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When Is Failing to Advise a Defendant of His Right to Counsel Harmless Error?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 89–91.

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Issue

When should a district court's failure to advise a counseled defendant at his guilty plea hearing that he has the right to the assistance of counsel at trial be subject to plain-error, rather than harmless-error, review?

Facts

In February 1997 three men entered a bank in Long Beach, Calif., and attempted a daring robbery. Announcing "[t]his is a holdup," two of the robbers drew guns and instructed everyone to get on the floor. The third man, Alphonso Vonn, leaped over the counter with a bag for the tellers to fill with money. The three robbers fled with a total of $209. A short time later, the three robbers were arrested and the police recovered the money from Vonn's sock.

Vonn was charged with armed bank robbery and chose to plead guilty. At his guilty plea hearing, the court informed Vonn of the rights he was relinquishing by pleading guilty. However, the court did not advise him of his right to counsel at trial.

After Vonn pled guilty, the government filed a superseding indictment charging Vonn with conspiracy to commit bank robbery and carrying a firearm during a crime of violence. Vonn pled guilty to these additional charges. Again, the judge failed to inform Vonn of his right to an attorney at trial.

At this time, the government's attorney informed the court that it did not "remember hearing the Court inform the defendant of his right to assistance of counsel." The judge responded that he did do so because Vonn was represented by counsel.

Vonn later moved to withdraw his guilty plea on the firearm charge, claiming that he was not guilty and his plea was the result of a mistake. The court denied Vonn's motion and sentenced him to 97 months in prison, to be followed by three years' supervised release.

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United States v. Vonn
Docket No. 00-973

Argument Date:
November 6, 2001
From: The Ninth Circuit

Case at a Glance

The Supreme Court is asked to determine whether a district's court's failure to advise a defendant represented by counsel at his guilty plea hearing that he also has a right to the assistance of counsel at trial is subject to "plain error" review on appeal even if the defendant failed to preserve that claim of error in the district court.

Vonn then appealed his conviction to the U.S. Court of Appeals for the Ninth Circuit, asking the court to set aside his convictions because of the judge's failure to advise him of his right to counsel at trial. Reversing the district court, the Ninth Circuit held that the district court's failure, during its acceptance of Vonn's guilty pleas, to advise him of his right to counsel at trial was not harmless error.

The Supreme Court granted the government's petition for a writ of certiorari, 121 S.Ct. 1185 (2001), and it will now review the Ninth Circuit's decision.

Case Analysis

According to Rule 11 of the Federal Rules of Criminal Procedure, before accepting a guilty plea, "the court must address the defendant personally in open court and inform the defendant" of his rights. Rule 11 then lists the specific rights the court must explain to the defendant. These enumerated rights include the right to representation by counsel at trial. Where a defendant's Rule 11 rights are violated, the defendant is typically allowed to withdraw his guilty plea.

Whenever a court determines an error has occurred, however, the court must decide whether it must remedy the error. By their nature, some errors so significantly affect the entire structure of the proceeding that they must always be remedied. In these cases, there is no need for any analysis of how the error might have affected or not affected the particular proceeding. See *Arizona v. Fulminante,* 499 U.S. 279 (1991).

In *McCarthy v. United States,* 394 U.S. 459 (1969), the Supreme Court held that a defendant is entitled to plead anew if the district court accepts the defendant's guilty plea without fully adhering to the procedure provided in Rule 11. In 1985, subsection (h) was added to Rule 11 of the Federal Rules of Criminal Procedure to provide: "Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

Normally, where an error is not brought to the district court's attention before appeal, the "plain error" rule applies. See *Chapman v. California,* 386 U.S. 18 (1967). Rule 52(b)of the Federal Rules of Criminal Procedure defines "plain error" as "errors or defects affecting substantial rights," and provides that these "may be noticed although they were not brought to the attention of the court." See also *United States v. Olano,* 507 U.S. 725 (1993) (error is "plain error" only if the error affected the fairness, integrity, or public reputation of the judicial proceeding).

If the "plain error" rule under Rule 52(b) applies to an unobjected-to Rule 11 violation, then the defendant will bear the burden of establishing "prejudice" and must demonstrate not only that he would not have pleaded guilty in the absence of the court's error, but also that there is some reason to believe that he would not have been convicted. If, on the other hand, "harmless error" under Rule 11(h) applies, the government will bear the burden of establishing the lack of prejudice.

The government argues that Vonn is precluded from raising his Rule 11 claim because he failed to raise it in the trial court when he moved to withdraw his guilty pleas. According to the government, the district court's failure to adhere strictly to the requirements of Rule 11 was harmless error. Thus, the government asserts, Vonn is entitled to relief only if he can show that the court's action was "plain error" within the meaning of Rule 52(b).

It is the government's position that a showing of plain error in a guilty plea colloquy requires a finding that the error affected the outcome of the proceeding. Vonn disagrees, arguing that the district court's failure to advise him of his right to counsel if he went to trial rendered his guilty pleas unintelligent and entitles him to have his guilty pleas vacated.

According to Vonn, the "plain error" rule in Rule 52(b) is inapplicable to Rule 11 errors. Relying on the "harmless error" rule in Rule 11(h), Vonn asserts that a Rule 11 error going to the essence of whether the plea was voluntary and intelligent is never harmless. He claims that Rule 11(h) was meant merely to prevent the vacating of guilty pleas based on violations that did not go to the voluntariness or intelligence of the plea.

The government contends that there is no basis in the text of Rule 11(h) to suggest that some subset of Rule 11 errors may not be found harmless. Pointing out that Rule 11(h) states that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded [emphasis added]," the government says the court's duty to inform the defendant of his right to counsel at trial is one of the procedures required by Rule 11 and is thus subject to harmless-error review.

According to Vonn, plain-error review under Rule 52(b) is inappropriate when a guilty plea is unconstitutional. Although recognizing that the provisions of Rule 11 are not constitutional requirements, Vonn claims that they are prophylactic rules meant to guarantee the

constitutional requirement that a guilty plea be voluntary and intelligent. The government disagrees, contending that the Supreme Court has rejected the argument that the procedures of Rule 11 are compelled by the Constitution.

Vonn says it makes no sense in the context of a voluntary and intelligent plea or the waiver of a constitutional right to hold him responsible for the inaction of his attorney. He asserts that application of the government's raise-or-forfeit rule to a guilty plea colloquy would result in the waiver of important constitutional rights by silence.

SIGNIFICANCE

The Supreme Court has never expressly addressed the applicability of plain-error review to Rule 11 violations, including those that go directly to ensuring the plea is voluntary and intelligent. The 1985 amendment adding subsection (h) to Rule 11 of the Federal Rules of Criminal Procedure was intended to abrogate the Supreme Court's ruling in *McCarthy v. United States* to some extent. The Supreme Court is now called upon to determine the extent to which *McCarthy* has been abrogated. The Supreme Court's decision determining the allocation of the burden of proof is important, as the allocation of the burden will often determine which side prevails. See *Speiser v. Randall,* 357 U.S. 513 (1958).

A number of federal courts have held that when the district court was not asked to set aside a guilty plea, appellate review will be for plain error. See, e.g., *United States v. Gandia-Maysonet,* 227 F.3d 1 (1st Cir.2000); *United States v. Bashara,* 27 F.3d 11743 (6th Cir.1994); *United States v. Driver,* 242 F.3d 767 (7th Cir.2001); *United States v. Young,* 927 F.2d 1060 (8th Cir.1991); and *United States v. Quinones,* 97 F.3d 473 (11th Cir.1996). See also *United States v. Olano,* 507 U.S. 725 (1993).

Other circuits have disagreed with the Ninth Circuit and held that a defendant who is represented by counsel at his plea hearing is presumed to be aware of his right to counsel at trial. In *United States v. Gomez-Cuevas,* 917 F.2d 1521 (10th Cir. 1990), the Tenth Circuit held that there was no prejudice resulting from the court's failure to advise the defendant that he had a right to counsel because the defendant was already represented by counsel. See also *United States v. Caston,* 615 F.2d 1111 (5th Cir. 1980) (harmless error where court failed to explicitly advise defendant of right to assistance of counsel at trial); *United States v. Saft,* 558 F.2d 1073 (2d Cir. 1977) (it would defy reality to suppose that defendant had any doubts about his appointed counsel's continuing to represent him at trial because, unlike a defendant with retained counsel who might worry that his money might run out, there was no suggestion that defendant's counsel would abandon him if he went to trial).

The Seventh Circuit recently held that a violation of the requirements of Rule 11 is harmless and does not provide a fair and just reason to allow the withdrawal of a guilty plea when the defendant already knew the information omitted by the judge. *United States v. Driver,* 242 F.3d 767 (7th Cir. 2001).

A decision upholding the government's position would make it more difficult for a defendant to withdraw a guilty plea. Such a decision could enable district courts to build a record essential to understanding the effect of any noncompliance with Rule 11 and would permit district judges to take the guilty plea anew and avoid the delay that results from an appeal and that may undermine the accuracy of any ensuing trial.

On the other hand, a decision upholding the Ninth Circuit's decision would provide further assurance that a defendant is aware of his or her rights at the time they are being waived in the course of pleading guilty. Such a decision would ensure strict compliance with the requirements of Rule 11 in entertaining a defendant's plea of guilty.

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