[Cite as *State v. Stroughter*, 2019-Ohio-935.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO, CITY OF YOUNGSTOWN,

Plaintiff-Appellee,

v.

JERMAINE STROUGHTER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0158

Criminal Appeal from the
Youngstown Municipal Court of Mahoning County, Ohio
Case Nos. 17 TRC 2704, 17 TRC 2825

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Dana Lantz, City Prosecutor, 26 South Phelps Street, Fourth Floor, Youngstown, Ohio 44503. No Brief Filed for Plaintiff-Appellee and

Atty. Andrew Zellers, Richard G. Zellers & Associates, Inc., 3810 Starr Centre Drive, Canfield, Ohio 44406, for Defendant-Appellant.

Dated: March 7, 2019

Robb, J.

{¶1} Defendant-Appellant Jermaine Stroughter appeals from his conviction in Youngstown Municipal Court of two counts of driving under the influence, one count of failure to reinstate a suspended license, and one count of driving under suspension. Appellant sets forth two arguments in this appeal. First, he argues at the plea colloquy he was not correctly advised his guilty plea waived the right to a jury trial. Next, he contends at the sentencing hearing he was not advised of his Crim.R. 32(B) right to appeal. There is no merit with either of Appellant's arguments. Neither advisement was required because the charged crimes and the pled to crimes were not serious offenses; the crimes were petty misdemeanors. Ohio law does not require either of those advisements for non-serious offenses. Appellant's convictions are affirmed.

Statement of the Case

{¶2} On June 9, 2017, Appellant was stopped in Youngstown, Ohio for failing to use a turn signal when changing lanes. During the stop, the officer noticed an open container in the vehicle and a strong odor of alcohol emanating from Appellant. Other indicators of alcohol impairment were observed. Field sobriety tests were administered. Indicators of alcohol impairment were observed during all three field sobriety tests. At that point, Appellant was placed under arrest for operating a vehicle while intoxicated. At the Ohio State Highway Patrol Post Appellant submitted to a breath test. Appellant's breath test result was 0.171; Appellant had a prohibited breath alcohol concentration.

{¶3} Thereafter, Appellant was charged with two counts of driving while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(h), both first-degree misdemeanors; one count of driving under suspension in violation of R.C. 4510.037(J), and failure to use a turn signal in violation of R.C. 4511.39, a minor misdemeanor. This case was assigned case number 17TRC02704Y.

{¶4} Approximately one week later, Appellant was stopped again in Youngstown, Ohio for failing to use his turn signal. During the stop indicators of intoxication were observed by the officer. Field sobriety tests were administered and the results indicated

impairment. Appellant was arrested and at the Ohio State Highway Patrol Post Appellant submitted to a breath test. The BAC test result was a 0.162; Appellant had a prohibited breath alcohol concentration.

{¶5} Appellant was charged with two counts of driving while under the influence of alcohol in violation of R.C. 4511.191(A)(1)(a) and R.C. 4511.19(A)(1)(h), both first-degree misdemeanors; one count of ALS suspension in violation of R.C. 4510.14, a first-degree misdemeanor; failure to use a seat belt in violation of R.C. 4513.263(B)(1); and failure to use a turn signal in violation of R.C. 4511.39, a minor misdemeanor. This case was assigned case number 17TRC02825Y.

{¶6} The two cases were heard together and a plea agreement was reached in each case. In case number 17TRC02704Y, Appellant pled guilty to first-degree misdemeanor driving under the influence in violation of R.C. 4511.19(A)(1)(a) and an unclassified misdemeanor failure to reinstate a suspended license in violation of R.C. 4510.21(A)(C). The turn signal and driving under the influence with a prohibited breath alcohol concentration (R.C. 4511.19(A)(1)(h)) charges were dismissed. In case number 17TRC02825Y, Appellant pled guilty to first-degree misdemeanor driving under the influence in violation of R.C. 4511.19(A)(1)(a) and first-degree misdemeanor ALS suspension in violation of R.C. 4510.14. The seat belt, turn signal and driving under the influence with a prohibited alcohol concentration charges were dismissed.

{¶7} During the plea colloquy, the trial court explained to Appellant that by pleading guilty to the four offenses set forth in the plea agreement, he was admitting he committed those four offenses. 8/24/17 Plea Hearing Tr. 4. The trial court also explained the rights Appellant was waiving by entering a guilty plea, including the "right to have a trial." 8/24/17 Plea Hearing Tr. 4. Following the advisements, Appellant entered a guilty plea and the trial court accepted it. 8/24/17 Plea Hearing Tr. 5.

{¶8} Appellant was sentenced to an aggregate sentence of 330 days. 10/13/17 17TRC02704Y J.E.; 10/3/17 17TRC02825Y J.E. He received 60 days and $1,000 fine for the driving under the influence conviction in case number 17TRC02704Y. 10/13/17 17TRC02704Y J.E. Appellant received a $100 fine for the failure to reinstate conviction. 10/13/17 17TRC02704Y J.E. He received 90 days and a $1,000 fine for the driving under the influence conviction in case number 17TRC02825Y. 10/3/17 17TRC02825Y J.E. He

received 180 days and a $100 fine for driving under suspension. 10/3/17 17TRC02825Y J.E. The sentences were ordered to be served consecutive to each other. 10/13/17 17TRC02704Y J.E.; 10/3/17 17TRC02825Y J.E. Appellant also received 18 months of supervised probation and a 1 year license suspension. 10/13/17 17TRC02704Y J.E.; 10/3/17 17TRC02825Y J.E.

{¶9} Appellant timely appealed his convictions.

First Assignment of Error

"The trial court committed an error when it failed to advise the Defendant-Appellant of his right to a jury trial, thus violating his 5th, 6th, and 14th Amendment rights under the U.S. Constitution and his rights under Article I, Section 10 of the Ohio Constitution."

{¶10} Appellant argues the trial court failed to comply with Crim.R. 11(C) when it advised him that by pleading guilty he waived his "right to have a trial." Appellant argues in order to comply with Crim.R. 11(C), the trial court had to use the word "jury" when explaining a guilty plea waives the right to a jury trial. Appellant cites Seventh District Court of Appeals precedent to support his position.

{¶11} Recently, we held a trial court does not strictly comply with the mandates of Crim.R. 11(C) when it fails to advise an offender of his constitutional right to a jury by informing the offender of "the right to a speedy and public trial" where no reference to a jury was made elsewhere at the plea hearing. *State v. Thomas*, 7th Dist. No. 17 BE 0014, 2018-Ohio-2815, ¶ 16. In order for the offender to be properly advised of the right to jury trial, the trial court must use the phrase "jury trial" in explaining the offender waives the right to a jury trial by entering the plea or, at minimum, use the word "jury" or reference the jury in explaining one of the other rights the offender waives by pleading guilty or no contest. *Id.* at ¶ 12-16.

{¶12} The holding in *Thomas* is specific as to Crim.R. 11(C); *Thomas* involved felonies and the required advisements for felonies are set forth in Crim.R. 11(C). In the case at hand, the offenses are misdemeanors. The Ohio Supreme Court has explained Crim.R. 11 sets forth distinct procedures based on the classification of the offense involved. *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 11. Misdemeanors are not governed by Crim.R. 11(C). Rather, Crim.R. 11(D) and (E) are applicable and those sections provide:

> (D) Misdemeanor Cases Involving Serious Offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.
>
> (E) Misdemeanor Cases Involving Petty Offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

Crim.R. 11(D) and (E).

{¶13} Consequently, what is required for the Crim.R. 11 advisements for misdemeanors is dependent on whether the misdemeanors are considered serious offenses or petty offenses.

{¶14} A petty offense is defined in Crim.R. 2(D) as "a misdemeanor other than [a] serious offense." *Jones*, at ¶ 11. Subsection (C) of that rule defines a "serious offense" as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Crim.R. 2(C).

{¶15} R.C. 4511.19(G) and R.C. 2929.24(A)(1) indicate the driving under the influence charges and convictions are first-degree misdemeanors and the maximum sentence allowable by law is no more than six months. Driving under suspension is also a first-degree misdemeanor and is subject to a maximum six-month sentence. R.C. 2929.24; R.C. 4510.037(J). Failure to reinstate a license is an unclassified misdemeanor and is not subject to a jail term. R.C. 4510.21(C)(1). The failure to use a signal offense is a minor misdemeanor and the seat belt violation is only subject to a fine. R.C. 2929.26(D) (minor misdemeanor is not subject to a jail term); R.C. 4513.263(G)(1) (seat belt fine).

{¶16} Consequently, the charged and pled to offenses are petty offenses, not serious offenses.

{¶17} Pursuant to Crim.R. 11(E) a trial court cannot accept a guilty plea or no contest plea without first informing the defendant of the effect of the specific plea being entered. *Jones*, at ¶ 11, 20. In advising about the effect of the specific plea being entered, the trial court is not required to advise the offender that by entering the plea he or she is waiving the right to a jury trial. See *id*. at ¶ 22 (The concepts of the effect of the plea and right to a jury trial are distinct. "Thus, a statement about the effect of a plea is separate from statements relating to a maximum penalty and the right to jury trial.").

{¶18} Consequently, the rule espoused in *Thomas* is not applicable in the case at hand. *See Twinsburg v. Milano*, 2018-Ohio-1367, 110 N.E.3d 781, ¶ 10 (9th Dist.) (Pleading guilty to a "petty offense" required the trial court to only inform her of the effect of her guilty plea before accepting it. "The court was not required to tell her that she had the right to subpoena witnesses, confront her accusers, or demand a jury trial."). The trial court was only required to inform Appellant of the effect of his guilty plea. *Jones*, at ¶ 20, 22, 51. The record indicates the trial court complied with this requirement. 8/24/17 Plea Hearing Tr. 4.

{¶19} For the above stated reasons, this assignment of error is meritless.

Second Assignment of Error

"The trial court committed an error when it failed to advise the Defendant-Appellant of his appellate rights under Crim.R. 32."

{¶20} Appellant argues the trial court erred when it failed to advise him at the sentencing hearing of his right to appeal pursuant to Crim.R. 32(B).

{¶21} Appellant is correct; the sentencing transcript is devoid of an advisement on the right to appeal.

{¶22} Crim.R. 32(B) provides, in relevant part:

> (1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

> (2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

Crim.R. 32(B)(1)(2).

{¶23} The language of this rule clearly indicates Crim.R. 32(B) only applies to serious offenses. As aforementioned, Crim.R. 2(C) defines "serious offense" to include felonies and misdemeanors with a penalty involving confinement for more than six months. See also *State v. Bixby*, 2d Dist. No. 2017-CA-11, 2017-Ohio-7927, ¶ 5. The crimes charged and pled to in this case are not serious offenses. Rather, they are petty offenses. Consequently, Crim.R. 32(B) is not applicable. *State v. Seaunier*, 3d Dist. No. 14-10-12, 2011-Ohio-658, ¶ 14 (Trial court was not required to inform offender of his appellate rights under Crim.R. 32(B) because offender was convicted of first-degree misdemeanor aggravated menacing for which the penalty prescribed by law does not include confinement for more than six months and thus, the offense constituted a petty offense, not a serious offense.)

{¶24} Regardless, even if the requirement in Crim.R. 32(B) was applicable, Appellant has failed to show prejudice. Crim.R. 52(A) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Appellant timely appealed the October 3, 2017 judgment entries on November 3, 2017. Thus, any error committed by the trial court in failing to advise Appellant of his right to appeal is harmless and not reversible error. *State v. McCrae*, 5th Dist. No. CT2017-0008, 2017-Ohio-2968, ¶ 18-19; *State v. Abrams*, 12th Dist. Nos. CA2017-03-018 and CA2017-03-019, 2017-Ohio-8536, ¶ 24*; State v. Dews*, 2d Dist. No. 2015-CA-2, 2016-Ohio-4975, ¶ 6; *State v. Powell*, 9th Dist. No. 27830, 2016-Ohio-2820, ¶ 24-25; *State v. D.H.*, 10th Dist. No. 15AP-525, 2015-Ohio-5281, ¶ 6; *State v. Tunison*, 6th Dist. No. WD-13-046, 2014-Ohio-2692, ¶ 19; *State v. Thompson*, 4th Dist. Nos. 10CA5 and 10CA13, 2012-Ohio-3188, ¶ 18; *State v. Bauldwin*, 8th Dist. No. 96703, 2011-Ohio-6435, ¶ 15; *State v. Duncan*, 3d Dist. No. 7-02-10, 2003-Ohio-3879, ¶ 12; *State v. Joiner*, 1st Dist. No. C-840784, 1985 WL 8916. *Compare State v. Humr*, 11th Dist. No. 2008-P-0088, 2009-Ohio-5632, ¶ 36-38 (Failure to advise of Crim.R. 32(B) rights was found to violate

appellant's due process rights. However, the appellate court was already reversing the case for other sentencing errors.).

{¶25} Consequently, for both of those reasons, this assignment of error lacks merit.

Conclusion

{¶26} Both assignments of error lack merit. Appellant's convictions are affirmed.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Youngstown Municipal Court of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.