[Cite as *State v. Giovanni*, 2009-Ohio-3333.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 150
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
MARCO GIOVANNI,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 05CRB237.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 26, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Marco Giovanni appeals from his conviction of aggravated vehicular homicide which was entered upon his guilty plea in the Mahoning County Common Pleas Court. He contends that his plea was not entered knowingly, voluntarily or intelligently for three reasons. First, he alleges that the court should have advised him that the right against self-incrimination bars the state from commenting on his failure to testify. Second, he claims that the court should have advised him about the existence of a no contest plea. Third, he complains that the court failed to disclose the elements of the offense. For the following reasons, appellant's arguments are without merit, and his plea and conviction are affirmed.

STATEMENT OF THE CASE

¶{2} On Christmas Day in 2004, appellant's vehicle was involved in a collision. His passenger died. On March 17, 2005, appellant was indicted for aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), which is defined as: while operating or participating in the operation of a motor vehicle, cause the death of another as the proximate result of committing a violation of R.C. 4511.19(A) (the operating while intoxicated statute). This type of aggravated vehicular homicide is a second degree felony under R.C. 2903.06(B)(2)(a).

¶{3} After three years of pretrials and continued trial dates, appellant entered into a plea agreement. On April 28, 2008, he agreed to plead guilty to an amended charge of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), which is defined as: while operating or participating in the operation of a motor vehicle, cause the death of another recklessly. This type of aggravated vehicular homicide is a felony of the third degree under R.C. 2903.06(B)(3).

¶{4} In a June 17, 2008 entry, appellant was sentenced to a maximum sentence of five years in prison. Appellant filed the within timely appeal.

CRIMINAL RULE 11(C)(2)

¶{5} Appellant's arguments all concern the trial court's compliance with Crim.R. 11(C)(2). This rule provides:

¶{6} "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:

¶{7} "(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.

¶{8} "(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.

¶{9} "(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*." Crim.R. 11(C)(2) (Emphasis added to contested portions).

ASSIGNMENT OF ERROR

¶{10} Appellant's sole assignment of error provides:

¶{11} "THE TRIAL COURT DENIED MARCO GIOVANNI HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHEN IT ACCEPTED AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY GUILTY PLEA."

¶{12} First, appellant contends that in advising him that he would be waiving his right against self-incrimination, the court failed to explain that no one could comment on his refusal to testify at trial, which statement was contained in the written plea agreement.

¶{13} A guilty plea is constitutionally infirm when the defendant is not informed in a reasonable manner at the time of his guilty plea of his privilege against self-incrimination. *State v. Ballard* (1981), 66 Ohio St.2d 473, 478. Appellant apparently believes that advisement of the right not to be compelled to testify against oneself is not reasonable without an additional explanation that the right is further preserved by prohibiting the state from commenting on his refusal to testify. However, the Supreme Court has held:

¶{14} "*The best method of informing a defendant of his constitutional rights is to use the language contained in Crim.R. 11(C)*, stopping after each right and asking

the defendant whether he understands the right and knows that he is waiving it by pleading guilty. We strongly recommend such procedure to our trial courts." Id. at 479 (emphasis added).

¶{15} The Court went on to hold that the trial court's language need not exactly match the language of Crim.R. 11(C)(2)(c) and that the court need not stop after each right. Id. at 479-480. However, by stating that the best method is to recite the rule verbatim, the Court upheld the practice of merely stating that a defendant could not have been compelled to testify against himself at the trial he is waiving. See id. See, also, *State v. Baier* (June 30, 1999), 7th Dist. No. 98BA11 (court need not define "compulsory process" when defendant responds affirmatively that he understood this right).

¶{16} In other words, there is no requirement of further explanation of the right because the current rule does not require the rights listed to be defined or otherwise mention that the defendant should be advised that no one can comment on his refusal to testify. Rather, the rule merely states that the defendant cannot be compelled to testify against himself at trial, and the Supreme Court prefers tracking this language. Consequently, in advising that the defendant cannot be compelled to testify against himself, the court need not further explain that no one can comment on a defendant's failure to testify where the defendant answers that he understands his right against self-incrimination.

¶{17} Here, appellant was asked if he understood that he would be waiving his right not to testify at trial or any other proceeding if he so desired.[1] He responded affirmatively. Thus, the court had no further obligation regarding the self-incrimination waiver under *Ballard* and *Baier*. As such, appellant's first argument is without merit.

¶{18} Second, appellant complains that the court did not explain the effect of a no contest plea under Crim.R. 11(C)(2)(b). However, this rule requires the court to inform the defendant of and determine that the defendant understands "the effect of the plea of guilty *or* no contest". Crim.R. 11(C)(2)(b) (emphasis added). *Thus, a defendant who is pleading guilty need not be advised about a no contest plea*. *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6043, ¶17-19, 26 (referring to the effect of the plea being entered, even in petty misdemeanor portion of rule which uses "and"

[1]Appellant does not contest that this is equivalent to stating that he could not be compelled to testify against himself at trial. See *State v. Rowbotham*, 173 Ohio App.3d 642, 2007-Ohio-6227, ¶20-22 (where this court essentially endorsed this same language).

instead of "or" between types of pleas); *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶6-11 (reviewing "effect of plea" language for felonies and working under assumption that one who pleads guilty should be informed of the effect of the guilty plea). See, also, *State v. Giovanni*, 7th Dist. No. 07MA60, 2008-Ohio-2924, ¶44. As such, this argument is without merit.[2]

¶{19} Third, appellant complains that his plea was not voluntary with an understanding of the charges as required under Crim.R. 11(C)(2)(a) because the court did not discuss the elements of the offense. However, the trial court has no obligation to explain the elements of the charge. *Johnson*, 7th Dist. No. 07MA8 at ¶14 (this information can come from another source). Notably, Crim.R. 11 (C)(2) instructs only that the court must determine that the defendant has an understanding of the nature of the charges under subsection (a). This subsection does not use the language in subsections (b) and (c) requiring the court to not only determine that the defendant understands but also to inform him of the listed items.

¶{20} Thus, the Supreme Court has held that where defense counsel states that he has reviewed the elements with the defendant or where the defendant's written plea advises of this fact, then there is substantial compliance with the Crim.R. 11(C)(2)(a) requirement that the court determine the defendant made the plea voluntarily with an understanding of the nature of the charges. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶57-58. See, also, *Marshall v. Lonberger* (1983), 459 U.S. 422, 436 ("it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit."). "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." *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

¶{21} In viewing the totality of the circumstances here, we first note that appellant had been advised of the elements of the indicted offense at his arraignment and through service of the indictment. This case had been pending for over three years at the time of the plea. Appellant had two different retained attorneys throughout

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[2]Although appellant does not present any argument on the sufficiency of the trial court's advisement of the effect of a guilty plea, we note that there is no prejudice where the defendant did not assert his innocence at the plea hearing as he is presumed to understand that a guilty plea is a complete admission of guilt. See *Jones*, 116 Ohio St.3d 211 at ¶52-55; *Griggs*, 103 Ohio St.3d 85 at ¶12, 19; *State v. Johnson*, 7th Dist. No. 07MA8, 2008-Ohio-1065, ¶16-17.

this time. Multiple pretrials had been conducted where plea negotiations were conducted and offers discarded until he accepted the plea to the within charge.

¶{22} At the plea hearing, the state pointed out that the second degree felony aggravated vehicular homicide charge was being amended to a third degree felony and cited the substantive and procedural statutes. (Tr. 2). Appellant stated that he had read the plea agreement and understood that he was pleading to third degree felony aggravated vehicular homicide. (Tr. 3, 8). See *State v. Davis*, 4th Dist. No. 06CA21, 2007-Ohio-3944, ¶28 (knowledge of the nature of the charge is more general than knowledge of each element). He stated that his plea was voluntary and that everything in the document was fully explained to him. (Tr. 7-8).

¶{23} *Moreover, the written plea specified that counsel advised appellant and that he fully understood the nature of the charge against him and the elements contained therein.* (Plea Agreement at ¶2). As such, it is clear that appellant had an understanding of the nature of the charge. See *Fitzpatrick*, 102 Ohio St.3d 321 at ¶57-58; *Johnson*, 7th Dist. No. 07MA8 at ¶14.

¶{24} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.