IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2023 Session

STATE OF TENNESSEE v. TINISHA NICOLE SPENCER

Appeal from the Criminal Court for Knox County
No. 117168 G. Scott Green, Judge

No. E2022-00350-CCA-R3-CD

The Defendant, Tinisha Nicole Spencer, appeals her jury conviction for driving under the influence, fifth offense. The trial court sentenced her to two years suspended after service of 150 days in jail. On appeal, the Defendant challenges whether the State established an unbroken chain of custody for her blood sample, whether the sentence enhancement counts were void because they included the dates of the prior offenses rather than the dates of conviction as required by statute, and whether the sentence enhancement counts vested the trial court with jurisdiction to sentence her as a multiple offender because they incorporated a facially void judgment. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Marcos M. Garza (at trial and on appeal); Tyler M. Caviness (on appeal); and Dominic A. Garduno (at trial), Knoxville, Tennessee, for the appellant, Tinisha Nicole Spencer.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Charme P. Allen, District Attorney General; and Oscar Butler and Joseph Welker, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

These charges stem from an October 20, 2018 traffic stop that occurred in Knoxville on the University of Tennessee ("UT") campus. Following the stop, the Defendant was indicted for alternative counts of driving under the influence ("DUI") per se and DUI by impairment and one count of violation of the implied consent law. *See* Tenn. Code Ann.

§§ 55-10-401, -406. Relative to both DUI counts, the indictment further alleged that the Defendant had four prior convictions that would be used to enhance her sentence if convicted. On May 5, 2021, the State dismissed the charge of violating the implied consent law, and the Defendant proceeded to a jury trial on the remaining counts. Our summary of the facts presented at trial focuses on the issues raised in this appeal.

Michael Tomlin testified that he worked for three and one-half years as an officer with the University of Tennessee Police Department ("UTPD") and that during this time, he patrolled the UT campus and any adjacent property.[1] He attended the Blount County Sheriff's Department Academy where he received training to become a certified police officer in the State of Tennessee. In addition, Officer Tomlin, was trained on "the basics of DUI and field sobriety" while at the academy. Officer Tomlin participated in fifteen to twenty DUI investigations while employed by UTPD, though all of those investigations did not result in arrests.

Officer Tomlin encountered the Defendant around 1:20 a.m. on October 20, 2018, when he observed her driving a yellow coupe westbound on Cumberland Avenue at a high rate of speed. Officer Tomlin followed the Defendant in his patrol car onto Melrose Street. He activated his blue lights before the Defendant pulled into a staff parking lot on the UT campus. The State introduced into evidence a recording from Officer Tomlin's body camera that depicted his interactions with the Defendant. Officer Tomlin testified that the Defendant's eyes appeared watery or "glazed over" and that her speech was slurred. He noticed an odor of alcohol coming from her vehicle. The Defendant denied that she had been drinking alcohol. Officer Tomlin administered a battery of field sobriety tests on the Defendant, including a "complete eye" test, the "walk and turn" test, and the "one-leg stand" test.

Officer Tomlin believed, based upon his experience and training, that the Defendant was impaired after her poor performance on the field sobriety tests, coupled with her "erratic actions" and the smell of alcohol about her. The Defendant was arrested, and Officer Tomlin placed the Defendant in the back of his patrol car and read to her the implied consent form. However, the Defendant refused to consent to a blood draw, so Officer Tomlin proceeded to obtain a search warrant. Officer Tomlin confirmed that while in custody, the Defendant would have been unable to drink alcohol or place anything in her mouth. A copy of the implied consent form reflecting the Defendant's signature that she was refusing a blood draw was admitted into evidence.

[1] At the time of trial, Officer Tomlin was no longer employed with UTPD. He was an agent with the United States Border Patrol in Eagle Pass, Texas. We will refer to him as Officer Tomlin, as that was his position at the time of these events.

After securing the warrant, Officer Tomlin drove the Defendant to the University of Tennessee Medical Center for a blood draw. Once at the hospital, Officer Tomlin provided the blood alcohol kit to the phlebotomist, which consisted of two vials and included an Alcohol Toxicology Request Form that had been filled out by Officer Tomlin. According to the form, at 4:57 a.m., the phlebotomist drew the Defendant's blood using the blood alcohol kit provided by Officer Tomlin. Officer Tomlin testified that he was present for the blood draw. After drawing the Defendant's blood, the phlebotomist sealed the two vials and labeled them with the Defendant's name and information. She returned the sealed vials to Officer Tomlin, who then placed the form and the vials back inside the blood alcohol kit, double-sealed the box with evidence tape, and wrote the date and his initials in a way so that his handwriting overlaid both the evidence tape and the box. Officer Tomlin confirmed his handwriting on the Alcohol Toxicology Request Form, and it was admitted into evidence.

After taking the Defendant to the county jail, Officer Tomlin returned to UTPD and put the blood alcohol kit in a designated evidence refrigerator, which was kept locked. According to Officer Tomlin, only "specified individuals" had permission to access the locker per department policy. Officer Tomlin testified that the evidence was later transported to the Tennessee Bureau of Investigation ("TBI").

On cross-examination, the defense showed a portion of the "sally port" video, where the Defendant was taken for intake at the county jail following her arrest and blood draw at the hospital. The recording was entered as an exhibit and shown to the jury. The recording began at 6:27 a.m. and was approximately eight minutes in length. Officer Tomlin agreed that as the handcuffed Defendant exited the patrol car, she was "showing dexterity" and appeared to be compliant with instructions. He confirmed that the Defendant also walked unassisted without stumbling or staggering while handcuffed, took off her socks and shoes one at a time, and removed a necklace.

TBI Special Agent Forensic Scientist Regina Aksanov was qualified as an expert in blood toxicology. She testified that the Defendant's blood alcohol kit was hand-delivered to the TBI's "blood alcohol drop box," which she described as resembling a mailbox outside a post office. According to Agent Aksanov, she did not have access to the locked drop box, which was only accessible by evidence technicians who had keys. Once a blood alcohol kit was placed inside the drop box, it could not be retrieved. Agent Aksanov indicated that evidence technicians were responsible for emptying the drop box, which they did on a daily basis. Laboratory policy required that the evidence technicians open each blood alcohol kit, remove the vials, verify the information on the vials, assign the kit a case number, and then dispose of the outer cardboard box.

Agent Aksanov obtained the Defendant's blood alcohol kit from the "evidence receiving unit" and took it to the toxicology section for testing. She verified the information on the vials and compared it to the Alcohol Toxicology Request Form. After Agent Aksanov described the testing process for the jury, she stated that she tested the blood sample in this case and prepared an official toxicology report. She confirmed that her laboratory number appeared on both the request form submitted by Officer Tomlin and her toxicology report. Her report noted that the Defendant's blood sample was collected at 4:57 a.m. on October 20, 2018, that the sample was received from UTPD by Lori James at 4:30 p.m. on October 26, 2018, and that Agent Aksanov tested the sample at 5:12 p.m. on November 28, 2018. Her report was admitted into evidence over the Defendant's objection to the chain of custody of the Defendant's blood sample. Agent Aksanov confirmed that her testing revealed the Defendant's blood alcohol concentration ("BAC") was 0.185 gram percent with a "measurement certainty at a minimum of a 99.73% confidence level." In addition, Agent Aksanov opined that the Defendant's BAC was likely higher at the time she was driving because the blood draw occurred about three-and-a-half hours after the traffic stop when the Defendant's body would have been "fully in the elimination" phase, assuming that she did not consume alcohol during that time.

According to Agent Aksanov, a BAC of .185 had "slowing effects on the body." A person with this BAC might have slurred speech, lack coordination, appear drowsy or sleepy, and struggle with multi-tasking. She also indicated that the individual might be unsteady on their feet, have bloodshot eyes, speak nonsensically, or act belligerently. A driver with this BAC might experience prolonged reaction time and might struggle with maintaining a consistent speed, maintaining their lane, and paying attention to road signs and other objects. Agent Aksanov said that she would expect a person with this BAC level to show some indication of impairment, though those signs depended on the individual and "how they exhibit[ed] impairment."

When asked if the delay in testing the Defendant's blood sample from October to November would have affected the results, Agent Aksanov said no, indicating that the vials were stored properly at the TBI facility and that the vials were sealed appropriately. According to Agent Aksanov, the vials "had the proper anticoagulant and . . . preservatives" in them to prevent blood from clotting in the tubes, "so the storage was not an issue." Agent Aksanov further explained that if the seal had been broken or tampered with, the evidence technician would have made a notation to that effect during the intake process, but there was no such notation in this case. Agent Aksanov opined that there was no reason to think the sample did not contain the Defendant's blood. She also believed that the blood alcohol kit in this case had not expired because each vial contained "plenty of blood," explaining that the vacuum in the tubes dissipated over time making it harder to draw blood into them.

On cross-examination, Agent Aksanov agreed that she did not know what happened to the blood alcohol kit during the six days following the blood draw before it was received by the TBI. She had no knowledge about how it might have been stored during that time. When asked if it was possible the TBI lab made a mistake in this case, Agent Aksanov replied that she was "confident that the sample was tested properly."

Following the conclusion of proof, the jury found the Defendant guilty of DUI per se and DUI by impairment in counts one and two. At this juncture, the Defendant orally moved the trial court to dismiss the sentence enhancement counts of the indictment in counts three and four because they included the dates of her prior offenses rather than the dates of her prior convictions as required by Tennessee Code Annotated section 55-10-411(b)(2). The trial court denied the motion, indicating that the Defendant had waived the issue by failing to object to the indictment before trial. The trial court also found that the indictment gave the Defendant fair notice of the prior convictions that the State planned to rely on to enhance her sentence.

During the sentence enhancement phase of the trial, the State introduced proof of the Defendant's four prior convictions over her standing objection to the validity of the indictment. Ultimately, the jury found that she had four prior DUI convictions as alleged in the indictment. Thereafter, the trial court merged the DUI convictions into a single count for DUI, fifth offense, a Class E felony. *See* Tenn. Code Ann. § 55-10-402(a)(4) (Repl. 2017).[2] The trial court sentenced the Defendant to two years as a Range I, standard offender, with all time suspended to supervised probation but 150 days, and imposed a $3,000 fine, along with court costs, and an eight-year driver's license revocation.

The Defendant filed a timely motion for a new trial, renewing her challenges to the chain of custody of the Defendant's blood sample and to the validity of the enhancement portion of the indictment in light of its inclusion of offense dates instead of conviction dates. The trial court denied the motion. The court reiterated that the Defendant's challenge to the indictment was likely untimely. The court also described the issue regarding the dates as being one of variance and ruled that any such variance was neither material nor prejudicial. This timely appeal followed.

[2] At the time the Defendant committed this offense, either a fourth or fifth conviction for DUI was classified as a Class E felony. However, a fifth offense DUI is presently classified as a Class D felony. *See* Tenn. Code Ann. § 55-10-402(a)(5) (Supp. 2022) (amended by 2019 Tenn. Pub. Acts, ch. 486, § 11, effective July 1, 2019).

II. ANALYSIS

A. Chain of Custody

The Defendant contends that the trial court erred in admitting the results of the blood alcohol test because the State failed to prove an adequate chain of custody of the Defendant's blood sample. Generally, Tennessee Rule of Evidence 901 governs the authentication of evidence: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Tenn. R. Evid. 901(a). To admit tangible evidence, the party offering the evidence must either introduce a witness who is able to identify the evidence or must establish an unbroken chain of custody. *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008) (citations omitted). This evidentiary rule ensures that "there has been no tampering, loss, substitution, or mistake with respect to the evidence." *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000) (quoting *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)).

"Even though each link in the chain of custody should be sufficiently established, this rule does not require that the identity of tangible evidence be proven beyond all possibility of doubt; nor should the State be required to establish facts which exclude every possibility of tampering." *Cannon*, 254 S.W.3d at 296 (citing *Scott*, 33 S.W.3d at 760). Absolute certainty of identification is not required. *See State v. Kilpatrick,* 52 S.W.3d 81, 87 (Tenn. Crim. App. 2000) (citing *Ritter v. State*, 462 S.W.2d 247, 250 (Tenn. Crim. App. 1970)).

Evidence is not necessarily precluded from admission if the State fails to call all of the witnesses who handled it. *Cannon*, 254 S.W.3d at 296 (citing *State v. Johnson*, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984)). According to our supreme court,

> when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence. On the other hand, if the State fails to offer sufficient proof of the chain of custody, the evidence should not be admitted . . . unless both identity and integrity can be demonstrated by other appropriate means.

Id. (internal citations and quotation omitted).

Whether the required chain of custody has been sufficiently established to justify the admission of evidence is a matter committed to the sound discretion of the trial court.

Cannon, 254 S.W.3d at 295 (citations omitted). The court's determination will not be overturned in the absence of a clearly mistaken exercise of that discretion. *State v. Holbrooks*, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998) (citing *State v. Beech*, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987)).

At trial, Agent Aksanov described the testing process, and she was then asked if she was the agent who analyzed the blood in this case. The defense lodged an objection to admission of Agent Aksanov's official toxicology report, challenging the chain of custody of the Defendant's blood sample. As grounds for the objection, the defense noted that the phlebotomist had not been called to establish her qualifications or to testify she in fact drew the Defendant's blood and that Officer Tomlin did not testify he saw the blood draw. The defense referenced the State's failure to introduce a "chain of custody document." The defense also made a vague reference to a "*Gibson*" case, without elaboration. The trial court overruled the objection, noting that Officer Tomlin had in fact testified that he was present for the Defendant's blood draw.

On appeal, the Defendant now claims that the trial court erred by admitting the result of her blood alcohol test into evidence because "[t]he State failed to prove the integrity of blood sample . . . because it did not establish the circumstances under which it was stored by UTPD and the TBI prior to testing." Citing portions of Officer Tomlin's testimony, the Defendant submits that "the State did not establish that [the Defendant's] blood sample was not misplaced, damaged, tampered with, or confused with another sample during the six-day gap it was unaccounted for at UTPD." Next, the Defendant observes that "the State failed to introduce evidence about how the blood sample was transported to the TBI." Finally, the Defendant notes that "the State offered no evidence about the storage or security of the blood sample after being removed from the drop box until Agent Aksanov tested it." The Defendant concludes that the error in admitting the results of the testing was not harmless and requires a new trial because "[t]he blood testing was critical to both the DUI by impairment and DUI per se convictions" and "[t]he other aspects of the State's case were not without defense challenge." The State responds that the trial court acted within its discretion because "the State's proof reasonably established the identity and integrity of the evidence," or alternatively, that "any error in the admission of this evidence [was] harmless as to the conviction for DUI by impairment."

The Defendant's objection at trial centered on the State's failure to call the phlebotomist to testify and the State's failure to introduce a "chain of custody document." Her arguments on appeal, on the other hand, involve the storage of the blood sample by UTPD and the TBI and its transport from one agency to another. It is well-settled that a party is bound by the evidentiary theory argued to the trial court and may not change or add theories on appeal. *State v. Alder*, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001).

Doing so generally results in waiver of the issue on appeal because this court may only consider the arguments presented to the trial court. *See, e.g., State v. Michael Jason Vance*, No. M2011-02469-CCA-R3-CD, 2013 WL 6001954, at *15 (Tenn. Crim. App. Nov. 12, 2013) ("These procedural rules support our long-standing policy of refraining from finding a trial court to have erred in matters not brought to its attention through proper objections at trial.").

Additionally, we note that on appeal, the Defendant cites to *State v. John Palladin Gibson*, 2018 WL 4811086, at *5-8 (Tenn. Crim. App. Oct. 3, 2018), and argues that her "case presents an error similar to that analyzed" therein.[3] However, the defense made only vague reference to a *Gibson* case when lodging an objection at trial. Notably, the Defendant offered no argument at trial regarding the storage of the sample at either UTPD or the TBI or its transport from UTPD to the TBI. It was insufficient to generically provide a case name, giving only a last name, and expect the trial court to fill in the blanks as to the details of the argument, particularly when the entirety of the Defendant's argument pertained to issues unrelated to *Gibson*. Moreover, when the trial court ruled on the Defendant's chain of custody objection as it was presented, it was incumbent upon the Defendant to ask for a ruling on any omitted *Gibson* issue if she wished to preserve that issue for appeal. *See* Tenn. R. App. P. 36(a) (stating that relief is not required where a party "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"). Thus, we conclude that the Defendant has waived appellate review of this issue by changing theories on appeal.

B. Sentence Enhancement Counts

On appeal, the Defendant challenges the sentence enhancement counts of the indictment that were used to increase her punishment from a Class A misdemeanor to a Class E felony for DUI, fifth offense. First, the Defendant argues that "the trial court erred by permitting the jury to consider the void sentence enhancements counts of the indictment that did not comply with the pleading requirements" of Tennessee Code Annotated section 55-10-411(b)(2). Specifically, the Defendant observes that the indictment included the offense dates rather than the dates of convictions as statutorily required. The State responds that this issue is waived because the Defendant failed to challenge the indictment on this basis before trial. The State further observes inclusion of the offense dates rather than the

[3] In *Gibson*, a panel of this court held that the State failed to establish an unbroken chain of custody where the State did not present any proof "about the whereabouts and security of the [d]efendant's blood sample from the time [the deputy] gave it to the Forensic Department until it was received in the TBI Laboratory's evidence drop box six days later." 2018 WL 4811086, at *7. The panel concluded that the proof failed to establish the normal procedures for handling the evidence to ensure the integrity of the evidence. *Id.* at *8.

dates of convictions for the prior DUI convictions did not mean that the Defendant was unaware of the accusations against her.[4]

Second, the Defendant argues that "the trial court lacked jurisdiction to sentence [the Defendant] as a DUI fifth offender because the enhancement counts of the indictment incorporated a facially void judgment to enhance [the Defendant's] sentence." Specifically, the Defendant, citing Tennessee Rule of Criminal Procedure 32(e),[5] submits that the trial court erroneously enhanced her sentence because the judgment from Mississippi was facially void in that it lacked a judge's signature. The Defendant concludes that because counts three and four of the indictment incorporated the void Mississippi judgment, those counts were a nullity to the extent they alleged that the Defendant had four–as opposed to three–prior DUI convictions. The State responds that the Defendant has waived this issue by raising it for the first time on appeal. In addition, the State contends that the Mississippi court documents were not facially invalid judgments of conviction because they were not judgments at all and a judgment was not required to prove the conviction.

Counts three and four of the indictment alleged that the Defendant had the following four prior DUI convictions:

> 1. That in Case No. @1003127, on the 15th day of May, 2012, in the General Sessions Court for Knox County, TN, the said TINISHA NICOLE SPENCER, ALIAS, was in violation and convicted of the offense of DUI,
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> 2. That in Case No. @995863, on the 9th day of March, 2012, in the General Sessions Court for Knox County, TN, the said TINISHA NICOLE SPENCER, ALIAS, was in violation and convicted of the offense of DUI,
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> 3. That in Case No. 6-112076, on the 15th day of September, 2008, in the Justice Court for Jones County, Mississippi, the said TINISHA NICOLE SPENCER, ALIAS, was in violation and convicted of the offense of DUI,

[4] We note that the Defendant also argues in her brief that "[t]he trial court was incorrect in its characterization of the issue" as one of variance. The trial court, sua sponte, addressed the issue in the context of variance at the motion for new trial hearing. However, the basis for the trial court's ruling at trial focused on constitutional notice requirements. Because the Defendant has consistently framed her issue as one of compliance with the statutory pleading requirements for DUI offenses, we will limit our analysis to this issue.

[5] Rule 32 of the Tennessee Rules of Criminal Procedure states that a "judgment of conviction shall be signed by the judge and entered by the clerk."

> 4. That in Case No. 2004MM256, on the 24th day of October, 2004, in the Fortieth Judicial District Court for St. John The Baptist Parish, Louisiana, the said TINISHA NICOLE SPENCER, ALIAS, was in violation and convicted of the offense of Operating a Vehicle While Intoxicated[.]

The State, during the sentence enhancement phase, introduced two judgments from the Knox County General Sessions Court, one judgment from a Louisiana state court, and an "abstract of court record" and "uniform traffic ticket" from a Mississippi state court. The documents showed that the indictment listed the offense dates rather than the dates of conviction: respectively, the conviction dates for the Defendant's prior DUI convictions were June 12, 2012, for the first and second offenses; December 11, 2008, for the third offense; and January 18, 2005, for the fourth offense.

In Tennessee, an indictment is sufficient that states "the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in a manner so as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." Tenn. Code Ann. § 40-13-202. Generally, an indictment is valid "if it provides sufficient information '(1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for entry of a proper judgment, and (3) to protect the accused from double jeopardy.'" *State v. Duncan*, 505 S.W.3d 480, 484-85 (Tenn. 2016) (quoting *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997)). "So long as an indictment performs its essential constitutional and statutory purposes, a defect or omission in the language of the indictment will not render the judgment void." *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000) (citing *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn. 1998)). The validity of an indictment is a question of law and, therefore, our review is de novo. *Hill*, 954 S.W.2d at 727.

A defendant subject to enhanced penalties as a multiple offender must be given notice that they are subject to mandatorily increased punishment for a second or subsequent DUI offense in order to comply with due process. *See State v. Daniels*, 656 S.W.3d 378, 391 (Tenn. Crim. App. 2022). When alleging the fact of prior convictions, the defendant must be apprised of sufficient facts to enable preparation to defend the prior convictions and at the same time enable the court to determine whether the statute imposing the greater penalty applies. *Frost v. State*, 330 S.W.2d 303, 306 (Tenn. 1959) (citation omitted).

A motion alleging a defect in the indictment must be made prior to trial, "but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense." Tenn. R. Crim. P. 12(b)(2)(B). Other, lesser defects in the indictment, including "defects in the

indictment that go to matters of form rather than substance," must be challenged prior to trial. *State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997). Further, Rule 12 provides, "Unless the court grants relief for good cause, a party waives any defense, objection, or request by failing to comply with . . . rules requiring such matters to be raised pretrial[.]" Tenn. R. Crim. P. 12(f)(1).

1. Offense Dates

In the prosecution of second or subsequent DUI offenders, Tennessee Code Annotated section 55-10-411(b)(2) requires that the indictment or charging instrument allege the prior convictions "setting forth the time and place of each prior conviction or convictions" when dealing with Tennessee convictions and the "time, place, and state of the prior conviction" when listing out-of-state convictions. The Defendant acknowledges that this court has addressed this precise issue in *Daniels* and held that the defendant was not entitled to relief. The *Daniels* court first observed that the defendant had failed to file a motion to dismiss the sentence enhancement counts of the indictment or seek a bill of particulars prior to trial. 656 S.W.3d at 392. The *Daniels* court then concluded that "[t]he fact that the indictment stated the dates of the prior offenses rather than the dates of the prior convictions [did] not mean that [d]efendant was not apprised of the accusation against him." *Id.*

The enhancement counts in this case correctly identified the Defendant's prior convictions, including the offense dates, the case numbers, the convicting courts, and the places of conviction, giving the Defendant an opportunity to contest them. The Defendant argues that we should decline to follow *Daniels*. We reject her request to do so, in part because *Daniels* is controlling authority on this issue. *See* Tenn. Sup. Ct. R. 4(G)(2) (stating that opinions reported in the official reporter "shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction").

In *Nixon*, this court explained that the objections which are subject to waiver include "defects in the indictment that go to matters of form rather than substance," including statutory requirements such as that the indictment must be signed by the district attorney general and that the indictment identify the person charged, the time of the offense, and the location of the offense. 977 S.W.2d at 121. This defect alleged by the Defendant goes to a matter of form rather than substance. The trial court correctly determined that the indictment gave the Defendant fair notice of which prior convictions would be used for sentence enhancement. We agree with the trial court and the State that the Defendant's challenge in this regard to the sentence enhancement counts of the indictment should have

been raised prior to trial. Further, we see no reason to depart from or modify *Daniels* as it relates to this question. This issue is waived.

2. Mississippi Conviction

The Defendant challenges for the first time on appeal the inclusion of the Mississippi conviction, and she frames the issue as a challenge to the trial court's jurisdiction to enter judgment against her as a multiple DUI offender. *See* Tenn. R. Crim P. 12(b)(2)(B) (providing that "at any time while the case is pending, the court may hear a claim that the indictment, presentment or information fails to show jurisdiction in the court or to charge an offense"). Controlling authority provides that a defendant cannot waive objections to a lack of subject matter jurisdiction or the failure of an indictment to charge an offense. *Nixon*, 977 S.W.2d at 121. *But see Duncan*, 505 S.W.3d at 489 n.10 (citing *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) and questioning whether a jurisdictional attack on an indictment can be raised for the first time on appeal).

A valid indictment is essential to establish jurisdiction for prosecution. *Dykes*, 978 S.W.2d at 529 (citations omitted). Again, the enhancement counts in this case correctly identified the Defendant's prior convictions, including the offense dates, the case numbers, the convicting courts, and the places of conviction, giving the Defendant an opportunity to contest them. Thus, the notice was sufficient for constitutional purposes and did not deprive the trial court of jurisdiction to impose an enhanced sentence as a multiple DUI offender. *See Daniels*, 656 S.W.3d at 392.

Though the Defendant phrases her issue as one of jurisdiction, she is, in essence, challenging the method in which the State proved her prior Mississippi conviction. Any attack to the form in which her prior conviction was proven should have been raised at the trial. *See, e.g., State v. Pierre Jackson*, No. W2006-02127-CCA-R3-CD, 2008 WL 2053652, at *5 (Tenn. Crim. App. May 12, 2008) (holding that the defendant waived his collateral attack on prior DUI convictions by failing to lodge a contemporaneous objection). The State introduced the documents pertaining to the Mississippi conviction at trial without objection by the Defendant. Moreover, even if her argument on appeal as to the form had merit, which we are not saying that it does, dismissal of the indictment would not have been the appropriate remedy as the Defendant suggests, but rather merely exclusion of consideration of the Mississippi conviction for enhancement purposes. *See State v. Jason A. Albright*, No. M2009-00640-CCA-R3-CD, 2010 WL 2160356, at *3 (Tenn. Crim. App. May 28, 2010) (reversing a DUI, third offense conviction because one of the prior convictions was facially invalid and should not have been used to enhance, and directing the trial court to modify the judgment to reflect a conviction for DUI, second offense). Furthermore, there would be no need to remand for resentencing because, as

noted above, the law at the time of the Defendant's convictions imposed the same punishment for persons convicted of their fourth and fifth DUI offense. *See* Tenn. Code Ann. § 55-10-402(a)(4) (Repl. 2017). The Defendant is not entitled to relief.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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KYLE A. HIXSON, JUDGE