[Cite as *State v. Lindenmayer*, 2009-Ohio-3982.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-142
STEPHANIE LINDENMAYER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Municipal Court Case No. 08-CRB-2051
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 6, 2009

APPEARANCES:

For Plaintiff-Appellee:

JONATHAN C. DIERNABCH 0071206
Assistant Law Director
40 W. Main St.
Newark, Ohio 43055

For Defendant-Appellant:

ROBERT E. CESNER 0016125
456 Haymore Ave. North
Worthington, Ohio 43085

Delaney, J.

{¶1} Defendant-Appellant, Stephanie Lindenmayer, appeals from the judgment of the Licking County Municipal Court based on her no contest plea to one count of Failure to Comply with Order of Police Officer, a misdemeanor of the first degree, in violation of R.C. 2921.331, and one count of Willful or Wanton Disregard of Safety on Highways (Reckless Operation), a misdemeanor of the third degree, in violation of R.C. 4511.20.

{¶2} Appellant pled no contest to the charges of Failure to Comply and Reckless Operation on October 14, 2008, and was represented by counsel. At the plea hearing, Appellant signed a "Change of Plea" form, indicating her desire to plead no contest to the charges. On that form, Appellant acknowledged that she was pleading no contest to both charges and that she was withdrawing her previously entered plea of not guilty.

{¶3} Additionally, on the form, she signed her initials beside several boxes that stated the following:

{¶4} "I understand all of the following:

{¶5} "That my plea of no contest is not an admission of my guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission cannot be used against me in any subsequent civil or criminal proceedings. Further, I understand that I stipulate to a finding of guilt and waive any explanation of circumstances underlying the offense under R.C. 2937.07.

{¶6} "That by pleading no contest, I am waiving my rights to a jury trial, to confront witnesses against me, to have compulsory process for obtaining witnesses in

my favor, and to require the Prosecutor to prove my guilt beyond a reasonable doubt. Further, I understand that if I went to trial I would not be required to testify.

{¶7} "That no one has promised me anything as an inducement to change my plea.

{¶8} "That I am completely satisfied with the legal advice and representation I have received from my attorney.

{¶9} "I am not under the influence of alcohol or drugs.* * *"

{¶10} Appellant then signed the document, as did her attorney.

{¶11} At her change of plea hearing, the trial court asked Appellant if she had reviewed the change of plea form with her attorney, to which she replied, "yes." The trial court additionally asked her if she understood the consequences of entering a no contest plea, to which she replied, "I do."

{¶12} Upon imposing sentence, the trial court, Appellant, and her attorney engaged in the following exchange:

{¶13} "THE COURT: All right well uhh . . . here is what I am going to do; I am going to enter guilty findings. On the uhh . . . reckless operation charge I will impose a fine of $150.00 plus court costs. On the uhh . . . failure to comply charge I am going to impose a jail sentence of 60 days. I'll suspend it and place you on probation for a period of two years instead. You're not on probation now are you?

{¶14} "MRS. LINDENMAYER: (Inaudible) * * *

{¶15} "THE COURT: All right. I am going to order that you not consume alcohol or any controlled substance that you don't have a prescription for. I am going to order that you uhh . . . abide by the standard terms and conditions of probation. I am required

to suspend your license for a period of three years. That is a class three license suspension and umm . . . I am also going to uhh . . . refer the case for our specialized docket and uhh . . . that is something you can discuss with the probation officer you first meet with. Do you have any questions about any of that?

{¶16} "MR. BOECKMAN: I think she does your Honor I'll attempt to answer them for her unless you have a specific question for him. [sic](Inaudible)

{¶17} "THE COURT: You would be eligible to request limited driving privileges. Are you valid otherwise?

{¶18} "MS. LINDENMAYER: Yes.

{¶19} "THE COURT: Okay well then you can fill out an application for limited driving privileges under uhh . . . through the probation department.

{¶20} "MRS. LINDENMAYER: Three years?

{¶21} "THE COURT: It's mandatory. State law.

{¶22} "MRS. LINDENMAYER: I can't go to the grocery store?

{¶23} "THE COURT: Well that is what I am explaining to you. You can have limited driving privileges if you request them and if you're valid otherwise.

{¶24} "MR. BOECKMAN: You will be able to make your doctors appointments, your [sic] will be able to (inaudible).

{¶25} "THE COURT: Treatment all that kind of stuff.

{¶26} "MR. BOECKMAN: You will be able to do that by requesting it sure and I can help you with that. Do you have any other questions right now?

{¶27} "THE COURT: Okay good luck to you.

{¶28} "MR. BOECKMAN: Thank you."

{¶29} Appellant now raises two Assignments of Error based on her change of plea and sentencing:

{¶30} "I. THE TRIAL COURT ERRED BY ACCEPTING THE NO CONTEST PLEA OF DEFENDANT-APPELLANT TO A CHARGE OF FAILURE TO COMPLY WITH AN ORDER OF A POLICE OFFICER, IN VIOLATION OF O.R.C. 2921.331, A MISDEMEANOR OF THE FIRST DEGREE, AND ENTERING A FINDING OF GUILTY ON SAID PLEA WITHOUT INFORMING DEFENDANT-APPELLANT THAT SHE WAS SUBJECT TO A MANDATORY LICENSE SUSPENSION OF THREE YEARS. AS A RESULT, THE SENTENCE SHOULD BE MODIFIED BY REMOVAL OF THE LICENSE SUSPENSION, OR, IN THE ALTERNATIVE, THE CONVICTION SHOULD BE SET ASIDE ON THE BASIS THAT HER PLEA TO THE CHARGE WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

{¶31} "II. IF THIS COURT OF APPEALS OVERRULES DEFENDANT-APPELLANT'S FIRST ASSIGNMENT OF ERROR UPON THE BASIS THAT SHE WAS REPRESENTED BY COUNSEL AT THE PLEA AND SENTENCING HEARING, THE MANDATORY LICENSE SUSPENSION SHOULD BE VACATED OR IN THE ALTERNATIVE, THE JUDGMENT AND SENTENCE SHOULD BE SET ASIDE, UPON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶32} In her first assignment of error, Appellant argues that the trial court erred by accepting a no contest plea that was not in compliance with Crim. R. 11. Specifically, Appellant argues that the trial court had a duty to inform Appellant that she

would be subject to a mandatory three year driver's license suspension during her plea colloquy.

{¶33} A trial court's duty when accepting a plea differs based upon the level of offense to which the defendant is pleading. *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, citing *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E.2d 635, ¶25.

{¶34} Crim. R. 11 governs pleas and a defendant's rights upon entering a plea as follows:

{¶35} "(A) Pleas

{¶36} "A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

{¶37} "(B) Effect of guilty or no contest pleas

{¶38} "With reference to the offense or offenses to which the plea is entered:

{¶39} "(1) The plea of guilty is a complete admission of the defendant's guilt.

{¶40} "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

{¶41} “(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

{¶42} “(C) Pleas of guilty and no contest in felony cases

{¶43} “(1) Where in a felony case 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.

{¶44} “(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶45} “(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶46} “(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶47} “(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a

reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶48} "(3) * * *

{¶49} "(D) Misdemeanor cases involving serious offenses

{¶50} "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.

{¶51} "(E) Misdemeanor cases involving petty offenses

{¶52} "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."

{¶53} Depending upon the classification of offense, the requirements placed upon the trial court is different. Thus, our inquiry turns to what type of offense Appellant was convicted of.

{¶54} Crim. R. 2(D) defines a "petty offense" as: "a misdemeanor other than serious offense." "'Serious offense' means any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Crim. R. 2(C). As Appellant pled no contest to a misdemeanor of the first degree, which carries

a maximum penalty of six months in jail, and not *more* than six months in jail, her offense is classified as a petty offense.

{¶55} As the Supreme Court noted in *Jones*, supra, the procedure set forth in Crim. R. 11(C) for felony offenses is more elaborate than the procedure for misdemeanors. In a felony case, the court must "inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *Jones*, at ¶12, quoting *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, paragraph one of the syllabus. "In addition to these constitutional rights, the trial court is required to determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea. Crim.R. 11(C)(2)(a) and (b)." Id.

{¶56} Conversely, Crim. R. 11(E) does not provide such stringent requirements in the case of a petty offense. Crim.R. 11(E) instructs the court that it "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." There is no requirement to inform the defendant of the maximum penalties under Crim. R. 11(E). "A statement about the effect of a plea is separate from statements relating to a maximum penalty and the right to a jury trial." *Jones*, supra, at ¶22.

{¶57} Thus, for a no contest plea to a petty misdemeanor offense, "a defendant must be informed that the plea of no contest is not an admission of guilt but is an admission of the truth of the facts alleged in the complaint, and that the plea or admission shall not be used against the defendant in any subsequent civil or criminal

proceeding." *Jones*, supra, at ¶23. In other words, "to satisfy the requirement of informing a defendant of the effect of a plea, a trial court must inform the defendant of the appropriate language under Crim. R. 11(B)." In this case, the court would have had to inform Appellant that her "plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶58} We must now turn to the record in order to determine if the trial court informed Appellant of the effect of her plea in compliance with Crim. R. 11(B), per the Supreme Court's ruling in *Jones*.

{¶59} Before accepting Appellant's guilty plea, the trial court engaged in the following colloquy with Appellant:

{¶60} "THE COURT: All right uhh . . . Ms. Uhh . . . Lindenmayer is in court with her attorney Mr. Boeckman, and it is my understanding she has decided to change her plea to no contest to the failure to comply with the police order and uhh . . . reckless operation charge is that right?

{¶61} "MR. BOECKMAN: Uhh . . . that's correct your Honor. [sic]

{¶62} "THE COURT: Uhh . . . maam [sic] is that true?

{¶63} "MS. LINDENMAYER: Yes.

{¶64} "THE COURT: Have you gone over this form with your attorney?

{¶65} "MS. LINDENMAYER: Yes.

{¶66} "THE COURT: Do you understand the consequences of entering a no contest plea?

{¶67} "MS. LINDENMAYER: I do.

{¶68} "THE COURT: Do you understand then that you umm . . . won't have a trial?

{¶69} "MS. LINDENMAYER: Yes.

{¶70} "THE COURT: That means that you give up your right to cross-examine witnesses, you also give up the right to uhh . . . call your own witnesses on your behalf, and issue subpoenas if necessary to compel them to appear in Court, you give up the right to force the prosecutor to prove your guilt beyond a reasonable doubt?

{¶71} "MS. LINDENMAYER: Yes.

{¶72} "THE COURT: Okay, I will uhh . . . accept your no contest pleas. * * *"

{¶73} As noted in the statement of the case, above, Appellant additionally signed a change of plea form wherein she acknowledge and signed the document informing her that a no contest plea "is not an admission of my guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission cannot be used against me in any subsequent civil or criminal proceedings. Further, I understand that I stipulate to a finding of guilt and waive any explanation of circumstances underlying the offense under R.C. 2937.07."

{¶74} In *Jones*, supra, the Supreme Court found that the trial court failed to comply with Crim. R. 11(B) because the court only asked the defendant if he "understood that (1) he had a right to a bench or jury trial in which the state would bear the burden to prove his guilt beyond a reasonable doubt; (2) he had the right to subpoena his own witnesses and cross-examine witnesses against him; (3) at trial, he could testify or remain silent, and his silence could not be used against him; (4) by

pleading guilty, his maximum sentence could be up to 180 days in jail and a $1,000 fine, with costs; and (5) he gave up these rights to enter a plea of guilty to one count of domestic violence. The trial court also confirmed that Jones had discussed the plea with his lawyer. In sum, Jones was informed of the constitutional rights that he was waiving by entering a plea instead of proceeding with the scheduled trial, he was told the maximum penalty that could be imposed, and he was asked whether he understood what he was doing." The Court determined that because the trial court failed to inform Jones of the effect of his plea, even though it asked him if he understood what he was doing, and because it was not in writing, the trial court did not comply.

{¶75} The Supreme Court did note, however, that "whether orally or in writing, a trial court must inform the defendant of the appropriate language under Crim. R. 11(B) before accepting a plea." *Jones*, supra, at ¶51. Because the court did inform Appellant in writing the effect of her plea, we find that the court complied with Crim. R. 11(B).

{¶76} Even if the court had been required to orally inform Appellant of the effect of her no contest plea, no prejudice has been demonstrated. "'[F]ailure to comply with nonconstitutional rights [such as the information in Crim. R. 11(B)(1)] will not invalidate a plea unless the defendant thereby suffered prejudice. * * * The test for prejudice is "whether the plea would have otherwise been made."'" *Jones*, at ¶52 (internal citations omitted).

{¶77} Appellant has presented no evidence that she would not have made her plea but for the fact that the trial court did not orally inform her of the effect of her plea. She also never indicated any desire to change her plea once she was informed of the mandatory driver's license suspension. We find, therefore, that Appellant was aware of

the effect of her plea and that she was not prejudiced by the trial court's failure to orally inform her of Crim. R. 11(B).

{¶78} The trial court did comply with Crim. R. 11(B), and was not required to inform Appellant of the maximum sentence.

{¶79} Appellant's first assignment of error is overruled.

II.

{¶80} In her second assignment of error, Appellant argues that counsel was ineffective for failing to notify Appellant of the mandatory driver's license suspension. We disagree.

{¶81} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶82} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶83} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual

prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶84} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense "is meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶85} Regarding Appellant's claim that counsel was ineffective for failing to inform her of a mandatory driver's license suspension, we find that the record is devoid of any indication that counsel did not inform Appellant of this penalty. This is a matter that would be outside of the record and thus, inappropriate for appellate review. From a review of the record, we find that counsel's representation fell within the wide range of acceptable conduct; moreover, Appellant indicated that she was satisfied with her representation.

{¶86} Even if counsel's conduct fell outside that range, Appellant has failed to demonstrate prejudice with respect to the imposition of the driver's license suspension. Appellant must demonstrate that there is a reasonable probability that but for counsel's alleged error, she would not have pled no contest and would have insisted on going to trial. See *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203.

{¶87} Moreover, "[a] naked allegation by a defendant of a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be upheld on appeal unless it is supported by affidavits or other supporting materials, substantial enough to rebut the record which shows that his plea was voluntary." *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶57.

{¶88} " ' * * *[A]n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore, the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant's own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. * * * '" Id. at ¶59 citing *State v. Kapper* (1983), 5 Ohio St.3d 36, 38, 448 N.E.2d 823.

{¶89} The record below demonstrates that Appellant's no contest plea was voluntarily made. She told the court that she intended to plead no contest to both charges. She indicated on her change of plea form that she was not coerced into entering the plea. She acknowledged that she giving up certain rights and that she was satisfied with her counsel's legal advice and representation.

{¶90} Based upon these representations and given that Appellant has not demonstrated that counsel failed to inform her of the suspension or that she was prejudiced by that alleged error, we find this assignment of error to be without merit and it is overruled.

{¶91} Based on the foregoing, we overrule Appellant's assignments of error and affirm the judgment of the Licking County Municipal court.

By: Delaney, J

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

[Cite as *State v. Lindenmayer*, 2009-Ohio-3982.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STEPHANIE LINDENMAYER	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-142
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Municipal Court is affirmed. Costs assessed to Appellant.

_____

HON. PATRICIA A. DELANEY

_____

HON. JULIE A. EDWARDS

_____

HON. SHEILA G. FARMER