

[Cite as *Parma v. Lemajic*, 2015-Ohio-3888.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102620

CITY OF PARMA

PLAINTIFF-APPELLEE

vs.

VISNJA LEMAJIC

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Parma Municipal Court
Case Nos. 02CRB03318, 04CRB04938, 06CRB01832

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: September 24, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} In this accelerated appeal, appellant Visnja Lemajic (“Lemajic”) appeals the Parma Municipal Court’s judgment denying her motion to vacate her guilty plea and assigns the following two errors for our review:

I. The Parma Municipal Court erred in denying Defendant-Appellant Visnja Lemajic’s motions to withdraw plea and vacate sentence in accordance with Ohio Revised Code 2943.031.

II. The Parma Municipal Court erred in considering unsubstantiated extraneous information in its findings of facts and conclusions of law.

{¶2} After reviewing the record and relevant law, we affirm the trial court’s decision. The apposite facts follow.

{¶3} Lemajic is a citizen of Croatia, lawfully residing in the United States. She entered several pleas due to shoplifting from 2002 until 2006 in Parma Municipal Court. On October 23, 2002, Lemajic entered a plea of no contest and was found guilty of theft from Kohl’s Department Store. She served one day in jail and paid a fine of \$150, plus costs. On December 15, 2004, Lemajic entered a guilty plea to a charge of theft from Kaufmann’s Department Store. She served three days in jail and paid a fine of \$250, plus costs. On August 31, 2006, she entered a no contest plea and was found guilty

of an amended charge of attempted theft from Value City. She was sentenced to 90 days in jail, with 20 days suspended and fined \$750, plus costs. She served 10 days in jail and was permitted to serve the remaining sentence by electronically monitored house arrest.

{¶4} On November 19, 2014, after entering a fourth plea to theft, Lemajic filed a motion pursuant to R.C. 2943.031 to withdraw her three prior guilty pleas. Because the audio recordings of the plea hearings from 2002 to 2006 no longer existed, Lemajic argued that pursuant to R.C. 2943.031, it must be presumed she was not advised regarding the deportation consequences of her pleas. She attached an affidavit in which she averred that she could not recall whether she was advised that her pleas could have adverse consequences regarding deportation, along with letters from the Parma Municipal Court Clerk's Office stating that it no longer had the audio recordings.

{¶5} The trial court conducted a hearing on the motion. Subsequently, in a three-page opinion, the trial court denied Lemajic's motion.¹ The court, citing to the Ohio Supreme Court's decision in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, concluded that timeliness is a factor to be considered in deciding whether to vacate a guilty plea pursuant to R.C.

¹The court also followed up with a three-page Findings of Fact and Conclusions of Law further explaining its decision.

2943.031(A). The trial court, citing to this court's decisions in *State v. Lovano*, 8th Dist. Cuyahoga No. 100578, 2014-Ohio-3418 and *State v. Preciado*, 8th Dist. Cuyahoga No. 101257, 2015-Ohio-19, denied Lemajic's motion as untimely. The court specifically held as follows:

In the matter before this court, the defendant likewise gives no reason for the delay in filing her motion. The convictions range from eight to twelve years ago. Nothing in her Affidavit or other evidence indicates how long she has been aware of ICE's [Immigration and Custom Enforcement] interest in her, to justify her tardiness. Moreover, the court must factor in the fact the defendant's attorney in her 2006 conviction is well versed in immigration issues and also speaks her language. That might have been the time to address the issue.

Journal Entry, Jan. 15, 2015.

R.C. 2943.031 Advisement

{¶6} In her first assigned error, Lemajic argues the trial court erred by denying her motion to vacate her pleas because there is no record that she ever received the advisement required by R.C. 2943.031(A) at her plea hearings.

{¶7} R.C. 2943.031(A) provides that prior to accepting a guilty plea from a noncitizen, the court shall advise the defendant of potentially adverse effects a criminal conviction may have on the individual's citizenship status. R.C. 2943.031(D) requires that a trial court set aside a judgment of conviction and allow a defendant to withdraw his guilty plea if the defendant demonstrates: "(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 pled guilty may result in deportation under the immigration laws of the federal government.” *State v. Aquino*, 8th Dist. Cuyahoga No. 99971, 2014-Ohio-118, ¶ 13, citing R.C. 2943.031(D).

{¶8} Under R.C. 2943.031(E), the absence of a record showing that the court gave the advisement required by R.C. 2943.031(A) creates a presumption that the advisement was not given. *Mayfield Hts. v. Grigoryan*, 8th Dist. Cuyahoga No. 101498, 2015-Ohio-607, ¶ 19; *Lovano*, 8th Dist. Cuyahoga No. 100578, 2014-Ohio-3418, ¶ 7.

{¶9} Here, it is undisputed that the audio recordings of the plea hearings no longer exist. Thus, in considering Lemajic’s motion, the trial court was obliged to presume the advisement was not given. *Preciado*, 8th Dist. Cuyahoga No. 101257, 2015-Ohio-19, ¶ 21. However, the withdrawal of the plea is not automatic simply because the court failed to give the R.C. 2943.031(A) advisement. As the Ohio Supreme Court held in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, the decision to set aside a judgment of conviction and allow the defendant to withdraw a guilty plea is committed to the sound discretion of the court. *Id.* at ¶ 32. The court is allowed to take into account “many factors” when considering whether to grant

a motion to withdraw a guilty plea based on the court's failure to give the R.C. 2943.031(A) advisement. *Id.* at ¶ 36. Although the Ohio Supreme Court did not list what factors in addition to the R.C. 2943.031(D) factors the court could consider, it did state that "untimeliness will sometimes be an important factor in reaching a decision on a motion to withdraw." *Id.* at ¶ 42.

{¶10} "The concept of 'timeliness' discussed in *Francis* involves more than just the numerical calculation of the number of years between entering the plea and the motion to withdraw the plea. As *Francis* noted, subsumed within timeliness is the prejudice to the state in terms of stale evidence and unavailability of witnesses." *Lovano*, 8th Dist. Cuyahoga No. 100578, 2014-Ohio-3418, ¶ 13.

{¶11} In the instant case, Lemajic waited 12 years from her first plea, with two more intervening pleas, and a new criminal case occurring, before deciding to withdraw her pleas. She provided no reason to explain the delay in filing her motion to withdraw and she did not state when she first became aware she was in danger of being deported. This is not a case where the defendant claimed to have just discovered the deportation consequences of her plea. Although she alleges in her brief that she is now on ICE's "radar" due to her plea in 2014, she does not state when she became aware she may be in danger of being deported in relation to the first three pleas she entered

between 2002 and 2006, which are the subject of the instant appeal. Just because her situation regarding deportation is now more urgent does not mean Lemajic was not aware back then she could be deported.

{¶12} In the instant case, as the result of the length of the delay, the audio recordings of the pleas are no longer available. Additionally, as the city argues, it would be difficult to locate witnesses from the three shoplifting cases. Thus, it is doubtful that the city would be able to proceed to trial on these old misdemeanor theft cases. Thus, the trial court did not abuse its discretion by denying Lemajic's motion for being untimely filed.

{¶13} Lemajic argues that the trial court incorrectly applied *Francis* to the instant case, because in *Francis*, unlike the instant case, there was a transcript of the proceedings. However, this court adopted the reasoning in *Francis* in *Preciado*, and *Preciado*, like in the instant case, did not have a record of the plea hearings. In *Preciado*, we held that because the defendant's motion to withdraw pursuant to R.C. 2943.031 was untimely filed, the trial court did not err by denying the motion.

{¶14} We did hold in *Grigoryan*, which was decided a little over a month after *Preciado*, that *Francis* was distinguishable because the court in *Francis* had a transcript. However, we made this statement in discussing the state's contention that the trial court "substantially complied" with the statute in

making the advisement. We held that without a record of the hearing, it was impossible to determine whether what the court advised was in substantial compliance with the statute.² Timeliness was not an issue in *Grigoryan*. *Grigoryan* does not stand for the proposition that *Francis* does not apply, in toto, when there is no transcript. In fact, the court in *Grigoryan* relied on *Francis* in determining whether the defendant was prejudiced by not receiving the advisement.

{¶15} Moreover, whether there was a record or not would not have an impact on the holding of *Francis* regarding the timeliness of a R.C. 2943.031 motion. In fact, recently in *State v. Jukic*, 8th Dist. Cuyahoga No. 101663, 2015-Ohio-2695, ¶ 9, we held that the trial court erred by not granting the defendant’s R.C. 2943.031 motion to vacate because no record of the advisement existed, “the statutory elements [were] established beyond a reasonable doubt and there [was] *no question* that [the defendant] sought withdrawal of his plea in a *timely manner*.” (Emphasis added.) Thus, we reaffirmed that timeliness is still an issue to be considered when there is no record of an advisement. This decision was decided five months after our

²The dissent found that the document entitled Statement of Rights, which contained a R.C. 2943.031 advisement, that was given to the defendant prior to his plea, was sufficient to provide proof that the defendant was aware of the possibility his plea would have an adverse affect on his immigration status.

decision in *Grigoryan*. Accordingly, Lemajic's first assigned error is overruled.

Unsubstantiated Information

{¶16} In her second assigned error, Lemajic argues the trial court erred by considering unsubstantiated evidence in its Findings of Fact and Conclusions of Law. Specifically, she argues the trial court should not have considered that regarding the prior three pleas, Lemajic was represented by counsel "fluent in defendant's native language and is well-versed in representing persons who are permanent residents or otherwise not naturalized citizens" and that her prior attorney was "well versed in the ORC 2943.031 advisement."

{¶17} We agree that the trial court erred in making a presumption that Lemajic's attorney would have so advised her. R.C. 2943.031 specifically states that without a record of the advisement, the court must presume no advisement was made. Nonetheless, because the court based the denial of the motion to vacate on the fact it was untimely filed, no prejudicial error occurred. Accordingly, Lemajic's second assigned error is overruled.

{¶18} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Parma Municipal Court to carry this judgment into execution. 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR