

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KIWAN ROOSEVELT WARREN-HERROD,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0049

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2022 CR 00642

BEFORE:

Cheryl L. Waite, Carol Ann Robb, Judges, and William A. Klatt, Judge of the
Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:

Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*,
Assistant Prosecutor, for Plaintiff-Appellee

Atty. Robert T. McDowall, Jr., for Defendant-Appellant

Dated: March 21, 2024

WAITE, J.

{¶1} Appellant Kiwan Roosevelt Warren-Herrod appeals his conviction, based on a guilty plea, for failure to register as a sex offender. Appellant argues on appeal the trial judge failed to inform him at the change of plea hearing that he had a right to trial by jury and was waiving that right. The record reflects the trial court did inform Appellant of the right to trial by jury at the change of plea hearing and that Appellant agreed to waive his right. There was a slight ambiguity in the way the trial court explained the right to a jury trial, but based on our prior precedent in *State v. Gilmore*, 7th Dist. Mahoning No. 22 MA 0067, 2023-Ohio-1503, we are permitted to look at the written plea agreement for confirmation that Appellant was notified of the right and it was properly waived. Based on the clear record in this case and on our holding in *Gilmore*, Appellant's assignment of error is overruled and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On May 30, 2019, Appellant pleaded guilty to and was sentenced on one count of unlawful sexual contact with a minor, one count of compelling prostitution, and one count of importuning. He was sentenced to one year in prison and was required to register as a Tier II sexual offender. On November 3, 2022, Appellant was indicted in Mahoning County Common Pleas Case No. 22 CR 642 with a violation of R.C. 2950.04(A)(2), (E), failure to register as a sex offender, a third degree felony. On March 6, 2023, Appellant entered a Crim.R. 11 plea agreement on the failure to register charge. The change of plea hearing took place on February 28, 2023. Appellant agreed to plead guilty to the charge.

{¶3} During the hearing, the trial judge informed Appellant that if he decided to proceed to trial instead of entering a plea, the state had the burden of proving that he was guilty beyond a reasonable doubt and “would try and meet that burden by bringing the witnesses and evidence they have to present to the judge and jury. You would have the right, through your lawyer, to challenge and confront the witnesses and evidence they present against you.” (2/28/23 Tr., p. 6.)

{¶4} Immediately after informing Appellant of these rights, the court stated: “Those are your trial rights. If you plead guilty, we're not going to have a trial, so you're waiving and rejecting all of those trial rights. Is that what you want to do?” (2/28/23 Tr., p. 7.) Appellant responded by saying “Yes, Your Honor.”

{¶5} Appellant also signed a plea agreement form advising him of his right to a jury trial and that he was waiving that right.

{¶6} Appellant was sentenced on April 5, 2023 to twelve months in prison on the charge. The sentencing judgment entry was filed the same day. This appeal followed on April 17, 2023, and Appellant raises one assignment of error.

ASSIGNMENT OF ERROR

WHETHER A TRIAL COURT WHICH ACCEPTS A DEFENDANT’S GUILTY PLEA AND FAILS TO EXPLAIN DURING THE PLEA COLLOQUY THAT HIS PLEA WAIVES HIS RIGHT TO A JURY TRIAL REQUIRES HIS CONVICTION BE REVERSED AND PLEA BE VACATED.

{¶7} Appellant is challenging the validity of his guilty plea to one count of failure to register as a sex offender. Appellant contends the trial court failed to explain to him

that he had a right to a jury trial and was waiving that right by pleading guilty to the charge. The record reflects that the trial judge did explain the right to a jury trial, told Appellant he was waiving the right, and the record also shows that Appellant understood all of this by virtue of the written plea agreement he signed.

{¶8} In a criminal case, a plea must be made “knowingly, intelligently, and voluntarily.” *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Failure on any of these points “renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.” *Id.* Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights the defendant is waiving and to discuss the consequences of the plea. *State v. McBride*, 7th Dist. Mahoning No. 16 MA 0002, 2017-Ohio-4281, ¶ 19.

{¶9} To ensure that a Crim.R. 11 plea is properly made, the trial judge must engage the defendant in a colloquy before accepting the plea. *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus. The colloquy must include an explanation of both the constitutional and nonconstitutional rights the defendant is waiving. One of the constitutional rights waived when a guilty plea is entered is the right to trial by jury. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus. A trial court must strictly comply with the requirement in Crim.R. 11(C)(2) of informing the defendant of the right to trial by jury and that the defendant is waiving that right by entering a guilty plea. *Id.* When a court does not strictly comply with Crim.R. 11(C)(2), the plea is invalid. *State v. Hill*, 7th Dist. Belmont No. 18 BE 0037, 2019-Ohio-4079, ¶ 9.

{¶10} However, when there is ambiguity at the change of plea hearing regarding an explanation of a constitutional right or its waiver, including the right to trial by jury, reviewing courts are permitted to look at the entirety of the record to reconcile the ambiguity: “an alleged ambiguity during a Crim.R. 11 oral plea colloquy may be clarified by reference to other portions of the record, including the written plea, in determining whether the defendant was fully informed of the right in question.” *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 25.

{¶11} The record in the instant appeal reflects that the trial judge did discuss the right to trial by jury at the change of plea hearing. After explaining the five constitutional rights Appellant would give up by pleading guilty, including the right to a jury trial, the judge asked if Appellant wished to waive his trial rights, and Appellant answered: “Yes, Your Honor.” (2/28/23 Tr., p. 7.)

{¶12} This Court, in *State v. Gilmore*, 7th Dist. Mahoning No. 22 MA 0067, 2023-Ohio-1503, recently reiterated its prior holding in *Hill, supra*, that when there is some reference to the right to a jury trial at the change of plea hearing, but the explanation of the right and its waiver are ambiguous, the appellate court may look to the written plea agreement to confirm that Appellant understood the right and that he waived that right by pleading guilty. *Id.* at ¶ 15.

{¶13} In *Gilmore*, the language the trial judge used to explain the right to jury trial was as follows: “And at trial, the State would have to prove beyond a reasonable doubt each and every element of each offense against you. So they would try and meet that burden by bringing whatever witnesses and evidence they have to present to the judge and jury.” *Id.* at ¶ 5. In the instant case, the trial judge stated: “[T]he State would have

to prove that you're guilty beyond a reasonable doubt * * * [and] would try and meet that burden by bringing the witnesses and evidence they have to present to the judge and jury." (2/28/23 Tr., p. 6.) The language of the two cases is nearly identical. In *Gilmore* we held that the words "judge and jury" together created a slight ambiguity regarding the specific right of trial by jury. In *Gilmore*, we relied on the written plea agreement to confirm both that the defendant was notified of his right to a jury trial, and that the right was properly waived. We are compelled to follow the same procedure in this case and rely on the notice in Appellant's plea agreement that he fully understood his right to trial by jury and this right was waived.

{¶14} The record confirms that the trial court held a plea colloquy explaining Appellant's constitutional rights and their waiver when pleading guilty. The written plea agreement clarifies any ambiguity as to whether Appellant understood the right to jury trial and that he waived this right. In the future, the trial judge, who also presided in *State v. Gilmore, supra*, may be more prudent in revising its bench book for change of plea hearings to more specifically set forth the right to trial by jury and the waiver of that right. However, while not a model of clarity, the record in this case shows that Appellant was notified of his constitutional rights, waived those rights, and entered his guilty plea knowingly, intelligently, and voluntarily. Appellant's argument has no merit and his assignment of error is overruled.

Conclusion

{¶15} Appellant argues that when he pleaded guilty to one count of failing to register as a sex offender, the trial judge failed to explain his right to jury trial and that he was waiving that right by pleading guilty. Appellant's argument is not supported by the

record. The trial court notified Appellant of his right to jury trial and explained that Appellant would waive that right by pleading guilty. Although there may have been a slight ambiguity created by the trial court's wording of the right to trial by jury, Appellant signed the written plea agreement and confirmed that he understood his right to a jury trial and waived the right by pleading guilty. Based on our holding in *Gilmore*, Appellant's sole assignment of error is without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Klatt, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.