[Cite as *Willoughby Hills v. Qasim*, 2007-Ohio-2860.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CITY OF WILLOUGHBY HILLS,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2006-L-199**
- vs -	:	
IMRAN QASIM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Willoughby Municipal Court, Case No. 00 CRB 04608.

Judgment: Affirmed.

Michael P. Germano, City of Willoughby Hills Prosecutor, Centre Plaza South, 35350 Curtis Boulevard, #530, Eastlake, OH 44095 (For Plaintiff-Appellee).

Carol R. Gedeon, 19443 Lorain Road, Fairview Park, OH 44126 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Imran Qasim, appeals from the August 11, 2006 judgment entry of the Willoughby Municipal Court, denying his motion to withdraw plea and vacate dismissal.

{¶2} On November 27, 2000, appellee, city of Willoughby Hills, filed a complaint against appellant for domestic violence, a misdemeanor of the first degree, in

violation of R.C. 2919.25(A)(3). Appellant pleaded not guilty at his initial appearance on November 29, 2000.

{¶3} On December 13, 2000, appellant withdrew his former not guilty plea and entered a plea of no contest.[1] He signed a waiver of right to speedy trial. The trial court referred appellant to domestic violence diversion and scheduled a pretrial diversion hearing. On April 3, 2001, the trial court dismissed the domestic violence charge.

{¶4} On August 10, 2006, appellant filed a motion to withdraw plea and vacate dismissal pursuant to R.C. 2943.031(D) and Crim.R. 32.1, along with his affidavit.[2]

{¶5} Pursuant to its August 11, 2006 judgment entry, the trial court denied appellant's motion to withdraw plea and vacate dismissal, indicating that the matter had been dismissed on April 3, 2001.[3] It is from that judgment that appellant filed a timely notice of appeal and makes the following assignment of error:

{¶6} "The trial court erred to the prejudice of [appellant] in denying his motion to withdraw plea and vacate dismissal and in failing to properly apply [R.C.] 2943.031(A) and [Crim.R.] 32.1."

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1. The trial judge failed to advise appellant, pursuant to R.C. 2943.031, that such a plea could affect his immigration status.

2. In his affidavit, appellant indicated the following: he was a native of Pakistan; was not a United States citizen; was a permanent resident of the United States since 1998; was not advised nor did he understand his rights or that he could suffer extreme immigration consequences; did not understand that he could be "thrown out" of the United States for his offense; that removal proceedings have commenced against him; and that he has two young children, both United States citizens, who are financially dependent on him.

3. Appellee filed an objection to appellant's motion to withdraw plea and vacate dismissal on August 17, 2006, after the trial court's judgment entry.

{¶7} In his sole assignment of error, appellant argues that the trial court erred in denying his motion to withdraw plea and vacate dismissal and in failing to properly apply R.C. 2943.031(A) and Crim.R. 32.1. Appellant posits three issues for our review. In his first issue, appellant contends that the trial court failed to comply with the mandatory provisions of R.C. 2943.031, requiring a warning of the immigration consequences of a guilty or no contest plea prior to accepting his plea. In his second issue, appellant maintains that the trial court's dismissal of the domestic violence charge against him provided no legal basis for the trial court to later deny his motion to set aside the judgment and to withdraw his no contest plea. In his third issue, appellant alleges that the trial court erred in denying his motion based upon Crim.R. 32.1 without holding a hearing.

{¶8} Because appellant's three issues are interrelated, we will address them together.

{¶9} R.C. 2943.031(A) provides: "*** 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:

{¶10} "'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.'

{¶11} "Upon request of the defendant, the court shall allow him additional time to consider the appropriateness of the plea in light of the advisement described in this division."

{¶12} In the instant matter, the record does not establish that appellant was informed of the advisement as set forth in R.C. 2943.031(A). Also, appellee concedes that the record is silent as to whether appellant was advised of the R.C. 2943.031(A) advisement. Thus, we can conclude that it was not given. See R.C. 2943.031(E), (indicating that "[i]n the absence of a record that the court provided the advisement described in division (A) of this section and if the advisement is required by that division, the defendant shall be presumed not to have received the advisement.")

{¶13} R.C. 2943.031(D) states: "[u]pon 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 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."

{¶14} "[I]n order for the R.C. 2943.031 advisement to apply, the record must affirmatively demonstrate that a defendant is not a citizen of the United States through affidavit or other documentation." State v. Almingdad, 151 Ohio App.3d 453, 2003-Ohio-295, at ¶19. (Citations omitted.) Again, appellant attached an affidavit to his motion, stating that he was not a United States citizen and that he was not advised nor did he understand his rights or that he could suffer extreme immigration consequences. Thus, he properly showed, through his affidavit, that he was not a United States citizen.

{¶15} In addition, "[a] defendant must show he suffered a prejudicial effect from the trial court's failure to comply with R.C. 2943.031(A)." State v. White, 163 Ohio App.3d 377, 2005-Ohio-4898, at ¶21, citing State v. Gegia, 11th Dist. No. 2003-P-0026, 2004-Ohio-1441, at ¶29. "'The mere possibility of deportation as a result of the guilty [or no contest] pleas is insufficient to demonstrate such effect.'" Id.

{¶16} Here, while the better practice would have been for appellant to submit the actual order of the immigration proceedings, he did claim in his affidavit that deportation proceedings had begun against him. As such, appellant shows a prejudicial effect from the trial court's failure to comply with R.C. 2943.031(A). Cf. Gegia, supra, at ¶30 (holding "there is nothing in the record that demonstrates that deportation proceedings have commenced against Gegia, nor does Gegia claim that deportation is currently being sought against him. Thus, Gegia fails to demonstrate the requisite prejudicial effect to vacate his guilty plea.") (Emphasis added.)

{¶17} R.C. 2943.031(F) provides: "[n]othing in this section shall be construed as preventing a court, in the sound exercise of its discretion pursuant to Criminal Rule

32.1, from setting aside the judgment of conviction and permitting a defendant to withdraw his plea."

{¶18} Crim.R. 32.1 states: "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶19} "An appellate court will review the trial court's determination of the Crim.R. 32.1 motion for an abuse of discretion." State v. Desellems (Feb. 12, 1999), 11th Dist. No. 98-L-053, 1999 Ohio App. LEXIS 458, at 8, citing State v. Blatnik (1984), 17 Ohio App.3d 201, 202. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Desellems, supra, at 8, citing State v. Montgomery (1991), 61 Ohio St.3d 410, 413.

{¶20} In the case at bar, although appellant demonstrates that he is not a United States citizen through his affidavit, and shows that he suffered prejudice due to the fact that deportation proceedings had begun against him, the trial court's failure to advise him of the R.C. 2943.031(A) advisement was error with respect to the facts in this case. Again, pursuant to its December 13, 2000 judgment entry, the trial court referred appellant to domestic violence diversion. Due to appellant's compliance, the trial court dismissed the domestic violence charge on April 3, 2001 making appellant's plea null and void. Appellant filed a motion to withdraw plea and vacate dismissal on August 10, 2006, along with his affidavit. However, since there was no case pending or in

existence, the case having been dismissed with prejudice by the time appellant filed his motion, the trial court properly exercised its discretion in denying the motion. We realize that the department of immigration may chose to proceed utilizing a dismissed conviction and a null and void plea. This would create a manifest injustice which this appellate court is powerless to correct.

{¶21} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Willoughby Municipal Court is affirmed.

MARY JANE TRAPP, J., concurs in judgment only with Concurring Opinion.

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., concurs in judgment only with Concurring Opinion.

{¶22} I concur with the judgment inasmuch as the trial court did not abuse its discretion by denying appellant's motion to withdraw the no contest plea and vacate the dismissal. I write to make it clear that appellant's successful completion of the diversion program and the subsequent dismissal of the charge against him deprived the trial court of jurisdiction over the matter dismissed.

{¶23} "When a criminal case is dismissed, it is over - except in the case where the dismissal is appealed." See *State ex rel. Douglas v. Burlew* (2005), 106 Ohio St.3d

180; 2005-Ohio-4382, at ¶13, citing *State ex rel. Flynt v. Dinkelacker* (2004), 156 Ohio App.3d 595, 2004-Ohio-1695, at ¶20.

{¶24} The court below unconditionally dismissed the case against appellant. Thus, the trial court "patently and unambiguously" lacked the jurisdiction to proceed. See *Page v. Riley* (1999), 85 Ohio St.3d 621, 623.

WILLIAM M. O'NEILL, J., dissenting.

{¶25} I must respectfully dissent, because the majority opinion permits a miscarriage of justice to occur.

{¶26} Qasim made a mistake involving himself in an act of domestic violence in his own home. He accepted responsibility for his own ill-advised actions and pled no contest. Following his participation in a domestic violence diversion program to the satisfaction of the trial court, the court dismissed his case because he had proven he could do the right thing!

{¶27} Unfortunately, this salutary outcome is about to become undone by a bureaucracy that threatens to impose a penalty far more severe than could be justified by Qasim's plea of no contest. Qasim is about to be deported based upon the plea he entered and which, in a real sense, was erased by the trial court. These facts do not warrant the outcome that is looming.

{¶28} Qasim's dilemma was foreseen when the Ohio General Assembly mandated that all non-citizens be advised of the potential consequences of a plea. The General Assembly added this additional protection in R.C. 2943.031(D) for non-citizens entering a no contest plea in order to notify them of the harsh consequences of their plea. The mandatory nature of this notice must not be treated lightly.

{¶29} As stated by the Seventh Appellate District:

{¶30} "On remand, the municipal court must be aware that, because the language in R.C. 2943.031(D) is *mandatory*, the court has *no discretion* and must allow appellant to withdraw his plea if the following statutory requirements are met: (1) the advisement was not given, (2) the advisement was required to be given, (3) appellant is not a citizen of the United States, and (4) appellant may be deported, excluded, or denied naturalization as a result of his conviction of domestic violence."[4]

{¶31} In addition, Crim.R. 11(B)(2) provides that a no contest plea "shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶32} It appears that the trial court treated this matter as a typical Crim.R. 32.1 proceeding when it dismissed Qasim's motion. However, the trial court was not operating pursuant to the correct standard. As stated by the Supreme Court of Ohio:

{¶33} "In most circumstances, motions to withdraw guilty or no-contest pleas are subject to the standards of Crim.R. 32.1, which requires that after sentencing has occurred, a defendant must demonstrate 'manifest injustice' before a trial court should

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4. (Citation omitted and emphasis added.) *State v. Traish* (1999), 133 Ohio App.3d 648, 651.

permit withdrawal of the plea. However, an examination of R.C. 2943.031 in its entirety makes apparent the General Assembly's intent to free a noncitizen criminal defendant from the 'manifest injustice' requirement of Crim.R. 32.1 and to substitute R.C. 2943.031(D)'s standards in its place. The General Assembly 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 R.C. 2943.031(A) warning and that failure to do so should not be subject to the manifest-injustice standard even if sentencing has already occurred.

{¶34} "In light of the above, we must agree with those courts that have determined that, through R.C. 2943.031, the General Assembly has created a substantive statutory right for certain criminal defendants and that this right therefore prevails over the general procedural provisions of Crim.R. 32.1."[5]

{¶35} Obviously, the passage of time weighed heavily on the trial court's decision. However, that consideration is of lesser importance in this case. "The statute [R.C. 2943.031] contains no language imposing a time limit on the filing of a motion to withdraw [the plea]."[6]

{¶36} Bearing in mind that the original action was dismissed based upon Qasim's cooperation with the court to resolve this matter and his willingness to take responsibility for his actions, the Supreme Court of Ohio places the reasonableness of

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5. (Citation omitted.) *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶26-27.
6. *State v. Abi-Aazar*, 149 Ohio App.3d 359, 2002-Ohio-5026, at ¶27.

Qasim's motion to withdraw his plea as the paramount consideration in determining whether his plea should be vacated. As stated by that court:

{¶37} "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, particularly when the trial court, which did not explain its ruling, never found that appellant's delay in moving to withdraw the plea was unreasonable. It is too great a leap on this meager record to conclude, with no further inquiry, that appellant's delay in filing the motion was unreasonable as a matter of law."[7]

{¶38} In line with the ruling of the Supreme Court of Ohio, I would hold that the untimeliness of Qasim's motion was not unreasonable as a matter of law where his "substantive statutory right" was ignored by the trial court at the time he entered his no contest plea.

{¶39} Furthermore, as stated by the Tenth Appellate District, this independent statutory right to withdraw an improperly accepted plea takes precedence over the criminal rules of procedure:

{¶40} "While Crim.R. 32.1 generally governs the withdrawal of guilty pleas, the state cites no case authority directly applying the manifest injustice standard to a motion to withdraw a guilty plea filed under R.C. 2943.031(D), and our independent research

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7. *State v. Francis*, supra, at ¶41.

has found none. Given this lack of authority, we again rely on the explicit language of R.C. 2943.031 to resolve the matter. *As we noted above, R.C. 2943.031(D)'s explicit language mandates that a trial court set aside a judgment of conviction and allow a defendant to withdraw his guilty plea if the defendant satisfies four requirements. Showing manifest injustice is not included as one of the requirements*. Thus, as with our refusal to impose an additional requirement that a defendant establish that he would not have otherwise pled guilty, we will not impose an additional requirement that the defendant show manifest injustice. Moreover, we point out that the General Assembly saw fit to include the language of R.C. 2943.031(F), which states that nothing in the statute prevents a court from setting aside a conviction and guilty plea pursuant to Crim.R. 32.1. This language, combined with the explicit language of R.C. 2943.031(D), persuades us that the General Assembly intended that R.C. 2943.031(D) be an independent means of withdrawing a guilty plea separate and apart from and in addition to the requirements of Crim.R. 32.1."[8]

{¶41} The cases I have cited tell us that there is no requirement to find that a manifest injustice has been committed in this circumstance. In addition, I believe that courts should ensure that manifest justice should prevail wherever possible. Qasim is caught in a bureaucratic quagmire not entirely of his own making. Had the trial court told him that he was going to be deported based solely upon his plea, he would have had much more to consider than a conviction for a misdemeanor. His whole future in

8. (Emphasis added.) *State v. Weber* (1997), 125 Ohio App.3d 120, 129.

his new country was at stake, and he did not know it. Mistakes were made, both by Qasim and the trial court. It is within the power of this court of appeals to correct them. I believe that justice requires that we take that step in this case.