[Cite as *Cleveland v. Catchings-El*, 2017-Ohio-189.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104312

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

PHILLIP D. CATCHINGS-EL

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED, VACATED, AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2016 TRC 002443

BEFORE: Kilbane, J., Keough, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 19, 2017

ATTORNEY FOR APPELLANT

Eric M. Levy
The Law Office of Jaye M. Schlachet
55 Public Square, Suite 1600
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Barbara Langhenry
Director of Law
City of Cleveland
Lorraine Coyne
Assistant City Prosecutor
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Phillip D. Catchings-El ("Catchings-El"), appeals from his no contest plea to one count of operating a vehicle while intoxicated ("OVI"). For the reasons set forth below, we conclude that the no contest plea was not knowingly and voluntarily made, and therefore, we reverse, vacate the plea, and remand the matter to the trial court for further proceedings.

{¶2} On January 25, 2016, at approximately 2:45 a.m. , Catchings-El was stopped for speeding on Interstate 90 in Bratenahl. Ohio Highway Patrol Trooper J. Turner subsequently issued Catchings-El citations for speeding in violation of R.C. 4511.21(D)(4), a minor misdemeanor, and OVI in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor. Catchings-El pled not guilty to the charges.

{¶3} On March 9, 2016, Catchings-El, through defense counsel, entered into a plea agreement with the prosecuting attorney under which the speeding charge was dismissed, Catchings-El would plead no contest to OVI, and "consent to the finding of guilt." After holding a plea hearing, the trial court sentenced him to serve 180 days in jail, with 177 days suspended; imposed a $1,000 fine plus court costs, with $500 suspended; suspended his driver's license for ten months; and ordered him to complete the Alternative to Jail Program and attend five Mothers Against Drunk Driving meetings. Catchings-El now appeals and assigns two errors for our review.

Assignment of Error One

> The trial court erred when it took an invalid plea from appellant which failed to explain the effect of a no contest plea and failed to make a voluntary finding of guilt.

Assignment of Error Two

> The trial court erred when it failed to make a finding based upon an explanation of facts and otherwise failed to find the appellant not guilty.

No Contest Plea

{¶4} In his first assignment of error, Catchings-El asserts that the no contest plea was invalid. He complains that the trial court did not advise him of the effect of the plea, "never actually took a plea of no-contest" from him, and failed to determine that the plea was voluntary.

{¶5} Crim.R. 11(D) states in relevant part:

> In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily.

{¶6} The trial court must personally address a defendant and inform the defendant of the effects of the plea and ensure that the plea is being entered voluntarily. *Cleveland Hts. v. Brisbane*, 8th Dist. Cuyahoga No. 103459, 2016-Ohio-4564, ¶ 47. Further, a plea of guilty or no contest in a criminal case "must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. "In considering whether a plea was entered knowingly, intelligently and voluntarily, an

appellate court examines the totality of the circumstances through a de novo review of the record." *Cleveland v. Wynn*, 8th Dist. Cuyahoga No. 103969, 2016-Ohio-5417, ¶ 4, citing *State v. Tutt*, 8th Dist. Cuyahoga No. 102687, 2015-Ohio-5145, ¶ 13.

{¶7} In this matter, the record of the proceedings states:

> [DEFENSE COUNSEL]: We have a resolution.
>
> [PROSECUTING ATTORNEY]: Okay, on the A Count, no contest. Consent to finding of guilt. Move to nolle the Speed.
>
> THE COURT: Counsel, is that your understanding of the plea agreement?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: Mr. Catchings, is it your desire to plead no contest to one count of Driving Under the Influence?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: You understand that by changing your plea — excuse me — you're waiving your right to go to trial, so you understand that we're not going to have a trial?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: You're giving up your right to confront witnesses and have witnesses come in and testify in your behalf; do you understand that?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: You're waiving your right to have the prosecutor prove your guilt beyond a reasonable doubt; do you understand that?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: And, you're waiving your right to remain silent for the limited purpose of pleading no contest; do you understand that?
>
> THE DEFENDANT: Yes, your Honor.

> THE COURT: You also understand that by pleading no contest that I could find you guilty, and as part of the plea agreement, will find you guilty, and I could sentence you to a fine of up to — between 400 — $375 and $1,000 fine; do you understand that?
>
> THE DEFENDANT: Yes, your Honor.

{¶8} From the record presented herein, and following our de novo review, we conclude that the trial court did not personally address Catchings-El and determine from him directly that he was entering a no contest plea. Rather, it was the defense counsel who indicated that Catchings-El was entering the no contest plea, and the court did not accept this plea directly from Catchings-El. That is, Catchings-El never stated that he was pleading "no contest" to the charges, but simply replied "yes" when questioned by the court. Further, the record demonstrates that Catchings-El did not understand the effects of the no contest plea and did not understand that he was admitting to the truth of the facts in the complaint since he protested to the court that he "didn't do a urine sample." Therefore, on this record and because of the unique facts presented herein, we conclude that the no contest plea was not knowingly, voluntarily, and intelligently made.

{¶9} The plea is vacated and the matter is remanded for further proceedings. In light of our disposition of the first assignment of error, the second assignment of error, in which Catchings-El complains that the trial court failed to obtain an explanation of the circumstances surrounding the offense, is moot under App.R. 12(A)(1)(c).

{¶10} Judgment is reversed, plea vacated, and case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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 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.

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR