[Cite as *State v. Greene*, 2006-Ohio-480.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2005 CA 26
v.	:	T.C. NO. 2004 CR 782
DAVID EUGENE GREENE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 3rd day of February, 2006.

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DONOVAN, J.

{¶ 1} Defendant-appellant David E. Greene appeals from his conviction and sentence for receiving stolen property and failure to comply with an order or signal of a police officer. On January 3, 2005, Greene entered a plea of guilty to said offenses in exchange for a stipulation that the State would recommend six month prison sentences

for each of the two counts, to be served consecutively for a total of twelve months incarceration. Greene was also required to pay $600.00 in restitution.

{¶ 1} The trial court accepted Greene's plea and sentenced him to according to the State recommendation. Additionally the trial court suspended Greene's driver's license for life. Greene filed a timely notice of appeal on March 3, 2005.

I

{¶ 2} On October 23, 2004, Greene was observed by Officer Etchison of the Xenia Police Department driving a red 1999 Pontiac Grand Am which had been reported stolen earlier that day. Suspecting that this was the same vehicle that was reported stolen, Officer Etchison activated the lights on his police cruiser and shined a spotlight on the vehicle. Greene drove the vehicle out of the parking lot he was spotted in and proceeded east on Second Street in Xenia, Ohio. Greene was stopped and apprehended shortly thereafter in the vehicle through the use of stop sticks.

{¶ 3} From his conviction and sentence, Greene appeals.

II

{¶ 4} Greene's first assignment of error is as follows:

{¶ 5} "THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA OF GUILT, AS IT WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY."

{¶ 6} In his first assignment, Greene contends that he did not subjectively understand the implications of his plea and the rights he was waiving because the trial court failed to inform him that he could be potentially subject to lifetime license suspension. Thus, Greene asserts that his guilty plea was not knowingly, voluntarily, or

intelligently made and should be vacated. We agree.

{¶ 7} Crim. R. 11(C) sets forth the requisite notice to be given to a defendant at a plea hearing on a felony. To be fully informed of the effect of the plea, the court must determine that the defendant's plea was made with an "understanding of the nature of the charges and the maximum penalty involved." Crim. R. 11(C)(2)(a).

{¶ 8} In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim. R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709.

{¶ 9} A trial court must strictly comply with Crim. R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id*. at 243-44. However, substantial compliance with Crim. R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The non-constitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim. R. 11(C)(2)(a)(b); *State v. Philpott* (Dec. 14, 2000), 8th District No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Nero*, 56 Ohio St.3d at 108.

{¶ 10} A defendant who challenges his guilty plea on the basis that it was not

knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v, Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163, 1167; Crim. R. 52(A). The test is whether the plea would have been otherwise made. *Id*. At 108.

{¶ 11} In reviewing the colloquy between the trial court and Greene, we find that the court did not substantially comply with the requirements set forth in Crim. R. 11(C). Based on the nature of his offenses, Greene was subject to a mandatory suspension of his driver's license ranging from a minimum of three years to a maximum lifetime suspension pursuant to R.C. § 4510.02. The record of the plea hearing and the sentencing hearing reveal that at no time was Greene orally advised by the trial court that his license was subject to a lifetime suspension. In fact, the only mention of a suspension of driving privileges in the plea form signed by Greene indicated that he would be subject to license suspension ranging from six months to five years for a drug related offense which was clearly not applicable given the nature of Greene's offenses.

{¶ 12} We hold that Greene was prejudiced by the trial court's failure to inform him that he would receive a mandatory driver's license suspension of at least three years and as long as his natural life. It is reasonable to conclude that Greene would not have pled guilty had he been aware that he could receive a lifetime driving suspension.

{¶ 13} Greene 's first assignment of error is sustained.

III

{¶ 14} Greene's final assignment of error is as follows:

{¶ 15} ""THE COURT'S IMPOSITION OF A LIFETIME DRIVER'S LICENSE SUSPENSION WAS EXCESSIVE, DISPROPORTIONATE TO APPELLANT'S OFFENSES, AND ACCOMPLISHED IN VIOLATIN (sic) OF APPELLANT'S

CONSTITUTIONAL RIGHT TO DUE PROCESS."

{¶ 16} In light of our ruling with respect to Greene's first assignment, we hold that his final assignment of error is rendered moot.

IV

{¶ 17} Based upon the foregoing, Greene's first assignment is sustained, the judgment of the trial court is reversed and his pleas are vacated. This matter is remanded for further proceedings in accordance with the law and consistent with this opinion.

{¶ 18} Judgment reversed and vacated.

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GRADY, P.J., concurs separately, and in which separate concurrence WOLFF, J., joins.

GRADY, P.J., concurring:

{¶ 19} Defendant Greene proffered a plea of guilty to a violation of R.C. 2921.331(B), failure to comply with the lawful order or direction of a police officer. His violation of R.C. 2921.331(B) is classified as a fourth degree felony. R.C. 2921.331(C)(4). In accepting Greene's plea the trial court was therefore governed by the requirements of Crim.R. 11(C)(2), which sets out the requirements the court must satisfy before it accepts a plea of guilty or no contest to a felony offense.

{¶ 20} Crim.R. 11(C)(2)(a) requires the court to determine that the defendant understands the nature of the charges to which the plea is entered and the maximum penalty involved. The nature of the charge refers to the particular basis for the criminal

liability that may result. The maximum penalty generally refers to criminal penalties, that is, to incarceration and/or fines that may be imposed. Collateral consequences involving potential or mandatory civil disabilities, such as the loss of the right to vote, or loss of a business license or operator's privileges, are not among the penalties to which Crim.R. 11(C)(2)(a) has been held to refer.

{¶ 21} Crim.R. 11(C)(2)(b) requires the court to determine that the defendant understands the "effect" of his plea and that, if it is accepted, the court may proceed to judgment. The effect of a guilty plea is defined by Crim.R. 11(B)(1), which states: "The plea of guilty is a complete admission of the defendant's guilt." Obviously, that does not implicate a suspension of driving privileges.

{¶ 22} Two other appellate districts have held that failure to determine that a defendant understands that his plea of guilty or no contest will subject him to a mandatory driver's license suspension violates Crim.R. 11(C)(2) and/or Crim.R. 11(D), which applies to serious misdemeanor offenses. *Metropolitan Park District v. Pauch* (Dec. 16, 1999), Cuyahoga App. No. 74792; *State v. Stamper* (June 12, 1997), Mahoning App. No. 95CA73. We did likewise in *State v. Calderon* (Nov. 29, 1995), Montgomery App. No. 15250, though in the context of a subsequent Crim.R. 32.1 motion to vacate the plea. Though we found no "manifest injustice" in *Calderon*, the majority's opinion and the opinions in *Pauch and Stamper* viewed the mandatory suspension as a form of penalty for purposes of Crim.R. 11.

{¶ 23} I agree that a mandatory suspension of driving privileges is a serious adverse consequence of a guilty plea, and that good practice supports the court's determination that the defendant understands his plea will subject him to it. In *Pauch*

and *Stamper* the suspensions imposed were for one year and six months, respectively. In the present case, Defendant Greene faced a mandatory suspension of from three years to life, and the court imposed it for his lifetime. That is a penalty so draconian that some prior explanation is surely warranted. Nevertheless, for the reasons stated above, finding that the failure violates Crim.R. 11(C)(2) is problematic.

{¶ 24} A different basis for reversal is presented, however. The plea agreement form that Greene signed indicated that he would be subject to a license suspension ranging from six months to five years, a suspension that was a consequence of a drug-related offense with which Greene was not charged. When material misinformation about a consequence of a guilty plea is conveyed to a Defendant, and the court by its silence fails to correct the mistake, the failure renders the plea less than knowing, intelligent, and voluntary. *State v. Engle* (1996), 74 Ohio St.3d 525. In that circumstance, the plea must be vacated. *Id*. As I wrote in my dissenting opinion in *Calderon*, which likewise involved misadvice, I would reverse Greene's plea and conviction and remand for further proceedings on the authority of *Engle*.

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