

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 107956
 v. :
 :
 KEYON SMITH, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED AND REMANDED
RELEASED AND JOURNALIZED: September 19, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629767-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Steven N. Szelagiewicz, Assistant Prosecuting Attorney, *for appellee*.

The Law Office of Jaye M. Schlachet, and Eric M. Levy, *for appellant*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Keyon Smith (“Smith”), appeals his convictions and sentence, arguing that his guilty plea was invalid. For the reasons set forth below, we vacate his guilty plea and remand to the trial court.

{¶ 2} In June 2018, Smith was charged with the rape and kidnapping of his stepsister, who was under the age of 13 at the time of the offense.¹ According to Smith, the victim allegedly hurt her vagina and “he checked on it.” While doing so, he digitally penetrated the victim’s vagina.

{¶ 3} In October 2018, Smith entered into a plea agreement with the state. Smith pled guilty to amended counts of attempted rape and child endangering, and the accompanying specification was dismissed. At the plea hearing, the court informed Smith of his constitutional and nonconstitutional rights, but never expressly stated that by pleading guilty, he was waiving those rights. Smith plead guilty according to the terms of the plea agreement, and the trial court referred Smith to the probation department for a presentence investigation report.

{¶ 4} At sentencing, the court heard from the victim’s sister, defense counsel, Smith, and Smith’s mother. The attempted rape and child endangering counts merged for purposes of sentencing, and the state elected to proceed with sentencing on the attempted rape count. The court then sentenced Smith to seven years in prison.

{¶ 5} Smith now appeals, raising the following three assignments of error for review:

ASSIGNMENT OF ERROR NO. 1

[Smith’s] guilty pleas are invalid and are required to be vacated pursuant to Crim.R. 11(C)(2)(c) where at the time of the guilty plea the trial court failed to ensure that [Smith] was aware that by entering his

¹ The kidnapping charge carried a sexual motivation specification.

plea he would be waiving his constitutional rights which was not in strict compliance with the criminal rule.

ASSIGNMENT OF ERROR NO. 2

The trial court erred and abused its discretion when it considered inadmissible polygraph test results when determining whether appellant accepted responsibility for his actions and to impose sentence upon [Smith] and [Smith's] trial counsel was otherwise ineffective for failing to object to the consideration of the polygraph results.

ASSIGNMENT OF ERROR NO. 3

The trial court erred by imposing a lengthy prison sentence upon [Smith] which is not supported by the record when a less severe sanction would have accomplished the principles and purposes of felony sentencing.

{¶ 6} Smith, relying on *State v. Miller*, 8th Dist. Cuyahoga No. 105363, 2018-Ohio-843, *discretionary appeal allowed*, 153 Ohio St.3d 1502, 2018-Ohio-4288, 109 N.E.3d 1259, argues that his plea should be vacated as involuntarily made because the trial court did not ensure he understood that, by pleading guilty, he was waiving the constitutional rights set forth in Crim.R. 11(C)(2)(c), which provides in relevant part:

In felony cases the court may refuse to accept a plea of guilty * * *, and shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following:

* * *

[i]nforming 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.²

The state, citing to the dissent in *Miller*, argues that Smith's guilty plea is valid when reviewing the totality of circumstances under the substantial compliance standard of review.³ We find *Miller* instructive.

{¶ 7} In *Miller*, the defendant (Miller) entered into a plea agreement. At the plea hearing, the trial court "informed Miller of his constitutional rights, but never expressly stated that by pleading guilty, Miller was waiving those rights. Miller nevertheless pleaded guilty according to the terms of the plea agreement, and the court sentenced him to an aggregate eight-year prison term." *Id.* at ¶ 3.

{¶ 8} During the plea colloquy, the trial court in *Miller* explained the constitutional rights in Crim.R. 11(C)(2)(c) as follows:

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: And if you go to trial, you always have your lawyers. Can't afford one, one is appointed no cost to you. Understood, * * * Mr. Miller?

² We recognize that at the time of this appeal, *Miller* is pending before the Ohio Supreme Court with oral argument scheduled for December 11, 2019. Because Miller is the current law of this district, we are reviewing this case instead of staying the proceedings pending the Ohio Supreme Court.

³ We note that the authorities relied on in the *Miller* dissent are distinguishable from the matter before us because those cases were decided prior to Ohio Supreme Court's decision in *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621.

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: 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 one can make you talk or even comment on your silence. Understood, * * * Mr. Miller?

*** * ***

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: And do you understand that you and your lawyer get to cross-examine all the witnesses that the prosecutor brings in here to try to build a case against you[.] * * * You understand that? * * * Do you, Mr. Miller?

DEFENDANT MILLER: Yes.

THE COURT: Okay. So the other thing you need to know, your lawyer 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. Miller?

DEFENDANT MILLER: Yes, Your Honor.

THE COURT: Any questions from any of you?

*** * ***

DEFENDANT MILLER: No.

Id. at ¶ 10, quoting tr. 41-45.

{¶ 9} On appeal to this court, Miller argued that his guilty pleas should be vacated as involuntarily made because “the trial court failed to ensure that he understood that, by pleading guilty, he was waiving the constitutional rights enumerated in Crim.R. 11(C)(2)(c).” *Miller*, 8th Dist. Cuyahoga No. 105363, 2018-Ohio-843, at ¶ 4. The majority agreed, finding that while the trial court ensured that Miller understood all of the constitutional rights relative to his right to trial, it neglected to ensure that Miller understood that his guilty pleas constituted a waiver of those rights, and failed to strictly comply with the requirements of Crim.R. 11(C)(2)(c). *Id.* at ¶ 16. As a result, this court found that Miller’s guilty pleas were invalid. *Id.* In doing so, we stated:

“[w]hen a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily.” *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450 (1996). The purpose of Crim.R. 11(C) is to convey relevant information to the defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981).

We review the trial court’s compliance with the requirements of Crim.R. 11(C) de novo. *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

* * *

Strict compliance is required for the waiver of the constitutional rights set forth under Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. Substantial compliance is sufficient for the instruction on the nonconstitutional rights set forth in Crim.R. 11(C)(2)(a) and (b). *Veney* at ¶ 14-17.

Strict compliance equates to literal compliance with Crim.R. 11(C)(2)(c), though rote recitation of the rule is not required. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18, 27

(exact language is preferred, but rote recitation of the rule is not required for strict compliance). 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 the defendant. *Id.* at ¶ 18, citing *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981).

Although verbatim language is not required, the Ohio Supreme Court encourages a word-for-word recitation of Crim.R. 11(C) when accepting guilty pleas. In *Ballard*, the court explained that

it is important to emphasize that the interest of finality is to be protected when accepting a guilty plea. With that interest in mind, the best method of informing a defendant of his constitutional rights is to use the language contained in Crim. R. 11(C), stopping after each right and asking the defendant whether he understands the right and knows that he is waiving it by pleading guilty. We strongly recommend such procedure to our trial courts.

Ballard at 480.

* * *

In *Veney*, the court held:

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.

(Emphasis added.) *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at syllabus. Indeed, the court in *Veney* reaffirmed its prior decision in *Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 in which the Ohio Supreme Court held:

Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses. (*Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274, followed.)

Ballard at paragraph one of the syllabus.

Common sense dictates that by pleading guilty, the defendant is not going to receive a trial nor require the state to prove the charges beyond a reasonable doubt, and there will be no need to subpoena and cross-examine witnesses. [*State v. Strebler*, 7th Dist. Mahoning No. 08 MA 108, 2009-Ohio-1200, ¶ 36]. There is an implicit understanding that by entering a guilty plea, the defendant is waiving the rights associated with trial. However, in *Veney* the court held that the court's failure to strictly comply with the requirements of Crim.R. 11(C)(2)(c) renders the plea invalid. *Veney* at ¶ 32.

Id. at ¶ 5-9, 14-15.

{¶ 10} During the plea colloquy in the instant case, the trial court explained the constitutional rights to Smith as follows:

[THE COURT]: Even though your lawyer may have discussed your trial rights, it is my duty to explain them to you in open court.

First, you would have a right to a trial by a jury or by a judge without a jury, whichever you prefer.

You would have the right to be represented by a lawyer. If you could not afford one, the Court will appoint one to represent you at no cost.

At trial, the prosecutor would have to produce its witnesses in open court, and you and your attorney would have the right to cross-examine those witnesses.

You could issue subpoenas to compel witnesses to come into court to testify on your own behalf. You could testify if you wish, but you cannot be compelled to testify against yourself, and the prosecutor could not comment on your failure to testify.

You would be presumed innocent until the prosecutor proved your guilt by evidence beyond a reasonable doubt.

Do you understand those rights?

[SMITH]: Yes, sir.

* * *

[THE COURT]: Having said all that, how do you plead to Count 1 as amended, attempted rape, felony of the second degree; Count 2 as amended, child endangering, felony of the third degree?

[SMITH]: Guilty, sir.

[THE COURT]: Let the record reflect [Smith] has pled guilty. The Court accepts that plea, finds it was made knowingly, intelligently, and voluntarily.

{¶ 11} Here, just as in *Miller*, the trial court ensured that Smith understood all of the constitutional rights, but it never expressly stated, or inquired as to whether Smith understood, that by pleading guilty, he was waiving his constitutional rights. While the trial court in the instant case used the words “would have” and “could have” during the plea colloquy, we cannot conclude the use of these words demonstrate that the trial court explained the rights in a manner reasonably intelligible to Smith. As the Ohio Supreme Court strongly recommended in *Ballard*, “the best method of informing a defendant of his constitutional rights is to use the language contained in Crim. R. 11(C), stopping after each right and asking the defendant whether he understands the right and knows that he is waiving it by pleading guilty.” *Id.*, 66 Ohio St.2d at 480, 423 N.E.2d 115. Consequently, we find that the trial court’s failure to strictly comply with the requirements of Crim.R. 11(C)(2)(c), with respect to the waiver of Smith’s constitutional rights,

renders his guilty plea invalid. *Id.* at ¶ 16; *State v. Lozada*, 8th Dist. Cuyahoga No. 107827, 2019-Ohio-3040, ¶ 6-7 (where this court recently found that Lozada's guilty plea was invalid because the plea colloquy suffered from the same fatal infirmity in *Miller*). Therefore, the first assignment of error is sustained.

{¶ 12} In the second and third assignments of error, Smith challenges his sentence. However, in light of our disposition of the first assignment of error, the remaining assignments of error are moot. App.R. 12.

{¶ 13} Accordingly, Smith's plea is vacated and the matter is remanded to the trial court for further proceedings.

It is ordered that appellant recover from 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR