

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No.
Appellee :
v. :
JESSE LEE HAGAN :
Appellant :

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JESSE LEE HAGAN**

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Proposition of Law No. I

Substantial compliance with Criminal Rule 11(C)(2) requires that an accused sex offender be advised of the three basic punitive consequences under the Adam Walsh Act prior to acceptance of a guilty plea, which consequences include the registration requirements, community notification where applicable, and the residency restriction requirements, and the failure to inform an accused of any one of these consequences represents a complete failure to comply with Crim.R. 11(C)(2), making a demonstration of prejudice unnecessary.

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Opinion of the Butler County Court of Appeals, Twelfth Appellate District, in Case No. CA2018-07-136

(March 25, 2019)

Judgment Entry of the Butler County Court of Appeals, Twelfth Appellate District, in Case No. CA2018-07-136

(March 25, 2019)

**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This appeal is one of public or great general interest and involves a substantial constitutional question under both the United States and Ohio Constitutions. The case involves a guilty plea to sexual battery which was not knowing, intelligent and voluntary because the trial court failed to advise Appellant that he would be subject to mandatory community notification as a result of his plea. Where a guilty or no contest plea is not knowing, intelligent and voluntary “enforcement of the plea [is] unconstitutional under both the United States Constitution and the Ohio Constitution.” *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996)

In *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, this Court held that the sex offender registration requirements (SORN) had become punitive in nature and not remedial after the enactment of the Adam Walsh Act. Therefore, the SORN requirements now have been deemed part of the punishment for an offense. This has raised the question of what advisement a trial court must provide in this regard at a plea hearing. In other words, what is required for a trial court to convey the maximum penalty to an accused.

Some courts have held that courts must inform defendants of the basic registration requirements before accepting a guilty or no contest plea to a sex offense. However, these courts also have held that trial courts need not explain each requirement or restriction in doing so. see *State v. Butcher*, 12th Dist. Butler No. CA2012-10-206, 2013-Ohio-3081 (holding that “Crim.R. 11 obligates a trial court to advise a defendant of the basic registration requirements under R.C. Chapter 2950,” but that a court need not discuss “each of the numerous individual restrictions and

requirements set forth in R.C. Chapter 2950”); *State v. Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627 (informing a pleading defendant that conviction of Tier III offense would result in lifetime reporting and notification requirements amounted to substantial compliance with Crim.R. 11)

Other courts have held that trial court must provide notice of the basic consequences of a guilty or no contest plea to a sex offense. Specifically, the Sixth District Court of Appeals has held that R.C. Chapter 2950 contains three basic areas of consequence for a sex offense conviction: the registration requirements in R.C. 2950.03, the community notification requirements in R.C. 2950.11, and the residential restrictions in R.C. 2950.034. The Sixth District has held that each of these separate areas must be discussed during the plea colloquy in order for the plea to be in substantial compliance with Ohio Criminal Rule 11. Moreover, the failure to mention even one of the applicable areas constitutes a complete failure to Crim.R. 11, obviating the need to demonstrate prejudice. see *State v. Hines*, 6th Dist. Erie No. E-13-054, 2014-Ohio-1996 (holding that a court must inform a defendant of applicable community notification requirements for a guilty plea to be knowing, intelligent and voluntary); *State v. Ragusa*, 6th Dist. Lucas No. L-15-1244, 2016-Ohio-3373 (invalidating a guilty plea where a trial court “failed to inform [a defendant] of the community notifications and residential restrictions imposed upon Tier II and Tier III child victim offenders”); *State v. Kouts*, 6th Dist. Sandusky No. S-16-012, 2017-Ohio-2905 (invalidating a plea where the defendant had been informed of the registration and community notification requirements of a Tier III classification, but not the residential restrictions, and holding that “substantial compliance [with Crim.R. 11] requires the trial court to inform the defendant of the registration requirements in R.C. 2950.03, the community notification requirements in R.C. 2950.11, and the residential restrictions in R.C. 2950.034) The Sixth District also has held that a failure to advise a defendant regarding

each of the three basic SORN requirements represents a complete failure to comply with Crim.R.

11. *State v. Mahler*, 6th Dist. Ottawa No. OT-16-009, 2017-Ohio-1222, ¶ 13.

At the present, this issue is pending before the Court in *State v. Dangler*, Sup. Ct. No. 2017-1703.¹ Appellant respectfully requests that the Court accept this appeal for review.

STATEMENT OF THE CASE AND FACTS

Appellant Jesse Lee Hagan was indicted by the Butler County Jury on March 28, 2018, as follows: Count One: Gross Sexual Imposition, a third degree felony, on violation of R.C. 2907.05(A)(1); Count Two: Rape, a first degree felony, in violation of R.C. 2907.02(A)(2); and Count Three: Sexual Battery, a third degree felony, in violation of R.C. 2907.03(A)(5). On May 10, 2018, Appellant entered a guilty plea to sexual battery and the other counts were dismissed. The guilty plea form provided that “upon conviction, Defendant will be designated a Tier III sex offender requiring in-person verification every 90 days for life among other restrictions including a prohibition from living within 1000 feet of a school.” During the plea hearing, Appellant acknowledged that he had read the contents of the plea form and that he understood them.

Pertinent to the present appeal, the trial court informed Appellant during the plea colloquy that he would be designated as a Tier III sex offender. The court stated, “[Y]ou will be designated a tier 3 sex offender and that will require that you register in person for verification every 90 days for the rest of your life.” The court further advised Appellant that “[t]here will be other restrictions which will include a prohibition from moving within a thousand feet of a school.” Appellant

¹ On April 3, 2019, Appellant filed a Motion to Certify a Conflict Pursuant to App.R. 25, asserting that the Twelfth District Court of Appeals decision is in conflict with the decisions in *Ragusa*, *Kouts*, and *Dangler*, as well as a decision of the First District Court of Appeals in *State v. Jackson*, 1st Dist. Hamilton No. C-110645, 2012-Ohio-3348. Appellant is awaiting a decision on that motion.

acknowledged that he understood that. The trial court never mentioned mandatory community notification for a Tier III offender during the plea hearing.

At the sentencing hearing on June 14, 2018, Appellant was designated a Tier III sex offender. Doing so, the trial court explained Appellant's registration requirements in more detail than provided during the plea colloquy. The court still did not mention to Appellant that he would be subject to mandatory community notification pursuant to R.C. 2950.11.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I:

Substantial compliance with Criminal Rule 11(C)(2) requires that an accused sex offender be advised of the three basic punitive consequences under the Adam Walsh Act prior to acceptance of a guilty plea, which consequences include the registration requirements, community notification where applicable, and the residency restriction requirements, and the failure to inform an accused of any one of these consequences represents a complete failure to comply with Crim.R. 11(C)(2), making a demonstration of prejudice unnecessary.

In the present case, the trial court accepted Appellant's guilty plea to one count of sexual battery. However, in doing so, the court utterly failed to advise Appellant that he would be subject to community notification as a Tier III offender. Because community notification has been deemed punitive by this Court, Appellant respectfully submits that the trial court, therefore, failed to explain the maximum penalty involved with his conviction. Moreover, this represents a complete failure to comply with Crim.R. 11(C)(2).

In its decision, the Twelfth District held that the trial court had substantially complied with Crim.R. 11 despite the failure to tell Appellant that he would be subject to mandatory community

notification as a result of his conviction. According to the court, it was sufficient under the totality of the circumstances to notify Appellant about the registration requirements and residential restrictions associated with Tier III offender status, even though the trial court “failed to explicitly advise Hagan . . . that he would be subject to a mandatory community notification requirement.” *State v. Hagan*, 12th Dist. Butler No. 2019-Ohio-1047, ¶ 44. Appellant respectfully disagrees with this conclusion.

Pleas of guilty or no contest are valid only when they are knowing, intelligent, and voluntary. *Boykin v. Alabama* (1969), 395 U.S. 238.

Crim.R. 11(C) was adopted to ensure that pleas of guilty or no contest are valid. “Adherence to the provisions of Crim.R. 11(C)(2) requires an *oral dialogue between the trial court and the defendant* which enables the court to determine fully the defendant’s understanding of the consequences of [a] plea of guilty or no contest.” *State v. Prom* (Dec. 8, 2003), But. App No. CA2002-01-007, 2003-Ohio-5103, ¶ 23, quoting *State v. Caudill* (1976), 48 Ohio St.2d 242, paragraph two of the syllabus. (emphasis added)

“Crim. R. 11 was enacted to ensure that a guilty or no contest plea would be accepted by the court *only* if voluntarily, knowingly and intelligently made by the accused.” *State v. Redmond* (1999), Cuyahoga App. No. 74738, unreported, citing *State v. Stone* (1975), 43 Ohio St.2d 163, 167-168. (emphasis added) Crim.R. 11(C)(2)(a) provides, in pertinent part, that, “[i]n felony cases, the court . . . shall not accept a plea of guilty . . . without first addressing the defendant personally and . . . [d]etermining that the defendant is making the plea voluntarily, with understanding of . . . *the maximum penalty involved.*” **Crim.R. 11(C)(2)(a)** (emphasis added).

When determining whether a plea is knowing, intelligent and voluntary, this Court has instructed that reviewing courts must look to whether a trial court has adequately protected the constitutional and nonconstitutional rights promised by Criminal Rule 11. The standard of review

depends on the type of right involved. Where, as in the present case, questions arise about nonconstitutional rights, substantial compliance with Criminal Rule 11(C) is required. State v. Nero (1990), 56 Ohio St.3d 106.

Substantial compliance is determined from reviewing the totality of the circumstances. State v. Carter (1979), 51 Ohio St.2d 86, 92-93. Although Crim.R. 11 compliance must be “substantial,” as opposed to literal, when nonconstitutional rights are involved, the Supreme Court of Ohio has repeatedly warned lower courts that “[l]iteral compliance with Crim.R. 11, in all respects, remains preferable to inexact plea hearing recitations.” State v. Clark (2008), 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 29, quoting State v. Griggs (2004), 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 19, citing Nero, *supra* at 108. An appellant also must demonstrate a prejudicial effect, i.e. whether the plea otherwise would have been made, but for the trial court error. Carter, *supra* at 108. However, the need to demonstrate prejudice does not apply where there is a complete failure to comply with Crim.R. 11. Clark, *supra*, ¶ 32.

Community notification as it now exists is not an inconsequential aspect of the punishment for a Tier III offender. In State v. Williams, *supra*, this Court observed that:

[C]ommunity notification has expanded to the extent that any statements, information, photographs, or fingerprints that an offender is required to provide are public record and much of that material is now included in the sex-offender database maintained on the Internet by the attorney general. R.C. 2950.031. ¶ 14.

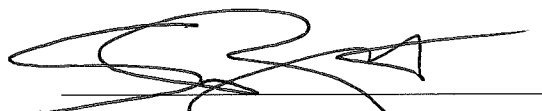
Appellant’s status as a sex offender now has been placed on a public internet registry accessible by any and all. Therefore, Appellant respectfully disagrees with the conclusion that a trial court may substantially comply with Crim.R. 11 without mentioning this significant punishment. The majority decision in this case appears to take the view that it is sufficient for a trial court to explain some, but not all, of the punishment, so long as an accused knows that he will

be subject to some SORN requirements. This is tantamount to deeming it sufficient to inform a defendant that he could go to prison, but not explaining the maximum prison term the defendant faces.

CONCLUSION

For the foregoing reasons, this case involves a matter of public or great general interest and a substantial constitutional question. Appellant requests that the Court accept jurisdiction in this case, a discretionary and claimed appeal of right, so that the important issue presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by email transmission to Michael Greer, Esq., greerjm@butlercountyohio.org, the Office of the Butler County Prosecuting Attorney, Appellate Division, 315 High Street, 11th Floor, Hamilton, Ohio 45011 on this 9th day of May, 2019.



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