[Cite as *State v. Roberts*, 2010-Ohio-156.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92789

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SCOTT ROBERTS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514852

BEFORE: Cooney, J., Blackmon, P.J., and Dyke, J.

RELEASED: January 21, 2010

JOURNALIZED:
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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Scott Roberts ("Roberts"), appeals from his guilty plea and sex offender classification. Finding merit to the appeal, we vacate his plea and remand for further proceedings.

{¶ 2} In August 2008, Roberts was charged with four counts of unlawful sexual conduct with a minor and two counts of importuning. Pursuant to a plea agreement, Roberts pled guilty to an amended count of unlawful sexual conduct with a minor and an amended count of importuning.[1] The remaining charges were nolled. At the plea hearing in November 2008, the court stated that: "[a]s part of the plea agreement — by virtue of the plea agreement, rather, the defendant will be classified as a Tier I sex offender * * *."

{¶ 3} On January 8, 2009, the trial court sentenced Roberts to an aggregate of three years in prison and classified him as a Tier I sex offender. One week later, the trial court reconvened and changed Roberts's classification to a Tier II offender. The State noted that at the time the charges were read at the plea hearing "there was an indication that it was a Tier I offense when in actuality it was a Tier II offense."

[1]The counts were amended to include all three juvenile victims.

{¶ 4} Roberts now appeals, raising two assignments of error for our review. We will discuss the second assignment of error first because it is dispositive. In this assignment of error, Roberts argues that his plea was not knowingly, intelligently, or voluntarily made because he was incorrectly advised of the applicable sex offender classification tier. He claims that he was told at the plea hearing and sentencing that he would be labeled a Tier I sex offender, but then was subsequently labeled as a Tier II offender.

{¶ 5} In support of his argument, Roberts relies primarily on *State v. Oldham*, Franklin App. No. 21777, 2007-Ohio-5184, in which Oldham pled no contest to rape and gross sexual imposition. The trial court sentenced him to four years in prison and advised that he would be designated as a sexual offender. When asked whether there was an agreement as to the particular sexual offender designation, the State advised the court that the particular designation "'would depend upon the report,' i.e. presentence investigation report. The trial court advised Oldham that in addition to the sexually oriented offender classification, it 'could' classify him as a habitual sexual offender or it 'could' classify him as a sexual predator. The trial court did not tell him that based on findings of guilty on his no contest pleas, he would automatically be designated an aggravated sexually oriented offender." Id. at ¶5.

{¶ 6} The *Oldham* court found that the trial court misinformed Oldham and concluded that his plea was not knowingly or voluntarily made. Id. at ¶8. See, also, *State v. Trainer*, Champaign App. No. 2006 CA 23, 2007-Ohio-6698 (where the court found that the defendant's plea was not knowingly, intelligently, or voluntarily made when the trial court misinformed the defendant about the availability of judicial release).

{¶ 7} The State correctly argues that the trial court was not required to advise Roberts of the sexual offender classification and registration obligations as a prerequisite to accepting his guilty plea. Roberts recognizes that the trial court was not required to advise him of the collateral consequences of his plea (the sex offender classification), but rather he claims that when the trial court chose to inform him, it was obliged to correctly inform him of the collateral consequences attendant to his plea. We agree.

{¶ 8} As the *Oldham* court noted, "Crim.R. 11(C) obliges the trial court to be satisfied that guilty and no contest pleas are made voluntarily and knowingly before they may be accepted. It is commendable that some trial judges go beyond the express requirements of Crim.R. 11(C) in assuring that pleas are knowingly and voluntarily made. In doing so, however, the trial judge must impart accurate information." *Oldham* at ¶8. See, also, *State v. Johnson*, Cuyahoga App. No. 92364, 2009-Ohio-5821 (where this court

vacated defendant's guilty plea when the State and trial court misinformed the defendant that imprisonment was discretionary).

{¶ 9} In the instant case, a review of the record reveals the following exchanges:

Plea Hearing

Court: "My understanding is the defendant [Roberts] will be pleading guilty to Count 1 as amended, unlawful sexual conduct with a minor * * *.

"He will be further pleading guilty to an amended Count 5, importuning * * *.

"As part of the plea agreement — by virtue of the plea agreement, rather, the defendant will be classified as a Tier I sex offender, which means he must register annually for 15 years with the sheriff in the county in which he resides. Failure to register could result in additional felony charges.

"Correct statement, counsel?"

Defense Counsel: "Correct, Your Honor."

State: "Yes, Your Honor. Furthermore, in Count 1, I believe after 10 years, the defendant could petition for removal from the registration."

Sentencing Hearing — January 8

Court: "By virtue of the plea you [Roberts] are designated a Tier I sex offender, which means you will be required to register with the sheriff in the county in which you reside on an annual basis for 15 years. Failure to register will result in additional felony charges."

Post-Sentencing Hearing — January 15

Court: "Why don't you put on the record what happened at the time of the plea."

State: "At the time of the plea, your Honor, the charges were read and there was an indication that it was a Tier I offense, when in actuality it was a Tier II offense. The error would have been from the course of the plea negotiations to the entering of the plea."

* * *

Court: "Mr. Roberts, you are subject not to Tier I, but Tier II registration requirement, which means you have to register on an annual basis — strike that. You have to register for 25 years, every 180 days with the sheriff in the county in which you reside as opposed to annually for 15 years."

{¶ 10} Based on the trial judge's statements, we find that Roberts's plea was not knowingly, voluntarily, or intelligently made. Therefore, the trial court committed reversible error when it failed to impart accurate information, and, accordingly, Roberts's plea must be vacated.

{¶ 11} Thus, the second assignment of error is sustained.

{¶ 12} Given our disposition of the second assignment of error, we find the remaining assignment of error challenging the court's jurisdiction to sua sponte reclassify Roberts to be moot.

{¶ 13} Judgment is reversed, and the guilty plea is vacated. Case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANN DYKE, J., CONCUR