[Cite as *State v. Acoff*, 2009-Ohio-6633.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92342

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL ACOFF

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511281

BEFORE: Jones, J., Dyke, P.J., and Celebrezze, J.

RELEASED: December 17, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, Michael Acoff ("Acoff"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} On May 30, 2008, Acoff was indicted in a 13-count indictment. In Counts 1 through 4, Acoff was indicted for rape under R.C. 2907.02(A)(1)(b). In Counts 5 through 8, Acoff was indicted for rape under R.C. 2907.02(A)(2). In Counts 9 through 12, Acoff was indicted for kidnapping under R.C. 2905.01(A)(2) and/or (A)(4). Additionally, these counts contained an attached sexual motivation specification. In Count 13, Acoff was indicted for disseminating obscene matter to a juvenile under R.C. 2907.31(A)(3).

{¶ 3} On June 4, 2008, Acoff was arraigned. He pled not guilty to the charges, and the first pretrial was set for June 11, 2008. At Acoff's request, that pretrial was continued to July 7, 2008. On July 14, 2008, again at Acoff's request, trial was set for August 4, 2008. On August 1, 2008, Acoff filed motions for discovery, evidence notice, and a bill of particulars. On August 6, 2008, Acoff waived his right to a speedy trial until November 1, 2008. This was done in order to allow time to test a bed sheet for DNA and to allow time to set up a lie detector test.

{¶ 4} On August 11, 2008, a pretrial was held and, at Acoff's request, that pretrial was continued to September 8, 2008 in order to allow more time to

conduct further discovery and DNA testing. On September 22, 2008, a final pretrial was held and trial was set for October 1, 2008. On October 1, 2008, the court called the matter for trial, but the state announced that there was a plea agreement. The state offered to allow Acoff to plead guilty to Count 1, as indicted, with an agreed sentence between the parties of 10 years in prison (the maximum sentence for Count 1), with all remaining counts dismissed. At that time, the state also stated that Count 1 was a Tier III offense, which "requires lifetime registration for every 90 days and all with a mandatory five years post-release control."[1]

{¶ 5} After a long discussion between the court, the attorneys, and Acoff, Acoff entered his plea of guilty. The court sentenced Acoff to the agreed 10 years incarceration, with 5 years post-release control, $250 in court costs, and ordered Acoff to be classified as a Tier III offender. Acoff now appeals.

Assignments of Error

{¶ 6} Acoff assigns two assignments of error on appeal:

{¶ 7} "[1.] Appellant's guilty plea was not voluntary, knowing or intelligent and is void because the trial court participated in, and influenced, the plea negotiations in violation of appellant's Fifth Amendment Constitutional Rights and Criminal Rule 11.

[1]Tr. 6.

{¶ 8} "[2.] The trial court erred by labeling appellant a Tier III label because Senate Bill 10 is unconstitutional."

LEGAL ANALYSIS

Guilty Plea

{¶ 9} Acoff argues that the trial court's participation in the plea negotiations renders his plea involuntary. Participation by a judge in a plea negotiation does not per se render the plea invalid. *State v. Byrd* (1980), 63 Ohio St.2d 288, 293, 407 N.E.2d 1384. However, a trial judge's participation in the plea bargaining process must be carefully scrutinized to determine if the judge's intervention affected the voluntariness of the plea. Id. Ordinarily, if the judge's active conduct could lead a defendant to believe he could not get a fair trial because the judge thinks that a trial is a futile exercise, or that the judge would be biased against him at trial, the plea should be held to be involuntary and void under the Fifth Amendment and Section 10, Article I of the Ohio Constitution. Id. at 293-294.

{¶ 10} Crim.R. 11(C)(2) states, in relevant part, "In felony cases the court may refuse to accept a plea of guilty * * * and shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following: (a) determining that the defendant is making the plea voluntarily, with understanding the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶ 11} In the instant case, the record does not support appellant's argument that the trial court was impermissibly involved in the plea negotiations. During the August 6, 2008 plea hearing, the record indicates that Acoff and his defense counsel both agreed to the plea.

Defense Counsel: "He's admitting to the conduct, your Honor, that's indeed –"

* * *

The Court: "What are we doing?"

Defense Counsel: "Your Honor, Judge, my client already indicated that he pled guilty and now he's going to indicate that he did have sexual conduct with this young man as alleged in Count 1 when he was under 13 years of age and that is statutory rape. The victim is unable to give consent completely."

The Court: "Is that correct?"

The Defendant: "Yes, Your Honor."

The Court: "So you did do that?"

The Defendant: "Yes, Your Honor."

The Court: "Let the record reflect the Court finds the *Defendant has knowingly and voluntarily entered his plea with a full understanding of his Constitutional and trial rights*.

"Counselors, are you satisfied that Rule 11 has been complied with?"

Prosecutor: "Yes, Judge, I am."

Defense Counsel: "That is my opinion, Our Honor."

(Emphasis added.)[2]

{¶ 12} In addition to asking many other qualifying questions of defendant, the court also discussed maximum penalty and postrelease control issues before accepting Acoff's guilty plea:

> The Court: "Do you understand the offense to which you are pleading guilty, that being a felony of the first degree, it is possibly punishable from three to ten years in yearly increments, carries with it a maximum discretionary fine of $20,000, post-release control must be for a period of five years, there can be no reduction; do you understand that?"
>
> The Defendant: "Yes."
>
> The Court: "Sir, upon your release from prison, the Ohio Parole Board will impose a period of post-release control for a period of five years. They may impose conditions and sanctions. Should you decide to commit an act that causes you to be found in violation of your post-release control, you can be remanded to an Ohio Penal Institution for an additional 50 percent of our original sentence; do you understand that?"
>
> The Defendant: "Yes."
>
> * * *
>
> The Court: "Are there any other conditions or any other promises –"
>
> The Defendant: "No."
>
> The Court: "That have been made to you?"

[2]Tr. 18-20.

The Defendant: "No."[3]

{¶ 13} The trial court's involvement in the plea process was proper. The court did nothing to indicate that Acoff would not get a fair trial if he withdrew his plea. Nothing in the court's comments indicated that the trial would be a futile exercise, or that the court would be biased against him at trial. We find no error on the part of the lower court.

{¶ 14} Accordingly, Acoff's first assignment of error is overruled.

Senate Bill 10 – Adam Walsh Act

Background

{¶ 15} Senate Bill 10 modified former R.C. Chapter 2950 ("Megan's Law") so that it would be in conformity with the federal Adam Walsh Act ("AWA"). The changes made to R.C. Chapter 2950 by S.B. 10 altered the sexual offender classification system. Under pre-S.B. 10, depending on the crime committed and the findings by the trial court at the sexual classification hearing, an offender who committed a sexually oriented offense could be labeled a sexually oriented offender, a habitual sex offender, or a sexual predator. See former R.C. 2950.09. Each classification required registration and notification requirements.

{¶ 16} Under Megan's Law, a sexually oriented offender was required to register with the sheriff in the county of his or her residence, employment, and school annually for ten years. A sexually oriented offender was not subject to

[3]Tr. 15-16.

"community notification" of this information; i.e., the information a sexually oriented offender was required to provide to the sheriff was not shared with the public. A habitual sex offender was required to register his or her address annually for 20 years and may or may not have been subject to community notification. A sexual predator was required to register every 90 days for life and was subject to community notification.

{¶ 17} S.B. 10 abolished those classifications. The new provisions leave little, if any, discretion to the trial court in classifying an offender. See R.C. 2950.01. Instead, the statute requires the trial court to classify an offender based solely on his or her conviction. Depending on what crime the offenders committed, they are classified as a Tier I, Tier II, or Tier III sex offender. R.C. 2950.01(E)-(G). The tiers dictate the registration and notification requirements. Tier I is the least restrictive tier, requiring a Tier I sex offender to register once annually for 15 years, but there are no community notification requirements. Tier II requires registration every 180 days for 25 years, but it also has no community notification requirements. Tier III, the most restrictive label and similar to the former sexual predator finding, requires registration every 90 days for life, and community notification may occur every 90 days for life. See R.C. 2950.07 and 2950.11.

{¶ 18} The stated purpose of S.B. 10 is "to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a

child-victim oriented offense * * *." See S.B. 10, Section 5. Similar language is used in the purpose section of the federal act. ("In order to protect the public from sex offenders and offenses against children, * * * Congress in this chapter establishes a comprehensive national system for the registration of those offenders * * *.") Section 16901, Title 42, U.S.Code. Moreover, the Ohio legislature has declared that the purpose of sex offender registration is not punitive, but "to protect the safety and general welfare of the people of this state." R.C. 2950.02(B).

Crimes After January 1, 2008

{¶ 19} Acoff argues in his second assignment of error that the sex offender registration law under which he was classified a Tier III offender is unconstitutional. Specifically, Acoff argues that Senate Bill 10 is unconstitutional because it violates fundamental liberty and property interests, due process rights, the double jeopardy clause, and cruel and unusual punishment prohibitions in the Ohio and U.S. Constitutions.

{¶ 20} A review of the evidence in this case demonstrates that Acoff failed to object to the imposition of Tier III registration under the AWA and also failed to object to the residency requirements therein. In fact, a review of the record demonstrates that Acoff, through counsel, affirmatively *consented* to the AWA's application:

Defense Counsel: "Nothing further on our part.
Anything you want to say?"

Defendant: (Indicated negatively.)

The Court: "The sentence of the Court, $250 in court costs, ten years at Lorain Correctional Institution. We need to deal now with his sexual classification hearing. *Do you consent to it?"*

Defense Counsel: *"We consent, your Honor."*

The Court: "The Court does then classify you as a Tier III sex offender. As such, you are required to register in person with the sheriff of the county in which you establish residency within three days of coming into that county. You are also required to register in person with the sheriff of the county in which you establish a place of education or employment immediately upon coming into that county."

* * *

"As a Tier III offender, this must be for your lifetime with in-person verification every 90 days. Failure to register, failure to verify residence at the specified times, or failure to provide notice of a change in residence address or other required information as described will result in criminal prosecution; *do you understand that?"*

The Defendant: *"Yes."*[4]

(Emphasis added.)

{¶ 21} A review of the record demonstrates Acoff failed to object to the imposition of Tier III registration under the AWA. This court will not address

[4]Tr. 22-24.

Acoff's residency requirement argument since it does not yet apply to him and he therefore has no standing to argue its application. See *State v. Ralston*, Lorain App. No. 08CA009384, 2008-Ohio-6347.

{¶ 22} Contrary to appellant's wishes, this court is unable to bypass the requirements of the AWA and impose the prior existing classification scheme on Acoff. This court has previously found that trial courts that ignore the AWA, and instead use the prior classification scheme, commit plain error in doing so. See *State v. Robinson*, Cuyahoga App. No. 91041, 2009-Ohio-123, and *State v. Hollis*, Cuyahoga App. No. 91467, 2009-Ohio-2368. Accordingly, the lower court in this case had no choice but to implement the classification.

{¶ 23} In *State v. Honey*, Medina App. No. 08CA0018-M, 2009-Ohio-4943, the court found that the AWA, although codified in Title 29 of the Ohio Revised Code, does not create a further criminal penalty, *but rather remains civil in nature*. (Emphasis added.) Therefore, it does not violate due process or create cruel and unusual punishment.

{¶ 24} Acoff is already on notice that his crime of rape has consequences, which are that he serve 10 years in prison, 5 years of postrelease control, and be subject to the requirements of Tier III registration. There are no further penalties that will be assessed for this crime, and while the civil penalty of registration is for the remainder of his life, he is already on notice of that. There are no double jeopardy issues since Acoff's plea removes the state's ability to indict him and subject him to a second case for matters involving this victim. Thus, we find that

the prospective application of the AWA does not violate due process, double jeopardy, or constitute cruel and unusual punishment.

{¶ 25} Accordingly, after reviewing the evidence and finding no error on the part of the lower court and finding nothing unconstitutional in the application of Senate Bill 10 to crimes committed after January 1, 2008, we hereby overrule Acoff's second assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY;
FRANK D. CELEBREZZE, JR., J., DISSENTS
WITH SEPARATE OPINION

FRANK D. CELEBREZZE, JR., J., DISSENTING:

{¶ 26} After a thorough review of the record and for the following reasons, I respectfully dissent. The majority ignores statements made by the trial judge which, in my opinion, render appellant's plea involuntary. Specifically, the following exchange took place on the record:

{¶ 27} "THE COURT: I don't know. Ten years. That's destroyed this kid.

{¶ 28} "[PROSECUTOR]: Your Honor, I would not bring a plea to your courtroom without having reviewed it with the family first.

{¶ 29} "THE COURT: I understand, I appreciate that, but I don't know. Maybe 30. He's destroyed this kid. The kid has no possibility of normal existence. He's destroyed another human being. We're bickering over ten.

{¶ 30} "Well I'll tell you what, I'll tell you what, you got ten minutes. If he hasn't taken ten in ten minutes, then we're going to trial. I'm not going to discuss it anymore.

{¶ 31} "He's got ten minutes. If he doesn't take it in ten minutes, then we'll see him suit up for trial.

{¶ 32} "[DEFENSE COUNSEL]: Judge, may his mother speak with him? Would that be agreeable?

{¶ 33} "THE COURT: I don't know how the sheriff works it, and I don't really care because I'm not interested in ten years. So if you can work on it, fine. If you can't work on it, then that's fine too.

{¶ 34} "I'm only agreeing to it because this is a respectable prosecutor and he must have his reasons for doing what he's doing, but it doesn't set well with me.

{¶ 35} "[PROSECUTOR]: Thank you, Your Honor.

{¶ 36} "THE COURT: I have always sentenced people in these kinds of cases to like 150."

{¶ 37} While I have found no cases in which a trial judge engaged in such behavior, a similar issue was addressed in *State v. Byrd* (1980), 63 Ohio St.2d 288, 407 N.E.2d 1384. Specifically, the court in *Byrd* stated: "A judge's participation in the actual bargaining process presents a high potential for coercion. The defendant often views the judge as the final arbiter of his fate or at the very least the person in control of the important environment of the courtroom. He may be led to believe that this person considers him guilty of the crime without the chance of proving otherwise. He may infer that he will not be given a fair opportunity to present his case. Even if he wishes to go to trial, he may perceive the trial as a hopeless and dangerous exercise in futility." Id. at 292.

{¶ 38} Although the *Byrd* court acknowledged that there is no per se rule with regard to a judge's participation in the plea bargaining process, the court held that such participation should be carefully scrutinized. Id. The *Byrd* court specifically held that a trial judge's participation in the plea bargaining process

creates a great likelihood for coerced guilty pleas and significantly compromises a trial judge's impartiality. See id.

{¶ 39} It should be noted, however, that *Byrd* contained facts somewhat distinguishable from the case at bar. In *Byrd*, the trial judge actively engaged himself in the plea bargaining process by speaking with members of the defendant's family and asking for their assistance in convincing the defendant to take the plea. Although the trial judge in the case before us certainly did not encourage appellant to accept the plea, she essentially told appellant that he would receive a much harsher sentence if he took the case to trial. In fact, the trial judge indicated to appellant that he should receive a 30-year sentence and that she usually sentences individuals in cases such as this to 150 years. Such statements by a trial judge should not be condoned.

{¶ 40} This court considered a judge's participation in the plea negotiation process in *State v. Gaston*, Cuyahoga App. No. 82628, 2003-Ohio-5825. In *Gaston*, the trial judge implied that the defendant would receive a harsher penalty if he took his case to trial. In finding that these actions rendered the defendant's plea involuntary, this court stated that "[a] judge should not be involved in plea discussions between the prosecutor and a defendant because the judge's mere presence has a 'subtle but powerful influence.' Therefore, any judicial participation in negotiations could compromise the plea's voluntariness. * * * The judge's comments here go well beyond any acceptable level of involvement; she threatened increased punishment if Gaston exercised his constitutional right to

trial. The "'subtle but powerful'" influence already present in any judicial participation was 'replaced by the overt and overwhelming pressures produced by the judge's direct threat.'" Id. at ¶16.

{¶ 41} It is apparent from the record that the trial judge was convinced of appellant's guilt and felt that ten years was too minimal a sentence for the purported crime. As such, she took it upon herself to announce in open court, where appellant was listening, that she has "always sentenced people in these kinds of cases to like 150." This statement left appellant with no meaningful choice but to forego his right to trial and accept the state's offer of ten years.

{¶ 42} Appellant likely felt that proceeding to trial would be a meaningless exercise resulting in a harsher penalty. Id. See, also, *State v. Kirby* (Oct. 25, 1990), Cuyahoga App. No. 59234. In *Kirby*, the defendant accepted a plea after the trial judge indicated, on the record, that he was prepared to impose the minimum sentence if the deal was accepted, but no such guarantee existed if the case went to trial. The court in *Kirby* recognized that such statements leave a defendant with no choice but to accept the deal, and an involuntary plea is void. Id.

{¶ 43} As in *Kirby*, appellant here was presented with two real options: 1) accept the plea deal and receive a ten year sentence, or 2) take the case to trial and risk facing the trial judge at sentencing after she had indicated that she usually sentences such individuals to 150 years. In the eyes of any reasonable person, there was no real choice in this matter. This lack of a choice rendered

appellant's plea void because it was not voluntarily, knowingly, and intelligently made.

{¶ 44} "The concept of justice must include proper respect for the judicial system and the rights of all criminal defendants. When jealously maintained, this respect safeguards the rights of all while meting proper punishment to offenders. Individual judges should not take it upon themselves to disregard criminal defendants' rights simply because they are convinced of a particular defendant's guilt. Such conduct threatens the rights of all defendants and works a manifest injustice to the American concept of freedom." *Gaston*, supra, ¶17.

{¶ 45} It is axiomatic that a guilty plea must be knowingly, voluntarily, and intelligently made. The trial judge's behavior in this case deprived appellant of the ability to render a voluntary plea. As such, I respectfully dissent.