

[Cite as *State v. Jukic*, 2015-Ohio-2695.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101663

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIJO JUKIC

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-05-471469-A

BEFORE: Stewart, J., Keough, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: July 2, 2015

ATTORNEY FOR APPELLANT

Rhys B. Cartwright-Jones
Rhys B. Cartwright-Jones, L.L.C.
42 North Phelps Street
Youngstown, OH 44503

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

T. Allan Regas
Assistant County Prosecutor
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶1} After being charged with possession of crack cocaine, defendant-appellant Mario Jukic agreed to intervention in lieu of conviction. That program allowed Jukic to enter a provisional plea of guilty to a fifth-degree felony drug possession charge and engage in drug rehabilitation, the successful completion of which would ultimately lead to the dismissal of the criminal charge. Jukic's participation in the intervention program had an unintended consequence however: Jukic is not a United States citizen and the U.S. government considered his provisional guilty plea, even without a conviction, sufficient grounds for deportation. After being given notice of deportation, Jukic sought to withdraw his plea because he had not been advised that his guilty plea could have immigration consequences. The court denied the motion to withdraw and then dismissed the criminal charge against him. The sole assignment of error contests the dismissal.

{¶2} If, as relevant here, the court has reason to believe that drug or alcohol usage by an eligible offender was a factor leading to the commission of a criminal offense, the court “may accept, prior to the entry of a guilty plea, the offender’s request for intervention in lieu of conviction.” R.C. 2951.041(A)(1). If the request for intervention in lieu of conviction is granted, “the court shall accept the offender’s plea of guilty,” stay all criminal proceedings, and order the offender to comply with all terms and conditions of treatment. R.C. 2951.041(C). If the offender complies with the terms and conditions of the intervention, “the court shall dismiss the proceedings against the offender.” R.C. 2951.041(E). Successful completion of intervention “shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime * * *.” *Id.*

{¶3} As noted, Jukic is a noncitizen. R.C. 2943.031(A) states that, “prior to accepting a plea of guilty or a plea of no contest,” the court shall address the defendant personally and provide the following 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.

{¶4} The failure to give the R.C. 2943.031 advisement to a noncitizen is mandatory grounds for setting aside a judgment of conviction and permitting the defendant to withdraw a plea of guilty or no contest. R.C. 2943.031(D). Particularly relevant to this case, “[i]n 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).

{¶5} There is no record of Jukic’s guilty plea, much less that the court gave the R.C. 2943.031(A) advisement. So upon receiving Jukic’s motion to withdraw his guilty plea, the court had to presume that Jukic had not been given the R.C. 2943.031(A) advisement. *See State v. Lovano*, 8th Dist. Cuyahoga No. 100578, 2014-Ohio-3418, ¶ 10. The failure to give the advisement was grounds for Jukic to withdraw the plea and R.C. 2943.031(D) required the court to set aside the judgment and allow withdrawal of the guilty plea.

{¶6} Jukic filed a motion to withdraw the plea as soon he became aware that deportation proceedings had commenced against him. For reasons that are unclear, the court did not rule on the motion to withdraw the guilty plea for *years* — Jukic filed his unopposed motion to withdraw the plea in September 2006, and in October 2006, filed a motion to expedite hearing on the motion. In April 2011, Jukic filed a “motion for vacatur,” again arguing that his guilty plea should be vacated because the court failed to give him the R.C. 2943.031(A) advisement. For the first time, the state opposed that request. It was not until May 2013, that the court denied Jukic’s September 2006 motion to withdraw his plea on grounds that successful completion of intervention in lieu of treatment had resulted in the termination of supervision. That order did not make the case final, however, because the court had yet to actually dismiss the criminal charge against Jukic. *State v. Jukic*, 8th Dist. Cuyahoga No. 99997, Motion No. 469933 (Nov. 26, 2013). The court finally closed Jukic’s case on June 6, 2014, when it “dismissed” the criminal charge against him.

{¶7} The state does not argue that Jukic received the R.C. 2943.031(A) advisement; instead, it maintains that Jukic was never “convicted” of anything and that the trial court never made any findings of guilt, so there was nothing for the court to vacate. There were two bases for Jukic to seek withdrawal of his guilty plea, neither of which were dependent on there being a conviction: Crim.R. 32.1 and R.C. 2943.031(D).

{¶8} Jukic's motion to withdraw his guilty plea was a *presentence* motion to withdraw under Crim.R. 32.1 because it was filed before there had been any "final" disposition or judgment in the case at the time. As such, it was by definition a viable motion even though no sentence or final disposition of the case had been entered at the time he sought to withdraw his plea. With there being no record that Jukic had been given the R.C. 2943.031(A) advisement, the court had to presume that he did not receive the advisement. The error of law was manifest and prejudice was established by the deportation proceedings against Jukic, so the court had no discretion to deny the presentence motion to withdraw the guilty plea.

{¶9} In addition, the court should have ordered withdrawal of the guilty plea under R.C. 2943.031(D). That division directs the court to permit the defendant to withdraw a guilty plea if the court fails to give the advisement required by R.C. 2943.031(A) and the plea may result in the defendant being subject to deportation. Again, with no record that the court gave the advisement as required, it is presumed that it did not. Jukic also established that deportation proceedings had commenced against him as a result of his guilty plea. With the statutory elements established beyond any doubt and there being no question that Jukic sought withdrawal of his guilty plea in a timely manner, the court was required to permit the withdrawal of Jukic's guilty plea.

{¶10} We reject the state’s reliance on *State v. Kona*, 8th Dist. Cuyahoga No. 100191, 2014-Ohio-1242, insofar as the state suggests that *Kona* indicates that no advisement is required when no finding of guilt is made. *Kona* did not involve intervention in lieu of conviction, but the Cuyahoga County pretrial diversion program. Unlike intervention in lieu of conviction where the defendant enters a guilty plea, the diversion program utilized in *Kona* “require[d] a defendant to complete an admission of guilt statement as part of the application into the diversion program.” *Id.* at ¶ 17. We found that the admission of guilt was not the equivalent of a guilty plea for purposes of triggering the R.C. 2943.031(A) advisement. *Id.* at ¶ 19. By its own terms, *Kona* does not control the outcome of this case.¹

¹ *Kona* is currently under review in the Ohio Supreme Court. *State v. Kona*, 140 Ohio St.3d 1414, 2014-Ohio-3785, 15 N.E.3d 883.

{¶11} Additionally, both the state and the court erroneously relied on *Willoughby Hills v. Qasim*, 11th Dist. Lake No. 2006-L-199, 2007-Ohio-2860, for the proposition that the court had no authority to allow withdrawal of the guilty plea after the case had been dismissed. Qasim, a noncitizen, entered a no contest plea to a complaint charging him with domestic violence without first being given the R.C. 2943.031(A) advisement. He entered into domestic violence diversion, apparently successfully completing it because the court later dismissed the charge. Five years after the dismissal of the criminal charge, Qasim sought to withdraw his guilty plea on grounds that the court failed to advise him that there might be deportation consequences with his plea. The trial court denied the motion to withdraw the no contest plea. The Ninth District Court of Appeals affirmed, finding that “there was no case pending or in existence, the case having been dismissed with prejudice by the time appellant filed his motion.” *Id.* at ¶ 20.

{¶12} *Qasim* is distinguishable from this case because it dealt with a motion to withdraw a guilty plea that had been filed *after* the criminal charges had been dismissed; Jukic filed his motion to withdraw his guilty plea *before* the criminal charges had been dismissed. The dismissal of criminal charges following the successful completion of intervention in lieu of conviction is not self-executing — we noted as much in our order dismissing Jukic’s first appeal for want of a final order because even though Jukic successfully completed intervention in lieu of conviction, the charges against him had not been dismissed. So at the time Jukic’s motion to withdraw his guilty plea was pending, the court had jurisdiction to consider it.

{¶13} But even if Jukic had filed his motion after his case was dismissed, we believe he still should have been able to withdraw his guilty plea. *Qasim* draws attention to the ability of this court to hear an appeal from a case where the criminal charges have been dismissed. In *State v. Eberhardt*, 56 Ohio App.2d 193, 381 N.E.2d 1357 (8th Dist.1978), we recognized that some dismissals of a defendant's case were so contrary to a defendant's rights that those dismissals were orders affecting a substantial right and determined the action and prevented a judgment even if a criminal case against a defendant had been dismissed.

{¶14} Eberhardt was arrested and a “clerical” error caused him to be held without bail pending trial for more than 90 days, in violation of R.C. 2945.71(C)(2) and (D). Eberhardt filed a motion to dismiss the indictment on speedy trial grounds, but the court denied the motion by reference to R.C. 2945.71(H) (the provision for tolling speedy trial time for any continuance granted on the accused’s motion). The court then entered a nolle prosequi at the state’s request — a dismissal that did not prohibit reindictment. *See* Crim.R. 48(A); *State v. Dixon*, 14 Ohio App.3d 396, 397, 471 N.E.2d 864 (8th Dist.1984). On appeal from those rulings, this court noted that there was no basis for the court to find that the speedy trial time had been tolled by any motion, whether by Eberhardt, or by the state. *Eberhardt* at 196. We then considered whether the order was final and appealable. We noted that “[t]he body of case law relative to this issue teaches that it is not the name or the character of the order which determines its appealability — it is the effect of the order upon the action.” *Id.* at 197. We rejected the proposition that the nolle prosequi was interlocutory and nonappealable, finding that under R.C. 2505.02, “[t]he proper test to apply is whether the order affects a substantial right and in effect determines the action and prevents a judgment.” *Id.* Concluding that the nolle prosequi did affect a substantial right and determine the action, we stated:

Had the case proceeded to trial, the appellant would have been either acquitted or convicted. If acquitted, the denial of his motion to dismiss would become a moot issue. If convicted, the appellant would be able to raise the state’s failure to afford him a timely trial as error on appeal. The nolle prosequi prevented either disposition and committed the appellant to the uncertainty of possible reindictment and trial. And, in subsequent proceedings instituted against him, the appellant would ultimately be discharged due to the state’s failure to afford him a speedy trial.

Id. at 198.

{¶15} Jukic falls within the *Eberhardt* exception because there was a constitutional right implicated — the dismissal of the criminal charge in this case came at the expense of Jukic’s statutory right as a noncitizen to be advised that his guilty plea might have deportation consequences. The court’s failure to provide that statutory right affected Jukic’s constitutional right to make a knowing, intelligent, and voluntary plea. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 48. This case thus takes on a constitutional dimension of the kind present in *Eberhardt*: the court dismissed the charges against Jukic, affecting his substantial right to raise defects in his guilty plea that might cause the federal government to reconsider his deportation.

{¶16} R.C. 2943.031 is a remedial provision that ensures that noncitizen defendants enter guilty or no contest pleas that are made with an understanding that deportation consequences might occur. The court accepted Jukic's guilty plea without complying with that statutory requirement, so it should either have granted Jukic's motion to withdraw the guilty plea as required by R.C. 2943.031(D) or considered it as a Crim.R. 32.1 presentence motion to withdraw his guilty plea. Either way, grounds for withdrawal were established and prejudice was manifest — the guilty plea itself was enough to cause deportation proceedings to commence against Jukic, the lack of a conviction notwithstanding. It is our understanding that Jukic has, in fact, been deported. But that fact does not moot his appeal nor does it prevent him from protecting his rights on the chance that he might be allowed entry back into the United States. We therefore sustain the assignment of error, reverse and remand to the trial court with instructions to vacate the dismissal of the case and allow Jukic to withdraw his guilty plea.

{¶17} This cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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.

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

MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY EILEEN KILBANE, J., CONCUR