

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS L. VENEY,

Defendant-Appellee

Case No.

07 - 0656

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-523

**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

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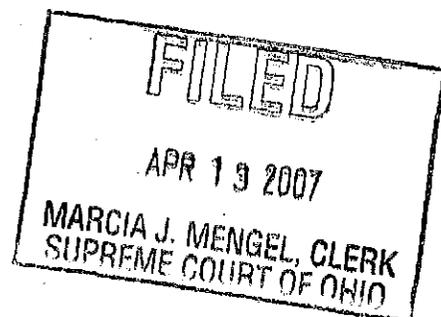
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**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Plaintiff-appellant, the State of Ohio, hereby gives notice that, on March 22, 2007, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict in *State v. Veney*, 10th Dist. No. 06AP-523, on the following question of law pursuant to its authority under Section 3(B)(4), Article IV, of the Ohio Constitution:

Whether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.

Attached are the Tenth District journal entry certifying the conflict (attached, A-1), the Tenth District opinion (attached, A-2), and the conflicting appellate opinions in *State v. Shinkle* (1998), 4th Dist. No. 98CA2560 (attached, A-11), *State v. Scott* (8th Dist. 1996), 113 Ohio App.3d 401, 406-407 (attached, A-15), and *State v. Cogar* (1993), 9th Dist. No. CA-16234 (attached, A-22).

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



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Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 13th day of April, 2007, to the office of John W. Keeling, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.

Pursuant to S.Ct.Prac.R. XIV(2)(A), a copy was also sent by regular U.S. mail on this 13th day of April, 2007, to the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



STEVEN L. TAYLOR
Assistant Prosecuting Attorney

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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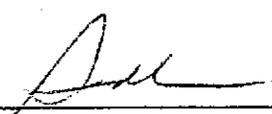
State of Ohio, :
 Plaintiff-Appellee, :
 v. : No. 06AP-523
 : (C.P.C. No. 04CR07-4791)
 Thomas L. Veney, : (REGULAR CALENDAR)
 Defendant-Appellant. :

JOURNAL ENTRY

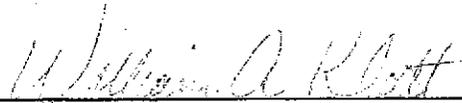
This court, sua sponte, certifies the judgment in this case rendered on March 22, 2007, as being in conflict with the judgments in *State v. Scott* (1996), 113 Ohio App.3d 401, 406-407, *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234, and *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560. Pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Whether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.

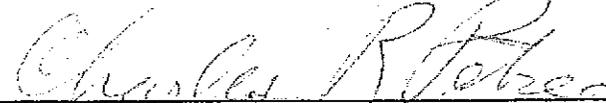
It is so ordered.



 Judge Lisa L. Sadler, Presiding Judge



 Judge William A. Klatt



 Judge Charles R. Petree
 STEVEN L. TAYLOR
 FR CO PROSECUTORS OFC
 373 S HIGH STREET
 13TH FLOOR
 COLUMBUS, OH 43215

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 06AP-523
 : (C.P.C. No. 04CR07-4791)
 :
 Thomas L. Veney, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. STEVEN L. TAYLOR
 FR CO PROSECUTORS OFC
 373 S HIGH STREET
 13TH FLOOR
 COLUMBUS, OH 43215

O P I N I O N

Rendered on March 22, 2007

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Defendant-appellant, Thomas L. Veney, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. Because the trial court did not comply with Crim.R. 11(C) when it accepted appellant's guilty plea, we vacate that judgment and remand the matter for further proceedings.

{¶2} On July 16, 2004, a Franklin County Grand Jury indicted appellant for one count of felonious assault in violation of R.C. 2903.11 and one count of kidnapping in violation of R.C. 2905.01. Both counts contained firearm specifications pursuant to R.C.

2941.141 and R.C. 2941.145. The charges arose out of a domestic altercation between appellant and his wife. Appellant initially entered a not guilty plea to the charges but subsequently entered a guilty plea to the lesser included offense of attempted felonious assault in violation of R.C. 2923.02 as it relates to R.C. 2903.11, and one firearm specification.¹ The trial court accepted appellant's guilty plea, found him guilty, and sentenced him accordingly.

{¶3} Appellant appeals and assigns the following error:

THE TRIAL COURT ERRED WHEN IT FAILED TO COMPLY WITH CRIM.R. 11 BY INFORMING THE DEFENDANT THAT THE STATE WAS REQUIRED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT AND BY FAILING TO PROPERLY ASCERTAIN THAT THE DEFENDANT UNDERSTOOD THE NATURE OF THE CHARGE AGAINST HIM.

{¶4} In his lone assignment of error, appellant contends that the trial court did not comply with Crim.R. 11(C) when it failed to inform him that by entering a guilty plea, he waived his constitutional right to have his guilt determined under a "beyond a reasonable doubt standard" at trial. We agree.

{¶5} Crim.R. 11(C) governs the procedure that a trial court must follow before accepting a guilty plea. Crim.R. 11(C)(2) provides:

In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

¹ The trial court dismissed the remaining charges and specifications.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶6} A trial court need only substantially comply with the non-constitutional requirements contained in Crim.R. 11(C)(2)(a) and (b). *State v. Thomas*, Franklin App. No. 04AP-866, 2005-Ohio-2389, at ¶10. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.*, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶7} Although substantial compliance is sufficient for the non-constitutional requirements set forth in Crim.R. 11(C)(2)(a) and (b), a trial court must strictly comply with the critical constitutional requirements referenced in Crim.R. 11(C)(2)(c). *State v. Carter*, Franklin App. No. 02AP-294, 2002-Ohio-6967, at ¶11, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus. Although strict compliance is required, a trial court is not required to use the exact language contained in Crim.R. 11(C)(2)(c). The trial court must explain the constitutional rights that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant. *Ballard*, paragraph two of the syllabus; *State v. Anderson* (1995), 108 Ohio App.3d 5, 11; *Carter*. What constitutes the

critical constitutional requirements in Crim.R. 11(C)(2)(c) lies at the heart of the issue presented in the case at bar.

{¶8} It is undisputed that the trial court failed to inform appellant that by entering a guilty plea he waived his constitutional right to have his guilt determined under a "beyond a reasonable doubt" standard, a right listed in Crim.R. 11(C)(2)(c). The state contends, however, that the trial court must only substantially comply with the requirement that it inform appellant of this constitutional right, and that it did so when appellant signed a guilty plea form indicating that he waived this right. We disagree.

{¶9} In *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, the United States Supreme Court held that before accepting a guilty plea, a trial court must inform a criminal defendant of the constitutional rights he waives by entering a guilty plea. *Id.* at 243. The rights identified in *Boykin* were: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. *Id.* These three constitutional rights are among those listed in Crim.R. 11 (C)(2)(c). Therefore, a trial court must strictly comply with the requirement that it inform a defendant of these constitutional rights prior to accepting a guilty plea. *Ballard*.

{¶10} The right to have the state prove guilt beyond a reasonable doubt is a constitutionally-protected right of a criminal defendant. See *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068; *State v. Higgs* (1997), 123 Ohio App.3d 400, 406; *Beachwood v. Barnes* (Oct. 25, 2001), Cuyahoga App. No. 78841 (O'Donnell, J., concurring). At the time *Boykin* was decided, there was apparently some question regarding whether the reasonable doubt standard was a constitutional right. See *Winship*; see, also, *State v. Scott* (1996), 113 Ohio App.3d 401, 406 (stating that

reasonable doubt standard was a statutory right). The Court in *Winship*, however, made it clear that the standard was constitutionally based. *Id.* at 364. ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt * * *"). The Court decided *Winship* one year after it decided *Boykin*. If *Winship* had been decided before *Boykin*, it is possible that the constitutional right to have guilt proven beyond a reasonable doubt may have been included in the *Boykin* rights. See *Barfell v. State* (Ind.App.1979), 399 N.E.2d 377, fn. 11. In fact, the author of the *Boykin* opinion later wrote that the right to have guilt proved beyond a reasonable doubt is also involved when a defendant enters a guilty plea. *Johnson v. Ohio* (1974), 419 U.S. 924, 926, 95 S.Ct. 200 (Douglas, J., dissenting) (the three constitutional rights identified in *Boykin* were illustrative and not exhaustive). See, also, *State v. Mallon* (Dec. 17, 1999), Trumbull App. No. 98-T-0032 (noting that the list of constitutional rights in *Boykin* were illustrative, not exhaustive).

{¶11} In *Ballard*, the Supreme Court of Ohio added a fourth constitutional right that must be strictly explained to a defendant entering a guilty plea: the right to compulsory process. *Id.* at paragraph one of the syllabus. This constitutional right is the fourth of the five constitutional rights listed in Crim.R. 11(C)(2)(c). The *Ballard* court noted that the constitutional right to compulsory process was not named in *Boykin* as a right that a trial court must explain to a defendant. The court, however, reasoned that because the right to compulsory process was a trial right guaranteed by the United States Constitution, just like the trial rights named in *Boykin*, a trial court must also inform a defendant of that constitutional right prior to accepting a guilty plea, notwithstanding the fact that it was not

identified in *Boykin*. *Id.* at fn. 4. It is well-established that a state court may provide more constitutional safeguards than federal courts. *Higgs*, at 406, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, paragraph one of the syllabus.

{¶12} On the same day the Supreme Court of Ohio decided *Ballard*, it also decided *State v. Sturm* (1981), 66 Ohio St.2d 483. *Sturm* also involved a trial court's obligation pursuant to Crim.R. 11 to advise a criminal defendant of constitutional rights waived by a guilty plea. In that case, the court held that the trial court failed to inform Sturm of his constitutional right to confront his accusers, a right expressly identified in *Boykin*. Therefore, the court vacated Sturm's plea and remanded the case.

{¶13} In a footnote, however, the court noted that Sturm also argued that his plea should be vacated because the trial court failed to inform him of his right to have his guilt determined under a beyond a reasonable doubt standard. *Id.* at fn. 2. Although not the basis of the court's decision, the court stated that "[w]hile a trial court is required by Crim.R. 11(C) to inform a defendant of this right, it is not required by [*Boykin*]." *Id.* Thus, the court reasoned, because *Boykin* did not mention the constitutional right to have guilt proven beyond a reasonable doubt, a trial court would only have to substantially comply with that requirement. *Id.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86 (requiring only substantial compliance with non-constitutional requirements of Crim.R. 11).

{¶14} The reasoning expressed in footnote two of *Sturm*, while only dicta, is inconsistent with the rationale underlying the *Boykin* and *Ballard* decisions. Crim.R. 11(C)(2)(c) identifies five constitutional rights of which a trial court must inform a defendant before accepting a guilty plea. *Ballard* expressly requires a trial court to strictly explain four of these constitutional rights to a defendant before accepting a guilty plea,

notwithstanding the fact that *Boykin* did not expressly identify all four of these constitutional rights. We see no rational basis for treating a defendant's constitutional right to have his or her guilt determined under a beyond a reasonable doubt standard any differently.

{¶15} Accordingly, we hold that a trial court must strictly comply with the constitutional requirements in Crim.R. 11(C)(2)(c) and explain all of the constitutional rights listed in the rule that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant, including the right to have the state prove guilt beyond a reasonable doubt. *Higgs*.² Other courts have reached the same conclusion. See *State v. Green*, Mahoning App. No. 02CA-217, 2004-Ohio-6371, at ¶11; *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082, at ¶27; *Mallon*, supra; *State v. Givens* (Sept. 16, 1982), Montgomery App. No. 7774.³

{¶16} In this case, the trial court failed to inform appellant of his right to have his guilt determined under a beyond a reasonable doubt standard. Thus, the trial court did not strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c) when it accepted appellant's guilty plea.⁴ Appellant's lone assignment of error is sustained, and

² For the reasons previously stated, we disagree with this court's analysis in *State v. Ellis* (June 20, 1996), Franklin App. No. 95APA10-1399. In that case, this court considered whether the trial court informed a defendant of the right to have guilt proven beyond a reasonable doubt. This court, citing *Sturm*, simply questioned whether the right was identified in *Boykin*, and because it was not, required a trial court to substantially comply with the rule. Identification of a right in *Boykin* is not sufficient, per *Ballard*, to determine a trial court's obligations pursuant to Crim.R. 11(C)(2)(c). See, also, *State v. Hines* (May 23, 1995), Franklin App. No. 94APA10-1428 (requiring substantial compliance).

³ Other courts only require substantial compliance with the requirement that a defendant be advised of the right to have the state prove guilt beyond a reasonable doubt. See *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234; *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560; *Scott*, supra, at 406-407.

⁴ Because of this determination, appellant's claim that he did not understand the nature of the charges when he entered his guilty plea is moot. App.R. 12.

the judgment of the Franklin County Court of Common Pleas is vacated. The matter is remanded to the trial court for further proceedings.

Judgment vacated and cause remanded.

PETREE, J., concurs.
SADLER, P.J., dissents.

SADLER, P.J., dissenting.

{¶17} I do not minimize the importance of informing a defendant of the state's burden of proving guilt beyond a reasonable doubt. Clearly, if appellant had not been informed of that burden at all during his sentencing, vacation of his guilty plea would be required, but that is not the case here. I disagree with the majority's conclusion that the trial court was required to strictly comply with Crim.R. 11 regarding the state's burden, and would instead apply the test of substantial compliance to this case.

{¶18} Neither the United States Supreme Court after its decision in *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; nor the Ohio Supreme Court after its decision in *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, has taken the opportunity to expand the list of critical constitutional rights requiring strict adherence to Crim.R. 11(C) to include the right to require the state to prove guilt beyond a reasonable doubt. In fact, the Ohio Supreme Court, albeit speaking by way of a footnote, has stated that a court's communication of the right to have the state prove guilt beyond a reasonable doubt is not subject to strict compliance with Crim.R. 11 under *Boykin*. *State v. Sturm* (1981), 66 Ohio St.2d 483, 422 N.E.2d 853, at fn. 2.

{¶19} Moreover, we have held in two cases that a trial court's failure to strictly comply with Crim.R. 11 by informing a defendant of the right to have guilt proven beyond a reasonable doubt does not establish that the defendant's guilty plea was not entered

knowingly, intelligently, and voluntarily, thus applying a substantial compliance test to a trial court's compliance with this requirement. *State v. Ellis* (June 20, 1996), Franklin App. No. 95AP10-1399, LEXIS 2522; *State v. Hines* (May 23, 1995), Franklin App. No. 94APA10-1428, LEXIS 2175.

{¶20} For those portions of Crim.R. 11 to which the substantial compliance test applies, the proper method for analyzing the issue is whether, under the totality of the circumstances, the defendant properly understood the charges and the rights he was waiving, and whether the defendant suffered any prejudice from the trial court's omission specifically informing appellant of the right to have guilt proven beyond a reasonable doubt. In this case, the plea form appellant signed did identify the right to have guilt proven beyond a reasonable doubt as one of the rights appellant was waiving by signing the form. The record shows that the trial court asked appellant if he had read the form and discussed it with his attorney, and that appellant indicated he understood the rights he was waiving. I believe this was sufficient to establish that appellant's plea was made knowingly, intelligently, and voluntarily.

{¶21} Since I cannot join the majority's conclusion that appellant's plea was rendered involuntary by the procedure followed by the trial court in his sentencing, I respectfully dissent.

State of Ohio, Plaintiff-Appellee, vs. William Shinkle, Defendant-Appellant.
COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, SCIOTO COUNTY
1998 Ohio App. LEXIS 3872
Case Nos. 98CA2560 & 98CA2561
August 18, 1998, Filed

Disposition

JUDGMENTS AFFIRMED.

Counsel

Thomas M. Spetnagel, Chillicothe, Ohio, for Appellant.

Lynn Alan Grimshaw, Scioto County Prosecuting Attorney and R.

Randolph Rumble, Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

Judges: William H. Harsha, Judge. Abele, J. and Kline, J.: Concur in Judgment and Opinion.

Opinion

Opinion by: William H. Harsha

DECISION AND JUDGMENT ENTRY

Harsha, J.:

William Shinkle appeals his conviction for Felonious Sexual Penetration, in violation of R.C. 2907.12(A)(2) . He filed both a delayed appeal and an appeal of the denial of a motion to withdraw his plea of no contest. *We sua sponte* consolidate these two appeals for decision. He assigns the following errors:

[I.] "THE TRIAL COURT ERRED IN ACCEPTING DEFENDANT-APPELLANT'S NO CONTEST PLEA IN VIOLATION OF OHIO CRIMINAL RULE 11(C)(2)(c) ."

[II.] "THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT DEFENDANT-APPELLANT TO WITHDRAW HIS NO CONTEST PLEA."

In exchange for the state dropping charges of Aggravated Burglary (R.C. 2911.11(A)(3)) and Rape (R.C. 2907.02(A)(2)), the appellant withdrew his plea of not guilty and entered a plea of no contest to Felonious Sexual Penetration. The trial court found appellant guilty and sentenced him to eight to twenty-five years imprisonment and a \$ 5,000 fine. It is undisputed that before appellant pled no contest, the trial court failed to inform him that by pleading no contest, he would be waiving his right to have the state prove his guilt beyond a reasonable doubt. Over two years after he was found guilty, appellant filed a Crim.R. 32.1 motion to withdraw his plea of no contest. The trial court overruled appellant's motion.

In his first assignment of error, appellant argues that the trial court erred in accepting his plea of no contest. He implicitly argues that his plea was not knowingly and voluntarily made because he was not informed of his right to have the state prove his guilt beyond a reasonable doubt.

A trial court's acceptance of a plea must be affirmed if the trial court substantially complied with the requirements of Crim.R. 11 . *State v. Stewart* (1977), 51 Ohio St. 2d 86, 364 N.E.2d 1163. Substantial compliance means "under the totality of the circumstances the defendant objectively understands the implications of his plea and the rights he is waiving." *State v. Carter* (1979), 60 Ohio St. 2d 34, 38, 396 N.E.2d 757, certiorari denied (1980), 445 U.S. 953, 63 L. Ed. 2d 789, 100 S. Ct. 1605; *State v. Nero* (1990), 56 Ohio St. 3d 106 at 108, 564 N.E.2d 474, citing *Stewart*. That portion of the rule at issue here is Crim.R. 11(C)(2) , which states:

In felony cases, the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

- (a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.
- (b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.
- (c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

In accepting a guilty plea, a court must inform the defendant of certain constitutional rights. *Boykin v. Alabama* (1969), 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709. These constitutional rights are: the privilege against compulsory self incrimination; the right to a jury trial; and the right to confront accusers. *Id.* at 243. The Ohio Supreme Court has added the defendant's right to compulsory process to this list. *State v. Ballard* (1981), 66 Ohio St. 2d 473, 477, 423 N.E.2d 115.

Although literal compliance with Crim.R. 11(C)(2)(a) is preferred, it is not an absolute requirement. Rather, the trial court's actions will be reviewed for "substantial compliance" with Crim.R. 11(C)(2)(a). *State v. Johnson* (1988), 40 Ohio St. 3d 130, 133, 532 N.E.2d 1295; *Nero; Stewart*. In other words, if it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court's error, there is still substantial compliance. *Nero*, 108-109. Furthermore, an appellant who challenges his plea on the basis that it was not knowingly and voluntarily made must show a prejudicial effect. *Nero*, citing *Stewart* at 93; Crim.R. 52(A). The test is whether the plea would have otherwise been made. *Stewart*, at 93.

The appellant argues that a trial court, in accepting a plea of no contest or guilty must strictly comply with Crim.R. 11. This is incorrect. While the Ohio Supreme Court at one time did require scrupulous adherence to Crim.R. 11, see *State v. Caudill* (1976), 48 Ohio St. 2d 342, 358 N.E.2d 601, this standard is no longer used. Rather, the trial court's actions are reviewed for "substantial compliance" with Crim.R. 11(C)(2)(a). *Johnson; Nero*. Appellant argues that in relationship to constitutional rights, strict compliance with Crim.R. 11 is necessary for the plea to be given knowingly. See *State v. Colbert* (1991), 71 Ohio App. 3d 734, 595 N.E.2d 401; *State v. Gibson* (1986), 34 Ohio App. 3d 146, 517 N.E.2d 990. The Ohio Supreme Court has recognized that while Crim.R. 11 requires the trial court to inform the defendant of his right to have the state prove his guilt beyond a reasonable doubt, neither *Boykin* nor *Ballard* require that statement. See *State v. Sturm* (1981), 66 Ohio St. 2d 483, 484, fn 2, 422 N.E.2d 853. Therefore, the failure to inform the defendant of this right "would be tested by [the Ohio Supreme Court's] cases interpreting Crim.R. 11(C). See e.g., *State v. Stewart* * * * [citations omitted.] *State v. Scott* (1996), 113 Ohio App. 3d 401, 406, 680 N.E.2d 1297 (trial court substantially complied with Crim.R. 11 even though defendant was not informed that he was waiving his right to have the state prove his guilt beyond a reasonable doubt); *State v. Binion* (Apr. 18, 1996), Cuyahoga App. No. 69336, unreported (failure to inform defendant of his right to have the State prove his guilt beyond a reasonable doubt not prejudicial); *State v. McGhee*, 1994 Ohio App. LEXIS 1709 (Apr. 21, 1994), Cuyahoga App. No. 65214, 65215, 65216, unreported (court substantially complied with Crim.R. 11 requirements regarding defendant's right to have the State prove his guilt beyond a reasonable doubt); *State v. Agresti* (May 27, 1993), Cuyahoga App. No. 64174, unreported (court not required by *Boykin* or *Sturm* to inform defendant of right to have State prove his guilt beyond a reasonable doubt; there was no constitutional error and since there was substantial compliance, any error was harmless). See, also, *State v. Hines*, 1995 Ohio App. LEXIS 2175 (May 23, 1995), Franklin App. No. 94APA10-1428, unreported; *State v. McDowell* (Sept. 30, 1993), Erie App. No. E-92-78, unreported. But, see, *State v. Higgs*, 1997 Ohio App. LEXIS 4442 (Sept. 30, 1997), Trumbull App. No.

96-T-5450, unreported (due to constitutional nature of the beyond a reasonable doubt burden of proof, a trial court must strictly comply with Crim.R. 11(C) when advising the defendant of this right.)

The record reveals that the trial court explained the charge and possible penalties to appellant, informed him of his right to jury trial, his right to counsel, his right to face his accusers, his right not to testify, his right to compulsory process, and ensured that no one had threatened appellant nor had induced him to plea. The trial court maintained a dialogue with appellant, who was represented by counsel, to ensure that he comprehended all that was happening.

Thus, we find that the trial court substantially complied with the requirements of Crim.R. 11 as a whole and that under the totality of the circumstances, appellant subjectively understood the implications of his plea and his waiver of rights. Moreover, the record is devoid of any indication that the defendant would have pled differently if he had been informed of the burden of proof; therefore, the trial court's failure to inform the appellant of the state's burden of proof was not prejudicial to the appellant. We overrule appellant's first assignment of error.

Appellant argues in his second assignment of error that the lower court erred in not granting his motion to withdraw his plea of no contest. Pursuant to Crim.R. 32.1, a trial court may grant a post-sentence motion to withdraw a guilty plea only to correct manifest injustice. The standard permits a defendant to withdraw his guilty plea "only in extraordinary cases." *State v. Smith* (1977), 49 Ohio St. 2d 261, 264, 361 N.E.2d 1324. Permitting a defendant to withdraw his guilty plea only upon a showing of manifest injustice helps to reduce "the possibility of a defendant pleading guilty to test the weight of potential punishment." *Id.* Thus, a trial court may not grant a post-sentence motion to withdraw a guilty plea unless the defendant establishes that manifest injustice will result if his plea is allowed to stand. *State v. Xie* (1992), 62 Ohio St. 3d 521, 525, 584 N.E.2d 715; *Smith*, paragraph one of the syllabus. The defendant who seeks to withdraw his sentence has the burden of proof to show "manifest injustice." *Smith*; *State v. Nathan* (1995), 99 Ohio App. 3d 722, 725, 651 N.E.2d 1044. The decision to grant or deny a post-sentence motion to withdraw a guilty plea is committed to the sound discretion of the trial court. *Smith*, paragraph two of the syllabus. An appellate court, therefore, will not reverse the trial court's decision absent an abuse of discretion. *Xie, supra*. An abuse of discretion implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *State v. Clark* (1994), 71 Ohio St. 3d 466, 470, 644 N.E.2d 331.

Appellant argues that the trial court's failure to inform the defendant of his right to have the state prove his guilt beyond a reasonable doubt was "manifest injustice." Appellant argues that if a defendant is not informed about a constitutional right then the plea is constitutionally infirm and is therefore manifestly unjust.

There are two classes of information that the trial court must impart to the defendant at a plea hearing. Those disclosures required by *Boykin* and *Ballard*, as well as Crim.R. 11 ("Ballard Rights") and those required solely by Crim.R. 11. The Supreme Court has explicitly put the defendant's right to require the state to prove his guilt beyond a reasonable doubt in the latter category. *Stewart, supra*. In cases where a trial court has failed to inform a defendant of a Ballard Right before a plea, the pleas themselves are constitutionally infirm and as such, there is "manifest injustice." See e.g., *State v. Thomas* (1990), 67 Ohio App. 3d 127, 586 N.E.2d 198. But in cases where information other than Ballard Rights was not explained to the defendant, the defendant must prove that the failure to explain the information was manifest injustice. See e.g., *State v. Colbert* (1991), 71 Ohio App. 3d 734, 595 N.E.2d 401; *State v. Rebman*, 1997 Ohio App. LEXIS 2513 (June 11, 1997), Lorain App. No. 96CA6520, unreported (no "manifest injustice" because trial court substantially complied with Crim.R. 11); *State v. Reimsnyder* (Dec. 20, 1995), Ashland App. No. 1110, unreported (no "manifest injustice" because trial court substantially complied with Crim.R. 11 although it failed to inform defendant of non-Ballard Right); *State v. Moton*, 1993 Ohio App. LEXIS 5545 (Nov. 18, 1993), Cuyahoga App. No. 61918, 61919, 61920, unreported (appellant failed to prove plea was defective, therefore no manifest injustice); *State v. Hart* (Sept. 16, 1988), Lucas App. No. L-87-371, unreported (noncompliance with

Crim.R. 11 is not *per se* manifest injustice).

Appellant's only explanation of how the trial court's failure to allow appellant to withdraw his plea was "manifest injustice" is that the trial court did not adhere to the requirements of Crim.R. 11(C)(2). This does not meet his burden of proof to demonstrate "manifest injustice." The appellant failed to meet his burden of proof. We overrule his second assignment of error as the trial court did not abuse its discretion in denying his motion to withdraw his plea.

In sum, we have overruled both of appellant's assignments of error and affirm the judgments of the trial court.

JUDGMENTS AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENTS BE AFFIRMED and Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and Kline, J.:

Concur in Judgment and

Opinion.

For the Court

BY: William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Footnotes

Footnotes

1 We note that Fed.R.Crim.P. 11 does not require that the defendant be informed of the burden of proof on the state. Rather, the drafters "assumed that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived." Advisory Committee Note to the 1974 amendment.

STATE OF OHIO, Plaintiff-Appellee -vs- GEORGE E. SCOTT, Defendant-Appellant
COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY
113 Ohio App. 3d 401; 680 N.E.2d 1297; 1996 Ohio App. LEXIS 3254
NO. 68907

August 1, 1996, DATE OF ANNOUNCEMENT OF DECISION

Editorial Information: Prior History

CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case No. CR-268115.

Disposition

JUDGMENT: Affirmed

Counsel

APPEARANCES:

For Plaintiff-Appellee: STEPHANIE TUBBS JONES, Cuyahoga County Prosecutor, NORMAN A. KOTOCH, Assistant Prosecuting Attorney, Cleveland, Ohio.
For Defendant-Appellant: CHARLES B. BRAGG, ESQ., Berea, Ohio.

Judges: JAMES M. PORTER, JUDGE. BLACKMON, P.J., CONCURS. TIMOTHY E. McMONAGLE, J., DISSENTS. (SEE DISSENTING OPINION ATTACHED)

Opinion

Opinion by: JAMES M. PORTER

{113 Ohio App. 3d 402} {680 N.E.2d 1297}

JOURNAL ENTRY AND OPINION

JAMES M. PORTER, J.,

Defendant-appellant George E. Scott appeals his conviction in the trial court as a result of his plea of guilty to the charge of robbery (R.C. 2911.02). Defendant entered his plea as a result of a plea bargain agreement entered into by the defendant and the State of Ohio. Defendant's sole assignment of error challenges the trial court's failure to comply with Crim. R. 11(C)(2) . For the reasons stated below, we affirm the decision of the trial court.

The defendant was indicted for robbery in violation of R.C. 2911.02 . Included in the indictment were a prior aggravated felony specification and a violence specification. The defendant, through his attorney, entered into a plea bargain agreement with the State whereby the defendant would plead guilty to the charge of robbery in violation of R.C. 2911.02 , amended by the deletion of both the prior aggravated felony specification and the violence specification. In return, the judge would sentence the defendant to three to fifteen years at the Lorain Correctional Institution, which sentence would run concurrently with the time the defendant was currently serving on another charge. On October 22, 1991, the defendant pled guilty to the charge of robbery, and the trial judge sentenced him pursuant to the agreement.

Defendant's motion for a delayed appeal was granted May 24, 1995.

Defendant raises the following sole assignment of error for our review:

{113 Ohio App. 3d 403}

I. THE APPELLANT'S GUILTY PLEA WAS NOT KNOWINGLY AND VOLUNTARILY MADE SINCE THE

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COURT DID NOT SUFFICIENTLY EXPLAIN TO THE APPELLANT THE RIGHTS HE WAS WAIVING BY ENTERING HIS GUILTY PLEA.

When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim. R. 11 have been followed. *State v. Kelley* (1991), 57 Ohio St. 3d 127, 128, 566 N.E.2d 658.

Crim. R. 11(C) states in pertinent part:

Pleas of guilty and no contest in felony cases.

* * *

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and if applicable, that he is not eligible for probation;

(b) informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence;

(c) informing him of and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

The taking of a plea will be affirmed on appeal so long as the reviewing court determines that the trial court substantially complied with the requirements of Crim. R. 11. *State v. Stewart* (1977), 51 Ohio St. 2d 86, 364 N.E.2d 1163. "Substantial compliance means that under the totality of the circumstances the defendant objectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St. 3d 106, 108, 564 N.E.2d 474. A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently and voluntarily made must show a prejudicial effect. *Id.*

The defendant challenges the lower court's compliance with Crim. R. 11 on four bases: 1) that the court never informed the appellant that by entering a guilty plea, he would be waiving his right to not be compelled to testify against himself; 2) that the court did not explain that he would be waiving his right to require the state to prove him guilty beyond a reasonable doubt; 3) that the court never explained the meaning of the indefinite sentence and defendant was thereby prejudiced to the extent that he is serving a sentence which he could not have possibly understood; and 4) that the court did not sufficiently inform defendant {113 Ohio App. 3d 404} of the extent of his right to counsel because he was not informed that this counsel would represent him throughout the proceedings and through any trial that might take place.

Defendant argues that as a result of these failures by the trial court, he was prejudiced in this matter to the extent that he improperly entered a plea of guilty to a charge that carried a sentence of three, four, five, six, seven or eight to fifteen years without being adequately informed of the rights he was waiving. We do not agree.

A careful review of the transcript of the proceedings below shows that the arguments of the defendant are without merit.

The colloquy between the court and the defendant indicates that the court informed the defendant that he would be giving up certain constitutional rights upon entering a plea to the amended charge. The record reflects in pertinent part:

THE COURT: Mr. Scott, it's my duty to apprise you of your constitutional rights in connection with trial and to tell you if you do enter a plea to the amended charge, you are going to be waiving or giving up certain constitutional rights.

You will not have a trial.

Do you understand that, first of all?

DEFENDANT: Yes.

COURT: You have the right to be represented by an attorney. If you are indigent, the court will assign a lawyer to represent you at no cost to you.

Do you understand that?

DEFENDANT: Yes.

COURT: If you went to trial with the case, you could have a jury trial to 12 people, or you can waive the jury and try the case to the court.

{680 N.E.2d 1299}

During the course of the trial, you have a right not to testify. If you decided to remain silent during your trial, nobody could comment to the jury the fact you didn't take the witness stand. That is also within your constitutional rights.

Do you understand that?

DEFENDANT: Yes.

*** {113 Ohio App. 3d 405}

COURT: *** Mr. Kotoch from the prosecutor's office indicated that the State of Ohio will amend - has moved the court to delete, or remove the specification contained in the indictment, both the aggravated felony spec and the violent spec.

This then becomes an aggravated felony of the second degree and it carries with it a potential penalty of 3, 4, 5, 6, 7, 8 years minimum, up to 15 years maximum, and a fine not to exceed \$ 7,500.

Do you understand that?

DEFENDANT: Yes.

COURT: Has anybody promised you anything or threatened you with anything in order to get you to change your plea, other than I told your attorney Mr. Milano that I would sentence you, if you plead today, to 3 to 15 in LCI and it would be concurrent with the case you are currently sentenced and doing time for? Any other promises than that?

DEFENDANT: No, your honor.

COURT: Understanding the amended indictment herein and the potential penalties I outlined for you, I ask you, first of all, are you, in fact guilty of robbery contained in the indictment, an aggravated felony?

DEFENDANT: Yes.

COURT: How do you plead to the amended indictment, guilty or not guilty?

DEFENDANT: Guilty.

COURT: Is your plea made voluntary, of your own free will and after speaking with Mr. Milano about it?

DEFENDANT: Yes.

COURT: Let the record reflect the defendant understands his rights, he knowingly, voluntarily, and intelligently waived them in connection with trial and otherwise.

From the record before us, it is evident that the court did, in fact, inform the defendant that by entering a guilty plea, he would be waiving his right to not be compelled to testify against himself and that he had a right to counsel. The record reflects that the defendant objectively stated that he understood the sentence which was to be imposed and which was to run concurrently with the sentence which he was currently serving on another charge. {113 Ohio App. 3d 406}

While it is undisputed that the trial judge did not inform the appellant that the state is required to prove his guilt beyond a reasonable doubt, as Crim. R. 11(C)(2)(c) requires, the Ohio Supreme Court stated in *State v. Nero, supra*, that "literal compliance with Crim.R. 11 is certainly the preferred practice, but the fact that the trial judge did not do so does not require vacation of the defendant's guilty plea if the reviewing court determines that there was substantial compliance. *Stewart, supra*. " *Id.* at 108.

Substantial compliance allows the trial court to infer from the totality of the circumstances that the defendant understood the charges against him. *State v. Rainey* (1982), 3 Ohio App. 3d 441, at 442, 446 N.E.2d 188. See, also, *State v. Nero, supra*, at 108.

According to *Boykin v. Alabama* (1969), 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709, a court in accepting a guilty plea must inform the defendant of certain constitutional rights. These constitutional rights are: the privilege against compulsory self incrimination; the right to a jury trial; and the right to confront accusers. *Id.* at 243. The Ohio Supreme Court in *State v. Stewart* (1977), 51 Ohio St. 2d 86, 93, 364 N.E.2d 1163, held that "the absence of a ritualistic incantation of an admonishment which is not constitutionally guaranteed does not establish grounds for vacating the plea." {680 N.E.2d 1300} Thus, while the trial court is required by Crim. R. 11(C)(2)(c) to inform the defendant of his right to have the State prove his guilt beyond a reasonable doubt, this is not required by *Boykin*, as is it is not a constitutional right, but a statutory right. The Ohio Supreme Court recognized this in *State v. Sturm* (1981), 66 Ohio St. 2d 483, 484, fn. 2, 422 N.E.2d 853:

Appellant also argues that he was not informed of his right to have the state prove his guilt beyond a reasonable doubt. While a trial court is required by Crim.R. 11(C) to inform a defendant of his right, it is not required by *Boykin v. Alabama* (1969), 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709. See *Id.* at 243. Therefore, such a failure would be tested by this court's cases interpreting Crim. R. 11(C). See, e.g. *State v. Stewart* (1977), 51 Ohio St. 2d 86, 364 N.E.2d 1163.

See, also, *State v. Binion*, 1996 Ohio App. LEXIS 1589, (April 18, 1996), Cuyahoga App. No. 69336, unreported (failure to inform defendant of his right to have the State prove his guilt beyond a reasonable doubt not prejudicial); *State v. McGhee* (April 21, 1994), 1994 Ohio App. LEXIS 1709, Cuyahoga App. No. 65214, 65215, 65216, unreported (court substantially complied with Crim.R. 11 requirements regarding defendant's right to have the State prove his guilt beyond a reasonable doubt); *State v. Agresti* (May 27, 1993), Cuyahoga App. No. 64174, unreported (court not required by *Boykin* or *Sturm* to inform defendant of right to have State prove his guilt {113 Ohio App. 3d 407} beyond a reasonable doubt; there was no constitutional error and since there

was substantial compliance, any error was harmless).

A review of the entire transcript of the proceedings as substantiated by the excerpted dialogue between the court and the defendant in this matter convinces us that the trial court satisfied the requirements of Crim. R. 11 and that the totality of the circumstances indicates that the appellant objectively understood the implication of his plea and all of the rights which he was waiving. The defendant plea bargained to receive a sentence which was to run concurrently with the time which he was already serving on another case, and that is the sentence which the judge imposed. Therefore, we find that there was no prejudicial effect upon defendant.

Accordingly, the defendant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLACKMON, P.J., CONCURS.

TIMOTHY E. McMONAGLE, J., DISSENTS.

(SEE DISSENTING OPINION ATTACHED)

JAMES M. PORTER

JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Dissent

Dissent by: TIMOTHY E. McMONAGLE

TIMOTHY E. McMONAGLE, J., DISSENTING:

I am compelled to respectfully dissent from the majority in this case. Although I do agree that the "substantial compliance" standard of *Stewart* is the correct standard for the court to apply to determine whether the defendant understood the charges against him or the penalty to be imposed upon the court's acceptance of the plea as required by Crim.R. 11(C)(2)(a) and (b), I believe that the standard of *Stewart* is not the correct standard to be used in the case *sub judice*. The majority here is relying on a standard which was merely put forth in a footnote in *State v. Sturm, supra*. The *Sturm* court, without analysis of the importance of the right of the defendant to have the state prove guilt beyond a reasonable doubt, simply noted that this right, because it is not required by *Boykin*, should be tested by the supreme courts' cases interpreting Crim.R. 11(C). The *Sturm* court did not address the fact that the *Stewart* standard was not applied to the rights of the defendant enumerated in Crim.R. 11(C)(2)(c).

I believe that, where the court has failed to apprise the defendant of his right to have the state find him

guilty beyond a reasonable doubt, the appropriate test to be used by our court when determining whether the trial court complied with Crim.R. 11(C)(2)(c) when accepting a guilty plea should be the same test as required by the court in *Boykin*.{113 Ohio App. 3d 408}

Crim.R. 11(C)(2)(c) contains two enumerated rights which the *Boykin* court did{680 N.E.2d 1301} not address: first, the right to have compulsory process for obtaining witnesses in his favor (which is an enumerated constitutional right in Amendment VI); and second, the right to have the state prove guilt "beyond a reasonable doubt." In response to the omission in the *Boykin* opinion of the right to have "compulsory process" our supreme court stated, in *State v. Ballard* (1981), 66 Ohio St. 2d 473, 423 N.E.2d 115 at footnote 4:

It may be noted that *Boykin* did not mention the right of the defendant to have compulsory process of witnesses to testify on his behalf. However, as the right is guaranteed by the Sixth Amendment to the United States Constitution, and like those mentioned in *Boykin* is a trial right, we hold that the defendant must also be informed of his right to compulsory process.

The second right found in Crim.R. 11(C)(2)(c) which the court in *Boykin* did not address is the one at issue here -- the trial right that requires the state to prove the defendant's guilt beyond a reasonable doubt.

The "reasonable doubt standard" is an essential trial right which reaches constitutional stature. As the Supreme Court held in *In re Winship* (1970) 397 U.S. 358, at 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In trial, this important right is always explained to the jury by a verbatim reading of the statutory definitions.

As Judge Mahoney stated in his dissent in *State v. Teter*, 1990 Ohio App. LEXIS 3950, (Sep. 5, 1990), Wayne App. No. 2543, unreported:

I personally fail to see how our Supreme Court can require that a defendant be informed in an intelligent manner as to four of the constitutional rights set forth in Rule 11 but only a "substantial compliance" standard as to the fifth constitutional right set forth in Rule 11. This is an anomaly. Additionally, the latter standard requires a showing of prejudice by the omission to inform whereas the former does not. It is incongruous. In this case, there was a complete omission to reasonably inform the defendant of the state's burden of proof beyond a reasonable doubt. This requires reversal *per se* in my opinion.

In order to knowingly, intelligently and voluntarily give up a right, a defendant must know that he has that right and what it is. The right at issue here, to have the state prove guilt beyond a reasonable doubt, while not a constitutional right as those enumerated in *Boykin* or *Ballard*, is a statutory right which reaches constitutional stature and is embedded within the constitutional trial rights in {113 Ohio App. 3d 409} Crim.R. 11(C)(2)(c). This right is the only right included in the statute which is not a constitutional right.

I believe that for a guilty plea to be determined as voluntarily and intelligently entered, a defendant must be informed that he is waiving important trial rights. The rule mandates that the court inform the defendant of his trial rights and determine that he understands these rights and that he is waiving these rights. Where the court fails to address each of the trial rights enumerated, it cannot be said that the court has explained the rights in a manner reasonably intelligible to the defendant. Therefore, where, as here, the court entirely omits an important trial right when addressing the defendant upon the acceptance of a plea, I believe that the court has failed to comply with the mandate of Crim.R. 11(C)(2)(c), which demands that the court "shall not accept such a plea without first addressing the defendant personally and *** informing him of and determining that he understands that by his plea he

is waiving his right *** to require the state to prove his guilt beyond a reasonable doubt at *** trial ***."

For the reasons stated above, I believe that the issue in this case raises a substantial constitutional question and concerns a question of public and great general interest which should be called to the attention of our Ohio Supreme Court. {680 N.E.2d 1302}

Accordingly, I would vacate the plea and remand this case to the court below.

STATE OF OHIO, Appellee v. DAVID E. COGAR, III, Appellant
COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY
1993 Ohio App. LEXIS 5288
C.A. NO. 16234
October 20, 1993, Decided
October 20, 1993, Filed

Editorial Information: Prior History

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. 92 08 2079

Disposition

The judgment of the trial court is affirmed.

Counsel

LYNN SLABY, Prosecuting Attorney, City-County Safety Bldg., Akron, OH 44308, for Appellee.

JOHN R. KASSINGER, Attorney at Law, 1655 W. Market St., Suite 400, Akron, OH 44313, for Appellant.

Judges: QUILLIN, REECE, DICKINSON

Opinion

Opinion by: FOR THE COURT; DANIEL B. QUILLIN

DECISION AND JOURNAL ENTRY

Dated: October 20, 1993

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, P. J. In this case we must determine whether a trial court's failure to inform a defendant before accepting a plea of guilty that the state bears the burden of proving guilt beyond a reasonable doubt at trial constitutes reversible error. We hold that reversible error cannot be found absent a showing that the defendant was prejudiced by the court's failure to inform him of this right. Accordingly, we affirm.

After plea negotiations with the state, David E. Cogar, III entered a plea of guilty to one count of breaking and entering and to one count of burglary. Cogar appeals, asserting a single assignment of error.

Assignment of Error

"The trial court erred by failing to comply with Rule 11 of the Ohio Rules of Criminal Procedure when accepting appellant's guilty plea."

Appellant frames the issue presented for review as follows:

"Did the Trial Court err by accepting Appellant's guilty plea when the Court failed to advise Appellant pursuant to Crim.R. 11 that he was waiving his right to 'require the state to prove his guilt beyond a reasonable doubt at trial?'"

Crim.R. 11 governs the acceptance of guilty pleas in felony cases, stating in part:

"(C)(2) In felony cases the court may refuse to accept a plea of guilty* * * and shall not accept such plea without first addressing the defendant personally and:

* * *

"(c) Informing him and determining that he understands that by his plea he is waiving his right* * * to require the state to prove his guilt beyond a reasonable doubt at a trial[.]

* * * "

In determining whether the trial court has properly satisfied its duties contained in Crim.R. 11 , the Supreme Court of Ohio has delineated two separate tests with respect to constitutional and non-constitutional requirements. In *Boykin v. Alabama* (1969), 395 U.S. 238, 23 L. Ed. 2d 274, the United States Supreme Court held that, "in order for a reviewing court to determine whether a guilty plea was voluntary, the United States Constitution requires the record to show that the defendant voluntarily and knowingly waived his constitutional rights." *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474 citing *Boykin, supra*, 395 U.S. at 242-243, 23 L. Ed. 2d at 279. *Boykin* enumerated the required constitutional rights as: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. *Boykin, supra*, at 243, 23 L. Ed. 2d at 279. In *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus, the Supreme Court of Ohio expanded the *Boykin* constitutional requirements to include the right to compulsory process.

In order for the trial court to satisfy both Crim.R. 11 and the United States Constitution, the trial court is required to explain the *Boykin* and *Ballard* rights in a manner reasonably intelligible to the defendant. *Id.* at paragraph two of the syllabus. Thus, there must be some dialogue between the trial court judge and the defendant which, in substance, informs the defendant of his *Boykin* and *Ballard* rights. However, the court's duty to inform a defendant of the remainder of the rights conferred upon a defendant under Crim.R. 11 is non-constitutional and requires a different analysis.

The analysis used to determine whether a trial court has satisfied the non-constitutional requirements contained in Crim.R. 11 was first enunciated by the Supreme Court of Ohio in *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. The *Stewart* Court stated:

"* * * although it can validly be argued that the trial court should adhere scrupulously to the provisions of Crim.R. 11(C)(2) * * *, there must be some showing of prejudicial effect before a guilty plea may be vacated. See Crim.R. 52(A) . This court is of the opinion that the appellant has not demonstrated that he was in any way prejudiced by the oversight of the trial court." (citation omitted).

Id. at 93.

In *State v. Strawther* (1978), 56 Ohio St.2d 298, 383 N.E.2d 900, the Supreme Court was called upon to re-visit its holding in *Stewart*. *Strawther* approved and followed *Stewart*, saying, "the rule adopted by this court in *State v. Stewart, supra*, requires prejudice to be shown before a plea can be vacated pursuant to Crim.R. 11 ." *Id.* at 300. Referring to the trial court's failure to orally advise *Strawther*, as required by Crim.R. 11 , that by his guilty plea he was waiving his right to compulsory process, *Strawther* held, "the record does not demonstrate any prejudicial effect as a result of the trial court's oversight and we therefore conclude the trial court substantially complied with Crim.R. 11 ." *Id.* at 301.

In *Nero, supra*, the Supreme Court of Ohio defined "substantial compliance" as follows:

"Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving."

Id. at 108. Further, *Nero* held that, in order to show prejudicial effect, the appellant is required to show that the plea would not have been made had the trial judge informed appellant of his Crim.R. 11 right. *Id.*

The Ohio Supreme Court has previously classified a defendant's right to be informed that the state must prove his guilt beyond a reasonable doubt at trial as a non-constitutional right under Crim.R. 11. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484, 422 N.E.2d 853, fn.2. Accordingly, we must determine whether the record demonstrates prejudice resulting from the trial court's failure to so inform Cogar.

Cogar does not argue, and the record does not disclose, that but for the judge's failure to inform Cogar of his right to have the prosecution prove his guilt beyond a reasonable doubt at trial, the guilty plea would not have been entered. Instead, Cogar attempts to avoid having to demonstrate prejudice by classifying the right to be informed that the state must prove guilt beyond a reasonable doubt at trial as constitutionally mandated. As previously discussed, that right is mandated solely by statute and requires only substantial compliance by the trial court judge. In the absence of a demonstration that Cogar was prejudiced by the trial court judge's failure to inform Cogar of his statutory Crim.R. 11 right, his guilty plea should not be vacated.

It should be emphasized, however, that literal compliance with Crim.R. 11 remains the preferred practice in Ohio. See *Nero, supra*, at 108. Failure to do so spawns needless appeals. With that concern in mind, the best method of informing a defendant of his rights under Crim.R. 11 is to use the language contained in Crim.R. 11, stopping after each right and asking the defendant whether he understands the right and knows he is waiving it by pleading guilty. *Ballard, supra*, at 479. We urge our trial courts to adopt and to systematically utilize such a procedure when accepting guilty or no contest pleas. Many experienced trial judges use a written check list.

Appellant's assignment of error is overruled. The judgment of the trial court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

DANIEL B. QUILLIN, FOR THE COURT

REECE, J.

DICKINSON, J.

CONCUR