

[Cite as *State v. Gaines*, 2015-Ohio-2397.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102024

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANGELO GAINES

DEFENDANT-APPELLANT

**JUDGMENT:
VACATED; REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584018-A

BEFORE: Stewart, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 18, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Angelo Gaines appeals from his convictions of rape, kidnapping, and gross sexual imposition. On appeal, Gaines raises the following assignments of error: 1) that his guilty plea was involuntary due to the trial court's failure to adequately advise him of his constitutional rights under Crim.R. 11(C)(2); 2) the trial court abused its discretion in ordering him to consecutive and maximum prison terms on each offense; and 3) ineffective assistance of counsel. Finding merit to the appeal, we reverse the conviction and vacate his guilty plea.

{¶2} The grand jury indicted Gaines in a 14-count indictment charging him with four counts of rape in violation of R.C. 2907.02(A)(1)(b), with each containing a sexually violent predator specification and one containing a sexual motivation specification; two counts of rape in violation of R.C. 2907.02(A)(2) with sexually violent predator specifications; six counts of kidnapping in violation of R.C. 2905.01(A)(4) with sexual motivation specifications and furthermore clauses identifying the victim as being under the age of 13; and two counts of gross sexual imposition ("GSI") in violation of R.C. 2907.05(A)(4) with sexually violent predator specifications. The indictment arose out of several alleged sexual assaults committed by Gaines against the victim from November 1, 2012, to March 28, 2014, when the victim was between the ages of 12 and 14.

{¶3} Gaines entered into a plea agreement whereby he agreed to plead guilty to two amended counts of rape, with all references to age and sexually violent predator specifications deleted; two counts of kidnapping, one with a sexually violent predator specification; and GSI as charged, with the sexually violent predator specification deleted — in exchange for the state’s dismissal of the remaining charges. The court merged the kidnapping and rape offenses under R.C. 2941.25, the allied offenses statute, and the state elected to proceed to sentencing on the rape charges. The court sentenced Gaines to consecutive, 11-year prison terms on both rape counts, and a consecutive 60 months on the GSI, for a total prison term of 27 years.

{¶4} In his first assignment of error, Gaines contends that his plea was not entered into knowingly, intelligently, and voluntarily because the trial court failed to follow Crim.R. 11(C)(2) when advising him of his rights prior to accepting his plea. Specifically, Gaines argues that the trial court failed to properly explain to him what it means to have the right not to testify at trial. We find merit to this assigned error.

{¶5} The United States and Ohio Constitutions require that a trial court, prior to accepting a plea of guilty or no contest, determine that the plea is entered into knowingly, intelligently, and voluntarily. *State v. Johnson*, 40 Ohio St.3d 130, 132, 532 N.E.2d 1295 (1988), citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 274 (1969). From a constitutional standpoint, this requires a court to inform a defendant of five rights: his privilege against compulsory self-incrimination, the right to trial by jury, the right to confront one's accusers, his right to have guilt proven by the state beyond a reasonable doubt, and the right to compulsory process to obtain witnesses — and then determine if the defendant understands these rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶19; Crim.R. 11(C)(2)(c). In Ohio, Crim.R. 11(C)(2)(c) codifies the court's obligation to inform the defendant of the constitutional protections, while Crim.R. 11(C)(2)(a) and (b) create a further obligation on courts to inform the defendant of other important information, the understanding of which the state of Ohio deems necessary to a knowing and voluntary plea. *See Veney* at ¶ 14, 18.

{¶6} Crim.R. 11(C)(2) requires that the court conduct an oral dialogue with the defendant to determine whether the plea is voluntary, and that the defendant understands, among other things, that if he did choose to go to trial, he would not be compelled to testify against himself. *See* Crim.R. 11(C)(2)(c). While a court must substantially comply with the dictates of Crim.R. 11 when advising a defendant of his nonconstitutional rights contained in subsections (C)(2)(a) and (b) — advisement of the constitutional protections contained in (C)(2)(c) requires strict compliance with the statute. *See Veney* at ¶ 18. The test for strict compliance is whether “the record shows that the judge explained these rights in a manner reasonably intelligible to the defendant.” *State v. Ballard*, 66 Ohio St.3d 473, 480, 423 N.E.2d 115 (1981). Strict compliance contemplates both the trial court’s advisement and the defendant’s response to the advisement. *See id.* at 480–481 (conveying that it is the court’s statements and the defendant’s answers that lead to the conclusion that the defendant either was, or was not, adequately informed of his rights); *accord State v. Truitt*, 10th Dist. Franklin No. 10AP-795, 2011-Ohio-2271, ¶ 14.

{¶7} Prior to beginning the Crim.R. 11 colloquy, the court advised Gaines that if at any time he had a question regarding his rights, he should tell the court or his lawyer, and his question would be answered. The court then proceeded to advise the defendant of both the constitutional and statutory rights and notifications under Crim.R. 11. When the court told Gaines that he had the constitutional right “to remain silent and not to testify and [that] no one could comment on the fact that [he] did not testify at trial,” he asked, “[w]hat that mean, I don’t have to testify at trial?” Tr. at 7. The court responded:

If we had proceeded to trial, the State of Ohio would have the burden of proof. That means that the jury would be impaneled, and the State of Ohio would have the burden of presenting to the jury information and testimony beyond a reasonable doubt that you committed these offenses, but you would not have any burden at all. Do you understand?

The Defendant: Yes.

Tr. at 7–8.

{¶8} The court did advise the defendant of his right against compulsory self-incrimination in accordance with Crim.R. 11(C)(2)(c). Nevertheless, strict compliance with the constitutional mandates under this section requires that the defendant also understand the rights he is waiving. *See Ballard* at 480–481. Gaines argues that although the court’s answer to his question correctly instructs him on who carries the burden of proof at trial and what that burden is, it does not answer his question regarding his constitutional right not to testify at trial. Therefore, there is no clear manifestation that he understood his right not to testify.

{¶9} The state contends that the trial court went above and beyond what it had to do when answering Gaines because the court could have simply answered “yes” but chose to go further and explain that Gaines had absolutely no burden of proof at trial. We find this assertion unpersuasive. The court did not specifically answer Gaines’s question nor explain to him what it means to not be subject to compulsory self-incrimination. Gaines asked the court, in no uncertain terms, if what was just said to him meant that he did not have to testify at trial. Instead of answering the question directly, the court responded by saying to Gaines that the state had the burden of proof at trial, not Gaines. And although Gaines answered “yes” when the judge asked if he understood what she said, an understanding that the state (and not Gaines) would have the burden of proving guilt beyond a reasonable doubt does not demonstrate whether Gaines understood that he did not have to testify. The court should have fully explained to Gaines that he would not have to take the witness stand and testify at trial unless he wanted to, and that the state could not use any unwillingness to testify in support of its case. In the alternative, and as the state acknowledges, the court could simply have stated, “yes,” or “that’s correct,” or given a similar response.

{¶10} The state further contends that Gaines told the trial court that he understood the answer, and had he not understood, he had an opportunity at that time to ask further questions. We also find no merit this argument. Gaines could have asked follow-up questions, but his failure to do so does not change the unresponsive nature of the trial court’s answer to Gaines’s direct question.

{¶11} Lastly, the state argues that Gaines's very question implies that he recognized that he did not have to testify at trial, thus further evidencing the fact that he understood his rights. We do not believe that the form of Gaines's question evidenced an understanding of his rights. The state seems to argue that the question took on a more declarative form that showed that the defendant understood what the court told him regarding his right not to testify. However, it is equally reasonable to view Gaines's question as simply pinpointing the precise statement by the court that caused him confusion. At any rate, we decline to decide whether Gaines's question was more declarative than inquisitory, because the court failed to adequately respond to either form.

{¶12} As we find that the plea was not entered into knowingly, intelligently, and voluntarily, we vacate the plea and remand to the trial court for further proceedings. The remaining assignments of error are rendered moot.

{¶13} Judgment vacated and remanded to the trial court for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. 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.

MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR