

[Cite as *State v. Phillips*, 2010-Ohio-1941.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-09-242
 :
 - vs - : OPINION
 : 5/3/2010
 :
 MICHAEL DALE PHILLIPS, :
 :
 Defendant-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR08-01-0006

Robin N. Piper, III, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Brian K. Harrison, P.O. Box 80, Monroe, Ohio 45050 for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Michael Dale Phillips, appeals his conviction in Butler County Court of Common Pleas on a specification to the offense of driving under the influence (OVI). We affirm the judgment for the reasons outlined below.

{¶2} Appellant pled no contest to and was found guilty of an OVI offense under R.C. 4511.19(A)(1)(a), charged as a felony of the third degree because of a

prior felony OVI conviction. Appellant waived a jury trial. In the trial to the bench he contested the R.C. 2941.1413 specification that within 20 years of committing the OVI offense, appellant previously had been convicted of or pled guilty to five or more equivalent offenses.

{¶13} The trial court found appellant guilty on the specification and imposed a cumulative prison term of seven years for the specification and underlying offense. On appeal, appellant presents a single assignment of error for our review.

{¶14} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S COLLATERAL CHALLENGE TO FOUR PRIOR OMVI CONVICTIONS AS PREDICATE OFFENSES TO SUPPORT THE ENHANCEMENT OF APPELLANT'S OMVI CHARGE AND TO SUPPORT A SPECIFICATION PURSUANT TO R.C. 4511.19(G)(1)(c)(ii)."¹

{¶15} Appellant argues that the records from the four prior convictions at issue do not contain any written jury waivers and, therefore, the convictions are constitutionally infirm and could not be used for sentence enhancement.²

{¶16} 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. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶9. A conviction obtained against a defendant who is without the assistance of counsel, or its corollary, an uncounseled conviction obtained without a valid waiver of the right to

1. We note that R.C. 4511.19(G)(1)(c)(ii) and R.C. 2929.13(F), which were both listed in the judgment entry, may be clerical errors as those subdivisions are not applicable to the case at bar.

2. Appellant did not contest the prior felony OVI conviction, which was used to charge appellant with a felony of the third degree. See R.C. 4511.19(G)(1)(e).

counsel, has been recognized as constitutionally infirm. *Id.*; *State v. O'Neill*, 140 Ohio App.3d 48, 52-53, 2000-Ohio-2656, citing *Custis v. United States* (1994), 511 U.S. 485, 114 S.Ct. 1732;

{¶7} A conviction obtained without the assistance of counsel or with an invalid waiver of the right to counsel has been the only constitutional infirmity recognized with regard to a collateral attack on a conviction that was used to enhance a criminal penalty. *State v. Culberson*, 142 Ohio App.3d 656, 659-660, 2001-Ohio-3261 (court rejected defendant's attempt to collaterally challenge previous convictions that enhanced degree of OVI offense on grounds that he was not fully apprised of his constitutional rights); see *State v. Nadock*, Lake App. No. 2009-L-042, 2010-Ohio-1161, ¶¶20-21 (court rejected defendant's argument that he could challenge prior convictions as infirm when full consequences of plea and circumstances of previous offenses were not explained to defendant); see *State v. Lamer* (June 28, 2001), Franklin App. No. 00AP-1204; see, also, *State v. Dowhan*, Lake App. No. 2008-L-064, 2009-Ohio-684, ¶¶10-17.

{¶8} Appellant did not allege that he was denied his right to counsel in the prior convictions. We decline appellant's invitation to extend the reach of a collateral attack as set forth in this appeal. Appellant's assignment of error is overruled.

{¶9} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.