

[Cite as *State v. Fisher*, 2011-Ohio-629.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23992
vs.	:	T.C. CASE NO. 09-CR-3913
	:	(Criminal Appeal from
RICHANO FISHER	:	Common Pleas Court)
Defendant-Appellant	:	

. . . . .

O P I N I O N

Rendered on the 11<sup>th</sup> day of February, 2011.

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. . . . .

GRADY, P.J.:

{¶ 1} Defendant, Richano Fisher, appeals from his conviction  
 and sentence for illegally conveying a drug of abuse onto the  
 grounds of a detention facility.

{¶ 2} Pursuant to a negotiated plea agreement, Defendant pled

guilty to illegally conveying a drug of abuse (marijuana) onto the grounds of a detention facility, R.C. 2921.36(A)(2), a felony of the third degree. In exchange, the State dismissed a charge of theft involving R.C. 2913.71 property (credit cards and checks), R.C. 2913.02(A)(1). The trial court sentenced Defendant to ten days in jail and to five years of community control sanctions, which included drug and alcohol treatment.

{¶3} Defendant timely appealed to this court from his conviction and sentence.

#### ASSIGNMENT OF ERROR

{¶4} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ACCEPTING APPELLANT'S GUILTY PLEA WITHOUT ASCERTAINING THAT SAID PLEA WAS KNOWINGLY GIVEN."

{¶5} Defendant argues that his guilty plea was not entered knowingly. In support of that claim, Defendant argues that he did not understand the nature of the charge to which he pled guilty.

He also points out that he did not audibly respond to the trial court's question regarding whether he understood he had a right to a jury trial, and at sentencing denied that he committed this offense.

{¶6} In order to be constitutionally valid and comport with due process, a guilty plea must be entered knowingly, intelligently, and voluntarily. *Boykin v. Alabama* (1969), 395

U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. Compliance with Crim.R. 11(C) (2) in accepting guilty or no contest pleas portrays those qualities.

{¶ 7} In *State v. McGrady*, Greene App. No. 2009CA60, 2010-Ohio-3243, at ¶11-13, this court stated:

{¶ 8} "In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim. R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶ 9} "A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93; Crim. R. 52(A). The test is whether the plea would have been otherwise made. *Id.* at 108.

{¶ 10} "A trial court must strictly comply with Crim. R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id.* at 243-44. However, substantial compliance with Crim. R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. The non-constitutional rights

that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim. R. 11(C)(2)(a)(b); *State v. Philpott*, Cuyahoga App. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Nero*, 56 Ohio St.3d at 108."

{¶ 11} "The determination that there has been an intelligent voluntary waiver with understanding of rights is a subjective procedure. It can be accomplished by short direct inquiry, investigation or lengthy interrogation. Each determination must be made on an ad hoc basis. The depth and breadth of the interrogation depends upon the totality of circumstances surrounding each case." *State v. McKee* (1976), 50 Ohio App.2d, 313, 314.

{¶ 12} Our review of the plea hearing demonstrates that the trial court scrupulously complied with all of the requirements in Crim.R. 11(C)(2), and advised Defendant about all of the constitutional rights he was giving up by pleading guilty, as well as all of the other non-constitutional matters. With respect to

the nature of the charge, the trial court asked the prosecutor to read the charge. The following then transpired:

{¶ 13} "THE COURT: Would the prosecutor read the charge?

{¶ 14} "MR. CAVINDER: Yes, Your Honor. If this case had proceeded to trial, the State of Ohio would have proven beyond a reasonable doubt that Richano Fisher, on or about November 19<sup>th</sup>, 2009, in Montgomery County, Ohio, did knowingly convey or attempt to convey onto the grounds of a detention facility or the Department of Rehabilitation and Correction, any drug of abuse, to-wit: marijuana, a drug included in Schedule I as defined in Section 3719.01(1) of the Revised Code, all of this contrary to Section 2921.36(A)(2) of the Revised Code, which is the illegal conveyance of drugs into a detention facility, a felony of the third degree.

{¶ 15} "THE COURT: Sir, do you understand the nature of the charge?

{¶ 16} "THE DEFENDANT: Yes, sir." (Plea Tr. at 8-9.)

{¶ 17} Defendant complains because the prosecutor did not include in his recitation of the charge the specific facts of this case. There is no such requirement in Crim.R. 11(C)(2), and Defendant has not directed our attention to any such caselaw. The prosecutor's explanation of the charge included all of the essential elements of the offense. Defendant explicitly told the trial court that he understood the nature of the charge. In the

absence of other evidence showing that Defendant was confused or did not understand, which the record of this plea hearing does not suggest, the record is sufficient to demonstrate that the trial court properly determined that Defendant understood the nature of the charge. As for the various elements of the offense, including the mens rea, Defendant's guilty plea is a complete admission of his guilt. Crim.R. 11(B)(1).

{¶ 18} With respect to the trial court's explanation of the constitutional rights Defendant would be giving up by pleading guilty, when the trial court inquired if Defendant understood he had a right to a jury trial and a right to require the prosecutor to prove his guilt beyond a reasonable doubt, Defendant did not audibly respond. When the court then asked Defendant if he had any question about that, Defendant conferred with his counsel and then confirmed that he understood he had the right to require the prosecutor to prove his guilt beyond a reasonable doubt. Defendant went on to affirmatively indicate that he understood his right to confront the witnesses against him, his right to compulsory process, and his right to remain silent and not incriminate himself.

The trial court then asked Defendant:

{¶ 19} "THE COURT: And do you understand that by pleading guilty you are giving up all these constitutional rights?"

{¶ 20} "THE DEFENDANT: Yes, sir." (Plea Tr. at 8.)

{¶ 21} Subsequently, the following occurred:

{¶ 22} "THE COURT: Knowing all this, considering everything we've talked about here this morning, how do you plead to the charge of illegal conveyance of drugs of abuse onto the ground of a detention facility?

{¶ 23} "THE DEFENDANT: Guilty.

{¶ 24} "THE COURT: All right. If you'll so verify that plea by signing the form. If you have any question, please ask it now.

{¶ 25} "(Defendant and counsel executing form.)

{¶ 26} "THE COURT: Anything else, Mr. Fisher?

{¶ 27} "THE DEFENDANT: No, sir." (Id. at 9.)

{¶ 28} In addition to the above, in examining the totality of the facts and circumstances surrounding Defendant's guilty plea, we note that Defendant is thirty four years of age, and when asked how far he went in school, Defendant responded, "thirteen years and a half." Defendant told the court that he did not have any trouble reading. Defendant was represented by a very experienced criminal defense attorney, and executed a written plea form which states, "The Court informed me and I understand that by pleading guilty I am waiving (giving up) my right to a jury trial." (Dkt. 9.)

{¶ 29} In *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, the Supreme Court wrote:

{¶ 30} “{¶ 37} A jury waiver must be voluntary, knowing, and intelligent. Crim.R. 23; *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271, 8 O.O.3d 232, 375 N.E.2d 1250. Waiver may not be presumed from a silent record. However, if the record shows a jury waiver, the conviction will not be set aside except on a plain showing that the defendant's waiver was not freely and intelligently made. *Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268. Moreover, a written waiver is presumptively voluntary, knowing, and intelligent. *United States v. Sammons* (C.A.6, 1990), 918 F.2d 592, 597. See, generally, *State v. Bays* (1999), 87 Ohio St.3d 15, 19, 716 N.E.2d 1126.

{¶ 31} \* \* \*

{¶ 32} “{¶ 43} ‘A waiver is the intentional relinquishment of a known right or privilege. \* \* \* Hence, a defendant must have some knowledge of the nature of the jury trial right to make a valid waiver.’ *Bays*, 87 Ohio St.3d at 19-20, 716 N.E.2d 1126. However, ‘[t]here is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial.’ *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus; accord *Spytma v. Howes* (C.A.6, 2002), 313 F.3d 363, 370 (colloquy not constitutionally required). ‘The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant,

filed with the court, and made in open court, after arraignment and opportunity to consult with counsel.' *Jells*, 53 Ohio St.3d at 26, 559 N.E.2d 464."

{¶ 33} The better practice is to give separate advice to a defendant concerning each right he elects to waive, and to obtain an oral response from the defendant demonstrating his understanding of the matter. The trial court explained the rights Defendant's plea would waive. Defendant's failure to make an oral response concerning waiver of his right to a jury trial was an oversight on his part, and not a basis to find that Defendant failed to understand that he waived the right the court had explained to him. The fact that the court did not interrogate Defendant further on the matter, after he discussed the court's advice with his lawyer, did not invalidate his guilty plea or prevent the court from accepting it.

{¶ 34} This record amply demonstrates that Defendant was informed of and understood all of the constitutional rights he was giving up by pleading guilty in this case. Defendant's guilty plea was entered knowingly, intelligently, and voluntarily, with a full understanding of the constitutional rights he would be giving up, including his right to trial by jury. Defendant's later assertion at the sentencing hearing that he was intoxicated and did not deliberately convey marijuana into the jail, does not

vitiating his otherwise knowing, intelligent, and voluntary guilty plea. In that regard we simply note that Defendant did not ask to withdraw his guilty plea prior to sentencing.

{¶ 35} Defendant's assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, J. and FROELICH, J. concur.

Copies mailed to:

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Hon. Timothy N. O'Connell