

[Cite as *State v. Rolf*, 2010-Ohio-5700.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TODD A. ROLF

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 10-CA-37

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 09-CR-00384

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 19, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Todd A. Rolf appeals the March 24, 2010 Judgment Entry entered by the Licking County Court of Common Pleas, which found him guilty of, inter alia, one count of felony driving under the influence and sentenced him to a term of incarceration of four years, following Appellant's entering a plea of no contest. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 7, 2009, the Licking County Grand Jury indicted Appellant on one count of felony driving under the influence; one count of resisting arrest; one count of falsification; one count of possession of drug paraphernalia; one count of possession of marijuana; and one count of driving under suspension. The OVI was charged as a felony three as Appellant had previously been convicted of felony OVI in Licking County Court of Common Pleas Case No. 02CR00351. The Indictment in Case No. 02CR00351 alleged Appellant had been convicted of OVI three times within the six years preceding the offense in Licking County Municipal Court Case Nos. 97-TRC-08063, 00-TRC-10426, and 00-TRC-10629.

{¶3} On February 1, 2010, Appellant filed a motion in limine in the instant action requesting the trial court strike the felony OVI conviction in Case No. 02CR00351 for purposes of degree enhancement. Appellant argued the prior felony OVI should be excluded because his first misdemeanor OVI in Case No. 97-TRC-08603 was constitutionally infirm due to the denial of counsel. The trial court conducted an oral hearing after which it denied Appellant's motion.

{¶14} Thereafter, on March 24, 2010, Appellant appeared before the trial court and entered a plea of no contest to the charges. The trial court conducted a Crim.R. 11 colloquy with Appellant, accepted the pleas, and found him guilty as charged. The trial court sentenced Appellant to an aggregate term of imprisonment of four years.

{¶15} It is from the judgment entry memorializing his conviction and sentence Appellant appeals, raising the following assignment of error:

{¶16} “I. APPELLANT’S RIGHTS TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WERE VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION IN LIMINE TO EXCLUDE HIS PRIOR OVI CONVICTIONS BECAUSE HE WAS DENIED COUNSEL.”

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{¶17} “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. 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.” *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533 at para. 9, citing *State v. Brandon* (1989), 45 Ohio St.3d 85, 86; *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745. Accordingly, pursuant to this exception, in order to determine whether a defendant’s prior convictions are available for penalty enhancement, the prior convictions must be examined as they relate to the defendant’s current offense. *Id.*

{¶8} In the instant action, Appellant argues his 1997 misdemeanor conviction for OVI was invalid as it was unconstitutionally infirm; therefore, that conviction could not operate to form the basis of his 2002 felony OVI. As a result, the 2002 felony OVI could not be used to enhance the current charge to a felony of the third degree. We disagree.

{¶9} In *State v. Mariano*, 2009-Ohio-5426, the Eleventh District Court of Appeals addressed this exact issue. In *Mariano*, the appellant argued a 2003 felony-four OVI, which was based upon prior, allegedly uncounseled, misdemeanors could not be used to enhance her current felony-three OVI. The *Mariano* Court found the 2003 conviction was valid and final, and the appellant had had the opportunity, prior to voluntarily entering her plea of guilty in 2003, to collaterally challenge her prior, allegedly uncounseled, misdemeanor OVI convictions. The Eleventh District added, “Whether she did or did not is irrelevant to this appeal. Because *that* conviction is final and valid and it is *that* conviction upon which the instant felony-three OVI is premised, we hold any attempt to challenge the underlying elements of the 2003 charge, i.e., her allegedly uncounseled prior misdemeanor convictions, is necessarily res judicata.” *Id.* at para. 19.

{¶10} We agree with the *Mariano* court. Appellant’s sole assignment of error is overruled.

{¶11} The Judgment of the Licking County Court of Common pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE

