

Case No. 2018-0948

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

v.

SHAWN MILLER

Defendant-Appellee.

On Appeal from the Court of Appeals
Eighth Appellate District, Cuyahoga County, Ohio
Case No. 105363

BRIEF ON THE MERITS OF APPELLEE SHAWN MILLER

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STATEMENT OF FACTS

The State's Merit Brief includes a recitation of the underlying facts providing the basis for the charges set forth in the indictment against Appellee, which was taken from the prosecutor's version of events presented at the sentencing hearing. Appellee respectfully asserts that the underlying facts of the case have no relevance whatsoever regarding the issue presently before this Honorable Court, i.e., whether Mr. Miller's plea strictly complied with the requirements of Crim. R. 11(C)(2)(c). Needless to say, Mr. Miller does not agree with the State's version of events set forth in the State's Merit Brief. However, given that Mr. Miller's plea has been vacated, coupled with the understanding that the underlying facts are not relevant to the issue presently before this Honorable Court, Mr. Miller's Statement of Facts will be limited to the procedural posture of the case and what transpired at his change of plea hearing.

On March 23, 2016, the State of Ohio indicted Mr. Miller in a sixteen count indictment, together with co-defendants Robert A. Bailey-Burline and William R. Looby, in Cuyahoga County Court of Common Pleas case number CR-16-604581. The State alleged the following: Counts 1 - 4: Attempted Murder, felonies of the first degree pursuant to R.C. § 2923.02; Counts 5 – 8: Aggravated Arson, felonies of the first degree pursuant to R.C. § 2909.02(A)(1); Count 9: Aggravated Arson, a felony of the second degree pursuant to R.C. § 2909.02(A)(2); Count 10: Arson, a felony of the fourth degree pursuant to R.C. § 2909.03(A)(1); Count 11: Felonious Assault, a felony of the second degree pursuant to R.C. § 2903.11(A)(1); Counts 12 – 15: Felonious Assault, felonies of the second degree pursuant to R.C. § 2903.11(A)(2); and Count 16: Breaking and Entering, a felony of the fifth degree pursuant to R.C. § 2911.13(B).

On November 14, 2016, Mr. Miller entered pleas of guilty to Aggravated Arson as charged in Count 9 of the indictment, Arson as charged in Count 10 of the indictment, and Felonious Assault as amended in count 11 of the indictment, with the remaining counts in the indictment being nolle. Count 11 of the indictment was amended to include three additional victims and to delete the forfeiture specification. At the change of plea hearing, the trial court had a discussion with the prosecutor regarding the terms of the plea arrangement and confirmed with Mr. Miller that he understood the plea bargain. (Change of Plea Hearing Transcript, p. 28). The trial court also had a discussion with Mr. Miller regarding the nature of the charges to which he was pleading guilty and the potential penalties for each one. (Change of Plea Hearing Transcript, pp. 45-52). Mr. Miller indicated that he understood the terms of the plea bargain and the potential penalties that the trial court could impose at sentencing.

Prior to the discussion with Mr. Miller and his co-defendants regarding the nature of the charges and potential punishments that the trial court could impose at sentencing, the trial court had a discussion with Mr. Miller and the co-defendants regarding their constitutional rights. (Change of Pleas Hearing Transcript, pp.41 – 45). The following exchange took place between the trial court and Mr. Miller in this regard:

THE COURT: So does everybody – you can sit down now. Thank you very much, sir. Does everybody understand that pleading guilty is like giving a speech, and the speech goes, Judge Burnside, I did these crimes right here and I admit I did each one of them.

Understood, Mr. Miller?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Mr. Looby?

DEFENDANT LOOBY: Yes.

THE COURT: Mr. Bailey-Burline?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: As good as the plea bargains might sound to people, nobody is under an obligation to accept them. You're welcome to stay with not guilty and go to trial instead. Right, Mr. Miller?

DEFENDANT MILLER: Yes, your honor.

THE COURT: Mr. Looby?

DEFENDANT LOOBY: Yes, Your Honor.

THE COURT: Mr. Bailey-Burline?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: And if you go to trial, you always have your lawyers. Can't afford one, one is appointed no cost to you. Understood, Mr. Bailey-Burline?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: Mr. Looby?

DEFENDANT LOOBY: Yes, Your Honor.

THE COURT: Mr. Miller?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: And you know that at trial you're presumed innocent. The burden is on the prosecutor. They have to come

in with evidence. They have to prove each of the original charges against you with evidence beyond a reasonable doubt.

If there is one or more charges on the list that they cannot prove beyond a reasonable doubt, you would be acquitted and discharged of that count if they couldn't prove to that degree.

Understood, Mr. Miller?

DEFENDANT MILLER: Yes, your honor.

THE COURT: Mr. Looby?

DEFENDANT LOOBY: Yes.

THE COURT: Mr. Bailey-Burline?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: So at trial you're welcome to take the witness stand in your defense but you have a right to stay off the stand and remain silent. No can make you talk or even comment on your silence.

Understood, Mr. Bailey-Burline?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: Understood, Mr. Looby?

DEFENDANT LOOBY: Yes, Your Honor.

THE COURT: Understood, Mr. Miller.

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: And do you understand that you and your lawyers get to cross-examine all the witnesses that the prosecutor

brings in her to try to build a case against you, Mr. Bailey-Burline? You understand that?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: Do you, Mr. Looby?

DEFENDANT LOOBY: Yes.

THE COURT: Do you, Mr. Miller?

DEFENDANT MILLER: Yes.

THE COURT: Okay. So the other thing you need to know, your lawyers can issue subpoenas to select your witnesses, get them on the witness stand. The Court will enforce those subpoenas to help you get them here to testify for you.

Understood, Mr. Bailey-Burline?

DEFENDANT BAILEY-BURLINE: Yes, Your Honor.

THE COURT: Understood, Mr. Looby?

DEFENDANT LOOBY: Yes, Your Honor.

THE COURT: Understood, Mr. Miller?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Any Questions from any of you?

DEFENDANT BAILEY-BURLINE: No.

DEFENDANT LOOBY: No.

DEFENDANT MILLER: No.

(Change of Plea Hearing Transcript, pp. 41-45). Although the trial court informed Mr. Miller and the co-defendants of their constitutional rights, the trial court neglected to

inquire as to whether Mr. Miller understood that he was waiving those rights by changing his plea to guilty. In fact, the terms “waive” and “waiver” are not found anywhere in the transcript of the change of plea hearing. The trial court did not ask Mr. Miller if he understood that he was waiving these rights or giving up these rights as a consequence of entering a guilty plea pursuant to the plea bargain.

At the sentencing hearing held on December 13, 2016, the trial court sentenced Mr. Miller to serve a maximum term of imprisonment of eight years as to Count 9 (Aggravated Arson), eighteen months as to Count 10 (Arson), and six years as to Count 11 (Felony Assault), with the sentences to run concurrently. Co-defendant Looby received an identical sentence consisting of an eight-year term of incarceration and co-defendant Bailey-Burline received a two-year prison term.

On January 12, 2017, Mr. Miller timely filed a notice of appeal to the Eighth District Court of Appeals, raising one assignment of error, which was that the trial court committed reversible error in accepting Mr. Miller’s plea without inquiring as to whether Mr. Miller understood that by making the plea he was waiving certain constitutional rights listed in Crim. R. 11(C)(2)(c). On March 8, 2018, the Eighth District Court of Appeals issued its Journal Entry and Opinion, sustaining Mr. Miller’s sole assignment of error, reversing the judgment of the trial court, vacating his guilty pleas and remanding the matter for further proceedings. *State v. Miller*, 8th Dist. No. 105363, 2018-Ohio-843. The Eighth District Court of Appeals correctly invalidated his guilty pleas, finding that the trial court failed to strictly comply with the requirements of Crim.R. 11(C)(2)(c) with respect to ensuring that Mr. Miller understood that his guilty pleas constituted a waiver of constitutional rights. *Id.* at ¶ 16.

The State subsequently filed an application for en banc consideration and a motion to certify a conflict, both of which the Eighth District denied. The State then filed a jurisdictional appeal on July 9, 2018. This Honorable Court issued an Entry on October 24, 2018 accepting the State's appeal. On October 30, 2018, Appellee filed a Motion to Dismiss this appeal as being improvidently allowed, arguing that the appeal should be dismissed because the identical question was raised in the appeal of Mr. Miller's co-defendant, William Looby, and this Court declined to accept jurisdiction in that matter on September 26, 2018.¹ See, Ohio Supreme Court Case No.2018-0944. On December 19, 2018, Mr. Miller's Motion to Dismiss was denied and the State then filed its Merit Brief on January 28, 2019.

LAW AND ARGUMENT

RESPONSE TO THE STATE OF OHIO'S PROPOSITION OF LAW: STRICT COMPLIANCE WITH CRIMINAL RULE 11(C)(2)(C) IS REQUIRED OF A TRIAL COURT WHEN ACCEPTING A GUILTY PLEA IN A FELONY CASE IN TERMS OF INQUIRING AS TO WHETHER A CRIMINAL DEFENDANT UNDERSTANDS THAT BY MAKING THE PLEA HE IS WAIVING CERTAIN CONSTITUTIONAL RIGHTS.

- A. The State failed to preserve the issue of substantial compliance versus strict compliance in the context of a trial court's requirements under Criminal Rule 11(C)(2)(c) because the State asserted, correctly, at the lower level that the applicable standard is strict compliance and that the trial court, in fact, strictly complied with Crim. R. 11(C)(2)(c).**

The State of Ohio never argued a theory of substantial compliance in the Eighth District Court of Appeals. To the contrary, the State argued that the appropriate standard in this context is strict compliance and that the trial court did in fact strictly

¹ Upon remand, Mr. Looby's prison sentence was reduced to four years. See, Journal Entry of November 30, 2018 in Cuyahoga County Court of Common Pleas Case No. CR-16-604581-C.

comply with the requirements of Crim. R. 11(C)(2)(C) with respect to determining whether Mr. Miller understood that by making the plea he was waiving certain constitutional rights. The State's Brief quotes the discussion between the trial court and Mr. Miller at the time of the plea and then immediately thereafter states, "From the forgoing, it is clear that the trial court strictly complied with the mandates of Crim. R. 11." (State's Brief filed June 8, 2017 at p.6). Moreover, the State did not set forth an alternative argument at the lower level advocating in favor of a substantial compliance requirement in this context. In fact, the precedent primarily relied upon by the State at the lower level, *State v. Boyd*, 8th Dist. Cuyahoga No. 100225, 2014-Ohio-1081, stands for the proposition that a trial court has a duty of strict compliance under Crim R. 11(C). (State's Brief filed June 8, 2017 at pp.6, 8). The Eight District in *Boyd*, citing *Veney*, *infra*, stated, "The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights." *State v. Boyd*, 2014-Ohio-1081, ¶ 12. At no point during the course of the lower court proceedings did the State argue a theory of substantial compliance, but rather only argued that the colloquy between the trial court and Mr. Miller reflects that the trial court met its duty of strict compliance. Only after the Eighth District sustained Mr. Miller's assignment of error and vacated Mr. Miller's guilty pleas did the State change its theory from "the trial court strictly complied with the rule" to "the trial court should be held to a lesser standard of substantial compliance."

It is a well settled principle of appellate review that the Ohio Supreme Court "does not indulge itself in advisory opinions" and "will not ordinarily consider a claim of error which is neither raised nor considered by the court below." (Citation omitted.)

Egan v. Natl. Distillers & Chem. Corp., 25 Ohio St. 3d 176, 177, 495 N.E.2d 904 (1986); see also *Portage County Bd. of Comm'rs v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 86 (holding that an issue neither raised by the appellant/cross-appellee in the court of appeals nor addressed by the court of appeals may be raised in the Ohio Supreme Court for the first time on appeal); *State v. Cornely*, 56 Ohio St. 2d 1, 4, 381 N.E.2d 186 (1978) (“This court will not ordinarily consider a claim of error which a defendant has failed to raise before the appellate court and which was not considered by that court.”). Having argued strict compliance in the Eighth District Court of Appeals, both as the required duty of a trial court to follow in a general sense, as well as that which was actually followed by the trial court in this specific case, the State should not now be permitted to deviate from its prior position out of mere expedience. “[A]n appellant cannot change h[is] theory of the case on appeal in the hope of obtaining reversal.” (Citations omitted.) *Schutte v. Summit Cty. Sheriff's Office*, 9th Dist. No. 07CA009238, 2018-Ohio-2565, ¶29.

B. The Eighth District Court of Appeals correctly determined Mr. Miller’s plea was invalid because the trial court failed to strictly comply with Crim. R. 11(C)(2)(c) by not making a determination that Mr. Miller understood by making the plea he was waiving constitutional rights.

Before accepting a guilty plea in felony cases, a trial court must be in strict compliance with Crim. R. 11(C)(2)(c), which requires, among other things, that a trial court make a determination that the defendant understood he was giving up or waiving certain constitutional rights by virtue of pleading guilty. Here, the Trial Court neglected to inquire as to whether Mr. Miller had this understanding as to the waiver of his rights and, therefore, committed plain error by accepting his guilty plea.

Crim.R. 11(C)(2) provides in pertinent part:

"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:

* * *

(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." (emphasis added).

Crim. R. 11(C)(2)(c). "A Trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid." *State v. Veney*, 120 Ohio St. 3d 176, 2008 Ohio 5200, 897 N.E.2d 621, 2008 Ohio LEXIS 2768 (2008).

The State relies heavily upon the Tenth District Court of Appeals decision in *State v. Ellis*, 10th Dist. No. 14AP-912, 2015-Ohio-3438 in support of its proposition of law. However, the argument set forth by the defendant in *State v. Ellis* is different from the issue decided by the Eighth District in this matter. In *State v. Ellis*, the defendant argued that the trial court "failed to determine if he actually understood the constitutional rights he was waiving by pleading guilty." *Id.* at ¶ 9. The defendant in *Ellis* did not raise the argument, as was raised here, that the trial court failed to determine that he understood he was waiving his constitutional rights. Rather, the argument raised in *Ellis* was that the trial court failed to determine whether the defendant actually understood

the nature of his constitutional rights. Accordingly, the Eighth District properly followed the decision of the Seventh District Court of Appeals holding “that in order to strictly comply with Crim.R. 11(C)(2)(c), the trial court must not only explain the applicable constitutional rights but it must also advise that by entering a guilty plea the criminal defendant is waiving those rights.” *State v. Strebler*, 7th Dist. No. 08 MA 108, 2009-Ohio-1200, ¶ 36.

Since the issue before the Tenth District in *State v. Ellis* is distinguishable from the issue decided by the Eighth District in this matter, there is not a conflict between the appellate districts as the State wrongfully suggested in its Memorandum in Support of Jurisdiction filed in this matter. Rather, the Eighth District correctly applied the Seventh District’s opinion in *State v. Strebler* as it was exactly on point with the issue before it, which is whether Crim. R. 11(C)(2)(c) requires strict compliance in felony cases as to whether a defendant understood he is waiving his constitutional rights. The issue presented is not merely whether he understood those rights, as was the case in *Ellis*, but also that he understood the consequence of the plea, i.e., that he is waiving those rights. The waiver of rights goes to the very essence of the nature of a guilty plea and our system of justice should not merely take for granted that a layperson understands certain things, such as a waiver of trial rights, as “common sense” as the State suggests in its Merit Brief.

In addition, the fact scenario in *State v. Ellis* is distinguishable from the fact scenario in this case. Primarily, there is no dispute that the trial court here did not once mention the word “waiver” or any other variant of that word, such as “give up” or “forego” or “bypass” or “surrender.” Conversely, the trial court in *Ellis* stated on the

record, “When you enter a guilty plea, you give up your right to have a jury trial on these charges....By entering this guilty plea, that means you're giving up those trial rights. Are you doing that voluntarily?” *Ellis* at ¶¶ 7, 14. Here, there was no such exchange that occurred between Mr. Miller and the trial court. Consequently, Mr. Miller’s plea would be invalidated under either a strict compliance or a substantial compliance standard.

Moreover, the position taken by the State in this matter raises the exact concern expressed in Judge Dorrian’s dissenting opinion in *Ellis*, in which she stated:

I am concerned that the effect of the majority decision is to require strict compliance with a trial court's first duty under Crim.R. 11(C)(2)(c) (i.e., informing the defendant of his constitutional rights), but mere substantial compliance for the second duty under that rule (i.e., determining that the defendant understands he is waiving those constitutional rights by pleading guilty). I believe this is an incorrect interpretation of the rule and existing precedent. See *Veney* at syllabus (‘A trial court must strictly comply with Crim.R. 11(C)(2)(c).’).”

State v. Ellis, 2015-Ohio-3438, ¶ 22 (Dorrian, J., dissenting). Additionally, as Judge Dorrian correctly noted in her dissenting opinion, “The majority bases this application of substantial compliance on its reading of ¶ 16 of *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200. That portion of the *Veney* decision refers to the totality of the circumstances in the context of the substantial compliance standard as it applies to non-constitutional rights outlined in Crim R. 11(C)(2)(a) and (b).” *State v. Ellis*, 2015-Ohio-3438, ¶ 22 (Dorrian, J., dissenting). Based on the foregoing, the State’s reliance on *State v. Ellis* is misplaced. It cannot be assumed that Mr. Miller understood the effect of his plea unless the trial court explicitly asked him if he had an understanding as such, which in this case the trial court did not.

Here, the trial did not explain to Mr. Miller that his plea of guilty meant that he was waiving all of those rights delineated in Crim. R. 11(C)(2)(c). Without asking him the question of whether he understood that he was giving up these rights, the trial court could not have properly made the determination that his plea was made knowingly, intelligently, and voluntarily. Because the trial court failed strictly comply with Crim. R. 11(C)(2)(c) in this regard, Mr. Miller's guilty pleas were properly vacated and this Honorable Court should uphold the decision of the Eighth District Court of Appeals.

C. Even if the applicable standard is substantial compliance in relation to a trial court's duty under Crim. R. 11(C)(2)(c) with respect to ensuring a defendant understands he is waiving his constitutional rights by pleading guilty, the trial court in this matter nevertheless failed to satisfy this less stringent standard.

The Eighth District properly followed the decision of the Seventh District Court of Appeals holding "that in order to strictly comply with Crim.R. 11(C)(2)(c), the trial court must not only explain the applicable constitutional rights but it must also advise that by entering a guilty plea the criminal defendant is waiving those rights." *State v. Strebler*, 7th Dist. No. 08 MA 108, 2009-Ohio-1200, ¶ 36. However, assuming for the sake of argument that the applicable standard is a substantial compliance standard as the State would urge this Court to follow, it can hardly be said that the trial court met this less stringent standard. The State concedes that the trial court did not use the words "waive" or "waiver" in Mr. Miller's plea colloquy. (State's Merit Brief at p. 10). However, the absence of the term "waive" or "waiver" in itself is not dispositive of the issue. Rather, the fact is the trial court did not come close to approximating an explanation of a waiver of constitutional rights even in the simplest terms. Not only did the trial court not use the terms "waive" or "waiver," it also did not mention the terms "giving up,"

“foregoing,” “abandoning,” “relinquishing” “surrendering,” or any other synonym for the term waiving. Respectfully, the trial court’s only statement during the plea colloquy that could be construed as approximating an explanation of waiver of rights was when the trial court said to the Defendants, “As good as the plea bargains might sound to people, nobody is under an obligation to accept them. You’re welcome to stay with not guilty and go to trial instead. Right, Mr. Miller?” (Change of Pleas Hearing Transcript, p.41). Even if this phrase were to be given a broad interpretation in a light most favorable to the State’s position, it does not meet the standard of substantial compliance. The trial court’s colloquy with Mr. Miller leaves too much in question as to one of the essential aspects of any guilty plea, that is, whether a defendant understands he is waiving his constitutional rights. As such, it cannot be said the trial court met its duty of either strict or substantial compliance in this case.

CONCLUSION

Appellee Shawn Miller respectfully urges This Honorable Court to apply a strict compliance standard as the Eighth District Court of Appeals did herein and as the Seventh District Court of Appeals did in the similar case of *State v. Strebler*, 7th Dist. No. 08 MA 108, 2009-Ohio-1200. Strict compliance is required of a trial court in relation to making a proper determination as to whether a defendant in a felony case understands by entering a plea he is waiving his constitutional rights described in Crim. R. 11(C)(2)(c). Given the seriousness of what is at stake when someone pleads guilty in a felony case, Appellee urges this Court not to set a precedent that “close enough” is good enough. Strict compliance is required to ensure a defendant understands the consequences of his plea. When a trial court fails to confirm that a criminal defendant

understood the consequence of his guilty plea, as was the case here, such failure constitutes reversible error.

Here, even under a less stringent substantial compliance standard, Mr. Miller's guilty pleas should nonetheless remain vacated as the trial court never asked Mr. Miller any questions during the proceedings relative to whether he knew the consequence of his guilty pleas was that he would be giving up his constitutional rights.

Additionally, the State asserted at the Eighth District Court of Appeals only that the proper standard was strict compliance and that the trial court in fact met that standard. The State never argued at the lower level that substantial compliance should be the standard and, therefore, should be deemed to have failed to preserve this argument for further appeal to this Honorable Court.

Accordingly, Appellee Shawn Miller respectfully requests that this Honorable Court affirm the decision of the Eighth District Court of Appeals, finding that the trial court failed to strictly comply with the requirements of Crim. R. 11(C)(2)(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief on the Merits of Appellee Shawn Miller was served this 19th day of March, 2019 upon the following via electronic mail at:

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