

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | No. 108549 |
| | : | |
| v. | : | |
| | : | |
| ROBERT CLEMONS, | : | |
| | : | |
| Defendant-Appellant. | : | |

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-614751-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kevin R. Filiatraut, Assistant Prosecuting Attorney, *for appellee*.

Patituce & Associates, L.L.C., Joseph C. Patituce, Megan M. Patituce, and Catherine Meehan, *for appellant*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Defendant-appellant Robert Clemons appeals from a conviction following his guilty plea. Because we find the trial court properly complied with Crim.R. 11, we affirm.

Procedural History

{¶ 2} On March 13, 2017, Clemons was charged in a multiple-count indictment as follows: Count 1 — murder in violation of R.C. 2903.02(A); Count 2 — murder in violation of R.C. 2903.02(B); Count 3 — felonious assault in violation of R.C. 2903.11(A)(1); Count 4 — felonious assault in violation of R.C. 2903.11(A)(2); Count 5 — having weapons while under disability in violation of R.C. 2923.13(A)(2); and Count 6 — tampering with evidence in violation of R.C. 2921.12(A)(1). Counts 1 through 4 included one- and three-year firearm specifications. Counts 3 and 4 also carried a repeat violent offender specification. And Counts 2 through 5 contained a forfeiture specification.

{¶ 3} On January 29, 2019, Clemons withdrew his previously entered not guilty plea and entered into a plea agreement with the state. Under the plea agreement, the state amended Count 1 to involuntary manslaughter in violation of R.C. 2903.04(A). Clemons agreed to plead guilty to amended Count 1 and the attached three-year firearm specification, Count 5 and the attached forfeiture specification, and Count 6. The parties also agreed to a recommended 20-year prison sentence, which included 11 years on the underlying manslaughter charge, 3 years on the attached firearm specification, and 3 years each on Counts 5 and 6.

{¶ 4} After the trial court engaged the defendant in a Crim.R. 11 colloquy, Clemons pleaded guilty to the charges as agreed. Counsel agreed that the trial court complied with Crim.R. 11. The trial court then found Clemons knowingly, intelligently, and voluntarily pleaded guilty, and it accepted the plea. The court

proceeded directly to sentencing, during which the court imposed the agreed recommended sentence of 20 years imprisonment.

{¶ 5} Clemons now appeals, assigning one error for our review: The trial court erred when it accepted Clemons's guilty plea after failing to notify him of his right to a jury trial during the Crim.R. 11 plea colloquy.

Guilty Plea

{¶ 6} In his sole assignment of error, Clemons contends that the trial court failed to advise him of his constitutional right to a jury trial during his guilty plea, in violation of Crim.R. 11(C)(2)(c), because the word "jury" is mentioned for the first time during the court's explanation of the state's burden of proof. According to Clemons, his guilty plea must therefore be vacated.

{¶ 7} Where a defendant enters a guilty plea in a criminal matter, "the plea must be made knowingly, intelligently, and voluntarily, [and f]ailure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *see also State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7. In determining whether a criminal defendant knowingly, intelligently, and voluntarily entered a guilty plea, we must first review the record to determine whether the trial court complied with Crim.R. 11(C). *State v. Kelley*, 57 Ohio St.3d 127, 128-129, 566 N.E.2d 658 (1991); *State v. Brown*, 8th Dist. Cuyahoga No. 107933, 2019-Ohio-3516, ¶ 17.

{¶ 8} Crim.R. 11(C) delineates certain constitutional and procedural requirements with which a trial court must comply prior to accepting a guilty plea. Under Crim.R. 11(C)(2), the trial court shall not accept a guilty plea in a felony case without personally addressing the defendant and doing all of the following:

(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 * * *, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(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.

{¶ 9} The purpose of Crim.R. 11(C)(2) is “to convey to the defendant certain information so that he [or she] can make a voluntary and intelligent decision whether to plead guilty.” *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981); *State v. Bailey*, 8th Dist. Cuyahoga No. 107216, 2019-Ohio-1242, ¶ 5. In considering whether a plea was made knowingly, intelligently, and voluntarily, we examine the totality of the circumstances through a de novo review. *State v. Albright*, 8th Dist. Cuyahoga No. 107632, 2019-Ohio-1998, ¶ 16.

{¶ 10} Crim.R. 11(C)(2)(c) sets forth the five constitutional rights a trial court must advise a defendant he is waiving before the court can accept a guilty plea, which includes the right to a jury trial. *State v. Rembert*, 8th Dist. Cuyahoga No. 99707, 2014-Ohio-300, ¶ 8, citing *Boykin v. Alabama*, 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The trial court must strictly comply with advisements concerning a defendant's constitutional rights delineated in Crim.R. 11(C)(2)(c). *Rembert*. Where the trial court fails to explain these constitutional rights, it is presumed the plea was entered involuntarily and was unknowingly made and therefore invalid. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12.

{¶ 11} While the best practice of informing a defendant of his constitutional rights is to track the language contained in Crim.R. 11(C), stopping after each right and asking whether the defendant understands the right and knows that he or she is waiving it by pleading guilty, the “failure to so proceed will not necessarily invalidate a plea.” *Ballard* at 480; *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 14 (stating that a trial court's failure to “literally comply” with Crim.R. 11(C) does not in and of itself invalidate a plea); *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 18, 27 (exact language is preferred, but rote recitation of the rule is not required for strict compliance). The focus, therefore, on review, “is whether the record shows that the trial court explained or referred to the right in a manner reasonably intelligible to that defendant.” *Id.*; *State v. McElroy*, 8th Dist. Cuyahoga Nos. 104639, 104640, 104641, 2017-Ohio-1049, ¶ 19,

citing *State v. Gaines*, 8th Dist. Cuyahoga No. 102024, 2015-Ohio-2397, ¶ 6 (finding the “test for strict compliance” under Crim.R. 11(C)(2)(c) is whether the judge explained these rights in a manner reasonably intelligible to the defendant).

{¶ 12} Here, the record demonstrates that the court inquired of Clemons’s age and education and whether he was under the influence of alcohol, medication, or drugs. Clemons replied that he is 56 years old, he has completed the 11th grade, and he was not under the influence of any drugs or medication. The court stated that it would explain to Clemons his trial rights and to “stop me at any time if you don’t understand, okay?” Clemons responded, “Yes.”

{¶ 13} The court then advised Clemons of his constitutional rights as follows:

Court: You have an absolute right to go to trial. At trial you have the right to confront the witnesses against you through your counsel. If you cannot afford an attorney, one will be appointed at no cost to you. Do you understand that?

Defendant: Yes.

Court: The burden of proof at trial is on the state alone. At trial, the state must prove beyond a reasonable doubt each and every element of the charge by proof beyond a reasonable doubt unanimously to a jury of 12 or a judge if you waived a jury. You would have no burden of proof. Do you understand that?

Defendant: Yes.

Court: At trial you could present a defense, call witnesses, compel their appearance at trial by a subpoena, testify yourself and tell your own side of the story, or you could choose not to testify and the prosecutor could not comment upon that fact in violation of your Fifth Amendment right. Do you understand that?

Defendant: Yes.

Court: Has anyone threatened or coerced you into making this plea today?

Defendant: No.

Court: Do you understand if you plead guilty you are waiving your trial rights and obviously you're admitting the truth of the charges to which you are pleading?

Defendant: Yes.

{¶ 14} Crim.R. 11(C)(2)(c) requires the trial court to inform the defendant and determine that the defendant understands “that by the plea the defendant is waiving the rights to jury trial.” Although the court’s initial statement that “you have an absolute right to go to trial” lacked the word “jury,” the court further explained that this trial would be “to a jury of 12 or a judge if you waived a jury.” The court’s inclusion of “jury of 12” in the context of the discussion concerning the state’s burden of proof offers further clarification of the defendant’s “absolute right to go to trial,” which trial could be heard by the judge alone or a jury of 12 people. The placement of the court’s explanation in this context does not diminish the court’s advisement of Clemons’s right to a jury trial. *See State v. Cruz*, 8th Dist. Cuyahoga Nos. 108198, 108199, 108731, 2019-Ohio-5239 (finding strict compliance where the trial court initially advised the defendant that he has “the right to trial” and then in the context of explaining the defendant’s right to confront witnesses advised the defendant that his case would be heard by the assigned judge “or by a jury of 12 people”).

{¶ 15} Moreover, after each advisement of the defendant’s rights, the court asked Clemons if he understood, to which Clemons replied that he did. Clemons

never asked any questions or gave any indication that he did not understand his right to a jury trial, and there is nothing in the record suggesting that he did not fully understand that he had a right to a jury trial or that he was waiving that right by pleading guilty. Given the defendant's age, the defendant's responses to the court after each advisement, and the evident lack of any confusion expressed by the defendant, it is further reasonable to believe Clemons understood that he was waiving the rights associated with a jury trial, including the right to a trial by jury. *Cruz* at ¶ 13, citing *State v. Truitt*, 10th Dist. Franklin No. 10AP-795, 2011-Ohio-2271, ¶ 14.

{¶ 16} In light of the foregoing, we find that the trial court strictly complied with Crim.R. 11(C)(2)(c) when he advised Clemons of his right to a jury trial, and Clemons made a knowing, intelligent, and voluntary plea.

{¶ 17} Clemons's sole assignment of error is overruled.

{¶ 18} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27
of the Rules of Appellate Procedure.

MICHELLE J. SHEEHAN, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR