

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

CITY OF NILES,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2004-T-0004
LEE W. YEAGER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Niles Municipal Court, Case No. 03 TRD 2085.

Judgment: Affirmed.

Bruce W. Bennett, Niles City Prosecutor, Niles Municipal Court, 15 East State Street, Niles, OH 44446 (For Plaintiff-Appellee).

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellant).

DONALD R. FORD, P.J.,

{¶1} Appellant, Lee W. Yeager, appeals the December 5, 2003 judgment entry of the Niles Municipal Court, in which he was found guilty of driving in marked lanes and ordered to pay a fine of \$20 plus costs.

{¶2} On November 13, 2003, appellant was issued a citation for driving in a marked left turn lane, in violation of Niles City Ordinance No. 331.08. A not guilty plea

was entered on appellant's behalf on November 19, 2003. A bench trial was held on December 5, 2003, and appellant represented himself.

{¶3} Officer John Marhulik ("Marhulik") of the Niles Police Department testified that he was on school patrol at 7:30 a.m., on November 13, 2003, at the South Main and Third Street intersection. He was watching traffic when he heard a vehicle, which had a loud muffler, pass a semi-tractor trailer in the left turn lane and continue straight through the intersection. The semi was proceeding south through the intersection. According to Marhulik, the traffic light at the intersection had just turned green, and the semi was moving slowly through the intersection. He stated that he "watched the vehicle come all of the way from Second Street *** because *** [he] heard the loud muffler and [the driver] proceeded to go southbound from the left turn lane [through the intersection] to turn on to Third Street." Marhulik identified the driver of the car as appellant.

{¶4} Appellant took the stand in his own defense. He related that he approached a light, which was red, and "there was a stopped eighteen wheeler and a four wheeled automobile sitting at the light. I noticed that the four wheeler that was behind the eighteen wheeled truck, the white reverse lights came on and he turned around and looked at me, like come around me. I then proceeded and looked at the back of this truck and saw that the rear flashers were on, on the back of this eighteen wheeled truck. I then proceeded to come around the vehicle that was waiting to back up toward me and proceeded around the truck and passed around the truck. The light was green, no one was moving, and I proceeded around the truck with safety."

{¶5} In an entry dated December 5, 2003, appellant was found guilty of the offense and fined \$20, plus costs. Appellant timely filed the instant appeal and now raises a single assignment of error for our review¹:

{¶6} “The trial court erred in finding [appellant] ‘guilty’ of the ‘driving in marked lanes’ traffic offense; entering judgment thereon; and imposing sentence therefor.”

{¶7} For his lone assignment of error, appellant alleges that the trial court erred in finding him guilty of and sentencing him for driving in marked lanes because the complaint failed to set forth the specific subsection under which appellant was charged. Appellant also claims that the trial court erred because it did not comply with the provisions contained in Traf.R. 8.

{¶8} As an initial matter, we note that appellant did not properly object to the failure to set forth the specific subsection under which appellant was charged and also did not object to the trial court’s failure to comply with the provisions contained in Traf.R. 8. Appellant’s failure to raise the issues in the trial court constitutes a waiver of the error claimed. *State v. Comen* (1990), 50 Ohio St.3d 206, 211. Generally, “an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.” *State v. Campbell* (1994), 69 Ohio St.3d 38, 40, quoting *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus.

1. We remanded the matter to the trial court since the December 5 entry did not comply with the criteria for a final judgment as set forth in *State v. Ginocchio* (1987), 38 Ohio App.3d 105, or Crim.R. 32(C). The entry did not articulate the specific ordinance or statutory violation that appellant was charged with and was found guilty of committing. The trial court issued a June 18, 2004 nunc pro tunc entry that complied with the criteria for a final judgment and resolved our jurisdictional concerns. The appeal then proceeded.

{¶9} Furthermore, the record in the instant matter contains no transcript of appellant's traffic arraignment, and appellant has the burden of demonstrating his error. "An appellant has a duty to exemplify any alleged errors by reference to matters in the record, and that duty is discharged by the filing of a verbatim transcript, a narrative statement of the evidence as provided in App.R. 9(C), or an agreed statement of the record filed pursuant to App.R. 9(D)." *In re Price* (Mar. 25, 2002), 12th Dist. Nos. CA2001-02-35 and CA-2001-04-085, 2002 WL 449455, at 4, citing *Djurich v. LaHood* (1990), 66 Ohio App.3d 332. Since appellants have failed to present a transcript from the hearing or a suitable alternative with which to demonstrate the alleged error, this court presumes regularity in the trial court's proceedings on the matter. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Hence, since appellant did not provide this court with a transcript of the traffic arraignment or a statement pursuant App.R. 9(C) or (D), if a transcript was unavailable, he has not demonstrated his claimed error.

{¶10} Nonetheless, in the interests of justice we will briefly address the issues presented by appellant. First, appellant maintains that the complaint did not set forth the specific subsection under which appellant was charged. Niles Codified Ordinances 331.08, which is similar to R.C. 4511.33, states:

{¶11} "Whenever any roadway has been divided into two or more clearly marked lanes for traffic or wherever traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

{¶12} “(a) A vehicle shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.

{¶13} “(b) Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or when preparing for a left turn, or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is posted with signs to give notice of such allocation.

{¶14} “(c) Official signs may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway, and drivers of vehicles shall obey the directions of such signs.

{¶15} “(d) Official traffic control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.”

{¶16} A traffic ticket that complies with Traf.R. 3 standards will serve as the complaint and summons for a traffic violation. In *Cleveland v. Austin* (1978), 55 Ohio App.2d 215, 220, the court stated that “*** the ticket need not contain every element of the offense in its description. It will satisfy legal requirements if it apprises the defendant of the nature of the charge [t]ogether with a citation of the statute or ordinance involved.”

{¶17} The traffic ticket in *Austin* was upheld as legally sufficient even though it charged the defendant with fleeing a police officer, in violation of R.C. 4511.02, without stating the element of willfulness. Moreover, an instrument charging a minor offense will not be judged as strictly as one charging a major offense, and the focus of inquiry is whether the defendant had notice of the nature and cause of the accusation. *Youngstown v. Starks* (1982), 4 Ohio App.3d 269, 271, citing *Strongsville v. McPhee* (1944), 142 Ohio St. 534, 538.

{¶18} Here, Marhulik issued the citation to appellant for violating Niles City Ordinance 331.08. Therefore, appellant knew from the information stated on the traffic ticket the nature and cause of the accusation. The traffic ticket gave the appropriate statutory designation, even though it did not specifically state which subsection. It is our view that the citation put appellant on sufficient notice of the charge against him and did not mislead him in preparing his defense. Hence, appellant's first issue is meritless.

{¶19} Appellant next argues that the trial court erred because it did not comply with the provisions contained in Traf.R. 8. Traf.R. 8 provides:

{¶20} "(A) Arraignment time. Where practicable, every defendant shall be arraigned before contested matters are taken up. Trial may be conducted immediately following arraignment.

{¶21} "(B) Arraignment procedure. Arraignment shall be conducted in open court and shall consist of reading the complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto. The defendant shall be given a copy of the complaint, or shall acknowledge receipt thereof, before being called upon to plead and may in open court waive the reading of the complaint.

{¶22} “(C) Presence of defendant. The defendant must be present at the arraignment, but the court may allow the defendant to enter a not guilty plea at the clerk’s office in person, by his attorney in person, or by his attorney by mail, within four days after receipt of the ticket by the defendant.

{¶23} “(D) Explanation of rights. Before calling upon a defendant to plead at arraignment the judge shall cause him to be informed and shall determine that defendant knows and understands:

{¶24} “(1) That he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Criminal Rule 44, the right to have counsel assigned without cost to himself if he is unable to employ counsel;

{¶25} “(2) That he has a right to bail as provided in Rule 4;

{¶26} “(3) That he need make no statement at any point in the proceeding; but any statement made may be used against him;

{¶27} “(4) That he has, where such right exists, a right to jury trial and that he must, in petty offense cases, make a demand for a jury pursuant to Criminal Rule 23;

{¶28} “(5) That if he is convicted a record of the conviction will be sent to the Bureau of Motor Vehicles and become part of his driving record.”

{¶29} We would note that the court’s entry in this case includes the following printed words: “Defendant present with/without Counsel. All rights pursuant to Criminal Rules 10 & 11 and Traffic Rules 8 & 10 explained.”

{¶30} Here, even if the trial court violated Traf.R. 8(B) by not calling upon appellant to enter a plea, neglecting to provide him with a copy of the complaint or

asking if he had received one, and failing to inform him that he need not make any statements and any statements that he made could later be used against him, these deficiencies do not constitute reversible error. Appellant's second issue lacks merit.

{¶31} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Niles Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, J.,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment,

concur.