[Cite as *State v. Caynor*, 2003-Ohio-3282.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 867
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
RONALD M. CAYNOR, II	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the County Court of Monroe County, Ohio
Case No. 99-TR-D-199

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. L. Kent Riethmiller
Monroe County Prosecutor
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Assistant Prosecuting Attorney
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P.O. Box 430
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For Defendant-Appellant:

Ronald M. Caynor, Pro-se
19609 Chardon Road
Cleveland, Ohio 44117

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich

Hon. Mary DeGenaro

Dated: June 19, 2003

WAITE, P.J.

{¶1} Appellant Ronald M. Caynor II appeals his conviction and sentence on one count of driving without a valid operator's license, in violation of R.C. 4507.02(A). Appellant argues that he should have been permitted to present the affirmative defense of "substantial emergency" as set forth in R.C. 4507.02(E). The trial court correctly concluded that R.C. 4507.02(E), by its own terms, does not apply to a violation of section (A) of the statute. The trial court's decision is affirmed.

{¶2} This case has recently been before this Court (*State v. Caynor* [2001], 142 Ohio App.3d 424, 755 N.E.2d 984, hereafter *Caynor I)*, in which Appellant was permitted to withdraw a prior plea of no contest.

{¶3} This case arose in the County Court of Monroe County. On February 28, 1999, Appellant was given a traffic citation for, inter alia, driving without a valid operator's license. He was specifically charged under R.C. 4507.02(A), which states:

{¶4} "(A)(1) No person, except those expressly exempted under sections 4507.03, 4507.04, and 4507.05 of the Revised Code, shall operate any motor vehicle upon a highway or any public or private property used by the public for purposes of vehicular travel or parking in this state unless the person has a valid driver's license issued under this chapter or a commercial driver's license issued under Chapter 4506. of the Revised Code."

{¶5} Pursuant to a negotiated plea agreement, Appellant entered a no contest plea to one count of driving without a valid driver's license, and the other charges were

dismissed. Appellant later filed a motion to withdraw that plea, and was permitted to withdraw the plea as a result of this Court's decision in *Caynor I.*

{¶6} On remand, the case was set for a jury trial on October 4, 2001. Prior to the start of the trial, counsel for both parties met in chambers to determine whether Appellant would be permitted to present evidence concerning the affirmative defense of "substantial emergency" as set forth in R.C. 4507.02(E), which states:

{¶7} "It is an affirmative defense to any prosecution brought pursuant to division (B), (C), or (D) of this section that the alleged offender drove under suspension or in violation of a restriction because of a substantial emergency, provided that no other person was reasonably available to drive in response to the emergency."

{¶8} The court ruled that R.C. 4507.02(E), by its own terms, applies only to sections (B), (C) and (D) of the statute, and does not apply to the section of the statute under which Appellant was charged. The court ruled that Appellant was not entitled to a jury instruction on "substantial emergency" based on R.C. §4507.02(E), and that any attempt to present facts to support this defense were irrelevant and would be excluded from trial. (10/4/01 Transcript, pp. 9-10; hereinafter "Tr.".)

{¶9} At this point, Appellant and the prosecutor entered into a negotiated plea agreement, in which Appellant agreed to plead no contest to one count of driving without a valid operator's license in violation of R.C. 4507.02(A). In exchange for the plea, Appellee agreed that Appellant would retain the right to raise on appeal the issue that he should have been permitted to assert the "substantial emergency" defense as stated in R.C. 4507.02(E). Appellant then proffered evidence of the alleged emergency. The evidence indicated that Appellant's wife, Linda Caynor, was driving from West Virginia to Cleveland, Ohio, and developed a migraine headache during the drive, causing extreme pain and vomiting. (Tr., pp. 29-30.) Appellant was a passenger in the vehicle, along with Mrs. Caynor's two children, ages three and ten, and her mother. (Tr. p. 33.) None of the other passengers had a valid driver's license. (Tr., p. 33.)

{¶10} Mrs. Caynor testified that she had suffered from migraine headaches since she was eighteen years old. (Tr., p. 35.) She testified that her only method of treating the headaches was to take over-the-counter medications.

{¶11} Mrs. Caynor continued to drive, periodically stopping when the driving became too difficult. At some point, Appellant began driving. Ten minutes after Appellant began driving, an Ohio Highway Patrol officer stopped the vehicle. (Tr., p.

43.) Appellant was given a citation and taken into custody. Mrs. Caynor subsequently drove the car to an aunt's house, and stayed there overnight. (Tr., p. 37.) Mrs. Caynor did not see a doctor concerning her condition. (Tr., p. 37.)

{¶12} After the proffer of evidence, the court conducted a plea hearing and accepted Appellant's no contest plea. The court sentenced Appellant to 180 days in jail and a $500 fine. This timely pro se appeal followed.

{¶13} Appellant presents one assignment of error:

{¶14} "NO. 1 THE TRIAL COURT ERRED BY DENYING DEFEDANT-APPELLANT THE DUE PROCESS OF AN AFFIRMATIVE DEFENSE PRIOR TO THE TRIAL."

{¶15} The record indicates that the only affirmative defense asserted at trial was the statutory defense of "substantial emergency" in R.C. §4507.02(E). On appeal, Appellant argues that he should have been allowed to raise the common law defense of necessity. Appellant did not raise this issue with the trial court, and it did not form a basis of the plea agreement. Appellant has waived this argument by not raising it or preserving it at the trial level. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781, N.E.2d 88, at ¶28.

{¶16} Although Appellant essentially abandons any argument about the applicability of R.C. 4507.02(E), it should be noted that the trial court was correct in refusing to allow the affirmative statutory defense of "substantial emergency." R.C. 4507.02(B) through (D) deals with driving under a suspended license. The defense described in R.C. 4507.02(E) specifically applies only to sections (B), (C) and (D) of the statute. It does not apply to section (A) of the statute, which deals with driving without a valid operator's license. Under the rule of statutory construction of expressio unius est exclusio alterius, an, "expression of one or more items of a class implies that those not identified are to be excluded." *State v. Droste* (1998), 83 Ohio St.3d 36, 39, 697 N.E.2d 620. This rule is applied to both civil and criminal statutes. Id.; *State v. Johnson* (1986), 23 Ohio St.3d 127, 130, 491 N.E.2d 1138; *State v. Black* (1993), 87 Ohio App.3d 724, 729, 622 N.E.2d 1166. The fact that R.C. 4507.02(E) expressly states that it applies only to section (B), (C) and (D) of the statute creates the presumption that it does not apply to section (A). Appellant could not rely on a statutory defense that does not apply to the crime for which he was charged.

{¶17} Even if Appellant could have theoretically raised the statutory defense of "substantial emergency," it is clear from the record that he did not proffer facts which would have entitled him to a jury instruction on the defense. Appellant would have

needed to proffer some evidence of an actual emergency. One court has defined "substantial emergency" in R.C. 4507.02(E) as an, "unforeseen combination of factors which exist in fact and which a reasonable person would perceive as an emergency requiring an immediate response." *State v. Harr* (1992), 81 Ohio App.3d 244, 250, 610 N.E.2d 1049. Although it may have been inconvenient for Appellant and Mrs. Caynor to deal with the situation posed by her migraine headache, apparently it was not serious enough to stop her from driving after Appellant was arrested. There was no indication that Appellant was driving Mrs. Caynor to a doctor or that she even needed to see a doctor. Based on the facts proffered by Appellant, there was no emergency.

{¶18} For the foregoing reasons, Appellant's sole assignment of error is overruled and the trial court judgment is hereby affirmed.

Judgment affirmed.

Vukovich and DeGenaro, J., concur.