[Cite as *State v. Fordenwalt*, 2010-Ohio-2810.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C. A. No. 09CA0021
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DANA L. FORDENWALT	WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO
Appellant	CASE No. TRC-08-09-09720

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Police officers stopped Dana Fordenwalt after seeing him drive past a stop sign without stopping. Based on their observations during the stop, the officers arrested Mr. Fordenwalt and charged him with operating a vehicle under the influence of alcohol. When Mr. Fordenwalt refused to provide a breath sample, they obtained a search warrant for a blood draw. Based on the results of the blood test, the State charged him with operating a vehicle with "a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in [his] whole blood." R.C. 4511.19(A)(1)(f). Mr. Fordenwalt moved to suppress the test results, arguing that his blood samples were not handled properly. Following a hearing on his motion, the municipal court denied it. Mr. Fordenwalt entered into a plea agreement in which he agreed to plead no contest to the blood test charge and the State agreed to dismiss the other charge. After the court ensured that his plea was knowing and voluntary, it found him

guilty and sentenced him to 180 days in jail and suspended his license for five years. Mr. Fordenwalt has appealed, assigning two errors. Because the record does not contain an explanation of the circumstances of the blood test charge, the municipal court incorrectly found him guilty of violating Section 4511.19(A)(1)(f) of the Ohio Revised Code, his conviction must be reversed, and he must be discharged.

EXPLANATION OF THE CIRCUMSTANCES

{¶2} Mr. Fordenwalt's first assignment of error is that the municipal court incorrectly found him guilty without having an explanation of the circumstances. Under Section 2937.07 of the Ohio Revised Code, "[a] plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense."

{¶3} In *City of Cuyahoga Falls v. Bowers*, 9 Ohio St. 3d 148 (1984), the Ohio Supreme Court considered what is necessary to meet "the requirement for an explanation of circumstances" under Section 2937.07. *Id*. at 150. Mr. Bowers was charged with operating a motor vehicle under the influence of drugs or alcohol. When the municipal court called his case, it told him the charges he was facing and the possible penalties. After he pleaded no contest, the court examined his driving record and imposed sentence. On appeal, he argued that the court had not complied with Section 2937.07. The Supreme Court determined that "[t]he 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 court made the necessary explanation in this instance." *Id*. at 151. It noted that the evidence before the municipal court "consisted of the traffic citations issued to [Mr. Bowers], the report of a chemical breath test administered to him, the arresting officer's report, and the accident report." *Id*. at 150. After

reviewing the record, it agreed with Mr. Bowers that there was "nothing in the record of this case to show that any papers or documents of any kind were considered by the Municipal Court in determining the guilt or innocence of [Mr. Bowers] or that there was any explanation of circumstances considered. . . . The only document that the record shows the Court to have actually considered is a computer printout of the Appellant's driving record . . . ." *Id*. at 150-51. It concluded that "no explanation of circumstances took place, notwithstanding the availability of documentary evidence that might have been the basis for meeting the statutory requirement." *Id*. at 151.

{¶4} Applying *Bowers*, this Court has held that, to satisfy Section 2937.07, "the record must show that the required explanation [of circumstances] included a statement of facts which supports all the essential elements of the offense." *State v. Pangrac*, 9th Dist. No. 1985, 1991 WL 108580 at *1 (June 12, 1991). "If the prosecution relies on documents for this purpose, the record must reflect that the court considered them." *Id*. "It cannot be presumed from a silent record that the trial court complied with the requirements of R.C. 2937.07." *State v. Bennett*, 9th Dist. No. 21202, 2003-Ohio-1289, at ¶9. "[If] the record indicates that none of the essential elements of the offense were set forth, the defendant was improperly convicted." *Id*.

{¶5} Mr. Fordenwalt's lawyer told the court that Mr. Fordenwalt was entering "a no contest plea for purposes of appeal." The municipal court asked the lawyer whether Mr. Fordenwalt had any prior offenses and whether he had anything to offer in mitigation. Following a conference off the record, the court asked Mr. Fordenwalt whether he understood the consequences of his plea and the constitutional rights he was giving up. After Mr. Fordenwalt said that he understood and signed a written waiver, the court again asked Mr. Fordenwalt's lawyer whether he had anything to offer in mitigation. The State did not present a statement of

facts indicating how Mr. Fordenwalt had violated Section 4511.19(A)(1)(f) or any other explanation of the circumstances of the offense.

{¶6} The State has argued that it did not need to read a statement of the facts into evidence at the hearing because the same judge had already heard its explanation of the events at Mr. Fordenwalt's suppression hearing. It has noted that Section 2937.07 does not indicate when the explanation of circumstances must occur and that the First and Fifth Districts have held that it may occur at a hearing on a motion to suppress. See *State v. Kiefer*, 1st Dist. No. C-030205, 2004-Ohio-5054; *State v. Nichols*, 5th Dist. No. 01CA016, 2002-Ohio-4048.

{¶7} It is not necessary for this Court to decide whether testimony presented at a suppression hearing could satisfy "the explanation of the circumstances" requirement under Section 2937.07 because, even if it could, the testimony in this case was insufficient. Under Section 4511.19(A)(1)(f), "[n]o person shall operate any vehicle . . . if, at the time of the operation, . . . [t]he person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood." At the suppression hearing, the court received testimony from the officers who stopped Mr. Fordenwalt and the medical technologist who drew his blood. None of them testified that Mr. Fordenwalt's blood had "a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol."

{¶8} The State has noted that the blood test results were in a report that was admitted at the suppression hearing. The fact that that information appeared in an exhibit, however, is not sufficient to satisfy the explanation of circumstances requirement under Section 2937.07. As the Ohio Supreme Court explained in *Bowers*, the record must indicate that the municipal court considered the exhibit in determining the defendant's guilt or innocence. *City of Cuyahoga Falls*

v. Bowers, 9 Ohio St. 3d 148, 151 (1984). As in that case, "the record is silent as to whether the [municipal] court based its decision on the documentary evidence in the file or whether it made its finding of guilty in the 'perfunctory fashion' . . . proscribed by [the Ohio Supreme Court]." *Id*. (quoting *Springdale v. Hubbard*, 52 Ohio App. 2d 255, 260 (1977)); see *State v. Pangrac*, 9th Dist. No. 1985, 1991 WL 108580 at *1 (June 12, 1991). The blood test results were not relevant to the issues the court had to resolve in ruling on the motion to suppress. This Court, therefore, concludes that the municipal court did not "make a finding of guilty or not guilty from the explanation of the circumstances of the offense," as required under Section 2937.07. See *State v. Bennett*, 9th Dist. No. 21202, 2003-Ohio-1289, at ¶15 ("There was no explanation, by the trial court or the prosecution, of the circumstances of the offenses of operating under the influence or driving under suspension."). Accordingly, Mr. Fordenwalt's conviction must be vacated.

{¶9} In *City of North Ridgeville v. Roth*, 9th Dist. No. 03CA008396, 2004-Ohio-4447, this Court held that a defendant can waive the explanation of circumstances requirement. *Id*. at ¶12. In that case, "Mr. Roth's counsel explicitly waived a reading of the facts . . . ." *Id*.; see also *State v. Moore*, 9th Dist. No. 21182, 2003-Ohio-244, at ¶10 ("Defendant's counsel agreed that it '[would not] be necessary to recite the facts or allegations for the record[.]'"); *City of Twinsburg v. Corporate Sec. Inc.*, 9th Dist. No. 17265, 1996 WL 73370 at *3 (Feb. 21, 1996) ("[Defendant] signed and entered a written waiver of the explanation of the facts and circumstances surrounding the charges, specifically indicating that 'the court may find me guilty without such explanation of circumstances and facts.'"). In this case, Mr. Fordenwalt did not waive the explanation of circumstances requirement. Although he signed a written waiver of his right to a jury trial, his right to be represented by a lawyer, his right to confront the witnesses against him, his right to subpoena witnesses on his behalf, his right to have the State prove each and every

element of the crime beyond a reasonable doubt, his right to remain silent, and his right to bail, he did not waive his right to an explanation of the circumstances under Section 2937.07.

{¶10} It could be argued that, by waiving his right to have the State prove each and every element of the crime beyond a reasonable doubt, Mr. Fordenwalt also waived his right to have an explanation of the circumstances. The right to have the State prove each and every element of a crime beyond a reasonable doubt and the right to have an explanation of circumstances under Section 2937.07, however, are two different rights that must be waived separately. As the Twelfth District has explained, "[i]t is well-established that when a defendant enters a plea of no contest, thereby admitting the truth of the matters alleged in the complaint, he waives certain constitutional rights, including the right to have the prosecution prove its case beyond a reasonable doubt. However, before relying upon a no contest plea to convict a defendant for a misdemeanor offense, the court must comply with R.C. 2937.07, which requires an explanation of circumstances." *State v. Spence*, 12th Dist. No. CA2002-02-012, 2002-Ohio-3600, at ¶10 (citations omitted). This Court has not found any authority that a defendant's waiver of his right to have the State prove each and every element of a crime beyond a reasonable doubt is also a waiver of his right to have an explanation of the circumstances under Section 2937.07.

{¶11} Mr. Fordenwalt has argued that, because there was no explanation of the circumstances, he should be discharged. As noted earlier, under Section 2937.07, "[a] plea to a misdemeanor offense of 'no contest' . . . shall constitute a stipulation 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 record does not contain an explanation of circumstances upon which the court can predicate a finding of guilty, it is the duty of the court to find the defendant not guilty. *State*

v. Stewart, 2d Dist. No. 19971, 2004 WL 1352628 at *3 (June 10, 2004). Moreover, "[if] a conviction is reversed for insufficiency of the evidence, jeopardy has attached, and a remand for a new determination of guilt or innocence is barred by double jeopardy." *Id*. The defendant "is entitled to the reversal of his conviction, and to be discharged." *Id*.; see also *State v. Valentine*, 1st Dist. No. C-070388, 2008-Ohio-1842, at ¶9; *State v. Smyers*, 5th Dist. No. CT 2004-0039, 2005-Ohio-2912, at ¶19; *City of Broadview Heights v. Krueger*, 8th Dist. No. 88998, 2007-Ohio-5337, at ¶13, 17; *State v. Hoskins*, 12th Dist. No. CA98-07-143, 1999 WL 527796 at *3 (June 14, 1999). Mr. Fordenwalt's assignment of error is sustained. His second assignment of error is moot and is overruled on that basis.

CONCLUSION

{¶12} There was no explanation of circumstances on which the municipal court could find Mr. Fordenwalt guilty of violating Section 4511.19(A)(1)(f) of the Ohio Revised Code. The judgment of the Wayne County Municipal Court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and caused remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

WHITMORE, J.
DISSENTS, SAYING:

{¶13} I respectfully dissent, as I would overrule Fordenwalt's first assignment of error and reach the merits of his second assignment of error.

{¶14} The Ohio Supreme Court has held that "the unambiguous language of R.C. 2937.07 clearly states that in the case of a no contest plea to a misdemeanor offense, a court may make its finding from the explanation of circumstances by the state." *State v. Waddell* (1995), 71 Ohio St.3d 630, 631. If no explanation of circumstances takes place, a plea must be vacated. *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148, 151. Yet, the court need not "read into the record its reasoning for finding the defendant guilty; rather, the record must reveal an explanation of the circumstances by the state." *State v. Bennett*, 9th Dist. No. 21202, 2003-Ohio-1289, at ¶9. The problem arises only when the record is silent as to whether the trial court complied with R.C. 2937.07. Id. In essence, "[t]he requirement that the court shall call for an explanation of circumstances is satisfied when the court considers evidence to support each element of the offense charged." *Akron v. Schaffer* (June 5, 1995), 9th Dist. No. 11894, at *2.

{¶15} This Court has recognized that a defendant may waive an explanation of circumstances when entering a plea of no contest. *North Ridgeville v. Roth*, 9th Dist. No. 03CA008396, 2004-Ohio-4447, at ¶12. At the plea hearing, Fordenwalt signed a written waiver of rights, which he first reviewed with his counsel. The written waiver provides, in relevant part, as follows:

> "I hereby acknowledge in open Court that I have been advised of the following rights and hereby knowingly and voluntarily waive same:
>
> "***
>
> "5. My right to have the State prove each and every element of the alleged crime, beyond a reasonable doubt."

Fordenwalt acknowledges that the court obtained his waiver of rights and written plea of no contest.

{¶16} Fordenwalt argues on appeal that his plea was defective because "the explanation of circumstances must provide enough information to support each essential element of the offense." He argues that "[t]he failure of the state to offer an explanation of circumstances following a plea of no contest entitles the defendant to be discharged." Yet, Fordenwalt specifically waived his right to have the State present evidence to prove each element of the offense, and he does not argue that his waiver was involuntary, uninformed, or otherwise unknowingly made. See App.R. 16(A)(7). He cannot complain on appeal that the State failed to present evidence of each element after he specifically agreed to forego the presentation of that evidence in the court below. *State v. Howell*, 7th Dist. No. 04 MA 31, 2005-Ohio-2927, at 20 (concluding that defendant waived explanation of circumstances after agreeing to written plea agreement in which he "waive[d] presentation of evidence and stipulate[d] to a finding of guilt"); *Twinsburg v. Corporate Sec., Inc.* (Feb. 21, 1996), 9th Dist. No. 17265, at *3 (concluding that defendant waived explanation of circumstances by entering into a written waiver that

"specifically indicat[ed] that 'the court may find me guilty without such explanation of circumstances and facts'"). As such, I would overrule Fordenwalt's first assignment of error on the basis of waiver.

{¶17} Because I would overrule the first assignment of error, I would reach the merits of the second assignment of error. In his second assignment of error, Fordenwalt argues that the court erred by not suppressing his blood alcohol test results on the basis that the State did not comply with Ohio Administrative Code Section 3701-53-05. I would sustain Fordenwalt's argument on the basis of *State v. Hoder*, 9th Dist. No. 08CA0026, 2009-Ohio-1647. *Hoder* held that the State must substantially comply with O.A.C 3701-53-05's requirement that a blood specimen be refrigerated at all times when the specimen is not in transit or under examination. *Hoder* at ¶9-19. The State failed to set forth evidence at the suppression hearing that Fordenwalt's blood sample remained refrigerated in accordance with *Hoder* and O.A.C. 3701-53-05. Officer Brandon Lash testified that he did not know what time Fordenwalt's specimen was released from refrigeration and did not know whether the sample stayed in the refrigerator until it went to the mail for transit. He also did not know who put the sample into the mail. The State acknowledges these defects on appeal. Based on the foregoing, I would conclude that the court erred by denying his motion to suppress.

{¶18} In sum, I would reverse Fordenwalt's conviction and remand this matter for further proceedings. Because I would overrule Fordenwalt's first assignment of error, I would not conclude that the State is barred from retrying Fordenwalt on the basis of double jeopardy. As such, I respectfully dissent.

APPEARANCES:

JOHN E. JOHNSON, JR., attorney at law, for appellant.

MARTIN FRANTZ, prosecuting attorney and LATECIA E. WILES, assistant prosecuting attorney, for appellee.