

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CITY OF EAST CLEVELAND, :
 :
 Plaintiff-Appellee, :
 : No. 107594
 v. :
 :
 ANITA HARRIS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

**JUDGMENT: REVERSED, VACATED, AND REMANDED
RELEASED AND JOURNALIZED: June 6, 2019**

Criminal Appeal from the
East Cleveland Municipal Court
Case No. 18 TRC 01592

Appearances:

Willa M. Hemmons, East Cleveland Law Director, and
Heather McCollough, Assistant Law Director, *for
appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and
Robert Blanshard McCaleb, Assistant Public Defender, *for
appellant.*

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Anita Harris, appeals her convictions and
claims the following error:

The trial court erred in rendering a guilty verdict without requesting or receiving a factual basis for conviction.

{¶ 2} We find merit to the appeal and reverse the trial court’s judgment.

I. Facts and Procedural History

{¶ 3} Harris was charged in the East Cleveland Municipal Court with one count of driving while under the influence of alcohol (“DUI”) in violation of East Cleveland Ordinances (“E.C.O.”) 333.01(A)(1), one count of driving without a seatbelt in violation of E.C.O. 337.27, and one count of failing to drive in one lane in violation of E.C.O. 331.08. Harris pleaded no contest to the DUI and seatbelt charges, and the government nolleed the remaining charge. The court accepted her no contest pleas and found her guilty on both counts. The court then sentenced her to 180 days in jail, suspended 177 days of the jail term, and gave Harris the opportunity to complete a three-day driving course in lieu of serving three days in jail. The court also sentenced Harris to 12 months of probation, imposed \$430 in fines, and ordered her to pay court costs.¹

{¶ 4} After receiving her sentence, Harris asked the court if she could make a statement regarding her case. With the court’s permission, Harris informed the court that on the day of her arrest, she only had one drink and refused the breathalyzer test because the “drink was still fresh on [her] breath.” (Tr. 9.) The

¹ Although the court found Harris guilty of the seatbelt charge in open court and on the record, the journal entry of conviction and sentence indicates the court only found her guilty of the DUI charge. Therefore, Harris’s seatbelt conviction is not an issue in this appeal because it was never journalized.

court advised Harris that Ohio law penalizes people who refuse the breathalyzer. Thereafter, the proceedings were concluded. Harris now appeals her convictions.

II. Law and Analysis

{¶ 5} In her sole assignment of error, Harris argues the trial court committed reversible error when it rendered guilty verdicts without any factual basis for the convictions.

{¶ 6} R.C. 2937.07 governs the court's action when taking guilty or no contest pleas in misdemeanor cases and 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. If the offense to which the accused is entering a plea of “no contest” is a minor misdemeanor, the judge or magistrate is not required to call for an explanation of the circumstances of the offense, and the judge or magistrate may base a finding on the facts alleged in the complaint.

{¶ 7} By pleading no contest, the defendant admits the facts alleged in the complaint. Crim.R. 11(B)(2) (“With reference to the offense or offenses to which the plea is entered * * * [t]he 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 indictment, information, or complaint[.]”). Although an admission of the facts alleged in the complaint would likely support a guilty finding, R.C. 2937.07 nevertheless requires that an explanation of the circumstances of the offense be set forth on the record before the trial court may find the defendant guilty. *Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 151, 459 N.E.2d 532 (1984). “The mere fact that the court's record includes

documents which could show the defendant's guilt will not suffice." *Chagrin Falls v. Katelanos*, 54 Ohio App.3d 157, 159, 561 N.E.2d 992 (8th Dist. 1988).

{¶ 8} In *Bowers*, the court explained:

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. Our review of the record indicates that no explanation of circumstances took place, notwithstanding the availability of documentary evidence that might have been the basis for meeting the statutory requirement. Therefore, appellee's contention that the trial court fulfilled the obligations imposed by R.C. 2937.07 is without merit and the plea must be vacated.

Bowers at 151.

{¶ 9} In *Girard v. Giordano*, 155 Ohio St.3d 470, 2018-Ohio-5024, ___ N.E.3d ___, the Ohio Supreme Court observed that although a no contest plea constitutes an admission to the facts alleged in the complaint, R.C. 2937.07 nevertheless requires an "explanation-of-circumstances" as a prerequisite to a guilty finding in order "to provide an extra layer of procedural protection to the defendant." *Id.* at ¶ 14-15. The *Girard* court explained there could be circumstances in which the "degree of protection" provided by the explanation-of-circumstances requirement would allow a trial court to find the defendant not guilty or refuse to accept the no contest plea if the uncontested facts do not rise to the level of a criminal violation. *Id.* at ¶ 20.

{¶ 10} In this case, the trial court accepted Harris's plea and found her guilty without an explanation of the circumstances upon which the court could make a

guilty finding.² Although Harris later admitted she consumed at least one alcoholic beverage prior to her arrest, she made that statement *after* the court had already found her guilty and imposed her sentence. The court's guilty finding was based solely on the allegations contained in the complaint and, therefore, failed to comply with the requirements of R.C. 2937.07.

{¶ 11} In *Girard*, the court explained that where a trial court fails to call for an explanation of the circumstances prior to making a guilty finding, the trial court's guilty finding must be vacated due to a procedural error, and the case must be remanded to the trial court to make a finding of guilt or innocence based on an explanation of the circumstances surrounding the defendant's conduct. *Girard* at ¶ 21-24.

{¶ 12} Harris argues that having established that the court failed to comply with R.C. 2937.07, the appropriate remedy is to vacate the conviction and discharge Harris. She contends double jeopardy bars the retrial of her case. However, in *Girard*, the Ohio Supreme Court explained that because the failure to comply with the explanation of circumstances requirement of R.C. 2937.07 is not equivalent to an acquittal based on insufficiency of the evidence, jeopardy never attaches, and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not bar retrial. *Girard*, Slip Opinion No. 2018-Ohio-5024, ¶ 21, 24. Therefore,

² Although the seatbelt conviction is not an issue in this appeal because it was never journalized, the transcript indicates there was no explanation of the circumstances made relative to that charge before the court found her guilty.

while we agree Harris's DUI conviction must be vacated, we do not agree that discharge is the appropriate remedy.

{¶ 13} The sole assignment of error is sustained.

{¶ 14} The trial court's judgment is vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
RAYMOND C. HEADEN, J., CONCUR