IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case Nos. 2007-656 and 2007-657
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
Thomas L. Veney,	:	Court of Appeals Case No. 06AP-523
Appellee.	:	

MERIT BRIEF OF DEFENDANT-APPELLEE

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FILED
OCT 24 2007
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF FACTS

The defendant-appellee (hereinafter referred to as defendant) was indicted on a count of felonious assault and a count of kidnapping with firearm specifications. The defendant entered into a plea agreement and pled guilty to an amended charge of attempted felonious assault as a third-degree felony with the firearm specification. The prosecutor indicated that the defendant had confronted his wife and accused her of sleeping with his cousin. The prosecutor claimed that the defendant got a loaded gun and threatened to shoot her. The state indicated that the couple then left the bedroom and went downstairs where the defendant fired a shot into the wall. The defendant's wife then ran out of the house and heard the defendant fire several more shots. The defendant's wife was not actually shot during this encounter and, according to the prosecutor, the defendant's wife wanted him released from custody but based upon the seriousness of the charge the prosecutor was only willing to agree to the stated reduction of the charge. (Tr. 8)

The defendant was sentenced to two years of imprisonment with an additional three years for the firearm specification for an aggregate prison term of five years. (Tr. 13; judgment entry, attached) He later filed an appeal from this judgment and the Court of Appeals reversed his conviction on the grounds that the trial court had failed to advise the defendant of the state's obligation to prove his guilt beyond a reasonable doubt. The Court of Appeals also certified this case to this Court as a conflict among the appellate districts. This Court accepted the case as a conflict and on the state's request for discretionary

review with respect to whether or not this kind of error is subject to a harmless error review or always constitutes plain error.

ARGUMENT

Proposition of Law No. 1

Courts 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.

Proposition of Law No. 2

The failure to orally inform the defendant under Crim.R. 11(C)(2)(c) that the entry of a guilty plea constitutes a waiver of the state's obligation to prove his guilt beyond a reasonable doubt at a trial constitutes plain error because it affects a substantial right of the accused.

Certified Question

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?

Guilty plea proceedings are very crucial to the administration of justice. Most convictions are obtained through guilty or no contest pleas. Generally, at least 95% of felony convictions are obtained through such pleas.[1] In misdemeanor cases the percentage is even higher and approaches 99% in many municipal court systems. Since approximately nineteen out of every twenty felony convictions are obtained by pleas instead of trials, the criminal justice system has a vested interest in making sure that the plea process is conducted as fairly as possible.

[1] Frontline: The Plea, June 17, at 9 P.M. on PBS, as summarized at http://www.truthinjustice.org/the-plea.htm.

There are those who evince little concern about the fairness of guilty plea proceedings because, after all, if the person pled guilty how unfair could any resulting conviction be? These folks are also likely to be people with little understanding of the pressure that the criminal justice system brings to bear upon innocent people to plead guilty and upon guilty people, who have been overcharged, to plead to offenses greater than were actually committed.

Some studies dealing with wrongful convictions have concluded that in over half of such cases the wrongful convictions were obtained as a result of coerced confessions or guilty pleas. The first felony case that undersigned counsel ever worked on involved the drafting of a motion for a new trial for Jack Carmen, a mentally retarded man with an IQ of between 45 and 50 who had confessed and pled guilty to the murder of a fourteen-year-old girl. The resulting news coverage of the plea and sentence alerted credible witnesses to the fact that the defendant could not have committed the crime because he had been elsewhere at the time. The new trial was granted and the defendant was acquitted based upon the substantial alibi evidence. The mentally retarded man had confessed because the police had been so nice to him and his attorney had him plead guilty because of his confession.

Since then, counsel has followed instances of wrongful convictions. An article in the Columbus Dispatch discussed the wrongful convictions in several prominent central Ohio cases. In 75% of the cases, the wrongful convictions had been obtained through guilty pleas instead of trials.[2]

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[2] Yocum, *'Starting Over' Not Easy after Wrongful Conviction,* Columbus Dispatch, December 21, 1986, § E at 2

An innocent person will plead guilty for the same reasons that an insurance company will settle a claim that it believes is without merit or even fraudulent. Parties just do not have the confidence that the justice system will always get things right and they need to weigh the risks and consequences accordingly.

A person who is innocent is normally just as likely to be convicted as is a truly guilty person facing similar accusations and facts. A person mistakenly accused of robbery by two eyewitnesses is just as likely to get convicted as is a robber who is correctly accused by two eyewitnesses. A person who is falsely accused of rape in a he-said, she-said case is as likely to get convicted as is a guilty person facing similar facts. Witnesses making false or mistaken accusations can be just as convincing, if not more so, than a person making truthful ones.

An accused person does not have the discovery advantages that parties in civil litigation have. Unlike insurance companies and other litigants in the civil arena, the defendant does not have a right to depose witnesses or even see the prior statements of the witnesses until after they have testified. The accused does not have the right to have his attorney or investigator talk to the witnesses before or after trial since the state's witnesses are under no obligation to do so and zealous prosecutors and police officers are generally quick to remind them of this fact. Under Crim.R. 16, the state only has to provide the defendant with the names and addresses of its witnesses and the witnesses are not required to talk to any of the defendant's representatives. The state does not even have to

provide the names or addresses of witnesses if it merely certifies that to do so may subject the witnesses to physical or economic harm or coercion. Thus a defense attorney is often placed in the pretrial position of telling his client that he has no idea of what the witnesses will say at trial and no real opportunity to investigate the truth of the statements since they will be hearing the statements for the first time at trial.

None of this does much to inspire the confidence of one falsely accused that justice will be done. In fact, the confidence of the accused will have been severely shaken at the point of pretrial plea discussions because nothing else has worked the way it should have up to that point. Thus innocent people will plead guilty in order to avoid the more severe consequences of going to trial. The system puts immense pressure on them to do so just as the system puts pressure upon insurance companies to sometimes pay undeserving claims. The chief difference is that the insurance representatives are only in danger of losing their jobs and not of going to prison for a long time.

The system is more coercive now than at any other time in undersigned counsel's thirty-two years of practice. There are less safeguards with respect to multiple and unconstrained sentences now than there used to be. At common law the merger doctrine existed that held that if the conduct of an accused resulted in the commission of multiple offenses, the state should elect which offense should apply to the conduct and the other offenses would merge into the single offense. Ohio codified this common law doctrine with the allied offense of similar import statute, R.C. 2941.25, which, according to the committee

comment, was designed "to prevent 'shotgun' convictions." However, this statute was changed from a shield for the defendant into a sword for the state in *State v. Rance* 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, when this Court determined that the purpose of the statute was actually to allow for more cumulative punishments than could otherwise be imposed by law rather than to prevent them.

There used to be a minimum maximum sentence of fifteen years of imprisonment that applies to the longest of non-life, aggregate prison terms so that if a person received an aggregate sentence of 150 years to 300 years of imprisonment, he would be eligible for parole after fifteen years. This was abolished by the sentencing reforms which provided for sentencing guidelines for the imposition of consecutive and maximum sentences. These guidelines have been ruled unconstitutional and the prevailing view is that the judges have no constraints with respect to the imposition of maximum and consecutive sentences.

Now we have situations where a person can be facing more time for a minor crime spree where he used his grandfather's credit card to fill up his motorcycle's gas tank eight times within a month than he could for aggravated robbery or even murder. Because the victim was elderly, he could be charged with eight counts of felony theft, eight counts of felony misuse of a credit card, eight counts of felony forgery and eight counts of felony unauthorized used of property. He could be potentially convicted and sentenced to maximum consecutive sentences on all thirty-two felony counts if he went to trial and the

jury did not believe the defendant when he asserted that his grandfather was old and senile and did not remember that he had given the defendant permission to use the card in exchange for work that he had done for his grandfather.

The pressure is immense to plead guilty when the potential consequences can be so unlimited and severe. The person facing 32 felony counts would be very foolish to risk going to trial if he was told that he could plead to eight forgery counts and receive judicial release. Otherwise he could be facing five, ten, or maybe over thirty years of imprisonment if the judge was angered over an elderly person being victimized and by the conclusion, sometimes drawn by judges, that the defendant showed no remorse for his actions as demonstrated by his decision to go to trial and his failure to accept responsibility by pleading guilty.

Sometimes people plead guilty to things they did not do merely to get out of jail that day. People held in lieu of bail will plead at arraignment or at a pretrial hearing if they believe they can go home that day on judicial release.

Even guilty people face pressure to plead to things that they are not guilty of because they might be over charged or face multiple counts for the same conduct and must make their best deal in order to minimize the consequences even if this means pleading to charges greater than actually were committed.

The pressure on innocent people to plead guilty is immense. So is the pressure of a guilty person to plead to charges greater than he actually committed in order to avoid the consequences of trial. Nothing that this Court can do in this case will end this immense pressure but the Court needs to recognize that injustice does occur as a result of the tremendous pressure

imposed upon people to plead guilty and that legal steps have been implemented to help ensure that guilty pleas are entered voluntarily and knowingly and that these steps are simple, basic, and must be followed if justice is to be served.

Boykin v. Alabama (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, stands for the proposition that the court must establish on the record that a guilty plea was knowingly and voluntarily entered and that the accused understood the important constitutional rights that he was waiving by entering the plea. The Court noted that:

> It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. [Id. 395 U.S. at 242]

The Court further noted that "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality" of guilty plea proceedings and noted that the issue of the waiver of a federal constitutional right was governed by federal standards. [Id 395 U.S. at 242-243] The Court then held:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought (Garner v. Louisiana, 368 U.S. 157, 173, 82 S.Ct. 248, 256, 7 L.Ed.2d 207; Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326), and forestalls the spin-off of collateral proceedings that seek to probe murky memories. [Id 395 U.S. at 243-244, footnotes omitted]

Thus *Boykin* does not stand for the proposition that a guilty plea is voluntary if the accused is just advised of three constitutional rights. Rather, it stands for the proposition that a judge must engage in a meaningful colloquy with the accused to ensure that he has a "full understanding of what the plea connotes and of its consequence." The reference to the three required constitutional rights that must be given was more to note that any plea would be "per se" involuntarily or unknowingly entered without reference to these rights. However, just the giving of these enumerated rights would not establish that the plea was knowingly and voluntarily entered.

Crim.R. 11(C)(2) sets forth the following guidelines for guilty pleas 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 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.
>
> (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. [emphasis added]

In the instant case, the trial court failed to inform the defendant that the state was required to prove the defendant's guilt beyond a reasonable doubt at a trial. (Tr. 2-10) With respect to whether or not the defendant understood the nature of the charges, the trial court merely asked if he understood the nature of the offense and never explained the nature of the charge to the defendant. (Tr. 3, 4)

The criminal rules state that a judge shall not accept a plea without informing the defendant and determining that he understands that, by entering the plea, he is waiving his right to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial. This is unquestionably a federal constitutional right that applies to the states through the Due Process Clause. It is a right that one must be aware of before any guilty plea can be knowingly and intelligently made.

The Court of Appeals noted at ¶10 that at the time *Boykin* was decided in 1969 there was some question about whether or not the right to have the state prove guilt beyond a reasonable doubt was a federal constitutional right that extended to the states through the Due Process Clause. The court noted that this issue was clearly resolved in *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, when the United States Supreme Court held that this basic and fundamental federal constitutional standard also applied to the states. The holding in *Boykin* was that the plea proceedings had to demonstrate **on the**

record that the plea was knowingly and voluntarily entered. The holding in ***Boykin*** regarding the three constitutional rights was illustrative, not exhaustive. It just makes no sense to hold that a person must be informed that he has a right to confront witnesses before his plea can be considered to have been knowingly entered but that the plea can be knowingly and intelligently entered if he is not aware of his right to have a trial where the state must prove his guilt beyond a reasonable doubt.

In *State v. Higgs* (1997), 123 Ohio App.3d 400, 704 N.E.2d 308, noted that it would be an anomaly to hold that a defendant be informed in an intelligent manner as to four of the constitutional rights set forth in Crim.R. 11 but not to the fifth constitutional right set forth in the rule.

In the instant case the defendant was not even substantially informed of his right to have his guilt proven beyond a reasonable doubt. The only reference in the record to any attempt to impart this information to the defendant is the printed language found in the guilty plea form. However, the fact that an explanation of a right that the court must inform the defendant of under Crim.R. 11 is buried somewhere in a plea form, does not demonstrate that the defendant necessarily read or understood the plea form. As noted in *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, the obligation is upon the trial court to explain each right to the defendant in a "manner reasonably intelligible to that defendant." [Id. 66 Ohio St.2d at 480] In this case the trial court engaged in absolutely no dialogue with the defendant that informed the defendant of his right to have the state prove his guilt beyond a reasonable doubt.

In many respects this case is not so much about the rights of the accused as it is about the fundamental process and the dignity of the courts. The rule is simple. It states that the court shall inform the defendant of this important constitutional right. There is nothing inherently difficult about complying with this rule. It just requires the simple reading of a form. An average fourth grader could comply with the rule with minimal training. If a judge gets easily confused or loses track of what he or she has read, the form could be modified to include check marks for each item. If up to 95% of felony convictions are obtained through pleas and it is so simple to inform the defendants of the critical rights they are waiving by entering the plea, why should this Court, in its supervisory capacity, not enforce the rule? In the military, even minor rules are enforced so that in critical situations orders will be followed. It is just basic discipline. This is not a minor rule. This is the rule by which most felony convictions are obtained and where defendants waive their most important constitutional rights and safeguards. It might be the single most important rule to our criminal justice system.

The Court cannot provide a foolproof system where the innocent will not plead guilty or the guilty will not be pressured to plead guilty to greater offenses than they actually committed. The most intelligent choice an innocent person might make is to plead guilty. It is better to spend three years in prison for a crime you did not do then to spend ten years or the rest of your life. People will be wrongly convicted at trial and the only thing that the justice system can do is to make sure the trials are properly and fairly conducted. People will also be

coerced and pressured to plead guilty at plea proceedings because such proceedings are by their very nature pressure-packed and coercive. The only thing the justice system can do is to ensure that such proceedings are properly and fairly conducted. The proceedings are not properly and fairly conducted when a court ignores a basic rule designed to demonstrate that a defendant is aware of a fundamental constitutional right that he is giving up by pleading guilty. If the courts cannot comply with such a basic obligation expressly demanded by rule, how can the public and the litigants have any faith at all in the system? Should we change the name of the Rules of Criminal Procedure to Suggestions for Criminal Procedure and declare that the rules are merely advisory when convenient for the courts?

The Failure of the Court to Determine that the Defendant Understands that the State Is Required to Prove the Defendant's Guilt Beyond a Reasonable Doubt at a Trial Is Plain Error

Crim.R. 52(B) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Without question, the trial court's failure affected a substantial right. The most troubling part of the state's argument in this regard is its assertion that the defendant has the obligation to object and to bring this error to the trial court's attention. If the defendant knew enough to object to the failure to advise him of this right there would be no need for such advice in the first place. If the implication is that counsel for the defendant must bring this error or defect to the court's attention, then *Boykin* and Crim.R. 11 have not been correctly interpreted.

It is the trial court's obligation to question the defendant and place on the record sufficient information to determine that the plea was knowingly and voluntarily entered into, which, by definition, includes informing the defendant of the constitutional rights that he is waiving and determining that he understands this. It is not the prosecutor's job to place this on the record nor is it defense counsel's duty. The rule clearly places this obligation upon the court. Nor can it be argued that this obligation was not properly brought to the attention of the court. Crim.R. 11 provides for this duty and the rule properly brought this obligation to the attention of the trial court.

The final analysis is always whether or not the record establishes that the plea was knowingly or voluntarily entered into. In order to minimally comply with this requirement it is necessary for the record to establish that the defendant knew of his important constitutional rights that were being waived by the guilty plea. There is no presumption that the defendant understands these rights, this must be established on the record. The fact that defense counsel did not know enough to object has no relevance to a determination that must be apparent from the record. In fact, one could conclude that if defense counsel, the judge, and the prosecutor were unaware of this right then it is even more unlikely that the defendant knew of it.

In *Sullivan v. Louisiana* (1993), 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182, the Supreme Court dealt with a case involving a deficient reasonable doubt jury instruction which the Supreme Court of Louisiana had held to be harmless beyond a reasonable doubt. The Court stated:

> In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), we rejected the view that all federal constitutional errors in the course of a criminal trial require reversal. We held that the Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of the conviction if the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.,* at 24, 87 S.Ct., at 828. The *Chapman* standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial." [Id. 508 U.S. at 278-279]

The Court noted that the *Chapman* standard was premised upon a jury verdict that could be scrutinized to determine that the verdict was not attributable to the error in question. The Court then noted that if there is no jury verdict, ""[t]here is no *object,* so to speak, upon which harmless-error scrutiny can operate." [Id. 508 U.S. at 280] The court further held:

> Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: In *Fulminante,* we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S., at 309, 111 S.Ct., at 1265, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *id.,* at 307-308, 111 S.Ct., at 1252, 1264. **Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort**, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose, supra,* 478 U.S., at 577, 106 S.Ct., at 3105. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana,* 391 U.S., at 155, 88 S.Ct., at 1451. **The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."** [Id 508 U.S. at 281-282]

A guilty plea results in a denial of the right to a jury verdict of guilt beyond a reasonable doubt, which is why *Boykin* held that it must be clearly established on the record that it was knowingly and voluntarily entered into and that the accused understood the constitutional rights that he was giving up by pleading guilty. Because the defendant was not advised of his right to have the state prove his guilt beyond a reasonable doubt at trial, it cannot be affirmatively inferred from the record that he understood this right and that he was willing to waive this right by entering a guilty plea.

There is no way of telling from the record that this error was harmless or that the defendant would have still been willing to enter his plea if he understood this right. This is the deprivation of a right, "with consequences that are necessarily unquantifiable and indeterminate" as noted above and therefore "unquestionably qualifies as structural error."

CONCLUSION

The Constitution and the Criminal Rules clearly provide that a guilty plea must be knowingly and voluntarily entered and that the accused understands the constitutional rights he is waiving by making such a plea. The judge has an express duty to make a proper record and to inform the defendant that the state is required to prove his guilt beyond a reasonable doubt at trial and to determine that the defendant understands this right. The trial court completely failed to abide by the Constitution and the law in this regard and it cannot be concluded that the defendant's guilty plea was knowingly and voluntarily entered. The Court

of Appeals was correct in its judgment in this regard and the decision should be affirmed.

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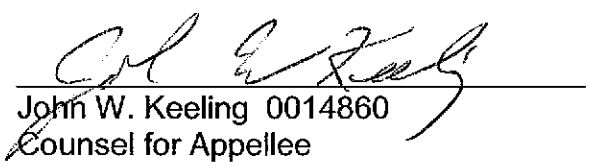
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was hand delivered to Steven L. Taylor, Assistant Franklin County Prosecutor, 373 South High Street, Thirteenth Floor, Columbus, Ohio 43215, on this Wednesday, October 24, 2007.



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