[Cite as *State v. Gonda*, 2010-Ohio-1094.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 228
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
DIANE GONDA,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Youngstown Municipal Court, Case No. 08CRB307.
JUDGMENT:	Judgment Reversed; Complaint Dismissed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Anthony Farris Deputy Law Director Attorney Bassil Ally Senior Assistant Law Director 26 South Phelps Street Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Matthew Fekete 725 Boardman-Canfield Road, Unit L-1 Youngstown, Ohio 44512

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 17, 2010

VUKOVICH, P.J.

¶{1} Defendant-appellant Diane Gonda appeals from her conviction of a criminal housing violation entered in the Youngstown Municipal Court. She makes various allegations concerning the trial court's refusal to grant her motion to dismiss. The threshold issue is whether the complaint was deficient. Because the complaint failed to set forth all of the elements of the offense charged and failed to properly state the specific numeric designation of the violation, we conclude that the complaint was insufficient. Accordingly, this case is reversed and the complaint is hereby dismissed.

STATEMENT OF THE CASE

¶{2} On January 31, 2008, a housing code enforcement officer with the City of Youngstown cited appellant regarding a building she owned at 31 Spring Common in downtown Youngstown. She was charged with an Exterior Structure violation of section 304 of the International Property Maintenance Code (I.P.M.C.), which had been adopted by an unnamed city ordinance. This offense was a third degree misdemeanor. Appellant was arraigned on February 1, 2008.

¶{3} On March 5, 2008, her attorney filed a motion to dismiss under Crim.R. 12. The motion argued in pertinent part that the charging document was vague because it did not give notice of the specific building condition that violated the code and complained that I.P.M.C. Section 304 has multiple subsections, none of which contain language matching that used in the complaint. This dismissal motion was never ruled on.

¶{4} On June 11, 2008, appellant filed a motion for leave to file another motion to dismiss instanter and attached said motion. Among other things, the motion alleged that the complaint was not sufficient because it failed to describe the housing code defects alleged, noting that if the state meant to charge her with a violation of Section 304.1 of the I.P.M.C., then the complaint omitted the final element of the offense.

¶{5} The state responded that Crim.R. 12(D) requires such motion to be filed within thirty-five days of arraignment and that appellant failed to show how the interest

of justice exception was satisfied. Appellant replied that Crim.R. 12(B)(2) provides that jurisdictional defects and the failure to charge an offense shall be noticed at any time during the pendency of the proceedings and pointed out that a timely motion to dismiss had been filed as well. On June 25, 2008, the trial court denied the request for leave and refused to address the motion to dismiss.

¶{6} On July 11, 2008, appellant pled no contest to violating I.P.M.C. Section 304.1, a third degree misdemeanor. The state dismissed a companion charge against her and her husband regarding their residence, as they had performed the requested repairs. (07/11/08 Tr. 16-17).

¶{7} At her October 20, 2008 sentencing hearing, she explained that she was in the process of selling the building to a company that had plans to demolish it in order to operate a parking lot. Appellant was fined $250 and sentenced to a suspended sentence of sixty days in jail with one year of probation on the condition that the property comes into compliance.

¶{8} Appellant filed timely notice of appeal. She sets forth two assignments of error. The first assignment of error states that the trial court erred in failing to dismiss the complaint, raising issues surrounding the sufficiency of the complaint; the sufficiency of oath on the complaint; and, the lack of administrative process prior to instituting criminal charges, which she raised only in an untimely motion to dismiss. Her second assignment of error raises for the first time that the assignment of her case to the housing division was improper.

SUFFICIENCY OF THE COMPLAINT

¶{9} Appellant contends that the criminal complaint was fatally defective as it failed to set forth all essential elements of the offense. The complaint alleges that appellant:

¶{10} "did on the 31st day of January 2008: The exterior structure shall be maintained in good repair, structurally sound, and up to the housing code standards. Contrary to and in violation of section: I.P.M.C. 304 Ext. Structure City of Youngstown Ordinance * * *."

¶{11} Appellant pled no contest to I.P.M.C. 304.1, which mandates:

¶{12} "The exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare."

¶{13} Most noticeably, the complaint did not refer to what section of 304 was violated and did not include the phrase "so as not to pose a threat to the public health, safety or welfare" from 304.1.

¶{14} A complaint is a written statement of the essential facts constituting the offense charged. Crim.R. 3. The complaint shall state the numerical designation of the applicable ordinance. Id. A conviction will not be reversed because of an "inaccuracy or imperfection in the * * * complaint, *provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him*." Crim.R. 33(E)(1) (emphasis added). Thus, although in general the specific factual acts underlying the elements need not be specified in the complaint, the complaint must provide the essential elements of the offense. See *State v Simmans* (1967), 21 Ohio St.3d 258, 260-261 (only essential elements are required, not particular facts establishing each element, and thus, additional "to wit" facts are not necessary).

¶{15} The city seems to suggest that appellant actually violated various sections of 304. Most of these sections have specific elements referring to problems with particular features of the building. Since none of these elements were listed in the complaint, none were charged here.

¶{16} In any event, the parties on appeal focus on whether 304.1, the broad "general" section, was sufficiently charged. Appellant pled no contest to 304.1, and the language of the complaint coincided with the first portion of this section. However, the complaint recited only a violation of 304.

¶{17} Contrary to the city's argument, this case is not different from regular criminal cases merely because it deals with housing. Although I.P.M.C. 304 is an administrative model code, the city turned it into a criminal ordinance and made its violation a criminal offense, specifically a third degree misdemeanor.

¶{18} The complaint's failure to provide appellant notice of what section of I.P.M.C. 304 was alleged to have been violated contravenes Crim.R. 3. The appellate

case relied upon by the city at this point is distinguishable as the complaint here did not attach and incorporate by reference any police reports. See *City of N. Royalton v. Kozlowski* (Apr. 18, 1996), 8th Dist. No. 69138. More pertinent is a case where we held that a complaint was deficient where it alleged the violation of the parental responsibility ordinance and provided the ordinance number but failed to state which of the six specific types of violations was being alleged either by listing the elements or by pinpoint citation. See *City of Struthers v. Ardale*, (Nov. 17, 2000), 7th Dist. No. 99CA145. See, also, *State v. Newell*, 6th Dist. No. E-08-64, 2009-Ohio-1816, ¶9, 23-25 (court lacked subject matter jurisdiction, notwithstanding guilty plea, where complaint charged only disorderly conduct and did not specify subsection of statute).

¶{19} A bare citation to 304 is no more than a reference to a title. There are no introductory words that apply to each section. Rather, 304 was drafted so that there are eighteen separate divisions, 304.1 through 304.18. Each section constitutes its own violation with its own elements.

¶{20} It could be argued that charging someone with a violation of I.P.M.C. 304, entitled Exterior Structure, is similar to charging a violation of Ohio Revised Code Chapter 2907, entitled Sex Offenses, without specifying the proper decimals after the 2907. At the very least it is similar to charging sexual battery without providing notice of which of the thirteen types of sexual battery is alleged to have been committed.

¶{21} The listing of an incomplete numerical designation in a complaint may lack prejudice in many cases where the charge in the complaint is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him. See Crim.R. 33(E)(1) (dealing with complaints and indictments). Cf. Crim.R. 7(B) (error in the omission of a numerical designation in an *indictment* does not warrant reversal if the omission did not prejudicially mislead the defendant). Yet, in some cases, this numerical omission can be amplified by certain other issues.

¶{22} Thus, appellant urges that any failure to maintain the exterior structure in good repair and/or structurally sound was required to have posed a threat to the public health, safety or welfare in order to constitute a violation of 304.1. Because the complaint omitted the public health clause, appellant posits that it was deficient for this

reason as well. The city urges that the public health clause is not an element but is merely the rationale for the words preceding this phrase.

¶{23} However, we cannot agree with the city that the elements of 304.1 were properly listed so as to diminish the improper failure to disclose the specific numerical designation. The city agrees that 304.1, to which they had appellant plead no contest, defines an offense. There is only one sentence within 304.1. The public health clause is contained within that sole sentence.

¶{24} The city cites no case where a portion of a section (more particularly a sentence) defining an offense has been held to be simply the expression of legislative rationale for criminalizing certain behavior. We reiterate here that this was not a mere administrative citation. Rather, it was a criminal complaint charging a third degree misdemeanor, which carried a maximum penalty of sixty days in jail.

¶{25} A plain reading of the ordinance leads a reasonable person to the conclusion that "so as not to pose a threat to the public health, safety or welfare" modifies the optional elements of good repair, structurally sound and sanitary. In other words, I.P.M.C. 304.1 is not violated if the alleged failure (to keep in good repair, to keep structurally sound, or to keep sanitary) does not pose a threat to the public health, safety or welfare.

¶{26} For instance, if the exterior of a structure is unsanitary at a certain point in time for a certain reason, the owner does not automatically commit a third degree misdemeanor unless the condition creates a threat to public health, safety or welfare. Whether it does so may factually depend on the nature of the condition or the length of time the condition existed for instance. Consequently, by failing to include the public health clause, the city has omitted an element of this criminal offense from the complaint. See, e.g., *State v. Hayes*, 7th Dist. No. 07MA134, 2008-Ohio-4813, ¶32 (charging instrument was deficient where it failed to charge that tampered-with records were "government" records); Crim.R. 3 (complaint shall state essential facts constituting the offense).

¶{27} We conclude that the complaint's deficiency regarding the omission of the public health clause was compounded by the failure to numerically specify which section of title 304 was being charged. As such, the complaint was not sufficient to

fairly and reasonably inform appellant of all the elements of I.P.M.C. 304.1 or that she was being charged with said section.

¶{28} Contrary to the city's contention, appellant did not waive this issue. Thus, we are not restricted by *Colon*'s structural error analysis, which applies only in cases of waiver. See *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ¶37 (relying on the failure to indict on a mental state plus the further trial errors in closing and jury instructions to find structural error instead of applying the plain error doctrine in a case of waiver). As will be established, appellant properly raised this issue to the trial court.

¶{29} In general, pretrial motions shall be made within thirty-five days of arraignment or seven days before trial, whichever is earlier; however, the court in the interest of justice may extend the time for making pretrial motions. Crim.R. 12(D). The failure to raise such defenses at the appropriate time constitutes waiver unless the trial court for good cause shown relieves the defendant from the waiver. Crim.R. 12(H). A plea of no contest does not preclude a defendant from asserting on appeal that the trial court prejudicially erred in ruling on a pretrial motion. Crim.R. 12(I). Pursuant to Crim.R. 12(C), certain issues must be made prior to trial, including:

¶{30} "(1) Defenses or objections based upon a defect in the institution of the prosecution;

¶{31} "(2) Defenses or objections based on defects in the indictment, information, or complaint (*other than failure to show jurisdiction in the court or charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding*)". Crim.R. 12(C) (emphasis added).

¶{32} Initially, appellant raised the deficiency of the complaint in her original motion to dismiss, which was filed within thirty-five days of arraignment. The city contends that the original motion should be treated as if it had been withdrawn because the motion asked for a continuance in the alternative to a motion to dismiss, because counsel made oral comments when seeking a continuance that the procedure seemed "reasonable", and because a continuance was granted. However, this does not equate with a withdrawal of the dismissal motion by counsel. That is, counsel did not agree that a continuance would cure the alleged deficiencies in the complaint.

¶{33} Alternatively, appellant filed a second motion to dismiss. Although it fell outside the thirty-five day time limit, the failure to charge an offense in the complaint is an exception to the time limit. Crim.R. 12(C)(2). *The omission of a material element from the charging document falls within the failure to charge an offense exception*. See *Colon*, 118 Ohio St.3d 26 at ¶37. Under either theory, there was no waiver here.

CONCLUSION

¶{34} In conclusion, the complaint was deficient. The complaint omitted an element and failed to specify the section of 304 alleged to have been violated. The trial court erred in failing to recognize these problems.

¶{35} For the foregoing reasons, the judgment of the trial court is reversed, and the complaint against appellant is hereby dismissed. Appellant's remaining arguments are moot at this point.

Donofrio, J., concurs.
Waite, J., concurs.