[Cite as *State v. Showalter*, 2018-Ohio-5411.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEVEN EARL SHOWALTER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 BE 0027

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CR 41

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed. Remanded.

Atty. Dan Fry, Belmont County Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee, No Brief Filed.

Atty. Rhys B. Cartwright-Jones, 42 N. Phelps Street, Youngstown, Ohio 44503-1130, for Defendant-Appellant.

Dated: December 26, 2018

WAITE, J.

{¶1} Appellant Steven Earl Showalter appeals from his convictions and sentencing in the Belmont County Common Pleas Court following a jury trial. Appellant was convicted of third-degree felony driving while under the influence of alcohol or drugs ("DUI") and third-degree felony failure to comply with an order or signal of a police officer. The DUI charge is now properly referred to as operating a vehicle under the influence of alcohol or drugs ("OVI"), but because of the stated charges in this matter, we will refer to the charge as a DUI. Appellant argues two issues on appeal: ineffective assistance of trial counsel for permitting the jury to hear evidence of Appellant's prior record; and that the trial court failed to consider the factors enumerated in R.C. 2921.331(C)(5)(b) before imposing sentence. Based on the following, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On January 9, 2016 at approximately 9:30 p.m., a Bethesda police officer witnessed an all-terrain vehicle (ATV) driving past him at an excessive speed and weaving across the center line. When the vehicle drove through a stop sign without stopping, the officer attempted to effectuate a traffic stop. The driver did not stop his vehicle, instead leading the officer on a 20-minute chase throughout the community and causing other vehicles to run off of the road to avoid a collision. The vehicle ultimately stopped at a residence. At this point, an individual identified at trial as Appellant jumped out of the ATV and ran around and through the house as the officer gave chase. Appellant ultimately got entangled in bushes at the rear of the dwelling where he was finally apprehended. A urine test revealed Appellant's alcohol level to be .250, well above the legal limit.

{¶3} In its spring term of 2016, the Belmont County Grand Jury indicted Appellant on two felony counts. Count one was a third-degree-felony DUI with the specification that Appellant had a previous conviction for a felony DUI offense. R.C. 4511.19(A)(1)(a), (G)(1)(e). Count two was a third-degree-felony failure to comply with an order or signal of a police officer. R.C. 2921.331(B), (C)(5)(a)(ii). On March 15, 2016, Appellant filed a motion to dismiss the charges. He also filed a motion to suppress the field sobriety results, statements made by Appellant during the stop, and any opinions and observations of the police officers at the scene. Appellant contended his stop and seizure were unreasonable, as he was not the individual operating the vehicle in question, and that the officer lacked probable cause to arrest. (3/15/16 Motion to Suppress.)

{¶4} A hearing on the motion to suppress was held on April 12, 2016. At the hearing, Appellant's counsel made an oral motion to withdraw the motion to suppress and sought to withdraw as counsel at Appellant's request. In a judgment entry dated April 12, 2016, the trial court granted the motion to withdraw the motion to suppress, but overruled counsel's motion to withdraw pending Appellant's action in obtaining new counsel.

{¶5} New counsel was not obtained. The matter proceeded to a jury trial on April 26, 2016, where the state offered testimony from the criminalist at the Ohio State Highway Patrol crime laboratory, Tiffany Paugh, as well as from the arresting officer, Sergeant Justin Wise. Evidence of Appellant's blood alcohol test results was admitted without objection. Sergeant Wise testified that he noticed a red ATV Razor pass his marked police cruiser at a high rate of speed while weaving erratically. The cruiser was

stationary at the time. (4/26/16 Tr., p. 170.) The driver of the ATV was wearing a red hoodie and dark pants. (4/26/16 Tr., p. 172.) He observed the ATV as it "blew right through the stop sign and made a left-hand turn." (4/26/16 Tr., p. 170.) Wise then activated his lights and siren. The driver of the vehicle failed to pull over, and Wise continued pursuit at approximately 55 miles per hour as the vehicle passed a truck on a blind curve, causing the truck to pull to the side of the road. (4/26/16 Tr., pp. 175-176.) Another truck was run partially into a ditch as the ATV overtook it, still traveling approximately 50 miles per hour. The officer was still in pursuit and had his lights and siren still activated. (4/26/16 Tr., p. 178.) The chased extended for several miles until the vehicle finally stopped at Appellant's residence, where he jumped off the ATV and ran through the yard, into the front door and out of the back door of the residence while the officer gave chase. Appellant continued through the back yard before becoming entangled in bushes. At that point, the officer was able to restrain him and apply handcuffs. (4/26/16 Tr., pp. 180-181.) Wise testified that the chase lasted from approximately 9:36 p.m. until 10:10 p.m. (4/26/16 Tr., p. 187.)

{¶6} In support of his theory that the arresting officer misidentified Appellant as the person driving the ATV on the day in question, Appellant presented testimony from his cousin, Ryan Showalter, who was present at Appellant's home on the day of the incident. Ryan testified that he arrived at Appellant's home around 4:00 p.m. and the two spent the evening together outside of Appellant's house, sitting around a fire. (4/26/16 Tr., p. 229.) Ryan testified that he was with Appellant until Ryan's girlfriend picked him up at Appellant's house at around 9:20 p.m. (4/26/16 Tr., p. 225.) Ryan testified that Appellant never left his residence and that no one else was outside with

them. He also stated that he was familiar with Appellant's red ATV, but that he did not see it that day. (4/26/16 Tr., pp. 223-225.)

{¶7} The jury convicted Appellant on both counts. The trial court conducted sentencing on May 6, 2016. Due to a number of factors noted by the trial court at sentencing and in the judgment entry of sentence, including that this was actually Appellant's seventh DUI offense, the court sentenced Appellant to a 36-month term of imprisonment on count one and a 36-month term of imprisonment on count two, to be served consecutively. Appellant's driver's license was also suspended for the remainder of his life and he was ordered to pay a $1,350.00 fine.

{¶8} Appellant filed a timely notice of appeal on May 26, 2016. On August 18, 2016, Appellant's counsel filed a no merit brief asking to withdraw because there were no meritorious arguments for appeal, pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396 (1967), also known in this district as a *Toney* brief. *State v. Toney,* 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970). In *State v. Cruz-Ramos,* 7th Dist. No. 17 MA 0077, 2018-Ohio-1583, this Court overruled *Toney*. We held that it would no longer be an acceptable practice in this Court for counsel to file a no merit brief. *Id.* at ¶ 16. Appointed counsel was permitted to withdraw and new counsel was appointed for Appellant. Appellant's new counsel filed a merit brief in the matter on April 30, 2018. Appellee has not filed a brief. Appellant asserts two assignments of error on appeal.

ASSIGNMENT OF ERROR NO. 1

SHOWALTER RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE INSOFAR AS TRIAL COUNSEL ALLOWED THE JURY UNNECESSARILY TO HEAR HIS PRIOR RECORD.

{¶9} In his first assignment of error Appellant contends trial counsel was ineffective for permitting the jury to hear evidence that he had a prior DUI conviction.

{¶10} In a claim for ineffective assistance of counsel, a court must indulge in a strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. Appellant bears the burden of demonstrating that counsel's performance fell below an objective standard of professional competence. If successful in demonstrating that counsel committed professional error, the appellant must then demonstrate he was prejudiced by that deficiency. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Deficient performance" means performance falling below an objective standard of reasonable representation. *Id.* at 687-688. "Prejudice," in this context, means a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694.

{¶11} "An ineffectiveness claim * * * is an attack on the fundamental fairness of the proceeding whose result is challenged," and that, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 697, 670. An appellant's burden when challenging the effectiveness of counsel is to demonstrate that some action or inaction by counsel operated to undermine or call into question the integrity of the process that resulted in conviction. *State v. Calhoun,* 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶12} Appellant was charged in this matter with a third-degree-felony DUI, with the specification that he had a previous conviction for a felony DUI offense, pursuant to R.C. 4511.19(A)(1)(a), (G)(1)(e).

{¶13} R. C. 4511.19(A)(1)(a) provides that "[n]o person shall operate any vehicle * * * within this state, if, at the time of the operation, * * * [t]he person is under the influence of alcohol." If a person has previously been convicted of or pleaded guilty to a previous DUI that was a felony, regardless of when the violation and conviction or guilty plea occurred, that person is guilty of a third-degree felony DUI. R.C. 4511.19(G)(1)(e).

{¶14} Appellant asserts he was denied effective assistance of trial counsel because: (1) trial counsel failed to request a bifurcation of the predicate felonies which constituted the felony DUI charge in the instant matter; and (2) trial counsel stipulated to the underlying felony DUI to the jury. (4/26/16 Tr., p. 234.)

{¶15} Appellant relies on *State v. Thompson,* 8th Dist. No. 96929, 2012-Ohio-921, for the proposition that counsel may be ineffective for failing to request a bifurcation of an accused's charges. In *Thompson,* the defendant had been charged with felonious assault and having a weapon while under disability. However, the Eighth District did not conclude that counsel was ineffective in failing to request a bifurcation. The *Thompson* court noted that, while in *State v. Jenkins,* 8th Dist. No. 91100, 2009-Ohio-235, it had concluded that a failure to request a bifurcation constituted ineffective assistance, in *Jenkins* trial counsel had committed a litany of errors which cumulatively constituted ineffective assistance, whereas there were no such cumulative errors in *Thompson*. The trial court's decision was affirmed.

{¶16} First, it is important to note that in both *Thompson* and *Jenkins* the charges at issue were that the accused had a weapon under disability. Neither case related to DUI offenses. More importantly, the weapons under disability charges were currently pending before the trial court in *Thompson* and *Jenkins.* In the instant matter,

the felony DUI at issue is a prior offense, rather than one of the current charges before the court. However, the most crucial fact, here, that the prior felony DUI is an essential element of the charged offense. When a prior conviction acts to "transform the crime itself by increasing its degree," the prior conviction is an essential element of the crime and must be proved beyond a reasonable doubt by the state. *State v. Fairchild,* 7th Dist. No. 16 MA 0047, 2016-Ohio-8218, ¶ 5 citing *State v. Brooke,* 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 8.

{¶17} It is axiomatic that the state has the burden of proving all essential elements of an offense beyond a reasonable doubt. R.C. 2901.05; *See State v. Henderson,* 58 Ohio St.2d 171, 173, 389 N.E.2d 494 (1979) (a prior conviction that is an element of the present offense must be proven beyond a reasonable doubt). It becomes apparent that because the prior conviction is an element of the present offense to be proven beyond a reasonable doubt, Appellant is not entitled to bifurcate proceedings on one element of the charge. In order to prove an accused guilty of DUI pursuant to R.C. 4511.19(A)(1)(a), the state is required to prove that Appellant was operating a vehicle under the influence. *State v. Hoover,* 123 Ohio St.3d 418, 916 N.E.2d 1056, 2009-Ohio-4993, ¶ 13. In order to prove that Appellant is guilty of a third-degree felony DUI under R.C. 4511.19(G)(1)(e), the state must prove: (1) Appellant has a prior conviction or has previously pleaded guilty to a felony DUI; and (2) Appellant was operating a vehicle under the influence. Therefore, a bifurcation of the prior conviction was not permissible, and Appellant was not denied effective assistance of counsel for counsel's failure to seek bifurcation of the prior conviction.

{¶18} Appellant also takes issue with the state's opening statement, which refers to the predicate felony offense:

> Why run? Why hide? In the grand scheme of things, it's not the most egregious offense in the world. Why lead the police on a high speed chase? Why pass cars on a double lane road? Why make people stop? Why commit such a selfish act that you jeopardize other people just to escape detection of an OVI?
>
> I'll tell you why: Because this wasn't going to be a normal OVI. This wasn't a normal driving under the influence of alcohol case. You see, for Mr. Showalter, it would be a felony offense, because in 2008, he received out of this Common Pleas court a felony offense conviction for operating a motor vehicle. And what that means, ladies and gentlemen, is from here on out, every time he gets an OVI, that's going to be a felony.

(4/26/16 Tr. p. 143.)

{¶19} Appellant contends this statement was improper because identification remained an issue throughout the trial, as Appellant's defense was based on the theory that he was intoxicated at home and that the police could not establish that Appellant led the police on the high speed chase that ended at his home. Although not entirely clear, Appellant appears to be arguing that, as his identity was an issue, trial counsel's stipulation to the prior felony DUI conviction was tantamount to ineffective assistance, and when the stipulation was presented to the jury, it "tipped a not-so-strong case" towards conviction. (Appellant's Brf., p. 5.)

{¶20} A review of the record and the transcript reflects that Appellant's contentions are not well founded. At the close of the state's evidence, the court excused the jury and the trial court addressed the admission of the exhibits into evidence. The state introduced their exhibits, which included: the certificate of the lab director; a lab submission form; a chain of custody form; certified copy of the indictment and a waiver and plea of sentence. (4/26/16 Tr., p. 217.) As there was no objection from Appellant's trial counsel, the exhibits were admitted into evidence. The trial court then inquired if there were any other matters, and the prosecutor stated:

> [APPELLEE COUNSEL]: Just one thing, briefly, depending upon the direction that the defendant goes in. And [Appellant's trial counsel] and I have already talked to avoid certain issues with the certified copy of the conviction, that we may ask the Court to address the jury instead of giving them the certified copy of the conviction; which may contain some things that might not be appropriate, depending upon the direction the defendant goes. But, however, having said that, we would rest.
>
> THE COURT: You mean that there may be in fact just a stipulation as to a prior felony?
>
> [APPELLEE COUNSEL]: Yes. Judge, we have a 609 issue, Evidence Rule 609, because it actually lists the conviction. And again, if the defendant testifies, that's a moot issue. If he doesn't testify, then that's an issue that, obviously, [Appellant's trial counsel] would want to preclude.

(4/26/16 Tr., pp. 217-218.)

{¶21} Evid.R. 609 governs the use of evidence of a prior conviction to impeach a witness' credibility. Evid.R. 609(A)(1) provides that the credibility of a witness can be impeached by a prior conviction punishable by over one year in prison if Evid.R. 403 is also satisfied. Evid.R. 403(A) provides a mandatory exclusion for relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Evid.R. 403(B) allows discretionary exclusion of relevant evidence if its probative value is substantially outweighed by undue delay or needless presentation of cumulative evidence.

{¶22} Evid.R. 609(F) states:

> When evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is not the person to whom the public record refers.

{¶23} In the instant matter, according to the statement made by the prosecutor, he and Appellant's counsel discussed the potential prejudicial nature of having the certified copy of the conviction presented to the jury. The exhibit would reveal that the instant offense would actually be Appellant's seventh DUI offense. It was decided that providing the jury with the certified copy of the conviction might run afoul of the evidence rules, particularly if Appellant did not testify at trial (and he did not.) Therefore, rather than allowing the certified copy of the conviction to go before the jury, Appellant's trial

counsel stipulated to a prior conviction at the conclusion of the presentation of evidence and prior to jury instructions. Where, as here, stipulation to a prior conviction is actually used to prevent substantial prejudice to Appellant, that stipulation by trial counsel was a sound trial tactic. Based on the facts and circumstances of the instant case, Appellant was not denied effective assistance of counsel. Appellant's first assignment is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT FAILED TO BASE ITS SENTENCE ON R.C. 2921.331.

{¶24} In his second assignment, Appellant contends the trial court erred in failing to consider, on the record, factors relative to his offense of failure to comply enumerated in R.C. 2921.331(C)(5)(b), before imposing consecutive sentences.

{¶25} In addition to his conviction for a felony DUI, Appellant was convicted of failure to comply with order or signal of police officer, in violation of R.C. 2921.331(B), (C)(5)(a)(ii):

> (B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

R.C. 2921.331(B).

{¶26} R.C. 2921.331(C)(5)(a)(ii) reads:

> A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

* * *

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

{¶27} R.C. 2921.331(D) mandates that Appellant's sentence for failure to comply was required to be ordered to run consecutively to any other prison term imposed. That mandate is not affected by the factors enumerated in R.C. 2921.331(C)(5)(b).

{¶28} The factors listed in R.C. 2921.331(C)(5)(b) include: the duration of the pursuit; the distance of the pursuit; the rate of speed at which the offender was operating the vehicle during the pursuit; whether the offender stopped at traffic lights or stop signs; the number of traffic lights or stop signs for which the offender failed to stop; whether the offender operated the vehicle without lights on when lights were required; whether the offender committed a moving violation during the pursuit; the number of moving violations the offender committed; and any other factors indicating the offender's conduct was more serious than conduct normally constituting the offense.

{¶29} Where consecutive sentences are mandatory, an evaluation of the seriousness of the conduct will determine whether the offender receives the minimum sentence, maximum sentence or some other term of incarceration. Appellant's contention that the factors themselves are to be utilized in determining whether consecutive sentences are required is a misstatement of the law.

{¶30} As we noted in *State v. Oliver,* 7th Dist. No. 07 MA 169, 2008-Ohio-6371 cited by Appellant, the factors serve only to establish the seriousness of the offender's conduct in concert with the factors set forth in R.C. 2929.12 and R.C. 2929.13. *Id.* at ¶ 17. In *Oliver,* this Court held that the R.C. 2921.331(C)(5)(b) factors do not need to

be expressly stated on the record, nor do specific findings under each factor need be made. *Id.* at ¶ 28. The trial court is only required to demonstrate that it considered the factors. *Id.* The matter was remanded for resentencing in *Oliver* because there had been no mention of the facts related to the offender's conduct at the sentencing hearing, nor did the record contain any indication that the trial court had considered the R.C. 2921.331(C)(5)(b) factors. *Id.* at ¶ 32.

{¶31} The Eighth District has held that although there was no mention of the factors by name, when at the sentencing hearing the judge described the offender's high rate of speed, failure to stop at stoplights and that the offense took place in a school zone, this demonstrated that the court considered the seriousness of the offender's conduct, and the sentence was upheld. *State v. Jones,* 8th Dist. No. 89499, 2008-Ohio-802, ¶ 17.

{¶32} In *Anderson*, after the defendant entered a plea of no contest, the state recited the facts of the case into the record and the trial court imposed sentence. On appeal, the Eighth District held that the trial court found the offender guilty based on the facts as presented by the state, so it necessarily considered the factors contained within R.C. 2921.331(C)(5)(b). *State v. Anderson,* 8th Dist. No. 83285, 2004-Ohio-2858.

{¶33} In *Jordan,* the Third District concluded the facts as presented by the state at a change of plea hearing provided the trial court with sufficient information to determine the seriousness of the offender's conduct pursuant to R.C. 2921.331(C)(5)(b). *State v. Jordan,* 3d Dist. No. 6-11-05, 2001-Ohio-6015, ¶ 19.

{¶34} In the instant matter, the trial court noted at the sentencing hearing:

I have studied in depth for this case Ohio Revised Code 2929.11 and 2929.12. The overriding purposes, the principles and the factors of sentencing.

As [Appellee Counsel] pointed out, I sat through a complete jury trial in this case, so I am very familiar with the facts. I've reviewed the file. I have reviewed the Presentence Investigation. The conclusion is that the defendant clearly drove erratically through an intersection. The attention was caught by Sergeant Wise, who signaled the vehicle by lights and sirens to stop. This defendant chose not to stop. This defendant chose, while thoroughly intoxicated, to flee. A high-speed chase ensued. Sergeant began pursuing the defendant; chased the vehicle through Belmont; back to Bethesda; continued to follow until he reached the defendant's residence. * * * The facts are horrendous. This defendant did not give a darn about the safety of the officer pursuing him. He did not give a darn about any individuals on the road; running at least one car off the road. He's such a loving family man for his family, but no one else's family. He did not give a darn if he killed your children or your grandchildren.

(5/6/16 Tr., pp. 4-6.)

{¶35} In the sentencing entry, the trial court notes, *inter alia*:

In accord with R.C. §2929.13 (F), it is presumed that prison is necessary to comply with the purposes and principles of Sentencing. In addition, this Court, in Sentencing, in its discretion to determine the most effective way

> to comply with the principles and purposes of sentencing set forth in R.C. §2929.11, may also consider the factors contained in R.C. §2929.12 (B), (C), (D) and (E), and any other factors relevant to achieving those purposes and principles.

(5/6/16 J.E., p. 2.)

{¶36} We note at this point that the trial court incorrectly cited to R.C. 2929.13(F) in its sentencing judgment entry. The correct citation involving the presumption of prison time in a third-degree felony DUI is R.C. 2929.13(G)(2). However, the record contains ample evidence that the trial court possessed an in-depth knowledge of the facts surrounding Appellant's conduct during the offense. The court's reference to Appellant's high rate of speed, the duration of the pursuit, the numerous moving violations committed therein and the serious risk of physical harm to others clearly meets the standard we established in *Oliver* for determining the seriousness of Appellant's conduct when committing the offense of failure to comply in violation of R.C. 2921.331(C)(5)(a)(ii). Based on the record, the trial court's incorrect citation is merely a clerical error. A *nunc pro tunc* judgment entry is appropriate where the original judgment entry contains a clerical error. *State v. Council,* 7th Dist. No. 16 MA 0133, 2017-Ohio-9047, ¶ 13. Therefore, as the trial court clearly considered the correct law but cited to the wrong revised code section in its sentencing entry, we remand this matter in order for the trial court to issue a *nunc pro tunc* entry reflecting the correct citation. Notwithstanding the clerical error, we conclude that the trial court did not err in sentencing Appellant. Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶37} Based on the foregoing, Appellant's two assignments of error are without merit and the judgment of the trial court is affirmed. However, in order for the record to accurately reflect the correct statute citation, the matter is remanded to the trial court in order to enter a *nunc pro tunc* entry to correct the clerical error and reflect the correct citation for a regarding the presumption of prison time in a third-degree felony DUI is R.C. 2929.13(G)(2).

Robb, P.J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. However, we hereby remand this matter to the trial court to enter a *nunc pro tunc* entry to correct the clerical error and reflect the correct citation regarding the presumption of prison time in a third-degree felony DUI is R.C. 2929.13(G)(2). Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.