[Cite as *Middleburg Hts. v. Elsing*, 2017-Ohio-6891.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105231

CITY OF MIDDLEBURG HEIGHTS

PLAINTIFF-APPELLEE

vs.

LEEANNA K. ELSING

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED; REMANDED

Criminal Appeal from the
Berea Municipal Court
Case No. 15-TRC-02854

BEFORE: E.A. Gallagher, P.J., Stewart, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 20, 2017

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Leeanna Elsing appeals her conviction for operating a vehicle under the influence of alcohol following her no contest plea in the Berea Municipal Court. Elsing contends that the trial court erred in finding her guilty on the OVI offense without an explanation of the circumstances under R.C. 2937.07 and in denying her motions to dismiss and to suppress evidence. For the following reasons, we reverse the trial court's judgment, vacate her OVI conviction and discharge Elsing as to that conviction.

Factual and Procedural Background

{¶2} On January 18, 2015, Elsing was issued a citation for operating a vehicle under the influence of alcohol in violation of Middleburg Heights Codified Ordinances 434.01(a)(1)(A) (the "OVI offense"), operating a vehicle with breath alcohol content in excess of .170 in violation of Middleburg Heights Codified Ordinances 434.01(a)(1)(H) and a continuous lanes violation in violation of Middleburg Heights Codified Ordinances 432.08(a). Elsing pled not guilty to the charges.

{¶3} Elsing filed motions to dismiss and to suppress evidence, asserting that the initial traffic stop of Elsing's vehicle was not justified because the Middleburg Heights police officer who initiated the stop lacked jurisdiction to stop her vehicle in Parma Heights and lacked a reasonable suspicion to conduct an investigatory traffic stop. Following an evidentiary hearing, the trial court denied the motions.

{¶4} In December 2015, the parties reached a plea agreement. Pursuant to the plea agreement, Elsing withdrew her not guilty plea and pled no contest to the OVI offense. The trial court accepted her plea and found Elsing guilty of the OVI offense. In exchange for her plea, the remaining charges were dismissed.

{¶5} The trial court sentenced Elsing to three days in jail and one year of probation, imposed a $500 fine plus court costs, suspended her driver's license for one year and ordered Elsing to attend a Mothers Against Drunk Driving meeting. The sentence was stayed pending appeal.

{¶6} Elsing appealed her conviction, raising the following two assignments of error for review:

> ASSIGNMENT OF ERROR NO. 1: The trial court erred when it accepted a plea of no contest and found the Appellant guilty without an explanation of the facts and circumstances.
>
> ASSIGNMENT OF ERROR NO. 2: The trial court erred when it denied Appellant's motion to dismiss and motion to suppress.

Law and Analysis

{¶7} In her first assignment of error, Elsing argues that she should be acquitted of the OVI offense because the trial court found her guilty without an explanation of the circumstances supporting all of the elements of the offense. Elsing contends that the trial court's guilty finding did not comply with R.C. 2937.07 because there was no evidence in the record that Elsing smelled of alcohol or admitted to drinking, no evidence as to how she performed on the field sobriety tests or her breath test results and no evidence demonstrating that she was impaired.

{¶8} R.C. 2937.07, which governs pleas in misdemeanor cases, states, in relevant part:

> 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.

{¶9} Under R.C. 2937.07, when a trial court finds a defendant guilty after he or she has entered a no contest plea, the record must contain an "explanation of the circumstances" of the offense, i.e., a statement of facts sufficient to establish commission of the offense, supporting the guilty finding. *Cleveland v. Wynn*, 8th Dist. Cuyahoga No. 103969, 2016-Ohio-5417, ¶ 12; *Berea v. Moorer*, 2016-Ohio-3452, 55 N.E.3d 1186, ¶ 9 (8th Dist.). "R.C. 2937.07 confers a substantive right. Therefore, a no contest plea may not be the basis for a finding of guilt without an explanation of circumstances." *Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 150, 459 N.E.2d 532 (1984). An "explanation of the circumstances" is required so that the trial court "'does not simply make the finding of guilty in a perfunctory fashion.'" *Wynn* at ¶ 12, quoting *Moorer* at ¶ 9.

{¶10} A sufficient "explanation of the circumstances" exists where the record includes "a statement of the facts supporting all of the essential elements of the offense." *Moorer* at ¶ 9; *see also State v. Horvath*, 2015-Ohio-4729, 49 N.E.3d 847, ¶ 12 (3d Dist.). Documentary evidence may suffice as an "explanation of the circumstances" only if the

record demonstrates that the trial court actually considered that evidence in determining the defendant's guilt or innocence. *State v. Brown*, 3d Dist. Marion No. 9-16-37, 2017-Ohio-678, ¶ 6. "'[T]he mere fact that the court's record includes documents which could show the defendant's guilt will not suffice.'" *Moorer* at ¶ 9, quoting *Chagrin Falls v. Katelanos*, 54 Ohio App.3d 157, 158, 561 N.E.2d 992 (8th Dist.1988); *Horvath* at ¶ 16-17. As the Ohio Supreme Court stated in *Bowers*:

> 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 trial court made the necessary explanation in this instance. * * *

Bowers, 9 Ohio St.3d at 151, 459 N.E.2d 532.

{¶11} If an appellate court finds that the "explanation of circumstances" requirement was not satisfied, the conviction must be vacated and the defendant discharged. "[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; *State v. Lloyd*, 6th Dist. Lucas No. L-15-1035, 2016-Ohio-331, ¶ 28; *see also Horvath*, 2015-Ohio-4729, 49 N.E.3d 847, at ¶ 18 ("Under R.C. 2937.07, when a plea of no contest is accepted in a misdemeanor case, the explanation of circumstances serves as the evidence upon which the trial court is to base its finding of guilty or not guilty. * * * When a conviction is reversed due to insufficient evidence, jeopardy attaches, and a remand for a new determination of guilt or innocence

is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.").

{¶12} In this case, Elsing pled no contest to operating a vehicle under the influence of alcohol. The following exchange occurred at the plea hearing:

> THE COURT: Ms. Elsing, you've talked to the Prosecutor and the Prosecutor is going to dismiss the BAC Over Limit .17 and the Continuous Lanes charge.
>
> It's my understanding that as part of that plea bargain Ms. Elsing has agreed to pay the court costs in those dismissed charges. Do you understand that? * * * Is that true Ms. Elsing?
>
> MS. ELSING: Yes.
>
> THE COURT: And then she's going to plead to the DUI, is that right?
>
> [DEFENSE COUNSEL]: That's correct, Judge.
>
> THE COURT: What would be her plea?
>
> [DEFENSE COUNSEL]: Judge, she would withdraw her previously entered plea of not guilty and enter a plea of no contest to that particular offense.
>
> THE COURT: Is the Defendant waiving the facts?
>
> [DEFENSE COUNSEL]: I believe you've heard the facts, Judge.
>
> THE COURT: I have.
>
> [DEFENSE COUNSEL]: So I don't think there's anything more that needs to be presented to the Court.
>
> THE COURT: (Inaudible.)
>
> [DEFENSE COUNSEL]: I prefer you would find her not guilty.

> THE COURT: So, Ms. Elsing * * * the Supreme Court requires that I go over a dialogue with you.
>
> When you plead no contest, you're not admitting guilt of the charge itself, but you are admitting that the facts of the charges basically are true. So you can assume that I would find you guilty, but the results of it can't be used against you later in any civil or criminal proceeding. Do you understand that?
>
> MS. ELSING: Yes, sir.
>
> THE COURT: So I accept your no contest. I find you guilty. * * *

{¶13} It is clear from a review of the transcript that neither the trial judge nor the prosecutor[1] stated any facts on the record at the plea hearing and thus "'offered no explanation of what circumstances gave rise to the finding of guilty'" at the plea hearing. *Moorer* at ¶ 13, quoting *State v. Herbst*, 6th Dist. Lucas No. L-03-1238, 2004-Ohio-3157. Once Elsing entered her no contest plea, the trial judge simply stated that he accepted her plea and that he found her guilty. Elsing did not explicitly waive the reading of the facts or the "explanation of the circumstances" requirement. *See Moorer* at ¶ 13.

{¶14} Although the record contains several documents, including the citation and the police officer's testimony from the suppression hearing that could have supported a finding of guilt and, although the trial judge acknowledged that he had previously "heard the facts," the trial court did not at any point reference any of these facts or materials for the record. "While the trial court judge may have had knowledge of facts that would

[1]Although the transcript from the plea hearing indicates that the prosecutor was present, he said nothing at the plea hearing.

constitute a sufficient basis for a finding of guilt, the law requires an explanation of the circumstances that support such a conclusion." *Brown*, 2017-Ohio-678, at ¶ 12; *see also Horvath*, 2015-Ohio-4729, 49 N.E.3d 847, at ¶ 16 (citing *Cleveland v. Paramount Land Holdings, L.L.C.*, 8th Dist. Cuyahoga No. 95448, 2011-Ohio-3383, ¶ 23, for the proposition that "an explanation of circumstances is not satisfied by a presumption that the [trial] court was aware of facts").

{¶15} The state does not dispute that R.C. 2937.07 required an explanation of the circumstances or that the trial court failed to comply with R.C. 2937.07 before finding Elsing guilty of the OVI offense in this case. The state concedes that "[the OVI charge] should be dismissed and [Elsing] discharged as to that charge." The state, however, asserts that this court should then "reinstate" the operating a vehicle with breath alcohol content in excess of .170 and continuous lanes violation charges the state dismissed as part of the plea agreement. The city has not presented any argument or cited any authority in its brief to support its assertion that this court should reinstate these previously dismissed charges. *See* App.R. 16(A)(7), (B). Accordingly, we decline to address that issue.

{¶16} For these reasons, we find that Elsing must be acquitted of the OVI offense. Elsing's first assignment of error is sustained. Based on our disposition of Elsing's first assignment of error, her second assignment of error is rendered moot and need not be considered. App.R. 12(A)(1)(c).

{¶17} We reverse the trial court's judgment. We vacate Elsing's OVI conviction, discharge her with respect to that conviction and remand the case for the trial court to enter an appropriate entry consistent with this opinion, and to notify the Ohio Bureau of Motor Vehicles to remove any points that have been assessed against her operators license.

{¶18} Judgment reversed; case remanded.

It is ordered that appellant recover from appellee the 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 Berea 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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EILEEN A. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANITA LASTER MAYS, J., CONCUR