[Cite as *State v. Faulkner*, 2015-Ohio-2059.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2013-CA-43
	:	
v.	:	T.C. NO. 13TRC1707
	:	
PAUL E. FAULKNER	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___29th__ day of ____May____, 2015.

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FROELICH, P.J.

{¶ 1} Paul E. Faulkner pled guilty to operating a vehicle while under the influence of drugs or alcohol, in violation of R.C. 4511.19(A)(1)(a). As part of his plea, the State

dismissed an OVI charge under R.C. 4511.19(A)(1)(d) (prohibited concentration) and a turn signal violation charge. The trial court sentenced Faulkner to 180 days in jail, 170 of which were suspended, imposed three years of community control, and suspended his driver's license for two years. The community control sanctions included the conditions that Faulkner attend drug and alcohol counseling and submit to alcohol and drug screening for three years. The trial court also ordered Faulkner to pay a $650 fine and court costs. Faulkner appeals from his conviction. For the following reasons, the trial court's judgment will be reversed, and the matter will be remanded for resentencing.

{¶ 2} According to the record, at approximately 1:36 a.m. on August 10, 2013, Faulkner was stopped on State Route 56 in Champaign County as a suspected impaired driver. Deputy Sheriff Ervin asked Faulkner to perform field sobriety tests and to take a test on a portable breath analyzer. The BAC result was 0.111, which is above the legal limit. Faulkner was transported to the Sheriff's Office, where he submitted to a chemical breath test. The result of that test indicated 0.108 grams of alcohol per 210 liters of breath, which was a prohibited alcohol concentration as defined by R.C. 4511.19(A)(1)(d).

{¶ 3} Faulkner was charged with OVI and a turn signal violation. The traffic citation indicates that Faulkner had two prior OVIs – one in 1990 and one in 2001 – and cited Faulkner for violating R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(d). R.C. 4511.19(A)(1)(a) states: "No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply: (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them." R.C. 4511.19(A)(1)(d) prohibits operating a vehicle with a prohibited alcohol

concentration.

{¶ 4} Faulkner appeared, as summoned, on August 12, 2013. The trial court found him to be indigent and appointed counsel. Faulkner was released on a recognizance bond. Faulkner was ordered to appear on August 14, 2013 to answer the two charges of "OVI – 2d within 20 years" and the turn signal violation.

{¶ 5} On August 14, 2013, Faulkner appeared, with counsel, and pled guilty to "operating a vehicle under the influence." Neither the plea form nor the transcript of the plea hearing (portions of which were inaudible) identifies the section of R.C. 4511.19 to which Faulkner pled or the degree of the offense, but several of the trial court's entries state that he pled guilty to "OVI 2nd within 20 years," in violation of R.C. 4511.19(A)(1)(a). The turn signal violation and the charge under R.C. 4511.19(A)(1)(d) were dismissed. The trial court immediately imposed sentence, as described above. Faulkner was ordered to report to the jail on September 1, 2013, to serve his 10-day sentence.

{¶ 6} Faulkner appealed his conviction. Faulkner's original appellate counsel filed a brief under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that after thoroughly examining the record and the law, he found no potentially meritorious issues for appeal. Counsel identified one potential assignment of error, namely that Faulkner's trial counsel rendered ineffective assistance by failing to file a motion to suppress, but opined that such an assignment was frivolous.

{¶ 7} By entry, we informed Faulkner that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. No pro se brief was filed. After an independent review of the record, we identified a potentially meritorious issue regarding whether Faulkner understood the offense of which he was

charged and whether his counsel was ineffective in failing to clarify the charge. We ordered new counsel to be appointed.

{¶ 8} Faulkner now raises two assignments of error, namely (1) that the trial court erred by accepting his guilty plea to the OVI charge "when the record did not support such convictions" [sic], and by failing to inform him that "a plea of guilty was a full admission of guilt to said charge in accordance with Criminal Rule 11," and (2) that he was denied the effective assistance of counsel "when his counsel allowed him to plead guilty to charges of which he was not guilty."

{¶ 9} Initially, Faulkner's guilty plea serves as a complete admission of factual guilt. Crim.R. 11(B)(1). Accordingly, his guilty plea precludes an argument that the record does not support his conviction, i.e., that his conviction is based on insufficient evidence or is against the manifest weight of the evidence. *E.g.*, *State v. Salmon*, 2d Dist. Montgomery No. 24305, 2011-Ohio-1289, ¶ 4.

{¶ 10} Faulkner claims that his guilty plea was invalid, because the trial court failed to comply with Crim.R. 11. Crim.R. 11 sets forth distinct procedures for the trial court to follow in accepting a plea, with the procedures varying based on whether the offense involved is a misdemeanor that is a petty offense, a misdemeanor that is a serious offense, or a felony.[1] *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 11; *see* Crim.R. 2 (defining classifications of offenses); *State v. Hall*, 2d Dist. Greene No. 2011 CA 32, 2012-Ohio-2539, ¶ 18. A "serious offense" is defined as "any felony, and any misdemeanor for which the penalty prescribed by law includes

[1] The maximum penalty for a first-degree misdemeanor, the most serious classified misdemeanor, is 180 days in jail. R.C. 2929.24. Under R.C. 2901.02, an unclassified offense is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty.

confinement for more than six months." Crim.R. 2(C). A "petty offense" is a misdemeanor other than a serious offense. Crim.R. 2(D).

{¶ 11} An OVI offense under R.C. 4511.19(A) may be a "petty offense" misdemeanor, a "serious offense" misdemeanor, or a felony, depending on the number and timing of any prior OVI convictions. A first or second OVI offense within six years is a first-degree misdemeanor, a petty offense. A third OVI within six years is an unclassified misdemeanor, a serious offense. A fourth or fifth OVI offense within six years or a sixth OVI offense within 20 years is a fourth-degree felony. A second felony OVI offense is a third-degree felony. The range of penalties for these offenses depends on the chemical test results and whether the defendant refused a chemical test. *See* R.C. 4511.19(G) (providing increased penalties for violations of R.C. 4511.19(A)(1)(f)-(i) and R.C. 4511.19(A)(2), compared with R.C. 4511.19(A)(1)(a)-(e), (j)).

{¶ 12} Unlike R.C. 4511.19(A)(1)(a), R.C. 4511.19(A)(2) has a "second offense in 20 years" component. R.C. 4511.19(A)(2) provides:

> (2) No person who*, within twenty years of the conduct described in division (A)(2)(a) of this section*, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do *both* of the following:
>
> (a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;
>
> (b) Subsequent to being arrested for operating the vehicle * * * as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section

> 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, *refuse to submit to the test or tests*.

(Emphasis added.) R.C. 4511.19(A)(2) is inapplicable to Faulkner, as he complied with the officer's request to submit to a chemical test, and he was not charged, let alone convicted, under this provision.

{¶ 13} The record in this case repeatedly refers to the charged offense under R.C. 4511.19(A)(1)(a), the charge to which Faulkner pled guilty, as "4511.19A1A/2/20" and "OVI-2nd within 20 years"; it is identified by the trial court as a first-degree misdemeanor. As stated above, the traffic ticket indicated that Faulkner had two prior OVI convictions. Thus, the appropriate statutory "look back" period for determining the degree of the offense under R.C. 4511.19(A)(1)(a) was six years. Faulkner's prior convictions were in 1990 and 2001; neither was within six years of the 2013 OVI charge. Accordingly, Faulkner's OVI charge under R.C. 4511.19(A)(1)(a) should have been considered a "first OVI within six years," a first-degree misdemeanor, for which the maximum possible jail term is six months in jail. Regardless, even if the court mistakenly considering the OVI charge as if it were a second offense within six years or a charge under R.C. 4511.19(A)(2), the OVI offense would still have been a first-degree misdemeanor. Accordingly, Faulkner's OVI offense constituted a "petty offense" misdemeanor for purposes of Crim.R. 11.

{¶ 14} For a "petty offense" misdemeanor, such as Faulkner's OVI offense, the trial court was required only to inform Faulkner of the effect of his guilty plea, i.e., that his

guilty plea was a complete admission of guilt. *Jones* at ¶ 14, ¶ 25; Crim.R. 11(E).

{¶ 15} At the plea hearing, the trial court asked Faulkner if he wanted to enter a guilty plea to the charge of operating a vehicle while under the influence of alcohol and another misdemeanor charge in a separate case. Faulkner responded that he did. The court continued:

> THE COURT: Do you understand that one of those[2] have [sic] a maximum penalty of up to 6 months in jail and without the dollar fine and costs?
>
> DEFENDANT FAULKNER: Yes.
>
> THE COURT: The OVI also has up to a 3-year driver's license suspension. Do you understand that it's (INAUDIBLE) the OVI could be charged as a felony. For example, if you were to get a fourth OVI within six years or a sixth OVI within one year that that could be charged as a felony?
>
> DEFENDANT FAULKNER: Yes, ma'am.

The trial court then asked Faulkner if he understood that he was giving up his right to a jury trial, his right to remain silent, his right to make the State prove his guilt beyond a reasonable doubt, his right to face his accusers and to cross-examine them, and his right to compel witnesses on his behalf. Faulkner responded affirmatively. Upon further questioning, Faulkner stated that he was making his guilty plea voluntarily and intelligently and that no threats or promises had been made to induce him to enter his plea. The court did not, however, inform Faulkner at the plea hearing that a plea of guilty was a complete admission of guilt. Accordingly, the trial court did not satisfy its

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[2] It is not clear whether the court was referring to the OVI charge, the unrelated offense (violation of a protection order), or both.

obligation under Crim.R. 11 to inform Faulkner of the effect of his plea.

{¶ 16} Nevertheless, the Supreme Court of Ohio has held that a defendant must establish that the failure to comply with nonconstitutional rights, such as the information contained in Crim.R. 11(B)(1), resulted in prejudice, meaning the defendant would not have entered his plea. *Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, at ¶ 52. There is no evidence of prejudice in this case. Faulkner did not claim innocence; he stated before sentencing that he simply thought it was "kind of harsh over 20 years my second one." By failing to assert his innocence, Faulkner is "presumed to understand that a plea of guilty is a complete admission of guilt." *Jones* at ¶ 54, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 19. Faulkner's plea form did not detail the effect of a guilty plea, but in signing the form, Faulkner also agreed, "I understand the effect of a plea of (GUILTY) to the charge." Accordingly, Faulkner's plea is not invalid due to the trial court's failure to inform him of the effect of a guilty plea.

{¶ 17} Faulkner further argues that the trial court erred in sentencing him as if he had been convicted of an offense under R.C. 4511.19(A)(2) or a second offense within six years under R.C. 4511.19(A)(1)(a).

{¶ 18} R.C. 4511.19(G)(1)(a)(i) provides that a first offender is subject to up to six months in jail, with a mandatory jail term of three consecutive days, or to attend a driver's intervention program. A first offender in six years under R.C. 4511.19(A)(2) is subject to six months in jail, with a mandatory jail term of three consecutive days plus a three-day driver's intervention program, or to a mandatory six consecutive days. R.C. 4511.19(G)(1)(a)(ii). For either offense, the court may, but is not required to, impose as a community control sanction that the offender attend a treatment program. In addition,

the offender is subject to a fine between $375 and $1,075 and a class five driver's license suspension (6 months to three years).

{¶ 19} A person who has a second OVI under R.C. 4511.19(A)(1)(a) within six years is subject to six months in jail, with a ten-day mandatory jail term. R.C. 4511.19(G)(1)(b). In addition, the court must order the offender to be assessed by an alcohol and drug treatment program and to follow the treatment recommendations of the program. The offender is subject to a fine between $525 and $1,625 and a Class 4 driver's license suspension (one to five years).

{¶ 20} The sentences for the possible three relevant offenses is illustrated below:

Offense	Minimum Jail	Fines	Treatment	Lic. Susp.	Driving	Restr. Pl./ Interlock	Immobilization
1st in 6 yrs	3 days	$375-$ 1,075	Optional	Class 5	After 15 days	Optional	No
1st in 6 yrs; refusal with prior in 20 yrs	6 days	$375-$ 1,075	Optional	Class 5	After 15 days	Optional	No
2d in 6 yrs	10 days	$525-$ 1,625	Mand. assessmt & treatment	Class 4	After 45 days	Required	90 days if registered to Deft.

{¶ 21} In imposing sentence, the trial court stated that it had considered the fact that Faulkner had two prior OVI convictions. The court also specifically noted that Faulkner had two OVI offenses in the past 20 years. Faulkner received a 180-day jail term, with 170 days suspended. The court also imposed three years of community control, which included the conditions that Faulkner attend drug and alcohol counseling and submit to alcohol and drug screening for three years. The trial court ordered Faulkner to pay a $650 fine, suspended his driver's license for two years, and imposed court costs.

{¶ 22} Faulkner's sentence fell within the permissible range of a sentence for a

first OVI offense within six years under R.C. 4511.19(A)(1)(a), although it was more than the minimum mandatory jail sentence for a first OVI offense within six years under R.C. 4511.19(A)(1)(a) and included community control requirements that were discretionary. The sentence *also* fell within the permissible range for a violation of R.C. 4511.19(A)(2) and exceeded those mandatory minimum sanctions. Faulkner's sentence is similar to the minimum requirements for a sentence for a second OVI offense within six years, but the trial court did not order immobilization of Faulkner's vehicle and impoundment of his license plates, which would have been required. *See* R.C. 4511.19(G)(1)(b)(v).

{¶ 23} It is not apparent from the record and, in particular, the trial court's sentence, what specific OVI offense it believed Faulkner had committed when it imposed sentence. The trial court's repeated references in its entries to "OVI – 2nd in 20 years" implies that it could have sentenced Faulkner under R.C. 4511.19(G)(1)(a)(ii) for a violation of R.C. 4511.19(A)(2), but the same documents refer to Faulkner's having violated R.C. 4511.19(A)(1)(a). Although the sentence itself is not necessarily unlawful for a violation of R.C. 4511.19(A)(1)(a) (first offense) or (A)(2), it is impossible to discern, based on the record before us, whether the trial court was considering the appropriate sentencing provisions in imposing sentence. On its face, the court sentenced Faulkner for an alleged OVI offense (violation of R.C. 4511.19(A)(1)(a)/second in 20 years) that is not addressed by the OVI statute. We therefore conclude that Faulkner's sentence must be reversed, and the matter must be remanded for resentencing under the appropriate sentencing provisions.

{¶ 24} Finally, Faulkner claims that his trial counsel rendered ineffective assistance by failing to "understand or advise Faulkner that R.C. 4511.19(G) does not

carry specific sentencing provisions for a second offense unless the offender has been convicted two times within six years or the offender has been convicted of OVI and has refused to submit to a chemical test after his second OVI arrest in twenty years." The record does not reflect the advice that Faulkner's trial counsel gave him regarding the charges and the plea, and trial counsel made no statement at Faulkner's sentencing. Because Faulkner relies on matters outside the record, his argument is not cognizable on direct appeal.

{¶ 25} The trial court's judgment will be reversed, and the matter will be remanded for resentencing.

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FAIN, J. and HALL, J., concur.

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