

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

State of Ohio

Court of Appeals No. OT-12-031

Appellee

Trial Court No. CRB 1200565 A

v.

Jessica A. Waller

DECISION AND JUDGMENT

Appellant

Decided: December 30, 2013

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
and Emily M. Gerber, Assistant Prosecuting Attorney, for
appellee.

Shawn M. Jones, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Jessica Waller, appeals from the judgment of the Ottawa County Municipal Court, convicting her of theft in violation of R.C. 2913.02. For the following

reasons, we reverse and remand the matter for the issuance of a nunc pro tunc judgment entry.

{¶ 2} On May 30, 2012, appellant was arraigned on the charge of theft in violation of R.C. 2913.02, a misdemeanor of the first degree, stemming from her conduct at a local Wal-Mart. At the arraignment, appellant was given a pamphlet explaining her rights, including the effect of pleading not guilty, no contest, or guilty. Appellant acknowledged that she read the pamphlet and had no questions regarding its contents. Appellant subsequently entered a plea of not guilty, and requested that trial counsel be appointed for her.

{¶ 3} On July 27, 2012, appellant appeared with counsel and entered a plea of no contest to the amended charge of unauthorized use of property in violation of R.C. 2913.04(A), a misdemeanor of the fourth degree. Prior to accepting the plea, the court offered to explain the nature of the offense she would be pleading to, the possible penalties that could be imposed, and the rights she would be waiving by entering the plea. Counsel for the appellant stated that was unnecessary, and that “[appellant] understands the affect [sic] of the plea; and by entering it, she gives up her rights to trial, all the rights that accompany it. She also understands the possible penalties.”

{¶ 4} The trial court accepted appellant’s plea, and found her guilty of the amended charge of unauthorized use of property. The matter was continued for a sentencing hearing at which the trial court sentenced appellant to 30 days in jail, with 20 days suspended. Appellant appealed her conviction. We initially reviewed the appeal,

and sua sponte remanded the matter to the trial court because the judgment entry did not state the crime for which the defendant was convicted in contravention of Crim.R. 32(C).

{¶ 5} Upon remand, the trial court entered a nunc pro tunc entry that stated that appellant was found guilty of theft in violation of R.C. 2913.02 pursuant to a plea of no contest. The imposed sentence remained the same.

{¶ 6} Appellant now appeals from the nunc pro tunc judgment entry, assigning two errors for our review:

I. The trial court erred when it accepted appellant's guilty [sic] pleas without making a meaningful determination whether appellant's pleas were knowing, voluntary, and intelligent; and, whether appellant fully understood the possible penalties to which she could be sentenced, in violation of Ohio Criminal Rule 11 and Due Process guarantees.

II. The trial court erred when it accepted appellant's guilty [sic] pleas to unauthorized use of property, a violation of Ohio Rev. Code § 2913.04(A) and subsequently found the appellant guilty of theft, in violation of Ohio Rev. Code § 2913.02.

II. Analysis

{¶ 7} In her first assignment of error, appellant argues that the trial court failed to advise her of her rights as provided in Crim.R. 11 before accepting her plea. Specifically, appellant argues that the court failed to explain the rights she was waiving, the maximum

fine that could be imposed, and the implications of pleading no contest. We find no error.

{¶ 8} “A trial court’s obligations in accepting a plea depend 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, ¶ 7, citing *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E.2d 635, ¶ 25. Here, appellant pleaded to a petty offense.¹ Thus, the trial court’s obligation is 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.*” (Emphasis added.) Crim.R. 11(E); *Jones* at ¶ 14. Importantly, for petty offenses, the court is not required to engage in a more detailed colloquy informing appellant of the nature of the charge, the maximum penalty involved, or her constitutional rights. *Watkins* at ¶ 27-28.

{¶ 9} To meet the requirement of informing the defendant of the effect of the plea, the trial court must communicate, either orally or in writing, the appropriate language under Crim.R. 11(B). *Jones* at ¶ 51. Because appellant pleaded no contest, the trial court was required to inform her that, “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.” Crim.R. 11(B)(2). In this case, the appropriate Crim.R. 11(B)(2) language was included in a pamphlet provided to

¹ “Petty Offense” is defined as “a misdemeanor other than a serious offense.” Crim.R. 2(D).

appellant at her arraignment, which she acknowledged that she read and understood. Further, appellant's trial counsel confirmed that appellant understood the effect of her plea. Therefore, we hold that the trial court fulfilled its Crim.R. 11 requirement before accepting appellant's plea of no contest.

{¶ 10} Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 11} In her second assignment of error, appellant argues that the trial court's nunc pro tunc entry constituted a new sentence, and thus should have been done in open court in appellant's presence. We disagree.

{¶ 12} In this case, we remanded the matter to the trial court because the initial entry did not comply with Crim.R. 32(C) in that it did not state the offense for which appellant was convicted. "Consistent with the treatment of Crim.R. 32(C) errors as clerical mistakes that can be remedied by a nunc pro tunc entry, we have expressly held that '*the remedy for a failure to comply with Crim.R. 32(C) is a revised sentencing entry rather than a new hearing.*'" (Emphasis added.) *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 18, quoting *State ex rel. Alicea v. Krichbaum*, 126 Ohio St.3d 194, 2010-Ohio-3234, 931 N.E.2d 1097, ¶ 2. Therefore, the trial court was not required to conduct a new sentencing hearing when it issued its nunc pro tunc entry to include the offense for which appellant was convicted.

{¶ 13} Alternatively, appellant argues that the trial court erred when it listed the original charge in the nunc pro tunc entry, rather than the amended charge for which she was found guilty. We agree, and we remand the matter to the trial court to enter a nunc

pro tunc judgment that correctly states that appellant was convicted of unauthorized use of property in violation of R.C. 2913.04(A). *See Burge* at ¶ 17 (“[N]unc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.”).

{¶ 14} Accordingly, appellant’s second assignment of error is well-taken.

III. Conclusion

{¶ 15} For the foregoing reasons, the judgment of the Ottawa County Municipal Court is reversed, and the matter is remanded to the trial court for the entry of a nunc pro tunc judgment that correctly states that appellant was convicted of unauthorized use of property in violation of R.C. 2913.04(A). The state is ordered to pay the costs of this appeal 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

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
