77 P.3d 1288 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Dean Oliver TAPEDO, Appellant.

No. 89,883.
|
Oct. 3, 2003.
|
Review Denied Jan. 6, 2004.

Defendant was convicted, in bench trial on stipulated facts before the District Court, Douglas County, Robert W. Fairchild, J., of felony driving under the influence (DUI), and he appealed. The Court of Appeals held that defendant's prior uncounseled DUI diversion was properly used as prior conviction for sentencing purposes.

Affirmed.

Appeal from Douglas District Court; Robert W. Fairchild, judge. Opinion filed October 3, 2003. Affirmed.

Attorneys and Law Firms

Randall L. Hodgkinson, deputy appellate defender, for appellant.

Bradley R. Burke, assistant district attorney, Christine E. Kenney, district attorney, and Phill Kline, attorney general, for appellee.

Before RULON, C.J., LEWIS, J., and WAHL, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Defendant Dean Oliver Tapedo appeals from his sentence for DUI. We affirm.

The defendant was arrested in Douglas County on December 15, 2001, for DUI and other offenses. He was subsequently charged with, *inter alia,* felony DUI due to two prior DUI convictions pursuant to K.S.A. 8-1567.

In 1992, the defendant entered into a DUI diversion agreement with the City of Lawrence. Later, the defendant was convicted of DUI in 1998, again in Douglas County.

On April 25, 2002, the defendant was found guilty in a bench trial of felony DUI based on stipulated facts, and he entered pleas of no contest to two lesser charges. The district court found that the defendant's waiver of the right to counsel in the 1992 diversion agreement was not valid, but such did not preclude use of the diversion to enhance the defendant's sentence because the defendant had not been incarcerated as a result of that diversion.

The defendant first argues the district court should not have used his 1992 DUI diversion to enhance his sentence and elevate his present conviction to a felony. Specifically, he asserts that because he was not afforded counsel and did not properly waive the right to counsel in agreeing to the diversion, the diversion may not be used to enhance his sentence. This contention is not persuasive.

Our standard of review is de novo for cases decided by the district court based upon documents and stipulated facts. *State v. Brown,* 272 Kan. 843, 845, 35 P.3d 910 (2001).

Basing its decision on *Nichols v. United States,* 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), this court has specifically held that "an uncounseled diversion may be used as a prior conviction to enhance sentencing in a subsequent conviction so long as no imprisonment was actually imposed on the uncounseled diversion." *Paletta v. City of Topeka,* 20 Kan.App.2d 859, 868, 893 P.2d 280, *rev. denied* 258 Kan. 859 (1995).

[1] The defendant's argument centers on cases in which there are underlying prison sentences, such as conditional or suspended sentences, and claims such cases mirrors the present action. However, contrary to the defendant's claim, the cases he cites are inapplicable because diversions do not have underlying sentences. Instead, failure to comply with a diversion agreement results in the reinstatement of charges against defendant and prosecution. See K.S.A.2002 Supp. 22-2911; *State*

v. Clevenger, 235 Kan. 864, 867-68, 683 P.2d 1272 (1984). Such conditions were expressly provided in the defendant's diversion agreement. The district court found that the 2-day sentence for which the defendant was incarcerated in January 1994 was imposed as a result of his failure to appear at a revocation hearing, and the 1992 journal entry appears to support such finding. Consequently, the defendant neither was incarcerated nor could have been incarcerated as a result of his decision to enter into a diversion. As such, this argument fails under *Paletta.*

*2 **[2]** The defendant further contends that diversion agreements are not prior "convictions" as contemplated by the United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and therefore may not be used to enhance sentences as required by K.S.A. 8-1567(a) and (l)(1).

> "The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. [Citation omitted.]" *State v. Groschang,* 272 Kan. 652, 668, 36 P.3d 231 (2001).

K.S.A. 8-1567(l)(1) provides that in determining the number of DUI convictions to attribute to a defendant:

> " 'Conviction' includes being convicted of a violation of this section *or entering into a diversion agreement in lieu of further criminal proceedings* on a complaint alleging a violation of this section." (Emphasis added.)

In *Apprendi,* the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490. As mentioned, the defendant's argument is that diversions are not "prior convictions" and thus should not be considered within the *Apprendi* exception.

The defendant fails to cite to any authority to support his position. Instead, he cites only to *State v. Hitt,* 273 Kan. 224, 42 P.3d 732 (2002), *cert. denied* 537 U.S. 1104, 123 S.Ct. 962, 154 L.Ed.2d 772 (2003). In *Hitt,* our Supreme Court held that prior juvenile adjudications are properly considered as convictions pursuant to *Apprendi* when used to determine a defendant's criminal history score at sentencing, based on the "ample procedural safeguards" attached to them and the "historical cloak of recidivism" in which they exist. 273 Kan. at 236, 42 P.3d 732. The defendant's apparent assertion is that diversions do not share comparable procedural safeguards to that of juvenile adjudications.

Hitt, particularly when examined in tandem with the aforementioned *Clevenger,* actually refutes the defendant's argument. Although pre-*Apprendi, Clevenger* dealt with virtually the same issue as here. In *Clevenger,* the defendant claimed that 8-1567 violated his due process rights, because, as the defendant now contends, a DUI diversion is entered into prior to an adjudication of guilt and hence cannot be considered a conviction. In rejecting Clevenger's argument, our Supreme Court noted:

> "While it is true there is no adjudication, there is a stipulation entered into by the defendant and the prosecutor stating the facts which constitute the offense. Further, the defendant must waive all constitutional rights to a speedy trial and to a trial by jury.... Finally, and most importantly, the defendant's decision to enter the diversionary program is completely voluntary. The defendant may choose to go to trial, rather than accept diversion. The trial phase guarantees all constitutional rights. Hence, there can be no claim the waiver of due process rights which accompanies the diversion agreement is not voluntary." 235 Kan. at 867-68, 683 P.2d 1272.

*3 Importantly, at the time of the defendant's diversion, K.S.A. 8-1567(1) (Furse 1991) provided that diversions were to be considered convictions for the purpose of determining recidivism. The voluntary waiver of constitutional rights here appears to be tantamount to the procedural safeguards central to the decision in *Hitt.*

As mentioned previously, there is no constitutional problem with using an uncounseled diversion as a prior conviction to enhance the sentence for a subsequent DUI conviction if no imprisonment was imposed on the diversion. See *Paletta,* 20 Kan.App.2d at 868, 893

P.2d 280. The defendant's waiver of the right to counsel was the only improper waiver found by the district court. The defendant voluntarily waived his due process rights in 1992 in order to avoid incarceration and now seeks to reap additional benefit from the same diversion agreement. However, he has failed to clearly demonstrate the constitutional invalidity of K.S.A. 8-1567(l)(1) and his claim accordingly fails.

Affirmed.

All Citations

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