[Cite as *State v. Fincher*, 2011-Ohio-2697.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-10-031

Appellee — Trial Court No. 2009CR0166

v.

Michael Fincher — **DECISION AND JUDGMENT**

Appellant — Decided: June 3, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Bertrand R. Puligandla, for appellant.

* * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a sentencing judgment of the Wood County Court of Common Pleas imposed upon appellant following his negotiated pleas of guilty to one count of complicity to trafficking in marijuana, in violation of R.C. 2923.03(A)(2) and 2923.03(A)(1) and (C)(3)(a), a felony of the fifth degree, and one count of possession of

marijuana, in violation of R.C. 2925.11(A)(2) and (C)(3)(f). In exchange for the pleas, the two remaining higher level felony offenses were dismissed. For the reasons set forth below, the judgment of the trial court is affirmed.

{¶ 2} Appellant, Michael Fincher, sets forth the following two assignments of error:

{¶ 3} "I. In order for a plea of guilty to be deemed knowingly, voluntarily and intelligently made, trial courts must strictly comply with Crim.R. 11(C)(2)(c) when reciting the rights that the defendant waives upon entering the plea. In this case, when it recited the rights that Fincher was waiving upon entering a plea of guilty, the trial court did not tell Fincher that he was giving up his right against compulsory self-incrimination; instead, it told him that if he chose not to testify, that would be 'acceptable'. Must the Court vacate Fincher's plea because the trial court failed to strictly comply with Crim.R. 11(C)(2)(c), thereby violating his due process rights?

{¶ 4} "(A) The Trial court’s recital omitted any reference to Fincher's right against compulsory self-incrimination.

{¶ 5} "(B) Even if the trial court's recital is deemed to have included a reference to Fincher's right against compulsory self-incrimination, it was not in strict compliance with Crim.R. 11(C)(2)(c).

{¶ 6} "II. Trial courts are required to inform defendants when post-release control is mandatory. In this case, the trial court failed to inform Fincher that he was subject to a

mandatory term of post-release control. Must the Court remand the case for a hearing under R.C. 2929.191(C)?"

{¶ 7} The following undisputed facts are relevant to the issues raised on appeal. On March 16, 2009, appellant sold approximately one-quarter pound of marijuana to an undercover agent. The following day, the police executed a search warrant on appellant's residence. During the course of that search, the police discovered approximately 44 pounds of marijuana in appellant's garage. In response, appellant was subsequently indicted on the felony offenses of complicity to trafficking in marijuana, in violation of R.C. 2923.03(A)(2) and R.C. 2923.03(A)(1) and (C)(3)(a), trafficking in marijuana, in violation of 2925.03(A)(2) and (C)(3)(f), possession of marijuana, in violation of R.C. 2925.11(A) and (C)(3)(f), and engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1). Appellant entered pleas of not guilty to the charges.

{¶ 8} On July 28, 2009, in the course of a negotiated plea agreement, appellant withdrew his former pleas of not guilty and entered pleas of guilty to complicity to trafficking in marijuana and possession of marijuana. In exchange, the remaining felony offenses were dismissed. Whereupon, the record reflects that the court performed the requisite colloquy with appellant to ensure that appellant understood the effects of his guilty plea and the constitutional rights that he was giving up.

{¶ 9} Of significance to the instant appeal is the following excerpt from the plea and sentencing transcript:

{¶ 10} "Court: And you would certainly have the right to testify at your own trial if that was your choice. On the other hand, if you chose not to testify that also would be acceptable. I would tell the jury they couldn't consider that for any reason; you understand that?

{¶ 11} "Mr. Fincher: Yes."

{¶ 12} After the court had ensured that appellant understood the rights that he was waiving, the court proceeded to sentencing. During this phase of the hearing, the record clearly shows that appellant's attorney informed the court that he had reviewed the plea agreement with appellant, indicated to him the mandatory nature of the applicable felony sentence, and stated his belief that appellant had entered into the agreement knowingly, intelligently, and voluntarily.

{¶ 13} The court then questioned appellant as to his understanding of postrelease control and clearly stated to appellant that it would be part of the sentence imposed. Appellant unambiguously affirmed his understanding of same. Finally, the court imposed sentence on appellant stating unequivocally that "the post-release control as to count 3 would be a part of this sentence."

{¶ 14} Appellant was then sentenced to one year of imprisonment for complicity to trafficking in marijuana, a fifth degree felony, and the mandatory eight years of imprisonment for possession of the 44 pounds of marijuana, a second degree felony. The sentences were ordered to be served concurrently, for a total term of incarceration of eight years. Appellant now appeals from this sentence.

{¶ 15} In appellant's first assignment of error, he asserts that the court failed to inform him of his right against compulsory self-incrimination, or, in the alternative, that the court's recital of this right was not in strict compliance with Crim.R.11(C)(2)(c). Our review of the record reveals no merit in these allegations.

{¶ 16} It is well established that a trial court must strictly comply with Crim.R.11(C)(2)(c) when advising a defendant of his constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 31; *State v. Chears*, 6th Dist. No. L-09-1054, 2011-Ohio-967, ¶ 5. Equally well established is that the trial court need not recite the rule verbatim. *State v. Ballard* (1981), 66 Ohio St.2d 473, 478; *Veney* at ¶ 27. What is required is that the trial court "explain[s] these rights in a manner reasonably intelligible to that defendant." *Ballard*, paragraph two of the syllabus.

{¶ 17} Here, the record clearly shows that the trial court complied with this standard. The court informed appellant that he could choose not to testify, that such a choice was "acceptable," and that his choice to not testify could not be considered by the jury or mentioned by the prosecution. We find this colloquy to have adequately informed appellant of his right against compulsory self-incrimination in compliance with Crim.R.11(C)(2)(c).

{¶ 18} Appellant argues that this case is indistinguishable from *State v. Singh* (July 10, 2000), 141 Ohio App.3d 137. We disagree. *Ballard* instructs that the appellant is informed of his rights in a way that "is reasonably intelligent to *that defendant*." *Ballard* at paragraph two of the syllabus. (Emphasis added.) In *Singh*, appellant was not

a U.S. citizen and was unfamiliar with our justice system. In the present case however, appellant is a U.S. citizen and holds a post-secondary associate's degree. The cases are materially distinguishable.

{¶ 19} Given these facts and circumstances, we find that appellant was properly informed of his right against compulsory self-incrimination in conformity with the mandate set forth in Crim.R.11(C)(2)(c). Appellant's first assignment of error is not well-taken.

{¶ 20} In appellant's second assignment of error, he argues that he was not properly notified about postrelease control. R.C. 2929.19(B)(3) requires that a sentencing court notify an offender that he *will* be subject to postrelease control for a felony of the first or second degree, and that he *may* be subject to postrelease control for felonies of the third, fourth, or fifth degree. See, also, *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 27.

{¶ 21} The record in this case establishes that appellant was adequately notified of the postrelease control implications of his plea agreement. The sentencing transcript states, "So the remaining two charges, Mr. Fincher, of Complicity to Trafficking in Marijuana in Count 1 which is a felony five, and that carries with it a possible sentence of 6 to 12 months, a fine up to $2,500, the possibility of three year's postrelease control * * *. And in Count 3 Possession of Marijuana, which is a felony of the second degree, that carries with it a mandatory eight years. A mandatory fine of $7,500 that could be up

to $15,000; the same postrelease control, and driver's license suspension that we have already talked about."

{¶ 22} In conjunction with this notification during sentencing, appellant reviewed and executed with the assistance of his counsel a written plea agreement including a precise and detailed section, entitled section K "POST RELEASE CONTROL", unequivocally stating that a three-year term of postrelease control was optional for count 1 and mandatory for count 3. Consistent with this, the sentencing transcript reflects that counsel for appellant likewise stated to the court," I would indicate to the Court that before court today I had the opportunity to sit down with Mr. Fincher. I've spoken to him before about this plea agreement. I went through the plea papers with him, reviewed those with him and, in fact, *read those to him*. He indicated to me he understands the nature of his plea, the types of sentences that are potentially involved in this particular case, the mandatory nature of the one particular sentence, and that this is the agreement he wants me to enter into on his behalf. I've signed the certificate believing he has done this knowingly, intelligently, and voluntarily."

{¶ 23} Lastly, the sentencing judgment entry states, "Mr. Phillips and the court explained to the defendant the consequences of not having a presentence report prepared and that the court would not be able to sentence the defendant to community control sanctions and not grant judicial release as to Count 1. However, the Court further explained that a mandatory sentence was required for the offense in Count 3. The defendant stated that he understood and wished to proceed to sentencing * * *. The

Defendant is reminded that he may be subject to post release control of three (3) years pursuant to R.C. 2929.14(F) * * *. The Defendant is ordered to serve, as part of his sentence, any term of post release control imposed by the parole board and any prison term for violation of the post release control."

{¶ 24} Given all of the indicia contained in the record, in its entirety, and in particular the written plea agreement executed by appellant unequivocally agreeing to the disputed postrelease control terms, we find that appellant was properly notified that he would be subject to a term of postrelease control. Appellant's second assignment of error is not well-taken.

{¶ 25} On consideration whereof, the judgment of the Wood County of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R.24

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE