[Cite as *State v. Pugh*, 2012-Ohio-829.]

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

State of Ohio	Court of Appeals No. E-11-014
Appellee	Trial Court Nos. 10 TRC 03775 TRD 1100404
v.	
Jerry E. Pugh	**DECISION AND JUDGMENT**
Appellant	Decided: March 2, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

John F. Kirwan, for appellant.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} This is an appeal from a judgment rendered by the Erie County Municipal Court in which appellant, Jerry Pugh, was found guilty of reckless operation following his plea of no contest to the offense. For the reasons that follow, we reverse.

A. Facts and Procedural History

{¶ 2} On Saturday, August 7, 2010, at approximately 10:45 p.m. Pugh was arrested for operating a vehicle while intoxicated, in violation of R.C. 4511.19(A)(1)(a), and for refusing to submit to a breath test in violation of R.C. 4511.19(A)(2)(a). This case was numbered 10TRC03775.

{¶ 3} On September 10, 2010, Pugh filed a motion to suppress and an accompanying memorandum in support of his motion in which he argued that the officers lacked reasonable suspicion to conduct field sobriety tests on him. A suppression hearing on Pugh's motion was held on October 4, 2010.

{¶ 4} Pugh's motion to suppress was subsequently denied in a decision dated October 22, 2010. In so denying Pugh's motion, the trial court stated,

> The issue before the court is whether the officers had probable cause to arrest Defendant. The Court finds that Defendant's failed HGN test together with the admission of alcohol consumption, bloodshot glassy eyes, and empty alcohol containers in the vehicle constitute sufficient probable cause to arrest Defendant for operating a motor vehicle under the influence of alcohol.

{¶ 5} Despite the trial court's ruling, Pugh's operating a vehicle while intoxicated ("OVI") charges were dismissed at the prosecutor's request on January 31, 2011. On the same day, a citation was issued charging Pugh with a second offense reckless operation in violation of R.C. 4511.20(A). The citation was filed in case number 11TRD00404.

The citation indicated that the date of the offense was August 7, 2010, at 10:43 p.m., the same date and time as noted on Pugh's OVI citation. Pugh pleaded no contest to the reckless operation offense. The trial court found Pugh guilty and imposed a fine of $250, court costs of $226, and 30 days in jail. Four points were also assessed to Pugh's license in addition to a one-year license suspension from the date of the offense. The transcript of the plea hearing indicates that the trial court made its guilty finding "based on the testimony that was presented at the [OVI] suppression hearing on October 4th * * *." Pugh's sentence was suspended pending appeal.

B. Assignments of Error

{¶ 6} Pugh now asserts three assignments of error:

> I. The Trial Court errored [sic] by denying Defendant's Motion to Suppress based on a lack of probable cause to arrest Defendant.
>
> II. Pursuant to Defendant's no contest plea there was insufficient evidence for the Court to find Defendant guilty of reckless operation pursuant to ORC 4511.20(A).
>
> III. The Court abused its discretion by imposing a jail sentence.

II. ANALYSIS

A. Motion to Suppress

{¶ 7} Pugh's motion to suppress evidence was filed under case number 10TRC03775, the OVI offenses. Because those charges were dismissed, there is no final

order in this trial court case that can be appealed. Therefore, we find Pugh's first assignment of error not well-taken.

B. Sufficiency of the Evidence

{¶ 8} In Pugh's second assignment of error, he argues that the trial court lacked sufficient evidence to support a conviction of reckless operation. In his third assignment of error, Pugh similarly argues that the trial court had insufficient evidence that he committed a predicate motor vehicle crime within the past 12 months to support an enhancement of the offense from a misdemeanor to a second offense reckless operation, a fourth degree misdemeanor. Because Pugh's second and third assignments of error are interrelated, they will be discussed together.

{¶ 9} A challenge to a conviction based upon a claim of insufficiency of the evidence presents a question of law on whether the evidence at trial is legally adequate to support a jury verdict on all elements of a crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). A reviewing court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89, 103, 684 N.E.2d 668 (1997).

{¶ 10} In this case, Pugh pleaded no contest to a second offense of reckless operation, a misdemeanor of the fourth degree. Crim.R. 11(B)(2) provides: "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."

{¶ 11} On a plea of no contest to a misdemeanor offense, R.C. 2937.07[1] provides that a court may find the defendant guilty or not guilty based on "the explanation of the circumstances of the offense."[2] The explanation requirement "contemplates some explanation of the facts surrounding the offense [so] that the trial court does not make a finding of guilty in a perfunctory fashion." *State v. Buennagel*, 2d Dist. No. 2010 CA 74, 2011-Ohio-3413, ¶ 18, citing *Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 151, 459 N.E.2d 532 (1984). Further, R.C. 2937.07 gives "[a] defendant who pleads no contest a substantive right to be acquitted where the state's statement of facts fails to establish all of the elements of the offense." *State v. Gilbo*, 96 Ohio App.3d 332, 337, 645 N.E.2d 69 (2d Dist.1994), citing *Bowers* at 150. Therefore, the explanation "necessarily involves, at a minimum, some positive recitation of facts which, if the court finds them to be true, would permit the court to enter a guilty verdict and a judgment of conviction on the charge to which the accused has offered a plea of no contest." (Citation omitted.) *State v. Osterfeld*, 2d Dist. No. 20677, 2005-Ohio-3180, ¶ 6. An explanation that merely

[1]R.C. 2937.07 was amended effective September 17, 2010. This opinion, however, discusses the former version of the statute that was in effect at the time of the offense and prior to the amendments.

[2]"A plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense."

restates the statutory elements of the offense is not sufficient. *State v. McGlothin*, 2d. Dist. No. 13460, 1993 WL 32023, *2 (Feb. 10, 1993).

{¶ 12} A review of the record reveals that the trial court found Pugh guilty of a second offense of reckless operation, a fourth degree misdemeanor, based upon the officers' testimony produced at the suppression hearing in Pugh's OVI case. This is evidenced by the following colloquy which occurred in the trial court following Pugh's plea and the trial court's finding of guilt:

> [Prosecutor]: Your Honor, I guess for my benefit, because I know that this agreement had been made with Assistant Prosecutor Trevor Hayberger, if the charges under 3775 are dismissed is he able to then go to the Court of Appeals on that case number?
>
> [Pugh's attorney]: Well, I assumed that this was an amendment of those charges.
>
> THE COURT: This is not an amendment.
>
> [Pugh's attorney]: Ok, what I would suggest to the Court is that the Court is rendering it's [sic] decision based on the testimony that was presented at the suppression hearing on October 4th, and that is the basis for it's [sic] finding of guilty on his no contest plea today?
>
> THE COURT: It is.

{¶ 13} We find that the testimony presented at the suppression hearing, in addition to the trial court's judgment entry denying Pugh's motion, were insufficient as an

"explanation of the circumstances" required by R.C. 2937.07. Pugh filed a motion to suppress in case number 10TRC03775. Because Pugh's OVI case was not consolidated with Pugh's reckless operation case, our review of Pugh's reckless operation conviction is limited to the record presented for case number 11TRD00404. As such, a transcript of the proceedings contained in 10TRC03775 is not properly reviewable in the appeal of case number 11TRD00404. Therefore, we must determine from the record in case number 11TRD00404 whether there is sufficient evidence supporting the trial court's finding of guilt.

{¶ 14} Pugh's reckless operation conviction was for a violation of R.C. 4511.20, which provides:

> (A) No person shall operate a vehicle, trackless trolley, or streetcar on any street or highway in willful or wanton disregard of the safety of persons or property.
>
> (B) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

{¶ 15} Willful conduct "implies an act done intentionally, designedly, knowingly, or purposely, without justifiable excuse." *State v. Earlenbaugh*, 18 Ohio St.3d 19, 21, 479 N.E.2d 846 (1985), citing Black's Law Dictionary, 1434 (5th Ed.1979). Wanton conduct, on the other hand, is defined as "an act done in reckless disregard of the rights of others which evinces a reckless indifference of the consequences to the life, limb, health, reputation, or property of others." *Id.* at 21-22. Furthermore, in order to elevate the degree of an offense as permitted by statute, the prior offenses become necessary elements of the charge and must be proven by the state beyond a reasonable doubt. *State v. Allen*, 29 Ohio St. 3d 53, 54, 506 N.E.2d 199 (1987).

{¶ 16} A review of the record reveals that there is no evidence that Pugh even operated a motor vehicle on the evening of August 7, 2010. A transcript of the sentencing hearing reveals that there was no explanation of the circumstances as required by R.C. 2937.07. Furthermore, there is also no evidence in the record sufficient to support a finding that Pugh was convicted of a predicate motor vehicle offense within one year of the instant offense. The state failed to present *any* evidence upon which the trial court could have concluded beyond a reasonable doubt that Pugh had prior traffic convictions within the previous 12 months. Thus, the state failed to prove this required element to elevate the degree of the offense. Therefore, there is insufficient evidence to support a finding of guilt for the offense of reckless operation.

{¶ 17} Furthermore, even if the testimony from the suppression hearing in case number 10TRC03775 could be considered as evidence in this case, there would still be insufficient evidence to support a finding of guilt for a second offense reckless operation.

{¶ 18} At the suppression hearing in the OVI case, Troopers Timothy A. Grimm and Joshua M. Zaugg of the Ohio State Highway Patrol, testified to Pugh's non-driving related indicia of intoxication because the officers approached Pugh after his vehicle became disabled along State Route 2. The only testimony related to Pugh's operation of his vehicle was his own admission of driving from Marblehead that evening. The core of the offense of reckless operation lies not in the act of operating a motor vehicle, but rather in the manner and circumstances of its operation. Being under the influence of intoxicating liquor is not necessarily an element of reckless operation and reckless operation is not an element of operating a vehicle under the influence. *City of Akron v. Kline*, 165 Ohio St. 322, 324, 135 N.E.2d 265 (1956); *State v. Brown*, 7th Dist. No. 90 C.A. 107, 1991 WL 192140 (Sept. 26, 1991); *contra Ray v. State*, 563 S.W.2d 218, 220-221 (Tenn.Crim.App.1977), (Galbreath, J., dissenting). ("I would hold as a matter of law and fact that any person who undertakes to drive a motor vehicle while drunk is acting in a wanton and grossly negligent manner amounting to reckless driving. It does not matter that one who undertakes to operate a vehicle while under the influence of an intoxicant is not involved in an accident, or even that he appears to operate the vehicle in a careful and prudent fashion. The mere fact that he is drunk renders him unfit to drive or to be in control of a motor vehicle.") We also note that it is not inconsistent for a court to find

that officers did not sufficiently testify to the elements of reckless operation but at the same time find the indicia of intoxication presented by the officers believable. *See State v. Rouse*, 7th Dist. No. 04 BE 53, 2005-Ohio-6328, ¶ 51.

{¶ 19} While Pugh's OVI charges were not amended to the offense of reckless operation, the state attempted to use the same facts to prove the newly charged offense. However, there is no evidence from the suppression hearing to suggest that Pugh operated his vehicle willfully or wantonly on the evening of August 7, 2010. There is only evidence that Pugh at some point operated his vehicle.

{¶ 20} Thus, the record lacks sufficient evidence to support a finding of guilt for a second offense of reckless operation, a misdemeanor of the fourth degree.

{¶ 21} Accordingly, we find Pugh's second and third assignments of error well-taken.

III. CONCLUSION

{¶ 22} On consideration whereof, the judgment of the Erie County Municipal Court is hereby reversed. As to case number 10TRC03775, the appeal is dismissed at Pugh's cost. As to case number 11TRD00404, Pugh is ordered acquitted as to the single count therein with costs taxed to appellee pursuant to App.R. 24.

Judgment reversed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE