[Cite as *State v. Feldman*, 2009-Ohio-5765.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-052**
- vs -	:	
ARTEM L. FELDMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 00 CR 000086.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Rhys Brendan Cartwright-Jones, 101 City Center One Building, 100 Federal Plaza East, Youngstown, OH 44503-1810 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Artem L. Feldman, appellant herein, appeals the judgment entered by the Lake County Court of Common Pleas overruling a motion to vacate his plea of guilty to one count of grand theft and one count of forgery entered over nine years ago. At issue is whether Mr. Feldman's plea of guilty was entered knowingly and voluntarily where the trial court did not provide him, a non-citizen, the complete recitation of the statutory caveat set forth under R.C. 2943.031 highlighting the potential effects a plea of guilty would have on his residential status in the United States. For the reasons discussed in

this opinion, we reverse the judgment of the trial court and remand the matter for further proceedings.

{¶2} **Facts and Procedural Posture**

{¶3} Mr. Feldman, a Russian native and citizen, arrived in the United States under refugee status with his parents in March of 1993. In 1994, Mr. Feldman became a legal permanent resident of the United States. He has lived in the United States continuously since his arrival.

{¶4} On June 12, 2000, Mr. Feldman pleaded guilty to felony-four grand theft, in violation of R.C. 2913.02(A)(1), and one count of felony-five forgery, in violation of R.C. 2913.31(A)(3). He was later sentenced to two years community control and sixty days in jail with work release privileges.

{¶5} In September 2008, Mr. Feldman returned from a trip abroad when the United States Customs and Border Patrol ("CBP") stamped his passport "deferred." He was subsequently required to report to the CBP office in Cleveland, Ohio. Upon reporting, Immigration and Customs Enforcement ("ICE") officers took him into custody and initiated removal proceedings with the United States Department of Homeland Security.

{¶6} On December 5, 2008, Mr. Feldman filed a petition for post-conviction relief seeking to vacate his guilty plea, and, on February 27, 2009, he filed a renewed motion to withdraw his guilty plea. Mr. Feldman asserted he was entitled to relief pursuant to Crim.R. 32.1 as the circumstances surrounding his plea of guilty demonstrated it was not entered knowingly and voluntarily; specifically, he alleged his plea could not have been entered knowingly and voluntarily because the trial court

failed to adequately comply with the statutory advisement under R.C. 2943.031. In support, Mr. Feldman argued, through counsel, that even though the trial court discussed the potential for deportation, he "is somewhat clueless" and has a tendency to simply nod agreeably when addressed by an authority figure. He also claimed that the charges to which he pleaded guilty were based upon a check-theft scam arranged by a third-party. He alleged that, while a crime was committed, "it involved no knowing participation on [his] part." As a result, Mr. Feldman asserted he "got himself into an unwitting guilty plea in the same way he got himself into the check debacle: he just nodded along."

{¶7} On April 13, 2009, the trial court overruled Mr. Feldman's motions. With respect to Crim.R. 32.1, the court concluded, in relevant part:

{¶8} "The defendant has not met his burden of establishing manifest injustice. The assertions that the defendant does not understand things and simply nods with what others say is supported only by unsworn, unsigned letters from friends. Further, the allegation that the defendant's conviction stems from a scam the defendant fell for is not relevant to whether his plea was made voluntarily, knowingly, and intelligently. The defendant seeks to withdraw his plea more than 8 years after the fact. The circumstances and facts alleged by the defendant existed and were known at the time of the plea. The only change is that the defendant now faces immigration problems because of his conviction. That the defendant thought those consequences would not come to fruition because they had not occurred previously does not make his plea involuntary, unknowing, or unintelligent. The record reflects that the defendant was advised of the rights he was giving up, he understood the English language, he

understood that he could be subjected to immigration laws, he understood the charges against him, understood the potential sentence, and understood the rights he was giving up. Additionally, the defendant was represented by counsel, there has been no allegation that counsel was ineffective, and the record reflects that counsel answered all of his questions."

{¶9} The trial court further observed a sentencing judge is merely required to substantially comply with the statutory caveat under R.C. 2943.031. The court determined the advisement Mr. Feldman received met this standard. The court reasoned:

{¶10} "The defendant was advised that his plea of guilty could subject him to immigration laws, including deportation, and the defendant indicated that he understood. Deportation is commonly understood to mean 'the removal from a country of an alien whose presence is unlawful or prejudicial.' *** Thus, although the defendant may not have understood the particular methods that could be used to remove him from this country, he understood that removal was a possibility because of his conviction. *** No evidence is presented indicating that the defendant did not understand that as a result of his conviction he could be sent back to Russia. *** [I]t is not necessary for the defendant to understand in detail the procedures that can be utilized to remove him from this country. The defendant understood that he could be removed, and that is enough." (Footnote omitted.)

{¶11} Mr. Feldman now appeals the trial court's order setting forth two assignments of error for our consideration. Because the arguments asserted in each assigned error interrelate, we shall address them together. They provide:

{¶12} "[1.] The trial court erred in declining to vacate Mr. Feldman's guilty plea for failure of statutory compliance – R.C. 2943.031.

{¶13} "[2.] The trial court erred in declining to vacate Mr. Feldman's guilty plea for failure of a voluntary, knowing, and intelligent guilty plea tantamount to Crim.R. 32.1 manifest injustice."

{¶14} Mr. Feldman's assignments of error argue the trial court erred in denying his motion to vacate his plea because it failed to advise him properly when it accepted his guilty plea in 2000.

{¶15} **Statutory Requirements for a Non-Citizen Defendant**

{¶16} R.C. 2943.031(A) states that, when a trial court accepts a guilty plea from a defendant who is not a United States citizen:

{¶17} "*** 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:

{¶18} "'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.'"

{¶19} Additionally, R.C. 2943.031(D) provides:

{¶20} "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 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."

{¶21} A motion to withdraw a guilty plea after a sentence has been imposed is typically subject to the "manifest injustice" standard of Crim.R. 32.1. However, when such a motion is filed pursuant to R.C. 2943.031, "the *** abuse-of-discretion standard of review applies." *State v. Francis*, 104 Ohio St.3d 490, 495, 2004-Ohio-6894. Mr. Feldman's brief seems to argue he is entitled to relief under either R.C. 2943.031 or Crim.R. 32.1. However, his position is fundamentally premised upon the claim that his guilty plea was not voluntary, knowing, or intelligent due to the trial court's failure to provide a sufficiently thorough recitation of the warning set forth under R.C. 2943.031. Accordingly, the manifest injustice standard does not apply to this case, and we shall review the trial court's judgment for an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶22} In *Francis*, supra, the Supreme Court of Ohio recognized that a trial court is not required to read the statutory warning of R.C. 2943.031 verbatim; rather, to the extent a court substantially complies with the statutory requirements, its advisement will suffice. *Francis*, supra, at 499. "'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.'" Id. at 500, quoting *State v. Nero*, 56 Ohio St.3d 106, 109. Finally, although R.C. 2943.031 does not provide any time limitation within which a party must file his or her motion, the "timeliness of the motion is just one of many factors the trial court should take into account when exercising its discretion ***" in ruling on the motion. *Francis*, supra, at 497.

{¶23} **Application of Law to Mr. Feldman's Case**

{¶24} During his 2000 plea hearing, the following exchange took place between Mr. Feldman and the court:

{¶25} "THE COURT: Are you able to read, write and understand the English language?

{¶26} "THE DEFENDANT: Yes, sir.

{¶27} "THE COURT: Are you a U.S. citizen?

{¶28} "THE DEFENDANT: No.

{¶29} "THE COURT: What country are you a citizen of?

{¶30} "THE DEFENDANT: Russia.

{¶31} "THE COURT: Do you understand that by pleading guilty today, if the plea is accepted, that you can be subjected to some Immigration laws?

{¶32} "THE DEFENDANT: Yes.

{¶33} "THE COURT: Or action?

{¶34} "THE DEFENDANT: Yes.

{¶35} "THE COURT: Could involve deportation?

{¶36} "THE DEFENDANT: Yes.

{¶37} "THE COURT: Do you understand that this Court has nothing to do with that? Do you understand that?

{¶38} "THE DEFENDANT: Yes.

{¶39} "THE COURT: Nothing I do or say has any effect on that procedure; do you understand that?

{¶40} "THE DEFENDANT: Yes."

{¶41} The trial court specifically notified Mr. Feldman he could be deported; however, the only additional warning Mr. Feldman received generally advised that he could be subject to immigration laws. The question, therefore, is whether the generic caveat that Mr. Feldman could be subject to general immigration laws was sufficient to place him on notice that his plea could prevent him from reentering the country (if he left) as well as potentially deny him citizenship in the future. Although the trial court's warning could be viewed as incorporating, by reference, the more detailed statutory notification, we hold its sweeping, open-ended nature was insufficient to meet the demands of R.C. 2943.031(A) as construed by *Francis*.

{¶42} The language of R.C. 2943.031 is clear; although a trial court need not provide a verbatim recitation of each consequence, it must provide some meaningful notification of all three separate statutory consequences (i.e., deportation, exclusion, and denial of naturalization). By failing to at least touch upon each possible consequence contemplated by the General Assembly, a court cannot meet minimal standards of due process. In codifying the notification statute, the General Assembly evidently believed warning a non-citizen defendant of three separate consequences was necessary to achieve a knowing, voluntary, and intelligent plea of guilty. Given the

General Assembly's directive, we hold substantial compliance with R.C. 2943.031 demands a trial court's warning to feature at least some reference to each particular consequence designated in the statute.

{¶43} We are conscious that other courts have held that substantial compliance does not demand an allusion to each separate consequence. See *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425; *State v. Gomez*, 9th Dist. No. 02C008036, 2002-Ohio-5255; *State v. Lamba*, 2d Dist. No. 18757, 2001-Ohio-7024. We nevertheless believe such an approach fails to recognize the policy animating the notification requirement of R.C. 2943.031. The warning is not simply an academic, procedural obstacle which a court must overcome; rather, the purpose of the caveat is to ensure a non-citizen defendant *fundamentally appreciates* that a plea of guilty could eventuate in one of the three sanctions set forth in the statute. The substantial compliance standard established by *Francis* requires that a "'defendant subjectively understand the implications of his plea and the rights he is waiving ***.'" Id. at 500, quoting *Nero*, supra, at 109. In light of this standard, we fail to see how a non-citizen defendant can be charged with a subjective understanding of all three statutory consequences when he or she is not apprised, in some form, of each separate consequence.

{¶44} In *State v. Naoum*, 8th Dist. Nos. 91662 and 91663, 2009-Ohio-618, the Eighth Appellate District reached a similar conclusion. In *Naoum*, the Cuyahoga County Court of Common Pleas did not advise a non-citizen defendant of the possibility of exclusion from admission to the United States. In omitting the advisement, the Eighth District held the trial court failed to substantially comply with R.C. 2943.031. The court

concluded that "[s]ubstantial compliance is not met when only 2/3 of the advisement is given." *Naoum*, supra, at ¶23. Moreover, the court pointed out that "[w]ithout the required explanation, [the non-citizen defendant] could not and did not understand the ramifications upon his status as a non-citizen." Id. at ¶24. See, also, *State v. Zuniga*, 11th Dist. Nos. 2003-P-0082 and 2004-P-0002, 2005-Ohio-2078 (warning insufficient where trial court only advises non-citizen defendant of possibility of deportation and evidence suggested defendant was misled into belief such a possibility would occur only if he violated probation.)

{¶45} We agree with the court's conclusions in *Nauom*. Namely, the trial court's failure to advise Mr. Feldman of the three consequences set forth under R.C. 2943.031 did not rise to the level of substantial compliance. Although *Francis* clearly held that a trial court need not strictly recite the statutory advisory set forth in the code, the statute unambiguously provides that a direct advisement of the three sanctions set forth under subsection (A) is necessary for a non-citizen defendant to enter a valid plea of guilty. Without delineating each consequence set forth in the statute, we cannot conclude Mr. Feldman subjectively understood the full implication of his plea. As the court failed to provide such a warning, it therefore follows Mr. Feldman's 2000 plea of guilty was not entered knowingly, voluntarily, and intelligently.

{¶46} **Timeliness**

{¶47} As already discussed, untimeliness is not a sufficient basis to justify a trial court's decision to deny a motion filed pursuant to R.C. 2943.031. *Francis*, supra, at 497-498. Moreover, even considerable delay does not, on its own, support a decision to deny a R.C. 2943.031 motion when the immigration-related consequences do not

become manifest for a significant period after the plea was entered. See, e.g., *Francis*, supra, at 498; see, also, *Naoum*, supra, at ¶25.

{¶48} Here, Mr. Feldman filed his motion approximately eight years after entering his plea. During that time, it appears Mr. Feldman had not experienced any immigration-related difficulties prior to the initiation of the underlying removal proceedings. Without some triggering event that would place an unaware non-citizen defendant on notice that he could be excluded (e.g., actual exclusion), it would be somewhat arbitrary and unreasonable to give significant weight to the timing of a motion. Moreover, and most importantly, despite the state's protestations, we fail to see how the timing of the instant motion would have any significant bearing on the state's ability to move forward and prosecute Mr. Feldman's crime.

{¶49} In support of its assertion that Mr. Feldman's motion is untimely, the state asserts the bank investigator who handled the investigation which precipitated the charges to which Mr. Feldman eventually pleaded, has passed away. Without this witness, the state maintains that trying Mr. Feldman at this point would be hampered. We recognize that live witness testimony is generally preferable to, for example, documentary evidence at a trial. However, the state does not allege the evidence accumulated by the deceased was destroyed or is now unavailable due to the witness' passing. Although we are unaware of the basic facts underlying the case, we do know the crime at issue involved a check theft scam. Given the crime, it is likely that business records such as transaction logs, banking records, and other similar documentation would be sufficient to build a case. As the state has failed to establish unavoidable or

necessary prejudice due to the timing of Mr. Feldman's motion, we hold the eight-year delay does not adversely impact Mr. Feldman's argument.

{¶50} **Semantic Exactitude of Codified Language**

{¶51} The state points out that R.C. 2943.031 employs language which does not technically correspond to vernacular utilized in current federal immigration legislation. Hence, the state maintains, requiring the court to provide notice of each consequence set forth in the code elevates form over substance. We believe the opposite is true.

{¶52} The state rightly observes that R.C. 2943.031 was enacted in 1989 utilizing legal terms relating to federal immigration law as it applied at that time. However, pursuant to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the procedural terms "deportation" and "exclusion" were replaced with a unified procedure termed "removal." Kidane, Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence (2007), 57 Cath. U. L.Rev. 93, 133, f.n. 205, citing the Immigration and Nationality Act ("INA"), Sec. 240, generally (codified as 8 U.S.C. Sec. 1229a). With this in mind, the advisement upon which the legislature placed such emphasis in 1989 provides a non-citizen defendant with notice of procedures that no longer exist and thus have little, if any, technical import. Therefore, any "subjective understanding" a non-citizen defendant could glean from the statutory notification would not assist in a true appreciation of what could actually happen under current federal immigration law.

{¶53} As a strictly semantic point, the state's observations are both astute and clever. However, regardless of how the verbiage in the INA has evolved, the actual,

pragmatic consequences remain unchanged. If a non-citizen resident has been convicted of certain crimes proscribed by federal immigration laws, he or she could be either removed from this country, denied re-entry into this country, or precluded from obtaining citizenship in this country in the future. To be sure, the General Assembly would do well by modifying the language of the warning to correspond with the relevant language used in federal immigration law. Still, the current advisement, when given properly, should nevertheless place a non-citizen defendant on notice of the practical consequences of entering a plea. We therefore find the non-correspondence of nomenclature between the R.C. 2943.031 and federal immigration law an insufficient basis for demanding less of a trial court when delivering the statutory caveat.

{¶54} As we hold the trial court failed to substantially comply with R.C. 2943.031, Mr. Feldman's two assignments of error are sustained. Therefore, it is the order of this court that the judgment entry of the Lake County Court of Common Pleas be reversed and the matter remanded.

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

{¶55} As I would affirm the judgment entered by the trial court, I respectfully dissent.

{¶56} As the majority aptly observes, a motion to withdraw a guilty plea pursuant to R.C. 2943.031 is reviewed for an abuse of discretion. *State v. Francis*, 104 Ohio St.3d 490, 495, 2004-Ohio-6894. However, I believe the majority has lost focus of this standard and, instead, engaged in a de novo review. In so doing, the majority has simply substituted its judgment for that of the trial court.

{¶57} Further, the majority maintains a trial court must provide a non-citizen defendant with some notification of all three separate statutory consequences (i.e., deportation, exclusion, and denial of naturalization) to substantially comply with R.C. 2943.031. In support, the majority relies upon the Eighth Appellate District's holding in *State v. Naoum*, 8th Dist. Nos. 91662 and 91663, 2009-Ohio-618.

{¶58} In *Naoum*, the Eighth Appellate District held that substantially complying with R.C. 2943.031 requires a trial court to reference each of the three consequences set forth under subsection (A) of the statute. While *Naoum* is circumstantially on-point, I believe the holding in that case misunderstood the applicable standard to which a trial court must adhere. That is, by relying on *Naoum* the majority inappropriately demands strict compliance from the trial court rather than the non-constitutional substantial compliance standard announced in *Francis*.

{¶59} Courts have held that the term "strict compliance" does not mean "rote recitation" of a rule or statute. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 480 (discussing strict compliance vis-à-vis advisement of constitutional rights in a Crim.R. 11 colloquy); accord *State v. Gibson*, 11th Dist. No. 2005-Ohio-0066, 2006-Ohio-4182, at ¶28. Hence, "strict compliance does not necessarily mean 'punctilious' compliance if, with only minor deviations, substantial and clear disclosure of the fact or information

demanded by the applicable statute or regulation occurs." *ContiMortgage Corp. v. Delawder* (July 30, 2001), 4th Dist. No. 00CA28, 2001 Ohio App. LEXIS 3410, *22. However, by expressly holding that a trial court is *required* to paraphrase, or discretely itemize, each separate consequence set forth under R.C. 2943.031, the majority, by way of *Naoum*, essentially demands strict compliance with the statute. In this respect, the majority's holding is fundamentally inconsistent with the standard announced by the Supreme Court in *Francis*.

{¶60} Substantial compliance simply requires a defendant to subjectively understand the potential effects a plea of guilty could have on his or her status as a non-citizen resident; it does not require a court to "punctiliously" detail all aspects of the statute at issue. I therefore decline to follow the path trod by the court in *Naoum* and would hold the trial court substantially complied with the statutory warnings.

{¶61} Moreover, I believe this court's holding in *State v. Zuniga*, 11th Dist. Nos. 2003-P-0082 and 2004-P-0002, 2005-Ohio-2078, which concluded the trial court failed to substantially comply, actually supports my position. In *Zuniga*, the trial court advised the defendant that pleading guilty could result in deportation, but failed to advise him of the possibility of exclusion or denial of naturalization. He eventually faced removal proceedings in a United States Immigration Court. The defendant moved the trial court to withdraw his guilty plea claiming it was his understanding that he would face deportation *only if* he violated his probation. The defendant averred that his misunderstanding was premised upon his attorney's mistaken advice at the time he entered his plea of guilty. This court held the trial court did not substantially comply with the dictates of R.C. 2943.031 because it failed to advise the defendant that his

conviction, standing alone, could result not only in deportation, but also other "related immigration consequences." Id. at ¶44. This court determined the trial court's omission, in conjunction with defense counsel's wrong advice, "resulted in [the defendant's] misguided belief that he would only be deported if he violated probation." Id. Given the totality of these circumstances, this court concluded the defendant's guilty plea was not voluntarily and intelligently entered.

{¶62} Here, the trial court not only warned appellant of the possibility of deportation, but also alerted appellant his plea could subject him to certain immigration laws over which the court had no control. Appellant stated he was aware of these potential consequences, but still wished to plead guilty pursuant to the negotiated plea bargain. The record also indicates that counsel discussed the potential impact pleading guilty would have on his status as a non-citizen resident of the United States. There is no indication that counsel misinformed appellant nor is there any allegation that counsel was ineffective. Rather, during appellant's 2000 plea hearing, counsel made the following statement on record:

{¶63} "I have met with my client. It was explained to him about entering a plea of guilty, giving up certain constitutional rights that will be explained by this Court. When that plea is forthcoming, I believe, Your Honor, it will be made knowingly, voluntarily and [of] his own free will.

{¶64} "Furthermore, my client is not a U.S. citizen. I have explained to him about the possible repercussions of entering a plea of guilty to this charge."

{¶65} The court subsequently queried whether counsel advised appellant of the possibility of deportation. Counsel responded in the affirmative, pointing out that neither

he nor appellant had been contacted by any immigration officials, but he had advised appellant that deportation was a possibility of entering a plea of guilty. It is also worth noting that, during his plea colloquy with the trial court, appellant expressed his satisfaction with counsel's representation on record at the plea hearing. Thus, the reasoning in *Zuniga* supports the trial court's conclusion in the instant matter.

{¶66} A review of the totality of the circumstances of this case reveals counsel stated he had discussed with appellant the implications and/or impact that a plea of guilty would have on his status as a resident non-citizen. Furthermore, the court advised appellant of both the possibility of deportation and that his plea could subject him to other United States immigration laws. By alerting appellant in this fashion, the court specifically indicated that appellant not only ran the risk of removal via deportation, but his residential status could be affected by other immigration procedures, not the least of which could be exclusion. Even if appellant did not "realize," at the time he entered his plea, he could be excluded from the country after returning from a trip abroad, R.C. 2943.031 does not demand that a resident non-citizen possess a detailed understanding of all the procedures that could be utilized to remove him from the country. See *Francis*, generally; see, also, *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425; *State v. Pineda*, 8th Dist. No. 86116, 2005-Ohio-6386; *State v. Gomez*, 9th Dist. No. 02CA008036, 2002-Ohio-5255.

{¶67} Furthermore, the record is devoid of any testimony or evidence (either from appellant or from his trial counsel) that the trial court's failure to warn him of his immigration status affected his plea or prejudiced the bargain he received at the time he entered the plea. As a result, I would hold appellant failed to provide any basis for this

court to conclude that he would not have entered his plea if the court gave a more detailed warning. Substantial compliance requires a non-citizen defendant to subjectively understand that removal, regardless of how it is occasioned, is a possibility. Appellant represented, in open court, that he subjectively understood these consequences and nothing in the record contradicts this representation.

{¶68} Because the foregoing conclusion is sufficient to meet the demands of due process as outlined by the Supreme Court, the "timeliness" of appellant's motion could be viewed as inconsequential. However, it is worth pointing out that appellant's eight-year delay in filing his motion is not insignificant. I recognize that even considerable delay does not, on its own, support a decision to deny a R.C. 2943.031 motion when the immigration-related consequences do not become manifest for a significant period after the plea was entered. See, e.g., *Francis*, supra, at 498. However, under these circumstances, it appears the state could suffer prejudice due to the timing of appellant's motion. Even though the state may still have documentary evidence tending to prove its allegations beyond a reasonable doubt, the impact of the absence of a crucial witness in a criminal proceeding who possesses first-hand knowledge of the case cannot be undervalued. See *Francis*, supra, at 497; see, also, *State v. Tabbaa*, 151 Ohio App.3d 353, 2003-Ohio-299, at ¶35. (Holding, "without any time limitation, a defendant could wait until the state's evidence against him became stale, or witnesses died, or any other circumstances prejudicial to the state transpired, before seeking to withdraw a guilty plea, thereby imposing, among others, an unreasonable obligation on the state to maintain evidence and witness lists on all cases, ad infinitum.")

{¶69} There is *nothing* in the record indicating appellant took any measures, after pleading guilty in 2000, to determine what, if any, immigration laws might affect him. This passive approach led to the legal entanglement in which he now finds himself. Although he may not have expected these problems, they resulted from (1) his failure to ask any questions (or seek additional legal consultation) regarding the implications of the conviction on his immigration status and (2) his subsequent decision to leave the country. Under these circumstances, I believe appellant, as a non-citizen felon, was unreasonable for not taking a more aggressive and active personal role in determining how the federal law could impact his residential status, especially given both his counsel's and the court's clear admonitions that his conviction could have negative immigration consequences. Had appellant done so, the motion could have been filed sooner, potentially securing the availability of all relevant witnesses and evidence. Viewing the circumstances in their totality, I would hold the instant motion was not filed in a timely manner.

{¶70} Under our standard of review, we are constrained to affirm the trial court save an abuse of discretion. A court abuses its discretion if there is no sound reasoning process that would support that decision. Such an error is not merely one of judgment, but reflects a perversity of will, prejudice, partiality, or moral delinquency. *Pons v. Ohio State Medical Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. Under this standard, "[i]t is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enters., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

Regardless of "countervailing reasoning processes," a court of appeals *must affirm* the trial court's judgment if it is neither arbitrary, unreasonable, nor unconscionable. See *Blakemore*, supra.

{¶71} Here, I would hold the trial court did not abuse its discretion; I believe the trial court's on-record conversations with both appellant and defense counsel during the 2000 plea hearing demonstrates it substantially complied with the requisite statutory advisement. By reversing the trial court, the majority is reviewing the matter de novo contrary to the more limited standard to which we are bound; moreover, by requiring a trial court to reiterate or paraphrase the statute, I believe the majority demands strict compliance with the statute and thus contravenes the unambiguous pronouncement of the Supreme Court of Ohio in *Francis*.

{¶72} For these reasons, I dissent.