

[Cite as *State v. Kaminski*, 2010-Ohio-4669.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93744

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREG KAMINSKI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521314

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

RELEASED AND JOURNALIZED: September 30, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Greg Kaminski, appeals from the trial court's judgment, entered after a guilty plea, finding him guilty of driving under the influence, with a specification of 5 or more similar offenses in the last 20 years, and sentencing him to 1 year plus 120 days in prison, and imposing a \$2,000 fine. Kaminski contends that his guilty plea was not knowingly, voluntarily, or intelligently made, in violation of Crim.R. 11, because prior to accepting his plea, the trial court did not explain to him the nature and circumstances of the charge to which he pled guilty.

I

{¶ 2} Under Crim.R. 11(C), prior to accepting a guilty plea in a felony case, a court must conduct an oral dialogue with the defendant to determine that the plea is voluntary and the defendant understands the nature of the charges and the maximum penalty involved, and to personally inform the defendant of the constitutional guarantees he is waiving by entering a guilty plea.

{¶ 3} A trial court must strictly comply with the Crim.R. 11(C)(2) requirements regarding the waiver of constitutional rights, meaning the court must actually inform the defendant of the constitutional rights he is waiving and make sure the defendant understands them. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 876 N.E.2d 621, ¶18 and 27. With respect to the other requirements of Crim.R. 11(C)(2) regarding nonconstitutional rights, “substantial compliance” is sufficient. *Id.* at ¶14, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163; *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶31. “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, 564 N.E.2d 474.

{¶ 4} If the trial judge partially complied with the rule with respect to nonconstitutional rights, the plea may be vacated only if the defendant

demonstrates a prejudicial effect. *Clark*, ¶32. See, also, *Veney* at ¶17 (“A defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.”) The test for prejudice is “whether the plea would have otherwise been made.” *Clark* at ¶32, quoting *Nero* at 108.

{¶ 5} Kaminski contends that his plea was not knowingly, voluntarily, or intelligently made because the trial court did not explain the nature of the charges to him. The right to be informed of the nature of the charges prior to entering a plea is a nonconstitutional right, and thus we review the plea proceedings to determine if there was substantial compliance with the rule. *State v. Johnson*, 8th Dist. No. 91567, 2009-Ohio-3088, ¶7; *State v. Esner*, 8th Dist. No. 90740, 2008-Ohio-6654; *State v. Joachim*, 8th Dist. No. 90616, 2008-Ohio-4876; *State v. Asberry*, 173 Ohio App.3d 443, 2007-Ohio-5436, 878 N.E.2d 1082.

II

{¶ 6} The judge began the plea hearing by identifying the charge and specifications against Kaminski. She then informed Kaminski of the potential penalties upon pleading guilty and he indicated that he understood the penalties. The judge then asked him general questions about his level of education, his past offenses, and whether he was under the influence of drugs or alcohol. Kaminski responded appropriately to each question and stated

that he was “thinking clearly” that day. The judge next explained the constitutional rights Kaminski would be waiving by pleading guilty, and upon questioning, Kaminski stated that he understood these rights. The judge then explained that postrelease control would be imposed after incarceration, and explained the consequences of violating postrelease control. In response to questioning, Kaminski stated that he had discussed his decision to plead guilty with his lawyer and that he had no questions “at all” about the proceedings.

{¶ 7} Next, reading the entire indictment, the judge asked him, “Mr. Kaminski, how do you plead, sir, that on or about February 20, 2009, in Cuyahoga County, Ohio, in violation of the driving under the influence statute, 4511.19(A)(1)(a) of the Ohio Revised Code, you unlawfully did operate a vehicle within this state while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, and further, that within 20 years of committing the above offense, you were convicted of or pled guilty to five or more equivalent offenses?” The trial judge continued reading the indictment regarding each of the prior offenses and further, regarding Kaminski’s refusal to submit to a Breathalyzer test.

{¶ 8} Thus, the record reflects that Kaminski was advised twice during the hearing as to the nature of the charges to which he was pleading guilty. Despite Kaminski’s argument that the trial court should have inquired as to

whether he understood the nature of the crime or whether someone had explained the nature of the crime to him, this court has repeatedly held that “courts are not required to explain the elements of each offense, or even to specifically ask the defendant whether he understands the charges, unless the totality of the circumstances shows that the defendant does not understand the charge.” *Johnson*, supra at ¶8, citing *State v. Carpenter*, 8th Dist. No. 81571, 2003-Ohio-3019; *State v. Krcal*, 8th Dist. No. 80061, 2002-Ohio-3634; *State v. Whitfield*, 8th Dist. No. 81247, 2003-Ohio-1504; *State v. Steele*, 8th Dist. No. 85901, 2005-Ohio-5541; *State v. Swift* (1993), 86 Ohio App.3d 407, 621 N.E.2d 513.

{¶ 9} When the defendant “indicates that he understands the nature of the charge, in the absence of evidence to the contrary or anything in the record that indicates confusion, it is typically presumed that the defendant actually understood the nature of the charge against him.” *State v. Martin*, 8th Dist. Nos. 92600 and 92601, 2010-Ohio-244, ¶13, quoting *State v. Wangul*, 8th Dist. No. 84698, 2005-Ohio-1175, ¶10. The charges were explained to Kaminski twice, and he stated that he had no questions about the proceedings. He stated that he was “thinking clearly,” and there is nothing in the record to indicate that he was confused, coerced, or did not understand the proceedings or his plea. The record reflects that Kaminski understood the charge to which he pled guilty.

{¶ 10} Finally, even assuming any error by the trial court, Kaminski has made no showing of prejudice relating to his plea, much less any argument that he would not have pled guilty had the trial court more fully explained the nature and circumstances of the charge against him. Accordingly, we find that Kaminski's plea was knowingly, voluntarily, and intelligently made and that the trial court substantially complied with the requirements of Crim.R. 11(C) in accepting the plea.

{¶ 11} Appellant's assignment of error is overruled; judgment affirmed.

It is ordered that appellee recover from appellant 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. 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.

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR