

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LUIS R. CRUZ-RAMOS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 17 MA 0077**

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16-CR-351

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Appellee and

Atty. Edward Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio, 44503, for Appellant.

Dated: February 6, 2019

Robb, .J.

{¶1} Defendant-Appellant Luis R. Cruz-Ramos appeals after pleading guilty to multiple charges in the Mahoning County Common Pleas Court. He argues his plea was not knowing, voluntary, and intelligent because he was not informed of his right to a *bench* trial. However, the trial court is not required to specify the statutory bench trial alternative to a jury trial during a plea colloquy. Accordingly, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On April 7, 2016, Appellant was indicted on ten counts of felonious assault on a police officer (felonies of the first degree) as a result of his shooting at or driving a vehicle into ten officers from three different jurisdictions who were attempting to capture him. He was also charged with multiple firearm specifications and the additional offenses of: failure to comply with the order or signal of a police officer, a felony of the third degree; resisting arrest, a felony of the fourth degree; and having a weapon under disability, a felony of the third degree.

{¶3} In March 2017, Appellant pled guilty to all charges. He was assisted by counsel and an interpreter at the plea hearing. The court ensured Appellant understood the charges, advised him of the maximum penalties, informed him he was not eligible for probation or community control, and provided post-release control advisements. (Plea Tr. 2, 5, 7-9). The court explained the plea of guilty was a complete admission of the charges which allowed the court to proceed to judgment and sentence upon accepting the plea; Appellant said he understood. (Plea Tr. 7). The court explained and ensured Appellant understood the five constitutional rights in Crim.R. 11(C)(2)(c) he would be waiving by pleading guilty. (Plea Tr. 4-7). In accepting Appellant's guilty plea, the court concluded the plea was entered freely and voluntarily with full knowledge of the consequences.

{¶4} At a later sentencing hearing, the trial court sentenced Appellant to three years on each of the ten felonious assault counts to run concurrent to each other but consecutive to three years for failure to comply, eighteen months for resisting arrest, and

three years for having a weapon under disability. Appellant was also sentenced to seven years on one type of firearm specification consecutive to three years on another type of firearm specification (but concurrent to five years on a third type of firearm specification). This resulted in a total sentence of 20.5 years.

{¶15} Appellant filed a timely appeal from the April 7, 2017 sentencing entry. After receiving multiple extensions, Appellant's original appellate counsel filed an *Anders* brief and sought to withdraw from representation. We permitted withdrawal but appointed new counsel to represent Appellant. Appellant's brief was filed in October 2018.

ASSIGNMENT OF ERROR

{¶16} Appellant's sole assignment of error contends:

"Appellant had a right to a bench trial which was not discussed with him during the plea colloquy resulting in the plea being made unknowingly, unintelligently and/or involuntarily."

{¶17} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). A guilty plea is governed by Crim.R. 11. Strict compliance with the rule is required when the trial court addresses the constitutional rights contained therein. *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. Regarding the constitutional rights, the trial court has the duty of:

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)(c). If there is not strict compliance when imparting these five constitutional rights, then the plea is invalid regardless of whether the defendant demonstrates he was prejudiced. *Veney*, 120 Ohio St.3d 176 at ¶ 30.

{¶18} While the trial court must strictly comply with this portion of the rule, the failure to recite the exact language will not invalidate a plea if the record demonstrates

the court actually explained each constitutional right in a reasonably intelligible manner. *Barker*, 129 Ohio St.3d 472 at ¶ 14-15, 20 (the court reasonably explained the defendant was waiving the right to have compulsory process for obtaining witnesses in his favor where the court advised him of the right to “call witnesses to speak on your behalf” and the plea agreement spoke of the defendant’s ability to use the power of the court to call witnesses to testify). This court has concluded that an advisement on the right to a speedy and public trial did not strictly comply with the duty to advise the defendant of the right to a jury trial. *State v. Thomas*, 7th Dist. No. 17 BE 0014, 2018-Ohio-2815, ___ N.E.3d ___, ¶ 16 (noting compliance could exist if the court mentioned a jury in conjunction with its explanation of another right).

{¶9} As for the contents of a plea agreement, it is the trial judge who has the duty to impart knowledge of the constitutional rights and “cannot simply rely on other sources to convey these rights to the defendant.” *Veney*, 120 Ohio St.3d 176 at ¶ 29 (invalidating plea where the court failed to orally inform the defendant of his constitutional right to require the state to prove his guilt beyond a reasonable doubt). Yet, if there is some ambiguity in the court’s references to a constitutional right, the reviewing court can use the plea agreement to reconcile the ambiguity. *Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826 at ¶ 23-27 (limiting *Veney* to the situation where a trial court omits all discussion of a constitutional right in the oral colloquy).

{¶10} Crim.R. 11 also refers to certain non-constitutional rights of a pleading defendant, stating the court shall not accept the plea without:

- (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.
- (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.

Crim.R. 11(C)(2)(a)-(b).

{¶11} The trial court’s advisement on non-constitutional rights at the plea hearing is subject to a substantial compliance analysis, which looks at the totality of the

circumstances to ascertain whether the defendant subjectively understood the implications of his plea and the rights he was waiving. *See, e.g., State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990); *State v. Stewart*, 51 Ohio St.2d 86, 93, 364 N.E.2d 1163 (1977). If there is a lack of substantial compliance regarding a certain non-constitutional right, then the reviewing court is to determine whether there was a partial or a total failure to comply with the rule. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462 at ¶ 32. A complete failure to advise of one of the non-constitutional rights requires the vacation of the plea without an analysis of prejudice. *Id.*, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶ 22, 25. However, if the court's advisement on a non-constitutional right is considered partial compliance with the rule, then the plea cannot be vacated unless the defendant demonstrates prejudice. *Clark*, 119 Ohio St.3d 239 at ¶ 32, 40.

{¶12} Appellant does not contest the adequacy of the trial court's advisements on the five constitutional rights in Crim.R.11(C)(2)(c) or the non-constitutional rights contained in Crim.R. 11(C)(2)(a)-(b). Rather, Appellant contends the court was required to advise him of the right to a bench trial. He states the trial court totally failed to mention the right to a bench trial, requiring vacation of the plea regardless of whether the right to trial by a judge is a constitutional right or a non-constitutional right. He notes the plea agreement did not specifically mention the right to a bench trial either.

{¶13} Here, the trial court informed Appellant and ensured he understood that his guilty plea would waive the following constitutional rights: the right to a jury trial; the right to require the state to prove at trial his guilt of each element beyond a reasonable doubt; the right to cross-examine witnesses called by the state at trial; the right to call witnesses to appear at trial through compulsory process by issuing subpoenas; and the right to refuse to testify at trial without the state commenting on it or the jury considering it. (Plea Tr. 4-7). In explaining Appellant's constitutional rights, the court began by stating: "You have important rights. The most important is your right to a jury trial." (Plea Tr. 4). We note the trial court repeatedly spoke of a "trial" when explaining each of the other four constitutional rights, modifying the term with "jury" only when speaking of the right to a jury trial. (Plea Tr. 4-6).

{¶14} The five constitutional rights in Crim.R. 12(C)(2)(c) are the ones currently required to be explained during a plea. *Veney*, 120 Ohio St.3d 176 at ¶ 22 (“a court must strictly comply with Crim.R. 11(C)(2)(c) when advising a defendant of all five constitutional rights listed”). See also *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 76. Subdivision (c) of Crim.R. 11(C)(2) lists the constitutional rights to be addressed at the plea hearing and does not require the court to explain the defendant will be waiving his right to a bench trial by pleading guilty. *State v. Acosta*, 6th Dist. No. WD-15-066, 2016-Ohio-5698, ¶ 13-14 (also noting the plea agreement mentioned waiver of the right to a “jury trial or court trial”).

{¶15} A person has many constitutional rights, but the mere fact a person is pleading guilty does not require the trial court to list every conceivable constitutional right he may be waiving. For instance, there is a right to a speedy and public trial; however, a trial court is not required to advise the pleading defendant about this right. See, e.g., *State v. White*, 6th Dist. No. E-10-061, 2011-Ohio-5946, ¶ 13 (“A specific advisement of waiver of the right to speedy trial, as implied by appellant, is not required under Crim.R. 11.”); *State v. Mavroudis*, 7th Dist. No. 02 CO 44, 2003-Ohio-3289, ¶ 25 (“The court is not obligated to inform the defendant of anything beyond what is required by Crim.R. 11 before accepting a guilty plea, including that a guilty plea will prejudice a later speedy trial claim.”).

{¶16} Moreover, it is the right to trial *by jury* that is guaranteed by the Sixth Amendment to United States Constitution. See *Singer v. United States*, 380 U.S. 24, 25, 85 S.Ct. 783 13 L.Ed.2d 630 (1965) (upholding the constitutionality of a federal rule allowing the defendant to waive his right to a jury trial only if the court and the prosecution consent). See also Article I, Section 10 of Ohio Constitution. In Ohio, the right to be tried by the court is conferred by R.C. 2945.05. *State v. Frohner*, 150 Ohio St. 53, 85-87, 80 N.E.2d 868 (1948) (addressing the availability of a bench trial if one is provided by a state’s positive legislative enactment such as R.C. 2945.05).

{¶17} Pursuant to R.C. 2945.05, “the defendant may waive a trial by jury and be tried by the court without a jury.” A signed and filed waiver of the constitutional right to a jury trial must state: “I hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I

fully understand that under the laws of this state, I have a constitutional right to a trial by jury.” R.C. 2945.05 (the waiver must also be made in open court and can be withdrawn by the defendant any time before the trial’s commencement).

{¶18} It has thus been concluded that the right to waive one’s constitutional right to a jury trial and to have one’s case tried by the court in a bench trial under R.C. 2945.05 is a statutory and non-constitutional right. *Acosta*, 6th Dist. No. WD-15-066 at ¶ 12; *State v. Bell*, 2d Dist. No. 24356, 2011-Ohio-5016, ¶ 17.

{¶19} As aforementioned, the non-constitutional rights relevant to the plea hearing are contained in subdivisions (b) and (c) of Crim.R. 11(C)(2). The right to a bench trial is not contained therein. Appellant cites no other rule or statute requiring a discussion of a bench trial right at the plea hearing. Notably, in one case, a capital defendant pled guilty, was sentenced to death, and thereafter complained his plea was not knowingly, voluntary, or intelligent as the court did not inform him that any verdict of the three-judge panel would have to be unanimous (under R.C. 2945.06). The Supreme Court overruled this argument, concluding: “the right to a unanimous verdict by a judicial panel in a bench trial is not a constitutional right; it is conferred by R.C. 2945.06. Because that right is not a constitutional right, a trial court need not advise a defendant that he waives it by pleading guilty.” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 54. The Supreme Court has thus rejected any argument that a non-constitutional right must be discussed by the trial court at the plea hearing notwithstanding its absence from Crim.R. 11. See *id.*

{¶20} Contrary to Appellant’s contention, the trial court is under no obligation to advise a pleading defendant that he waives his right to a bench trial. *Bell*, 2d Dist. No. 24356 at ¶ 17. See also *State v. Timmons*, 8th Dist. No. 105940, 2018-Ohio-2837, ¶ 7, 11-13 (generally rejecting the argument that the trial court was required to advise the pleading defendant that a jury trial could be waived in favor of a bench trial); *State v. Kittelson*, 11th Dist. No. 2016-L-062, 2016-Ohio-8430, 78 N.E.3d 355, ¶ 30 (“he was advised of his right to a bench trial, despite the fact that the trial court is under no obligation to advise him of that right”); *State v. Brown*, 9th Dist. No. 24831, 2010-Ohio-2328, ¶ 17 (affirming the denial of a plea withdrawal motion as “[n]othing in the rule requires the trial judge to advise that a plea waives the defendant’s right to a bench trial”);

State v. Steele, 8th Dist. No. 85901, 2005-Ohio-5541, ¶ 13 (“there is no requirement that trial courts are likewise required to inform defendants of the right to a bench trial”).

{¶21} Finally, regardless of whether the right to a trial by the court is a constitutional or non-constitutional right, it is not addressed in Crim.R. 11 as a required advisement or subject of discussion. Accordingly, a plea is not invalidated by the failure of the trial court to discuss the bench trial option.

{¶22} For all of the foregoing reasons, Appellant’s sole assignment of error is overruled, and the trial court’s judgment is affirmed

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.