

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

AARON K. RICHEY,

Appellant.

Supreme Court Case No.:

09-1423

On Appeal from the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals No:

08AP-923

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT AARON K. RICHEY

YEURA R. VENTERS (0014879)
Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
614.462.3194

and

JOHN KEELING (0014860)
Assistant Public Defender

Counsel for Appellant

RICHARD C. PFEIFFER, JR. (0021982)
Columbus City Attorney
375 South High Street, 17th Floor
Columbus, Ohio 43215
614.645.8876

and

MELANIE R. TOBIAS (0070499)
Assistant Prosecuting Attorney

Counsel for Appellee

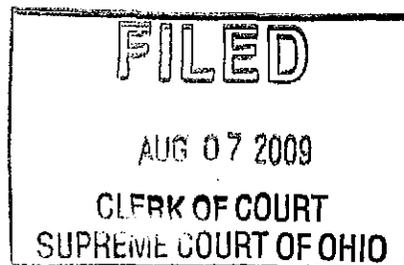


TABLE OF CONTENTS

Page No.

**THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION.....1**

STATEMENT OF THE CASE AND FACTS3

ARGUMENT

Proposition of Law I:

**Unilateral removal of appointed counsel because of an indigent
criminal defendant’s purported non-compliance with financial
verification requirements, without a hearing and without judicial
instruction as to the potential consequences of non-compliance,
violates the defendant’s right to assistance of counsel.....6**

Proposition of Law II:

**When presented with information suggesting that a criminal
defendant may be indigent, the trial court has an independent,
affirmative constitutional duty to inquire into the ability of the
defendant to afford counsel.....10**

Proposition of Law III:

**A trial court that elects to expand the scope of its plea colloquy to
include additional information beyond that required by Criminal
Rule 11 violates the due process rights of the criminal defendant if it
misleads the defendant as to his rights or the potential consequences
of a no contest plea.....11**

Proposition of Law IV:

**Legislative enactments that impose new collateral sanctions for
conviction of a misdemeanor, including felony consequences for non-
compliance with the sanctions, where such consequences and
sanctions are greater and more serious than those applicable at the
time of the no contest plea, constitute manifest injustice sufficient to
justify withdrawal of a no contest plea.13**

CONCLUSION15

CERTIFICATE OF SERVICE16

APPENDIX

State v. Richey, Franklin App. No. 08AP-923, 2009-Ohio-2988
[Opinion & Judgment Entry]

TABLE OF CONTENTS

Page No.

**THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION.....1**

STATEMENT OF THE CASE AND FACTS3

ARGUMENT

Proposition of Law I:

**Unilateral removal of appointed counsel because of an indigent
criminal defendant’s purported non-compliance with financial
verification requirements, without a hearing and without judicial
instruction as to the potential consequences of non-compliance,
violates the defendant’s right to assistance of counsel.....6**

Proposition of Law II:

**When presented with information suggesting that a criminal
defendant may be indigent, the trial court has an independent,
affirmative constitutional duty to inquire into the ability of the
defendant to afford counsel.....10**

Proposition of Law III:

**A trial court that elects to expand the scope of its plea colloquy to
include additional information beyond that required by Criminal
Rule 11 violates the due process rights of the criminal defendant if it
misleads the defendant as to his rights or the potential consequences
of a no contest plea.....11**

Proposition of Law IV:

**Legislative enactments that impose new collateral sanctions for
conviction of a misdemeanor, including felony consequences for non-
compliance with the sanctions, where such consequences and
sanctions are greater and more serious than those applicable at the
time of the no contest plea, constitute manifest injustice sufficient to
justify withdrawal of a no contest plea.13**

CONCLUSION15

CERTIFICATE OF SERVICE15

APPENDIX

**THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS.**

Mr. Richey, who was unable to afford hiring counsel, was pushed through a criminal prosecution without the benefit of counsel even though he repeatedly requested representation and had previously been determined by the public defender to be eligible to receive appointed counsel. It is clear that Appellant was given an attorney, then *dropped* by that attorney under questionable circumstances, and then told by the trial court to either *hire* an attorney or proceed by himself. After he was forced to proceed unrepresented because could not afford to hire counsel, he was accused of procedural default and seeking to cause inordinate delay. Yet, no possible failing on Appellant's part can erase the critical flaw in the lower court proceedings – Mr. Richey was denied the most fundamental right normally afforded a criminal defendant, and every procedure and sanction thereafter was tainted by that denial.

The lower court proceedings violated numerous procedural safeguards and denied critical constitutional rights. The approval of this flawed process by the Tenth District raises matters of public and great general interest. Proposition of Law I addresses the trial court's unilateral action in removing counsel without questioning Appellant or providing its own instructions directly to Appellant. Clear direction on these points would provide municipal courts statewide with a guide, highlighting the potential for error when appointed counsel are allowed latitude to erect procedural barriers. Proposition II addresses the exact nature of a trial court's duty, when presented with a clear claim of indigency and no contradictory assertions, to conduct its own inquiry and make its own informed decisions.

The full effect of the denial of rights in this case is perhaps best exhibited by the heavy weight that fell upon Appellant *after* he decided, knowing he could not handle the intricacies of a trial, to throw himself on the mercy of the trial court. He was given the maximum jail sentence, charged the maximum fine, and subjected to serious, long-term collateral sanctions, including

being classified under complex registration laws. He ultimately faced greater criminal charges for non-compliance because subsequent legislative changes elevated registration violations to felony level offenses.

In Proposition of Law III this Court is asked to recognize the effect of a trial court's advice during a plea colloquy, and the critical problem with inaccurate or incomplete descriptions of consequences. The problem here is not whether the trial court met its basic obligations, but whether the court had a duty to truthfully and thoroughly advise Appellant as to additional areas of law it *decided* to discuss.

Finally, Proposition of Law IV addresses the significant enhancements to these sanctions, as a result of subsequent legislation, and the effect the increased requirements have on an otherwise constitutionally sufficient plea. Assuming, *arguendo*, that there are no other flaws in the trial court proceedings, a manifest injustice still occurs when a criminal defendant, standing without counsel in a municipal court proceeding, enters a no contest plea, and then later discovers that the legislature has assigned *felony* consequences to his non-compliance with regulatory sanctions.

When Aaron Richey entered his no contest plea, he knew only that he had been *denied* a court appointed attorney, that he could *not* afford a paid attorney, and that he could *not* proceed on his own. His understanding of collateral sanctions was shaped and confined by the trial judge's misleading description of these, and then further invalidated by subsequent legislation enhancing related penalties.

These are matters that involve substantial constitutional questions and issues of public and great general interest. This case presents this Court with an opportunity to insure a constitutionally sufficient level of protection to accused misdemeanor offenders in Ohio who, like Mr. Richey, are unable to obtain the assistance of counsel. Further review is warranted.

STATEMENT OF THE CASE AND FACTS

Aaron Richey was charged with one count of sexual imposition, based on the allegation that he committed a single, offensive, non-penetrative touching. Without being arrested, Appellant presented himself to the Court and, based on his inability to pay for representation, was assigned an assistant public defender. Shortly thereafter, Appellant's attorney withdrew, citing her client's failure to comply with an unnecessary income verification requirement. Appellant then appeared in court, still unable to pay for representation but now having been summarily dropped by his appointed advocate.

At the time of the plea, based not on an actual determination of inability to pay but rather on an out-of-court screening process, Mr. Richey was told that he would *not* receive a court appointed attorney, in language that would be plainly understood by any similarly situated person, and given a clear choice that was, in fact, no choice at all: pay for an attorney or proceed without. Lacking the cash, he proceeded *pro se*. No deal was offered, and no leniency shown. Appellant entered an unbargained plea to the sole count in the Complaint as charged, and the matter was set for sentencing. When he returned, he received the maximum jail term and fine. He was then notified that, as a result of his conviction, he would be subject to the full weight of Ohio's sex offender regulations, including periodic registration obligations and a variety of related sanctions.

It is clear from Appellant's undisputed averments, submitted concurrently with the original motion to withdraw the plea, that Appellant lacked critical knowledge at the time he entered that plea. He did *not* know, for example, that sexual imposition is generally unprosecutable, absent a third-party witness or physical evidence, nor will the sufficiency of the evidence in this case ever be known, since appointed counsel did not even file a standard discovery request before withdrawing. Appellant did *not* know that sex offender laws only

applied to sexual imposition convictions under certain limited circumstances, or that a basic showing on his part would shift the burden to the government to overcome a presumption of exemption. Nearly two years after his plea, Appellant consulted with a *different* attorney, after discovering that his registration requirements had been abruptly increased and compounded by new legislation. Only at this late date was Appellant made aware of the flaws in his original case, and only *then* was he able to make an informed request for assistance in reversing this injustice.

Appellant sought leave to withdraw his plea roughly two years after entering it. The trial court then conducted a hearing on the matter, and accepted Appellant's factual averments without dispute from the State. However, the trial court denied Appellant's request, citing Appellant's failure to meet his attorney's verification requirements as the court's primary reason for rejecting the assertion that Appellant's right to counsel had been impaired. The current judge also found the previous judge's misleading characterization of the registration requirements to be incorrect but *harmless*, held the two-year delay against Appellant, and thus rejected this second basis for withdrawal. Finally, the trial court found complaints about the drastic enhancing effects of Senate Bill 10 to be meritless and untimely, and declined to discuss these further.

Upon appellate review, the Tenth Appellate District held that Appellant's counsel had been removed "based on appellant's failure to cooperate with the process of determining his eligibility" (Opinion Below at ¶11) and rejected any suggestion that the trial court had an independent duty to inquire into Appellant's circumstances. The appellate court did *not* discuss the unilateral nature of the order removing appointed counsel, taking place without the presence of Appellant, and did *not* find any constitutional error in the issuance of such an order without affording the indigent defendant any opportunity to contest his counsel's claims of non-cooperation. Most importantly, the appellate court, like the trial court, was not troubled by the *actual indigence* of Appellant, even though this fact was never disputed by the State.

Similarly, the appellate court did *not* meaningfully disagree with Appellant's objections to the misleading statements made by the original trial court. Instead, the appellate court found that these mischaracterizations were remedied by the provision of accurate information at the time of sentencing. Construing the two-year delay and the failure to ask for plea withdrawal at sentencing against Appellant, notwithstanding his *pro se* status during all of those times, the court held that no manifest injustice existed and no abuse of discretion had occurred. As to the final problem faced by Appellant, who is now subject to *felony* consequences for failure to comply with the sanctions that have been retroactively attached to his *misdemeanor* conviction, and faces increased requirements and prohibitions because of the statutory changes, the appellate court noted the remedial nature of registration laws, and then rejected Appellant's arguments without further discussion.

Interestingly, in a separate concurrence, one member of the appellate panel found that the trial court's handling of Appellant's entitlement to appointed counsel was "questionable, if not deficient" (Opinion Below at ¶23), and further noted that "the trial court misled appellant" as to registration consequences (at ¶24). However, the concurring member joined her brethren in weighing the two-year delay heavily against Appellant.

This timely appeal follows the appellate court's affirmation, recorded in *State v. Richey*, Franklin App. No. 08AP-923, 2009-Ohio-2988 [Opinion and Judgment Entry attached].

ARGUMENT

Proposition of Law I: Unilateral removal of appointed counsel because of an indigent criminal defendant's purported non-compliance with financial verification requirements, without a hearing and without judicial instruction as to the potential consequences of non-compliance, violates the defendant's right to assistance of counsel.

The appellate court held that "R.C. 120.15(D) makes it clear that it is the public defender's office that has the responsibility of determining indigence, subject to review by the court." Opinion Below at ¶10. The court then used this authority as the basis for characterizing

this appeal as the public defender's office mounting a challenge to its own conduct. The relevant acts here, however, are the *trial court's* execution of an entry removing appointed counsel, and the *trial court's* statements to Appellant, which sent a clear message that he had lost his opportunity to have counsel appointed and that he must either *hire* an attorney or proceed on his own. Notably, the State and the appellate court did *not*, at any point, dispute that this was *exactly* the message delivered by the trial judge.

The relevant events, which establish the nature of the rights violation here, were:

1. Appellant was screened by the public defender;
2. Appellant was approved for appointed counsel by the public defender;
3. Representation began;
4. The individual attorney privately approached the judge and made a claim of procedural non-compliance; and,
5. The judge, without a hearing or any other process, removed counsel.

At this point, without further action or inaction by any party, Appellant had been deprived of his right to counsel. There may have been opportunities to remedy the denial at later points in the process, and the trial judge also failed to act with propriety at those times. However, when the judge executed the withdrawal entry, he was removing counsel from a defendant without properly observing the controlling statutes *and* without any legitimate basis for the action.

First, to the extent that R.C. 120.15(D) divides responsibility for the counsel appointment process, each part of this process was already complete before the attorney privately approached the judge. At arraignment, the public defender's office had "determine[d] indigency", and the assertion that Appellant was eligible had been made to the court in the usual manner, i.e., by entering an appearance and a not guilty plea. At this point, no further "review by the court" was required. The second financial screening and the withdrawal based thereupon both occurred *after* the appointment of counsel had been completed.

Second, while there are arguably many circumstances under which an attorney may privately, without her client and without opposing counsel, approach a trial judge for an order, this was *not* one of them. The trial court executed its entry, removing counsel, without taking any steps to formally review the attorney's claims, whatever those might have been,¹ and without attempting to establish any sort of process, wherein Appellant might have contested the attorney's claims or re-asserted his actual indigency. R.C. 120.15(D) requires county public defenders to follow the same procedures applicable to the state public defender, as set forth in R.C. 120.05. In turn, R.C. 120.05(B) authorizes the public defender to *investigate* financial status of those it represents, and then requires the public defender to "make the results of the investigation available to the court upon request." This is clearly *not* a grant of authority to unilaterally drop clients at will, based on subjective, unwritten criteria, but rather a reasoned process by which indigency claims may be reviewed.

The result of the trial court's actions and the appellate court's reading of R.C. 120.15(D), is an odd contradiction. On the one hand, the information provided by Appellant at arraignment, which would have involved completion of a complex financial affidavit, is treated as insufficient to establish his need for an attorney. On the other hand, the off-the-record claim of procedural non-compliance, made by the attorney, is enough to *permanently* deprive Appellant of appointed counsel. Significantly, neither the State nor either lower court ever expressed a belief that Appellant was *not*, in fact, indigent. Rather, the simple act of non-compliance was consistently held in these proceedings as justification for the removal of counsel.

The legitimate question must be asked: what *should* the trial court have done, when faced with an attorney asserting non-compliance with a financial screening process? Appellant

¹ As there is no record of the contents of such a conversation, nor even that a conversation actually occurred, as opposed to the simple signing of an entry left in chambers, it is impossible to reconstruct the factual basis, if any, for the trial court's decision. Nonetheless, the undated entry is signed by both counsel and the judge, and reflects the attorney's claim of non-compliance, whereas the lack of formal review by the court is clear from its absence in the record.

answers in two parts. First, the trial court *should* have made the deprivation order the subject of an on-the-record hearing, at which Appellant *should* have been given an opportunity to speak as to both the non-compliance and his actual indigency. Second, at that hearing, if the trial judge believed that further financial verification was necessary and appropriate, he *should* have then charged Appellant with presenting such verification to the court, and explained the consequences of further non-compliance. Such instruction would have likely resulted in one of two outcomes. Either Appellant would have provided financial information, at which point the court would be able to make a final decision as to indigency, or Appellant would have failed to provide verification, at which point the court would have been justified in denying appointed counsel.

The Seventh Appellate District reviewed a similar issue in 1999, and reached a very different result. A trial court removed appointed counsel based upon the defendant's failure to complete a financial affidavit when one was sent to him, but on appeal, the court held that the trial judge should have done more before construing non-compliance as a waiver of the right. *State v. Glasure* (1999), 132 Ohio App.3d 227, 238, 724 N.E.2d 1165.² That court held:

The record is also void of any evidence suggesting that the court conducted a sufficient pre-trial inquiry using the *Von Moltke* requirements to notify appellant of the nature of the charges against him as well as the consequences of his actions before concluding that he had impliedly waived his right to counsel. At the very least, the trial court should have informed appellant in its final judgment entry that he was required to retain counsel unless he established that he could not employ an attorney and that the court would infer a waiver of counsel if he did not comply with the court's order. Moreover, the court could have, on the day of trial, granted appellant additional time to obtain an attorney after completing the proper pre-trial inquiries on the record so as to insure that appellant was aware of the consequences of his actions. If he still after that point did not file something with the court indicating that he was unable to employ counsel, then the court properly could have inferred a waiver of counsel.

² The contrasting holding in *Glasure* is the subject of Appellant's argument that a conflict exists on this issue between the Tenth and Seventh Districts. See *Notice of Pending Motion to Certify a Conflict*, concurrently filed.

As such, this court holds that the trial court must hold a hearing in order to inquire into appellant's ability to retain counsel. After said inquiry, if the court determines that in fact appellant is indigent, the court must then inquire into whether appellant desires to have counsel appointed to him. In the event appellant chooses to proceed *pro se*, the court shall establish on the record consistent with *Von Moltke, supra* that appellant is thoroughly apprised of the pitfalls of self representation.

Id. at 238-39 (citing *Von Moltke v. Gillies* (1948), 332 U.S. 708, 68 S.Ct. 316). This is consistent with federal decisions which have upheld denial of appointed counsel *after* courts have directed defendants to provide financial information *and* those defendants have willfully refused. See, e.g., *United State v. Ellsworth* (C.A.9, 1976), 547 F.2d 1096; and, *United States v. Sarsoun* (C.A.7, 1987), 834 F.2d 1358.

This case does *not* rest upon the policy merits of a procedural compliance standard and does *not* seek review of a decision to proceed *pro se*, since appointed counsel was removed because of purported non-compliance with a *non-judicial, non-statutory* verification process and the decision to proceed *pro se* was made only *after* appointed counsel was removed. Instead, the critical constitutional problem lies in the decision, reached by both the trial court and the appellate court that appointed counsel can be removed as a *punishment* for non-compliance, without an open and equitable judicial process and without any cautionary advisement to the *pro se* defendant of the consequences of his implied waiver. This conclusion is inconsistent with the letter of the relevant statutes and runs contrary to the fundamental purpose of this essential constitutional right.

Proposition of Law II: When presented with information suggesting that a criminal defendant may be indigent, the trial court has an independent, affirmative constitutional duty to inquire into the ability of the defendant to afford counsel.

Even if the actions in this case could be construed as consistent with R.C. 120.05 and 120.15, this does *not* excuse the simple failure of the court to notice and act upon a legitimate claim of indigency that was before it. The decision to base denial of appointed counsel entirely

on procedural default, with *no* consideration of Appellant's actual ability to fund his own defense, transformed the removal order into *punishment* for the default. In so deciding, the trial court abrogated its constitutional responsibilities.

Regardless of what went before, Appellant's statement that he might qualify for a public defender was sufficient to put the judge on notice that the defendant before him might be constitutionally entitled to appointed counsel. The United States Supreme Court has held that the claim, by an indigent person, that he cannot pay for an attorney, is enough to place the question before a court of whether counsel should be appointed. *Kitchens v. Smith* (1971), 401 U.S. 847, 848-89, 91 S.Ct. 1089. In *Kitchens*, the simple statement that the defendant did not have any money was enough, the Court held, to raise the issue, and where that statement went uncontradicted, as it did here, *was enough to settle the question*. *Id.*

Further, this Court has been explicit that, "[t]o make the right to the assistance of court-appointed counsel a factual reality, the determination of need must turn, not upon whether an accused ought to be able to employ counsel, but whether he is in fact able to do so." *State v. Tymcio* (1975), 42 Ohio St.2d 39, 45, 325 N.E.2d 556. "It is the duty of the trial court in a criminal case to inquire fully into the circumstances impinging upon an accused's claimed inability to obtain counsel and his consequent need for assistance in employing counsel, or for the assistance of court-appointed counsel." *Tymcio* at paragraph three of the syllabus. When the possibility of waiver is on the table, a court's duty is *proactive*, and requires the judge to "investigate as long and as thoroughly as the circumstances of the case before him demand." *Von Moltke*, 332 U.S. at 723-24.

Just as it has never been disputed that Appellant failed to comply with a *private, unsanctioned* verification process, it is uncontested that Appellant *was*, in fact, indigent, and could *not*, in fact, afford an attorney. The trial judge could have, notwithstanding the attorney's assertions of non-compliance, asked a single critical question, such as: "How much do you

make?" If Appellant stated an amount that seemed to qualify him for appointed representation, the court could then have either chosen to believe Appellant's statement *or* directed Appellant to produce documentation and explained the consequences of failing to do so. After a reasonable continuance, which would have been taxed to Appellant, failure to provide documentation could properly result in the denial of appointed counsel. The discussion conducted in this case, which was outside the presence of the defendant, and the questionable procedural waiver that followed could have been avoided. Instead, the judge showed no interest in making this simple inquiry. This procedure applied by the trial court clearly denied constitutional rights by creating an improper informal process concerning the fundamental right to counsel.

Proposition of Law III: A trial court that elects to expand the scope of its plea colloquy to include additional information beyond that required by Criminal Rule 11 violates the due process rights of the criminal defendant if it misleads the defendant as to his rights or the potential consequences of a no contest plea.

The appellate court incorrectly construed Appellant as arguing that the trial court had an independent duty to advise Appellant of the sex offender registration consequences of his no contest plea, prior to accepting that plea. This is *not* the issue here. Rather, the trial judge *took it upon himself* to inform Appellant and then did so inaccurately. First, the judge implied that Appellant would have a *de minimus*, one-time registration obligation, instead of the periodic and ongoing duty imposed as a matter of law. Second, the judge failed to point out to Appellant that he could make an evidentiary showing and attempt to establish that the exemption presumption applied in this case. This procedure would have exempted Appellant from registration requirements. Third, the judge failed to tell Appellant that there would be consequences for *future* failures to register, including new misdemeanor charges with the possibility of additional jail sentences and fines. Independently, the judge may not have been *required* to inform Appellant in this manner before accepting his plea. However, when the judge *chose* to provide

registration information, he accepted responsibility for doing so accurately, and then failed in this regard.

A no contest plea lacks constitutionality unless it is entered “with knowledge of rights that [the defendant] would forgo and creates a record by which appellate courts can determine whether [it was] entered voluntarily.” *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, at ¶24 (quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶11). With respect to specific statements made by a trial judge, Ohio courts recognize that a plea is invalid, “even where no specific promise was made, [if] entered as a result of a ‘grave misunderstanding’”. *State v. Longo* (1982), 4 Ohio App.3d 136, 140, 446 N.E.2d 1145 (quoting *United States, ex rel. Elksnis, v. Gilligan* (S.D.N.Y. 1966), 256 F. Supp. 244, 249). While this standard is usually applied in the context of a misrepresentation or substantive mistake by defense counsel, such errors are relevant in their *effect on defendants*, inasmuch as “pleas were not ‘intelligently’ entered, because the decisions to enter the pleas were based on inaccurate, or incomplete, information.” *State v. Lausin*, Ashtabula App. No. 2005-A-0049, 2006-Ohio-5649, at ¶20 (citing *State v. Gillespie*, Lake App. No. 2003-L-018, 2004-Ohio-2440, ¶21-23). Here, based on the court’s advice, Appellant similarly developed a fundamental misunderstanding of the consequences of a no contest plea.

The best measure of whether the voluntary nature of the plea has eroded as a result of incomplete or misleading information is the relatively straightforward question of whether Appellant *would have proceeded differently* if given all the facts. *State v. Freeman*, Cuyahoga App. No. 86740, 2006-Ohio-2583, at ¶32-34. In fact, Appellant made this *exact* claim, stating clearly that he would not have entered a no contest plea if he had understood the registration consequences, and the State has *never* provided *any* evidence or argument to the contrary. Under such circumstances, vacation of the plea is the only way to adequately address the ill-advised decision made by Appellant, resulting in unknowing acceptance of substantial, enduring

consequences. *Freeman* at ¶34. Ohio courts have even found that plea withdrawal is appropriate and necessary, based on unawareness of: (1) laws prohibiting convicted felons from teaching; (2) civil consequences of admission of guilt; and (3) applicability of federal firearm disabilities. *State v. Sykes*, Hamilton App. No. C-060277, 2007-Ohio-3086; *State v. Beamer*, Coshocton App. No. 05CA011 and 05CA004, 2005-Ohio-7065; *State v. Wright*, Wood App. No. WD-04-070, 2005-Ohio-4171 (denying withdrawal *because* defendant was fully informed).

Finally, the appellate court's reliance on the two-year delay is inappropriate here, because it ignores Appellant's simple, undisputed averments. Extended delays usually weigh heavily against defendants seeking plea withdrawal, because the emphasis on *undue* delay addresses the delinquency implied by a lengthy, unexplained passage of time. See *State v. Hall*, Franklin App. No. 05AP-957, 2006-Ohio-2742, at ¶3-5 (motion properly overruled because defendant was revisiting a settled issue). Here, there was delay, but the State made no cognizable argument that the delay was *undue*. Accordingly, there should have been no automatic detriment to Appellant's credibility or to the merits of his withdrawal request. Considering it instead on the substantive issues, there is only one reasonable conclusion – Appellant, being without counsel, had no idea that he could meaningfully contest the extensive sanctions applied to him after his plea, until he encountered a different assistant public defender two years later and received better advice, whereupon he *immediately* sought plea withdrawal.

Proposition of Law IV: Legislative enactments that impose new collateral sanctions for conviction of a misdemeanor, including felony consequences for non-compliance with the sanctions, where such consequences and sanctions are greater and more serious than those applicable at the time of the no contest plea, constitute manifest injustice sufficient to justify withdrawal of a no contest plea.

Appellant's final Proposition of Law points to the drastic effects of Amended Substitute Senate Bill 10 on the voluntary nature of his plea. Although Appellant has pointed above to specific problems with the advisement provide by the trial court, even a thorough, accurate advisement would not have prepared Appellant for such a sweeping legislative enactment. Most

notably, the penalty for non-compliance, previously a third-degree misdemeanor, is now a fourth-degree felony, punishable by up to eighteen months in prison. R.C. 2950.99(A)(1)(a)(iii). Enhancements to another statute within the scheme, R.C. 2950.034, have the effect of rendering at least sixty-five percent of Franklin County, and perhaps as much as eighty percent, legally 'off limits' to Appellant *for the rest of his life*. Red Bird, *Assessing Housing Availability Under Ohio's Sex Offender Residency Restrictions* (Mar. 25, 2009), The Ohio State University. The period of time during which Appellant must register has been extended by an additional five years, and he is required to provide substantially more information.

Supposing, *arguendo*, that Appellant's no contest plea was voluntarily entered, and otherwise free from constitutional impairment, his reliance on the consequences of that decision, as conveyed to him by the trial court, would still be subject to ordinary constitutional protections. A plea of no contest is never a purely criminal action, but rather touches on a "synthesis of contract and criminal law in [the] particular factual setting." *State v. Zima* (2004), 102 Ohio St.3d 61, 2004-Ohio-1807, at ¶11 (citing *State v. Carpenter* (1993), 68 Ohio St.3d 59, 61, 623 N.E.2d 66). Further, "plea agreements are a necessary and desirable part of the administration of criminal justice and, therefore, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* (quoting *Carpenter*, *supra* (quoting *Santobello v. New York* (1971), 404 U.S. 257, 262, 92 S.Ct. 495)). If Appellant is ultimately found to have entered his no contest plea voluntarily, with sufficient understanding of the consequences, then a legislative alteration of that plea agreement wholly undermines that volition and comprehension, in violation of Ohio's prohibition on the impairment of contracts. Section 28, Article II, Constitution.

This is not a general constitutional objection to the enhancements of Senate Bill 10, such as this Court currently has pending before it. Rather, Appellant's otherwise presumably voluntary plea is effectively dissolved by the gross increases in the sanctions attached to that

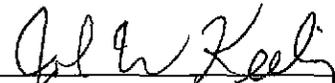
plea. Such a change, as applied here, *must* constitute manifest injustice sufficient to require withdrawal.

CONCLUSION

The mishandling of this case began with a highly questionable removal of appointed counsel and ended with the imposition of serious, long-term consequences. The manner in which the right to counsel was withheld has serious implications both for average misdemeanants and for criminal defense practitioners. The deprivation in this case *must* be remedied, so that Aaron Richey may have the chance to go through the system with his rights preserved, and so that misdemeanants throughout Ohio will be protected from such abuses.

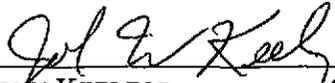
Respectfully submitted:

Yeura R. Venters
Franklin County Public Defender

By: 
JOHN KEELING 00148
Counsel for Appellant Richey
373 South High Street, 12th Floor
Columbus, Ohio 43215
(614) 462-3194

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MEMORANDUM was hand-delivered to the offices of Richard C. Pfeiffer, Jr., Columbus City Attorney, at 375 South High Street, 17th Floor, Columbus, Ohio 43215, this 1st day of August, 2009.

By: 
JOHN KEELING 00148
Counsel for Appellant Richey

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 08AP-923
 : (M.C. No. 2006 CRB 016699)
 Aaron K. Richey, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 23, 2009

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, *William Safford*, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Aaron K. Richey ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court denying his motion to withdraw his plea of no contest. For the reasons that follow, we affirm.

{¶2} On July 2, 2006, a sworn complaint was filed charging appellant with sexual imposition in violation of R.C. 2907.06(A)(1), a third-degree misdemeanor. The Franklin County Public Defender's office entered a plea of not guilty on appellant's behalf. At some point, the trial court granted a motion by the public defender's office to withdraw as counsel.¹ The entry, which is styled as a motion, states:

Defense counsel, Elizabeth Westfall, hereby requests this Court to allow leave to withdraw as counsel in the above captioned case.

The Defendant has failed to comply with the income verification requirements of the Public Defender's Office.

{¶3} On August 24, 2006, the trial court signed a continuance entry setting a pre-trial for September 22, 2006. The entry states, "D to hire private counsel." The case was set for trial on September 28, 2006. On that date, appellant executed a waiver of his rights to a jury trial and counsel and entered a plea of no contest to the charge of sexual imposition. At the plea hearing, the trial court addressed appellant regarding his waiver of his rights:

THE COURT: Aaron Richey, 16699. This is an M-3 offense sir, a 2907.06(A)(1). Now, you could face up to a \$500 maximum fine and up to 60 days in jail. Also, upon conviction you may be required to register with the State, registration for sex offenders.

Now, do you understand that?

THE DEFENDANT: (Nods head.)

THE COURT: You would still be entitled to an attorney today. You signed a waiver indicating that you are waiving that right?

¹ The copy of the signed entry in the record is neither dated nor time stamped as having been filed with the Clerk of Courts for the Franklin County Municipal Court.

THE DEFENDANT: (Nods head.)

THE COURT: Now, if you cannot afford an attorney, one would be appointed for you. Now, if you wish to hire your own attorney, then a reasonable continuance would be granted to give you that opportunity. Otherwise, you would be proceeding today without the advice and counsel of an attorney as to your legal rights and any possible defenses.

Any questions on this?

THE DEFENDANT: No.

THE COURT: Now, you could receive jail time. Jail time could be suspended. In any event, since jail time is involved here, you do have an absolute right to have an attorney if you want one.

THE DEFENDANT: I'm not sure if I can afford one.

THE COURT: Have you talked to the Public Defender?

THE DEFENDANT: I didn't bring in my check stub that day when I was supposed to, so I don't know. I think that the money that I do make, I might qualify for the Public Defender, but I'm not sure.

THE BAILIFF: I believe, if I remember the story correctly, I believe they asked him to provide income information. He declined to do that. That's why they got off the case, because he declined to provide them with income verification.

THE COURT: It's been reassigned for counsel, this would be two times before.

MR. STEINBERG: I think this is the third time.

THE COURT: And, as a matter of fact, you did speak with the Public Defender's Office, and an attorney was assigned, but you failed to comply with the income verification. So the question I ask you today, sir, do you want to proceed today without an attorney?

THE DEFENDANT: Yeah.

THE COURT: And you understand the possible consequences if there's a conviction?

THE DEFENDANT: Yeah.

THE COURT: You might have to register with the State and could receive jail and probation?

THE DEFENDANT: (Nods head.)

THE COURT: With that understanding, the Court will accept the waiver of right to an attorney.

(Plea Hearing Tr. 2-4.)

{¶4} The trial court then accepted appellant's plea of no contest and entered a finding of guilty on the charge. After a pre-sentence investigation, the court sentenced appellant to 60 days of incarceration and a \$500 fine. The court also designated appellant a Sexually Oriented Offender, and at the sentencing hearing appellant was provided with forms that fully spelled out the sex offender registration requirements appellant would be required to follow.

{¶5} On September 5, 2008, appellant, represented by the public defender's office, filed a motion seeking to have his conviction vacated and to withdraw his plea of no contest pursuant to Crim.R. 32.1. Appellant argued that his plea had not been entered knowingly, voluntarily, and intelligently. On October 2, 2008, the court held a hearing to consider appellant's motion. The trial court denied the motion.

{¶6} Appellant then filed this appeal, asserting three assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred in finding that Appellant "knowingly, voluntarily and intelligently waived his right to counsel".

SECOND ASSIGNMENT OF ERROR

The trial court erred in finding that Appellant's plea was intelligently entered.

THIRD ASSIGNMENT OF ERROR

The trial court erred in finding that the enhancements and increases of Senate Bill 10 do not require plea withdrawal.

{¶7} Motions to withdraw pleas of no contest are controlled by Crim.R. 32.1, which provides, in relevant part, that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Because the motion in this case was made after sentencing, the issue before the trial court was whether granting the motion would correct a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499.

{¶8} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty, and the decision whether to hold a hearing on the motion, are subject to review for abuse of discretion. *State v. Smith* (1977), 49 Ohio St.2d 261. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} In his first assignment of error, appellant argues that he did not knowingly, voluntarily, and intelligently waive his right to counsel at the time he entered his no contest plea. Specifically, appellant argues that the trial court improperly allowed appellant to enter his plea of no contest without the benefit of counsel, and that this constitutes a manifest injustice making withdrawal of his plea appropriate.

{¶10} Appellant argues that the trial court erred both when it signed the entry allowing the public defender's office to withdraw from representation and accepted appellant's waiver of his right to counsel without conducting its own inquiry into whether appellant was indigent. Although in briefing appellant appears to suggest that the duty of determining a defendant's indigence, and therefore a defendant's right to appointed counsel, lies exclusively with the trial court, R.C. 120.15(D) makes it clear that it is the public defender's office that has the responsibility of determining indigence, subject to review by the court.²

{¶11} The entry allowing the public defender's office to withdraw from representation stated that the reason was appellant's failure to provide income verification. Thus, the withdrawal was not based on appellant's ineligibility to be represented by the public defender's office, but, rather, was based on appellant's failure to cooperate with the process of determining his eligibility. Failure of a client to meet obligations to an attorney is a basis for the attorney to withdraw from representation. See Prof.Con.R. 1.16.

² In briefing, the public defender's office argues at great length that the action taken that resulted in the public defender's office withdrawing from representation was unlawful, which has the effect of constituting a challenge by the public defender's office to its own conduct in this case specifically, as well as to the manner in which it determines indigence generally.

{¶12} Prior to the date on which appellant entered his plea, the court continued appellant's trial date for the specific purpose of allowing appellant to obtain counsel. On the date of the plea, the trial court offered appellant another continuance so appellant could obtain counsel. At that time, there was a discussion regarding appellant's failure to cooperate with the public defender's office in determining his eligibility for appointed counsel. Appellant did not disagree with the assertions regarding his lack of cooperation, did not state that he was willing to begin cooperating with the public defender's office, and did not accept the trial court's offer to continue the case so he could obtain counsel. Instead, he signed the form waiving his right to counsel, stated on the record that he was waiving that right, and proceeded to enter a plea of no contest.

{¶13} Given these facts, the trial court did not abuse its discretion in finding that the circumstances surrounding appellant's waiver of his right to counsel do not constitute a manifest injustice requiring that appellant be allowed to withdraw his plea of no contest. Accordingly, appellant's first assignment of error is overruled.

{¶14} In his second assignment of error, appellant argues that he should have been allowed to withdraw his plea of no contest based on the trial court's failure to accurately inform him of the consequences of being found guilty of a sexually oriented offense. Specifically, appellant argues that at the time he entered his plea of no contest, the trial court told him two different times that he "may" or "might" be required to register as a sex offender, when in actuality sex offender registration was required. Appellant argues that the trial court's statements regarding the effect of a plea on his status as a sex offender were flawed in two respects: first, in failing to make it clear that registration

would be mandatory, and second, in failing to explain the full scope of what registration would involve.

{¶15} Crim.R. 11 sets forth certain specific advisements that a court must give a defendant at a plea hearing in order to assure that a plea is entered knowingly, voluntarily, and intelligently. The rule does not specifically require that a defendant be notified of registration requirements in the event that a plea is entered to a sexually oriented offense for which registration is required under R.C. Chapter 2950. Ohio courts have held that a trial court is not required to inform a defendant regarding the sex offender registration requirements prior to accepting a plea. *State v. Cupp*, 2d Dist. No. 21176, 2006-Ohio-1808; *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066.

{¶16} Furthermore, in its decision and entry denying appellant's motion to withdraw his plea of no contest, the trial court noted that at the time of his sentencing, appellant was provided two forms that fully described the registration requirements. Appellant argues that his receipt of the forms is irrelevant because that occurred at the time of his sentencing, which occurred approximately one month after the entry of the plea. However, a trial court's uncertainty regarding the specifics of the sex offender registration requirements at the time a plea is entered can be remedied by provision of full information at the time of sentencing such that the plea was still entered knowingly, voluntarily, and intelligently. *State v. Stape*, 2d Dist. No. 22586, 2009-Ohio-420.

{¶17} Moreover, the fact that appellant was properly informed of the registration requirements at the time of his sentencing is relevant to the credibility of his claim that he would not have entered the plea if he had known of the full requirements at the time the plea was entered. Approximately two years passed between the time appellant was fully

informed of the registration requirements and the time appellant sought to withdraw his plea. The passage of time between the occurrence alleged as the basis for a motion to withdraw a plea and the filing of that motion is a factor adversely affecting the movant's credibility and militating against granting such a motion. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894.

{¶18} The trial court did not abuse its discretion in finding that the trial court's statements regarding the sex offender registration requirements at the time appellant entered his plea did not constitute a manifest injustice requiring that appellant be allowed to withdraw that plea. Accordingly, appellant's second assignment of error is overruled.

{¶19} In his third assignment of error, appellant argues that amendments to R.C. Chapter 2950 enacted in Am.Sub.S.B. No. 10 of the 127th General Assembly drastically rewrote the sex offender registration laws, making them much more burdensome to persons in appellant's situation. Appellant argues that these amendments created a manifest injustice requiring that he be allowed to withdraw his plea of no contest.

{¶20} Appellant cites no authority for the proposition that the changes in the laws governing sex offender registration in and of themselves can constitute a manifest injustice requiring that defendants who entered pleas of guilty or no contest under the old provisions must be allowed to withdraw those pleas. We note that the provisions of R.C. Chapter 2950 have generally been recognized as remedial in nature, and thus not unconstitutionally retroactive. See *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824.

{¶21} We cannot say that the trial court abused its discretion in concluding that the Am.Sub.S.B. No. 10 amendments to the laws governing sex offender registration do

not constitute a manifest injustice. Accordingly, appellant's third assignment of error is overruled.

{¶22} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BROWN, J., concurs.
BRYANT, J., concurring separately.

BRYANT, J., concurring separately.

{¶23} Unlike the majority, I believe the trial court's inquiry regarding appellant's alleged indigency is questionable, if not deficient. Appellant advised he was not sure he could afford an attorney. The trial court, however, did not inquire further but instead appeared to rest on the fact that the public defender concluded appellant failed to submit the needed income verification to the public defender's office. Additional inquiry was appropriate. See generally *State v. Tymcio* (1975), 42 Ohio St.2d 39.

{¶24} I further believe the trial court misled appellant in advising that he may have to comply with sex offender registration laws, since appellant's guilty plea necessarily subjected him to those provisions. While I acknowledge the trial court is not required to advise a defendant of the repercussions a guilty plea will have under the sex offender registration laws, the trial court, if it decides to advise of the registration provisions, should not understate the consequences.

{¶25} Nonetheless, I cannot conclude the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea when he did not file the motion until two years after his conviction, a date that coincided generally with increased requirements

under the amended sex offender registration laws. Accordingly, I concur in the majority's conclusion that the judgment of the trial court be affirmed.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

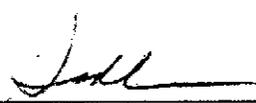
FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2009 JUN 23 PM 2: 57
CLERK OF COURTS

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 08AP-923
Aaron K. Richey, : (M.C. No. 2006 CRB 016699)
Defendant-Appellant. : (ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 23, 2009, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs shall be assessed against appellant.

SADLER, BRYANT, and BROWN, JJ.

By  _____
Judge Lisa L. Sadler

JOHN W. KEELING
FRANKLIN CO PUBLIC DEFEND
373 SOUTH HIGH STREET
12TH FLOOR
COLUMBUS, OH 43215