

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0798

STATE OF OHIO,

APPELLEE,

VS.

KALI SUNTOKE,

APPELLANT.

SUPREME COURT CASE NO. _____

ON APPEAL FROM THE MUSKINGUM COUNTY
COURT OF APPEALS, FIFTH DISTRICT.

APPEALS CASE NO. CT2013-0032

TRIAL CASE NO. CR2012-0101

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT KALI SUNTOKE

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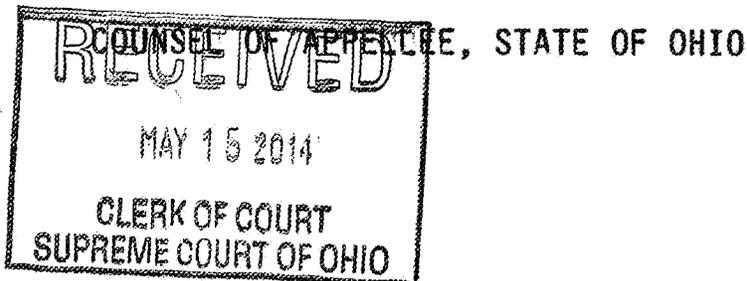
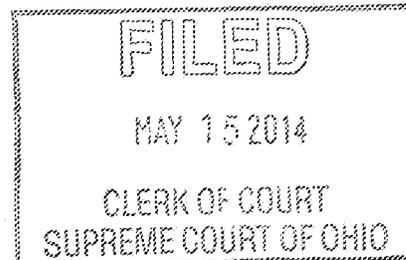


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Proposition of Law No. I: This Court must clarify the Standard for granting a Pre-Sentence Motion to Withdraw a Guilty Plea. In fact, while there is a strict standard for deciding a Post Sentence Motion to withdraw; there are no real guidelines for deciding a Pre-Sentence Motion. Specifically, here, the Ohio State Courts erred and abused their discretion by denying Appellant's Pre-Sentence Motion to Withdraw his "No Contest" Plea properly filed under Crim. Rule 32.1.

Proposition of Law No. II: The question presented to this Court is the scope of the right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution and Section 10, Article I of the Ohio Constitution. More specifically, herein, whether Appellant had the right to counsel of his choosing; given the tenor and specific factors facing him in the Proceedings.

Proposition of Law No. III: The extent, in Ohio, to the right to effective assistance of counsel at a Pretrial stage of the Proceedings. This Court must interpretate the parameters of a criminal offender's constitutional right to counsel; especially in light of, the U.S. Supreme Court's recent landmark Decisions extending the Sixth Amendment right to effective assistance of counsel to all critical stages of the proceedings, including the Pretrial stage. More specifically, the cumulative effect upon Appellant due to counsel's deficient performance in many areas; including, not allowing the Appellant to participate in his own defense; improper advice regarding ability to withdraw no contest plea; and failing to challenge the sufficiency of Indictment as well as facial defects.

Proposition of Law No. IV: This Court must address the issue of disparate treatment in Sentencing Here in Ohio. The Ohio Courts, post Foster, have failed to follow any consistency in Sentencing contrary to the principles and purposes of felony sentencing under the Ohio Statutes. Specifically, the Appellant herein was unduly sentenced more harshly than other offenders similarly situated. In fact, his aggregate sentence of Seven(7) years in prison, under the circumstances, was grossly disproportionate.

CONCLUSION

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Opinion and Judgment Entry of the Muskingum County Court of Appeals, Fifth Appellate District; dated April 2, 2014.

EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED IN THIS FELONY CASE: WHY THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case, for many compelling reasons, must be granted leave to appeal and reviewed by this Ohio Supreme Court on the merits. Firstly, from a procedural standpoint, the Appellant's case presents an Appeal, upon Four(4) Propositions of Law; from the Opinion and Judgment Entry of the Muskingum County Court of Appeals, Fifth Appellate District, dated April 2, 2014. **See copy of Opinion and Judgment Entry attached Hereto in the Appendix.** This case stems from unsupported allegations resulting in an Indictment against the Appellant for 33 counts of Pandering; filed in the Muskingum County Common Pleas Court. However, the issues herein present a number of due process and equal protection violations during these Proceedings.

Specifically, this case must be granted Jurisdiction as this Court must clarify the standard for granting a Pre-Sentence Motion to withdraw a Guilty Plea. In fact, in Ohio, while there is a strict standard for for deciding a Post Sentence Motion to withdraw; there are no real guidelines for deciding a Pre-Sentence Motion. More specifically, in this case, the Ohio State Courts erred and abused their discretion by denying Appellant's Pre-Sentence Motion to withdraw His "No Contest" Plea properly filed under **Crim. Rule 32.1**. Moreover, just on this issue, this Court's involvement is necessary to provide Appellant, and all similarly situated individuals, some guidance on this critical stage in criminal proceedings.

The next question presented to this Court is the scope of the right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and

Section 10, Article I of the Ohio Constitution. More specifically, here, whether Appellant had the right to counsel of his own choosing; given the tenor and specific factor facing him in the Proceedings. It is the Appellant, Kali Suntoke's contention that the Sixth Amendment right to counsel, goes far beyond having any warm body that's passed the bar; present during the proceedings. It entails having someone you have some level of confidence and relationship with; who has agreed to be your advocate. Moreover, especially if you are retaining private counsel; the Ohio Courts should not deny you your right to counsel of own choosing.

In this case, Appellant Kali Suntoke was dissatisfied with both of his court appointed attorneys. In fact, he had been filing his own Pro Se Motions and discovery requests due to counsels' failure to follow any of his direction or wishes. Therefore, it was this setting and tenor; in which, he retained private counsel, Attorney Elizabeth Gaba; who then attempted to secure a continuance to allow her to prepare for trial. This reasonable request was denied. Both the trial court and Court of Appeals erred and abused their discretion in denying Appellant his right to counsel of his own choosing. Thus, this Ohio Supreme Court must address this substantial constitutional question affects many of us in the Ohio criminal justice system.

Another compelling issue and reason this Court should grant leave entails the extent, in Ohio, to the right to effective assistance of counsel at any Pre-Trial stage of the Proceedings. Moreover, this Appellant, and all criminal defendants in Ohio, need direction and guidance with regard to the parameters of this important constitutional

right ignored or dismissed by the courts in Ohio. In fact, the context or critical stage of the criminal proceedings is not addressed in the analysis at all. This is contrary to the U.S. Supreme Court's recent landmark Decisions extending the Sixth Amendment right to effective assistance of counsel to all critical stages of the proceedings; including the Pre-Trial stage. More specifically, here, the cumulative effect upon Appellant due to counsels' deficient performance in many areas; including not allowing the Appellant to participate in his own defense; improper advice regarding ability to withdraw his "No Contest" plea; and failing to challenge the sufficiency of the Indictment as well as facial defects. All of this creates a case of public or great general interest.

Lastly, It is now time for this Court to address the issue of disparate treatment in Sentencing here in Ohio. The Ohio Courts, post **Foster**, have failed to follow any consistency in sentencing contrary to the principles and purposes of felony sentencing under the Ohio Statutes. Specifically, the Appellant herein was unduly sentenced more harshly than other offenders similarly situated. In fact, his aggregate sentence of Seven(7) years in prison, under the circumstances, was grossly disproportionate. Moreover, a review of the felony sentences statutes; especially for a first time offender is required. **See ORC Sections 2929.11; 2929.12; and 2929.14.** Sadly, this issue was not even argued by appellate counsel, Valerie K. Wiggins; nor was it addressed or noticed by the Ohio State Courts which further supports a review by this Ohio Supreme Court.

STATEMENT OF THE CASE AND FACTS

This case presents a telling view of the criminal justice system in Ohio. On April 26, 2012, the Appellant, Kali Suntoke, was indicted on 33 counts of pandering, which was filed in the Muskingum County Common Pleas Court under **Case No. CR2012-0101**. Mr. Suntoke, who is an older man in his 70's and of Indian descent and a practicing Zoroastrian; maintained his innocence and pled not guilty. He was appointed counsel, Attorney Kevin Van Horn. Almost from the very beginning, there was no communication between attorney and client. Moreover, Mr. Van Horn failed to follow direction from or pursue any level of investigation or research for his client. This dissatisfaction with his appointed counsel was brought to the trial court's attention. Specifically, Mr. Suntoke filed **Pro Se Motions** for continuance (to prepare for trial and get discovery) and appointment of new counsel. Both were denied on August 17, 2012. This was the tenor of the proceedings. At no point in the lower courts, did the Appellant ever receive fair consideration.

The attorney-client relationship continued to breakdown. Again, from the Appellant's perspective, Attorney Van Horn failed to work or discuss defense to the charges. In fact, Mr. Suntoke attempted to point out deficiencies and defects in the Indictment as well as missing discovery. However, Attorney Van Horn continued to ignore or dismiss anything said by Kali Suntoke. In fact, he simply questioned his sanity or competency to stand trial. Again, no investigation or research was ever done. He was not prepared to try this case. Rather, he filed a Motion to appoint Co-counsel. On December 21, 2012, the trial court appointed Attorney Greg Myers as co-counsel. Unfortunately, things went from bad to worse.

In fact, nothing was being done at all by either attorney on Mr. Suntoke's behalf. The Record will show that no documents were filed between December 21, 2012 and April 3, 2013; except for Attorney Van Horn requesting to be released from the case. Therefore, the Appellant had to file **Pro Se Motions**, again because neither counsel would; for orders on non-compliance and non-disclosure by the prosecution on request for discovery. Some of this discovery related to problems and defects with the Indictment. In response to these **Pro Se Motions**, the Prosecutor's Office filed a Motion to amend the Indictment to "Fix" the erroneously listed files in the Indictment. Again, neither attorney filed any Motion in Opposition nor did they object at all. On April 5, 2013, the Court ordered the Amendment removing the Appellant's name from the labels.

What was really happening during all this time? Both Attorney Van Horn and Attorney Greg Myers were trying to plead out the case. While their client was steadfast regarding his innocence and asking them to work on his defense; they were trying to force him into a guilty plea. Mr. Suntoke, in light of his attorneys "lack of zeal, had been trying to retain private (paid) counsel. Finally, on April 8, 2013, He was able to Attorney Elizabeth Gaba to file a Conditional Notice of Appearance contingent upon the trial court granting a continuance to allow her to prepare for trial. Once again, Mr. Suntoke was denied any consideration for the attorney of his choosing and the continuance. He knew neither attorney was ready for trial. The Appellant's back was against the wall. He had no real recourse. Yes, the continuance was denied by the trial court. However, Attorney Van Horn was released. Mr. Suntoke had to go forward with deficient counsel, Attorney Greg Myers.

It is Appellant's contention that Attorney Greg Myers advised him; if he pleads "No Contest" at the April 9, 2013 trial date; then changed his mind and wished to withdraw this plea pre-sentence, such Motion would be freely granted. Upon this advice, On April 9, 2013, Mr. Suntoke withdrew his "Not Guilty" plea and entered a "No Contest" Plea to 16 charged counts of pandering. In exchange, the Prosecutor agreed to Nolle the remaining charges and recommended an aggregate Seven(7) year sentence. Again, it was Mr. Suntoke's understanding that the Judge did not have to follow such recommendation. Rather, based on the nature of the charges and his status as a First Time Offender, who was 74 years old, consistent with the Felony Sentencing Statutes, he could receive a range of sentencing options; including minimum and concurrent as well as some form of community control. The Trial Judge accepted the "No Contest" plea and set a Sentencing date of June 4, 2013.

Thereafter, the Appellant seeing the continued holes in the case, especially additional errors and defects in the Indictment, wrote his Attorney, Greg Myers, on May 28, 2013 and asked him to file a Motion withdrawing his "No Contest" plea. Attorney Myers waited until the day of sentencing, June 4, 2013; and filed the Motion and attached a copy of Mr. Suntoke's Letter of May 28, 2013. However, at sentencing, Attorney Myers made no arguments on behalf of the Motion. The trial court held a short hearing on the Motion and then denied it; and proceeded to sentence Mr. Suntoke to the aggregate Seven(7) year prison term. On July 1, 2013, a timely filed Notice of Appeal was filed.

On Appeal, Attorney Valerie K. Wiggins was appointed Appellate counsel. On or about September 3, 2013, Attorney Wiggins filed an Appeal Brief asserting Three(3) Assignments of Error with the Court of Appeals, Fifth Appellate District. Unfortunately, once again, Mr. Suntoke received ineffective assistance of counsel as she left out a number of requested assignments of Error; including nothing whatsoever regarding disparate treatment in sentencing. The fact that the courts in Ohio, **post Foster**, have failed to follow any consistency in sentencing should be known to any attorney practicing criminal law in Ohio. But, she failed or refused to argue that the sentence was contrary to the principles and purposes of Felony sentencing Statutes and/or unduly more Harsh than other offenders similarly situated. Thus, somewhat predicted, on April 2, 2014, the Muskingum County Court of Appeals overruled all three Assignments of Error and affirmed the trial court. This Appeal and Memorandum in Support of Jurisdiction is being timely filed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: This Court must clarify the Standard for granting a Pre-Sentence Motion to Withdraw a Guilty Plea. In fact, while there is a strict standard for deciding a Post-Sentence Motion to withdraw; there are no real guidelines for deciding a Pre-Sentence Motion. Specifically, here, the Ohio State Courts erred and abused their discretion by denying Appellant's Pre-Sentence Motion to Withdraw his "No Contest" Plea properly filed under Crim. Rule 32.1.

In this First Proposition of Law, the Appellant, Kali Suntoke argues that both the trial court and the Court of Appeals erred and abused their by denying his Pre-Sentence Motion to Withdraw his "No Contest Plea filed properly under **Crim. Rule 32.1**. In particular, Mr. Suntoke argues that that He was forced into entering the plea and reluctantly entered into

it upon advice of counsel, Attorney Greg Myers. More specifically, as the Record supports, Mr. Suntoke was forced to file many **Pro Se Motions**; and was very dissatisfied with Attorney Myers. However, as the trial court denied him, both a continuance and his choice of counsel (more specifically, he retained private (paid) counsel, Attorney Elizabeth Gabo); He was forced into continuing with Mr. Myers. Moreover, as he was innocent, He wanted to take case to trial. Further, He entered the "No Contest" plea, only after being told it could be withdrawn anytime before sentencing. This was the advice and opinion of Attorney Greg Myers. But, such Motion was denied, even though it was filed Pre-Sentence.

This Ohio Supreme Court must clarify the Standard for granting a Pre-Sentence Motion to Withdraw a Guilty Plea. In fact, while there are strict standards set for deciding a Post-Sentence Motion, there are no real guidelines for deciding a Pre-Sentence Motion. **Ohio Crim. Rule 32.1** provides a defendant may file a pre-sentence motion to withdraw a no contest plea. The general rule is that a trial court should freely grant such a motion. **State V. Xie, 62 Ohio St. 3d 521, 584 N.E. 2d 715 (1992); State V. Spivey, 81 Ohio St. 3d 405, 692 N.E. 2d 151 (1998).** In fact, a trial court must hold a meaningful Hearing and grant as long as there exists a "**reasonable and legitimate basis.**" *Id.* In the instant case, not only was Appellant denied a meaningful Hearing; the Motion was denied despite a reasonable and legitimate basis.

However, while the Appellant contends that the Record supports a "reasonable and legitimate basis" and the Motion should have been freely granted **Pre-Sentence**; the Rule itself gives no guidelines for a trial court to use when ruling on a **Pre-Sentence** Motion to withdraw a guilty

Plea. See *State V. Maney*, 2013 Ohio 2261, 993 N.E. 2d 422, 2013 Ohio App. LEXIS 2188 (2013). Further, at the appellate level, the Court of Appeals will only overturn on this issue; if the trial court abused its discretion. *State V. Peterseim*, 68 Ohio App. 2d 211, 428 N.E. 2d 863 (1980). An abuse of discretion is more than an error in judgment; rather, it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State V. Adams*, 62 Ohio St. 2d 151, 404 N.E. 2d 144 (1980). But, this appellate standard really does not help us herein.

Therefore, the Appellant would like to suggest some direction from a recent Eleventh District, Court of Appeals case. On January 13, 2014, in *State V. Pudder*, 2014 Ohio 68, 2014 Ohio App. LEXIS 60 (2014); the Court used a combination of two tests; one from *Maney* and another from *Peterseim*, to determine whether full and fair consideration was afforded to the Appellant. Specifically, in *Pudder*, the Court found factors supporting the granting of the Motion. However, in reiterating the general Rule that a Motion to withdraw a guilty or No Contest Plea filed before sentencing should be freely and liberally granted; the Court of Appeals, Eleventh District, held that the existence of any one or more of the factors is enough. The key being the prejudice to Appellant in not granting the Motion and the lack of prejudice to the prosecution, if the plea is withdrawn. Think also Due Process and equal protection. Both important tenets the State must provide to criminal defendants.

First, the Court in *Pudder* used the *Peterseim* factors: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim. R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the

accused is given a complete and impartial Hearing on the Motion; and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request. See *State V. Peterseim*, 68 Ohio App. 2d 211 (1980). Specifically, the Court in *Pudder* found merit in both the third and fourth factors. Mr. Pudder had evidence supporting if not his innocence, then elements of a defense. Plus, it appears that full and fair consideration was not given to him. The Court concluded that the factors in this case indicate the trial court abused its discretion in failing to grant Mr. Pudder's Motion to withdraw his plea. Moreover, the Courts in Ohio should decide cases on the merits. *DeHartt v. Aetna Life Ins. Co.*, 69 Ohio St. 2d 189 (1982). This same Rule is fully applicable in criminal cases. *State V. Davis*, 2005 Ohio 4845, 5th Dist. (2005); *State V. Young*, 1995 Ohio App. LEXIS 4216 (1995). Any of these same factors support the granting in Mr. Suntoke's case.

First, no one could argue that the evidence supports that Mr. Suntoke was represented by highly competent counsel. Both Attorney Van Horn and Attorney Greg Myers were deficient in zeal and performance. Since Mr. Suntoke was filing his own Motions, it's quite apparent that Mr. Myers was not even listening to his client. Regardless, you certainly could not say he was highly competent counsel. Next, while the Court of Appeals used the Rule 11 Hearing to support his "No Contest" Plea, this was only one factor for not granting and, in fact, given that he was forced into it, after the trial court denied continuance and did not allow Elizabeth Gaba to represent him. In context, this was not a full Hearing. Next, Mr. Suntoke did not get a complete and impartial Hearing on his Motion to withdraw. Even from the Court of Appeals, after a "short Hearing", it was denied. Plus, remember, he got no argument from Mr. Myers. In

On this regard, the last factor under **Peterseim** was greatly missing, Mr. Suntoke did not get full and fair consideration on the plea withdrawal request. Therefore, like in **Pudder**, this Court should use any one or more factors found above and find that the trial court erred and abused its discretion in denying Appellant, Kali Suntoke's properly filed Pre-Sentence Motion to Withdraw His No Contest Plea under **Crim. Rule 32.1**. Moreover, the Court of Appeals, Fifth District, erred in affirming said Judgment. Here, this Court should vacate the Judgment, reverse the findings and remand for further proceedings more consistent with this Ohio Supreme Court's direction.

Lastly, without going thru each of the **Maney** Factors, actually used (or misused) herein, it's instructive to note that application of the **Maney** Factors leads to the same conclusion. See again **State V. Maney, 2013 Ohio 2261 (2013)**. Specifically, focusing on the fact that nothing in the record indicates the prosecution would be prejudiced, if the plea was withdrawn. The Motion was done pre-sentence and in a reasonable time and the additional evidence of possible defenses must be more fully considered. Under these factors, the Appellant herein, Kali Suntoke was certainly denied full and fair consideration. This Court must grant Jurisdiction and review on the merits.

Proposition of Law No. II: The question presented to this Court is the scope of the right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution and Section 10, Article I of the Ohio Constitution. More specifically, herein, whether Appellant had the right to counsel of his choosing; given the tenor and specific factors facing him in the proceedings.

A trial court's decision to grant or deny a request for new counsel is examined under an "abuse of discretion" standard. **State V. Cox, 2001**

Ohio App LEXIS 1293 (2001). However, it is also true that an "erroneous deprivation of the right to counsel of choice . . . becomes clear "structural error." **United States V. Gonzalez-Lopez, 548 U.S. 140 at 150 (2006); See also State V. Chambliss, 128 Ohio St. 3d 507 (2011).** In other words, given the facts herein, that the trial court did not allow retained counsel, Elizabeth Goba, to represent Mr. Suntoke; such deprivation constitutes **structural error** and it was error, in and of itself, for the Court of Appeals to not automatically reverse the conviction. **See also Arizona V. Fulminante, 499 U.S. 279 ; Powell V. Alabama, 287 U.S. 45 (1932).** Here, it is very clear that the trial court as well as the court of appeals committed reversible error.

The Sixth Amendment right to counsel goes far beyond having a warm body from the bar present during the process; it entails having an effective advocate there on your behalf. Someone of your own choosing that you've paid fits this very well. This is actually the situation presented but ignored by the lower courts. In fact, while the Court of Appeals Decision notes the guarantees to the right to counsel, such right is balanced against orderly administration of justice. However, the Decision, then states; ". . . the right of a defendant to select his own counsel is inherent only in the cases where the accused is employing counsel himself. **Thurston V. Maxwell, 3 Ohio St. 2d 92 (1965)**" (P59) See Opinion and Judgment Entry dated April 2, 2014 in Appendix. This is exactly the right denied herein. Mr. Suntoke, being dissatisfied with both appointed attorneys, went out and retained private (paid) counsel.

The trial court (as well as the Court of appeals) makes note of Mr. Suntoke's March 28, 2013 "indication that Attorney Myers was sufficient"

However, this is taken out of context. Please remember, that such put in a Pro Se Motion filed to get rid of Attorney Van Horn. Mr. Myers was simply the lesser of two evils. The fact that Mr. Suntoke had to file it himself should speak volumes. Next, consider that he had been for months trying to retain Elizabeth Gaba. This, again, is all supported by the evidence in the Record. While Appellant does not believe any balancing with public need or orderly administration needs to be done, given that this was retained (paid) counsel, not appointed, one reasonable continuance to allow her to get up to speed would not cause undue delay nor would it prejudice the prosecution (who had at least two continuances already). Due Process and equal protection dictates a fair and equitable proceeding. See Powell, Supra. This Court must review these substantial constitutional questions.

Proposition of Law No. III: The extent, in Ohio, to the right to effective assistance of counsel at a PreTrial stage of the Proceedings. This Court must interpretate the parameters of a criminal offender's constitutional right to counsel; especially in light of the U.S. Supreme Court's recent landmark Decisions extending the Sixth Amendment right to effective assistance of counsel to all critical stages of the proceedings, including the PreTrial stage. More specifically, the cumulative effect upon Appellant due to counsel's deficient performance in many areas; including, not allowing the Appellant to participate in his own defense; improper advice regarding ability to withdraw no contest plea; and failing to challenge the sufficiency of Indictment as well as facial defects.

This is a question of law beyond the standards set for effective representation in Strickland v. Washington, 466 U.S. 668. Specifically, this is reviewing the right to effective assistance of counsel at a Pre-Trial stage of the Proceedings. Moreover, not only was Appellant denied his right to counsel of his own choosing, as his counsel failed to even argue on behalf of his Motion to Withdraw his "No Contest" Plea, he was

denied any real representation at all at both the April 8, 2013 Pre-Trial Hearing and the June 3, 2013 Motion Hearing. This lack of effective assistance at a critical stage in the proceedings. Certainly, Attorney Myers was not zealously representing his client. Mr. Suntoke deserved more and one can easily say that; but for Mr. Myers, another result would have happened.

This Court must review the standard here in Ohio. The Courts in Ohio are ignoring or dismissing the context or critical stage as it is not addressed in the analysis. This is contrary to the U.S. Supreme Court's recent landmark decisions extending the Sixth Amendment right to effective assistance of counsel to all critical stages of the proceedings; including the pre-Trial stage. See *Laffler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012). For these reasons, this Felony case involves the interpretation of constitutional rights, and as 95% of all criminal cases result in pleas, Mr. Suntoke's case presents a matter of public and great general interest.

Proposition of Law No. IV: This Court must address the issue of disparate treatment in Sentencing here in Ohio. The Ohio Courts, post *Foster*, have failed to follow any consistency in Sentencing, contrary to the principles and purposes of felony sentencing under the Ohio Statutes. Specifically, the Appellant herein was unduly sentenced more harshly than other offenders similarly situated. In fact, his aggregate sentence of Seven(7) years in prison, under the circumstances, was grossly disproportionate.

In summary, for Appellant's final Proposition, he implores this Court to address the issue of disparate treatment in Sentencing in Ohio. The sentencing scheme must be reviewed in light of the many changes since *State v. Foster*, 109 Ohio St. 3d 1 (2006). See also *Oregon v. Ice*, 129 S.Ct. 711 (2009); HB 86 and the "Foster Fix". Here, Appellant's

sentence is contrary to law especially in light of the principles and purposes of felony sentencing. His crimes were not the worst of the worse nor was he the worst of offenders. Specifically, for a first time offender, his sentence was improper and void. See *State V. Fischer*, 128 Ohio St. 3d 92 (2010); *State V. Scott*, 2010 Ohio App. LEXIS 241 (2010). Therefore, for this Appellant, Kali Suntoke, and all Ohio offenders; this Court must provide guidance to ensure greater consistency in sentencing.

Here, the Appellant was unfully sentenced more harshly than other offenders similarly situated. In fact, his aggregate sentence of Seven(7) years in prison, under the circumstances, was grossly disproportionate. Moreover, a review of the Felony sentences statutes; especially for a First Time Offender is required. See ORC Sections 2929.11; 2929.12; and 2929.14. Mr. Suntoke's case should be granted Jurisdiction.

CONCLUSION

Wherefore, for all the stated reasons, the Appellant, Kali Suntoke, prays this Court to accept Jurisdiction so that the important issues presented can be reviewed on their merits.

Respectfully Submitted,

Kali S. Suntoke

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CERTIFICATE OF SERVICE

The Undersigned does hereby certify that a true and accurate copy of the foregoing was served upon the Muskingum Co. Prosecutor's Office, 27 North Fifth Street, Zanesville, Ohio 43701, by regular U.S. Mail service, on this 5th Day of MAY, 2014.

Kali S. Suntoke

KALI SUNTOKE

COPY

FILED
FIFTH DISTRICT
COURT OF APPEALS

APR - 2 2014

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

KALI SUNTOKE

Defendant - Appellant

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Craig R. Baldwin, J.

Case No. CT2013-0032

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County
Court of Common Pleas, Case No.
CR2012-0101

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

APPEARANCES:

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Baldwin, J.

{¶1} Defendant-appellant Kali Suntoke appeals his conviction and sentence from the Muskingum County Court of Common Pleas on sixteen (16) counts of pandering obscenity involving a minor. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 26, 2012, the Muskingum County Grand Jury indicted appellant, who is in his 70s, on thirty-two (32) counts of pandering obscenity involving a minor in violation of R.C. 2907.321(A)(1), felonies of the second degree, and one count of pandering obscenity involving a minor in violation of R.C. 2907.321(A)(5), a felony of the fourth degree. At his arraignment on May 2, 2012, appellant, who was represented by court-appointed counsel Attorney Kevin Van Horn, entered a plea of not guilty to the charges.

{¶3} On May 9, 2012, appellant filed a motion seeking modification of the \$500,000.00 cash, surety or property bond and a Request for a Bill of Particulars. Pursuant to an Entry filed on May 9, 2012, the trial was scheduled for June 19, 2012. The Bill of Particulars was filed on May 16, 2012. Following a hearing held on May 21, 2012, the trial court denied the request for bond modification. Appellant filed a written time waiver on June 14, 2012.

{¶4} Appellee, on June 14, 2012, filed a motion seeking a continuance of the trial. Appellee, in its motion, argued that counsel was scheduled to be in trial on June 14, 2012 and that counsel was scheduled to attend a seminar from June 21, 2012 to June 23, 2012. Via an Entry filed on June 18, 2012, the trial court continued the trial to August 21, 2012.

{¶5} Thereafter, on August 8, 2012, appellant filed a handwritten motion for the appointment of new counsel. Appellant, in his motion, indicated that he had “no faith and confidence” in the ability of his counsel because his counsel did not have jury trial experience in his type of case. Appellant asked that an attorney from Columbus, Cleveland or Cincinnati be appointed to represent him.

{¶6} On August 14, 2012, appellee filed a motion for a continuance of the trial because a critical witness was not available for trial as scheduled. As memorialized in an Entry filed on August 16, 2012, the trial was continued to October 9, 2012. Following a hearing held on August 12, 2013, the trial court denied appellant’s request for new counsel and appellant’s oral request for a continuance of trial. Subsequently, on September 21, 2012, appellant filed a Motion Requesting a Competency Evaluation, a Motion to Change Venue, and a Motion to Appoint Co-Counsel. Appellant also filed a Motion Requesting Leave of Court to Enter a Not Guilty by Reason of Insanity Plea. The trial court, pursuant to a Judgment Entry filed on September 21, 2012, granted the latter motion and appellant, on the same date, filed a written plea of not guilty by reason of insanity.

{¶7} Via a Journal Entry filed on September 24, 2012, the trial court granted appellant’s request for a competency evaluation and ordered that appellant be evaluated for purposes of competency to stand trial and for purposes of determining his sanity at the time of the alleged offenses. After a hearing held on December 10, 2012, the trial court found that appellant was competent to stand trial. As memorialized in an Entry filed on December 21, 2012, the trial court appointed Greg Myers of the Public

Defender's Office as co-counsel. The trial, via an Entry filed on February 27, 2013, was scheduled for April 9, 2013.

{¶8} Appellant, on March 28, 2013, filed a handwritten "Motion for Release/Discharge of Attorney Kevin Van Horn." Appellant, in his motion, alleged that the service of Attorney Van Horn was no longer necessary and that he had no faith or confidence in Van Horn's ability to adequately represent him. Appellant argued that Attorney Myers was sufficient.

{¶9} Appellee, on April 4, 2013, filed a Motion to Amend the Indictment, seeking to amend Counts 10 through 18 and 22 through 27 by deleting "KALI SONTOKÉ" from the image titles. Appellee sought to correct an error. The trial court granted such motion as memorialized in an Order filed on April 5, 2013. Three days later, a Journal Entry was filed granting appellant's motion to release Attorney Kevin Van Horn. On April 8, 2013, Attorney Elizabeth Gaba filed a Notice of Conditional Appearance. In her notice, she stated that she would be counsel of record for appellant if the trial court continued the trial date to a reasonable date. Also on April 8, 2013, appellant filed a motion seeking a continuance of the April 9, 2103 trial. A hearing was held on April 8, 2013. Pursuant to a Journal Entry filed on the same day, the motion for a continuance was denied.

{¶10} Thereafter, on April 9, 2013, appellant, who was represented by Attorney Greg Myers, withdrew his former not guilty plea and entered a plea of no contest to Counts 1 through 9, 14, 15, 20, 21, 28, 29, and 32. On June 3, 2013, appellant presented the trial court with a handwritten motion to withdraw his no contest plea. The motion was filed on June 4, 2013. Via an Entry filed on June 6, 2013, the trial court

denied such motion after a hearing and sentenced appellant to an aggregate sentence of seven (7) years in prison. The trial court also classified appellant a Tier II Sex Offender. The remaining counts were nolleed by appellee.

{¶11} Appellant now raises the following assignments of error on appeal:

{¶12} 1. THE TRIAL COURT VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS AND ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO WITHDRAW HIS "NO CONTEST" PLEA.

{¶13} 2. THE TRIAL COURT VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WHEN IT ERRONEOUSLY DENIED THE DEFENDANT'S CHOICE OF COUNSEL.

{¶14} 3. THE DEFENDANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL, THE CUMULATIVE EFFECT OF WHICH DENIED HIM OF HIS CONSTITUTIONAL RIGHT TO COUNSEL.

{¶15} A. THE DEFENDANT WAS NOT GIVEN THE OPPORTUNITY TO PARTICIPATE IN HIS OWN DEFENSE.

{¶16} B. THE DEFENDANT WAS ADVISED, AGAINST PROTEST, TO GO AHEAD AND PLEAD TO THE CHARGES AND THEN WITHDRAW HIS PLEAS LATER, BEFORE SENTENCING.

{¶17} C. NEITHER COUNSEL CHALLENGED THE SUFFICIENCY OF THE INDICTMENT EVEN THOUGH THERE WERE DEFECTS IN THE FORM OF THE INDICTMENT ON ITS FACE.

{¶18} Appellant, in his first assignment of error, argues that the trial court erred in denying his motion to withdraw his no contest plea. Appellant had made such motion before sentencing.

{¶19} Crim.R. 32.1, which governs the withdrawal of a guilty plea, provides:

{¶20} "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."

{¶21} This rule establishes a fairly strict standard for deciding a post-sentence motion to withdraw a guilty plea, but provides no guidelines for deciding a presentence motion. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992).

{¶22} The Ohio Supreme Court has stated pre-sentence motions to withdraw a guilty plea "should be freely and liberally granted." *Id.* at 526. That does not mean, however, a defendant has an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. There must be "a reasonable and legitimate basis for withdrawal of the plea." *Id.* The decision to grant or deny a pre-sentence plea withdrawal motion is within the trial court's sound discretion. *Id.* at paragraph two of the syllabus.

{¶23} The factors to be considered when making a decision on a presentence motion to withdraw a guilty plea are as follows: (1) prejudice to the state; (2) counsel's representation; (3) adequacy of the Crim .R. 11 plea hearing; (4) extent of the plea withdrawal hearing; (5) whether the trial court gave full and fair consideration to the motion; (6) timing; (7) the reasons for the motion; (8) the defendant's understanding of

the nature of the charges and the potential sentences; and (9) whether the defendant was perhaps not guilty or has a complete defense to the charge. *State v. Cuthbertson*, 139 Ohio App.3d 895, 898–899, 746 N.E.2d 197 (7th Dist.2000), citing *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995). No one *Fish* factor is absolutely conclusive. *Cuthbertson, supra*.

{¶24} At the hearing on appellant's motion, appellant agreed that one of the reasons he wished to withdraw his plea was because "Assistant Prosecutor Ron Welch stated very, very clearly that, considering the age of the defendant in this case we believe that the sentence that's been recommended had the same effect as if it were to recommend a 70-year sentence." Transcript from June 3, 2013 hearing at 6-7. Appellant also indicated that the second reason was because the Judge did not have to follow such recommendation. Appellant also concurred that the third main reason he wanted to withdraw his plea was because he believed that his counsel was not prepared to go to trial.

{¶25} However, the following discussion took place on the record:

{¶26} "THE COURT: In reviewing that, before you changed your pleas to no contest, you knew that the State was going to recommend seven years, correct, and you pled no contest knowing that to be the recommendation?"

{¶27} "THE DEFENDANT: Yes.

{¶28} "THE COURT: Also, I asked you at that time if you understood that I did not have to follow that recommendation.

{¶29} "THE DEFENDANT: Yes, sir.

{¶30} "THE COURT: And you said yes, right?"

{¶31} "THE DEFENDANT: Yes.

{¶32} "THE COURT: And you still understand that, right?

{¶33} "THE DEFENDANT: Yes, sir.

{¶34} "THE COURT: And regarding your third factor, I spoke very clearly with Mr. Meyers at that time, and he indicated he was ready to go to trial. He was prepared and ready. Do you remember he and I having that discussion on the record?

{¶35} "THE DEFENDANT: Maybe.

{¶36} "THE COURT: Well, we did.

{¶37} "MR. MEYERS: I reminded Mr. Suntoke that the afternoon the day before the plea hearing, which would have been Monday, April 8th. We were before this Court when private counsel requested to be permitted to enter, and then at that time, it was at that hearing that the Court addressed me directly asking were I ready to take the case to trial if need be, and, of course, forthrightly I said I was ready.

{¶38} "THE COURT: Thank you, Mr. Meyers. So those three reasons – those three points that you make are no reason for me to allow you to withdraw your no contest plea.

{¶39} "And I also asked if you withdrew all motions you had pending before the Court at that time and also withdraw all those pending motions; do you remember that?

{¶40} "MR. MEYERS: Mr. Suntoke may not have good recollection of what I reminded him is a routine part of a plea colloquy. I remember you opening the file and indicating there were perhaps a few pending motions, some pro se. It's my recollection -- certainly that could be wrong -- we withdrew all those motions.

{¶41} "THE COURT: Thank you. So other than what we've just talked about, Mr. Suntoke, is there anything else you would like to bring to my attention that I should allow you to withdraw your no contest plea?

{¶42} "THE DEFENDANT: Yes, Your Honor.

{¶43} "THE COURT: Go ahead.

{¶44} "THE DEFENDANT: As I said, Mr. Meyers, even Mr. Kevin Van Horn and Mr. Meyers, we have never discussed the actuality of the case itself. We have never discussed what motions need to be filed or what to be done.

{¶45} "THE COURT: The motions are over.

{¶46} "THE DEFENDANT: No, no, no motions are over now. What I'm saying previously we had never discussed what motions are to be done.

{¶47} "THE COURT: Let me pause you, Mr. Suntoke.

{¶48} "THE DEFENDANT: Yes, sir.

{¶49} "THE COURT: If you recall at your change of plea when you pled no contest, I asked you if you were pleased with the representation of your attorney, and you said yes. Do you recall that?

{¶50} "THE DEFENDANT: I don't exactly recall that.

{¶51} "THE COURT: I assure you I asked you that.

{¶52} "THE DEFENDANT: I believe you. I believe you, Your Honor.

{¶53} "THE COURT: And I assure you you said you were pleased with his representation of you. So anything else that needs brought to the Court's attention?

{¶54} "THE DEFENDANT: No.

{¶55} “THE COURT: Based upon your letter and our discussion, I’m going to deny your motion to withdraw your no contest plea.” Transcript from June 3, 2013 hearing at 8-11. Moreover, a review of the transcript from the April 9, 2013 plea hearing demonstrates that the trial court engaged appellant in a thorough Crim.R. 11 colloquy before accepting his plea.

{¶56} Based on the foregoing, we find that the trial court did not abuse its discretion in denying appellant’s motion to withdraw his plea.

{¶57} Appellant’s first assignment of error is, therefore, overruled.

II

{¶58} Appellant, in his second assignment of error, argues that the trial court violated his Sixth Amendment right to counsel when it denied his choice of counsel.

{¶59} “The right to counsel guaranteed by the Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution does not always mean counsel of one’s own choosing. *State v. Marinchek*, 9 Ohio App.3d 22, 23, 457 N.E.2d 1198 (9th Dist. Medina 1983). The right to counsel must be balanced against the public’s right to prompt, orderly and efficient administration of justice. *Id.* Moreover, the right of a defendant to select his own counsel is inherent only in the cases where the accused is employing counsel himself. *Thurston v. Maxwell*, 3 Ohio St.2d 92, 93, 209 N.E.2d 204 (1965).

{¶60} The decision whether or not to remove court appointed counsel and allow substitution of new counsel is addressed to the sound discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of discretion. *State v. Pruitt*, 18 Ohio App.3d 50, 480 N.E.2d 499 (8th Dist.1984). *Id.* “The term ‘abuse of discretion’

implies that the court's attitude is unreasonable, arbitrary or unconscionable.”

Blakemore v. Blakemore, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶61} As is stated above, Attorney Kevin Van Horn was originally appointed to represent appellant. As memorialized in an Entry filed on December 21, 2012, the trial court appointed Greg Myers of the Public Defender's Office as co-counsel at the request of Attorney Van Horn. Subsequently, at appellant's request, the trial court discharged Attorney Van Horn. Appellant, in his March 28, 2013 handwritten motion, stated that “in these times of state budget deficits & controls I see no reason for the State of Ohio to pay for two attorneys when one attorney in the form of Mr. Gregory Myers would be sufficient.”

{¶62} Thereafter, on April 8, 2013 Attorney Elizabeth Gaba filed her Notice of Conditional Appearance. In her April 8, 2013 motion for a continuance of the trial, she stated, in relevant part, as follows:

{¶63} “Undersigned Counsel was contacted in November 2012 by Mr. Suntoke regarding representation and promptly responded. Mr. Suntoke has stated that he wrote three additional letters to Counsel but they were not received, and Counsel did not hear again from Mr. Suntoke until 4-4-13. On that day a representative of Mr. Suntoke contacted Counsel regarding proposed representation of Mr. Suntoke in this matter as privately retained counsel.”

{¶64} The motion for a continuance was denied.

{¶65} Based on the foregoing, we find that the trial court did not violate appellant's rights when it refused to continue the trial so that Attorney Gaba would represent appellant. Appellant was represented by qualified appointed counsel when he

entered his plea and did not have a right to counsel of his choosing. We note that as late as March 28, 2013, appellant had indicated that Attorney Myers' representation was "sufficient".

{¶66} Appellant's second assignment of error is, therefore, overruled.

III

{¶67} Appellant, in his third assignment of error, argues that he received ineffective assistance of trial counsel.

{¶68} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's performance fell below an objective standard of reasonable representation and that but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

{¶69} Appellant initially argues that he received ineffective assistance of trial counsel because he was not given an opportunity to participate in his own defense. Appellant points out that in a May 29, 2013 letter to his counsel, which was attached to appellant's motion seeking to withdraw his plea, appellant raised the issue that he had not had the chance to consult with his attorney concerning any trial issues. However, the record is insufficient to demonstrate that counsel acted incompetently in representing appellant or that actual prejudice resulted from such representation.

{¶70} Appellant also maintains that trial counsel was ineffective in advising appellant, against protest, to go ahead and plead to the charges and then withdraw his plea later before sentencing. However, there is nothing in the record supporting such assertion. When asked at the sentencing hearing who gave him the impression that he could file a motion for the withdrawal of his no contest pleas, appellant stated that he read in a law book that he could file such a motion.

{¶71} Appellant finally argues that counsel was ineffective in failing to challenge the sufficiency of the indictment. Appellee, on April 4, 2013, filed a Motion to Amend Indictment. Appellee specifically sought to amend Counts 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26 and 27 by deleting "KALI SUNTOKE" from image titles. Such counts contained language stating, in relevant part, that appellant "did... create, reproduce, or publish any obscene material, to wit: Image titled KALI SUNTOKE... that has a minor as one of its participants or portrayed observers;..." The trial court granted such motion and deleted "Kali Sontoke" from the image titles.

{¶72} We note that appellee dismissed Counts 10, 11, 12, 13, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 30, 31 and 33. Moreover, Crim.R. 7(D) provides in pertinent part:

{¶73} "The court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."

{¶74} Thus, the trial court could amend the indictment so long as the amendment did not change "the name or identity of the crime charged." We find that the trial court properly amended the indictment in accordance with Crim.R. 7(D) because

the amendment did not alter the name or identity of the crime charged. The amendment added no new language to the indictment and did not add any additional elements that the state was required to prove. We find that appellant's claim that his attorney was ineffective for failing to object to the amendment of the indictment lacks merit because his attorney did not fall below an objective standard of representation. Moreover, we find that appellant was not prejudiced by the amendment of the indictment.

{¶75} Appellant's third assignment of error is, therefore, overruled.

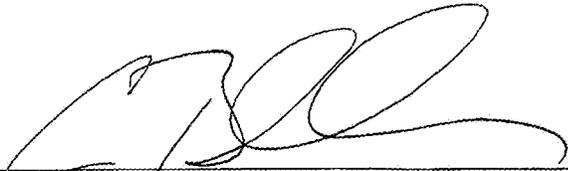
{¶76} Accordingly, the judgment of the Muskingum County Court of Common

Pleas is affirmed.

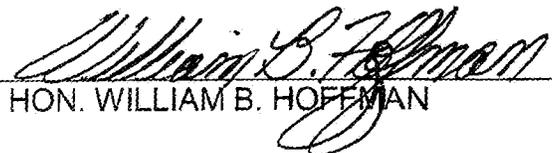
By: Baldwin, J.

Hoffman, P.J. and

Farmer, J. concur.



HON. CRAIG R. BALDWIN



HON. WILLIAM B. HOFFMAN



HON. SHEILA G. FARMER

CRB/dr

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

APR - 2 2014

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

STATE OF OHIO

Plaintiff - Appellee

-vs-

KALI SUNTOKE

Defendant - Appellant

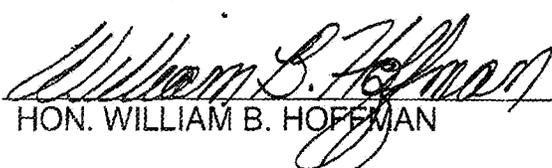
JUDGMENT ENTRY

CASE NO. CT2013-0032

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio is affirmed. Costs assessed to appellant.



HON. CRAIG R. BALDWIN



HON. WILLIAM B. HOFFMAN



HON. SHEILA G. FARMER