

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

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : CASE NO. CA2011-02-013
 :
 - vs - : OPINION
 : 3/12/2012
 JOHN D. MILLER, :
 :
 Defendant-Appellee. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2010TRC01205

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellant

John D. Miller, 60 Elmwood Drive, Springboro, Ohio 45066, defendant-appellee, pro se

HENDRICKSON, P.J.

{¶ 1} The state of Ohio appeals a decision from the Warren County Court granting John D. Miller's motion to bifurcate proceedings. For the reasons set forth below, we find that the trial court's decision was erroneous; however, as the principles of double jeopardy preclude retrial, we affirm the final judgment rendered below.

{¶ 2} Miller was charged with operating a vehicle while under the influence of alcohol (simple OVI) in violation of R.C. 4511.19(A)(1)(a), operating a vehicle while under the

influence of alcohol and refusing a chemical test with a prior conviction within twenty years (refusal OVI) in violation of R.C. 4511.19(A)(2), and failure to display illuminated lights after dark in violation of R.C. 4513.03.

{¶ 3} Prior to trial, Miller filed a motion to bifurcate the proceedings, requesting that the court conduct the trial in two consecutive stages. First, a trial by jury on the simple OVI under R.C. 4511.19(A)(1)(a), and if the jury found him guilty of the simple OVI, then a bench trial on the refusal OVI under R.C. 4511.19(A)(2). Miller argued that a bifurcated proceeding was necessary because he would be unduly prejudiced if the jury heard evidence regarding his prior OVI conviction. He further argued that bifurcation was permissible pursuant to *State v. Allen*, 29 Ohio St.3d 53 (1987), as his prior conviction was not an essential element of the charge under R.C. 4511.19(A)(2). The State opposed Miller's motion to bifurcate. Relying on *Allen*, the trial court granted Miller's motion to bifurcate, finding that the prior conviction was not an essential element. In reaching this conclusion the court stated:

Both OVI and OVI-Refusal are first-degree misdemeanors, subject to the same maximum fine and the same maximum jail term. The additional element of refusal with a prior conviction elevates the mandatory minimum sentence only. It does not change the level/degree of offense. * * * Because the degree of offense is unchanged by the prior conviction, the prior conviction is not an essential element of the case. (Footnote omitted).

{¶ 4} The court subsequently issued an order *in limine* prohibiting the state from introducing any evidence to the jury regarding Miller's prior conviction. Miller ultimately pled guilty to the simple OVI under R.C.4511.19(A)(1)(a), and the remaining charges were dismissed.

{¶ 5} The state timely appeals the trial court's decision to bifurcate the proceedings pursuant to R.C. 2945.67(A). *See also State v. Bistricky*, 51 Ohio St.3d 157 (1990). The state does not, however, appeal the final judgment, specifically Miller's conviction, in this

case.¹ Rather, the state appeals the trial court's legal conclusion that a prior conviction is not an essential element in the prosecution of a refusal OVI under R.C. 4511.19(A)(2). Although this decision has no effect on Miller's conviction, we nevertheless consider the merits of this appeal as the issue presented is one that is capable of repetition, yet evading review. *Bistricky* at 158; *State v. Edmondson*, 92 Ohio St.3d 393 (2001); *Showe Mgmt. Corp. v. Hazelbaker*, 12th Dist. No. CA2006-01-004, 2006-Ohio-6356, ¶ 7.

{¶ 6} The state asserts one assignment of error:

{¶ 7} THE EXISTENCE OF A PRIOR OVI CONVICTION IS AN ESSENTIAL ELEMENT OF R.C. § 4511.19(A)(2); CONSEQUENTLY, THE WARREN COUNTY COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED THE APPELLEE'S BIFURCATION MOTION AND WHEN IT PROHIBITED THE STATE FROM ADDUCING EVIDENCE OF THE APPELLEE'S PRIOR OVI CONVICTION.

{¶ 8} The state contends that a prior OVI conviction is an essential element of the offense contained in R.C. 4511.19(A)(2) for which it bears the burden of proof. Furthermore, the state asserts that the Supreme Court decision in *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, controls in this situation, rather than the *Allen* case relied on by the trial court. The State argues that by relying on *Allen* and consequently finding the prior OVI offense was not an essential element, the trial court improperly bifurcated the proceedings and excluded evidence of Miller's prior OVI conviction.

{¶ 9} The issue before us is whether a prior OVI conviction is an essential element of an offense under R.C. 4511.19(A)(2). As this presents merely a question of law, our review

1. Guilty pleas are treated as the equivalent of a conviction and therefore bar a second prosecution pursuant to the double jeopardy clause. *State v. Musick*, 119 Ohio App.3d 361, 369 (11th Dist.1997) citing *United States v. Wilson*, 420 U.S. 332, 343, 95 S.Ct. 1013 (1975). Here, double jeopardy principles bar the state from pursuing a second prosecution against Miller based on his guilty plea to the simple OVI charge under R.C. 4511.19(A)(1)(a) as he has already been convicted and punished for that crime. See *Wilson* at 343.

is de novo. *State v. Baughman*, 12th Dist. Nos. CA2010-08-069, CA2010-08-070, 2011-Ohio-162, ¶ 13.

{¶ 10} It is well settled that the state must prove all essential elements of an offense beyond a reasonable doubt. R.C. 2901.05(A); *State v. Day*, 99 Ohio App.3d 514, 517 (12th Dist.1994) citing *State v. Henderson*, 58 Ohio St.2d 171, 173 (1979). It follows, that because the state is required to prove all such elements beyond a reasonable doubt, a defendant is not entitled to bifurcate proceedings or waive a jury trial on one element alone. *State v. Adams*, 106 Ohio App.3d 139, 142-144 (10th Dist.1995). The existence of a prior conviction is ordinarily such an inflammatory fact that it should not be revealed to the jury unless otherwise permitted under a statute or rule. *State v. Allen*, 29 Ohio St.3d 53, 55 (1987). However, "where the existence of a prior offense is an element of a subsequent crime, the State must prove the prior conviction beyond a reasonable doubt * * *. The jury must find that the previous conviction has been established in order to find the defendant guilty on the second offense." *Day* at 517.

{¶ 11} Here, Miller was charged with OVI under both R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2). In order to prove a simple OVI under R.C. 4511.19(A)(1)(a) the state is required to prove that the defendant was operating a vehicle under the influence of drugs, alcohol or a combination of both.² *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, ¶ 13. In order to prove a refusal OVI under R.C. 4511.19(A)(2), however, the state must prove three elements: "(1) a DUI conviction within 20 years of the current violation, (2) operation of a motor vehicle while under the influence of alcohol or drugs, and (3) a refusal to submit to a

2. "No person shall operate any vehicle * * * if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." R.C. 4511.19(A)(1)(a).

chemical test while under arrest for the current DUI." *Hoover* at ¶ 13.³ The Supreme Court of Ohio made it clear in *Hoover* that a prior OVI conviction is an essential element under R.C. 4511.19(A)(2). There, the Court stated: "A person's refusal to take a chemical test is simply an additional element that must be proven beyond a reasonable doubt *along with the person's previous DUI conviction* to distinguish the offense from a violation of R.C. 4511.19(A)(1)(a)." (Emphasis added.) *Id.* at ¶ 21.

{¶ 12} Because a prior OVI conviction within the past 20 years is required to be proven beyond a reasonable doubt in order for the state to obtain a conviction under R.C. 4511.19(A)(2), it is an essential element. Accordingly, a court may not preclude the state from presenting evidence of the prior conviction as such evidence is not only proper, but required. See *State v. Holland*, 5th Dist. No. 2011 CA 00104, 2012-Ohio-486, ¶ 18-21 (finding no error in allowing evidence of defendant's prior conviction as it is an element of R.C. 4511.19(A)(2)). It was in error for the trial court to bifurcate the proceedings and allow the jury trial on only the remaining elements in R.C. 4511.19(A)(2) and R.C. 4511.19(A)(1)(a).

{¶ 13} In reaching its decision to bifurcate the proceedings below, the trial court relied upon *State v. Allen*, 29 Ohio St.3d 53 (1987). There, the Supreme Court held: "Where the existence of a prior conviction enhances the penalty for a subsequent offense, but does not elevate the degree thereof, 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." *Allen* at

3. {¶ a} "No person who, within twenty years of conduct described in division (A)(2) of this section previously has been convicted of or pleaded guilty to a violation of this division, a violation (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

{¶ b} "(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

{¶ c} "(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests. R.C. 4511.19(A)(2)."

syllabus. In *Allen*, the defendant was charged with operating a motor vehicle while under the influence of alcohol under R.C. 4511.19(A). At the time *Allen* was decided, a prior conviction merely enhanced the penalty pursuant to R.C. 4511.99(A)(3), it did not increase the degree of the offense, and therefore the prior conviction was only a sentencing consideration. *Allen* at 55. Further, R.C. 4511.19(A)(2) did not exist. Rather, as the court noted in *Hoover* at ¶ 27:

R.C. 4511.19(A)(2), was added to the Revised Code by Am.Sub.H.B. No. 163, 150 Ohio Laws, Part III, 4620, 4705, effective September 23, 2004. Its enactment shows the legislature's concern with the problems of both repeat drunk drivers and chemical-test refusals. The General Assembly addressed these problems by enhancing the sentence for a DUI conviction when the driver refuses to be tested and has previously been convicted of a DUI.

{¶ 14} While we sympathize with the trial court in trying to ascertain whether or not a prior conviction is an essential element based upon the test provided in *Allen*, the OVI statute has since been modified and the legislature and supreme court have expressly stated that a prior conviction is an essential element under R.C. 4511.19(A)(2). Therefore, the trial court erred in finding that Miller's prior conviction was not an essential element of R.C. 4511.19(A)(2).

{¶ 15} In accordance with the foregoing, we find the trial court erred by granting the motion to bifurcate the proceedings and excluding the evidence of Miller's prior conviction. The state's assignment of error is sustained. We therefore reverse the judgment of the trial court to the extent that it improperly bifurcated the proceedings and prohibited the state from presenting evidence of Miller's prior conviction. Notwithstanding the trial court's erroneous application of law, Miller's conviction for simple OVI in violation of R.C. 4511.19(A)(1)(a) is affirmed inasmuch as he cannot twice be put in jeopardy.

{¶ 16} Judgment reversed in part and affirmed in part.

RINGLAND and PIPER, JJ., concur.