

[Cite as *State v. Rodrigues*, 2002-Ohio-5489.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 01CA0062

vs. : T.C. CASE NO. 97-CR-0215

ALFREDO VENEGAS RODRIGUEZ* :

Defendant-Appellant :

.

DECISION AND ENTRY

Rendered on the 11th day of September, 2002.

.

PER CURIAM:

{¶1} This matter is before the court on App.R. 25 motion to certify a conflict that was filed by the State. The motion argues that our decision of July 12, 2002, reversing Defendant Rodriguez's conviction, is in conflict with the holdings of two other appellate districts; *State v. Abuhilwa* (Mar. 29, 1995), Summit App. No. 16787, and *State v. Reeder* (April 14, 1994), Cuyahoga App. No. 65782.

{¶2} Motions filed pursuant to App.R. 25 must be filed within ten days after announcement of the court's decision, at the latest. Applications for reopening filed pursuant to App.R. 26(A) must be filed within the same time. That form of application is appropriate when the court's decision contains an obvious error. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68.

* Reporter's Note: For earlier opinion, see *State v. Rodrigues*, [2002-Ohio-3568](#).

Because we find that our decision herein contains an obvious error on the issue of law presented, we shall consider the motion that the State filed on July 22, 2002, within ten days after our decision of July 12, 2002, as an App.R. 26(A) application for reconsideration.

{¶3} *Abuhilwa and Reeder* hold that the relief available to a defendant for the trial court's failure to give the advice required by R.C. 2943.031(A) is that provided by R.C. 2943.031(D), which is to set aside the defendant's conviction upon the filing of a Crim.R. 32.1 motion to withdraw a guilty plea and the showing that R.C. 2943.031(D) requires concerning citizenship and the potential for deportation. This court has also so held. See *State v. McDargh* (Nov. 2, 2001), Clark App. No. 00CA94, 2001-Ohio-1703, citing *Abuhilwa and Reeder*.

{¶4} As the basis for our decision herein, we relied on our decision in *State v. Mason* (Feb. 15, 2001), Greene App. No. 01CA113, 2002-Ohio-930, and we construed *Mason* to have modified *McDargh*. Upon further review, we find that it did not, because in *Mason* the defendant had sought the relief for which R.C. 2943.031(D) provides and appealed after being denied that relief. Therefore, our decision in *McDargh* remains authoritative, and governs the holding in this appeal.

{¶5} Defendant-Appellant Rodriguez did not ask the trial court to set aside his conviction pursuant to R.C. 2943.031(D), and instead filed a direct appeal from his conviction, assigning as error the trial court's failure to comply with R.C. 2943.031(A) when it accepted his guilty pleas. Per *McDargh*,

Abuhilwa, and Reeder, Defendant-Appellant was barred from prosecuting that error on appeal. (Also see *State v. Thompson* (Mar. 21, 1991), Greene App. No. 90-CA-90.) Therefore, Defendant-Appellant's single assignment of error should have been overruled, not sustained.

{¶6} Upon reconsideration, we vacate our decision of July 12, 2002, and instead overrule Defendant-Appellant's assignment of error. Therefore, on the error presented, his conviction and sentence are affirmed.

So Ordered.

MIKE FAIN, JUDGE

THOMAS J. GRADY, JUDGE

FREDERICK N. YOUNG, JUDGE

- Copies mailed to:
- Andrew P. Pickering
Asst. Pros. Attorney
50 East Columbia Street
Springfield, Ohio 45502

 - S. Todd Brecount, Esq.
P.O. Box 913
Urbana, Ohio 43078

 - Hon. Gerald F. Lorig
101 N. Limestone Street
Springfield, Ohio 45502