[Cite as *State v. Caplinger*, 2010-Ohio-1236.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2009 CA 4

v. : T.C. NO. 2008 CR 735

MICHAEL L. CAPLINGER : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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OPINION

Rendered on the 26th day of March, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Michael L. Caplinger, filed February 5, 2009. Caplinger was convicted of rape in 1989, and on October 17, 2008, he was indicted on one count of failure to register and/or failure to notify change of address, a felony of the first degree, in violation of R.C. 2950.04(E); 2950.99.

After initially pleading not guilty, Caplinger entered a guilty plea on November 21, 2008. The Petition to Enter a Plea of Guilty provides, "[t]he State is willing to recommend community control for the Defendant on the condition he find a place to live that is verifiable." At the plea hearing, the trial court advised Caplinger as follows: "Now, it's my understanding you and your counsel have negotiated a plea agreement with the State of Ohio. That agreement is that the State is willing to recommend Community Control for the Defendant on the condition that he find a place to live that is verifiable." The court further advised Caplinger that it was not bound by the plea agreement. Also at the hearing, defense counsel indicated, "as part of the pretrial, myself and the prosecution had agreed to propose to the Court a COR release of Mr. Caplinger provided he had a verifiable place to live." The court instructed defense counsel to provide potential addresses. On November 25, 2008, the trial court issued a judgment entry that provides in relevant part, " * * * the bond in this case will not be modified. The addresses that the defense attorney provided are not acceptable." One of the addresses listed was 158 Pocahontas, Xenia, OH 45385.

{¶ 2} On January 9, 2009, Caplinger filed a "Motion for Hearing to Establish Suitable and Legal Housing for Defendant," asking the court to "find that 158 Pocahontas, Xenia, Ohio is suitable and legal housing for Defendant, as it is not within 1,000 feet of any school * * * ." On January 21, 2009, Caplinger filed a "Motion Contra to State's Position as to Location of 'School'" regarding the same address.

{¶ 3} At the sentencing hearing, held January 22, 2009, Caplinger argued his January 21st motion, asserting that the Pocahontas address was beyond 1,000 feet of the portion of the school property that is used for any instruction, extracurricular activities or

training. The trial court overruled Caplinger's motion and determined "as a matter of law [Caplinger] must reside beyond 1,000 feet from the property line" of the school and not from an area within the property where activities are conducted. Prior to sentencing Caplinger, the trial court stated, "Well, I wish there was someplace that you could reside that was beyond 1,000 feet of the school. But I know Mr. Daly has attempted many efforts to try to find a location. There doesn't seem to be a location where that can be accomplished." The trial court then sentenced Caplinger to three years, with no additional objection from defense counsel regarding the plea agreement, noting that "a previous prison term was served; that the Defendant is not amenable to Community Control, * * *."

{¶ 4} Caplinger's Notice of Appeal provides that he "appeals the findings and sentence of the trial court pronounced January 9, 2009," and attached to the notice is the January 22, 2009 Judgment Entry reflecting Caplinger's sentence.

{¶ 5} Caplinger asserts the following assignment of error:

{¶ 6} "THE DEFENDANT COMPLAINS AND APPEALS FROM THE TRIAL COURT'S INTERPRETATION OF THE LAW, SPECIFICALLY R.C. 2925.01."

{¶ 7} According to Caplinger, "[t]he point of measuring is not border to border. The point of measuring is from the parcel of land ends [sic] that instruction, extracurricular activities or training is, or has in the past, being [sic] conducted to the proposed residence." We construe Caplinger's assigned error to assert that the State failed to comply with the terms of the plea agreement, namely that it would recommend community control sanctions if Caplinger provided a "verifiable" residence.

{¶ 8} R.C. 2950.034 provides: "(A) No person who has been convicted of, is

convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense * * * shall establish a residence or occupy residential premises within one thousand feet of any school premises * * * ." The school at issue herein is the Spring Hill Elementary School. R.C. 2925.01 provides: "'School premises' means either of the following: (1) The parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed; (2) Any other parcel of real property * * * and on which some of the instruction, extracurricular activities, or training of the school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed." When he argued his motion, defense counsel incorrectly relied upon and argued the applicability of R.C. 2925.01(R)(2). It is clear that the first section of the statute should have been applied, since it is undisputed that a school is situated on the property at issue.

{¶ 9} This determination, however, does not resolve this case. Unfortunately, the prosecutor, defense counsel and trial court all mistakenly believed that Caplinger was eligible for community control sanctions. At the plea hearing, the court noted its understanding of the negotiated plea agreement as follows: "the State is willing to recommend Community Control for the Defendant on the condition that he find a place to live that is verifiable." Caplinger's 1989 conviction was for rape, which is a first degree felony. R.C. 2907.02(B). R.C. 2950.99(A)(1)(ii) provides that whoever fails to register and/or notify change of address, in violation of R.C. 2950.04(E), shall be punished as follows: "If the most serious sexually oriented offense * * * that was the basis of the

registration, notice of intent to reside, change of address notification, or address verification requirement that was violated * * * is a felony of the first, second, third, or fourth degree if committed by an adult * * * the offender is guilty of a felony of the same degree as the most serious sexually oriented offense * * * that was the basis of the registration, notice of intent reside, change of address, or address verification requirement that was violated * * *." R.C. 2929.13(F)(6) mandates imprisonment for convictions which are first degree felonies if the offender was previously convicted of a first degree felony, as Caplinger was.

{¶ 10} The State's promise to recommend community control sanctions was wholly illusory, and Caplinger received no benefit in the plea agreement. This misinformation, coupled with the trial judge's erroneous statement that Caplinger was eligible for community control sanctions renders his plea less than knowing, intelligent and voluntary. See *State v. Howard*, Champaign App. No. 06-CA-29, 2008-Ohio-419, ¶ 26 (holding that guilty pleas to felonious offenses were not made knowingly, intelligently, and voluntarily where trial court "affirmatively mis-advised Howard that he was eligible for the imposition of community control sanctions" when he was subject to a mandatory prison term.) Plain error is demonstrated. Accordingly, Caplinger's plea and sentence is vacated. The matter is remanded for further proceedings consistent with this opinion.

Judgment reversed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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