[Cite as *State v. Walbolt*, 2011-Ohio-805.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1242

Appellee — Trial Court No. CR0200901748

v.

Glenn Walbolt — **DECISION AND JUDGMENT**

Appellant — Decided: February 18, 2011

* * * * *

Brad F. Hubbell, for appellant; Glenn Walbolt, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Glenn Walbolt, appellant, appeals his conviction and sentence on two counts of aggravated vehicular homicide. Each count charged Walbolt with a violation of R.C. 2903.06(A)(1)(a) and (B) in that while operating a motor vehicle on February 11, 2009, he caused the death of another as the proximate result of a violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d). The offenses are second degree felonies.

{¶ 2} Walbolt pled no contest to the charges on July 6, 2009. Two other counts, charging aggravated vehicular homicide as a proximate result of violations of R.C. 4511.19(A)(1)(c) and (G)(1)(d) were dismissed.

{¶ 3} In an August 12, 2009 judgment, the trial court sentenced Walbolt to serve consecutive, six year prison terms on each count, for a total period of incarceration of 12 years. The trial court also suspended appellant's driver's license for life and ordered him to pay restitution in the amount of $8,467.26 and to pay costs.

{¶ 4} In a narrative statement of fact made by the state at the plea hearing, the state contended that it would have proved beyond a reasonable doubt at trial that Walbolt operated a 1994 Chevrolet Baretta on February 11, 2009, at 12:03 a.m. northbound on Grand Rapids Road, north of State Route 24, in Lucas County, Ohio. The state further contended that the "[e]vidence would have shown that the vehicle went off the right side of the roadway, struck a pole, rotated and ended up against trees in that area."

{¶ 5} EMS personnel extricated appellant from the driver's side of the vehicle, behind the steering wheel. Jacob Polen, age 17, and David Todd, age 18, both passengers, were killed as a result of the collision. Walbolt, age 56, was seriously injured.

{¶ 6} According to the state, the evidence at trial would have established that Walbolt agreed to voluntary blood draws for purposes of testing. Several blood samples were taken. Each of the results of the blood samples was in excess of the legal limits for blood alcohol. The state also asserted that a blood test for marijuana established a blood

concentration of more than 61.46 nanograms per milliliter of the drug, making operation of a vehicle prohibited.

{¶ 7} The state asserted that the evidence would establish that each of the tests were conducted by certified technicians through the State of Ohio Department of Public Safety, Ohio State Highway Patrol and together establish that Walbolt was operating a motor vehicle under the influence of alcohol and marijuana on February 11, 2009.

{¶ 8} Appellant has been provided court appointed counsel for this appeal. Appointed counsel filed an appellate brief, but has also moved for leave to withdraw as counsel under *Anders v. California* (1967), 386 U.S. 738, due to his inability to find meritorious grounds for appeal. Pursuant to *Anders*, counsel provided appellant with copies of both the appellate brief and the motion to withdraw as counsel. Counsel also informed appellant of his right to file his own, additional assignments of error and appellate brief. Appellant has filed an additional brief and assigned additional assignments of error.

{¶ 9} We consider the arguments of counsel first. In the *Anders* brief filed by counsel, appellant argues two potential assignments of error:

{¶ 10} Potential Assignment of Error No. 1

{¶ 11} "Mr. Walbolt argues that the Trial Court erred in accepting his no contest plea because he was under the influence of prescription medications related to his recovery from the injuries he suffered in the instant car collision."

{¶ 12} Potential Assignment of Error No. 2

{¶ 13} "Mr. Walbolt also argues that the Trial Court erred in sentencing him to a six year sentence on both counts to be served consecutively because the sentence is excessive."

{¶ 14} Under Potential Assignment of Error No. 1, appellant argues that his no contest pleas were not knowingly, intelligently, and voluntarily made because at the time of his pleas he was under the influence of prescription drugs he took to treat injuries from the collision.

{¶ 15} When entering a no contest plea, a defendant must do so knowingly, intelligently, and voluntarily. *State v. Engle* (1996), 74 Ohio St.3d 525, 527. "Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." Id.

{¶ 16} In the plea colloquy, conducted before the trial court accepted appellant's no contest pleas, Walbolt advised the court that he was 56 years of age and a high school graduate. He indicated that he could read and write the English language. The court specifically questioned appellant about whether he was under the influence of any drugs that would interfere with his ability to understand.

{¶ 17} "Q. The Court: Are you presently under the influence of any drugs, alcohol or medication that would interfere with your ability to understand what's taking place here today?

{¶ 18} "A. No, sir."

{¶ 19} Appellant's present claim that drugs impaired his ability to understand at the plea hearing directly conflicts with his statement to the court at the hearing. It is also not supported in the record.

{¶ 20} The trial court complied with the requirements of Crim.R. 11(C) at the plea hearing before accepting Walbolt's no contest pleas. The court strictly complied with the requirements of Crim.R. 11(C)(2)(c) concerning notice and waiver of constitutional rights. It substantially complied with the requirements of Crim.R. 11(C)(2)(a) and (b) as to non-constitutional matters.

{¶ 21} Appellant had the opportunity to review a written plea of no contest form with counsel and signed the plea document in open court with the approval and advice of his attorney.

{¶ 22} In accepting the no contest pleas, the trial court made findings that appellant made a knowing, intelligent, and voluntary waiver of his constitutional rights in making the pleas:

{¶ 23} "The Court: The Court finds the defendant appeared in open court, was orally and in writing advised of all of his constitutional rights including any limited rights to appeal, and that he made a knowing, intelligent and voluntary waiver of those rights."

{¶ 24} Under the totality of the circumstances, we find that there is competent, credible evidence in the record supporting the trial court's determination that the no contest pleas where knowingly, intelligently, and voluntarily made. We find appellant's Potential Assignment of Error No. 1 is not well-taken.

Consecutive Sentences and *Oregon v. Ice*

{¶ 25} Under Potential Assignment of Error No. 2, appellant challenges the trial court's decision to impose consecutive sentences for the vehicular homicide convictions. Appellant argues that "[t]he trial court should have made findings of fact on the record before sentencing Mr. Walbolt to consecutive sentences." Appellant argues that the trial court should have followed statutory judicial fact-finding procedure that was invalidated by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 before imposing consecutive sentences in this case.

{¶ 26} The argument is based upon the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160. "After *Ice*, it is now settled law * * * that the jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences." *State v. Hodge*, ___Ohio St.3d ___, 2010-Ohio-6320, ¶ 19.

{¶ 27} The Ohio Supreme Court in *State v. Hodge* directly rejected appellant's argument. The court held that the decision in *Ice* "does not revive Ohio's former consecutive-sentencing statutory provisions * * * which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470." *Hodge* at paragraph two of the syllabus. Accordingly, we find appellant's Potential Assignment of Error No. 2 is not well-taken.

{¶ 28} In his pro se brief, appellant asserts three assignments of error:

{¶ 29} "Supplemental Assignment of Error No. I:

{¶ 30} "Appellant was deprived of his right to due process of law to notice of the charges by undifferentiated, carbon-copy counts contained in the indictment.

{¶ 31} "Supplemental Assignment of Error No. II:

{¶ 32} "Appellant's indictment and conviction of multiple undifferentiated and ambiguous counts deprived him of the ability to protect himself against double jeopardy, violating his due process rights.

{¶ 33} "Supplemental Assignment of Error No. III:

{¶ 34} "The trial court erred in sentencing appellant to consecutive sentences where trial court could not distinguish the facts of the two convicted counts, and no overriding purpose existed."

Sufficiency of Indictment

{¶ 35} "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 * * *." Crim.R. 11(B)(2). A no contest plea preserves for appeal the issue of the sufficiency of an indictment to support a conviction. *Bowling Green v. Schabel*, 6th Dist. No. WD-05-013, 2005-Ohio-6522, ¶ 36; *State v. Luna* (1994), 96 Ohio App.3d 207, 209.

{¶ 36} Under Supplemental Assignments of Error Nos. I and II, appellant argues that the indictment was deficient because the different counts lacked allegations of distinguishing facts as they merely parroted statutory language. Under Supplemental

Assignment of Error No. I, appellant argues that the claimed ambiguity denied him fair notice of the charges against him. In Supplemental Assignment of Error No. II he claims the ambiguity deprived him of the ability to protect against double jeopardy. He argues that both failures denied him his rights to due process.

{¶ 37} The indictment charged appellant with four counts of aggravated vehicular homicide, violations of R.C. 2903.06(A)(1)(a) and (B), in that while operating a motor vehicle on February 11, 2009, appellant caused the death of another. Two counts (Counts 1 and 3 to which appellant pled) alleged that the deaths were also a proximate result of a violation of R.C. *4511.19(A)(1)(a)* and (G)(1)(d). The remaining two counts (Counts 2 and 4 which were dismissed) were different. They alleged that the deaths were a proximate result of a violation of R.C. *4511(A)(1)(c)* and (G)(1)(d).

{¶ 38} The difference concerns the category OVI offense allegedly committed. R.C. 4511.19(A)(1)(a) (referred to in Counts 1 and 3) is the general statute, prohibiting operation of a vehicle "under the influence of alcohol, drug of abuse, or combination of them." Id. R.C. 4511.19(A)(1)(c) (referred to in Counts 2 and 4) is a strict liability OVI offense.[1] It prohibits operation of any vehicle with "a concentration of ninety-six-thousandths of one per cent or more but less that two hundred four-thousandths of one

[1]Unlike the general OVI statute, to prove a violation of a per se OVI offense, "the trier of fact is not required to find that the defendant operated a vehicle while under the influence of alcohol or drugs, but only that the defendant's chemical test reading was at the prescribed level and that the defendant operated a vehicle within the state." *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3; *State v. Henry*, 6th Dist. No. WD-09-092, 2010-Ohio-5171, ¶ 12.

per cent by weights per unit volume of alcohol in the person's blood serum or plasma." We limit our inquiry to Counts 1 and 3 to which appellant pled.

{¶ 39} Counts 1 and 3 of the indictment each alleged Walbolt:

{¶ 40} "[O]n or about the 11th day of February, 2009, in Lucas County, Ohio, while operating or participating in the operation of a motor vehicle did cause the death of another as the proximate result of committing a violation of division (A)(1)(a) and (G)(1)(d) of §4511.19 of the Revised Code or of a substantially equivalent municipal ordinance, in violation of §2903.06(A)(1)(a) and (B) of the Ohio Revised Code, aggravated vehicular homicide, being a felony in the second degree * * *."

{¶ 41} R.C. 2903.06 governs the offense of aggravated vehicular homicide. It provides in pertinent part:

{¶ 42} "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:

{¶ 43} "(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

{¶ 44} "* * *

{¶ 45} "(B)(1) Whoever violates division (A)(1) or (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(2) and (3) of this section."

{¶ 46} The Ohio Supreme Court identified the constitutional requirement for indictments in *State v. Childs* (2000), 88 Ohio St.3d 558. "An indictment meets constitutional requirements if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *State v. Childs* (2000), 88 Ohio St.3d 558, 564-565, 728 N.E.2d 379, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590.'" *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶ 9.

{¶ 47} Indictments provide adequate notice of the charges where they track the language of the charged offense and identify "a predicate offense by statute number" without listing each element of the offense. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, ¶ 11; *State v. Buehner* at ¶ 11. Facts supporting issuance of the indictment can be secured by a bill of particulars. *State v. Buehner* at ¶ 10.

{¶ 48} Here the indictment tracked statutory language in Counts 1 and 3 and gave notice of two separate charges against appellant of causing the death of another while operating a motor vehicle on February 11, 2009. The indictment also specified that the deaths were proximately caused by his violation of Ohio's general OVI statute, R.C. 4511.19(A)(1)(a). That statute prohibits operating a vehicle "under the influence of

alcohol, drug of abuse, or combination thereof." R.C. 4511.19(A)(1)(a). We conclude that all the elements of aggravated vehicular homicide were alleged in Counts 1 and 2 of the indictment.

{¶ 49} We recognized in *State v. Blackwell*, 6th Dist. No. L-01-1031, 2002-Ohio-6352, however, that a bare bones indictment, parroting statutory language alone, while valid, does present risks:

{¶ 50} "In our view, an indictment which makes no attempt to particularize facts is certainly not the preferred practice. It seems to us that such a rote exercise presents a significant opportunity for errors and omissions. The state uses such an indictment at its own peril. However, as stated above, as long as there are allegations of all the essential elements of an offense, such an indictment is sufficient. If a defendant fails to find an indictment adequately specific, he or she may, as did appellant, request a bill of particulars." *State v. Blackwell* at ¶ 12.

{¶ 51} We also recognized in *State v. Blackwell*, that the state's recitation of facts supporting the charges at the time of the plea hearing is relevant:

{¶ 52} "With respect to any confusion such an indictment might later engender, we note that during appellant's plea colloquy the court inquired of the prosecutor about the basis of the charges. On the record, the state detailed each offense and each victim with specifics as to the date, time and occurrence. If there is any doubt as to the nature of the offenses or any possibility of confusion as to the particularity of the offenses to which

appellant pled, the prosecutor's recital of the facts which would have been proven had the matter proceeded to trial is sufficient to dispel such concerns." *State v. Blackwell* at ¶ 13.

{¶ 53} Here the state provided a detailed narrative statement of fact at the plea hearing including identification of Jacob Polen and David Todd as the passengers who died as a result of the collision and facts supporting the conclusion that appellant caused their deaths by operating the motor vehicle at the time of the collision while intoxicated.

{¶ 54} In our view, appellant's indictment provided adequate notice of the charges against appellant by tracking the statutory language of the charged offenses. We find appellant's Supplemental Assignments of Error No. I and II are not well-taken.

{¶ 55} Under Supplemental Assignment of Error No. III, appellant argues that the trial court erred with respect to sentence. He argues the trial court erred as to his sentence as it lacked facts to distinguish the two aggravated vehicular homicide convictions. Appellant seeks this court to reverse the trial court's judgment and remand this case to the trial court for resentencing on one count of vehicular homicide alone.

{¶ 56} The trial court accepted appellant's no contest pleas to two counts of aggravated vehicular homicide and convicted him of the two offenses on July 6, 2009. Under Supplemental Assignments of Error No. I and II we have ruled that the indictment was sufficient to support the two convictions. Upon conviction, the trial court referred appellant for a presentence investigation. The trial court conducted a sentencing hearing on August 11, 2009.

{¶ 57} The trial court received and reviewed a presentence investigation report before the hearing. The presentence investigation report is part of the record. It provides factual detail concerning the offenses and other matters, including appellant's criminal record. The trial court conducted a sentencing hearing. Appellant apologized to the families of Jacob Polen and David Todd at the hearing for their deaths.

{¶ 58} We find appellant's arguments that the trial court lacked a factual basis upon which to impose sentence is without merit. We find appellant's Supplemental Assignment of Error No. III is not well-taken.

{¶ 59} We have also undertaken an independent review of the entire record and find no grounds for a meritorious appeal. We conclude this appeal is wholly frivolous under *Anders v. California* and grant counsel's motion to withdraw. Substantial justice was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, P.J.
CONCUR.

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JUDGE