

[Cite as *State v. Clark*, 2017-Ohio-4287.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 16 MA 0106
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
KEWAN CLARK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio  
Case No. 2016 CRB 1597

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Jeffrey Moliterno  
Assistant Prosecuting Attorney  
26 S. Phelps St., Fourth Floor  
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Edward Czopur  
Degenova & Yarwood, Ltd  
42 N. Phelps Street  
Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: June 9, 2017

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ROBB, P.J.

{¶1} Defendant-Appellant Kewan Clark appeals the judgment of the Youngstown Municipal Court finding him guilty upon his no contest plea. He contends the trial court erred in finding him guilty, alleging the record does not contain an adequate explanation of circumstances as required by R.C. 2937.07 for misdemeanor no contest pleas. For the following reasons, the trial court's judgment is affirmed.

#### STATEMENT OF THE CASE

{¶2} After a July 3, 2016 traffic stop, complaints were filed against Appellant in the Youngstown Municipal Court; the Ohio State Highway Patrol (OSHP) incident report was incorporated and attached. Appellant was charged with fifth-degree felony drug trafficking in violation of R.C. 2925.03(A)(2) and tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony. He was also issued three traffic tickets. A written plea agreement was entered just prior to the scheduled preliminary hearing.

{¶3} In return for Appellant's no contest plea, the prosecution agreed to amend the felony drug trafficking charge to first-degree misdemeanor drug possession in violation of R.C. 2925.11. The prosecution also agreed to amend the felony tampering with evidence charge to obstruction of official business, a second-degree misdemeanor. See R.C. 2921.31(A) ("No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties."). The prosecution recommended one year of probation plus forfeiture of the \$6,721 seized during Appellant's arrest.

{¶4} After the plea hearing, the court sentenced Appellant to 90 days in jail and three years of intensive probation. The court imposed a \$200 fine on each offense and ordered the \$6,721 to be forfeited to the OSHP. Appellant filed a timely notice of appeal from the July 12, 2016 sentencing order.

#### ASSIGNMENT OF ERROR

{¶15} Appellant’s sole assignment of error provides:

“The trial court committed reversible error when it found Appellant guilty, of each charge, without an explanation of the circumstances as required by R.C. 2937.07.”

{¶16} Appellant argues the discussion of the offenses by the prosecution was insufficient to constitute an explanation of circumstances. He notes the Supreme Court’s main case of the subject held “a defendant has a substantive right to be discharged by a finding of not guilty where the statement of facts reveals a failure to establish all of the elements of the offense.” See *City of Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 150, 459 N.E.2d 532 (1984) (but then vacating the plea and remanding to the trial for further proceedings). Appellant concludes the failure to provide an adequate explanation of circumstances upon a no contest plea equates to insufficient evidence, which requires dismissal of the case with prejudice and without retrial as jeopardy attached at the time of conviction, citing *State v. James*, 7th Dist. No. 15 MA 0003, 2016-Ohio-4662, ¶ 13.<sup>1</sup>

{¶17} Appellant also claims the defense cannot agree to waive the reading of the explanation of circumstances. He relies on Sixth District cases without noting our *James* case which said a defendant may waive the right to an explanation of circumstances. See *James*, 7th Dist. No. 15 MA 0003 at ¶ 9 (then finding there was no waiver on the record in that case). Additionally, the Sixth District has recently pronounced: “where a defendant has waived the R.C. 2937.07 requirement, he has invited the error and may not raise the issue on appeal.” *State v. Kern*, 6th Dist. No. L-14-1173, 2015-Ohio-1988, ¶ 12 (citing this district and others).

{¶18} R.C. 2937.07 provides in pertinent part: “A plea to a misdemeanor offense of ‘no contest’ or words of similar import shall constitute an admission of the

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<sup>1</sup> See also *Cleveland v. Wynn*, 8th Dist. No. 103969, 2016-Ohio-5417, ¶ 15; *State v. Lloyd*, 6th Dist. No. L-15-1035, 2016-Ohio-331, ¶ 19; *State v. Horvath*, 2015-Ohio-4729, 49 N.E.3d 847, ¶ 18 (3d Dist.); *State v. Fordenwalt*, 9th Dist. No. 09CA0021, 2010-Ohio-2810, ¶ 11; *State v. Smyers*, 5th Dist. No. CT 2004-0039, 2005-Ohio-2912, ¶ 17-19; *State v. Stewart*, 2d Dist. No. 19971, 2004-Ohio-3103.

truth of the facts alleged in the complaint and that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense.”<sup>2</sup> Crim.R. 11 does not provide for an explanation of circumstances in setting forth the procedures for accepting a no contest plea. Nevertheless, the explanation of circumstances for a no contest plea as required by R.C. 2937.07 is considered a substantive right which was not superseded by Crim.R. 11. *City of Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 459 N.E.2d 532 (1984), syllabus (at that time, the statute said a no contest plea “shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of circumstances of the offense”).

{¶9} The explanation of circumstances must be sufficient to find the defendant guilty of the offense. *Id.* It has thus been concluded the explanation must be sufficient to cover each element of the criminal offense. See *James*, 7th Dist. No. 15 MA 0003 at ¶ 7. “A defendant has a substantive right to be discharged by a finding of not guilty where the statement of facts reveals a failure to establish all of the elements of the offense.” *Bowers*, 9 Ohio St.3d at 151, quoting *Springdale v. Hubbard*, 52 Ohio App.2d 255, 259, 369 N.E.2d 808 (1st Dist.1977).

{¶10} Here, the trooper’s incident report attached to the complaint provided a detailed explanation of the circumstances. However, “the 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 an explanation of circumstances was in fact provided in the record. *Bowers*, 9 Ohio St.3d at 151. The court’s finding of guilt after a no contest plea cannot be performed in a “perfunctory fashion.” *Bowers*, 9 Ohio St.3d at 151. There is no absolute requirement for the trial court judge to be the one to read the explanation of circumstances into the record, but some participant in the hearing must provide a recitation for the record. See

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<sup>2</sup> The statute also provides that in a minor misdemeanor case, “the judge or magistrate is not required to call for an explanation of the circumstances of the offense, and the judge or magistrate may base a finding on the facts alleged in the complaint.” R.C. 2937.07. In any subsequent civil or criminal proceeding, a no contest plea shall not be construed as an admission of any fact at issue in the criminal charge. *Id.*

*James*, 7th Dist. No. 15 MA 0003 at ¶ 8. Statements of the defendant or his attorney can provide or contribute to the explanation of circumstances. See *id.* at ¶ 11.

{¶11} At the plea hearing, the state explained the negotiated plea involved the state's agreement to amend the felony charges of drug trafficking and tampering with evidence to misdemeanor charges of drug possession and obstruction of official business. The state said it would also be dismissing the traffic case. The prosecutor advised the court the original charge was drug trafficking because Appellant "had on him" a large amount of money and items used in preparation for trafficking in addition to marijuana. The prosecutor also said the trooper indicated Appellant placed something in his mouth while in the car. (Tr. 3).

{¶12} Defense counsel advised he was trying to work with Appellant to help him, "I think he is making a turn but, you know, there is this fixation with marijuana anymore. It's illegal, everybody knows it's illegal but they still have it." (Tr. 4). The court said Appellant "apparently wants to be a drug dealer." (Tr. 4). The prosecutor disclosed the amount of money found on Appellant was \$6,721. Defense counsel said he was not going to argue about the money but noted some of the money was rental money that had just been collected from family rental properties, "probably 1800 to 2,000 of it and the rest wasn't." (Tr. 5).

{¶13} The court expressed, "perhaps reducing these felonies to misdemeanors is enough of a break that you're entitled to get." (Tr. 6). The court then conducted a Crim.R. 11 plea colloquy, which is not contested. After Appellant entered his no contest plea, the court asked defense counsel if he was "stipulating to a finding," and counsel answered in the affirmative. (Tr. 8). The court then found Appellant guilty of the two charges.

{¶14} Appellant argues the explanation of circumstances was too vague. The state alleged facts supporting drug trafficking and allowed Appellant to plead to drug possession as there was evidence he possessed drugs in addition to evidence of trafficking. Defense counsel added incriminating statements to the explanation. We note a trial court can find a defendant guilty of a lesser included offense upon a no contest plea. See, e.g., *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 423, 662

N.E.2d 370 (1996), fn.1. Regarding the obstructing official business charge, this charge was amended from the felony charge of tampering with evidence. It was alleged the trooper saw Appellant put something in his mouth during a traffic stop where evidence of drug trafficking was discovered. This court concludes the explanation of circumstances was sufficient to permit the trial court to accept the no contest plea under the circumstances of this case.

{¶15} Furthermore, as the state points out, after Appellant voiced he would plead no contest and details about the offenses were given, defense counsel said he was stipulating to a finding. As aforementioned, our recent *James* case stated a defendant can waive the right to an explanation of circumstances. See *James*, 7th Dist. No. 15 MA 0003 at ¶ 9 (we then found the record did not show the defendant waived this right during his no contest plea), citing *North Ridgeville v. Roth*, 9th Dist. No. 03CA008396, 2004-Ohio-4447, ¶ 12.

{¶16} In the cited *Roth* case, the Ninth District held: “a defendant is not precluded from waiving the explanation of circumstances.” *Roth*, 9th Dist. No. 03CA008396 at ¶ 12, citing *Broadview Hts. v. Burrows*, 8th Dist. No. 79161 (Oct. 4, 2001). The *Roth* court also held an appellant cannot raise as error an action he induced or invited the trial court to make. *Roth*, 9th Dist. No. 03CA008396 at ¶ 12. The court found no issue with the defendant’s complaint that the trial court asked counsel whether there would be a waiver, and counsel merely answered in the affirmative. *Id.* at ¶ 13. The state points out the Eighth District has also stated: the law does not prohibit waiver of the explanation of the circumstances; the waiver relieves the judge of the obligation to determine whether an explanation of the circumstances would provide sufficient evidence to support each element of the offense; and the defendant cannot challenge the lack of an explanation if he invited the omission. *City of Cleveland v. Serrano*, 8th Dist. No. 74552 (Nov. 10, 1999).

{¶17} Finally, even before our statement in *James* (that waiver was possible but not present in that particular case), this court held “a defendant could invite noncompliance with the statute or waive its requirements.” *State v. Vittorio*, 7th Dist. No. 09 MA 166, 2011-Ohio-1657, ¶ 17, citing *State v. Howell*, 7th Dist. No. 04 MA 31,

2005-Ohio-2927, at ¶ 20 (“a criminal defendant may waive the right to an explanation of circumstances when pleading guilty”). See also *State v. Arnold*, 3d Dist. No. 13-16-13, 2017-Ohio-326, ¶ 9 (quoting *Vittorio*). In *Vittorio*, this court found waiver of the explanation of circumstances when defense counsel voiced he stipulated to a finding of guilt. *Vittorio*, 7th Dist. No. 09 MA 166 at ¶ 21-22. In accordance, counsel’s stipulation to a finding could be read as a stipulation to a finding of guilt and a waiver of a further reading of the explanation of circumstances.

{¶18} Appellant’s sole assignment of error is overruled, and the trial court’s judgment is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.