

[Cite as *State v. Adkins*, 2010-Ohio-307.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GARY L. ADKINS

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CAA 02 0012

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 07-CRI-090506

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 28, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Delaney, J.

{¶1} Defendant-Appellant Gary L. Adkins appeals his conviction and sentence entered by the Delaware County Court of Common Pleas, on one count of driving under the influence of alcohol or drugs, in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree, after the trial court found him guilty upon his entering a plea of no contest. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On September 14, 2007, the Delaware County Grand Jury indicted Appellant on the aforementioned charge. The count was charged as a felony of the fourth degree based upon the allegation Appellant had previously been convicted of or pled guilty to five or more similar offenses within the last twenty years. The Indictment also contained a specification of enhancement which was also based upon the identical prior convictions which had enhanced the offense to a fourth degree felony. Appellant appeared before the court for arraignment on September 25, 2007, and entered a plea of not guilty to the charge.

{¶3} On October 15, 2007, Appellant filed a Motion to Dismiss Specification to the Charge in Indictment, asserting the specification was based upon the same prior convictions which enhanced the penalty and was merely a duplicate of an element of the original offense. The trial court overruled the motion. The State subsequently dismissed the specification pursuant to a plea agreement. On February 5, 2008, Appellant filed a Motion to Dismiss Indictment, asserting the Indictment lacked a necessary element of the offense. Specifically, Appellant argued the Indictment lacked

the sufficient number of prior convictions to support the felony charge. Appellant explained two of the prior offenses were not “convictions” for purposes of proving a felony OMVI. The trial court conducted a hearing on the motion. The trial court found the August 10, 1993 conviction from the Muskingum East County Court was inadmissible. However, the trial court found the August 9, 2002 conviction from the Delaware Municipal Court, and the November 19, 1987 finding Appellant was a juvenile traffic offender from the Delaware County Court of Common Pleas, Juvenile Division, were admissible. Pursuant to its findings, the trial court denied Appellant’s motion to dismiss.

{¶4} Appellant appeared before the trial court on October 28, 2008, and entered a plea of no contest to the charge. As part of the plea negotiations, the State dismissed the specification. The trial court found Appellant guilty, and deferred sentencing pending the preparation of a pre-sentence report. On December 17, 2008, the trial court sentenced Appellant to a period of imprisonment of twelve months, the first sixty days of which were mandatory. The trial court imposed a mandatory fine of \$800.00 and suspended Appellant’s driver’s license for a period of three years commencing upon his release from prison. The trial court memorialized the sentence via Nunc Pro Tunc Judgment Entry on Sentence on January 16, 2009.

{¶5} It is from this conviction and sentence Appellant appeals, raising as his sole assignment of error:

{¶6} “I. THE TRIAL COURT ERRED IN DENYING RELIEF UNDER A MOTION TO DISMISS UPON THE BASIS OF CONCLUDING THAT THE DEFENDANT’S CONVICTION IN THE DELAWARE MUNICIPAL COURT ON AUGUST 2, 2002, WAS

ADMISSIBLE, AND THAT THE FINDING OF THE DELAWARE COUNTY JUVENILE COURT ON NOVEMBER 18, 1987, THAT DEFENDANT WAS A JUVENILE OFFENDER WAS LIKEWISE ADMISSIBLE AS THE EQUIVALENT OF A PRIOR CONVICTION UNDER THE OVI FELONY STATUTE.”

I

{¶17} In his sole assignment of error, Appellant maintains the trial court erred in denying his motion to dismiss after finding defendant’s August 2, 2002 conviction in the Delaware County Municipal Court and November 18, 1987 Finding of the Delaware County Juvenile Court were valid prior convictions for purposes of enhancement of his present offense.

Delaware Municipal Court Case No. 02TRC09606, August 9, 2002

{¶18} On August 9, 2002, Appellant entered a plea of no contest to the offense of driving while intoxicated in Delaware Municipal Court Case No. 02TRC09606. After the magistrate found Appellant guilty, he was sentenced to thirty days in jail, commencing August 16, 2002, followed by ninety days of electronically monitored house arrest, and a \$500.00 fine. The trial court did not approve and adopt magistrate’s order until March 7, 2005, over 2½ years later.

{¶19} Appellant asserts, because the magistrate’s order failed to comply with Crim. Rule 19 and Crim. Rule 32, he was deprived of his due process right to a speedy trial under the Sixth Amendment of the United States and the Ohio Constitutions. Appellant submits this 2002 conviction can be collaterally attacked on this basis. In support of his position, Appellant relies upon the Ohio Supreme Court’s decision in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533.

{¶10} In *Brooke*, the Ohio Supreme Court noted, “Generally, a past conviction cannot be attacked in a subsequent case. However, there is a limited right to collaterally attack a conviction when the state proposes to use the past conviction to enhance the penalty of a later criminal offense. *Id.* at para. 9. Specifically, the *Brooke* Court held: “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.*, citing, *State v. Brandon* (1989), 45 Ohio St.3d 85, 86, 543 N.E.2d 501; *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745.

{¶11} Contrary to Appellant’s assertion, we do not find the August, 2002 conviction is void because of the trial court’s failure to timely sign the magistrate’s report. A defendant has a right to have his sentence timely imposed. This right was not violated in Appellant’s case. Appellant was timely sentenced, jail time was imposed and served. Appellant may have been entitled to a Writ of Habeas Corpus while he was incarcerated or could have sought mandamus relief if the trial court refused to enter a final judgment and sentence. He did neither. Appellant also failed to file a Notice of Appeal after he received the trial court’s signed March 7, 2005 Judgment Entry. Accordingly, we find Appellant does not have the right to collaterally attack the conviction pursuant to *Brooke*, and the trial court properly considered the conviction for enhancement purposes.

Delaware County Court of Common Pleas, Juvenile Division,**Case Nos. 14, 073 thru 14, 079, November 18, 1987**

{¶12} The trial court herein found the November 18, 1987 Judgment Entry was sufficient to establish a violation of OMVI or its equivalent. The trial court explained, when the original traffic ticket and the judgment entry were viewed together, the juvenile court did, in fact, journalize a finding of guilt on a violation of R.C. 4511.19(A)(3); therefore, such was valid for enhancement purposes.

{¶13} Prior to January 1, 1996, juvenile traffic offenders' adjudications were not classified as convictions and could not be used to enhance the penalty of a subsequent adult OMVI conviction. However, the Ohio Legislature enacted R.C. 2901.08, effective January 1, 1996, which changed the law with respect to the effect of juvenile adjudications on subsequent offenses. Pursuant to R.C. 2901.08, a prior juvenile adjudication is now considered a conviction for purposes of determining subsequent offenses, enhancements, or punishments.

{¶14} Appellant asserts R.C. 2901.08 has no retroactive effect on juvenile findings prior to its effective date of January 1, 1996. We disagree.

{¶15} This Court has previously considered and rejected this argument in *State v. Glover* (August 19, 1999), Licking App. No. 99CA30, unreported and in *In re: Fogle*, Stark App. No. 2006 CA 00131, 2007-Ohio-553. For the reasons set forth therein, we also overrule this portion of Appellant's assigned error.

{¶16} Appellant's assignment of error is overruled.

{¶17} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney J.

Edwards, J. concurs

Hoffman, P.J. dissents

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

Hoffman, P.J., concurring in part and dissenting in part

{¶18} I concur in the majority's analysis and disposition of that portion of Appellant's assignment of error as it relates to his prior conviction in the Delaware Municipal Court.

{¶19} I respectfully dissent from that portion of the majority's opinion as it relates to Appellant's Delaware juvenile court case for the reasons set forth in my dissents in both *Glover* and *Fogle*.

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GARY L. ADKINS

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 09 CAA 02 0012

For the reasons stated in our accompanying Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN