

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-110086
Plaintiff-Appellee,	:	TRIAL NO. C10-TRC26479B
vs.	:	
MONIE PHELPS,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op.3(A); App.R.11.1(E); and Loc.R.11.1.1.

Defendant-appellant Monie Phelps appeals following his plea of no contest to the charge of driving under the influence of alcohol [“DUI”]. The state had identified two misdemeanor DUI convictions, which it alleged enhanced the penalty for the current DUI offense.

In a single assignment of error, Phelps argues that the trial court violated his due process rights under the United States and Ohio Constitutions when it denied his motion to exclude one of these prior misdemeanor convictions as constitutionally defective because it was obtained without counsel and without a valid waiver of his right to counsel.

In *State v. Williams*, 1st Dist No. C-110097, 2011-Ohio-6267, ¶11, this court held that a prior conviction is constitutionally defective and cannot be used to

enhance the penalty for a subsequent conviction when (1) it results in a sentence of incarceration for a defendant (2) who was unrepresented and (3) did not validly waive his right to an attorney.

Here, Phelps failed to carry his burden to prove the constitutional defect in his prior conviction by a preponderance of the evidence. See R.C. 2945.75(B)(3); *Williams*, supra, at ¶10. While Phelps established that the prior misdemeanor conviction had been obtained without the assistance of counsel and that it had resulted in a sentence of incarceration, he made no showing that he had not validly waived his right to counsel in the prior proceedings. See *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, paragraph two of the syllabus; *Williams*, supra, at ¶12-13. As a result, we cannot conclude that the trial court violated his due process rights in overruling his motion to exclude the state from using this prior conviction. We, therefore, overrule his sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

**HILDEBRANDT, P.J., SUNDERMANN and FISCHER, JJ.**

To the clerk:

Enter upon the journal of the court on December 21, 2011

per order of the court \_\_\_\_\_.  
Presiding Judge