**[Cite as *State v. Griffith*, 2010-Ohio-5556.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 10AP-94 |
| v. | : | (M.C. No. 2009 TRC 132196) |
| Clifford Griffith, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on November 16, 2010

*Richard C. Pfeiffer, Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

*Shaw & Miller, Mark J. Miller* and *J. Andrew Stevens*, for appellant.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

**{¶1}** Defendant-appellant, Clifford Griffith, appeals from a judgment of the Franklin County Municipal Court finding him guilty of operating a vehicle while impaired ("OVI"), in violation of Columbus City Code 2133.01(A)(1)(a) after appellant entered a no contest plea to said charge.

**{¶2}** On April 1, 2009, appellant was charged with one count of OVI and one count of assured clear distance ahead ("ACDA"). Appellant entered a no contest plea to a first offense OVI on October 5, 2009. A sentencing hearing was held on January 4, 2010, whereat appellant was sentenced to 180 days in jail, with 150 days suspended and

three days credited, resulting in a jail term of 27 days. However, the trial court's sentencing entry states appellant was sentenced to 180 days in jail with 177 days suspended and three days credited, resulting in no time in jail being served. On January 26, 2010, appellant filed a motion to withdraw his no contest plea, and on February 12, 2010, said motion was denied without a hearing.

**{¶3}** On appeal, appellant brings the following three assignments of error for our review:

> 1. The trial court erred in accepting the Appellant's no contest plea without first personally addressing the Appellant to determine whether his plea was knowingly, intelligently and voluntarily made and without first informing the Appellant of the potential penalties involved.
>
> 2. The Appellant's sentence is void because the sentencing entry indicates the incorrect jail term and license suspension.
>
> 3. The trial court abused its discretion in denying the Appellant's Motion to Withdraw his no contest plea because the Appellant relied on the representations of the trial court to his detriment and he was denied both a hearing on his motion and specific performance of the terms of his plea agreement.

**{¶4}** In his first assignment of error, appellant contends the trial court erred in accepting his no contest plea. Specifically, appellant argues that, in addition to failing to personally address him to determine whether his plea was knowingly, intelligently, and voluntarily made, the trial court also failed to inform him of the potential penalties involved.

**{¶5}** It is undisputed that appellant was charged with a misdemeanor involving a petty offense as defined by law. Traf.R. 2(D) (petty offense is one for which the penalty prescribed by law includes confinement for six months or less); Crim.R. 2(D). Because the charge is a petty offense, the trial court was required to substantially comply with the provisions of Traf.R. 10(D), which mirror Crim.R. 11(E), before accepting appellant's no

contest plea. *State v. George* (Apr. 24, 2001), 10th Dist. No. 00AP-1071. Traf.R. 10(D) provides:

> 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. This information may be presented by general orientation or pronouncement.

**{¶6}** A trial court complies with Traf.R. 10(D) by informing the defendant of the information contained in Traf.R. 10(B). *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419. Traf.R. 10(B) provides, in relevant part:

> (2) 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.

**{¶7}** Though conceding that neither Traf.R. 10(D) nor Crim.R.11(E)[1] command the trial court to address a defendant personally to determine whether the no contest plea is voluntarily, knowingly, and intelligently made or to inform him of the potential penalties involved, appellant asserts this court's decision in *Columbus v. Baba*, 10th Dist. No. 01AP-341, 2002-Ohio-831, requires the same. Indeed, *Baba* held that the failure to fully engage a defendant in a dialogue to determine whether a guilty plea to a misdemeanor involving a petty offense was voluntarily made constituted reversible error, as did failing to inform a defendant of the potential penalties. However, subsequent to *Baba*, the Supreme Court of Ohio decided *Watkins* and *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093. *Watkins* held that "[w]hen a defendant charged with a petty misdemeanor

[1] Crim.R. 11(E) provides: "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty."

traffic offense pleads guilty or no contest, the trial court complies with Traf.R. 10(D) by informing defendant of the information contained in Traf.R.10(B)." Id. at syllabus. *Jones* held that when "accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered." Id. at paragraph one of the syllabus.

**{¶8}** Though Crim.R. 11(E) applies to non-traffic misdemeanor cases involving petty offenses, it is identical in all respects to Traf.R. 10(D); thus, the framework for analyzing cases under Crim.R. 11(E) is equally appropriate to cases involving Traf.R. 10(D). *Watkins* at ¶15. The court in *Watkins* refused to adopt the position that a trial judge in a case involving a defendant who falls under Crim.R. 11(E) is required to engage in the same colloquy with the defendant as that required specifically by Crim.R. 11(C) for felony defendants. Crim.R. 11(C) provides, in relevant part:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a

> trial at which the defendant cannot be compelled to testify against himself or herself.

**{¶9}** As reiterated by the Supreme Court of Ohio in *Jones*, the *Watkins* court rejected any suggestion that the effect of the plea in the petty offense was defined by the requirements of Crim.R. 11(C)(2)(c) or that when accepting a no contest plea to a traffic charge, the trial court should engage a defendant in a Crim.R. 11(C) colloquy about the effect of his plea. *Jones* at ¶23. "Thus, for a no contest plea, a defendant must be informed that the plea of no contest is not an admission of guilt but is an admission of the truth of the facts alleged in the complaint, and that such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Id.

**{¶10}** The court went on to hold:

> Although Crim.R. 11(E) does not require the trial court to engage in a lengthy inquiry when a plea is accepted to a misdemeanor charge involving a petty offense, the rule does require that certain information be given on the "effect of the plea." Whether orally *or* in writing, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B) before accepting a plea.

(Emphasis added.) Id. at ¶51.

**{¶11}** In the case sub judice, the following exchange took place during the plea hearing:

> [The Court]: [Appellant], I have a document in front of me entitled advice and waiver of trial by jury. Did you read – Did you read this over with your counsel?
>
> [Appellant's Counsel]: He was just asking if it was the no contest form. I said yes.
>
> [The Court]: Did you understand everything in it before you signed it?
>
> [Appellant]: Yes.

> [The Court]: Counsel, do you believe that your client is proceeding knowingly, voluntarily and intelligently in this matter?
>
> [Appellant's Counsel]: I do.
>
> [The Court]: [Appellant], what is your plea to the charge of OVI as a misdemeanor of the first degree?
>
> [Appellant]: No contest.

(Oct. 5, 2009 Tr. 2-3.)

**{¶12}** The "Advice and Waiver of Trial By Jury" document referenced by the trial court was signed by appellant on October 2, 2009. Said document states, "I understand and acknowledge that a plea of 'NO CONTEST' is not an admission of guilty but is an admission of the truth of the facts alleged in the complaint, and the no contest plea or admission cannot be used against me in any subsequent civil or criminal proceeding." Additionally, appellant's initials appear on a line next to this statement.

**{¶13}** Thus, we find the trial court substantially complied with Traf.R. 10(D) by informing appellant of the effect of his no contest plea to a misdemeanor involving a petty offense as indicated in Traf.R. 10(B). *Watkins*; *Jones*; *State v. Lindenmayer*, 5th Dist. No. 08-CA-142, 2009-Ohio-3982, ¶75 (compliance with Crim.R. 11(B) satisfied where the defendant was informed in writing of the effect of his plea). Accordingly, we overrule appellant's first assignment of error.

**{¶14}** For ease of discussion, we will address appellant's remaining assignments of error in reverse. In his third assignment of error, appellant contends the trial court erred in denying his motion to withdraw his no contest plea. Crim.R. 32.1 provides:

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct

> manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

**{¶15}** Because appellant's request was made post-sentence, the standard by which the motion was to be considered was "to correct a manifest injustice." Id.; *State v. Franks*, 10th Dist. No. 04AP-362, 2005-Ohio-462. A manifest injustice has been defined as a "clear or openly unjust act." *State v. Honaker*, 10th Dist. No. 04AP-146, 2004-Ohio-6256, ¶7, discretionary appeal not allowed by 105 Ohio St.3d 1472, 2005-Ohio-1186, citing *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. A manifest injustice has also been found to "[relate] to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Wooden*, 10th Dist. No. 03AP-368, 2004-Ohio-588, ¶10, discretionary appeal not allowed by 102 Ohio St.3d 1484, 2004-Ohio-3069. It is the defendant who has the burden of establishing the existence of a manifest injustice warranting the withdrawal of a guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. Further, under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in "extraordinary cases." Id. at 264.

**{¶16}** Absent an abuse of discretion, a reviewing court will not disturb a trial court's decision on whether to grant a motion to withdraw a guilty plea. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. The term "abuse of discretion" connotes more than a mere error in judgment; it signifies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The good faith, credibility, and weight of the movant's assertions in support of

the motion to withdraw a guilty plea are matters to be resolved by the trial court. *Smith* at paragraph two of the syllabus.

**{¶17}** " 'An evidentiary hearing on a post-sentence motion to withdraw a guilty plea "is not required if the facts as alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn." ' " *Honaker* at ¶9, quoting *State v. Patterson*, 5th Dist. No. 2003CA00135, 2004-Ohio-1569, ¶18, quoting *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204; *State v. Wynn* (1998), 131 Ohio App.3d 725, 728. However, generally, a self-serving affidavit or statement is insufficient to demonstrate manifest injustice. Id., citing *Patterson*, citing *State v. Laster*, 2d Dist. No. 19387, 2003-Ohio-1564.

**{¶18}** According to appellant's motion, he entered the no contest plea to a first offense OVI because he was told he would receive a recommendation for minimum first offense penalties. Appellant's supporting affidavit states:

> 2. On October 6, 2009 I entered pleas of No Contest to the charges in this case anticipating I would receive the minimum sentence.
>
> 3. Prior to sentencing, my counsel discussed sentencing with the Judge at the bench, at no time did the Court indicate it was going to give me a jail sentence.
>
> 4. On January 4, 2010 this Court sentenced me to 27 days in jail. Had I known the Court was going to sentence me to 27 days in jail, I would not have waived my Constitutional right to a jury trial and I would have proceeded to trial.

**{¶19}** In denying appellant's motion to withdraw his no contest plea, the trial court stated, "although [appellant] may have anticipated a lesser sentence the burden of determining sentence is left with the court." (Feb. 12, 2010 entry.)

**{¶20}** We recognize that "when a trial court accepts a plea bargain and makes a promise to impose sentence in a certain manner, consistent with the agreement, it becomes bound by said promise." *State v. Burks*, 10th Dist. No. 04AP-531, 2005-Ohio-1262, ¶19, citing *State v. Bonnell*, 12th Dist. No. CA01-12-094, 2002-Ohio-5882, ¶18, and *United States v. Brummett* (C.A.6, 1986), 786 F.2d 720. However, the record before us contains no evidence that appellant was promised anything, much less promised a sentence consisting of only minimum first offense penalties. At the hearing, after the victim described the events of the night appellant was cited for OVI, the trial court stated:

> Counsel, that's a lot more information that I had when we talked about a probable resolution to the sentence. I will acknowledge that when we first talked, I had assumed that he had struck the telephone pole or something along those lines. We are not looking at a minimum sentence here.

(Jan. 4, 2010 Tr. 9.)

**{¶21}** The trial court went on to state, "[b]ecause he was not anticipating the jail days that I'm going to impose, I will give you within the next 30 days to pick for enforcement of the additional 27 days that you'll be doing in jail." Id. at 10.

**{¶22}** The transcript of the sentencing hearing does not indicate appellant was promised any type of sentence. In fact, appellant's own affidavit does not even allege that he was promised anything but, rather, states that he received a sentence he did not *anticipate*. Indeed, the trial court recognized that appellant may not have anticipated a jail term, but that does not equate to a finding that the sentence was unanticipated because the trial court promised the same. Further, not only is there no evidence that appellant was promised he would receive a sentence that did not include a term of incarceration, the record contains no evidence of a jointly recommended sentence. While appellant's

affidavit states that he anticipated minimum first offense penalties rather than incarceration, it is well-settled that a defendant's self-serving declarations or affidavits are "insufficient to demonstrate manifest injustice." *State v. Kerns,* 10th Dist. No. 06AP-372, 2006-Ohio-6435, ¶11, citing *Honaker* at ¶9, citing *State v. Patterson,* 5th Dist. No. 2003CA00135, 2004-Ohio-1569.

**{¶23}** Moreover, a "defendant's change of heart or mistaken belief about the guilty plea or expected sentence does not constitute a legitimate basis that requires the trial court to permit the defendant to withdraw the guilty plea." *State v. Brooks,* 10th Dist. No. 02AP-44, 2002-Ohio-5794, ¶51, citing *State v. Sabatino* (1995), 102 Ohio App.3d 483, 486. See also *State v. Drake* (1991), 73 Ohio App.3d 640, 645, citing *State v. Meade* (May 22, 1986), 8th Dist. No. 50678; *State v. Sabath,* 6th Dist. No. L-08-1148, 2009-Ohio-5726 (where the defendant was sentenced to incarceration rather than community control, the evidence in the record established only that the state would not oppose community control, not that it would affirmatively recommend community control as a sanction; therefore, the trial court did not abuse its discretion in denying the defendant's motion to withdraw guilty plea). Additionally, the Advice and Waiver of Trial by Jury signed by appellant states, "I realize that my penalty may or may not consist of jail time and/or a monetary fine."

**{¶24}** Given the evidence in the record, we find the trial court's decision to deny appellant's motion to withdraw guilty plea without a hearing was not unreasonable, arbitrary, or unconscionable and, therefore, does not rise to the level of an abuse of discretion. Accordingly, appellant's third assignment of error is overruled.

**{¶25}** In his second assignment of error, appellant contends his sentence is void because: (1) the sentencing entry does not accurately reflect the sentence pronounced by the court at the sentencing hearing; and (2) the sentencing entry incorrectly indicates that the Administrative License Suspension ("ALS"), remains in effect. The state concedes both errors in the sentencing entry and asks this court to remand the matter back to the trial court for the sole purpose of correction of the errors.

**{¶26}** The sentencing entry states that the jail term is 180 days, 177 days suspended and three days credited, however it lists a length of confinement of 27 days. At the sentencing hearing, the trial court stated appellant was sentenced to 180 days in jail, 150 days suspended and three days credited, which results in a length of confinement of 27 days.

**{¶27}** Crim.R. 36 provides that "[c]lerical mistakes in judgments * * * may be corrected by the court at any time." Upon reviewing the transcript, we agree that the error here is a clerical error, necessitating remedial action. *State v. Hollingsworth*, 10th Dist. No. 07AP-863, 2008-Ohio-2424, ¶15. As noted by this court in *Hollingsworth*, affirming a conviction yet remanding the matter for the trial court to correct a clerical error, such as an incorrect statute or level of offense of conviction, has been utilized by this court on a number of occasions. Id. at ¶16, citing *State v. Brown,* 10th Dist. No. 03AP-130, 2004-Ohio-2990, discretionary appeal denied, 103 Ohio St.3d 1481, 2004-Ohio-5405; *State v. Silguero,* 10th Dist. No. 02AP-234, 2002-Ohio-6103, ¶14, discretionary appeal not allowed, 98 Ohio St.3d 1490, 2003-Ohio-1189. Additionally, we stated, "[t]he procedure has also been used to correct a clerical error in order that the sentencing entry reflects what occurred at the sentencing hearing." *Hollingsworth*, citing *State v. Steinke,* 8th Dist.

No. 81785, 2003-Ohio-3527, discretionary appeal not allowed, 100 Ohio St.3d 1507, 2003-Ohio-6161; *State v. Akers* (June 2, 2000), 6th Dist. No. S-99-035; *State v. Watts*, 8th Dist. No. 82601, 2003-Ohio-6480 (convictions affirmed but matter remanded for the trial court to correct the sentencing entry to accurately reflect what occurred at the sentencing hearing).

**{¶28}** Accordingly, because we conclude the trial court made a clerical error in the sentencing entry, this cause should be remanded to that court with instructions to correct the entry to make it conform to the sentence pronounced at the sentencing hearing.

**{¶29}** There remains, however, a second problem with the sentencing entry. The state agrees with appellant's contention that the ALS should have been terminated upon his being sentenced for OVI. See R.C. 4511.19. In *State v. Gustafson* (1996), 76 Ohio St.3d 425, the Supreme Court of Ohio was concerned with cases in which the ALS had not been terminated at the time sentences were imposed. In those cases, the Supreme Court affirmed the convictions but remanded the cases to the trial court with instructions "that the trial court issue an order to [the Bureau of Motor Vehicles] to terminate their respective ALSs, retroactive to the date of sentencing on the DUI convictions." Id. at 444. This disposition has been adopted by several appellate courts. *State v. Ritch* (Sept. 21, 1999), 4th Dist. No. 99CA2634 (ALS remanded to the trial court for termination retroactive to the defendant's sentencing date); *State v. Starling* (Feb. 19, 1997), 9th Dist. No. 96CA0032 (conviction affirmed but case remanded with instructions to order the lifting of the ALS); *State v. Windsor* (Dec. 23, 1996), 5th Dist. No. 95CAC-05-029 (conviction affirmed, matter remanded for termination of the ALS). We believe that such disposition is appropriate in the instant case.

**{¶30}** Accordingly, appellant's second assignment of error is sustained to the extent we recognize a clerical error in the sentencing entry and the improper inclusion of the ALS suspension. Thus, on remand, the trial court is instructed to correct the sentencing entry to make it conform to the sentence pronounced at the sentencing hearing and to terminate the ALS retroactive to the date the trial court imposed its sentence in this case.

**{¶31}** In conclusion, appellant's first and third assignments of error are overruled, and appellant's second assignment of error is sustained to the extent indicated above. The judgment of the Franklin County Municipal Court is reversed, and we remand this matter to that court with instructions to correct the clerical error in its sentencing entry so that it conforms to the sentence pronounced at the sentencing hearing and to terminate the ALS retroactive to the date of sentencing.

*Judgment reversed and cause remanded with instructions.*

BRYANT and KLATT, JJ., concur.

_____