

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1448

STATE OF OHIO, * Case No. _____
Plaintiff-Appellant, * On appeal from the Lucas County
Court of Appeals, Sixth Appellate
District *
-vs- * Court of Appeals Case No.
CHRISTOPHER BARKER, L-09-1139
Defendant-Appellee. *

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF JURISDICTION

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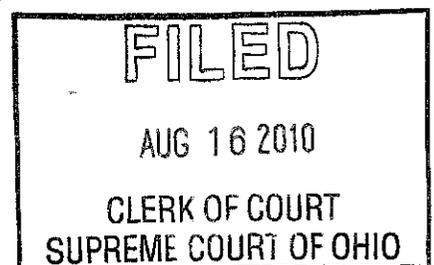
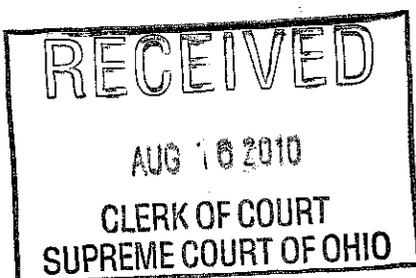


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EXPLANATION OF WHY THIS MATTER IS OF PUBLIC OR GREAT GENERAL INTEREST

This case permits a determination of whether a trial court's choice of a single word during a plea colloquy--the word "call" as opposed to "subpoena" or "compulsory process"-- is sufficient to invalidate a plea, even when the defendant signed a written plea acknowledging his relinquishment of the right to "use the power of the court to call witnesses to testify for me."

Resolution of this case involves two issues that have divided Ohio's appellate courts. First, the case presents the issue of whether a trial court's language permitting different inferences, one of which is consistent with a constitutional right included in Crim.R. 11(C)(2)(c), is sufficient to inform the defendant of that constitutional right. In this case, the trial court informed appellee that by virtue of his plea, he would give up the "right to call witnesses to speak on your behalf." Appellant submits that the word "call" in this context is sufficient to convey compulsion, and that the use of the word "call" is more readily understandable to a lay person than "subpoena" or "compulsory process for obtaining witnesses." The Sixth Appellate District, however, held that a term such as "power to force," subpoena" or "compel" must be used with respect to the right to compulsory process. See *State v. Barker*, 6th Dist. No. L-09-1139, 2010-Ohio-3067, ¶13.

Ohio's courts have reached differing conclusions when considering this issue. See *State v. Ward*, 2nd Dist. No. 21044, 2006-Ohio-832, ¶12 (statement that defendant would give up "right to have [his] own witnesses come in here and testify" adequately

informed defendant that he would relinquish the right to compulsory process); and *State v. Anderson* (1995), 108 Ohio App.3d 5, 12, 669 N.E.2d 865 (trial court's advice during plea colloquy that "[y]ou are giving up your right to call witnesses on your behalf" was sufficient to meet the requirements of Crim.R. 11(C)). Cf. *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, ¶9; and *State v. Smith*, 8th Dist. No. 92320, 2009-Ohio-5692, ¶35. The State seeks review of the issue in order to clarify the extent to which language used during a plea colloquy must mirror the language of Crim.R. 11(C)(2)(c).

But this case also presents a second issue for this Court's determination, and that issue has likewise resulted in a split among the lower appellate courts. Assuming for the purpose of argument that the word "call" is ambiguous in the context of the right to compulsory process for obtaining witnesses, the issue then becomes whether a trial court's verbal description of a constitutional right may be clarified by reference to a written plea executed contemporaneously by defendant and his counsel.

In this case, the Sixth Appellate District interpreted this Court's decision in *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621 to preclude reference to any other portion of the record. The Sixth District focused its attention on a single line from *Veney*, "the court cannot simply rely on other sources to convey these constitutional rights." See *State v. Barker*, 6th Dist. No. L-09-1139, 2010-Ohio-3067, ¶15. However, the trial court in this case did not "simply" rely on the written plea. Rather, the trial court verbally addressed the right of compulsory process of witnesses, but used the word "call" instead of "compel" or "subpoena."

Notwithstanding the Sixth Appellate District's interpretation of *Veney*, at least one other district of the Court of Appeals has permitted reference to the record to clarify a verbal description of a constitutional right during a plea colloquy. The day before the Sixth District's decision in this case, the Tenth Appellate District issued an opinion that specifically permitted reference to the record as a whole under virtually identical circumstances. In *State v. Jordan*, 10th Dist. No. 09AP-1080, 2010-Ohio-2979, the Tenth District considered the following exchange at a plea hearing:

THE COURT: Do you understand that you would have the right to call witnesses on your behalf?

MR. JORDAN: Yes, ma'am. (Tr. 21.)

Id. at ¶6. The Tenth District concluded that "[t]he record, taken as a whole, clearly indicates that Jordan knew the particulars about how defense witnesses would be made available to the witness stand and that Jordan gave up that right." Id. at ¶9 (emphasis added). By permitting consideration of the record as a whole in evaluating whether the trial court strictly complied with its obligation to inform defendant of the right to compulsory process, the outcome of *Jordan* was at odds with the Sixth District's decision in this case. See also *State v. Nicholas*, 11th Dist. No. 2009-P-0049, 2010-Ohio-1451, ¶20 (considering a written plea as well as plea colloquy in assessing defendant's claim that he was not informed of his right of compulsory process).

The significance of these issues demands this Court's attention. Interpretation of the trial court's statement during the plea colloquy will provide trial courts with additional guidance as to how closely the oral colloquy must mirror the language of Crim.R. 11(C)(2)(c). Resolution of the case will also guide appellate courts by answering the

question of whether the record as a whole may be considered in interpreting a verbal statement regarding one of the constitutional rights enumerated in Crim.R. 11(C)(2)(c). The State therefore respectfully submits that review of the Sixth District's decision is warranted in order to guide both trial and appellate criminal proceedings.

STATEMENT OF THE CASE

On January 7, 2009, appellee was indicted on five counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), all felonies of the third degree. Appellee subsequently entered a plea of no contest to the first three counts of the indictment and was sentenced to a term of four years imprisonment for each count, to be served consecutively to each other, for a total term of twelve years.

Appellee claimed in his direct appeal that he did not knowingly, intelligently and voluntarily enter his plea of no contest because the trial court's verbal colloquy did not adequately inform him of his right to compulsory process of witnesses. The Sixth District reversed, reasoning that the use of the trial court's use of the word "call" during its plea colloquy did not adequately convey the court's ability to compel a witness to testify, and that the written plea could not be considered in evaluating whether the trial court strictly complied with Crim.R. 11(C)(2)(c). See *State v. Barker*, 6th Dist. No. L-09-1139, 2010-Ohio-3067.

STATEMENT OF FACTS

The charges in this case resulted from sexual conduct between appellee, who was between 23 and 24 during the time of the offenses, and his half-sister, who was thirteen. (Tr. April 22, 2009 at p. 11.) In October, 2008, appellee's girlfriend found him and the victim naked in bed together in the girlfriend's home. Appellee later admitted during a police interview that he supplied the victim with drugs and alcohol and had vaginal, anal and oral sex with the victim on average of three to four times a month over a three year period. (Id. at p. 12.)

At his plea hearing, appellee stated that he was 28 years old, could read and write and understand English, and was not under the influence of drugs or alcohol. (Tr. April 22, 2009 at pp. 2, 8.) He stated that no threats or promises were made to induce him to enter the plea. (Id. at p. 8.)

Appellee also acknowledged that he understood the consequences of the plea. He said that he understood that each count to which he was entering a plea was a felony of the third degree, to which he might be sentenced from one to five years, and that those sentences could be run consecutively for a total potential term of incarceration of 15 years. (Id. at p. 3.) He recognized that the maximum possible fine for each of the offenses was \$10,000, and that he would be required to register as a Tier II sex offender. (Id. at p. 4.) He also said that he understood that he would be subject to a mandatory period of five years of post-release control, and that he understood the consequences of a violation of post-release control. (Id. at pp. 5-6.)

Appellee acknowledged that he understood he was relinquishing certain constitutional rights, including the "right to call witnesses to speak on your behalf." (Id.

at p. 8.)

Finally, appellee acknowledged that he had reviewed the written plea with his attorney, that he was satisfied with his attorney's advice, counsel and competence, and that he understood the plea. (Id. at pp. 12, 7.) The written plea which appellee executed included the following statement:

I understand by entering this plea I give up my right to a jury trial or court trial, where I could see and have my attorney question witnesses against me, and where I could use the power of the court to call witnesses to testify for me.

(Plea form executed April 22, 2009 and journalized May 7, 2009.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A trial court strictly complies with Crim.R. 11(C)(2)(c) when its description of a constitutional right employs language reasonably intelligible to the defendant and consistent with that constitutional right. The right to compulsory process of witnesses is sufficiently described by the phrase "right to call witnesses to speak on your behalf." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, explained.

Crim.R. 11 (C)(2)(c) "requires that the defendant be advised of the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt." *Veney*, supra, 2008-Ohio-5200, at ¶19. A trial court must strictly comply with the obligation to inform a defendant of these rights. *Id.* at ¶18 (citation omitted).

Veney confirmed that strict compliance does not require the use of exactly the same wording as that employed by Crim.R. 11(C)(2)(c). Rather, the test for strict compliance is whether the language employed by the trial court is "reasonably intelligible" to the defendant:

"Failure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his [*Boykin* rights], is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant." (Emphasis added.) *Ballard*, 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph two of the syllabus, modifying *State v. Caudill* (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601. With that holding, we recognized that a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.

Id., at ¶27.

The use of the word "call" serves the purpose recognized in *Ballard* and *Veney*

of conveying information in a manner understandable to a defendant. "Call" is recognized to be synonymous with "summon." Dictionary.com Unabridged. Random House, Inc. <http://dictionary.reference.com/browse/call> (accessed: August 12, 2010). This connotation of the word "call" is evident in its everyday usage. Individuals may be "on call" in their professions, meaning that they may be required to perform professional duties. Citizens may be "called" for jury duty, a call that they may not legally ignore. Members of military reserves may be "called up" or summoned for active duty.

The word "call" thus conveys the idea that one is required to appear or to perform. This connotation arises without the use of words such as "subpoena" or "compulsory," words that may not even be within a lay person's vocabulary:

In addition, to "call" means to "summon." Garner, Black's Law Dictionary (8th Ed.2004) 217. Therefore, I believe that the trial court adequately conveyed the nature of this right to the defendant. In fact, I believe that the trial court's words conveyed an even clearer message than does a recitation of the right to "have compulsory process for obtaining witnesses." Crim.R. 11(C)(2)(c). The words "compulsory process," "subpoena," and "compel witnesses" have legal significance and implications that a defendant may not know or understand. If the court uses these terms, a defendant may subsequently argue that he did not understand the right he was waiving because he did not know the meaning of "compulsory process."

State v. Cummings, 107 Ohio St. 3d 1206, 2005-Ohio-6506, ¶14, Lundberg-Stratton, J., dissenting.

In short, the trial court's verbal description of the right to compulsory process of witnesses employed a word that frequently and commonly carries a connotation of action required by law or authority. Accordingly, appellant seeks a determination that the trial court's plea colloquy strictly complied with the obligations set forth in Crim.R. 11(C)(2)(c).

Second Proposition of Law: When the trial court verbally addresses a constitutional right during a plea colloquy, an ambiguity in wording may be clarified by reference to other portions of the record, including the written plea.

In this case, in addition to the trial court's verbal statements during the colloquy, appellee had the benefit of notices contained in the written plea. The plea, executed by defendant and his counsel, acknowledged relinquishment of his right to a trial by jury "where I could use the power of the court to call witnesses to testify for me." The Sixth Appellate District chose to disregard the written plea, reasoning that this Court's holding in *Veney* precluded its consideration of anything other than the verbal colloquy. Appellant now seeks a clarification that *Veney* does not preclude consideration of other portions of the record under the circumstances of this case, where appellee sought to invalidate his plea based on the choice of words used during the plea hearing, as opposed to a total failure to discuss the constitutional right in question.

Significantly, *Veney* did not offer any interpretation or evaluation of a trial court's verbal statement regarding a constitutional right. In that case, there was apparently no discussion of the right whatsoever during the plea colloquy--the trial court plainly "**failed to orally inform**" the defendant of the right in question. *Id.* at ¶30 (emphasis added). Under those circumstances, "the court cannot simply rely on other sources to convey these constitutional rights." *Id.* at ¶29. However, the trial court in this case did not "simply" rely on the written plea. Rather, the trial court engaged in a full plea colloquy, which appellee then complained failed to inform him of his rights due to the use of the word "call."

The State submits that the distinction between this case and the facts described

in *Veney* is material. Ohio's appellate courts have frequently held that a written plea agreement may not be relied upon when the right is entirely omitted from the plea colloquy, but when a discussion of the right does occur, the written plea may be used to clarify the colloquy. See *State v. Green*, 7th Dist. No. 02CA217, 2004-Ohio-6371, ¶15 ("[o]ral ambiguities in the oral colloquy can be reconciled in some cases by a written acknowledgment of the plea and waiver of the trial rights," although "the writing does not substitute for an oral exchange when it is **wholly omitted**"); *State v. Dixon*, 2d Dist. No. 01CA17, 2001-Ohio-7075 ("[a] written acknowledgment of a guilty plea and a waiver of trial rights executed by an accused can, in some circumstances, reconcile ambiguities in the oral colloquy that Crim.R. 11(C) prescribes"). Accord *State v. Ballard*, 6th Dist. Nos. L-04-1070, L-05-1070, L-05-1027, 2006-Ohio-1863, ¶14.

Although the Sixth District interpreted *Veney* to require a change in this approach, the Tenth Appellate District continues to permit consideration of the record as a whole to clarify a verbal discussion of the right at the plea colloquy. In *Jordan*, *supra*, the Tenth District noted that the trial court's oral statement "approximates the requirement that Jordan be informed that he had the right 'to have compulsory process for obtaining witnesses' in his favor." *Id.* at ¶7. *Jordan* acknowledged that "[i]f this were the sole extent of the record on this issue, Jordan's complaint might have some merit," but went on to find that the plea form "precisely mentions Jordan's right to have 'compulsory subpoena process for obtaining witnesses' in his favor and points out that he is giving up that right by entering a guilty plea." *Id.* at ¶8. Accordingly, *Jordan* held that the trial court strictly complied with the requirements of Crim.R. 11(C)(2)(c).

Similarly, the Eleventh District has also suggested that the terms of a written plea may be appropriately considered in evaluating a claim that a defendant was not informed at his plea hearing of his right to compulsory process. See *State v. Nicholas*, supra, 2010-Ohio-1451, ¶20.

Appellant sought certification of a conflict between the Sixth District's decision in this case and the Tenth District's decision in *Jordan*. The Sixth District denied the motion on grounds that the day after its decision in *Jordan*, the Tenth District issued *State v. Troiano*, 10th Dist. No. 09AP-862, 2010-Ohio-3019. Based on *Troiano*, the Sixth District concluded that "our decision in *Barker* is no longer in conflict with the law set forth by the Tenth Appellate District."

Appellee respectfully disagrees with the Sixth District's conclusion. *Troiano* did not explicitly or implicitly overrule the Tenth District's decision in *Jordan*, and all court of appeals decisions are applicable precedent unless and until they are formally overruled. *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 58, 2008-Ohio-4914, 896 N.E.2d 672, ¶15, citing S.Ct.R.Rep.Op. 4(B). Moreover, the *Jordan* opinion may not be dismissed as failing to have considered *Veney*. To the contrary, the panel deciding *Jordan* was obviously aware of *Veney*, although the majority apparently rejected its application under the facts of that case. *Jordan*, supra, ¶¶24, 27, Connor, J., dissenting.

Finally, any perceived conflict between the two Tenth District cases may be resolved based on their factual differences. Although *Jordan*, like this case, involved a verbal discussion of the constitutional right in question, *Troiano* considered a plea hearing in which the trial court "did not inform appellant of his right against compulsory

self-incrimination." *Id.*, ¶7. In *Troiano*, application of *Veney* was proper to preclude the trial court from "simply" relying on the written plea form to provide information about a right never mentioned at the hearing. *Veney*, *supra*, ¶29.

Appellant respectfully submits that rather than reflecting a settled state of law consistent with the Sixth District's holding in this case, the case law of the Tenth District actually exemplifies the issues confronting Ohio's appellate courts with respect to the application of *Veney*. This case presents an opportunity for this Court to clarify those issues, thus providing guidance for Ohio's appellate courts.

CONCLUSION

This Court has recognized that defendants must be informed of their constitutional trial-related rights before entering a plea in order to protect both the defendant's interest in understanding his constitutional rights and in order to protect societal interest in the finality of a plea. *State v. Ballard*, 66 Ohio St. 2d 473, 479, 423 N.E.2d 115. This case raises two recurring issues implicating exactly these interests, and those issues have resulted in varying outcomes in the lower appellate courts. As a result, this case is of public and great general interest. The jurisdiction of this Court is therefore sought in order to resolve those issues for the benefit of trial and appellate courts, as well as the general public.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via facsimile and ordinary U.S. Mail this 16th of August, 2010, to Stephen D. Long, attorney for defendant-appellee, at 3230 Central Park West, Ste. 106, Toledo, Ohio 43617.



Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

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COURT OF APPEALS COURT
BRIAN B. QUILLER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1139

Appellee

Trial Court No. CR0200901024

v.

Christopher Barker

DECISION AND JUDGMENT

Appellant

Decided:

JUN 30 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas County Court of Common Pleas, appellant, Christopher Barker, sets forth the following assignment of error:

{¶ 2} "THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING THE APPELLANT'S NO CONTEST PLEA WITHOUT ENSURING THAT THE PLEA

E-JOURNALIZED

WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED AND DID NOT COMPLY WITH CRIM.R. 11(C)(2)(c)."

{¶ 3} On January 7, 2009, appellant was indicted on five counts of unlawful sexual conduct with a minor, all violations of R.C. 2907.04(A) and felonies of the third degree. He entered not guilty pleas to all five counts. Subsequently, however, he withdrew his guilty pleas and entered pleas of no contest to three of the counts in the indictment. The court found him guilty on all three counts and, after holding a sentencing hearing, sentenced appellant to four years in prison on each count, to be served consecutively for a total of 12 years in prison. The court below also found appellant to be a Tier II Child Victim Offender pursuant to R.C. 2950.01 and ordered him to comply with the registration requirements found in R.C. 2950.03(B)(3)(a) for a period of 25 years.

{¶ 4} In his sole assignment of error, appellant asserts that the entry of his no contest plea was not voluntary, intelligent, and knowing because the trial judge failed to fully comply with the requisites of Crim. 11(C), which reads:

{¶ 5} "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:

{¶ 6} "(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.

{¶ 7} "(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.

{¶ 8} "(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.)

{¶ 9} Because the rights contained in Crim.R.11(C)(2)(a) and (b) are not constitutional rights, a trial court need only "substantially comply" with its duty to inform the defendant of his rights under these sections. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 14. On the other hand, the rights articulated in Crim.R. 11(C)(2)(c) are constitutional in nature. Accordingly, a trial court must strictly comply with its obligation to inform the defendant of his rights under that section. *Id.* at ¶ 19-21. Strict compliance does not mean that the a court must use the exact wording found in Crim.R. 11(C)(2)(c) during the colloquy; it "may vary slightly, but the court cannot simply rely on other sources to convey these rights to the defendant." *Id.* at ¶ 29.

{¶ 10} Appellant urges that the common pleas judge failed to notify him of his right to compulsory process to obtain witnesses because she did not inform him of the fact "that he could compel any such witnesses to attend and testify on his behalf, which is the crux of the constitutional right to subpoena." The relevant portion of the Crim.R. 11 colloquy between appellant and the trial court judge is as follows:

{¶ 11} "THE COURT: The State is recommending that Counts Four and Five will be nulled at the time of sentencing. I do have to ask you, do you understand when you're entering a plea you're giving up your right to a jury trial or bench trial, also *giving up your right to call witnesses to speak on your behalf* or question witnesses that are speaking against you [?] Do you understand that?"

{¶ 12} "A. Yes, Your Honor." (Emphasis added.)

{¶ 13} Although a court does not necessarily have to employ the term "compulsory process" during the Crim.R. 11 colloquy, it must use some equivalent term such as the defendant has the "power to force," "subpoena," use the "power of the court to force," or "compel" a witness to appear and testify on a defendant's behalf. See *State v. Neeley*, 12th Dist. No. 2008-Ohio-034, 2009-Ohio-2337, ¶ 29. Here, the trial court did not use any of these terms when informing appellant that he was giving up the right to compel witnesses to testify on his behalf. The ability "to call witnesses" simply does not satisfy the constitutional mandate. *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, ¶ 9, quoting *State v. Smith*, 8th Dist. No. 92320, 2009-Ohio-5692, ¶ 35. See, also, *State v. Cummmings*, 107 Ohio St.3d 1206, 2005-Ohio-6506 (declining to accept

jurisdiction over a case in which the Eighth Appellate District Court determined that the phrase "right to call witnesses" was not the equivalent of the right to use compulsory process for obtaining witnesses in a defendant's favor.)

{¶ 14} Appellee points out, however, that the change of plea form reads, in relevant part: "I understand by entering this plea I give up my right to a jury trial or court trial, where I could see and have my attorney question me, and where I could use the power of the court to call witnesses to testify for me." Appellee further argues that at the change of plea hearing, the trial court asked appellant whether he had an opportunity to review the change of plea form with his attorney before signing it. Because appellant replied that he had done so, and both he and his trial counsel signed that form, appellee contends that the trial court satisfied the constitutional imperative set forth in Crim.R. 11(C)(2)(c). We disagree.

{¶ 15} The *Veney* majority plainly states that "the court cannot simply rely on other sources to convey these constitutional rights." We find that written plea agreement is another source, and, therefore, cannot be employed to satisfy the constitutional mandate in Crim. R. 11(C)(2)(c). This conclusion is bolstered by the partial concurrence and partial dissent in *Veney* authored by Justice Lanzinger, joined by Justices Lundberg, Stratton, and Cupp. Justice Lanzinger notes that the failure of a trial judge to explain the constitutional rights in Crim.R. 11(C)(2)(c), is a presumption, but has never been held to be an irrebuttable presumption. *Id.* at ¶ 34. Calling the view of the majority "formalistic," she finds that an appellate court must "review the entire record, including

written materials that have been reviewed with counsel and signed and assented to in open court." Justice Lanzinger then concludes that the holding of the majority "will invalidate convictions based upon a single omitted oral statement of the trial court." Id. at ¶ 38.

{¶ 16} Accordingly, we are required to reject the state's argument, and find that Barker was not properly informed of his constitutional rights under Crim.R. 11(C)(2)(c). Therefore, his no contest plea was not voluntary, knowing, and intelligent, and his sole assignment of error is found well-taken.

{¶ 17} The judgment of the Lucas County Court of Common Pleas is reversed and remanded to that court for further proceedings consistent with this judgment. Appellee, the state of Ohio, is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

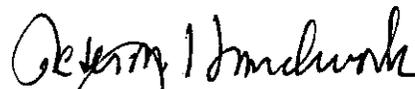
JUDGMENT REVERSED.

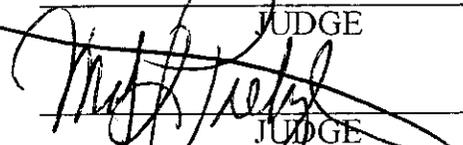
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

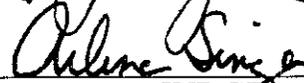
Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Arlene Singer, J.
CONCUR.



JUDGE


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.