

[Cite as *Mayfield Hts. v. Grigoryan*, 2015-Ohio-607.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101498

CITY OF MAYFIELD HEIGHTS

PLAINTIFF-APPELLEE

vs.

GHAZAROS GRIGORYAN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Lyndhurst Municipal Court
Case Nos. 11 CRB 00913 and 12 CRB 00118

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

RELEASED AND JOURNALIZED: February 19, 2015

ATTORNEY FOR APPELLANT

Rhys B. Cartwright-Jones
42 N. Phelps Street
Youngstown, Ohio 44503-1130

ATTORNEYS FOR APPELLEE

Paul T. Murphy Co., L.P.A.
Law Director
City of Mayfield Heights
5843 Mayfield Road
Mayfield Heights, Ohio 44124

Dominic J. Vitantonio
Assistant Prosecuting Attorney
City of Mayfield Heights
6449 Wilson Mills Road
Mayfield Village, Ohio 44143

Michael E. Cicero
25 West Prospect Avenue
Republic Building, Suite 1400
Cleveland, Ohio 44115

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Ghazaros Grigoryan, appeals from a judgment denying his motion to vacate his plea. He raises one assignment of error for our review: “The trial court erred in denying Grigoryan’s motion to vacate his guilty plea pursuant to [R.C. 2943.031].”

Procedural History

{¶2} Plaintiff-appellee, the city of Mayfield Heights, filed two complaints against Grigoryan, in November 2011 and February 2012, charging him with theft in each case, both misdemeanors of the first degree.

{¶3} Grigoryan, represented by counsel, pleaded guilty to theft in one of the cases and to an amended charge of possession of criminal tools, also a misdemeanor of the first degree, in the other case. Both guilty pleas were reduced to written plea agreements.

{¶4} Attached to both written plea agreements was a form titled, “Traffic and Misdemeanor Cases Only Statement of Rights.” As part of the “Statement of Rights” form, number 16 included the following:

Are you a citizen of the United States? Yes ____ No ____[.] **ORC 2943.031:**
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.
Defendant_____ **Date** _____[.]

(Emphasis sic.)

{¶5} On the form in each case, Grigoryan checked “No,” that he was not a United States citizen. He also signed the form and dated it November 9, 2012, which was the wrong date; it should have been October 9, 2012.

{¶6} On each written plea agreement, the trial court checked two boxes: (1) “Court finds defendant entered plea knowingly, intelligently, and voluntarily, and (2) “Effect of plea and constitutional rights pursuant to Criminal and Traffic Rules explained.” In both cases, the trial court accepted Grigoryan’s guilty pleas and found him guilty.

{¶7} In March 2014, new counsel for Grigoryan filed a notice of appearance in each case, moving for “any and all audio recordings of the plea and sentencing hearings.” In May 2014, Grigoryan moved to withdraw his guilty pleas. In his motions, he argued that because there was “no transcribed or recorded record” of the proceedings, his pleas must be vacated pursuant to R.C. 2943.031. Grigoryan supplemented both motions with a letter from an attorney regarding the effect of Grigoryan’s misdemeanor convictions on his immigration status, namely, that because of his convictions and because he “is not a U.S. citizen,” Grigoryan “**might be placed in deportation proceedings and/or denied naturalization.**” (Emphasis sic.)

{¶8} The trial court denied both motions to vacate, without a hearing and without explanation. It is from these judgments that Grigoryan appeals, contending the trial court erred in doing so.

R.C. 2943.031

{¶9} 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.”

{¶10} 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.

{¶11} R.C. 2943.031(E) further makes clear that “[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.”

{¶12} To ensure compliance with the statute, a trial court accepting a plea should never assume that 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 that 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.*

{¶13} Although the Ohio Supreme Court in *Francis* held that this advisement is mandatory, it determined that some amount of flexibility was required. *Id.* at ¶ 46. Thus, the court held that when reviewing whether a trial court fulfilled this duty, a “substantial-compliance approach” is necessary. *Id.* at paragraph two of the syllabus. “Substantial compliance means

that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *Id.* at ¶ 48, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). The substantial-compliance standard requires the defendant to show that prejudice resulted from the lack of compliance. *Id.* at ¶ 45. The test of prejudice queries whether the plea would have been made despite the trial court’s failure to substantially comply. *Id.* at ¶ 48. See also *State v. Zuniga*, 11th Dist. Lake Nos. 2003-P-0082 and 2004-P-0002, 2005-Ohio-2078, ¶ 45.

Standard of Review

{¶14} While the standard of review for a postsentence motion under Crim.R. 32.1 is subject to the manifest injustice standard, this standard does not apply to plea withdrawal motions filed pursuant to R.C. 2943.031(D). *State v. Aquino*, 8th Dist. Cuyahoga No. 99971, 2014-Ohio-118, ¶ 13, citing *Francis* at ¶ 26. This is because

[t]he General Assembly has apparently determined that due to the serious consequences of a criminal conviction on a noncitizen’s status in this country, a trial court should give the R.C. 2943.031(A) warning, and that failure to do so should not be subject to the manifest-injustice standard even if sentencing has already occurred.

Francis at ¶ 26.

{¶15} The explicit language of R.C. 2943.031(D) mandates that a trial court set aside a judgment of conviction and allow a defendant to withdraw his guilty plea if the defendant satisfies the four requirements listed in the statute. The four requirements to be demonstrated under R.C. 2943.031(D) are: (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).

{¶16} We review a trial court’s decision regarding a motion to withdraw a guilty plea on R.C. 2943.031(D) grounds under an abuse of discretion standard. *Francis* 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.

Analysis

{¶17} We must determine if Grigoryan established the four requirements under R.C. 2943.031(D). If so, then the statute required the trial court to grant his motion and set aside his convictions.

{¶18} Grigoryan argues that because there is no transcript or recording of his plea hearing, the trial court erred when it denied his motions to vacate his guilty pleas under R.C. 2943.031(D) and (E) because it failed to give him the R.C. 2943.031(A) advisement.

{¶19} R.C. 2943.031(A) provides in pertinent part that “the court *shall* address the *defendant personally.*” (Emphasis added.) In addressing the defendant personally, the court must provide the required advisement to the defendant “*that shall be entered in the record of the court, and determine that the defendant understands the advisement[.]*” (Emphasis added.) Significantly, R.C. 2943.031(E) explicitly states that “[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.” Without a transcript of the hearing, we have no way of determining whether the court addressed

Grigoryan personally, gave the proper advisement, or made sure that Grigoryan understood the advisement, as required by R.C. 2943.031(A).

{¶20} The city counters that the trial court did advise Grigoryan, as evidenced by the written plea agreement and the attached “Statement of Rights.” The city contends that because the trial court gave Grigoryan “some warning,” that it substantially complied with the statute. In support of its argument that the written advisement satisfies the “substantial compliance standard,” the city cites to *Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355. In *Francis*, the Ohio Supreme Court held at paragraph two of the syllabus that

If some warning of immigration-related consequences was given at the time a noncitizen defendant’s plea was accepted, but the warning was not a recital of the R.C. 2943.031(A) verbatim statutory language, a trial court considering the defendant’s motion to withdraw the plea under R.C. 2943.031(D) must exercise its discretion in determining whether the trial court that accepted the plea substantially complied with R.C. 2943.031(A).

{¶21} *Francis* is distinguishable. In *Francis*, there was a transcript of the plea hearing establishing that the trial court personally addressed the defendant and gave him “some warning,” but it did not give the warning verbatim. The issue was whether the warning was sufficient, despite the fact that it was not verbatim with the statute. The Supreme Court held that courts must determine if the trial court substantially complied with the statute when giving the warning. *Id.* at paragraph two of the syllabus. In this case, there is no record of the hearing at all. Thus, *Francis* is not applicable here.

{¶22} Accordingly, we find that the trial court failed to give Grigoryan the required advisement under R.C. 2943.031(A) when it was required to do so. Thus, Grigoryan established the first two requirements under R.C. 2943.031(D). Pursuant to R.C. 2943.031(D), however, a defendant is not automatically entitled to relief if a trial court fails to provide the advisement required by division (A) of the statute before accepting a plea of guilty or no contest.

State v. Garmendia, 2d Dist. Montgomery No. 2002-CA-18, 2003-Ohio-3769, ¶ 12. The defendant must satisfy all of the R.C. 2943.031(D) requirements.

{¶23} The city argues that in his motion to vacate, Grigoryan failed to affirmatively prove that he is not a United States citizen, which is the third requirement under R.C. 2943.031(D).

{¶24} Pursuant to the requirements of R.C. 2943.031(D), the defendant was required, upon motion, to demonstrate that he was not a citizen of the United States. 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*, 151 Ohio App.3d 453, 2003-Ohio-295, 784 N.E.2d 718, ¶ 11 (8th Dist.); *State v. Muller*, 134 Ohio App.3d 737, 742, 732 N.E.2d 410 (8th Dist.1999), citing *State v. Thomas*, 8th Dist. Cuyahoga Nos. 63719 and 63720, 1993 Ohio App. LEXIS 1496 (Mar. 18, 1993).

{¶25} Grigoryan attached a letter to his motion from an attorney, advising him that because he was not a United States citizen and because he had two convictions, he may be deported or denied naturalization. Although the letter is unauthenticated, the city does not challenge its validity. Moreover, the record before us establishes that Grigoryan is not a United States citizen because in the “Statement of Rights” attached to the written plea agreement, Grigoryan checked “no,” that he was not a United States citizen. This is not a situation where a defendant informed the court that he was a United States citizen at his plea hearing, and then later attempted to assert that he was not in order to withdraw his plea. Thus, these documents are sufficient to affirmatively establish that Grigoryan is not a citizen of the United States.

{¶26} Finally, the city contends that Grigoryan did not establish that he was prejudiced by the trial court’s denial of his motion to withdraw his plea. Specifically, the city maintains that because Grigoryan only argued in his motion that he may be deported or denied naturalization,

which the supplemental letter confirms, that is still not sufficient to establish that Grigoryan was prejudiced by his convictions. The city argues that “a movant must offer something more in the way of real prejudice”; the “possibility” of deportation is not enough.

{¶27} The explicit language of R.C. 2943.031(D) mandates that a trial court set aside a defendant’s conviction and allow the defendant to withdraw his or her guilty plea if the defendant satisfies the four requirements listed in the statute, including the fourth requirement 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.” (Emphasis added.) Despite the seemingly unambiguous language of R.C. 2943.031(D) that the court *shall* set aside the defendant’s conviction, the city is correct that some cases from the Eighth District required an additional prejudice element *beyond* what the Ohio Supreme Court held in *Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355.

{¶28} In *Francis*, the Ohio Supreme Court agreed that a defendant moving to withdraw his plea under R.C. 2943.031 must show prejudice. But the Supreme Court explained it as follows:

A criminal defendant’s right to be informed of a specific nonconstitutional feature of a plea, pursuant to Crim.R. 11, prior to a trial court’s acceptance of the defendant’s plea is subject to review under a substantial-compliance standard. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 12, 814 N.E.2d 51, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474. For our purposes, the R.C. 2943.031(A) notification is similar to the nonconstitutional notifications of Crim.R. 11(C)(2), such as the nature of the charges and the maximum penalty involved, and, therefore, implicates the same standard. As one of the showings that must be made to prevail on an R.C. 2943.031(D) motion, a defendant must demonstrate that he or she was prejudiced by the trial court’s alleged failure to comply with R.C. 2943.031(A).

Francis at ¶ 45.

{¶29} But in *Francis*, the state had specifically argued — just as the city does here — that the trial court had properly denied the defendant’s R.C. 2943.031 motion because the defendant had failed to “affirmatively prove prejudice with specificity before a plea may be withdrawn,” citing “a line of Eighth Appellate District cases” requiring a defendant to do so. *Francis* at ¶ 55, citing *State v. Isleim*, 8th Dist. Cuyahoga No. 66201, 1994 Ohio App. LEXIS 3637 (Aug. 18, 1994), as an example of this “line of cases.” Notably, however, the Supreme Court refused to consider this argument, calling it “unduly speculative” to consider the argument “or comment on this line of cases” because it was reversing for a number of other reasons. But the significant thing to note here is that despite the fact that the defendant did not “affirmatively prove prejudice” (at least according to the state’s argument), the Supreme Court still remanded to the trial court for an evidentiary hearing on the defendant’s motion. The Supreme Court could have easily disposed of the case, as this court did in *Isleim* (see below), but it did not. We find this to be significant.

{¶30} In *Isleim*, this court held that the defendant failed to establish that he was prejudiced by the trial court’s failure to advise him *even though* the defendant’s application for naturalization was denied. We found no prejudice to the defendant, explaining that he “could still reapply for naturalization or appeal the decision of the Immigration and Naturalization Service by filing a request for a hearing in that department.” *Id.* at *7. Many other Eighth District cases hold similarly. *See State v. Bisoño*, 8th Dist. Cuyahoga No. 74446, 1999 Ohio LEXIS 3594 (Aug. 5, 1999) (no prejudice found for failing to give the immigration advisement because defendant faced “only the possibility of deportation”); *Euclid v. Khodor*, 8th Dist. Cuyahoga No. 77640, 2000 Ohio App. LEXIS 5698 (Dec. 7, 2000) (no prejudice found for failing to give the immigration advisement because defendant alleged “only the possibility of

deportation and the possibility of any future attempt to become a naturalized citizen”); *State v. Kutkut*, 8th Dist. Cuyahoga Nos. 78720 and 78721, 2001 Ohio App. LEXIS 5389 (Dec. 6, 2001) (no prejudice found for failing to give the immigration advisement when defendant was facing deportation for other reasons).

{¶31} These cases, however, were before the Supreme Court’s decision in *Francis*. Although *Francis* did not outright overrule this “line of Eighth District cases” requiring prejudice with specificity, it certainly cast doubt on the validity of their reasoning.

{¶32} Further, when those cases were decided by this court, they were either pre-September 11, 2001, or just after it. It is no secret that September 11 affected immigration rules and policies in this country. According to one report, deportations after September 11 increased from “roughly 200,000 people in 2001 to nearly double that in 2011.” Ted Hesson, *Five Ways Immigration System Changed After 9/11*, (Sept. 11, 2012), available at http://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590 (accessed Jan. 14, 2015). There was even more impact to criminal deportations. From 2001 to 2012, criminal deportations increased nearly 400 percent, from 18,000 in 2001 to 91,000 in 2012. *Id.* Thus, it is imperative that trial courts give defendants the cautionary advisement under R.C. 2943.031(A) so that they can knowingly, voluntarily, and intelligently enter into their plea.

{¶33} Further, this panel agrees with the Second Appellate District, which has explained the fourth requirement under R.C. 2943.031(D) as follows:

The emphasized words [that the trial court “*shall* set aside the judgment and permit the defendant to withdraw a plea of guilty”] indicate that the trial court is without discretion in the matter, and that it is not necessary to show either that the guilty plea has resulted in deportation, exclusion from admission, or denial of naturalization, or that the plea will necessarily result in one of those consequences, but merely that it may have one of those results.

(Emphasis sic.) *State v. Balderas*, 2d Dist. Greene No. 07-CA-25, 2007-Ohio-4887, ¶ 14. The Second District is merely reiterating the plain language of the statute.

{¶34} In this case, Grigoryan attached a letter to his motion from an attorney, advising him that because he was not a United States citizen and because he had two convictions, he “might be placed in deportation proceedings and/or denied naturalization.” This document was sufficient to establish that he was prejudiced by his two convictions pursuant to *Francis*.

{¶35} Accordingly, we sustain Grigoryan’s sole assignment of error.

{¶36} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee the 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 Lyndhurst Municipal 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS (SEE SEPARATE OPINION)

MELODY J. STEWART, J., DISSENTING:

{¶37} While I agree with the majority that Grigoryan provided sufficient proof that he is not a United States citizen, and that the prejudice component only requires Grigoryan to show

that he may be subject to adverse immigration consequences, I disagree with the conclusion that the court failed to advise Grigoryan of possible immigration consequences. I therefore respectfully dissent from the decision to reverse the trial court's decision.

{¶38} It is true that we do not have a transcript of the plea hearing in this case. But the plain language of R.C. 2943.031(E) does not require a transcript: that section only requires a "record" that the court made the advisement. And although Grigoryan altogether fails to mention it in his brief to this court, the record in this case does evidence the fact that the court advised Grigoryan of the possible immigration consequences associated with his plea.

{¶39} Prior to taking his plea, the court gave Grigoryan a document entitled Statement of Rights. The document informed Grigoryan of all of his rights — including his right to a trial, his right not to testify against himself, and his right to confront his accusers, if he chose not to agree to a resolution of his case by a plea. The form also ensured that Grigoryan understood the charges against him, and the consequences of a plea of guilty, not guilty, or no contest. Further, and most important for purposes of this appeal, the Statement of Rights included a section that asked Grigoryan if he was a citizen of the United States, and then notified him, in accordance with R.C. 2943.031, that:

If [he was] not a citizen of the United States, [he was] hereby advised that conviction of the offense to which [he was] 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.

{¶40} The court provided Grigoryan with the Statement of Rights in both his native language and English, and provided him with an interpreter to go over the forms with him. Grigoryan then signed and dated this section on both forms, indicating that he understood the

potential consequences. The forms show that Grigoryan's attorney and the court bailiff witnessed the signing.

{¶41} The English and native language versions of the Statement of Rights are part of the trial court record. Because the documents clearly indicate that the court did advise Grigoryan of potential immigration consequences, the presumption of non-advisement under R.C. 2943.031(E), which Grigoryan would otherwise be entitled to, is rebutted. I would affirm the decision of the trial court.