IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 07 495906**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
LOUIS BAUER	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Defendant Louis Bauer is charged in a two-count indictment with driving under the influence of alcohol in count one[1] and driving with a prohibited concentration of alcohol in his breath.[2] Each count includes three identical factual allegations: that Bauer was previously convicted of driving under the influence, or an equivalent offense, 1) in Avon Lake Municipal Court on January 14, 2003, 2) in Rocky River Municipal Court on June 13, 2003, and 3) in Rocky River Municipal court on June 16, 2003. Bauer was arraigned on July 18, 2007 and entered a plea of not guilty.

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[1] Ohio Revised Code section 4511.19(A)(1)(a).

[2] R.C. 4511.19(A)(1)(h). In the March 4, 2013 bill of particulars the state refers to count two as a violation of R.C. 4511.19(A)(1)(d) and goes on to describe the defendant as having had, at the time of the offense, a "concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram" of alcohol per 210 liters of his breath. This is inconsistent with the indictment in count two, which alleges a "concentration of seventeen-hundredths of one gram or more." The state should either amend the bill of particulars or move to amend the indictment, depending on which concentration the evidence at trial is expected to show.

On April 25, 2013, Bauer filed a motion to dismiss the indictment's allegation that he was convicted of driving under the influence in Avon Lake Municipal Court.[3] The state has opposed the motion by a brief filed May 10, 2013 and this entry follows.

STATEMENT OF THE FACTS

Although the defendant is charged with driving under the influence on February 25, 2007 and there are three additional factual specifications, neither the events leading to his arrest and charge nor the two other previous convictions for driving under the influence are at issue, so only the Avon Lake Municipal Court conviction will be discussed here.

The record evidence pertaining to the proceedings in the Avon Lake Municipal Court is found in exhibits B and C of the defendant's motion and the two exhibits to the plaintiff's brief in opposition.[4]

Exhibit C is a précis of the court's docket, apparently from its web site. It lists the defendant as being represented by attorney John B. Gibbons. However, the state's exhibit 1 is a plea hearing form used by the court. On that form there is a line allowing the person completing the form to circle whether the defendant appeared "with/without" counsel, and nothing is circled. Another line on the form, for a defense attorney's signature, is blank. Exhibit 2 from the state is the court's "explanation of rights" form. The defendant's attorney's signature line on that form is blank. Additionally, in the body of the form, the defendant acknowledges by his signature that he "hereby knowingly, intelligently and voluntarily" waives his rights, including the right to counsel.

[3] This case has been pending for six years because Bauer, in violation of his bond, left court on the original trial date of December 17, 2007. A warrant was issued and he eventually voluntarily presented himself to the court on February 22, 2013. However, the defendant never moved to dismiss or strike the Avon Lake DUI allegation between July and December, 2007, and still waited over two months to file it in 2013.

[4] The prosecutor's brief in opposition describes a partial videotape of the January 14, 2003 hearing in the municipal court but the record here does not include the videotape or a transcript and that tape is thus not considered by this court in deciding the motion.

Based on this evidence, the court assumes, despite the one electronic docket notation to the contrary, that the defendant did not have an attorney at the January 14, 2003 plea hearing.

Upon signing the form the defendant proceeded to plead guilty to driving under the influence, driving under suspension and reasonable control. It is difficult to decipher from the documents the precise sentence imposed. However, it is clear that jail time was ordered (but possibly suspended) and it seems that the defendant was placed on probation.[5] For the purpose of the pending motion the court will assume that actual incarceration was imposed.

LAW AND ANALYSIS

The allegation of three prior convictions within six years of the charged offenses is part of the indictment because R.C. 4511.19(G)(1)(d) enhances the level of the offense for driving under the influence or with a prohibited alcohol concentration from a misdemeanor of the first degree to a felony of the fourth degree if a defendant has been convicted of three equivalent offenses within six years.

Although the prior convictions are not "core" elements of a driving under the influence charge – the defendant will be guilty of that crime if the state proves beyond a reasonable doubt that he did operate a vehicle while under the influence of alcohol (count one) or with a prohibited alcohol concentration on his breath (count two) – they, like any other element, must be proved beyond a reasonable doubt if the defendant is to be sentenced for a fourth degree felony. If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. *Ring v. Arizona,* 536 U.S. 584, 602 (2002).

The usual method of proving the prior convictions is set out in R.C. 2945.75(B)(1). That statute provides that "whenever in any case it is necessary to prove a prior conviction, a

[5] One of the judge's handwritten entries appears to mention "adult probation."

certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction." Here, the defendant does not question the state's ability to produce a certified copy, or other suitable evidence, of the Avon Lake Municipal Court conviction. Instead, he argues, in essence, that evidence of the Avon Lake conviction cannot be used against him because in that case he was unrepresented and did not validly waive his right to counsel. As such, if a prison sentence is imposed in this case then Bauer is effectively being incarcerated for the Avon Lake case without having been afforded his right to counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Those constitutional provisions require that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense. *Scott v. Illinois*, 440 U.S. 367, 373-374. An uncounseled conviction resulting in a term of incarceration and obtained without a valid waiver of the right to counsel has been recognized as constitutionally infirm. *State v. Brooke*, 113 Ohio St. 3d 199, 201 (2007). Therefore, such a conviction cannot be used to enhance the penalty for a later conviction. *State v. Putich*, 8th Dist. No. 89005, 2008-Ohio-681, ¶34. But there is no constitutional infirmity, and thus no reason to prohibit the prior conviction from increasing the level of offense in the current case, if the defendant waived his right to counsel in the Avon Lake case.

Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a *prima facie* showing of constitutional infirmity. *State v. Brandon*, 45 Ohio St. 3d 85, at syllabus (1989). The

defendant has not produced any such evidence. Bauer does argue that the lack of a full record of the Avon Lake proceedings makes it impossible to find that "an oral waiver in open court before a judge"[6] took place there. But since this court must presume the Avon Lake proceedings were lawful, the inability to produce a trial court record cannot be considered as evidence that the proceedings were contrary to law. At most there is the absence of evidence, and it is Bauer who has the burden of producing evidence to make a *prima facie* showing that his conviction was constitutionally infirm. *Id.*

Bauer does offer evidence in the form of Exhibit B, the on-line docket summary, to show "that the alleged waiver was never even docketed as a waiver."[7] That is meaningless since there is no requirement in the Ohio Rules of Criminal Procedure that a waiver of counsel be included in an on-line summary of the court's journal entries. The record here is bare of any evidence contrary to the presumption that the Avon Lake Municipal Court proceedings were by the book.

On the other hand, there is record evidence in the form of the signed, journalized waiver of counsel – which included an explicit acknowledgment that "a conviction in this matter may be used at a future date to enhance the degree of a future conviction" – that Bauer knowingly, intelligently and voluntarily waived his right to counsel before pleading guilty. A signature on a written waiver form is sufficient to demonstrate a knowing and intelligent waiver of the right to counsel. *City of Parma v. Romain*, 8th Dist. No. 87133, 2006-Ohio-3952, ¶12.

Bauer's failure to show by evidence that he did not properly waive his right to counsel in Avon Lake justifies denying his motion. But a second ground to deny it is untimeliness. Criminal Rule 12(D) required Bauer to file his motion within 35 days of arraignment. He

[6] Defendant's 04/25/2013 motion to dismiss, page 2.
[7] *Id.*, p. 2.

waited almost six years and has offered no reason to justify the late filing and avoid the automatic waiver of the issue under Criminal Rule 12(H).

CONCLUSION

For the reasons given, the court denies the defendant's motion to dismiss[8] and the state will be permitted to offer into evidence at trial a certified copy of the Avon Lake Municipal Court journal entry of conviction or other suitable evidence of that adjudication.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

[8] Although the defendant labeled his motion as a "motion to dismiss" the court has construed it as a motion to suppress evidence. Criminal Rule 12(C)(3) allows a defendant to file before trial a motion to suppress evidence that "was illegally obtained." That description applies to the situation here since the defendant claims that his Avon Lake conviction was unconstitutional, i.e. illegal. On the other hand, when a defendant in a criminal action files a motion to dismiss which goes beyond the face of the indictment, he is, essentially, moving for summary judgment, which is not permitted by the criminal rules. *State v. Tipton*, 135 Ohio App. 3d 227, 228 (9th Dist. 1999).

SERVICE

A copy of this journal entry was sent by email this 17th day of May, 2013, to the following:

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Judge John P. O'Donnell