[Cite as *State v. Patterson*, 2009-Ohio-1817.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-08-052

Appellee — Trial Court No. 2006-CR-321

v.

Daniel J. Patterson — **DECISION AND JUDGMENT**

Appellant — Decided: April 10, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Mark Landes and Mark H. Troutman, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Daniel J. Patterson, appeals a May 28, 2008 judgment of the Erie County Court of Common Pleas denying his Crim.R. 32.1 motion to withdraw his guilty plea to the offense of attempted importuning, a violation of R.C. 2907.07(D)(1) and 2923.02(A) and a first degree misdemeanor. Patterson pled guilty to the offense on

April 2, 2007. He was sentenced on June 12, 2007. He filed the motion to withdraw his guilty plea on March 31, 2008.

{¶ 2} Patterson was indicted on June 9, 2006, and charged with both sexual battery, a violation of R.C. 2907.03(A)(8) and a third degree felony, and intimidation, a violation of R.C. 2921.04(A) and a first degree misdemeanor. The sexual battery charge arose from claims by a 15 year old student ("AZ") that Patterson engaged in sexual conduct with her. Patterson had served as AZ's substitute teacher. The intimidation charge arose from claims by AZ that Patterson had told her to lie about what had happened between them. In exchange for Patterson's guilty plea to the attempted importuning charge, the state dismissed the sexual battery and intimidation charges.

{¶ 3} Sexual importuning is a criminal offense under R.C. 2907.07. R.C. 2907.07(D)(1) provides:

{¶ 4} "(D) No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:

{¶ 5} "(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person."

{¶ 6} Appellant claims ineffective assistance of counsel due to the claimed failure of trial counsel to properly investigate the original charges against him and failure to discover available favorable evidence for his defense. He argues that he would not have pled guilty to the offense of attempted importuning had he known of available favorable evidence, through two witnesses, to defend the original charges.

{¶ 7} Appellant also contends that the motion to withdraw his guilty plea should have been granted because he is innocent of the offense and due to increased registration and notification requirements imposed on him under S.B. 10 beginning in 2008.

{¶ 8} Appellant asserts two errors on appeal:

{¶ 9} "Assignments of Error

{¶ 10} "1. The trial court's findings and conclusions were arbitrary and inaccurate.

{¶ 11} "2. The trial court abused its discretion when it failed to consider the evidence before it and instead focused on the undisputed facts."

{¶ 12} We consider these assignments of error together as they each argue that the trial court abused its discretion in overruling the motion to withdraw appellant's guilty plea.

{¶ 13} "A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice. (Crim.R. 32.1)" *State v. Smith* (1977), 49 Ohio St.2d 261, at paragraph one of the syllabus. We review a trial court's grant or denial of a motion to withdraw a guilty plea under the abuse of discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 32; *State*

v. Smith at paragraph two of the syllabus. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Ineffective Assistance of Counsel

{¶ 14} Appellant claims that the trial court erred in denying his motion to withdraw his guilty plea due to ineffective assistance of counsel. Consideration of such a claim involves application of the two-part test of *Strickland v. Washington* (1984), 466 U.S. 668 as modified to consider guilty pleas in *Hill v. Lockhart* (1985), 474 U.S. 52. The Ohio Supreme Court has summarized the required test:

{¶ 15} "The *Strickland* test was applied to guilty pleas in *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203. 'First, the defendant must show that counsel's performance was deficient.' *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Hill*, 474 U.S. at 57, 106 S.Ct. at 369, 88 L.Ed.2d at 209. Second, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty * * *.' *Hill*, 474 U.S. at 59, 106 S.Ct. at 370, 88 L.Ed.2d at 210; see *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693." *State v. Xie* (1992), 62 Ohio St.3d 521, 524.

{¶ 16} In *Hill v. Lockhart*, the United States Supreme Court clarified application of this standard to test the validity of guilty pleas where it is claimed that counsel failed to investigate or discover exculpatory evidence:

{¶ 17} "In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Hill v. Lockhart*, 474 U.S. at 59.

{¶ 18} Appellant argues that an appropriate investigation by counsel would have disclosed exculpatory evidence through interviews of two witnesses, Amanda W. and Jenny Etchill. Both witnesses were identified in discovery by the state.

{¶ 19} Amanda W. was an older student who knew AZ. In her affidavit, Amanda W. contradicts AZ's statement to police that Amanda met AZ at Osborne Park and drove her home after the alleged incident involving appellant's sexual conduct with AZ. Amanda W. denies ever picking AZ up at Osborne Park and driving her home.

{¶ 20} Jenny Etchill is an elementary school teacher who has coached the varsity girls cross country team at Sandusky High School, first as an assistant coach and, subsequently, as the head coach. Appellant contends that Etchill's affidavit is relevant in that it contradicts AZ's statement to police as to how AZ's relationship with appellant

began. The statement is contained in a police report marked as exhibit "A" to the motion to withdraw appellant's guilty plea.

{¶ 21} According to the statement, AZ stated that she met appellant when introduced to him by her track coach, Jenny Wilke, now known as Jenny Etchill. According to the report, AZ stated that she and appellant ran together during the track season in 2007 and twice in 2008. Etchill denies introducing appellant to AZ and further denies that appellant assisted Etchill in coaching cross country or track or that appellant assisted any Sandusky cross country or track teams.

{¶ 22} Appellant argues that the testimony of these two witnesses presents a substantial challenge to AZ's credibility with respect to AZ's allegations against him.

{¶ 23} At the hearing on the motion, the trial court considered whether there was evidence of a social relationship between AZ and appellant. When questioned as to a social relationship between them, appellant's counsel admitted at the hearing that there was evidence of cell phone calls between appellant and AZ. There was also evidence that appellant was stopped at night by police when he was alone with AZ in a car.

{¶ 24} At sentencing appellant stated:

{¶ 25} "I sincerely regret my behavior as a professional, caused pain and embarrassment to * * * [AZ] * * * and members of her family. Since I am a professional, I should have known better. The effects have been far reaching * * *."

{¶ 26} The trial court considered the significance of the statements:

{¶ 27} "In exercising his Right of Allocution, the defendant says I sincerely regret my behavior as a professional. What did he mean by that? What could he have possibly meant by that? He says I sincerely regret my behavior as a professional, caused pain and embarrassment to * * * [AZ] * * * and members of her family. He states later on, I quote, I should have known better. Well, what is it he should have known better? This carries with it, in my judgment, the badges of authenticity and sincerity, and frankly confession of guilt."

{¶ 28} Under Assignment of Error No. 1, appellant argues that "any alleged improper activities over the phone or in a car" were not relevant to proof of an alleged incident at Osborne Park. In our view, however, evidence of the existence of such contacts as well as appellant's admissions at sentencing are both relevant to support AZ's credibility as to her allegations of a social relationship and sexual contact with appellant. Accordingly, we conclude that appellant's Assignment of Error No. 1 is not well-taken.

{¶ 29} Under Assignment of Error No. 2, appellant argues invalidity of the plea due to ineffective assistance of counsel, claimed innocence, and the increase in sex offender registration and notice requirements under S.B. 10 amendments to R.C. Chapter 2950.

{¶ 30} We find no abuse of discretion in overruling the motion to withdraw appellant's guilty plea. There was competent and credible evidence to support a conclusion that although the testimony of Amanda W. and Jenny Etchill presented

credibility issues concerning AZ's accusations against appellant, that nevertheless such evidence likely would not have changed the outcome had the case proceeded to trial. At trial appellant would have faced substantial evidence tending to support the credibility of his accuser: the admissions of unprofessional conduct made by appellant at sentencing, evidence that he had been stopped by police at night in a car with AZ alone, and evidence of telephone calls to AZ that were unrelated to school activities. Accordingly, we conclude that the trial court did not abuse its discretion in overruling the motion to withdraw appellant's guilty plea based upon claimed ineffective assistance of counsel. We conclude that no manifest injustice is presented under these facts by the trial court's denial of appellant's motion to withdraw his guilty plea based upon claimed ineffective assistance of counsel.

Challenges to Guilty Plea Based Upon
Retrospective Application of S.B. 10

{¶ 31} Appellant was sentenced on June 12, 2007. He was classified as a sexually oriented offender and subject to registration and notification requirements under R.C. Chapter 2950. Statutory changes enacted under S.B. 10 subsequently lengthened the period during which appellant is required to register, increasing it from 10 years to 15 years. S.B. 10 also modified notification requirements where appellant will be absent from the county. Under S.B 10, he is required to notify the county sheriff when he will be absent from the county for a period greater than three days. Previously, notice was required only for absences greater than five days. These changes took effect in 2008.

Appellant argues that imposition of these greater registration and notification requirements to him makes his prior guilty plea involuntary and violates his plea agreement.

{¶ 32} When the Supreme Court of Ohio considered prior increases to registration and notification requirements under R.C. Chapter 2950, it ruled that such requirements were civil and remedial in nature and not criminal and punitive. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 28-34; *State v. Cook* (1998), 83 Ohio St.3d 404, 417. Applying *Ferguson* and *Cook* to statutory changes under S.B. 10, we have held that a retrospective increase in registration and notification requirements under S.B. 10 is a civil collateral consequence of conviction and not an increased punishment for an offense. E.g. *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, and H-07-042, 2008-Ohio-6387, ¶ 18-19; *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397, ¶ 21-24.

{¶ 33} Appellant does not dispute that the requirements of Crim.R. 11(C) were met at his plea hearing. Nor does he dispute that at the time of his plea that he pled guilty with knowledge that he would be subject to classification as a sexually oriented offender and that the classification carried with it statutory registration and notification requirements. He argues that the subsequent S.B. 10 mandated increase in those requirements makes his plea, that was valid when made, now involuntary and invalid. We disagree.

{¶ 34} In *State v. Cook*, the Supreme Court of Ohio in considering retrospective application of earlier changes to R.C. Chapter 2950 registration requirements held that

"[e]xcept with regard to constitutional protections against *ex post facto laws * * * felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.*" *State v. Cook* at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282. This court has previously held that retrospective application of S.B. 10 to sexual offenders whose convictions were a result of plea agreements does not violate constitutional prohibitions against ex post facto laws. *State v. Tuttle,* 6th Dist. No. H-08-015, 2009-Ohio-1128, ¶ 8; *State v. Ohler*, 6th Dist. No. H-08-10, 2009-Ohio-665, ¶ 11; *Montgomery v. Leffler*, at ¶ 23.

{¶ 35} An increase in the duration or frequency of R.C. Chapter 2950 registration and notification requirements does not impose any new punishment or disability and consequently does not violate an offender's prior plea agreement concerning the underlying criminal conviction to which the registration and notification requirements relate. *State v. Wesley*, 149 Ohio App.3d 453, 2002-Ohio-5192, ¶ 6; accord, *State v. Eshbaugh*, 11th Dist. No. 97-T-0109, 2001-Ohio-8832. We have also held that the retrospective application of S.B. 10 increased registration and notification requirements to offenders whose convictions were based upon guilty pleas based upon plea agreements does not violate their constitutional right to contract. E.g. *State v. Tuttle*, at ¶ 10; *State v. Ohler*, at ¶ 12.

{¶ 36} We find appellant's arguments concerning the voluntariness of his plea and breach of his plea agreement are without merit.

{¶ 37} Appellant's Assignment of Error No. 2 is not well-taken.

{¶ 38} On consideration whereof, the court finds that substantial justice has been done the party complaining and that appellant has not been denied a fair hearing. The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Erie County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

William J. Skow, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE