[Cite as *State v. Oaks*, 2020-Ohio-1200.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	
STATE OF OHIO		C.A. No. 18AP0032
Appellee		
v.		APPEAL FROM JUDGMENT ENTERED IN THE
DESTINEE D. OAKS		WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO
Appellant		CASE No. 2017 TR-C 006576

DECISION AND JOURNAL ENTRY

Dated: March 31, 2020

PER CURIAM.

{¶1} Defendant-Appellant, Destinee Oaks, appeals the Wayne County Municipal Court's denial of her motion to suppress.

{¶2} In June 2017, a State Trooper stopped Ms. Oaks for speeding. While speaking with her, the trooper observed signs of intoxication. After she completed field sobriety tests, he placed her under arrest. She was unsuccessful completing a breath test, so she agreed to a urine test.

{¶3} Ms. Oaks was charged with one count of speeding and one count of operating a vehicle under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a). She moved to suppress the evidence and the parties agreed the hearing would be limited to probable cause and the urine sample. After the hearing, the trial court denied the motion.

{¶4} Pursuant to a plea agreement, Ms. Oaks pleaded no contest to the charge of operating a vehicle under the influence and the speeding charge was dismissed. The trial court found Ms. Oaks guilty and sentenced her.

{¶5} Ms. Oaks filed this appeal, raising one assignment of error.

Assignment of Error

THE TRIAL COURT ERRED IN DENYING [MS. OAKS'] MOTION TO SUPPRESS THE RESULTS OF HER URINE ALCOHOL TEST.

{¶6} For the reasons set forth in the separate opinions, the judgment of the trial court is reversed and the cause remanded for further proceedings.

Judgment reversed
and cause 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(C). 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.

LYNNE S. CALLAHAN
FOR THE COURT

CALLAHAN, P. J.
CONCURRING IN JUDGMENT ONLY.

{¶7} I am compelled to write separately because I disagree with the dissent's analysis and disposition of this appeal. Although I agree with the other concurring opinion that the trial court's judgment should be reversed, I cannot join in that opinion because I reach that conclusion for different reasons.

{¶8} Crim.R. 12(I) provides that "[t]he plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence." As the Ohio Supreme Court has noted, "the import of [this rule] is to preserve, not waive, the right to appeal pretrial rulings." *State v. Luna*, 2 Ohio St.3d 57, 58 (1982). "Prejudice" is "[d]amage or detriment to one's legal rights or claims." *Black's Law Dictionary* (11th Ed.2019), accessed through Westlaw. In contrast, a "dispositive fact" is "evidence that definitively resolves a legal issue or controversy." *Id.* By its plain terms, Crim.R. 12(I) preserves the right to appeal prejudicial rulings on pretrial motions, not just dispositive rulings.

{¶9} In that respect, the Ohio Supreme Court has recognized that the prejudicial nature of a ruling for purposes of Crim.R. 12(I) is determined with reference to the proof and defense of the charges if the case were to go to trial—not with reference to the entry of the no contest plea. *See Defiance v. Kretz*, 60 Ohio St.3d 1, 4 (1991). In *Kretz*, the Court considered the prejudicial effect of a suppression ruling when a defendant is charged with a per se violation under R.C. 4511.19. *Id.* At 3-4. The Ohio Supreme Court has yet to address the issue in the context of an alleged violation of R.C. 4511.19(A)(1)(a). The Supreme Court has acknowledged that test results are relevant in a prosecution under R.C. 4511.19(A)(1)(a), however. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 19. *Compare* R.C. 4511.19(D)(1)(a) (recognizing that in a prosecution

under R.C. 4511.19(A)(1)(a), blood or urine tests drawn and analyzed at a health care provider may be admitted with expert testimony "to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.").

{¶10} Ms. Oaks was prejudiced by the trial court's denial of her motion to suppress because admission of the urine test results against her would result in "damage or detriment to [her] legal rights [.]" *Black's Law Dictionary* (11th Ed.2019), accessed through Westlaw. This Court should therefore consider the merits of her appeal, which is properly before us under the plain terms of Crim.R. 12(I), and I cannot join the dissent for that reason.

{¶11} I acknowledge that this Court's opinion in *State v. Palacios*, 9th Dist. Lorain No. 17CA011093, 2018-Ohio-3523, may be relevant to the disposition of this case. Because I believe that Crim.R. 12(I) required this Court to resolve *Palacios* on the merits, however, I would not apply it in this instance and cannot join in the other concurring opinion for that reason. Nonetheless, I agree that the trial court's judgment should be reversed.

{¶12} In the trial court and in this Court, Ms. Oaks argued that the results of the urine test should have been suppressed because the individual who processed the test improperly placed a preservative substance in the vial. As a result, she argued that the State failed to substantially comply with the requirements of the Ohio Administrative Code but also, significantly, that the State failed to introduce evidence demonstrating what laboratory standards, if any, applied. Although the trial court determined that the State substantially complied with the Ohio Administrative Code, it did so in the context of discussing other arguments that Ms. Oaks made in the suppression proceedings. The trial court did not make any findings of fact or engage in any legal analysis of the sole issue presented in this appeal. Consequently, I would reverse the trial

court's judgment on the suppression and remand this appeal so that the trial court can address the issue at hand in the first instance.

HENSAL, J.
CONCURRING IN JUDGMENT ONLY.

{¶13} The judgment of the Wayne County Municipal Court should be reversed and the matter remanded. At the change of plea hearing, Ms. Oaks indicated that she was "anticipating filing a notice of appeal for the suppression motion that was filed." If a defendant is under the mistaken impression that her plea will preserve her appellate issues, this Court has consistently concluded that the plea was not entered knowingly or intelligently, has vacated the conviction and plea, and remanded the case to the trial court. *State v. Palacios*, 9th Dist. Lorain No. 17CA011093, 2018-Ohio-3523, ¶ 9-11; *State v. Rondon*, 9th Dist. Summit No. 25447, 2011-Ohio-4938, ¶ 6; *State v. Brown*, 9th Dist. Summit No. 25103, 2010-Ohio-3387, ¶ 12-13; *State v. Echard*, 9th Dist. Summit No. 24643, 2009-Ohio-6616, ¶ 12; *State v. Smith*, 9th Dist. Lorain No. 08CA009338, 2008-Ohio-6942, ¶ 10-12; *State v. Palm*, 9th Dist. Summit No. 22298, 2005-Ohio-1637, ¶ 14; *see also State v. Engle*, 74 Ohio St.3d 525, 528 (1996) ("There can be no doubt that the defendant's plea was predicated on a belief that she could appeal the trial court's rulings that her counsel believed had stripped her of any meaningful defense. Therefore, her plea was not made knowingly or intelligently.").

{¶14} Although in some of those cases, the prosecutor and trial court reinforced the defendant's incorrect belief, the underlying issue in each of them was whether the defendant's plea was entered knowingly and intelligently. *Brown* at ¶ 8 ("Since the decision in *Engle*, this Court has consistently held that a plea is not entered knowingly and intelligently where it is predicated on an erroneous belief that the trial court's rulings are appealable."). Under the facts of this case,

it is clear that Ms. Oaks pleaded no contest to a violation of R.C. 4511.19(A)(1)(a) because she held the belief that pleading no contest to that offense would enable her to appeal the denial of her motion to suppress. Ms. Oaks specifically stated that her purpose for changing her plea was to appeal the suppression motion, and the trial court did nothing to correct her. *See Smith* at ¶ 11 (recognizing the high burden placed on trial courts to ensure that a defendant makes a knowing, voluntary, and intelligent decision).

{¶15} This Court has also held that "it is appropriate for this court to sua sponte vacate [a] plea and remand for further proceedings" when it is "apparent on the face of the record that * * * the plea cannot be deemed knowing, intelligent, and voluntary[.]" *Rondon* at ¶ 11; *Palacios* at ¶ 10. Accordingly, even though Ms. Oaks has not raised this issue in her appellate brief, I would vacate the trial court's judgment and remand this matter to allow Ms. Oaks to withdraw her no contest plea.

SCHAFER, J.
DISSENTING

I.

{¶16} On June 30, 2017, at approximately 2:40 a.m., Trooper Ross of the Ohio State Highway Patrol sat stationary in his patrol vehicle at the on-ramp from State Route 172 onto U.S. 30 westbound in Wayne County. At that time, he was using his radar to check speed and observed a vehicle traveling at 73 miles per hour in a 55 mile per hour zone. Trooper Ross initiated a traffic stop of the vehicle on U.S. 30 westbound near mile marker twenty-five. Trooper Ross identified Ms. Oaks as the driver of the vehicle.

{¶17} While speaking with Ms. Oaks, Trooper Ross observed Ms. Oaks to have red, bloodshot glassy eyes and detected an odor of alcohol. Trooper Ross asked Ms. Oaks to exit the

vehicle and to perform the standard field sobriety tests from the NHTSA manual so that he could determine if Ms. Oaks was under the influence of drugs or alcohol or impaired. On the horizontal gaze nystagmus test, Trooper Ross observed six of six possible clues. On the walk and turn test, Trooper Ross observed six of eight possible clues. Finally, on the one leg stand test, Trooper Ross observed one out of four possible clues.

{¶18} Although Ms. Oaks denied having any alcohol to drink, Trooper Ross placed her under arrest for driving under the influence and transported her to the Wooster Post of the Ohio State Highway Patrol. At the Wooster Post, Trooper Ross read and showed Ms. Oaks the BMV 2255 form, and she agreed to take a breath test. Trooper Ross attempted to administer the breath test on two separate occasions, but neither test was successful. Trooper Ross testified that he observed Ms. Oaks act like she was blowing into the machine, but believed she was not actually attempting to blow into the device. Consequently, Trooper Ross offered Ms. Oaks the opportunity to take a urine test and Ms. Oaks agreed.

{¶19} Trooper Ross, however, is a male officer and no female officer was on duty at that time to assist with the collection of Ms. Oak's urine sample. Trooper Ross then asked a female dispatcher, Dispatcher Carr, to assist. Trooper Ross provided Dispatcher Carr with a collection kit that included a urine collection tube, an "SF capsule," instructions, and packing materials for the kit. After Dispatcher Carr witnessed Ms. Oaks provide the urine sample, she emptied the capsule into the urine tube and secured the lid. Dispatcher Carr then gave the tube to Trooper Ross. Dispatcher Carr completed a property control form for the urine collected from Ms. Oaks, stating that she collected the sample at 4:08 a.m. and gave it by hand to Trooper Ross at 4:10 a.m. Trooper Ross then sealed the container and labeled it. Trooper Ross thereafter mailed the urine sample to the Ohio State Highway Patrol Lab, via US mail, at 6:00 a.m.

{¶20} Trooper Ross subsequently charged Ms. Oaks with one count of speeding in violation of R.C. 4511.21(D)(1) and one count of operating a vehicle under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a). Ms. Oaks filed a motion to suppress the evidence. The parties stipulated that the hearing on the motion would be limited in scope to the issues of probable cause to arrest, the collection of Ms. Oaks's urine sample without a warrant, and the handling of Ms. Oaks's urine sample. Following the hearing, the trial court took the matter under advisement and ultimately denied the motion. Pursuant to a plea agreement, Ms. Oaks thereafter pleaded no contest to the charge of operating a vehicle under the influence and the speeding charge was dismissed. The trial court found Ms. Oaks guilty of operating a vehicle under the influence and sentenced her accordingly.

{¶21} Ms. Oaks filed this timely appeal, raising one assignment of error for our review.

II.

Assignment of Error

The trial court erred in denying [Ms. Oaks's] motion to suppress the results of her urine alcohol test.

{¶22} In her sole assignment of error, Ms. Oaks contends that the trial court erred when it denied her motion to suppress because the State failed to present evidence showing that her urine screen was conducted in substantial compliance with the Ohio Administrative Code. I do not reach the merits of Ms. Oaks's argument, however, because she has not shown—or even argued—that she was prejudiced by the alleged error.

{¶23} Pursuant to Crim.R. 12(I), a "plea of no contest does not preclude a defendant from asserting upon appeal that the trial court *prejudicially* erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence." (Emphasis added.). App.R. 12(B) states in part:

> When the court of appeals determines that the trial court committed *no error prejudicial* to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error *prejudicial* to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order * * * .

(Emphasis added.) Thus, in order "[t]o demonstrate reversible error, an aggrieved party must demonstrate both error and resulting prejudice." *Princess Kim, LLC v. U.S. Bank, N.A.*, 9th Dist. Summit No. 27401, 2015-Ohio-4472, ¶ 18.

{¶24} On appeal, Ms. Oaks does not assert—nor is it apparent from the record—that the trial court's alleged failure to suppress the results of her breath test lead to her conviction. Although Ms. Oaks's urine test results showed a prohibited concentration of alcohol, she was only charged with a violation of R.C. 4511.19(A)(1)(a). R.C. 4511.19(A)(1)(a) generally prohibits driving under the influence and does not require proof of a prohibited concentration of alcohol or drugs in the defendant's breath, blood, or urine. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 18. Ms. Oaks entered a plea of no contest to a violation of R.C. 4511.19(A)(1)(a). A plea of no contest "is an admission of the truth of the facts alleged in the indictment, information, or complaint[.]" Crim.R. 11(B)(2). The trial court accepted her no contest plea, found her guilty, and imposed sentence.

{¶25} "A conviction under R.C. 4511.19(A)(1)(a) focuses on the conduct of the defendant and observations of the arresting officers, rather than the results of a chemical test or breathalyzer exam * * *." *State v. Gladman*, 2d Dist. Clark No. 2013 CA 99, 2014-Ohio-2554, ¶ 24; *see State v. Perry*, 12th Dist. Preble No. CA2017-01-002, 2017-Ohio-7214, ¶ 14 (determining that because the appellant entered a no contest plea to a violation of R.C. 4511.19(A)(1)(a), the state did not need to prove the appellant's blood alcohol content was above any prohibited level, thus rendering

the results of the blood draw "immaterial"). While the State did include the results of Ms. Oaks' urine screen in its recitation of the facts prior to the trial court's finding of guilty, Ms. Oaks did not object to its inclusion and has not presented an argument or even suggested that but for its inclusion she would have been found not guilty. It is also not apparent from the record that the trial court relied on the results of her urine screen when it found her guilty of violating R.C. 4511.19(A)(1)(a). *See State v. Arenz*, 5th Dist. Licking No. 06CA111, 2007-Ohio-4283, ¶ 17-18 (finding that it is not prejudicial error for a trial court to note the results of the blood test on the record even if the trial court erred in denying a motion to suppress because the results of the blood test are not necessary to establish a violation of R.C. 4511.19(A)(1)(a)). Ms. Oaks also has not argued that, but for the results of her urine test, the State failed to provide sufficient facts to support the trial court's finding of guilty after her no contest plea. *See State v. Johnson*, 12th Dist. Preble, No. CA2017-12-016, 2018-Ohio-3621, ¶ 22 (finding any alleged error in trial court's failure to suppress HGN tests results would be harmless "due to the overwhelming amount of incriminating evidence supporting [the defendant]'s OVI conviction.").

{¶26} Therefore, because Ms. Oaks has not argued that any perceived error was prejudicial, and prejudice is not apparent from the record, I conclude that even if the trial court erred in this case, Ms. Oaks has not demonstrated that any such error would be reversible. I acknowledge the Supreme Court's recognition in *Mayl*, as referenced by Judge Callahan's concurring opinion, that the State may introduce the results of an alcohol test to show impairment in a prosecution for an alleged violation of R.C. 4511.19(A)(1)(a). I disagree, however, with the implication that the denial of *any* pretrial motion to suppress is per se prejudicial in the context of a no contest plea to a violation of R.C. 4511.19(A)(1)(a) in light of *Mayl*.

{¶27} I also disagree with the conclusion in Judge Hensal's concurring opinion—that Ms. Oaks' conviction should be vacated sua sponte—because it misconstrues this Court's prior case law. It states that this Court has consistently concluded that a plea was not entered knowingly or intelligently where a defendant is under the mistaken impression that her plea will preserve her appellate issues. However, a review of the cases cited show that this Court has required more than the defendant's own mistaken impression that an issue would be preserved. In *State v. Palacios*, 9th Dist. Lorain No. 17CA011093, 2018-Ohio-3523, ¶ 9, this Court determined that the plea was not knowing, intelligent, and voluntary where *the defendant, his counsel, the trial court, and the prosecution* understood the plea was predicated on the mistaken belief that the merits of his argument would be considered on appeal. In *State v. Rondon*, 9th Dist. Summit No. 25447, 2011-Ohio-4938, ¶ 6, this Court determined that a plea was not made knowingly and intelligently "because the *trial court, the State, and his standby counsel* led [the defendant] to believe his no contest plea along with his proffered argument following his plea preserved the issue[.]" (Emphasis added.). In *State v. Brown*, 9th Dist. Summit No. 25103, 2010-Ohio-3387, ¶ 12, this Court determined that a plea was not a knowing, voluntary, intelligent decision where defendant was counseled by his defense attorney and the trial judge that he would be able to appeal, and *all parties*, including the prosecution, shared the impression that the defendant could appeal. In *State v. Echard*, 9th Dist. Summit No. 24643, 2009-Ohio-6616, ¶ 12, this Court vacated a conviction where "*the prosecutor, trial court, and defense lawyer* gave [the defendant] the mistaken impression that he could plead no contest and appeal the issue * * *.") (Emphasis added.) In *State v. Smith*, 9th Dist. Lorain No. 08CA009338, 2008-Ohio-6942, ¶ 4, 8-12, this Court determined that plea was not a knowing, voluntary, and intelligent decision where "*defense counsel, the prosecutor, and the trial court judge* all gave [the defendant] the impression that he could enter a

plea of no contest and appeal the trial court's mid-trial evidentiary ruling.") (Emphasis added.). In *State v. Palm*, 9th Dist. Summit No. 22298, 2005-Ohio-1637, ¶ 7, 14, this Court determined that the trial court erred when it accepted the defendant's no contest plea as being entered knowingly, intelligently, and voluntarily where her plea was entered on the express condition that the issue would be preserved on appeal and the trial court made it clear the plea was accepted "so that an appeal [could] be taken[.]"). Moreover, in *State v. Engle*, 74 Ohio St.3d 525, 527-528, the case on which the above rely, the Supreme Court of Ohio determined that a defendant's plea was not made knowingly or intelligently where the "record reflect[ed] that *all the parties, including the judge and the prosecutor*, shared the impression that [the defendant] could appeal rulings other than a pretrial motion.") (Emphasis added.). In this case, Ms. Oaks' trial counsel stated that she was "anticipating filing a notice of appeal for the suppression motion that was filed." However, nothing in the record indicates that the trial court or the prosecution did or said anything to mislead Ms. Oaks to believe this Court would consider the issue without showing or arguing she was prejudiced in some way.

{¶28} It is also important to note that the facts of this case are distinguishable from *Palacios*. Despite the results of her urine screen, Ms. Oaks was only charged with, found guilty of, and convicted of violating R.C. 4511.19(A)(1)(a). In *Palacios*, the defendant was charged with two counts of aggravated vehicular homicide for causing the death of another as a result of driving under the influence of alcohol. He was also charged with one count of operating a vehicle under the influence of alcohol or drug of abuse in violation of R.C. 4511.19(A)(1)(a) and one count of operating a vehicle with a blood alcohol content of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per volume in violation of R.C. 4511.19(A)(1)(b). After the trial court denied the defendant's motion to suppress the results of a

blood alcohol test, the defendant changed his plea on all four counts to no contest. The trial court found Palacios guilty of all counts in the indictment and subsequently "merged count two, aggravated vehicular homicide by causing the death of another while operating a motor vehicle recklessly, with count one, aggravated vehicular homicide by causing the death of another while operating a motor vehicle as a proximate result of violating R.C. 4511.19. * * * The trial court then merged count four, operating a vehicle with a blood alcohol content in violation of R.C. 4511.19(A)(1)(b) with count three, operating a vehicle under the influence of alcohol or drug of abuse in violation of R.C. 4511.19(A)(1)(a)." *Palacios* at ¶ 8. Because the trial court merged the defendant's violation of R.C. 4511.19(A)(1)(b) with his violation of R.C. 4511.19(A)(1)(a) prior to sentencing, the defendant was only convicted of violating R.C. 4511.19(A)(1)(a). This Court noted that *under ordinary circumstances* it would conclude that the defendant had forfeited his ability to challenge the trial court's ruling on his motion to suppress because he pleaded no contest to, and was only sentenced on the violation of R.C. 4511.19(A)(1)(a). This Court subsequently clarified our reasoning when we denied the defendant's motion to reopen, stating that because the defendant was not convicted of a per se violation under R.C. 4511.19(A)(1)(b) and entered a plea of no contest to the violation of R.C. 4511.19(A)(1)(a), any issues regarding the admissibility of his blood test results were moot. *See Gladman*, 2014-Ohio-2554, ¶ 24; *Perry*, 2017-Ohio-7214 at ¶ 14. Although not convicted of R.C. 4511.19(A)(1)(b), Palacios was charged with and found guilty of the per se violation. Ms. Oaks, on the other hand, was not charged with, found guilty of, or convicted of a per se violation.

{¶29} Therefore, under the ordinary circumstances of Ms. Oaks's case—where she was charged with, pleaded no contest to, and was convicted of, a violation of R.C. 4511.19(A)(1)(a)—and in light of the fact that she has not argued or shown that she was prejudiced by the denial of

her motion to suppress the results of a urine test, Ms. Oaks's assignment of error should be overruled.

III.

{¶30} Ms. Oaks's sole assignment of error should be overruled and the judgment of the Wayne County Municipal Court affirmed.

APPEARANCES:

DAVID C. KNOWLTON, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and ANDREA D. UHLER, Assistant Prosecuting Attorney, for Appellee.