ORIGINAL

No. 2011-1383

In The Supreme Court Of Ohio

Appeal from the Court of Appeals
Ninth Appellate District
Wayne County

THE STATE OF OHIO
Plaintiff-Appellee,

v.

KYLE D. RABER
Defendant-Appellant.

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The State of Ohio's Merits Brief

David T. Eager (0074442)
David M. Todaro (0075851)
126 N. Walnut St.
Wooster, Ohio 44691
T: (330) 262.2279
deager622@msn.com

Attorneys for Appellant
Kyle D. Raber

Jason B. Desiderio (0075641)
(Counsel of Record)
103 Falconer St.
N. Tonawanda, New York 14120
T: (216) 410.4181
jasondesiderio@gmail.com

Attorney for Appellee
State of Ohio

Table of Contents

Table of Authorities..... ii

Preliminary Statement..... 1

Statement of Facts..... 2

Argument..... 5

This Case Should Be Dismissed As Improvidently Granted..... 5

Raber Forfeited Or Waived The Arguments He Raises On Appeal..... 7

Raber Agrees He Should Have Been Required To Register As A Sex Offender And So Any Error Is Harmless..... 8

The Court's Jurisdiction Continues Where Its Later Acts Only Correct An Error That Is Apparent In The Record..... 10

Conclusion..... 14

Table of Authorities

Cases

Colley v. Colley (1989), 43 Ohio St.3d 87 11,13

Hudson v. U.S. (1997), 522 U.S. 93, 99, 118 S.C. 488 14

Spitznagel v. St. Bd. of Educ., 126 Ohio St.3d 174 7,8

State v. Baker (2008), 119 Ohio St.3d 197 11,12

State v. Baston (1999), 85 Ohio St.3d 418 6

State v. Carlisle, 2011-Ohio-6553 11,12

State v. Childs (1986), 14 Ohio St.2d 56 7,8

State ex rel. Cruzado v. Zaleski, 2006-Ohio-5795 13

State v. Frazier (2007), 115 Ohio St.3d 139 7,8

State v. Fry (2010), 125 Ohio St.3d 163 ..... 9, 10

State *v. Hendricks*, 2012 Ohio 1924 (4th Dist.) 7

State v. Lester (2011), 130 Ohio St.3d 303 11,12

State v. Miller (2010), 127 Ohio St. 3d 407 12

State v. Williams (1977), 51 Ohio St.2d 112 6,8

Statutes and Rules

Crim. R. 32.....9,10

Ohio R. Crim. P. 10..... 6

Ohio R. Crim. P. 23..... 6

R.C. 2505.02..... 10

R.C. 2950.03..... 10, 11

S.Ct. Prac. R. 3.1.....5

S.Ct. Prac. R. 12.1.....7

Preliminary Statement.

On appeal, appellant Kyle Raber conceded that he should have been required to register as a sex offender without any further proceedings. Yet he argues the trial court's determination that he must register should be overturned because he received a hearing on the issue and was given a chance to present evidence and make legal arguments in open court, all while represented by highly qualified counsel. And all of this occurred in a process approved by Raber.

After Raber had consensual vaginal intercourse with his 18 year old ex-girlfriend, he anally raped her in her bed in her room at her parents' home. Raber raped his ex-girlfriend because he was mad at her. He admitted this in court. But Raber was indicted only on one count of sexual battery and plead guilty to sexual imposition, a third degree misdemeanor.

At Raber's sentencing, the State and Raber argued over his need to register as a sex offender. The law had recently changed and the issue was not as clear as Raber pretends. Accordingly, the court asked if the parties agreed to put off the question of registration so that they could present arguments on the issues. Raber agreed to this process.

At that point, the trial court imposed the other aspects of his sentenced. Putting off the registration question but imposing the jail sentence greatly benefited Raber because it allowed him to serve his jail time in between his college semesters. Yet despite his agreement to and his benefit from this bifurcated process, Raber now complains that he was treated unfairly. The Court should not condone such mischief.

Statement of Facts.

Raber and his 18 year old ex-girlfriend had consensual sex in her bedroom. [March 2, 2010 transcript p. 6, l. 7-20]. Immediately following that encounter, Raber anally raped the girl. [Id., at p. 6, l. 22-25]. Raber raped her because he was mad at her. As explained in court:

> THE COURT: [The victim] had stated in her victim impact statement that you had indicated to her after this happened that when she asked you why it happened you indicated that you were mad. Did you say that?
>
> KYLE D. RABER: Yes, I said that.

[November 26, 2008 transcript, p. 6, l. 21 - p. 7, l. 1; see also, March 2, 2010 transcript., p. 33, l. 16 - 20].

Raber was indicted on one count of sexual battery in April 2008. [R. at 1]. The case was settled and he entered a plea of guilty to one count of sexual imposition, which is a third degree misdemeanor. [R. at 21].

The record shows that the trial court, Raber's attorney, and the State's attorney argued about whether this conviction required Raber to register as a sex offender. [November 26, 2008 transcript, p. 2 - p. 13]. The State strenuously argued that Raber was subject to automatic classification as a sex offender. [Id. at 2-4]. Raber's attorney argued that there was a question about the necessity for Raber to register because Raber and his victim had engaged in consensual vaginal intercourse immediately before the conduct became offensive. [Id. at 4-5]. And the trial

court was unclear what standard of proof it should apply when deciding if someone must register as a sex offender under the new laws. [Id. at 5-6].

Given all of the questions surrounding Raber's registration, the court asked if the parties would agree to let the court take that issue under advisement. [Id. at p. 6, l. 6 - 11]. Raber's attorney's response was short, clear, and unequivocal - "Yes." [Id. at p. 6, l. 12].

Raber was then sentenced to sixty days in jail, probation, fined, and ordered to do community service. [Id. at p. 16 l. 10 - 19]. This sentence was memorialized in a judgment [R. 22]. Imposing the sentence at this point allowed Raber to serve his jail time in between his college semesters. [November 26, 2008 transcript, p. 16, l. 15 - 17]. Raber never objected to the sentence or the agreement to resolve the registration issue at a later date. Instead, he agreed to the bifurcated process. [Id. at p. 6, l. 12].

The trial court held an evidentiary hearing to determine if Raber's conduct was consensual. If the act was consensual, Raber argued that he could be exempt from the registration requirement. Raber never objected to the hearing. Conversely, Raber fully participated by cross-examining the victim. [March 2, 2010 transcript, p. 11 - 16.] Raber even testified. [March 2, 2010 transcript., p. 21-36].

Raber's testimony at the sex offender hearing is telling. For example, Raber:

- Confessed that he had anal sex with his ex-girlfriend after she changed her mind because he was mad at her. [Id., p. 33, l. 16 - 20].

- Recognized that he "messed up." [Id., p. 33, l. 21-23].
- Acknowledged that in a controlled phone call he was asked why he forced his ex-girlfriend to have anal sex and he responded that he was sorry and he wasn't thinking. [Id., 34, l. 3-7].
- Conceded that immediately after the attack his ex-girlfriend twice tried to call one of her friends and he hung up the phone both times. [Id., p. 35, l. 2 - p. 36, l. 10].
- Explained, "I hung up again and I told her that I didn't want her calling Leah . . . ." [Id., p. 36, l. 9-10].
- Admitted that his victim was crying when he left her room. [Id., p. 28, l. 21-24].

Yet, not before, during, or after the hearing did Raber or his attorney object or otherwise complain about the hearing, its timing, or its purpose.

Instead, Raber's counsel requested an opportunity to make an argument and said he would provide a brief to the court on the issues if it wanted one. [Id., p. 36, l. 18-22]. The court took the testimony and arguments under advisement and then decided Raber was required to register.

Raber believes that he should have been required to register as a sex offender. [Appellant Kyle Raber's Memorandum In Support Of Jurisdiction, p. 12 ("Thus, it was unnecessary to even hold an evidentiary hearing because lack of consent is inherent in the charge itself. The fact is, the trial court should have ordered the Appellant to register as a sex offender at the time he was sentenced on December 1, 2008.")]. But now, Raber wants this Court to relieve him of his registration requirements.

The trial court proposed a process that gave Raber an opportunity to present evidence, make legal arguments, and serve his jail sentence at a time more convenient to him. Raber accepted the process. Raber benefited from the process. And now Raber claims the process violated his rights. It did not. And, in any event, Raber has forfeited or waived these arguments and any error is harmless.

Argument.

This Case Should Be Dismissed As Improvidently Accepted.

Not every case belongs in this Court. Even if an appellate court makes a mistake, this Court should not automatically review the decision. Raber's case is one of the many cases that do not belong before this Court.

This Court accepted Raber's appeal as a discretionary appeal upon his unopposed motion for reconsideration. The motion followed this Court's decision to decline jurisdiction. The original request for leave to appeal and the later motion for reconsideration were unopposed. As explained below, this case will not advance the law and is not the kind of case that belongs in the Supreme Court of Ohio.

Raber's appeal does not present a substantial constitutional question. See, S.Ct. Prac. R. 3.1(B)(2). Raber agreed to a process that directly benefited him. He did not like the results and so now he is challenging that process. Not only is his displeasure not a substantial constitutional

question, it is not a question at all. Ohio has long recognized that parties can waive rights. Ohio R. Crim. P. 23 (A) (defendant may waive the right to a jury trial); Ohio R. Crim. P. 10 (A) (defendant may waive the reading of the indictment); *State v. Baston* (1999), 85 Ohio St.3d 418, 422 (explaining that courts allow the waiver of even fundamental constitutional rights if that waiver is made freely and intelligently).

To the extent Raber had a right to be adjudicated a sex offender at the same time he was sentenced, he agreed to waive that right so he could both have a hearing on the issue and serve his jail sentence between college semesters. Raber's rational decision is not a substantial constitutional question that requires this Court's review.

Also, this case is not a case of public or great interest. As explained above, this case involves Raber's simple waiver of his claimed right to be adjudicated a sex offender at the same time the rest of his sentence was imposed. It is unlikely any future cases will turn on the outcome of this one because defendants already are permitted to waive rights.

Additionally, this case is not the proper vehicle for determining any issues raised by Raber even if they are substantial constitutional questions or if this case was of public or great interest. Instead of objecting to the process, Raber agreed to it. Therefore, as explained below, he waived or forfeited the arguments he has asked this Court to review. *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus ("An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial

court."); *State v. Frazier* (2007), 115 Ohio St.3d 139, para. 40 (failing to object at trial to phrasing of voir dire questions waived any future appeal on that issue); S*tate v. Hendricks*, 2012 Ohio 1924, para. 18 (4th Dist.) (failure to raise an argument at the trial level forfeits all review but for plain error).

Finally, any error is harmless since even Raber agrees that he should have been adjudicated a sex offender. [Appellant Kyle Raber's Memorandum In Support Of Jurisdiction, p. 12 ("Thus, it was unnecessary to even hold an evidentiary hearing because lack of consent is inherent in the charge itself. The fact is, the trial court should have ordered the Appellant to register as a sex offender at the time he was sentenced on December 1, 2008.")]. Since even Raber agrees that the trial court reached the proper outcome, "[i]f error occurred, it does not affect the outcome of this case, rendering it harmless." *Spitznagel v. St. Bd. of Educ.,* 126 Ohio St.3d 174, para 20.

Raber's case does not belong in the Ohio Supreme Court. This case does not raise a substantial constitutional question. Nor is it a case of public or great general interest. And the arguments Raber raises are waived, forfeited, or any related error is harmless. For these reasons, the case should be dismissed as improvidently accepted under S.Ct. Prac. R. 12.1.

Raber Forfeited Or Waived The Arguments He Raises On Appeal.

"It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial

court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs* (1986), 14 Ohio St.2d 56, 61; see also, *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus ; *State v. Frazier* (2007), 115 Ohio St.3d 139, para. 40.

Raber had at least three opportunities to object to the bifurcated process but he chose to move forward with the sex offender hearing. When it was proposed by the court he could have objected. Instead, he agreed with the idea. [November 26, 2008 transcript at p. 6, l. 6 - 12]. Prior to or during the hearing he had an opportunity to object. Rather, he cross-examined witnesses and testified. [March 2, 2010 transcript, p. 11 - 16; 21 - 36]. And after the hearing he could have objected. But he made arguments about the facts and law. [March 2, 2010 transcript, p. 36, l. 18 - 22; p. 38, l. 3 - p. 39, l. 14].

By agreeing to bifurcate the proceeding and by failing to raise any objection to the agreed process, Raber waived and forfeited his arguments. *State v. Frazier* (2007), 115 Ohio St.3d 139, para. 40; *State v. Childs* (1986), 14 Ohio St.2d 56, 61; *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus. Accordingly, the Court should affirm the decisions below.

Raber Agrees He Should Have Been Required To Register As A Sex Offender And So Any Error Is Harmless.

Courts disregard errors if they are harmless. An error is harmless if it does not affect the outcome of the case. *Spitznagel v. St. Bd. of Educ.*, 126 Ohio St.3d 174, para 20. Any error in determining that Raber should register was harmless because even Raber concedes that he should have been required to register.

Raber's own Memorandum in Support of Jurisdiction explains that any error is harmless. "Thus, it was unnecessary to even hold an evidentiary hearing because lack of consent is inherent in the charge itself. The fact is, the trial court should have ordered the Appellant to register as a sex offender at the time he was sentenced on December 1, 2008." Appellant Kyle Raber's Memorandum In Support Of Jurisdiction, p. 12.

Raber recognizes that "the trial court should have ordered [Raber] to register as a sex offender." Id. His only complaint is that he waited over a year before he was required to register. Yet he fails to identify any harm from the claimed errors. And he can't. The fact is, Raber benefited by the agreed to process in that (1) he was able to serve his jail sentence between college semesters and (2) he had the opportunity to call witnesses and make legal arguments regarding his sex offender status. Further, he repeatedly agreed to or participated in the bifurcated process and never objected or complained about it.

In *State v. Fry* (2010), 125 Ohio St.3d 163, this Court held that an error committed under Crim. R. 32 could be harmless error. There, Fry was convicted of several crimes including aggravated felony murder. The trial court violated Crim. R. 32(A) when it filed its sentencing entry before the sentencing hearing, but the sentencing entry was affirmed because the error was harmless.

This Court held that despite the mandatory nature of Crim. R. 32(A)'s provisions, an error under that provision can still be harmless. *Fry*, 125 Ohio St. 3d at para. 188. In *Fry* the

trial court's filing of the sentencing entry before the sentencing hearing was harmless error because the trial court gave Fry and his counsel the opportunity to speak. Id. "[B]ecause Fry made a statement, the record is clear as to what he said. Having listened to Fry, the Court had an opportunity to evaluate his statement and could have modified its sentencing entry if it had felt obligated to do so." Id. at para. 192. Since Fry made a statement, and the Court could have modified his sentence based on that statement but chose not to, this Court held that the violation of mandatory provisions of Crim. R. 32(A) were harmless.

As in *Fry*, any failure to adhere to the terms of R.C. 2950.03(A)(2) are harmless, even if those terms are mandatory. The facts in Raber's case show that he should have been required to register as a sex offender. Despite the delay in notification, a delay Raber readily agreed to at the time, the outcome is still correct. Any error in the delay did not adversely affect Raber - in fact he benefited by not being required to register during the delay and by serving his jail time between semesters. Therefore, any alleged errors are harmless and so the lower courts' decisions should be affirmed.

The Court's Jurisdiction Continues Where Its Later Acts Only Correct An Error That Is Apparent In The Record.

While the December 1, 2008 sentencing order was a final appealable order, it was not a final order in the sense that it ended the case. A "final order" is one that "affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02 (B)(1). This means that it "may be reviewed, affirmed, modified, or reversed, with or without retrial." R.C. 2505.02 (B). The sentencing order was final in the sense that it determined issues

related to traditional notions of sentencing - jail time, probation, and fines. It is not a final order in the sense that it ended the case because the parties stipulated, on the record, that the sex offender registration issue would be decided at a later date. Despite the trial court's failure to mention that in the order, the case did not end. The trial court's actions following that order only corrected an omission that was apparent from the record. This is permissible.

The record is clear. The parties agreed that trial court was going to resolve the registration issues in the future. [November 26, 2008 transcript at p. 6, l. 6 - 12]. Also, the law is clear. "It is well settled that courts possess the authority to correct errors in judgment entries so that the record speaks the truth." *State v. Lester* (2011), 130 Ohio St.3d 303, para. 18. While R.C. 2950.03 states that a decision on registration should occur at the time of sentencing, here the parties agreed to a different process. They have that right. Accordingly, the December 1, 2008 order is more akin to an order granting partial summary judgment on one of two causes of action than it is to an order that terminates the proceedings. That order determined a portion of the case, but the record clearly reflects the parties intended the case to go on for a future determination of the registration issue. [November 26, 2008 transcript at p. 6, l. 6 - 12]. By acting in accordance with that agreement, the trial court corrected an error in the judgment entry so that the record is truthful. It has the authority to do this.

Raber's reliance on cases like *State v. Carlisle*, 2011-Ohio-6553, *State v. Baker* (2008), 119 Ohio St.3d 197, and *Colley v. Colley* (1989), 43 Ohio St.3d 87 is misplaced. These cases are drastically different than Raber's case.

In *Carlisle* the trial court attempted to reopen the case and modify the previously imposed terms of sentencing after Carlisle lost on appeal. The court was not moving forward with a previously stipulated bifurcated process - it was changing its mind on an issue it already decided and it was doing so over the State's objection. While this Court gave general guidance in *Carlisle*, it is not applicable here because the parties agreed, on the record, to a bifurcated process and Raber never objected.

State v. Baker also gives Raber no support. Importantly, in *State v. Lester* (2011), 130 Ohio St.3d 303, this Court explained parts of *Baker* and held that no new appeal lies from a trial court's nunc pro tunc order correcting a clerical omission. Id. at para 1. This is because courts have the ability to correct clerical omissions.

In Raber's case, the trial court's order transferring the case to a different judge to hold the sex offender hearing corrects a clerical omission in the prior order. "It is well settled that courts possess the authority to correct errors in judgment entries so that the record speaks the truth." Id. at para 18; see also, *State v. Miller* (2010), 127 Ohio St. 3d 407, para. 15 (trial courts can reconsider final orders when they contain clerical errors which are apparent on the record). The omission was the failure to restate the parties' agreement to bifurcate the sentencing process. The trial court's later action only corrects that omission and reflects what the court actually decided - and the agreement between the parties. In fact, paragraph 3 of the judgment entry on appeal even recognizes this where it states, "The registration issue was not decided at that time."

Raber cites paragraph 9 of *Carlisle* for the proposition that "it is well settled that a trial court lacks authority to modify a final criminal judgment even if errors existed in the entry." Appellant's Merits Brief, p. 5. But *Carlisle* only says that the general rule is a trial court cannot modify a final judgment. Raber also cites to *State ex rel. Cruzado v. Zaleski*, 2006-Ohio-5795 but again that case offers no support. As with other cases, *Cruzado* recognizes a trial court's ability to correct clerical errors that are apparent on the record. Id. at para 19.

Finally, *Colley v. Colley* (1989), 43 Ohio St.3d 87, only further supports the State's arguments. In *Colley*, this Court held that in a divorce the parties can agree to the trial court's continued jurisdiction to modify alimony payments. The Court specifically rejected the notion that such an agreement gives parties the right to confer jurisdiction on the trial courts. Id. at 89 ("Nor does such a holding permit parties to confer jurisdiction on a court."). As in *Colley*, the parties agreed to the court's continued jurisdiction so that the sex offender registration could be resolved.

Since the trial court retained jurisdiction, there is no violation of Raber's Due Process and Double Jeopardy rights under the Fifth Amendment. Raber's Due Process argument is not developed in his Merits Brief. Assuming it is not waived, it is still misplaced. There is nothing in the record that indicates Raber's Due Process rights were violated. He was not compelled to testify, he had notice of the sex offender hearing, he was given the opportunity to be heard, to present evidence, to cross-examine witnesses, to be represented by counsel, and to make legal arguments. Raber agreed to the hearing, it benefited him, and it would be strange for this Court to now determine that it violated Raber's Due Process rights.

The Double Jeopardy Clause protects a person from receiving multiple punishments for the same offense. *Hudson v. U.S.* (1997), 522 U.S. 93, 99, 118 S.C. 488. Even if the registration requirement is punitive, Raber has been punished only once. The record demonstrates that the December 1, 2008 order and the sex offender registration decision are all part of one process and make up one sentence even though it occurred in a mutually agreed to bifurcated process. This is not a case where a trial court either on motion or on its own, "reopened" a case to modify a sentence that the parties previously believed was final. It is a case where the first order issued with the agreement that a later order was coming. Since Raber was neither retried nor resentenced, he was not subject to double jeopardy. *Hudson*, 522 U.S. 93 at 99 (holding double jeopardy is an issue when there are multiple punishments "and then only when such occurs in successive proceedings.").

The December 1, 2008 order did not end the case – it imposed part of Raber's sentence and had a correctable clerical omission. Accordingly, even in accordance with the cases cited by Raber, the trial court's jurisdiction continued and Raber's rights were not violated.

Conclusion.

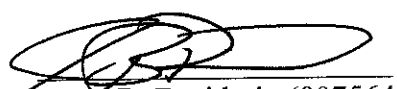
Raber agreed to a bifurcated process. He never objected. Thus, Raber waived and forfeited his arguments.

Raber changed his mind about the bifurcated process only after he got the result from the sex offender hearing. But it is a result that even Raber believes is proper. So, any error that exists is harmless.

Yet there are no errors. Courts are free to alter final judgments so that the judgments accurately reflect what was decided. That is all that happened here. The trial court's actions simply put into effect the parties' agreement. In doing so, the trial court only corrected its omission of the agreement from the sentencing order.

As explained above, none of Raber's rights were violated and the decisions of the trial court and the Court of Appeals should be affirmed.

Respectfully Submitted,



Jason B. Desiderio (0075641)
(Counsel of Record)
103 Falconer St.
N. Tonawanda, New York 14120
T: (216) 410.4181
jasondesiderio@gmail.com

Attorney for Appellee
State of Ohio

Certificate of Service

On May 25, 2012 a copy of the foregoing Merits Brief was sent by regular first class mail, postage prepaid, to:

David T. Eager
David M. Todaro
126 N. Walnut St.
Wooster, Ohio 44691

Respectfully submitted,

Jason B. Desiderio (0075641)