

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
 :

REPLY BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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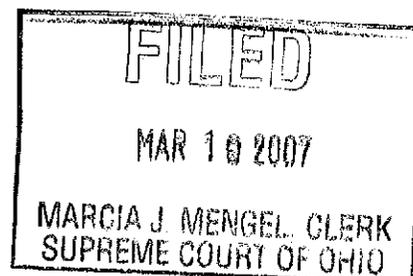


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INTRODUCTION

This Court has consistently held that the requirements for a misdemeanor plea colloquy under Crim. R. 11(E) are subject to 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. Contrary to that consistent holding, the Seventh District and Appellee Jones would have this Court adopt a rigid and formulaic reading of Crim. R. 11.

Specifically, Jones erroneously advocates an interpretation of Crim. R. 11(E) that requires a trial judge taking a plea for a misdemeanor to provide a more detailed colloquy than he would for a felony plea. Under Jones’s and the Seventh Circuit’s interpretation, it will be easier to vacate a misdemeanor plea than a felony plea because misdemeanor defendants, unlike felons, will not have to show that their decision to plead guilty was connected with an identified trial court error. Finally, under the overly-rigid Seventh District standard, misdemeanor defendants (but not felony defendants) need to be told the details of no contest pleas, even when they are pleading guilty.

In other words, mandating a rigid reading of Crim. R. 11(E) is tantamount to a “get out of jail free” card for a misdemeanor defendant if a judge does not follow a specific catechism in explaining the plea before he accepts it. This Court can avoid that result in three ways: (1) by following its previous holdings that the requirements of Crim. R. 11(E) are *not* rigidly formulaic, but that the standard is substantial compliance, (2) by adopting the Tenth District’s interpretation of Crim. R. 11(E) and (3) by enforcing the prejudice requirement.

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. The requirements of Crim. R. 11(E) should be read in the disjunctive for misdemeanor pleas because “the sense requires it.”

As previously explained, this Court has consistently held that the requirements for a misdemeanor plea colloquy under Crim. R. 11(E) are subject to a “substantial compliance” standard. Defendants charged with misdemeanors, unlike those charged with felonies, do not have a constitutional right to the detailed information given to felony defendants when submitting a plea. *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶28; *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. This Court has also long been wary of requests to require “a ritualistic incantation of an admonishment which is not constitutionally guaranteed[.]” *State v. Stewart* (1977), 51 Ohio St. 2d 86, 93. Therefore, a plea in a misdemeanor case—which has no constitutionally mandated informational requirements—requires only “substantial compliance” with Crim. R. 11(E).

The exact wording of Crim. R. 11(E) links the three possible pleas using the word “and.” That is, Crim. R. 11(E) requires the trial court to inform the “defendant of the effect of the plea of guilty, no contest, and not guilty.” However, this requirement may reasonably be read as disjunctive rather than conjunctive for misdemeanor pleas. Both R.C. 1.02 and established rules of interpretation support the disjunctive for misdemeanor pleas.

Under R.C. 1.02(F), this Court is “permitted to interpret [the word ‘and’] in the disjunctive ‘if the sense requires it.’” *Clagg v. Baycliffs Corp.* (1998), 82 Ohio St.3d 277, 280 (quoting R.C.

1.02(F)). Because a misdemeanor defendant does not have the right to the informational colloquy that a felony defendant does, this Court has reasonably interpreted “and” as disjunctive when it held that a misdemeanor colloquy is subject to a “substantial compliance” requirement. This is a situation where “the sense requires” that this Court treat the three pleas in the disjunctive.

B. The trial court here substantially complied with Crim. R. 11(E) by informing Jones of the maximum possible sentence and the loss of the right to a trial by jury.

The trial court here substantially complied with Crim. R. 11(E), even if this Court does not interpret Crim. R. 11(E) in the disjunctive. The trial court explained the maximum possible sentence and explained the constitutional rights the defendant was giving up. Under the Tenth District’s cogent analysis, this is all that is necessary. *State v. Horton-Alomar* (10th Dist.), 2005-Ohio-1537.

As noted before, telling a criminal defendant that his plea may result in jail time is a far better explanation of the effect of a plea of guilty or no contest than reciting a formulaic mantra about the effects of various other pleas. And telling a criminal defendant that he is losing his right to a jury trial is the clearest and easiest way to articulate the effect of a not guilty verdict.

In this case, Jones was informed that the court could sentence him 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 guilt beyond a reasonable doubt, he could subpoena and cross-examine witnesses and he could testify or remain silent. Tr. 3/11/05 at 3-4. The judge also confirmed that Jones had spoken with his attorney about the plea.

Thus, the trial court in this case substantially complied with Crim. R. 11 (E), as required by this Court’s precedents.

C. A trial court substantially complies with the requirements of Crim. R. 11(E) if it meets the requirements of Crim. R. 11(C).

This Court has explained that a trial judge’s duty during a colloquy is “graduated according to the seriousness of the crime with which the defendant is charged.” *Watkins*, 99 Ohio St.3d at 16. Logically, if a trial court has explained all of the constitutional and other rights that a defendant has under Crim. R. 11(C), the trial court will have given substantial guidance to a criminal defendant. Thus, a trial court will *always* meet the requirements of Crim. R. 11(E) if it has complied with the requirements of Crim. 11(C) for a misdemeanor plea.

Put another way, a trial court should not be required to spend more time performing a plea colloquy with a person pleading guilty to littering¹ than for someone pleading guilty to a charge of murder, rape, aggravated assault or arson.

Jones implicitly admits that the colloquy for his plea would have satisfied the requirements of Crim. R. 11(C). Brief at 15-16. Indeed, the transcript of the plea colloquy in this case would not look out of place for a felony case. The court below acknowledged that “the trial court went to great lengths to inform appellant of certain constitutional rights he was waiving by pleading guilty[.]” *State v. Jones* (7th Dist.), 2006-Ohio-3636, ¶48.

A trial court substantially complies with Crim. R. 11(E) if it explains the rights a misdemeanor defendant is giving up under Crim. R. 11(C), and therefore the trial court here substantially complied with the requirements of Crim. R. 11(E).

D. The prejudice requirement should be applied to both felonies and misdemeanors.

Both this Court and the United States Supreme Court have required that a defendant show prejudice before withdrawing a guilty plea. The purpose of the prejudice requirement is to encourage defendants to object *at trial* if there is an error during a plea colloquy and to limit

¹ Littering is a third degree misdemeanor. R.C. 3767.32 and 3767.99(C).

relief where the error was actually relevant to their case. In evaluating the federal standards, the United States Supreme Court expressly stated that the “burden should not be too easy for defendants” that did not timely object to an error during the colloquy. *United States v. Dominguez-Benitez* (2004), 542 U.S. 74, 82. Requiring a showing of prejudice will “encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.” *Id.* at 82. Trial counsel have a duty to “call a Rule 11 failing to the court’s attention.” *United States v. Vonn* (2002), 535 U.S. 55, 73 n.10. This Court has likewise required a contemporaneous objection to preserve error under Crim. R. 11. *See, e.g., State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶90 (failure to object to Crim. R. 11(F) error waived); *State v. Spivey*, (1998) 81 Ohio St.3d 405, 409 (defendant waived argument that colloquy regarding “the nature and circumstances of the no contest plea could have been more thorough”).

The standards for applying prejudice identified by this Court for felony charges apply equally well to misdemeanors, despite Jones’s argument to the contrary. Brief at 26, n 13. Indeed, this case demonstrates how a failure to object to a supposed error might upset the interests of finality for both the system of justice and the victims. Jones was charged with domestic violence for assaulting the children of his fiancée. Although the record is not entirely clear, the juvenile court apparently refused to return the children from foster care to their mother even after Jones “accept[ed] responsibility for his actions.” Perhaps facing the possibility that they would not return home, each of the three children recanted their allegations—two before trial and one after.

Even if the victims in this case were not subjected to arm-twisting, there is incentive for such coercion in other cases if the standard for withdrawing a plea does not include a requirement that the defendant show prejudice.

E. Jones has failed to demonstrate prejudice.

Jones had a full hearing on his motion to vacate the plea, but failed to present any facts relating to his argument that the colloquy was insufficient. Jones also should have but did not raise all of his legal challenges to his colloquy during that hearing. Indeed, during the evidentiary hearing, Jones did not claim that he misunderstood the colloquy. He admitted that he thought that his “plea was knowingly and voluntarily made.” Tr. 6/18/05 at 14. Despite Jones’s protestations to the contrary, the record is devoid of any indication that Jones would have pleaded no contest had the judge discussed it with him.

On the contrary, the record strongly suggests that a different colloquy would have made no difference. Had Jones pleaded no contest, he would have lost the benefit of the bargain that he had with the prosecutor—the prosecutor’s recommendation for a ten-day sentence. Jones testified that it was this recommendation that sold him. “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. Based on this statement, it is implausible that Jones would have ever pleaded no contest and risked a 180-day jail sentence. The evidence strongly suggests that the colloquy issue is a post-hoc rationalization.

Moreover, the failure by a trial court to instruct that a guilty plea is complete admission of guilt is deemed to be non-prejudicial as a matter of law. In *State v. Griggs* (2004), 103 Ohio St.3d 85, this Court established that “[a] defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt.” *Id.* at syllabus. As a result, “a court’s failure to inform the defendant of the effect of his guilty plea as required by Crim. R. 11 is presumed not to be prejudicial.” *Id.* at syllabus.

Jones attacks *Griggs* by incorrectly suggesting that it applies only where a defendant expressly accepts guilt in a felony case. However, the syllabus law imposes no such limits.

Indeed, the *Griggs* Court expressly states that its holding applies to “resolve the effect of a court’s failure to advise a criminal defendant that a guilty plea is a complete admission of guilt, pursuant to Crim. R. 11(C) (2), (D), and (E).” *Id.* at ¶2.

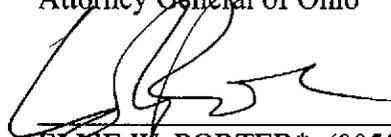
To withdraw his plea, Jones must show that errors in the colloquy would have changed his mind about his guilty plea. He has not done so. His motion to vacate the plea must fail.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

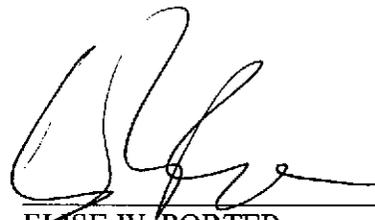
I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Marc Dann in Support of the State of Ohio was served by U.S. mail this 19th day of March 2007, on the following counsel:

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