

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0075
STEPHEN L. HARKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2009 CRB 1057 K.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

William S. Derkin, 5702 Theota Avenue, Parma, OH 44129-2240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Stephen L. Harker, appeals from the judgment entry of the Portage County Municipal Court, Kent Division, finding him guilty of failing to disperse after a plea of no contest. We affirm.

{¶2} On April 25, 2009, an annual celebration known as “College Fest” was taking place on College Street in Kent, Ohio, Portage County. College Fest is a street festival held to celebrate the end of the academic year at Kent State University. In the early evening, police officers and fireman from Brady Lake, Stow, Brimfield, Aurora, as

well as deputies from the Portage County Sheriff's Department were dispatched to the scene of the festival due to the growing obstreperousness of the crowd and the pandemonium it was causing. At the east end of College Street, a large fire had been lit and members of the crowd were throwing furniture and other objects into the blaze. Upon arrival, the officers also heard glass breaking and observed people throwing bottles and other objects into the street and at officers. The record indicates bottles were being thrown by members of the crowd in the street as well as the denizens of homes located on College Street.

{¶3} After small teams of officers failed to establish order, a skirmish line was formed to control the crowd. Lieutenant Altimeier stated on record that he operated a portable microphone system and gave a repeated and unambiguous disperse order to all individuals on or near the street. Altimeier's directive specifically ordered people to "*** leave the area immediately, go inside the houses, or you will be subject to arrest." While providing his statement, the lieutenant indicated:

{¶4} "I have done this when we had other similar situations over the years. I found it was effective, number one, for the crowd to understand what is going on and also for the court's purpose *** And I'm making that announcement and giving people the opportunity to leave. But I'm telling the people to get inside, close the doors, close the windows so we don't get any objects thrown at us.

{¶5} "Once we clear the streets, we're going to allow people to leave under a controlled environment so they can go back home, where they came from, but we needed to clear that area. ***"

{¶6} By way of procedure, the lieutenant stated “*** we made the announcement on each side of the road, people were given the opportunity to leave and arrest teams were dispatched to people who didn’t.” As the announcement was continuous, Altimeier estimated it was made over one hundred times over an hour and one-half. Notwithstanding the repetitious order, appellant, who was on his porch as the officer’s approached, did not enter his home. Because he failed to comply, appellant was arrested.

{¶7} On April 28, 2009, a criminal complaint was filed in Kent Municipal Court charging appellant with failure to disperse, in violation of R.C. 2917.04 and Codified Ordinances of Kent 509.03, a misdemeanor of the fourth degree. Appellant pleaded not guilty and filed a motion to dismiss. Appellant ultimately withdrew his motion to dismiss and requested a jury trial.

{¶8} On October 19, 2009, appellant withdrew his request for a jury trial and entered a plea of no contest. The trial court accepted appellant’s plea and, after the circumstances of the charge were established, entered a finding of guilty. Appellant was sentenced to 30 days in jail, a \$250 fine, and was ordered to pay one-half of the jury costs. The jail sentence and fine were suspended on conditions set forth by the trial court in its judgment entry. Appellant now appeals.

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

{¶10} “The trial court erred in finding appellant guilty of a violation of Revised Code sec. 2917.04, Failure to Disperse, on a plea of no contest.”

{¶11} Appellant's sole assignment of error asserts the trial court erred in finding him guilty because the state's explanation of the circumstances failed to support the charge of failure to disperse.

{¶12} A plea of no contest, while not an admission of guilt, is an admission to the facts alleged in a complaint. Crim.R. 11(B)(2). In this case, the complaint provided that appellant, on or about April 25, 2009:

{¶13} "did knowingly fail to disperse when ordered by a law enforcement officer or other public official where five or more persons were participating in a course of disorderly conduct *** and there were other persons in the vicinity whose presence created the likelihood of physical harm to persons or property, or of serious public inconvenience, annoyance, or alarm."

{¶14} The facts alleged in the complaint substantially track the language of the misdemeanor crime of failure to disperse.¹ As a result, appellant's plea of no contest conceded these facts.

{¶15} Pursuant to Crim.R. 11(B)(2), however, appellant's concession is not equivalent to a concession of guilt. Rather, in order for the trial court to enter a finding of guilty to appellant's plea of no contest, the circumstances of the arrest must adequately support the charge upon which the plea is based. To this end, R.C. 2937.07 provides:

1. R.C. 2917.04(A), the statute defining the crime of "failure to disperse," provides: "**** Where five or more persons are participating in a course of disorderly conduct in violation of section 2917.11 of the Revised Code, and there are other persons in the vicinity whose presence creates the likelihood of physical harm to persons or property or of serious public inconvenience, annoyance, or alarm, a law enforcement officer or other public official may order the participants and such other persons to disperse. No person shall knowingly fail to obey such order."

{¶16} “A plea to a misdemeanor offense of ‘no contest’ or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense.”

{¶17} R.C. 2937.07 confers a substantive right and a trial court’s failure to adhere to its requirements is reversible error. *State v. Spinazee*, 6th Dist. No. L-04-1274, 2005-Ohio-1780, at ¶7.

{¶18} To meet the statutory mandate, the “explanation of circumstances” must include a statement of the facts supporting all of the essential elements of the offense before a trial court enters a judgment of guilty on a plea of no contest. *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148, 150; *State v. Martin* (June 30, 1999), 11th Dist. No. 97-T-0217, 1999 Ohio App. LEXIS 3114, *4. The explanation of circumstances does not need to be taken by sworn testimony, but must be sufficiently detailed to allow the court to make an informed judgment as to whether the facts support the charge. See *Bowers*, supra.

{¶19} With this guidance in mind, appellant contends the trial court erroneously entered a finding of guilty because the statement of circumstances offered in open court was insufficient to show he failed to “disperse.” Appellant points out that the term “disperse” is neither defined by the statute nor anywhere else in the revised code. It is well-established that a term not defined by statute is accorded its common, everyday meaning. See, e.g., *State v. Dorso* (1983), 4 Ohio St.3d 60, 62. Appellant observes that “disperse” commonly means “(1) to cause to break up or (2) to cause to spread widely.” Appellant asserts that because he was on the front porch of his residence at

the time of his arrest, he was already “dispersed” when he was arrested. Thus, he concludes, the circumstances of the arrest do not support the charge. We disagree.

{¶20} At the plea hearing, the following facts were read into the record:

{¶21} “*** [T]he reporting officer was called to the home by the Kent Police dispatch at approximately 8:00 p.m. The investigating officer was advised to report to East College Street immediately because a riot was forming due to the annual College Fest activities.

{¶22} “The investigating officer arrived from Kent PD at approximately 8:30. *** [U]pon arrival at South High and College, investigating officer observed hundreds of people standing throughout East College Street and on the road and the tops of houses. The investigating officer could hear glass breaking and see a large fire ignited on East College Street. Officers and fire departments from Brady Lake, Stow, Brimfield, Aurora, Portage County Sheriff’s Office were on scene.

{¶23} “Investigating officer Anna Prosure was on South High Street and East College. Anna Prosure was informed that investigating officers were forming a skirmish line to try to disperse the crowds and investigating officer [was] to be part of an arrest team.

{¶24} “The investigating officer moved to College Street where officers were getting prepared in riot formation. The investigating officer then observed people throwing bottles and other objects in the street and at officers. Individuals were throwing objects into the fire that had been started. Investigating officers could see furniture and other large objects being added to the fire. As the fire got bigger, more officers arrived.

{¶25} “Once the skirmish line formed, the officers began working at a slow pace eastbound on College Street. Lieutenant Altimeier used the radio hailer to make announcements to the crowd. Continuously orders were given to leave the property or close all doors and that any individual that did not follow the order to disperse will be placed under arrest. These orders were given continuously over the audio hailer as the skirmish line moved onto College Street.

{¶26} “Many individuals continued to stand in the street, stand on porches and roofs of the houses. Individuals inside the houses were opening windows and throwing bottles from the windows of the houses.

{¶27} “Since the investigating officer was part of the arrest team, an individual who had not followed orders to disperse, Lieutenant Altimeier and other officers were advised individuals are not responding to the order, and a command for arrest was given to the investigating officer and other officers arrested them. ***

{¶28} “***

{¶29} “Stephen L. Harker was standing on the front porch of a house on College Street. The Lieutenant was giving a clear command to clear the yard or go inside the houses, close all doors and window[s]. Stephen did not follow the directions or make any attempt to follow the directions and was placed under arrest by the investigating officer and charged with failure to disperse.”

{¶30} Lieutenant Altimeier was present at the hearing and provided a statement regarding the announcements he made:

{¶31} “The announcements were made when we were prepared to move in with the skirmish line. I had a portable microphone system, and I was giving the order to leave the area immediately, go inside the houses or you will be subject to arrest.”

{¶32} Lieutenant Altimeier stated over a period of an hour and one-half, he personally repeated the disperse order “a hundred or more times.” He further indicated people were ordered into their homes in order to lessen the likelihood of objects being thrown at the officers.

{¶33} The first element of the crime of failure to disperse requires the participation of five or more persons in disorderly conduct. Disorderly conduct is defined as recklessly causing inconvenience, annoyance or alarm by making unreasonable noise or creating a condition which is physically offensive to persons or which presents a risk of physical harm to persons or property, by any act which serves no lawful and reasonable purpose of the offender. R.C. 2917.11. The explanation of the circumstances indicates the riotous crowd to which the officers responded was well in excess of five persons; Lieutenant Altimeier stated that the crowd, at large, consisted of “several hundreds or thousands of people ***.” The explanation further indicated the crowd was highly raucous, throwing bottles and tossing objects (such as furniture) onto a large fire; behavior sufficient to meet the elements of disorderly conduct.

{¶34} Next, the explanation set forth facts indicating the crowd, on the verge of a riot, created a likelihood of physical harm to its members and the responding officers by the reckless throwing of bottles. Additionally, the explanation related direct facts indicating the crowd was participating in the destruction of property by way of fire.

{¶35} Finally, Lieutenant Altimeier stated on record that the officers approached each house on the street systematically repeating the order to disperse. He particularly stated that people were ordered to leave the area immediately or “go inside, close the doors, [and] close the windows.” The order to disperse was clear and specific. In order to avoid arrest, the officers provided the members of the crowd, whether calm or disorderly, two unequivocal options: leave the area in question or enter a house. As appellant was on his porch, it may have been absurd for him to leave the area. However, he could have easily entered his home. He did not and, as a result, he failed to follow the directive as ordered. Such is the problem with appellant’s argument that he had already dispersed because he was on his porch at the time of his arrest. By failing to return to the interior of his home, he did not obey the order. We therefore hold the explanation of circumstances was sufficient to meet each element of the failure to disperse statute and therefore met the demands of R.C. 2937.07.

{¶36} One final point deserves attention. At the hearing, appellant attempted to defend his actions at the time of his arrest. He stated he was on the porch for the purpose of contacting his girlfriend who he noticed in the street. Once a defendant has pleaded “no contest,” however, he is not permitted to be heard in defense. *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 424, 1996-Ohio-93. Upon pleading no contest, therefore, appellant was not entitled to justify his disobedience of the order. Had he wished to do so, the proper avenue would have been going to trial thereby demanding that the state prove the charge beyond a reasonable doubt.

{¶37} Appellant’s sole assignment of error is overruled.

{¶38} The judgment of the Portage County Municipal Court, Kent Division is therefore affirmed.

DIANE V. GRENDELL, J.,
TIMOTHY P. CANNON, J.,
concur.