

[Cite as *State v. Fisher*, 2010-Ohio-3876.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93683

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVIN FISHER

DEFENDANT-APPELLANT

**JUDGMENT:
VACATED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517659

BEFORE: Jones, J., Gallagher, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 19, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Marvin Fisher (“Fisher”), appeals his conviction. Finding merit to the appeal, we reverse.

{¶ 2} In 2008, Fisher was charged with two counts of aggravated robbery, with notices of prior conviction and repeat violent offender specifications; one count of felonious assault with notice of prior conviction and repeat violent offender specification; one count of kidnapping with notice of prior conviction and repeat violent offender specification; and one count of grand theft motor vehicle.

{¶ 3} Fisher entered into a plea agreement with the state and pled guilty to one count each of aggravated robbery and kidnapping, with notices of prior conviction.

{¶ 4} At sentencing, defense counsel requested that the aggravated robbery and kidnapping charges merge. The trial court denied the request and sentenced Fisher to seven years for aggravated robbery — consecutive to three years for kidnapping — for a total sentence of ten years in prison.

{¶ 5} Fisher now appeals, raising the following two assignments of error for our review:

{¶ 6} “I. Appellant’s pleas were not knowing and voluntary and are, therefore void.

{¶ 7} “II. The trial court erred in merging the kidnapping and aggravated robbery offenses in that they are allied offenses of similar import with a single animus.”

{¶ 8} In his first assignment of error, Fisher contends that the trial court failed to comply with Crim.R. 11, and that his guilty plea was not knowingly, voluntarily, and intelligently given.

{¶ 9} 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, 660 N.E.2d 450. 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 the 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.

{¶ 10} Crim.R. 11(C)(2) states:

“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 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.”

{¶ 11} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. See *State v. Higgs* (1997), 123 Ohio App.3d 400, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 517 N.E.2d 990. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. See *State v. Stewart*

(1977), 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163; *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus. “Strict compliance” does not require an exact recitation of the precise language of the rule but instead focuses on whether the trial court explained or referred to the right in a manner reasonably intelligible to that defendant. *Id.* These strict compliance prerequisites include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474.

{¶ 12} For non-constitutional rights, scrupulous adherence to Crim.R. 11(C) is not required; the trial court must substantially comply. *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implication of his plea and the rights he is waiving.” *Nero* at 108. Moreover, there must be some showing of prejudicial effect before a guilty plea may be vacated. *Stewart*, *supra*.

{¶ 13} In the case at bar, a review of the plea hearing transcript establishes that the trial court did not inform Fisher of all of his constitutional rights. The state concedes that assignment of error.

{¶ 14} The court advised Fisher of his right to a trial by jury, his right to insist that the prosecutor prove his guilt beyond a reasonable doubt, his right to subpoena witnesses and have them “forced” to come to court to testify for him at trial, that he was giving up his right to remain silent and not testify, and that the

court could proceed to sentencing immediately after his plea. Fisher responded, “Yes, sir” to each question.

{¶ 15} The trial court then informed Fisher of the maximum penalty of the felonies to which he was pleading guilty, the effect of a notice of prior conviction, the amount of postrelease control for each charge, what would happen if he violated postrelease control, the maximum possible fines, and that the court could run his sentences consecutive to one another. The trial court then took Fisher’s pleas of guilty and referred him for a presentence investigation report.

{¶ 16} The court failed, however, to advise Fisher of his right to confrontation, which is a constitutional right. *Nero*. Therefore, we find that Fisher’s guilty plea was not knowing, voluntary, and in full compliance with Crim.R. 11.

{¶ 17} The first assignment of error is sustained.

{¶ 18} Based on our disposition of the first assignment of error, the second assignment of error is moot. See App.R. 12.

{¶ 19} Accordingly, Fisher’s plea is vacated and case remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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 common pleas court to carry this judgment into execution. 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR