

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS L. VENEY,

Defendant-Appellee

Case No. **07-0657**

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

Court of Appeals
Case No. 06AP-523

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF JURISDICTION

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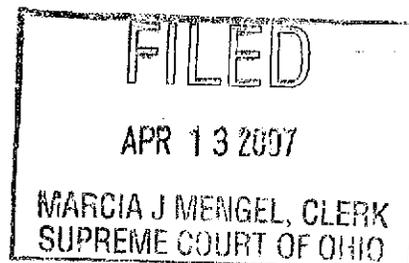


TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION	1
STATEMENT OF THE CASE AND THE FACTS	4
ARGUMENT	6
<u>Proposition of Law No. 1.</u> A substantial compliance standard applies to the advisement required by Crim.R. 11(C)(2)(c) regarding the State's burden of proving guilt beyond a reasonable doubt at trial.	6
<u>Proposition of Law No. 2.</u> The failure to give the beyond-reasonable-doubt oral advisement required by Crim.R. 11(C)(2)(c) is subject to harmless-error review and does not always require reversal.	6
CERTIFICATE OF SERVICE	15
APPENDIX	<u>Appx. Page</u>
Opinion (rendered and filed 3-22-07)	A-1
Judgment (filed 3-22-07)	A-10
Journal Entry Certifying Conflict (filed 3-22-07)	A-11
Journal Entry Granting Stay (filed 4-6-07)	A-12

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

When a felony defendant is entering a guilty plea, Criminal Rule 11(C)(2)(c) requires that the trial court address the defendant personally and advise the defendant of five constitutional rights he is forgoing by entering the plea: (1) the right to jury trial; (2) the right to confront witnesses; (3) the right not to be compelled to testify against himself; (4) the right to compulsory process; and (5) the right to require the prosecution to prove guilt beyond a reasonable doubt at a trial. The first three of these advisements are “*Boykin*” advisements because they are required as a matter of due process as a result of *Boykin v. Alabama* (1969), 395 U.S. 238. Ohio courts have generally said that there must be strict compliance with those three advisements in the sense that the court must discuss those rights in some reasonably intelligible fashion at the plea hearing.

The controversy in Ohio courts has centered on the non-*Boykin* rights mentioned in Crim.R. 11(C)(2)(c), i.e., the right to compulsory process and the right to proof beyond a reasonable doubt at trial. One case from this Court supports the view that the compulsory-process advisement is subject to only substantial-compliance review. *State v. Strawther* (1978), 56 Ohio St.2d 298. In a subsequent case, however, this Court stated in dicta that the compulsory-process advisement should be reviewed under the strict-compliance/reasonably-intelligible standard in the same manner as the *Boykin* advisements. *State v. Ballard* (1981), 66 Ohio St.2d 473.

As for the beyond-reasonable-doubt advisement, this Court has stated that a substantial-compliance standard applies to that advisement. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484 n. 2. However, Ohio appellate courts have split on whether a

standard of strict compliance or substantial compliance should apply to the beyond-reasonable-doubt advisement. A number of the appellate districts deciding the issue have followed *Sturm*, including the Tenth District in *State v. Ellis* (1996), 10th Dist. No. 95AP-1399, and including decisions in other appellate districts. *State v. Shinkle* (1998), 4th Dist. No. 98CA2560; *State v. Scott* (8th Dist. 1996), 113 Ohio App.3d 401, 406-407; *State v. Cogar* (1993), 9th Dist. No. CA-16234. Other courts deciding the issue, including the two-judge majority below, have held that the beyond-reasonable-doubt advisement should be subject to strict-compliance review. See, e.g., *State v. Higgs* (11th Dist. 1997), 123 Ohio App.3d 400; *State v. Givens* (1982), 2nd Dist. No. 7774. There was a dissent in *Higgs*, as there was a dissent by Judge Sadler in the present case.

Recognizing the stark conflict, the Tenth District unanimously certified the conflict to this Court, and the State has filed a certified-conflict appeal under another case number. This conflict meets the standards for certification of a conflict, as the Tenth District's judgment of reversal under the strict-compliance standard conflicts with the judgments of other appellate courts in *Shinkle*, *Scott*, and *Cogar*, in which those courts affirmed the convictions using a substantial-compliance standard. Given this conflict of judgments on a rule of law, this Court at a minimum should accept the State's certified-conflict appeal so that this Court can settle the conflict.

The State believes that its propositions of law fall within the ambit of the certified question, and so the present discretionary appeal may not be absolutely necessary. However, in the interest of avoiding any dispute about the reach of the certified question, the State has filed the present discretionary appeal so that this Court

can engage in plenary review of these legal issues without concerns about whether the issues technically fall within the reach of the certified question.

The issues warrant the granting of discretionary review. Most criminal cases are resolved by plea, and, although most trial judges strictly comply with Crim.R.

11(C)(2)(c), errors in failing to give an oral advisement do occur. The issue of how these errors will be addressed in the appellate courts is therefore a recurring and important question. While errors truly prejudicing the defendant ought to require reversal, it is the rare case in which the failure to give the beyond-reasonable-doubt advisement would be prejudicial. That standard is well known even to laymen, and plea hearings are often accompanied by written plea documents that advise the defendant of the right to proof beyond a reasonable doubt. Such defendants are also represented by counsel who have reviewed the plea documents with them and who are presumed to have given the defendant competent advice on their rights. In short, there is little chance of real prejudice from the lack of this oral advisement, but the Tenth District has imposed a standard of strict compliance that automatically requires reversal. This requirement of automatic reversal is disproportionate to the judicial error committed, and it unnecessarily requires litigants and victims to “start over” in the absence of any showing of prejudice and even in the face of affirmative evidence that the error was not prejudicial.

Accordingly, the State requests that this Court accept discretionary review because a substantial constitutional question is presented, because leave to appeal should be granted in this felony case, and because the case presents questions of public

or great general interest that would be helpful to the bench and bar.

STATEMENT OF THE CASE AND THE FACTS

Defendant Veney was indicted on counts of felonious assault and kidnapping, both with one-year and three-year firearm specifications. The indictment alleged that the victim was Nicole Veney and that the date of the offenses was July 8, 2004.

After a lengthy delay due to defendant absconding while on recognizance bond, defendant eventually pleaded guilty to the stipulated lesser included offense of attempted felonious assault, a third-degree felony, with a three-year firearm specification.

Defendant also pleaded guilty at the same hearing to a charge in another case of attempted failure to appear on a recognizance bond.

The prosecutor recited facts at the plea hearing, indicating that defendant had come home from a night of drinking and accused his wife Nicole of sleeping with his cousin. Defendant pulled out a loaded gun while in the bedroom, and while Nicole was laying next to her seven-year-old daughter, defendant held the gun on Nicole and threatened to shoot.

Nicole asked him to take the argument downstairs so as not to involve the daughter. Defendant shot the gun into a wall downstairs, and, at that point, the gun apparently jammed, thereby giving Nicole time to flee. Defendant gave pursuit, and Nicole saw that he was pointing the gun at her. She heard more shots. Nicole was able to run to a nearby business to seek help. Nicole's account was corroborated by neighbors who heard the shots and saw defendant holding a gun.

At the plea hearing, defendant acknowledged his signature on the Entry of Guilty

Plea and acknowledged that his attorney had reviewed his constitutional rights with him. The court addressed various constitutional rights, including the right to jury trial, and defendant said he understood that he was giving up those rights. However, the court did not expressly discuss with defendant the legal requirement that such a trial would require the State to prove its case beyond a reasonable doubt.

The Entry of Guilty Plea did discuss that right, stating, as follows:

I understand that my guilty plea to the crime specified constitute(s) both an admission of guilt and a waiver of any and all constitutional, statutory, or factual defenses with respect to such crime and this case. I further understand that by pleading "Guilty", *I waive a number of important and substantial constitutional, statutory and procedural rights*, which include, but are not limited to, the right to have a trial by jury, the right to confront witnesses against me, to have compulsory subpoena process for obtaining witnesses in my favor, *to require the State to prove my guilt beyond a reasonable doubt* on each crime herein charged at a trial at which I cannot be compelled to testify against myself, and to appeal the verdict and rulings of the trial court made before or during trial, should those rulings or the verdict be against my interests.

At the subsequent sentencing hearing, the prosecutor noted that defendant had been incarcerated before, and the court noted defendant's extensive record. The court imposed a two-year sentence for the third-degree felony and the mandatory consecutive three-year prison term for the firearm specification.

In a judgment and opinion filed on March 22, 2007, a two-judge majority of the Tenth District reversed the conviction, concluding that a standard of strict compliance required reversal because no oral beyond-reasonable-doubt advisement was given. *State v. Veney*, 10th Dist. No. 06AP-523, 2007-Ohio-1295. Judge Sadler

dissented and concluded that the pertinent standard was substantial compliance and that such standard was satisfied.

At the same time the Tenth District issued its judgment of reversal, the Tenth District unanimously certified a conflict on the issue of whether a standard of strict compliance applies. On April 6, 2007, the Tenth District granted a stay of the judgment pending the State's appeal to this Court.

ARGUMENT

Proposition of Law No. 1. A substantial compliance standard applies to the advisement required by Crim.R. 11(C)(2)(c) regarding the State's burden of proving guilt beyond a reasonable doubt at trial.

Proposition of Law No. 2. The failure to give the beyond-reasonable-doubt oral advisement required by Crim.R. 11(C)(2)(c) is subject to harmless-error review and does not always require reversal.

Defendant contended that his plea must be vacated because the trial court failed to advise him orally that the State would be required to prove his guilt beyond a reasonable doubt at a trial. The two-judge majority of the Tenth District agreed after applying a strict-compliance standard. Defendant and the Tenth District majority were mistaken.

A.

Case law from this Court shows that a standard of strict compliance does not apply to all advisements of constitutional rights mentioned in Crim.R. 11(C)(2)(c). In *State v. Strawther* (1978), 56 Ohio St.2d 298, this Court recognized that only substantial compliance was necessary regarding the compulsory-process advisement. The Court found that an advisement regarding that right is not constitutionally required under *Boykin. Strawther*, 56 Ohio St.2d at 301 ("the right to compulsory process is not declared

by *Boykin* to be a constitutional right requiring a waiver to appear upon the record.”). In *Strawther*, the defendant had executed a written plea in which he waived his compulsory-process right, but the trial court had not orally advised him of that right. This Court still upheld the plea by finding substantial compliance with the rule and finding no prejudice.

In *State v. Sturm* (1981), 66 Ohio St.2d 483, 484 n. 2, this Court applied the same analysis to the beyond-reasonable-doubt advisement. In *Sturm*, the Court overturned the plea because there had been no advisement of the right to confront witnesses, a *Boykin* right. However, the Court said that the defendant’s claimed error regarding the beyond-reasonable-doubt advisement warranted different treatment:

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 this right, it is not required by *Boykin v. Alabama* (1969), 395 U.S. 238. 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.

Under the *Stewart* approach, the test is one of substantial compliance.

“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.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108. “[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.* at 108, citing *Stewart*, 51 Ohio St.2d at 93. “The test is whether the plea would have otherwise been made.” *Nero*, 56 Ohio St.2d at 108.

The majority opinion below erred in contending that the substantial-compliance ruling in *Sturm* was “dicta.” The defendant in *Sturm* raised the issue, and this Court

expressly ruled on the merits and held that only a standard of substantial compliance applied. To be sure, the defendant in *Sturm* won his appeal on another ground, but that ruling on a second ground does not detract from the precedential value of the actual decision on the standard of review made on the first ground.

In light of *Sturm*, the Tenth District correctly recognized in another case that the beyond-reasonable-doubt advisement required by the criminal rule “is not a *Boykin* constitutional right * * *.” *State v. Ellis* (1996), 10th Dist. No. 95AP-1399. Accordingly, the court in *Ellis* upheld the guilty plea because there was no showing of prejudice. *Id.*

Several other Ohio courts have concluded that the test of substantial compliance applies when the trial court has omitted the beyond-reasonable-doubt advisement. “[W]hen a nonconstitutional right is omitted, *i.e.*, one not required by *Boykin* * * *, such as the right to have the state prove guilt beyond a reasonable doubt, there must be some showing of prejudicial effect before a guilty plea may be vacated.” *State v. Flanigan* (1985), 8th Dist. No. 48318. The beyond-reasonable-doubt advisement “is mandated solely by statute and requires only substantial compliance * * *.” *State v. Cogar* (1993), 9th Dist. No. 16234. “[W]hile 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.” *State v. Shinkle* (1998), 4th Dist. No. 98CA2560 (collecting cases applying substantial compliance standard); *State v. Scott* (1996), 113 Ohio App.3d 401, 406.

The *Strawther-Sturm* analysis is squarely on point here. Defendant executed the written plea indicating that he understood he was waiving his right to proof beyond a

reasonable doubt. Defendant further acknowledged that he and his counsel had discussed his constitutional rights. The facts recited by the prosecutor also gave no indication that defendant would have had a reasonable-doubt defense, since defendant threatened his wife, fired a shot, pursued her out of the home, pointed the gun at her, and then fired more shots, with neighbors corroborating defendant's acts in possessing the gun and firing the shots. The record also shows that defendant has a substantial criminal record, which buttresses the view that defendant would have been aware of the beyond-reasonable-doubt standard through his many contacts with the criminal-justice system. There was substantial compliance here, and there was no showing that, but for the absence of the oral beyond-reasonable-doubt advisement, defendant would not have still pleaded guilty.

According to defendant, every "constitutional right" mentioned in Criminal Rule 11 requires strict compliance, and the beyond-reasonable-doubt standard is an undoubted constitutional right. But the issue is not the constitutional nature of the right being addressed in the advisement, but rather whether the advisement itself is constitutionally required. As *Sturm* recognized, the beyond-reasonable-doubt advisement is not an advisement required by constitutional standards under *Boykin*. See, also, *People v. Saffold* (2001), 465 Mich. 268, 281, 631 N.W.2d 320, 328 ("Although we continue to recognize the importance of the presumption of innocence, we decline to elevate it to the status of the *Boykin/Jaworski* rights.").

B.

The decision in *State v. Ballard* (1981), 66 Ohio St.2d 473, does not require a different result. The *Ballard* Court extended *Boykin* to require an advisement as to the

compulsory-process right. *Id.* at 477 n. 4. But, notably, not even *Ballard* purported to extend *Boykin* to the beyond-reasonable-doubt advisement.

Even as to the right to compulsory process, the *Ballard* language extending *Boykin* was dicta, since *Ballard* did not involve a failure to give the compulsory-process advisement but rather a failure to advise the defendant of the jury-trial right, an undoubted *Boykin* right. In contrast, *Strawther* *did* involve a claimed failure to advise the defendant of the compulsory-process right, and therefore *Strawther* continues to have binding precedential value. Indeed, *Ballard* seemed to distinguish *Strawther* without overruling it because *Ballard* noted that the defendant in *Strawther* had executed a written waiver of the compulsory-process right. *Ballard*, 66 Ohio St.2d at 476.

C.

The majority below saw no “rational basis” for reconciling *Ballard* and *Sturm*. *Ballard* had included the compulsory-process advisement on the list of advisements requiring strict compliance, while *Sturm* had concluded that the beyond-reasonable-doubt advisement only required substantial compliance. On the basis of the purported irreconcilability of *Ballard* and *Sturm*, the majority concluded that the strict-compliance standard of *Ballard* should control.

This analysis was greatly mistaken. *Ballard* and *Sturm* were decided on the very same day (June 24, 1981), and so this Court had already found the two cases reconcilable by issuing them on the same day. Moreover, there was no conflict, as *Sturm* had expressly relied on *Ballard* and yet still ruled that the beyond-reasonable-doubt advisement was not required by *Boykin*. In short, *Ballard* had already taken *Sturm* into

account, and *Sturm* had already taken *Ballard* into account, and so it was not the place of the Tenth District majority to elevate *Ballard* over *Sturm*.

Most importantly, in the purported “conflict” between *Ballard* and *Sturm*, the Tenth District majority’s method of decision was backwards. The majority had disregarded *Sturm* because it was supposedly “dicta,” when in fact it was the holding of the *Sturm* Court that the beyond-reasonable-doubt advisement only required substantial compliance. On the other hand, it *was* dicta when *Ballard* said that the compulsory-process advisement was required by *Boykin*. By standards of “precedent” versus “dicta,” the ruling in *Sturm* was more precedential than the dicta in *Ballard*.

Concededly, *Ballard* included the compulsory-process advisement on the list of *Boykin* rights in syllabus language, and at that time lower courts were not allowed to ignore syllabus language on the basis that it was “dicta.” *Smith v. Klem* (1983), 6 Ohio St.3d 16, 18. But the *Ballard* syllabus does not aid defendant here, because, although it included the compulsory-process advisement, it did not include, and thereby excluded, the beyond-reasonable-doubt advisement. The State *wins* under the *Ballard* syllabus.

The ruling in *Sturm* still could not be disregarded. *Sturm* was a per curiam opinion and therefore held as much precedential value as a syllabus. See *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 150; former Rule 1(C) of Rules for Reporting of Opinions. The Tenth District should have followed *Sturm*, as it had in the past.

D.

In adding the beyond-reasonable-doubt advisement to the list of *Boykin* rights, the Tenth District majority overlooked post-*Boykin* case law from the United States

Supreme Court. As stated in *Godinez v. Moran* (1993), 509 U.S. 389, 397 n. 7, “[a] criminal defendant waives *three* constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers.” (Emphasis added) In *United States v. Ruiz* (2002), 536 U.S. 622, 628-29, the Court cited *Boykin* and said that, “[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees” because “pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one’s accusers, and the Sixth Amendment right to trial by jury.” As these statements show, the Court has not expanded the list of *Boykin* rights beyond the three rights already listed. The beyond-reasonable-doubt standard is simply not among the narrow list of *Boykin* rights.

Contrary to the assumption of the majority below, due process does not require that a plea colloquy address every constitutional right or every potential defense. “Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required.” *United States v. Broce* (1989), 488 U.S. 563, 573. As confirmed by *Ruiz*, 536 U.S. at 629, “the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights; despite various forms of misapprehension under which a defendant might labor.”

While the majority below failed to address cases like *Godinez* and *Broce*, which the State had cited, the majority did rely on a dissent from a denial of a petition for writ of

certiorari in *Johnson v. Ohio* (1974), 419 U.S. 924, in which Justice Douglas had opined that a beyond-reasonable-doubt advisement was required by *Boykin* because the three *Boykin* rights were illustrative and not exhaustive. But, even before *Sturm*, this Court had discussed the *Johnson* dissent in *State v. Stone* (1975), 43 Ohio St.2d 163, and had nevertheless rejected the defendant's contention therein that a beyond-reasonable-doubt advisement was always required. *Id.* at 164-65. *Stone* held that the trial-court record can sufficiently demonstrate a knowing, voluntary, and intelligent plea without an enumeration of every right waived. *Id.* at 169-70.

Notably, if the Tenth District's analysis is followed, federal Crim.R. 11 is unconstitutional, since it does not require a beyond-reasonable-doubt advisement. And if the Tenth District's logic is carried to its logical conclusion, then Ohio's Crim.R. 11 is unconstitutional as well, as that rule lists only five of the trial-related constitutional rights, even though a defendant has many more such rights, including the right to testify, the right to be present, the right to counsel, the right to a public trial, and on and on.

E.

The decision in *United States v. Vonn* (2002), 535 U.S. 55, supports the view that a flawed plea colloquy does not automatically require reversal, even when a rule requiring a constitutional advisement is violated. In *Vonn*, the pertinent rule required the court to advise the defendant of his right to counsel at trial, but the court failed to give an oral advisement. The *Vonn* Court concluded that the error had been forfeited through lack of objection and that a plain-error standard of review applied to the issue. *Id.* at 73-74. The Court also approved looking at parts of the record other than the plea hearing transcript in

determining whether an error amounts to plain error or harmless error. *Id.* at 74-76.

In light of *Vonn*, the strict-compliance approach misses the mark. As *Vonn* establishes, even for an advisement of a constitutional right like the right to counsel, an error regarding such advisement does not automatically require reversal, and parts of the record other than the oral plea colloquy can show that the error was harmless.

Although the Criminal Rules require an advisement of the beyond-reasonable-doubt standard, they also mandate that appellate courts apply harmless-error and plain-error standards of review. Crim.R. 52(A) & (B). These rules are routinely applied to claims of constitutional error in the context of a trial, and there is no textual or logical reason not to apply them to advisements of constitutional rights under Crim.R. 11. Harmless-error review applies to “[a]ny error, defect, irregularity, or variance” and therefore it reaches plea-advisement errors of this sort.

F.

Defendant also claimed in the Tenth District that the record was insufficient to show that he understood the nature of the charge to which he was pleading. The Tenth District did not rule on that issue. If the State’s appeals are sustained here, the case can be remanded to that court so that the nature-of-charge issue can be addressed.

Defendant’s claim lacked merit. The trial court specifically asked defendant if he understood the nature of the offense, and defendant said yes twice. Since defendant conceded that he understood, there was sufficient indication that he understood. “Where a defendant indicates that he understands the nature of the charge, in the absence of evidence to the contrary or anything in the record that indicates confusion, it is typically

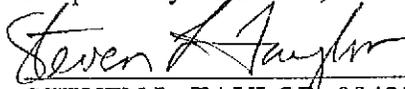
presumed that the defendant actually understood the nature of the charge against him.”

State v. Wangul, 8th Dist. No. 84698, 2005-Ohio-1175, ¶ 10.

The court was not required to recite the elements of the offense, as there is no general requirement that the elements be recited. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶ 57; *State v. Rainey* (1982), 3 Ohio App.3d 441, 442. A defendant’s counsel is expected to advise the defendant of the various implications of his plea, see *Fitzpatrick*, and it can be presumed that the source of a defendant’s understanding of the offense was his counsel. *Henderson v. Morgan* (1976), 426 U.S. 637, 647.

Defendant’s nature-of-charge claim does not provide an alternative ground for affirming the Tenth District’s flawed judgment of reversal.

Respectfully submitted,



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Assistant Prosecuting Attorney

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.



STEVEN L. TAYLOR
Assistant Prosecuting Attorney

ATH

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
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 Plaintiff-Appellee, :
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 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
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 : 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.

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 22, 2007, appellant's assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is vacated, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs assessed against appellant.

KLATT & PETREE, JJ.

By William A Klatt
Judge William A. Klatt

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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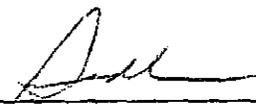
State of Ohio, :
 Plaintiff-Appellee, :
 v. : No. 06AP-523
 : (C.P.C. No. 04CR07-4791)
 Thomas L. Veney, : (REGULAR CALENDAR)
 Defendant-Appellant. :

JOURNAL ENTRY

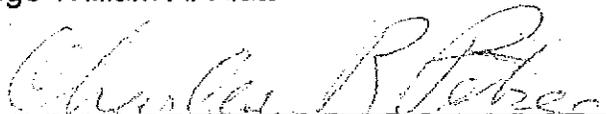
This court, sua sponte, certifies the judgment in this case rendered on March 22, 2007, as being in conflict with the judgments in *State v. Scott* (1996), 113 Ohio App.3d 401, 406-407, *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234, and *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 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

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
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 :
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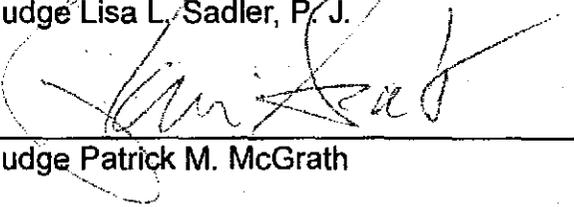
JOURNAL ENTRY

Appellee's March 22, 2007 motion for a stay of execution of this court's judgment pending appeal to the Supreme Court of Ohio is granted. No bond is required as a condition of this stay.

Judge William A. Klatt



Judge Lisa L. Sadler, P. J.



Judge Patrick M. McGrath

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