[Cite as *State v. Lang*, 2004-Ohio-6374.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 03-CO-65
	)	
KUMI LANG,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Columbiana County Court, Southwest Division Case No. 03 TRD 260S
JUDGMENT:	Judgment Reversed Conviction Vacated
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Robert L. Herron Columbiana County Prosecutor Attorney Shelli Ellen Petrella Asst. Prosecuting Attorney Columbiana County Courthouse 105 S. Market St. Lisbon, Ohio 44432
For Defendant-Appellant:	Kumi Lang, Pro Se 225 W. Lincoln Way, Apt. C Lisbon, Ohio 44432
JUDGES:	
Hon. Gene Donofrio Hon. Joseph J. Vukovich Hon. Cheryl L. Waite	

Dated: November 24, 2004

DONOFRIO, J.

{¶1} Pro se defendant-appellant, Kumi Lang, appeals from a Columbiana County Municipal Court, Southwest Division judgment convicting her of willful or wanton disregard of safety on highways.

{¶2} On January 30, 2003, appellant was riding her bicycle down a hill on Teegarden Road in Hanoverton Township. She noticed a stopped school bus at the bottom of the hill, letting a student off. As she approached the stopped school bus, she either did not or could not stop her bicycle. At the time, a student had exited the bus and was crossing the road. The bus driver had to honk her horn to warn the student to stop because appellant almost hit him with her bicycle. Appellant rode past the school bus without stopping, though the bus's lights were activated, indicating that students were getting off.

{¶3} Thereafter, the bus driver filed a complaint with Officer Timothy Jones and gave him a description of appellant. The bus driver was familiar with appellant and informed Officer Jones where she lived. Officer Jones, who was also familiar with appellant, went to appellant's apartment to question her. Appellant admitted to being on Teegarden Road on the day in question, to seeing the school bus with its lights on, and to passing the bus claiming an inability to stop her bicycle. Officer Jones then issued her a citation for improper passing of a school bus in violation of R.C. 4511.75.

{¶4} Plaintiff-appellee, the State of Ohio, later amended the charge from failure to stop for a school bus to reckless operation without due regard for safety, a minor misdemeanor in violation of R.C. 4511.20. The case proceeded to a bench trial. The court found appellant guilty and fined her $100. Appellant then filed a timely notice of appeal on November 12, 2003.

{¶5} Initially, we note that appellant's brief fails to comply with most of the provisions of App.R. 16(A). Her brief does not contain a table of contents, citations to cases in support, a statement of assignments of error, a statement of the issues

presented for review, or an argument for each assignment of error with citations to relevant authority and the record as required by App.R. 16(A)(1)(2)(3)(4)(7). However, in the interests of justice we will examine the arguments appellant raises.

{¶6} Initially, we will address appellant's contention that because she was riding a bicycle, which is not a motor vehicle, the motor vehicle statutes did not apply to her.

{¶7} Appellant is correct that her bicycle is not a "motor vehicle" as defined by R.C. 4511.01(B). A "motor vehicle" includes "every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires" with various exceptions. R.C. 4511.01(B). However, a bicycle is not excluded from qualifying as a "vehicle." R.C. 4511.01(A) defines a "vehicle" as "every device, including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway, except that '*vehicle' does not include* any motorized wheelchair, electric personal assistive mobility devices, any device that is moved by power collected from overhead electric trolley wires or that is used exclusively upon stationary rails or tracks, *or any device, other than a bicycle*, that is moved by human power." (Emphasis added.) Thus, a bicycle is not excluded from meeting the definition of "vehicle." And bicyclists are required to obey traffic laws. According to R.C. 4511.55(A), "[e]very person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable *obeying all traffic rules applicable to vehicles* and exercising due care when passing a standing vehicle or one proceeding in the same direction." (Emphasis added.)

{¶8} In *State v. Vest* (Sept. 26, 1986), 4th Dist. No. 1262, the State appealed a trial court judgment dismissing a D.U.I. complaint against the appellee finding that he could not be charged with D.U.I. while riding his bicycle since a bicycle is not a vehicle. The appellate court reversed holding that bicycles moved by human power are vehicles within the definition provided in R.C. 4511.01(A) and, therefore, appellee could be charged with D.U.I. while riding a bicycle.

{¶9} Here we have a similar argument – that a bicycle is not a motor vehicle. However, R.C. 4511.55(A) is clear that all bicyclists must obey the traffic rules.

Thus, appellant was required to follow all traffic rules while riding her bicycle, including stopping for a school bus. This argument therefore is without merit.

{¶10} Appellant also argues the trial court improperly allowed appellee to amend its complaint without first obtaining her permission. At a pretrial hearing, appellee moved to amend the charge against appellant from improper passing of a school bus to willful or wanton disregard of the safety of persons or property. Appellant objected to this amendment. (Status Conference Tr. 6-7). However, the trial court granted the motion and amended the charge. Appellant also filed a motion asking the trial court to reconsider its decision, which the court denied.

{¶11} The amendment of traffic tickets is governed by Crim.R. 7(D). *City of Tiffin v. Ruden* (1988), 46 Ohio App.3d 138, 139, 546 N.E.2d 223. It provides, in pertinent part: "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." Crim.R. 7(D). A traffic ticket is a complaint. Traf.R. 3(A). Thus, the court could amend the complaint against appellant as long as it made no changes to the name or identity of the crime charged.

{¶12} In this case, the court changed both the name and identity of the crime charged. Appellant was originally cited for improper passing of a school bus in violation of R.C. 4511. 75. The court amended the charge against appellant to willful or wanton disregard for the safety of persons or property. The court did not merely correct a defect or omission, but instead altered the offense with which appellant was charged. Crim.R. 7(D) does not permit for this type of amendment. See *State v. Logue* (Feb. 11, 2000), 7th Dist. No. 97 BA 46; *State v. Hasentab* (June 2, 1995) 11th Dist. No. 94-L-112; *City of Middletown v. Blevins* (1987), 35 Ohio App.3d 65, 51 N.E.2d 846

{¶13} But the court can amend the original charge to a lesser included offense without changing the name or identity of the original charge. *Logue*, 7th Dist. No. 97 BA 46. Therefore, since the court amended the complaint from a violation of

R.C. 4511.75 to a violation of R.C. 4511.20, we must determine whether R.C. 4511.20 is a lesser included offense of R.C. 4511.75.

{¶14} We conclude that it is not a lesser included offense. "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, 209, 533 N.E.2d 294. Thus, we must examine the two offenses in light of these elements.

{¶15} R.C. 4511.75(A) provides, in relevant part: "The driver of a vehicle, * * * upon meeting or overtaking from either direction any school bus stopped for the purpose of receiving or discharging any school child, * * * shall stop at least ten feet from the front or rear of the school bus and shall not proceed until such school bus resumes motion, or until signaled by the school bus driver to proceed." While R.C. 4511.20(A) provides: "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."

{¶16} Operating a vehicle in willful or wanton disregard for the safety of persons or property carries a lesser penalty than improper passing of a school bus. Thus, the first element is met. However, because improper passing of a school bus, as statutorily defined, can be committed without operating a vehicle in willful or wanton disregard for the safety of persons or property, as statutorily defined, also being committed, the lesser charge is not a lesser included offense of the greater charge. In order to be guilty of operating a vehicle in willful or wanton disregard for the safety of persons or property, one must act willfully or wantonly. There is no such requirement in order to be guilty of improper passing of a school bus. Thus, the greater offense can be committed without the lesser offense also being committed.

{¶17} Since operating a vehicle in willful or wanton disregard for the safety of persons or property is not a lesser included offense of improper passing of a school bus, the trial court could not simply amend the complaint against appellant from one

to the other. Because such an amendment is expressly prohibited by Crim.R. 7(D), the trial court committed reversible error regardless of whether appellant can demonstrate prejudice as a result of the amendment. *Logue*, 7th Dist. No. 97 BA 46.

{¶18} When a defendant is charged with an offense and the State wishes to amend the charge to another offense that is not the same offense in name and identity and is not a lesser included offense of the original charge, the State must serve the defendant with a new charging instrument setting forth the new charge against him unless the defendant agrees to waive service. *Blevins*, 35 Ohio App.3d at 67. "Ohio Traf.R. 3 contemplates that an officer who completes a ticket at the scene of an alleged offense may execute a new complaint when the original complaint proves to be deficient." *State v. Mangen* (Oct. 15, 1991), 2d Dist. No. 1282. Accordingly, in this case, once appellant objected to the amendment of the ticket the State should have served her with a new ticket charging her with the new offense. It did not.

{¶19} Given the resolution of appellant's amendment argument, we need not address the merit of her remaining arguments, which allege errors during a pre trial proceeding, trial, and the issuance of the complaint.

{¶20} For the reasons stated above, appellant's conviction is vacated.

Vukovich, J., concurs.
Waite, P.J., concurs.