

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Court of Appeals No. H-10-024

Appellee

Trial Court No. CRI 95 0224

v.

Emerenciano Contreras

DECISION AND JUDGMENT

Appellant

Decided: September 2, 2011

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Brian C. DiFranco, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, Emerenciano Contreras, appeals from a judgment of the Huron County Common Pleas Court which denied his motion to withdraw his guilty plea to a felony drug abuse offense that was entered in 1995. The trial court denied the motion on the grounds that it was untimely, considering the prejudice the state would likely suffer if it had to proceed to trial. The court further determined that appellant lacked sufficient

evidence to excuse his waiting such an excessive amount of time before filing the motion. For the following reasons, we reverse.

{¶ 2} In 1995, appellant pleaded guilty to an amended charge of trafficking in marijuana. According to the pre-sentence investigation report, appellant was a legal alien at the time of his plea. He presently contends that he was never informed that his citizenship status could be affected by pleading guilty to a felony offense. Furthermore, the court's record of the plea hearing was destroyed in 2005, pursuant to its rules of superintendence.

{¶ 3} According to appellant, in 2009, upon returning from a trip to Mexico, he was warned by border security that he would encounter difficulty in returning from any future trips until he was cleared on the felony conviction. After being referred to his current counsel, appellant learned he could be denied citizenship and potentially removed from the United States as a result of this conviction. He is also now required either to renew his legal permanent resident card or to apply for naturalization. Due to the felony conviction, however, if appellant files either application, he could be placed in removal proceedings pursuant to Section 237(a)(1)(B)(i) of the Immigration and Nationality Act.

{¶ 4} Appellant assigns one error for our review:

{¶ 5} "The trial court erred in denying defendant/appellant's motion to withdraw his guilty plea pursuant to O.R.C. 2943.031 solely on the basis of timeliness. The trial court conceded that no record exists in this matter that demonstrates that the defendant/appellant was properly advised pursuant to O.R.C. 2943.031."

{¶ 6} In pertinent part, R.C. 2943.031(A) mandates the following pre-acceptance advisement to defendants who are not United States citizens entering pleas to felonies or misdemeanor charges:

{¶ 7} "[P]rior to accepting a plea of guilty or a plea of no contest to an indictment * * * charging a felony * * * 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:

{¶ 8} "'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.'"

{¶ 9} Additionally, R.C. 2943.031(D) and (E) state:

{¶ 10} "(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.

{¶ 11} "(E) *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.*" (Emphasis added.)

{¶ 12} R.C. 2943.031 was effective October 2, 1989. Upon the defendant's motion, the trial court is required to set aside a conviction and allow him to withdraw his previous guilty plea when: 1) the court fails to properly advise the defendant; 2) the advisement is required; 3) the defendant is not a United States citizen; and, 4) the defendant's conviction "may result" in deportation, exclusion, or denial of naturalization under federal law. R.C. 2943.031(D). In addition to the statutory factors, the Ohio Supreme Court now requires the timeliness of the motion to be considered. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 40. The *Francis* court acknowledged that the state's concern that as more time passes after a plea is entered, the likelihood increases that evidence will become stale and witnesses more difficult to locate. In addition, it recognized the state's interest "in maintaining the finality of a conviction that has been considered a closed case for a long period of time." *Id.*

{¶ 13} Nevertheless, the *Francis* court noted that because the facts which favor or militate against allowing a plea-withdrawal under the statute will often vary, "no bright-line rule" is required. *Id.* at ¶ 42. Thus, differences in circumstances will render how timely the motion is more important or less important, especially in light of the proportional consequences to be suffered where no advisement was given. *Id.* In reversing the Eighth Appellate District after it affirmed the denial of a motion to

withdraw solely on the timeliness factor, the court stated: "[t]imeliness is *just one of many factors* that the trial court should take into account in exercising its discretion in considering whether to grant the motion." *Id.* The court specifically held that "[a] *primary factor* in a trial court's decision whether an R.C. 2943.031(D) motion should be granted is whether the trial court at the time the defendant entered his * * * plea did indeed fail 'to provide the defendant the advisement described in division (A)'" *Id.* at ¶ 44. Thus, while timeliness is properly *one* factor, the "*primary factor*" to consider is whether the trial court in fact failed to provide the defendant with the required advisement.

{¶ 14} The standard of review for a trial court's decision on a motion to withdraw a plea, brought under R.C. 2943.031, is "abuse of discretion." *Id.* at ¶ 36, citing R.C. 2943.031(D). "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* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 15} In this case, the trial court appears to have given no consideration to any factor *other than* timeliness. A review of the record shows that appellant provided proof that he is not a citizen of the United States and that the court likely knew his status at the time of pleading; therefore, an advisement was required. Further, pursuant to R.C. 2943.031(E), in the absence of a record indicating otherwise, *it is presumed* that no advisement was given to the defendant. That is the case here. Furthermore, there seems

to be little question that the failure to advise appellant will presently result in prejudice. Lastly, we cannot disagree with the trial court's concern about the timeliness factor, considering the prejudice incurred by the state in terms of the availability of witnesses or evidence.

{¶ 16} The trial court's judgment entry, however, shows that the trial court made little or no mention of the R.C. 2943.031 factors. Regarding whether the R.C. 2943.031 advisement was given, the trial court ruled that "it does not need to be resolved at this time." Instead, the trial court opted to focus solely on the 15-year delay between appellant's original guilty plea and the motion to withdraw it. Thus, we can only reason that the court did not consider any of the other statutory factors set forth in R.C. 2943.031. The failure to consider all the factors is contrary to the Supreme Court's ruling in *Francis*, and the absence of a plea record creates the presumption that appellant received no advisement. R.C. 2943.031(E).¹

¹The court's judgment entry here indicates that in denying appellant's motion, the court relied solely on *State v. Tabaa*, 151 Ohio App.3d 353, 2003-Ohio-299. In *Tabaa*, the Eighth Appellate District had affirmed the trial court's denial of a motion to withdraw under R.C. 2943.031 based only on the timeliness factor. As noted above, however, the Supreme Court's ruling in *Francis* has undercut using timeliness as the sole or even primary reason for denying a defendant's plea-withdrawal motion under the statute. See, *id.* at ¶ 41-43. Furthermore, in *State v. Kiss*, 8th Dist. No. 91353, 2009-Ohio-739, the Eighth District later held: "[i]nsofar as *Francis* emanated from the Ohio Supreme Court in 2004, *Tabaa* from this court in 2003, *Francis* controls, and to the extent that *Tabaa* is inconsistent with *Francis*, *Tabaa* is overruled." *Id.* at ¶ 17. Thus, the court's reliance on *Tabaa* as authority to deny appellant's motion here was misplaced.

{¶ 17} Accordingly, we find the trial court abused its discretion when it denied appellant's motion to withdraw his plea. Appellant's sole assignment of error is well-taken.

{¶ 18} On consideration whereof, the judgment of the Huron County Court of Common Pleas is hereby reversed. This case is remanded for proceedings consistent with this decision.

{¶ 19} Appellee is ordered to pay the costs of this appeal pursuant to App. R. 24.

JUDGEMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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