

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-07-020

Appellee

Trial Court No. 2006-CR-647

v.

Brandon A. Robinson

DECISION AND JUDGMENT

Appellant

Decided: June 19, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Laura A. Perkovic, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Brandon Robinson, appeals his conviction by the Erie County Court of Common Pleas of the offense of failure to register, a violation of R.C.

2950.05(A) and a fourth degree felony.¹ Appellant's conviction is based upon a guilty plea.

{¶ 2} Appellant's original counsel filed an appellate brief, but sought leave to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. We conducted a review of the record, as mandated in *Anders*, and concluded that there is an arguable assignment of error in this appeal concerning whether there was a valid waiver, under the procedures set forth in Crim.R. 11(C)(2)(c), of appellant's constitutional right to compulsory process to obtain witnesses to testify on his behalf. *State v. Robinson*, 6th Dist. No. E-07-020, 2008-Ohio-2985, ¶ 26 ("*Robinson I*"). We granted leave for appellant's original appellate counsel to withdraw and appointed new counsel.

{¶ 3} With the assistance of new counsel, appellant now assigns three errors on appeal:

{¶ 4} "Assignments of Error

{¶ 5} "I. Absence of the mens rea element in the indictment for failure to register violates appellant's right to indictment by grand jury under the Ohio Constitution and violates appellant's due process rights under the Ohio and United States Constitutions.

{¶ 6} "II. The appellant's plea of guilty was not knowingly, intelligently and voluntarily made.

¹In an indictment, Robinson was charged with failure to register a change in his residential address with the Erie County Sheriff between September 5 and October 2, 2006. He was subject to the registration requirement due to a prior felony conviction for unlawful sexual conduct with a minor and classification as a habitual sex offender.

{¶ 7} "III. Appellant was denied the effective assistance of counsel, in violation of his Sixth Amendment rights under the United States Constitution."

Claimed Mens Rea Defect in the Indictment

{¶ 8} Under Assignment of Error No. I, appellant argues that the indictment for failure to register, a violation of R.C. 2950.05(A), was defective because it lacked any mens rea element for the offense. Appellant argues that, under *State v. Collins* (2000), 89 Ohio St.3d 524 and R.C. 2901.21(B), proof of recklessness is an element of the offense of failure to register. The state responds that the offense is a strict liability offense and that proof of any culpable mental state is not required.

{¶ 9} The Supreme Court of Ohio has identified R.C. 2901.21(B) as setting forth the test to be applied to determine whether a criminal offense requires proof of a culpable mental state. *State v. Collins* at 529-30. "That statute provides that where a statute defining a criminal offense fails to expressly specify a mental culpability element, e.g., negligence, recklessness, or intentional conduct, proof of a violation of the criminal provision requires a showing of recklessness, absent *a plain indication in the statute of a legislative purpose to impose strict criminal liability*. R.C.2901.21(B)." *Id.* (Emphasis added.)

{¶ 10} R.C. 2950.05(A) does not specify any required culpable mental state for the offense of failure to register. Therefore, under R.C. 2901.21(B) proof of recklessness is required unless the statute itself "plainly indicates a purpose to impose strict liability." R.C. 2901.21(B).

{¶ 11} In *State v. Beasley* (Sept. 27, 2001), 8th Dist. No. 77761, the Eighth District Court of Appeals considered this issue. In the decision, the court reviewed the language used by the General Assembly in R.C. 2950.05. The statute provides that "[n]o person who is required to notify a sheriff of a change of address pursuant to division (A) of this section shall fail to notify the appropriate sheriff * * *." R.C. 2950.05(E)(1).² (Emphasis added). The court concluded that use of the language "no person shall" in the statute, absent reference to a required mental state, demonstrated a legislative intent to impose strict liability.

{¶ 12} The court also concluded that such an analysis was supported by the General Assembly's intent behind enactment of registration requirements for sexual offenders as considered by the Ohio Supreme Court in *State v. Williams* (2000), 88 Ohio St.3d 513, 518.

{¶ 13} The Eighth District Court of Appeals held in *Beasley* that the offense of failure to register, in violation of R.C. 2950.05(A), is a strict liability offense.

{¶ 14} The Ninth District Court of Appeals in *State v. Hardy*, 9th Dist. No. 21015, 2002-Ohio-6457, ¶ 18, followed *Beasley* in considering another registration requirement in Chapter R.C. 2950 applicable to sexual offenders, the requirement to verify current residence address under R.C. 2950.06.

{¶ 15} The defendant in *Hardy* was a sexually oriented offender. The version of R.C. 2950.06 considered by the court in *Hardy* requires that "[a] defendant who is a

²That provision is now contained in R.C. 2950.05 (F)(1).

sexually oriented offender '*shall* verify [his or her] current residence address in accordance with division (C) of this section on each anniversary of the offender's initial registration date during the period the offender is required to register.'" *Id.* at ¶ 9, quoting R.C. 2950.06(B)(2) with emphasis added by court. The Ninth District held that R.C. 2950.06 is a strict liability offense. *Id.* at ¶ 22-23.

{¶ 16} The same version of R.C. 2950.05 considered in *Beasley* governs this case. The statute instructs that "no person shall." In considering such statutory language in the past, we also have recognized that use of such language, absent reference to a required mental state, clearly indicates a legislative intent to impose strict liability. E.g., *State v. Schmuhl*, 6th Dist. No. L-06-1061, 2007-Ohio-744, ¶ 18; *Perrysburg v. Bush* (Mar. 31, 1999), 6th Dist. No. WD-98-072; *State v. Kendrick* (Sept. 30, 1996), 6th Dist. No. L-95-381.

{¶ 17} We conclude that use of the wording in R.C. 2950.05(E)(1) commanding that "[n]o person who is required to notify a sheriff of a change of address pursuant to division (A) of this section shall fail * * *" is language that "plainly indicates a purpose to impose strict liability" within the meaning of R.C. 2901.21(B). Accordingly, failure to register as required under R.C. 2950.05(A) is a strict liability offense. There is no mens rea element to the offense. Appellant's Assignment of Error No. I is not well-taken.

Waiver of Constitutional Right to Compulsory Process and Guilty Plea

{¶ 18} Under Assignment of Error No. II, appellant argues that his guilty plea was not knowingly, intelligently and voluntarily made due to the failure of the trial court

personally to inform him of his constitutional right to compulsory process to compel attendance of witnesses to testify on his behalf at trial as required under Crim.R.

11(C)(2)(c).

{¶ 19} In the decision of *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, the Ohio Supreme Court recently revisited the requirement of strict compliance with Crim.R. 11(C)(2)(c) in plea colloquies involving waiver of constitutional rights. In *Veney*, the Ohio Supreme Court held "that a trial court's failure to inform a defendant of any right in that subsection [Crim.R. 11(C)(2)(c)] invalidates the plea." *Id.* at ¶ 1. According to the decision, a trial court must advise the defendant orally before accepting a plea that the guilty plea waives certain constitutional rights:

{¶ 20} "*A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)*" (Emphasis added.) *Id.* at syllabus.

{¶ 21} Pursuant to *Veney*, a guilty plea is invalid where the trial court failed to inform the defendant in a plea colloquy that he would be waiving constitutional rights specified in Crim.R. 11(C)(2)(c) by pleading guilty. *State v. Strebler*, 7th Dist. No. 08

MA 108, 2009-Ohio-1200, ¶ 36; *State v. Walker*, 1st Dist. Nos. C-070345, C-070346, C-070347, C-070348, and C-070349, 2008-Ohio-5629, ¶ 4.

{¶ 22} We considered the nature of the trial court's plea colloquy prior to accepting appellant's guilty plea in *Robinson I*. The trial court questioned appellant about different constitutional rights including "(1) a right to trial by jury; (2) the right to cross-examine witnesses that would testify against him; (3) the right to have the state of Ohio prove appellant's guilt beyond a reasonable doubt; (4) the right to choose not to testify at trial; (5) the right to bear firearms; and (6) the right, for all practical purposes, to appeal." *Robinson I* at ¶ 23. The trial court did not discuss the constitutional right to compulsory process to compel attendance witnesses at trial, either to explain the nature of the right or to determine that appellant understood that he waived the right by pleading guilty. Accordingly, the trial court failed to strictly comply with the requirements of Crim.R. 11(C)(2)(c) as to the constitutional right to compulsory process before accepting appellant's guilty plea and appellant's guilty plea is invalid. We find that appellant's Assignment of Error No. II is well-taken.

{¶ 23} Under Assignment of Error No. III, appellant argues that he was denied effective assistance of trial counsel due to the claimed failure of counsel to assure compliance with Crim.R. 11(C)(2)(c) before appellant pled guilty and the failure of counsel to object to the indictment as being defective due to lack of a mens rea element for the offense. We consider the issues raised in Assignment of Error No. III are moot in

view of our rulings on the other assignments of error and decline to consider them under authority of App.R. 12(A)(1)(c).

{¶ 24} For the reasons stated, we vacate appellant's guilty plea and reverse the trial court's judgment. We remand this matter to the Erie County Court of Common Pleas for further proceedings consistent with this decision and judgment. Appellee is ordered to pay costs pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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