

I. The Case at Bar Does Not Involve an Issue of Public or Great General Interest or a Substantial Constitutional Question.

Appellant State of Ohio proposes that this is a case of public or great general interest and involves a substantial constitutional question. With regard to whether a substantial constitutional question is involved, there is no constitutional question in this matter. The Court of Appeals below relied only upon an analysis of Criminal Rule 11 and not the federal or Ohio constitutions. Moreover, the State in its Memorandum in Support of Jurisdiction makes no cogent attempt to explain why a substantial constitutional question is involved or that anything more than an interpretation of Criminal Rule 11 is involved herein.

This case is also not a matter of public or great general interest because the appellate court's analysis of Criminal Rule 11 was limited to the facts of this particular case. The Trial Court committed error because it *clearly* implied that *only* the two-year sentence was a mandatory sentence. That was a misstatement of the law. All of the possible sentences, two years, three years, four years, and five years are *all* mandatory sentences for this particular felony. But the Trial Court did not say it that way; it only said that the two-year minimum sentence was mandatory. Additionally, at Appellee's sentencing hearing, it was clear that both Appellee and her attorney thought that only the two-year sentence was mandatory. At the sentencing hearing, the following exchange took place:

MR. SULLIVAN [*defense counsel*]: Your Honor, was it the Court's intention to impose the mandatory minimum?

THE COURT: The Court is imposing three years mandatory.

MR. SULLIVAN: It's my understanding, Judge – could we approach on this?

THE COURT: Yes, you may.

THEREUPON, a sidebar was held.

THE BAILIFF: Go off the Record?

THE COURT: No, this needs to be on the Record.

MR. SULLIVAN: I understand that the mandatory minimum is two years.

THE COURT: My understanding is that mandatory minimum is two years and the Court has the option to impose whatever the appropriate sentence is for an F-3, and that sentence is mandatory. Whatever the Court imposes.

MR. SULLIVAN: It's not the Court's intention to impose the mandatory minimum?

THE COURT: I am imposing three years mandatory. If she wants to appeal that then she can.

My understanding of the Sentencing statutes and I am not saying that I am an expert at three months on the bench, but my understanding is for purposes of Sentencing, when there is a mandatory sentence, the fact there is a minimum mandatory, what that means is that is a minimum sentence that the Court has to impose. It's a mandatory sentence, meaning there is no credit for good time and those kinds of things. That is not meaning that a three, four, five year Sentence is not also mandatory.

There is a difference between mandatory time and non-mandatory time, whether it's two years, three years, four years.

And my understanding is that this charge carries with it a mandatory sentence, period. It's one of those F-3 Sentences, but that Sentence, whatever it is, is mandatory. Again, if I am wrong, I guess you can appeal it and we all will find out, but that is what the Sentence is.

Let me know if you guys have a discussion at the Prosecutor's Office, let me know if I am off base about that.

MR. BUSH [prosecutor]: I will (Inaudible).

THE COURT: That is my understanding.

Anything further, Attorney Sullivan?

MR. SULLIVAN: No, Your Honor.

THE COURT: Anything further, Attorney Bush?

MR. BUSH: No, Your Honor.

THE COURT: This matter is concluded.

Thank you.

(*Sentencing Transcript*, p.12-15)

The appellate case holding is limited to the facts of this case. Neither Appellee nor her counsel knew that any sentence over and above the mandatory two-year sentence would also be mandatory. The Court did not accurately inform Appellee that any sentence in addition to the mandatory two-year sentence would also be mandatory time prior to her entering a plea. The holding herein is unique to these facts, but the concept that a trial court cannot misstate the possible criminal penalties at a plea hearing is not a novel holding. It has been held that where early release is "misrepresented or misstated" then there has been a failure of the trial court to properly inform a defendant in violation of Criminal Rule 11(C)(2)(a). *State v. Byrd* (2008), 178 Ohio App. 3d 646, 651, 2008 Ohio 5515 P.24. The appellate court in *Byrd* explained:

On closer review, we believe that the holdings in *Colbert*¹ and *Brigham*² stand for the proposition that when a defendant's eligibility for probation or community control sanctions is misrepresented or misstated, a determination by the court that the defendant understands he is ineligible is then "applicable," and that the same applies to the defendant's ineligibility for "super shock probation" or, as it is now, judicial release. Neither *Colbert* nor *Brigham* held that in every instance in which a mandatory sentence is

¹ *State v. Colbert* (1991), 71 Ohio App. 3d 734, 595 N.E.2d 401.

² *State v. Brigham* (February 27, 1997), Franklin App. Nos. 96 APA07-964 and 96 APA07-970, 1997 Ohio App. LEXIS 689.

imposed that the court must determine that a defendant understands he is ineligible for judicial release. Indeed, *Colbert* expressly disclaimed that purpose.

Id. It has thus been the rule in Ohio that only a misrepresentation or misstatement makes “applicable” an additional duty of the trial court. This exception to the general rule was found to be applicable to the case at bar.

Whether a trial court meets its duty of “substantial compliance”³ in meeting its duty under Crim. R. 11(C)(2)(a) is “based upon a consideration of the totality of the circumstances surrounding the entry of the plea.” *State v. Colbert* 71 Ohio App. 3d 734,737, citing this Court’s “totality of the circumstances” test in *State v. Carter* (1979), 60 Ohio St. 2d 34, 14 O.O.3d 199, 396 N.E.2d 757, and *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. The Court of Appeals below cited the fact that a misstatement or misrepresentation occurred and held under these circumstances the Trial Court had violated its affirmative duty under Crim. R. 11(C)(2)(a). There is no reason to believe as the State contends herein that new law or a new precedent was created by the appellate court below. Accordingly, this case does not involve a matter of public or great general interest.

Moreover, this case is not even a case anymore. Since the decision of the Court of Appeals on February 29, 2012, the Appellee Terri L. Bell has repled and has been resentenced once again to the same three-year sentence. Nothing this Court does or does not do will change the outcome of this case. In other words, this case is moot.

The State suggests that this Court should hear this case nevertheless because the rule of law pronounced by the Court of Appeals herein is capable of repetition but evades review. This Court has held: “this exception [to the mootness doctrine] applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is

³ *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163.

too short in its duration to be fully litigated before its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St. 3d 229, 231, 729 N.E.2d 1182, 1186.

The State has not shown this case to involve “exceptional circumstances.” Appellant has not shown that the challenged action herein is “too short in its duration to be fully litigated before its cessation or expiration.” And in view of the fact that the Court of Appeals decision only applies to the peculiar facts of *this* matter, there is no reasonable expectation that the same complaining party will be subject to the same action again. Additionally, the trial Judge stated at the sentencing hearing that at that time, April 29, 2011, he had been on the bench only three months. The change of plea hearing, when the inaccurate and/or unclear information was given to Appellee, was held almost two months earlier, on March 10, 2011. It is therefore highly unlikely that these particular circumstances will ever arise again.

Moreover, as shown above, no new rule of law was pronounced by the appellate court. But, even if a new rule of law could be gleaned from the appellate decision, its repetition is unlikely to evade review. It evades review in this particular case because Terri Bell decided to enter into a plea bargain again and the same sentence was reimposed.

Based on the foregoing, the Court should decline the invitation to accept this matter for review.

II. Appellee's Response to Appellant's Proposition of Law No. I: A trial court does not commit reversible error when it fails to advise a defendant that he will not be eligible for judicial release due to the imposition of a mandatory sentence.

As shown above, the Court of Appeals did not hold that a trial court commits reversible error when it fails to advise a defendant that he will not be eligible for judicial release due to the impositions of a mandatory sentence, which is the premise of the proposition of law of the State. The appellate court's reversal was clearly limited to the facts of this case. In fact, all of the cases cited by Appellant under its Proposition of Law use the phrases "under these facts," or "under the totality of the circumstances," or similar verbiage. Whether a trial court met its duty under Crim. R. 11(C)(2) is determine on a case-by-case basis.

Indeed, the State's proposition of law would negate the very case law upon which the State relies. Its proposition of law suggests that a trial court would never be wrong if it failed to accurately advise a pleading defendant that he or she will not be eligible for judicial release due to the imposition of a mandatory sentence. But the longstanding case law holds that such bright-line rules are inappropriate in view of the "totality of the circumstances" test espoused by this Court. The very case cited prominently by Appellant, *State v. Mitchell*, 11th App. No.2004-T-0139, 2006 Ohio 618, *cert. denied*, 109 Ohio St. 3d 1508, 2006 Ohio 2998, 849 N.E.2d 1028, which states that "under the totality of the circumstances, trial counsel's misrepresentation regarding eligibility for judicial release did not invalidate guilty plea," at ¶16, would negate any such broad proposition of law that applies in *every* circumstance.

A fine example of why such a broad proposition does not work is the instant case. The Trial Court implied that a two-year minimum term was mandatory but that the longer sentences were *not* mandatory. The Court of Appeals deemed this particular colloquy under the circumstances to be misleading. In the *Mitchell* case, as well as the other cases cited by

Appellant at page 6 of its brief, the courts did not apply a broad proposition requested by the State herein, but held that under the circumstances that Criminal Rule 11(C)(2) was not violated because there was no showing that any misleading statements were relied upon or caused prejudice. *State v. Cvijetinovic*, 8th App. No. 81534, 2003 Ohio 563 (guilty plea upheld where the record failed to demonstrate that defendant relied upon the trial court's misstatements about judicial release); *State v. Taylor*, 12th App. No. 2003-07-025, 2004 Ohio 3171, *cert. denied*, 103 Ohio St. 3d 1526, 2004 Ohio 5852, 817 N.E.2d 409 (guilty plea upheld where record did not reflect that the decision to plead guilty was influenced by the trial court's erroneous information regarding his eligibility for judicial release); *State v. Blackshear*, 2nd Dist. No. 24302, 2011 Ohio 2059 (under the circumstances, trial counsel's misrepresentations regarding eligibility for judicial release did not invalidate guilty plea).

In the case at bar, an exchange amongst the court, prosecutor and defense counsel during Appellee's sentencing hearing shows that Appellee *did not* understand that any sentence over the two-year mandatory sentence would also be mandatory. On the contrary, Appellee and her counsel thought that the two-year mandatory sentence was the only part of the sentence that would be mandatory and were obviously surprised at the court's sentence. Under these circumstances, the appellate court reversed and remanded the case. The appellate court rightly preserved the integrity of the Ohio criminal court system when it reversed and remanded Appellee's conviction because Appellee was not clearly apprised of the maximum sentence, either by the Court or by her counsel, before entering a plea in the first instance, in light of the particular facts and circumstances surrounding this specific case. Appellee ultimately entered a plea to the same charge and was sentenced to three years but did so with a clear understanding of the maximum sentence.

The cases cited by Appellant cut against its sole proposition of law because they all have holdings that only apply to the circumstances therein and do *not* go so far as the proposed proposition of law to suggest that a trial court *never* commits reversible error because it fails to advise of the lack of opportunity for judicial release. In other words, it is not the Court of Appeals herein that has extended the law, but rather it is the Appellant State of Ohio that suggests that brand new law has been created. This Court should decline the invitation to accept such a broad proposition in lieu of the well-established “totality of the circumstances” test.

CONCLUSION

For the reasons set forth above, the Court should decline jurisdiction of this case because it is no longer a “case”, it does not involve a matter of public and great general interest or a substantial constitutional question, and the Proposition of Law herein would dramatically change the law regarding Criminal Rule 11(C)(2) without any salutary purpose.

Respectfully submitted,

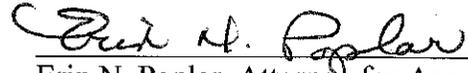
ERIN POPLAR LAW, LLC



Erin N. Poplar (0071312)
Attorney for Appellant
1636 Eagle Way
Ashland, Ohio 44805
PH: 419.281.3561
FX: 419.281.6999
epoplar@poplarlawoffices.com

PROOF OF SERVICE

I sent a copy of this Response on the 9th day of May, 2012 to Attorney for the State of Ohio, Ramona Francesconi-Rogers, Ashland County Prosecutor, 110 Cottage Street, Ashland Ohio 44805.



Erin N. Poplar, Attorney for Appellant

ERIN POPLAR LAW, LLC

1636 EAGLE WAY

ASHLAND, OHIO

44805

419.281.3561 phone

419.281.6999 fax