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ERRORS ASSIGNED BY APPELLANT

- I. THE TRIAL COURT ERRED IN HOLDING THAT A PRIOR PETTY OFFENSE MISDEMEANOR CONVICTION WAS NOT VALID BECAUSE OF A NO CONTEST PLEA WAS ACCEPTED WITHOUT THE JUDGE CONDUCTING A COLLOQUY WITH THE DEFENDANT ABOUT HIS RIGHTS TO A JURY TRIAL, TO PRESENT EVIDENCE, TO COMPEL THE ATTENDANCE OF WITNESSES, TO REMAIN SILENT, AND TO REQUIRE THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT.

- II. THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT-APPELLEE TO COLLATERALLY ATTACK HIS PRIOR CONVICTION ON THE BASIS OF AN ALLEGED NON-COMPLIANCE WITH THE CRIMINAL PLEA PROCEDURE.

- III. THE TRIAL COURT ERRED IN RULING THAT A PRIOR UNCOUNSELED MISDEMEANOR CONVICTION COULD NO BE USED TO ENHANCE A SUBSEQUENT OFFENCE TO A FELONY SINCE THE DEFENDANT PRESENTED NO EVIDENCE THAT HE HAD FAILED TO KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL IN THE RPREVIOUS CASE.

- IV. THE TRIAL COURT ERRED IN RULING THAT THE STATE CANNOT INTRODUCE EVIDNECE OF THE DEFENDANT-APPELLEE'S PRIOR COURT PROCEEDINGS WHERE COUNSEL WAS APPOINTED FOR HIM TO HELP REBUT A CLAIM THAT THE DEFENDANT-APPELLEE DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL IN A LATER CASE.

STATEMENT OF FACTS AND CASE

Appellee is dissatisfied with Appellant's Statement of Facts and Statement of the Case. The following is included as a fair statement of facts relevant to the issues presented herein.

On January 10, 2002, Mr. Armbruster was indicted for Domestic Violence, a Felony of the Fifth Degree. The level of the offense was enhanced because Mr. Armbruster previously had been convicted of two misdemeanor counts of Domestic Violence in the Municipal Court for Marion County. On May 22, 2002, Mr. Armbruster moved the Court of Common Pleas to exclude evidence of his Municipal Court convictions from the felony case because his pleas were uncounseled. A hearing was held and testimony was heard.

The trial court granted the Defendant's Motion to Exclude Evidence "of a prior uncounseled conviction for which a jail sentence was imposed." See Ruling on Motion, p.1, attached to Appellant's Brief as Appendix 1. It is from this Ruling that the State appealed. The evidence adduced at the hearing revealed the following facts regarding the proceedings on Mr. Armbruster's misdemeanor cases.

On June 1, 2000, Mr. Armbruster was arraigned. He had been brought to the Municipal Court in chains from the jail. (Tr., p. 37) He entered a plea of not guilty and requested an attorney be appointed to represent him. (Tr., p. 16-18, State's Exhibit 2, 11B) The Municipal Court Judge ("Judge"), asked Mr. Armbruster if he had read the green rights form. (Tr., p. 37) Mr. Armbruster indicated that he had read it, but he did not sign the form. (Tr., p. 37) Neither the Judge nor anyone else read or explained his rights to him. (Tr., p. 37, 38) The Judge advised Mr. Armbruster that he could be sentenced to six months on each of his two charges, but never advised him that the sentences could have been served

consecutively. (Tr., p. 43) The Judge denied Mr. Armbruster's request for a court-appointed attorney. (Tr., p. 29)

On June 7, 2000, Mr. Armbruster attended a pretrial where he met with the Assistant Law Director. (Tr., p. 38) Shortly thereafter, he appeared before the Municipal Court without counsel to change his plea. The plea proceeding was recorded on audio tape. The Judge addressed Mr. Armbruster:

Judge: Okay Mr. Armbruster, it's my understanding that there is an agreement that's been reached between yourself and the prosecutor on this case that in exchange for a plea of no contest on this first charge of domestic violence there's be a recommended penalty on a finding of guilty of 90 days in jail and a fine of \$400.00. 84 days of the jail time and \$250.00 of the fine would be suspended on the condition that you obey the laws of the State of Ohio and its subdivisions for a period of one year. That you also, uh, complete the Marion Domestic assessment test, uh, if necessary that you also take, uh, the domestic assessment test, uh, and any other follow up counseling. In addition, you would have to pay court costs on this matter.

Then in exchange for a plea of no contest on this other charge domestic violence there'd be a recommended penalty on a finding of guilty again of 90 days in jail of which 84 days would be suspended. There'd be an additional fine of \$400 of which \$300 would be suspended on the condition that you obey the laws of the State of Ohio and its subdivisions for a period of one year. That you take the domestic assessment test and any, uh, attend and complete any and all follow up counseling that may be ordered. Is this your understanding?

Judge: And are you in agreement with these proposed penalties?

Judge: How do you wish to plead on these two charges of domestic violence?

* * * *." State's Exhibits 3 and 3A.

Mr. Armbruster's responses were inaudible on the tape. At no time during the plea did the Judge advise Mr. Armbruster of the maximum penalties or the fact that the maximum sentences could have been imposed consecutively. (Tr., p. 44, 46) At no time during the plea did the Judge verbally advise Mr. Armbruster of the rights he was giving up. (Tr., p.

46) At no time during the plea did the Judge explain or discuss the facts upon which he found Mr. Armbruster guilty. (Tr., *passim*)

After asking Mr. Armbruster how he wanted to plead, the Judge inquired whether he had reviewed the green rights form. (Tr., p. 46)

Judge: Okay. And, Mr. Armbruster, you've looked over this form and wish to give up those rights that are spelled out there at this time?

Judge: 'Kay we will accept your pleas, make findings of guilty on these charges and will adopt the prosecutor's recommendations on penalty on these matters and they'll take care of you right next door. Thank You.'" (State's Exhibit 3 and 3A)

At some point during the plea proceedings, Mr. Armbruster had been given one of the green rights forms. He signed the front of the green rights form. (Tr., p. 19; See Appendix A) Among the contents of the front written form was the following:

"You should also be aware of what it means when you enter a plea of not guilty, guilty, or not contest. A plea of guilty is a complete admission of your guilt in the matter. A plea of not contest is not an admission of guilt, but is an admission of the facts alleged in the complaint or ticket and such plea or admission shall not be used against you in any subsequent civil or criminal proceedings. A plea of not guilty is a denial of the allegations contained in the complaint or ticket." (See Appendix A)

On the reverse side of the form is the following Acknowledgment:

" I acknowledge that I have been advised and that I understand that a finding of guilty on a 'Domestic Violence' offense may be used against me to raise to a felony level the charge and penalty in any future 'Domestic Violence' offense; that a finding of guilty on a 'Menacing by Stalking' offense may be used against me to raise to a felony level the charge and penalty in any future 'Menacing by Stalking' offense; and that a finding of guilty on a third (3rd) 'Driving Under the Influence' offense may be used against me to raise to a felony level the charge and penalty in any future 'Driving Under the Influence' offense;". (Tr., p. 40; See Appendix A)

The Judge never advised Mr. Armbruster of information articulated in the Acknowledgment.

Even though the County Prosecutor recommended using the Acknowledgment, the Judge

did not think it was necessary. (Tr., p. 40, 41) Mr. Armbruster did not sign the Acknowledgment. (Tr., p. 41) Along with the Acknowledgment, the reverse side also contained a waiver of the right to an attorney. (Tr., p. 41; See Appendix A) It stated:

“After being fully informed by the Court of the charge against me, the penalty provided by law, and of my constitutional rights, I understand that I have the right to an attorney, the right to a reasonable amount of time to obtain an attorney, and the right to have the Court appoint an attorney to represent me without cost if I am unable to employ an attorney; that I do not need to make any statement and any statement that I do make may be used against me, that I have the right to demand a trial by jury; and that I have the right to have bail set in an amount established by the Court. I have read the foregoing and hereby waive and reject all those rights. I enter a plea of guilty/no contest to the crime charged.” See Appendix A.

Mr. Armbruster did not sign that either. (Tr., p. 42; See Appendix A) Finally, the form contained the following language:

“JUDGMENT ENTRY

The Court finds that the Defendant was advised of his/her constitutional rights, and that he/she understood, waived and rejected them before entering a plea.

The above plea of guilty/no contest is accepted and ordered filed.”

The Judge did not sign the foregoing.

ARGUMENT

I. THE TRIAL COURT CORRECTLY EXCLUDED THE EVIDENCE OF MR. ARMBRUSTER’S PRIOR CONVICTION FOR DOMESTIC VIOLENCE.

The Prosecutor’s First Assignment of Error, as articulated, is not presented by the facts and procedural posture of this case. Contrary to the Prosecutor’s assertion, the trial judge did not hold that the Municipal Court conviction was invalid. He held that it could not be used to enhance a subsequent offense. Also, contrary to the Prosecutor’s assertion, the trial judge did not base his holding on the lack of “colloquy with the defendant about his

rights to a jury trial, to present evidence, to compel the attendance of witnesses, to remain silent, and to require the state to prove guilt beyond a reasonable doubt.” The trial judge’s holding is based on his finding of fact that the prior plea was uncounseled and a jail term was imposed. The Prosecutor’s phrasing of his assignment of error appears to be an attempt to reshape this case into *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419. This is not *State v. Watkins*. Any attempt to recast it as such would be a fallacious straw-man argument.

A. THE DEFENDANT PROPERLY BROUGHT THE ISSUE BEFORE THE TRIAL COURT.

The Prosecutor attempts to defeat Mr. Armbruster’s Motion as a collateral attack of prior conviction. This argument is spurious because Mr. Armbruster is not seeking to overturn his prior conviction. Instead, he seeks to bar its use to enhance the charges in the instant case. The law specifically provides for this. It is well-settled that someone whose current offense is being enhanced due to a prior conviction may attack the prior conviction based on the violation of the right to counsel.¹ Furthermore, the Ohio Supreme Court has held that when, “a defendant raises a constitutional question concerning a prior conviction, he must lodge an objection as to the use of this conviction and must present sufficient evidence to establish a prima facie showing of constitutional infirmity.”² Mr. Armbruster’s Motion was properly before the Court.³ The constitutional infirmity is apparent on the face of the record.

¹ *State v. O’Neill*, 140 Ohio App.3d 48, 52-53, 2000-Ohio-2656, citing *Nichols v. United States*, 511 U.S. 738, 749, 114 S.Ct. 1921, 1928, 128 L.Ed.2d 745, 755 (1994).

² *State v. Adams* (1988), 37 Ohio St.3d 295, Para. 2 of Syllabus.

³ See *State v. Clevenger* (Oct. 11, 2002), Lake County App. No. 2001-L-160, 2002-Ohio-5515(unreported, see Appendix B), and *State v. Glendenning* (1999), 103 Ohio Misc.2d 46, 48-49.

B. THE EXCLUSION OF EVIDENCE OF PRIOR CONVICTION WAS PROPER BECAUSE MR. ARMBRUSTER'S PLEA IN MUNICIPAL COURT WAS UNCOUNSELED AND A TERM OF INCARCERATION WAS IMPOSED.

The trial court concluded that Mr. Armbruster's plea of no contest in Municipal Court was uncounseled. This was based on a finding of fact that the record of the plea did not demonstrate a knowing, intelligent and voluntary waiver of the right to counsel. The trial court also found that Mr. Armbruster served a term in jail. These two findings of fact compel the conclusion that the prior conviction could not be used to enhance a subsequent offense. These findings of fact are supported by substantial, credible evidence on the record that was before the Court of Common Pleas.

The law applicable to this issue is well settled. The Sixth Amendment right to counsel applies to misdemeanor cases in which a sentence of imprisonment could be imposed.⁴ Of course, a defendant has a constitutional right to act as his own counsel.⁵ Before a court permits a defendant to represent himself, the court must satisfy itself of two things: (1) that the accused is voluntarily electing to proceed pro se and (2) that the accused is knowingly, intelligently, and voluntarily waiving the right to counsel.⁶

Any waiver of the Sixth Amendment right to counsel must affirmatively appear on the record.⁷ Courts are to indulge every reasonable presumption against the waiver of fundamental constitutional rights, including the right to counsel, and the State bears the burden of overcoming those presumptions.⁸ The Criminal Rules outline the manner in

⁴ *Argersinger v. Hamlin* (1972), 407 U.S. 25

⁵ *Faretta v. California* (1975), 422 U.S. 806; *State v. Gibson* (1976), 45 Ohio St.2d 366; *State v. Nichols* (1997), 122 Ohio App.3d 631.

⁶ *State v. Jackson* (2001), 145 Ohio App.3d 223, 227, *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4(unreported, see Appendix C).

⁷ *State v. Wellman* (1974), 37 Ohio St.2d 162, *State v. Dyer* (1996), 117 Ohio App.3d 92, 95; See also Crim.R. 44(B).

⁸ *State v. Dyer* (1996), 117 Ohio App.3d 92, 95

which a waiver of counsel must affirmatively appear in the record.⁹ Criminal Rule 44 provides for both serious and petty offenses that a defendant shall be “fully advised by the court” before a waiver of counsel is permitted.¹⁰ These requirements are mandatory, and failure to comply with these procedures constitutes error.

In order to establish an effective waiver of the right to counsel, a trial court must make a sufficient inquiry to determine whether a defendant fully understands and intelligently relinquishes that right.¹¹ To discharge its duty “properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.”¹² “To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and other circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.”¹³

Here, the Judge made no inquiry to determine whether Mr. Armbruster fully understood and intelligently relinquished his right to counsel. The Judge did not investigate whether Mr. Armbruster understood the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and other circumstances in mitigation thereof, or any other facts essential to a broad understanding of the whole matter. Here, the written waiver of attorney on the back

⁹ Crim.R. 44 and Crim.R. 22

¹⁰ Crim.R. 44(B) and (C).

¹¹ *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4 (unreported, see Appendix C), citing *State v. Gibson* (1976), 45 Ohio St.2d 366 at paragraph two of the syllabus.

¹² *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4 , citing *State v. Gibson* (1976), 45 Ohio St.2d 366, 377.

¹³ *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, and *State v. Gibson* (1976), 45 Ohio St.2d 366, 377.

of the green rights form was not signed. See Appendix A. The “Acknowledgment” of the potential enhancement of future charges and penalties was not signed. Assuming arguendo that Mr. Armbruster voluntarily waived his right to counsel, the record is quite simply devoid of evidence that the waiver was knowingly or intelligently made.¹⁴ There is no dispute that Mr. Armbruster was incarcerated as a result of his pleas of no contest. The record is clear and it compels the conclusion that the pleas of no contest in Municipal Court can not be used to enhance the alleged offense pending before the Court of Common Pleas.

C. THE RECORD FAILS TO DEMONSTRATE THAT THE MUNICIPAL COURT COMPLIED WITH THE REQUIREMENTS OF CRIM.R. 11.

1. THE MUNICIPAL COURT FAILED TO COMPLY WITH THE APPLICABLE REQUIREMENTS OF CRIM.R. 11(D)

In one plea proceeding, Mr. Armbruster entered pleas of no contest to two counts of domestic violence. The maximum term of imprisonment for each was six months. The maximum terms could have been imposed consecutively, for a total term of imprisonment of 12 months. This, therefore is a “serious offense” and the requirements of Crim.R. 11(D) apply.¹⁵

Crim.R. 11(D) states:

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right

¹⁴ See *State v. Thompson* (Oct. 29, 2001), Stark County App. No. 2000CA00283 (unreported, see Appendix F)

¹⁵ Crim.R. 2; *State v. Moore* (1996), 111 Ohio App.3d 833, 835.

to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.¹⁶

It appears undisputable that the Judge failed to address Mr. Armbruster personally in a manner that would satisfy Crim.R. 11(D). Furthermore, “a no contest plea may not be the basis for a finding of guilty without an explanation of the circumstances.”¹⁷ The record clearly establishes that the Municipal Court plea failed to comport to the requirements of Crim.R. 11(D).

2. *THE MUNICIPAL COURT FAILED TO COMPLY WITH THE APPLICABLE REQUIREMENTS OF CRIM.R. 11(E)*

At a minimum, the Municipal Court was required to comply with Crim.R. 11(E).

Ohio Crim.R. 11(E) states the following regarding petty offenses:

“In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.”¹⁸

Where a defendant charged with a petty misdemeanor offense pleads guilty or no contest, the trial court complies with Crim.R. 11(E) by informing the defendant of the information contained in Crim.R. 11(E).¹⁹ In all cases, the judge must inform the defendant of the effect of his plea.²⁰ This differed from *State v. Watkins* in the following respects:

¹⁶ Crim.R. 11(D)

¹⁷ *State v. Myers* (June 10, 2003), Marion App. Nos. 9-02-65 and 9-02-66, 2003-Ohio-2936, ¶16 (unreported, see Appendix E), quoting *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148, 150; *State v. Hensley* (April 19, 2002), Montgomery County App. No. 18886, 2002-Ohio-1887 (unreported, see Appendix D)

¹⁸ Crim.R. 11(E)

¹⁹ *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419

²⁰ *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶ 26

- A) In *Watkins*, the judge personally advised the Defendant that a plea of “no contest means you're not admitting you are guilty, but you are also not contesting the facts in the Complaint and Affidavit.”²¹ In the instant case, the Judge never personally informed Mr. Armbruster of the effect of the plea of guilty, no contest, and not guilty.
- B) In *Watkins*, prior to accepting the plea, the judge advised the Defendant: “Based on those facts, the Court could and probably would find you guilty.”²² In the instant case, the Judge never advised Mr. Armbruster that he could and probably would find him guilty. Instead he stated, “in exchange for a plea of no contest on this other charge domestic violence there'd be a recommended penalty on a finding of guilty * * *.” (State's Exhibit 3 and 3A) He merely described the penalty which was contingent upon a finding of guilt.
- C) In *Watkins*, the Defendant was represented by counsel.²³ Here, Mr. Armbruster was not represented by counsel.
- D) In *Watkins*, the judge asked defense counsel whether he wanted the prosecutor to read into the record the facts underlying the charge. Defense counsel stated on the record, “That is not necessary, your Honor. We would agree that sufficient facts would exist upon which the Court can make a finding of guilty.”²⁴ In the instant case, Mr. Armbruster's pleas were accepted by the Municipal Court in the same “perfunctory manner” that was deemed reversible error in *State v. Myers*.²⁵

²¹ *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶3

²² *Id.*,

²³ *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶¶ 2, 4

²⁴ *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶ 4

²⁵ *State v. Myers* (June 10, 2003), Marion App. Nos. 9-02-65 and 9-02-66, 2003-Ohio-2936, ¶16 (unreported, see Appendix E).

The record establishes a constitutional infirmity sufficient to be a deprivation of due process. It precludes the use of the prior no contest pleas to enhance the offense alleged in the instant case.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT PURPORTED EVIDENCE OF MR. ARMBRUSTER'S PRIOR MUNICIPAL COURT PROCEEDINGS WHERE COUNSEL WAS APPOINTED FOR HIM.

The determination of the admission or exclusion of evidence is within the discretion of the trial court and will not be reversed without an abuse of discretion.²⁶ “[T]he term abuse of discretion connotes more than error of law or judgment: it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.”²⁷ The waiver of the Defendant’s Constitutional rights must affirmatively appear on the record.²⁸ Therefore, the trial court was well within its discretion to find that the events were not of consequence to the determination of Mr. Armbruster’s Motion. Even if the evidence was of some consequence to the Motion, the deficiencies in the Municipal Court plea were of such magnitude and clarity, that any error was harmless.

CONCLUSION

The trial court’s ruling on the exclusion of evidence was correct for two essential

²⁶ *State v. Finnerty* (1989), 45 Ohio St.3d 104, 109, *State v. Combs* (1991), 62 Ohio St.3d 278; *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271; *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of syllabus.

²⁷ *Nielson v. Meeker* (1996), 112 Ohio App.3d 448, 450.

²⁸ *State v. Wellman* (1974), 37 Ohio St.2d 162, *State v. Dyer* (1996), 117 Ohio App.3d 92, 95; See also Crim.R. 44(B).

reasons. It was correct because the record failed to demonstrate that Mr. Armbruster effectively waived his right to counsel. It was correct because the record failed to demonstrate that the Municipal Court complied with Crim.R. 11. The pleas in the Municipal Court were received in an unacceptable perfunctory fashion. The trial court did not abuse its discretion in refusing to admit the evidence of other Municipal Court cases involving Mr. Armbruster. Assuming arguendo that the trial court did commit error in refusing to admit the evidence, it was harmless because the record of the no contest pleas fails to demonstrate a knowing and intelligent waiver of counsel.

For the reasons articulated above and because justice so requires, the judgment of the trial court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon Jim Slagle, Prosecuting Attorney for Marion County, Attorney for Plaintiff-Appellant at his office located at 134 East Center Street, Marion, Ohio 43302 by ordinary U.S. Mail, postage prepaid, this _____ day of June, 2003.

Kevin P. Collins (0029811)
Attorney for Defendant-Appellee

Appendices

- A. Explanation of Rights form, a.k.a., green rights form (State's Exhibit 11, Defendant's Exhibit C)
- B. *State v. Clevenger* (Oct. 11, 2002), Lake County App. No. 2001-L-160, 2002-Ohio-5515
- C. *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199
- D. *State v. Hensley* (April 19, 2002), Montgomery County App. No. 18886, 2002-Ohio-1887
- E. *State v. Myers* (June 10, 2003), Marion App. Nos. 9-02-65 and 9-02-66, 2003-Ohio-2936
- F. *State v. Thompson* (Oct. 29, 2001), Stark County App. No. 2000CA00283

