

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NOS. 2006-1851
2006-1606
PLAINTIFF-APPELLANT
-vs- : ON APPEAL FROM THE SEVENTH
DISTRICT, CASE NO. 05 MA 69,
JOSEPH W. JONES, SR DISCRETIONARY AND CONFLICT
DEFENDANT-APPELLEE :

STATE'S MERIT BRIEF

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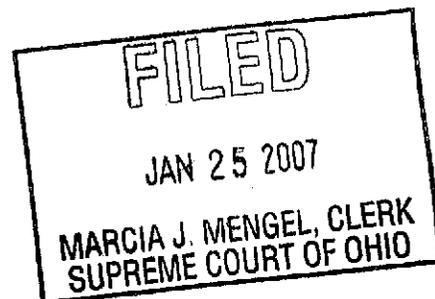


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STATEMENTS OF THE CASE AND FACTS

Standing accused of beating his fiance's children and shocking them with an electric fly swatter in an open-and-shut case, Defendant-Appellant JOSEPH W. JONES, SR. ("Mr. Jones") chose to enter a Crim.R 11 plea agreement rather than to stand trial.

In an extensive Crim.R. 11 hearing, the trial court determined that Mr. Jones entered a voluntary, knowing, and intelligent plea of guilty. Specifically, the court asked whether Mr. Jones understood the following: (1) that he had a right to a jury trial in the matter in which the State would bear a burden of proof of his guilt beyond a reasonable doubt; (2) that he had the right to subpoena his own witnesses and cross examine witnesses against him; (3) that at trial he could remain silent; (4) that by pleading guilty he placed himself at the mercy of the court as to his sentence; and (5) that in light of the foregoing he wanted to enter a plea of guilty to one count of domestic violence. [See Rule 11 Tr.] Mr. Jones entered his plea fully aware of what he did and fully aware of the facts against his, and he was sentenced.

After his sentence, Mr. Jones moved to withdraw his guilty plea. The court held an extensive Crim.R. 32 hearing. Upon taking the matter under advisement, the trial court determined that Mr. Jones entered a voluntary and knowing guilty plea, and denied his request to withdraw. [See Rule 32 Tr. and Judgment Entry 6/25/2005].

Mr. Jones appealed the court's denial of his motion to withdraw. Given that Mr. Jones entered a voluntary and knowing guilty plea, the State asked the Seventh District to deny his request for relief. Nevertheless, the Seventh District held that where the trial court did not inform Jones of his the effect of a contest plea—a plea that he was not even entering—that he had not entered an informed plea. In its opinion the Seventh District cited this Court's decision

in *State v. Watkins* (2003), 99 Ohio St.3d 12, 788 N.E.2d 635¹ and expressed a difference of viewpoint between its decision in *State v. Jones*, 7th Dist. App. No. 2006-Ohio-3636, the Tenth District's decision in *State v. Horton-Alomar*, 10th Dist. No. 04AP-744, 2005-Ohio-1537, and the Second District's decision in *State v. Raby*, 2nd Dist. No. 2005-CA-88, 2005-Ohio-3741.

The State filed a discretionary appeal with this Court and a motion to certify conflict with the Seventh District. On motion, the Seventh District certified conflict review relative to the following issue:

Whether a trial court complies with Crim.R. 11(E) by simply notifying a defendant of the effect of his/her plea as set out in Crim.R. 11(B) or whether the trial court complies with Crim.R. 11(e) by notifying a defendant of the maximum penalties that could result from a plea and that the defendant waives his/her right to a jury trial by entering a plea but does not notify a defendant of the effect of his/her plea.

The State filed notice of conflict with this Court, and this Court accepted the appeal on conflict review, ordering briefing combined with the State's discretionary appeal relative to the same issue.

The record having been transmitted and the parties now on notice, the State submits its merit brief and moves this Court to hold that if a court informs a defendant of the rights he/she waives upon entering a plea and of the minimum and maximum sentences he/she may receive upon being found guilty, then a court satisfies Crim.R. 11(E) for the reasons this brief contains.

¹ According to this Court addressing *Watkins*, "we find that where a defendant charged with a petty misdemeanor traffic offense pleads guilty or no contest, the trial court complies with Traf.R. 10(D) by informing the defendant of the information contained in Traf.R. 10(B)." Traf.R. 10(B) being identical to Crim.R. 11(E). The *Watkins* opinion did not, however, mandate that recitation of the 10(B) elements was the only form of compliance.

LAW AND DISCUSSION

SOLE PROPOSITION OF LAW: If a court informs a defendant of the rights he/she waives upon entering a plea and of the minimum and maximum sentences he/she may receive upon being found guilty, then a court satisfies Crim.R. 11 (E).

Ohio law does not require that a trial court specifically inform a defendant, who enters a guilty plea, of the effect of a no contest plea at a Rule 11 plea hearing. Under Ohio law, “[a] trial court must substantially comply with the requirements of Crim.R. 11 before it may accept a guilty plea.” *City of Columbus v. Simmons* (Dec. 28, 1999), 10th Dist. No. 99AP-310, unreported, 1999 WL 1262059, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. And according to the Courts, “[a] trial court substantially complies with Crim. R. 11(E) [the applicable statute] by notifying the defendant of both the maximum penalties that could result from the plea and the waiver of the right to a jury trial that results from the plea.” *State v. Raby*, 2nd Dist. App. No. 2004-CA-88, 2005-Ohio-3741, at ¶ 7, citing *Simmons* supra.

The following discussion satisfies this test:

THE COURT: Mr. Raby, you are charged with furnishing alcohol to minors. The maximum penalty is up to six months in jail and a thousand dollar fine. How do you want to proceed?

THE DEFENDANT: Guilty.

THE COURT: Do you understand that, by pleading guilty, you are waiving your right to have a trial? That trial could actually be in front of a judge or a jury. Do you understand that?

THE DEFENDANT: Yeah. Id. at ¶ 9-13.

Provided the trial court establishes these points, the colloquy satisfies Crim.R. 11, and there is no need to remand a defendant’s case for either trial or a new plea hearing. Id.

As a matter of good policy, this conclusion makes sense based on the purpose of Crim.R.

11. According to the courts, “[t]he purpose of Criminal Rule 11 is to ensure that the defendant entering a plea of guilty [or, presumably, no contest] does so knowingly, with the understanding that he is waiving his critical constitutional rights.” *State v. Lane* (Mar. 16, 1978), 8th Dist. App. No. 37066, unreported, 1978 WL 217834, citing *State v. Younger* (8th Dist. 1975), 46 Ohio App.2d 269, 271, 349 N.E.2d 322; U.S. Const. Amend. V; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; U.S. Const. Amend. IX; Oh. Const. Art. 1., Sec. 10. But provided that a court informs a defendant of the minimum and maximum available sentences and that he is waiving his constitutional rights, the purpose of Rule 11—informing a defendant of his waiver of rights—is satisfied. *Id.* at ¶ 9-13. The balance of the information is non-critical and non-constitutional, and omission thereof hardly qualifies as constitutional, reversible error. And particular to Jones’ case, other than informing the defendant of the basic rights he relinquishes by entering a plea, there is no reason that a court should have to inform a defendant of the effects of a plea that he is not entering.

The trial court properly took Jones’ guilty plea. And though unique, Mr. Jones’ argument below should have been unpersuasive. Basically, Mr. Jones argued that had he been expressly read the option of a no contest plea (1) he would have entered it, and (2) he would have preserved the right to attack the validity of Ohio’s domestic violence statute under the Ohio Constitution. But one can say the same thing for a not guilty plea: that Mr. Jones could have entered it and that he could have preserved the right to attack the validity of Ohio’s domestic violence statute on appeal, had he lost at trial.

Moreover, Mr. Jones knew of his right to plead no contest and the effect of a no contest plea at the time he entered his plea. First, the court would have informed him of his right to

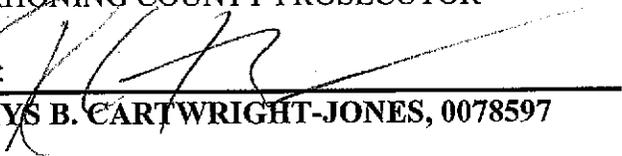
plead no contest and the effect of such a plea at his arraignment—as is the common practice. And thereafter, Mr. Jones signed a Rule 11 form, which mentioned his right to enter a no contest plea. [See Crim R. 11 Journal Entry, Mar. 11, 2005, signed by Mr. Jones.] Simply stated, Mr. Jones’ assertion that he entered a guilty plea without being fully advised of his right to plead no contest was infirm. And where the trial court substantially complied with Crim.R. 11 in taking his plea, Jones had no right to relief.

CONCLUSION

WHEREFORE, the State asks this Court to overrule the Seventh District’s reversal of the trial court, to deny Mr. Jones’ request for relief as granted below, and to tax the costs of this action to the defense.

Respectfully Submitted,

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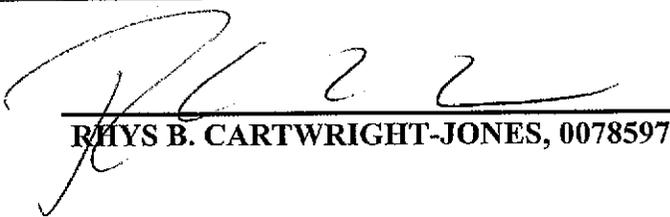
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APPENDIX

DATE-STAMPED NOTICE OF APPEAL TO THE SUPREME COURT (06-1606)

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO : **CASE NO. 06-1606**
PLAINTIFF-APPELLANT

-vs- : **ON APPEAL FROM THE SEVENTH**
JOSEPH W. JONES, SR : **DISTRICT, CASE NO. 05 MA 68**
: **[CONFLICT REVIEW PENDING]**

DEFENDANT-APPELLEE :

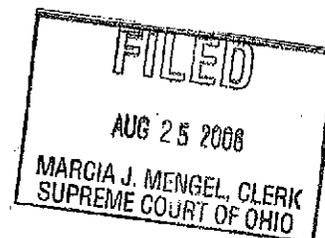
NOTICE OF APPEAL

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11/14

NOTICE

The State timely gives notice to this Court and to all interested parties that on September 20, 2006 the Seventh District Court of Appeals sitting in Mahoning County certified a conflict in this matter. The Seventh District's judgment entry certifying conflict [Attachment A], the District's prior judgment entry and opinion in conflict [Attachments B, C], and the opinions with which it conflicts [Attachment D, E], are attached hereto and made a part hereof.

WHEREFORE, the State prays this Court take notice of the conflict below and assume jurisdiction over this matter so that this Court may decide this case on its full merits.

Respectfully Submitted,

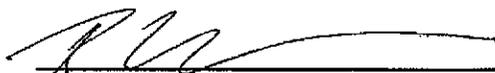


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RILYS B. CARTWRIGHT-JONES (0078597)

DATE-STAMPED NOTICE OF APPEAL TO THE SUPREME COURT (06-1851)
[ATTACHMENTS OMITTED]

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

:

CASE NO.:

06-1851

PLAINTIFF-APPELLEE

-vs-

:

ON CONFLICT APPEAL FROM
SEVENTH DISTRICT CASE NO.
05-MA-69

JOSEPH W. JONES

DEFENDANT-APPELLANT

:

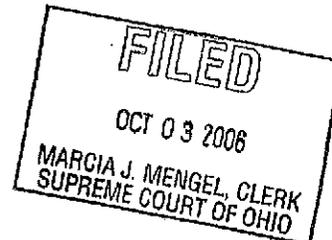
NOTICE OF CERTIFIED CONFLICT
[DISCRETIONARY APPEAL PENDING IN CASE NO. 06-1606]

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Respectfully Submitted,



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RHYS B. CARTWRIGHT-JONES (0078597)

JUDGMENT FROM WHICH THE APPEAL IS TAKEN

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUL 13 2006
FILED
ANTHONY VIVC, CLERK

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT

STATE OF OHIO,)
PLAINTIFF-APPELLEE,)
VS.) CASE NO. 05-MA-69
JOSEPH W. JONES,) JOURNAL ENTRY
DEFENDANT-APPELLANT.)

For the reasons stated in the opinion rendered herein, appellant's first assignment of error has merit and is sustained, rendering his second assignment of error moot. It is the final judgment and order of this Court that the judgment of County Court Number Four of Mahoning County, Ohio, is hereby reversed. Appellant's plea is vacated and this case is remanded for further proceedings pursuant to law and consistent with this Court's opinion.

Costs to be taxed against appellee.

Gene Tompkins
Cliff White
Mary DeGard
JUDGES.

OPINION RELATING TO THE JUDGMENT ON APPEALED

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)
)
PLAINTIFF-APPELLEE,)
VS.)
JOSEPH W. JONES,)
)
DEFENDANT-APPELLANT.)

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUL 13 2006
FILED
ANTHONY W. CO. CLERK
CASE NO. 05-MA-69

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court
Number Four
Case No. 04-CRB-670B

JUDGMENT: Reversed and Remanded

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: July 13, 2006

DONOFRIO, J.

{11} Defendant-appellant, Joseph Jones, Sr., appeals from Mahoning County Court Number Four judgments convicting him of one count of domestic violence and denying his motion to vacate his guilty plea to that charge.

{12} On August 18, 2004, appellant was charged with three counts of domestic violence, first degree misdemeanors in violation of R.C. 2919.25. These charges stemmed from allegations made by his fiancée's children that appellant hit them with an electric fly swatter. The children were ages 11 and 16 at the time. The matter was set for trial.

{13} On March 9, 2005, appellant filed a motion to dismiss based on the unconstitutional application of the domestic violence statute in light of Ohio's Constitutional amendment to include Article XV.¹

{14} Nonetheless, two days later appellant appeared in court for his trial date. At this time, appellant changed his plea to guilty to one count of domestic violence.

{15} The trial court found appellant guilty and sentenced him to 180 days in jail, 170 days suspended; a \$150 fine, plus jury costs; 12 months of reporting probation; anger management classes; and a psychological evaluation with counseling if necessary. Appellant subsequently retained new counsel and filed a timely notice of appeal.

{16} Appellant served his ten-day jail sentence and then filed a motion to stay the balance of his sentence pending appeal. Appellant also filed a motion to withdraw his guilty plea. This court issued a limited remand so that the trial court could rule on appellant's motion to vacate his guilty plea. The trial court held a

¹ In December 2004, the Ohio Constitution was amended to include Article XV. Section 11, the defense of marriage provision, states: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." This amendment has been used to challenge the constitutionality of the domestic violence statute when applied to people who are not related.

hearing on the motion and subsequently denied it. Appellant then filed another timely notice of appeal.

{17} Initially, it should be noted that while appellant voluntarily served his jail sentence, it is not apparent from the record whether he completed the remainder of his sentence. This is important because when a defendant, convicted of a misdemeanor, voluntarily satisfies the judgment imposed upon him for that offense, an appeal from the conviction is moot unless the defendant offers evidence from which an inference can be drawn that he will suffer some collateral disability or loss of civil rights stemming from the conviction. *State v. Golston* (1994), 71 Ohio St.3d 224, 226, 643 N.E.2d 109. Appellant filed a motion with the trial court to stay the remainder of sentence; but it appears that the trial court never ruled on it. Generally, if a court fails to rule on a motion, we can presume it overruled the motion. However, in this case there is no indication that appellant did in fact pay his fine and jury costs or that he attended the court-ordered anger management classes and psychological evaluation. We should not presume that he did so especially in light of the fact that he filed a motion to stay that portion of his sentence. See *In re Payne*, 1st Dist. No. C-040705, 2005-Ohio-4849, at ¶4 ("While the record does not demonstrate that Payne filed for a stay of the trial court's judgment, neither does it demonstrate that Payne had actually been notified to report for his work detail or that he had paid his court costs. We decline to find the appeal moot on this record, especially when Payne does not have any prior juvenile adjudications.") Thus, we will consider the merits of appellant's appeal.

{18} Appellant raises two assignments of error, the first of which states:

{19} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INFORM THE APPELLANT OF THE FACT THAT HE COULD ENTER A PLEA OF NO CONTEST TO A CHARGE OF DOMESTIC VIOLENCE, FOR WHICH HE WAS CONVICTED, AS REQUIRED BY OHIO R. CRIM. PROC. 11(E)."

{110} Appellant argues that the trial court erred in accepting his plea because the court failed to inform him of the effect of the plea of no contest. He contends that

because the court failed to inform him of the effect of a no contest plea, he was not apprised that he could have challenged the validity of the domestic violence statute on appeal if he pled no contest instead of guilty.

{¶11} Before accepting appellant's plea, the trial court engaged in the following colloquy with him:

{¶12} "THE COURT: * * * First of all, do you understand that you do have a right to have a trial in this matter and the trial can be held in front of either a jury or a judge? Do you understand that?

{¶13} "MR. JONES: Yes.

{¶14} "THE COURT: As a matter of fact, you understand we're set for a trial by jury today and you saw the jurors out there ready to go forward; correct?

{¶15} "MR. JONES: Yes.

{¶16} "THE COURT: You understand that if you enter this plea that you are now giving up that right to the jury that you and your attorney demanded; do you understand that?

{¶17} "MR. JONES: Yes.

{¶18} "THE COURT: You understand that at that trial the State of Ohio would have been required to prove your guilt beyond a reasonable doubt. Do you understand that?

{¶19} "MR. JONES: Uh-huh.

{¶20} "THE COURT: You understand that at that trial you would have had the right to subpoena witnesses for you and the right to cross examine any against you. Understand that?

{¶21} "MR. JONES: Yes.

{¶22} "THE COURT: And you understand that at that trial you would have had the right to testify yourself or to remain silent, and had you chosen to remain silent that no one would have been allowed to comment on that fact. Do you understand that, sir?

{¶23} "MR. JONES: Yes.

{¶24} "THE COURT: Finally, you understand that by pleading guilty that you do put yourself on the mercy of the court regardless of what is in this plea agreement and that you could receive up to 180 days in the county jail today and a fine of up to \$1,000 in court costs. Do you understand that?"

{¶25} "MR. JONES: Yes.

{¶26} "THE COURT: Okay. Do you want to waive or give up those rights now and enter a plea of guilt to one count of domestic violence?"

{¶27} " * * *

{¶28} "THE COURT: Is that what you want to do, sir?"

{¶29} "MR. JONES: Yeah, I guess.

{¶30} "THE COURT: Well, you don't have to guess. You have to tell me. Only you know.

{¶31} "MR. JONES: Yes.

{¶32} "THE COURT: Okay. You've had the opportunity to discuss this with your attorney; correct?"

{¶33} "MR. JONES: Yes." (Plea hearing Tr. 3-5).

{¶34} Appellant pled guilty to domestic violence in violation of R.C. 2919.25(A). It is a first degree misdemeanor subject to a sentence of 180 days. R.C. 2919.25(D)(1)(2); R.C. 2929.24(A)(1). Thus, it is a petty offense. Crim.R. 2(D).

{¶35} Crim.R. 11(E) provides: "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty."

{¶36} Some courts have held that a trial court substantially complies with Crim.R. 11(E) by notifying the defendant of the maximum penalties that could result from the plea and the waiver of the right to a jury trial that results from the plea. See *State v. Horton-Alomar*, 10th Dist. No. 04AP-744, 2005-Ohio-1537; *State v. Raby*, 2d Dist. No. 2004-CA-88, 2005-Ohio-3741.

{¶37} But this court has held that since the Ohio Supreme Court's decision in

State v. Watkins, 99 Ohio St.3d 12, 788 N.E.2d 635, 2003-Ohio-2419, the trial court need only engage in the dialogue required by Crim.R. 11(E). *State v. Howell*, 7th Dist. No. 04-MA-31, 2005-Ohio-2927; *State v. Thompson*, 7th Dist. No. 03-MA-247, 2005-Ohio-6448; *State v. Logue*, 7th Dist. No. 02-BE-29, 2004-Ohio-387.

{¶38} In *Watkins*, the defendant pled no contest to a second offense DUI. He appealed arguing the court should have engaged him in a Crim.R. 11(C) colloquy before sentencing him. The appellate court affirmed the conviction. The Ohio Supreme Court found that a conflict existed between the districts and ordered the parties to brief the issue:

{¶39} "Where a defendant charged with a petty offense changes his plea of not guilty to a plea of guilty or no contest, does the trial court comply with Traf.R. 10(D) and Crim.R. 11(E) by informing the Defendant of the information contained in Traf.R. 10(B) or Crim.R. 11(B) or must the trial court engage in a colloquy with the defendant that is substantially equivalent to that required by Crim.R. 11(C) in felony cases?" *Watkins*, 99 Ohio St.3d at ¶9.

{¶40} The Court concluded that, "[w]hen a defendant charged with a petty misdemeanor traffic offense pleads guilty or no contest, the trial court complies with Traf.R. 10(D) by informing the defendant of the information contained in Traf.R. 10(B)." *Id.* at the syllabus. In so holding, the court noted that the Traffic Rules applied to the case since it involved a DUI and that Crim.R. 11(E), which applies to non-traffic misdemeanors involving petty offenses, is identical in all relevant aspects to Traf.R. 10(D).

{¶41} Crim.R. 11(B) is titled "Effect of guilty or no contest pleas" and provides, in relevant part:

{¶42} "With reference to the offense or offenses to which the plea is entered:

{¶43} "(1) The plea of guilty is a complete admission of the defendant's guilt.

{¶44} "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any

subsequent civil or criminal proceeding.”

{¶45} The *Watkins* Court concluded that while a trial court does not have to engage in a Crim.R. 11(C) colloquy with the defendant before accepting his plea to a petty offense, it must inform the defendant of the effect of his plea. *Watkins*, 99 Ohio St.3d at ¶26.

{¶46} Likewise, in *Howell*, supra, we observed that a trial court complies with Crim.R. 11(E) by informing the defendant of the information contained in Crim.R. 11(B), which is entitled “Effect of guilty or no contest pleas.” *Howell*, 7th Dist. No. 04-MA-31, at ¶11, citing *Watkins* at the syllabus. Thus, we concluded that when reviewing whether a trial court complied with Crim.R. 11 (E), we must simply determine whether it informed the defendant of the information in Crim.R. 11(B).

{¶47} Additionally, in *Logue*, supra, and *Thompson*, supra, we reversed the defendants’ convictions and vacated their pleas because the trial court failed to advise them of the effects of their pleas. In *Logue*, the defendant entered a guilty plea to driving under the influence. Three days after pleading guilty, the defendant filed a motion to withdraw his plea alleging that the court never inquired if his plea was made knowingly, intelligently, and voluntarily. The trial court denied the motion and the defendant appealed. We reversed the trial court’s judgment, finding that the trial court never advised the defendant of the effect of his plea as set out in Traf.R. 10(B). We concluded, “In other words, *the court never told appellant that a guilty plea is a complete admission of his guilt*. The court did inform appellant of the possible sentences he faced and the fact that he was entitled to a jury trial. This information, while helpful to appellant, does not satisfy *Watkins* and Traf.R. 10(D).” (Emphasis added.) *Logue*, 7th Dist. No. 02-BE-29, at ¶22. And in *Thompson*, the defendant pleaded no contest to driving under suspension and making a false statement to a police officer. On appeal, he argued that he did not enter his plea knowingly, intelligently, and voluntarily. We reversed the conviction and vacated the defendant’s plea. We found that “[a]lthough the trial court did inform Appellant of certain rights that he was waiving by pleading no contest, the judge did not convey to

Appellant the information contained in Crim.R. 11(B), and it is this information that now satisfies the requirements of Crim.R. 11(E)." *Thompson*, 7th Dist. No. 03-MA-247, at ¶22.

{¶48} In this case, while the trial court went to great lengths to inform appellant of certain constitutional rights he was waiving by pleading guilty, it never informed him of the *effect* of his guilty plea or the *effect* of a no contest plea as is required by Crim.R. 11(B), Crim.R. 11(E), and *Watkins*. Thus, we must conclude that appellant did not enter his plea knowing, voluntarily, and intelligently. Accordingly, appellant's first assignment of error has merit.

{¶49} Appellant's second assignment of error states:

{¶50} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY OVERRULING APPELLANT'S MOTION TO WITHDRAW PLEA OF GUILTY UNDER CRIM. R. 32.1"

{¶51} Given the merit of appellant's first assignment of error, his second assignment of error is now moot.

{¶52} Based on the merit of appellant's first assignment of error, the trial court's judgment is hereby reversed. Appellant's plea is vacated and this case is remanded for further proceedings pursuant to law and consistent with this opinion.

Waite, J., concurs
DeGenaro, J., concurs

APPROVED:


Gene Donofrio,
Presiding Judge

JUDGMENT ENTRY OF CONFLICT

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT

STATE OF OHIO,
PLAINTIFF-APPELLEE,
VS.
JOSEPH W. JONES,
DEFENDANT-APPELLANT.

CLERK OF COURTS
MAHONING COUNTY, OHIO
SEP 20 2006
FILED
ANTHONY WVO, CLERK

CASE NO. 05-MA-69
JOURNAL ENTRY

Plaintiff-appellee, the State of Ohio, has filed a motion asking that we certify a conflict to the Ohio Supreme Court alleging that our decision in *State v. Jones*, 7th Dist. No. 05-MA-69, 2006-Ohio-3636, is in conflict with the Tenth District's decision in *State v. Horton-Alomar*, 10th Dist. No. 04AP-744, 2005-Ohio-1537, and the Second District's decision in *State v. Raby*, 2d Dist. No. 2005-CA-88, 2005-Ohio-3741. Appellee asks that we certify the following issue:

"Whether a trial court properly complies with Crim.R. 11 by notifying a defendant of the maximum penalties that could result from a plea and that the defendant waives his/her jury rights by entering a plea."

Initially, we should note that while on its face this motion may appear untimely, that is not the case. A motion to certify a conflict shall be made "before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later." App.R. 25(A). This court entered judgment in this case on July 13, 2006. However, our judgment was not issued to appellee until July 19, 2006. Therefore, appellee had until July 29, 2006 to file its motion to certify. However, July 29, 2006 was a Saturday. Accordingly appellee had until July 31, 2006 to file its motion. Appellee filed its motion to certify on July 31, 2006. Thus, the motion was timely filed.

In order to certify a conflict to the Ohio Supreme Court, we must find that three conditions are met:

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"First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032. (Emphasis sic.)

These conditions are satisfied here. In this case, we reversed appellant's conviction and remanded the case. Appellant entered a plea of no contest. Before accepting appellant's plea, the trial court informed him of certain rights he was waiving by entering the no contest plea, including the right to a jury trial, and also informed him of the maximum sentence and fine he faced. However, we held that the trial court did not comply with Crim.R. 11(E) because the court never informed appellant of the *effect* of his plea as required by *State v. Watkins*, 99 Ohio St.3d 12, 788 N.E.2d 635, 2003-Ohio-2419, Crim.R. 11(B), and Crim.R. 11(E). *Jones*, 7th Dist. No. 05-MA-69, at ¶48. The effect of a guilty or no contest plea, we stated, is defined in Crim.R. 11(B). Crim.R. 11(B) sets out what the trial court must inform the defendant of before accepting such a plea and does not include the maximum sentence or the right to a jury trial. Instead, it states in pertinent part:

"(B) Effect of guilty or no contest pleas

"With reference to the offense or offenses to which the plea is entered:

"(1) The plea of guilty is a complete admission of the defendant's guilt.

"(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Crim.R. 11(B)(1)(2).

The Tenth and Second Districts reached the opposite conclusion in *Horton-Alomar*, *supra*, and *Raby*, *supra*, respectively. In both cases, the courts held that a trial

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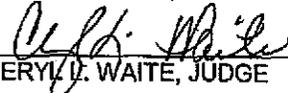
court substantially complies with Crim.R. 11(E) by notifying the defendant of both the maximum penalties faced and the waiver of the right to a jury trial. *Horton-Alomar*, 10th Dist. No. 04AP-744, at ¶10-11; *Raby*, 2d Dist. No. 2005-CA-88, at ¶7, 30.

While we find that a conflict does exist, the question presented by appellee should be more specifically drafted. Therefore, we certify the following question to the Ohio Supreme Court:

"Whether a trial court complies with Crim.R. 11(E) by simply notifying a defendant of the effect of his/her plea as set out in Crim.R. 11(B) or whether the trial court complies with Crim.R. 11(E) by notifying a defendant of the maximum penalties that could result from a plea and that the defendant waives his/her right to a jury trial by entering a plea but does not notify a defendant of the effect of his/her plea."



GENE DONOFRIO, PRESIDING JUDGE



CHERYL D. WAITE, JUDGE

MARY DeGENARO, JUDGE

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CRIM.R. 11

Westlaw

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Crim. R. Rule 11

C

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & Annots)

→ Crim R 11 Pleas, rights upon plea

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

- (1) The plea of guilty is a complete admission of the defendant's guilt.
- (2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.
- (3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases

- (1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.
- (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
 - (a) Determining that the defendant is making the plea voluntarily, with understanding of 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.
 - (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
 - (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.
- (3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's

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right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

**TRAF.R. 10
IN RELEVANT PART**

Westlaw.

OH ST TRAF Rule 10
Traf. R. Rule 10

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C

Baldwin's Ohio Revised Code Annotated Currentness
Ohio Traffic Rules

→ Traf R 10 Pleas; rights upon plea

(A) Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, no contest. All pleas may be made orally. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

- (1) The plea of guilty is a complete admission of the defendant's guilt.
- (2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.
- (3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall proceed with sentencing under Criminal Rule 32.

(C) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses, the court may refuse to accept a plea of guilty or no contest and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel, the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Criminal Rule 44 by appointed counsel, waives this right.

(D) Misdemeanor cases involving petty offenses

In misdemeanor cases involving petty offenses, except those processed in a traffic violations bureau, the court may refuse to accept a plea of guilty or no contest and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Criminal Rule 44(B), (C) and (D) apply to this subdivision.

(E) Refusal of court to accept plea

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.