**[Cite as *State v. Ashraf*, 2017-Ohio-4148.]**

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WAQAR ASHRAF

Defendant-Appellant

JUDGES:
Hon. Patricia A. Delaney, P. J.
Hon. John W. Wise, J.
Hon. Earle E. Wise, Jr., J.

Case No. CT2016-0026

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. CR2014-0327

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 30, 2017

APPEARANCES:

For Plaintiff-Appellee

D. MICHAEL HADDOX
PROSECUTING ATTORNEY
GERALD V. ANDERSON II
ASSISTANT PROSECUTOR
27 North Fifth Street, P.O. Box 189
Zanesville, Ohio 43702-0189

For Defendant-Appellant

DAVID A. SAMS
Box 40
West Jefferson, Ohio 43162

*Wise, John, J.*

**{¶1}** Defendant-Appellant Waqar Ashraf appeals the decision of the Court of Common Pleas, Muskingum County, which denied his petition for post-conviction relief and additional motion to set aside his 2015 plea on multiple counts of illegal food stamp use and drug trafficking. Appellee is the State of Ohio. The relevant procedural facts leading to this appeal are as follows:

**{¶2}** On October 22, 2014, appellant, a citizen of Pakistan, was indicted by the Muskingum County Grand Jury on thirty-six counts of illegal use of food stamp benefits (R.C. 2913.46(B)) and thirteen counts of trafficking in drugs (R.C. 2925.03(A)(1)).

**{¶3}** On March 2, 2015, appellant entered guilty pleas to twenty counts of illegal use of food stamp benefits, as well as separate counts of trafficking in drugs (oxycodone, percocet) with a school specification, trafficking in drugs (marijuana), trafficking in drugs (oxycodone, oxycontin) with a school specification, trafficking in drugs (methamphetamine) with a school specification, trafficking in drugs (cocaine) with a school/juvenile specification, and trafficking in drugs (alprazolam) with a school specification.

**{¶4}** Appellant was sentenced on April 17, 2015 to an aggregate term of incarceration of seventy-one months.

**{¶5}** On September 14, 2015, appellant filed a petition for post-conviction relief, claiming he had been insufficiently advised that if he entered a guilty plea he could face deportation.

**{¶6}** On September 25, 2015, the trial court denied appellant's petition without conducting a hearing.

**{¶7}** Appellant then appealed to this Court, raising four assigned errors. Upon review, this Court noted that when a trial court denies a petition for post-conviction relief without a hearing, it is statutorily required to issue findings of fact and conclusions of law (R.C. 2953.21(G)). We then determined that the judgment entry of denial of September 25, 2015 was insufficient to comply with this requirement. The judgment was therefore reversed and the case was remanded to the trial court with instructions to render written findings of fact and conclusions of law. *See State v. Ashraf*, 5th Dist. Muskingum No. CT2015–0052, 2015-Ohio-5323.

**{¶8}** Following said remand, the trial court instead scheduled a hearing for March 14, 2016, although it was apparently thereafter continued. In addition, on March 17, 2016, the trial court appointed defense counsel for appellant.

**{¶9}** On April 22, 2016, appellant, with the assistance of counsel, filed a "motion to set aside plea." Appellant therein asserted that had he known at the time in question that entering his guilty plea made his deportation "certain and imminent" under federal law, he never would have agreed to enter his guilty pleas. On April 25, 2016, the trial court conducted a hearing on both the petition for post-conviction relief and the motion to set aside plea.

**{¶10}** On June 7, 2016, the trial court issued a five-paragraph judgment entry denying both of appellant's motions.

**{¶11}** Appellant filed a notice of appeal on June 13, 2016. He herein raises the following sole Assignment of Error:

**{¶12}** "I. DEFENDANT-APPELLANT'S MOTION TO SET ASIDE HIS PLEA WAS IMPROPERLY DENIED."

I.

**{¶13}** In his sole Assignment of Error, appellant contends the trial court erred in denying his motion to set aside plea, maintaining that he was deprived of the effective assistance of trial counsel during the 2015 plea proceedings. We disagree.

**{¶14}** As an initial matter, we note appellant limits the sole assigned error to the issue of his motion to set aside or withdraw his plea under Crim.R. 32.1 and R.C. 2943.031(D), even though the trial court, at the April 25, 2016 hearing, also further considered his earlier petition for post-conviction relief ("PCR") in response to this Court's remand of December 17, 2015. As such, we presently find it unnecessary to re-visit the issue of post-conviction relief. We will instead direct our analysis to the concerns set forth in appellant's brief (*see State v. Trammell,* 5th Dist. Stark No. 2015 CA 00151, 2016-Ohio-1317, ¶ 15, citing *Sisson v. Ohio Department of Human Services,* 9th Dist. Medina No. 2949–M, 2000 WL 422396), while recognizing that ineffective assistance of trial counsel can also form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *See State v. Dunlap*, 5th Dist. Delaware No. 15 CAA 07 0051, 2016-Ohio-5197, ¶ 19, citing *State v. Dalton,* 153 Ohio App.3d 286, 292, 2003–Ohio–3813, ¶ 18 (10th Dist. Franklin).

**{¶15}** Crim.R. 32.1 states as follows: "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."

**{¶16}** Appellate review of a trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. *State v. Caraballo* (1985),

17 Ohio St.3d 66, 477 N.E.2d 627. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. A Crim.R. 32.1 motion is not a collateral challenge to the validity of a conviction or sentence, and instead only focuses on the plea. *See State v. Bush,* 96 Ohio St.3d 235, 773 N.E.2d 522, 2002–Ohio–3993, ¶ 13. However, under the "manifest injustice" standard set forth in the rule, a post-sentence withdrawal motion is allowable only in extraordinary cases. *See State v. Aleshire,* 5th Dist. Licking No. 09–CA–132, 2010–Ohio–2566, ¶ 60.

**{¶17}** A defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel when deciding whether to enter a guilty plea. *See State v. Galdamez*, 10th Dist. Franklin No. 14AP-527, 41 N.E.3d 467, 473, 2015-Ohio-3681, ¶ 15, citing *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (additional citations omitted). Moreover, the United States Supreme Court has recognized that "[t]he severity of deportation *** only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla v. Kentucky* (2010), 559 U.S. 356, 373-374, 130 S.Ct. 1473, 176 L.Ed.2d 284.

**{¶18}** A trial court's advising of a criminal defendant regarding the possible deportation consequences of his or her plea is set forth in R.C. 2943.031(A), which states in pertinent part: "Except as provided in division (B) of this section, 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: '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}** In the case *sub judice*, appellant's affidavit, filed in conjunction with his Crim.R. 32.1 motion to withdraw plea, states in pertinent part: "5. At the time of my plea in this case, I did not know, and was not advised by my trial counsel, that my deportation was certain and imminent as a result of my felony conviction ***. 6. Neither did I know, nor was I advised, that I would be barred from re-entry into the United States and naturalization as a result of this conviction." Ashraf Affidavit, April 22, 2016, at 8.[1]

**{¶20}** The trial court, near the conclusion of the April 25, 2016 hearing subsequent to our remand, clearly rejected appellant's aforesaid averments, stating in pertinent part as follows:

**{¶21}** "Dealing first with defendant's motion to set aside the plea, I'm going to deny that motion for the reasons following: We went through the Rule 11 matters at the - - when the plea was taken. Mr. Ashraf stated he was not a United States citizen, he was a citizen of Pakistan, and he was asked if he had - - told he had a right to contact [the] Pakistani Consulate, and asked if he had an opportunity to do that while he was out on

[1] Similarly, in appellant's 2015 PCR petition, he had attached an affidavit averring that his trial counsel did not inform him that he could face deportation and be sent back to Pakistan, and that the trial court did not advise him of the potentially adverse effects of a criminal conviction pursuant to R.C. 2943.031. However, as we have already indicated, the issue of R.C. 2953.21 post-conviction relief is not part of the present appeal.

the bond. He said he understood: Yes, I understand. Have you been free to contact the consulate? And he said, yes, he had been free to do that. And when asked if he wanted to do so before sentencing, he said yes. He was out on bond, so he had an opportunity before sentencing to contact the consulate.

**{¶22}** Additionally, he was asked if he had that conversation with his attorney regarding what the immigration consequences could be with regard to this, and he said yes, he discussed it with him. And at that point, I asked: Have you talked to Mr. Watson about it? And he said: Yes, sir. And then we went further on: You understand by pleading guilty and a finding of guilty on the felony charges, that could lead to your deportation? Mr. Ashraf said: Yes. And I asked: In spite of that, you wish to go forward with your plea? And he said: Yes.

**{¶23}** The Court also stated: You understand that your status - - well, then I corrected that and said: What is your status in the United States? He said he was here on a green card. The Court stated: You understand that status where you've been awarded a green card would terminate, or it could change, and when asked if he understands that: Yes, Any questions? No."

**{¶24}** Tr. at 17-18.

**{¶25}** Appellant accordingly does not in his present brief appear to dispute that his defense attorney, assisting with his plea in 2015, indeed advised him of basis deportation consequences and that the trial court at that time at least complied with the deportation risk aspect of R.C. 2943.031(A), *supra*. However, the crux of appellant's present argument is that he was not advised of the alleged "certainty and imminence" of

adverse immigration action and "of the risks of the denial of future entry into the U.S. and naturalization." *See* Appellant's Brief at 4.

**{¶26}** In support, appellant directs us to *Galdamez*, *supra*, in which the Tenth District Court of Appeals first concluded that a non-citizen defendant had satisfied the "deficient performance" portion of the two-pronged standard for ineffective assistance claims as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, holding that "[b]ecause the deportation consequences of defendant's guilty pleas were truly clear, defense counsel was constitutionally obligated to advise defendant that his guilty pleas would result in the loss of his TPS [Temporary Protected Status] benefits and in his deportation." *Galdamez* at ¶ 22. The Tenth District Court further found that "the trial court's general R.C. 2943.031 advisement, unaccompanied by any further discussion on the immigration consequences of defendant's pleas, did not cure defendant's attorney's specific error." *Id.* at ¶ 36.

**{¶27}** However, we are unpersuaded that *Galdamez* requires reversal in the instant case. Notably, the defendant in *Galdamez* was not advised at all by his defense counsel about deportation consequences, only the effect of the plea on his future naturalization as a citizen. We find the focus in *Galdamez* was on 8 C.F.R. 244.4(a), which provides that "[a]n alien is ineligible for Temporary Protected Status if the alien: * * * [h]as been convicted of any felony or two or more misdemeanors, as defined in § 244.1, committed in the United States." Unlike the Tenth District, we find the precise impact of the loss of TPS under this federal regulation on a defendant's specific situation is not within the purview of an Ohio trial or appellate court, nor should it be, as generally a proceeding before a federal immigration judge "shall be the sole and exclusive procedure

for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." Immigration and Nationality Act, § 240(a)(3), 8 U.S.C.A. § 1229a(a)(3).

**{¶28}** Furthermore, we have consistently held that a defendant cannot show prejudice from defense counsel's failure to inform him or her of the deportation consequences of a plea if the trial court informed the defendant of the potential immigration consequences during the plea colloquy. *See State v. Gallegos–Martinez,* 5th Dist. Delaware No. 10–CAA–06–0043, 2010–Ohio–6463, ¶ 39; *State v. Amegatcher,* 5th Dist. Delaware No. 15 CAC 10 0081, 2016–Ohio–5198, ¶ 21; *State v. Adames*, 5th Dist. Licking No. 16-CA-45, 2017-Ohio-587, ¶ 11.

**{¶29}** Finally, we adhere to Ohio Supreme Court's conclusion that "substantial compliance" is the proper standard when reviewing whether a trial court complied with the notification requirements contained in R.C. 2943.031(A). *See State v. Francis,* 104 Ohio St.3d 490, 820 N.E.2d 355, 2004–Ohio–6894, ¶¶ 45–46.

**{¶30}** We additionally are not persuaded by appellant's attempted reliance on *United States v. Batamula*, 788 F.3d 166, 171 (5th Cir. 2015), an appeal of a federal habeas corpus action first brought in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 2255.

**{¶31}** Appellant also claims that he was not provided time to contact the Pakistani consulate prior to pleading. However, this is not supported by the record, as appellant stated at the plea hearing that he had been free to contact the consulate before the plea; in addition, he was afforded the right to contact the consulate prior to sentencing. *See* Tr., Plea Hearing, at 12-14.

**{¶32}** Accordingly, under the circumstances of the case *sub judice*, we are unpersuaded the trial court abused its discretion in declining to find a manifest injustice warranting the extraordinary step of negating appellant's prior guilty pleas.

**{¶33}** Appellant's sole Assignment of Error is therefore overruled.

**{¶34}** For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Muskingum County, Ohio, is hereby affirmed.

By: Wise, John, J.

Delaney, P. J., concurs.

Wise, Earle E., J., dissents.

JWW/d 0426

*Wise, Earle, J., dissents.*

**{¶35}** I respectfully dissent from the majority's opinion.

**{¶36}** I would remand the case to the trial court for a hearing on the question as to what advice defense counsel gave to appellant on the non-citizen/deportation issue for the following reasons.

**{¶37}** The United States Supreme Court in *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct 1473, 176 L.E.2d 284 (2010), set out a defense attorney's obligation to his client in cases involving a non-citizen defendant. The *Padilla* court held a defense attorney must advise the client of "truly clear" immigration consequences that are "easily determined from reading the removal statute." *Id.* at 369. In that case, the defendant pled guilty to a drug distribution offense. The court had no trouble finding the offense to be a deportable offense under 8 U.S.C. 1227(a)(2)(B)(i), and looked to the definitional section, 8 U.S.C. 1101(a)(43)(B), to find that illicit trafficking in a controlled substance was an aggravated felony. *Id.* at 364. The court referenced 8 U.S.C. 1228 which states in paragraph (c), "[a]n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States." *Id.*

**{¶38}** The *Padilla* court held the defense attorney had the obligation to advise the client that upon a plea of guilty, the client would be deported. *Id.* at 369. The court found advising the client that he only faced a risk of deportation when charged with this type of offense was deficient for purposes of the first prong for ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Id.* at 370-371.

**{¶39}** In the instant case, appellant was charged with trafficking in drugs, the same category of offense under 8 U.S.C. 1227 and 1228 as in *Padilla*. The consequences of a conviction as set out in the statutes are clear; appellant faced the conclusive presumption of deportation.

**{¶40}** Appellant filed an affidavit with his motion to set aside his plea. He averred at paragraph five he was not advised at the time of his plea that his deportation "was certain and imminent" if he pled guilty. He further averred at paragraph 8 had he been so advised, he would not have pled guilty and "would have exercised my rights to trial and appeal."

**{¶41}** At the plea hearing, the trial court did advised appellant, to a limited degree[2], of the R.C. 2943.031 non-citizen risk of deportation warnings. However, this does not absolve defense counsel of the *Padilla* obligation to advise his client prior to the plea of the "truly clear" consequences on his non-citizen status.

**{¶42}** The trial court conducted a hearing on the motion to set aside the plea. However, the attorney present at the hearing was his appellate attorney and not the trial attorney who advised appellant on his plea of guilty and at the later sentencing hearing. I would find the trial court abused its discretion by not holding a hearing that included taking testimony from the trial attorney on the question of what advice appellant received prior to entering his plea of guilty. Armed with this vital information, the court would then

[2]The trial court informed appellant that his plea of guilty "could lead to your deportation" and that his, "green card could terminate also, or it could change * * *" March 2, 2015 T. at 14. The trial court did not advise appellant, as set out in R.C. 2934.031(A), that he could face "exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." *Id.* at 13-14.

have evidence before it in order to decide whether the withdrawal of the guilty plea should be granted or denied.

**{¶43}** This court has recently addressed this same issue in *State v. Romero,* 5th Dist. Stark No. 2016CA00201 (May 22, 2017). The *Romero* court more fully discussed the matter and I rely on its reasoning.

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