Approved, Michigan Court of Appeals

LOWER COURT Wayne County Circuit Court	Electronically Filed BRIEF COVER PAGE	CASE NO. Lower Court 10-9263-01 Court of Appeals CA_NO

(Short title of case)
Case Name: **People v. Raymond Henley**

1. Brief Type (select one):
☒ APPELLANT(S) ☐ APPELLEE(S) ☐ REPLY
☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Raymond Henley**

3. ☐ This brief is in response to a brief filed on by .

4. ORAL ARGUMENT: ☐ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☒ Table of Contents [MCR 7.212(C)(2)]
- ☒ Index of Authorities [MCR 7.212(C)(3)]
- ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
- ☒ Statement of Questions [MCR 7.212(C)(5)]
- ☒ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☒ Relief Requested [MCR 7.212(C)(9)]
- ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Valerie R. Newman**

Signing Attorney's Bar No. [if any]: **(P47291)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by plea of nolo contendere and was sentenced on November 24, 2010. Defendant-Appellant requested the appointment of appellate counsel on December 20, 2010. The offenses occurred after the effective date of the November, 1994 ballot Proposal B which eliminated the right to file a claim of appeal from plea-based convictions. This Court has jurisdiction to consider the Defendant-Appellant's application for leave to appeal as it is being filed within 12 months of judgment. MCR 7.203(B); MCR 7.205.

STATEMENT OF QUESTIONS PRESENTED

DID THE TRIAL COURT ERRONEOUSLY IMPOSE A LIFETIME MONITORING PENALTY WITHOUT GIVING NOTICE OF THIS PENALTY DURING THE PLEA OR INCLUDING IT IN ITS STATEMENT OF THE *COBBS* OFFER TO THE DEFENDANT.

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant Raymond Henley pled nolo contendere as a fourth habitual offender to criminal sexual conduct in the first degree (CSC), Mich. Comp. Laws § 750.520b, assault with intent to commit great bodily harm less than murder (GBH), Mich. Comp. Laws § 750.84, felonious assault, Mich. Comp. Laws § 750.82, kidnapping, Mich. Comp. Laws § 750.349 on October 29, 2010 in the Wayne County Circuit Court. None of the charges were reduced or dismissed. The only consideration Mr. Henley received in exchange for his plea to the charges was an offer by the sentencing court to impose a penalty in accordance with a *Cobbs*[1] evaluation, which forecast a minimum sentence of thirteen years, eleven months to twenty-five years imprisonment on the most serious charges. (PT[2] 14-16). On November 24, 2010, the Honorable Gregory D. Bill sentenced Mr. Henley to serve (1) thirteen years, eleven months to twenty-five years imprisonment on the CSC and kidnapping charges; (2) five to ten years imprisonment on the on the GBH charge, and (3) two to four years on the felonious assault charge. At sentencing and in the resulting judgment, the court advised Mr. Henley that he would be placed on lifetime electronic monitoring at the time of his release (ST 13).

The criminal sexual conduct statutes were amended in 2006 with enhanced penalty provisions. 2006 PA 169, eff 8/28/2006. The penalty subsection for the offense of second degree criminal sexual conduct was amended to add mandatory lifetime electronic monitoring in some cases. According to Mich. Comp. Laws § 750.520b(2)(d):

> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> > (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years. . . .

[1] *People v Cobbs*, 443 Mich 276, 565 NW2d 208 (1993).
[2] PT refers to plea transcript; ST refers to sentence transcript; PSI refers to presentence investigation report.

> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

Mr. Henley was never informed that he might be subject to a mandatory minimum penalty of lifetime electronic monitoring. The Felony Information informed him of the maximum prison sentence of life imprisonment and even of the requirement for HIV/STD testing. But it made no mention of electronic monitoring. Similarly, there was no mention of lifetime electronic monitoring either at the preliminary examination, at the the nolo contendere plea proceeding, or anywhere else on the record.

This is Mr. Henley's delayed application for leave to appeal.

THE TRIAL COURT ERRONEOUSLY IMPOSED A LIFETIME MONITORING PENALTY WITHOUT GIVING NOTICE OF THIS PENALTY DURING THE PLEA OR INCLUDING IT IN ITS STATEMENT OF THE *COBBS* OFFER TO THE DEFENDANT.

STANDARD OF REVIEW: This merit of this issue rests upon disputed issues of law which are reviewed *de novo* by this Court. *People v Houstina*, 216 Mich App 70 (1996).

PRESERVATION OF ISSUE: Mr. Henley did not interpose an objection to the lifetime monitoring penalty in the trial court.

The criminal sexual conduct statutes were amended in 2006 with enhanced penalty provisions. 2006 PA 169, eff 8/28/2006. The penalty for first degree criminal sexual conduct remained a life offense, but amongst other things, the legislature added a requirement that the sentence include lifetime electronic monitoring. MCL 750.520b(2)(d); MCL 750.520c(2)(b).

Inasmuch as the Information charged Mr. Henley with first degree CSC, he was subject to this mandatory monitoring provision if it was found to be committed after the effective date of the statute's amendment, which was August 28, 2006. The Information informed him of the maximum prison sentence of 15 years and even of the requirement for HIV/STD testing. But it made no mention of electronic monitoring.

Unlike sexual offender registration statutes, this provision for lifetime electronic monitoring is unquestionably a penal provision. It is a provision of the penalty subsection of this penal statute as something which "shall" be imposed in addition to the maximum prison term stated in the preceding subsection.

Moreover, it places a highly intrusive limit on personal liberty which has been recognized as an inherently penal sanction. For this reason it has been held to constitute a violation of the ex post facto limits if imposed for an offense predating the new law. In the recent case of *Commonwealth v Cory*, 454 Mass 559, 570; 85 Crim L Rptr 631 (2009), the Court had to decide whether a similar monitoring provision in a probation statute was a violation of the *ex post facto*

clause of the constitution. This in turn depended on whether the provision was intended to be punitive or merely a regulatory provision such as the sex offender registration laws. The court concluded that the provision, whatever the intent of the Legislature, its substantial burden on liberty made the sanction punitive in effect -- and thus a violation of the ex post facto clause. *Commonwealth v Cory*, 454 Mass 559, 570; 85 Crim L Rptr 631 (2009).

> As "continuing, intrusive, and humiliating" as a yearly registration requirement might be, a requirement permanently to attach a GPS device seems dramatically more intrusive and burdensome. There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment. Such an imposition is a serious, affirmative restraint. [footnotes omitted].

A. THE TRIAL COURT FAILED TO GIVE MR. HENLEY THE REQUIRED NOTICE OF THE ADDITIONAL MANDATORY PENALTY OF LIFETIME MONITORING WHEN HE ENTERED HIS PLEA.

By court rule and caselaw, the court must give advice concerning any mandatory minimum sentence before accepting a guilty or no contest plea. MCR 6.302(B)(2) ("Speaking directly to the defendant . . . the court must advise . . . of the following and determine that each defendant understands . . . the maximum possible prison sentence and any mandatory minimum sentence required by law."); *Guilty Plea Cases*, 395 Mich 96, 118 (1975) (court must advise of mandatory minimum sentence); *People v Jones*, 410 Mich 407 (1981) (same).[3]

The failure to give advice as to the existence of a mandatory minimum sentence is considered reversible error unless there was a sentence bargain which renders the failure to give

[3] Written advice is considered insufficient, *People v Fliam*, 422 Mich 929, 369 NW2d 201 (1985). A written waiver of some rights is permitted by MCR 6.302(5), but this is explicitly limited to *trial rights* and requires the court to satisfy itself on the record that the defendant has read and understood the trial rights.

this advice moot. *People v Jackson,* 417 Mich 243 (1983). *See also People v Jones, supra* (failure to advise of mandatory minimum sentence is reversible error). While there was a *Cobbs* agreement in this case, that agreement had no impact in rendering moot the electronic monitoring provision on which the court failed to advise Mr. Henley. The proper remedy in that case would be to correctly inform Mr. Henley of the plea advice it had omitted and given him the option whether or not to withdraw his plea. MCR 6.310(C).

Here, the provision can be read as part of the maximum penalty for this offense. The maximum penalty was not merely 25 years in prison, but 25 years in prison to be followed by lifetime monitoring. The court rule sets forth the requirements of fair notice in language written before an additional penal restriction on liberty is created. Nevertheless, the trial court here created a very significant maximum penalty with restrictions on liberty in addition to the maximum prison sentence. The failure to impart this fundamental information regarding the potential sentence in this case rendered the plea unknowing.

B. ALTERNATIVELY, THE TRIAL COURT FAILED TO OFFER MR. HENLEY THE OPTION OF WITHDRAWING HIS PLEA DESPITE EXCEEDING THE COBBS AGREEMENT BY IMPOSING THE ADDITIONAL PENALTY OF LIFETIME ELECTRONIC MONITORING.

Defendant asserts that his plea was involuntarily as it was induced in part by a promise of leniency which was not acknowledged or complied with at sentencing in violation of *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982) and *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993). To be valid, a defendant's guilty plea must be intelligent and voluntary. *Boykin v Alabama,* 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969); MCR 6.302(A),(C).

Mr. Henley was not informed that he might be subject to a mandatory minimum penalty of lifetime electronic monitoring at the time of his plea. Indeed, there was no such advice in any

of the notices of the offenses with which he was charged and their potential penalties. The Information informed him of the maximum prison sentence of 25 years and even of the requirement for HIV/STD testing. But it made no mention of electronic monitoring. Similarly there was no mention of electronic monitoring at the preliminary examination or during any other on-the-record proceeding in this matter.

Most significantly, at the nolo contendere plea proceeding there was never a mention of the lifetime monitoring penalty. Because Mr. Henley was convicted of an offense taking place after August 28, 2006, the Court erred in failing to inform Mr. Henley of the additional lifetime monitoring mandatory minimum penalty for this offense, rendering his plea unknowing and unintelligent.

CONCLUSION

The failure of the trial court to inform Mr. Henleyof the additional mandatory penalty of lifetime monitoring required the court to offer him the alternative of withdrawing his plea prior to imposing this provision. The fact that this plea was entered pursuant to a *Cobbs* agreement does not change this result as it did not render the lack of notice moot.

Alternatively, the *Cobbs* agreement to a maximum of twenty-five years was exceeded by the additional restriction on his liberty of lifetime electronic monitoring.

As a result, Mr. Henley is entitled to withdraw his guilty plea and/or to a resentencing.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court vacatehis conviction, allow him to withdraw his guilty plea, and/or remand for a resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Valerie R. Newman

BY:_____

VALERIE R. NEWMAN (P47291)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: October 27, 2011