[Cite as *State v. Kern*, 2015-Ohio-1988.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-14-1173
Appellee	Trial Court No. 13TRC017900101
v.	
Thomas D. Kern	**DECISION AND JUDGMENT**
Appellant	Decided: May 22, 2015

* * * * *

Melissa Purpura, Law Director, for appellee.

Thomas D. Kern, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Thomas Kern, appeals the July 7, 2014 judgment of the Oregon Municipal Court which, following his no contest plea to reckless operation, R.C. 4511.20, a second offense and a fourth degree misdemeanor, sentenced appellant to 20 days of incarceration, a two-year license suspension with driving privileges, and a fine and costs. For the reasons that follow, we affirm.

{¶ 2} On November 18, 2013, appellant was cited for driving under the influence of alcohol, R.C. 4511.191(A)(1)(a), a first degree misdemeanor due to a prior offense and having an open container of alcohol. After two continuances to retain counsel, appellant entered not guilty pleas on December 9, 2013. Appellant's attorney was granted leave to withdraw on March 24, 2014, and new counsel was retained.

{¶ 3} A motion to suppress evidence challenging the reasonableness of the stop was filed on April 10, 2014. On May 14, 2014, the state opposed the motion.

{¶ 4} On May 20, 2014, a plea hearing was held wherein appellant withdrew his not guilty pleas and entered a plea of no contest to the amended charge of reckless operation, R.C. 4511.20, second offense. The ALS was vacated and the open container charge was dismissed.

{¶ 5} Appellant appealed the July 7, 2014 judgment entry and raises the following three assignments of error:

> I. The trial court erred in finding appellant guilty, pursuant to appellant's plea of no contest, of the offense of reckless operation ORC 4511.20 as there was insufficient evidence presented to establish the offense.
>
> II. The trial court erred in sentencing appellant to a misdemeanor of the fourth degree when the state never presented any evidence of a prior offense within the previous year, as required by ORC 4511.20(B) to elevate the crime.

III. To the extent that the first and second assignments of error might be considered waived, they constitute plain error, which should be noticed by this court and remedied, in that those errors seriously affect the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

{¶ 6} In appellant's first assignment of error, he argues that the trial court's finding of guilt following his no contest plea was not supported by sufficient evidence. In his second assignment of error appellant similarly contends that the court failed to find that he had been convicted of a prior offense within the past year to elevate the crime to a fourth degree misdemeanor. As they are related, the assignments of error will be jointly addressed.

{¶ 7} Appellant was convicted of willful or wanton disregard of safety on highways, or reckless operation, R.C. 4511.20, second offense, which provides:

(A) No person shall operate a vehicle, trackless trolley, or streetcar on any street or highway in willful or wanton disregard of the safety of persons or property.

(B) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the

offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

{¶ 8} Prior to a court's finding of guilt following a no contest plea to a misdemeanor, a statement of facts, or explanation of circumstances, supporting the elements of the crime charged must be presented. R.C. 2937.07; *City of Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 459 N.E.2d 532 (1984). This court has recently examined the meaning of the term "explanation of circumstances." *State v. Czech*, 6th Dist. Lucas No. L-13-1141, 2015-Ohio-458. In *Czech*, we noted that documentary evidence that the court considered may suffice as an explanation of circumstances, but that a mere recitation of the charge or statutory elements of the offense is not sufficient. *Id.* at ¶ 15-18, citing *State v. Muhammad*, 6th Dist. Lucas No. L-00-1263, 2001 WL 1636436 (Dec. 21, 2001); *State v. Sabo*, 6th Dist. Lucas No. L-08-1452, 2009-Ohio-6979; *State v. Pugh*, 6th Dist. Erie No. E-11-014, 2012-Ohio-829.

{¶ 9} Similar to the offenses charged in this case, in *State v. Pugh*, the defendant entered a no contest plea to a second offense reckless operation; his OVI charge was dismissed. During the plea hearing, the trial court indicated that it made its guilty finding based on the testimony presented at the suppression hearing. *Id.* at ¶ 5. Reviewing the record we determined that because the charges had different case numbers, there was no evidence in the record that appellant was operating a motor vehicle on the day in

question. Further, we noted that the record was devoid of evidence that appellant has a predicate offense in the prior 12 months to elevate the degree of the offense. *Id.* at ¶ 16.

{¶ 10} In the present case, at the May 20, 2014 plea hearing, appellant's attorney stated that "he would enter a plea of no contest with a consent to finding of guilty and waive a reading." The trial court then noted: "Affidavit states that on or about November 18, 2013, Mr. Kern was operating a motor vehicle in the City of Oregon, Lucas County, Ohio recklessly, in violation of R.C. 4511.20. This court finds the affidavit supports the conclusions of guilt."

{¶ 11} Reviewing the plea hearing and the record before us, we find that the trial court failed to provide an "explanation of circumstances" sufficient to comply with R.C. 2937.07. While courts have held that an officer affiant's notes regarding the offense may be sufficient when read into the record, *State v. McGlothin*, 2d Dist. Montgomery No. 13460, 1993 WL 32023 (Feb. 10, 1993), the above-quoted language is barely more than a recitation of the statute. Further, the court failed to allude to any prior violation which would elevate the level of the offense.

{¶ 12} Our analysis, however, is not complete. Unlike *Pugh*, *supra*, in the instant case appellant specifically waived a reading of the circumstances of the offense. Reviewing Ohio law, we have found several courts which have held that R.C. 2937.07 is waivable. *See City of Broadview Heights v. Burrows*, 8th Dist. Cuyahoga No. 00CRB 03197-1-1, 2001 WL 1174264, *2 (Oct. 4, 2001); *State v. Smyers*, 5th Dist. Muskingum No. CT03-0039, 2004-Ohio-851, ¶ 12, citing *State v. Ritch*, 4th Dist. Scioto

No. 97CA2491, 1998 WL 282970 (May 11, 1998), *City of North Ridgeville v. Roth*, 9th Dist. Lorain No. 03CA008396, 2004-Ohio-4447, ¶ 12; *State v. Howell*, 7th Dist. Mahoning No. 04 MA 31, 2005-Ohio-2927, ¶ 20. Further, where a defendant has waived the R.C. 2937.07 requirement, he has invited the error and may not raise the issue on appeal. *Burrows, supra*, at *2; *Ritch, supra*, at *4.

{¶ 13} Based on the foregoing, we find that appellant's first and second assignments of error are not well-taken.

{¶ 14} Appellant's third assignment of error argues that even assuming the issue was waived, the court committed plain error by finding him guilty of reckless operation, second offense. To prevail on a claim of plain error under Crim.R. 52(B), an appellant must demonstrate that the outcome would have been clearly different but for the alleged errors. *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996).

{¶ 15} In this case, appellant has not demonstrated that had the trial court informed him of the circumstances of the charges, he would not have entered the plea. The record demonstrates that appellant had multiple prior OVI convictions and was charged with a first degree misdemeanor. Appellant was convicted of a fourth degree misdemeanor and received a benefit from entering the plea. Accordingly, we find that appellant's third assignment of error is not well-taken.

{¶ 16} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Oregon Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE