

[Cite as *State v. Abouelhana*, 2009-Ohio-5838.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92903

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MAHOMOUD ABOUELHANA

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-328127

BEFORE: Rocco, P.J., Dyke, J., and Boyle, J.

RELEASED: November 5, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant the state of Ohio appeals from the trial court's decision to grant the motion filed by defendant-appellee Mahomoud Abouelhana to withdraw his guilty pleas.

{¶ 2} Appellant asserts the trial court abused its discretion in determining appellee demonstrated his case warranted relief pursuant to R.C. 2943.031(D). Upon a review of the record, this court disagrees. Consequently, the trial court's decision is affirmed.

{¶ 3} The record reflects appellee originally was indicted in this case in 1995. The indictment contained fifteen counts charging him with committing crimes in late 1989 and early 1990. With respect to three separate motor vehicles, appellee was charged with one count each of receiving stolen property, fraudulent actions concerning a vehicle identification number, fraudulent title, grand theft, and possession of criminal tools.

{¶ 4} Appellee eventually entered into a plea agreement with appellant, whereby, in exchange for his pleas of guilty to three counts of possession of criminal tools, appellant would dismiss the other charges. The trial court conducted a hearing on the matter.

{¶ 5} In discussing this arrangement on the record, neither the prosecutor nor defense counsel mentioned the fact that appellee was not a United States

citizen. Thus, the attorneys never indicated when outlining the potential penalties involved with the pleas whether they had discussed potential immigration-related consequences, either among themselves or with appellee.

{¶ 6} The trial court proceeded to conduct a Crim.R. 11(C) colloquy. After describing the constitutional rights appellee would be relinquishing in entering a guilty plea, the court stated as follows:

“THE COURT: It is my understanding, sir, you are not a United States citizen, although you do have a green card. Correct?”

“THE DEFENDANT: That’s correct.”

“THE COURT: And you are aware that the finding of guilty could affect your right to remain in America?”

“THE DEFENDANT: Yes, sir.”

“THE COURT: And that I have no control over what Immigration and Naturalization Services does. You understand that?”

“THE DEFENDANT: Yes, your Honor.”

{¶ 7} The trial court proceeded to outline the charges, ask for appellee’s pleas to the three counts of possession of criminal tools, accept his guilty pleas, and then dismiss the remaining counts. After obtaining a presentence investigation report, the trial court sentenced appellee to concurrent terms of one year on each of the counts; however, the court suspended sentence and placed him on two years of conditional probation.

{¶ 8} Less than six months later, in August 1996, appellee filed a motion to terminate his probation; he informed the trial court he had completed all of the conditions imposed. Appellant failed to lodge any objection, so the trial court granted appellee's motion.

{¶ 9} On December 12, 2008 appellee filed a motion to withdraw his plea pursuant to R.C. 2943.031. Appellee asserted that, at the time of his plea, he had not been provided with the statutory advisement.

{¶ 10} Appellee further asserted that: 1) his Permanent Resident ("PR") card expired on November 3, 2008; 2) when he attempted to renew his PR card, he discovered pursuant to the current version of the Immigration and Naturalization Act ("INA"), he could be deported,¹ he was ineligible to renew his PR card and he was "excludable" from the United States,² and he was ineligible for citizenship³; 3) he had not been informed of these consequences at the time of his pleas; 4) he had learned of the consequences "[o]nly when [he] consulted with current counsel"; and 5) he would not have entered his pleas if he had been informed.

{¶ 11} Appellee supported his motion with several documents, including his affidavit. He requested an oral hearing.

¹§237(a)(2)(A)(1).

²§212(a)(2)(A).

³§316(A).

{¶ 12} Appellant responded with a brief in opposition. Appellant argued the trial court should deny appellee's motion without a hearing for two reasons, viz., the original advisement with which appellee had been provided at the plea hearing constituted "substantial compliance" with R.C. 2943.031, and appellee's motion was "untimely."

{¶ 13} The trial court conducted a hearing on appellee's motion. After listening to the arguments of counsel, the trial court granted appellee's motion to withdraw his pleas. The trial court justified its decision, in part, with the following observation:

{¶ 14} "* * * [T]he general assembly [of Ohio] has apparently determined that due to the serious consequences of a criminal conviction on a noncitizen's status in this country, a trial court should give the RC 2943.03(A)(1) [sic] warning, of which I assumed they mean verbatim, and that failure to do so should not be subject to the manifest injustice standard * * *.

{¶ 15} "* * * [A] lot of this never would have become relevant but for the change in federal government policy subsequent to 9-11. It's very likely that a nonviolent lower level felony would not form a basis for deportation back at the time that this plea was entered.

{¶ 16} "Things have changed radically in the last several years, and I cannot ignore the possibility that what was—would have been a nonissue in 1995 or '96 is very relevant and perhaps even crucial today."

{¶ 17} This court subsequently granted appellant's motion for leave to appeal from the trial court's decision. Appellant presents the following assignment of error.

{¶ 18} **"I. The trial court erred when it granted Defendant Mahomoud Abouelhana's untimely motion to withdraw guilty plea."**

{¶ 19} Having abandoned for purposes of appeal one of its arguments presented below, viz., that the trial court's R.C. 2943.031(A) advisement in this case constituted "substantial compliance" with the statutory requirement, appellant instead asserts only that appellee's motion was "unreasonably and unjustly delayed by thirteen years." Appellant argues on this basis that the trial court abused its discretion when it granted appellee's motion. This court disagrees. When a trial court entertains a guilty plea from a defendant who is not a United States citizen, R.C. 2943.031(A) mandates the trial court to issue a preliminary warning as follows: the 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."

{¶ 20} The Ohio Supreme Court has held that a trial court, in the first instance, must read the statutory requirement verbatim. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶46. In making its decision on the defendant's motion made pursuant to R.C. 2943.031(D) to vacate his plea, the trial court is required to exercise its discretion. *Id.* This court then reviews the trial court's

decision under an abuse of discretion standard. *State v. Naoum*, Cuyahoga App. Nos. 91662 and 91663, 2009-Ohio-618, ¶22; *State v. Schlaf*, Cuyahoga App. No. 90825, 2008-Ohio-6151, ¶10.

{¶ 21} The supreme court explained the process as follows: “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).” *Francis*, at ¶36.

{¶ 22} R.C. 2943.031(D) provides:

{¶ 23} “Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty * * * and enter a plea of not guilty * * * 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 is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (Emphasis added.)

{¶ 24} A review of the foregoing demonstrates that appellee met each of the necessary requirements for a successful R.C. 2943.031(D) motion.

Nevertheless, that did not end the trial court’s inquiry. In relevant part, the supreme court stated in *Francis* as follows at ¶40-43:

{¶ 25} “We reject [the defendant’s] argument that timeliness of the motion cannot ever be a factor in an R.C. 2943.031(D) consideration. Timeliness of the motion is just one of many factors that the trial court should take into account when exercising its discretion in considering whether to grant the motion. The more time that passes between the defendant’s plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable. The state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time. It is certainly reasonable to require a criminal defendant who seeks to withdraw a plea to do so in a timely fashion rather than delaying for an unreasonable length of time.

{¶ 26} “However, at the same time, we also do not accept the court of appeals’ determination that, as a matter of law, untimeliness here was a sufficient factor in and of itself to justify the trial court’s decision to deny the motion. In light of the strong policy expressed within R.C. 2943.031(D), we reject the court of appeals’ approach in this regard, * * *.

{¶ 27} “Depending on the particular facts, untimeliness will sometimes be an important factor in reaching a decision on a motion to withdraw. On the other hand, in some cases even a considerable delay in filing the motion to withdraw

will not be a factor supporting denial of the motion, such as when the immigration-related consequences of the plea and resulting conviction did not become evident for some time after the plea was entered. This is not a situation that requires a bright-line rule. As one of many factors underlying the trial court's exercise of discretion in considering the motion to withdraw, timeliness of the motion will be of different importance in each case, depending on the specific facts.

{¶ 28} “Because of the way we view the timeliness issue, we do not accept the court of appeals’ conclusion that the timing of the motion alone justifies the trial court’s denial of it.” (Emphasis added.)

{¶ 29} Appellee in this case submitted evidence that proved he remained unaware of the immigration-related consequences of his pleas and resulting convictions until December 2008, when his PR card expired. He filed his motion within days of his discovery. *State v. Naoum*, supra; cf., *State v. Villafuerte*, Cuyahoga App. No. 90367, 2008-Ohio-5587.

{¶ 30} The trial court conducted a hearing on appellee's motion. Significantly, the prosecutor supplied nothing upon which the court could conclude, as *Francis* notes, that the case against appellee was “stale and that witnesses [were] unavailable.” Although the state had the opportunity, it presented no evidence to support its argument that it would suffer “great detriment” were the motion granted.

{¶ 31} After considering whether the court had substantially complied with the statutory advisory at appellee's plea hearing, the trial court also observed that immigration law had changed in the time between appellee's plea hearing and his effort to renew his PR card. Based upon the record in this case, therefore, this court cannot find the trial court abused its discretion in granting appellee's R.C. 2943.031(D) motion. *State v. Schlaf*, supra.

{¶ 32} Accordingly, appellant's assignment of error is overruled.

{¶ 33} The trial court's decision is affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., and
MARY J. BOYLE, J., CONCUR

