

[Cite as *Westlake v. O'Linn*, 2005-Ohio-383.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 84020 & 84280

CITY OF WESTLAKE,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
TIMOTHY J. O'LINN,	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 3, 2005
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CHARACTER OF PROCEEDING:	:	Criminal appeals from
	:	Rocky River Municipal Court
	:	Case Nos. 03 TRC 05818
	:	and 03 TRC 05329

JUDGMENT	:	AFFIRMED.
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DATE OF JOURNALIZATION	:	
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APPEARANCES:

For plaintiff-appellee:	John D. Wheeler, Esq. Prosecutor City of Westlake 1801 East Ninth Street Suite 1710 Cleveland, Ohio 44114
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For defendant-appellant:	Robert L. Tobik, Esq. Chief Public Defender BY: John T. Martin, Esq. Noelle A. Powell, Esq. Assistant Public Defenders 1200 West Third Street 100 Lakeside Place Cleveland, Ohio 44113
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JOSEPH J. NAHRA, J.*:

{¶ 1} In this consolidated appeal, Timothy O'Linn appeals his convictions from two counts of driving under the influence of alcohol in violation of R.C. 4511.19 and one count of failure to control a motor vehicle in violation of Westlake Municipal Code 331.34A. We affirm.

{¶ 2} According to the record on appeal, on March 14, 2003, Westlake police responded to a call on Clark Parkway at Rose Road after receiving reports that a car had run off the road. When they arrived, they found O'Linn walking in the general area of the car, and found his car in a ditch on the side of the road. The officers noted that in addition to the strong odor of alcohol, O'Linn's eyes were bloodshot, his speech was slurred and he appeared confused. He was given a field test for sobriety, failed the test, and was arrested for OMVI and failure to maintain control.

{¶ 3} Shortly thereafter, on March 23, 2003, O'Linn was again stopped by Westlake police after he was observed driving 5 m.p.h. on Center Ridge Road. The officer again noted O'Linn's slow speech, bloodshot eyes, and the strong odor of alcohol on his breath, and asked him to take a breathalyzer test. He refused and was arrested.

{¶ 4} O'Linn entered pleas of no contest to all charges and was sentenced to concurrent terms of 180 days in jail, a five-year license suspension under R.C. 4507.16, and given a suspended \$350 fine plus court costs.

{¶ 5} In his sole assignment of error, O'Linn claims his due process rights were violated by the trial court's failure to inform him of his right to have the prosecution prove his case beyond a reasonable doubt.

{¶ 6} O'Linn cites to Crim.R. 11(C)(2)(c) which governs the trial court's acceptance of guilty pleas and states in relevant part:

"(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

"(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

{¶ 7} This provision, however, is applicable only as to *felony* offenses. Both driving under the influence and failure to control are misdemeanors and, as such, these offenses are governed by Crim.R. 11(E) which states:

"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."

{¶ 8} Even if this court were to adhere to the more stringent standard as outlined in Crim.R. 11(C), in *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163, the Ohio Supreme Court held that the provisions of Crim.R. 11(C) were met so long as there was substantial compliance with the provisions, and that omission did not constitute prejudicial error. Further, "substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. We have held that even in felony cases, a trial court's failure to inform the defendant that the state must prove guilt beyond a reasonable doubt is not a fatal flaw. See, e.g., *State v. Styles* (Oct. 9, 1997), Cuyahoga App. No. 71052.

{¶ 9} In the instant case, the record reflects that O'Linn was informed of the full ramifications of pleading no contest to these charges including: the six-year "look back" period for DUI offenses, including the possibility of a ten-year "look back period" due to pending legislation, enhanced penalties for future alcohol-related offenses, a fine of \$800 to \$10,000, driver's license suspension, the right to a jury trial, the right to subpoena witnesses and cross-examine them, waiver of the right to remain silent, and a full explanation of the ramifications of a no-contest plea compared to a guilty plea, and the resulting conviction.

{¶ 10} Based on this colloquy, the trial court substantially complied with Crim.R. 11, and there is no indication of prejudice.

In addition, there is nothing in the record that indicates that O'Linn would have pleaded otherwise, and the trial court's failure to inform him of the state's burden of proof beyond a reasonable doubt was not prejudicial.

{¶ 11} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOSEPH J. NAHRA*
JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS.

SEAN C. GALLAGHER, P.J., CONCURS WITH
SEPARATE CONCURRING OPINION.

(*SITTING BY ASSIGNMENT: Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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SEAN C. GALLAGHER, J., CONCURRING:

{¶ 12} I concur with the judgment and analysis of the majority.

I write separately to clarify plea requirements applied to misdemeanor offenses.

{¶ 13} The plea transcript covering the two cases that are the subject of this appeal stretches for nearly eighty pages. Within the minutia of detail, the colloquy outlines that both offenses are "petty" misdemeanors of the first degree punishable by a maximum

term of imprisonment of six months on each charge. They are not serious offenses as defined in Crim.R. 2 or as discussed in Crim.R. 11(D).

{¶ 14} The Supreme Court of Ohio has recognized "[a] judge's duty to a defendant before accepting his guilty or no contest plea is graduated according to the seriousness of the crime with which the defendant is charged. *State v. Watkins*, (2003), 99 Ohio St.3d 12, 16. The court explained:

"The same requirements placed upon a judge by Crim.R. 11(D) and (E) for defendants charged with committing serious and petty offenses, respectively, are also set forth in Crim.R. 11(C)(2) and (C)(2)(b) for felony defendants. For felony defendants, and only felony defendants, Crim.R. 11(C)(2)(c) adds something extra and separate -- the judge must also inform the defendant of all the rights attendant to the trial that he is foregoing. Crim.R. 11(C)(2)(c) is not a definitional section defining what is meant by the Crim.R. 11(C)(2)(b) requirement that the judge explain the effect of the guilty or no contest plea. It is a separate part of the statute spelling out additional requirements in felony cases that are not required in misdemeanor cases. If Crim.R. 11(C)(2)(c) were merely defining what it means to instruct a defendant as to the effect of his plea, similar language would have been included in Crim.R. 11(D) and (E). That language is missing in the rules because those protections are not required for misdemeanor defendants.

"In felony cases, the Ohio and United States Constitutions require that a defendant entering a guilty plea be 'informed in a reasonable manner at the time of entering his guilty plea of his rights to a trial by jury and to confront his accusers, and his privilege against self-incrimination, and his right of compulsory process for obtaining witnesses on his behalf.' *State v. Ballard* (1981), 66 Ohio St.2d 473, 478, 20 O.O.3d 397, 423 N.E.2d 115. Crim.R. 11(c) sets forth how a judge should explain those rights to a defendant. However, there are no such

constitutionally mandated informational requirements for defendants charged with misdemeanors."

{¶ 15} In this case, I believe the trial court complied with Crim.R. 11(E). I also agree that even if this case had involved a more serious offense to which greater requirements applied, the failure to inform a defendant of the right to have the state prove guilt beyond a reasonable doubt is not fatal where the court has substantially complied with the provisions of Crim.R. 11 since this right is not a constitutional right. See *State v. Moore* (Jan. 20, 2000), Cuyahoga App. No. 75652.