

[Cite as *State v. Almingdad*, 2003-Ohio-1829.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81201

|                     |   |               |
|---------------------|---|---------------|
| STATE OF OHIO       | : | ACCELERATED   |
|                     | : | JOURNAL ENTRY |
| Plaintiff-appellee  | : | AND           |
|                     | : | OPINION       |
| -vs-                | : |               |
|                     | : |               |
| MOHAMMAD ALMINGDAD  | : |               |
|                     | : |               |
| Defendant-appellant | : |               |

DATE OF ANNOUNCEMENT  
OF DECISION:

APRIL 10, 2003

CHARACTER OF PROCEEDING:

Criminal appeal from the  
Court of Common Pleas  
Case No. CR-293507

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON, ESQ.  
CUYAHOGA COUNTY PROSECUTOR  
BY: L. CHRISTOPHER FREY  
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For Defendant-Appellant:

RICHARD H. DRUCKER, ESQ.  
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ANN DYKE, P.J. :

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. Defendant-appellant Mohammad Almingdad a.k.a. Mohammed Almigdad ("defendant") appeals from the judgment of the trial court which denied his motion to vacate a guilty plea. For the reasons set forth below, we affirm the judgment of the trial court.

{¶2} On March 3, 1993, the defendant, several co-defendants and their business, were indicted on several counts including trafficking in food stamps and possession of criminal tools. The defendant was indicted on two counts of trafficking in food stamps in violation of R.C. 2913.46. The defendant pleaded guilty to the offenses. At the plea hearing, the trial judge addressed all of the defendants. The trial judge asked the defendant if he was a United States citizen, to which he responded, "Legal alien, green card." The court thereafter stated:

{¶3} "\*\*\*\* I should make you aware that a finding of guilty could make you subject to deportation." (T. 12-13). The defendant acknowledged the risk and thereafter entered a guilty plea. He was sentenced to a one-year prison term, which was suspended. The defendant did not appeal the decision.

{¶4} The defendant was allegedly deported to Jordan in 2000. In November 2001, he moved to vacate his guilty plea pursuant to R.C. 2943.031, which the trial court denied without a hearing. It is from this ruling that the defendant now appeals, asserting one assignment of error for our review.

{¶5} “The trial court erred when it overruled Appellant’s Motion to Vacate Guilty Plea, without a hearing, when at the time of his plea the trial court failed to provide the advisement pursuant to R.C. 2943.031 (A) that he was subject to exclusion from the United States or denial of naturalization pursuant to the laws of the United States.”

{¶6} The defendant contends that although the trial court advised him of the risk of deportation upon a plea of guilty, its failure to provide a verbatim advisement pursuant to R.C. 2943.031 entitles him to have his guilty plea vacated.

{¶7} R.C. 2943.031 provides, in relevant part:

{¶8} “(A) Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to an indictment, information or complaint charging a felony or a misdemeanor other than a minor misdemeanor if the defendant previously has not been convicted of or pleaded guilty to a minor 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.

{¶9} “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 \*\*\* 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.\*\*\*

{¶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 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.” (Emphasis added.)

{¶11} Therefore, pursuant to the requirements of the statute, the defendant was required, upon motion, to demonstrate that he was not a citizen of the United States. R.C. 2943.031(D) This court has held that the record must affirmatively demonstrate that a defendant is not a citizen of the United States through affidavit or other documentation. *State v. Almingdad*, Cuyahoga App. No. 81200, 2003-Ohio-295; *State v. Muller* (1999), 134 Ohio App.3d 737 citing *State v. Thomas* (Mar. 18, 1993), Cuyahoga App. Nos. 63719, 63720. In this case, the defendant failed to offer any proof that he is a non-citizen. Therefore, having failed to satisfy this portion of R.C. 2943.031 (D), we find that the trial court properly denied his motion to vacate a guilty plea.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, J., CONCURS.

DIANE KARPINSKI, J., DISSENTS (SEE ATTACHED DISSENTING  
OPINION)

ANN DYKE  
PRESIDING JUDGE

KARPINSKI, J., DISSENTING:

{¶12} I respectfully dissent.

{¶13} The majority has added a new requirement to R.C. 2943.031: that a defendant provide an affidavit or other documentation demonstrating that defendant is not a citizen of the United States. On this point the statute requires only that “the defendant show[] that he is not a citizen of the United States.”

{¶14} That requirement was satisfied when the defendant stated *on the record* in common pleas court that he was not a citizen. As the majority observed, when defendant was asked whether he was a United States citizen, he responded, “Legal alien, green card.” This statement on the record in the underlying case is sufficient to meet the statutory requirement. Nothing more is required on this point. It would be different if defendant were to return later to claim what was not ever established below. Those are not the circumstances here. In the case at bar, the lower court accepted his statement that he was a “legal alien,” when the court proceeded to advise him that he could be deported. For this court to add a new requirement on an issue of fact already established would in effect, add an unnecessary technicality. The requirement of an affidavit or other documentation arises only when the lower court is not aware at the sentencing hearing that a defendant is not a U.S. citizen.

{¶15} The majority misreads the statute by requiring that the defendant show anew upon motion that he is not a U.S. citizen. A careful reading of the statute shows that the phrase “upon motion does not qualify the section specifying this showing any more than it qualifies the immediately preceding phrase: that is, “the court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division\*\*\*.” All three of these criteria were established by the transcript from the first hearing. Nothing further on these points is needed.

{¶16} The state, but not the majority opinion, argues, however, that the court satisfied the statute when it advised only on deportation, not on exclusion or denial of naturalization. The state assumes that advising only deportation substantially complies with the statutory requirement. I disagree. First, we must consider that the advisement specified in the statute is contained in quotation marks. Those quotation marks must be honored: the usual meaning is that they signal that the advisement is to be given verbatim. *State v. Quran*, 2002-Ohio-4917. The state, however, offers no reason to ignore them.

{¶17} In any event, even if “substantial compliance” were the standard—and I do not agree that it is—there cannot be substantial compliance when the court addresses only one of three expressly specified consequences that must be advised.<sup>1</sup> It is one thing to ignore quotation marks; it is quite another to trim three specific consequences down to one that does not include the other two. That is not “substantial compliance.” That’s more like “hit and miss.”

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<sup>1</sup> As this court said in *State v. Quran*, supra, citing *State v. Pless* (1996), 74 Ohio St.3d 333, 340, “If we were to ignore this statute, as some would have us do, then, henceforth, no clear and unambiguous statute would be safe from a substantial compliance interpretation.”

**{¶18}** The fourth criterion—that the offense to which he pleaded guilty “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”—can be shown as a matter of law by reference to INA 101(a)(43), INA 237 (a)(2)(A) (iii) and 8 USC 1227(A)(2)(A)(iii) (2001). He pled guilty to what is considered an “aggravated felony” as defined by INA. No documentation is needed to satisfy this criterion, because as a matter of law he is deportable and may be excluded from admission to the United States, as well as denied naturalization.

**{¶19}** Because defendant complied with the statutory requirements, I would reverse and allow defendant to withdraw his guilty plea.