

[Cite as *State v. Ortiz*, 2009-Ohio-2877.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91626

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAPHAEL ORTIZ

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498823

BEFORE: Stewart, J., McMonagle, P.J., and Dyke, J.

RELEASED: June 18, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Raphael Ortiz, appeals from his conviction for trafficking in drugs in violation of R.C. 2925.03(A)(1). He asserts that the trial court erred by accepting his guilty plea without ensuring that the plea was knowingly, intelligently, and voluntarily entered. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant was charged in a three-count indictment with one count of drug possession, and two counts of trafficking in drugs. The counts included a juvenile specification pursuant to R.C. 2925.03(C)(2)(b). Appellant entered a plea of not guilty to all counts.

{¶ 3} On October 29, 2007, the day of trial, appellant entered a plea of guilty to one amended count of drug trafficking. The juvenile specification was deleted to lower the class of felony from a first degree to a second degree. The remaining counts were dismissed. Appellant agreed to forfeit the \$830 seized at the time of his arrest.

{¶ 4} At appellant's request, the trial court set the sentencing hearing for the following week and continued appellant's court supervised release. The court instructed appellant that if he failed to appear for sentencing on November 5, 2007, as ordered, he would be arrested, brought back to court, and the sentencing structure would look different than if he appeared as ordered.

{¶ 5} Appellant failed to appear for the sentencing hearing on November 5, 2007. He was arrested months later and returned to court. On May 15, 2008, the trial court held a sentencing hearing and sentenced appellant to a mandatory prison term of five years, a driver's license suspension of five years, and a fine of \$10,000. Appellant was also advised that upon completion of his prison term, he was subject to a mandatory three-year period of postrelease control.

{¶ 6} Appellant timely filed a notice of appeal setting forth the following assignment of error for our review:

{¶ 7} "The trial court abused its discretion by accepting the appellant's guilty plea without ensuring that the plea was knowingly, intelligently and voluntarily entered."

{¶ 8} Both the Ohio and the United States Constitutions require that a defendant entering a guilty plea must do so knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. Before accepting a guilty plea, Crim. R. 11(C)(2) requires that the trial court engage in oral dialogue with the defendant to determine that the plea is voluntary, that defendant understands the nature of the charges and the maximum penalty involved, and to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea.

{¶ 9} Crim.R. 11(C)(2) states:

{¶ 10} "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:

{¶ 11} “(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.

{¶ 12} “(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.

{¶ 13} “(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.”

{¶ 14} The trial court must strictly comply with the dictates of Crim.R. 11(C)(2) regarding the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200; *State v. Stewart* (1977), 51 Ohio St.2d 86, 88-89. “Strict compliance does not require a rote recitation of the exact language of the rule; rather, the focus on review is whether the ‘record shows that the judge explained these rights in a manner reasonably intelligible to the defendant.’” *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, _6, quoting *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph two of the syllabus.

{¶ 15} Regarding the non-constitutional requirements of Crim.R. 11(C)(2)(a) and (b), only substantial compliance with the rule is required. 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. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must demonstrate prejudice. To demonstrate prejudice in this context, the defendant must show that the plea would not otherwise have been made. *Id.*

{¶ 16} Appellant contends only that the trial court failed to adequately advise him of his constitutional rights. He asserts that the trial court merely recited the names of the rights appellant would be waiving by entering a plea, without inquiring as to whether he fully understood the concepts. He argues that a criminal defendant would not understand what a subpoena was, or how the court would enforce the subpoena and, that the court failed to define “reasonable doubt” or to fully explain what “no one will comment on that silence” means in connection with Fifth Amendment protections. As a result, he maintains that the record does not establish that he understood his rights and understood what waiving those rights meant. We disagree.

{¶ 17} A review of the transcript from the plea hearing reflects that appellant had his constitutional rights reviewed three times prior to entering his guilty plea – twice by the court and once by his retained counsel.

{¶ 18} On October 29, 2007, as trial was set to begin, the court informed appellant:

{¶ 19} “I’m going to review with you what your constitutional rights are. Under the constitution of the United States and the great State of Ohio, you are guaranteed the right to trial by jury; the right to confront and examine witnesses that the state would present against you; the right to subpoena or force the attendance at trial of any individual who can offer testimony on your behalf, and the court will enforce that subpoena; the right not to testify at the time of trial; that no one may comment on your silence. In addition, the right to testify is among the rights waived when defendants plead guilty and forego trial.”

{¶ 20} The judge then asked appellant, “Do you understand your rights?” Appellant replied, “Yes, your Honor, I do.”

{¶ 21} After conferring with appellant, defense counsel informed the court that appellant desired to change his not guilty plea. Counsel stated that he discussed the matter of the plea change at great length with appellant. Counsel told the court:

{¶ 22} “We, also, discussed at great length his constitutional rights, which include but are not limited to his rights to trial, his right to trial by jury, his right of confrontation, his right to remain silent and nobody can comment on that.”

{¶ 23} Before accepting appellant’s plea, the trial court conducted its own inquiry of appellant to be certain that he understood his rights and the effects of the guilty plea he was making. The court again explained appellant’s constitutional rights as follows:

{¶ 24} “Court: The constitution of the United States of America and the great State of Ohio guarantee to you certain rights. These rights are as follows:

{¶ 25} “The right to trial by jury.

{¶ 26} “The right to confront and examine witnesses that the state would present against you.

{¶ 27} “The right to subpoena or force the attendance at trial of any person who can offer testimony on your behalf, and the court will enforce that subpoena.

{¶ 28} “The right to have the state prove your guilt beyond a reasonable doubt to a jury of 12, or a judge if you were to waive a jury.

{¶ 29} “And, the right not to testify at the time of trial, that no one will comment on that silence.

{¶ 30} “And in addition the right to testify is among the rights waived when defendants plead guilty and forego trial.”

{¶ 31} The court again asked if appellant understood his rights and again appellant informed the court that he did. There is no evidence to suggest that appellant did not understand what he was being asked and his responses indicated that he understood the rights he was waiving, as enumerated by the trial court. Further, during the plea colloquy, appellant asked the court to stop so he could discuss a matter with his counsel. Additionally, when he was uncertain about the mandatory nature of the sentence, appellant asked the court to explain it further. Therefore, it is clear from the record that if appellant had any questions about his

constitutional rights or any of the words used by the court in describing those rights, he would have asked the court to explain.

{¶ 32} The record reflects that the trial court strictly complied with each of the constitutional requirements of Crim.R. 11(C)(2)(c). As appellant did not challenge the trial court's compliance with the non-constitutional requirements of Crim.R. 11, we need not address that issue. Accordingly, appellant's single assignment of error is overruled and the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE _____

CHRISTINE T. McMONAGLE, P.J., and
ANN DYKE, J., CONCUR