[Cite as *State v. Elmore*, 2009-Ohio-6400.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-JE-36
	)	
ANTHONY Q. ELMORE,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 08CR107
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Samuel A. Pate Assistant Prosecuting Attorney 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant	Attorney Keith O'Korn 1188 South High Street Columbus, Ohio 43206

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 3, 2009

[Cite as *State v. Elmore*, 2009-Ohio-6400.]
DONOFRIO, J.

{¶1} Defendant-appellant Anthony Q. Elmore appeals his conviction and three-year prison sentence for failure to comply with an order or signal of a police officer.

{¶2} On August 6, 2008, a Jefferson County grand jury indicted Elmore for failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B)(C)(5)(a)(ii), a third-degree felony, and obstructing official business in violation of R.C. 2921.31(A), a fifth-degree felony. The state alleged that Elmore, while driving a motor vehicle, evaded police by going through multiple red lights and stop signs while traveling at a high rate of speed. In addition, the state alleged that after the several block chase, Elmore exited his vehicle and continued to flee on foot before being apprehended by a Steubenville patrolman.

{¶3} Elmore was appointed counsel, pleaded not guilty, and the case proceeded to discovery and other pretrial matters.

{¶4} Subsequently, Elmore was implicated in a burglary and the parties entered into plea negotiations. The result was a change of plea and sentencing hearing which took place in the Jefferson County Common Pleas Court on September 16, 2008. Elmore withdrew his plea of not guilty to both counts and pleaded guilty to failure to comply with an order or signal of a police officer. In exchange, the state dropped the obstructing official business count and agreed not to prosecute Elmore on the burglary charge then pending in the Steubenville Municipal Court. Furthermore, both parties entered into an agreed recommended sentence of three years in prison. After accepting Elmore's plea, the trial court sentenced Elmore to three years in prison along with a three-year level two driver's license suspension.

{¶5} On October 27, 2008, Elmore inexplicably filed a pro se motion to recuse the trial judge. The court denied the motion, noting that nothing in the case remained pending. On November 5, 2008, Elmore untimely filed a pro se notice of appeal and on November 12, 2008, sought to file his delayed appeal. This court granted Elmore's motion for delayed appeal on December 22, 2008.

{¶6} Elmore's first assignment of error states:

{¶7} "THE TRIAL COURT ERRED WHEN IT DID NOT COMPLY WITH CRIM.R. 11 BY FAILING TO INFORM THE APPELLANT THAT THE STATE WAS REQUIRED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT, BY FAILING TO PROPERLY ASCERTAIN THAT THE APPELLANT UNDERSTOOD THE NATURE AND ELEMENTS OF THE CHARGE AGAINST HIM, AND BY FAILING TO INFORM THE APPELLANT ABOUT COMMUNITY CONTROL. (September 16, 2008 Transcript of Proceedings ("tr." overall and in particular at 6-8, 11)"

{¶8} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. To that end, Crim.R. 11 requires the trial court to follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that they understand the plea they are entering and the rights being voluntarily waived. Crim.R. 11(C)(2).

{¶9} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives by entering the guilty plea. "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. (Crim.R. 11[C][2][c], applied.)" *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus.

{¶10} Crim.R. 11(C) also sets forth the nonconstitutional rights that a defendant must be informed of prior to the court accepting the plea. These rights are that: 1) a defendant must be informed of the nature of the charges; 2) the defendant

must be informed of the maximum penalty involved; 3) the defendant must be informed, if applicable, that he is not eligible for probation or the imposition of community control sanctions; and 4) the defendant must be informed that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott* (Dec. 14, 2000), 8th Dist. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. For these nonconstitutional rights, the trial court must substantially comply with its mandates. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. 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. Id. Additionally, when nonconstitutional aspects of the Crim.R. 11 plea colloquy are at issue, the defendant must show prejudice before a plea will be vacated. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶17. "To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered." Id. at ¶15, citing *State v. Nero* (1990), 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶11} Under this assignment of error, Elmore argues that the trial court failed to comply with Crim.R. 11 because it failed to inform him of (1) the state's burden to prove his guilt beyond a reasonable doubt, (2) the nature and elements of the charge, and (3) his eligibility for community control. We will address each of these alleged deficiencies in turn.

{¶12} As indicated, Crim.R. 11 requires that the trial court inform the defendant that by pleading guilty he is waiving his right to require the state to prove guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c). Since this right is a constitutional right, we review compliance with this requirement under a strict compliance standard. In this case, the trial court stated:

{¶13} "Had this case gone to trial * * * you would have a number of trial rights but by your plea of guilty you're waiving or giving up * * * your right to trial by jury and in this case that means that there would have been 12 jurors who could not convict

you unless they were unanimously convinced beyond a reasonable doubt of each element of this offense." (Tr. 6).

{¶14} Elmore argues that the failure to specifically mention the state as the carrier of the burden invalidates his guilty plea. But, the Ohio Supreme Court has held that failure to use the exact language contained in Crim.R. 11(C) in informing a criminal defendant of his constitutional rights is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant. *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, paragraph two of the syllabus. The Court reaffirmed that holding in *Veney* noting "that a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant." *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶27.

{¶15} Following the trial court's advisement, it asked Elmore if he understood the statement, and Elmore answered in the affirmative. Then, subsequent to Elmore's allocution, the court again advised Elmore as follows: "Do you understand a jury could not convict you of this level of this offense unless they were unanimously convinced beyond a reasonable doubt of all the things that you and I just talked about?" (Tr. 8). Again, Elmore responded to this question in the affirmative. (Tr. 8). Thus, the trial court did inform Elmore of the state's burden, in a manner reasonably intelligible to him, notwithstanding the omission of identifying the state by name. The only other party to convince the jury would be the state. When the indictment, and caption of the case and all papers relevant to this matter designated the State of Ohio as the complainant, it does not require much reasoning to conclude that it was the State of Ohio that was required to convince the jury of each element of the crime charged. Also, the prosecutor was the only other party in the courtroom during the hearing.

{¶16} Crim.R. 11 also requires the trial court to ensure that the defendant

understands the nature of the charge against him. Crim.R. 11(C)(2)(a). Since this right is a nonconstitutional right, we review compliance with this requirement under a substantial compliance standard. Substantial compliance means that the totality of the circumstances demonstrate that the defendant subjectively understood the implications of his plea and the rights that he is waiving. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶27.

{¶17} Here, the court addressed Elmore as follows: "So, you're charged with fleeing and eluding. What did you do to get yourself into this trouble?" (Tr. 6). Elmore explained, "I just ran from the cops in the car, drunk night." (Tr. 6). The trial court also asked Elmore, "to get up to the F-3 level you had to go pretty fast. What did you do?." (Tr. 6). Elmore explained, "When [the cop] threw his lights on I just – I just took off, took off like probably about 12 blocks, jumped out of the car, started running, jumped in the bushes." (Tr. 6-7). Elmore further explained that he went the wrong way on a one-way street, and was going "too fast" (Tr. 7-8).

{¶18} In *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 NE.2d 927, the Ohio Supreme Court held that "it is not always necessary that the trial court advise the Defendant of the elements of the crime, or specifically ask the Defendant if he understands the charge, so long as the totality of the circumstances are such that the trial court is warranted in making a determination that the Defendant understands the charge." As the above colloquy illustrates, Elmore was able to articulate, in his own words, his actions which he understood to be the basis for the charge against him. (Tr. 6-7). Therefore, under the totality of the circumstances, Elmore's descriptions would demonstrate to the trial court that Elmore understood the nature of the charge against him. Also, he has failed to demonstrate any prejudice.

{¶19} Lastly, the trial court must inform a defendant "*if applicable*, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing." Crim.R. 11(C)(2)(a) (emphasis added). However, in this case, in accordance with R.C. 2921.331(B)(C)(5)(a)(ii), Elmore would have the possibility of probation or community control at the trial court's

discretion. Therefore, it was not necessary that the trial court engage in a colloquy with Elmore about community control or probation.

{¶20} In sum, the trial court strictly complied with Crim.R. 11(C)(2)(c) by informing Elmore, that if he went to trial, he could not be convicted unless the jury was unanimously convinced beyond a reasonable doubt of each element of the offense. The trial court substantially complied with Crim.R. 11(C)(2)(a) by ascertaining that Elmore understood the nature and elements of his charges. And, the court was not required to tell Elmore about eligibility for community control or probation.

{¶21} Accordingly, Elmore's first assignment of error is without merit.

{¶22} Elmore's second assignment of error states:

{¶23} "THE APPELLANT'S GUILTY PLEA, AND IN PARTICULAR THE ALLEGED JOINTLY RECOMMENDED SENTENCE, WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED INTO IN VIOLATION OF CRIM.R. 11 AND THE DUE PROCESS CLAUSES OF OHIO AND FEDERAL CONSTITUTIONS (Tr. at 4, 6-8, 14-17 and September 17, 2008 Judgment Entry of Sentence)."

{¶24} In the present case, the trial court substantially complied with the nonconstitutional instructions of Crim.R. 11(C)(2)(a). Elmore was informed that if the court accepted his plea the court could proceed with judgment and sentence. (Tr. 5). Elmore was advised of the charge against him and the possible penalties, which included failure to comply with an order or signal of a police officer and a possible five-year maximum sentence. (Tr. 5-6). The court advised Elmore about the suspension of his driver's license and court costs. (Tr. 16-17). Finally, the court instructed Elmore on the terms of postrelease control. (Tr. 11).

{¶25} The trial court also strictly complied with the language of Crim.R. 11(C)(2)(a), laying out the constitutional rights Elmore would be waiving. The court advised Elmore that he was giving up "[the] right to a trial by jury," "the right of confrontation of witnesses," and "the right of compulsory process." (Tr. 8-9). The trial court also advised Elmore, "Had this case gone to trial * * * you would have a number

of trial rights but by your plea of guilty you're waiving or giving up * * * your right to trial by jury and in this case that means that there would have been 12 jurors who could not convict you unless they were unanimously convinced beyond a reasonable doubt of each element of this offense." (Tr. 6). Furthermore, the trial court informed Elmore, several times, that he was giving up his right to a trial in general. (Tr. 4, 8-11).

{¶26} In addition to complying with Crim.R. 11(C)(2), the trial court also engaged in rhetoric to make certain Elmore's plea was knowing, intelligent, and voluntary. First, the trial court addressed Elmore as follows: "I need to know that your new plea is being entered voluntarily. So, I'm going to ask you. Are you entering your new plea voluntarily?" (Tr. 5). Elmore answered, "yes, sir." (Tr. 5). The trial court also made certain that Elmore was not threatened, coerced, or promised anything other than what he had heard in the courtroom that morning. (Tr. 5). Elmore also admitted that he was "hundred percent guilty, or [he] wouldn't be putting a plea in." (Tr. 16). Elmore was able to recite, in his own words, his actions that constituted Fleeing and Eluding, demonstrating he fully comprehended his charge.

{¶27} In regards to the jointly recommended sentence, the trial court advised Elmore several times that he had the option of a trial as opposed to entering a plea with a recommended sentence. (Tr. 4, 8-11). When Elmore showed hesitation stating, "three years is a little excessive," the trial court immediately advised Elmore, "It's your call. You can say 'no, I want to go to trial.'" (Tr. 4). However, Elmore stated, "No, I don't want no trial." (Tr. 4). Immediately before accepting the plea, the trial court confirmed Elmore's decision stating, "You have every right to back out of this if you want to." Elmore answered, "No, I don't want to. I don't want to." (Tr. 4).

{¶28} In the present case the trial court complied with Crim.R. 11(C)(2) and further ascertained that Elmore's plea was voluntarily and knowingly entered. Therefore, Elmore's guilty plea and the jointly recommended sentenced were entered knowingly, intelligently, and voluntarily and Elmore was accorded his Due Process Rights under both the United States and the Ohio State Constitutions.

{¶29} Accordingly, Elmore's second assignment of error is without merit

{¶30} Elmore's third assignment of error states:

{¶31} "APPELLANT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION (Tr. at 16-17 and September 17, 2008 Judgment Entry of Sentence)."

{¶32} For the reasons detailed under the second assignment of error, the argument presented under this assignment of error is equally unpersuasive. Elmore's plea agreement, which included a jointly recommended sentence, was found to be tendered knowingly, intelligently, voluntarily, and accordingly valid. Moreover, "[a] sentence imposed upon a defendant is not subjected to review under this section if the sentence is authorized by law, had been recommended jointly by the defendant, and the prosecution in the case, and is imposed by the sentencing judge." R.C. 2953.08(D)(1). Since the trial court sentenced Elmore to the jointly recommended three year sentence, this sentence is not subject to review pursuant to R.C. 2953.08(D)(1).

{¶33} Accordingly, Elmore's third assignment of error is without merit.

{¶34} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.