



Ohio Prosecuting Attorneys Association

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Simultaneous Plea Colloquy Upheld

In *State v. Phillips*, 7th Dist. No. 08 MA 217/218, 2010-Ohio-752, the defendant pleaded guilty under one indictment to felonious assault and under another indictment to attempted robbery. The court conducted the plea colloquy in the same hearing and addressed the various constitutional rights the defendant was giving up, per Crim.R. 11(C)(2)(c). The court's colloquy indicated that the rights applied in both cases.

On appeal, the defendant argued that the guilty pleas for the two cases should have been taken separately. The 7th District rejected that argument:

{¶14} We addressed a similar challenge to validity of a plea colloquy last year in *State v. Docgrand*, 7th Dist. Nos. 08 MA 249, 08 MA 250, 08 MA 251, 2009-Ohio-5077:

{¶15} “Appellant has pointed to no caselaw or criminal rule that requires the trial court to hold separate change of plea hearings for a defendant who has signed multiple plea agreements, all of which are pending before the court at the same time. Combined plea hearings are a common occurrence in Ohio. *State v. Hartman*, 8th Dist. No. 91611, 2009-Ohio-2876 (one plea hearing for six separate indictments); *State v. Horner*, 6th District No. L-08-1125, 2009-Ohio-1815, ¶5 (one plea hearing for two defendants with separate indictments); *State v. Goyman*, 3rd Dist. Nos. 10-06-23, 10-06-24, 2007-Ohio-215, ¶4 (one plea hearing for two separate criminal cases)”. *Id.* at ¶16.

{¶16} As in the *Docgrand* case, Appellant does not argue that there was some difference between the two pending cases that would require a separate or different explanation from the trial court as to the constitutional rights that were being waived. Both cases involved felony charges and the same constitutional rights were being waived in each case. In conformance with Crim.R. 11(C)(2), the court addressed Appellant personally regarding all the constitutional rights that he was waiving by entering a guilty plea. Thus, the court strictly complied with the requirements of the criminal rule. The trial court also reviewed the details of each indictment separately, including the specific charges and potential

penalties for each crime, so there was no confusion that the change of plea hearing was somehow limited to one particular indictment.

Weapon Under Disability

In *State v. Robinson*, 1st Dist. No. C-081084, 2010-Ohio-543, the defendant was charged with murder, tampering with evidence, improper handling, CCW, and WUD. The court in a bench trial acquitted the defendant of the first two charges but found the defendant guilty of the latter three charges. After merging the improper handling with the CCW, the court imposed sentences on the CCW and WUD charges.

Although the 1st District vacated the CCW conviction, it affirmed the WUD conviction. The basis for the disability from possessing a firearm was the defendant's prior minor-misdemeanor convictions for marijuana possession. The 1st District rejected the defense argument that the WUD statute does not reach persons convicted of such offenses:

{¶20} R.C. 2923.13(A)(3) “broadly” provides that a disability arises when one is indicted for or convicted of “any offense involving the illegal possession, [or] use * * * [of] any drug of abuse.” The Ohio Supreme Court has held that the drug-abuse offenses referred to in R.C. 2923.13(A)(3) are defined in R.C. 2925.01(G)(1) through (4.), formerly R.C. 2925.01(H)(1) through (4). Subsection (G)(1) of R.C. 2925.01 expressly includes a violation of R.C. 2925.11, the possession statute. “Offense,” as used in Ohio’s criminal code, includes conduct classified as a minor misdemeanor, and “any” is a common, inclusive term. Thus, under the clear, unambiguous language of the disability statute, a conviction for a minor-misdemeanor violation of R.C. 2925.11 creates a disability preventing the possession of a firearm. This court interpreted the statute accordingly in *State v. Mackin*, [(Dec. 26, 1979), 1st Dist. No. C-790054] * * *. (Footnotes omitted)

The defendant was relying on R.C. 2925.11(D), which provides, as follows:

“[A]rrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquires about the person’s criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person’s appearance as a witness.”

The 1st District rejected such reliance, concluding that the “no criminal record” provision is directed toward contexts like employment and license applications, not toward the disability provisions of the WUD statute:

{¶21} Robinson essentially argues that our interpretation of R.C. 2923.13(A)(3) is inconsistent with the language of R.C. 2925.11(D). But we do not find the statutes inconsistent when read together. The criminal-record exception of R.C. 2923.11(D) has a specified application that includes employment opportunities

and that, by its terms, is distinct from the weapons proscription found in the disability statute.

{¶22} In addition, we note that the legislature has excepted a conviction for a minor-misdemeanor offense, in some circumstances, from the definition of a “previous or subsequent conviction” for the limited purpose of determining “first offender” status under the expungement statute. If the legislature had intended to except convictions for minor-misdemeanor offenses from the disability statute, it could have easily done so. Rather, the legislature intended the disability statute to provide a broad “prohibition against weapons in the hands of bad risks * * *.” Instead of excepting minor misdemeanor drug offenses, the legislature provided a mechanism for the removal of the disability in R.C. 2923.14, if warranted.

{¶23} We hold that a conviction for a minor-misdemeanor violation of R.C. 2925.11 creates a disability prohibiting the possession of a firearm or dangerous ordnance, even though the conviction may not constitute a “criminal record” for background checks involved in licensing. Thus, we reject Robinson’s interpretation of the disability statute and his challenge to his conviction based upon his erroneous interpretation. (Footnotes omitted)

The validity of the 1st District’s decision boils down to the reach of the “no criminal record” language of R.C. 2925.11(D). It will be argued that the phrase “does not constitute a criminal record” stands on its own since it is connected by the word “and” to the remainder of the paragraph, i.e., “does not constitute a criminal record *and* need not be reported by the person so arrested or convicted * * *.” Read in that light, it will be argued that the “no criminal record” language would preclude reliance on the MM conviction as a disability-creating “criminal record,” independent of the remainder of the paragraph that also allows the person to avoid reporting the conviction on employment and license applications.

Fraud on the Court

In *State v. Gerek*, 6th Dist. No. WD-09-018, 2010-Ohio-466, the defendant was convicted of making false alarms in 1987. Over 20 years later, he filed a motion to vacate the conviction and to dismiss the charge, contending that his no contest plea had been uncounseled. A hearing was held, and the motion was granted.

Almost one year later, the prosecution sought to reinstate the conviction. The prosecution contended that the defendant had claimed that the conviction was causing him difficulties in traveling to and from Canada, which was a problem for him because he was a commercial pilot. But now it had come to light that the defendant actually had other convictions that hindered his travel to Canada. The court reinstated the conviction.

The 6th District affirmed, concluding that the court had the inherent power to correct the fraud, citing *Jelm v. Jelm* (1951), 155 Ohio St. 226, 240-241 (court has “inherent right

and power to protect itself against the perpetration of a fraud. * * * A judgment so procured can be vacated by exercise of the inherent power of the court.”). The 6th District noted that Civ.R. 60(B)(3) allowed vacating of a judgment based on fraud or misrepresentation, and, via Crim.R. 57(B), a criminal court could look to Civ.R. 60(B)(3) as a basis to correct a fraud. The court’s action vacating the earlier judgment would not be reversed absent an abuse of discretion.

While this decision can be viewed as a welcome decision for prosecutors, prosecutors must be careful, as there is the danger that a prosecutor’s reliance on Civ.R. 60(B) in one case could lead to defendants relying on the same provision in another case, notwithstanding *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, which recognizes that “Civ.R. 60(B)” motions filed by defendants can be recast as post-conviction petitions.

Post-Conviction Review During Appeal

In *State v. Orr*, 8th Dist. No. 93796, 2010-Ohio-366, the defendant filed a post-conviction petition while his appeal from his conviction was pending. The common pleas court denied the petition on the sole ground that it lacked jurisdiction to consider the petition while an appeal was pending.

The 8th District reversed, relying on R.C. 2953.21(C):

{¶ 12} In this case, the trial court struck Orr’s petition without considering it because his appeal was pending in this court. However, R.C. 2953.21(C) explicitly states that trial courts shall consider timely filed petitions even if a direct appeal of the judgment is pending:

“R.C. 2953.21(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. * * *.”

{¶ 13} “This part of the statute became effective in September 1995 and allows concurrent processing of direct appeals and post-conviction petition proceedings. As a result, trial courts do have jurisdiction to hear timely filed petitions for post-conviction relief, even while direct appeals are pending.” *State v. Myers* (Feb. 28, 2003), Clark App. No. 2002-CA-73, 2003-Ohio-915, at ¶8, citing *State v. Traish* (1999), 133 Ohio App.3d 648, 650-651, 729 N.E.2d 766 and *State v. Walker* (Dec. 11, 1998), Montgomery App. No. 16959.

This ruling is consistent with the usual rule that a trial court cannot take any action that would detract from the appellate court’s jurisdiction to review the judgment then under appeal. See *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94. Consideration of a post-conviction petition during a pending appeal does not violate that principle. R.C. 2953.21(G) rightly allows the court to deny the petition while the appeal is pending, as denying the petition would do nothing to the

judgment under appeal and so would not interfere with the appellate court's jurisdiction. On the other hand, if the court concludes it wishes to grant the petition and vacate the judgment of conviction, R.C. 2953.21(E) and (G) recognize that such action would interfere with the appellate court's power of review that judgment, and so the statute provides that the trial court can notify the parties of the court's intent to grant the petition, and either party may request the appellate court to remand the case for the purpose of granting the petition.

Stored Communications Act

In *State v. Rivera*, 12th Dist. No. CA2008-12-308, 2010-Ohio-323, the defendant had been paying juveniles to perform sex acts while he filmed them. When the misconduct came to light, a detective obtained a court order under Section 2703(d), Title 18, U.S.Code, also known as the Stored Communications Act. Such an order can be issued based upon specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

Under the court order, the detective obtained text messages from the defendant's cell phone provider, and some of the messages showed negotiation of payments and the arrangement, scheduling, and discussing of activities. A search warrant was then obtained for the defendant's car and home. Upon his arrest, the defendant admitted the activities.

After being charged for compelling prostitution, the defendant sought to suppress the text messages and the fruits derived therefrom. The defense claimed that the court order had violated the Stored Communications Act and contended that the Act was unconstitutional anyway.

The detective had violated the Act, as the Act required the use of a warrant in order to obtain text messages that were less than 180 days old. The Act allows a court order to be used only when the messages are more than 180 days old. But the 12th District found no basis to suppress any evidence because of the violation, as the Act provides that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." Section 2708, Title 18, U.S.Code. No exclusionary rule is provided in the Act, as found by various cases. As the 12th District concluded:

{¶24} * * * [A]s we indicated above, Congress included several remedies for violations of the Act but did not include exclusion of [evidence] as a remedy. Further, despite having the opportunity to do so, several courts have declined to hold that exclusion is a remedy for a violation of the Act. Accordingly, this court does not find it appropriate to permit exclusion as a remedy for violations of the Act. Moreover, we find it was objectively reasonable for Detective Woodall to rely on the Act being constitutional, as the Act has not been found to be unconstitutional, and Detective Woodall obtained the court order from a neutral

and detached magistrate. Therefore, we find that the exclusionary rule is inapplicable to the evidence obtained in violation of the Act.

{¶25} To benefit from the protection provided by the Fourth Amendment, appellant must demonstrate that he suffered a violation of a constitutional right. At best, appellant has demonstrated that he suffered a violation of a statutory right. Because appellant has not demonstrated any valid privacy interest that invokes Fourth Amendment protection and the remedy he seeks for a nonconstitutional violation is impermissible, we need not determine whether the Act is facially unconstitutional.