

[Cite as *State v. Neff*, 2006-Ohio-6608.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 2005 CA 112
v.	:	T.C. NO. 05 TRC 6808
	:	
WILLIAM NEFF	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	

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**OPINION**

Rendered on the 8<sup>th</sup> day of December, 2006.

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DONOVAN, J.

{¶ 1} Defendant-appellant William Neff appeals from his conviction and sentence for DUI, operating a vehicle with prohibited concentration of alcohol in the body, driving outside the marked lanes, and driving without wearing seatbelt. On July 6, 2005, Neff entered a plea of guilty to said offenses after waiving his right to counsel. On July 21, 2005, through his newly retained counsel,

Neff filed a motion to vacate the guilty pleas. In the written motion, Neff asked for an oral hearing, so that he could testify and explain to the Court his lack of understanding of the consequences of entering a guilty plea. In addition, Neff wanted to state reasons why he would like to withdraw his pleas. The trial judge refused the request for a hearing, and on September 26, 2005, sentenced him to 180 days jail term. However, the trial court suspended all but three of those days and credited Neff for attending a three day alcohol program. Neff was placed on probation for one year, and was required to pay a \$350 fine, plus court costs. Additionally the trial court suspended Neff's driver's license for two years. Neff filed a timely notice of appeal on October 14, 2005.

{¶ 2} Neff's first assignment of error is as follows:

{¶ 3} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY DENYING APPELLANT'S PETITION TO VACATE THE GUILTY PLEAS."

{¶ 4} In his first assignment, Neff contends that the trial court erred by failing to sustain the motion to vacate the plea. He states that pre-sentence plea withdrawal requests should be "freely and liberally granted," *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E. 2d 715, and that a failure to grant a plea withdrawal must be judged on an abuse of discretion standard. In his brief, Neff relies on the factors set out in *Peterseim*, which include the following: 1) Was the defendant represented by counsel? 2) Was he given a full and fair hearing before entering his plea? 3) Was the defendant given a complete and impartial hearing after the motion to withdraw was filed? 4) Does the trial record show that full and fair consideration to the plea's withdrawal request was given by the court? *State v. Peterseim* (1980), 68 Ohio App.2d 211, 214, 428 N.E.2d 863. Neff contends that all the factors in *Peterseim* weigh in his favor; because he was not represented by counsel at the plea hearing, he was not fully advised of the rights he was waiving, and he was denied a full and fair hearing on the

motion to withdraw his pleas. We agree.

{¶ 5} Crim.R. 11(E) and Traf.R. 10(D) required the court to inform Neff of the effect of his guilty pleas before accepting them. The effects to which Crim.R. 11(E) and Traf.R. 10(D) refer are simply those which are identified in Traf.R. 10(B). *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419. With respect to guilty pleas, the rule provides, at subparagraph (1), that the effect of “[t]he plea of guilty is a complete admission of the defendant’s guilt.” The trial court was required to advise Neff of this fact, yet failed to do so. The court merely asked Neff, “Do you understand if you plead Guilty, I will find you Guilty?” (July 6, 2005, Transcript of Plea, pg. 3). Clearly, the trial court failed to inform Neff that his pleas were “complete admissions” as required by Traf.R. 10(B). We note also that Neff proceeded without counsel and was not informed of a mandatory license suspension. Neff’s motion to withdraw his pleas should have been granted.

{¶ 6} Neff’s first assignment of error is sustained.

{¶ 7} Based upon the foregoing, Neff’s conviction and sentence entered on his guilty pleas is reversed and the case is remanded for further proceedings consistent with this opinion.

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WOLFF, J., concurs.

GRADY, P.J., dissenting and concurring:

{¶ 8} Per Crim.R. 11(E), before accepting Defendant’s guilty plea the court was required to advise him of the “effect” of his plea, which is the information contained in Traf.R. 10(B)(1): that a “plea of guilty is a complete admission of the defendant’s guilt.” *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419. The court inquired of Defendant, “Do you understand (that) if you plead guilty, I

will find you Guilty?” Defendant acknowledged that understanding.

{¶ 9} Substantial compliance with a rule of procedure governing a defendant’s waiver of non-constitutional rights by entering a plea of guilty or no contest is shown when the record permits a conclusion that, under the totality of the circumstances, the defendant understands the implications of his plea and the rights he is waiving. *Westlake v. Kilbane* (2001), 146 Ohio App.3d 308; *Euclid v. Miller* (1999), 134 Ohio App.3d 737, appeal not allowed (2000), 87 Ohio St.3d 1494. Application of the rule is narrower in the case of petty misdemeanors, which includes the offense involved here, because the court is not required to determine that the defendant is aware of the rights he is waiving. *Watkins*. However, the record must portray at least substantial compliance with Crim.R. 11(E) vis-a-vis the implications of his plea.

{¶ 10} In a “cause and effect” context, there is no significant difference between the “effect” of a guilty plea set out in Traf.R.10(B)(1) and the automatic result of the plea of which the trial court advised Defendant and to which he acknowledged an understanding. In fact, the advice the court gave was probably more to the point: that the hammer would fall and Defendant would be convicted. I would find substantial compliance with Traf.R. 10(B)(1).

{¶ 11} Nevertheless, I agree that Defendant’s conviction must be reversed, because the trial court failed to afford Defendant a hearing on his Crim.R. 32.1 motion to withdraw his guilty plea, which was made prior to sentencing, and in that circumstance “the trial court must conduct a hearing to determine whether there is a reasonable legitimate basis for the withdrawal of the plea.” *State v. Xie* (1992), 62 Ohio St.3d 521, 527. Failure to conduct the hearing prevents the court from exercising the discretion to deny the defendant’s motion to vacate, and is grounds for reversal. *State v. Peterseim* (1988), 68 Ohio App.2d 211.

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