

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

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| CITY OF KIRTLAND, | : | OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2011-L-090 |
| ANGIE L. CLARK, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Willoughby Municipal Court, Case No. 11TRC02353.

Judgment: Reversed and remanded.

Michael P. Germano, City of Kirtland Prosecutor, 37265 Euclid Avenue, Willoughby, OH 44094 (For Plaintiff-Appellee).

Harvey B. Bruner, 700 W. St. Clair Avenue, #110, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Angie L. Clark, appeals her convictions in the Willoughby Municipal Court following her guilty plea to operating a vehicle under the influence of alcohol (OVI). At issue is whether the trial court complied with Crim.R. 11 before accepting her guilty plea. For the reasons that follow, we reverse and remand.

{¶2} On April 5, 2011, appellant was charged by citation with OVI, having previously been convicted of one OVI offense within the last six years, in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; operating a vehicle with a

prohibited blood-alcohol concentration (.248), in violation of R.C. 4511.19(A)(1)(h), a misdemeanor of the first degree; and operating a vehicle with a suspended driver's license, in violation of R.C. 4510.14, a misdemeanor of the first degree. Appellant pled not guilty, and the public defender was appointed to represent her.

{¶3} Subsequently, at a change-of-plea hearing, appellant pled guilty to a second OVI offense within six years, in violation of R.C. 4511.19(A)(1)(a), and the court found her guilty. At the state's request, the remaining counts were nolle.

{¶4} On June 8, 2011, the court sentenced appellant to 180 days in jail, with 165 days suspended, for a total of 15 days to be served, and fined her \$675. The 15-day sentence was ordered to be served consecutively to a 30-day sentence recently imposed against appellant in an unrelated case, for a total of 45 days in jail. The court placed appellant on probation for one year.

{¶5} The trial court granted appellant's motion to stay the execution of sentence pending appeal.

{¶6} Appellant timely appealed her conviction, asserting the following for her sole assignment of error:

{¶7} "The court failed to satisfy the requirements of Rule 11 when a plea was never entered, yet the Appellant was convicted and sentenced."

{¶8} Appellant argues her conviction should be reversed because the guilty plea on which it was based was not entered in compliance with Crim.R. 11.

{¶9} Initially, appellant argues she never entered a guilty plea. However, this argument is incorrect because the record shows that at her change-of-plea hearing, she told the court she would be changing her plea. Further, at that hearing, she entered a

guilty plea through her attorney. The case cited by appellant in support of her argument that she did not enter a guilty plea, *State v. Ivy*, 7th Dist. No. 01 CA 191, 2002-Ohio-5021, is inapposite. Unlike the instant case, in *Ivy*, the defendant never spoke a word during the guilty-plea hearing, and the trial court entered a guilty plea on the record for the defendant.

{¶10} In any event, based on our review of the record, the trial court did not comply with Crim.R. 11 in accepting appellant's guilty plea. The parties agree that Crim.R. 11(E), which concerns misdemeanor cases involving petty offenses, applies in this case. That rule provides: "[i]n 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.*" (Emphasis added.)

{¶11} "Although rigid adherence to Crim.R. 11 is preferred, a court need only substantially comply with its requirements as long as the record reflects that under the totality of the circumstances, the defendant knowingly, intelligently, and voluntarily entered his plea by *subjectively understanding the effect of the plea and his rights waived.*" (Emphasis added.) *Garfield Hts. v. Mancini*, 121 Ohio App.3d 155, 156-157 (8th Dist.1997), citing *State v. Nero*, 56 Ohio St.3d 106, 108 (1990).

{¶12} "In applying Crim.R. 11(E), this court has expressly held that its basic requirements are mandatory and that the failure to satisfy the requirements renders the plea of guilty invalid." *State v. Jones*, 11th Dist. No. 96-T-5432, 1996 Ohio App. LEXIS 4611, *4 (Oct. 18, 1996), citing *Mentor v. Carter*, 11th Dist. No. 93-L-104, 1994 Ohio App. LEXIS 1330, *5 (Mar. 25, 1994).

{¶13} This court has also held that when informing a defendant of the effect of a guilty plea, as required by Crim.R. 11(E), the trial court should advise the defendant of his right to a trial by jury or to the court; the duty of the state to prove his guilt beyond a reasonable doubt if he were to go to trial; his right to cross-examine the witnesses against him; his right not to testify; and his right to subpoena any witness he may have in his own defense. *Carter, supra*, at *6; *State v. Beatty*, 11th Dist. No. 94-G-1884, 1995 Ohio App. LEXIS 5161, *4 (Nov. 24, 1995); *Jones, supra*, at *4-*5. The trial court should satisfy itself that the defendant understands his rights before accepting his guilty plea. *State v. Joseph*, 44 Ohio App.3d 212, 213 (9th Dist.1988).

{¶14} Ohio Appellate Districts, including this court, have also held that in advising a defendant of the effect of a guilty plea, the trial court must inform him of the potential penalty before accepting the guilty plea. *Mancini, supra*, at 157. *Accord State v. McDonald*, 11th Dist. No. 96-G-2036, 1997 Ohio App. LEXIS 4028, *4 (Sept. 5, 1997). In *Mancini, supra*, the Eighth District held that, “[u]nder Crim.R. 11(E), a court is required to advise the defendant of the effect of his plea, which ‘means that the possible minimum and maximum penalties should [be] explained to [the defendant] * * *.’” *Id.*, quoting *State v. Moore*, 111 Ohio App.3d 833, 838 (7th Dist.1996). Further, the trial court’s failure to advise the defendant of the possible penalty is reversible error. *Mancini, supra*; *Moore, supra*. Where the trial court fails to inform the defendant of the possible sentence he could receive, it does not substantially comply with Crim.R. 11(E). *Mancini, supra*.

{¶15} Further, this court has held that Crim.R. 11(E) requires that the record affirmatively demonstrate that a guilty plea was entered voluntarily, intelligently, and knowingly. *Beatty, supra*, citing *Joseph, supra*.

{¶16} Moreover, this court has held that in misdemeanor cases in which incarceration is a possibility, such as in the instant case, a “meaningful dialogue between the court and the defendant” is required. *State v. Fonseca*, 124 Ohio App.3d 231, 235 (11th Dist.1997), citing *State v. Mascaro*, 81 Ohio App.3d 214, 216 (9th Dist.1991).

{¶17} The following colloquy at appellant’s guilty-plea hearing is the only discussion on the record between the court and appellant concerning her guilty plea in the traffic case:

{¶18} JUDGE: Okay. Miss Clark, I understand this morning or this afternoon that you will be changing your plea on the charge of operating a motor vehicle under the influence. Is that your understanding?

{¶19} THE DEFENDANT: Yes, sir.

{¶20} JUDGE: This appears to be your second OVI in a six year period.

{¶21} THE DEFENDANT: Yes, sir.

{¶22} JUDGE: So on that basis consult with your attorney and advise me please how you are pleading?

{¶23} MR. HADA: Guilty.

{¶24} JUDGE: Okay. A guilty plea is a complete admission of guilt and waives your Constitutional rights. The right to an attorney is not being waived.

{¶25} The transcript in the instant case thus reveals that the trial court did not advise appellant of any of the constitutional rights she would be waiving by entering her guilty plea. Nor did the court inform her of the possible sentence she could receive prior to the court's acceptance of her guilty plea. The city does not dispute that the trial court did not advise appellant of her constitutional rights or the potential penalties for OVI. Instead, the city argues that appellant was required to show prejudice resulting from the trial court's failure to inform her of the effect of her guilty plea in order to demonstrate reversible error. In support of this argument, the city relies on *State v. Bogan*, 50 Ohio App.2d 60 (1st Dist.1976), in which the First Appellate District held:

{¶26} [U]nder circumstances involving petty offenses, where a defendant is represented by counsel, there must be some demonstration of prejudice to the defendant flowing from the failure of the trial court to inform him of the effect of the various possible pleas before the error can be considered prejudicial. *Id.* at 62.

{¶27} However, the city fails to note that the First District expressly overruled its holding in *Bogan* in its later decision in *State v. Hays*, 2 Ohio App.3d 376 (1st Dist.1982). In *Hays*, the First District held:

{¶28} Where a trial court in a misdemeanor offense case accepts a plea of [guilty] without first informing the defendant of the effect of such plea, as mandated by Crim. R. 11(E), and there is absolutely no compliance with the Rule, the error will be considered prejudicial, even when the defendant is represented by counsel. (*Bogan*, [*supra*], overruled.) *Hays, supra*, at syllabus.

{¶29} Based on the record of this case and Ohio case law, we hold that the trial court did not follow the mandates of Crim.R. 11(E). The transcript of proceedings reveals virtually no discussion about appellant's guilty plea. Thus, there was no "meaningful dialogue" between the court and appellant as required by *Fonseca, supra*; *Mascaro, supra*.

{¶30} Next, for the plea to have been properly accepted, the trial court was required to, but did not, advise appellant as to the effect of her plea. This means that the trial court should have advised appellant of the Fifth and Sixth Amendment rights she was waiving by entering her guilty plea, *Carter, supra*, and the possible penalties to which she was exposed, *McDonald, supra*. Finally, the record was required to show that appellant's guilty plea was intelligent and voluntary. *Beatty, supra*. However, the record does not indicate whether appellant wanted to plead guilty or if she was doing so voluntarily. Thus, the record does not show that appellant entered her plea voluntarily, intelligently, and knowingly.

{¶31} We note that, while the parties argue in their respective briefs that Crim.R. 11(E) applies to appellant's guilty plea, Traf.R. 10(D) specifically sets forth the requirements for guilty pleas to petty offenses in traffic cases. Traf.R. 10(D) provides: "In misdemeanor cases involving petty offenses * * *, the court * * * shall not accept [a guilty plea] without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Traf.R. 10(D) thus mirrors Crim.R. 11(E). The parties argue in their briefs that the trial court was required to comply with Crim.R. 11(E) before accepting appellants's guilty plea to OVI. Neither party mentioned Traf.R. 10(D). The city's attorney argued for the first time at the hearing that Traf.R. 10(D) applies to this

case. Ohio Appellate Districts have held that Crim.R. 11(E) and Traf.R. 10(D) are identical. See e.g. *Broadview Hts. v. Baccellieri*, 8th Dist. No. 60661, 1992 Ohio App. LEXIS 4133 *4 (Aug. 13, 1992). In *Baccellieri*, the Eighth District noted that both rules require the trial court to inform the defendant of the effect of his guilty plea in a petty offense case, such as OVI, before accepting the plea. *Id.* The appellate court further held that a trial court's failure to inform a defendant of the effect of his plea to OVI is a violation of Crim.R. 11(E) and Traf.R. 10(D) and is reversible error. *Id.* at *3-*5. As a result, by not advising appellant of the effect of her plea, the trial court did not comply with both Traf.R. 10(D) and Crim.R. 11(E).

{¶32} The trial court failed to inform appellant of the effect of her guilty plea, as mandated by Crim. R. 11(E) and Traf.R. 10(D), and there was a complete lack of compliance with the mandates of these rules. We therefore hold that the trial court did not substantially comply with Crim.R. 11(E) and Traf.R. 10(D), and committed prejudicial error, despite the fact that appellant was represented by counsel.

{¶33} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Willoughby Municipal Court is reversed; appellant's guilty plea is vacated; and this case is remanded to the trial court to allow appellant to either maintain her not guilty plea or to plead anew.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.