

THE SUPREME COURT OF OHIO

STATE OF OHIO, : Supreme Court Case No. 07-2246
Appellant, : On Appeal from the Mahoning
v. : County Court of Appeals
 : Seventh Appellate District
DAVID ROWBOTHAM, : Court of Appeals No. 06MA59
 :
Appellee. :

MEMORANDUM IN RESPONSE
OF APPELLEE DAVID ROWBOTHAM

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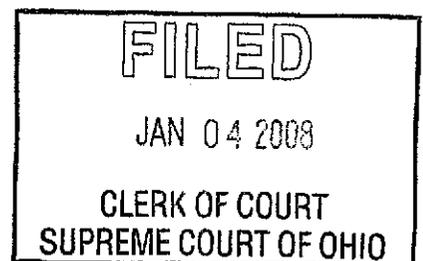


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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST NOR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should not accept jurisdiction in *State v. Rowbotham*, 7th District Case No. 06MA59, because the case does not involve a substantial constitutional question and is not of public or great general interest. The Seventh District Court of Appeals properly applied this Court's analysis regarding the entering of a guilty plea. This Court has previously determined that the failure to inform a defendant that he or she is waiving the right of compulsory process of witnesses by entering a guilty plea constitutes reversible error and no showing of prejudice is required. *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115. Any issue that the State has with the court of appeals' analysis of the trial court's failure to inform Mr. Rowbotham of his right to have the State prove each and every element *beyond a reasonable doubt* is not dispositive, because Mr. Rowbotham's plea must be vacated under *Ballard*.

This Court has stated that a failure to adequately inform a defendant that he or she is waiving a constitutional right by entering a guilty plea will invalidate the plea, though failure to inform a defendant of nonconstitutional rights will not invalidate a guilty plea unless the defendant suffered prejudice. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12. Furthermore, this Court has stated that requiring the State to prove a defendant's guilt beyond a reasonable doubt is a constitutional right which must be expressly understood and relinquished. *State v. Stewart* (1977), 51 Ohio St.2d 86, 89, 364 N.E.2d 1163. Finally, this Court has stated that there is a presumption that a guilty plea is not entered knowingly and voluntarily when dealing with a failure to inform a defendant that he or she is waiving a constitutional right by pleading guilty, and that an appellant need not prove prejudice under such circumstances. *Griggs*, at ¶12.

This Court should decline to accept jurisdiction in this case because this Court has previously addressed these issues. While the subject matter of Appellant's request for jurisdiction is a substantial constitutional right, no question is presented for this Court to resolve.

STATEMENT OF THE CASE AND FACTS

Mr. Rowbotham pleaded guilty to attempted kidnapping, and attempted extortion, as part of a plea agreement. Originally Mr. Rowbotham was charged with attempted burglary, attempted kidnapping, and attempted extortion. The State agreed to dismiss the attempted burglary charge, in exchange for a guilty plea to the other counts. The trial court accepted Mr. Rowbotham's guilty plea, and sentenced Mr. Rowbotham to a six-year prison term.

Mr. Rowbotham's written plea agreement properly advised him of every constitutional right that he waived by entering a guilty plea. But the trial court did not address Mr. Rowbotham personally, in open court, regarding that waiver. During Mr. Rowbotham's plea hearing, the trial court was required to comply strictly with Crim.R. 11(C), because Mr. Rowbotham pleaded guilty to two felony-level offenses. However, the court merely asked Mr. Rowbotham the following:

The Court: Do you understand by changing your plea this morning you're giving up certain substantial and constitutional rights, such as your right to trial by jury, the right to have the state prove each element of each crime against you, the right to confront witnesses who testify against you, and the right not to testify if you so desire at your trial or any other proceeding?

The Defendant: Yes, I do.

Mr. Rowbotham appealed and the Seventh District Court of Appeals granted his appeal, vacating his plea and reversing and remanding for further proceedings.

RESPONSE TO STATE'S PROPOSITIONS OF LAW

The State's propositions of law present several intertwined arguments. First, the State has implicitly argued that the trial court was not required to inform Mr. Rowbotham that by pleading guilty, he waived his right to require the State to prove each element of the charged offenses beyond a reasonable doubt. Second, the State has argued that Mr. Rowbotham's guilty plea was not subject to reversal by the court of appeals because he has not demonstrated that he was prejudiced by the trial court's failure to inform him of one of the rights being waived by entering a plea of guilty. As described below, the State's arguments are without merit, and this Court should not accept jurisdiction in this case.

A. Constitutional vs. nonconstitutional rights and Criminal Rule 11(C).

Before accepting a guilty plea to a felony from a defendant, a trial court must engage the defendant in a colloquy, and inform the defendant of the rights that he or she is waiving by pleading guilty. See Crim.R. 11(C). To what degree a court must comply with the requirements of Crim.R. 11(C) during that colloquy depends upon the nature of the rights at issue. *Griggs*, at ¶12.

For a trial court to comply with the provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights, at the time of entering the guilty plea the court must inform the defendant of the constitutional rights being waived by entering that plea. *Ballard*, 66 Ohio St.2d at 477. Regarding the nonconstitutional rights described in Crim.R. 11(C), only substantial compliance with the rule is required. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. But the United States Supreme Court has held that the right to have one's guilt proven beyond a reasonable doubt is a constitutionally protected right. See *Apprendi v. New Jersey* (2000), 530 U.S. 466, 477-478; *In re Winship* (1970), 397 U.S. 358, 364.

B. Prejudice is presumed when constitutional rights are involved.

This Court has previously explained that the “failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly,” however, the “failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffers prejudice.” *Griggs*, at ¶12, citing *Nero*. In the present case, the State has argued that the reasonable doubt standard is constitutional, and that the defendant’s right to be informed of that standard is a constitutional issue. The court of appeals stated that the right to be proven guilty beyond a reasonable doubt is a constitutional right, and a trial court’s obligation to inform a defendant that he or she waives that right by pleading guilty is subject to strict compliance with the provisions of Crim.R. 11(C). *Rowbotham*, at ¶9. Finally, in *Stewart*, this Court discussed a court’s failure to inform a defendant that a guilty plea waives the right to require the State to prove guilt beyond a reasonable doubt, and held that it is a “constitutional right which must be expressly understood and relinquished.” *Stewart*, at 89. When a trial court fails to include that information in a guilty plea colloquy, prejudice is presumed, and the State’s argument that Mr. Rowbotham failed to demonstrate prejudice on appeal is without merit.

The State’s reliance upon *Stewart* is misplaced. *Stewart* dealt with the nonconstitutional right to be informed regarding eligibility for probation. When a nonconstitutional right is at issue, only substantial compliance with the provisions of Crim.R. 11(C) is required, and a defendant must demonstrate prejudice. *Griggs*, at ¶12. *Stewart*’s discussion of substantial compliance with Crim.R. 11(C) and a showing of prejudice are not applicable to the present case.

The State has argued that Mr. Rowbotham did not show plain error as required by Criminal Rule 52(B). Discussing the trial court’s failure to explain the waiver of constitutional

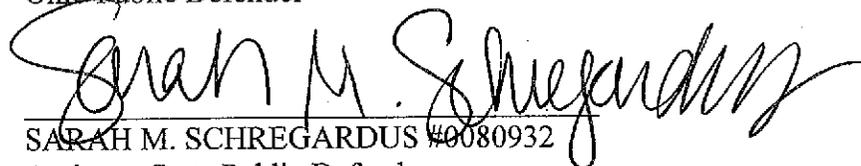
rights involved in a guilty plea, the United States Supreme Court has held that it was plain error to accept a guilty plea without affirmatively showing that it was intelligently and voluntarily made. *Boykin v. Alabama* (1969), 395 U.S. 238, 242. This Court, in interpreting *Boykin*, has held that a guilty plea is constitutionally infirm when the defendant is not informed in a reasonable manner of the constitutional rights being waived by entering a guilty plea. *Ballard*, at 477. As the right to require the State to prove each element of a charged offence beyond a reasonable doubt is a constitutional right, a trial court's failure to inform a defendant of that right during a guilty plea colloquy constitutes a plain error affecting a substantial right. The court of appeals correctly vacated Mr. Rowbotham's guilty plea and remanded to the trial court.

CONCLUSION

For the foregoing reasons, David Rowbotham respectfully asks that this Court decline to accept jurisdiction, and dismiss the State's appeal.

Respectfully submitted,

TIMOTHY YOUNG #0059200
Ohio Public Defender



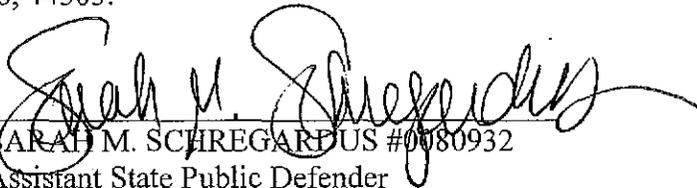
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN RESPONSE OF DAVID ROWBOTHAM was forwarded by regular U.S. Mail this 4th of January, 2008 to Ralph M. Rivera, Assistant Prosecuting Attorney, Mahoning County Prosecutor's Office, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio, 44503.


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