DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

CHRISTINA YACOUB,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D10-2400

[April 18, 2012]

GROSS, J.

Christina Yacoub appeals her conviction and sentence for felony driving under the influence. We reverse because the state failed to satisfy its burden of proving that Yacoub was either provided counsel or validly waived the right with respect to a previous misdemeanor conviction.

On July 4, 2008, the state charged Yacoub with felony driving under the influence. The felony charge was based on her guilty plea to two misdemeanor DUI offenses within the past ten years. *See* § 316.193(2)(b), Fla. Stat. (2008). Yacoub moved to dismiss the charge for lack of jurisdiction, arguing that there was no valid felony charge to prosecute in circuit court since one of her 2002 DUI convictions had been uncounseled. Following a hearing, the trial court denied the motion.

A defendant charged with felony DUI may move to dismiss the charge by alleging that the state is improperly relying on a prior uncounseled misdemeanor DUI conviction. *See Sate v. Kelly*, 999 So. 2d 1029, 1052 (Fla. 2008). To validly raise such a jurisdictional challenge, the defendant must satisfy an initial burden of production by asserting under oath "(1) that the [prior] offense involved was punishable by more than six months of imprisonment or that the defendant was actually subjected to a term of imprisonment; (2) that the defendant was indigent and, thus, entitled to court-appointed counsel; (3) [that] counsel was not appointed; and (4) [that] the right to counsel was not waived." *Id.* at 1037 (citing *State v. Beach*, 592 So. 2d 237, 239 (Fla. 1992)). If the defendant

carries this minimalistic burden, then the "burden of persuasion shifts to the state to show either that counsel was provided or that the right to counsel was validly waived." *See id.* at 1053.

At the hearing on the motion in this case, the parties stipulated that Yacoub pleaded guilty to two prior DUIs on the same date in 2002 before the same judge, while Yacoub was in custody. They further agreed that one DUI was handled by the public defender's office and that the second was punishable by imprisonment. The state had the burden of establishing that counsel was provided for the second DUI or that Yacoub validly waived her right to counsel. The state offered no transcript of the 2002 plea conference and no other evidence of what occurred. The state produced no written waiver of the right to counsel. *See* Fla. R. Crim. P. 3.160(e). The lawyer who was present for Yacoub on one DUI at the 2002 hearing did not appear to testify. The state argued that the temporal proximity of the two pleas circumstantially established that both pleas were entered on the advice of counsel. The trial judge accepted this view. However, the state's "showing" failed to meet the requirements of *Beach* and *Kelly*, which require "evidence in the record" "'*to show* [1] either that counsel was provided or [2] that the right to counsel was *validly* waived.'" *Beach*, 592 So. 2d at 239; *Kelly*, 999 So. 2d at 1037 (quoting *Beach*) (emphasis in original). The sparse record failed to carry the state's burden of persuasion under *Kelly* and *Beach*. We therefore reverse the felony conviction and remand to the circuit court to resentence Yacoub to misdemeanor driving under the influence.

Reversed and remanded.

MAY, C.J., and DAMOORGIAN, J., concur.

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Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Sherwood Bauer, Jr., Judge; L.T. Case No. 432008CF000965A.

Carey Haughwout, Public Defender, and Emily Ross-Booker, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Mark J. Hamel, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.