

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 09 MA 72
PLAINTIFF-APPELLEE,)	
)	
- VS -)	O P I N I O N
)	
MATTHEW KOWAL,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court No. 5,
Case No. 08CRB459.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 4, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Matthew Kowal appeals the March 6, 2009 decision of Mahoning County Court No. 5 (Canfield) denying in part his Motion to Update Record for the Bureau of Motor Vehicles. The issue before the court is whether there was error when the trial court denied Kowal's request to issue an order to the Ohio Bureau of Motor Vehicles (OBMV) to remove the points on his OBMV record since the offense he pled guilty to, R.C. 4301.69(E)(1), underage consumption, was not a traffic offense nor was it an offense that carried points. The state filed a Confession of Judgment conceding that the trial court erred in its failure to order the points removed. For the reasons discussed below, there is no statutory provision to assess points for a R.C. 4301.69(E)(1) conviction. Thus, the trial court's denial of the Motion to Update the Record for the Bureau of Motor Vehicles is reversed and the cause is remanded with instructions for the court to order the removal of the points from the OBMV record.

STATEMENT OF CASE

¶{2} In the early morning of July 28, 2008, Kowal, age 19, was found by Deputy Costantino of the Mahoning County Sheriff's Department passed out in his car on St. Andrews Drive in Canfield Township, Mahoning County, Ohio. The keys to the car were lying on the passenger seat. The deputy woke Matthew up, smelled a strong odor of alcohol emanating from his person and observed that his eyes were red and glassy. The deputy tried to administer field sobriety tests, but was unable to because Kowal could barely stand. Kowal was then arrested and transported to Canfield City Police Department, where a breath test was administered; he blew a 0.167, which was above the per se legal limit of 0.02 for a person under the age of twenty one.

¶{3} Kowal was charged with underage consumption, a violation of R.C. 4301.69(E), a first degree misdemeanor; and physical control, a violation of R.C. 4511.194, a first degree misdemeanor. He pled not guilty to both charges.

¶{4} A Crim.R. 11 agreement was reached between the state and Kowal. He pled guilty to the underage consumption charge and the physical control charge was dismissed. 09/16/08 J.E.; 09/24/08 J.E. However, when the trial court journalized the guilty plea and found Kowal guilty, it stated that he pled guilty to R.C. 4511.19(B), underage consumption while operating a motor vehicle. 09/26/08 J.E. The trial court sentenced Kowal to 180 days in jail with 177 days suspended, ordered six months of

probation, fined him \$325, and suspended his license for six months with occupational driving privileges. 09/26/08 J.E. He was additionally ordered to attend D.I.P. (Driver Intervention Program) and have an alcohol assessment. 09/26/08 J.E.

¶{5} Later, Kowal discovered the trial court's mistake of stating that it found him guilty of R.C. 4511.19(B) instead of R.C. 4301.69(E). He then filed a Crim.R. 36 Motion to Correct Clerical Error in Prior Conviction. 01/12/09 Motion. The trial court granted the motion on February 19, 2009. Despite the corrected error, according to Kowal, the OBMV records still showed points on his record from the mistaken R.C. 4511.19(B) conviction. Thus, Kowal filed a Motion to Update Record for the Bureau of Motor Vehicles. 02/25/09 Motion. In this motion, Kowal asked the court to issue an order to the OBMV to eliminate the points and license suspension from the previously corrected conviction; he contends that neither of those penalties were appropriate for a R.C. 4301.69(E) conviction, a nontraffic offense. The trial court granted the motion in part and denied it in part; the license suspension was vacated, but the request to remove the points was denied. 03/06/09 J.E. On March 20, 2009, Kowal filed a motion for reconsideration. That same day the motion was denied.

¶{6} On April 7, 2009, Kowal filed a notice of appeal from the trial court's judgment. After filing jurisdictional memorandum explaining why the notice of appeal was late, we accepted the appeal.

ASSIGNMENT OF ERROR

¶{7} "THE TRIAL COURT FAILED TO REMOVE IMPROPER PENALTIES REMAINING ON DEFENDANT'S RECORD AFTER IT HAD CORRECTED A MISTAKE MADE ON THE RECORD AS TO THE ACTUAL CHARGE PLED TO BY THE DEFENDANT."

¶{8} When the trial court mistakenly found Kowal guilty of R.C. 4511.19(B), underage consumption while operating a motor vehicle, according to Kowal, points were assessed against him. The record before this court does not contain an order from the court assessing points against Kowal, nor does the judgment entry that mistakenly finds him guilty of R.C. 4511.19(B) contain an order that assesses points against him. That said, R.C. 4510.036 dictates the point system for motor vehicle violations. In section (B) it provides that when a person is charged with a traffic offense "for which points are chargeable," the court "shall assess and transcribe to the abstract of conviction that is furnished by the bureau to the court the number of points

chargeable by this section in the correct space assigned on the reporting form.” R.C. 4510.036(B). Section (C) then provides the number of points “a court shall assess” for each of the traffic offenses listed in that section. R.C. 4510.036(C)(1)-(13). Thus, from these sections it is clear that the trial court assesses the points on the abstract of conviction, not through a conviction and sentencing judgment entry. See, also, R.C. 4510.037(D) (stating court charges points against a person).

¶{9} Furthermore, we note that since the assessment of points is a penalty ordered by the trial court, if that assessment is incorrect it can be appealed to this court. *State v. Baldauf* (1990), 67 Ohio App.3d 190, 196 (direct appeal finding that the trial court’s assessment of points was incorrect).

¶{10} Apparently what happened here was when the trial court incorrectly stated that Kowal pled guilty and was found guilty of R.C. 4511.19(B), an abstract of that conviction was provided to the trial court from the OBMV and pursuant to R.C. 4510.036(C)(9) the court assessed four points against Kowal.¹ However, when the trial court corrected the judgment entry to state that Kowal pled guilty and was found guilty of R.C. 4301.69(E)(1), not R.C. 4511.19(B), the four points assessed for the mistaken conviction on R.C. 4511.19(B) were not removed. The trial court then later denied the request to have an order transmitted to the OBMV to remove the points. Kowal asserts that since R.C. 4301.69(E)(1) does not carry any points, the trial court erred when it failed to order the removal of the points.

¶{11} R.C. 4301.69(E)(1) provides that a person is guilty of underage consumption when the individual is under the age of 21 and knowingly is “under the influence of beer or an intoxicating liquor in any public place.” Nothing in that statute provides a means for assessing points to one’s driver’s license for a conviction of that offense. Furthermore, R.C. 4301.99, the penalties section for violations of R.C. Chapter 4301, provides that a violation of R.C. 4301.69(E)(1) is a first degree misdemeanor; it does not state that any points can be assessed against a person’s driver’s license because of a violation of R.C. 4301.69(E). R.C. 4301.99(C). Additionally, the general statutes dictating penalties for first degree misdemeanors do not provide for the assessment of points as part of the penalty. See R.C. 2929.24(A)(1) (stating jail sentence for first degree misdemeanors is not more than

¹This was the correct number of points for a R.C. 4511.19(B) underage consumption while operating a motor vehicle conviction.

one hundred eighty days) and R.C. 2929.28(A)(2)(a)(i) (stating the fine for first degree misdemeanors is not more than one thousand dollars). Moreover, R.C. 4301.69(E) is a liquor control law; it is not a traffic law, and as such, R.C. 4510.036, which guides the point system for traffic offenses, is not applicable. However, even if it was, there is nothing in that statute that provides a means to assess points for a nontraffic offense or to assess points for a R.C. 4301.69(E) conviction. Likewise, there is not a statute equivalent to R.C. 4510.036 that provides a means to assess points against a person's driver's license for nontraffic offenses.

¶{12} Therefore, considering all the above, the trial court has no authority to assess points for a R.C. 4301.69(E) conviction. Consequently, considering the facts of this case, the trial court erred when it denied the motion to update the OBMV records. This assignment of error has merit.

¶{13} For the foregoing reasons, the judgment of the trial court is hereby reversed and this cause is remanded with instructions for the trial court to issue an order to the OBMV for it to remove the four points associated with the mistaken September 26, 2008 R.C. 4511.19(B) conviction.

Donofrio, J., concurs.

DeGenaro, J., concurs.