

[Cite as *State v. Duplessis*, 2010-Ohio-2388.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:
C.A. CASE NO.
2009 CA 58

v.

: T.C. NO. 05
CR 94

LEONARD DUPLESSIS

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

:

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OPINION

Rendered on the 28th day of May, 2010.

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FROELICH, J.

{¶ 1} Defendant-Appellant Leonard Duplessis appeals from a trial court
decision denying his motion to withdraw his guilty plea pursuant to R.C. 2943.031(D).

He argues that the trial court abused its discretion in denying his motion, without holding a hearing, because the court had failed to advise him at the time of his plea, in accordance with R.C. 2943.031(A), that his guilty plea could have a negative impact on his immigration status. For the following reasons, the judgment of the trial court will be reversed.

I

{¶ 2} On February 7, 2005, Duplessis was indicted on one count of gross sexual imposition. On July 21, 2005, he entered into a plea agreement in which he pled guilty to a reduced charge of sexual imposition in exchange for the State's agreeing not to seek revocation of his parole under a different case number. The State also agreed to a six-month sentence and a sexually oriented offender classification. The transcript of the plea hearing includes a complete Crim.R. 11 colloquy between Duplessis and the trial court, prior to the court's finding that the plea was knowingly, intelligently, and voluntarily made. There was no separate plea form.

{¶ 3} Nearly four years later, on May 7, 2009, Duplessis filed a motion to withdraw his plea pursuant to R.C. 2943.031(D). He attached to the motion a letter from the U.S. Department of Justice, Immigration and Naturalization Service which directed him to appear for an appointment about his "immigration status in regards to [his] criminal history." The letter was dated March 31, 2009. The State opposed the motion. Without holding a hearing, the trial court overruled the motion. Duplessis appeals.

II

{¶ 4} Duplessis' sole assignment of error:

{¶ 5} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE HIS CRIMINAL CONVICTION PURSUANT TO OHIO REV. CODE 2943.031."

{¶ 6} Duplessis argues that the trial court should have granted his motion to withdraw his guilty plea because the court failed to advise him, as required by R.C. 2943.031(A), of the potential negative consequences of his plea in regard to his immigration status. We review a trial court's decision on a motion to withdraw a plea filed pursuant to R.C. 2943.031(D) under an abuse-of-discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶32, citations omitted. "An abuse of discretion means an unreasonable, arbitrary, or unconscionable action." *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶15, quoting *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶59.

{¶ 7} R.C. 2943.031(A) requires a trial court to give the following advisement to any defendant entering a plea who is not an American citizen: "If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading * * * 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." However, the warning need not be given if the defendant "states orally on the record that he is a citizen of the United States." R.C. 2943.031(B). When a trial court accepts a plea from a foreign citizen without providing the necessary advisement, the defendant may seek to withdraw his plea pursuant to R.C. 2943.031(D).

{¶ 8} Duplessis filed a motion to withdraw his plea pursuant to R.C. 2943.031(D). “The clear and unambiguous language of subsection (D) of the statute allows the trial court to set aside a conviction and allow the defendant to withdraw his guilty plea if the following four requirements are met: ‘1) the court failed to provide the advisement described in the statute; 2) the advisement was required to be given; 3) the defendant is not a citizen of the United States, and 4) the offense to which the defendant plead guilty may result in the defendant being subject to deportation, exclusion, or denial of naturalization under federal immigration laws.’ *State v. Weber* (1997), 125 Ohio App.3d 120, 126, * * *. The Ohio Supreme Court has additionally held that timeliness of the motion to withdraw the plea is a consideration in determining whether a defendant may withdraw a plea after sentencing under R.C. 2942.031. *State v. Francis*, (2004), 104 Ohio St.3d 490, * * * 2004-Ohio-6894.” *State v. Ayupov*, Montgomery App. No. 21621, 2007-Ohio-2347, ¶12.

{¶ 9} The record reflects that the trial court did not provide the R.C. 2943.031(A) advisement to Duplessis. We must next consider whether the advisement was necessary in this case. During the plea hearing, the following exchange took place:

{¶ 10} “THE COURT: Are you a United States citizen?”

{¶ 11} “THE DEFENDANT: No.

{¶ 12} “THE COURT: You’re not?”

{¶ 13} “THE DEFENDANT: I’m a - - I have dual status. I’m a permanent resident Visa.

{¶ 14} “THE COURT: Are you a United States citizen?”

{¶ 15} “THE DEFENDANT: Yes.”

{¶ 16} When a defendant gives a negative or equivocal response, such as Duplessis did when he first answered that he was not a citizen and then said, “I have dual status. I’m a permanent resident Visa”, the trial court has a responsibility to inquire in order to clarify the status of the defendant’s citizenship. Here the court did follow up by asking for a yes or no answer, and Duplessis affirmatively responded that he was an American citizen. However, this affirmative answer is in direct conflict with the first two answers that Duplessis gave. At first, Duplessis stated that he was not a citizen; he then claimed to have dual status and to hold a permanent resident visa. It is unclear what he means by “dual status.” Assuming, arguendo, that Duplessis meant that he holds dual citizenship, this status is inconsistent with that of a permanent resident visa holder. An American citizen would have no need for a visa, while a non-citizen permanent resident would need to obtain a visa. Given these conflicting answers, the trial court should have inquired further in order to clarify Duplessis’ citizenship status at the time of the plea hearing. Where, as here, the defendant’s citizenship status is in doubt, it is unreasonable for the trial court to fail to inquire further in order to clarify that status.

{¶ 17} A trial court is not required to hold a hearing on a R.C. 2943.031(D) motion to withdraw a plea; however, “it is sometimes difficult for an appellate court to review a trial court’s ruling on a motion to withdraw a plea * * * when no hearing occurred.” *Francis*, supra, at ¶50. “Furthermore, the trial court’s failure to specify any reasons in its journal entry denying the motion severely hampers any consideration of whether an abuse of discretion occurred.” *Id.* at ¶52. Here, the

trial court's decision merely stated, "For the reasons set forth in the State's response, the defendant's motion is hereby OVERRULED." A hearing is necessary to address both the statutory factors and the timeliness issue.

{¶ 18} The trial court abused its discretion in overruling Duplessis' R.C. 2943.021(D) motion to withdraw his plea, without holding a hearing, when it is unclear from the record whether he is an American citizen, or if he was entitled to the R.C. 2943.031(A) advisement. The assignment of error is sustained. We remand the case for a hearing to determine whether Duplessis is an American citizen, thereby necessitating the R.C. 2943.031(A) advisement. The trial court is also directed to consider the remaining R.C. 2943.031(D) factors, i.e., whether gross sexual imposition is an offense that "may result in [Duplessis] being subject to deportation, exclusion, or denial of naturalization under federal immigration laws," *Weber*, supra, and the timeliness of Duplessis' motion, which appears to have been filed a few weeks after he learned that his immigration status was being reviewed in regard to his criminal history. *Francis*, supra.

III

{¶ 19} Having sustained Duplessis' sole assignment of error, the judgment of the trial court is Reversed, and the case is Remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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