

## COA Opinion: Failure to advise of sex-offender registration is ineffective assistance of counsel

26. January 2011 By Nicole Mazzocco

On January 25, 2011, the Michigan Court of Appeals published its opinion in *People v. Fonville*, No. 294554. The court held that the defendant had received ineffective assistance of counsel where the defendant's attorney failed to advise him that his guilty plea would require him to register as a sex offender.

The defendant agreed to watch his girlfriend's children until 11 p.m. on April 20, 2006, while she was working. But the defendant did not return the children to their mother as planned. Instead, from 11 p.m. until the following afternoon, while high on drugs, the defendant drove the children around Oakland County looking for drugs. The defendant returned the children to their mother on the afternoon of April 21, 2006, unharmed.

The defendant was charged with two counts of child enticement and two counts of kidnapping. The defendant agreed to plead guilty to one count of child enticement. At the plea hearing, the defendant stated the facts described above, and also agreed that he "fraudulently detained" the children. The trial court accepted the defendant's plea. Later, at the sentencing hearing, the defendant moved to withdraw his plea because he did not understand that the plea required him to register as a sex offender. The trial court adjourned the hearing in order to review the transcript of the plea hearing. In the interim, the defendant's attorney moved to withdraw as counsel, and new counsel was appointed. The defendant's new counsel again moved to withdraw the plea. The trial court denied the motion to withdraw the plea and sentenced the defendant. Following sentencing, the defendant again moved to withdraw his plea. And again the trial denied the motion. The defendant then moved for relief from judgment. The trial court denied this motion and the defendant's later motion for reconsideration. The defendant appealed by leave granted.

The Court of Appeals first addressed the defendant's assertion that he should be allowed to withdraw his plea because there was an insufficient factual basis to support it. The court held that the statement of facts above was sufficient to support the charge of child enticement.

Next, the defendant argued that the requirement that he register as a sex offender is cruel and unusual punishment under Michigan's Constitution because the crime of child enticement does not include a sexual component. The court rejected this argument, stating that sex-offender registration is not a "punishment" under the Constitution and registration in this case is consistent with the legislature's goal to protect children.

The court then turned to the defendant's ineffective-assistance-of-counsel claim. The court rejected the defendant's argument that his counsel's failure to quash certain information resulted in ineffective assistance because it had been waived, among other reasons. But the court agreed that the defendant's counsel's failure to inform the defendant that his plea would require him to

register as a sex offender was ineffective assistance. The court relied upon the reasoning of the United States Supreme Court in *Padilla v. Kentucky*, which held that neglecting to tell a defendant that his plea would likely result in deportation was ineffective assistance. The court stated that, although sex-offender registration is not a criminal sanction, it is a sufficiently severe penalty that counsel must advise a defendant that registration is a consequence of the proposed plea.

Judge Jansen concurred in part and dissented in part. He concurred with the majority's ineffective-assistance ruling. But he wrote separately to note that, in his view, there was an insufficient factual basis to support the defendant's guilty plea. Judge Jansen did not believe that there was sufficient evidence regarding the defendant's intent to detain or to conceal the children.