

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 09-1423
	:	
Appellee,	:	On Appeal from the
	:	Franklin County Court
vs.	:	of Appeals, Tenth
	:	Appellate District
AARON K. RICHEY,	:	
	:	Court of Appeals
Appellant.	:	Case No. 08AP-923

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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FILED
 SEP 04 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

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Why this case does not present an issue of public or great general interest or a substantial constitutional question.

The crux of the instant case is whether the trial court abused its discretion when it denied Appellant's post sentence motion to withdraw his no contest plea filed more than two years after his conviction of third degree misdemeanor sexual imposition. On appeal, the Tenth District Court of Appeals held that the facts surrounding Appellant's guilty plea did not constitute a manifest injustice requiring that he be allowed to withdraw his plea of no contest. There is no constitutional question because the lower court employed the standard of review dictated by this Court. *State v. Smith* (1977), 49 Ohio St.2d 261, 261, 361 N.E.2d 1324, paragraph one of the syllabus; *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. Therefore this Honorable Court should overrule Appellant's motion for jurisdiction.

I. The Tenth District Court of Appeals correctly applied the standard of review set forth in *State v. Smith* and *State v. Xie* and thus there is no constitutional question.

In its decision in *State v. Richey*, the Tenth District Court of Appeals followed the holdings of *Smith* and *Xie*, when it reviewed Appellant's claim that the trial court erred when it denied his post sentence motion to withdraw his plea. *Richey* at ¶ 8. In fact, the Tenth District cited verbatim the language used by this Honorable Court when citing the test to be used for review, "...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." *Id.* ¶ 8. In the *Smith* case, this Court held that the manifest injustice standard "permits a defendant to withdraw his guilty plea only in extraordinary cases." *Smith* at paragraph one of the syllabus. The Tenth District Court of Appeals held that the trial court did not abuse its discretion when it found that the specific factual circumstances surrounding Appellant's no contest plea did not constitute a manifest injustice and that Appellant's two year

delay in filing his motion to withdraw his plea weighed heavily against his credibility and mitigated against granting his motion. *Richey* at ¶17, citing *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894. For these reasons this Honorable Court should overrule Appellant's motion for jurisdiction as it is not a case of public or great general interest nor does it involve a substantial constitutional question.

Answer to Appellant's First Proposition of Law

The Tenth District Court of Appeals held that the specific factual circumstances surrounding Appellant's no contest plea, namely his waiver of counsel, did not constitute a manifest injustice requiring the withdrawal of his plea. Appellant was represented by the Franklin County Public Defender's Office until they requested to withdraw from his case based on Appellant's refusal to cooperate with counsel; namely refusing to complete the office's income verification paperwork. The trial court granted the motion to withdraw and Appellant appeared without counsel at his subsequent court dates. The Tenth District held that Appellant's refusal to cooperate formed a valid basis for the public defender's office withdraws from Appellant's case under Prof.Con.R. 1.16 – failure of a client to meet obligations to an attorney. *Richey* at ¶ 10.

On the date of his no contest plea, there was a colloquy between Appellant and the trial court and Appellant did not disagree with the trial court's assertions regarding his lack of cooperation with the public defender's office and did not state that he was willing to begin cooperating with the public defender's office. *Richey* at ¶ 12. Appellant did not request the appointment of another attorney to represent him. Further, on the date he entered his no contest plea, Appellant was offered an additional continuance to obtain counsel, which he refused. *Id.* at ¶ 12. Instead, Appellant signed a form waiving his right to an attorney, stated on the record he

was waiving that right and then entered a no contest plea. *Id.* at ¶ 12. Given these specific facts, the Tenth District held that “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.” *Id.* ¶ 13.

Answer to Appellant’s Second Proposition of Law

The Tenth District Court of Appeals held that the trial court did not abuse its discretion when it found that Appellant voluntarily waived his right to counsel before entering his plea of no contest. Appellant never stated that he was unable to employ counsel and never stated that he did not want to proceed without an attorney. The Tenth District found that the record demonstrated that the trial court offered Appellant a continuance to obtain counsel and Appellant refused this continuance. *Richey* at ¶ 12. Appellant signed a form waiving his right to counsel and stated on the record that he was waiving his right to counsel. *Id.* at ¶ 12. For these reasons, the Tenth District held that the trial court did not abuse its discretion when it determined that the circumstances surrounding Appellant’s waiver of counsel did not constitute a manifest injustice. *Id.* at ¶ 13.

Answer to Appellant’s Third Proposition of Law

The Tenth District Court of Appeals correctly determined that the two year delay in Appellant’s motion to withdraw his no contest plea adversely affected Appellant’s credibility with respect to his argument that the trial court improperly advised him of his sex offender registration requirements. *Richey* at ¶ 17. The lower court noted that the trial court, when deciding that Appellant had not demonstrated a manifest injustice, relied on the fact that at the time of Appellant’s sentencing he was provided two forms that fully and accurately described his registration requirements. *Id.* ¶ 16. In holding that the trial court did not abuse its discretion, the

Tenth District found that the fact that Appellant was properly informed of the sex offender registration requirements at the time of his sentencing and yet still chose to wait *two years* before filing his motion to withdraw his plea, was relevant to the credibility of Appellant's claim that he would not have entered the plea if he had known the full registration requirements at the time his plea was entered and mitigated against granting his motion. *Richey* at ¶ 17.

Answer to Appellant's Fourth Proposition of Law

Appellant's argument that the passage of Senate Bill 10 unjustly altered his understanding of his original no contest plea is without merit. This Honorable Court has repeatedly held that a defendant's sexual offender classification is a collateral consequence of the offender's criminal acts rather than a form of punishment and a defendant has no reasonable expectation of finality in the parameters of the collateral consequence. *State v. Ferguson* (2008), 120 Ohio St.3d 7, 16, 2008-Ohio-4824, 896 N.E.2d 110; *State v. Cook* (1998), 83 Ohio St.3d 404, 412, 700 N.E.2d 570. Sex offender classifications and their corresponding registration requirements are remedial in nature and thus not unconstitutionally retroactive. *Ferguson* at 14. In the instant case Appellant had no reasonable expectation of finality with respect to his classification and registration requirements when he entered his plea of no contest in 2006. *Id.* at 15. Because Appellant had no reasonable settled expectations or vested rights concerning the registration obligations imposed on him when he entered his no contest plea, the subsequent changes to R.C. § 2950, via Senate Bill 10, do not constitute a manifest injustice.

Appellant's arguments with respect to his understanding of his sex offender registration requirements directly contradicted one another, and when considered in light of the two year delay in Appellant's filing of his Crim.R. 32.1 motion, weighed against Appellant's credibility. Appellant argued to both lower courts, and alleged in his Crim. R. 32.1 affidavit, that his no

contest plea to the charge of sexual imposition constituted a manifest injustice because he was not properly advised of and did not know about the sex offender registration requirements that would attach to his conviction. *Richey* at ¶ 17; Applt. Affidavit, ¶7. According to Appellant, had he known about the requirements he would not have entered a no contest plea. Yet he also argued that his no contest plea was entered in specific contemplation of the requirements of R.C. Chapter 2950 as it existed in 2006 and therefore, the increased registration requirements of Senate Bill 10 so greatly altered the consequences he agreed to when he entered his no contest plea, maintaining that plea would be a manifest injustice.

Appellant either had no idea what the collateral consequences of his no contest plea would be *or* he relied on his knowledge of the specific collateral consequences as they existed in 2006 when deciding to enter his no contest plea. Neither scenario, when considered individually, rises to the level of a manifest injustice and when considered together raise considerable questions regarding Appellant's credibility with respect to his motion to withdraw his plea. Appellant had the burden of demonstrating a manifest injustice requiring the withdrawal of his no contest plea and the fact that he argued two conflicting theories to support this burden adversely affected his credibility and mitigated against the granting of his motion. Accordingly, the Tenth District Court of Appeals held that the trial court did not abuse its discretion when it denied Appellant's motion to withdraw his plea.

Conclusion

The Tenth District Court of Appeals appropriately determined that the trial court did not abuse its discretion when it found that the specific factual circumstances surrounding Appellant's no contest plea did not constitute a manifest injustice requiring the withdrawal of his plea. The lower court held that Appellant's refusal to cooperate with the public defender's office formed an

appropriate basis for the public defender to withdraw from Appellant's case. Appellant did not dispute that he failed to cooperate with the public defender, did not request any further appointment of counsel, and refused a further continuance to obtain counsel. Appellant waived his right to counsel on the record, signed a waiver of counsel form and proceeded to enter a plea of no contest. The Tenth District did not err when it held that under these specific factual circumstances the trial court did not abuse its discretion when it denied Appellant's motion to withdraw his plea.

Appellant was advised of his specific sex offender registration requirements at his sentencing date and yet waited two years before filing a motion to withdraw his no contest plea, asserting that he did not know he would have to register as a sex offender and would not have entered his plea had he been aware of the extent of his sex offender status and corresponding registration requirements. At the same time, Appellant argued that his no contest plea constituted a manifest injustice because he entered his plea in specific contemplation of the sex offender registration requirements as they existed in 2006 and the subsequent changes to R.C. § 2950, via Senate Bill 10, drastically altered his original plea agreement. These arguments directly contradict one another, and when considered in light of the two year delay in Appellant's filing of his Crim.R. 32.1 motion, weighed against Appellant's credibility. Thus, the Tenth District Court of Appeals did not err when it held that the trial court did not abuse its discretion when it denied Appellant's motion to withdraw his no contest plea. For the reasons set forth above, the State respectfully requests that this Honorable Court decline jurisdiction and dismiss Appellant's Memorandum in Support of Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Memorandum in Opposition of Jurisdiction was hand-delivered to John Keeling, Counsel for Appellant, 373 South High Street, 12th Floor, Columbus, Ohio 43215, this 4th day of September, 2009.



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Director – Appellate Unit