Supreme Court of Ohio Clerk of Court - Filed October 19, 2015 - Case No. 2015-0381

IN THE SUPREME COURT OF OHIO

2015- 0381

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| CITY OF CLEVELAND | : | |
| Appellee | : | |
| -vs- | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals |
| TROUSSANT D. JONES | : | |
| Appellant | : | CA: 100598 |

# APPELLANT MERIT BRIEF

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## INTRODUCTION

Troussaint Jones pled no contest to a misdemeanor offense of operating a vehicle while under the influence ("DUI") and the trial court judge found him guilty of having physical control of a vehicle while under the influence. The City sought leave to challenge the validity of that verdict on appeal. The Eighth District not only granted the City leave to appeal but also vacated *both* the guilty verdict and the underlying plea.

The questions presented by this case are whether the prosecutor (City or State) can appeal a final verdict after a no contest plea and, if so, whether the Court of Appeals can sua sponte vacate a plea for noncompliance with procedural rules designed to protect the rights of a criminal defendant and subject the defendant to a second criminal prosecution. This Court should follow the plain language of R.C. 2945.67 and its own prior precedent and hold that the prosecutor is prohibited from appealing the final verdict of a trial court in a criminal case. In the alternative, this Court should hold that the Eighth District erred in sua sponte vacating Jones' plea based on the trial court's alleged failure to comply with Traffic Rule 10.

Ultimately, any imperfection in the plea process or verdict does not change the most salient fact in this case—the trial court rendered a final verdict, nor the well-established legal principle that the State may not appeal that final verdict. The Eighth District overstepped its authority when it accepted the City's appeal and vacated Jones' plea and verdict.

## STATEMENT OF THE CASE AND FACTS

On June 15, 2013, Troussaint Jones was charged in Cleveland Municipal Court with four misdemeanor offenses: 1) DUI in violation of R.C. 4511.19(A)(1) (a first-

degree misdemeanor that carries a mandatory three-day jail term); 2) DUI with a prior conviction and refusal to submit to chemical tests in violation of R.C. 4511.19(A)(2) (a first-degree misdemeanor that carries a mandatory six-day jail term); 3) Driving while under a 12-point suspension in violation of R.C. 4510.037 (a first-degree misdemeanor); and 4) Driving over marked lanes in violation of R.C. 4511.33 (minor misdemeanor). Mr. Jones initially pled not guilty and was appointed counsel.

On October 10, 2013, the trial court held a change of plea hearing. At the beginning of the hearing, the State presented its version of the traffic stop. The trooper explained that he pulled Jones over for "drifting" three times outside his lane. (Tr. at 10). The trooper indicated that Jones had "an attitude" as soon as he was pulled over and that Jones became "verbally combative" during the traffic stop. (Tr. at 3 and 7-8). The trooper also claimed that he "smelled an odor of alcohol, glassy, bloodshot eyes." (Tr. at 10). The trooper ordered Jones "out of the vehicle" and attempted to perform field sobriety tests but Jones kept interrupting him and "was trying to dictate the tone of the traffic stop from the beginning to the end." (Tr. at 4 and 10). The trooper acknowledged that Jones "maintained that he was not drinking." (Tr. at 3).

Mr. Jones explained that he "wasn't drunk at all" and was "just upset" about being stopped because the car he was using had to be returned to someone who needed to get to work. (Tr. at 5 and 11). He explained that "the only reason [he] was drifting" was that his phone had started ringing and he dropped it on the seat. (Tr. at 11). He also told the judge that he had his license and "didn't know my license was suspended" because he thought he "took care of that." (Tr. at 9 and 11).

The trial judge noted that there is "a difference between intoxicated and angry."

(Tr. at 5). And the judge went on to explain that she could understand "some degree of combativeness" and wants to look beyond that to the "underlying factors." (Tr. at 8).

After Jones apologized to the trooper for "being rude and disrespectful," he changed his plea to no contest. (Tr. at 14). The trial court then rendered the following verdict based on the facts that "have already been submitted:"

- Guilty of physical control in violation of Cleveland Ordinance 433.011 instead of DUI (count one);
- Not guilty of DUI in violation of R.C. 4511.19(A)(2) (count two);
- Guilty of driving under the 12-point suspension (count three);
- Guilty of driving in the marked lines (count four);

(Tr. at 14-15). The trial court explained that this "probably more resembles and finds a balance of what happened." (Tr. at 16). The trial court sentenced Jones to one year of active probation, ordered Jones to attend the Cop Program at Tri-C, ordered him to attend two MADD meetings, and imposed six points on his license. (Tr. at 15-16).

The City prosecutor then sought clarification regarding the trial court's verdict on the DUI counts. (Tr. at 17). The trial court explained:

> Count 1, is the Physical Control, I make the notation the prosecutor amended that, based upon the facts, the Court finds the defendant guilty of Physical Control, it's not as though you are amending it.

(Tr. at 17). The City prosecutor wanted to make clear that "the city did not amend count 1 to Physical Control." (Tr. at 18). The trial judge acknowledged that was the case and said "[t]hat's what I'm writing on the journal." (Tr. at 18). And the journal entry stated, in pertinent part, "[b]ased upon facts court finds defendant guilty of physical control."

The City sought leave to appeal the trial court's guilty verdict on physical control

(count one). It did not challenge the remainder of the trial court's verdict on the other three charges. The Eighth District granted the City's request for leave. In its brief, the *City* asked the Eighth District to vacate the trial court's verdict that Jones was "guilty of violating Cleveland Codified Ordinance ("CCO") 433.01, physical control." *City of Cleveland v. Jones*, 8th Dist. No. 100598, 2014-Ohio-4201, ¶ 1. Mr. Jones argued that the Eighth District should dismiss the appeal because the City cannot appeal a final verdict. He also argued, in the alternative, that, even if the City could appeal the final verdict, any decision rendered by the Eighth District would be purely advisory in nature because double jeopardy would bar any further criminal proceedings. And, finally, he maintained that, if the Court elects to issue the advisory opinion requested by the City, it should affirm the trial court's decision because the trial court had the authority, based on a misdemeanor no contest plea, to acquit Jones of the DUI and convict him of physical control, a lesser included offense.

The Eighth District, in a 2-1 decision, ultimately vacated Jones' physical control conviction on a basis that was neither briefed nor argued by either party. Specifically, the majority held that the trial court failed to comply with Traffic Rule 10 in accepting Jones' plea and therefore the plea and verdict was invalid. *Jones*, 2014-Ohio-4201, ¶¶ 29-34 ("A review of the transcript in this case demonstrates the municipal court complied with none of its Traf. R. 10 duties. Therefore, Jones's 'plea,' which was entered only by his attorney and without any compliance with Traf. R. 10, was infirm.") The dissenting judge held that the trial court "did not amend the charge prior to Jones's plea" and that, regardless of any imperfections in the plea hearing, the trial court's verdict could not be appealed by the City. *Jones*, 2014-Ohio-4201, ¶¶ 48-49 (Jones, J. *dissenting*).

Mr. Jones filed a motion for reconsideration and a motion for *en banc* consideration. Mr. Jones argued the majority should reconsider its decision because: 1) Its holding was based on a mistaken premise that Jones pled no contest to an amended charge as opposed to the original charges; and 2) It improperly decided a legal issue regarding the validity of the no contest plea that was neither raised nor briefed by either party. The Eighth District denied Jones' motion for reconsideration because in its view a plea was not "properly entered in this case." (Judgment Entry 12/30/14) ("Although there was plenty of innuendo and arguably an attempt at a plea, the proceedings simply never made it to the goal line.") The Eighth District also denied Jones' motion for en banc review because there "was no consensus about the basis for this court's jurisdiction in this appeal or whether double jeopardy would bar further prosecution." (Judgment Entry 1/22/15).

Mr. Jones filed a discretionary appeal with this Court raising the following proposition of law:

> A trial court's pronouncement of a verdict precludes any appeal by the State that could disturb that verdict.

This Court accepted Mr. Jones appeal and Jones' merit brief follows.

## LAW AND ARGUMENT

Troussaint Jones walked into Cleveland Municipal Court on October 10, 2013 and, through counsel, pled no contest to four charges. The trial court rendered the following verdict based upon the facts presented at the hearing: 1) Guilty of physical control as a lesser of OVI (R.C. 4511.19(A)(1)) (count one); 2) Not guilty of OVI (R.C. 4511.19(A)(2)) (count two); 3) Guilty of driving with a 12-point license suspension (R.C.

4510.037); and 4) Guilty of driving in marked lanes (R.C. 4511.33) (count four). The trial court sentenced Mr. Jones to one year of active probation with several conditions. By all accounts this was a very ordinary case.

Two things transformed this ordinary case into an extraordinary one: 1) The *City* (not the defendant) sought leave to appeal the trial court's final verdict; namely the trial court's finding that Jones was "guilty of violating Cleveland Codified Ordinance ("CCO") 433.01, physical control;" *City of Cleveland v. Jones*, 8th Dist. No. 100598, 2014-Ohio-4201, ¶ 1; and 2) the Eighth District granted the City leave and, in a 2-1 decision, vacated the trial court's verdict. The lead opinion held that Jones' no contest plea was infirm because the trial court failed to engage in the proper plea colloquy as required by Traf. R. 10. *Jones*, 2014-Ohio-4201 at ¶¶ 29 and 34. The Eighth District's decision is groundbreaking because it appears to be the first time the prosecution was permitted to appeal and actually overturn a final verdict. Moreover, this case represents the first occasion that an appellate court has found a plea colloquy to be infirm *at the request of the State (or in this case the City).*

This Court should reverse the Eighth District's decision and hold that the State cannot appeal a final verdict and that the Court of Appeals cannot sua sponte vacate a plea over the objection of the defendant.

**A. The State (or City) cannot appeal a final verdict for any reason.**

This Court should reverse the Eighth District's decision because the City's appeal should have been dismissed for lack of jurisdiction. The City lacks any authority to appeal the final verdict in this case.

In obtaining leave to appeal, the City relied on R.C. 2945.67. R.C. 2945.67 provides that the State "may appeal by leave of the court to which the appeal is taken any other decision, *except the final verdict*." (emphasis added). Although the City characterized this case as presenting a legal issue regarding the trial court's authority to amend charges, that characterization is incorrect. In fact, the City challenged the trial court's final verdict. It sought a ruling from the Eighth District that the trial court could not find the defendant guilty of physical control based upon his no contest plea to a charge of DUI. That is the final verdict that the City cannot appeal and an appellate court has no jurisdiction to review. *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St. 2d 380; *State v. Mayfield*, 8th Dist. No. 81924, 2003-Ohio-2312, ¶ 6.

This Court's decision in *Sawyer* is directly on point and requires the dismissal of the City's appeal. In *Sawyer*, the defendant pled no contest to an OVI charge. 54 Ohio St. 2d at 380. And although the facts elicited at the hearing clearly supported an OVI conviction, the trial court found the defendant guilty of reckless operation because the OVI conviction would cause the defendant to lose his job. *Id.* at 380-81. Recognizing that it had no right to appeal, the City sought a writ of mandamus to direct the trial court to "set aside the finding of guilty of reckless operation" and sentence the defendant for OVI. *Id.* at 381. The Court of Appeals granted the writ, but this Court unanimously reversed that decision. *Id.*

In reversing the Court of Appeals, this Court reiterated that the State has no right to appeal a final verdict "no matter how erroneous." *Id.* at 382. This Court explained that this rule is "required by federal and Ohio constitutional protections against double jeopardy" and that the "constitutional guarantees against double jeopardy cannot be frustrated by mandamus, even if the trial court ignored the law or facts in arriving at the verdict." *Id.*

And, although this Court recognized that the "trial court simply failed to follow the law," it also recognized that the state had no recourse because the trial court's final verdict was inviolate. *Id.*

The instant case is indistinguishable from *Sawyer*. As in *Sawyer*, the defendant pled no contest to OVI. And, as in *Sawyer*, the trial court exercised its judgment and proceeded to final judgment on a reduced charge. Thus, as in *Sawyer*, the Eighth District was wrong to disturb that verdict, regardless of how wrong the Eight District viewed the process by which the verdict was obtained.

**B. The Eighth District incorrectly concluded that the trial court amended the charges against Jones when, in fact, the trial court rendered a verdict *after* Jones pled no contest to the original charges.**

The Eighth District issued three different opinions on the City's actual assignment of error; namely whether the trial court improperly amended the charge, pursuant to Crim. R. 7(D), against Jones prior to accepting his plea. In the lead opinion, Judge Rocco sustained the City's assignment of error and concluded that the trial court improperly amended the charge from OVI to physical control. *Jones*, 2014-Ohio-4201, ¶¶ 2 and 26. In the concurring opinion, Judge Gallagher explained that he did *not* believe that "the journal entry demonstrates that the trial judge recorded the city as amending the charge;" rather, he concluded that the court amended the charge after "a no contest plea offered through defense counsel." *Id.* at ¶¶ 40-41. In the dissenting opinion, Judge Jones concluded that the trial court "did not amend the charge prior to Jones's plea" and "found Jones guilty of physical control after Jones entered his plea." *Id.* at ¶ 48 (Jones, J. *dissenting*). A plain reading of the transcript illustrates that the trial court did *not* amend the charges against Jones prior to his no contest plea and simply rendered a verdict based

upon a plea to the original charges. Thus, there is no issue with an improper amendment or Crim. R. 7(D).

The lead decision issued by Judge Rocco assumes the following order: 1) The trial court amended the DUI charge to physical control; and 2) The defendant then pled no contest to physical control. However, the actual sequence of events was quite different: 1) The defendant pled no contest to the actual charges including DUI; and 2) The trial court found Jones' not guilty of DUI but guilty of physical control. Here is the critical part of the transcript:

> MS. HOPP [prosecutor]: Well, Judge, from the city's position, if he would like to plead no contest to the citation, he's more than welcome to do that or we could set it for trial. The city is not willing to make any reductions at this time, give his prior history.
>
> MR. EIDENMILLER [defense attorney]: Your Honor, he'll change his plea to contest.

(Tr. at 14). It was only *after* Jones pled no contest that the judge found Jones not guilty of DUI but guilty of physical control. (Tr. at 14-15). Indeed, Jones clearly pled no contest to DUI because the trial court found him not guilty of that charge. This is a distinction that makes a huge difference. Taken in that order, the trial court's verdict, even if wrong or improper, cannot be appealed. *See State v. Mayfield*, 8th Dist. No. 81924, 2003-Ohio-2312; *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St. 2d 380, 382-83.

Because the lead decision is based on the erroneous belief that Jones only pled no contest to amended charges, this Court should correct this error and issue a decision that either dismisses the State's appeal, because it cannot appeal a final verdict, or affirms the decision of the trial court. Whether or not this Court agrees with the trial court's verdict

of physical control, an appellate court lacks the jurisdiction or authority to determine whether or not that verdict was proper.

**C. The Eighth District incorrectly concluded that the trial court failed to substantially comply with Traffic Rule 10 in accepting Jones' no contest plea.**

In addition to erroneously sustaining the City's argument regarding an improper amendment, the Eighth District also incorrectly held that Jones' no contest plea was "infirm" because it was entered "without any compliance with Traf. R. 10." *Jones*, 2014-Ohio-4201, ¶ 29. The trial court substantially complied with Traffic Rule 10.

1. Traffic Rule 10

Jones pled no contest to several traffic offenses, including misdemeanor DUI charges.[1] Since the charges brought against Jones involved violations of traffic laws or ordinances, the Traffic Rules apply to his case.

"A judge's duty to a defendant before accepting his guilty or no contest plea is graduated according to the seriousness of the crime with which the defendant is charged." *State v. Watkins*, 99 Ohio St. 3d 12, 16, 788 N.E.2d 635, 2003-Ohio-2419. In accepting a plea to a traffic offense, a trial court judge need not advise a defendant of the rights he is waiving and need not comply with Criminal Rule 11. *Id.* In place of Criminal Rule 11, Traffic Rule 10 "addresses pleas and a defendant's rights when pleading" to a traffic offense. *Id.* at 14. When, as here, the traffic case involves a petty offense,[2] Traffic Rule 10(D) applies. *Id.* This rule provides:

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[1] A traffic case is defined, in pertinent part, as "any proceeding, other than one that results in a felony indictment, that involves one or more violations of law, ordinance, or regulation governing the operation and use of vehicles. . . ." Traf. R. 2(A).

[2] A petty offense "means an offense for which the penalty prescribed by law includes confinement for six months or less." Traf. R. 2(D).

> In misdemeanor cases involving petty offenses, except those processed in a traffic violations bureau, the court may refuse to accept a plea of guilty or no contest and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty. This information may be presented by general orientation or pronouncement.

The traffic rules provide that a no contest plea "is not an admission of guilt, but is an admission of the truth of the facts alleged in the complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Traf. R. 10(B)(2). In accepting a no contest plea for a petty traffic offense, a trial court must simply inform the defendant of the effect of the plea. *Watkins*, 99 Ohio St. 3d at 15. Nothing more is required. *Id.* Indeed, when a case involves a petty offense, the trial court is not even required to address the defendant personally. *Cf.* Traf. R. 10(C) (which includes the additional requirement the trial court "address the defendant personally" before accepting the plea).

2. <u>The trial court substantially complied with Traffic Rule</u>

With respect to compliance with Traffic Rule 10, the only question is whether the trial court adequately explained the effect of the no contest plea.[3] The right to be informed of the effect of a plea is a nonconstitutional requirement subject to review under a standard of substantial compliance. *State v. Griggs*, 103 Ohio St. 3d 85, 814 N.E.2d 51, 2004 Ohio 4415, ¶ 12. "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." *State v. Nero*, 56 Ohio St. 3d 106, 108, 564 N.E.2d 474 (1990).

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[3] This issue was never briefed in the Eighth District because neither party argued that the plea failed to comply with the traffic rules and because it was raised sua sponte by the Eighth District without any request for further briefing.

Here the trial court substantially complied with the requirement to explain the effect of a no contest plea prior to accepting it. As an initial matter, traffic cases involving petty offenses can be resolved by pleas by "general orientation or pronouncement." Traf. R. 10(D). As such, the Cleveland Municipal Court plays a general orientation video at every criminal defendant's initial appearance that outlines the rights of the defendant and the procedures associated with municipal court.[4] In the video, Administrative Judge Ronald B. Adrine explains the following:

> There are three possible pleas that you might make. The first is not guilty which is a complete denial of the charges. The second is guilty which is a complete admission of your guilt. *The third is no contest which is not an admission of guilt but is an admission of the truth of the facts contained in the complaint.* The importance of the no contest plea then is that it cannot be used against you in any subsequent civil or criminal proceeding.

(Emphasis added). Even if the trial court had done nothing more, this general orientation video substantially complies with the Traffic Rule 10's requirement that the effect of a no contest plea be explained.

However, the trial court did, in fact, provide an additional explanation about the no contest plea when it accepted Jones' no contest plea.[5] At that hearing, the trial court began by eliciting a factual basis for the allegations from the State and the trooper and then heard from the defendant. (Tr. at 2-13). The trial court then stated the following:

> So there's two ways we could go about this, you could either enter a no contest plea and stipulate to the facts, and we could do a finding. I'm inclined to, as we talked on the side, he's totally responsible for both of

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[4] Because compliance with Traf. R. 10 was not an issue raised by the parties, the original record did not include a copy of the orientation video played in Cleveland Municipal Court. Contemporaneously with this brief, Mr. Jones has filed a motion to supplement the record with a copy of the Cleveland Municipal Court's orientation video.

[5] In this case, there had initially been a resolution of the case on September 24, 2013 but the trial court would not accept the plea "without the trooper being present." (Tr. at 2). The trial court held a second change of plea hearing on October 10, 2013.

> the charges but one, I'm going to give him the benefit of the doubt, however you want to do it.

(Tr. at 13). The City Prosecutor responded that it was not willing to reduce any charges but "if he would like to plead no contest to the citation, he's more than welcome to do that or we could set it for trial." (Tr. at 14). Jones' defense counsel then stated that his client will "change his plea to no contest." (Tr. at 14). And the trial court then rendered its verdict based on the facts already submitted. (Tr. at 14). Here Jones received a second advisement regarding the effect of a no contest plea and was told that a plea of no contest constitutes a stipulation to the facts and that it would lead to a finding, or verdict, by the court. Jones submits that constitutes substantial compliance with Traffic Rule 10.

**D. A trial court's failure to comply with procedural rules associated with pleas (Traf. R. 10 or Crim. R. 11) does not render a plea void; rather, a trial court's noncompliance with these rules render a plea voidable at the request of the defendant.**

Even if this Court concludes that the City had the authority to appeal the final verdict and even if this Court concludes that the trial court did not substantially comply with Traf. R. 10, it should nonetheless reverse the Eighth District's decision because it sua sponte vacated a plea for non-compliance with Traf. R. 10. In so doing, the Eighth District proceeded on two misplaced assumptions: 1) A court may vacate a plea for noncompliance with Traf. R. 10 even over the objection of the criminal defendant; 2) Noncompliance with Traf. R. 10 renders a plea, and any subsequent verdict based on that plea, void. Both assumptions are incorrect. Because the procedural rules in Traf. R. 10 (like Crim. R. 11) are designed to protect the rights of the defendant, only a criminal defendant has the right to raise a challenge to a plea's non-compliance with these rules.

Moreover, because errors in the plea process only render a plea voidable, it must be timely raised and should not be found sua sponte by an appellate court.

1. Only a criminal defendant can seek to vacate a plea based on noncompliance with procedural rules like Traffic Rule 10.

Even if the trial court failed to substantially comply with Traffic Rule 10, the Eighth District nonetheless erred in vacating his plea because only a criminal defendant can seek to vacate a plea for noncompliance with procedural rules like Traffic Rule 10. The Eighth District failed to recognize that such procedural rules are designed for the protection of criminal defendants and, even if they are not substantially complied with, the plea will only be vacated if the *defendant* could establish he or she was prejudiced. Clearly, in a situation where the defendant is not seeking to vacate the plea, there is no evidence of prejudice.

The purpose of Crim. R. 11 and Traf. R. 10 is to protect the rights of the defendant and to ensure that the defendant enters any plea knowingly and intelligently. As explained by this Court, Crim. R. 11 (and, by analogy Traf. R. 10) is designed "to assure that the defendant is informed, and thus enable the judge to determine that the defendant understands that his plea waives his constitutional right to a trial." *State v. Ballard* (1981), 66 Ohio St. 2d 473, 480-81. Even if the trial court fails to substantially comply with these procedural rules, a defendant still may not vacate a plea unless he or she can establish prejudice. *State v. Veney*, 120 Ohio St. 3d 176, 179, 897 N.E. 2d 621, 2008-Ohio-5200. To demonstrate prejudice in this context, "the defendant must show that the plea would otherwise not be entered" but for the trial court's lack of compliance with the procedural rule. *Id.* at 179-80.

When, as here, a defendant does not wish to withdraw his plea despite any alleged non-compliance with the procedural rules, there is no prejudice from the non-compliance and the plea should not be vacated. Because these rules protect the defendant's rights, any failure to comply with Traffic Rule 10 (like Crim. R. 11) must be raised by the defendant and the defendant alone.

2. The City waived any argument about whether the trial court complied with Traf. R. 10 by failing to raise it on direct appeal.

Even if the trial court did not substantially comply with Traf. R. 10(D) and even if the City could seek to vacate a plea on that basis, the City has waived any such argument by failing to raise that issue in its direct appeal. Because a plea that does not comply with procedural rules is merely voidable, an appellate court may not treat such errors as rendering the plea void and may not *sua sponte* vacate the plea on that basis.

There has never been a rule that a trial court's failure to comply with procedural protections set forth in Crim. R. 11 or Traf. R. 10 automatically invalidates the resulting plea. On the contrary, it is well-established that the failure to raise a challenge to the plea colloquy on direct appeal prevents any future challenges to the plea on the basis of *res judicata*. See e.g. *State v. Smith*, 8th Dist. No. 94063, 2010-Ohio-3512, ¶¶ 19-20. A defect in the plea process constitutes a voidable error that must be raised at the first opportunity.[6]

In this case, the Eighth District vacated Jones' plea on a basis that was not even raised by the City. Specifically, the Eighth District concluded that Jones plea was invalid because it "was entered only by his attorney and without any compliance with Traf. R.

10." *City of Cleveland v. Jones*, 2014-Ohio-4201, ¶ 29. Even assuming that the Eighth District is correct that the plea did not substantially comply with Traf. R. 10, it was wrong to sua sponte vacate the plea on this basis because the issue was not raised by either party and because any noncompliance with Traf. R. 10 renders a plea merely voidable and not void.

The Eighth District's decision in this case is truly unprecedented and, carried to its logical conclusion, would allow the State to seek to vacate any plea that, in its view, did not comply with the procedural rules even over the objection of the defendant—the very person those procedural rules were designed to protect. Such a result is both ill-advised and illogical. An appellate court cannot *sua sponte* vacate a plea over the objection of the defendant based on alleged non-compliance with Traf. R. 10.

**E. The Eighth District imposed the incorrect remedy in this case.**

Even if this Court finds that the Eighth District correctly determined that: 1) It had jurisdiction to hear the City's appeal of the final verdict; 2) The trial court failed to substantially comply with Traffic Rule 10; and 3) It could sua sponte vacate a plea for noncompliance with Traffic Rule 10, this Court must still reverse the Eighth District because it imposed the wrong remedy in remanding the case to the trial court for further proceedings. Because Mr. Jones pled no contest, his state and federal protections against being placed in Double Jeopardy, under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, would foreclose any further criminal proceedings.

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[6] "Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous." *State v. Simpkins* (2008), 117 Ohio St. 3d 420, 422-23.

This Court has made clear that a defendant is "placed in jeopardy at the time the trial court exercised its discretion to accept a no contest plea." *O'Connor*, 54 Ohio St. 2d at 382; *see also State ex rel. Leis v. Gusweiler*, 65 Ohio St. 2d 60, 61 (1981). And, when a trial court finds the defendant guilty of a lesser offense based on the no contest plea, the defendant cannot, as a constitutional matter, be placed in jeopardy a second time for the greater offense. *O'Connor*, 54 Ohio St. 2d at 382. Indeed, Double Jeopardy forecloses any further criminal prosecution for the greater offense irrespective of whether the trial court "abused its discretion or erroneously determined" that the defendant was guilty of a "lesser-included offense of the principle charge." In *O'Connor*, the defendant pled no contest to DUI and the trial court found him guilty of reckless operation. *Id.* at 380-81. The State challenged the trial court's verdict on the basis that reckless operation was not a lesser included offense and thus the trial court lacked authority to enter that verdict. This Court held that the State could not appeal that final judgment due to "federal and Ohio constitutional protections against double jeopardy." *Id.* at 382. Even "if the trial court ignored the law or facts in arriving at its verdict," the defendant, having pled no contest to DUI and found guilty of a lesser offense, could not be placed in jeopardy again for DUI. *Id.* at 383.

*O'Connor* clearly establishes that, once a trial court accepts a no contest plea and enters a final verdict, the State cannot appeal that verdict and cannot place the defendant in jeopardy again for the offense that was the basis of the no contest plea. In *O'Connor*, the Court held that the defendant could not be prosecuted again for DUI after he pled no contest to DUI and was found guilty of reckless operation. In this case, Jones pled no contest to DUI and was found guilty of physical control. And thus, as in *O'Connor*,

Jones cannot be prosecuted again for the DUI because it would "unconstitutionally place the defendant twice in jeopardy for driving while under the influence of alcohol." *Id.* at 383.

In light of Jones' constitutional protections against Double Jeopardy, one thing is clear—he cannot be prosecuted a second time after having been placed once in jeopardy with his no contest plea. If this Court were to affirm the Eighth District's decision to vacate Jones' conviction for physical control, the end result would be that Jones would have no conviction at all and could not be further prosecuted. If this Court were to reverse the Eighth District's decision to vacate Jones' physical control conviction, the City would still have a conviction. Regardless of whether this Court elects to upheld or invalidate Jones' plea, it must, at a minimum, make clear that Troussaint Jones' state and federal constitutional Double Jeopardy rights foreclose any further prosecution of this case.

## CONCLUSION

Wherefore, Troussaint Jones respectfully requests that this Honorable Court adopt his proposition of law, reverse the decision of the Eighth District, and reinstate Jones' conviction for physical control.

Respectfully submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Supplement was served by ordinary mail upon Bridge E. Hopp, Assistant City Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 19th day of October, 2015.

/s/ Cullen Sweeney
CULLEN SWEENEY
Counsel for Appellant

Supreme Court of Ohio Clerk of Court - Filed March 06, 2015 - Case No. 2015-0381



IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| CITY OF CLEVELAND | | |
| Plaintiff-Appellee | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District CA 100598 |
| vs | : | |
| TROUSSAINT JONES | : | |
| Defendant-Appellant | : | |

# NOTICE OF APPEAL OF APPELLANT TROUSSAINT JONES

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NOTICE OF APPEAL OF APPELLANT

Appellant Troussaint Jones hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District opinion, entered in Court of Appeals case No. 100598. The Eighth District originally decided the case on September 25, 2014 but then denied Mr. Jones motion for reconsideration on December 30, 2014 and application for en banc consideration on January 22, 2015.

This case involves raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served by ordinary mail upon Bridge E. Hopp, Assistant City Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 26th day of February, 2015.

/s/ Cullen Sweeney
CULLEN SWEENEY
Counsel for Appellant

# CLEVELAND MUNICIPAL COURT - JOURNAL ENTRY

: Number: 2013 TRC 034882
.TE OF OHIO / CITY OF CLEVELAND
VS.
ES, TROUSSAINT D
A:

DOB: 11/29/1990
SSN: XXX-XX-5001
SCR Status: OPEN
Arresting Agency:
OHIO STATE HIGHWAY PATROL

Event Date: 10/10/2013 11:00 am
Event: CRIMINAL PRETRIAL
Event Location: 14TH FLOOR COURTROOM B
Event Judge: GROVES, EMANUELLA
433, 011

PD No. 51

A-3

| ge | Short Description | PNG | NGW | NC | PG | Prosecutor Amends Charge | FG | FNG | NOL | DWP | Fine | Days | Suspended Fine | Suspended Days |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 - | 4511.19A1A DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THE | | ✓ | ✓ | | ~~4511.19~~ | ✓ | | | | 400 | 60 | | 55 |
| 1 - | 4511.19A2 DRIV UNDER INFLUENCE ALC/DRUG; | | ✓ | ✓ | | | | ✓ | | | | | | |
| 1 - | 4510.037 DRIVING UNDER 12 PT SUSPENSION | | ✓ | ✓ | | 4510.11 | ✓ | | | | 200 | 30 | | |
| M - | 4511.33 DRIV IN MARKED LANES | | ✓ | ✓ | | | ✓ | | | | 50 | | | |
| | | | | | | | | | | | | | | |

☐ Public Defender Fee
☐ Time to Pay Until: 1/20/14
☐ Indigency Hearing Had:
☐ Found ☐ Not Found
☐ CWS in lieu of F & C
_____ Hrs _____ Date

Bond Set $ _____ ☐ No Contact ☐ Personal Bond
Capias / BFC / Warrant to Issue ☐ Capias Recalled
Bond Forfeiture Vacated ☐ Original Bond Reinstated
Warrant Block Release ☐ Warrant Fee Waived
☐ Defendant Advised of Rights

☐ Found Indigent Costs Suspended
☐ Cost Satisfied
☐ Credit for 5 Days Served $ 250
☐ Sentence Ordered Executed
☐ Sentence Stayed Until (Date / Time)

☐ Sentence Satisfied
☐ Cost Partially Suspended $ _____
☐ Sentence Suspended
Fine _____ Days
Mandatory Days _____
Date _____

:am: ☐ W /BO ☐ H /BO ☐ Demanded ☐ Days Held _____
to: _____ at _____ am / pm ☐ Drug Court
☐ COPR ☐ CODR ☐ COCR ☐ Final ☐ SPW
☐ Pretrial ☐ Trial ☐ Jury Trial ☐ PFS
rial Had ☐ Trial in Progress ☐ Jury Sworn ☐ Motion Hearing _____
nterpreter Requested Language _____ ☐ Jury Waived
tty: _____ ☐ Public Defender
's License Suspended from Date of Arrest _____ or
_____ to _____ DUI # Within 6 Yrs _____
ilization _____ Days ☐ Vehicle Forfeited ☐ TIP
IS ☐ LDPG ☐ ALS Appeal ☐ ALS Term
To / For: _____
anted ☐ Denied
/ MAGISTRATE

Refer to Probation: ☐ PSI ☐ CWS _____ Hrs _____
☐ SIP: [S][P][C] ☐ MHD: [S][P] ☐ Veteran's Docket: [S][P] ☐ DJP: [S][P]
☐ DV: [A][C] ☐ DIET ☐ COP ☐ Get On Track ☐ Project HOPE
☐ Anger Mgmt ☐ Parenting
Probation Duration: _____ MO 1 YRS ☐ Active ☐ Inactive
Probation Conditions: no violations will be followed, maintain employment
☐ ATJ ☐ MADD # 2 ☐ SAT ☐ SA[A][C] ☐ AA _____ x per wk.
Probation Violation Hearing: ☐ Had ☐ Waived ☐ Found ☐ Not Found ☐ SRS
Probation Continued Until: _____ ☐ Probation / SIP Terminated
☐ Notes: Based upon facts court finds A guilty of phys control and 2 point violation of DUS

CLERK OF COURTS CRIMINAL DIVISION 2013 NOV -4 FILED

[Cite as *Cleveland v. Jones*, 2014-Ohio-4201.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 100598**

---

## CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

## TROUSSAINT D. JONES

DEFENDANT-APPELLEE

---

**JUDGMENT:**
REVERSED AND REMANDED

---

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2013 TRC 034882

**BEFORE:** Rocco, J., Jones, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** September 25, 2014

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KENNETH A. ROCCO, J.:

**{¶1}** Plaintiff-appellant the city of Cleveland appeals from the order entered in Cleveland Municipal Court that found defendant-appellee Troussaint Jones guilty of violating Cleveland Codified Ordinance ("CCO") 433.011, physical control.

**{¶2}** The city presents one assignment of error, arguing that the municipal court improperly amended the charge against Jones. This court agrees. Consequently, the city's assignment of error is sustained, and the municipal court's order is reversed. This case is remanded for further proceedings consistent with this opinion.

**{¶3}** Jones received a traffic ticket from an Ohio state trooper on June 15, 2013. The ticket alleged that Jones had been traveling on I-480 at 4:27 a.m. and appeared to be operating his vehicle while intoxicated ("OVI"), having had one prior OVI, had drifted over "marked lanes," and had operated his vehicle with a suspended driver's license ("DUS"). The trooper cited Jones with violating four state laws, viz., R.C. 4511.19(A)(1)(a) and (A)(2), 4510.037(J), and 4511.33.

**{¶4}** Jones pleaded not guilty in the municipal court and the case went through several pretrial hearings. On October 10, 2013, the judge called the case for, apparently, a second plea hearing.

**{¶5}** According to the transcript, the prosecutor addressed the court by stating that, at the previous hearing, "[T]here was a resolution," but that "[t]he Court would not accept it without the trooper being present." The judge asked Jones if this was his "second

DUI," and Jones responded affirmatively. The judge then turned to the trooper to inquire if he had "any additional information on this?"

**{¶6}** The trooper told the judge that, at the outset of the traffic stop, Jones was "immediately, verbally combative" and "aggressive" toward him. Before the trooper could provide any further details, the judge turned to Jones and stated, "You said you had not been drinking, right?"

**{¶7}** Jones answered, "Right." The judge turned back to the trooper and asked if he noticed "more" Jones's combativeness or "a smell of alcohol?" The trooper answered that he observed "definite signs of impairment," although Jones denied drinking.

**{¶8}** The prosecutor jumped into the conversation to state that a review of the "paperwork" indicated Jones had failed an HGN test, but that the trooper had been unable to conduct field sobriety tests, although he did note "a smell of alcohol." The trooper explained that the location of the stop and Jones's attitude did not permit administration of the field sobriety tests.

**{¶9}** The judge asserted, "[Jones] said he was angry." After Jones concurred, the judge continued, "There is a difference between intoxicated and angry, and *that's why I didn't accept the plea* * * * ." (Emphasis added.)

**{¶10}** The judge also asked Jones where he was coming from, and, after Jones explained and his attorney conceded that Jones had "argued with the officer from the time the officer pulled him over," the trooper interjected that his review of the video showed Jones lost his balance on the walk and turn test and then restarted arguing. Jones denied

that he had even begun the test. The trooper urged the court to "review the video." Jones, however, stated, "I never did it." Jones claimed he swerved because he had been reaching for his cell phone; he stated, "I wasn't drunk at all."

**{¶11}** Once again, the judge engaged Jones in conversation, then, once again, hinted that the trooper had arrested Jones because of his combativeness. Before the trooper could give a complete reply to this suggestion, the judge stated she could "understand the combativeness" because "there is a sense of [....], you know, *I live in the inner city. I get policed all the time - - I'm training my son.*" (Emphasis added.) The judge indicated that when "people [came] before [her], [she] want[ed] to look beyond whatever their attitude is to try to look at, you know, the underlying factors."

**{¶12}** When the prosecutor pointed out that Jones should not have been driving in any event with a suspended license, the judge permitted Jones to explain that he "didn't know" his license was still suspended; he thought the suspension had expired. The record reflects that, at this point, the prosecutor handed the judge the LEADS printout the trooper obtained on Jones. The judge, however, did not invite the prosecutor to offer this document into evidence.

**{¶13}** As the court reviewed the document, the trooper attempted to justify his conclusion that Jones was driving as if he were impaired and that the trooper "smelled the odor of alcohol" and observed "glassy, bloodshot eyes."

**{¶14}** According to the transcript, two "discussions" occurred "off the record." Afterward, the judge asked Jones,

THE COURT: You said you were at your grandmother's?

THE DEFENDANT: Yeah.

**{¶15}** Then the judge stated,

> THE COURT: We're going to hold you accountable for some of the stuff. Let's call it back, but you have got to understand too, you know, you have got to conduct yourself in a certain way. You can't come out here and go ape. You get nothing when you do that. * * *
>
> Have a seat. Let me figure this out.

**{¶16}** After another pause, proceedings recommenced. Jones apologized to the trooper. The judge thereupon stated,

> THE COURT: So there's two ways we could go about this, you could either enter a no contest plea and stipulate to the facts, and we could do a finding. I'm inclined to, *as we talked on the side, he's totally responsible for both of the charges but one, I'm going to give him the benefit of the doubt, however you want to do it.*

(Emphasis added.)

**{¶17}** The prosecutor stated that the city was unwilling to make any reductions, given Jones's prior OVI conviction. Defense counsel at that point claimed that Jones would change his plea to no contest. The judge stated,

> THE COURT: Okay. In regards to this, the facts have already been submitted. In regards to the driving in the marked lines [sic], there would be a finding of guilty. On the driving under 12 point suspension, it's guilty. On the distinction between the two - -
>
> [THE PROSECUTOR]: Judge, the first, one of the charges is just your basic OVI, the second charge is an OVI, OVI refusal with a prior within 20 years under the state code.
>
> * * *

THE COURT: That's going to be a finding of not guilty. And then is there a Physical Control under the revised code, Ohio Revised Code?

**{¶18}** The prosecutor answered affirmatively, section "4511.194." The judge simply proceeded to tell Jones that he would be required to attend programs for dealing with police officers and would "get six points on [his] license." The court stated,

> THE COURT: * * * So, in essence, it's *almost the same facts*, but at least this probably more resembles and finds *a balance of what happened.* There's no question whether you were driving on the marked lines, you said you dropped your cell phone.

(Emphasis added.)

**{¶19}** Because Jones's license had been suspended already, the judge was "not inclined" to impose any further suspension. The following exchange occurred at that point.

> [THE PROSECUTOR]: I'm sorry, just to be clear, on count 1, you found him not guilty and on count 2, you found him guilty of the Physical Control?
>
> THE COURT: Count 1, is the physical control, *I make the notation that prosecutor amended that*, based upon the facts, the Court finds the defendant guilty of Physical Control, it's not as though you are amending it.
>
> [THE PROSECUTOR]: No, to be clear, *the city did not amend count 1 to Physical Control.*
>
> THE COURT: *That's what I'm writing on the journal.*
>
> [THE PROSECUTOR]: Thank you. And then count 2 was a finding of not guilty.
>
> THE COURT: Right. And count 3 and 4 are both findings of guilty.

(Emphasis added.)

**{¶20}** After some additional discussion about the points Jones would receive on his license, the trial court pronounced sentence on the charges.

**{¶21}** The court, however, despite its assurance to the prosecutor to the contrary, noted on its journal that the city amended the first charge to a violation of CCO "433.011."

**{¶22}** This court has permitted the city to appeal from the foregoing judgment. The city presents one assignment of error, which states:

> I. The trial court abused its discretion by reducing a charge of DUI to physical control over the prosecutor's objection.

**{¶23}** The city argues that the municipal court violated Crim.R. 7(D) when it amended Count 1 from a violation of R.C. 4511.19(A)(1)(a) to a violation of CCO 433.011.

**{¶24}** Jones's response to the argument is that the city may not appeal the judgment because the municipal court stated that it found him guilty of violating CCO 433.011 based upon a "recitation of the facts." Jones asserts that further prosecution on Count 1 is barred by the Double Jeopardy Clause. Under the unique circumstances of this case, this court disagrees. *State v. Broughton*, 62 Ohio St.3d 253, 262-263, 581 N.E.2d 541 (1991), fn. 13, quoting *State v. Malinovsky*, 60 Ohio St.3d 20, 23, 573 N.E.2d 22, 26 ([*United States v.*] "*Scott* [437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1982)] ultimately held that retrial is permissible after the guarantee against double jeopardy has attached where the defendant has sought a termination of the proceedings on grounds other than the state's failure of proof").

**{¶25}** In this case, when his attorney claimed Jones would plead "no contest" to "physical control," he thereby sought a termination of the proceedings against his client on grounds other than the city's failure of proof. The municipal court accepted this claim without actually adducing any evidence, despite its notation on the docket that the finding was "based upon the facts."

**{¶26}** In addition, although it is axiomatic that the court "speaks through its journal," this court has noted that this axiom has a caveat: when the "record of the proceedings [and the docket] are in conflict as to what actually transpired," this court cannot presume regularity. *Cleveland Hts. v. Roland*, 197 Ohio App.3d 661, 2012-Ohio-170, ¶ 18, 968 N.E.2d 564, (8th Dist.). Under such circumstances, the judgment must be reversed and the matter remanded. *Id.* at ¶ 19.

**{¶27}** This case fits within the exception set forth in *Roland.* The municipal court "accepted" Jones's no contest plea without ever having complied with Traf.R. 10, in spite of the fact that the Ohio Supreme Court has held that a trial court's acceptance of a defendant's plea to a petty misdemeanor traffic offense is governed by that rule. *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E.2d 635, at the syllabus. Traf.R. 10(D) provides:

> In misdemeanor cases involving petty offenses, except those processed in a traffic violations bureau, the court may refuse to accept a plea of guilty or no contest and *shall not accept such pleas* without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty. This information may be presented by general orientation or pronouncement.

(Emphasis added.)

**{¶28}** A trial court complies with Traf.R. 10(D) "by informing the defendant of the information contained in Traf.R. 10(B)." *Watkins*, at the syllabus. Traf.R. 10(B) states:

> **(B) Effect of guilty or no contest pleas**
>
> With reference to the offense or offenses to which the plea is entered:
>
> * * *
>
> (2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

**{¶29}** A review of the transcript in this case demonstrates the municipal court complied with none of its Traf.R. 10 duties. Therefore, Jones's "plea," which was entered only by his attorney and without any compliance with Traf.R. 10, was infirm. Moreover, despite the municipal court's assurance to the city that the docket would reflect that the amendment would be made over the city's objection, the docket does not so reflect.

**{¶30}** In this case, the city is challenging a purely legal issue, i.e., the court's authority to amend the charge over the prosecution's objection. *Akron v. Shuman*, 9th Dist. Summit No. 18851, 1998 Ohio App. LEXIS 2472 (May 27, 1998); *compare State v. Tinsley*, 8th Dist. Cuyahoga Nos. 92335 and 92339, 2010-Ohio-2083, ¶ 37. The municipal court lacked that authority.

**{¶31}** Crim.R. 7(D) provides in pertinent part:

> The court may at any time before, during, or after a trial amend the * * * complaint * * * , in respect to any defect, imperfection, or omission in form or substance, or of any

> variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *

**{¶32}** Jones was charged in this case with violating R.C. 4511.19(A)(1)(a), OVI. The docket reflects the municipal court found Jones "guilty" of violating CCO 433.011, physical control. Obviously, the court changed "the name or identity of the crime" in contravention of Crim.R. 7(D). *Akron v. Jaramillo*, 97 Ohio App.3d 51, 646 N.E.2d 212 (9th Dist.1994), cited with approval in *Cleveland Hts. v. Pearson*, 8th Dist. Cuyahoga No. 72859, 1998 Ohio App. LEXIS 118 (Jan. 15, 1998), *State v. Jackson*, 78 Ohio App.3d 479, 482, 605 N.E.2d 426 (2d Dist.1992), *compare Lakewood v. Sheeran*, 8th Dist. Cuyahoga No. 68728, 1997 Ohio App. LEXIS 576 (Feb. 20, 1997).

**{¶33}** In *Akron v. Robertson*, 118 Ohio App.3d 241, 242, 692 N.E.2d 641 (9th Dist.1997), the court noted:

> Crim.R. 7(D), while permitting some changes to a criminal complaint at any time before, during or after trial, "flatly forbids the court to change the name or identity of the crime charged." *Akron v. Jaramillo* (1994), 97 Ohio App.3d 51, 53, 646 N.E.2d 212. As this court previously held in *Jaramillo*, a *trial court has no discretion to amend a complaint over the state's objection if the amendment changes the name or identity of the crime.* In the present case the crime originally charged, possession of marijuana, a drug offense, is completely different in nature from the amended charge, disorderly conduct, an offense against the public peace: the underlying elements of the two crimes are different.
>
> The trial court must not forget the state, as the complainant, is "entitled to its day in court." *Id.* (citation omitted.) By amending the charge against Robertson, the lower court deprived the state of a fair trial. Although Robertson may have presented the court with facts seemingly mitigating his culpability, "*the place to take into account facts that have occurred outside the crime, in order to accord the accused some broader sense of justice, is* in the sentencing procedure *after the controversy has been fairly and impartially determined, not in the process whereby the controversy is determined.*" *Id.* at 54. (Citation omitted.) The state should not in such a manner be deprived of the opportunity to prove its case.

(Emphasis added.)

**{¶34}** Similarly to the situation presented in *Robertson*, the record of this case reflects that the municipal court did not provide a fair and impartial process "whereby the controversy [was] determined." The municipal court conducted neither a trial nor a proper plea hearing. In her effort to come to "a balance of what happened," the judge simply took it upon herself to provide Jones with an unrelated municipal code section as a way for the court to resolve his case.

**{¶35}** As the court observed in *N. Ridgeville v. Harris*, 9th Dist. Lorain No. 03CA008287, 2004-Ohio-957, ¶ 7:

> When a statute is unrelated to a DUI charge under R.C. 4511.19, changing a DUI charge to a charge under that statute is a change in the name and identity of the offense. See *Middletown v. Blevins* (1987), 35 Ohio App.3d 65, 66-67, 519 N.E.2d 846. In the instant case, the trial court impermissibly changed the name and identity of the crime charged when it amended the DUI to a charge of disorderly conduct over the City's objection. The disorderly conduct statute, by its own language, does not reach the question of operating a motor vehicle under impairment.

**{¶36}** So, too, does the municipal court's decision to amend the charge against Jones from a violation of R.C. 4511.19(A)(1)(a) to a charge of violating CCO 433.011, physical control, fail to "reach the question of operating a motor vehicle under impairment."

**{¶37}** Because the municipal court erred in all these particulars, the city's assignment of error is sustained. The municipal court's order is reversed, and this case is remanded for further proceedings consistent with this opinion.

**{¶38}** Judgment reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, J., CONCURS
(See attached opinion.)
LARRY A. JONES, SR., P.J., DISSENTS
(See attached opinion.)

SEAN C. GALLAGHER, J., CONCURRING:

**{¶39}** I concur with Judge Rocco's judgment, but write separately to address the question of what happens next.

**{¶40}** First, I would note one exception to Judge Rocco's findings. I do not believe the journal entry demonstrates that the trial judge recorded the city as amending the charge on the journal entry contrary to what appears in the transcript. Rather, the entry states that "[b]ased upon facts court finds defendant guilty of phys control and 2 point violation of DUS."

**{¶41}** It appears that the court amended the charge under some flawed notion that a trial court has the authority to amend a charge sua sponte on its own solely on a no

contest plea offered through defense counsel. Simply put, the court was attempting to turn this OVI offense into a physical control violation where the court had no authority to do so.

**{¶42}** I see the proceedings in the lower court as being void. They are a nullity. Any findings or rulings related to the improper amendment, flawed plea, or the subsequent sentencing are void. Although not before us at this time, I do not believe jeopardy ever attached because no actual plea was entered by the defendant. Nevertheless, a double jeopardy argument will no doubt be an issue for another day.

**{¶43}** I would also like to address the prosecutor's right to appeal. Too often prosecutorial appeals on issues like this are dismissed because there is a view that they fail to satisfy R.C. 2945.67 or because double jeopardy is implicated. The Ohio legislature should review R.C. 2945.67 to permit appeals even where jeopardy has attached to ensure the judicial process is not being perverted as it was in this instance. Nevertheless, even if jeopardy were to attach, I believe this matter is a final appealable order because it is a controversy capable of reoccurring and evading review. *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990).

**{¶44}** Because the proceedings were fatally flawed, I agree with Judge Rocco that affirming the decision sends the wrong message. I would remand and allow the double jeopardy issue to be raised below.

LARRY A. JONES, SR., P.J., DISSENTING:

**{¶45}** Respectfully, I dissent. While I agree with the majority that the municipal court conducted an "infirm" plea hearing, I would find that we are bound to affirm the trial court's judgment because it was a final judgment that the city is precluded from appealing.

**{¶46}** The city's right to appeal in criminal cases is governed by R.C. 2945.67(A), which provides:

> A prosecuting attorney * * * may appeal as a matter of right any decision of a trial court in a criminal case * * * which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief * * * , and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case * * * .

**{¶47}** "A court of appeals has discretionary authority pursuant to R.C. 2945.67(A) to review substantive law rulings made in a criminal case which result in a judgment of acquittal so long as the judgment itself is not appealed." *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990), syllabus. Although the city contends, and the majority agrees, that the city is challenging the "purely legal issue" of the trial court's sua sponte decision to amend the OVI charge to physical control in contravention of Crim.R. 7, the city is, in reality, challenging the final verdict. The city asks this court to reverse the trial court's judgment, i.e., the final verdict, and remand the case for a new trial. I do not believe we have the authority to do so.

**{¶48}** To support its position, the city cites *Akron v. Jaramillo*, 97 Ohio App.3d 51, 646 N.E.2d 212 (9th Dist.1994), and *N. Ridgeville v. Harris*, 9th Dist. Lorain No.

03CA008287, 2004-Ohio-957. But *Jaramillo* and *Harris* are distinguishable from this case because those courts amended the indictments before the defendants entered their pleas. Although, in this case, the court had some discussion with the city prosecutor about the city amending the charge from OVI to physical control, the prosecutor specifically stated, "the city did not amend count 1 to physical control." It was after Jones's attorney stated that Jones would change his plea to no contest that the court decided that "based upon the facts," it was finding Jones guilty of physical control. Therefore, Crim.R. 7(D) is inapplicable; the trial court found Jones guilty of physical control after Jones entered his plea. The court did not amend the charge prior to Jones's plea; therefore, I would find that the trial court did not violate Crim.R. 7(D).

**{¶49}** As the majority noted, the trial court made substantive errors when accepting Jones's plea. The majority proposes we vacate Jones's conviction and remand the case for further proceedings on the OVI charge. But even if the plea hearing was "infirm" and the trial court abused its discretion in finding Jones guilty of physical control, I believe we are constrained to affirm the decision of the trial court. The trial court rendered a final verdict and that verdict is unassailable because it is being appealed by the city.[1]

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[1] My analysis would differ if it were Jones who appealed and claimed that the trial court did not comply with Traf.R. 10; a defendant can claim noncompliance with Traf.R. 10 on appeal. *See State v. Powell*, 7th Dist. Mahoning No. 05 MA 50, 2006-Ohio-3477 (finding that the trial court failed to inform defendant-appellant of the effect of his no contest plea in accordance with Traf.R. 10).

**{¶50}** This case is akin to *State ex rel. Sawyer v. O'Connor*, 54 Ohio St.2d 380, 377 N.E.2d 494 (1978). In *Sawyer*, the defendant pleaded no contest to driving under the influence ("DUI") but the trial court sua sponte reduced the charge to reckless operation of a vehicle. The *Sawyer* court found that the defendant was placed in jeopardy at the time the trial court exercised its discretion to accept a no contest plea. The court further determined that the trial court's finding of guilt of reckless operation constituted a finding of not guilty of the DUI. *Id.* at 382. For double jeopardy purpose, the circumstances would be no different had the trial court found the defendant "not guilty" of *any offense* after accepting his plea and, so far as the DUI charge was concerned, there had been a final determination of not guilty irrespective of whether the trial court grossly abused its discretion in arriving at its decision (because the evidence supported a guilty finding on the DUI). *Id.*

**{¶51}** Here, even though the trial court did not specifically state that it was finding Jones not guilty of the OVI charge in Count 1, because the court found him guilty of physical control, the court acquitted him of OVI. Consequently, because Jones was acquitted of OVI, he cannot be retried on that charge. Therefore, this court should affirm the trial court's decision irrespective of whether the trial court made errors in accepting his no contest plea. *See State v. Bouman*, 8th Dist. Cuyahoga No. 88021, 2007-Ohio-824, ¶ 12.

**{¶52}** Instead of reversing the trial court's judgment, I would remand for correction of the journal entry of conviction and docket as to Count 1 to remove any notation that the prosecution moved to amend the charge.

**{¶53}** For these reasons, I dissent.

DEC 30 2014

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 100598 | LOWER COURT NO. CR-09-523916

COMMON PLEAS COURT

-vs-

TROUSSAINT D. JONES

Appellant

MOTION NO. 478996

Date 12/30/14

Journal Entry

Appellee's motion for reconsideration is overruled. Appellee's motion is premised on a claim that his case went to trial and he entered a plea, but nothing in the record supports such a claim. The record instead reflects only that his case was discussed at a pretrial hearing and that appellee's attorney indicated his client "would plead" to a charge, but that no plea hearing took place. Because appellee was not placed in jeopardy for any offense, his motion is denied.

SEAN C. GALLAGHER, J., CONCURRING:

I concur with Judge Rocco that the motion for reconsideration should be denied. I further feel that although the motion to en banc the case should likewise be denied, it must be reviewed and voted on by the court as a whole.

My rationale for denying reconsideration is based on my view that no actual plea was ever entered by the defendant in this case. Although there was plenty of innuendo and arguably an attempt at a plea, the proceedings simply never made it to the goal line.

The appellant views the proceedings as a no contest plea to the original charge, coupled with the court finding him guilty to a "lesser included offense" of physical control. (Note: I believe the entire question of whether physical control is a lesser included offense of OVI in Ohio is subject to considerable debate. See Ohio v. Taylor, 9th Dist. Lorain No. CA010258, 2013-Ohio-2035). The appellant then characterizes Judge Rocco as finding that the trial court improperly amended the original charge. Despite these assertions, the facts show the defendant never spoke, and although his lawyer said the words "no contest," there was nothing in this record to demonstrate there was anything even resembling a viable plea to either the original charge or a finding of guilt on a supposed lesser included charge.

As I indicated in my earlier concurring opinion, I do not believe a plea was ever properly entered in this case. What the appellant is seeking is a pre-emptive strike on the government's ability to pursue this action on a double jeopardy claim. It may well be the double jeopardy claim has merit, but it is premature for us to resolve that question at this time. We would be putting the cart before the horse. Thus, I would reject the claim for reconsideration.

As far as the en banc consideration, I do not see State v. Mayfield, 8th Dist. Cuyahoga No. 81924, 2003-Ohio-2312; State v. Gump, 8th Dist. Cuyahoga No. 85693, 2005-Ohio-5689; or State v. Conti, 57 Ohio App.3d 36, 565 N.E.2d 1286 (8th Dist.1989), as being in conflict. In my view, because no plea was ever actually taken, these cases are easily distinguishable.

CA13100598 87326461

Presiding Judge LARRY A. JONES., Concurs

Judge SEAN C. GALLAGHER., Concurs

KENNETH A. ROCCO
Judge

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 30 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

CC 97 / 2783

**The State of Ohio,**
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal C/a 100598 dated 12-30-14 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal C/a 100598 dated 12-30-14 and that the same is correct transcript thereof.

**In Testimony Whereof**, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 31st day of December A.D. 20 14

***ANDREA F. ROCCO,*** *Clerk of Courts*

By R Reimer Deputy Clerk

2783

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Kelley A. Sweeney, Clerk of Courts

CITY OF CLEVELAND

Appellant

COA NO. 100598 | LOWER COURT NO. 2013 TRC 034882

CLEVELAND MUNI.

-vs-

TROUSSAINT D. JONES

Appellee

MOTION NO. 478997

Date 01/22/15

Journal Entry

Motion by appellee for en banc consideration is denied. See separate journal entry of this same date (motion no. 478997).

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JAN 22 2015

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

FRANK D. CELEBREZZE, JR.
Administrative Judge

CA13100598 87637239

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Kelley A. Sweeney, Clerk of Courts

CITY OF CLEVELAND

Appellant

COA NO. 100598 | LOWER COURT NO. 2013 TRC 034882

CLEVELAND MUNICIPAL COURT

-vs-

TROUSSAINT D. JONES

Appellee

MOTION NO. 478997

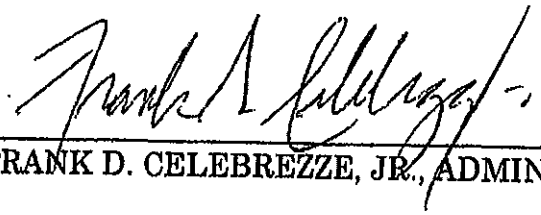
Date 01/22/2015

Journal Entry

This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellee contends that the panel decision conflicts with prior decisions of this court on two issues: (1) whether the state or city may appeal a trial court's verdict rendered after a no contest plea, see *State v. Gump*, 8th Dist. Cuyahoga No. 85693, 2005-Ohio-5689, *State v. Mayfield*, 8th Dist. Cuyahoga No. 81924, 2003-Ohio-2312, and *State v. Conti*, 57 Ohio App.3d 36, 565 N.E.2d 1286 (8th Dist. 1989) and (2) whether double jeopardy precludes further prosecution of a defendant after an acquittal even if the acquittal was factually or legally erroneous, see *State v. Bouman*, 8th Dist. Cuyahoga No. 88021, 2007-Ohio-824, and *State v. Ginnard*, 8th Dist. Cuyahoga No. 61964, 1992 Ohio App. LEXIS 213.

There was no majority opinion in this case. Each panel member performed a different analysis of the issues and reached different conclusions. There was no consensus about the basis for this court's jurisdiction in this appeal or whether double jeopardy would bar further prosecution. Therefore there was no decision of the court on these issues that could conflict with the prior decisions cited by appellee. The en banc application is denied.



FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

Concurring:

MARY J. BOYLE, J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J.,
KENNETH A. ROCCO, J., and
MELODY J. STEWART, J.

Dissenting:

PATRICIA A. BLACKMON, J.