

In the
Supreme Court of Ohio

STATE OF OHIO, : Case Nos. 2006-1606
 : 2006-1851
 :
 Plaintiff-Appellant, :
 :
 v. : On Appeal from the
 : Mahoning County
 : Court of Appeals,
 JOSEPH JONES, SR., : Seventh Appellate District
 :
 :
 Defendant-Appellee. : Court of Appeals Case
 : No. 05-MA-69
 :
 :

**MERIT BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL MARC DANN
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO**

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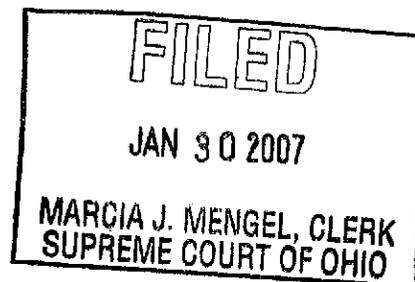


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INTRODUCTION

Every business day, hundreds, perhaps thousands, of people across Ohio plead guilty to misdemeanors. Because the stakes are lower for misdemeanors than they are for felonies, Ohio's Rules of Criminal Procedure Rule 11("Crim. R. 11"), which controls the acceptance of pleas in criminal cases, has a lower bar for plea colloquies in misdemeanor cases than for felony cases. The Seventh District has gone astray by improperly requiring that trial courts recite the elements of Crim. R. 11(B), as well as meeting the requirements of Crim. R. 11(E), when taking a plea in a misdemeanor case. This makes the requirements of a misdemeanor plea colloquy as stringent as—or more stringent than—those for a felony colloquy.

The Seventh District's approach below, if adopted by this Court, will upset the expectations of municipal court judges, prosecutors and defense attorneys across the state with regard to misdemeanor pleas. According to the Seventh District, it is not enough to ensure that a defendant has consulted with counsel and to warn him of the constitutional rights that he is losing and the possible sentence he faces. The Seventh District requires that a trial court use "magic language" to confirm that a defendant knows that a guilty plea is an admission of all elements of the offense, and that the defendant knows the implications of a no contest plea—even when the defendant is *not* making such a plea. That is, the Seventh District orders trial judges to ensure that defendants pleading guilty must be told that a no contest plea is available as an alternative, and the court must ensure that the defendant understands the relative benefits of a no contest plea compared to a guilty plea.

The decision below will act as a "get out of jail free card" for misdemeanor defendants who are unhappy with their sentences after they plead guilty. The Attorney General urges this Court to reverse the Seventh District's decision and to clarify the standards for a plea colloquy in a misdemeanor case. This Court should also firmly reject the Seventh District's holdings that

during such a colloquy a trial court must explain (1) the elements of a no contest plea to a defendant who is pleading guilty and (2) that a guilty plea is an admission to all relevant facts.. Instead, this Court should expressly adopt the Tenth Appellate District's interpretation of Crim. R. 11(E), whose common-sense approach requires that a court inform the defendant of the maximum sentence available and explain the loss of the right to a jury trial. The Tenth Appellate District's description of Crim. R. 11(E) strikes the proper balance between protecting the rights of criminal defendants with the State's interest in finality in criminal cases. The Court should also expressly hold that misdemeanor defendants who seek to withdraw their pleas must prove prejudice. Finally, the Court should apply settled law and conclude that the trial court did not abuse its discretion when it held that there was no manifest injustice in the present case because the defendant here has not shown that he would have changed his plea had the colloquy been done differently.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Marc Dann acts as Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring rigorous and consistent enforcement of Ohio's criminal laws. The conflict between the Seventh and the Tenth Appellate Districts undermines the Attorney General's strong interest in consistency in the acceptance of guilty pleas in misdemeanor cases. This case will affect pleas in cases involving drunk driving, domestic violence and various drug offenses.

STATEMENT OF THE CASE AND FACTS

Joseph Jones, Sr. ("Jones") was accused by his fiancée's children of various acts of violence, including hitting them with an electric fly swatter. As a result, the Austintown Police Department charged Jones with three counts of domestic violence. This crime is a first degree misdemeanor under R.C. 2919.25.

On the day of trial, the prosecutor dismissed two of the three counts of domestic violence because two of the victims had given sworn statements to Jones's attorney recanting their accusations. However, one of the three victims continued to assert that Jones had beaten him. Tr. 6/18/05 at 7.

The prosecutor and Jones agreed that if Jones pleaded guilty to the remaining charge, the prosecutor would recommend that Jones spend only ten days in jail. Jones's attorney said that Jones wanted to "accept responsibility for his actions" to "spare this family any further grief[.]" Tr. 3/11/05 at 5. Jones's trial attorney also explained that Jones was agreeing to the plea to avoid "the cross examination of a young child, his girlfriend's youngest child." Tr. 3/11/05 at 5.

The trial court engaged in a colloquy, informing Jones of the implications of pleading guilty. The trial court explained that it could sentence Jones to up to 180 days in the county jail and impose a fine of \$1,000. Tr. 3/11/05 at 4. The trial court also informed Jones that he was giving up the right to a trial in which:

- a jury would hear the case;
- the prosecution would have to prove his guilt beyond a reasonable doubt;
- he could subpoena and cross-examine witnesses;
- he could testify or choose to remain silent. Tr. 3/11/05 at 3-4.

After confirming that Jones had spoken with his attorney about the plea, the trial court accepted the guilty plea and sentenced Jones to 180 days in the county jail, but suspended all but ten of those days. The court also ordered Jones to: (1) pay a \$150 fine and court costs, (2) remain on reporting probation for twelve months, (3) take anger management classes and (4) undergo a psychological evaluation and counseling "if necessary." Tr. 3/11/05 at 8-9.

After serving his ten days in jail, Jones retained new counsel and sought to withdraw his guilty plea. Doc. R. 48. Jones claimed that all three victims had recanted before trial, and not just two. Jones also claimed that his attorney knew about the recantations, but lied to him, claiming that one witness had not recanted. As a result, Jones asserted that he had ineffective assistance of counsel. The motion does not mention that the plea colloquy violated Rule 11(E).

The trial court held an evidentiary hearing on the motion to withdraw the guilty plea. Even though Jones asserted ineffective assistance of counsel and his trial counsel was apparently available to testify, Jones chose not to call him as a witness. At the beginning of the hearing, the trial court questioned why Jones was not calling the original trial counsel to testify. Jones's new attorney cryptically explained that "It's my motion." Tr. 6/18/05 at 7.

The prosecutor told the court that the third victim had been "interviewed by multiple parties" and had "stuck to his guns" about the abuse. Tr. 6/18/05 at 7. The prosecutor also explained that "when I interviewed the young man, the defense attorney was present. So he understood exactly where we were coming from and what he was faced with with that young man testifying." Tr. 6/18/05 at 7. The plea colloquy was *never* mentioned during the motion hearing.

The trial court overruled the motion to vacate the plea.

Jones argued for the first time on appeal that the plea colloquy was inadequate. The Seventh Appellate District agreed, holding that Jones "did not enter his plea, knowing[ly], voluntarily, and intelligently." *State v. Jones*, 2006-Ohio-3636, ¶48 (7th Dist.). According to the Seventh District, although the trial court went to "great lengths" to affirm that Jones understood the constitutional rights that he was giving up, the trial court did not expressly meet the requirements of Crim. R. 11(E). *Id.* at ¶48. The Seventh District held that the trial court erred by

failing to do two things: (1) explain that a guilty plea is a complete admission of guilt and (2) describe the effect of a no contest plea. *Id.*

The Mahoning County Prosecutor timely appealed. The Court has accepted this case as both a certified conflict and as a discretionary appeal and consolidated the two cases. *See 11/29/06 Case Announcements*, 2006 Ohio 6171.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

Substantial compliance with Crim. R. 11(E) is satisfied where a defendant who pleaded guilty to a misdemeanor was told by the trial court of the maximum criminal penalties for his offense and of the loss of a right to a jury trial.

A. Trial courts need not recite the provisions of Crim. R. 11(B) to satisfy Crim R. 11(E) and accept a misdemeanor plea.

The Court has consistently held that the requirements for a misdemeanor plea colloquy under Crim R. 11(E) are subject to a “substantial compliance” standard. Further, the Rule 11 requirements are combined with constitutional due process requirements. In felony cases, the U.S. and Ohio constitutions require that the defendant be “informed in a reasonable manner at the time of entering his guilty plea of his rights to a trial by jury and to confront his accusers, and his privilege against self-incrimination, and his right of compulsory process for obtaining witnesses on his behalf.” *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419 ¶ 28, quoting *State v. Ballard* (1981), 66 Ohio St.2d 473, 478.

However, “there are no such constitutionally mandated informational requirements for defendants charged with misdemeanors.” *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶28. As the *Francis* Court stated, “A criminal defendant’s right to be informed of a specific nonconstitutional feature of a plea, pursuant to Crim.R. 11, prior to a trial court’s acceptance of the defendant’s plea is subject to review under a substantial-compliance standard.” *State v.*

Francis, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶45, citing *State v. Griggs*, 103 Ohio St. 3d 85, 2004-Ohio-4415, ¶12, in turn citing *State v. Nero* (1990), 56 Ohio St.3d 106, 107. As the *Francis* Court stated “a criminal defendant’s right to be informed of a specific nonconstitutional feature of a plea . . . is subject to review under a substantial compliance standard.” 2004-Ohio-6894 at ¶ 45. Therefore, a plea in a misdemeanor case—which has no constitutionally mandated informational requirements—requires only “substantial compliance” with Crim. R. 11(E).

- 1. The Tenth District correctly applies the “substantial compliance” standard by requiring only that the defendant be told of the maximum penalties and the loss of the right to jury trial.**

Ohio’s appellate courts are currently split, with the Seventh and the Tenth Districts on opposite sides regarding the amount of explanation that a trial court must give the defendant before accepting a guilty plea in a misdemeanor case. The Tenth District holds that Crim. R. 11(E) requires, at a minimum, that the trial court (1) inform the defendant of the maximum penalties and (2) by pleading guilty, the defendant will lose the right to a jury trial. *State v. Horton-Alomar* (10th Dist.), 2005-Ohio-1537:

A trial court substantially complies with Crim.R. 11(E) 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.

Id. at ¶10 (citing *City of Columbus v. Simmons* (10th Dist.), 1999 Ohio App. Lexis 6503).

The Seventh District has chosen a much more stringent standard—a trial court must explain not only the elements found in Crim. R. 11(E), but must explain *all* of the elements of Crim. R. 11(B). *Jones*, 2006-Ohio-3636, ¶46 (citing *State v. Howell*, (7th Dist.) 2005-Ohio-2927). There are three elements under Crim. R. 11(B): (1) a “plea of guilty is a complete admission of the defendant’s guilt,” (2) a no contest plea is an admission of the truth of the allegations, and (3) that once a plea is accepted, the court can sentence the defendant. Specifically, the Seventh District has held that a trial court must explain subsection two—the no contest plea elements—

even when the defendant is pleading guilty and not no contest. *Jones*, 2006-Ohio-3636, ¶48. For the reasons set forth below, the Tenth District’s approach is the better one.

2. The Seventh District misinterprets *State v. Watkins* and erects an overly rigid rule for misdemeanor pleas.

The Seventh District has based their rule on a misinterpretation of *Watkins*: “When 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)” *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, syllabus.¹

However, the Seventh District misreads *Watkins*. The Seventh District held here that a trial court must explain the elements of *both* Crim. R. 11(E) and (B) before accepting a misdemeanor plea. *Watkins* held that if a trial court explains the provisions of Crim. R. 11(B), then it has automatically met the requirements of Crim. R. 11(E)—but *Watkins* did *not* hold that this is the *only* way to comply with Crim. R. 11(E).

The Seventh District’s overly rigid approach here is inconsistent with the *Francis* Court’s approval of the more flexible “substantial compliance” standard. This Court should reject the lower court’s attempt to rigidly apply Crim. R. 11(E) and clarify that there are many ways for a trial court to perform a colloquy with a misdemeanor defendant that satisfy the “substantial compliance” standard. The failure to utter a catechism should not warrant reversal of an otherwise valid plea.

Nor does the Seventh District’s requirement fit with the long-standing presumption that counsel have adequately “inform[ed] a defendant of the advantages and disadvantages of a plea agreement[.]” *Libertti v. United States* (1995), 516 U.S. 29, 50-51. The vast majority of

¹ Although *Watkins* involves Traf. R. 10(D) and (B). These provisions “largely mirror” Crim. R. 11(E) and (B). *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶13.

misdemeanor pleas involve defendants who are represented by counsel. Courts routinely rely on counsel to explain the implications of the various pleas to the defendant. *Stumpf v. Bradshaw* (2005), 545 U.S. 175, 183. This Court has recognized that “in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.” *State v. Carter* (1979), 60 Ohio St.2d 34, 38-40 (quoting *Henderson v. Morgan* (1976), 426 U.S. 637, 647).

Counsel’s key role in advising a client strongly suggests that an overly strict approach is misguided. The courts presume that an attorney has adequately explained the advantages and disadvantages of a plea agreement. With this presumption, it makes little sense to erect overly strict requirements for the trial court during colloquies.

Finally, the Seventh District’s approach runs contrary to *State v. Griggs*, 103 Ohio St. 3d 85, 2004-Ohio-4415, ¶19. In *Griggs*, this court did not grant relief in a felony case, despite a failure to state that a guilty plea is an admission of all facts. The *Griggs* court explained that such an omission is deemed to be non-prejudicial if the defendant did not assert her innocence during the plea colloquy.

3. Trial courts need not instruct on pleas that are not at issue in misdemeanor colloquies, because to do so would cause confusion and undermine the finality of guilty pleas.

The Seventh District requires that trial courts instruct a misdemeanor defendant about the elements of a no contest plea, even if the defendant is pleading guilty. The Seventh District’s approach runs contrary to the two balancing principles that this Court recognized in *State v. Ballard* (1981), 66 Ohio St.2d 473, 478: (1) to ensure that the defendant knows what he is waiving and (2) to ensure “the interest of society in the finality of guilty pleas.” Reciting irrelevant information is more likely to confuse criminal defendants than to help them. A defendant who is pleading guilty might incorrectly believe that her plea will have elements of a

no contest plea. For example, a defendant pleading guilty might mistakenly believe that her plea “shall not be used against the defendant in any subsequent civil or criminal proceeding.” Crim. R. 11(B)(2). Even literate and intelligent criminal defendants might be confused by including this additional information.

Moreover, mandating specific requirements in the plea colloquy will increase the number of misdemeanor defendants who can withdraw their guilty pleas simply because of a trial judge’s technical error. The rule will undermine the “interest of society in the finality of guilty pleas.” *Ballard*, 66 Ohio St.2d at 478. As the United States Supreme Court has explained, “society and the individual criminal defendant have [an interest] in insuring that there will at some point be the certainty that comes with an end to litigation.” *Sumner v. Mata* (1981), 449 U.S. 539, 550-551 n. 3 (quotation and punctuation omitted). This interest is particularly well-defined when there has been a guilty plea which “usually rest[s], after all, on a defendant’s profession of guilt in open court, and [is] indispensable in the operation of the modern criminal justice system” *United States v. Dominguez Benitez* (2004), 542 U.S. 74, 82-83.

This Court should reject the Seventh District’s approach because it will invite confusion among defendants and reversals based on technicalities.

4. This Court should adopt the Tenth District’s interpretation of the “substantial compliance” standard for Crim. R. 11(E).

The Tenth District has identified an approach that provides a good balancing of the twin goals identified in *Ballard*: informing the defendant of what he is pleading to and ensuring finality of guilty pleas. See *Ballard*, 66 Ohio St.2d at 478. The Tenth District held that a trial court satisfies “substantial compliance” with Crim. R. 11(E) by notifying a 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. Horton-Alomar* (10th Dist.), 2005-Ohio-1537 at ¶10 (citing *City of Columbus v. Simmons* (10th Dist.), 1999 Ohio App. Lexis 6503).

Crim. R. 11(E) has only one basic requirement relating to colloquies: that the court explain the effect of the relevant pleas. By stating the maximum sentence, the trial court will “inform[] the defendant of the effect of a plea of guilty [and] no contest[.]” The effect of such a plea is that the defendant will face a criminal penalty—usually a jail term and a fine. Explaining to a defendant that he may spend time in jail and pay a fine impresses on him the effect of his plea.

And by describing the loss of a right to jury trial, the trial court also informs the defendant of the effect of a not guilty plea, so it meets the requirement of Crim. R. 11(E). Although the Constitution does not require that misdemeanor defendants know about their right to a jury trial,² learning that they are losing that right is also a simple and easy way to explain the “effect of a plea of ... not guilty.” Crim. R. 11(E). Explaining that a defendant has the right to a trial by jury is simplest and clearest way to explain to an ordinary citizen that he is not guilty unless convicted. By explaining to a defendant that he has a right to a jury trial (and is waiving that right), the vast majority of ordinary citizens will have a clear understanding of a not guilty plea.

The Tenth District’s approach is far superior to the Seventh’s, as it will inform criminal defendants of the key facts they need to know before pleading guilty, without the excessive rigidity and unnecessarily high standard required by the holding below.

² Indeed, under United States Supreme Court case law, misdemeanor defendants are not even entitled to a jury trial. “Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses.” *Scott v. Illinois* (1979), 440 US. 367, 371. trial if they otherwise qualify as petty offenses.” *Scott v. Illinois* (1979), 440 US. 367, 371.

B. The court below failed to apply the prejudice requirement.

1. The standards of prejudice apply to Crim. R. 11(E).

The Court has explained that “[a] defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108. That is, but for the trial court’s error, a defendant would not have accepted the plea. *State v. Stewart* (1977), 51 Ohio St. 2d 86, 93.³

The Court has never expressly addressed whether a misdemeanor defendant—as opposed to a felony defendant—seeking to withdraw a plea under Crim. R. 11(E) must prove prejudice. However, the *Nero* Court did not distinguish between felony defendants and misdemeanor defendants; it merely referred to “a defendant.”

Nor is there any logical reason to dispense with the prejudice requirement for misdemeanor defendants. The interest in finality of criminal pleas counsels for a proof of prejudice in withdrawing misdemeanor pleas even more strongly than in felonies. Misdemeanors are generally less serious crimes than felonies, and involve lesser sentences. A judge’s duty during a plea colloquy is “graduated according to the seriousness of the crime with which the defendant is charged.” *State v. Watkins* (2003), 99 Ohio St.3d 12, 16. In other words, a judge in a felony case has to provide more guidance than a judge who is handling a misdemeanor case. *Id.* at 17. The harm of mistakenly accepting an erroneous misdemeanor plea is therefore correspondingly less than for a felony. Simply put, finality dictates that it should be harder to vacate a guilty plea for a misdemeanor than for a felony. At a minimum, it should be equally hard to vacate for felonies

³ This requirement parallels the requirements for prejudice found in federal court. For federal convictions, a defendant must prove that “but for the error, he would not have entered the plea.” *United States v. Dominguez-Benitez*, (2004) 542 U.S. 74, 83.

and misdemeanors. But making it easier to vacate a misdemeanor, as the court below does, surely cannot be right.

If a misdemeanor defendant did not have to prove prejudice, the courts would be full of misdemeanants wanting to withdraw pleas, thus undermining finality. Therefore, to support the interest in finality, a misdemeanor defendant wishing to withdraw a plea must also prove that, but for the trial court's error, he would not have entered the plea. *Stewart*, 51 Ohio St. 2d at 93.

2. Jones has not shown prejudice.

Jones has not alleged or shown that he would not have pleaded guilty if the court had informed him of the effect of a no contest plea or if the court had described the elements of the offense. In Jones's motion to vacate his plea, Jones did not even allege that there were any failures in the colloquy—much less that he would have not accepted the guilty plea had the judge conducted the colloquy differently. Instead, Jones alleged that his attorney lied about how a potential witness would testify. See Doc. R. 48.

To prevail on the argument that he would have taken a plea bargain if told of a no contest plea, Jones must show both that (1) he would have taken a no contest plea if he had known of that option and that (2) the prosecutor had agreed to such a plea. Jones did neither, presenting no evidence about the colloquy at all. During his testimony at the waiver hearing, neither Jones nor his attorney mentioned the plea colloquy. Jones never argued that he would have backed out of his plea if the judge had performed the plea colloquy differently, nor that the prosecutor had offered a no contest plea.

The trial court held a hearing on Jones's motion to withdraw. During that hearing, Jones testified, emphasizing that his plea was based on two factors: (1) the danger that his fiancée's youngest child would testify against him and (2) that if he did not take the plea, he would face 180 days in jail, rather than just ten days.

He came in the room in there, and basically said that A.B.'s⁴ sticking to his story, which I didn't believe he was, and I knew was a lie. And he basically said that you've got a choice; you've got two minutes to make it. The bottom line is, Joe, if you take the plea, you get ten days. If you go with the trial, and you get found guilty, you get 180 days.

Tr. 6/18/05 at 12. Jones decided to take the plea because a longer sentence would dramatically hurt his career. "I took the ten days. I wasn't going to take 180, lose my job, and everything I've worked for in the last 20 years." Tr. 6/18/05 at 14. Indeed, at the colloquy, defense counsel emphasized that Jones had a new job and tried to arrange for Jones to serve his abbreviated sentence on his days off. Doc. R. Tr. 3/11/05 at 8. The court permitted contact between Jones and the victims because the juvenile court was contemplating returning the victims to their mother and Jones. Tr. 3/11/05 at 8-9.

Not only did Jones *not* challenge the plea colloquy, he expressly stated that he understood the implications of what he was doing. Jones admitted, at the hearing to withdraw his guilty plea, that he thought that the "plea was knowingly and voluntarily made." Tr. 6/18/05 at 14. Simply put, the motion hearing is either silent on the key facts necessary for his current legal argument, or actively cuts against his current assertion that he did not know what he was doing.

This Court should reverse the Seventh District's decision because Jones has not shown prejudice from the plea colloquy or from the trial court's application of Crim. R. 11(E).

3. Even if Jones could show prejudice, the correct remedy is a no contest plea.

Even assuming that Jones could withdraw his guilty plea, the appropriate remedy is *not* to permit Jones to plead not guilty. The major error according to the Court below was that the trial court did not discuss the elements of a *no contest* plea. Logically, the only available remedy for such an error is to permit Jones to change his plea to no contest and then be resentenced

⁴ The Attorney General uses the children's initials here to protect their identities.

accordingly. Jones would lose the benefit of the bargain that he had with the prosecutor—that the prosecutor would recommend only a ten day sentence if Jones pleaded guilty.

In addition, allowing Jones to change his plea to no contest is more consistent with the goal of finality in criminal pleas.

C. The trial court here did not abuse its discretion by denying Jones’s motion to withdraw his guilty plea.

1. The trial court here correctly used the “manifest injustice” rule for reviewing a motion to withdraw a guilty plea.

As required by Crim. R. 32.1, the trial court correctly looked for “manifest injustice” when Jones moved to withdraw his guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, syllabus paragraph one. On appeal, the Seventh District should have—but did not—apply an abuse of discretion standard when Jones failed this standard, because the trial court has wide latitude to resolve “the good faith, credibility and weight of the movant’s assertions in support of the motion.” *Id.* at syllabus paragraph two.

2. In the original colloquy, the trial court explained the effects of Jones’s guilty plea and the rights that Jones was forgoing.

The trial court’s plea colloquy substantially complied with the requirements of the Crim. R. 11(E). Crim R. 11(E) states in relevant part:

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

Crim. R. 11(E). A “petty offense” occurs when there is a misdemeanor that will *not* involve confinement for more than six months. Crim. R. 2(D). *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶11 (applying identical provision in traffic rules).

The trial court's colloquy informed Jones of the effect of his plea—that he was throwing himself on the mercy of the court, was admitting his guilt and that Jones could face up to 180 days in jail, along with a \$1,000 fine:

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?

MR. JONES: Yes.

Tr. 3/11/05 at 4. The trial court spoke in plain English to identify the key implication of a guilty plea—that Jones was facing time in the county jail and a substantial fine.

Moreover, the trial court explained the effect of the plea that Jones was giving up—the not guilty plea. The trial court detailed the constitutional and statutory rights that Jones had if he continued to plead not guilty—and what the rights he would lose.

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?

MR. JONES: Yes.

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?

MR. JONES: Yes.

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?

MR. JONES: Yes.

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?

MR. JONES: Uh-huh.

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?

MR. JONES: Yes.

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?

MR. JONES: Yes.

Tr. 3/11/05 at 3-4.

In light of the fact that the trial court explained the effect of a guilty plea and the rights that Jones gave up, the trial court did not abuse its discretion in accepting this plea. The trial court substantially complied with the requirements of Crim. R. 11(E).

Admittedly, the trial court did not mention the possibility of a no contest plea. As noted above, the Seventh District erred by requiring the recitation of all elements of Crim. R. 11(B). But even if this Court rejects that argument, the record does not justify granting relief in Jones's case.

The current record provides no evidence of harm from the trial court's "failure" to describe the mechanics of a no-contest plea. Jones had the opportunity to answer two key questions that are vital for him to receive relief. He chose not to do so. Would the prosecutor have continued to recommend only a ten day sentence if Jones had pled no contest, rather than guilty? Would Jones have pled no contest if such a plea had been offered? Jones chose not to answer these questions at the motion hearing. Indeed, the words "no contest" never even appear in the hearing on Jones's motion to vacate his plea. The record also does not reflect the issue of a guilty plea being an admission of all facts. And, under *Griggs*, any error would be non-prejudicial because Jones did not assert his innocence at the colloquy. *Griggs*, 2004 Ohio 4415, ¶ 19. On the contrary, his attorney said that Jones was "in order to spare this family any further grief, he's agreed to enter this plea today and accept responsibility for his actions in this case." Tr. 3/11/05 at 5. There can

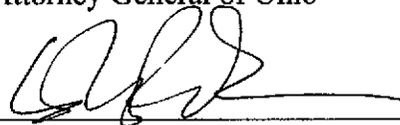
hardly be a violation of Crim. R. 11(E) for failing to instruct on a plea where the defendant did not take the opportunity to develop the record on facts critical to that claim. The trial court did not abuse its discretion in concluding that Jones failed to prove that there was manifest injustice, and denying his motion to withdraw.

CONCLUSION

For the above reasons, this Court should reverse the decision of the Seventh District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Marc Dann in Support of the State of Ohio was served by U.S. mail this 30th day of January 2007, on the following counsel:

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