

[Cite as *State v. Batista*, 2004-Ohio-5066.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 03AP-1009
	:	(C.P.C. No. 02CR-01-402)
Daniel A. Batista,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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O P I N I O N

Rendered on September 23, 2004

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*Ron O'Brien*, Prosecuting Attorney, and *Richard Termuhlen, II*, for appellee.

*Margaret W. Wong & Associates*, and *Robert Marek*. for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

WATSON, J.

{¶1} Defendant-appellant, Daniel A. Batista (hereinafter "appellant"), appeals from the October 16, 2002, judgment of conviction by the Franklin County Court of Common Pleas sentencing him to 11 months for gross sexual imposition. For the following reasons, we affirm the judgment of the trial court.

{¶2} The Franklin County Grand Jury indicted appellant on January 29, 2002, on one count of kidnapping with specification, three counts of rape, each with specification, and one count of attempted rape with specification.

{¶3} On October 12, 2002, appellant entered a plea of guilty to gross sexual imposition, a stipulated lesser offense of rape with specification. Pursuant to a joint recommendation, the trial court sentenced the defendant to 11 months with no chance for parole, and to pay restitution in the amount of \$1,500. The trial court ordered a nolle prosequi for the remaining counts.

{¶4} Appellant timely appeals and asserts the following assignment of error:

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA WHERE THE IMMIGRATION ADVISEMENT STATUTE WAS NOT COMPLIED WITH.

{¶5} Appellant contends, before entering his guilty plea, the trial court failed to comply with R.C. 2943.031(A). Specifically, appellant claims he was not advised of the possibility his guilty plea could exclude him from admission into the United States or deny him naturalization. Accordingly, appellant argues the trial court should have allowed him to withdraw his guilty plea, set aside the judgment of conviction, and enter a plea of not guilty.

{¶6} In addition to the procedural requirements set forth in Crim.R. 11(C)(2)<sup>1</sup>, a trial court must also comply with the requirements of R.C. 2943.031(A) when a defendant is a not a citizen of the United States. R.C. 2943.031(A) states, in relevant part:

Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to \* \* \* a felony or a misdemeanor \* \* \* the court shall address the

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<sup>1</sup> Appellant does not assert the trial court failed to comply with the requirements of Crim.R. 11(C)(2).

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' (hereinafter "advisement".)

\* \* \*

{¶7} Under the clear and unambiguous language of R.C. 2943.031(A), when the defendant is not a citizen of the United States, the court shall provide the defendant with the advisement on the record. However, a trial court need not recite the advisement verbatim. Instead, the record must demonstrate the trial court substantially complied with the requirements of R.C. 2943.031(A). *State v. Abi-Aazar*, 154 Ohio App.3d 278, 282, 2003-Ohio-4780, at ¶9. In *State v. Nero* (1990), 56 Ohio St.3d 106, the Supreme Court of Ohio held "[s]ubstantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." Applying this definition to R.C. 2943.031(A), a defendant must be informed, and understand, by entering a plea of guilty, he or she may be subject to three separate and distinct forms of action concerning his or her status as a resident in the United States.

{¶8} In this matter, the following discussion concerning R.C. 2943.031(A) transpired between the trial court and appellant:

Court: \* \* \* Now, you are also not a citizen of the United States. You know, I don't have any control over the INS, but you understand there is a possibility that you could be deported?

Defendant: Yes, your Honor.

Court: By pleading?

Defendant: Yes, your Honor.

\* \* \*

(Tr. at 6.)

{¶9} The colloquy reveals the trial court did not substantially comply with R.C. 2943.031(A). The only aspect of the advisement the trial court informed appellant of was the possibility of deportation. As such, in pleading guilty, appellant was aware he could be deported. However, he was not aware of the possibilities he could be denied entry into the United States and he could be barred from becoming a naturalized citizen. Without being informed of the additional warnings, appellant could not form a subjective understanding of the implications of his plea.

{¶10} R.C. 2943.031(D) sets forth the procedure for a withdrawal of a guilty or no contest plea if the advisement required by R.C. 2943.031(A) was omitted. R.C. 2943.031(D) states:

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.' [Hereinafter "advisement".]

{¶11} Moreover, prior to granting a motion to withdraw a guilty plea pursuant to R.C. 2943.031, a defendant must show he or she suffered a prejudicial effect due to the trial court's failure to substantially comply with R.C. 2943.031(A). *State v. White* (2001),

142 Ohio App.3d 132, 137 (defendant only faced possibility of deportation as a result of his plea which is insufficient to show prejudicial effect); *State v. Browley* (September 29, 1994); Cuyahoga App. No. 66038 (trial court's failure to comply with mandates of R.C. 2943.031(A) was harmless error as appellant failed to demonstrate prejudice).

{¶12} In this matter, appellant fails to demonstrate he suffered a prejudicial effect as a result of the trial court's failure to substantially comply with R.C. 2943.031(A). First, appellant does not assert the full advisement would have influenced his decision to plead guilty to one count of gross sexual imposition in exchange for the entering of a nolle prosequi on the counts of kidnapping, rape, and attempted rape. Moreover, the plea arrangement benefited appellant. *State v. Esqueda* (September 30, 1996), Franklin App. No. 96APA01-118. Finally, there is no evidence appellant is facing exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States as a result of his guilty plea, which is insufficient to show prejudicial effect. See *White*, supra. Accordingly, there is no evidence to support a finding appellant was prejudiced and the trial court's error in failing to substantially comply with R.C. 2943.031 is harmless.

{¶13} Therefore, appellant's sole assignment of error is hereby overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BROWN and KLATT, JJ., concur.

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