

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MUHAMMAD AKHTAR

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. CT2016-0003

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from Muskingum County Court,
Case No. TRC 11 00287

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 29, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

D. MICHAEL HADDOX
Prosecuting Attorney
Muskingum County, Ohio

TODD W. BARSTOW
JUSTIN M. FOX
538 S. Yearling Road, Ste. 202
Columbus, Ohio 43213

By: GERALD V. ANDERSON II
Assistant Prosecuting Attorney
Muskingum County, Ohio
27 North Fifth St., P.O. Box 189
Zanesville, Ohio 43702-0189

Hoffman, J.

{¶1} Defendant-appellant Muhammad Akhtar appeals the December 14, 2015 Judgment Entry entered by the Muskingum County Court, which denied his motion to withdraw his guilty plea. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant is a citizen of Pakistan, lawfully residing in the United States. Following a traffic stop on January 11, 2011, Appellant was cited with operating a vehicle under the influence/refusal, in violation of R.C. 4511.19(A)(2); no operator's license, in violation of R.C. 4510.12(A)(1); and failure to control, in violation of R.C. 4511.202. On January 14, 2011, Appellant entered a plea of no contest and the trial court found him guilty of all three charges. Appellant was sentenced on April 22, 2011.

{¶3} On October 5, 2015, Appellant filed a motion to withdraw his 2011 no contest plea. Appellant argued the trial court should allow him to withdraw his plea because the trial court did not comply with R.C. 2943.031 because it failed to advise him of the possible immigration consequences of his conviction. The state filed a response, urging the trial court to deny Appellant's motion as he had failed to establish he was prejudiced by the trial court's failure to provide the R.C. 2943.031(A) advisement. The trial court conducted a hearing on November 20, 2015.

{¶4} Via Judgment Entry filed December 14, 2015, the trial court denied Appellant's motion.

{¶5} It is from this judgment entry Appellant appeals, raising as his sole assignment of error:

{¶6} “I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT’S MOTION TO WITHDRAW HIS PREVIOUSLY ENTERED GUILTY PLEA. (*TR.* at p. 8-10, 17-19, 32-36).”

{¶7} R.C. 2943.031(A) provides, in pertinent part:

(A) * * * [P]rior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor * * *, the court shall address the 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.”

{¶8} R.C. 2943.031(D) provides the remedy for noncompliance with this advisement requirement:

(D) 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.

{¶9} “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.” R.C. 2943.031(E)

{¶10} To ensure compliance with the statute, a trial court accepting a plea should never assume a defendant is a United States citizen, but must give the R.C. 2943.031(A) warning verbatim to every criminal defendant (other than certain defendants pleading to a minor misdemeanor) unless a defendant affirmatively has indicated either in writing or orally on the record he or she is a citizen of the United States. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 20, citing R.C. 2943.031(B). This prevents “the possibility that a defendant who later reveals that he or she was not a citizen at the time of the plea may invoke R.C. 2943.031(D) as grounds for withdrawing the plea.” *Id.*

{¶11} We review a trial court's decision regarding a motion to withdraw a guilty plea under an abuse of discretion standard. *Id.* at ¶ 32. “At the same time,” however, “when a defendant's motion to withdraw is premised on R.C. 2943.031(D), the standards within that rule guide the trial court's exercise of discretion.” *Id.* at ¶ 33. “[A] defendant seeking relief under R.C. 2943.031(D) must make his or her case before the trial court under the terms of that statute,” then “the trial court must exercise its discretion in determining whether the statutory conditions are met[.]” *Id.* at ¶ 36.

{¶12} As stated supra, the explicit language of R.C. 2943.031(D) mandates a trial court set aside a judgment of conviction and allow a defendant to withdraw his guilty plea

if the defendant satisfies four requirements. Specifically, a defendant must demonstrate: (1) the court failed to provide the defendant with the advisement contained in R.C. 2943.031(A); (2) the advisement was required; (3) the defendant is not a United States citizen; and (4) the offense to which the defendant pleaded guilty may result in deportation under the immigration laws of the federal government. *State v. Weber*, 125 Ohio App.3d 120, 126, 707 N.E.2d 1178 (10th Dist.1997). Furthermore, the Ohio Supreme Court held timeliness of the motion to withdraw the plea is also a consideration in determining whether a defendant may withdraw a plea after sentencing under R.C. 2943.031. *State v. Francis*, supra, at ¶ 37–43.¹

{¶13} Unlike the trial court in *Francis*, in the instant case the trial court held a hearing on Appellant's motion to withdraw his plea, and a transcript of the hearing has been made a part of the record. However, the record does not establish the trial court provided Appellant with the requisite advisement when Appellant entered his no contest pleas in 2011; therefore, we must presume Appellant did not receive the advisement. R.C. 2943.031(E).

{¶14} Appellant filed his motion four years and nine months after he entered his pleas. Although Appellant presented the testimony of immigration attorney Kimberly Harrison-Donaldson, who stated Appellant may face immigration consequences as a

¹ In *Francis*, the Ohio Supreme Court specifically reversed the court of appeals' decision finding the untimeliness of the defendant's motion to withdraw plea required its denial as a matter of law. The Court in *Francis* held timeliness is one of the many factors underlying the trial court's exercise of discretion in considering the motion to withdraw the plea; however, timeliness will be of different importance with each case, depending on the facts. *Francis* at 363. However, Chief Justice Moyer and Justice Pfeifer held timeliness of the motion to withdraw plea is not a factor to be considered in application of R.C. 2943.031.

result of his multiple OVI convictions, Appellant did not affirmatively demonstrate the 2011 conviction resulting from his no contest pleas had actually caused him to be prejudiced at any time since entering his plea.² Appellant failed to produce documentation demonstrating the issuance of a notice of deportation proceedings or that a deportation order had been issued against him as a result of the 2011 plea and conviction. Nor has Appellant shown the 2011 conviction at issue is the proximate cause of any purported deportation proceedings. Rather, Appellant simply makes the assertion the 2011 conviction might possibly be considered by an immigration judge should Appellant be subject to an immigration proceeding. Such assertion is insufficient. Appellant has failed to demonstrate the 2011 conviction may result in deportation as required to withdraw a guilty plea under R.C. 2943.031(D). Further, the 2011 conviction is outside the five year look back period for assessing his moral character.

{¶15} We believe Appellant's motive for filing his motion to withdraw his plea is also a factor to consider. The 2011 OMVI conviction was a misdemeanor. Appellant had subsequently been charged with two new OMVI offenses, one of which was elevated to a felony because of the 2011 conviction and other prior OMVI offenses. A felony conviction could potentially give rise to immigration consequences. This appears to have possibly been the motive for filing his motion to withdraw his plea. Possible immigration consequences which could result from a felony conviction, as testified to by Attorney

² Appellant in *Francis* claimed her plea of guilty to Grand Theft (a felony) rendered her statutorily ineligible to become a United States citizen. In contrast, the testimony herein revealed Appellant's OMVI conviction would not render him statutorily ineligible for naturalization, but arguably could be a consideration despite being outside the normal five year look back period for assessing his moral character.

Harrison-Donaldson, were not at issue when Appellant entered his plea in 2011. Such factor would mitigate against granting the motion.³

{¶16} Because Appellant cannot satisfy the requirements of R.C. 2943.031(D), we find the trial court did not abuse its discretion in denying his motion to withdraw his guilty plea.

{¶17} The judgment of the Muskingum County Court is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

³ *Francis* makes it clear there may be many factors involved in consideration of a defendant's motion to withdraw plea under R.C. 2943.031. *Id.* at ¶40.