[Cite as *Parma v. Buckwald*, 2009-Ohio-4032.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92354 and 92356

CITY OF PARMA

PLAINTIFF-APPELLEE

vs.

RALPH D. BUCKWALD

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Parma Municipal Court
Case Nos. 06 TRD 05403 and 08 CRB 03429

BEFORE: Boyle, J., Cooney, A.J., and McMonagle, J.

RELEASED: August 13, 2009

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Ralph Buckwald, appeals from a judgment convicting him of driving under suspension and contempt for failure to appear for court. Finding merit to the appeal, we reverse and remand.

{¶ 2} On August 21, 2008, a complaint for contempt (Case No. 08 CRB 03429) was issued against Buckwald for failure to appear for court on October 11, 2006 in Case No. 06 TRD 05403. In the 2006 case, Buckwald had been charged with five traffic offenses under Parma Codified Ordinances ("PCO"): driving under suspension, in violation of PCO 335.08; failure to wear a safety belt, in violation of PCO 337.295; failure to signal a lane change, in violation of PCO 331.08; failure to yield right of way, in violation of PCO 331.22; and driving without an operator's license, in violation of PCO 335.01. After he failed to appear for a pretrial in October 2006, a warrant was issued for his arrest.

{¶ 3} On September 30, 2008, Buckwald pled no contest to the contempt charge in Case No. 08 CRB 03429 and pled no contest to driving under suspension in an amended complaint in Case No. 06 TRD 05403; the other four charges were dismissed.

{¶ 4} The trial court sentenced Buckwald to 30 days in jail on the contempt, suspended the 30 days, and ordered him to pay a fine of $100 plus costs. The trial court further sentenced him to 180 days in jail for driving under suspension, suspended the 180 days, ordered him to pay a fine of $1,000 plus costs, and further ordered that he be placed on probation for 36 months.

{¶ 5} It is from this judgment that Buckwald appeals, raising the following assignment of error for our review:

{¶ 6} "The proceedings below were defective in that the court erred in violation of Crim.R. 11 and/or Traffic Rule 10 and/or in violation of appellant's constitutional rights when accepting the pleas of no contest."

Trial Court's Acceptance of a Plea

{¶ 7} A trial court's obligations in accepting a plea depend upon the level of offense to which the defendant is pleading. *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶25. For a petty offense, defined in Crim.R. 2(D), the court is instructed 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." Crim.R. 11(E). If the misdemeanor charge is a serious offense, defined in Crim.R. 2(C), the court shall not accept a guilty or no contest plea "without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily." Crim.R. 11(D).

{¶ 8} The procedure set forth in Crim.R. 11(C)(2) for felony cases is more elaborate than that for misdemeanors. Before accepting a guilty plea in a felony case, a "trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus. In addition to these

constitutional rights, the trial court is required to determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea. Crim.R. 11(C)(2)(a) and (b).

{¶ 9} It is clear that in all cases, i.e., petty misdemeanor offenses, serious misdemeanor offenses, and felonies, the judge must inform the defendant of the effect of his or her plea. *Watkins* at ¶26.

Petty Misdemeanor Offenses

{¶ 10} Buckwald was convicted of contempt for failure to appear, which is a fourth degree misdemeanor, and driving under suspension, which is a first degree misdemeanor. Buckwald claims that driving under suspension is a "serious misdemeanor offense," and therefore the trial court had to comply with Traf.R. 10(C). We disagree.

{¶ 11} Crim.R. 2(D) defines "petty offense" as "a misdemeanor other than a serious offense." "Serious offense" is defined as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Driving under suspension is a petty offense because it carries the possibility of *up to six months in jail*. R.C. 2929.21(B)(1); *Macedonia v. Ewing*, 9th Dist. No. 23344, 2007-Ohio-2194, ¶11. Contempt is also a petty misdemeanor offense, since it is a fourth degree misdemeanor with the possibility of 30 days in jail. R.C. 2929.21(B)(4). The traffic rules govern Buckwald's plea regarding driving under suspension, and the criminal rules govern his plea with respect to contempt.

{¶ 12} Traf.R. 10 addresses pleas and a defendant's rights when pleading to a traffic offense. Traf.R. 10(D) applies to misdemeanor cases involving petty offenses. Traf.R. 10(D) provides:

{¶ 13} "In misdemeanor cases involving petty offenses, except those processed in a traffic violations bureau, 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."

{¶ 14} Crim.R. 11(E) applies to nontraffic misdemeanor cases involving petty offenses (including Buckwald's contempt conviction) and "is identical in all relevant aspects to Traf.R. 10(D)." *Watkins*, supra, at ¶15. Crim.R. 11(E) states:

{¶ 15} "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."

{¶ 16} Since Buckwald's convictions were petty misdemeanor offenses, the rules governing the trial court's acceptance of his pleas are governed by Traf.R. 10(D) and Crim.R. 11(E). Thus, Buckwald's claim that the trial court violated his constitutional rights when it accepted his pleas of no contest is without merit. Crim.R. 11(C) and the protections it provides to a defendant who is charged with a felony simply do not apply to misdemeanor petty offenses.

The Effect of a Plea

{¶ 17} Traf.R. 10(B) and Crim.R. 11(B) set forth the "effect of guilty or no contest pleas." These provisions are also nearly identical and provide:

{¶ 18} "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 complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Traf.R. 10(B)(2).

{¶ 19} "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).

{¶ 20} In *Watkins*, supra, the Ohio Supreme Court clarified that all that is required of a trial judge before accepting a plea to a petty misdemeanor offense under Traf.R. 10(D) and Crim.R. 11(E) is that the judge must inform the defendant of the information contained in Traf.R. 10(B) and Crim.R. 11(B)(2) – both of which set forth the effect of the no contest plea. Id. at ¶28.

{¶ 21} In *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, the Ohio Supreme Court interpreted the meaning of the "effect of the plea." It specifically addressed the question, "[w]hether a trial court complies with Crim.R. 11(E) by simply notifying a defendant of the effect of his/her plea as set out in Crim.R. 11(B) or whether the trial court complies with Crim.R. 11(E) by notifying a defendant of the maximum penalties that could result from a plea and that the

defendant waives his/her right to jury trial by entering a plea, but does not notify a defendant of the effect of his/her plea." Id. at ¶5.

{¶ 22} The Supreme Court stated that its prior cases "suggest" that Crim.R. 11(B), captioned "'[e]ffect of guilty or no contest pleas,' actually defines the effect of the plea." Id. at ¶23. Thus, "for a no contest plea, a defendant must be informed that the plea of no contest is not an admission of guilt but is an admission of the truth of the facts alleged in the complaint, and that the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Id., citing Traf.R. 10(B)(2) and Crim.R. 11(B)(2). The Supreme Court held that "to satisfy the requirement of informing a defendant of the effect of a plea, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B)." Id., paragraph two of the syllabus. This holding equally applies to traffic offenses under Traf.R. 10(B).

Buckwald's Plea Hearing

{¶ 23} The transcript of Buckwald's plea hearing reveals that the trial court failed to inform him of the effect of his no contest pleas. After the court asked Buckwald if he understood the plea agreement offered by the prosecutor in the 2006 case, the following colloquy took place.

{¶ 24} "THE COURT: Okay. Same questions go to you. Are you presently under the influence of any drugs or alcohol?

{¶ 25} "MR. BUCKWALD: No Your Honor.

{¶ 26} "THE COURT: Has anyone made any threats or promises in order to get you to admit today?

{¶ 27} "MR. BUCKWALD: No Your Honor.

{¶ 28} "THE COURT: Do you understand that by admitting you're giving up your constitutional rights to go to trial to cross-examine witnesses, to summon or subpoena your own witnesses and to testify on your own behalf if you choose to testify; do you understand all that?

{¶ 29} "MR. BUCKWALD: Yes Your Honor.

{¶ 30} "THE COURT: The city of Parma has the burden of proving his case beyond a reasonable doubt. By entering the plea today you're giving up that right; do you understand that?

{¶ 31} "MR. BUCKWALD: Yes Your Honor.

{¶ 32} "THE COURT: This is a first degree misdemeanor, maximum fine and penalty is six months in jail, $1000 fine; do you understand that?

{¶ 33} "MR. BUCKWALD: Yes Your Honor.

{¶ 34} "THE COURT: Any questions of your attorney at this time?

{¶ 35} "MR. BUCKWALD: No Your Honor.

{¶ 36} "THE COURT: Do you understand everything that's happening this afternoon?

{¶ 37} "MR. BUCKWALD: Yes he went over it extensively Your Honor.

{¶ 38} "THE COURT: Okay, very good. Then I will ask you your plea to the one count driving under suspension.

{¶ 39} "MR. BUCKWALD: No contest Your Honor."

{¶ 40} Regarding the contempt charge in the 2008 case, the trial court stated, "Your contempt * * * is for failure to appear, * * * you had a court hearing here and you didn't show up." Buckwald agreed that was true. The court then asked, "How do you want to plead to that one?" Buckwald replied, "plead no contest." Buckwald then tried to explain to the court why he missed the court date. The trial court then imposed its sentence.

{¶ 41} After reviewing the record, it is clear that Buckwald was informed of the constitutional rights he was waiving by entering a plea instead of proceeding with a trial, he was further told the maximum penalty that could be imposed, and he was asked whether he understood what he was doing – all of which the trial court was not required to do. The trial court, however, failed to inform Buckwald of the effect of his no contest pleas as required by Traf.R. 10(D) and Crim.R. 11(E), the language of which is set forth in Traf.R. 10(B)(2) and Crim.R. 11(B)(2).

{¶ 42} The Supreme Court held in *Jones* that a trial court may advise a defendant of the language of Crim.R. 11(B) and Traf.R. 10(B) "orally or in writing." Id. at ¶51. We note here that in both cases, Buckwald signed an identical written "plea withdrawal/change of plea." But they were standardized forms that were not completely filled out. In fact, the forms did not even indicate that Buckwald pled no contest in the cases (guilty or no contest options were given on the form, but neither choice was indicated). Nor did the forms include the proper language necessary to inform a defendant of the effect of a no contest plea.

Thus, the written plea agreements did not inform Buckwald of the effect of his pleas.

The Requirement to Show Prejudice

{¶ 43} The city argues that Buckwald did not suffer any prejudice as a result of the trial court's failure to inform him of the effect of his no contest pleas. Indeed, in *Jones*, although the Ohio Supreme Court acknowledged that the trial court committed clear error, the court also concluded the error did not involve a constitutional right. Id. at ¶52. For that reason, the error was not reversible without a showing of prejudice. Id. Prejudice, in this context, means that the plea would not otherwise have been made but for the trial court error. Id. Jones did not allege any prejudice from the trial court's failure to tell him that a guilty plea amounts to a complete admission of guilt, and he never claimed that he was innocent. Thus, the Supreme Court determined that he was not prejudiced by the trial court's failure to comply with Crim.R. 11(B)(1), and, "under the totality of the circumstances, Jones was aware that a plea of guilty was a complete admission of guilt * * *." Id. at ¶55.

{¶ 44} More recently, however, in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, the Ohio Supreme Court explained:

{¶ 45} "When the trial judge does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without

explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. * * * The test for prejudice is 'whether the plea would have otherwise been made.' * * * If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. * * * 'A complete failure to comply with the rule does not implicate an analysis of prejudice.'" (Internal citations omitted.) *Clark* at ¶32.

{¶ 46} Here, there was a "a complete failure to comply with the rule" on the part of the trial court because the trial court failed to mention any of the language in Traf.R. 10(B)(2) or Crim.R. 11(B)(2) regarding the effect of Buckwald's no contest pleas. Thus, a prejudice analysis is not necessary. Accordingly, Buckwald's sole assignment of error is sustained.

{¶ 47} We note that Buckwald raises several pro se assignments of error. Since we are vacating his pleas, however, his pro se arguments are moot.

{¶ 48} Buckwald's pleas are vacated. We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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 Parma Municipal Court to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR