intended R.C. 4511.19 and R.C. 2941.1413 to authorize cumulative punishments for a single OVI offense by a repeat offender." *Id.* at ¶52.

**{¶13}** We adopt the rationale of the Twelfth District Court of Appeals in *Hartsook* and therefore do not find the penalty enhancement set forth in R.C. 2941.1413 to be unconstitutional. *See State v. Reddick*, 11th Dist. Lake No. 2014-L-082, 2015-Ohio-1215, ¶10-11.

**{¶14}** Appellant's first assignment of error is without merit.

**{¶15}** Appellant's second assignment of error states:

**{¶16}** "The trial court committed reversible error when it sentenced appellant to consecutive prison terms without first making any findings pursuant to R.C. 2929.14(C)(4)."

**{¶17}** Under this assigned error, appellant argues his sentence must be reversed, as the trial court failed to issue findings pursuant to R.C. 2929.14(C)(4) before imposing consecutive sentences. We find R.C. 2929.14(C)(4) inapplicable to the factual scenario presented.

**{¶18}** R.C. 2929.14(C)(4), the statute governing consecutive sentences, states, in pertinent part: "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively," if the court makes the required findings. Here, appellant was not subject to multiple prison terms for convictions of multiple offenses, and therefore, R.C. 2929.14(C)(4) is inapplicable, as the sentence on the OVI specification is to be served consecutively by terms of the statute. Specifically, appellant was sentenced to one year on the underlying OVI, in violation of R.C. 4511.19(G)(1)(d)(iii), and a mandatory one-year prison term on the specification of repeat OVI offender, to be served consecutively. The statute provides that the mandatory prison term on the specification runs

"consecutively to and prior to the prison term imposed for the underlying offense." *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374, ¶17; R.C. 2929.13(G)(2). Appellant was sentenced on a single charge of OVI, which carried an OVI specification—that sentence being imposed in addition to the penalty on the underlying OVI conviction. *See Stillwell*, *supra*.

**{¶19}** Appellant's second assignment of error is without merit.

**{¶20}** As his third assignment of error, appellant alleges:

**{¶21}** "The guilty finding was entered in error as the trial court relied, only, upon the factual basis presented by the State which was insufficient to support a conviction."

**{¶22}** Under this assigned error, appellant argues the state failed to "note the number, dates, courts or case numbers of the prior OVI convictions," and therefore, the conviction of appellant was based on insufficient evidence. Appellant maintains the trial court "is required to look to the indictment, not a factual basis offered by the State, in order to come to its conclusion."

**{¶23}** As recognized by the state on appeal, appellant has failed to dispute the knowing and voluntary nature of his plea of no contest, nor did he dispute that each of his five prior municipal convictions under R.C. 4511.19 appear in both the indictment and the plea form he signed. That is because the record reveals that both the indictment and the plea form state the date of each prior conviction, along with the case number and the court of jurisdiction.

**{¶24}** Pursuant to Crim.R. 11, a "plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint[.]" Crim.R. 11(B)(2). By pleading no contest, appellant

admitted the allegations contained in the indictment and waived the right to contest the factual finding; "Crim.R. 11 does not require the trial court to establish a factual basis for the plea before its acceptance." *State v. Post*, 32 Ohio St.3d 380, 387 (1987), holding modified by *State v. McDermott,* 72 Ohio St.3d 570 (1995); *see also State v. Duncan,* 9th Dist. Wayne No. 07CA0050, 2007-Ohio-6004, ¶18-19 (finding that defendant waived his right to a hearing to contest factual issues when the issues were set forth in his indictment and he entered a no contest plea). In addition, appellant reaffirmed the relevant factual basis for the offense. At the plea and sentencing hearing, the trial court again recited each of appellant's five prior municipal convictions under R.C. 4511.19. The trial court then informed appellant that, with respect to the specification, the state would have to prove that he, within 20 years of committing the current offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses. Appellant replied that he understood his right to a jury trial and "what the State would have to prove." Appellant informed the court that he understood that by entering a no contest plea, he would be giving up those rights.

**{¶25}** Because appellant admitted the facts set forth in the OVI specification when he agreed to plead no contest, appellant's third assignment of error is without merit.

**{¶26}** Appellant's fourth assignment of error asserts:

**{¶27}** "Appellant was deprived of his right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendment to the United States Constitution."

**{¶28}** In order to prevail on an ineffective assistance of counsel claim, the appellant must demonstrate from the record that trial counsel's performance fell below

an objective standard of reasonable representation and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, applying the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim of ineffective assistance can be disposed of by showing a lack of sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Bradley*, *supra*, at 143, citing *Strickland*, *supra*, at 697. There is a general presumption that trial counsel's conduct is within the broad range of competent professional assistance. *Id.* at 142.

**{¶29}** Under this assigned error, appellant maintains his trial counsel was ineffective for failing to investigate and call witnesses at the suppression hearing, filing a two-page brief that only challenged probable cause for the traffic stop, and failing to challenge any of appellant's prior OVI convictions.

**{¶30}** Here, appellant entered into and signed a plea of no contest, which verified that appellant had not received any threats or promises in exchange for his plea of no contest and that he "freely and voluntarily" plead no contest to the charges. The written plea of no contest contained the five previous violations of division (A) or (B) of R.C. 4511.19. Further, the no contest plea, signed by appellant, stated that appellant and his attorney "have fully discussed the facts and circumstances surrounding this case including the names of all witnesses." The document additionally states that appellant's attorney "has investigated these facts and circumstances to the best of my knowledge and has discussed with me the making of or the necessity of pre-trial motions."

**{¶31}** There is no evidence in the record that substantiates appellant's assertion that his trial counsel failed to investigate or call two witnesses who allegedly observed appellant driving on the night of the incident, as well as Trooper Brown's pursuit of appellant's vehicle. This court cannot consider matters outside the record; "[a]ny allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of R.C. 2953.21." *State v. Coleman*, 85 Ohio St.3d 129, 134 (1999), citing *State v. Cooperrider*, 4 Ohio St.3d 226, 228 (1983).

**{¶32}** Appellant further argues that his trial counsel was ineffective because he failed to raise the issue of whether the officer had probable cause for his arrest. Appellant states in his brief that he was arrested "simply on a moving violation, slurred speech and staggering * * * [which] is not a sufficient basis to arrest."

> **{¶33}** Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

*State v. Beck*, 379 U.S. 89, 91 (1964); *State v. Timson*, 38 Ohio St.2d 122 (1974). A probable cause determination is based on the "totality" of facts and circumstances within a police officer's knowledge. *State v. Miller*, 117 Ohio App.3d 750, 761.

**{¶34}** Here, Trooper Brown observed appellant commit a marked lanes violation. In *State v. Sitko*, 11th Dist. No. 2011-P-0042, 2012-Ohio-2705, ¶28, this court stated that police testimony regarding a defendant's erratic driving may be considered in the probable-cause determination. Additionally, the record establishes that appellant refused to participate in any of the field sobriety tests. This court has held that the "refusal to submit to field sobriety tests is another factor that may be considered in

determining the existence of probable cause in an arrest for driving under the influence of alcohol." *State v. Molk*, 11th Dist. Lake No. 2001-L-146, 2002-Ohio-6926, ¶19. There was also evidence of appellant slurring his speech, staggering, and falling—all of which are pertinent to a probable cause determination. Based on the totality of the circumstances, Trooper Brown had probable cause to arrest appellant. Therefore, trial counsel was not ineffective for not raising this issue in the motion to suppress.

**{¶35}** Further, it is equally plausible that trial counsel assessed the strength of the various arguments and tactically determined the issue of probable cause to arrest should not be raised and could have adversely affected the credibility of the entire motion. Indeed, we must indulge a strong presumption that trial counsel's assistance fell within the wide range of reasonable professional assistance.

**{¶36}** Next, appellant again argues the state failed to present sufficient evidence to support the OVI specification, and as such, trial counsel was ineffective for failing to challenge his prior convictions. Appellant's prior OVI convictions, however, have already been addressed in his second assignment of error. As such, we find this argument to be without merit.

**{¶37}** Appellant's fourth assignment of error is without merit.

**{¶38}** The judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.