

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-795 (C.P.C. No. 10CR03-1484)
Ladell D. Truitt,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 12, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Ladell D. Truitt ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, in which the court accepted his guilty plea and sentenced him for nonsupport of dependents, in violation of R.C. 2919.21, a felony of the fifth degree. For the following reasons, we affirm in part and reverse in part.

{¶2} On March 11, 2010, pursuant to R.C. 2919.21, a Franklin County Grand Jury indicted appellant on one count of nonsupport of dependents, alleging that appellant failed to provide support for his minor child "for a total accumulated period of twenty-six (26) weeks out of one hundred four (104) consecutive weeks." (See Mar. 11, 2010

Indictment.) On June 17, 2010, appellant, with counsel, entered a plea of guilty to the indictment for nonsupport of dependents. (See Aug. 17, 2010 Judgment Entry.) That same day, the trial court accepted appellant's plea and found him guilty of nonsupport of dependents. On August 13, 2010, the trial court sentenced appellant to a prison term of 11 months at the Ohio Department of Rehabilitation and Corrections.

{¶3} On August 20, 2010, appellant filed a timely notice of appeal, setting forth the following two assignments of error for our consideration:

[1.] THE TRIAL COURT ERRED WHEN IT FAILED TO COMPLY WITH CRIM.R. 11 BY INFORMING THE DEFENDANT THAT HE WAS WAIVING HIS RIGHT TO A JURY TRIAL AND TO A TRIAL AT WHICH THE DEFENDANT COULD NOT BE COMPELLED TO TESTIFY AGAINST HIMSELF.

[2.] THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUTION FOR THE DEFENDANT'S ENTIRE SUPPORT ARREARAGE INSTEAD OF THE AMOUNT THAT ACCRUED DURING THE TIME PERIOD COVERED IN THE INDICTMENT AND IN THE CHARGE THAT THE DEFENDANT WAS CONVICTED ON.

{¶4} In his first assignment of error, appellant contends that, upon accepting his guilty plea, the trial court did not strictly comply with Crim.R. 11(C)(2)(c). Specifically, appellant argues that the trial court, in its colloquy, failed to inform appellant that, by entering a guilty plea, he waived (1) his constitutional right to a jury trial, and (2) privilege against compulsory self-incrimination. We disagree.

{¶5} "Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶13. "While the trial court must strictly comply with

[Crim.R. 11(C)(2)(c)] regarding the constitutional notifications listed in it, the trial court need only substantially comply with the non-constitutional provisions of the rule." *State v. Enyart*, 10th Dist. No. 08AP-184, 2008-Ohio-6418, ¶15.

{¶6} Crim. R. 11(C)(2) provides:

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:

(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.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights [1] to jury trial, [2] to confront witnesses against him or her, [3] to have compulsory process for obtaining witnesses in the defendant's favor, and [4] to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which [5] the defendant cannot be compelled to testify against himself or herself.

{¶7} Because appellant's first assignment of error only challenges the trial court's compliance with Crim.R. 11(C)(2)(c), we limit our discussion to the trial court's duty to strictly comply with the rule's constitutional requirements when accepting a defendant's plea in a felony case.

{¶8} In *Veney*, the Supreme Court of Ohio reaffirmed that "a court must strictly comply with Crim.R. 11(C)(2)(c)" when advising a defendant of his constitutional rights. *Veney*, 120 Ohio St.3d 176, at ¶22. The Supreme Court stated that "[a] trial court must

strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination." *Id.* at syllabus. In *Veney*, the appellant alleged that the trial court failed to "explain the nature of the charges and failed to inform [Veney] that the state had to prove him guilty beyond a reasonable doubt at trial." *Id.* at ¶3. The Supreme Court, upholding this court's decision to reverse the trial court's judgment in *State v. Veney*, 10th Dist. No. 06AP-523, 2007-Ohio-1295, stated that "the right to have guilt proven by the state beyond a reasonable doubt is among the duties of Crim.R. 11(C)(2)(c) with which the court must strictly comply." *Id.* at ¶21.

{¶9} The Supreme Court of Ohio, in discussing "strict compliance," referenced the noteworthy case of *State v. Ballard* (1981), 66 Ohio St.2d 473, "which marked the first time that [the Court] explicitly made the connection between the strict-compliance standard and the constitutional rights in Crim.R. 11(C)(2)(c)." *Veney*, 120 Ohio St.3d 176, at ¶23. *Ballard* modified the "scrupulous adherence" rule set forth in *State v. Caudill* (1976), 48 Ohio St.2d 342. In *Ballard*, the Supreme Court of Ohio held that, pursuant to *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, "the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *Ballard* at paragraph one of the syllabus. Further, the Supreme Court stated that "[f]ailure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such

trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant." *Id.* at paragraph two of the syllabus. In reaching this conclusion, the Supreme Court reasoned that "[t]o hold otherwise would be to elevate formalistic litany of constitutional rights over the substance of the dialogue between the trial court and the accused. This is something we are unwilling to do." *Id.* at 480.

{¶10} Therefore, "the trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid." *Veney*, 120 Ohio St.3d 176, at ¶29. In doing so, "the trial court may vary slightly from the literal wording of the rule in the colloquy"; however, "the court cannot simply rely on other sources to convey these rights to the defendant." *Id.* Further, "a signed written waiver of constitutional rights does not effect a legal waiver in the absence of the necessary colloquy between the court and the defendant." *State v. Reece*, 10th Dist. No. 05AP-527, 2006-Ohio-4073, ¶18.

{¶11} First, we will discuss appellant's assertion that the trial court failed to inform him that, in pleading guilty, he was waiving his right to a jury trial. Appellant contends that the trial court "informed [appellant] that he was waiving the rights that he would have at a jury trial but did not inform him that he was waving [sic] his right to a jury trial." (See Appellant's Brief at 3.) We are not persuaded by appellant's argument.

{¶12} The record reveals that, prior to accepting appellant's plea of guilty, the trial court inquired regarding appellant's age and level of education, stating:

THE COURT: And how old are you?

[APPELLANT]: Thirty-seven.

THE COURT: How far did you go in school?

[APPELLANT]: Ten - - tenth grade.

THE COURT: From that may I assume that you can read and write and understand the English language?

[APPELLANT]: Yes, sir.

(June 17, 2010, Tr. 2.) Further, after ascertaining whether appellant had knowingly, intelligently, and voluntarily signed the "Entry of Guilty Plea," pursuant to the requirements set forth in Crim.R. 11(C)(2)(a) and (b), the following colloquy occurred:

THE COURT: When you sign a document such as this, I'm required by law to advise you that you *waive all the rights that you would have at a jury trial*. They are:

The right to remain silent.

The right to require the prosecutor to prove your guilt beyond a reasonable doubt.

The right to issue subpoenas for your witnesses, if you have any, and have this Court enforce them for you.

You would have the right to confront and cross-examine your accusers.

And finally, you would have the *right to appeal if the jury found against you*.

Do you understand all of those rights and voluntarily give them up in order to enter this plea of guilty?

[Appellant]: Yes, sir.

(Tr. 3-4.) (Emphasis added.) Finally, the trial court asked:

THE COURT: Do you have any questions about any of this that you'd like to ask either me or your attorney?

[APPELLANT]: No, sir.

THE COURT: Pardon?

[APPELLANT]: No, sir.

THE COURT: All right. I'll accept your plea. You may be seated.

(Tr. 4.)

{¶13} In *Ballard*, the Supreme Court of Ohio faced a similar fact pattern wherein the appellant argued that the trial court failed to inform him that, by pleading guilty, "he was waiving his right to a trial by jury." *Id.* at 474. In its oral colloquy, the trial court "informed the appellant that *neither judge nor jury* could draw any inference if the appellant refused to testify," and immediately thereafter stated that "[the appellant] was entitled to a *fair and impartial trial* under law." *Id.* at 481. (Emphasis added.) In holding that the trial court's colloquy strictly complied with Crim.R. 11(C)(2)(c), the Supreme Court of Ohio noted that "[i]n each instance, the defendant was asked if he understood. The defendant, in each instance, responded affirmatively. These statements and answers, taken together, lead us to the conclusion that the appellant was informed of his right to a trial by jury." *Id.*

{¶14} Here, we also find that the trial court strictly complied with Crim.R. 11(C)(2)(c). In its colloquy, the trial court advised appellant that he was waiving "all the rights that [he] would have at a jury trial." (Tr. 3.) In explaining appellant's constitutional rights, the trial court explicitly listed several rights accorded in a jury trial (right to remain silent, right to have guilt proven beyond reasonable doubt, right to subpoena witnesses, right to confront accusers), as well as appellant's "right to appeal if the jury found against you." (Tr. 4.) Further, when directly asked if he understood "all of those rights," appellant answered "yes, sir," and when directly asked if he "had any questions," appellant

answered "no, sir." (Tr. 4.) Given appellant's age and level of education, it is reasonable to believe that appellant understood that, in waiving the rights associated with a jury trial, he was also waiving his right to a jury trial. Therefore, pursuant to *Ballard*, we find that the trial court explained waiver of the right to a jury trial in a reasonably intelligible manner and in strict compliance with Crim.R. 11(C)(2)(c).

{¶15} Second, we will discuss appellant's assertion that the trial court failed to inform him that, in pleading guilty, he was waiving his Fifth Amendment privilege against compulsory self-incrimination. Appellant contends that "the trial court merely explained to [appellant] that he was giving up the *right to remain silent* and did not adequately explain to [appellant] that he could not be compelled by the state to testify on his own behalf." (See Appellant's Brief at 3.) (Emphasis added.) Again, we are not persuaded by appellant's argument.

{¶16} Because this court has not yet ruled on this exact issue, we look to other appellate courts for direction. The Eighth District Court of Appeals in *State v. Sherman*, 8th Dist. No. 95716, 2011-Ohio-1810; *State v. Flynn*, 8th Dist. No. 93588, 2010-Ohio-3191; and *State v. Butcher* (Oct. 17, 1985), 8th Dist. No. 49642; and the Second District Court of Appeals in *State v. Moorefield* (Oct. 8, 1999), 2d Dist. No. 98-CR-26, offer sound guidance in resolving the issue presently before this court.

{¶17} In *Sherman*, the appellant argued that he was prejudiced because the trial court "failed to inform him of his constitutionally guaranteed right against self-incrimination." *Id.* at ¶4. The trial court, in its colloquy, advised the appellant that "if we went to trial you'd have the *right to remain silent* and not testify and no one could comment on the fact that you did not testify." *Id.* at ¶10. (Emphasis added.) In affirming

the appellant's convictions, the court stated that "[t]he 'right to remain silent' has been described as a 'term of art synonymous with the Fifth Amendment privilege against self-incrimination.'" Id. at ¶12, quoting *State v. Henderson*, 2d Dist. No. 21425, 2006-Ohio-6306, ¶7.

{¶18} In *Flynn*, the appellant stated he did not knowingly, voluntarily, and intelligently enter his guilty plea "because of the trial court's failure to advise [him] that, should he decide not to testify at trial, no one could comment on [his] failure to testify." Id. at ¶1. The trial court, in its colloquy, advised the appellant that he was "giving up his *right to remain silent*." Id. at ¶7. (Emphasis added.) The court, in affirming the appellant's conviction, held "[b]y telling [Flynn] he was waiving his right to remain silent, the court complied with Crim.R. 11(C)'s requirement that the defendant be advised he was waiving his privilege against compulsory self-incrimination." Id. at ¶8. See also *State v. Burston*, 8th Dist. No. 93645, 2010-Ohio-5120, ¶7, holding that trial court complied with Crim.R. 11(C) in advising the appellant in its colloquy that "you are giving up your right in each case to remain silent and not testify."

{¶19} In *Butcher*, the appellant contended that "he was not advised of his absolute right not to testify," because, in its colloquy, the trial court stated "you have the *right to remain silent* if you so desire or you have the right to take the witness stand and testify if you wish to do that." Id. (Emphasis added.) The Eighth District Court of Appeals affirmed the judgment of the trial court, stating "[t]he plain meaning of the words used by the court is that the defendant had the right to choose to testify or not to testify." Id.

{¶20} In *Moorefield*, the appellant asserted that the trial court "failed to inform him of his * * * right against self-incrimination in the manner that [Crim.R.11(C)(2)(c)]

requires." Id. The trial court, in its colloquy, advised the appellant that "[i]f your pleas of guilt are accepted you're giving up certain Constitutional rights. Those include * * * the *right to remain silent*." Id. (Emphasis added.) The court, in affirming the appellant's convictions, stated that "[t]he court's explanation that [the appellant] would, by his plea, waive his 'right to remain silent' * * * was fully sufficient to [be] reasonably intelligible to [the appellant]." Id.

{¶21} Here, similar to the above-cited cases, the trial court advised appellant of his "right to remain silent." (Tr. 4.) The plain meaning of the trial court's words suggest that appellant had the right to say absolutely nothing at trial, if he so desired. Intuitively, if a person remains silent at trial, they opt to engage the privilege against self-incrimination and do not testify against themselves. In addition, as previously stated, the trial court inquired whether appellant had any questions regarding the colloquy, and appellant answered "no, sir." (Tr. 4.) Therefore, pursuant to *Ballard*, we find that the trial court explained waiver of the privilege against self-incrimination in a reasonably intelligible manner and in strict compliance with Crim.R. 11(C)(2)(c).

{¶22} Appellant's first assignment of error is overruled.

{¶23} In his second assignment of error, appellant contends that, pursuant to R.C. 2929.18(A)(1), the trial court erred in ordering restitution in the amount of \$33,232.24, the full arrearage, instead of the amount due for the period of nonsupport in appellant's conviction. The state concedes that this was error, and we agree.

{¶24} In the present matter, the judgment entry holds that "[d]efendant shall pay restitution in the amount of \$33,232.24 to Franklin County Child Support Enforcement Agency." R.C. 2929.18(A)(1) states in relevant part that "the court imposing a sentence

upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section * * *: (1) [r]estitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss."

{¶25} In *State v. Turns*, 10th Dist. No. 10AP-740, 2011-Ohio-1497, this court held that "R.C. 2929.18 * * * limits an order of restitution to the amount of economic loss suffered by the victim as a result of the offender's commission of the offense." *Id.* at ¶34. See *State v. Schul*, 12th Dist. No. CA2009-08-215, 2010-Ohio-1285 (reversing a trial court order that imposed restitution in an amount exceeding the support owed for a period of nonsupport).

{¶26} Appellant's second assignment of error is sustained.

{¶27} For the foregoing reasons, appellant's first assignment of error is overruled, and his second assignment of error is sustained. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this matter to that court to impose restitution in an amount not to exceed the amount of support owed for the 104-week period set forth in the indictment.

*Judgment affirmed in part, reversed in part,
and cause remanded with instructions.*

BROWN and SADLER, JJ., concur.
