North Dakota Law Review

Volume 63 | Number 2 Article 2

1987

Criminal Law - Right to Counsel - A Defendant's Prior Uncounseled Misdemeanor Convictions May Not Be Used To Enhance Punishment Pursuant to North Dakota's Driving under the Influence Statute

Patrick Stevens

CRIMINAL LAW — RIGHT TO COUNSEL — A DEFENDANT'S PRIOR UNCOUNSELED MISDEMEANOR CONVICTIONS MAY NOT BE USED TO ENHANCE PUNISHMENT PURSUANT TO NORTH DAKOTA'S DRIVING UNDER THE INFLUENCE STATUTE.

On December 8, 1982, Kenneth L. Orr pleaded guilty in a municipal court to a charge of driving under the influence of intoxicating liquor (DUI).[1] On July 6, 1984, Orr again was

---

1. State v. Orr, 375 N.W.2d 171, 173 (N.D. 1985). Orr was charged with driving under the influence in violation of § 39-08-01 of the North Dakota Century Code. *See id.* Section 39-08-01 provides, in relevant part:

> 1. A person may not drive any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>   a. That person has a blood alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving.
>   b. That person is under the influence of intoxicating liquor.
>   c. That person is a habitual user of narcotic drugs or is under the influence of a narcotic drug.
>   d. That person is under the influence of any controlled substance to a degree which renders that person incapable of safely driving.
>   e. That person is under the influence of a combination of intoxicating liquor and a controlled substance to a degree which renders that person incapable of safely driving.
> 2. A person may not be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>   a. That person has a blood alcohol concentration of at least ten one- hundredths of one percent by weight at the time of the performance of a chemical test within two hours after being in physical control of a vehicle.
>   b. That person is under the influence of intoxicating liquor.
>   c. That person is a habitual user of narcotic drugs or is under the influence of a narcotic drug.
>   d. That person is under the influence of any controlled substance to a degree which renders that person incapable of safely driving.
>   e. That person is under the influence of a combination of intoxicating liquor and a controlled substance to a degree which renders that person incapable of safely driving.

N.D. CENT. CODE § 39-08-01 (Supp. 1985). Orr pleaded guilty to the driving under the influence charge and was convicted in a Jamestown municipal court. *Orr*, 375 N.W.2d at 173. He received a fine and a five day suspended sentence. *Id.*

charged with DUI.[2] Prior to trial on the second DUI charge, the State moved to amend its complaint to allege that the present incident was Orr's second DUI offense and that if convicted, he should be treated as a second offender pursuant to subsection 39-08-01(5)(b) of the North Dakota Century Code.[3] Subsection 39-08-01(5)(b) provides that a second DUI offense within five years of the first offense must be punished by at least four days imprisonment or ten days community service, a five hundred dollar fine, and evaluation at an addiction treatment program.[4] Orr resisted the State's motion, claiming that the municipal court judgment could not be used to enhance the present charges.[5] The trial court convicted him of driving under the influence, however, and sentenced him as a second time offender.[6] On appeal to the North Dakota Supreme Court, Orr argued that the State could not use the municipal court conviction to enhance the punishment for the subsequent DUI conviction because he was not represented by counsel during the first trial and the municipal court record

2. *Orr*, 375 N.W.2d at 173.

3. *Id.*; *see* N.D. CENT. CODE § 39-08-01(5)(b) (Supp. 1985). Section 39-08-01(5) provides, in relevant part:

> A person convicted of violating this section, or an equivalent ordinance, must be sentenced in accordance with this subsection.
> a. For a first offense, the sentence must include both a fine of at least two hundred fifty dollars and an order for addiction evaluation by an appropriate licensed addiction treatment program.
> b. For a second offense within five years, the sentence must include at least four days' imprisonment of which forty-eight hours must be served consecutively, or ten days' community service; a fine of at least five hundred dollars; and an order for addiction evaluation by an appropriate licensed addiction treatment program.
> c. For a third offense within five years, the sentence must include at least sixty days' imprisonment, of which forty-eight hours must be served consecutively; a fine of one thousand dollars, and an order for addiction evaluation by an appropriate licensed addiction treatment program.
> d. For a fourth offense within seven years, the sentence must include one hundred eight days' imprisonment, of which forty-eight hours must be served consecutively and a fine of one thousand dollars.

Id.

4. N.D. CENT. CODE § 39-08-01(5)(b) (Supp. 1985). For the text of § 39-08-01(5)(b), see *supra* note 3.

5. *Orr*, 375 N.W.2d at 173. Orr contended that the municipal court judgment could not be used for sentence enhancement because Orr had not been represented by counsel during the municipal court trial, and because there was no evidence in the record indicating that he had waived his right to counsel. *Id.* Orr stated that he did not recall whether the municipal court judge had advised him of his right to counsel. *Id.* at 174.

6. *Id.* Orr was convicted of driving under the influence and was sentenced to four days in jail, fined $500, and ordered to submit to an alcohol addiction evaluation. *Id.* The trial court did not state whether Orr was sentenced as a first or second time offender, in spite of § 12.1-32-02(5) of the North Dakota Century Code. *Id.*; *see* N.D. CENT. CODE § 12.1-32-02(5) (Supp. 1985). Section 12.1-32-02(5) provides as follows: "All sentences imposed shall be accompanied by a written statement by the court setting forth the reasons for imposing the particular sentence. The statement shall become part of the record of the case." *Id.* Since the issue was not raised on appeal, the effect of noncompliance with § 12.1-32-02(5) was not addressed by the North Dakota Supreme Court. *Orr*, 375 N.W.2d at 173 n.1.

contained no evidence indicating that he had waived his right to counsel.[7] Orr contended that his sentence as a second offender violated his right to counsel secured by the sixth amendment to the United States Constitution and article I, section 12 of the North Dakota Constitution.[8] The North Dakota Supreme Court reversed the trial court and *held* pursuant to article I, section 12 of the North Dakota Constitution that, absent a valid waiver of the right to counsel, a prior uncounseled misdemeanor conviction cannot be used to enhance a term of imprisonment for a subsequent offense.[9] *State v. Orr,* 375 N.W.2d 171 (N.D. 1985).

The sixth amendment to the United States Constitution provides that an accused in a criminal prosecution has the right to assistance of counsel.[10] The United States Supreme Court determined that the right to counsel applies to state court proceedings in *Gideon v. Wainwright.*[11] Clarence Earl Gideon was charged with a felony in a Florida state court.[12] Gideon appeared in court without funds and without a lawyer.[13] He asked the court to appoint counsel for him, but the court refused and Gideon was convicted.[14] Gideon then appealed to the United States Supreme

7. *Orr,* 375 N.W.2d at 173. The trial court had concluded that Orr validly waived his right to counsel in his first DUI trial, even though the municipal court record did not reflect a waiver. *Id.* The trial court's decision was based primarily on the presumptions set forth in § 31-11-03 of the North Dakota Century Code. *Id.*; *see, e.g.*, N.D. CENT. CODE § 31-11-03(15) (1976) (presumption that an official duty has been performed in a regular manner); *id.* § 31-11-03(17) (presumption that a judicial record, when not conclusive, correctly sets forth the rights of the parties).

8. *Orr,* 375 N.W.2d at 173; *see* U.S. CONST. amend. VI; N.D. CONST. art. I, § 12. The sixth amendment to the United States Constitution provides, in relevant part, as follows: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. Article I, § 12 of the North Dakota Constitution provides, in relevant part, as follows: "In criminal prosecutions in any court whatever, the party accused shall have the right . . . to appear and defend in person and with counsel." N.D. CONST. art. I, § 12.

9. *Orr,* 375 N.W.2d at 178-79.

10. *See* U.S. CONST. amend. VI. For the text of the sixth amendment to the United States Constitution, see *supra* note 8.

11. 372 U.S. 335 (1963).

12. Gideon v. Wainwright, 372 U.S. 335, 336-37 (1963). Gideon was charged with breaking and entering a poolroom with intent to commit a misdemeanor, which was a felony under Florida law. *Id.*, *see* FLA. STAT. § 810.05 (1957) (breaking and entering with intent to commit a misdemeanor is punishable by up to five years imprisonment or a fine not to exceed $500) (repealed 1974); *id.* § 775.08 (a felony is any offense punishable by imprisonment in a state prison) (current version at FLA. STAT. ANN. § 775.08(1) (West 1976)).

13. *Gideon,* 372 U.S. at 337.

14. *Id.* When Gideon asked the state court to appoint counsel for him, the following conversation took place:

> The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
>
> The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.

Id. The jury found Gideon guilty, and the trial court sentenced him to five years imprisonment. *Id.*

Court.[15] The Supreme Court stated that an indigent defendant must be provided with counsel in a state criminal proceeding because the right to counsel is "fundamental and essential to a fair trial."[16]

Because the *Gideon* decision involved a defendant charged with a felony, many state courts extended an indigent the right to counsel only when he or she was charged with a felony.[17] The United States Supreme Court addressed the issue of an indigent's right to counsel when charged with a misdemeanor in *Argersinger v. Hamlin.* [18] Jon Argersinger was charged in a Florida state court with carrying a concealed weapon, an offense punishable by six months imprisonment, a $1000 fine, or both.[19] Argersinger was convicted and sentenced to ninety days imprisonment.[20] On appeal to the United States Supreme Court, Argersinger claimed that his conviction was invalid because the State had denied him his sixth amendment right to counsel.[21] The Supreme Court noted a number of constitutional problems associated with petty and

15. *Id.* at 338. Following his conviction, Gideon filed a habeas corpus action with the Florida Supreme Court on the grounds that the conviction was obtained in violation of his right to counsel. *Id.* at 337; *see* U.S. CONST. amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8. The Florida Supreme Court, without an opinion, denied relief. *Gideon,* 372 U.S. at 337. The United States Supreme Court granted certiorari to determine whether Gideon's federal constitutional right to counsel applied in a state court. *Id.* at 338.

16. *Gideon,* 372 U.S. at 342; *see* U.S. CONST. amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8. The United States Supreme Court accepted the proposition that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory on the States by the Fourteenth Amendment." *Gideon,* 372 U.S. at 342; *see* U.S. CONST. amend. XIV, § 1 (state cannot deprive any person of life, liberty or property without due process of law). The Court, overruling past precedent, reasoned that the right to counsel is fundamental and essential to a fair trial; because governments employ lawyers to prosecute defendants, defense counsel is no longer a luxury, but a necessity to insure a fair trial. *Gideon,* 372 U.S. at 344 (overruling Betts v. Brandy, 316 U.S. 455, 473 (1942) (holding that sixth amendment right to counsel is not fundamental and essential for a fair trial)).

17. *See, e.g.,* Winters v. Beck, 239 Ark. 1151, ____, 397 S.W.2d 364, 364 (1965) (courts need not appoint counsel in misdemeanor cases), *cert. denied,* 385 U.S. 907 (1966); State v. Sherron, 268 N.C. 694, ____, 151 S.E.2d 599, 601 (1966) (defendant charged with misdemeanor is not entitled to court appointed counsel); City of Toledo v. Frazier, 10 Ohio App. 2d 51, ____, 226 N.E.2d 777, 783-84 (1967) (right to court appointed counsel applies only in felony cases); *see also* Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar,* 34 U. FLA. L. REV. 517, 523 (1982) (noting that subsequent to *Gideon,* many courts held that a defendant's right to counsel applied only in felony cases). Rudstein attributes the lower courts' conclusion that *Gideon* established a right to counsel only in felony cases to Justice Harlan's concurring opinion. *Id.; see* Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring) (arguing that that Court's opinion applies only to "offenses which, as the one involved here, carry the possibility of a substantial prison sentence").

18. 407 U.S. 25 (1972).

19. Argersinger v. Hamlin, 407 U.S. 25, 26 (1972).

20. *Id.*

21. *Id.* at 26-27; *see* U.S. CONST. amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8. After his conviction, the petitioner filed a habeas corpus action in the Florida Supreme Court, and the court, in a four to three decision, held that the right to counsel extends only to trials "for non-petty offenses punishable by more than six months imprisonment." *Argersinger,* 407 U.S. at 26-27. The Supreme Court granted certiorari. *Id.* at 27.

22. *Argersinger,* 407 U.S. at 28-37.

misdemeanor offenses.[22] For example, the court noted that if a defendant pleads guilty to a misdemeanor offense without the assistance of counsel, the accused might not be informed of the repercussions of the guilty plea.[23] The Court also expressed concern that, because of the vast number of misdemeanor cases, the courts may dispose of these cases hastily, resulting in unfair trials.[24] The Court determined that because of these problems, the presence of counsel was often necessary to insure a fair trial for a person accused of a misdemeanor.[25] Therefore, the Court concluded that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[26]

Subsequent to *Argersinger* there was uncertainty whether an individual charged with a misdemeanor always had a right to counsel if the possible sentence included prison, or whether the right to counsel existed only if the defendant was actually sentenced to prison.[27] The United States Supreme Court addressed this issue in *Scott v. Illinois*.[28] Aubrey Scott was charged with a misdemeanor theft offense that was punishable by a $500 fine, one year in jail, or both.[29] Scott was convicted and fined fifty dollars.[30] On appeal to the United States Supreme Court, Scott argued that his conviction was invalid because the State had not provided him with counsel at

---

23. *Id.* at 34.

24. *Id.*

25. *Id.* at 36-37. In discussing the necessity of counsel to obtain a fair trial, the Court stated:

> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'

Id. at 31 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

26. *Id.* at 37. The Supreme Court noted that counsel might be necessary for a fair trial even in petty offenses. *Id.* at 33. The Court stated that it was not convinced that the legal and constitutional questions involved in a case that actually resulted in imprisonment, even for a brief time, were distinguishable from cases in which the defendant could be impisoned for six months or more. *Id.*

27. *See* Scott v. Illinois, 440 U.S. 367, 368-69 (1979) (noting the conflict among lower courts regarding the proper application of *Argersinger*).

28. 440 U.S. 367 (1979).

29. Scott v. Illinois, 440 U.S. 367, 368 (1979); *see* ILL. ANN. STAT. ch. 38, § 16-1 (Smith-Hurd 1969) (first conviction of theft not exceeding $150 is punishable by a $500 fine, one year in jail, or both) (amended 1986).

30. *Scott*, 440 U.S. at 368. The appellate court and the Illinois Supreme Court affirmed Scott's conviction. *Id.*

trial.[31] The State contended that the sixth amendment right to counsel should be interpreted to mean that a defendant charged with a misdemeanor offense has a right to counsel only when his or her conviction results in actual imprisonment.[32] The Court noted that actual imprisonment for an offense is a more serious punishment than fines or a mere threat of imprisonment.[33] Thus, the Court stated that "the Sixth and Fourteenth Amendments to the United States Constitution require only 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."[34] Therefore, the Court concluded that a defendant does not have a sixth amendment right to counsel unless the defendant is actually imprisoned.[35]

The Supreme Court, however, did not determine whether a prior uncounseled misdemeanor conviction could be used to enhance a defendant's punishment for a subsequent conviction

---

31. *Id.* Scott argued that the sixth amendment to the United States Constitution, as interpreted in *Argersinger v. Hamlin*, requires the state to provide defense counsel whenever imprisonment is an authorized penalty for the crime charged. *Id.*; *see* Argersinger v. Hamlin, 407 U.S. 25 (1972); U.S. CONST. amend. VI (right to counsel). For a discussion of *Argersinger*, see *supra* notes 18-26 and accompanying text. For the text of the sixth amendment to the United States Constitution, see *supra* note 8.

32. *See Scott*, 440 U.S. at 369; U.S. CONST. amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8.

33. *See Scott*, 440 U.S. at 373. The Court stated that the central premise of *Argersinger* was that actual imprisonment was a different kind of punishment than fines or the threat of imprisonment. *Id.*; *see* Argersinger v. Hamlin, 407 U.S. 25 (1972). For a discussion of *Argersinger*, see *supra* notes 18-26 and accompanying text. The Court stated that actual imprisonment is an appropriate standard to determine when a defendant is entitled to counsel because any other standard would create confusion and impose substantial costs on the states. *Scott*, 440 U.S. at 373.

34. *Scott*, 440 U.S. at 373-74; *see* U.S. CONST. amend. XIV, § 1 (no person shall be denied life, liberty, or property without due process of law); *id.* amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8. Justice Blackmun disagreed with the contention that an indigent defendant is entitled to counsel only when he or she is actually imprisoned. *Scott*, 440 U.S. at 389 (Blackmun, J., dissenting). Justice Blackmun developed a "bright line approach," which required that an indigent defendant be provided the right to counsel when the defendant was prosecuted for a crime punishable by more than six months imprisonment, or whenever the defendant was actually subjected to a term of imprisonment. *Id.* at 389-90. Justice Blackmun reasoned that this approach would provide the "bright line" that defendants, prosecutors, and courts needed in order to determine when an indigent defendant was entitled to counsel pursuant to the sixth amendment. *Id.* at 390. Justice Blackmun concluded that, since Scott's conviction was punishable by more than six months imprisonment, he was entitled to appointed counsel, and therefore his conviction should have been reversed. *Id.*

35. *See Scott*, 440 U.S. at 374. The question whether to provide counsel for an indigent defendant occurs prior to trial. *See, e.g.*, N.D.R. CRIM. P. 44 (counsel shall be appointed before initial appearance unless court has determined that conviction will not result in imprisonment). The *Scott* decision, however, states that the right to counsel depends upon whether the defendant is actually imprisoned. *Scott*, 440 U.S. at 374. Thus, in determining whether counsel must be appointed, the *Scott* decision forces courts to decide, before hearing the evidence presented at trial, whether imprisonment may be imposed upon conviction. *See* N.D.R. CRIM. P. 44. This procedure forecloses the court's ability to consider the full range of punishments and select the sanction most appropriate under the circumstances revealed at trial. *See Scott*, 440 U.S. at 383-84 (Brennan, J., dissenting) (noting that the *Scott* decision circumvents the court's discretion in sentencing).

until *Baldasar v. Illinois*.[36] Thomas Baldasar was convicted of misdemeanor theft at a proceeding in which he was not represented by counsel.[37] Subsequently, Baldasar was again charged with theft and the prosecution introduced evidence of his prior conviction so that the Baldasar could be punished under an Illinois enhancement statute.[38]

Pursuant to Illinois law, a first conviction for theft was punishable by not more than one year in jail and a fine of not more than $1000.[39] The Illinois enhancement statute provided that a second conviction for the same offense could be treated as a felony with a possible prison sentence of one to three years.[40] Defense counsel objected to the admission of Baldasar's previous conviction, arguing that Baldasar had not been represented by counsel at the first proceeding.[41] Nevertheless, the defendant was convicted and sentenced to one to three years imprisonment.[42] On appeal to the United States Supreme Court, Baldasar argued that his prior uncounseled misdemeanor conviction could not be used to enhance his punishment for a subsequent offense.[43]

---

36. 446 U.S. 222 (1980). Although the United States Supreme Court did not address the use of uncounseled misdemeanor convictions until *Baldasar*, the Court had examined the use of uncounseled *felony* convictions for collateral purposes. *See, e.g.*, Loper v. Beto, 405 U.S. 473, 483 (1972) (prior uncounseled felony conviction could not be used for impeachment purposes); United States v. Tucker, 404 U.S. 443, 448 (1972) (prior uncounseled felony conviction could not be considered in the sentencing of defendant); Burgett v. Texas, 389 U.S. 109, 115 (1967) (absent a valid waiver of counsel, prior uncounseled felony conviction could not be introduced for enhancing punishment).

37. Baldasar v. Illinois, 446 U.S. 222, 223 (1980) (plurality, per curiam). A Cook County circuit court convicted Baldasar of misdemeanor theft in May 1975. *Id.* The circuit court sentenced Baldasar to probation for one year and fined him $159. *Id.*

38. *Id.*; *see* ILL. ANN. STAT. ch. 38, § 16-1(e)(1) (Smith-Hurd 1977) (amended 1986). The Illinois enhancement statute provided as follows: "Theft of property, other than a firearm, not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft, including retail theft, other than theft of a firearm, is a class 4 felony." *Id.*

39. *See* ILL. ANN. STAT. ch. 38, § 16-1(e)(1) (Smith-Hurd 1977) (theft is a class A misdemeanor) (amended 1986); *id.* ch. 38, ¶ ¶ 1005-8-3(a)(1), 1005-9-1(a)(2) (Smith-Hurd 1982) (a class A misdemeanor is punishable by not more than one year imprisonment and a fine not to exceed $1000) (amended 1986).

40. ILL. ANN. STAT. ch. 38, § 16-1(e)(1) (Smith-Hurd 1977) (second conviction for theft constituted class 4 felony) (amended 1986); *id.* ch. 38, § 1005-8-1(b)(5) (Smith-Hurd 1973) (a class 4 felony is punishable by one to three years imprisonment) (current version at ILL. ANN. STAT. ch. 38, ¶ 1005-8-1(a)(7) (Smith-Hurd) (1982). For the text of the Illinois enhancement statute, see *supra* note 38.

41. *Baldasar*, 446 U.S. at 223. The record of the first proceeding showed that Baldasar was not represented by counsel and that he did not formally waive his right to counsel. *Id.*

42. *Id.*

43. *See id.* The Illinois Appellate Court affirmed Baldasar's sentence because the court concluded that his imprisonment was based on his second conviction in which he was provided counsel, and not on his prior conviction in which he did not have the assistance of counsel. *See* People v. Baldasar, 52 Ill. App. 3d 305, 307, 367 N.E.2d 459, 463 (1977). The Supreme Court of Illinois denied leave to appeal, but the United States Supreme Court granted certiorari. Baldasar v. Illinois, 446 U.S. at 224.

The Court reversed the state court judgment in a five to four plurality per curiam opinion.[44] Justices Stewart, Marshall, and Blackmun wrote concurring opinions.[45] Justice Stewart argued that the sentence for Baldasar's second conviction violated his sixth amendment right to counsel because an indigent criminal defendant cannot be sentenced to imprisonment under an enhancement statute unless he or she was afforded the right to counsel at the prior trial.[46] Since Baldasar was sentenced to an increased prison term solely because of a prior conviction in which he had not received the assistance of counsel, Justice Stewart concluded that the sentence was unconstitutional.[47]

Justice Marshall, although arguing that *Scott* was decided wrongly, contended that even under the actual imprisonment standard of *Scott,* the petitioner's prior uncounseled misdemeanor conviction could not be used to impose an increased term of imprisonment for a subsequent conviction.[48] Justice Marshall reasoned that, since an uncounseled conviction is not reliable enough to support imprisonment, it is invalid for the purpose of increasing a term of imprisonment for a subsequent offense.[49]

Justice Blackmun stated that an indigent defendant has a right to counsel whenever he or she is prosecuted for an offense punishable by more than six months imprisonment or when the defendant is actually imprisoned.[50] Because Baldasar's prior conviction was punishable by more than six months imprisonment, Justice Blackmun argued that Baldasar was entitled to counsel at the prior misdemeanor hearing.[51] Because Baldasar was deprived

---

44. *See Baldasar,* 446 U.S. at 224.

45. *See id.* (Stewart, J., concurring); *id.* (Marshall, J., concurring); *id.* at 229 (Blackmun, J., concurring).

46. *Id.* at 224 (Stewart, J., concurring). Justice Stewart reasoned that Baldasar's prior conviction, though valid because it did not result in actual imprisonment, could not be used to impose an increased term of imprisonment for a second conviction. *See id.* Justice Stewart reasoned that the use of Baldasar's prior conviction to increase the term of imprisonment would contravene the principles set forth in *Scott* because, pursuant to *Scott,* a defendant cannot be imprisoned unless he is afforded his right to counsel. *See id.;* Scott v. Illinois, 440 U.S. 367, 373-74 (1979). For a discussion of *Scott,* see *supra* notes 27-35 and accompanying text.

47. *Baldasar,* 446 U.S. at 224 (Stewart, J., concurring).

48. *Id.* at 225-26 (Marshall, J., concurring); *see* Scott v. Illinois, 440 U.S. 367, 373-74 (1979). For a discussion of *Scott,* see *supra* notes 27-35 and accompanying text.

49. *Baldasar,* 446 U.S. at 227-28 (Marshall, J., concurring). Justice Marshall contended that an uncounseled conviction did not become more reliable because a defendant was convicted of a subsequent offense. *Id.* at 228. Therefore, he concluded that a conviction that could not be used to impose a prison sentence for a first conviction, could not be used to impose an increased term of imprisonment for a second conviction. *Id.*

50. *Id.* at 229 (Blackmun, J., concurring). The approach articulated by Justice Blackmun had been developed in his dissenting opinion in *Scott. See* Scott v. Illinois, 440 U.S. 367, 389 (Blackmun, J., dissenting) (1979). For a discussion of Justice Blackmun's dissent in *Scott,* see *supra* note 34.

51. *Baldasar,* 446 U.S. at 230 (Blackmun, J., concurring).

of his right to counsel, Justice Blackmun concluded that the conviction was invalid and could not be used for enhancement purposes.[52]

The *Baldasar* decision contained no majority opinion.[53] Interpretation of a plurality decision is generally based on the concurring opinion stating the narrowest grounds for the holding.[54] Since Justice Blackmun's concurrence stated the narrowest grounds, his opinion set the parameters for interpretation of *Baldasar*.[55] Thus, the *Baldasar* decision established that an uncounseled misdemeanor conviction punishable by more than six months imprisonment cannot be used to increase punishment under an enhancement statute.[56]

Similar to the sixth amendment to the United States Constitution, the North Dakota Constitution guarantees a defendant the right to counsel.[57] Article I, section 12 of the North Dakota Constitution provides, in relevant part, as follows: "In criminal prosecutions in any court whatever, the party accused shall have the right . . . to appear and defend in person and with counsel."[58]

The North Dakota Supreme Court discussed the North Dakota Constitution's right to counsel in *State v. Whiteman*.[59] Oscar Whiteman, Jr. pleaded guilty to murder after refusing assistance of counsel.[60] The trial court's record reflected that Whiteman believed that he could not have an appointed attorney and that he did not have time to find one.[61] After he was sentenced to imprisonment,

---

52. *Id.*

53. *Id.* at 224.

54. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (a plurality holding is viewed as the position taken by those judges concurring on the narrowest grounds).

55. *See Baldasar*, 446 U.S. at 229-30 (Blackmun, J., concurring). For a discussion of the North Dakota Supreme Court's conclusion that the opinion of Justice Blackmun represents the holding in *Baldasar*, see *infra* notes 89-95 and accompanying text.

56. *See Baldasar*, 446 U.S. 222; *see also* Rudstein, *The Collateral Use of Misdemeanor Convictions After Scott and Baldasar*, 34 U. FLA. L. REV. 517, 529 (1982) (*Baldasar* established that an uncounseled misdemeanor conviction punishable by more than six months imprisonment could not be used for enhancement purposes).

57. *Compare* U.S. CONST. amend. VI (right to counsel) *with* N.D. CONST. art. I, § 12 (right to counsel). For the text of the sixth amendment to the United States Constitution and article I, § 12 of the North Dakota Constitution, see *supra* note 8.

58. N.D. CONST. art. I, § 12.

59. 67 N.W.2d 599 (N.D. 1954).

60. State v. Whiteman, 67 N.W.2d 599, 600 (N.D. 1954). On January 17, 1953, Oscar Whiteman pleaded guilty to murder in the first degree. *Id.* The district court, after questioning Whiteman, sentenced him for the crime of murder in the second degree and ordered Whiteman to serve thirty years in the state penitentiary. *Id.*

61. *Id.* at 608. To understand the circumstances surrounding the defendant's waiver of counsel, the North Dakota Supreme Court examined the testimony of codefendant Donald Malnourie. *Id.* at 607-08. The trial court had asked Malnourie and Whiteman whether they desired assistance of counsel. *Id.* From the testimony of Malnourie, the supreme court noted that it was clear that Malnourie wanted to be represented by counsel, but waived his right because he did not think he

Whiteman moved to have the court set aside the verdict and allow him to enter a plea of not guilty.[62] The trial court denied the motion.[63] Whiteman appealed, claiming that he was denied his constitutional right to counsel.[64] The court reasoned that, for a waiver of counsel to be enforceable, a defendant must be capable of making an informed choice, and the choice must be made freely and responsibly.[65] The court stated that Whiteman's choice was not made freely and responsibly because he desired an attorney, but believed his desire could not be fulfilled.[66] Therefore, the court concluded that Whiteman had been denied his right to counsel guaranteed by the North Dakota Constitution.[67]

Sixteen years after *Whiteman,* and two years prior to *Argersinger,* the North Dakota Supreme Court addressed a defendant's right to counsel in misdemeanor cases in *State v. Heasely.*[68] Mr. Heasely was found guilty of contempt of court, which was a misdemeanor

---

could hire an attorney. *Id.* at 608. Malnourie had no money, and the only property he owned, which he did not believe he could mortgage, was in trust with the United States government. *Id.* Whiteman, who was in the same financial position as Malnourie, waived his right to counsel after hearing the trial court inform Malnourie that it would not appoint counsel for him because he owned land free from indebtedness. *Id.* at 610.

62. *Id.* at 600.

63. *Id.*

64. *Id.* at 601; *see* N.D. CONST. art. I, § 12 (right to counsel). For the text of article I, § 12 of the North Dakota Constitution, see *supra* note 8. On appeal to the North Dakota Supreme Court, Whiteman argued that he was denied his right to counsel and that his conviction was "obtained by reason of fraud and coercion, deceit, duress and other actions prejudicial to and overriding and destroying [his] free will." *Whiteman,* 67 N.W.2d at 600-01. In addition, Whiteman contended that he had discovered new evidence that was material to his case, and which was not produced at trial. *Id.* at 601.

65. *Whiteman,* 67 N.W.2d at 610.

66. *Id.* at 611 (citing Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948)). In *Uveges v. Pennsylvania* the United States Supreme Court stated:

> Where the gravity of the crime and other factors — such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto — render criminal proceedings without counsel so apt as to result in injustice as to be fundamentally unfair, . . . the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.

Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). The North Dakota Supreme Court noted that Whiteman was a Native American citizen, twenty-five years of age, with only a grade school education. *Whiteman,* 67 N.W.2d at 610. The court stated that Whiteman had been detained in a hostile atmosphere, and that the trial court had not been aware of that fact. *Id.* The North Dakota Supreme Court determined that Whiteman had been subjected to threats and violence by an angry mob and by law enforcement officials, and that because of this, Whiteman felt he had no alternative but to plead guilty. *Id.* at 605, 610. The court concluded that a waiver of counsel compelled by these circumstances could not have been freely and understandably made. *Id.* at 610.

67. *Whiteman,* 67 N.W.2d at 612; *see* N.D. CONST. art. I, § 12 (right to counsel). For the text of article I, § 12 of the North Dakota Constitution, see *supra* note 8. The North Dakota Supreme Court vacated Whiteman's convictions on two grounds. *See Whiteman,* 67 N.W.2d at 612. First, because Whiteman's guilty plea was given involuntarily, and second, because he was not afforded his right to counsel and did not intelligently and knowingly waive that right. *Id.*

68. 180 N.W.2d 242 (N.D. 1970).

pursuant to North Dakota law.[69] Prior to trial, the trial judge afforded Heasely an opportunity to obtain counsel and told him that if he had not obtained counsel by a certain date, the court would appoint counsel for him.[70] After an unsuccessful attempt to appoint counsel for Heasely,[71] the judge informed Heasely that he would not appoint counsel because appointment was not mandatory in misdemeanor cases.[72] On appeal, the North Dakota Supreme Court determined that, pursuant to statutory law, North Dakota courts are directed to inquire into the defendant's need for counsel and are authorized to appoint counsel for an indigent person.[73] In addition, the court determined that courts must appoint counsel for an indigent in any proceeding arising out of any criminal case, regardless of whether the offense charged is a misdemeanor or a felony.[74] Therefore, the court, apparently basing its decision on statutory law rather than the North Dakota Constitution, held that defendants in misdemeanor cases must be afforded the right to counsel.[75]

---

69. State v. Heasely, 180 N.W.2d 242, 244 (N.D. 1970). The district court enjoined Heasely from asserting an interest in a certain parcel of land. *Id.* Heasely continued to use the land, and the owner of the property filed a criminal complaint for contempt of court pursuant to § 12-17-24 of the North Dakota Century Code. *Id.* at 245; *see* N.D. CENT. CODE § 12-17-24 (1960) (disobedience of court order is misdemeanor contempt) (repealed 1973).

70. *Heasely*, 180 N.W.2d at 246. The district court set Heasely's trial for January 7, 1969, and Heasely was to inform the court who he had obtained for counsel by January 2, 1969. *Id.* The court told the defendant that if he had not obtained counsel by January 2, 1969, the court would appoint counsel for him. *Id.*

71. *Id.* The district court judge attempted to appoint counsel for Heasely, but the attorney that was contacted refused. *Id.*

72. *Id.* The trial judge had determined that appointment of counsel was only mandatory when a defendant was charged with a felony and did not have funds to hire an attorney. *Id.* The judge explained that the reason he had offered to appoint counsel for Heasely was to insure that the case would go to trial on the trial date. *Id.* The judge concluded, however, that since Heasely was not charged with a felony and he had made no showing that he did not have the funds to hire an attorney, he was not entitled to court appointed counsel. *Id.* at 246-47.

73. *Id.* at 248; *see* N.D. CENT. CODE § 29-07-01.1 (1969) (in criminal proceeding, court may appoint counsel for indigent defendant) (superceded); *id.* § 29-13-03 (1960) (defendant must be appointed counsel before arraignment if he cannot afford an attorney) (superceded). These statutes were replaced by rule 44 of the North Dakota Rules of Criminal Procedure, which provides:

> Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent him at every stage of the proceedings from his initial appearance before a magistrate through appeal in the courts of this state in all felony cases. Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent him at every stage of the proceedings from his initial appearance before a magistrate through appeal in the courts of this state in all non-felony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment. The court shall appoint counsel to represent a defendant at the defendant's expense if the defendant is unable to secure the assistance of counsel and is not indigent.

N.D.R. CRIM. P. 44.

74. *See Heasely*, 180 N.W.2d at 249; *see* N.D. CENT. CODE § 29-07-01.1 (1969) (court shall determine if person is needy and appoint counsel, and may appoint counsel whenever reasonable) (superceded).

75. *See Heasely*, 180 N.W.2d at 249.

The North Dakota Supreme Court did not address the use of prior uncounseled misdemeanor convictions for enhancement purposes until *State v. Orr*.[76] Orr contended that his uncounseled 1982 DUI conviction could not be used to enhance the punishment for his subsequent DUI conviction in 1984 because he had not waived his right to counsel before pleading guilty to the earlier DUI charge.[77] The State argued that Orr's previous uncounseled conviction could be used to enhance the punishment for his subsequent conviction because Orr's first offense was not punishable by more than six months imprisonment.[78]

Initially the North Dakota Supreme Court determined that the county court had sentenced Orr to jail only because he was a second offender.[79] The supreme court then considered whether Orr had validly waived his right to counsel in the prior municipal court DUI trial.[80] The county court had determined that, since Orr had validly waived his right to counsel in the municipal trial court, his first conviction could be used for enhancement purposes.[81] The county court had presumed that Orr validly waived his right to counsel even though the municipal court record did not affirmatively indicate a waiver.[82] The North Dakota Supreme

76. 375 N.W.2d 171 (N.D. 1985).

77. State v. Orr, 375 N.W.2d 171, 173 (N.D. 1985).

78. *Id.* at 175; *see* Baldasar v. Illinois, 446 U.S. 222, 229 (1980) (right to counsel under federal Constitution exists in misdemeanor cases if the offense is punishable by more than six months imprisonment or the defendant is actually imprisoned). For a discussion of *Baldasar*, see *supra* notes 36-56 and accompanying text.

79. *Orr*, 375 N.W.2d at 173. The North Dakota Supreme court determined that the trial court record indicated that Orr was sentenced as a second offender and not a first offender. *Id.* The supreme court determined that Orr was sentenced as a second offender because, as a matter of practice, first offenders are not sentenced to jail in the county where Orr was prosecuted and because Orr was sentenced to the minimum penalty for a second offender. *Id.* at 174; *see* N.D. CENT. CODE § 39-08-01(5)(b) (Supp. 1985) (penalty for second DUI conviction). For the text of § 39-08-01(5) of the North Dakota Century Code, see *supra* note 3.

80. *Orr*, 375 N.W.2d at 174.

81. *Id.*

82. *Id.* The county court's conclusion that Orr had waived his right to counsel was based on presumptions set forth in § 31-11-03 of the North Dakota Century Code. *Id.*; *see e.g.*, N.D. CENT. CODE § 31-11-03(15) (1976) (presumption that an official duty has been performed); *id.* § 31-11-03(17) (presumption that a judicial record, when not conclusive, correctly determines the rights of the parties).

The court noted that the municipal court's record did not indicate that Orr waived his right to counsel because municipal courts are not courts of record. *Id.* at 174 n.2; *see* N.D. CENT. CODE § 27-01-01 (1976) (only the supreme court, district courts, and county courts are courts of record). The court also noted that the fact that municipal courts are not courts of record in North Dakota conflicts with rule 11(f) of the North Dakota Rules of Criminal Procedure. *Orr*, 375 N.W.2d at 174 n.2; *see* N.D.R. CRIM. P. 11(f). Rule 11(f) of the North Dakota Rules of Criminal Procedure provides:

> A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Id. In his concurring opinion, Justice VandeWalle stated that the municipal court's failure to comply

Court concluded that the county court erred when it presumed a waiver of Orr's right to counsel.[83] The supreme court noted that a plea of guilty involves the forfeiture of numerous constitutional rights.[84] Thus, in the context of a guilty plea, the court suggested that a waiver of counsel restricts the exercise of numerous rights.[85] Because of the significance of the waiver of counsel in this context, the court concluded that it was erroneous to infer a waiver of counsel from the silent record.[86]

The next issue the court addressed was whether Orr could be sentenced as a second time offender when his prior conviction resulted from an uncounseled guilty plea and there was no evidence that Orr had waived his right to counsel.[87] The court extensively analyzed *Baldasar v. Illinois*.[88] Because *Baldasar* was a plurality opinion, the North Dakota Supreme Court concluded that the decision must be interpreted on its narrowest grounds.[89] The court analyzed the three concurrences in *Baldasar*.[90] The court determined that the opinions by Justices Marshall and Stewart would preclude the use of Orr's prior conviction for enhancement purposes because they stated that an unreliable prior conviction could not enhance a defendant's punishment.[91] The court noted, however, that pursuant to Justice Blackmun's opinion, Orr's prior conviction could be used for enhancement purposes.[92] Justice

with rule 11(f) required the county court to disregard, for enhancement purposes, Orr's previous conviction. *Orr*, 375 N.W.2d at 181 (VandeWalle, J., concurring).

83. *Orr*, 375 N.W.2d at 174.

84. *Id.* The North Dakota Supreme Court reasoned that, since a guilty plea itself is a conviction, a defendant who pleads guilty relinquishes the constitutional privilege against self-incrimination, the right to a jury trial, and the right to confrontation. *Id.* The court indicated that, because a guilty plea precludes the exercise of these important rights, a defendant should be afforded his or her right to counsel before pleading guilty. *See id.*

85. *See id.*

86. *Id.* (citing State v. Hagemann, 326 N.W.2d 861 (N.D. 1982)).

87. *Id.* at 175. The prosecution argued that Orr should be sentenced to mandatory imprisonment as a second DUI offender pursuant to § 39-08-01(5)(b) of the North Dakota Century Code. *See id.*; N.D. CENT. CODE § 39-08-01(5)(b) (Supp. 1985) (penalty for second DUI conviction). For the text of § 39-08-01(5)(b), see *supra* note 3.

88. *See Orr*, 375 N.W.2d at 175; Baldasar v. Illinois, 446 U.S. 222 (1980). For a discussion of *Baldasar*, see *supra* notes 36-56 and accompanying text.

89. *Orr*, 375 N.W.2d at 175; *see* Baldasar v. Illinois, 446 U.S. 222 (1980). For a discussion of *Baldasar*, see *supra* notes 36-56 and accompanying text. The North Dakota Supreme Court noted that "[w]hen a fragmented Court decided a case and no single rationale explaining the result enjoys the assent of five judges, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Orr*, 375 N.W.2d at 175 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

90. *See Orr*, 375 N.W.2d at 175, 176; Baldasar v. Illinois, 446 U.S. 222, 224 (1980) (Stewart, J., concurring); *id.* (Marshall, J., concurring); *id.* at 229 (Blackmun, J., concurring). For an interpretation of the concurring opinions in *Baldasar*, see *supra* notes 45-56 and accompanying text.

91. *Orr*, 375 N.W.2d at 176; *see* Baldasar v. Illinois, 446 U.S. 222, 224 (1980) (Stewart, J., concurring); *id.* at 228 (Marshall, J., concurring).

92. *Orr*, 375 N.W.2d at 176; *see* Baldasar v. Illinois, 446 U.S. 222, 229 (1980) (Blackmun, J., concurring). For a discussion of Justice Blackmun's concurrence in *Baldasar*, see *supra* notes 50-56 and accompanying text.

Blackmun's opinion stated that a prior uncounseled conviction that was not punishable by more than six months imprisonment and that did not result in actual imprisonment could be used to enhance punishment.[93] The court believed that Justice Blackmun's view was the narrowest view in the *Baldasar* analysis.[94] Thus, the court stated that *Baldasar* stands for the proposition that a prior uncounseled misdemeanor conviction, which was punishable by more than six months imprisonment or which resulted in actual imprisonment, cannot be used to increase a prison term under an enhancement statute.[95] Because Orr's prior conviction was not punishable by six months imprisonment and did not result in actual imprisonment, use of the prior uncounseled misdemeanor conviction for enhancement purposes was consistent with the United States Constitution.[96]

The court then addressed whether subsection 39-08-01(5) of the North Dakota Century Code was an enhancement statute.[97] The State contended that Orr's previous conviction could be used to increase punishment because subsection 39-08-01(5) was not an enhancement statute, but merely imposed a civil disability.[98] Therefore, the State argued that the focus of subsection 39-08-01(5) was not on the reliability of the previous conviction, but rather on the mere fact of the conviction.[99] The court noted that,

---

93. *Orr*, 375 N.W.2d at 176; *see* Baldasar v. Illinois, 446 U.S. 222, 229-30 (1980) (Blackmun, J., concurring) (offense punishable by more than six months imprisonment or resulting in actual imprisonment cannot be used for enhancement purposes). For a discussion of Justice Blackmun's concurrence in *Baldasar*, see *supra* notes 50-56 and accompanying text.

94. *Orr*, 375 N.W.2d at 176; *see* Baldasar v. Illinois, 446 U.S. 222, 229 (1980) (Blackmun, J., concurring). For a discussion of Justice Blackmun's concurrence in *Baldasar*, see *supra* notes 50-56 and accompanying text.

95. *Orr*, 375 N.W.2d at 176; *see* Baldasar v. Illinois, 446 U.S. 222 (1980). For a discussion of *Baldasar*, see *supra* notes 36-56 and accompanying text.

96. *Orr*, 375 N.W.2d at 176; *see* U.S. CONST. amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8.

97. *Orr*, 375 N.W.2d at 177; *see* N.D. CENT. CODE § 39-08-01(5) (Supp. 1985) (providing graduated penalties for successive DUI convictions). For the text of § 39-08-01(5) of the North Dakota Century Code, see *supra* note 3.

98. *Orr*, 375 N.W.2d at 177; *see* N.D. CENT. CODE § 39-08-01(5) (Supp. 1985) (providing graduated penalties for successive DUI convictions). For the text of § 39-08-01(5) of the North Dakota Century Code, see *supra* note 3.

99. *Orr*, 375 N.W.2d at 177. The State argued that the North Dakota Supreme Court's decision was controlled by *Lewis v. United States*. *Id.* at 176-77; *see* Lewis v. United States, 445 U.S. 55 (1980). In *Lewis* the defendant was convicted of a felony in 1961 and was subsequently charged with violating the Omnibus Crime Control and Safe Street Act. *Lewis*, 445 U.S. at 56-57; *see* 18 U.S.C. app. § 1202 (1982 & Supp. III 1985) (firearm provision of Omnibus Act). The Omnibus Act prohibited convicted felons from receiving, possessing, or transporting any firearms. *Id.* The defendant claimed that his 1961 conviction was obtained in violation of the sixth amendment right to counsel and, therefore could not support a conviction pursuant to the Omnibus Act. *Lewis*, 445 U.S. at 57-58; *see* U.S. CONST. amend. VI (right to counsel). For the text of the sixth amendment to the United States Constitution, see *supra* note 8. The Court reasoned that the federal gun laws focused on the mere fact of a conviction and not on the reliability of a conviction, in order to make firearms unavailable to potentially dangerous people. *Lewis*, 445 U.S. at 67. The United States Supreme Court determined that the Omnibus Act did not enhance punishment on account of a prior conviction, but only

pursuant to subsection 39-08-01(5), punishment is increased for a second, third, or fourth offense.[100] The court stated that punishment is increased because a repeat offense is considered a more serious crime requiring harsher punishment.[101] Therefore, the court concluded that subsection 39-08-01(5) is clearly an enhancement statute, which focuses on the reliability of the first conviction and not on the mere fact of conviction.[102]

After determining that *Baldasar* did not preclude the use of Orr's prior DUI conviction, and that subsection 39-08-01(5) is an enhancement statute, the court considered whether the trial court's use of Orr's prior uncounseled conviction for enhancement purposes was prohibited pursuant to article I, section 12 of the North Dakota Constitution, which guarantees an accused the right to counsel.[103] The court noted that a defendant's right to counsel guarantees, or at least facilitates, the best outcome for the defendant.[104] The court stated that uncounseled convictions are too unreliable to support the sanction of imprisonment.[105] The court

---

enforced a civil disability through criminal sanctions. *Id.* In *Orr* the State asserted that, similar to the Omnibus Act, § 39-08-01(5) of the North Dakota Century Code did not enhance punishment due to a past DUI conviction, but rather, merely imposed a civil disability. *Orr*, 375 N.W.2d at 177; *see* N.D. CENT. CODE § 39-08-01(5) (Supp. 1985) (graduated penalties for successive DUI convictions). For the text of § 39-08-01(5) of the North Dakota Century Code, see *supra* note 3.

100. *Orr*, 375 N.W.2d at 177; *see* N.D. CENT. CODE § 39-08-01(5) (Supp. 1985) (graduated penalties for successive DUI convictions). For the text of § 39-08-01(5) of the North Dakota Century Code, see *supra* note 3.

101. *Orr*, 375 N.W.2d at 177.

102. *Id.* Justice VandeWalle was not convinced that § 39- 08-01(5) of the North Dakota Century Code is an enhancement statute. *Id.* at 180 (VandeWalle, J., concurring). He expressed doubts regarding the validity of a distinction between civil disabilities and enhanced punishment as a result of a prior conviction. *Id.* Justice VandeWalle also noted that if a distinction existed, § 39-08-01(5) may "not enhance punishment on account of the prior conviction but rather enforces an 'essentially civil disability through a criminal sanction' — keeping the drunk driver off the road." *Id.*, *see* N.D. CENT. CODE § 39-08-01(5) (Supp. 1985) (punishments for DUI offenses). For the text of § 39-08-01(5) of the North Dakota Century Code, see *supra* note 3.

103. *See Orr*, 375 N.W.2d at 177; *see* N.D. CONST. art. I, § 12. For the text of article I, § 12 of the North Dakota Constitution, see *supra* note 8. The North Dakota Supreme Court has recognized that the North Dakota Constitution may afford more protection of rights to individuals than does the United States Constitution. *Orr*, 375 N.W.2d at 178 n.6; *see* City of Bismarck v. Altevogt, 353 N.W.2d 760, 766 (N.D. 1980) (the North Dakota Constitution can provide greater protection than the United States Constitution). Justice VandeWalle, however, was not convinced that the North Dakota Constitution provides any greater protection than the United States Constitution with respect to the right to counsel. *Orr*, 375 N.W.2d at 180 (VandeWalle, J., concurring). He stated that the question whether the North Dakota Constitution's right to counsel provision provides greater protection than the United States Constitution's right to counsel should have been saved for a later day. *Id.* Justice VandeWalle, however, did concur with the majority, because he concluded that the municipal court's violation of rule 11(f) of the North Dakota Rules of Criminal Procedure was sufficient to preclude the use of Orr's previous uncounseled conviction for enhancement purposes. *Id.* at 181; *see* N.D. R. CRIM. P. 11(f) (requiring the court to keep a record of any proceeding at which a plea is entered). For the text of rule 11(f), see *supra* note 82.

104. *Orr*, 375 N.W.2d at 178.

105. *Id.* The North Dakota Supreme Court determined that an uncounseled conviction was too unreliable to support imprisonment because uncounseled convictions often do not accurately reflect the guilt or innocence of the defendant. *Id.* at 178 n.7. The court stated: "Left without the aid of

reasoned that simply because Orr's second conviction was valid, the second conviction did not confer any reliability on his prior uncounseled conviction.[106] In addition, because the defect in Orr's prior conviction was the denial of counsel, the court stated that Orr would be deprived of his right to counsel again if he were imprisoned solely because of his uncounseled conviction.[107] Therefore, the North Dakota Supreme Court concluded that the enhancement of Orr's punishment solely because of his prior uncounseled conviction violated article I, section 12 of the North Dakota Constitution.[108]

The *Orr* decision will have a substantial impact on North Dakota municipal courts. Municipal courts, which are not courts of record, must now meet certain requirements if a prior conviction is to be used to enhance the penalty for a subsequent conviction.[109] Municipal courts must either obtain a valid waiver of counsel on record, afford a nonindigent defendant the opportunity to obtain counsel, or appoint counsel for indigent defendants regardless of the penalty imposed.[110] Although this broadening of the right to counsel for defendants who cannot afford an attorney will impose

---

counsel an accused may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).

106. *Id.* at 178. The North Dakota Supreme Court noted that a first conviction in which a defendant was not provided with the right to counsel was too unreliable to support the sanction of imprisonment. *See id.* The court reasoned that the mere fact that Orr was validly convicted on a second charge did not confer any reliability on his first conviction. *Id.* Therefore, the court concluded that an uncounseled misdemeanor could not support the punishment of imprisonment whether the imprisonment was the result of a first or second conviction. *Id.*

107. *Id.* (citing Burgett v. Texas, 389 U.S. 109, 115 (1967)). In *Burgett* the United States Supreme Court determined that a prior felony conviction was presumed void and could not be used for enhancement purposes when the record did not indicate that the defendant was afforded, or waived, his right to counsel. *Burgett*, 389 U.S. at 114-15. The Court stated that, because the defect in Burgett's first conviction was denial of the right to counsel, use of the uncounseled conviction for enhancement purposes would cause Burgett to suffer again from the deprivation of his right to counsel. *Id.* at 115.

The North Dakota Supreme Court determined that the State had the burden of proving the validity of an uncounseled conviction so that it could be used for enhancement purposes. *Orr*, 375 N.W.2d at 179. The court noted that a prior uncounseled conviction was presumed void, for purposes of imprisonment, when there was not waiver on record. *Id.* (citing Burgett v. Texas, 389 U.S. 109, 114-15 (1967)). Therefore, the North Dakota Supreme Court determined that the State, in attempting to imprison Orr as a second offender based on his prior, presumptively void uncounseled conviction, had the burden of proving the validity of the prior conviction for purposes of imprisonment for the subsequent conviction. *Id.* The court noted that the State could rely on parol or other evidence indicating that Orr had voluntarily waived his right to counsel, but that the State had failed to do so. *Id.* at 180.

108. *Orr*, 375 N.W.2d at 178; *see* N.D. CONST. art. I, § 12. For the text of article I, § 12 of the North Dakota Constitution, see *supra* note 8.

109. *See Orr*, 375 N.W.2d at 179; N.D. CENT. CODE § 27-01-01 (Supp. 1985) (municipal courts are not listed as courts of record).

110. *Orr*, 375 N.W.2d at 179. *See* NORTH DAKOTA STATE SUPREME COURT, NORTH DAKOTA MUNICIPAL COURT BENCH BOOK 32-33 (1984) (advising municipal courts to carefully record a defendant's waiver of counsel to ensure that a conviction will be valid for enhancement purposes).

an economic burden on the state, it is a significant step in the protection of an indigent defendant's rights under the North Dakota Constitution.[111]

PATRICK STEVENS

111. *See Orr*, 375 N.W.2d at 179. The North Dakota Supreme Court, justifying the additional expenditures needed to meet the requirements of the North Dakota Constitution's right to counsel, stated:

> While this may constitute an economic burden, our constitution must prevail . . . . We recognize the concentrated legislative effort to deter those who endanger us all by their drinking and driving. We believe that promotion of such a strong public policy merits the necessary allocation of public funds to pass constitutional muster. Of course not all DUI defendants are indigent and not all DUI violations will recur. For those that are and do, we can only ascribe to the principle that our constitution applies to ever-changing needs and problems facing society and implementation of its edicts may often require varying and innovative adaptions.

Id.

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK