

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
SENECA COUNTY**

---

**STATE OF OHIO,**

**PLAINTIFF-APPELLEE,**

**CASE NO. 13-14-43**

**v.**

**ERIC J. WELLY,**

**OPINION**

**DEFENDANT-APPELLANT.**

---

**Appeal from Seneca County Common Pleas Court  
Trial Court No. 14 CR 0193**

**Judgment Affirmed**

**Date of Decision: July 6, 2015**

---

**APPEARANCES:**

***John M. Kahler II* for Appellant**

***Stephanie J. Reed* for Appellee**

**WILLAMOWSKI, J.**

{¶1} Defendant-appellant Eric J. Welly (“Welly”) brings this appeal from the judgment of the Court of Common Pleas of Seneca County accepting his guilty plea to rape. Welly challenges the acceptance of the plea claiming that he was not adequately informed of his right to compulsory process as required by Criminal Rule 11(C)(2). For the reasons set forth below, the judgment is affirmed.

{¶2} On July 23, 2014, the Seneca County Grand Jury indicted Welly on one count of rape in violation of R.C. 2901.02(A)(1)(b),(B), a felony of the first degree in which the potential maximum penalty would be life without parole. Doc. 1. An arraignment hearing was held on July 25, 2014, and Welly entered a plea of not guilty. Doc. 6. On November 17, 2014, Welly entered a written guilty plea to a lesser included offense of rape in violation of R.C. 2907.02(A)(1)(b), (B). Doc. 29. The written pleas stated as follows regarding the power to compel witnesses.

**I understand by pleading Guilty I give up my right to a jury trial or court trial, where I could see and have my attorney question witnesses against me, and where I could use the power of the Court to call witnesses to testify for me.**

*Id.* at 3. Prior to Welly signing the plea agreement, a hearing was held on the change of plea. Doc. 31. The following dialogue occurred between the trial court and Welly at the hearing.

**The Court:** Do you understand that by pleading guilty, you give up your right to a jury trial or court trial.

**Mr. Welly:** Yes, sir.

**The Court:** At that trial, you have the right to be present, to be represented by counsel, and if you could not afford counsel, one would be appointed at state expense.

**Do you understand that?**

**Mr. Welly:** Yes, sir.

**The Court:** Do you understand that you're giving up your right to confront and have your attorney question witnesses against you?

**Mr. Welly:** Yes, sir.

**The Court:** Do you understand that you do not have to call witnesses; however, if you need to call witnesses, you are entitled to summon and have witnesses present to testify on your behalf.

**Do you understand this?**

**Mr. Welly:** Yes, sir.

**The Court:** Do you understand that at that trial, you would not have to take the witness stand, could not be forced to testify against yourself, and that no one could comment if you chose not to testify?

**Mr. Welly:** Yes, sir.

**The Court:** Do you understand that you're waiving your right to have the State of Ohio prove your guilt beyond a reasonable doubt on every element of the charge?

**Mr. Welly:** Yes, sir.

**The Court: Do you understand that by pleading guilty, you admit committing the offense?**

**Mr. Welly: Yes, sir.**

**The Court: Do you understand your right to appeal a maximum sentence, your other limited appellate rights, and any appeal must be filed within 30 days of my sentence?**

**Mr. Welly: Yes, sir.**

**The Court: And again, are you entering this plea voluntarily?**

**Mr. Welly: Yes sir.**

**The Court: Again, Mr. Welly, you're looking at an awful long time in prison before you're even eligible. I want to make sure you've given this enough thought, spoke with Mr. Stotzer, family, friends, whomever.**

**Mr. Welly: Yes, sir.**

**The Court: And you're sure this is what you want to do?**

**Mr. Welly: Yes, sir.**

**The Court: Very well then you may sign the plea.**

**\* \* \***

**The Court: The Court accepts the plea and orders it journalized.**

Tr. 11-13. The trial court found there was a factual basis for the plea and proceeded to sentence Welly to an indeterminate sentence of 25 years to life in prison.<sup>1</sup> Doc. 31.

{¶3} Welly filed his notice of appeal on December 16, 2014. Doc. 34. On appeal, Welly raises the following assignment of error.

**The trial court erred in accepting [Welly's] guilty plea where the trial court failed to sufficiently advise [Welly] of his right to compulsory process.**

{¶4} The sole assignment of error challenges the trial court's compliance with Criminal Rule 11. Before accepting a guilty plea in a felony case, the trial court must comply with the requirements of Criminal Rule 11(C).

**(2) 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.**

---

<sup>1</sup> The imposition of sentence immediately followed the change of plea, so no motion to withdraw the plea was filed prior to sentencing. Additionally, no such motion was filed after sentencing and the issue is being raised for the first time on direct appeal.

**(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the right 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 guilty 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). The only requirement at issue in this case is the third one.

{¶5} Welly's argument is that the trial court's statement that he was "entitled to summon witnesses" was not sufficient to inform him of his right to "compulsory process" as required by the rule. The Ohio Supreme Court has addressed what is required to satisfy the trial court's requirement during the plea colloquy in *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826. In *Barker*, the appellate court held that the trial court failed to notify a defendant of his right to compulsory process when it told the defendant that he had the "right to call witnesses to speak on your behalf." The State appealed the matter to the Supreme Court, who held that this language was sufficient to satisfy the requirement set forth in Criminal Rule 11(C)(2)(c).

**This court has held that the preferred method of informing a criminal defendant of his or her constitutional rights during the plea colloquy is to use the language contained in Crim.R. 11(C). \* \* \* However, a trial court's failure to literally comply with Crim.R. 11(C) does not invalidate a plea agreement if the record demonstrates that the trial court explained the constitutional right "in a manner reasonably intelligible to that defendant." [citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 270].**

**In *Veney*, we reaffirmed that strict, or literal, compliance with Crim.R. 11(C)(2)(c) is required when advising the defendant of the constitutional rights he is waiving by pleading guilty or no contest. \* \* \* Included in the list of constitutional rights is “the right to compulsory process to obtain witnesses.” \* \* \* The right to compulsory process of witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution. However, we reaffirmed that the “failure to [literally comply] will not necessarily invalidate a plea. The underlying purpose, from the defendant’s perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty.” \* \* \* This is because “a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.”**

*Barker* at ¶ 14-15. The Court then went on to note that call means to summon which also means to compel one’s appearance. *Id.* at ¶ 17-18. The use of these terms was determined to convey the idea that a witness would be required to appear. *Id.* at ¶ 18. The Court then held that using common, everyday words instead of a recitation of legal terminology is an acceptable method for informing defendants of their constitutional rights and complies with the requirements of Criminal Rule 11(C)(2)(c). *Id.* at ¶ 20.

{¶6} The language used in this case by the trial court was that Welly would have the right to summon witnesses to testify on his behalf. As noted by the Supreme Court in *Barker*, to summon one is to order that person to appear. *Id.* at ¶ 17. Thus, the use of the language summon witnesses does convey to the defendant

that he had the right to order witnesses to appear on his behalf. Pursuant to the holding in *Barker*, this court finds that the trial court complied with the requirements of Criminal Rule 11(C)(2)(c). The assignment of error is overruled.

{¶7} Having found no error in the particulars assigned and argued, the judgment of the Court of Common Pleas of Seneca County is affirmed.

*Judgment Affirmed*

**SHAW and PRESTON, J.J., concur.**

**/hlo**