

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1038 (C.P.C. No. 02CR-773)
Wilson T. Oluch,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 11, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

S. Adele Shank, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to withdraw guilty pleas of defendant-appellee, Wilson T. Oluch. The state assigns a single error:

THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS.

Because the trial court did not abuse its discretion in sustaining defendant's motion to withdraw his guilty pleas, we affirm.

I. Facts and Procedural History

{¶2} On February 2, 2002, the Franklin County Grand Jury indicted defendant on one count of kidnapping, in violation of R.C. 2905.01, one count of gross sexual imposition, in violation of R.C. 2907.05, and two counts of rape, in violation of R.C. 2907.02. The case proceeded to a jury trial, but the parties reached a plea agreement after two days of trial that resulted in defendant's entering guilty pleas to one count of rape and one count of kidnapping. The trial court sentenced defendant to the jointly-recommended sentence of 15 years in prison and declared him to be a sexual predator.

{¶3} On June 29, 2005, defendant filed a motion to withdraw his guilty pleas. Defendant, who is a Kenyan national, argued the trial court failed to comply with R.C. 2943.031 in accepting his guilty pleas. Defendant further argued his trial counsel was ineffective in not objecting to the trial court's failure to strictly comply with R.C. 2943.031. Defendant attached to his motion (1) his own affidavit, (2) an October 17, 2002 "Notice of Intent to Issue a Final Administrative Removal Order," and (3) a November 15, 2002 "Final Administrative Removal Order." The trial court denied defendant's motion without a hearing.

{¶4} Defendant timely appealed from the trial court's denial of his motion to withdraw guilty pleas. In a decision dated October 18, 2007, this court determined that in view of the trial court's not strictly complying with R.C. 2943.031(A), the issue was whether the trial court substantially complied with the requirements of the statute. *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶17. In that regard, we decided defendant was entitled to a hearing to determine whether defendant subjectively understood his guilty pleas could result in exclusion from admission to the United States

and denial of naturalization. *Id.* at ¶20. Accordingly, we reversed in part and remanded for a hearing where the trial court also was to consider whether defendant's trial counsel was ineffective in failing to object to the trial court's failure to comply strictly with R.C. 2943.031. *Id.* at ¶47.

{¶5} On April 18, 2008, the trial court conducted a hearing pursuant to this court's remand where both defendant and his trial counsel testified, and the state presented defendant's visa application form as a supplemental exhibit. Following the hearing, the trial court asked both parties to submit proposed findings of fact and conclusions of law. The trial court adopted defendant's findings of facts and conclusions of law and granted defendant's motion to withdraw his guilty pleas. The state appealed, seeking leave to appeal in the event it lacked an appeal of right.

II. Leave to Appeal

{¶6} R.C. 2945.67(A) grants the state a substantive, but limited, right of appeal in criminal cases. *State v. Slatter* (1981), 66 Ohio St.2d 452, 456-57; *State v. Waller* (1976), 47 Ohio St.2d 52, 55-56; *State v. Kole* (Sept. 29, 2000), 11th Dist. No. 99-A-0015. Pursuant to the statute, the state's absolute right of appeal is available only where the trial court's decision falls within one of the four statutory categories and grants: (1) a motion to dismiss all or part of an indictment, complaint, or information, (2) a motion to suppress evidence, (3) a motion for the return of seized property, or (4) a petition for post-conviction relief. *State v. Matthews*, 81 Ohio St.3d 375, 377-78, 1998-Ohio-433; *State v. Fraternal Order of Eagles* (1991), 58 Ohio St.3d 166, 167.

{¶7} The state may appeal "any other decision" of the trial court, but only if the state first obtains leave from the appellate court. R.C. 2945.67(A); *Matthews* at 378; *State*

v. Arnett (1986), 22 Ohio St.3d 186, syllabus. "The decision to grant or deny a motion for leave to appeal by the state in a criminal case is solely within the discretion of the court of appeals." *State v. Jama*, 189 Ohio App.3d 687, 2010-Ohio-4739, ¶13, citing *State v. Fisher* (1988), 35 Ohio St.3d 22, 26, citing *State v. Ferman* (1979), 58 Ohio St.2d 216. The state, however, is not authorized to appeal final verdicts. R.C. 2945.67(A); *State v. Keeton* (1985), 18 Ohio St.3d 379, paragraph one of the syllabus.

{¶8} We grant the state's motion for leave to appeal so that we may address the issues arising out of the hearing this court ordered on remand and to resolve any uncertainty about substantial compliance with R.C. 2943.031, the issue on remand. See *Jama* at ¶13.

III. Assignment of Error

{¶9} The state's single assignment of error asserts the trial court abused its discretion when it sustained defendant's motion to withdraw his guilty pleas. The trial court sustained defendant's motion on two grounds: (1) the trial court failed to substantially comply with R.C. 2943.031 during defendant's plea proceedings, and (2) trial counsel was ineffective in failing to object when the trial court did not strictly comply with the provisions of R.C. 2943.031 and in failing to advise defendant of the consequences of his plea.

{¶10} R.C. 2943.031 provides that "prior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony * * * the court shall address the defendant personally, provide the following advisement to the defendant * * * and determine that the defendant understands the advisement." The statutorily provided advisement states that "[i]f you are not a citizen of the United States, you are

hereby advised that conviction of the offense to which you are pleading guilty * * * 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(A).

{¶11} If the trial court fails "to provide the defendant the advisement described" in R.C. 2943.031(A), the trial court, on motion of defendant, "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." R.C. 2943.031(D). The statute sets forth the conditions for withdrawing a guilty plea under R.C. 2943.031: the advisement is required under R.C. 2943.031(A), the defendant establishes he is not a citizen of the United States, and the defendant demonstrates the conviction of the offense to which he pleaded guilty or no contest may result in his deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. R.C. 2943.031(D).

{¶12} The Ohio Supreme Court in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, held that "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)," then "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.* at ¶48. "[A] defendant seeking relief under R.C. 2943.031(D) must make his or her case before the trial court under the terms of that statute, * * * the trial court must exercise its discretion in determining whether the statutory conditions are met, and * * * an appellate court reviews a trial court's decision on the motion under an abuse-of-discretion standard in light of R.C. 2943.031(D)." *Id.* at ¶36.

Johnson v. Cassens Transport Co., 158 Ohio App.3d 193, 2004-Ohio-4011, ¶8, discretionary appeal not allowed, 104 Ohio St.3d 1427, 2004-Ohio-6585, citing *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 22 (noting the term "abuse of discretion" connotes a judgment that is rendered with an unreasonable, arbitrary, or unconscionable attitude).

{¶13} Substantial compliance with R.C. 2943.031(A) requires a defendant to be informed of the possibility not only of deportation, but also of exclusion from admission into the United States and denial of naturalization pursuant to the laws of the United States. *State v. Ouch*, 10th Dist. No. 06AP-488, 2006-Ohio-6949, ¶28, discretionary appeal not allowed, 114 Ohio St.3d 1410, 2007-Ohio-2632, citing *State v. Batista*, 10th Dist. No. 03AP-1009, 2004-Ohio-5066, ¶9. 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, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶14} The state points to three reasons it believes the trial court abused its discretion in granting defendant's motion to withdraw his guilty pleas: (1) the trial court misapplied the substantial compliance test and wrongly concluded defendant proved the trial court's failure under R.C. 2943.031 prejudiced defendant; (2) the trial court applied the wrong burden of proof; and (3) the trial court exceeded this court's mandate on remand.

A. Substantial Compliance

{¶15} The state argues that, despite the trial court's failure to strictly comply with the language of R.C. 2943.031, the record reveals defendant understood the consequences of his plea and thus cannot demonstrate he would not have entered the guilty pleas had the trial court been more explicit.

{¶16} The state first contends that because defendant knew his guilty pleas could result in deportation, defendant, as a matter of "common sense," should have known the same action that subjected him to deportation logically would exclude him from admission and deny him naturalization. Neither the plea proceedings nor the proceedings on remand support the state's argument.

{¶17} During the plea colloquy, the trial court informed defendant only "that by pleading guilty, this could jeopardize [his] status here in this country." *Ouch* at ¶14. In response to the court's inquiry, defendant's trial counsel specifically noted on the record that defendant had concerns about being allowed to stay in the country and wanted counsel to negotiate a recommendation to that effect as part of his plea bargain. Defense counsel also stated he informed defendant that the court, as a state entity, did not have authority over whether defendant could remain in the country. *Id.* The trial court corroborated defense counsel's statement, advising defendant it had "no authority over it, no." *Id.* Neither counsel nor the court mentioned to defendant either exclusion from admission to the United States or denial of naturalization. Further, the plea form bearing defendant's signature does not mention any possible adverse immigration consequences to defendant's guilty pleas.

{¶18} At the hearing on remand, defendant testified that, if he had known his entering a guilty plea might preclude his ever being allowed to return to the United States, he would not have pleaded guilty. (Apr. 18, 2008 Tr. 88.) Defendant further testified he would not have entered the plea if he had known at the time that the plea might mean he would never be allowed to become a citizen or be naturalized. (Tr. 88.) Defendant also presented documentation of his impending deportation. Taken together, defendant presented evidence he did not understand the consequences of his pleas, he would not have entered his guilty pleas had the trial court properly advised him of all the potential adverse immigration consequences, and he suffered adverse consequences as a result. See *Ouch* at ¶21 (stating that "by submitting a copy of the deportation order, appellant sufficiently established prejudice from his guilty pleas").

{¶19} Despite defendant's evidence, the state urges us to construe the evidence differently and conclude that defendant's testimony was disingenuous. The state asserts defendant's primary concern at the time of the plea proceeding was his return to Kenya to be with his family. As a result, the state contends, defendant should not be allowed to argue now that he would not have entered his guilty pleas had he a more complete warning of the adverse immigration consequences. To bolster its argument, the state points to defendant's visa application, including its questions directed to whether the applicant has ever been convicted of a crime. The state asserts the evidence, viewed under the totality of the circumstances, meant defendant must have subjectively understood that if he could be deported, he also would be subject to exclusion from admission and denial of naturalization.

{¶20} Ultimately, the state's argument suggests the trial court erred in giving too much weight to defendant's own testimony and too little weight to the visa application. Credibility and weight determinations are exclusively within the province of the trial court. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus (stating "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts"). Nor can we agree with the state's contention that the visa application's general questions regarding an applicant's prior criminal convictions are sufficient to inform an applicant of the potential adverse immigration consequences specified in R.C. 2943.031 that may arise from a future felony conviction. To so conclude would eviscerate R.C. 2943.031 and the long line of cases requiring substantial compliance with the advisement contained in the statute.

{¶21} The state also notes defendant never asked about the possibility of exclusion from admission and denial of naturalization, appearing to suggest defendant's failure to inquire indicates defendant subjectively understood the potential consequences of his guilty plea. To the extent the state so argues, it places the burden on the wrong party. A defendant does not have the responsibility to ask the trial court to fully inform him or her of rights under the statute. Rather, the purpose of R.C. 2943.031 is to insure the trial court fully informs a defendant of the implications of his or her plea. Although defendant asked about potential deportation, defendant's failure to ask specifically about exclusion from admission and denial of naturalization only lends further credence to defendant's testimony at the withdrawal hearing that he was unaware of those consequences and would not have entered his pleas had he known of them.

{¶22} In the end, the trial court did not abuse its discretion in determining defendant did not subjectively understand all of the consequences of his guilty pleas and would not have entered the pleas had the trial court properly advised him.

B. Burden of Proof

{¶23} The state next argues the trial court improperly equated the evidence necessary to justify a hearing on a motion to withdraw a guilty plea with the evidence necessary to establish relief. The state notes the trial court "cited this Court's decision in *State v. Ouch*, 10th Dist. No. 06AP-488, 2006-Ohio-6949, ¶¶28-30, for the proposition that defendant's testimony that he would not have pleaded guilty had the trial court strictly complied with R.C. 2943.031 was 'sufficient to establish prejudice.' " (Appellant's brief, 13-14.) The state suggests "*Ouch* merely held that the defendant's affidavit testimony that he would not have pleaded guilty had he known about exclusion from admission and denial of naturalization was sufficient to *warrant a hearing*—not that such testimony established prejudice once and for all." (Appellant's brief, 14.) (Emphasis sic.)

{¶24} *Ouch* determined the affidavit in that case warranted a hearing. Such a hearing would allow the trial court to determine if it found credible the assertions in *Ouch*'s affidavit. Had the affidavit, even if believed, been insufficient to warrant relief, we would have had no reason to remand for a hearing. On the other hand, because the affidavit, if believed, would support *Ouch*'s motion, the hearing gave the trial court the opportunity to determine, when *Ouch* testified at the hearing, the weight to attach to *Ouch*'s contention that he would not have pleaded guilty had he known the consequences flowing from the plea.

{¶25} Here, the trial court had the opportunity to assess the credibility of defendant's contention and the trial court found it credible. To the extent the state argues the trial court gave too much weight to defendant's testimony and not enough weight to other evidence at the hearing, such matters of credibility and weight are within the province of the trier of fact. The state's argument does not reveal any abuse of discretion in the trial court's credibility and weight determinations.

C. Mandate on Remand

{¶26} Lastly, the state argues the trial court exceeded this court's mandate on remand. Our prior decision partially instructed the trial court on remand to determine whether defendant's trial counsel was ineffective in not objecting to the trial court's failure to strictly comply with R.C. 2943.031. *Ouch* at ¶47. Because the trial court on remand also addressed the separate issue of whether defendant's trial counsel was ineffective in failing to advise defendant of the immigration consequences of his guilty pleas, the state argues the trial court abused its discretion.

{¶27} We need not address the merits of the state's argument because defendant presented alternative grounds for relief in moving to withdraw his pleas. Having already concluded defendant was entitled to relief based on the trial court's failure to substantially comply with R.C. 2943.031, any alleged error with respect to the trial court's resolving the ineffective assistance of counsel issue on remand is moot.

IV. Disposition

{¶28} Accordingly, we grant the state's motion for leave to appeal. Because, however, the trial court did not abuse its discretion when it sustained defendant's motion to withdraw his guilty pleas based on the trial court's failure to substantially comply with

R.C. 2943.031, we overrule the state's single assignment of error and affirm the judgment of the trial court.

*Motion granted;
judgment affirmed.*

BROWN and DORRIAN, JJ., concur.
