

[Cite as *State v. Wolfe*, 2010-Ohio-4049.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 09CA0098
vs.	:	T.C. CASE NO. 86CR0289
PATRICK S. WOLFE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 27<sup>th</sup> day of August, 2010.

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GRADY, J.:

{¶ 1} On December 2, 1986, Defendant, Patrick Wolfe, was operating his motor vehicle southbound on Derr Road in Springfield while he was under the influence of alcohol. Defendant's vehicle went left of center and struck a northbound vehicle head-on, causing the death of the driver and two passengers in that vehicle.

{¶2} Defendant was found guilty following a jury trial in April 1987 of three counts of involuntary manslaughter, R.C. 2903.04(B), three counts of vehicular homicide, R.C. 2903.07, with a specification that Defendant was under the influence of alcohol during the commission of that offense, and four counts of failure to stop after an accident, R.C. 4549.02. Defendant was sentenced according to law to a prison term, and his driving privileges were permanently revoked pursuant to R.C. 4507.16.

{¶3} On July 6, 1995, Defendant filed a motion for reinstatement of his driving privileges. The trial court denied the motion on November 13, 1995. On May 17, 2007, Defendant filed a motion to terminate his driving suspension or grant him occupational driving privileges. The trial court did not hold a hearing on the motion, but set up a briefing schedule for the filing of the parties' memorandums. The court indicated that prior to September 5, 2007, the non-oral hearing date, any party could file a written request for oral argument. On September 22, 2009, the trial court granted Defendant's request for occupational driving privileges.

{¶4} The State filed a motion for leave to appeal from the trial court's decision granting Defendant occupational driving privileges. On November 4, 2009, we granted the State's motion for leave to appeal.

ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR OCCUPATIONAL DRIVING PRIVILEGES WITHOUT A HEARING, AS REQUIRED BY REVISED CODE SECTION 4510.54(B)."

{¶ 6} R.C. 4510.54 provides that certain persons who have had their driver's license suspended for life by the sentencing court may file a motion with that court to modify or terminate the suspension. The movant has the burden to demonstrate that (1) at least fifteen years have elapsed since the suspension began, (2) for the past fifteen years the movant has not been found guilty of any felony, any offense involving a moving violation, or any violation of a suspension of his/her driver's license, (3) the movant has proof of financial responsibility, and (4) if the suspension was imposed because the movant was under the influence of alcohol at the time of the offense, the movant shall also demonstrate (a) that the movant successfully completed an alcohol treatment program, (b) the movant has not abused alcohol for a period satisfactory to the court, and (c) for the past fifteen years the movant has not been found guilty of any alcohol related offense. R.C. 4510.54(A).

{¶ 7} The court may, in its discretion, schedule a hearing on a motion for modification or termination of a lifetime suspension under R.C. 4510.54. However, R.C. 4510.54(B) provides in clear,

unequivocal language: "the court may deny the motion without a hearing but shall not grant the motion without a hearing." (Emphasis supplied). At the hearing the court shall afford the movant, the prosecuting attorney, and the victim or victim's representative an opportunity to provide information relevant to the motion to modify or terminate the suspension. R.C. 4510.54(D).

{¶8} Although Defendant's May 17, 2007 motion to terminate the suspension or grant occupational driving privileges does not specifically refer to R.C. 4510.54, the motion discusses each and every factor set forth in R.C. 4510.54(A) that the movant must demonstrate to be entitled to relief under that provision. Accordingly, it is obvious that Defendant sought to terminate or modify his lifetime driver's license suspension pursuant to R.C. 4510.54.

{¶9} The trial court granted Defendant's motion to modify his lifetime driver's license suspension and granted him occupational driving privileges without holding the mandatory hearing required by R.C. 4510.54(B). That was error, and the error is not harmless because it adversely affects the substantial rights of the prosecutor and Defendant's victims and/or their representatives to present relevant evidence at the hearing that refutes or contradicts Defendant's claim for relief from his lifetime suspension.

{¶ 10} Defendant argues that the State should not now be heard to complain that the trial court erred by failing to hold a hearing because the State failed to call the error to the court's attention at a time when it could have been avoided or corrected by the court.

*State v. Childs* (1968), 14 Ohio St.2d 56; *State v. Williams* (1977), 51 Ohio St.2d 112. The State failed to request a hearing, according to Defendant, even after the court had indicated in a pretrial conference that it intended to grant the motion, and after Defendant then submitted for the State's approval orders granting occupational driving privileges the court had directed Defendant to prepare for the court's signature.

{¶ 11} Defendant's representations concerning the pretrial conference and the orders Defendant prepared and submitted to the state, if they occurred, would surely have put the State on notice of the error the court would commit. However, those matters are not reflected in the record, to which we are confined. Furthermore, while opposition by the State based on the need for a hearing would likely have avoided the error the court committed, that error did not occur until the court journalized its order.

By then, no objection could be heard because the order was final, which limited the State to the appeal it filed.

{¶ 12} The mandatory language of R.C. 4510.54 (B) prohibits the trial court from granting the motion Defendant filed without

holding a hearing. Nothing in that provision requires the State to request a hearing. A party is not required to anticipate error the court has yet to commit.

{¶ 13} The assignment of error is sustained. The judgment of the trial court is reversed and this case is remanded to the trial court for further proceedings consistent with this opinion.

DONOVAN, P.J., And FROELICH, J., concur.

Copies mailed to:

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Hon. Richard J. O'Neill