[Cite as *State v. Hill*, 2019-Ohio-4079.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHRISTIANSON SEAN HILL,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0037

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CR 139

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Vacated and Remanded.

Atty. Dan Fry, Belmont County Prosecutor, and *Atty. J. Flanagan*, Chief Assistant Prosecutor, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Atty. John M. Jurco, P.O. Box 783, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: September 20, 2019

D'Apolito, J.

{¶1} Appellant, Christianson Sean Hill appeals his conviction and life sentence for one count of rape of a child under the age of thirteen, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Appellant contends that his plea is invalid because the trial court did not inform him at his plea colloquy that he was waiving his right to a jury trial. He argues, in the alternative, that his life sentence is contrary to law because it does not recognize his eligibility for parole in ten years. For the following reasons, we find that Appellant's plea was not knowingly and intelligently entered, and, as a consequence, Appellant's conviction and sentence are vacated, and this matter is remanded for further proceedings.

FACTS AND PROCEDURAL HISTORY

{¶2} On May 3, 2017, the Belmont County Grand Jury indicted Appellant for one count of rape of a child under the age of thirteen, a violation of R.C. 2907.02(A)(1)(b), with a specification that Appellant purposely compelled the victim, his stepdaughter, J.R.J. (D.O.B. 06-23-04), by force or threat of force. An offender guilty of the specification is sentenced pursuant to R.C. 2971.03(B)(1)(c), which mandates the imposition of an indefinite sentence of twenty-five years to life in prison, rather than R.C. 2971.03(B)(1)(a), which mandates a sentence of ten years to life.

{¶3} Relevant to the current appeal, at the beginning of the plea hearing on February 16th, 2018, the trial court stated, "This matter is set for full jury trial next Thursday at 8:30. The jury has already been called out. All parties are ready to proceed." (2/16/18 Plea Hrg. Tr. 2). At the plea hearing, the trial court granted the state's oral motion to dismiss the specification in exchange for Appellant's guilty plea to the sole count in the indictment, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

{¶4} As a part of the trial court's plea colloquy, the trial court asked Appellant if he understood that, by entering his plea, Appellant was "giv[ing] up the right to a speedy and public trial * * *?" Appellant responded, "I understand." (*Id.* at 6.) The plea agreement

reads, in pertinent part, "I understand by pleading Guilty, **I give up my right to a Jury Trial or a Trial to the Court** * * *." (Emphasis in original)(2/16/18 Plea Agreement, p. 3).

{¶5} An *Alford* plea occurs when "a defendant pleads guilty yet maintains actual innocence of the charges." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 13. Under Ohio law, an *Alford* plea is properly accepted where the record demonstrates: (1) the defendant's plea was not the result of coercion, deception or intimidation; (2) defense counsel was present at the time the plea was entered; (3) defense counsel's representation was competent in light of the circumstances of the indictment; (4) the plea was entered with an understanding of the underlying charges; and (5) the defendant was motivated by a desire for a lesser penalty, a fear of the consequences of a jury trial, or both. *State v. Timmons*, 7th Dist. Mahoning No. 18 MA 0046, 2019-Ohio-2723, ¶ 7, citing *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), syllabus.

{¶6} During the *Alford* portion of the colloquy, the trial court inquired, "Now do you believe that the evidence the State would likely offer against you at trial is sufficient for *a jury*, applying a reasonable doubt standard, to find you guilty of the offense of rape with the specification?" Appellant responded, "Yes, sir." (Emphasis added)(Plea Hrg Tr. at 10).

{¶7} At the sentencing hearing on March 13, 2018, the trial court imposed a life sentence. (3/3/18 J.E.) This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE CONVICTION AND RESULTING SENTENCE SHOULD BE OVERTURNED AND REVERSED BECAUSE THE TRIAL COURT VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS AT THE PELA HEARING BY NOT INFORMING HIM THAT HE HAD THE RIGHT TO A JURY TRIAL, WHICH HE WOULD WAIVE BY ENTERING THE PLEA AGREEMENT.

{¶8} A plea of guilty or no contest must be made knowingly, intelligently and voluntarily for it to be valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239, 2008-

Ohio-3748, 893 N.E.2d 462, ¶ 25. In order to ensure that a plea in a felony case is knowing, intelligent and voluntary, Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights that are being waived and to discuss the consequences of the plea. Strict compliance is required when notifying the defendant of constitutional rights incorporated in Rule 11. *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 15, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18.

{¶9} The trial court must both inform the defendant and determine that he understands that by the plea, he is waiving his constitutional rights to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial where he cannot be compelled to testify. Crim.R. 11(C)(2)(c). When a trial court fails to strictly comply with the notice requirements relating to a defendant's constitutional rights, the plea is invalid without a demonstration of prejudice. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621 at ¶ 30.

{¶10} Although the trial court must strictly comply with Rule 11(C)(2)(c), the failure to recite the language of the rule verbatim will not invalidate a plea, if the record demonstrates the court actually explained each constitutional right in a reasonably intelligible manner. *Barker* at ¶ 14-15, 20. For instance, in *Barker*, the Ohio Supreme Court concluded the trial court reasonably conveyed to the defendant that he was waiving the right to compulsory process, when the court advised him of his right to "call witnesses to speak on your behalf." *Id.* at ¶ 16. In addition to the plea colloquy, the *Barker* Court relied on the written plea agreement, which acknowledged the defendant's ability to use the power of the court to call witnesses to testify. *Id.* at ¶ 24.

{¶11} To the extent that the *Barker* Court relied on the written plea agreement, *Barker* appears to be at odds with the Supreme Court's earlier decision in *Veney*, *supra*. *Veney* holds that the trial court has the duty to inform the defendant of his constitutional rights at the plea hearing and "cannot simply rely on other sources to convey these rights to the defendant." *Veney* at ¶ 29 (invalidating plea where court failed to orally inform defendant of his constitutional right to require the state to prove his guilt beyond a reasonable doubt). In order to reconcile the law announced in the two cases, *Barker*

limited *Veney* to situations where the trial court omits any discussion of a constitutional right in the oral colloquy. Therefore, an appellate court may rely on a written plea agreement where the trial court's colloquy relating to a particular constitutional right is ambiguous, but not where there is no mention whatsoever in the colloquy of the constitutional right. *Barker* at ¶ 23-27.

{¶12} We have squarely held that the use of the phrase "public trial," instead of "jury trial," in a plea colloquy, without any other reference to a "jury" or "jury trial" at the plea hearing, invalidates the plea, regardless of whether the phrase "jury trial" appears in the written plea agreement. *State v. Thomas*, 7th Dist. Belmont No. 17 BE 0014, 2018-Ohio-2815; *State v. Raphael-Hopkins*, 7th Dist. Belmont No. 17 BE 0017, 2018-Ohio-1340; *State v. Gheen*, 7th Dist. Belmont No. 17 BE 0023, 2018-Ohio-1924.

{¶13} In cases where a reviewing court is faced with the complete omission of the constitutional right to a jury trial, Ohio courts have relied on various references to a "jury" made in other parts of the plea colloquy to validate the plea. *See, e.g.*, *State v. Ballard*, 66 Ohio St.2d 473, 481, 423 N.E.2d 115 (1981)("neither judge nor jury could draw any inference if the appellant refused to testify"); *State v. Hayward*, 6th Dist. Wood No. WD-17-010, 2017-Ohio-8611, ¶ 12 ("if Hayward chose not to testify, [the trial court] would 'instruct the jury' that it could not weigh this as a factor in determining Hayward's guilt or innocence"); *State v. Smiddy*, 2d Dist. Clark No. 2014-CA-148, 2015-Ohio-4200, ¶ 6 (" you have the right to require the State to prove beyond a reasonable doubt each and every element of the offenses to which you are pleading guilty and you could only be convicted upon a unanimous verdict of a jury"); *State v. Young*, 11th Dist. Trumbull No. 2009-T-0130, 2011-Ohio-4018, ¶ 39-40 ("[t]he State of Ohio would have to prove the following elements by proof beyond a reasonable doubt to the unanimous satisfaction of a jury").

{¶14} In each of the foregoing cases, the reviewing court relied on a reference to "the jury" during the trial court's colloquy regarding one of the other constitutional rights being waived by the defendant as a consequence of his plea. In *Ballard* and *Hayward, supra,* the trial court referred to "the jury" while explaining the defendant's right to not testify. In *Smiddy* and *Young, supra,* references to the "unanimous verdict of a jury" and the "unanimous satisfaction of a jury" were made during the trial court's explanation of the

defendant's right to require the State to prove every element of the charges against him beyond a reasonable doubt. Therefore, the defendants in the foregoing cases could glean their right to a jury trial from the trial court's reference to "the jury" during its explanation of one of the defendant's other constitutional rights. *See Smiddy* at ¶ 13 ("the trial court sufficiently explained the defendant's right to a jury trial because 'an average person of [her] age and intelligence would know that a trial requiring a "unanimous verdict of a jury" to convict necessitates a jury trial * * *.'")

{¶15} The same is not true here. The context of the trial court's first reference to the "jury trial" and the "jury" were at the commencement of the hearing, when the trial court summarized the procedural posture of the case prior to the notice that the parties had negotiated a plea. At that stage of the plea hearing, the trial court had not begun its colloquy with Appellant, and no discussion of the substance of the plea agreement of the waiver of Appellant's rights pursuant to the plea had occurred.

{¶16} No mention of the "jury" or the "jury trial" was made during the portion of the colloquy when the trial court both informed Appellant and determined that he understood that, by the plea, he is waiving his constitutional rights. The trial court did not mention the "jury" or the "jury trial" when it ascertained whether Appellant was aware that he was waiving his other constitutional rights.

{¶17} The trial court did refer to the "jury" during the *Alford* portion of the colloquy, when the trial court asked Appellant whether he believed that the evidence the State would likely offer against him at trial is sufficient for a jury, applying a reasonable doubt standard, to find him guilty of the offense of rape with the specification. However, the context in which the "jury" reference was made was not his waiver of constitutional, or even non-constitutional rights, but, instead, an acknowledgement that there was sufficient evidence of Appellant's guilt to result in a conviction.

{¶18} Accordingly, we find that the general reference to a scheduled jury trial, and the reference to the jury during the *Alford* portion of the colloquy, are insufficient to create an ambiguity regarding Appellant's understanding that he was waiving his right to a jury trial. Therefore, we cannot rely on Appellant's waiver in the written plea agreement to validate the plea. As a consequence, we find that Appellant's plea was not knowingly and

intelligently entered, and, we vacate the plea and remand this matter for further proceedings.

ASSIGNMENT OF ERROR NO. 2

WHETHER OR NOT THE APPELLANT'S SENTENCE SHOULD BE OVERTUNRED AND REVERSED BECAUSE THE SENTENCE IS IN VIOLATION OR AND CONTRARY TO LAW.

{¶19} Because we have sustained Appellant's first assignment or error, any alleged error relating to his sentence is moot.

CONCLUSION

{¶20} In summary, we find that Appellant's plea agreement was not knowingly and intelligently entered. Accordingly, Appellant's plea is vacated and this matter is remanded to the trial court for further proceedings.

Donofrio, J., concurs.

Waite, P.J., concurs.

Appellant's conviction and sentence are vacated and we hereby remand this matter to the trial court for further proceedings. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.