

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1448

STATE OF OHIO,

*

Case No.: _____

*

Appellant,

*

On appeal from the Sixth
Appellate District,
Case No. L-09-1139

v.

*

CHRISTOPHER BARKER,

*

Appellee.

*

MOTION TO STAY JUDGMENT OF COURT OF APPEALS PENDING APPEAL

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

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RECEIVED
AUG 10 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
AUG 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION FOR IMMEDIATE STAY

Pursuant to S.Ct.Prac.R. II, §2(A)(3)(a), appellant seeks an immediate stay of the Sixth Appellate District's judgment mandate pending an appeal to this Court. Appellee entered a plea of no contest to three counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), all felonies of the third degree. Upon appeal, the Sixth Appellate District found that appellee's plea was not voluntary, knowing and intelligent because of the trial court's choice of words in the description of the constitutional right to compulsory process of witnesses. The matter was reversed and remanded to the trial court for further proceedings. The State now seeks this Court's review of two issues which have divided Ohio's appellate courts with respect to the sufficiency of the plea colloquy.

The State also seeks a stay of the Court of Appeals' judgment in order to maintain appellee in the custody of Ohio Department of Rehabilitations and Corrections during the appeals process. The victim in this case was appellee's half-sister, who was thirteen years old at the time of the discovery of the offenses. Appellee later admitted during a police interview that he supplied the victim with drugs and alcohol and had vaginal, anal and oral sex with her on average of three to four times a month over a three year period. Because of the nature of the crimes and the familial relationship between appellee and his victim, the State seeks to maintain appellee in the custody of Ohio Department of Rehabilitations and Corrections for the protection of the victim during the appeal process.

A Memorandum in Support of Jurisdiction as required by S.Ct.Prac.R. II, §2(A)(3)(b), is being filed contemporaneously with this motion.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: *Evy M. Jarrett*
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellant

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 16th
day of August, 2010, to Stephen D. Long, 3230 Central Park West, Suite 106, Toledo,
Ohio 43617 and to the Office of the Ohio Public Defender, 250 East Broad Street, Suite
1400, Columbus, Ohio 43215.

Evy M. Jarrett
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellant

FILED
COURT OF APPEALS
2009 JUN 30 A 8:05

COMMISSIONER OF COURTS
BETH L. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1139

Appellee

Trial Court No. CR0200901024

v.

Christopher Barker

DECISION AND JUDGMENT

Appellant

Decided:

JUN 30 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas County Court of Common Pleas, appellant, Christopher Barker, sets forth the following assignment of error:

{¶ 2} "THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING THE APPELLANT'S NO CONTEST PLEA WITHOUT ENSURING THAT THE PLEA

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JUN 30 2010

WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED AND DID NOT COMPLY WITH CRIM.R. 11(C)(2)(c)."

{¶ 3} On January 7, 2009, appellant was indicted on five counts of unlawful sexual conduct with a minor, all violations of R.C. 2907.04(A) and felonies of the third degree. He entered not guilty pleas to all five counts. Subsequently, however, he withdrew his guilty pleas and entered pleas of no contest to three of the counts in the indictment. The court found him guilty on all three counts and, after holding a sentencing hearing, sentenced appellant to four years in prison on each count, to be served consecutively for a total of 12 years in prison. The court below also found appellant to be a Tier II Child Victim Offender pursuant to R.C. 2950.01 and ordered him to comply with the registration requirements found in R.C. 2950.03(B)(3)(a) for a period of 25 years.

{¶ 4} In his sole assignment of error, appellant asserts that the entry of his no contest plea was not voluntary, intelligent, and knowing because the trial judge failed to fully comply with the requisites of Crim. 11(C), which reads:

{¶ 5} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 6} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if

applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 7} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 8} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, *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 or herself." (Emphasis added.)

{¶ 9} Because the rights contained in Crim.R.11(C)(2)(a) and (b) are not constitutional rights, a trial court need only "substantially comply" with its duty to inform the defendant of his rights under these sections. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 14. On the other hand, the rights articulated in Crim.R. 11(C)(2)(c) are constitutional in nature. Accordingly, a trial court must strictly comply with its obligation to inform the defendant of his rights under that section. *Id.* at ¶ 19-21. Strict compliance does not mean that the a court must use the exact wording found in Crim.R. 11(C)(2)(c) during the colloquy; it "may vary slightly, but the court cannot simply rely on other sources to convey these rights to the defendant." *Id.* at ¶ 29.

{¶ 10} Appellant urges that the common pleas judge failed to notify him of his right to compulsory process to obtain witnesses because she did not inform him of the fact "that he could compel any such witnesses to attend and testify on his behalf, which is the crux of the constitutional right to subpoena." The relevant portion of the Crim.R. 11 colloquy between appellant and the trial court judge is as follows:

{¶ 11} "THE COURT: The State is recommending that Counts Four and Five will be nolleed at the time of sentencing. I do have to ask you, do you understand when you're entering a plea you're giving up your right to a jury trial or bench trial, also *giving up your right to call witnesses to speak on your behalf* or question witnesses that are speaking against you [?] Do you understand that?"

{¶ 12} "A. Yes, Your Honor." (Emphasis added.)

{¶ 13} Although a court does not necessarily have to employ the term "compulsory process" during the Crim.R. 11 colloquy, it must use some equivalent term such as the defendant has the "power to force," "subpoena," use the "power of the court to force," or "compel" a witness to appear and testify on a defendant's behalf. See *State v. Neeley*, 12th Dist. No. 2008-Ohio-034, 2009-Ohio-2337, ¶ 29. Here, the trial court did not use any of these terms when informing appellant that he was giving up the right to compel witnesses to testify on his behalf. The ability "to call witnesses" simply does not satisfy the constitutional mandate. *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, ¶ 9, quoting *State v. Smith*, 8th Dist. No. 92320, 2009-Ohio-5692, ¶ 35. See, also, *State v. Cummmings*, 107 Ohio St.3d 1206, 2005-Ohio-6506 (declining to accept

jurisdiction over a case in which the Eighth Appellate District Court determined that the phrase "right to call witnesses" was not the equivalent of the right to use compulsory process for obtaining witnesses in a defendant's favor.)

{¶ 14} Appellee points out, however, that the change of plea form reads, in relevant part: "I understand by entering this plea I give up my right to a jury trial or court trial, where I could see and have my attorney question me, and where I could use the power of the court to call witnesses to testify for me." Appellee further argues that at the change of plea hearing, the trial court asked appellant whether he had an opportunity to review the change of plea form with his attorney before signing it. Because appellant replied that he had done so, and both he and his trial counsel signed that form, appellee contends that the trial court satisfied the constitutional imperative set forth in Crim.R. 11(C)(2)(c). We disagree.

{¶ 15} The *Veney* majority plainly states that "the court cannot simply rely on other sources to convey these constitutional rights." We find that written plea agreement is another source, and, therefore, cannot be employed to satisfy the constitutional mandate in Crim. R. 11(C)(2)(c). This conclusion is bolstered by the partial concurrence and partial dissent in *Veney* authored by Justice Lanzinger, joined by Justices Lundberg, Stratton, and Cupp. Justice Lanzinger notes that the failure of a trial judge to explain the constitutional rights in Crim.R. 11(C)(2)(c), is a presumption, but has never been held to be an irrebuttable presumption. *Id.* at ¶ 34. Calling the view of the majority "formalistic," she finds that an appellate court must "review the entire record, including

written materials that have been reviewed with counsel and signed and assented to in open court." Justice Lanzinger then concludes that the holding of the majority "will invalidate convictions based upon a single omitted oral statement of the trial court." Id. at ¶ 38.

{¶ 16} Accordingly, we are required to reject the state's argument, and find that Barker was not properly informed of his constitutional rights under Crim.R. 11(C)(2)(c). Therefore, his no contest plea was not voluntary, knowing, and intelligent, and his sole assignment of error is found well-taken.

{¶ 17} The judgment of the Lucas County Court of Common Pleas is reversed and remanded to that court for further proceedings consistent with this judgment. Appellee, the state of Ohio, is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT REVERSED.

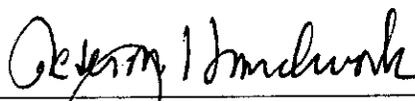
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Arlene Singer, J.

CONCUR.



JUDGE


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.