

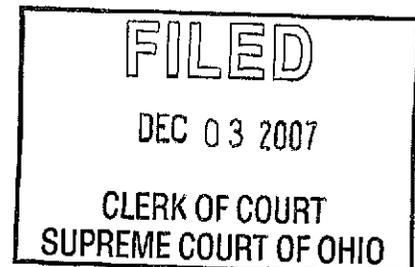
IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,) CASE NO.: 2006-1606
) 2006-1851
)
Plaintiff-Appellant,)
) On appeal from the Mahoning County
vs.) Court of Appeals, Seventh Appellate
) District
)
JOSEPH W. JONES, SR.,)
) Court of Appeals Case No. 05-MA-69
)
Defendant-Appellee.)

APPLICATION FOR RECONSIDERATION

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APPLICATION FOR RECONSIDERATION

Appellee, Joseph W. Jones, Sr., pursuant to S. Ct. R. XI, Section 2, respectfully requests reconsideration of this Court's judgment on the merits filed November 21, 2007. Appellee respectfully submits that the decision is contrary to the plain meaning of Crim. R. 11(E) and will work a terrible injustice upon many defendants in future cases. Specifically, the Court's decision erodes the rights of persons charged with petty offenses to know the options and consequences of plea decisions and further places an undue burden upon them to exercise rights (such as making an *Alfred* plea or compelling a trial court to decide a pretrial motion) in order to be able to challenge a trial court's non-compliance with Crim. R. 11(E)'s requirements. Rather than excuse failure to comply with unambiguous requirements set out in the Ohio Rules of Criminal Procedure, or create yet another exception to what should be (and if Crim. R. 11(E) is read as it should be) is a mandatory duty, this Court should adopt a bright-line rule which says that that non-compliance with Crim. R. 11(E)'s requirements as written is reversible error. Such a rule would level the playing field, ensure strict compliance, and would avoid even more litigation about whether a trial court "substantially complied" with the rule or whether the "totality of the circumstances" warrants an exception thereto.

1. CRIM. R. 11(E) IS CLEAR THAT THE EFFECTS OF ALL THREE PLEAS SHOULD EXPLAINED TO A DEFENDANT CHARGED WITH A PETTY OFFENSE PRIOR TO ACCEPTING ONE OF SUCH PLEAS.

In this Court's slip opinion, a bare majority of this Court interpreted Ohio R. Crim. Proc. 11(E), despite its mandatory and unambiguous language, to require that a defendant only be advised of the effect of the plea actually being made, rather than the three options available to him or her and specified in the rule (guilty, not guilty, and no contest). As the three justices in

dissent correctly noted, the rule is clear and unambiguous as to what it requires and it should be enforced as written. *State of Ohio v. Jones*, Slip. Opinion No. 2007-Ohio-6093, ¶ 62.

The fact that the rule expressly requires that the effect of the three pleas be explained to a defendant in the Appellee's position is hardly difficult as a practical matter or disingenuous. Rather, the rule as written is perfectly sensible since it is far more likely in a case such as this one that the defendant would not know or appreciate the differences between the pleas. This is not an inconsiderable point since many consequences flow from a guilty plea that do not flow from a no contest plea.

With due respect, the majority misread the plain meaning of Crim. R. 11(E) and confused it with the language in Crim. R. 11(C). Crim. R. 11(C) applies to pleas in felony cases only and, in that context, the rule requires that the effect of the actual plea being entered be described. In such cases, it is nearly unheard of for a defendant to not be represented by counsel and, moreover, a much more detailed colloquy is required with the defendant to ensure that his or her plea has been entered knowingly, intelligently, and voluntarily.

2. THE FACT THAT APPELLEE WAS NOT TOLD OF THE EFFECT OF HIS PLEA SHOULD HAVE RESULTED IN REVERSAL WITHOUT MORE.

It appears that six of seven members of this Court agreed that Appellee was not told of the effect of the actual plea Appellee entered in this case. *Jones, supra* at ¶ 51 (Justices Lanzinger, Pfeifer, and O'Donnell) and ¶ 72 (Chief Justice Moyer and Justices O'Connor and Cupp) (Justice Lundberg Stratton believed that Appellee was told of the "effect of his plea." *Id.* at ¶ 60). However, the majority found that despite the Trial Court's failure to "scrupulously adhere" to the requirements of Crim. R. 11(E), Jones did not suffer any prejudice as a result. *Id.*

at ¶ 52.

We respectfully submit that the majority erred in its reasoning. The prejudice that resulted from the Trial Court's error was that Jones entered a plea which deprived him of virtually any appellate review. Ohio R. Crim. Proc. 12(I), entitled "Effect of plea of no contest" provides that the "plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence." Jones made a pretrial motion to dismiss the charges on constitutional grounds. Had the Trial Court properly advised him of the effect of the plea options available, Jones would have preserved his right to challenge the constitutionality of the statute and any other defects in the Trial Court's proceedings. The majority notes that Jones did not "allow" the Trial Court to rule on his motion to dismiss. However, it was never explained to Jones that he had other options and what the effect of those options would have been. This is the *raison d'être* of requirement of Crim. R. 11(E) that the effect of all three plea options be explained.

By entering a plea of guilty, as opposed to no contest, Jones also exposed himself to liability for tort claims from the child(ren) he allegedly assaulted with the "bug zapper." This was a point that Justice Pfeiffer expressly made during oral argument.

Crim. R. 11(B)(2) expressly provides that "[t]he 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. In contrast, a plea of guilty is admissible in

subsequent litigation. See, Ohio R. Evid. 410(A)(2).¹ A plea of no contest, however, is not admissible as an admission of a party.

The majority concluded that Jones did not assert his innocence during the colloquy with the Trial Court. *Id.* at ¶ 54. The record of that colloquy – quoted in the majority opinion – clearly shows that Jones was very troubled by entering the plea, saying “Yah, I guess” when he was asked if he wanted to enter the plea. *Id.* at ¶ 45.

The majority relies upon *State v. Griggs*, 103 Ohio St.3d 85, 814 N.E.2d 51 for the proposition that “failure to comply with non-constitutional rights [such as the information in Crim. R. 11(B)(1)] will not invalidate a plea unless the defendant suffered prejudice.” *Id.* at ¶ 52. This should not be the law, particularly in relation to petty misdemeanor charges where lawyers are frequently not present. Rather, there should be a bright-line rule that if the effect of the plea is not described as Crim. R. 11(B)(1) provides, then the plea should be presumed to have not been made knowingly, intelligently and voluntarily. This is the only fair outcome in a case such as this.

More specifically, a defendant such as Jones here should not be required to make an *Alford* plea, otherwise proclaim his innocence, or assert that the statute under which he was convicted is invalid and unconstitutional in order to challenge a trial court’s failure to comply with a criminal rule of procedure which unambiguously informs the trial court of what it must do in order for the plea to be considered knowingly, voluntarily, and intelligently made.

The *Griggs* case relied upon *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. In

¹. Rule 410 “gives effect to the principal traditional characteristic of the nolo [no contest] plea, i.e. avoiding the admission of guilt which is inherent in pleas of guilty.” Advisory Committee’s Note, Fed. R. Evid. 410.

the latter case, a trial court, in violation of Crim. R. 11(C)(2)(a) failed to tell the defendant that he was ineligible for probation. While this Court said that “literal compliance with Crim. R. 11 is certainly the preferred practice,” it found that vacation of the defendant’s guilty plea was not required if the trial court substantially complied with the rules.” *Id.* at 108, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93, 364 N.E.2d 1163. This Court has said that “substantial compliance” means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Stewart, supra; State v. Carter* (1979), 60 Ohio St.2d 34, 38, 396 N.E.2d 757, 760, *certiorari denied* (1980), 445 U.S. 953, 100 S.Ct. 1605, 63 L.Ed.2d 789.

The record is clear in this case that Appellee did not subjectively understand the implications of his plea or the rights he was waiving. Thus, the contention that the trial court substantially complied with its obligations under Crim. R. 11(E) is simply unsupportable.

Appellee respectfully requests that the Court reconsider its ill-advised holding in this case and, instead, adopt a bright-line rule which requires that, at the least, a trial court explain the effects of the pleas available to defendants charged with petty offenses so that they can make knowing, voluntary, and intelligent pleas in such cases.

CONCLUSION

Appellee Joseph W. Jones, Sr. respectfully urges this Court to reconsider its holding for each of the reasons stated.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Appellee Joseph W. Jones, Sr.'s Application for Reconsideration was served by first class U.S. Mail, postage prepaid, upon the following counsel of record on this 3rd day of December 2007:

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