

[Cite as *State v. Monteleone*, 2010-Ohio-5064.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     10CA009751

Appellee

v.

MICHAEL J. MONTELEONE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
OBERLIN MUNICIPAL COURT  
COUNTY OF LORAIN, OHIO  
CASE No.    09TRC02209

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 18, 2010

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BELFANCE, Judge.

{¶1} Defendant-Appellant Michael Monteleone appeals from the ruling of the Oberlin Municipal Court which denied his motion to strike prior convictions for enhancement purposes. For the reasons set forth below, we affirm.

BACKGROUND

{¶2} Monteleone pled no contest to one count of driving under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a). As this was arguably Monteleone’s third similar offense in the past six years, Monteleone faced stiffer penalties at the time of sentencing. See R.C. 4511.19(G)(1)(c). After being found guilty by the court, but prior to sentencing, Monteleone moved to strike two prior convictions, asserting that they could not be used to enhance his sentence. The trial court held a hearing on the matter. The State submitted a Law Enforcement Automated Data System (“LEADS”) printout to demonstrate Monteleone’s prior convictions. Monteleone submitted copies of judgment entries from the two prior cases and argued that the

convictions could not be used to enhance his sentence as the two judgment entries did not comply with Crim.R. 32(C) and were therefore not valid judgments of conviction. The trial court denied Monteleone's motion and sentenced him to one hundred eighty days in jail with one hundred fifty days suspended. Monteleone has appealed, raising a single assignment of error for our review.

#### PRIOR CONVICTIONS

{¶3} Essentially Monteleone argues in his sole assignment of error that his prior convictions were not judgments of conviction as contemplated by Crim.R. 32(C) and thus, those convictions could not constitute prior convictions for enhancement purposes under R.C. 4511.19(G)(1)(c).

{¶4} We begin by noting that while the existence of two prior convictions in this case would increase the penalty Monteleone faced at sentencing for his third offense, it did not elevate the degree of the offense. See R.C. 4511.19(G)(1)(a), (c) (both a first offense and third offense under the statute are first-degree misdemeanors). The Supreme Court of Ohio has held that in such cases “the prior conviction is not an essential element of the subsequent offense, and need not be alleged in the indictment or proved as a matter of fact.” *State v. Allen* (1987), 29 Ohio St.3d 53, paragraph one of the syllabus. Instead, the prior conviction is “strictly a sentencing consideration for the court.” *Id.* at 55.

{¶5} In the instant matter, at the hearing on Monteleone's motion, the State submitted a copy of a LEADS report. Monteleone does not challenge the State's use of this evidence to establish Monteleone's convictions. Nonetheless, to rebut the State's evidence, Monteleone submitted certified copies of judgment entries from the two prior cases. He asserts the judgment entries he submitted do not satisfy all the elements of Crim.R. 32(C)(1) and thus, do not

constitute judgments of conviction. Therefore, Monteleone maintains that his sentence could not be enhanced.

{¶6} Thus, this Court is confronted with the narrow question of whether the language in R.C. 4511.19(G)(1)(c) contemplates that convictions used to enhance an offender's sentence are judgments of convictions as provided by Crim.R. 32(C). Based upon the plain language of the statute, and the Supreme Court's prior discussion of a similar issue, we conclude that the legislature did not intend such a result.

{¶7} We acknowledge that the Supreme Court has recently clarified that "for purposes of R.C. 2941.25, a 'conviction' consists of a guilty verdict *and* the imposition of a sentence or penalty." (Emphasis in original.) *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, at ¶12. Nonetheless, in so doing, the Court noted that in certain instances, specific statutory language might require a different definition of the term. *Id.* at ¶13.

{¶8} R.C. 4511.19(G)(1)(c) provides that "an offender who, within six years of the offense, previously has been *convicted of or pleaded guilty* to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor[]" and is subject to enhanced penalties. (Emphasis added.) The statute does not mention judgment of conviction. Instead the statute states that the offender has previously been "convicted of *or* pleaded guilty to" violations of the statute or related offenses. *Id.* Thus, based upon the plain language of the statute, evidence of a prior guilty plea is sufficient to enhance the offense. It therefore seems unlikely that the legislature intended its separate and additional use of the word "convicted" to require evidence to establish all the elements of Crim.R. 32(C) if an offender did not plead guilty to an offense, but instead pled no contest or was found guilty by the court or a jury.

{¶9} When analyzing substantially similar language in a different statute, the Supreme Court of Ohio noted that “the General Assembly placed ‘convicted’ on equal footing with a guilty plea[.]” *State ex rel. Watkins v. Fiorenzo* (1994), 71 Ohio St.3d 259, 260. The Court thus concluded that “the plain language of [the statute] requires only a plea of guilty to invoke the sanction []. Therefore, we believe the word ‘convicted’ as used in [the statute] logically refers only to a determination of guilt and does not include sentencing upon that determination.” *Id.*

{¶10} In light of the Supreme Court’s prior consideration of similar language, we conclude that to constitute a prior conviction under R.C. 4511.19(G)(1)(c), a prior determination of guilt is what is contemplated by the statute and not a judgment of conviction. We cannot say that the trial court erred in denying Monteleone’s motion where the evidence of Monteleone’s two prior convictions established two prior determinations of guilt as contemplated by R.C. 4511.19(G)(1)(c). Monteleone’s sole assignment of error is overruled.

#### CONCLUSION

{¶11} In light of the foregoing, we affirm the judgment of Oberlin Municipal Court.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Oberlin Municipal Court, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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EVE V. BELFANCE  
FOR THE COURT

DICKINSON, P. J.  
CONCURS

CARR, J.  
CONCURS, SAYING:

{¶12} I agree that, by the plain language of the statute, the legislature intended for the imposition of enhanced penalties whenever a defendant has previously pleaded guilty or been found guilty of prior violations of R.C. 4511.19(A) or (B). The common meaning of the term “convicted” is that a defendant has been found (or admitted he is) guilty of a crime. The term “judgment of conviction” is a judicially created concept developed for purposes of determining finality and, therefore, reviewability of a criminal defendant’s case. A reviewing court requires that a judgment of conviction comply with Crim.R. 32(C) for purposes of finality. These are judicial mandates necessary to invoke the jurisdiction of the reviewing court, not requirements imposed by the legislature to allow for enhanced penalties for repeat offenders.

APPEARANCES:

KENNETH M. LIEUX, Attorney at Law, for Appellant.

MICHELLE NEDWICK, Prosecuting Attorney, for Appellee.