[Cite as *State v. Ananthula*, 2019-Ohio-5442.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 19CA09
vs.	:	
CHARITHA ANANTHULA,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Scott P. Wood, Lancaster, Ohio, for appellant.[1]

Lisa A. Eliason, Athens City Law Director, and Matthew M. Ward, Athens City Prosecutor, Athens, Ohio, for appellee.

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 12-30-19
ABELE, J.

{¶ 1} This is an appeal from an Athens County Municipal Court judgment that denied the request of Charitha Ananthula, defendant below and appellant herein, to withdraw her guilty plea. Appellant assigns one error for review:

> "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO WITHDRAW HER GUILTY PLEA AFTER SHE WAS SENTENCED."

{¶ 2} Appellant, an Indian national, lives in the United States on a foreign student visa. On February 5, 2018, appellant was charged with theft in violation of Athens City Code Ordinance

[1] Different counsel represented appellant during the trial court proceedings.

13.03.01, a first-degree misdemeanor. On February 6, 2018, appellant, while represented by counsel, entered a not guilty plea. Although the record includes multiple requests for continuances, two are especially relevant to this appeal. On March 28, 2018, the trial court granted a request for a continuance and wrote that appellant "is a foreign student. Counsel is reviewing impact of immigration status." On April 17, 2018, the court issued another entry and wrote "need to [check] on immigration regulations."

{¶ 3} On May 7, 2018, appellant pleaded guilty to theft. The trial court imposed a $500 fine and ordered her to serve 90 days in jail, with all the jail time and $400 of the fine suspended on the conditions that appellant remain a law abiding citizen for two years, complete 40 hours of community service, and have no contact with Wal-Mart.

{¶ 4} On March 21, 2019, appellant filed a motion to withdraw her guilty plea. Appellant's motion cited Crim.R. 32.1 and R.C. 2943.031, *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355 (2004), and *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). After the trial court held a hearing on the motion, the court denied appellant's request. This appeal followed.

I.

{¶ 5} "Criminal defendants who are not United States citizens are permitted to withdraw a guilty plea in two distinct ways: (1) upon the finding that they were not given the warning required by R.C. 2932.031(A)(1) (and the court was not relieved of that requirement under R.C. 2943.031(B) of the potential consequences to their resident status when they pled guilty to criminal charges, among other related requirements contained in R.C. 2943.031(D)), or (2) when a court finds, pursuant to Crim.R. 32.1, that it is necessary to correct manifest injustice." *State v. Cardenas,*

2016-Ohio-5537, 61 N.E.3d 20, ¶ 14 (2d Dist.), citing *State v. Toyloy*, 10th Dist. Franklin No. 14AP-463, 2015-Ohio-1618, ¶ 12.

{¶ 6} Section (F) of R.C. 2943.031 "clarifies that the statute does not prevent a trial court from granting a plea withdrawal under the procedural rule, Crim.R. 32.1." *Id.* Thus, R.C. 2943.031 provides "an independent means of withdrawing a guilty plea separate and apart from and in addition to the requirements of Crim.R. 32.1." *State v. Weber*, 125 Ohio App.3d 120, 129, 707 N.E.2d 1178 (10th Dist. 1997). When a motion to withdraw a plea is premised under R.C. 2943.031(D), the usual "manifest injustice" standard applied to Crim.R. 32.1 motions does not apply; rather, the R.C. 2943.031 standards apply. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 26. Moreover, the Supreme Court of Ohio instructs us that, regardless of whether a motion to withdraw a plea is based on R.C. 2943.031 or Crim.R. 32.1, an appellate court reviews a trial court's decision under the abuse-of-discretion standard. *Francis* at ¶ 32, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus.

II.

{¶ 7} In her sole assignment of error, appellant asserts that the trial court erred by overruling her motion to withdraw her guilty plea.[2]

[2] Initially, we recognize that appellee argues that appellant has waived her argument because she did not raise R.C. 2943.031 during the trial court proceedings. Appellee cites *State v. Castillo*, 8th Dist. Cuyahoga No. 84143, 2005-Ohio-93, ¶ 53 as support for its argument that a non-citizen defendant, who premises a motion to vacate a guilty plea on Crim.R. 32.1 and not R.C. 2943.031, has waived that argument for purposes of appeal. We, however, believe that *Castillo* is inapplicable here because appellant premised her motion on both Crim.R. 32.1 and R.C. 2943.031. While appellant's motion cites Crim.R. 32.1, her memorandum in support focuses on R.C. 2943.031, *State v. Francis*, *supra,* and *Padilla v. Kentucky*, *supra.* Thus, we do not believe that appellant has waived this argument for purposes of appeal.

{¶ 8} If a defendant is not a citizen of the United States, under R.C. 2943.031(A) a trial court must personally address the defendant and advise, on the record, the possible deportation consequences associated with a guilty plea. R.C. 2943.031 provides:

> (A) Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor other than a minor misdemeanor if the defendant previously has not been convicted of or pleaded guilty to a minor misdemeanor, the court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:
>
> "If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

R.C. 2943.031(D) provides the remedy for noncompliance with this requirement:

> Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty or not guilty by reason of insanity, if, after the effective date of this section, the court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division, and the defendant shows that he [or she] is not a citizen of the United States and that the conviction of the offense to which he [or she] pleaded guilty or no contest may result in his [or her] being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

{¶ 9} In 2004, in *State v. Francis*, *supra*, the Supreme Court of Ohio considered what level of compliance with R.C. 2943.031(A) is required. The court held:

> A trial court accepting a guilty or no-contest plea from a defendant who is not a citizen of the United States *must give verbatim* the warning set forth in R.C. 2943.031(A), informing the defendant that conviction of the offense for which the plea is entered 'may have the consequences of deportation, exclusion from admission to the United states, or denial of naturalization pursuant to the laws of the United States.

Id., paragraph one of the syllabus. (Emphasis added.) However, in paragraph two, the court held:

> If some warning of immigration-related consequences was given at the time a noncitizen defendant's plea was accepted, but the warning was not a verbatim recital of the language in R.C. 2943.031(A), a trial court considering the defendant's motion to withdraw the plea under R.C. 2943.031(D) must exercise its discretion in determining whether the trial court that accepted the plea substantially complied with R.C. 2943.031(A).

Id., paragraph two of the syllabus. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Francis* at ¶ 48, quoting *State v. Nero,* 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). The substantial compliance standard requires the defendant to show that prejudice resulted from the lack of compliance. *Id.* at ¶ 48. The question of prejudice considers whether the plea would have been made despite the trial court's failure to substantially comply. *Id.* at ¶ 48.

{¶ 10} In the case sub judice, during the plea hearing the following discussion occurred regarding appellant's immigration status:

> DEFENSE ATTORNEY: Your Honor, I know [sic.] would advise her [inaudible] rights, but I have advised her this case will have an impact, and I told her what I think is on her - she has a student visa. But I've advised her to what those rights and impact is.
>
> COURT: Alright. Do you want to enter a plea of guilty to the theft charge?
>
> APPELLANT: Yes.
>
> COURT: And, you've spoke with Mr. Ball about potential consequences on your visa?
>
> APPELLANT: Yes.
>
> COURT: And you've considered all that in making a decision today to enter a plea of guilty to resolve the charge?
>
> APPELLANT: Yes.

{¶ 11} Our review reveals that the court did not give *verbatim* the R.C. 2943.031(A) warning and inform the appellant that the conviction "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Thus, we must determine whether the trial court substantially complied with R.C. 2943.031(A). As we point out, substantial compliance means "that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. * * * The test is whether the plea would have otherwise been made." *Francis* at ¶ 48.

{¶ 12} In *State v. Perry*, 5th Dist. Muskingum No. CT2018-0045, 2019-Ohio-2776, the Fifth District considered a case in which the trial court did not give a *verbatim* recitation of the R.C. 2943.031(A) warning and concluded that the second paragraph of *Francis*, which permits substantial compliance, "requires advisement of all three consequences described in the advisement." *Perry* at ¶ 32. The Fifth District also cited the Second District's substantial compliance analysis in *State v. Hernandez-Medina*, 2d Dist. Clark No. 061CA0131, 2008-Ohio-418, ¶ 30:

> The trial court failed to advise Defendant that his guilty plea might result in exclusion from admission to the United States, or denial of naturalization. Thus, in advising Defendant about the possible adverse immigration consequences of his guilty plea the trial court failed to even mention two out of the three separate, distinct consequences set forth in R.C. 2943.031(A). In our view, that does not constitute substantial compliance with R.C. 2943.031(A). See *State v. Zuniga*, Lake App. Nos. 2003-P-0082, 2004-P-0002, 2005-Ohio-2078.

Perry, supra, at ¶ 31. The *Perry* court thus concluded that the trial court did not substantially comply with the statute when it did not address the consequences of denial of naturalization or potential inadmissibility:

> The Legislature determined all three issues were of such significant import that it included specific language for the trial court's use when advising defendants. Concluding that a trial court substantially complied with the requirement of the Code

> without any mention of two of the consequences is tantamount to changing the language of the statute and we are not willing to adopt such an interpretation.

Perry at ¶ 32.

{¶ 13} In the case sub judice, we again point out that the plea hearing transcript reveals little discussion concerning immigration consequences. The trial court did ask appellant if she had spoken with her attorney "about potential consequences on your visa?" When appellant replied, "yes," the court asked if she had "considered all that in making a decision today to enter a plea of guilty to resolve the charge." We, however, do not find any discussion of the three consequences set forth in the R.C. 2943.03(A) advisement - that her plea "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

{¶ 14} Additionally, at the April 10, 2019 hearing on the appellant's motion to withdraw her plea, appellant testified that she is a citizen of India, and, at the time of her May 2018 plea, she was in the United States on an F1 student visa. When asked whether her attorney advised her of the consequences of her plea, she stated, "No." When asked whether her attorney discussed with her that, if she pleaded guilty to a theft offense it could affect her immigration status, appellant replied, "No * * * he did not. Like, he told like, he does not know the immigration consequences, and I didn't know - frankly speaking, I didn't know I was pleading guilty until the day of that day. So it - he told me, like, it was just a casual meeting, he told me to come. So I thought it was just a casual meeting and I went, and just before entering into the court, like two minutes before, he told me that you have to plead guilty. So." When asked whether on other occasions if a discussion occurred regarding how a conviction might affect her immigration status, appellant replied, "No. He told, like,

he's not sure." When asked what she has now learned about how this conviction may affect her current employment, appellant replied, "Like, there are fifty-fifty changes. But mostly it will affect, like, it might affect my H1 status. But I just took a chance because I don't, I mean." Counsel also asked appellant about her ability to lawfully re-enter the United States, and appellant explained that, after she pleaded guilty, she "spoke to the immigration lawyer in Columbus, so he told, like, I have two changes, deportability and inadmissibility. So once I leave the United States, they are very difficult - it is very difficult for me to come back."

{¶ 15} Later, when asked about conversations with her trial counsel regarding immigration consequences, appellant also stated, "So whenever I ask the immigration consequences, like what happens, they like, we don't know, you have to talk to an immigration lawyer." When asked if appellant consulted an immigration attorney prior to her plea, she replied, "No. Prior to the plea, no, because, like, here I could not find any immigration lawyers. And at that time, frankly speaking, I didn't know the case was this huge. It has this much complications. And all I trusted was my lawyer, like, I put my complete trust on him. I thought he will take care - because he gave me the confidence that, don't worry, it'll be fine. So I put all my trust on him, until the end date. And then after, like, once this thing is done, I went to all other attorneys here, and they ask, like, what can I do, what can I do. So like, because I blindly trusted him, the thing is - because, like, I don't know anyone here, like, I just came to study, and - so, I could not know how to react to this thing, so I thought, like, I just completely, blindly trusted my lawyer, and I could not - I just saw all the attorneys in Ohio - Athens, Ohio, and I called them."

{¶ 16} When asked if her attorney suggested that she plead guilty, appellant replied, "He told, like, plead guilty. He told, like, we cannot do any-on the day, on the last day, he told like, we cannot

do anything, you have to plead guilty. There was not a chance for me to talk."

{¶ 17} Under R.C. 2943.031(A), it appears that relief is mandated if a court (1) did not provide the defendant the advisement contained in R.C. 2943.031(A), (2) the advisement was required, (3) the defendant is not a United States citizen, and (4) the offense to which the defendant pleaded guilty may result in deportation under the immigration laws of the federal government. *See State v. Weber*, 125 Ohio App.3d 120, 126, 707 N.E.2d 1178 (10th Dist.1997). Appellant's testimony reveals that apparently she was not properly apprised of the consequences of her plea and she suffered prejudice with regard to deportability and exclusion from admission to the United States. References in the record to appellant's trial counsel possibly advising her to consult an immigration attorney does not fulfill the R.C. 2943.031(A) requirements. While we agree with the trial court that one should presume that trial counsel should fully inform a defendant of the various consequences of a criminal conviction, including any impact on the defendant's status in the United States, the language in the statute reflects the legislature's desire that courts affirmatively ensure that non-citizen defendants are advised of this information. Thus, after our review of the record in the case sub judice, we conclude that the appellant did not receive the R.C. 2943.031(A) advisement or substantially similar information, "For a noncitizen, the most significant aspect of a criminal conviction may not be the resulting criminal sanction but the conviction's effect on immigration status." *State v. Kona,* 148 Ohio St.3d 539, 2016-Ohio-7796, 71 N.E.3d 1023, ¶ 16. Under the totality of the circumstances, we cannot conclude that the appellant subjectively understood the implication of her plea and the rights she would be waiving. *Francis, supra,* at ¶ 48.

{¶ 18} Accordingly, based upon the foregoing reasons, we sustain appellant's assignment of error, reverse the trial court's judgment on appellant's motion to withdraw her plea and remand this

matter to the trial court for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and the cause remanded for further proceedings consistent with this opinion. Appellant recover of appellee the 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 Athens County Municipal Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.