

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 12AP-240
	:	(C.P.C. No. 94CR-05-2782)
Gerald K. Phillips,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 6, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

*The Olawale Law Firm, LLC*, and *Emmanuel Olawale*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing from the ruling of the Franklin County Court of Common Pleas which allowed Gerald K. Phillips to vacate his guilty plea entered in October 1994. The State assigns a single error for our consideration:

**The Trial Court Abused Its Discretion In Withdrawing Defendant's Guilty Plea.**

{¶ 2} At the time Phillips entered his plea, he was not a citizen of the United States. R.C. 2943.031 was in effect in 1994 and required that a person who was not a citizen be advised:

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.

{¶ 3} Phillips was not given such advice orally at the time he entered his guilty plea. This fact is proved by the transcript of the plea proceedings which was before the trial court judge. The record before us does not contain a copy of any guilty plea form, so there is no indication that Phillips was given the advisement mandated by R.C. 2943.031 in writing. As a result, there is nothing in the record before us to indicate that Phillips was ever given the advisement at all.

{¶ 4} Phillips, in moving to set aside his guilty plea, informed the trial court that he is a citizen of the United Kingdom. He has been in the United States since April 1984. He is married to a U.S. Citizen and has four children by her. Phillips is licensed to repair heating and air conditioning systems and has engaged in that work for many years.

{¶ 5} Nothing in the record indicates that Phillips was aware that his plea to trafficking in marijuana as a felony of the fourth degree put him at risk to being deported to England, let alone deported almost 20 years later.

{¶ 6} The State argues that nevertheless, the trial court judge abused his discretion in setting aside the plea, basing its argument on its interpretation of *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894.

{¶ 7} The syllabus for the *Francis* case reads:

1. A trial court accepting a guilty or no-contest plea from a defendant who is not a citizen of the United States must give verbatim the warning set forth in R.C. 2943.031(A), informing the defendant that conviction of the offense for which the plea is entered “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.”

2. If some warning of immigration-related consequences was given at the time a noncitizen defendant's plea was accepted, but the warning was not a verbatim recital of the language in R.C. 2943.031(A), a trial court considering the defendant's motion to withdraw the plea under R.C. 2943.031(D) must

exercise its discretion in determining whether the trial court that accepted the plea substantially complied with R.C. 2943.031(A).

{¶ 8} The syllabus does not in the least support the State's position. The warning from R.C. 2943.031(A) was not given, verbatim or otherwise. In fact, no warning of immigration consequences were given at the plea proceedings for Phillips. The clear holding in the *Francis* opinion is that in situations where no warning of immigration consequences is given, the plea proceeding is in violation of the statute. The trial court judge correctly followed *Francis* and clearly did not abuse his discretion.

{¶ 9} "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." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis*, 1 Ohio St.3d 89 (1982); *Wise v. Ohio Motor Vehicle Dealers Bd.*, 106 Ohio App.3d 562, 565 (9th Dist.1995); and *In re Ghali*, 83 Ohio App.3d 460, 466 (10th Dist.1992).

{¶ 11} Again, the trial court judge did not abuse his discretion in setting aside the defective plea proceeding. The State's single assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BROWN, P.J., concurs.  
BRYANT, J., concurs separately.

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Bryant, J., concurring separately.

{¶ 12} Although I agree with the majority's decision, I write to address the state's argument regarding the trial court's failure to conduct a hearing on defendant's motion to withdraw his guilty plea. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, notes the significance of a hearing on an R.C. 2943.031(D) motion where the trial court can determine whether the defendant has met the statutory factors, including demonstrating

that he or she is not a citizen of the United States and that immigration-related consequences flow from the conviction. At the same time, the court noted a hearing is not necessary in every case. To send this matter back to the trial court to consider those factors would be superfluous, as no one disputes they exist here.

{¶ 13} The state, however, contends a hearing is necessary to determine the prejudice element: whether defendant would have entered the plea had he been aware of the potential immigration consequences. *Francis* places the prejudice argument in the context of a hearing to determine whether the trial court substantially complied with the requirements of R.C. 2943.031. Here, the case does not present a question of substantial compliance, as the trial court in defendant's plea proceeding in no manner addressed the issue inherent in the warning required under R.C. 2943.031. Accordingly, a hearing to determine whether defendant would have entered the plea had he been given the warning is not necessary.

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