[Cite as *State v. Hernandez*, 2009-Ohio-3915.]

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

State of Ohio — Court of Appeals No. WM-08-015

Appellee — Trial Court No. 07 CR 211

v.

Michael D. Hernandez, II — **DECISION AND JUDGMENT**

Appellant — Decided: August 7, 2009

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, for appellee.

Matthew N. Fech, for appellant.

* * * * *

KNEPPER, J.

{¶ 1} Appellant, Michael D. Hernandez, Jr., appeals the judgment of the Williams County Court of Common Pleas. Hernandez was indicted for two counts of rape, a violation of 2907.02(A)(1)(b), a felony of the first degree. Each count included a specification that the victim was less than ten years of age at the time of the offenses.

{¶ 2} Pursuant to an unwritten plea agreement, Hernandez entered a plea of no contest to the second count of rape and its attached specification. The count to which Hernandez pled stated that he did commit rape "in that he did engage in sexual conduct,

to wit: fellatio, with Jane Doe, a person who was not his spouse at the time, and at the time of the offense, Jane Doe was a person less than thirteen years of age, to wit: age six years old, all against the peace and dignity of the State of Ohio." The count detailed that the alleged criminal conduct commenced on or about April 1, 2007, and continued to on or about October 31, 2007. The accompanying specification added that "The Grand Jury further find and specify at the time of the offense that Jane Doe was less than ten years of age."

{¶ 3} At the plea hearing, the state acknowledged that it agreed to dismiss the first count of the indictment, to remain silent at sentencing, and to pursue "no further charges based upon images found on the defendant's computer * * *." Hernandez verbally acknowledged the accuracy of the plea agreement.

{¶ 4} The trial court proceeded to hold a plea colloquy. Relevant to this appeal is the trial court's following colloquy with Hernandez regarding the effects of his plea. During the colloquy, the trial court informed Hernandez relevantly as follows:

{¶ 5} "THE COURT: Now, you have tendered a no contest plea to Count II as well as a no contest plea to the specification of Count II. You need to understand that a – I want you to understand the nature of a no contest plea. A no contest plea is not an admission of guilty but is an admission of the truth of the facts alleged in the indictment. Do you understand that?

{¶ 6} "MR. HERNANDEZ: I understand.

{¶ 7} "THE COURT: Furthermore, a no contest plea cannot be used against you in any later or subsequent civil or criminal proceeding. Do you understand that?

{¶ 8} "MR. HERNANDEZ: Yes, I do.

{¶ 9} "* * *

{¶ 10} "THE COURT: All right. Now, Mr. Hill, do you happen to have a copy of the indictment you can place in front of your client?

{¶ 11} "MR. HILL: I do.

{¶ 12} "THE COURT: You are tendering a no contest plea to Count II and the specification thereto. I want to go through the elements of this charge here and make sure you understand what each of these elements are in Count II and the specification. The reason I am doing this is because at trial the prosecutor would have to prove each of these elements beyond a reasonable doubt.

{¶ 13} "The first element is that the prosecutor would have to prove that the offense occurred in Williams County, Ohio.

{¶ 14} "Secondly, he would have to prove the time period. And the alleged time period is commencing on or about April 1, 2007, and continuing to on or about October 31, 2007.

{¶ 15} "The next element is that you engaged in sexual conduct with a Jane Doe, and the sexual conduct alleged here is fellatio. Do you understand the definition of fellatio, Mr. Hernandez?

{¶ 16} "MR. HERNANDEZ: Yes, I do.

{¶ 17} "THE COURT: All right. It alleges that you engaged in fellatio with a Jane Doe. That would be the next element.

{¶ 18} "The next element is the prosecutor would have to prove that Jane Doe was not your spouse at the time. And also the prosecutor would have to prove that at the time of the offense Jane Doe was a person who was less than thirteen years of age. The indictment alleges the [sic] Jane Doe was six years old.

{¶ 19} "Then there's a specification. It says the Grand Jury further finds and specifies that at the time of this offense Jane Doe was less than ten years of age. Again, the prosecutor would have to prove that allegation beyond a reasonable doubt at trial. And you understand that allegation is that Jane Doe was under ten?

{¶ 20} "MR. HERNANDEZ: I understand.

{¶ 21} "THE COURT: All right. Do you understand that by tendering this no contest plea while you are not admitting your guilt you are admitting the truth of the facts alleged in Count II of the indictment as well as the specification to Count II of the indictment? Do you understand that?

{¶ 22} "MR. HERNANDEZ: Yes.

{¶ 23} "* * *

{¶ 24} "THE COURT: All right. Now, the penalty for Count II has two possibilities. When I say Count II, I mean Count II plus the specification. The court could either impose a sentence of life without parole or the court could impose a minimum term of fifteen years to life imprisonment.

{¶ 25} "The offense defined in Count II defines the offense of rape, a felony of the first degree. And if I were to sentence you to prison on this charge, the prison term stated by the court would be the term that you would serve without good time reduction.

{¶ 26} "Now, in the law we have something called judicial release which means you get out early. Do you understand, Mr. Hernandez, that for this particular offense of rape you cannot get judicial release? You cannot get out early. Do you understand that?

{¶ 27} "MR. HERNANDEZ: I understand.

{¶ 28} "THE COURT: All right. Furthermore, if at some point you should be released from prison upon your release from prison you would have a mandatory period of post-release control for a term of five years. Post-release control is similar to parole supervision; in other words you would have terms and conditions of supervision that you would have to follow that are administered by the Ohio Parole Authority. And if you violated any of those terms or conditions of that post-release control you could be sent back to prison for up to nine months. Or if you had multiple violations of your post-release control then you could be returned to prison for up to 50% of the stated prison term imposed originally by this court.

{¶ 29} "* * *

{¶ 30} "THE COURT: This offense of rape is not eligible for a probation or community control sanction. Do you understand that?

{¶ 31} "MR. HERNANDEZ: Yes.

{¶ 32} "THE COURT: Now, do you understand what the charge here is in Count II and the specification thereto and what the possible penalties, including the maximum penalties, are?

{¶ 33} "MR. HERNANDEZ: Yes, I do.

{¶ 34} "THE COURT: Do you have any questions about anything I've said so far?

{¶ 35} "MR. HERNANDEZ: No, I do not."

{¶ 36} The trial court then continued, notifying Hernandez of the constitutional and non-constitutional rights he would be waiving by entering his plea. At the end of the colloquy, the trial court found Hernandez guilty of Count II and the specification. At the subsequent sentencing hearing, the trial court imposed a term of incarceration for life without the possibility of parole.

{¶ 37} From that judgment, Hernandez asserts two assignments of error for review:

{¶ 38} "The trial court erred when it notified appellant that he could be subject to a mandatory period of post-release control under O.R.C. 2967.28 despite the fact that appellant was pleading to a charge which carried an indefinite prison term, subjecting appellant to a parole sanction, not a post-release control sanction.

{¶ 39} "The trial court erred when it did not make a finding that the indictment set forth the elements of the offense and specification to which appellant entered a plea of no contest."

{¶ 40} Hernandez first argues that the trial court erred by informing him that he would be subject to postrelease control instead of parole, and that, therefore, his plea was involuntary. This is incorrect.

{¶ 41} At the time of the offenses as stated in Count II of the indictment, R.C. 2907.02(B) provided that if the victim of rape was less than 13 years of age, the offender "shall" be subject to a prison term or a term of life imprisonment pursuant to R.C. 2971.03. Additionally, because Count II specified that Hernandez's victim was less than 10 years of age, R.C. 2907.02(B) also allows the trial court to "in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, * * * impose upon the offender a term of life without parole." Also, because of the specification in Count II, R.C. 2971.03(B)(1) required the trial court, if it did not impose a sentence of life without parole, to sentence Hernandez to an indefinite prison term of a minimum of 15 years and a maximum of life imprisonment.

{¶ 42} Rape is a felony of the first degree. As a classified felony, offenders convicted of rape must be given postrelease control. R.C. 2967.28(B) provides: "Each sentence to a prison term for a felony of the first degree * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." R.C. 2967.28(B)(1) requires a period of five years of postrelease control for a felony of the first degree or a felony sex offense.

{¶ 43} Hernandez points, however, to R.C. 2967.28(F) in support of his proposition that because he "faced no charges with a definite prison sentence" postrelease control could not be imposed. This is not the case. That section specifically provides for the manner in which an offender serves postrelease control in addition to parole when the offender is serving "an indefinite prison term *or* a life sentence in addition to a stated prison term." (Emphasis added.) Because rape is a felony of the first degree, postrelease control was required to be imposed pursuant to R.C. 2967.28(B). Simply because Hernandez faced a possible indefinite term does not mean that only parole applies. In order to comply with Crim.R. 11(C)(2)(a) and adequately inform Hernandez of the effects of his plea, the trial court was required to inform him of mandatory postrelease control. See *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509; *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 15-17 (collected cases).

{¶ 44} Further, the trial court did not err when it omitted a discussion of parole from the plea colloquy. A trial court is not required to explain that a defendant could receive parole, or of the penalties for violating parole, in its plea colloquy before accepting a plea. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748. "Because parole is not certain to occur, trial courts are not required to explain it as part of the maximum possible penalty in a Crim.R. 11 colloquy." Id. at ¶ 37. In *Clark*, the trial court informed the defendant during the plea colloquy that he would be subject to postrelease control, when, in fact, he was not. In contrast, here, at the time of his plea, Hernandez may have been subject to mandatory postrelease control. Upon review, we find no error in the trial

court's notification of postrelease control and the lack of discussion of parole. Further, upon review of the entire plea hearing, we are satisfied that the trial court fully and strictly complied with the notification requirements of Crim.R. 11. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, syllabus. The first assignment of error is not well-taken.

{¶ 45} Next, Hernandez argues that his plea was involuntary because the trial court "failed to make a finding" that Count II and the specification as alleged in the indictment constituted an offense under Ohio law. In support, he points to cases where, he argues, the prosecution "makes a statement that positively contradicts the elements" of the charged felony offense, citing *State v. Rohda*, 6th Dist. Nos. L-05-1278, L-05-1280, 2006-Ohio-6463.

{¶ 46} *Rohda* is inapposite to this matter. In *Rohda*, we examined whether the prosecution's statements which did not include all of the elements of the charged offense rendered a felony plea involuntary. This examination only occurred, however, because the trial court wrongfully informed the defendant that by entering a plea of no contest he gave "consent to the court making findings of guilty or not guilty based upon explanations of the circumstances surrounding each offense by the prosecutor." Id. at ¶ 8. We then examined whether this incorrect statement of the effect of a no contest plea rendered the plea involuntary. We concluded that despite the error, and despite the fact that the prosecution's statement did not contain all of the elements of the offense, the trial

court still substantially complied with Crim.R. 11 and the defendant could not demonstrate prejudice. Id. at ¶ 23, 26.

{¶ 47} "Where the indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense. (*State ex rel. Stern v. Mascio* [1996], 75 Ohio St.3d 422, 425, followed.)" *State v. Bird* (1998), 81 Ohio St.3d 582, syllabus. Here, Count II and the specification in the indictment sufficiently stated the offense of rape of a person under thirteen years of age, a violation of R.C. 2907.02(A)(1)(b), and a sentencing specification for the rape of a victim under ten years of age pursuant to R.C. 2907.02(B). The trial court did not err in accepting Hernandez's plea of no contest to this charge and it did not err in entering a verdict of guilt upon his plea. The second assignment of error is not well-taken.

{¶ 48} Upon review, we find no error in the trial court's judgment. The judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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, P.J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Richard W. Knepper, J.
CONCUR.

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JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.