

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 02 CA 217
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
ALONZO GREEN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court,
Case No. 01CR524.

JUDGMENT: Reversed; Sentence Vacated; Case
Remanded.

APPEARANCES:
For Plaintiff-Appellee:

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JUDGES:
Hon. Joseph J. Vukovich

Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: November 26, 2004

VUKOVICH, J.

{¶1} Defendant-appellant Alonzo Green appeals from his conviction in the Mahoning County Common Pleas Court. Green pled guilty to one count of attempted rape, one count of attempted kidnapping, and one count of felonious assault. The issues presented in this appeal pertain to the voluntariness of his plea, ineffective assistance of trial counsel, and the trial court's imposition of maximum consecutive sentences. For the following reasons, the judgment of the trial court is reversed, appellant's plea is vacated and the case is remanded for further proceedings.

STATEMENT OF CASE

{¶2} On May 17, 2001, Green was indicted on two counts of rape under R.C. 2907.02, one count of kidnapping under R.C. 2905.01, and one count of felonious assault under R.C. 2903.11. It was alleged that between April 7, 2001 and April 9, 2001, that Green kidnapped, severely beat and raped Amber Mason multiple times.

{¶3} On July 16, 2001, Green pled not guilty by reason of insanity. However, psychological evaluations indicated that Green was able to stand trial and was not insane.

{¶4} Thus, on August 7, 2002, a plea hearing was held. At this hearing, Green entered into a plea agreement with the state whereby he pled guilty to one count of attempted rape, one count of attempted kidnapping, and one count of felonious assault. (Plea Tr. 16, 21-22). The state agreed to move to dismiss one count of rape, amend the other count of rape to attempted rape and amend the kidnapping count to attempted kidnapping. (Plea Tr. 2-3). The trial court accepted the plea agreement; sustained the state's motion to dismiss the rape count and the state's motion to amend the remaining rape count and the kidnapping count. (Plea Tr. 4-5, 22).

{¶15} A sentencing hearing was held on October 10, 2002. The trial court sentenced Green to the maximum term of eight years on each count and then ordered the terms to be served consecutively, for a total of twenty-four years. (Tr. 33-34).

{¶16} Green timely appealed from his conviction and sentence. The attorney assigned to represent him filed a no-merit brief. Pursuant to *State v. Toney* (1970), 23 Ohio App.2d 203, his attorney then moved to withdraw as appellate counsel. This court then granted Green time to file a pro se brief listing any assignments of error he chose. Thereafter, Green filed a pro se brief.

ASSIGNMENT OF ERROR NUMBER FIVE

{¶17} Green raises seven assignments of error. Due to its dispositive nature, the fifth assignment of error will be addressed first. This assignment of error contends:

{¶18} “FAILURE BY THE TRIAL COURT TO FOLLOW EVIDENTIARY RULES, PROCEDURAL RULES AND STATUTE DURING THE PLEA AND SENTENCING HEARINGS WAS CONTRARY TO LAW AND AN ABUSE OF DISCRETION RENDERING THE JUDGMENTS OF CONVICTION AND SENTENCING VOID.”

{¶19} Green argues that his guilty plea was not voluntarily, knowingly, or intelligently given, and therefore, his conviction and sentence are void. Specifically, Green argues that he was not advised in open court of his right to call witnesses on his behalf, his right against self-incrimination, and the elements of the offenses the prosecutor had to prove beyond a reasonable doubt at trial.

{¶10} It is well-established that to protect a criminal defendant's rights, Crim.R. 11(C) provides the procedure a trial judge must follow when accepting a guilty plea. *State v. Boshko* (2000), 139 Ohio App.3d 827, 833. Pursuant to Crim.R. 11(C), the court shall not accept a plea of guilty or no contest unless the court addresses the defendant personally and: (a) determines the defendant is making the plea voluntarily with full understanding of the nature of the charges and the maximum penalty involved and that he is ineligible for probation if such is the case; (b) informs the defendant and determines he understands the effect of the plea and that upon accepting the plea, the court can proceed to a judgment of sentence; (c) informs the defendant and determines he understands that by entering a plea he is waiving the right to a jury trial, to confront witnesses, to compulsory process, and to require the state to prove guilt

beyond a reasonable doubt at a trial where the defendant cannot be compelled to testify against himself. See, also, *State v. Tucci*, 7th Dist. No. 01CA234, 2002-Ohio-6903, at ¶11-12 (noting that a constitutional rights waiver requires strict compliance but a substantial compliance/totality of the circumstances test applies to the remaining advisories).

{¶11} A trial court must strictly comply with the provisions of Crim.R. 11(C) which relate to the waiver of constitutional rights, i.e. the Fifth Amendment privilege against self-incrimination, the right to a trial by jury, the right to confront one's accusers, the right to compulsory process of witnesses, and the right to be proven guilty beyond a reasonable doubt. *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus; *State v. Colbert* (1991), 71 Ohio App.3d 734; *State v. Foster*, 8th Dist. No. 81309, 2002-Ohio-7072. As to the nonconstitutional requirements of Crim.R. 11, only substantial compliance is required. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. Failure to strictly comply with Crim.R. 11(C)'s constitutional requirements and/or substantially comply with its nonconstitutional requirements requires reversal of the conviction and sentence.

{¶12} In regards to his constitutionally guaranteed rights, the trial court informed Green that by entering a guilty plea he would be forfeiting his right to a jury trial. (Plea Tr. 6, 20). The trial court then proceeded to explain the trial process and during this conversation Green was informed that if he chose to have a jury trial the state would have to prove beyond a reasonable doubt that Green committed the acts in which he was charged. (Plea Tr. 6, 10, 11). The trial court explained that at trial he would have the right to confront his accuser and to cross-examine any witnesses offered by the state. (Tr. 7-9, 10). Green was then informed that the state could not force him to testify against himself, i.e. the Fifth Amendment privilege against self-incrimination. (Plea Tr. 9-10).

{¶13} Yet, devoid from the conversation is any mention or explanation of the right to compulsory process of witnesses. As aforementioned, the right to compulsory process is constitutionally protected. *State v. Wilson*, 8th Dist. No. 82770, 2004-Ohio-499, citing *Nero*, 56 Ohio St.3d 106. See, also, Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. As such, strict

compliance is required. Thus, the trial court was required to explain this right in a manner reasonably intelligible to Green. *State v. Esqueda* (Sept. 30, 1996), 10th Dist. No. 96APA01-118, citing *Ballard*, 66 Ohio St.2d 473. See, also, *State v. Senich*, 8th Dist. No. 82581, 2003-Ohio-5082, citing *State v. Strawther* (1978), 56 Ohio St.2d 298 (stating in explaining the right to the compulsory process, the use of the term “compulsory process” is sufficient); *State v. Gurley* (June 5, 1997), 8th Dist. No. 70586 and *State v. Lelux* (Mar. 4, 1997), 10th Dist. No. 96APA08-1018 (stating that it is also sufficient for the trial court to explain that the defendant has the right to subpoena witnesses); *Tucci*, 2002-Ohio-6903, at ¶14 (stating that the explanation is insufficient where the court simply advises the defendant that “your attorney would present evidence on your behalf such as a defense”). Consequently, the trial court’s failure to advise Green of this right prior to accepting his plea renders the guilty plea invalid. *Senich*, 2003-Ohio-5082, at ¶34.

{¶14} That said, the record discloses that a signed plea agreement form that outlined the constitutional rights Green waived by entering the guilty plea was filed with the court. The plea agreement specifically states that by entering the guilty plea Green is waiving his right to compulsory process of witnesses. Nevertheless, Crim.R. 11(C) mandates an oral dialog between the trial court and defendant, and an appellate court’s determination of whether the requirement of Crim.R. 11(C) was satisfied must focus on that colloquy. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, citing *Kercheval v. United States* (1927), 274 U.S. 220, 223; *State v. Mulhollen* (1997), 119 Ohio App.3d 560, 564.

{¶15} The oral dialog does not need to contain a “rote recitation” of Crim.R. 11. *Ballard*, 66 Ohio St.2d at 120. Oral ambiguities in the oral colloquy can be reconciled in some cases by a written acknowledgement of the plea and waiver of the trial rights. *State v. Dixon*, 2d Dist. No. 01CA17, 2001-Ohio-7075. However, “the writing does not substitute for an oral exchange when it is wholly omitted.” *Id.* Accord, *State v. Saaty* (Mar. 4, 1997), 10th Dist. No. 96APA06-777; *State v. Timmons* (Sept. 27, 1999), 4th Dist. No. 98CA38.

{¶16} Accordingly, the omission by the trial court of any discussion or dialogue with the accused concerning the constitutionally protected right to compel the

attendance of witnesses on his behalf necessitates a conclusion that the trial court committed reversible error by such an omission that cannot be cured by a written waiver of that right. See *State v. Thompson*, 2d Dist. No. 20114, 2004-Ohio-1320 (discussing the trial court's failure to inform the defendant of his right to confront his accusers). Therefore, assignment of error number five has merit and is sustained. All other assignments of error are moot and need not be addressed. App.R. 12(A)(1)(c).

{¶17} For the foregoing reasons, the judgment of the trial court is hereby reversed, appellant's sentence is vacated and the case is remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

Donofrio, J., concurs.

DeGenaro, J., concurs.