[Cite as *State v. Toyloy*, 2015-Ohio-1618.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-463
v.	:	(M.C. No. 2013CRB-18954)
Roger E. Toyloy,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 28, 2015

Michael T. Shannon, Whitehall City Attorney, and *Kylie Keitch*, for appellee.

Eric J. Allen, for appellant.

APPEAL from the Franklin County Municipal Court

BRUNNER, J.

{¶ 1} Defendant-appellant, Roger E. Toyloy, appeals from a decision of the Franklin County Municipal Court which denied his post-sentence motion to withdraw his guilty plea. We find plain error in that the trial court considered matters outside the record in determining whether Toyloy had checked the box that he was a United States citizen that appeared on the plea form. At the hearing on Toyloy's motion to withdraw his guilty plea, the trial court elicited, admitted and relied on unsworn, uncross-examined testimony from Toyloy's former counsel, whom the court called post-hearing on the telephone not in Toyloy's presence in order to gather facts to render a decision. We find that this was plain error that (1) made it impossible to determine whether, under R.C. 2943.031(B)(1), the court was required to permit Toyloy to withdraw his guilty plea,

and/or (2) made it impossible to determine whether under Crim.R. 32.1, manifest injustice occurred at the hearing when Toyloy pleaded guilty in the first instance.

{¶ 2} Appellant has raised as his sole assignment of error that the trial court abused its discretion in denying his motion to withdraw his guilty plea, arguing he received ineffective assistance from his prior counsel at the original plea hearing. Appellant's new counsel for both the plea withdrawal hearing and also on appeal failed to object to the trial court's plain error and did not raise such plain error on appeal. We find that the plain error we recognize from our review of the record requires us to remand this matter to the trial court for further proceedings consistent with this decision. Accordingly, appellant's assignment of error is moot.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} On August 7, 2013, pursuant to a warrant stemming from alleged domestic abuse of his wife on August 3, 2013, Toyloy was arrested and charged with domestic violence and assault. On August 21, 2013, the assault charge was dismissed, and he pled guilty to domestic violence. The trial court sentenced him to eight days in jail, a fine of $250, and two years of community control.

{¶ 4} The trial court's entry specifically recognized its right to impose a jail term of up to 172 days if Toyloy violated the terms of his community control. Thus, when Toyloy performed sub-optimally on community control and it was revoked, he began on March 4, 2014 serving 100 days in jail. While Toyloy was jailed, United States Immigrations and Customs Enforcement ("ICE") served Toyloy with a petition for removal in which it announced its intention to deport Toyloy to his native country of Jamaica. As a result, on May 20, 2014, Toyloy filed a motion to withdraw his guilty plea based on the claim that neither the trial court nor his original counsel had advised him of the effect his guilty plea could have on his immigration status.

{¶ 5} The city of Whitehall opposed Toyloy's motion on May 28, 2014 and, on June 4, 2014, the trial court held a hearing on Toyloy's motion. Though the city did not withdraw its opposition to Toyloy's motion, it also did not appear at the hearing and thereby presented no witnesses. Toyloy's counsel at the hearing was a different attorney than at the time of the plea for which he was incarcerated. At the start of the hearing, the

trial court explained that it would conduct the hearing in the absence of the city prosecutor:

> [The Court]: The Court has been in contact with the prosecuting attorney for the City of Whitehall, Mr. Glenn Willer. Mr. Willer expressed his objection to the application to withdraw the plea but indicated that he would be satisfied for the Court to go ahead and conduct this hearing and would be satisfied with the ruling of the Court, and; specifically, waived his right to be present and participate.

(Tr. 4.)

{¶ 6} At the hearing, Toyloy testified on direct examination by his new counsel along with being questioned extensively by the trial court. The city of Whitehall did not appear at the hearing to conduct cross-examination of any witnesses. Toyloy explained that he was born in Jamaica in 1969 and had immigrated to the United States at age 12. He had never become a United States citizen but had a resident alien card. He said that he had this card on his person at the time of his arrest and that it was taken and subsequently returned by deputies. He also testified that he told the persons involved in booking him that he was born in Jamaica.

{¶ 7} Toyloy was further questioned by his attorney and also by the court about his guilty plea. He said that shortly before his guilty plea, his former attorney approached him and said that if Toyloy were to plead guilty, the assault charge would be dismissed and he would be given probation. Toyloy said his counsel presented him with a form entitled "WAIVER OF TRIAL BY JURY." He denied checking the box on the form beside the statement, "I am a citizen of the United States" and denied understanding the form, but admitted to signing it.

{¶ 8} Toyloy also called the victim as a witness on his behalf at the hearing. She testified that Toyloy was proud of being Jamaican, would never have denied it, and, in fact, had the Jamaican flag tattooed on his arm. No one, she said, at the time of Toyloy's sentencing, asked about his citizenship or told him he could be deported. Then, the trial court also questioned this witness:

> [The Court]: Were you present during whatever discussions [Toyloy] might have had with his attorney, prior to entering the plea?

> [The Witness]: No, Your Honor, I was not; however, I did speak with Colin McNamee, who was here and who represented him that day. And I spoke with him after Eric Allen [Toyloy's counsel in the motion to withdraw his guilty plea and current counsel] came into your quarters - - or your chambers today, where we had asked to hold this over until 1:00. I spoke with [McNamee] and he clearly identified on the telephone with me, in the presence of Mr. Allen, that he had no idea that [Toyloy] was an alien.
>
> [The Court]: So your testimony that nobody asked [Toyloy] about it at the time is based on what somebody else told you?
>
> [The Witness]: No. I am saying that while I was here in the courtroom that it was not asked. And I will just say for the record - -
>
> [The Court]: * * * I understand why you're here and what you want, but I think you better listen to the questions and answer them instead of giving me some other information.
>
> The question was: Were you present with Mr. Toyloy during discussions with his attorney that took place out of this room?
>
> [The Witness]: No.
>
> [The Court]: Were you sitting at the table with [Toyloy] at such time - - or whenever this form was executed?
>
> [The Witness]: No.
>
> [The Court]: You had no knowledge of whether or not he discussed that with his attorney before executing this form?
>
> [The Witness]: Not before.

(Tr. 17-18.)

{¶ 9} As the hearing ended, the trial court decided to call a fact witness of its own:

> [The Court]: * * * What I'm going to do with this case is I'm going to get a hold of [Toyloy's former counsel], and I will hear what he has to say over the phone. You won't be here to hear that. I kind of wish you had brought him in here today if he would have helped your case, because then we could get it all cleared at one time. If he says to me that he checked that

> mark [on the form] without inquiring of Mr. Toyloy as to his citizenship, then I'm going to let [Toyloy] off the hook.
>
> Mr. Allen: Okay.
>
> [The Court]: But if he says he didn't check that mark, then I'm going to conclude that Mr. Toyloy did, and whether it was by accident or not by accident the conduct of the Court in accepting the plea without making that disclosure is going to be consistent with the law, because I'm not required to make that disclosure if somebody tells me they're a citizen. So that's where I'm going to go with this, and you'll probably know within a day or two.
> Mr. Allen: Okay.

(Tr. 20-21.)

{¶ 10} On June 5, 2014, the trial court denied Toyloy's motion. In doing so, it stated:

> Mr. Toyloy testified that if he had known that his resident alien status would be in jeopardy, he would not have entered a guilty plea in this case. Mr. Toyloy presented a second witness who testified that Mr. Toyloy was never asked if he was a citizen, but upon questioning by the court it became obvious that she had no direct knowledge of discussions between Mr. Toyloy and his counsel.
>
> In light of the memorandum in support of [Toyloy's] motion [to withdraw his guilty plea], which asserts ineffective assistance of trial counsel for not inquiring as to Mr. Toyloy's nationality, the court continued investigation of this matter by contacting trial counsel. Although this action was taken off the record, the phone conversation with trial counsel took place in the presence of current counsel for Mr. Toyloy. As a result of that conversation, the court is of the opinion that Mr. Toyloy testified untruthfully and that trial counsel did, in fact, ask Mr. Toyloy if he was a United States citizen. Receiving an affirmative response, trial counsel checked the appropriate box and Mr. Toyloy affixed his signature immediately to the right of the affirmative statement of citizenship.
>
> There has been no manifest injustice here; for reasons known only to himself, Mr. Toyloy gave inaccurate information regarding his citizenship to his counsel and subsequently to the court. Relying on this information, the court did not

> provide Mr. Toyloy with the alien advisement which otherwise would have been required by statute.

(Entry and Order.) This appeal now follows.

II. ASSIGNMENT OF ERROR

{¶ 11} Toyloy advances a single assignment of error for our review:

> THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO WITHDRAW HIS GUILTY PLEA.

III. DISCUSSION

{¶ 12} Criminal defendants who are not United States citizens are permitted to withdraw a guilty plea in two distinct ways: (1) upon the finding that they were not given the warning required by R.C. 2943.031(A)[1] (and that the court was not relieved of that requirement under R.C. 2943.031(B)) of the potential consequences to their resident status in the United States when they pled guilty to criminal charges (among other related requirements contained in R.C. 2943.031(D)),[2] or (2) when a court finds, pursuant to Crim.R. 32.1, that it is necessary to correct manifest injustice. The statute requires that a trial court permit withdrawal when a defendant proves that the conditions of R.C. 2943.031(D) exist; the procedural rule is subject to the trial court's discretion. R.C. 2943.031(F) clarifies that the statute does not prevent a trial court from granting a plea withdrawal under the procedural rule, Crim.R. 32.1.

{¶ 13} There is no dispute in the record that the trial court did not warn Toyloy of the consequences to his plea as is required by R.C. 2943.031(A). There is also no dispute that, after Toyloy's community control was revoked and he was serving his jail sentence, when ICE petitioned to deport him, Toyloy was aware of the consequences of his plea,

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[1] The required warning is: "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." R.C. 2943.031(A).

[2] R.C. 2943.031(D) provides: "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 * * * 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."

with deportation imminent, and sought to withdraw it. In determining whether Toyloy should be permitted to withdraw his plea, the trial court created a hybrid standard of review, apparently utilizing both R.C. 2943.031 and Crim.R. 32.1. However, it conditioned permission to withdraw Toyloy's plea (in either case) on one key determinant, whether Toyloy's former counsel checked the box without inquiring of Toyloy if he was a United States citizen at the time of his plea. The court further informed Toyloy at the plea withdrawal hearing that if Toyloy's counsel testified that he did not "check that mark, then I'm going to conclude that Mr. Toyloy did." (Tr. 21.)

{¶ 14} It was a question of fact whether the trial court was required to read to Toyloy at the time of his plea the warning contained in R.C. 2943.031(A). The trial court determined at the hearing that, if Toyloy had not checked the box on the plea form indicating him to be a United States citizen, and if his previous attorney had not asked him the question before checking the box, the trial court would permit him to withdraw his plea. In Toyloy's situation, there was no clear path to making a statutory determination, pursuant to R.C. 2943.031, without first determining facts, such as who checked the box on the plea form and under what circumstances. If a trial court is not able to determine this, it may in its sound discretion additionally permit a plea to be withdrawn to correct manifest injustice. Crim.R. 32.1, R.C. 2943.31(F); *see also State v. Weber*, 125 Ohio App.3d 120, 129 (10th Dist.1997) ("the General Assembly saw fit to include the language of R.C. 2943.031(F), which states that nothing in the statute prevents a court from setting aside a conviction and guilty plea pursuant to Crim.R. 32.1. This language, combined with the explicit language of R.C. 2943.031(D), persuades us that the General Assembly intended that R.C. 2943.031(D) be an independent means of withdrawing a guilty plea separate and apart from and in addition to the requirements of Crim.R. 32.1."). Thus, even under a Crim.R. 32.1 analysis, the trial court proceeded on the same basis. That is, if found that Toyloy's counsel had checked the citizenship box on the plea form without first inquiring of Toyloy's citizenship status, it would find manifest injustice and permit Toyloy to withdraw his plea.

{¶ 15} Pursuant to Crim.R. 32.1 and the case law interpreting its application, a criminal defendant seeking plea withdrawal after sentencing must show that a "manifest injustice" exists in allowing his or her plea to stand. This court has stated that "[a] motion

made pursuant to Crim.R. 32.1 is generally addressed to the sound discretion of the trial court. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph two of the syllabus. Accordingly, an appellate court will ordinarily not reverse a trial court's denial of a motion to withdraw a plea absent an abuse of discretion. *State v. Totten*, 10th Dist. No. 05AP-278, 2005-Ohio-6210, ¶ 5." *State v. Lowe*, 10th Dist. No. 14AP-481, 2015-Ohio-382, ¶ 7. Appellant has couched his assignment of error in abuse of discretion but has made no mention of R.C. 2943.031.

{¶ 16} If the trial court was required to permit plea withdrawal pursuant to R.C. 2943.031(D), its failure to do so would be an abuse of discretion, and we would be obliged to sustain appellant's sole assignment of error. "Although an abuse of discretion is typically defined as an unreasonable, arbitrary, or unconscionable decision, *State v. Beavers*, 10th Dist. No. 11AP-1064, 2012-Ohio-3654, ¶ 8, we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70." *State v. Tauch*, 10th Dist. No. 13AP-327, 2013-Ohio-5796, ¶ 17. If the trial court was not required to permit plea withdrawal pursuant to R.C. 2943.031(D), it could have done so in its sound discretion. Crim.R. 32.1, R.C. 2943.031(F), *Smith*. Under either analysis, the trial court found that Toyloy's counsel had checked the box and had done so after asking Toyloy if he was a United States citizen.

{¶ 17} We find plain error in that the trial court questioned Toyloy's former counsel outside of the hearing to learn for itself what Toyloy's prior counsel's testimony was regarding who had checked the box and whether counsel had asked Toyloy about his citizenship. Toyloy had already testified that he did not check the box indicating he was a United States citizen and that he did not know who checked it. He also testified that he had his "green card" on his person at the time he was arrested and that he told persons involved in booking him that he was a Jamaican citizen. Toyloy's witness, the victim of the underlying offense, testified that Toyloy tells everyone that he "is very proud of his nationality" and sports a tattoo of the Jamaican flag on his arm. (Tr. 15.) With the city not attending the motion hearing, the trial court asked numerous questions of the witnesses. Toyloy's testimony, Toyloy's witness' testimony, and the plea form itself were the sum total of the evidence available to the court and subject to evaluation according to the court's discretion as both finder of fact and judge. Based on this evidence, the court

could have simply found Toyloy's and his victim's testimony to be not credible or even unreliable.

{¶ 18} The record and transcript of the plea withdrawal hearing show that the court went beyond the evidence on the record at the hearing and adduced additional evidence through what amounted to post-hearing, off-the-record testimony from Toyloy's former attorney. Thereafter, the trial court not only relied on such off-the-record testimony, but made it the linchpin of its decision denying Toyloy's motion to withdraw his plea, applying it using both the statutory ("alien advisement") analysis and Crim.R. 32.1 ("manifest injustice") analysis. In doing so, we find the court committed plain error.

{¶ 19} "A plain error is one that is 'obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings.' " *Isquick v. Dale Adams Ents., Inc.*, 9th Dist. No. 20839, 2002-Ohio-3988, ¶ 23, citing, *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209 (1982). Plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Crim.R. 52(B), *State v. McMillen*, 5th Dist. No. 2008-CA-00122, 2009-Ohio-210, ¶ 43. However, notice of plain error should be with " 'utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id.*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Plain error under Crim.R. 52(B)[3] requires a finding that, but for the error, "the outcome of the trial clearly would have been otherwise." *Id.* at ¶ 43, citing *Long*, at paragraph two of the syllabus. *See also State v. Jenks*, 61 Ohio St.3d 259, 282 (1991), quoting *State v. Watson*, 61 Ohio St.3d 1, 6 (1991) ("Plain error does not exist unless, but for the error, the outcome * * * would have been different."). A reviewing court should correct plain error only to " ' "prevent a manifest miscarriage of justice." ' " *McMillen* at ¶ 43, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), quoting *Long* at paragraph three of the syllabus.

{¶ 20} Even though the record indicates that Toyloy's (plea withdrawal hearing) counsel was present during the telephone call the trial court held with Toyloy's former

[3] Crim.R. 52(B) provides: "**(B) Plain error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

counsel, the record does not reflect whether Toyloy's counsel was permitted to question Toyloy's former counsel. There is also no indication that Toyloy was permitted to be present for his former counsel's testimony. The court had already stated to Toyloy during the in-court hearing, "[y]ou won't be here to hear that." (Tr. 21.) We have no alternative but to conclude that Toyloy was not present when the court held its telephone discussion with Toyloy's prior counsel. Even though Toyloy's plea withdrawal hearing counsel (and the same counsel on this appeal) did not object at the hearing or raise this as an issue on appeal, waiver does not occur for plain error. *See State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, ¶ 6, citing Crim.R. 12(C)(2).

{¶ 21} Because we find plain error, the trial court must conduct a new hearing devoid of the plain error we notice in hearing Toyloy's motion to withdraw his guilty plea. Because we have found plain error in the trial court's proceedings, we find appellant's assignment of error to be moot and decline to address it.

IV. CONCLUSION

{¶ 22} Having found plain error occurred in the plea withdrawal hearing held by the trial court, appellant's single assignment of error is moot, and we reverse the judgment of the Franklin County Municipal Court. The matter of Toyloy's motion to withdraw his guilty plea is remanded to the trial court for further proceedings consistent with this decision.

Judgment reversed and
cause remanded with instructions.

BROWN, P.J., and LUPER SCHUSTER, J., concur.