

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2002-T-0045
ERIC LEE PORTERFIELD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 00 R 402.

Judgment: Affirmed in part; reversed in part and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Erik M. Jones, One Cascade Plaza, 20th Floor, Akron, OH 44308 (For Defendant-Appellant).

JUDITH A. CHRISTLEY, J.

{¶1} Appellant, Eric Lee Porterfield, appeals from a guilty plea accepted by the Lake County Court of Common Pleas, in which he pleaded guilty to two counts of aggravated murder, one count of attempted aggravated murder, two counts of

kidnapping, one count of aggravated burglary and one count of aggravated robbery. Each count included a firearm specification.

{¶2} The record discloses the following facts. On June 23, 2000, appellant along with Ronald Shaffer ("Shaffer") and Dennis Gossett ("Gossett") arrived at the residence of Dave Harper ("Dave") with the intent of robbing him of money and drugs. Appellant armed himself with an assault rifle, while Shaffer was armed with a twelve-gauge shotgun. Karen Mathey ("Karen") and Dave were sitting on his front porch as appellant and Shaffer approached. Appellant and Shaffer forced Karen and Dave into the house by gunpoint. At this time, Gary Bell ("Gary"), Chuck Mathey ("Chuck"), John Lago ("John"), Jennifer Atkinson ("Jennifer") and her infant son Dillon were gathered inside the house. When appellant, Shaffer, Karen, and Dave entered the house, Karen immediately ran to Jennifer and Dillon, and the three of them quickly ran up a flight of stairs to hide in a loft. Karen testified that moments after she reached the top of the stairs she heard multiple gunshots.

{¶3} After the gunfire ceased and appellant and Shaffer had left, Karen and Jennifer went back down stairs. Karen found Chuck lying face down, shot in the back and not breathing. Gary had also been shot and was lying on the kitchen floor. Dave was found wandering the house in shock, bleeding profusely from gunshot wounds to the head, arm and thigh. Ultimately, Chuck was pronounced dead at the scene. Gary was transported to a level one trauma center where he was later pronounced dead. Dave was transported via life-flight to Cleveland Metro Hospital where he was treated for and survived three separate gunshot wounds.

{¶4} Appellant was eventually arrested and charged with the following counts: two counts of aggravated murder with aggravating circumstances and firearm specifications, in violation of R.C. 2903.01(B), R.C. 2929.04(A)(5) and (7), R.C. 2929.14(C), and R.C. 2941.145 (counts one and two); one count of attempted aggravated murder with a firearm specification, in violation of R.C. 2923.02, R.C. 2905(A)(2), and R.C. 2941.145 (count 3); two counts of kidnapping with firearm specifications, in violation of R.C. 2905.01(A)(2) and R.C. 2941.145 (counts four and five); one count of aggravated burglary with a firearm specification, in violation of R.C. 2911(A)(1) and/or (2) and R.C. 2941.145 (count 6); and one count of aggravated robbery with a firearm specification, in violation of R.C. 2911.01(A)(1) and/or (3) and R.C. 2941.145 (count 7). Following his indictment, appellant filed a motion to determine his competency to stand trial and a motion to suppress. After a hearing, the trial court found appellant competent to stand trial and denied his motion to suppress.

{¶5} Appellant then entered into a plea agreement with appellee, state of Ohio, whereby appellant would plead guilty to an amended indictment. Prior to accepting appellant's guilty plea, the trial court discussed with appellant his constitutional rights and the effect his guilty plea would have on those rights. The trial court accepted appellant's guilty plea; however, appellant, acting pro se, moved to withdraw his plea prior to sentencing. The trial court granted appellant's motion to withdraw his guilty plea and reinstated the original indictment.

{¶6} After having new counsel appointed, appellant executed a jury waiver, and a three-judge panel was assembled to hear the matter. Following one full day of trial, appellant and the state entered into another plea agreement. Appellant pleaded guilty

to an amended indictment which eliminated all aggravating circumstances contained in the two counts of aggravated murder (counts one and two). During a plea hearing, the trial court again advised appellant of his constitutional rights and the effect his guilty plea would have on those rights. Appellant stated that he understood his rights and the effect of his guilty plea and requested that the trial court accept his guilty plea. Accordingly, the trial court accepted appellant's guilty plea and immediately entered sentence.

{¶7} The trial court sentenced appellant as follows: “[a] prison term of ten (10) years on Count three; ten (10) years on each of Counts Four, Five, Six, and Seven to be served concurrently to the sentence imposed in Count Three; Life with parole eligibility after serving twenty (20) years of imprisonment on Count One to be served consecutively to the sentence imposed in Count Three; and Life with parole eligibility after serving twenty (20) years of imprisonment on Count Two to be served consecutively to the sentences imposed in Counts One and Three. Defendant to be sentenced to three (3) years on the firearm specification in Count Three which shall be served prior to and consecutive to the principle sentence. The firearm specification in Counts One Two, Four, Five, Six, and Seven will merge with the firearm specification in Count Three, for an aggregate sentence of fifty-three (53) years to life.”

{¶8} Appellant again filed a motion to withdraw his guilty plea and a petition to vacate or set aside the judgment of conviction or sentence. Both the motion to withdraw and petition to vacate were denied. Appellant, acting pro se, filed a notice of appeal with this court, but the appeal was dismissed for being untimely. Subsequently, appellant was appointed counsel and filed a motion for delayed appeal which was

granted. Appellant now sets forth the following six assignments of error for our consideration:

{¶9} “[1] The trial court erred by accepting appellant’s guilty plea without first determining whether the appellant understood the effect of the plea and the maximum penalty involved.

{¶10} “[2] The trial court erred by accepting a guilty plea without first determining whether the appellant understood the effect of the plea.

{¶11} “[3] The trial court erred by accepting appellant’s guilty plea without first finding that appellant was aware that the court could immediately proceed to judgment and sentencing upon acceptance of his plea, pursuant to Crim. R.11.

{¶12} “[4] The trial court erred by accepting appellant’s guilty plea without first advising appellant that if the matter proceeded to trial, that appellee would have the burden of proving appellant’s guilt beyond a reasonable doubt as to counts 2, 3, 4, 5, 6, and 7.

{¶13} “[5] The trial court erred by accepting appellant’s guilty plea without first advising appellant that if the matter proceeded to trial an [sic] appellant chose not to testify, that his not testifying could not be construed as an indication of guilt.

{¶14} “[6] The trial court’s imposition of consecutive sentences upon appellant is contrary to the law.”

{¶15} Appellant’s first five assignments of error challenge the validity of the trial court’s acceptance of his guilty plea. Essentially, under each assignment of error, appellant argues that the trial court failed to disclose information regarding the effect his guilty plea had on certain prescribed rights. As a result, appellant maintains that the

trial court erred in accepting his guilty plea because his decision to plead guilty was not fully informed. For the sake of clarity, we will first discuss the general provisions of law that will guide our analysis of appellant's first five assignments of error.

{¶16} Our analysis of appellant's first five assignments of error begins with Crim.R. 11(C)(2). This rule provides the trial court with the various rights that must be discussed with a defendant prior to the acceptance of a guilty plea. Crim.R. 11(C)(2) states:

{¶17} "(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:

{¶18} "(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.

{¶19} "(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.

{¶20} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the right 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."

{¶21} Crim.R. 11(C)(2) creates two separate sets of rights that the trial court is required to discuss with a defendant prior to its acceptance of a guilty plea. The first set addresses constitutional rights; the second set addresses non-constitutional rights. See, e.g., *State v. Lavender*, 11th Dist. No. 2000-L-049, 2001-Ohio-8790, at 10. Ultimately, “the basis of Crim.R. 11 is to assure that the defendant is informed, and thus enable the judge to determine that the defendant understands that his plea waives his constitutional right to a trial. And, within that general purpose is contained the further provision which would inform the defendant of other rights and incidents of a trial.” *State v. Ballard* (1981), 66 Ohio St.2d 473, 480.

{¶22} On appeal, the issue becomes whether the record demonstrates that the defendant was informed of the relevant constitutional rights and incidents of a trial to warrant the conclusion that he or she understands what a trial is and that a guilty plea represents a knowing and voluntary forfeiture of those rights stemming from a trial. *Id.* Thus, “a rote recitation of Crim.R. 11(C) is not required and failure to use the exact language of the rule is not fatal to the plea. Rather, the focus, upon review, is whether the record shows that the trial court explained or referred to the right in a manner reasonably intelligible to that defendant.” *Id.* at 480

{¶23} Crim.R. 11(C)(2)(c) specifically addresses the various constitutional rights that the trial court must discuss with the defendant prior to the acceptance of a guilty plea. These constitutional rights originated from *Boykin v. Alabama* (1969), 395 U.S. 238. In *Boykin*, the United States Supreme Court held that because a defendant’s guilty plea waives several constitutional rights, the record on appeal must demonstrate that a defendant is fully informed of such waiver for his or her guilty plea to be considered

voluntary and knowing. *Id.* at 242. Therefore, to conform with these constitutional requirements, the trial court must explain to the defendant that he or she is waiving: (1) the Fifth Amendment privilege against self-incrimination; (2) the right to a trial by jury; (3) the right to confront one's accusers; (4) the right to compulsory process of witnesses; and (5) the right to require the state to prove guilt beyond a reasonable doubt. See, generally, *Boykin* at 243. See, also, *State v. Singh* (2000), 141 Ohio App.3d 137. "The court must strictly comply with these requirements, and the failure to strictly comply invalidates a guilty plea." *Lavender* at 11. Therefore, the failure "to meaningfully inform" the defendant of one or more constitutional rights contained in Crim.R. 11(C) is plain error requiring reversal. *Ballard* at 480.

{¶24} The remaining requirements of Crim.R. 11(C) pertain to non-constitutional rights. Unlike the previously stated constitutional rights, which necessitate strict compliance, non-constitutional rights require that the trial court demonstrate substantial compliance. *State v. Nero*, (1990), 56 Ohio St.3d 106, 108. Initially, the Supreme Court of Ohio required a trial court to "scrupulously adhere" to these non-constitutional rights, but that rule has since been modified and has evolved so that substantial compliance is sufficient. *State v. Stewart* (1977), 51 Ohio St.2d 86. See, also, *Nero* at 108 (holding that "[l]iteral compliance with Crim.R. 11 is certainly the preferred practice, but the fact that the trial judge did not do so does not require vacation of the defendant's guilty plea if the reviewing court determines that there was substantial compliance.")

{¶25} 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." *Nero* at 108. In other words, the failure to otherwise inform

the defendant of these non-constitutional rights *may not be* reversible error if the reviewing court determines, upon evaluation of the totality of the circumstances, that the defendant was aware of the consequences of his or her guilty plea with respect to these rights.

{¶26} In addition, if the trial court fails to substantially comply with Crim.R. 11(C), the defendant must also demonstrate that he or she was prejudiced by this lack of compliance. *State v. Johnson* (1988), 40 Ohio St.3d 130,134. See, also, Crim.R. 52(A) and 33(E). The test of prejudice queries whether the plea would have been made despite the trial court's failure to substantially comply with the prerequisites of Crim.R. 11(C).

{¶27} With these general principals in mind, we will now examine appellant's first five assignments of error individually. Under his first assignment of error, appellant contends that the trial court erred by failing to inform him that his individual sentences could be served consecutively. Appellant concedes that the Supreme Court of Ohio has held that Crim.R. 11(C) does not require a trial court to address the possibility of a consecutive sentence, but submits this assignment of error to preserve this issue for further review. In support of his contention, appellant maintains the trial court's failure to explain that the individual sentences could run consecutively precluded him from understanding the effect of his plea.

{¶28} Crim.R. 11(C)(2)(a) requires that the trial court personally address a defendant regarding "the maximum penalty involved[.]" As an initial matter, we note that this requirement does not represent a constitutional right. *Johnson* at 133. See, also,

Stewart. Thus, a reviewing court need only determine that the trial court substantially complied with Crim.R. 11(C)(2)(a).

{¶29} Notwithstanding the application of substantial compliance, the Supreme Court of Ohio has found that the required disclosure of a maximum penalty does not necessitate that the trial court inform the defendant of a possible consecutive sentence. In *Johnson*, the Court reviewed Crim.R. 11(C)(2)(a) and held, “[t]here is no specific requirement in such rule that an explanation be made that any sentences as given may run consecutively, or only concurrently, as might benefit the defendant. We shall not at this time implant verbiage that is not presently in the rule.” *Id.* at 134. The Court based this holding upon the grammatical syntax of the rule and because the rule has no relevance to the exercise of the trial court’s sentencing discretion. *Id.* at 133-134. Consequently, we are bound by the Court’s decision that a trial court is not required to personally address the possibility of a consecutive sentence with the defendant prior to accepting a guilty plea.

{¶30} A review of the colloquy between appellant and the trial court prior to the acceptance of his guilty plea reveals that the trial court did discuss with appellant the maximum penalty for each offense. Although the trial court failed to inform appellant that his sentence could run consecutively, per *Johnson*, it was not required to do so. Thus, appellant’s first assignment of error is without merit.

{¶31} In the alternative, even if the trial court was required to inform appellant of a possible consecutive sentence, the totality of the circumstances confirms that appellant subjectively understood that his plea could result in a consecutive sentence. In a document entitled the finding on the guilty plea, which was signed by appellant and

filed with the trial court on the date of his plea, appellant stipulated that “consecutive prison terms are necessary to protect the public and punish the offender” and “that consecutive terms are not disproportionate to the conduct and to the danger the offender poses[.]” Appellant’s stipulations confirm that he subjectively understood that his guilty plea could result in consecutive sentences. Therefore, although not required, the record demonstrates substantial compliance. For this additional reason, appellant’s first assignment of error is without merit.

{¶32} Appellant’s second assignment of error contends that the trial court failed to determine whether he understood the effect of his plea. As authority for this argument, appellant cites to Crim.R. 11(C)(2)(b) which states, in relevant part, that the trial court must determine whether “the defendant understands the effect of his guilty plea[.]” Specifically, appellant contends, “the trial court did not personally advise the Appellant concerning the effect of his guilty plea and the fact that the guilty plea was a complete admission of guilt to all charges.”

{¶33} As an initial matter, we note that the requirement under Crim.R. 11(C)(2)(b) represents a non-constitutional right, thereby imposing a duty of substantial compliance. Upon examination of the colloquy between the trial court and appellant prior to acceptance of his guilty plea, it is evident that the trial court did not expressly inquire as to whether appellant understood the effect of his guilty plea. However, as mentioned previously, if the totality of the circumstances demonstrates that appellant subjectively understood the effect of his plea, no error has occurred.

{¶34} Upon careful review, we find that appellant subjectively understood the effect of his guilty plea. The trial court specifically explained to appellant what each

offense was and meticulously laid out the elements of each offense. The trial court also asked the state to provide a factual basis for the charges before it accepted appellant's guilty plea. Appellee proceeded to describe the offenses, including the location and dates of the crime.

{¶35} Furthermore, the finding on guilty plea document, which was read and signed by appellant, stated, “[a]fter being fully informed by my counsel and the Court of the charges against me, I am making a plea voluntarily with the understanding of the nature of the charge and the consequences, including the penalty of the plea[.]” When this document was submitted with the trial court, appellant was asked whether he signed the document voluntarily and whether he understood the contents of the document. Appellant answered each question affirmatively.

{¶36} The foregoing demonstrates that, based upon the totality of the circumstances, appellant understood the effect of his guilty plea as required by Crim.R. 11(C)(2)(b). Accordingly, this portion of appellant's second assignment of error is not well-taken.

{¶37} Appellant further argues that under Crim.R. 11(C)(2)(b) the trial court was required to explain to appellant that his guilty plea was a complete admission of guilt to all charges. In support of his position, appellant cites *State v. Roberson* (June 20, 1997), 2d Dist. No. 16052, 1997 Ohio App. LEXIS 2640, a case from the Second District Court of Appeals. In *Roberson*, the Second District held that the trial court had a mandatory duty to inform a defendant that his guilty plea acted as a complete admission of guilt as enunciated in Crim.R. 11(B)(1). As a result, the Second District vacated the

defendant's guilty plea on the basis that the trial court failed to inform the defendant in conformance with Crim.R. 11(B)(1).

{¶38} This court has previously addressed the same question. In doing so, we have held, contra *Roberson*, that “a guilty plea is not automatically invalidated simply because the trial court failed to advise the defendant that such a plea functions as ‘a complete admission of the defendant’s guilt’ pursuant to Crim.R. 11(B)(1).” *State v. Mallon* (Dec. 17, 1999), 11th Dist. No. 98-T-0032, 1999 Ohio App. LEXIS 6131, at 13. See, also, *State v. McKee* (June 19, 1998), 11th Dist. No. 97-T-0036, 1998 Ohio App. LEXIS 2767, at 6; *State v. Guilford* (June 19, 1998), 11th Dist. No. 97-L-017, 1998 Ohio App. LEXIS 2757, at 2. Instead, we must determine whether appellant subjectively understood that his guilty plea acted in such a manner. See, e.g., *Mallon*.

{¶39} Again, we recognize that the requirement under Crim.R. 11(C)(2)(b) is a non-constitutional right. Accordingly, the rule does not mandate a verbatim recitation that a guilty plea operates as a complete admission of the defendant’s guilt. Instead, “the touchstone is substantial compliance, to wit: did the trial court substantially comply with the spirit of Crim.R. 11(C)(2)(b)?” *Mallon* at 14.

{¶40} As mentioned previously, the trial court engaged in an extensive plea colloquy with appellant. The trial court recited the elements of each offense and the potential penalties associated with each offense. Moreover, the trial court explicitly informed appellant that his guilty plea would allow him to be sentenced in accordance with the penalties discussed. When asked whether appellant understood the seriousness of the offenses and the manner in which he could be sentenced, appellant answered affirmatively.

{¶41} Under the totality of the circumstances, there can be no doubt that appellant recognized the effect of his guilty plea. Although not expressly stated by the trial court, the colloquy confirmed that appellant subjectively understood his guilty plea would act as a complete admission of guilt and that he would be sentenced accordingly. This being the case, the trial court substantially complied with Crim.R. 11(C)(2)(b). This portion of appellant's second assignment of error is also not well-taken.

{¶42} Appellant has failed to establish that the trial court erred in accepting his guilty plea because he was not fully informed of the effect of his guilty plea. Therefore, appellant's second assignment of error is without merit.

{¶43} Under his third assignment of error, appellant argues that the trial court committed reversible error by failing to advise him that it would immediately proceed to judgment and sentencing following the acceptance of his guilty plea. Appellant contends that the record demonstrates his misunderstanding as to the manner by which the trial court would proceed in judgment and sentencing.

{¶44} Pursuant to Crim.R. 11(C)(2)(b), before accepting a defendant's guilty plea, the trial court must inform the defendant and determine that he or she understands "that the court upon acceptance of the plea may proceed with judgment and sentence." Again, we recognize that the foregoing is a non-constitutional right; therefore, we will apply the substantial compliance standard.

{¶45} After reviewing the totality of the circumstances, we have determined that appellant subjectively understood that the trial court could proceed immediately to judgment and sentencing following the acceptance of his guilty plea. While the trial court did not expressly inform appellant of the procedural manner by which judgment

and sentence would be issued, literal compliance with this non-constitutional right is not required. Instead, we must determine by the evidence presented in the record that appellant understood the trial court would immediately enter judgment and sentence.

{¶46} As an initial matter, during the plea hearing appellant specifically waived his right to a pre-sentencing investigation report, raised no objections to the trial court's immediate sentence, and failed to make any request of the trial court to delay sentencing until a future date. This alone establishes appellant's subjective understanding that the trial court would move directly to judgment and sentencing after the acceptance of his guilty plea. Also, the trial court followed the identical procedural steps when accepting appellant's first guilty plea. More specifically, following appellant's first guilty plea, the trial court immediately moved to judgment and sentencing. This further demonstrates appellant's awareness of the manner by which the trial court would enter judgment and sentence.

{¶47} Moreover, appellant has failed to show any resulting prejudice. As stated previously, prejudice is established by showing that the defendant would not have entered into the guilty plea had he or she been properly informed of his rights. Here, appellant has failed to present any evidence for our review which would demonstrate that had he not understood the manner in which the trial court would enter judgment and sentence he would not have entered his guilty plea.

{¶48} Due to appellant's subjective understanding of the trial court's ability to move immediately to judgment and sentencing and his failure to show a prejudicial effect, appellant has been unable to establish any error on the part of the trial court. Appellant's third assignment of error is without merit.

{¶49} Appellant's fourth assignment of error contends that the trial court committed reversible error by failing to inform him of the state's burden of proving his guilt beyond a reasonable doubt as to counts two, three, four, five, six, and seven. As evidence of such error, appellant points to the following statement made by the trial court during the plea hearing:

{¶50} "The Court: *** [B]ut if you wanted to we could go along with that trial as has already been commenced and what would happen is then that the State would have to prove the following elements with regards to the various charges: Regarding Count 1 the State would have to prove beyond a reasonable doubt, and that would have to be to the unanimous satisfaction of all three judges, that you did in Trumbull County, Ohio, purposely cause the death of Gary Bell ***[.]"

{¶51} Appellant explains that the trial court failed to reiterate that the state's burden of proof was beyond a reasonable doubt prior to its announcement of the elements for counts two through seven. Accordingly, appellant concludes that the trial court did not strictly comply with Crim.R. 11(C)(2)(c) and his guilty plea must be invalidated.

{¶52} First, we note that the strict compliance standard is applicable. The Supreme Court of Ohio has never expressly accorded constitutional stature to the right to have one's guilt proven beyond a reasonable doubt. See, e.g., *State v. Strum* (1981), 66 Ohio St.2d 483, 484, fn. 2 (wherein the Court stated that the beyond a reasonable doubt burden of proof was not mentioned in *Boykin*, but declined to address whether it was of a constitutional nature). However, in *State v. Higgs* (1997), 123 Ohio App.3d 400, 407, this court held that the right to have one's guilt proven beyond a reasonable

doubt is indeed a constitutional guaranty. Subsequently, we have reinforced our holding in *Higgs*. See, e.g., *Singh*; *State v. Scarnati*, 11th Dist. No. 2001-P-0063, 2002-Ohio-711. In accordance with our prior decisions, we again find that the right to be proven guilty beyond a reasonable doubt is a constitutional right and, therefore, strict compliance is mandatory.

{¶53} It is clear that the trial court stated to appellant that the state's burden of proof was beyond a reasonable doubt. However, the question becomes whether the manner and language employed by the trial court "meaningfully informed" appellant as to this burden with respect to counts two through seven. After careful examination of the record before us, we conclude that appellant was "meaningfully informed."

{¶54} As mentioned previously, the ultimate purpose of Crim.R. 11(C) is to enable the trial court to determine whether the defendant understands that his or her guilty plea will waive their constitutional right to a trial and any other rights and incidents of a trial. *Ballard* at 480. In informing a defendant of such rights, a rote recitation of Crim.R. 11(C) is not required. *Id.* Therefore, the trial court's failure to reiterate the state's burden of proof prior to its recitation of each count will not, standing alone, act to invalidate a defendant's guilty plea. Instead, a reviewing court must determine whether the record demonstrates that the trial court "meaningfully informed" the defendant as to the rights of trial in a manner which allowed the trial court to determine that the defendant understands the waiver of such rights.

{¶55} Here, in addition to being informed of the state's burden of proof at the plea hearing, appellant was also advised of the burden via the finding on guilty plea document. In that document, appellant stated, "I understand I have the right to confront

and cross-examine the witnesses against me, and the right to have compulsory process for obtaining witnesses in my favor *and to require the State to prove my guilt beyond a reasonable doubt at a trial which I cannot be compelled to testify against myself.*” (Emphasis added.) As mentioned previously, appellant signed and filed this document with the trial court during the hearing on the guilty plea. After reviewing the document, the trial court asked appellant if he understood its contents. Appellant answered affirmatively.

{¶56} While the trial court’s method of explanation and choice of language runs dangerously close to failing to meaningfully inform appellant, the record before us demonstrates that the trial court was in strict compliance with the ultimate purpose of Crim.R. 11(C). Namely, that appellant understood his guilty plea would effectively waive his right to a trial in which the state would be required to prove his guilt beyond a reasonable doubt. Thus, appellant’s fourth assignment of error is without merit.

{¶57} Under his fifth assignment of error, appellant argues that the trial court erred by failing to advise him that a future decision to not testify pursuant to the Fifth Amendment to the United States Constitution could not be used against him to infer guilt. Appellant submits that “an admonishment to criminal defendants of both their right to remain silent *and* their right to not have their own silence used against them is both constitutionally required and well within the ‘contours’ of Crim. R. 11(C).” We disagree.

{¶58} This court previously addressed this issue in *McKee*. In *McKee*, we held that Crim.R. 11(C) does not require a trial court to broaden its recitation regarding the constitutional Fifth Amendment right against self-incrimination to include an explanation that a defendant’s silence cannot be used against him or her. *Id.* at 8. Our holding was

based upon the Eighth Appellate District's decision in *State v. Huff* (May 8, 1997), 8th Dist. No. 70996, 1997 Ohio App. LEXIS 1879. In *Huff*, the court stated, "[w]e find nothing in Crim.R. 11(C)(2)(c) that would require the trial court to so advise a defendant. *** We find no precedent that would require the trial court to go beyond the statement used [in Crim.R. 11(C)(2)(c)] and defendant does not suggest that any such authority exists." *Id.* at 5-6

{¶59} We now reaffirm our previous holding from *McKee* and reiterate that a trial court is not obligated to go beyond the language of Crim.R. 11(C)(2)(c), to include an explanation that a defendant's silence cannot be used against him or her. Instead, based upon the language of Crim.R. 11(C)(2)(c), the trial court need only advise a defendant that he or she "cannot be compelled to testify against himself or herself."

{¶60} In the instant case, during the plea hearing colloquy the trial court gave appellant the following explanation with respect to his Fifth Amendment privilege:

{¶61} "The Court: *** You also have a Fifth Amendment right and that means the state cannot force you or compel you to testify against yourself. Do you understand each and every [sic] of those individual rights?

{¶62} "The Defendant: Yes."

{¶63} The foregoing confirms that the trial court adequately addressed appellant's right against self-incrimination. Although the trial court failed to inform appellant that his silence could not be used against him, it was not required to do so. Thus, appellant's fifth assignment of error is without merit.

{¶64} Appellant's sixth assignment of error contests the trial court's imposition of consecutive sentences. In support of his contention, appellant argues that the trial court failed to comply with the sentencing requirements of R.C. 2929.14(E)(4). We agree.

{¶65} Under R.C. 2953.08, our review of a felony sentence is de novo. *State v. Raphael* (Mar. 24, 2000), 11th Dist. No. 98-L-262, 2000 WL 306776, at 2. However, this court will not disturb appellant's sentence unless we find, by clear and convincing evidence, that the record does not support the sentence or that the sentence is otherwise contrary to law. *State v. Thomas* (July 16, 1999), 11th Dist. No. 98-L-074, 1999 WL 535272, at 4. Clear and convincing evidence is that evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Thomas* at 4.

{¶66} Appellant correctly points out that that the trial court must state its findings relating to R.C. 2929.14(E)(4) at the sentencing hearing and on the record to properly issue a consecutive sentence. In the past, we have held that the findings mandated by R.C. 2929.14 "must appear somewhere on the record of sentence, either in the judgment or in the transcript of the sentencing hearing." *State v. Rone* (Dec. 4, 1998), 11th Dist. No. 98-A-0001, 1998 Ohio App. LEXIS 5813, at 6. Recently, however, the Ohio Supreme Court held that when ordering a defendant to serve consecutive sentences, the trial court must make its statutorily required findings at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraphs one and two of the syllabus. As such, we must further examine the sentencing hearing and record of sentence.

{¶67} When imposing consecutive sentences, the trial court must first determine that consecutive sentences are “necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public[.]” R.C. 2929.14(E)(4). Next, the trial court must find that one of the following factors listed in R.C. 2929.14(E)(4) is also present: (a) that the offender was awaiting trial or sentencing or was under community control sanctions; (b) that the harm caused by the offenses was so great that a single prison term would not adequately reflect the severity of the conduct; or (c) that the offender’s prior criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime. *State v. Norwood* (June 8, 2001), 11th Dist. No. 2000-L-072, 2001 Ohio App. LEXIS 2573, 2001 WL 635951, at 4.

{¶68} The court must also follow the requirements set forth in R.C. 2929.19(B) when sentencing an offender to consecutive sentences under R.C. 2929.14. Specifically, R.C. 2929.19(B)(2)(c) requires that the trial court justify its imposition of consecutive sentences by making findings that give the court’s reasons for selecting that particular sentence.

{¶69} Of particular importance to the case at bar is R.C. 2953.08(C) which grants a defendant who has entered a guilty plea the right to appeal the issuance of a consecutive sentence, to wit:

{¶70} “In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the

sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.”

{¶71} However, R.C. 2953.08(D) provides the following exception:

{¶72} “A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge. ***”

{¶73} Thus, when the trial court imposes a jointly-recommend sentence which is authorized by law, it is not required to state its findings as required by *Comer* because the sentence is not subject to appellate review. See, e.g., *State v. McDowell* (Sept. 30, 2003), 11th Dist. No. 2001-P-0149, 2003-Ohio-5352.

{¶74} Nevertheless, R.C. 2953.08(D) further provides that a sentence imposed for aggravated murder “is not subject to review under this section.” Such language creates an ambiguity, as it is unclear whether the second sentence’s reference to “this section” is referring specifically to R.C. 2953.08(D) or R.C. 2953.08 as a whole. It is axiomatic that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” *State v. Young* (1980), 62 Ohio St.2d 370, 374, quoting *United States v. Bass* (1971), 404 U.S. 336, 348.

{¶75} Accordingly, we will interpret the second sentence as referring to and creating an exception to the first sentence of R.C. 2953.08(D). In other words, when a

defendant pleads guilty or is convicted of aggravated murder, the trial court is required to state its findings, despite the existence of a jointly-recommended sentence, authorized by law, and imposed by the judge.

{¶76} In the instant case, appellant pleaded guilty to two counts of aggravated murder. Although the trial court imposed a jointly-recommended sentence, authorized by law, it was still required to state its findings relating to R.C. 2929.14(E)(4) at the sentencing hearing and on the record of sentence to properly issue a consecutive sentence. It did not. Therefore, appellant's sixth assignment of error is with merit.

{¶77} Furthermore, we note that appellant stipulated to the specific factors of R.C. 2929.14(E)(4) in his finding on the guilty plea document. Notwithstanding these stipulations, it is clear that the purpose of requiring the trial court to discuss its findings in relation to the applicable factors, both at the sentencing hearing and on the record, is to facilitate adequate appellate review. Appellant's stipulations relate solely to the factors of R.C. 2929.14(E)(4). Thus, standing alone, they fail to provide us with the necessary findings in relation to such factors. Therefore, we are compelled to find that despite appellant's stipulations, the trial court was still required to state its findings relating to the factors of R.C. 2929.14(E)(4) at the sentencing hearing and on the record of sentence. For this additional reason, appellant's sixth assignment of error is with merit.

{¶78} Based upon the foregoing analysis, appellant's first five assignments of error are without merit, while his sixth assignment of error has merit. Therefore, the judgment of the trial court is affirmed in part and reversed in part, and the matter is

hereby remanded so that the trial court can vacate its prior sentencing judgment and hold a new sentencing hearing.

DONALD R. FORD, P.J., and CYNTHIA WESTCOTT RICE, J., concur.