

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio, : Case No. 09-1423  
Appellee, :  
v. : On Appeal from the  
Aaron K. Richey, : Franklin County Court  
Appellant. : of Appeals, Tenth  
Court of Appeals  
Case No. 08AP-923

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**MERIT BRIEF OF DEFENDANT-APPELLANT**

**AARON K. RICHEY**

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Yeura R. Venters (0014879)  
Franklin County Public Defender

and

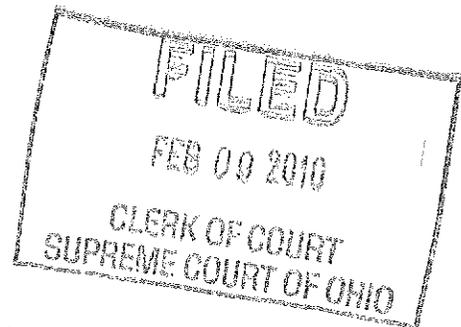
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## STATEMENT OF FACTS

The defendant-appellant (hereinafter referred to as defendant) was charged in a complaint filed in municipal court with the offense of sexual imposition in violation of R.C. 2907.06, a third-degree misdemeanor.

The defendant was deemed eligible for the services of the public defender based upon information set forth in an affidavit. However, for some reason his assigned public defender, who is no longer employed with the office, filed a combined motion and entry which allowed her to withdraw as the defendant's counsel. Counsel claimed that the defendant had failed to comply with the income verification requirements of the office but did not specify any details or underlying facts. While the propriety of this withdrawal of counsel was an issue on direct appeal, it is not an issue herein. The record demonstrates that the defendant told the judge that he had failed to "bring in my check stub that day, when I was supposed to."<sup>1</sup> The defendant further indicated that he was not sure that he could afford an attorney and that he was willing to proceed without one. He further indicated that he understood the "possible consequences if there's a conviction." (9/28/06 Tr. 3-4)

The defendant indicated a desire to enter a no contest plea and acknowledged that he understood that this change of plea constituted a waiver of a number of

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<sup>1</sup> If this was the basis for the withdrawal, it was an improper one. There is no requirement for pay stub verification. If the individual attorney had further doubt as to a client's eligibility, this request could be made, but the failure to comply would not prove that the client was ineligible, it would only prove that he had failed to comply with the request to bring in his stub. Further inquiry, before the court if necessary, would be required before an attorney could withdraw. Public defenders have an obligation to represent indigent clients. The fact that a client may be irresponsible does not mean that he is not indigent. In fact, there could be a bit of correlation between these two traits.

important rights such as the right to a jury trial and the right to cross-examine and present witnesses. The court accepted the no contest plea and then found the defendant guilty based upon the allegations set forth in the complaint. (9/28/06 Tr. 4-5) The court imposed the maximum sentence of sixty days in jail plus a five hundred dollar fine and court costs. (10/31/06 Tr. 130) In addition, the defendant was subjected to all of the registration and notification requirements that applied to sexually oriented offenders at the time and to all the criminal penalties that attached for violating any of his obligations as a sexually oriented offender.

After Senate Bill 10 was passed, which substantially increased the defendant's obligations as a sexually oriented offender and the consequences for violating his obligations, the defendant filed a motion to withdraw his no contest plea and to vacate his conviction pursuant to Crim.R. 32.1. The defendant asserted that the record did not demonstrate a proper waiver of the right to appointed counsel, that the trial court had failed to properly advise the defendant during the plea proceedings as required by rule, that the plea was not knowingly, voluntarily, and intelligently entered because of inaccurate and misleading statements regarding the effects of the plea and that the increased consequences imposed upon the defendant by Senate Bill 10 were such that his previous plea could no longer be deemed to have been knowingly, voluntarily, and intelligently entered because there was no way that he could have known of the consequences and ramifications of changing his plea when they did not legally exist at the time.

The trial court overruled the motion and the appellate court likewise overruled the assignments of error presented. This Court granted accepted the discretionary appeal

on the defendant's fourth proposition of law on the issue of whether the new collateral sanctions of Senate Bill 10 constitute a manifest injustice sufficient to warrant the withdrawal of the defendant's no contest plea.

As a result of the defendant's no contest plea, he was subjected to certain obligations and conditions as a convicted sexually oriented offender. The obligations and conditions were substantially increased as a result of new legislation and the penalties for any such violations were increased from misdemeanor penalties to felony level offenses.

Senate Bill 10 changed the registration requirements and the penalties for violating them. R.C. 2950.04(A)(2) imposes greater registration requirements and also shortens the time the offender has to register from five days to three days as follows:

(2) Regardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply with the following registration requirements described in divisions (A)(2)(a), (b), (c), (d), and (e) of this section:

(a) The offender shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's coming into a county in which the offender resides or temporarily is domiciled for more than three days.

(b) The offender shall register personally with the sheriff, or the sheriff's designee, of the county immediately upon coming into a county in which the offender attends a school or institution of higher education on a full-time or part-time basis regardless of whether the offender resides or has a temporary domicile in this state or another state.

(c) The offender shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender is employed if the offender resides or has a temporary domicile in this state and has been employed in that county for more than three days or for an aggregate period of fourteen or more days in that calendar year.

(d) The offender shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender then is employed if the offender does not reside or have a temporary domicile in this state and has been employed at any location or locations in this state more than three days or for an aggregate period of fourteen or more days in that calendar year.

(e) The offender shall register with the sheriff, or the sheriff's designee, or other appropriate person of the other state immediately upon entering into any state other than this state in which the offender attends a school or institution of higher education on a full-time or part-time basis or upon being employed in any state other than this state for more than three days or for an aggregate period of fourteen or more days in that calendar year regardless of whether the offender resides or has a temporary domicile in this state, the other state, or a different state.

Senate Bill 10 also extended the defendant's obligation to register and report from ten years, under former R.C. 2950.07(B)(3) to fifteen years, as a tier I offender, under the newly amended R.C. 2950.07(B)(3) . And, most significantly, it substantially increased the penalties for the failure to comply with the obligations.

Under the law that was in effect when the defendant was sentenced, the penalty for violating the registration obligations was "a misdemeanor of the same degree as the most serious sexually oriented offense" that was the "basis of the registration, notice of intent to reside, change of address, or address verification that was was violated." Former R.C. 2950.99(A)(1))(a)(ii). A subsequent conviction was punished as an offense one-degree higher than the sexually oriented offense. Former R.C. 2950.99(A)(1))(b)(iv). Thus the defendant would have been punished for a third-degree misdemeanor for a violation of his obligations and for a second-degree misdemeanor for any subsequent violations. Now the penalty for a registration violation, notice of intent to reside, change of address notification, or address verification requirement is a fourth-degree felony. R.C. 2950.99(A)(1)(a)(iii).

Before Senate Bill 10, the defendant was precluded from living within one thousand feet of any school premises. Former R.C. 2950.031(A). Now, he cannot establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises. R.C. 2950.034.

In addition, the defendant is subject to all of the consequences that attach to the newly created Tier I classification. These include provisions that allow landlords to cancel leases, the reporting and dissemination of detailed personal information through the internet and on a public web site with respect to his identity, photograph, address, employer, vehicle, date of birth, tattoos and other identifying marks, and to investigations by law enforcement officers conducting routine investigations to verify residency and employment information.

## ARGUMENT

### PROPOSITION OF LAW

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.

A no contest plea or a guilty plea constitutes the waiver by the defendant of many important constitutional rights. Such pleas waive the right to a jury trial, to confront witnesses against the accused, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself.

It is generally understood such pleas must be knowingly, voluntarily, and intelligently entered in order to be valid. *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. In order for a plea to be knowingly, voluntarily, and intelligently entered, the accused must have some understanding of the consequences of the plea. Crim.R. 11 requires that courts must advise the accused of certain effects of such pleas.

Change of plea proceedings are contractual in nature and are subject to contract law analysis. *State v. Butts* (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170. In *State v. Carpenter* (1993), 68 Ohio St.3d 59, 61, 623 N.E.2d 66, 68 this Court noted:

Plea agreements are an essential and necessary part of the administration of justice. *Santobello v. New York* (1971), 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 432. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons." *Id.* at 261, 92 S.Ct. at 498, 30 L.Ed.2d at 432. "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, **must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.**" *Id.* at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433. [Bold emphasis added]

While a defendant need not be advised of all of the collateral consequences to a plea, he cannot be misled by any material misstatements by the state. People enter pleas of guilty or no contest for any number of reasons. In misdemeanor cases, people who cannot make bail will often plead at arraignment because a conviction might carry fewer consequences than prolonged pretrial detention. A person might plead guilty to a petty theft knowing there is a substantial chance of being immediately given community control or probation rather than spending weeks in pretrial detention awaiting trial. Sometimes people will plead guilty because the expense of hiring an attorney is more prohibitive than the punishment they are facing. Others will plead guilty or no contest in order to avoid the risks of trial even if they believe they are innocent. Guilty people will plead no contest or guilty in the hope that the demonstrated remorse will carry some weight in sentencing. Many consequences must be weighed and factored into this decision besides actual guilt or innocence. In many ways, it is not much different than in civil practice. Dubious or rather spurious claims may be settled based upon the overall assessment of the potential risks and consequences.

Generally people are presumed to know the law. This presumption disappears if the state misleads the defendant with respect to the actual consequences of his plea. It also disappears if the state changes the consequences to a plea after the plea is

entered. While one may be presumed to know the existing law, one cannot be presumed to know what future laws may be enacted by the General Assembly.

In *State v. Florence*, 3<sup>rd</sup> Dist. App. No. 1-03-60, 2004-Ohio-1956, it was determined that the erroneous advice given to the defendant by the trial court indicating that he would be eligible for judicial release, when he was not legally eligible, created a manifest necessity for the defendant to withdraw his guilty plea. The appellate court held: "Since Florence was misinformed as to his possible eligibility for judicial release, his plea was not entered knowingly or intelligently and the trial court erred in accepting the plea." *Id.* at ¶ 4.

The Ohio and United States Constitutions prohibit laws that impair contract obligations. See, Section 28, Article II, Ohio Constitution; Clause I, Section 10, Article I, United States Constitution. This Court had held in *Kiser v. Coleman* (1986) 28 Ohio St.3d 259, 263, 503 N.E.2d 753, 756-757 that:

In *Goodale v. Fennell* (1875), 27 Ohio St. 426, this court effectively held that any change in the law which impairs the rights of either party, or amounts to a denial or obstruction of the rights accruing by contract, is repugnant to the Constitution. This the statutes at issue clearly do. Thus, the retroactive application of R.C. 5313.07 and 5313.08 to land installment contracts\*\*757 which were in existence at the time of the enactment of these statutes is violative of Section 28, Article II of the Ohio Constitution which prohibits the enactment of retroactive laws or laws impairing the obligation of contracts.

This Court has also determined that the law in effect at the time the contract was made defines the duties and rights of the parties under it. In *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 287, 1998-Ohio-381, 695 N.E.2d 732, 736, this Court stated:

Appellants' position on this issue is supported by a long line of decisions by this court. It is axiomatic that an insurance policy is a contract between the insurer and the insured. *Ohio Farmers Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph one of the syllabus. The court stated in *Goodale v. Fennell* (1875), 27 Ohio St. 426, 432, that "[w]hen a contract is once made, the law then in force defines the duties and rights of the parties under it." In *Weil v. State* (1889), 46 Ohio St. 450, 453, 21 N.E. 643, 644, quoting *Smith v. Parsons* (1823), 1 Ohio 236, 242, the court stated that "[c]ontracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed part of the contract.' "

In *State v. Bethel*, 110 Ohio St.3d 416, 423, 2006-Ohio-4853, 854 N.E.2d 150, 166, at ¶ 50, this Court stated, "Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements."

When a criminal defendant is induced to give up his right to a jury trial, to have the state prove his guilt beyond a reasonable doubt, his right to confront witnesses and to present witnesses, and to testify on his own behalf, based upon an analysis of the facts and the potential consequences, such a decision can be made knowingly, intelligently, and voluntarily only if the legal consequences can be ascertained. If the state can later change the consequences that attach to such a plea, in an onerous fashion, then the plea was not knowingly, intelligently, or voluntarily entered.

The law does not countenance such inequities in any civil proceeding and should not do so in criminal cases. Not every change in the potential consequences attaching to a plea would warrant vacating the plea. But if it appears reasonable that the defendant would not have entered the plea, given the change in the attached consequences, then the plea should be vacated pursuant to Crim.R. 32.1 in order to

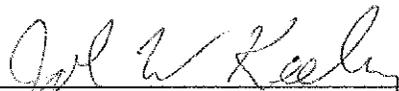
“correct manifest injustice.” The best measure of whether the voluntary nature of the plea has eroded as a result of changed or misleading information is the relatively straightforward question of whether the accused would have proceeded differently if given all the facts. Given the dramatic change in the consequences attaching to the defendant’s no contest plea, it cannot be concluded that the defendant would have still entered such a plea. Under such circumstance, the interests of justice require that the plea be vacated upon proper motion of the accused.

### CONCLUSION

For the reasons presented, the defendant requests that this Court reverse the judgment of the Franklin County Court of Appeals and that the defendant be allowed to withdraw his plea to the misdemeanor offense of sexual imposition.

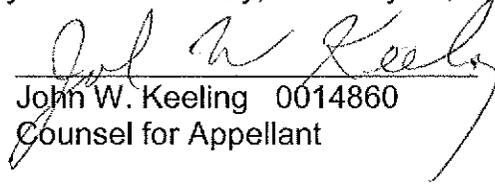
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of this brief was served upon Melanie R. Tobias, Director of the Appellate Unit of the Columbus City Prosecutor's Office, 375 South High Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, by hand delivery on this Tuesday, February 09, 2010.

  
John W. Keeling 0014860  
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IN THE SUPREME COURT OF OHIO

State of Ohio, : Case No. 09-1423  
Appellee, : On Appeal from the  
v. : Franklin County Court  
of Appeals, Tenth  
Appellate District  
Aaron K. Richey, : Court of Appeals  
Appellant. : Case No. 08AP-923

**APPENDIX**

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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

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NOTICE OF APPEAL OF  
APPELLANT AARON K. RICHEY

---

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*and*

JOHN KEELING (0014860)  
Assistant Public Defender

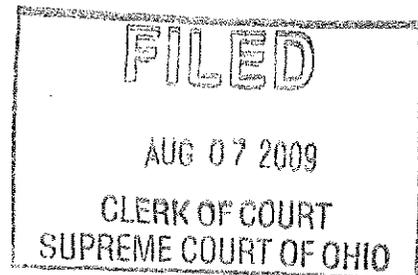
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*and*

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Assistant Prosecuting Attorney

Counsel for Appellee



A-1

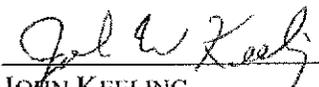
NOTICE OF APPEAL

NOTICE is hereby given that Aaron K. Richey, Appellant, appeals to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 08AP-923 on June 23<sup>rd</sup>, 2009.

This case raises a substantial constitutional question and is one of public or great general interest.

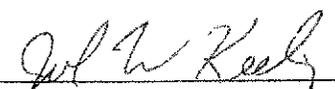
Respectfully submitted:

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Franklin County Public Defender

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CERTIFICATE OF SERVICE

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

By:   
JOHN KEELING 0014860  
Counsel for Appellant Richey A-2

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

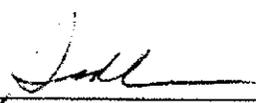
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FRANKLIN CO. OHIO  
2009 JUN 23 PM 2: 57  
CLERK OF COURTS

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

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

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 08AP-923
v.	:	(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.<sup>1</sup> 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?

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<sup>1</sup> 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.<sup>2</sup>

{¶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.

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<sup>2</sup> 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.

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IN THE FRANKLIN COUNTY MUNICIPAL COURT  
COLUMBUS, OHIO

CITY OF COLUMBUS,

08 OCT 16 PM 3:26

Plaintiff,

vs.

AARON K. RITCHEY,

Defendant.

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CASE No. 2006 CRB 016699

JUDGE TYACK

**DECISION AND ENTRY**

This matter came before the Court on the 2<sup>nd</sup> day of October, 2008, upon the Defendant's Motion to Set Aside Judgment of Conviction and Withdraw No Contest Plea filed September 5, 2008. Appearances were made by Michael Allbritain, Assistant Prosecuting Attorney, and Michelle L. Kazar, Esq., and William Safford, Legal Intern, on behalf of the Defendant. Counsel presented oral argument to supplement the Memorandum filed with the Motion, and the Court took the matter under advisement. A record was made of the proceedings before the Court Reporter. The Court now issues the following decision in overruling the above-referenced Motion.

**HISTORY OF THE CASE**

On or about July 1, 2006, Defendant was charged with Sexual Imposition, in violation of O.R.C., Section 2907.06(A)(1), a misdemeanor of the 3<sup>rd</sup> degree, stemming from an incident alleged to have occurred on June 20, 2006, involving the Defendant's minor child. A Summons was issued for Defendant's appearance at an Arraignment hearing, which was held on July 12, 2006. The Franklin County Public Defender entered an appearance on behalf of the Defendant, and it appears that the Defendant was not present at that hearing, with the "in adstentia" part of the "Not Guilty/Jury Demand" form being requested by Defendant's counsel and approved by the Assistant

Prosecuting Attorney upon that form as submitted to and approved by the Court.

A Pretrial hearing scheduled on August 7, 2006 was continued at the request of the Defendant until August 24, 2006. On August 24, 2006, counsel for Defendant moved to withdraw from representation, which was approved by the Court based upon Defendant failing to verify his income as required by the Public Defender's office to determine his eligibility for their representation. This information appears in a Motion to Withdraw which is part of the imaged records of this case maintained by the Clerk of the Court, but is not file-stamped or entered into the docket records of this case. The continuance form from August 24, 2006 indicates that the Pretrial was continued until September 22, 2006, at Defendant's request, so that he could hire private counsel.

On September 22, 2006, the case was continued for a jury trial until September 28, 2006, at which time Defendant appeared *pro se* and entered a "no contest" plea to the stated charge of Sexual Imposition. To accomplish this, Defendant executed a written Waiver of Right to an Attorney and a written Waiver of Trial by Jury, both of which were accepted and approved by the Court after a colloquy with the Defendant. The Court also discussed the effect of the "no contest" plea with the Defendant upon the record prior to accepting it. The Court then ordered a Pre-Sentence Investigation to be completed and reassigned the matter for a sentencing hearing on October 31, 2006.

On October 31, 2006, the Defendant was sentenced to serve 60 days in the FCCC forthwith, and a \$500.00 fine plus court costs was imposed, with Defendant being given a future date by which to pay. Also on October 31, 2006, two forms were completed, signed by the Defendant, and approved by the Court with respect to the Defendant's requirement to register as a sexually oriented offender pursuant to O.R.C., Section 2950.03. These forms are file-stamped and a part of the Court's record. The form entitled "Explanation of Duties to Register as a Sex Offender" is designed to be an attachment to the BCI-3-72 form (fingerprint card), and the form entitled "Notice of

Registration Duties of Sexually Oriented Offender or Child-Victim Offender (SORN)” is designed to be forwarded to the BCI and the Sheriff ‘s Office in Defendant’s expected county of residence.

No subsequent relevant action occurred in this case until Defendant’s above-referenced Motion filed September 5, 2008. The Court hereby makes findings of fact consistent with the above case history.

### **STANDARD OF MANIFEST INJUSTICE**

Pursuant to Rule 32.1, Ohio Rules of Criminal Procedure, a defendant must demonstrate “manifest injustice” in order to succeed on a post-sentence request to withdraw a plea. State v. Smith, 49 Ohio St.2d 261, 361 N.E. 2d 1324 (1977). Manifest injustice has been defined as a fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process. State v. Dumas, 2008-Ohio-4896 (10<sup>th</sup> Dist. C.A.), citing State v. Moncrief, 2008-Ohio-4594 (10<sup>th</sup> Dist. C.A.), citing State v. Williams, 2004-Ohio-6123 (10<sup>th</sup> Dist. C.A.). The Court will apply this standard to the case at bar, considering the relevant following issues argued at oral hearing and as raised by Defendant’s Motion.

### **WAIVER OF RIGHT TO ATTORNEY**

Defendant argues that he did not knowingly, intelligently and voluntarily waive his right to counsel in connection with this case. An attorney with the Public Defender’s office had represented Defendant at the Arraignment, and such representation continued through a Pretrial which was reassigned for a second Pretrial, at which time they withdrew from representation with the Court’s approval. The stated reason for withdrawal was Defendant’s failure to comply with the Public Defender’s requirement of income verification for purposes of determining eligibility for their representation. This is confirmed by the Defendant himself, who stated that he did not bring his check stub when he was supposed to do so. (Transcript of Plea Hearing, p.3) The Court notes that

Defendant signed the Certified Mail Return Receipt for the Summons on July 8, 2006 and had from then until August 24, 2006 (nearly seven weeks), which period of time encompassed three court hearings, and which time period constituted sufficient opportunity to comply with the income verification requirement. It is plausible to believe either that Defendant chose not to provide the information because he knew he earned too much to qualify for the services of the Public Defender, or that he simply desired to hire privately retained counsel, as specified in the continuance entry dated August 24, 2006. It is also plausible that Defendant voluntarily chose to not be represented by the Public Defender because he did not like what he was being told by them. In any event, the Court will not speculate, but simply find that Defendant must take some responsibility for his lack of legal representation on September 28, 2006, when he entered his “no contest” plea.

Defendant has cited the case of State v. Tymcio, 42 Ohio St.2d 39 (1975) in support of the Court’s duty to appoint counsel in this case. Tymcio involved a situation where prior counsel had withdrawn due to not being paid, and the Court had found the defendant not to be indigent and therefore not entitled to appointed counsel. Then, at a later trial date, the Court first refused to reconsider that prior finding of non-indigence (made by a different judge), and then proceeded to begin a jury trial in which the defendant essentially refused to participate on a *pro se* basis. Mr. Tymcio had stated in detail on the record, prior to trial, efforts which he had made to retain counsel prior to trial which were unsuccessful due to financial reasons, and also unsuccessful efforts which he had made to obtain bank loans to retain counsel. The fact that he was not offered a continuance to obtain counsel, or considered to be entitled to appointed counsel based upon sufficient factual statements made on the record, and forced into a jury trial despite his protestations, distinguish Tymcio from the case at bar.

Ordinarily, “private counsel” is appointed only when there is a conflict situation that prevents

the Public Defender's Office from representing a defendant. The Public Defender's Office seemed willing and able to represent the Defendant, and in fact, did represent him until their withdrawal for the reasons outlined above. Defendant was given ample opportunity to hire counsel, but did not do so for whatever reason. Despite Defendant's argument that he could not afford an attorney so the Court should have appointed one, the only information on that point is Defendant's statement that he was not sure that he could afford an attorney, and another statement that he thought he might be qualified for a public defender, but he was not sure. What is sure it that Defendant lost his representation simply by failing to provide income verification. This is in contrast to Tymcio, *supra*, where efforts made to hire an attorney and to obtain a bank loan were made known to the Court, and the Court denied appointed counsel where it was apparent that the defendant showed his inability to afford an attorney instead of being "not sure" due to his inaction.

Also contained as part of the record are the written Waiver of Right to an Attorney and written Waiver of Trial by Jury, both of which were signed by Defendant and approved and signed by the Court, and both of which contain language regarding the right to consult an attorney, the right to a continuance to obtain an attorney, and the right to have an attorney appointed if the defendant could not afford to hire an attorney. Again, in contrast to Tymcio, *supra*, this case was a plea and waiver of the right to a trial as opposed to a defendant who was forced to actually conduct a trial, *pro se*.

In viewing all of the information in the record together as a whole, including the language in the written forms referenced above (which, in State v. Jones, *infra*, at p. 219, the Court recognized as part of the record), the transcript of the plea hearing (which included the Court's colloquy with Defendant), Defendant's Affidavit, and the written memorandum, the Court finds that the Defendant knowingly, voluntarily and intelligently waived his right to counsel in connection with this case, and

any doubt in that regard does not rise to the level of manifest injustice required to allow Defendant to withdraw the “no contest” plea.

### **ADVICE REGARDING THE CONSEQUENCES OF THE “NO CONTEST” PLEA**

Defendant also questions the advice given by the Court regarding the effect of the “no contest” plea. Rule 11(E), Ohio Rules of Criminal Procedure, requires the Court to advise a defendant as to the effect of the specific plea entered. State v. Jones, 2007-Ohio-6093, 116 Ohio St. 3d 211. At the plea hearing on September 28, 2006, the Court first informed the Defendant that the no contest plea was “not an admission” instead of correctly informing him it was “not an admission of guilt” as required by Rule 11(E).

Then the Court informed the Defendant that in entering this plea, he would be “*accepting* as true the facts” as set forth, when the proper advice would be that he would be “*admitting* the truth of the facts” as alleged, pursuant to Rule 11(E). The Merriam-Webster Dictionary defines “accept” as “to recognize as true”, while the definition of “admit” is “to concede as true”. The definition of “concede” is to “to accept as true”. By definition, these words can and may be used interchangeably, and therefore, reasonable minds cannot draw a distinction between the words “accept” and “admit” in this context.

The Court found the Defendant guilty after hearing a recitation of the facts, and that guilty finding formed the basis of the consequences which followed and of which the Defendant now complains. Regardless of any admission made or not made by the Defendant, the end result would have been identical had Defendant instead entered a guilty plea, where there is a full admission to guilt, or an “Alford” plea where there is not an admission of guilt or to even the facts alleged. The Court finds that the advice given by the Judge prior to the “no contest” plea, regarding the effect of

that plea, although not totally correct, is harmless error in this case, and certainly does not rise to the level of “manifest injustice” required to disturb the plea.

**STATEMENTS BY THE COURT REGARDING OBLIGATIONS  
AND SANCTIONS AS A SEXUALLY ORIENTED OFFENDER**

The Defendant argues that misstatements made about Defendant’s registration obligations as a sexually oriented offender led to a grave misunderstanding by Defendant of those obligations, thereby rendering the plea not intelligently entered into by Defendant. Authorities have been cited by Defendant in his Memorandum in support of this argument. Specifically questioned by Defendant is the Court’s statement, prior to accepting the plea, to the Defendant that he “might” or “may” be required to register as a sex offender, and the characterization of that statement as implying a one-time requirement, as it certainly did not detail the actual requirements placed upon the Defendant pursuant to Chapter 2950 of the Ohio Revised Code, and sanctions which could be imposed.

As stated above, this matter was continued for a sentencing hearing on October 31, 2006. At that sentencing hearing, two forms were completed, signed by the Defendant, and approved by the Court with respect to the Defendant’s requirement to register as a sexually oriented offender pursuant to O.R.C., Section 2950.03. These forms are file-stamped and a part of the Court’s record. They are entitled “Explanation of Duties to Register as a Sex Offender” and “Notice of Registration Duties of Sexually Oriented Offender or Child-Victim Offender (SORN)”.

The two forms explain fully the requirements placed upon the Defendant regarding his duties to register as a sexually oriented offender and other requirements as well as explaining to him what would happen if he failed to comply. Any doubt in Defendant’s mind about what was required of

him was eliminated at the time of sentencing by his acknowledgment and signing of those forms, which were also approved with the Judge's signature, confirming that the Defendant was informed as such. Defendant made no attempt to question or withdraw his plea prior to or at sentencing.

Defendant was sentenced to serve 60 days in the Franklin County Correction Center forthwith, and also pay a fine of \$500.00 plus court costs, both of which were successfully accomplished. Defendant did not appeal this sentence or this case to the Court of Appeals, nor did he request a new trial or a reconsideration. Now, nearly two years later, he moves to withdraw the plea. Although there is not a time limit specified for this motion, an undue delay between the occurrence of the alleged cause for withdrawal (events at the plea hearing on September 28, 2006) and the filing of the motion (September 5, 2008) is a factor adversely affecting the credibility of the movant and mitigating against the granting of the motion. Okansen v. United States, 362 F.2d 74 (C.A. 8, 1966). State v. Harris, 2007-Ohio-6362. The State argues that this two year passage of time adversely prejudices the State in presenting their case should this Motion be granted. This Court finds that not only due to the passage of time, but also due to other reasons contained in this decision, Defendant's credibility is questioned with regard to the merits of this Motion. Although Defendant's Affidavit submitted with his Motion attempts to support his cause, as a general rule, a self-serving affidavit is insufficient to establish manifest injustice. State v. Smith, *supra*. The Court finds that manifest injustice does not exist with respect to this argument.

**ADDITIONAL CONSEQUENCES IMPOSED UPON DEFENDANT  
BY VIRTUE OF NEWLY ENACTED LEGISLATION**

The Defendant alternatively argues that the enactment of Senate Bill 10, which modified the registration requirements and possible sanctions under R.C., Chapter 2950, requires vacation of the

plea. The Court finds that the Defendant has failed to show that the retroactive application of this legislation to his case constitutes manifest injustice. The Court also notes that Defendant has filed a Petition to Contest Reclassification under Case No. 08 MS 000478 in the Court of Common Pleas of Franklin County, Ohio, which remains pending before that Court, presumably to contest the issues of retroactive application and reclassification. Therefore, Defendant's reclassification is unresolved and therefore prematurely argued here as a reason to set aside the plea.

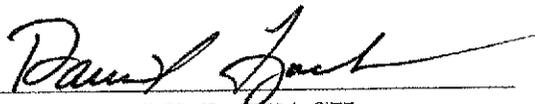
### CONCLUSION

Based upon the foregoing, Defendant has failed to meet his burden of showing manifest injustice. Therefore, it is

**ORDERED** and **ADJUDGED** that the above-referenced Motion be, and hereby is **OVERRULED**.

This constitutes a final appealable order.

Date: 10/16/08

  
\_\_\_\_\_  
JUDGE DAVID B. TYACK

Copies to: Michael Allbritain, Assistant City Prosecutor  
Michelle L. Kazar, Attorney for Defendant