

[Cite as *State v. Rosemond*, 2015-Ohio-4878.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-150199
	:	TRIAL NO. 14TRC-32261B
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
DEMETRIUS ROSEMOND,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: November 18, 2015

Paula Boggs Muething, City Solicitor, *Natalia Harris*, City Prosecutor, and
Jacqueline Pham, Assistant City Prosecutor, for Plaintiff-Appellee,

Mary Elaine Hall, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Demetrius Rosemond appeals his conviction for operating a motor vehicle while under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(h). He presents two assignments of error for review. We find merit in one of his assignments of error. Therefore, we reverse his conviction and remand the cause for further proceedings. We find his other assignment of error to be moot.

{¶2} The record shows that Rosemond was originally charged with a violation of R.C. 4511.19(A)(1)(b), which prohibits operating a motor vehicle with “a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person’s whole blood.” He was also charged with several other offenses, including operating a vehicle without reasonable control under R.C. 4511.202.

{¶3} Prior to trial, the state sought to amend the R.C. 4511.19(A)(1)(b) charge to a violation of R.C. 4511.19(A)(1)(h), which prohibits driving with “a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person’s breath.” At the time, the state acknowledged that it was “a higher tier charge.” The trial court granted the amendment.

{¶4} Subsequently, Rosemond pleaded no contest to the amended charge and the charge of operating a vehicle without reasonable control. The state dismissed the remaining charges. The trial court found Rosemond guilty of both offenses. This appeal followed.

{¶5} Crim.R. 7(D) provides that the court may at any time “amend the indictment, information, complaint, or bill of particulars, in respect to any defect,

imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.” In *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, syllabus, the Ohio Supreme Court held that this rule does not permit the amendment of the indictment when the amendment changes the penalty or degree of the charged offense, because such a change alters the identity of the offense.

{¶6} Similarly, in *State v. Solomon*, 2012-Ohio-5755, 983 N.E.2d 872 (1st Dist.), this court held that the trial court committed plain error in convicting the defendant of possession of Oxycodone as a third-degree felony where he had been indicted on the charge as a fifth-degree felony based on the amount of the drug. *Id.* at ¶ 6-8. We stated that by convicting the defendant of the higher offense, the trial court in effect amended the indictment to increase the degree of the charged offense in violation of Crim.R. 7(D). *Id.* at ¶ 7. The Ohio Supreme Court affirmed our decision without opinion in *State v. Solomon*, 140 Ohio St.3d 1432, 2014-Ohio-4160, 16 N.E.3d 677.

{¶7} Under R.C. 4511.19(G)(1)(a), both offenses in this case are first-degree misdemeanors. But a violation as originally charged under R.C. 4511.19(A)(1)(b) involves a minimum penalty of three days in jail, although the court may suspend the three-day sentence, place the offender on community control and sentence the offender to a three-day driver’s-intervention program. The court may also impose additional jail time, but the cumulative jail time cannot exceed six months. R.C. 4511.19(G)(1)(a)(i).

{¶8} For a violation of the amended charge under R.C. 4511.19(A)(1)(h), the court must sentence the offender to a mandatory jail term of three days *and* a three-day driver’s-intervention program. If the court determines that the offender is

not conducive to the three-day intervention program, if the offender refuses to attend the program, or if the jail at which the offender is to serve the jail term can provide a driver's-intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days. The court may impose additional jail time, but there is no six-month limitation on the amount of days that may be imposed. R.C. 4511.19(G)(1)(a)(ii).

{¶9} Thus, there is a higher penalty for the violation of the amended charge than for the charged offense. Therefore, the amendment changed the name and identity of the offense, and it was improper under Crim.R. 7(D).

{¶10} The state relies on *State v. Campbell*, 100 Ohio St.3d 361, 2003-Ohio-6804, 800 N.E.2d 356, in which the Ohio Supreme Court held that “[t]he amendment of a criminal charge from one subparagraph of R.C. 4511.19(A) to another subparagraph of the same subsection does not change the name and identity of the offense charged within the meaning of Crim.R. 7(D).” *Campbell* at syllabus. We do not find *Campbell* to be dispositive.

{¶11} First, *Campbell* was decided before *Davis* and *Solomon*. Second, in *Campbell*, the Supreme Court emphasized that the defendant in that case was not prejudiced by the amendment. It stated that the different subparagraphs of the version of R.C. 4511.19 in effect at the time “have the same name and identity—driving with specified concentrations of alcohol in bodily substances. The only difference among them is the particular bodily substance and thus the method by which evidence is obtained to prove the offense.” *Id.* at ¶ 7.

{¶12} If the trial court in this case had amended the charge from a violation of R.C. 4511.19(A)(1)(b) to a violation of R.C. 4511.19(A)(1)(d), which is equivalent to the original charge, *Campbell* would be applicable. See R.C. 4511.19(G)(1)(a)(i). But

this case is distinguishable from *Campbell*, because the amendment to the R.C. 4511.19(A)(1)(h) charge did not just involve a change in the bodily substance measured, but a substantive change to the penalty.

{¶13} Additionally, in *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, the Ohio Supreme Court held that a defendant may plead guilty to an indictment that was amended to change the name or identity of the charged crime when the defendant is represented by counsel, has bargained for the amendment, and is not prejudiced by the change. *Rohrbaugh* at syllabus. The court distinguished *Davis*, stating that “[u]nlike the defendant in *Davis*, Rohrbaugh was not prejudiced by the amendment to the indictment; to the contrary, he gained a benefit when the prosecution dismissed six charges against him.” It also noted that both the original charge and the amended charge were fifth-degree felonies, as opposed to *Davis* where the amendment raised the degree of felony. *Id.* at ¶ 9. Finally, the court stated that Rohrbaugh had invited the error, because he had negotiated for the amended indictment and had agreed to plead guilty to the amended charge, where in *Davis*, the prosecution had acted unilaterally during trial. *Id.* at ¶ 10.

{¶14} In this case, Rosemond did not plead guilty, which is a complete admission of guilt. He pleaded no contest, which is an admission only to the truth of the facts alleged in the complaint. *See* Crim.R. 11(B); *State v. Anderson*, 1st Dist. Hamilton No. C-070098, 2007-Ohio-6218, ¶ 11. Further, while some of the charges against Rosemond were dismissed as part of the plea deal, his counsel believed that those offenses would have merged anyway. The record shows that the amendment was not part of the plea bargain. Rosemond had not bargained for the amendment, the prosecution had acted unilaterally.

{¶15} We hold that because the amendment raised the penalty for the offense, it changed the nature and identity of the offense. It was, therefore, improper under Crim.R. 7(D). We sustain Redmond's first assignment of error, reverse the trial court's judgment, and remand the cause to the trial court for further proceedings.

{¶16} In his second assignment of error, Rosemond contends that he was denied the effective assistance of counsel. Our resolution of his first assignment of error renders this assignment of error moot, and we, therefore, decline to address it. *See* App.R. 12(A)(1)(c).

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., FISCHER and STAUTBERG, J.J.

Please note:

The court has recorded its own entry this date.