[Cite as *N. Ridgeville v. Harris*, 2004-Ohio-957.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CITY OF NORTH RIDGEVILLE

Appellant

v.

JOHN F. HARRIS

Appellee

C .A. No. 03CA008287

APPEAL FROM JUDGMENT
ENTERED IN THE
ELYRIA MUNICIPAL COURT
COUNTY OF LORAIN, OHIO
CASE No. 02 TR 13856

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Presiding Judge.

{¶1} Appellant, the City of North Ridgeville ("the City"), appeals from a judgment entry of the Elyria Municipal Court, which entered a no contest plea on

behalf of Appellee, John F. Harris and convicted Harris of operating a motor vehicle without reasonable control, disorderly conduct, and failure to comply with an order of a police officer. We reverse and remand.

I.

{¶2} On November 9, 2002, a North Ridgeville police officer placed Harris under arrest for driving under the influence ("DUI") in violation of R.C. 4511.19(A)(1), for having a breath alcohol content ("BAC") of .381 in violation of R.C. 4511.19(A)(6), and for failure to maintain reasonable control of his automobile in violation of R.C. 4511.202. Harris was summoned to appear in the Elyria Municipal Court on November 11, 1001, where he initially entered a not guilty plea on all the charges. After a series of continuances, the matter was set for trial on May 1, 2003. On that day, instead of going forward with a trial, and over the objection of the prosecutor, the trial court entered a plea of no contest on charges of reasonable control in violation of R.C. 4511.202, disorderly conduct in violation of the North Ridgeville Codified Ordinance 509.03, and failure to comply with an order of a police officer in violation of the North Ridgeville Codified Ordinance 606.165.

{¶3} The transcript of the proceedings demonstrates that the trial court was reluctant to subject Harris to a conviction of DUI or BAC because those convictions would result in a loss of employment. According to the statements in the transcript, Harris is a pilot with Continental Airlines and FAA regulations require the revocation of Harris' pilot's license in the event of any alcohol related

conviction. The trial court stated that since Harris had a clean driving record, he had sought treatment for alcoholism, and he would lose his job if convicted, the trial court would amend the DUI and the BAC charge to disorderly conduct, and add a charge of failure to comply with an order of a police officer. The trial court fined Harris $250.00 and sentenced him to 30 days in jail for the disorderly conduct, but suspended the sentence "on condition of intensive supervised probation, two years." On the failure to maintain reasonable control charge, the trial court fined Harris $100.00 and ordered a one year license suspension, with occupational driving privileges. On the charge of failure to comply, the trial court fined Harris $1,000 and sentenced him to 180 days in jail; the court suspended $350 of the fine and 122 days of the jail time "on condition of two years intensive supervised probation." The trial court granted Harris 28 days credit for time Harris spent in a rehabilitation program at Glenbeigh Hospital, and ordered that the remaining time would be on house arrest with work release and "intensive supervised probation meetings."

{¶4} The City sought leave to appeal on three issues; leave was granted on the issue of the trial court's amendment to the complaint.

II.

Assignment of Error

> "IT IS ERROR AND CONTRARY TO CRIMINAL RULE 7(D) FOR THE TRIAL COURT TO AMEND THE CHARGES, OVER THE PROSECUTOR'S OBJECTION, CHANGING BOTH THE NAME AND IDENTITY OF THE CRIME CHARGED."

{¶5} In the sole assignment of error, the City argues that the trial court amendment of the complaint changed the name and identity of the crimes charged and, therefore, the trial court did not have the discretion to make such an amendment. We agree.

> "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).

{¶6} Crim.R. 7(D), while permitting some changes to a criminal complaint at any time before, during or after trial, "flatly forbids the court to change the name or identity of the crime charged." *Akron v. Jaramillo* (1994), 97 Ohio App.3d 51, 53. A trial court has no discretion to amend a complaint over the state's objection if the amendment changes the name or identity of the crime. Id. at 54; *Akron v. Robertson* (1997), 118 Ohio App.3d 241, 242. The trial court may not deprive the state of the opportunity to prove its case. *Robertson*, 118 Ohio App.3d at 242. Where a defendant presents facts outside the crime charged, those facts are considered in sentencing and not in the determination of the controversy. *Jaramillo*, 97 Ohio App.3d at 54; *Dayton v. Thomas* (Apr. 18, 1980), 2nd Dist. No. 6567.

{¶7} When a statute is unrelated to a DUI charge under R.C. 4511.19, changing a DUI charge to a charge under that statute is a change in the name and identity of the offense. See *Middletown v. Blevins* (1987), 35 Ohio App.3d 65, 66-67. In the instant case, the trial court impermissibly changed the name and

identity of the crime charged when it amended the DUI to a charge of disorderly conduct over the City's objection. The disorderly conduct statute, by its own language, does not reach the question of operating a motor vehicle under impairment, but states:

> "(b) No persons, while voluntarily intoxicated, shall do either of the following:
>
> "(1) In a public place or in the presence of two or more persons engage in conduct likely to be offensive or to cause inconvenience, annoyance or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others;
>
> "(2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another.
>
> "(c) Violation of any statute or ordinance of which an element is operating a motor vehicle, locomotive, watercraft, aircraft or other vehicle while under the influence of alcohol or any drug of abuse, is not a violation of subsection (b) hereof." City of North Ridgeville Codified Ordinance 648.01.

{¶8} Therefore, the trial court lacked discretion to amend the DUI to the disorderly charge over the City's objection. We reverse and remand for further action consistent with this opinion.

III.

{¶9} The City's assignment of error is sustained. The judgment of the Municipal Court of Elyria is reversed and the cause is remanded.

Judgment reversed,
and cause remanded.

WILLIAM R. BAIRD

FOR THE COURT

SLABY, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

TONI L. MORGAN, City Prosecutor, 7307 Avon Belden Road, North Ridgeville, Ohio 44039, for Appellant.

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