[Cite as *Cleveland v. Wynn*, 2016-Ohio-5417.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103969

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

GEORGE WYNN

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2015-TRC-034255

BEFORE: Laster Mays, J., Boyle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 18, 2016

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant George Wynn ("Wynn") appeals his no contest plea to Driving Under the Influence ("DUI") in violation of Cleveland Codified Ordinance 433.01(A)(1). After a review of the record, we vacate Wynn's plea, discharge him with respect to the DUI conviction and remand to the trial court for proceedings consistent with this opinion.

{¶2} On December 1, 2015, Wynn, with the assistance of counsel, entered a plea of no contest to the DUI charge after the trial judge explained the charge and the minimum and maximum penalties he could receive. (Tr. 3 and 4.) The trial judge asked Wynn if he understood the possible penalties, to which he responded that he did. *Id*. The trial judge asked him for a second time if he wished to enter a no contest plea. *Id*. Wynn responded "I understand, but let's get this over with today. That's all I'm saying, so I'll plead." *Id.* The trial judge responded by explaining Wynn's constitutional rights and asked if Wynn wanted to waive those rights, to which Wynn responded "yes." *Id*. For a third time, the trial judge asked Wynn if he wished to enter a no contest plea, and he replied "yes, ma'am." (Tr. 5.) The trial court then allowed Wynn's counsel to allocute on his behalf.

{¶3} During sentencing, the trial court issued a $375 fine and suspended court costs, placed Wynn on active probation to include the three-day Alternative to Jail

Program, ordered him to attend three Mother's Against Drunk Driving meetings, and ordered him take a substance abuse assessment. The trial court suspended his driver's license until February 20, 2016, and informed Wynn that he could file for driving privileges 15 days after sentencing. As a result, Wynn filed this timely appeal and assigned three errors for our review:

> I. Appellant was denied due process of law when the court did not explain to the defendant the effect of a plea of no contest.
>
> II. Appellant was denied due process of law when the court accepted a plea of no contest without an explanation of the facts and circumstances.
>
> III. Appellant was denied due process of law when the court did not personally accept a no contest plea from appellant.

I. Standard of Review

{¶4} "In considering whether a plea was entered knowingly, intelligently and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record." *State v. Tutt*, 8th Dist. Cuyahoga No. 102687, 2015-Ohio-5145, ¶ 13.

II. The Effect of a Plea of No Contest

{¶5} In appellant's first assignment of error, Wynn argues that he was denied due process of law when the court did not explain the effect of a plea of no contest. Wynn was found guilty of a DUI after a no contest plea. The trial court informed the defendant that his DUI was punishable by a minimum of three days up to six moths in jail. Traf.R. 10(D) addresses pleas in misdemeanor cases involving petty offenses. A

petty offense is defined in Traf.R. 2 as "an offense for which the penalty prescribed by law includes confinement for six months or less." *Richmond Hts. v. Myles*, 8th Dist. Cuyahoga No. 84638, 2005-Ohio-509, ¶ 13.

{¶6} *Cleveland v. Adams*, 8th Dist. Cuyahoga No. 97523, 2012-Ohio-1063, ¶ 5, states "[a] trial court's obligations in accepting a plea depends on the level of the offense to which the defendant is pleading." *N. Royalton v. Semenchuk*, 8th Dist. Cuyahoga No. 95357, 2010-Ohio- 6197, ¶ 7, citing *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E.2d 635, ¶ 25. Wynn's DUI was punishable by confinement for six months or less. It is undisputed that appellant's offense is a petty offense.

{¶7} Traf.R. 10 addresses defendants rights when pleading. Traf.R. 10(D) states:

> 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.

Strongsville v. Semenchuk, 8th Dist. Cuyahoga No. 99257, 2013-Ohio-3247, ¶ 15.

{¶8} Traf.R. 10(B)(2) addresses such pleas and states:

> [E]ffect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:
>
> 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.

{¶9} "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." *N. Royalton v. Semenchuk* at ¶ 10. *See State v. Fitzgerald*, 8th Dist. Cuyahoga No. 92978, 2010-Ohio-363, ¶ 31 ("[i]nforming a defendant of the effect of his or her plea is a nonconstitutional right, and therefore, only substantial compliance is required."); *Semenchuk* at ¶ 14 ("[t]he 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."). When a accepting a plea to a petty offense, the judge must advise the defendant of the effect of the plea. *E. Cleveland v. Brown*, 8th Dist. Cuyahoga No. 97878, 2012-Ohio-4722, ¶ 13.

{¶10} Our review of the record indicates that the trial judge gave no such advisement at any point during the plea hearing. Because the trial court did not inform Wynn of the effects of his plea, we sustain appellant's first assignment of error.

III. Explanation of the Facts and Circumstances

{¶11} Although our decision on the first assignment of error vacates the plea, we reviewed the second assignment of error to determine if double jeopardy attaches. In Wynn's second assignment of error, he argues that he was denied due process of law when the court accepted a plea of no contest without an explanation of the facts and circumstances. R.C. 2937.07, which governs no contest pleas in misdemeanor cases, states:

> A plea to a misdemeanor offense of "no contest" or words of similar import shall constitute an admission of the truth of the facts alleged in the complaint and that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense.

{¶12} "Under R.C. 2937.07, when a trial court finds a defendant guilty after that defendant has entered a no contest plea, the record must provide an 'explanation of circumstances' that includes a statement of the facts supporting all of the essential elements of the offense." *Berea v. Moorer*, 8th Dist. Cuyahoga No. 103293, 2016-Ohio-3452, ¶ 9. "An explanation of circumstances is required so that the trial court does not simply make the finding of guilty in a perfunctory fashion." *Id.* "Moreover, 'the mere fact that the court's record includes documents which could show the defendant's guilt will not suffice. If the prosecution relies on such documents, the record must show that the court considered them.'" *Id*.

{¶13} The Ohio Supreme Court further explained:

> The question is not whether the court could have rendered an explanation of circumstances sufficient to find appellant guilty based on the available documentation but whether the court made the necessary explanation in this instance. Our review of the record indicates that no explanation of circumstances took place, notwithstanding the availability of documentary evidence that might have been the basis for meeting the statutory requirement. Therefore, appellee's contention that the trial court fulfilled the obligations imposed by R.C. 2937.07 is without merit and the plea must be vacated.

Cuyahoga Falls v. Bowers, 9 Ohio St.3d 148, 151, 459 N.E.2d 532 (1984).

{¶14} The prosecution did not offer any explanation of what circumstances were sufficient to find Wynn guilty. Wynn even stated that he was not under the influence; however, the trial court interrupted him and told him that was between him and his attorney. Without an explanation of circumstances, the trial court could not fulfill its

obligations imposed by R.C. 2937.07. Therefore, we find that the trial court failed in its duty to comply with R.C. 2937.07.

IV. Double Jeopardy

{¶15} As a result of the trial court's noncompliance with R.C. 2937.07, double jeopardy attaches, preventing the state from getting a second chance to meet its burden. This court held that "a trial court's failure to comply with R.C. 2937.07 is more than mere trial error, but is instead a failure to establish facts sufficient to support a conviction. As such, double jeopardy attaches, thereby preventing the state from getting a second chance to meet its burden." *Moorer* at ¶ 22 Therefore, we find that Wynn must be acquitted of the DUI offense.

{¶16} Accordingly, Wynn's second assignment of error is sustained.

{¶17} Based on our decision in Wynn's assignment of errors one and two, his remaining assignment of error is moot and need not be considered. App.R. 12(A)(1)(c).

{¶18} The trial court is ordered to vacate Wynn's plea, discharge him of the DUI conviction, and return his payment of the fine for the conviction.

It is ordered that the appellant recover from 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 Cleveland 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.

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ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR