IN THE SUPREME COURT OF IOWA

No. 38 / 03-0476

Filed August 11, 2004

STATE OF IOWA,

Appellant,

vs.

KAREN J. WILKINS,

Appellee.

Appeal from the Iowa District Court for Clinton County, Arlen J. Van Zee, Judge.

Discretionary review at State's request to consider district court's refusal to consider previously uncounseled OWI conviction for purposes of establishing offense of third-offense OWI. Defendant cross-appeals, challenging revocation of driving privileges. **REVERSED AND REMANDED ON THE STATE'S APPEAL; AFFIRMED ON DEFENDANT'S APPEAL.**

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Michael L. Wolf, County Attorney, for appellant.

John J. Wolfe, Clinton, for appellee.

PER CURIAM.

This is a discretionary review granted at the State's request to consider the district court's refusal to consider a prior uncounseled OWI conviction for purposes of supporting an offense of third-offense OWI. The defendant, Karen L. Wilkins, cross-appeals, challenging the revocation of her driving privileges. After reviewing the record and considering the arguments presented, we reverse the district court on the State's appeal and affirm that court on Wilkins' appeal.

Wilkins was charged with third-offense OWI after a chemical test of her breath imposed pursuant to the implied-consent law revealed an alcohol concentration of .135. As a predicate for a conviction of OWI, third-offense, it was alleged that she had been twice previously convicted of OWI. Wilkins initially pleaded guilty to OWI, third-offense. However, prior to the imposition of sentence, she successfully challenged the degree of that offense on the basis that she was proceeding without counsel at the time of one of her former OWI convictions for which she was granted a deferred judgment. Her conviction in the present case was accordingly reduced to OWI, second offense.

In challenging the district court's refusal to consider Wilkins' uncounseled OWI conviction as a basis for enhancing her latest offense, the State urges that, under current federal Sixth Amendment law, prior uncounseled convictions are only invalid for enhancing a later offense or sentence if imprisonment was actually imposed in the prosecution in which the uncounseled conviction was obtained. It premises this contention on the decision of the Supreme Court in *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). There, the Court determined that an enhancement of a sentence based on prior uncounseled misdemeanor convictions does not violate the Sixth Amendment unless the

prior uncounseled offenses actually resulted in imprisonment. *Nichols*, 511 U.S. at 746-47, 114 S. Ct. at 1927, 128 L. Ed. 2d at 754. The *Nichols* majority overruled a prior plurality decision in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). We recognized that result in *State v. Tovar*, 656 N.W.2d 112, 114 (Iowa 2003). The State contends that, because Wilkins received a deferred judgment in regard to her uncounseled guilty plea, there was never any actual incarceration on which to premise a Sixth Amendment claim.

I. *The Continuing Viability of* State v. Cooper.

This court accepted the *Baldasar* plurality opinion in *State v. Cooper*, 343 N.W.2d 485, 486 (Iowa 1984), stating that "the reasoning of *Baldasar* and our own view of the importance of counsel" dictated that two prior uncounseled convictions could not be used to enhance a theft conviction to theft in the third degree. By implication, we adhered to the view of the *Baldasar* plurality that this rule applies to any conviction in which imprisonment might be imposed. We are now asked to follow the *Nichols* decision and recognize that uncounseled misdemeanor convictions are not invalid for enhancement purposes unless imprisonment was actually imposed for the uncounseled conviction.

Wilkins argues that, because the result in our *Cooper* case was premised in part on "our own view of the importance of counsel," *see* 343 N.W.2d at 486, we should continue to follow that precedent. We disagree. *Cooper* was commenting on an interpretation of the Sixth Amendment of the federal constitution in which only four justices joined. Consequently, we believe that the reference to our view of the matter was intended as an affirmation of the view of the Sixth Amendment expressed by the justices in

the Supreme Court's plurality opinion.[1] That view of the federal constitution has now been unambiguously rejected in *Nichols*. We are therefore not at liberty to continue to follow our holding in *Cooper*. Because Wilkins was not imprisoned with respect to her prior misdemeanor conviction, her motion based on a denial of counsel should have been rejected.

Although Wilkins attempts, for the first time on appeal, to assert a violation of the state constitution, that issue was not raised in the district court. Wilkins' motion to reduce her conviction from third-offense OWI to second-offense OWI was expressly premised on the Sixth Amendment. No state constitutional claim was made. Consequently, we will not consider that issue on appeal.

II. *The Cross-Appeal.*

Wilkins cross-appeals, asserting that the district court improperly imposed a six-year revocation of her driving privileges pursuant to Iowa Code section 321J.4(4). The arguments presented in support of this contention were rejected in *State v. Grogan*, 385 N.W.2d 254, 255 (Iowa 1986), which held that the statutory six-year revocation is properly imposed irrespective of whether the prior convictions on which it was based resulted from uncounseled pleas of guilty. We continue to adhere to that view.

We have considered all issues presented and conclude that the judgment of the district court should be reversed on the State's appeal and the matter remanded to the district court for reinstatement of Wilkins' conviction for third-offense OWI upon her plea of guilty. The order of the district court revoking Wilkins' driving privileges is affirmed.

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[1]In the subsequent decision of *State v. Moe*, 379 N.W.2d 347, 349 (Iowa 1985), we viewed the decision in *Cooper* as an application of the federal Sixth Amendment.

REVERSED AND REMANDED ON THE STATE'S APPEAL; AFFIRMED ON DEFENDANT'S APPEAL.

This opinion shall be published.