[Cite as *State v. Minne,* 2010-Ohio-2269.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23390
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-TRD-5619
v.	:	
	:	(Criminal Appeal Kettering
CAROLINE J. MINNE	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 21st day of May, 2010.

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RINGLAND, J.

{¶ 1} Defendant-appellant Caroline Minne appeals from an order overruling her motion for relief from a judgment of conviction and sentence for violating R.C. 4511.21(D)(2). Minne contends that the traffic citation issued for this charge was insufficient to advise her of the seriousness of waiving her rights, because the citation contains only a very brief and partial explanation of a defendant's rights.

Minne further contends that allowing police officers and courts to restrict the due process rights of defendants through the traffic citation process is not in the public interest. Finally, Minne contends that the trial court acted unconscionably by failing to allow her an opportunity to be heard, because the citation process involves a boiler-plate waiver made unintelligently and without proper appraisal of a defendant's rights.

{¶ 2} We conclude that Minne failed to satisfy any of the requirements for relief from judgment under Civ.R. 60(B). Minne's claim of having used reasonable speed for the conditions is not a valid defense to the charge brought under R.C. 4511.21(D)(2), which is a per se violation that is not subject to a rebuttable presumption.

{¶ 3} Minne's motion also fails to demonstrate grounds for relief under Civ.R. 60(B). Minne's alleged lack of understanding of entitlement to a lawyer does not constitute excusable neglect or mistake, as her charge under R.C. 4511.21(D)(2) did not carry a possibility of incarceration, and there was no right to counsel. The contention that Minne's insurance costs may be raised also fails to satisfy the requirements for newly discovered evidence, because insurance costs are not material to any issue that could be contested at trial. There is also no showing that the citation in question failed to advise Minne of the offense with which she was charged, in a manner that could be readily understood by a person making a reasonable attempt to understand. Finally, Minne's motion was not filed within a reasonable time following her guilty plea, waiver of trial, and payment of costs.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} In April 2008, Carolyn Minne received a traffic citation for allegedly violating R.C. 4511.21(D)(2), by traveling 83 miles per hour in a 65 mile- per-hour zone on Interstate 675 in Montgomery County, Ohio. The citation informed Minne that she was to appear in Kettering Municipal Court on May 6, 2008. The box requiring a personal appearance was not checked. The back of the ticket reads as follows:

{¶ 6} "GUILTY PLEAS, WAIVERS OF TRIAL, PAYMENT OF FINES AND COSTS

{¶ 7} "I, the undersigned defendant, do hereby enter my written pleas of guilty to the offenses charged in this ticket. I realize that by signing these guilty pleas, I admit my guilt of the offenses charged and waive my right to contest the offenses in a trial before the court or jury. Further, I realize that a record of this plea will be sent to the Ohio Bureau of Motor Vehicles. I have not been convicted of, pleaded guilty to, or forfeited bond for two or more prior moving traffic offenses within the last 12 months. I plead guilty to the offenses charged."

{¶ 8} Minne signed the ticket and sent it to the Kettering Municipal Court, which filed the signed plea. By May 22, 2008, Minne had paid her fine and the case was concluded. Approximately ten months later, Minne filed a motion to vacate her conviction on the speeding ticket. Minne did not specify a particular provision under which she was proceeding, but contended in the motion that she did not understand that she was entitled to a lawyer. Minne also claimed that she had a good defense to the charge, because she was driving reasonably under the conditions at the time of her

arrest. She also alleged that her insurance company was indicating that the speeding ticket was influencing the cost of her insurance. In an affidavit attached to the motion, Minne offered statements reflecting her unawareness that she had a right to an attorney, and her belief that she had a good defense. However, the affidavit did not mention insurance costs.

{¶ 9} The trial court overruled the motion in a one-line entry in March 2009, without stating reasons for the denial. Minne now appeals from the decision overruling her motion to vacate the judgment.

II

{¶ 10} Minne's First Assignment of Error (phrased as an "Issue for Review") is as follows:

{¶ 11} "WHETHER A WAIVER OF A HEARING CANNOT BE MADE WITHOUT THE DEFENDANT INTELLIGENTLY UNDERSTANDING THE LEGAL AND ANCILLARY RAMIFICATIONS OF SUCH A WAIVER."

{¶ 12} Under this assignment of error, Minne contends that the traffic citation contains only a very brief and partial explanation of her rights. Minne contends this is insufficient to advise defendants of the seriousness of waiving their rights. Minne points to R.C. 4511.192 as an example of what should be required in order to notify a suspected offender of his or her rights.

{¶ 13} In *State v. Mattachione*, Greene App. No. 2004 CA 80, 2005-Ohio-2769, we held that municipal courts have the power to vacate their judgments under R.C. 1903.13, and that the standards in Civ.R. 60(B) should be applied to motions to vacate a judgment of conviction. Id. at ¶ 9 and 13. The First District Court of Appeals

subsequently reached a similar conclusion in *State v. Black*, Hamilton App. No. C-070546, 2008-Ohio-3790. In *Black*, the First District noted that the Ohio Supreme Court has read the post-conviction statutes as conferring jurisdiction over post-conviction petitions only on common pleas courts. Id. at ¶ 7, citing R.C. 2953.21 and *State v. Cowan*, 101 Ohio St.3d 372, 2004-Ohio-1583. The First District, therefore, concluded that because the Ohio Criminal Rules provide no procedure for municipal court defendants to challenge convictions with evidence outside the record, the municipal court should have resorted to Civ.R. 60(B) for appropriate criteria by which to judge the post-conviction motion. 2008-Ohio-3790, at ¶ 9-11.

{¶ 14} Civ.R. 60(B) allows parties to be relieved from final orders or judgments on the following grounds:

{¶ 15} "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶ 16} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where

the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc*. (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus.

{¶ 17} "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107. Motions for relief from judgment under Civ.R. 60(B) are addressed to the sound discretion of the trial court, and the court's ruling "will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion occurs when a trial court "makes a decision that is unreasonable, arbitrary, or unconscionable." *Huntington Natl. Bank v. Burch*, 157 Ohio App.3d 71, 2004-Ohio-2046, at ¶ 14, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 18} Minne's motion fails to satisfy any of the requirements for relief from judgment. As an initial matter, the reasonableness of speed is not a defense to Minne's offense, which involves a violation of R.C. 4511.21(D)(2). This statute prohibits speed in excess of sixty-five miles per hour on interstate highways and is a per se speeding violation that is not subject to a rebuttable presumption. See, *e.g.*, *City of Columbus v. Conley*, Franklin App. No. 05AP-1332, 2006-Ohio-4625, at ¶ 11.

{¶ 19} Minne's motion also fails to demonstrate grounds for relief under Civ.R. 60(B)(1) through (5). The motion fails to specify the ground under which Minne seeks relief, but Minne's contentions are that she did not understand that she was entitled to a lawyer, and that her insurance company indicates that her speeding ticket is influencing the cost of her insurance. The affidavit attached to the motion reiterates the comment

about lack of awareness of entitlement to a lawyer, but does not mention the issue of insurance costs.

{¶ 20} From the materials filed, the motion could only have been brought on the basis of excusable neglect or mistake, newly discovered evidence, or the catch-all provision in Civ.R. 60(B)(5). Taking the issue of mistake first, we note that Minne's violation of R.C. 4511.21(D)(2) did not carry a possibility of incarceration, and she had no right to counsel. *State v. Woods* (Dec. 31, 1998), Montgomery App. No. 16665, citing *State v. Buchholz* (1984), 11 Ohio St.3d 24, 28. In such circumstances, trial courts need not advise defendants of the right to counsel, nor must courts obtain waivers from defendants. See, *e.g.*, *State v. Sturgill,* Auglaize App. No. 2-01-34, 2002-Ohio-1766, and *State v. Wiest*, Hamilton App. No. C-030674, 2004-Ohio-2577, at ¶ 26-27. Thus, Minne's lack of knowledge about the right to counsel does not constitute excusable neglect or mistake. It would also not be newly discovered evidence, as Minne could have easily consulted a lawyer prior to entering her plea.

{¶ 21} There is also no reason to resort to Civ.R. 60(B)(5), which is "intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but * * * is not to be used as a substitute for any of the other more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, at paragraph one of the syllabus. This avenue of relief is also "only to be used in an extraordinary and unusual case when the interests of justice warrants it." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. No such circumstances exist in the case before us.

{¶ 22} An increase in insurance rates could potentially be classified as "newly

discovered evidence," since it might not have been known at the time of the guilty plea. However, in addition to showing that evidence is "newly discovered" and that the movant has exercised due diligence, a movant must show that the evidence is " 'material,' and that it would probably have produced 'a different result.' " *First Financial Servs., Inc. v. Cross Tabernacle Deliverance Church, Inc*., Franklin App. No. 06AP-404, 2007-Ohio-4274, at ¶ 59 (citation omitted). See, *also*, *Ping v. Payne* (Dec. 30, 1999), Montgomery App. No. 17539. Insurance rates would not satisfy this requirement, because they have no impact on any issue that could be contested at trial.

{¶ 23} Pertinent to Minne's contention that the traffic citation is insufficient, the Ohio Supreme Court recently stated that:

{¶ 24} "Consistent with the goal of ensuring simplicity and uniformity in procedure, a 'complaint prepared pursuant to [the Ohio Traffic Rules] simply needs to advise the defendant of the offense with which he is charged, in a manner that can be readily understood by a person making a reasonable attempt to understand.' * * * In the traffic-citation context, this has generally been interpreted as focusing on whether the defendant had notice of the nature and the cause of the accusation. * * * Notice is satisfied when a defendant is apprised of the nature of the charge together with a citation of the statute or ordinance involved." *Bellville v. Kieffaber*, 114 Ohio St.3d 124, 127, 2007-Ohio-3763, at ¶ 19.

{¶ 25} Minne's citation states the statute involved, R.C. 4511.21(D)(2), and the nature of the charge, which is speeding at a rate of 83 miles per hour in a 65 mile-per-hour zone on Interstate 675, in Washington Township, Montgomery County, Ohio. Minne failed to present facts indicating that a person making a reasonable

attempt could not understand the charge.

{¶ 26} Finally, although Minne's motion was filed within one year after judgment, the elapsed time (294 days), is not reasonable. "[A] motion may be filed within 1 year under Civil Rule 60(B) but still may not be considered within a 'reasonable time.' " *Adomeit*, 39 Ohio App.2d at106. Furthermore, the movant has the burden of presenting factual material establishing timeliness or justifying delay in filing the motion. *Wolfe v. Cahill*, Cuyahoga App. No. 88368, 2007-Ohio-638, at ¶ 18. Minne failed to meet this burden, as she did not submit factual material indicating why she delayed filing the motion for almost ten months.

{¶ 27} Based on the preceding discussion, the trial court did not abuse its discretion in denying Minne's motion to vacate the judgment.

{¶ 28} Minne's First Assignment of Error is overruled.

III

{¶ 29} Minne's Second Assignment of Error is as follows:

{¶ 30} "WHETHER IT IS NOT IN THE PUBLIC INTEREST TO RESTRICT A DEFENDANT'S DUE PROCESS RIGHTS TO SUCH A DEGREE AS TO IMPACT THEIR [SIC] JOB AND OR FINANCIAL SECURITY."

{¶ 31} Under this assignment of error, Minne contends that it is not in the public interest to allow police officers and courts to restrict due process rights of defendants in the manner that occurred here. This argument does not provide a basis for setting the judgment aside. As noted, the Ohio Supreme Court has approved the use of the citation procedure, and there is no indication in the case before us that Minne's traffic citation failed to properly advise her of the charged offense in a manner that could

reasonably be understood.

{¶ 32} In the regard, the Tenth District noted long ago that:

{¶ 33} "The city has an important and legitimate interest in the efficient processing of a great volume of minor traffic violations, and in keeping the docket and size of its court system at a manageable level. The people have an interest in fast and efficient handling of traffic citations and in avoiding unnecessary, time consuming, and expensive court proceedings. The establishment of the Traffic Violations Bureau by Traf. R. 13(A), and provisions for establishing fixed fines in Traf. R. 13(B) and (C) are rationally related to those legitimate governmental interests." *City of Columbus v. Skaggs* (October 17, 1985), Franklin App. No. 84AP-485, 1985 WL 10468, * 5.

{¶ 34} Accordingly, Minne's Second Assignment of Error is without merit and is overruled.

IV

{¶ 35} Minne's Third Assignment of Error is as follows:

{¶ 36} "WHETHER IT IS UNCONSCIONABLE FOR A JUDGE TO REFUSE TO ALLOW A HEARING ON A MINOR MISDEMEANOR IF THE DEFENDANT DID NOT INTELLIGENTLY UNDERSTAND HER WAIVER OF SAID HEARING."

{¶ 37} Under this assignment of error, Minne contends that the trial court acted unconscionably by failing to allow Minne an opportunity to be heard, despite a "boiler plate waiver made unintelligently and without proper appraisal of her rights." Appellant's Brief, p. 11. Again, Minne failed to present the trial court with evidence of any improper procedure that was followed.

{¶ 38} Minne's Third Assignment of Error is overruled.

V

{¶ 39} All of Minne's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., GRADY, J., concur.

(Hon. Robert P. Ringland, Twelfth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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