

**IN THE SUPREME COURT OF OHIO**

CITY OF CLEVELAND,	)	Case No. 2015-0381
	)	
Plaintiff-Appellee	)	
	)	
-vs.-	)	
	)	On Appeal from the Cuyahoga County
TROUSSAINT JONES,	)	County Court of Appeals, Eighth Appellate
	)	District Court of Appeals
	)	CA: 100598
Defendant-Appellant.	)	

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**MERIT BRIEF OF APPELLEE CITY OF CLEVELAND**

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## STATEMENT OF THE CASE AND FACTS

On June 15, 2013, Defendant-Appellant, Troussaint Jones, was arrested and charged with violations of R.C. 4511.19(A)(1)(a), DUI; R.C. 4511.19(A)(2), DUI refusal with a prior in 20 years; R.C. 4510.037, driving under a 12 point suspension; and, R.C. 4511.33, driving in marked lanes.

After a series of pretrials, Jones was set to enter a no contest plea to the DUI charge on September 24, 2013, but the trial court would not accept the plea because “there is a difference between intoxicated and angry.” (Tr. 5). The trial court asked the City to subpoena the arresting officer, Tpr. Jason Turner #706 of the Ohio State Highway Patrol, for the next pretrial. (Tr. 2).

On October 10, 2013, Tpr. Turner was present in court and the court inquired if he had any additional information. (Tr. 2-3). Tpr. Turner proceeded to detail the nature of the traffic stop of Jones, and then the court asked Jones if he had been drinking, to which Jones replied that he had not. (Tr. 3). Tpr. Turner continued to tell the court that there were, in fact, signs of impairment, which the City supplemented with its review of the trooper’s report. (Tr. 3-4).

The court indicated that its concern was that Jones was not impaired or intoxicated, but that he was “angry” that he was pulled over. (Tr. 4-5). A dialogue continued between all parties where the trooper continued to submit to the court the signs of impairment Jones exhibited and Jones continued to deny that he was intoxicated or impaired. (Tr. 5-11).

After a lengthy sidebar, the court admonished Jones for his attitude and conduct with Tpr. Turner the night of the arrest. (Tr. 12-13). When the case was recalled, the following exchange occurred:

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.

[Prosecutor]: I'm sorry?

The Court: I said, however you want to do it.

[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, given his prior history<sup>1</sup>. (Tr. 13-14).

Jones then changed his plea to no contest and then court proceeded to find him guilty of driving under suspension and driving in marked lanes. The court found Jones not guilty of DUI refusal with a prior in 20 years and then guilty of physical control. The court told Jones, "...in essence it's almost the same facts, but at least this probably more resembles and finds a balance of what happened." (Tr. 15-16).

After a discussion about the length of Jones's license suspension, the prosecutor inquired of the court:

[Prosecutor]: All right. 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 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.

[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. (Tr. 17-18).

On that same day, Jones was sentenced to a fine of \$400, 60 days in jail with 55 days suspended and credit for five days already served. He was ordered to attend the COP program, two MADD meetings, and placed on one year of active probation.

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<sup>1</sup> Defendant had a prior DUI conviction from 2010. (Tr. 2, 6).

On November 4, 2013, the City sought leave to appeal the decision of the trial court. That motion was granted by the Eighth District Court of Appeals on November 15, 2013 along with a stay of the trial court's order from October 10, 2013. The Eighth District sustained the City's assignment of error, namely, that the trial court improperly amended the OVI charge against Jones to that of physical control. *City of Cleveland v. Jones*, 8th Dist. No. 100598, 2014-Ohio-4201, ¶ 2. The majority also held that the trial court complied with none of its Traf.R. 10 duties, rendering Jones' plea infirm. *Id.* at ¶ 29. The Eighth District further held that the trial 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." *Id.* at ¶ 34.

Jones then filed both a motion for reconsideration and for *en banc* consideration, which were both denied. Jones' motion for reconsideration was denied because nothing in the record supported the claim that Jones actually entered a plea and that "no plea hearing took place." (Journal Entry 12/30/14). His motion for *en banc* consideration was likewise denied as "there was no decision of the court on [the court's jurisdiction or double jeopardy] that could conflict with the prior decisions cited by [Jones]." (Journal Entry 1/22/15).

Jones then filed a jurisdictional appeal with this Honorable Court, which this Court accepted on August 26, 2015.

## LAW AND ARGUMENT

### **A. The City did not appeal a final verdict as it appealed a purely legal issue.**

Jones urges this Court to reverse the Eighth District's decision since he argues that the City lacks authority to appeal a final verdict. While the City agrees that the prosecution in a criminal matter has no authority to appeal or disturb a final verdict, the City merely challenged the purely

legal issue of whether a trial court could amend a charge over the objection of the prosecutor. The Eighth District's holding that it could not was in alignment with other appellate courts. Crim.R. 7 flatly forbids changing the name or the identity of the crime charged, which is exactly what happened in this case. And because the trial court improperly amended the charge, the plea of no contest (which was never really entered by Jones) was infirm; and therefore, there was no "final verdict" for the City to appeal. Instead, the City was granted to leave to file on that purely legal issue.

Jones cites to *State ex rel. Sawyer v. O'Connor*, 54 Ohio St.2d 380, 377 N.E.2d 494 (1978) as being directly on point with this case. It is not. In *O'Connor*, a plea of no contest was entered. Here, a plea of no contest was never entered. The court did not engage in the requirements of Traf.R.10 when taking Jones' plea and in fact, Jones never entered a proper no contest plea. The full extent of the "plea hearing" conducted by the trial court is as follows:

[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, given his prior history.

[Defense Attorney]: Your Honor, he'll change his plea to no contest.

That is the key distinction between *O'Connor* and the instant case: the defendant in *O'Connor* actually entered a no contest plea, but Jones did not. As such, there was no final verdict and the Eighth District's decision to reverse and remand the proceedings of the trial court was proper as the City did not challenge a final verdict.

**B. The Eighth District correctly concluded that the trial court improperly amended the charge against Jones.**

Crim.R.7(D) provides:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, 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.

However, while Crim.R.7(D) “allows for some changes in a criminal complaint...[it] flatly forbids the court to change the name or identity of the crime charged.” *North Ridgeville v. Harris*, 9th Dist. Lorain No. 03CA008287, 2004-Ohio-957 at \*2 citing *Akron v. Jaramillo*, 97 Ohio App.3d 51, 646 N.E. 2d 212 (9th Dist. 1994).

In this case, the trial court *did* change the name or identity of the crime charged. Jones was charged with OVI in violation of R.C. 4511.19(A)(1)(a). The trial court then reduced the charge and changed the name or identity of the charge to physical control, C.C.O. 433.011. While both OVI and physical control share some similarities, the point of differentiation is the issue of operation. OVI and physical control are not the same charge and not only are these two charges separate and distinct, they are not “substantially equivalent” offenses. See *Cleveland v. Schlegel*, 8th Dist. Cuyahoga No. 91500, 2009-Ohio-2484; *State v. Justus*, 8th Dist. Cuyahoga No. 90837, 2009-Ohio-137; *State v. Schultz*, 8th Dist. Cuyahoga No. 90412, 2008-Ohio-4448. In reducing and amending the charge of OVI to physical control, the trial court changed both the name and identity of the crime charged.

While it could be argued that the purpose and intent of Crim.R.7(D) is the protection of an accused’s right to notice of the charges he faces, the accused is not the only party to a criminal trial. *Jaramillo* at 53. “The State of Ohio, as the complaining party ...is entitled to its day in court.” *Dayton v. Thomas*, 2nd Dist. Montgomery No. 6567, 1980 WL 352553 (April 18, 1980) at \*3. Here, the City of Cleveland was denied a fair and impartial trial on the facts when the trial court reduced the charge of OVI to physical control when the prosecutor clearly refused to amend the charge. See *Jaramillo* at 53. The trial court may not deprive the state of the

opportunity to prove its case. *Akron v. Robertson*, 118 Ohio App.3d 241, 692 N.E.2d 641 (9th Dist. 1997).

The Eighth District was correct in holding that the docket reflects that the trial court found Jones guilty of violating C.C.O 433.011, physical control. *Jones* 2014-Ohio-4201, ¶ 32. The court was also correct in holding that the trial court “changed ‘the name or identity of the crime’ in contravention of Crim.R.7(D).” *Id.* Even assuming Jones entered a proper no contest plea, Jones would be entering a no contest plea to the charges contained in his complaint and the trial court would have authority only to find him guilty or not guilty of those charges or any lesser-included charge. As will be discussed *infra*, physical control is not a lesser included of OVI, so the court could not find Jones guilty of that offense. The court improperly amended the charge of OVI to physical offense in contravention of CrimR. 7(D).

**C. The Eighth District correctly concluded that the trial court failed to substantially comply with Traffic Rule 10.**

In its majority decision, the Eighth District correctly concluded that Jones’ plea was infirm because the trial court did not comply with Traf.R. 10. *Jones* 2014-Ohio-4201, ¶ 29. Jones submits that the trial court substantially complied with Traf.R. 10, when in fact, the trial court did not comply at all.

“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, 2003-Ohio-2419, 788 N.E.2d 635. The City agrees that the Traffic Rules govern this case; however, the City disagrees with Jones’ contention that Traf.R.10(D) applies. The City contends that Traf.R.10(C) applies.

Traf.R. 10(D) applies to misdemeanor cases involving petty offenses for which the maximum penalty is confinement for six months or less. Traf.R. 10(C) applies to misdemeanor

cases involving serious offenses for which confinement could exceed six months. Here, Jones was charged with three first-degree misdemeanors, which could carry with them confinement totaling eighteen months if run consecutively.

In *State v. Moore*, 111 Ohio App.3d 833, 677 N.E.2d 408, (7th Dist. 1996), the court was faced with a similar issue regarding the validity of the plea process where the defendant in that case entered a plea to two first-degree misdemeanors. There, the court applied Crim.R.11(D), which mirrors Traf.R. 10(C) as it relates to the plea requirements for serious misdemeanors. The court held, “[d]efendant was charged with two first-degree misdemeanors, which could have resulted, and did result, in a sentence of confinement for one year. Therefore, we hold that Crim.R.11(D) applied herein.” *Id.* at 835.

Traf.R.10(C) states, in part:

In misdemeanor cases involving serious offenses, the court may refuse to accept a plea of guilty or no contest and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily...

Here, the trial court did not address the defendant personally, did not inform him of the effect of his no contest plea to any of the four charges and did not determine that he made that plea voluntarily. As stated earlier, the plea hearing in its entirety consisted only of Jones’ attorney stating to the trial court that Jones would change his plea to no contest. The trial court followed that statement only by saying:

The Court:     Okay. In regards to this, the facts have already been submitted. In regards to the driving in marked lines, there would be a finding of guilty... (Tr. 14).

The court never addressed Jones personally and did not tell Jones the effects of his plea of no contest or whether he was entering that plea voluntarily; the trial court immediately proceeded to findings as soon as the phrase “no contest” was uttered by Jones’ attorney.

Even assuming Traf.R.10(D) applies, as opposed to Traf.R.10(C), the trial court still did not substantially comply (if at all) with that rule. The court did not inform Jones of the effect of his plea of no contest as evidenced by the court's initial statement following Jones' attorney entering a no contest plea. Jones submits that in the Cleveland Municipal Court, a general orientation video is played to comply with Traf.R.10(C) because that rule provides for the information contained in that rule to be "presented by general orientation or pronouncement." While there is a short video recorded by Administrative Judge Ronald B. Adrine informing defendants in Cleveland Municipal Court of their rights, it is not played in every arraignment courtroom. In fact, there is no reason to believe Jones has ever had occasion to view that video.

Jones was arrested on June 16, 2013 and was arraigned the next day, June, 17, 2013, in Courtroom 3D, which is the courtroom for arraignment of defendants who are presently incarcerated and have not made bond. The video recorded by Judge Adrine is never played in that courtroom, as there is no television for purposes of video replay. However, there is a public defender assigned to Courtroom 3D and she does advise defendants of their rights. This Court has ordered submission of the recording of Jones' arraignment in Courtroom 3D on June 17, 2013. On that video, the public defender is seen advising the defendants present in that courtroom of their constitutional rights and courtroom procedures. Absent, however, is any discussion of the effect of either a guilty, not guilty, or no contest plea. At no point in the recording is Jones advised about the specific effect of a no contest plea. In fact, the only explanation given by the attorney to the defendants regarding a no contest plea is that "you can plead no contest and be done if you don't mind [the charge] being on your record."

This Court in *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677 discussed what "effect of the plea" meant as it relates to traffic offenses. Again, even assuming

that Jones entered a plea to a petty offense (as that is the lowest amount of advisement required), the trial court did not comply in the least. In *Jones*, this Court held that for a no contest plea, the trial court must comply with Traf.R. 10(B)(2), which mirrors Crim.R. 11(B)(2): “The plea of no contest is not an admission of guilty but is an admission of the truth of the facts alleged in the complaint, and that the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.” *Jones* 2007-Ohio-6093 at 217. This Court went on to hold that “whether orally or in writing, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B) before accepting a plea.” *Id.* at. 219. Again, here, there was no such advisement by the trial court to Jones either at his arraignment or at the time he entered a no contest plea.

**D. The trial court’s failure to comply with procedural rules rendered the plea void.**

Jones submits that only a criminal defendant can seek to vacate a plea for noncompliance with procedural rules such as Traf.R. 10. Obviously, Jones is not seeking to vacate his plea here because he reaps the benefits of the error of the trial court. The trial court found him guilty of a physical control which carries substantially lesser penalties than OVI. Aside from that, the trial court also amended a six point driving under suspension to one that carries only two points. Jones would not seek to vacate a plea that benefits him greatly.

In that same vein, Jones was not informed of the rights he was giving up or of the effect his no contest plea would have. This Court has explained that Crim.R. 11 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*, 66 Ohio St. 2d 473, 480 423 N.E.2d 115 (1981). At no point was Jones informed that a no contest plea to an OVI charge would subject him to certain mandatory minimum periods of incarceration as this was his second

OVI within the six year look-back period, nor was he informed that a no contest plea to an OVI is an enhanceable offense with increasing penalties for each subsequent violation.

What the trial court did was not simply voidable; it was void. As the concurring judge in *Jones* held, “I see the proceedings in the lower court as being void. They are a nullity. Any findings or ruling related to the improper amendment, flawed plea, or the subsequent sentencing are void.” *Jones*, 2014-Ohio-4201, ¶ 42 (Gallagher, J. *concurring*). A void judgment is “one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Here, the trial court had no authority to act in amending an OVI charge to one of physical control *sua sponte* and over the objection of the prosecutor. See *Jones* 2014-Ohio-4201, ¶¶ 30, 41.

In his merit brief, Jones submits to this Court that the Eighth District’s decision 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...” Appellant’s Merit Brief at \*16. But really, what the trial court did, carried to *its* logical conclusion, would mean that any defendant who entered a no contest plea to a citation (even if the plea was entered properly) would be at the mercy of the trial court in determining to which particular offense the defendant would actually be convicted – even if that charge was not contained in the complaint, not a lesser included offense, and not an amendment by the prosecutor.

**E. The Eighth District applied the correct remedy as Double Jeopardy does not apply.**

The Eighth District applied the correct remedy by reversing and remanding the case to the trial court for further proceedings. There are no double jeopardy issues here that would arise based upon the Eighth District’s decision to reverse and remand the proceedings. This Honorable Court in *State v. Malinovsky*, 60 Ohio St.3d 20, 23, 573 N.E.2d 22 (1991) held that the United

States Supreme Court in *U.S. v. Scott*, 437 U.S. 82, 98 S.C. 2187, 57 L.E.2d 65 (1978), ultimately decided 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.” Here, Defendant-Appellant sought to terminate the proceedings without a factual regard to his guilt or innocence to the crime with which he was charged; namely, R.C. 4511.19(a)(1)(A), OVI. Here, prior to any factual determination as to guilt or innocence, the trial court *sua sponte* improperly amended the charge of OVI to C.C.O. 433.011, physical control.

Jones cites to *O’Connor* 54 Ohio St.2d 380, 382 for the proposition that 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. While that holds true, that is not the situation here. Physical control is not a lesser included offense of OVI.

As explained in detail by the Ninth District in *State v. Taylor*, 9<sup>th</sup> Dist. Lorain. No. 12CA010258, 2013-Ohio-2035, it is possible to violate RC 4511.19 (OVI) without also violating RC 4511.194 (physical control). The court used the test clarified by this Court in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889 to determine whether an offense is lesser-included:

In determining whether an offense is a lesser included offense, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed.

While the appellant in that case conceded, and the court found, that OVI carries a greater penalty than physical control and that it has an element that is not required to prove physical control, OVI may be committed without also committing physical control. *Id.* at ¶5. The court went on

to explain that while a person could operate bicycle and violate the OVI statute, one could not be in physical control of a bicycle under the physical control statute since a bicycle does not have an ignition or an ignition key, required under physical control as statutorily defined.<sup>2</sup>

Moreover, the United States Supreme Court in *Scott* went on to hold that, “[it had] previously noted that ‘the trial judge’s characterization of his own action cannot control the classification of the action.’” *Scott* at ¶ 96 quoting *U.S. v. Jorn*, 400 U.S. 470, 478, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). That is precisely what happened in this case. The trial court based its improper amendment upon facts extraneous to the crime with which Jones was charged and then proceeded to find Jones guilty of physical control without any regard to his factual guilt or innocence to the charge of OVI. The trial court elicited unsworn statements from the trooper and Jones about what happened during the arrest and nothing in any of the statements made would support a finding guilty to physical control versus OVI, as there was no dispute that Jones was “operating” the vehicle – Jones only disputed that he was impaired. So, despite what the trial court indicated on the journal entry, the only facts that its finding of guilt to the physical control was based upon, were those outside the basis of the complaint. Therefore, Defendant-Appellant does not incur the protections of the Double Jeopardy Clause as “an appeal is not barred simply because a ruling in favor of a defendant is based upon facts outside the face of the indictment.” *Scott* at ¶ 96.

The Eighth District applied the correct remedy in this case and Jones does not incur the protections of the Double Jeopardy clause because: (1) Jones sought a termination of the proceedings on grounds other than the City’s failure of proof; (2) the trial court based its

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<sup>2</sup> Physical control is defined as being in the driver’s position of the front seat of a vehicle or in the driver’s position of a streetcar or trackless trolley and having possession of the vehicle’s, streetcar’s, or trackless trolley’s ignition key or other ignition device. RC 4511.194(A)(2).

improper amendment upon facts extraneous to the crime without any regard to factual guilt or innocence; and, (3) physical control is not a lesser-included offense of OVI, so a no contest plea to an OVI and finding of guilt to a charge of physical control does not bar further prosecution.

### CONCLUSION

Wherefore, the City of Cleveland respectfully requests that this Honorable Court affirm the decision of the Eight District Court of Appeals and remand this case to the trial court for further proceedings.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

A copy of the Merit Brief of Appellee City of Cleveland was served by ordinary U.S. Mail upon Cullen Sweeney, Counsel for Defendant-Appellant, 310 Lakeside Ave., Suite 200, Cleveland, OH 44113 on this 8th day of December, 2015.

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