

[Cite as *State v. Wheeler*, 2009-Ohio-2647.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 08 MA 53
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JOSEPH WHEELER,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 06 CR 1102.
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul J. Gains Prosecuting Attorney Attorney Ralph M. Rivera Assistant Prosecuting Attorney 21 W. Boardman St., 6th Floor Youngstown, OH 44503

For Defendant-Appellant:	Attorney Michelle Miller 132 West Main Street P.O. Box 430 St. Clairsville, OH 43950
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: June 1, 2009

[Cite as *State v. Wheeler*, 2009-Ohio-2647.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, and the parties' briefs. Appellant, Joseph Wheeler, appeals the decision of the Mahoning County Court of Common Pleas that found him guilty of one count of aggravated robbery, and three counts of kidnapping, all with firearm specifications, and sentenced him accordingly.

{¶2} On appeal, Wheeler argues his plea was not knowing, voluntary and intelligent. Wheeler also argues that the trial court abused its discretion by overruling his pre-sentence motion to withdraw his guilty plea. A review of the record reveals Wheeler's plea was not knowing, voluntary and intelligent, because the trial court failed to inform him that by pleading guilty he was waiving his constitutional rights to compulsory process of witnesses and to force the State to prove each element of the charged offenses beyond a reasonable doubt. Based on our resolution of this issue, Wheeler's argument regarding his motion to withdraw the guilty plea is moot.

{¶3} Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings.

Facts

{¶4} Wheeler was indicted in Mahoning County on November 2, 2006. The indictment included four counts: one count of aggravated robbery pursuant to R.C. 2911.01(A)(1)(C), a first-degree degree felony; and three counts of kidnapping pursuant to R.C. 2905.01(A)(2)(C), second-degree felonies. Firearm specifications were attached to all four counts pursuant to R.C. 2941.145(A).

{¶5} Wheeler initially pled not guilty to the charges. However, on July 9, 2007, Wheeler entered into a Crim.R. 11 plea agreement. Wheeler agreed to plead guilty to all counts in the indictment. The State agreed to recommend that Wheeler receive a total sentence of six years imprisonment, and to take no position on the issue of judicial release. The trial court held a plea hearing that same day for both Wheeler and his co-defendant. Following the hearing, the trial court accepted Wheeler's guilty plea.

{¶6} On October 1, 2007, Wheeler filed a pro-se motion to withdraw his guilty plea, in which he alleged that when he pled guilty he "mentally did not know what he was

signing." The trial court held a hearing on the motion, and as a result, ordered a competency evaluation. Subsequently, two competency examiners concluded Wheeler was competent. On February 29, 2008, following a second hearing, the trial court denied Wheeler's motion to vacate his guilty plea and proceeded to sentence him. The March 8, 2008 sentencing entry imposed the jointly recommended sentence of six years imprisonment: three years for the aggravated robbery and for each of the kidnapping charges, to be served concurrently; plus a three year consecutive sentence on the firearm specifications.

Guilty Plea

{¶7} In the present appeal, Wheeler sets forth the following two assignments of error:

{¶8} "The trial court erred when it denied Defendant's motion to withdraw his guilty (sic) plea."

{¶9} "The trial court denied Mr. Joseph Wheeler his right to due process under the 14th Amendment to the United States Constitution, and Section 10, Article I of the Ohio Constitution when and (sic) accepting an unknowing and unintelligent and involuntary guilty pleas (sic)."

{¶10} As an initial matter, Wheeler has waived appellate review of any sentencing errors by virtue of the trial court's imposition of the jointly recommended sentence. Wheeler may still challenge issues arising from his guilty plea. R.C. 2953.08; *State v. Gibson*, 7th Dist. No. 07MA98, 2008-Ohio-4518, at ¶7. Thus, we will address Wheeler's second assignment of error first, as it is dispositive of this appeal.

{¶11} Wheeler contends that his plea must be vacated because the trial court failed to inform him that by pleading guilty he was waiving his constitutional right to compulsory process of witnesses. The State concedes this error and adds that the plea should also be vacated because the trial court failed to inform Wheeler that by pleading guilty he waived his right to have the State prove each element of the offenses beyond a reasonable doubt. Upon review, we agree.

{¶12} In a criminal case, a plea must be made "knowingly, intelligently, and

voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. Failure on any of these points "renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *Id.* A determination of whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351.

{¶13} To help ensure that guilty pleas are knowingly, intelligently, and voluntarily made, Crim.R. 11 sets forth specific procedural requirements the trial judge must follow when accepting a guilty plea from a defendant. They are as follows:

{¶14} "(C) Pleas of guilty and no contest in felony cases.

{¶15} "(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

{¶16} "(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:

{¶17} "(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.

{¶18} "(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.

{¶19} "(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."

{¶20} The Ohio Supreme Court has held that four of the rights listed in subsection (C)(2)(c) are constitutional rights about which the trial court must inform the defendant prior to accepting the guilty plea:

{¶21} "Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph one of the syllabus (following *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274).

{¶22} Further, this and other appellate districts have concluded that a trial court also has a constitutional duty to inform the defendant of his right to require the State to prove all elements of the offenses beyond a reasonable doubt. See *State v. Rowbotham*, 173 Ohio App.3d 642, 2007-Ohio-6227, 879 N.E.2d 856, at ¶9 (citing cases).

{¶23} With respect to constitutional Crim.R. 11 rights, strict compliance with the rule is required. *Ballard* at 477; *Rowbotham* at ¶19. "Strict compliance" does not require a rote recitation of the exact language of the rule. Rather, this court should focus on whether the "record shows that the judge explained these rights in a manner reasonably intelligible to the defendant." *Ballard*, at paragraph two of the syllabus.

{¶24} In the present case, Wheeler argues that the trial court erred by failing to inform him that he was waiving his constitutional right to compulsory process of witnesses pursuant to Crim R. 11(C)(2)(c). A review of the plea hearing transcript reveals that the trial court indeed failed to inform Wheeler that by pleading guilty he was waiving this right. After explaining the nature of the charges, the court only explained *some* of the Crim.R. 11(C)(2)(c) rights:

{¶25} "THE COURT: Do you understand that by entering into these pleas that you're giving up certain substantial and constitutional rights such as your right to trial by jury, your right to have the state prove each element of each charge against you, the right to confront any witness that will testify against you and the right to testify at trial if you so desire?"

{¶26} Absent from the court's discussion is the right to obtain compulsory process of witnesses. In addition, although not specifically raised by Wheeler on appeal, the trial court also failed to explain to Wheeler that by pleading guilty he relinquished his right to have the State prove each element beyond a reasonable doubt. Thus, the trial court did not comply with Crim.R. 11(C)(2)(c).

{¶27} As explained above, strict compliance with Crim.R. 11(C)(2)(c) is required, otherwise the defendant's plea is not knowing, voluntary and intelligent. Pleas that are not knowing, intelligent and voluntary have been obtained in violation of due process and are void. *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, at ¶11, citing *Boykin* at, 243. Accordingly, Wheeler's second assignment of error is meritorious.

{¶28} In sum, we find that Wheeler's plea was not knowing, voluntary and intelligent, because the trial court failed to inform him that by pleading guilty he was waiving his constitutional rights to have compulsory process of witnesses and his right to have the State prove each element of the charged offenses beyond a reasonable doubt. Based on this holding, Wheeler's first assignment of error, which challenges the trial court's denial of his motion to withdraw the guilty plea, is rendered moot. Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Vukovich, P.J., concurs.

Donofrio, J., concurs.