

[Cite as *Westerville v. Zabala*, 2012-Ohio-5194.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Westerville, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-97
 : (M.C. No. 2010 CRB 13880)
 Mateo Zabala, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on November 8, 2012

DiFranco Law Office, LLC, and Brian C. DiFranco, for appellant.

APPEAL from the Franklin County Municipal Court

TYACK, J.

{¶ 1} Mateo Zabala is appealing from the overruling of his motion to withdraw his pleas of no contest to possessing drug paraphernalia and a traffic charge. He assigns three errors for our consideration:

FIRST ASSIGNMENT OF ERROR

The Trial Court erred in denying Defendant/Appellant's motion to withdraw his guilty plea because O.R.C. 2943.031(E) mandates that "In 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."

SECOND ASSIGNMENT OF ERROR

The Trial Court erred in denying Defendant/Appellant's motion to withdraw his guilty plea when it relied on the

written plea form signed by Defendant/Appellant that contained a version of the O.R.C. 2943.031(A).

THIRD ASSIGNMENT OF ERROR

The Trial Court erred in denying Defendant/Appellant's motion to withdraw his guilty plea when it relied on the magistrates testimony that a group advisal was given on the date of the Defendant/Appellant's plea hearing when no record existed of the group advisal or of the court personally addressing the Defendant/Appellant. Group advisals prior to commencement of court do not substantially comply with the plain meaning of O.R.C. 2943.031(A).

{¶ 2} Zabala filed his motion to set aside his pleas years after they were entered and years after he was sentenced. Thus, the trial court was bound by Crim.R. 32.1, which reads:

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.

{¶ 3} Zabala is a citizen of Columbia. He is married to an American citizen.

{¶ 4} Zabala is seeking American citizenship but fears he will be denied citizenship due to the convictions in this case. The trial court judge who reviewed his motions noted that Zabala has additional convictions in the state of Pennsylvania, Delaware County, Ohio and Granville, Ohio. These convictions include prior convictions for drug offenses and a conviction for operating a vehicle while intoxicated ("OVI"). OVI can be based on use of alcohol, use of a drug of abuse, or a use of both in a way that causes a driver to be impaired.

{¶ 5} The record before us on appeal includes a document signed by Zabala which includes the advisement required by R.C. 2943.031. It read:

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) my [sic] have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(Emphasis sic.) (R. at 2.)

{¶ 6} Counsel for Zabala argues that, because there is no transcript of the proceedings in the Westerville mayor's court, there is no record that the advisement occurred. We find that the form with the advisement, signed by Zabala is sufficient proof the advisement was given under the facts of this case. Zabala has significant skills in the English language and acknowledges signing the form but says he was distracted from a careful reading of the plea forms because he was thinking about what he should say before being sentenced. Testimony at the hearing on Zabala's motions also indicated the advisement was given orally.

{¶ 7} In short, the record shows that the required advisement was in fact given both in writing and orally.

{¶ 8} The first assignment of error is overruled.

{¶ 9} For the same reasons, the second assignment of error is overruled. We note the statute does not say that the advisement must be given orally, only that it be given.

{¶ 10} Counsel questions the trial court's giving credence to the testimony from a retired judge from the Franklin County Municipal Court who served as the magistrate in the Westerville mayor's court. The judge/magistrate testified that the mayor's court session began with all who were charged with offenses being advised of their rights and non-citizens being advised of the potential consequences of their pleas.

{¶ 11} There is no reason to doubt the credibility of this judge/magistrate. The fact that a mayor's court could not provide a transcript of all the proceedings before it on a given day years later does not make all the convictions of non-citizens voidable when documentary evidence and witness testimony indicate that the required advisement for non-citizens was given.

{¶ 12} The third assignment of error is overruled.

{¶ 13} All three assignments of error having been overruled, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BROWN, P.J., concurs.
SADLER, J., concurs in judgment only.
