[Cite as *State v. Mikolajczyk*, 2010-Ohio-75.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93085

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRAD MIKOLAJCZYK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499251

BEFORE: McMonagle, J., Gallagher, A.J., and Jones, J.

RELEASED: January 14, 2010

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Defendant-appellant Brad Mikolajczyk appeals the trial court judgments finding him guilty of felony driving under the influence ("DUI"), sentencing him to jail for 120 days, and fining him $1,400. We affirm.

{¶ 3} Mikolajczyk was charged with one count of DUI in September 2007. The indictment contained a specification that, within 20 years of the offense, Mikolajczyk had been convicted of or pleaded guilty to five or more equivalent offenses; it listed five prior offenses. The indictment also contained a furthermore clause stating that Mikolajczyk refused to submit to a breath test.

{¶ 4} The matter proceeded to a bench trial. The defense made a Crim.R. 29 motion on the grounds that (1) the indictment charged Mikolajczyk with a misdemeanor, not a felony, and (2) one of the prior convictions upon which the specification in this case was based was constitutionally infirm. The court allowed the parties to brief those two issues.

{¶ 5} The court overruled the defense's motion and found Mikolajczyk guilty as indicted. He was sentenced to 120 days in jail and fined $1,400; the

sentence was stayed pending appeal. Mikolajczyk raises four assignments of error for our review.

{¶ 6} In his first assignment of error, Mikolajczyk argues that the trial court erred by imposing a fine based on the statute in effect at the time of sentencing instead of the statute in effect at the time the offense occurred.

{¶ 7} App.R. 16(A)(7) requires an appellant to support his assignments of error "with citations to the authorities, statutes, and parts of the record on which [he] relies." App.R. 12(A)(2) allows an appellate court to "disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

{¶ 8} Mikolajczyk states the law on the effect of a reenactment, amendment, or repeal of a statute, but has neither cited the statute he contends he was incorrectly sentenced under nor the statute he believes he should have been sentenced under. Because he has not supported his assignment of error as required under App.R. 16(A)(7), we disregard it on the authority of App.R. 12 (A)(2).[1]

{¶ 9} The first assignment of error is overruled.

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[1]We further note that no objection was raised by the defense at sentencing.

{¶ 10} For his second assigned error, Mikolajczyk contends that the increased penalty for refusing the breath test was unconstitutional. The Ohio Supreme Court recently addressed this issue in *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056. Citing its previous decision in *State v. Starnes* (1970), 21 Ohio St.2d 38, 254 N.E.2d 675, which held that the implied-consent statute (R.C. 4511.191) is constitutional, the *Hoover* Court considered whether a defendant has a constitutional right to revoke his implied consent and whether his being forced by threat of punishment to submit to a chemical test violates his rights under the federal and state constitutions. The Court noted that because a defendant "has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication," "[a]sking a driver to comply with conduct he has no right to refuse and thereafter enhancing a later sentence upon conviction does not violate the constitution." (Citations omitted.) Id. at ¶22.

{¶ 11} In light of the above authority, the second assignment of error is overruled.

{¶ 12} In his third assignment of error, Mikolajczyk contends that the indictment was sufficient to charge a misdemeanor offense, but not a felony. We disagree.

{¶ 13} Under R.C. 4511.19, a DUI charge is a misdemeanor of the first degree when it is the offender's first, second, third, fourth, or fifth within 20

years. See R.C. 4511.19(A)(1) and 4511.19(G)(1)(b). Although the penalty is increased with each additional offense, the degree of the offense remains the same in these five situations. Id. When an offender has five prior violations within 20 years, however, the potential penalty is increased *and* the degree of the offense is elevated to a fourth-degree felony. R.C. 4511.19(G)(1)(d). The essence of Mikolajczyk's argument in this assignment of error is that the indictment should have listed the prior convictions under a "furthermore clause" rather than as a "specification." We disagree.

{¶ 14} R.C. 2945.75 governs charging requirements in situations where elements enhance the degree of an offense and provides that "[w]hen the presence of one or more additional elements makes an offense one or more serious degree: (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall state such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense."

{¶ 15} The indictment here does not specify the degree of the offense; we therefore must consider whether it stated "such additional element or elements" so as to elevate the offense to a fourth-degree felony. It did. Specifically, in pertinent part, the indictment read as follows:

{¶ 16} "Defendant * * * unlawfully did operate a vehicle within this state while under the influence of alcohol and/or a drug of abuse[.]

{¶ 17} "SPECIFICATION:

{¶ 18} "The Grand Jurors further find and specify that the said Brad Mikolajczyk, within twenty years of committing the above offense, had been convicted of or pleaded guilty to five or more equivalent offenses, to-wit:

{¶ 19} "The said Brad Mikolajczyk, in the Berea Municipal Court, Case No. 04 TRC 00728, was convicted of the crime of Driving Under the Influence or equivalent municipal offense, in violation of Revised Code Section 4511.19 of the State of Ohio or equivalent municipal ordinance.

{¶ 20} "FURTHERMORE, the said Brad Mikolajczyk, in the Shelby Municipal Court, Case No. 89 TRC 465, was convicted of the crime of Driving Under the Influence, or equivalent municipal offense, in violation of Revised Code Section 4511.19 of the State of Ohio or equivalent municipal ordinance.

{¶ 21} "FURTHERMORE, the said Brad Mikolajczyk, in the Bedford Municipal Court, Case No. 92 TRC 03276, was convicted of the crime of Driving Under the Influence, or equivalent municipal offense, in violation of Revised Code Section 4511.19 of the State of Ohio or equivalent municipal ordinance.

{¶ 22} "FURTHERMORE, the said Brad Mikolajczyk, in the Mahoning County Court, Case No. 93 TRC 1058, was convicted of the crime of Driving

Under the Influence, or equivalent municipal offense, in violation of Revised Code Section 4511.19 of the State of Ohio or equivalent municipal ordinance.

{¶ 23} "FURTHERMORE, the said Brad Mikolajczyk, in the Garfield Municipal Court, Case No. 99 TRC 05588, was convicted of the crime of Driving Under the Influence, or equivalent municipal offense, in violation of Revised Code Section 4511.19 of the State of Ohio or equivalent municipal ordinance." (Underscoring and capitalization sic.)

{¶ 24} On this record, the indictment complied with the statutory requirements of R.C. 2945.75 and therefore was sufficient to charge a fourth-degree felony. The third assignment of error is overruled.

{¶ 25} For his fourth assigned error, Mikolajczyk contends that one of the prior convictions, as set forth in state's exhibit 10, was insufficient to enhance his sentence. In particular, he contends that the conviction did not indicate that he was advised of his constitutional rights because the box so indicating on the entry of conviction and sentencing was not checked.

{¶ 26} Generally, a past conviction cannot be attacked in a subsequent case. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶9. A prior conviction may be challenged, however, on a constitutional infirmity. Id. "When 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 constitutional infirmity." *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph two of the syllabus.

{¶ 27} In *State v. Culberson*, 142 Ohio App.3d 656, 2001-Ohio-3261, 756 N.E.2d 734, the Seventh Appellate District addressed the issue presented here, where the defendant challenges the use of a prior conviction for a penalty enhancement on the grounds of a constitutional infirmity other than an uncounseled conviction. Culberson's claim of constitutional infirmity was that his prior convictions were not knowingly, voluntarily, and intelligently made. He argued that if he or some other witness testified that a recognized constitutional infirmity occurred in obtaining the prior convictions, then the burden shifted to the state to produce rebuttal evidence. The appellate court disagreed and stated the following:

{¶ 28} "The difficulty with [the defendant's] argument is that, to date, only one constitutional infirmity (with respect to a collateral attack on a conviction which has been used to enhance a criminal penalty) has been recognized by the Ohio or the United States Supreme Courts. That infirmity consists of a conviction obtained without the assistance of counsel, or its corollary, an invalid waiver of the right to counsel.

{¶ 29} "Ohio case law is 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.

{¶ 30} "The only seeming exception to this list is found in *State v. Hairston* [1985], 27 Ohio App.3d 125, 27 OBR 156, 499 N.E.2d 1268. The defendant in *Hairston* was charged with aggravated robbery with a specification that he had previously been convicted of aggravated attempted robbery. *Hairston* involved a situation similar to the case at bar in that the defendant was represented by counsel during the prior proceeding but claimed that there was no evidence that his prior plea was knowingly and voluntarily entered into. Id. at 126-127, 27 OBR at 156-157, 499 N.E.2d at 1269-1270.

{¶ 31} "The defendant in *Hairston* attempted to analogize his situation to those cases involving uncounseled prior convictions, citing *Baldasar* [*v. Illinois* (1980)], 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169, and *Burgett v. Texas* (1967), 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319. The court rejected this argument and held that there was a presumption that a criminal defendant's counsel has explained 'the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.' *Hairston* at 126, 27 OBR at 157, 499 N.E.2d at 1270. The defendant in *Hairston* failed to provide any evidence at all to rebut this presumption. The court stated in dicta that the state would have been required to submit

evidence of the voluntariness of the plea in the prior conviction if the defendant had presented sufficient evidence to support his claim. Id.

{¶ 32} "In a case subsequent to *Hairston*, the United States Supreme Court has held, in reference to federal sentencing statutes, that a criminal defendant may collaterally challenge the constitutional validity of a prior conviction only on the ground that he or she was denied the fundamental right to be represented by counsel in the prior proceeding in violation of *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. *Custis* [*v. United States* (1994)], 511 U.S. [485] at 496, 114 S.Ct. [1732] at 1738-1739, 128 L.Ed.2d [517] at 528. The Supreme Court reasoned that the failure to appoint counsel was a unique constitutional defect. Id. at 494, 114 S.Ct. at 1737-1738, 128 L.Ed.2d at 526-527. The Supreme Court held that other defects, such as denial of effective assistance of counsel and lack of a knowing, intelligent, and voluntary plea, do not rise to the level of failure to appoint counsel. Id.

{¶ 33} "*Custis* reasoned that collateral attacks on previous convictions should be limited to alleged uncounseled prior convictions because (1) there are administrative difficulties in having to rummage through frequently nonexistent or difficult-to-obtain state court files from another era and from far-flung jurisdictions, and (2) there is an interest in promoting finality of judgments. Id. at 496-497, 114 S.Ct. at 1738-1739, 128 L.Ed.2d at 528-529.

The Supreme Court was particularly concerned about the finality of judgments where a defendant was attempting to challenge a prior state-court conviction in a proceeding that has an independent purpose other than to overturn the prior judgment. Id. at 497, 114 S.Ct. at 1739, 128 L.Ed.2d at 528-529." *Culberson* at 660-62.

{¶ 34} In light of the above, Mikolajczyk failed to present a prima facie showing of constitutional infirmity. Accordingly, the fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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. 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR