[Cite as *State v. Wellman*, 2007-Ohio-6107.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2006 CA 00091
WESLEY WELLMAN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Licking County Municipal Court Case No. 06 CRB 01217
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	November 2, 2007
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
TRICIA M. KLOCKNER ASSISTANT PROSECUTOR 40 West Main Street 4th Floor Newark, Ohio 43055	SCOTT M. GRACE 98 North Union Street Delaware, Ohio 43015

Edwards, J.

{¶1} Defendant-appellant Wesley Wellman appeals from the July 21, 2006, Judgment Entry of the Licking County Municipal Court. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 5, 2006, appellant was arrested and charged with operating a motor vehicle while under the influence of drugs and/or alcohol in violation of R.C. 4511.19 and one count of failure to control in violation of R.C. 4511.202. Appellant submitted to a breath alcohol test as requested by the arresting officer and blew a .139%. As a result, appellant was placed under an administrative license suspension (ALS) under R.C. 4511.191(C). Appellant was also charged with operating a motor vehicle with a prohibited blood alcohol concentration.

{¶3} On April 6, 2006, appellant filed a motion to preserve and produce any and all audio and/or video recordings relevant to the case sub judice. Pursuant to an Entry filed the same day, the trial court granted such motion. On April 6, 2006, appellant also filed an appeal of his administrative license suspension. The same was never ruled on by the trial court.

{¶4} Subsequently, appellee, on June 28, 2006, filed a motion to dismiss all of the pending charges against appellant without prejudice since the videotape in the case sub judice had been destroyed. Appellee, in its motion, indicated that the same might have been destroyed after "the motion to preserve evidence had been ordered." As memorialized in an Entry filed on June 29, 2006, the charges against appellant were dismissed without prejudice.

{¶5} On June 30, 2006, appellant filed a motion to terminate the ALS pursuant to R.C. 4511.197 because the charges against him had been dismissed. Appellee filed a response in opposition to such motion. Following a hearing held on July 19, 2006, the trial court denied appellant's motion. The trial court, in its July 21, 2006, Judgment Entry, held that R.C. 4511.197(D) requires that an ALS be set aside if the person charged was later found not guilty of the charge that resulted in the chemical test being taken. The trial court noted that appellant was never found not guilty, but rather that the charges against appellant were dismissed on appellee's motion.

{¶6} Appellant now raises the following assignments of error on appeal:

{¶7} "I. THE TRIAL COURT ERRED WITH PREJUDICE AGAINST APPELLANT BY FAILING TO TERMINATE THE ADMINISTRATIVE LICENSE SUSPENSION IMPOSED UNDER RC 4511.191(C), DESPITE THE UNDERLYING CHARGES BEING DISMISSED BY THE STATE AND APPELLANT RETAINING HIS LEGAL STATUS OF 'NOT GUILTY' UNDER RC 4511.191(2).

{¶8} "II. THE TRIAL COURT ERRED WITH PREJUDICE TO APPELLANT BY FAILING TO CONSTRUE AMBIGUOUS STATUTORY LANGUAGE AGAINST THE STATE AND IN FAVOR OF THE ACCUSED."

{¶9} Appellant, in his first assignment of error, argues that the trial court erred in failing to terminate the ALS imposed pursuant to R.C. 4511.191(C) after the underlying charges against him were dismissed upon motion of appellee. We agree.

{¶10} R.C. 4511.191(C) provides the right to appeal an ALS suspension pursuant to R.C. 4511.197. R.C. 4511.197(D) provides in relevant part as follows: "(D) a person who appeals a suspension under division (A) of this section has the burden of

providing, by a preponderance of the evidence, that one or more of the conditions specified in division (C) of this section has not been met. *If, during the appeal, the judge or magistrate of the court or the mayor of the mayor's court determines that all of those conditions have been met, the judge, magistrate, or mayor shall uphold the suspension, continue the suspension,* and notify the registrar of motor vehicles of the decision on a form approved by the registrar." (Emphasis added).

{¶11} R.C. 4511.197 further states, in relevant part, as follows: "(D) …If the suspension was imposed under division (C) of section 4511.191 of the Revised Code in relation to an alleged misdemeanor violation of division (A) or (B) of section 4511.19 of the Revised Code or of a municipal OVI ordinance and it is continued under this section, the suspension shall terminate if, for any reason, the person subsequently is found not guilty of the charge that resulted in the person taking the chemical test or tests." (Emphasis added).

{¶12} In the case sub judice, the ALS was imposed pursuant to R.C. 4511.191(C). At issue in the case sub judice is whether the ALS should have been terminated after the charges against appellant were dismissed upon appellee's motion or, as appellee alleged before the trial court, whether the ALS should have remained in effect since appellant was never found "not guilty of the charge that resulted in [appellant] taking the chemical test…"

{¶13} However, reading these sections of R.C. 4511.197 in pari material, it is clear that, in order for a trial court to "continue" the suspension under R.C. 4511.197(D), the trial court would have had to overrule appellant's ALS appeal. The trial court, however, did not do so. The ALS suspension, therefore, was never continued. We find,

therefore, that R.C. 4511.197(D) is not applicable and it is irrelevant whether or not appellant was found not guilty.

{¶14} Moreover, we further find that appellant's due process rights were violated. In *State v. Norman*, Knox App. No. 2005CA00022, 2005-Ohio-5791, this Court held that a defendant who appeals the administrative license suspension (ALS) imposed after he is charged with operating a vehicle under the influence of alcohol is entitled to an evidentiary hearing on his appeal, even though the statute governing such appeals did not establish a procedure to be followed by the reviewing court; opportunity to be heard was inherent in an appeal, and the statue placed a burden on the motorist to prove by a preponderance of the evidence that one or more of the conditions for license suspension was not met. Id. at ¶ 17.

{¶15} As was true in *Norman,* appellant in the case sub judice was denied an opportunity to be heard and to prove by a preponderance of the evidence that one or more of the conditions for license suspension set forth in R.C. 4511.197(C) was not met. Appellant filed an appeal of his ALS on April 6, 2006. The trial court, however, never ruled on the same and, on June 29, 2006, the charges against appellant were dismissed without prejudice. Appellant's due process rights were thus violated.

{¶16} Appellant's first assignment of error is, therefore, sustained.

II

{¶17} Appellant, in his second assignment of error argues that the trial court erred in failing to construe the ambiguous language of R.C. 4511.197 in his favor.

{¶18} Based on our disposition of appellant's first assignment of error, appellant's second assignment of error is moot.

{¶19} Accordingly, the judgment of the Licking County Municipal Court is reversed and this matter is remanded to the trial court with instructions to dismiss appellant's ALS suspension and to notify the Ohio Bureau of Motor Vehicles of such dismissal.

By: Edwards, J.

Gwin, P.J. and

Farmer, J. concur

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JUDGES

JAE/0329

[Cite as *State v. Wellman*, 2007-Ohio-6107.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WESLEY WELLMAN	:	
Defendant-Appellant	:	CASE NO. 2006 CA 00091

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Municipal Court is reversed and this matter is remanded to the trial court with instructions to dismiss appellant's ALS suspension and to notify the Ohio Bureau of Motor Vehicles of such dismissal. Costs assessed to appellee.

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JUDGES