[Cite as *State v. Reynolds*, 2016-Ohio-8557.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 16 CO 0017
VS.	)	
	)	OPINION
DARRELL G. REYNOLDS, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 2015 CR 289
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiff-Appellee	Attorney Robert Herron Columbiana County Prosecutor Attorney Ryan Weikart Assistant Prosecutor 105 S. Market Street Lisbon, Ohio 44432
For Defendant-Appellant	Attorney Gregory Robey 14402 Granger Road Cleveland, Ohio 44137

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 22, 2016

[Cite as *State v. Reynolds*, 2016-Ohio-8557.]
DeGENARO, J.

{¶1} Defendant-Appellant, Darrell G. Reynolds, Jr., appeals the trial court's judgment convicting him of two counts of drug possession and sentencing him accordingly. On appeal, Reynolds argues the trial court's plea colloquy failed to strictly comply with Crim.R. 11(C), and that trial counsel was ineffective for failing to object to the allegedly incomplete colloquy. For the following reasons, Reynolds' assignments of error are meritless and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} A grand jury secretly indicted Reynolds on one count of drug possession (cocaine), R.C. 2925.11(A), a first-degree felony, and one count of drug possession (heroin), R.C. 2925.11(A), a fifth-degree felony. Attached to each count was a forfeiture specification for $2,184.00 in U.S. Currency, R.C. 2941.1417(A). Reynolds was arraigned, pled not guilty and counsel was appointed.

{¶3} Reynolds subsequently entered into a Crim.R. 11 plea agreement with the State, in which he agreed to plead guilty to the charges and specifications in the indictment. The State of Ohio agreed to recommend a three-year prison sentence on the felony-one count, and a ten-month prison sentence on the felony-five count, to be served concurrently, along with a mandatory $10,000.00 fine and a 24-month operator's license suspension.

{¶4} Prior to the plea hearing, Reynolds had also received a document entitled Judicial Advice to Defendant from the trial court, which explained the rights Reynolds would waive by pleading guilty. Reynolds also completed and signed a worksheet entitled Defendant's Response to the Court, in which he indicated his understanding. During the hearing, the trial court engaged in a colloquy with Reynolds about the rights he would be giving up by pleading guilty, and accepted Reynolds' pleas as knowing, voluntary and intelligent. The matter was continued for sentencing so that a pre-sentence investigation could be prepared.

{¶5} Following a sentencing hearing, the trial court imposed a mandatory three-year prison term on count one and a ten-month term on count two, to be served concurrently per the plea agreement, along with five years of mandatory post-release

control and 24-month operator's license suspension. The trial court declined to impose a fine due to Reynolds' indigence.

Plea Colloquy

{¶6} In his first of two assignments of error, Reynolds asserts:

> The trial court failed to strictly comply with Criminal Rule 11, when it failed to fully advise Appellant of the waiver of his constitutional right of compulsory process, and his constitutional right against self incrimination.

{¶7} A guilty plea must be made knowingly, voluntarily and intelligently. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008–Ohio–509, 881 N.E.2d 1224, ¶ 7. If it is not, it has been obtained in violation of due process and is void. *State v. Martinez,* 7th Dist. No. 03 MA 196, 2004–Ohio–6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). When determining the voluntariness of a plea, this court must consider all of the relevant circumstances surrounding it. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008–Ohio–1065, ¶ 8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

{¶8} The trial court must engage in a Crim.R. 11(C) colloquy with the felony defendant in order to ensure the plea is knowing, voluntary and intelligent. *State v. Clark*, 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, ¶ 25–26. During the colloquy, the trial court is to provide the defendant specific information, including constitutional and nonconstitutional rights being waived. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 490, 2004–Ohio–6894, 820 N.E.2d 355.

{¶9} The constitutional rights are to: a jury trial, confront one's accusers, compulsory process of witnesses, protection from self-incrimination, and the requirement that the state prove guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c); *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 19–21. A trial court must strictly comply with these requirements. *Id*. at ¶ 31; *State v. Ballard*, 66 Ohio St.2d 473, 477, 423 N.E.2d 115 (1981). Strict compliance does

not require a rote recitation but means the trial court must explain these rights to the defendant in a reasonably intelligible manner. *Id*. at paragraph two of the syllabus.

{¶10} The nonconstitutional rights are an explanation of: the effect of the defendant's plea; the nature of the charges; the maximum penalty; if applicable, advisements on post-release control and ineligibility for probation/community control sanctions; and that the trial court may immediately proceed to judgment and sentencing. Crim.R. 11(C)(2)(a)(b); *Veney*, 120 Ohio St.3d 176 at ¶ 10–13; *Sarkozy*, 117 Ohio St.3d 86, at ¶ 19–26. The trial court must substantially comply with these requirements. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Substantial compliance means the defendant understands the rights he is waiving and the consequences under the totality of the circumstances. *Id*. at 108. The defendant must additionally demonstrate prejudice: that he otherwise would not have entered the plea. *Veney*, 120 Ohio St.3d 176 at ¶ 15 citing *Nero*, 56 Ohio St.3d at 108.

{¶11} Reynolds contends the trial court failed to accurately advise him he was waiving his right to compulsory process and right against self-incrimination, both constitutional rights requiring strict compliance. Crim.R. 11(C)(2)(c); *Veney*, *supra*, at ¶ 19–21, 31. The trial court engaged in the following colloquy with Reynolds:

> THE COURT: You have a right to a trial before a jury or a non jury trial in front of me. In either situation your lawyer would be present; you would be presumed innocent and the State would have to prove your guilt beyond a reasonable doubt; but every defense you might have could be introduced in your favor and you could require witnesses favorable to you to be here and testify and I would order them to do so. You'd be able to confront all witnesses against you face-to-face; have your attorney cross-examine them to be sure that they are telling the truth. And, you, yourself, would not have to testify unless you wanted to. You could remain silent, that is your privilege, and nobody could comment about your decision. Do you understand?

MR. REYNOLDS: Yes.

{¶12} The Ohio Supreme Court held that a "rote recitation" of the rights as they are listed in Crim.R. 11(C) is not required; "failure to use the exact language of the rule is not fatal to the plea." *Ballard*, 66 Ohio St.2d at 120. The Court continued to explain that "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 the defendant. To hold otherwise would be to elevate formalistic litany of constitutional rights over the substance of the dialogue between the trial court and the accused * * *." *Id*. *See also Veney*, 120 Ohio St.3d 176, at ¶ 18-19; *State v. Tarleton*, 7th Dist. No. 13 BE 17, 2014-Ohio-5820, ¶ 11.

{¶13} Reynolds first argues that the trial court's colloquy regarding his right to compulsory process was inadequate because the court failed to tell him specifically that a bench warrant could be issued for non-appearing witnesses. In addition to *Ballard,* he relies on two cases, neither of which hold that a specific advisement about the use of bench warrants to compel witnesses must be included as part of the plea colloquy.

{¶14} In *State v. Cummings*, 107 Ohio St.3d 1206, 2005-Ohio-6506, 839 N.E.2d 27, the Ohio Supreme Court actually dismissed the appeal as being improvidently granted. *Id*. Perhaps Reynolds intended to cite to the Eighth District's opinion in *Cummings*, in which the court held that the trial court's advisement that the defendant had "the right to call witnesses to appear on [his] behalf[;]" and that he had "the right to confront and ask questions of witnesses[,]" failed to sufficiently inform the defendant of the right to compulsory process. *State v. Cummings*, 8th Dist. No. 83759, 2004-Ohio-4470, ¶ 5-6. The Eighth District reasoned:

> Although a trial court need not specifically tell a defendant that he has the right to "compulsory process," it must nonetheless "inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant's

> behalf." *State v. Wilson*, Cuyahoga App. No. 82770, 2004-Ohio-499, at ¶ 16, appeal not allowed, 102 Ohio St.3d 1484, 810 N.E.2d 968, 2004-Ohio-3069. See, also, *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082, appeal not allowed, 101 Ohio St.3d 1468, 804 N.E.2d 41, 2004-Ohio-819 (recognizing that merely telling a defendant that he has the right to call witnesses implies that the defendant could present only witnesses he was able to secure through his own efforts). Because the trial court failed to strictly comply with this constitutional requirement, we vacate the guilty pleas and remand this case for further proceedings. *See State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474. See, also, Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

Cummings at ¶ 6.

{¶15} Somewhat similarly, in *State v. Wilson*, 8th Dist. No. 822770, 2004-Ohio-499, the Eighth District held that the trial court's statement that the defendant has: "the right to bring in witnesses to this courtroom to testify for your defense" was insufficient to tell the defendant of his constitutional right to compulsory process. *Wilson* at ¶ 15, ¶ 17; *see also State v. Senich*, 8th Dist. No. 82581, 2003-Ohio-5082. The *Wilson* court explained: "The trial court must inform a defendant that it has the power to force, compel, subpoena, or otherwise cause a witness to appear and testify on the defendant's behalf. Otherwise, the logical import of the court's notice is that *the defendant could present such witnesses as he could only secure through his own efforts*." *Wilson* at ¶ 16 (emphasis sic).

{¶16} However, the advisements in *Cummings* and *Wilson* are distinguishable. The trial court explained to Reynolds that he: "could require witnesses favorable to you to be here and testify and I [the trial court] would order them to do so." This is sufficient to convey the meaning of the right to compulsory process, so as to strictly comply with Crim.R. 11(C).

{¶17} Regarding the right against self-incrimination, Reynolds argues that the

trial court erred by failing to advise him specifically "of his right to have a *jury advised* that any failure to testify may not be used against him." (emphasis sic). Reynolds cites two cases in support of his argument, but neither mandates the use of the specific language Reynolds proposes. First, *Veney*, *supra*, builds on prior case law about the level of compliance required for constitutional versus non constitutional rights.

{¶18} And a close reading of *State v. Singh*, 141 Ohio App.3d 137, 750 N.E.2d 598 (11th Dist. 2000) reveals it is factually distinguishable. The Eighth District held that the trial court's statement that " 'You could testify but you need not testify if you desire not to * * *,' fail[ed] to adequately apprise appellant of his constitutional right against self-incrimination." *Id*. at 143. The court explained that: "Although we have previously held that there need not be a rote recitation of Crim.R. 11(C) and the failure to use the exact language of the rule is not fatal to the plea, the trial judge must state to a defendant in the plea colloquy that he or she has a right to refuse to testify against himself or herself as part of the instruction on his or her right against self-incrimination. The failure to do so demonstrates that the trial judge did not strictly comply with Crim.R. 11(C)." *Id*. at 142. In contrast, the trial court advised Reynolds that: "you, yourself, would not have to testify unless you wanted to. You could remain silent, that *is your privilege*, and *nobody* could comment about your decision," emphasis added. This conveys the right against self-incrimination in a manner reasonably intelligible to the defendant, so as to strictly comply with Crim.R. 11(C).

{¶19} Thus, Reynolds' first assignment of error is meritless.

Ineffective Assistance of Counsel

{¶20} In his second and final assignment of error, Reynolds asserts:

> Appellant was denied the effective assistance of counsel at the plea hearing, when counsel failed to object to the incomplete recitation of constitutional rights.

{¶21} To prove an allegation of ineffective assistance of counsel, the

defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id*., paragraph three of the syllabus. In Ohio, a properly licensed attorney is presumed to be competent and the burden is on the defendant to prove otherwise. *State v. Hamblin*, 37 Ohio St.3d 153, 155, 524 N.E.2d 476 (1988).

{¶22} "A guilty plea waives the right to allege ineffective assistance of counsel, except to the extent the errors caused the plea to be less than knowing and voluntary." *State v. Stephen*, 7th Dist. No. 14 BE 0037, 2016-Ohio-4803, ¶ 14, quoting *State v. Huddleson*, 2d Dist. No. 20653, 2005–Ohio–4029, ¶ 9 citing *State v. Spates*, 64 Ohio St.3d 269, 1992–Ohio–130, 595 N.E.2d 351.

{¶23} Reynolds argues that trial counsel was ineffective at the plea hearing because he failed to object to the trial court's allegedly incomplete recitation of constitutional rights. However, the trial court acted properly and thoroughly explained Reynolds' constitutional rights during the plea colloquy. Therefore, trial counsel was not deficient in his representation of Reynolds at the plea hearing.

{¶24} Reynolds also notes his dissatisfaction with trial counsel, which he voiced during the plea hearing. However, this sentiment appears more indicative of Reynolds' dissatisfaction with the mandatory prison sentence for count one, than it was an issue with the trial court's plea colloquy.

> THE COURT: * * * Have you been satisfied with Attorney Naragon as your lawyer?
>
> MR. REYNOLDS: No.
>
> THE COURT: All right. You've not been satisfied. You want to tell me why?
>
> MR. REYNOLDS: Cause I'm basically still going to jail. It's like he

ain't doing his job.

THE COURT: Well, there's a mandatory prison term here. Do you understand that?

MR. REYNOLDS: Yeah.

THE COURT: Okay, now what's said between you and your lawyer is confidential. It's none of my business. Do you understand? But it is my business to determine whether or not you've been satisfied with your attorney.

Now, do you want us to stop right here and you spend some more time with him and we come back on another day?

MR. REYNOLDS: No, it's cool.

THE COURT: You want to keep going?

MR. REYNOLDS: Yeah.

THE COURT: All right. Are you sure that's what you want to do?

MR. REYNOLDS: Yeah.

THE COURT: Do you want to take a few minutes and talk to him now?

MR. REYNOLDS: No.

THE COURT: Okay. All right, now, do you want me to go over these charges again and the specifications or do you feel you understand?

MR. REYNOLDS: No, you ain't got to do that.

(Tr. 17-19.)

{¶25} This does not demonstrate that there were any deficiencies in counsel's representation at the plea hearing that caused the plea to be less than knowing, voluntary and intelligent. Thus, Reynolds' second assignment of error is meritless.

{¶26} In sum, the trial court fully complied with Crim.R. 11(C) in accepting Reynolds' guilty plea and trial counsel was not ineffective during the plea proceedings. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P. J., concurs.

Waite, J., concurs.