[Cite as *N. Royalton v. Semenchuk*, 2010-Ohio-6197.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95357

CITY OF NORTH ROYALTON

PLAINTIFF-APPELLEE

vs.

ELIZABETH SEMENCHUK

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Parma Municipal Court
Case No. 10 TRC 00130

BEFORE: Cooney, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 16, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Elizabeth Semenchuk ("Semenchuk"), appeals her conviction and sentence, claiming that the trial court failed to inform her of the effect of her plea and the maximum possible penalties. She also claims that failing to order a presentence investigation report violated her due process rights. We find merit to the appeal and reverse.

{¶ 3} In January 2010, Semenchuk was charged with violating R.C. 4511.19(A)(2), operating a motor vehicle while under the influence of alcohol (OVI), while having been convicted of the same offense within the last six years. Semenchuk was also charged with refusing to submit to a chemical test and failure to maintain control of her vehicle.

{¶ 4} In June, Semenchuk pled no contest to a single count of OVI. All other charges were nolled. The court sentenced Semenchuk to 180 days in jail with three days credit, fined her $525, and suspended her license for five years. A subsequent motion to modify her sentence was denied.

{¶ 5} Semenchuk now appeals, claiming her plea was accepted contrary to law.

{¶ 6} We shall first address the second assignment of error because it is dispositive of this appeal. Semenchuk contends that her due process rights were violated when the court accepted her plea without informing her of the effect of her plea.

{¶ 7} A trial court's obligation in accepting a plea depends upon the level of the offense to which the defendant is pleading. *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E.2d 635, ¶25. For a petty offense as 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). *Parma v. Buckwald*, Cuyahoga App. Nos. 92354 and 92356, 2009-Ohio-4032, ¶7.

{¶ 8} 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." (Emphasis added.) Semenchuk's charge of OVI carries a maximum sentence of six months in jail and constitutes a first degree misdemeanor. R.C. 4511.19(A)(2).

{¶ 9} In *Watkins*, the Ohio Supreme Court concluded that there is no constitutionally mandated informational requirement for defendants charged with misdemeanors. "The protections that the Criminal Rules provide to felony defendants should not be read into the Ohio Traffic Rules, which deal only with misdemeanor offenses." The court stated that before accepting a plea to a petty misdemeanor offense under Traf.R. 10(D), the trial judge is required to inform the defendant, whether orally or in writing, of the information contained in Traf.R. 10(B). Id. at ¶28.

{¶ 10} In regards to no contest pleas, Traf.R. 10(B)(2) states "[t]he 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." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶23.In

order to properly accept a no contest plea from a defendant charged with a petty misdemeanor, the trial court need only recite this language to the defendant.

{¶ 11} The transcript of Semenchuk's plea hearing reveals that the trial court failed to inform her of the effect of her no contest plea. The language of Traf.R. 10(B)(2) is noticeably absent from the colloquy. The record shows that the trial court began by enumerating the minimum penalties, and then, prior to the defendant's entering her plea, the following exchange took place:

> "THE COURT: Okay. By entering this Plea you're waiving your right to Trial, to myself or to a Jury and all the rights that go along with the Trial. Those rights include the right to be presumed innocent, the right to require the Prosecution to prove your guilt beyond a reasonable doubt. You're waiving your right to compel witness [sic] to testify on your behalf and your right to confront witnesses against you. You're also giving up your right not to testify against yourself and that fact cannot be used against you by any means. Do you understand that you're giving up all of those rights?
>
> "THE DEFENDANT: Yes Your Honor.
>
> "THE COURT: Are you currently under the influence of any drugs or alcohol?
>
> "THE DEFENDANT: Just my medications.
>
> "THE COURT: Okay. Is the medication making your judgment clearer or affecting your judgment in a negative fashion?
>
> "THE DEFENDANT: It's making it much more clearer Your Honor.
>
> "THE COURT: Okay. Do you understand what is taking place here today?
>
> "THE DEFENDANT: Yes I do.
>
> "THE COURT: What Plea would you like to enter?

"THE DEFENDANT: Um No –

"COUNSEL: No Contest.

"THE DEFENDANT: No Contest.

"THE COURT: I'll accept a Plea of No Contest, stipulate to a finding of Guilt Mr. Mancino?

"COUNSEL: Yes, that's correct Your Honor.

"THE COURT: I'll make a find [sic] of Guilty and I'm ready to impose sentence. Before I do, is there anything you'd like to say in mitigation?"

{¶ 12} Counsel for Semenchuk then drew the court's attention to some of the extenuating circumstances of the case. Following these details, the trial court imposed its sentence. The trial court did not recite the effect of the no contest plea as contained in Traf.R. 10(B)(2) at any time; i.e., the court failed to inform Semenchuk that "no contest" means she is admitting the truth of the facts in the complaint.

{¶ 13} The city argues that Semenchuk did not suffer any prejudice as a result of the trial court's failure to inform her of the effect of her no contest plea due to the fact that she stipulated to guilt. However, in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, the Ohio Supreme Court held that "[i]f 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.'" Id. at ¶32, quoting *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶2. See, also, *Buckwald* at ¶46.

{¶ 14} The trial court's failure to mention any of the language in Traf.R. 10(B)(2) constitutes a "complete failure to comply with the rule" and therefore, an analysis of prejudice is unnecessary. Semenchuk's assignment of error in regard to the effect of her plea is sustained.

{¶ 15} Having determined that Semenchuk was not informed about the effect of her plea, the remaining assignments of error challenging the validity of the plea and sentence are moot.

{¶ 16} Semenchuk's plea is vacated.

Judgment reversed.

It is ordered that appellant recover of said 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 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.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR