

[Cite as *State v. Green*, 2015-Ohio-2700.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101990

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT GREEN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-579730-A

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: July 2, 2015

ATTORNEY FOR APPELLANT

Ruth R. Fischbein-Cohen
3552 Severn Road
Apt. #613
Cleveland, Ohio 44118

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Denise J. Salerno
Brett Hammond
Assistant County Prosecutors
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Robert Green appeals his conviction and assigns the following errors for our review:

I. Ohio Criminal Rule 11 requires that a defendant's plea be "knowing and intelligent." He must understand what he is pleading to. If any of these factors are missing in a plea, the plea is rendered invalid under Criminal Rule 11.

II. It was error to sentence Robert Green to consecutive sentences.

III. It was error to classify Robert Green a sexual predator.

{¶2} Having reviewed the record and pertinent law, we affirm Green's conviction.

{¶3} On November 26, 2013, the Cuyahoga County Grand Jury returned a 20-count indictment against Green for the rape and kidnapping of six women. On May 7, 2014, the grand jury reindicted Green to add the rape and kidnapping of a seventh woman. Green pleaded not guilty at his arraignment on the charges, and several pretrials followed. On May 13, 2014, pursuant to a plea agreement with the state, Green pleaded guilty to seven counts of rape, representing a count for each woman. Also, in accord with the plea agreement, the state dismissed the remaining charges.

{¶4} On August 27, 2014, the trial court classified Green as a sexual predator, and imposed consecutive prison terms of five years on each of the seven counts for a total of 35 years. Green now appeals.

Criminal Rule 11

{¶5} In the first assigned error, Green argues his guilty pleas were not knowingly, intelligently, or voluntarily made.

{¶6} Before accepting a guilty plea, the trial court must determine whether the defendant has knowingly, intelligently, and voluntarily entered the plea. *State v. Lee*, 8th Dist. Cuyahoga No. 99795, 2014-Ohio-1421; Crim.R. 11(C). In considering whether a guilty plea was entered knowingly, intelligently, and voluntarily, an appellate court examines the totality of the circumstances through a de novo review. *State v. Boyd*, 8th Dist. Cuyahoga No. 100225, 2014-Ohio-1081, citing *State v. Siler*, 11th Dist. Ashtabula No. 2010-A-0025, 2011-Ohio-2326, ¶ 12.

{¶7} Crim.R. 11(C)(2) governs guilty pleas and provides:

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 a 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.

{¶8} In order to determine whether a criminal defendant knowingly, intelligently, and voluntarily entered a plea, we review the record to determine whether the trial court adequately advised the defendant of his constitutional and nonconstitutional rights set forth in Crim.R. 11(C). *State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990).

{¶9} The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus; *State v. Stewart*, 51 Ohio St.2d 86, 88-89, 364 N.E.2d 1163 (1977); *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), at 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.*

{¶10} Also with regard to the trial court's duty to explain the defendant's constitutional rights, the court must require that the defendant be advised of the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *Veney* at ¶ 18. The court must determine that the defendant understands that by the plea the defendant is waiving the rights to a jury trial and to confront witnesses. *Id.* Further, in order for the plea to be invalidated, the defendant must demonstrate prejudice, which requires a showing that the

plea would not otherwise have been entered. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12.

{¶11} In this matter, the trial court's colloquy provided:

Q: Mr. Green, you have rights afforded to you by the State of Ohio and the United States Constitution. I am about to advise you of those rights. Again, do not hesitate to let me know if you have any questions. Okay?

A: Yes.

Q: Do you understand that you may waive your right to a jury trial and have your case tried to this Court?

A: I do.

Q: Do you understand that at trial, the State of Ohio has the obligation to prove your guilt beyond a reasonable doubt as to each element of each crime of which you have been charged?

A: Yes.

Q: Do you understand that you, through counsel, have the right to confront or cross-examine any witness who testifies against you at trial?

A: Yes.

Q: Do you understand that you have the right to compulsory process, which means you have the right to subpoena witnesses or demand their attendance at trial if you present a defense at trial?

A: Yes.

Q: Do you understand that you cannot be forced or compelled to testify against yourself at trial?

A: Yes.

Q: Do you understand that if you choose or elect not to testify at trial, that your silence cannot be used against you in any attempt to prove your guilt?

A: Yes.

Q: Do you understand that you have the right to a speedy trial?

A: Yes, I do.

Q: Do you understand that you have the right to counsel, and if you cannot afford counsel, you will be provided counsel at no cost to you?

A: Yes.

Q: Do you understand that if you plead guilty, you are waiving all of these important constitutional rights?

A: Yes.

Tr. 15-18.

{¶12} From the foregoing, the record clearly indicates that the trial court tracked the language of Crim.R. 11(C), using words reasonably intelligible to Green, and that Green repeatedly indicated that he understood his rights. The record, therefore, demonstrates that the trial court met its duty of strict compliance as it properly explained Green's constitutional rights and that Green understood the rights that he was waiving.

{¶13} With respect to the other requirements of Crim.R. 11(C)(2)(a) and (b) regarding nonconstitutional rights, reviewing courts consider whether the trial court substantially complied with the rule. *Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115. "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 106, 108, 564 N.E.2d 474.

{¶14} A review of the record herein reveals that the trial court thoroughly explained the nonconstitutional rights Green would be waiving by entering a plea of guilty. In that regard, the trial court reviewed the nature of the offenses and the potential penalties involved; advised Green that his plea was a complete admission of guilt; and advised Green that the trial court could proceed with judgment and sentence immediately after accepting his pleas. Green expressed his understanding of those rights. In addition, Green’s trial attorney stated on the record that he had explained the plea bargain, possible penalties, and the constitutional rights regarding the agreement.

{¶15} We conclude that the trial court strictly complied with the constitutional requirements of Crim.R. 11, and also gave a textbook rendition of the nonconstitutional requirements. Therefore, we find that Green subjectively understood the consequences of pleading guilty and his pleas were knowingly, voluntarily, and intelligently made.

{¶16} Nonetheless, Green, who was 67 years old at the time of the plea, contends that his pleas were not knowingly entered because he has been diagnosed with dementia. At the plea hearing, Green appeared in a wheelchair and was breathing with the aid of an oxygen tank. The trial court inquired about his medical condition and Green indicated that he suffered from chronic obstructive pulmonary disease. Thereafter, the following exchange took place:

Q: Okay. Anything else that you're dealing with?

A: Yes.

[Defense Counsel]: Your kidneys.

A: What?

[Defense Counsel]: Your kidneys.

A: My kidneys. I got a kidney problem. And that's it.

Q: Okay. Are you on medication for those ailments?

A: Yes, I am.

Q: And have you been taking the medication you're prescribed for those ailments?

A: Yes.

Q: And is that medication helping you?

A: Yes, it is.

Q: Aside from what you've already discussed in terms of your physical ailments, are you suffering from any kind of mental disability?

A: No.

Q: Now, are the medications that you're taking for the COPD and the kidney problem impacting your ability to understand what's happening here today in this hearing?

A: No.

Q: [Defense Counsel], do you have any concerns about that?

A.: [Defense Counsel]: I don't, Your Honor.

Q: Thank you. Are you thinking clearly here today, Mr. Green?

A: Yes.

Tr. 11-13.

{¶17} A review of the above excerpt clearly indicates that Green was facing two major health challenges, was under doctor’s supervision, and was taking medication to address his medical conditions. However, Green specifically stated that he was not suffering from any mental disability. Further, Green indicated that the medication he was taking would not impact his understanding of the proceedings. As such, we can find no evidence that his pleas were not knowingly, intelligently, and voluntarily made. Accordingly, we overrule the first assigned error.

Consecutive Sentences

{¶18} In the second assigned error, Green argues the trial court erred when it imposed a consecutive sentence.

{¶19} R.C. 2929.14(C)(4) requires a sentencing judge to make three statutory findings before imposing consecutive sentences and incorporate those findings in the journal entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio- 3177, 16 N.E.3d 659, ¶ 29. First, the trial court must find that “consecutive service is necessary to protect the public from future crime or to punish the offender.” R.C. 2929.14(C)(4). Second, the trial court must find that “consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” *Id.*

{¶20} Finally, the trial court must find that at least one of the following applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶21} “[A] word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *Id.* The failure to make the findings, however, is “contrary to law.” *Bonnell* at ¶ 37.

{¶22} In this case, the trial court supported its decision to impose consecutive sentences by making the following findings in open court and on the record:

THE COURT: Thank you. Again, the Court will note for the record the reports that I have considered, it's already noted on the record, as well as the presentence investigation report, the briefings, memorandums provided by the State. The Court has considered the record and the oral statements made here today, both by the attorneys representing their respective parties and by the victim that appeared here in Court this morning, as well as certainly the statement of the defendant's daughter.

The Court has also considered a handwritten victim impact statement that was provided to the Court just this morning, by victim [D.W]. And I would like to state in relevant part just a few choice things that she stated in this victim impact statement. It's very long, what she wrote.

And a consistent — the consistent theme in this victim impact statement is that this situation, this incident, this attack upon her by the defendant ruined her life. Professionally, socially, mentally. She's been unable to trust a man, to get into a relationship with a man; she still is scared at times, thinking about the memory. But again, she's very detailed in her — what she suffered throughout these many years as a result of this attack on her by the defendant.

And I just want to make it clear that according to the handwritten notes that she provided to this Court, it has had a very dramatic, very serious, negative impact on her. Probably some of the strongest writings I've seen from a victim of a rape. So that's being incorporated into the basis for my sentence as well.

Now, as has been pointed out, this Court must consider certain factors in determining the appropriate sentence in this matter. And those factors are set forth in our laws. In our sentencing laws. And one of the factors that this Court must consider under section 2929.12(A) is the risk that the offender will commit another crime, and the need for protecting the public from the risk.

Certainly, the seven victims that were terrorized by this defendant is [sic] not being mitigated in any way by this Court stating at this point in time with the defendant being now 68 years old, and it's readily apparent to the Court that he is in significantly poor health.

* * *

So in considering that factor, I do not believe that the defendant is in a position to commit another crime. And so that factor certainly weighs in favor of a lesser term, because I don't think he's physically or otherwise capable of posing a risk to the public at this time. Particularly since the penalty associated with these crimes is a mandatory prison term. * * * However, when we get to considering the nature and circumstances of the offenses, that's where that certainly weighs in favor of a harsher penalty, as Ms.

Salerno set forth not only in open court today, but also in her sentencing memorandum. These were situations where this defendant preyed upon women. Came upon them sometimes in the context of offering assistance, sometimes not, would just grab them by threat of gun, knife, et cetera, force them into a car, took them into an out of the way place, forced them to have sex, not just vaginally, but otherwise, and certainly put them in grave fear. And the impact that they've — that this conduct has had on these victims is the most serious. And I can only — it's already been set forth by one of the victims that appeared here today.

And I certainly give great credit to those victims that have certainly forgiven the defendant, not only the [sic] here this morning, [Ms. L.], but others that have represented that to the Court through Ms. Salerno. But it does not in any way, shape or form take away from the nature and circumstances of the conduct of the defendant towards these victims. It was atrocious and devastating to these victims.

* * *

And certainly, the Court must as well consider the history, character and condition of the offender and his need for correctional or rehabilitation treatment. Now, the defendant not only was convicted of these several rapes, seven, he pled guilty to seven of the rape counts, but he has a prior history, dating back to the 1960s, in California. He was arrested for and charged with various crimes at that point in time. To include in 1966 assaulting with a deadly weapon a police officer.

He also was charged with battery in 1966, although we don't know the specific disposition of that case. He was also charged with robbery in 1967. And again the defendant was released. And other than that, we don't have any further information about the disposition of that case. Also, in 1968 he was charged with attempted rape. And again, due to the age of the case, no disposition was available. In 1971, again, there was a burglary charge. And due to the age of the case, no further disposition is available. And also in 1971, there was a charge of forced rape. And again, due to the age of the case no further disposition is available. And actually, in 1976 he was charged with attempted murder, but what happened was apparently the victim in that case was his brother. And then ultimately no prosecution was pursued, because of that relationship.

And then in 1996, here in Cuyahoga County, the defendant was convicted of or pled guilty to attempted carrying a concealed weapon. And then, of course, we have these offenses that he pled guilty to on these seven rapes.

So, certainly, the defendant does have a record, a criminal record dating back many years. And so I do believe that this defendant, although at an age and in a medical state where he's not likely to commit again, the problem is that his history, the character certainly weighs in favor of a prison sentence — actually, prison is mandated, but I'm saying in this case for consecutive sentences as well.

Tr. 56-62.

{¶23} A review of the above excerpt, representing the trial court's justification for imposing consecutive sentences, which we have quoted extensively because of Green's advanced age and chronic medical conditions, reveals that the trial court found all statutory factors. After considering Green's ill health, the trial court found it was very unlikely that he would commit future crimes, but acknowledged the barbarity of the crimes and found that consecutive sentences were still necessary to punish Green for his past behavior.

{¶24} The above excerpt also reveals that the trial court's imposition of consecutive sentences was not disproportionate to Green's conduct. There were seven separate women that felt the full force and effect of Green's heinous behavior. In addition, the excerpt reveals that the trial court found the harm caused by these separate attacks on the seven unsuspecting women was so great and unusual that a single prison term would not adequately reflect the seriousness of Green's conduct.

{¶25} As previously stated, the trial court acknowledged and was mindful that because of Green’s advanced age, as well as his poor medical condition, he was unlikely to reoffend; and thus, there was no perceived need to protect the public from future crimes of Green. However, despite Green’s present condition, the trial court still had to consider his past conduct and the lasting impact on the victims of his crimes.

{¶26} Finally, although the above excerpt does not contain an exact recitation of the statute, it bears repeating that pursuant to *Bonnell*, the trial court was not required to make a word-for-word recitation of the language of the statute. We can discern from the transcript that the trial court engaged in the correct analysis and that the record supports the findings. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29; *see also State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 17. Accordingly, we overrule the second assigned error.

Sexual Predator Classification

{¶27} In the third assigned error, Green argues he should not have been classified as a sexual predator.

{¶28} A sexual predator is defined in R.C. 2950.01(E) as a person who has been convicted of or pled guilty to committing a sexually oriented offense, and is likely to engage in the future in one or more sexually oriented offenses. *State v. Larson*, 8th Dist. Cuyahoga No. 101000, 2014-Ohio-4685.

{¶29} Because sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature, a trial court’s determination in a sex-offender-classification hearing

must be reviewed under a civil manifest-weight-of-the-evidence standard and may not be disturbed when the trial judge's findings are supported by some competent, credible evidence. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, syllabus.

{¶30} In making its determination as to whether an offender is a sexual predator, the trial court must consider all relevant factors to determine whether the individual is likely to engage in future sex offenses. These factors include, but are not limited to (1) the offender's age and prior criminal record, (2) the age of the victim, (3) whether the sex offense involved multiple victims, (4) whether the offender used drugs or alcohol to impair the victim of the sex offense, (5) if the offender has previously been convicted of or pleaded guilty to any criminal offense, (6) whether the offender completed a sentence for any conviction, and (7) if a prior conviction was for a sex offense, whether the offender participated in any available program for sex offenders, (8) whether the offender demonstrated a pattern of abuse or displayed cruelty toward the victim, (9) any mental illness or disability of the offender; and any other behavioral characteristics that contribute to the sex offender's conduct. Former R.C. 2950.09(B)(3)(a)-(j).

{¶31} The trial judge has "discretion to determine what weight, if any, he or she will assign to each guideline" set forth in former R.C. 2950.09(B)(3). *State v. Thompson*, 92 Ohio St.3d 584, 752 N.E.2d 276 (2001), paragraph two of the syllabus. Given that discretion, an appellate court cannot substitute its judgment for that of the trial judge

when reviewing a sexual predator classification. *See State v. Ellison*, 8th Dist. Cuyahoga No. 78256, 2002-Ohio-4024, ¶ 3.

{¶32} We note that the “trial court is not required to individually assess each of these statutory factors on the record nor is it required to find a specific number of these factors before it can adjudicate an offender a sexual predator so long as its determination is grounded upon clear and convincing evidence.” *State v. Caraballo*, 8th Dist. Cuyahoga No. 89757, 2008-Ohio-2046, ¶ 8, citing *State v. Ferguson*, 8th Dist. Cuyahoga No. 88450, 2007-Ohio-2777. “The court need not elaborate on its reasons for finding certain factors as long as the record includes the particular evidence upon which the trial court relied in making its adjudication.” *Caraballo* at ¶ 8.

{¶33} Applying R.C. 2950.09(B)(3) to the facts of this case, the trial court stated the relevant factors it considered and then proceeded to articulate each factor, to set forth the evidence that pertained to that factor. The trial court then determined whether that factor weighed in favor of adjudicating Green a sexual predator. For example, the trial court reviewed Green’s prior criminal record, as it had done in deciding whether consecutive sentences were appropriate, and reviewed the current convictions for raping seven different women. The trial court found that Green’s prior criminal record, along with the current convictions, weighed in favor of a sexual predator classification.

{¶34} The trial court highlighted Green’s display of cruelty towards the victims; specifically stating:

Seven different women and all sorts of the same type of thing: Whether it was a gun, a knife; the threat of force; vaginal, oral penetration; in the car,

throwing them out of the car, dressed or not dressed, leaving them in an isolated place, definitely a pattern of abuse. * * *. Again, I think the behavioral characteristics are that he did this over a period of several years, to unassuming victims. He offered them help and when they got into the car, thinking they were getting a ride from this man, he turned around and exhibited this kind of cruelty and force upon these women, and threatened force as well with guns, with a knife, et cetera.

Tr. 73-74.

{¶35} We find that multiple factors are satisfied such that there exists clear and convincing evidence supporting the trial court's decision to classify Green as a sexual predator.

{¶36} Nonetheless, Green argues his advanced age of 68 and poor health condition weighed against him being classified as a sexual predator.

{¶37} The trial court recognized Green's advanced age and was cognizant of his poor health, as well as the psychiatric tests that placed Green in a low risk of recidivism. However, without some evidence regarding Green's particular attributes, history, and circumstances, and how they relate to his age, we find this general principle that the risk of reoffending declines as one ages of little help. *State v. Gray*, 8th Dist. Cuyahoga No. 100492, 2014-Ohio-3139, citing *State v. Fears*, 10th Dist. Franklin No. 04AP-1164, 2005-Ohio-2960, ¶ 7.

{¶38} Thus, although the record indicates that the trial court considered Green's advanced age, poor health condition, and the result of the psychiatric test, there is nothing in R.C. 2950.09(B)(3) that requires the trial court to defer to the impact of age and poor health on the risk of recidivism when weighing the statutory factors. For the foregoing

reasons, we conclude that the trial court's decision classifying Green a sexual predator is supported by competent, credible evidence. Accordingly, we overrule the third assigned error.

{¶39} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR