

[Cite as *State v. Lein*, 2016-Ohio-5330.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103954

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALEXANDER LEIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-94-319412-A

BEFORE: McCormack, P.J., E.T. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: August 11, 2016

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TIM McCORMACK, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Defendant-appellant Alexander Lein appeals from the judgment of the Cuyahoga County Common Pleas Court denying his motion to vacate his no contest plea made more than 20 years ago. For the reasons that follow, we affirm the decision of the trial court.

Procedural History and Substantive Facts

{¶2} On April 20, 1995, Lein entered no contest pleas to the following charges in Cuyahoga C.P. No. CR-94-319412: (1) theft, in violation of R.C. 2913.02; (2) forgery, in violation of R.C. 2913.31; and (3) uttering, in violation of R.C. 2913.31. The court imposed a sentence of one-year imprisonment on each count, to be served concurrently. The court suspended execution of the sentence and placed Lein on 18-months community control, with the requirement that Lein perform 150 hours court community work service and maintain gainful employment.

{¶3} On July 7, 2015, Lein filed a motion to vacate his plea of 1995. In his motion, Lein stated that he is a noncitizen of the United States; he “does not recall receiving” an advisement that his plea would subject him to deportation, denial of naturalization, or denial of entry into the United States; had he received such advisement, he would not have entered the plea; and there is now a possibility that he may suffer “the aforementioned consequences.” In support of his motion, Lein attached a March 12,

2015 letter from an attorney who stated that, in light of Lein's convictions stemming from two criminal matters (CR-94-319412 and CR-95-318081), he "might be placed in deportation proceedings and/or denied naturalization." Lein also provided documentation from the court reporter's office that because the case occurred more than 12 years ago, in accordance with Ohio rules, the notes on the case had been destroyed; therefore, it is no longer possible to make a transcript of the case.

{¶4} The trial court denied Lein's motion, stating in its order the following:

The defendant has failed to make the motion in a timely manner;
The defendant has failed to present evidence that this case will result in deportation proceedings;

The defendant has failed to present evidence supporting the need for vacation of the plea in this case in light of the following cases:

A) * * * CR-95-318081, theft, the probation of which was served concurrent[ly] with this case;

B) CRB-94-00056, Lyndhurst Municipal Court, theft;

C) CRB-99-01473, Parma Municipal Court, attempted criminal trespassing;

D) CRB-00-00451, Lyndhurst Municipal Court, OMVI;

E) TRC-01-00108, Shaker Heights Municipal Court, open container;

F) CRB-02-00125, South Euclid Municipal Court, DUI;

G) TRC-03-00103, South Euclid Municipal Court, disorderly conduct-menacing; and

H) CRB-05-00167, East Cleveland Municipal Court.

This court has no information that would support the request made by the defendant and any action taken on this one case will have no impact on the many and repeated criminal cases involving the defendant. The motion is denied.

{¶5} Lein now appeals the trial court's order, alleging that the court erred in denying his motion to vacate his plea under R.C. 2943.031 and that he was denied the effective assistance of counsel during the plea.

R.C. 2943.031

{¶6} In his first assignment of error, Lein argues that the trial court erred in denying his motion to vacate his plea because at the time of the plea, the trial court failed to advise Lein of possible immigration consequences in accordance with R.C. 2943.031.

{¶7} R.C. 2943.031(A) provides that prior to accepting a guilty or no contest plea from a noncitizen of the United States, the court shall personally address the defendant and advise him of the potentially adverse effects a criminal conviction may have on one's citizenship status, including deportation, exclusion from admission to the United States, or denial of naturalization. Upon motion of the defendant, the court must set aside a judgment of conviction and permit the defendant to withdraw his guilty or no contest plea where 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, quoting *State v. Weber*, 125 Ohio App.3d 120, 126, 707 N.E.2d 1178 (10th Dist.1997); R.C. 2943.031(D). The possibility of deportation is sufficient to establish prejudice under R.C. 2943.031(D). *Mayfield Hts. v. Grigoryan*, 2015-Ohio-607, 27 N.E.3d 578, ¶ 34 (8th Dist.).

{¶8} The court's failure to provide the R.C. 2943.031(A) advisement, however, does not warrant an automatic withdrawal of the plea. *Parma v. Lemajic*, 8th Dist. Cuyahoga No. 102620, 2015-Ohio-3888, ¶ 9. The decision to set aside the judgment of

conviction and permit the defendant to withdraw his guilty plea is committed to the sound discretion of the trial court. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 32. The extent of the trial court's discretion applies to the court's decision on "whether the R.C. 2943.031(D) elements have been established * * *, not generally to the trial court's discretion once the statutory provisions have been met." *Id.* at ¶ 34. Therefore, a defendant who seeks relief under R.C. 2943.031(D), "must make his or her case before the trial court under the terms of that statute, * * * the trial court must exercise its discretion in determining whether the statutory conditions are met, and * * * an appellate court reviews a trial court's decision on the motion under an abuse-of-discretion standard in light of R.C. 2943.031(D)." *Id.* at ¶ 36.

{¶9} When considering a motion to withdraw a plea based upon the court's failure to provide the R.C. 2943.031(A) advisement, the trial court, in its discretion, may take into account many factors, including timeliness and prejudice. *Lemajic* at ¶ 9, citing *Francis* at ¶ 40 ("Timeliness of the motion is just one of many factors the trial court should take into account when exercising its discretion * * *."); *State v. Reyes*, 12th Dist. Butler Nos. CA2015-06-113, CA2015-06-114, CA2015-06-115, 2016-Ohio-2771, ¶ 14. In fact, "untimeliness" can be an important consideration for the court in deciding whether to grant or deny a motion to withdraw. *Lemajic* at ¶ 9; *Francis* at ¶ 42. "[T]he concept of 'timeliness' * * * involves more than just the numerical calculation of the number of years between entering the plea and the motion to withdraw the plea. * * * [S]ubsumed within timeliness is the prejudice to the state in terms of stale evidence and

unavailability of witnesses.” *State v. Lovano*, 8th Dist. Cuyahoga No. 100578, 2014-Ohio-3418, ¶ 13 (finding a 19-year lapse between the plea and the motion to withdraw the plea “an exceptionally lengthy lapse of time,” resulting in the probability of stale evidence and witness unavailability); *State v. Preciado*, 8th Dist. Cuyahoga No. 101257, 2015-Ohio-19 (finding the defendant’s 20-year delay in filing the motion to withdraw his plea untimely and prejudicial to the state).

{¶10} Here, it is undisputed that a record of the plea hearing no longer exists. Therefore, in accordance with R.C. 2943.031(E), the court must presume that the R.C. 2943.031(A) advisement was not given. *Grigoryan*, 2015-Ohio-607, 27 N.E.3d 578, at ¶ 19; *Lovano* at ¶ 7. It is also undisputed that Lein is a noncitizen of the United States.

{¶11} However, Lein was involved with “many and repeated criminal cases” that spanned from 1994 until at least 2005. A vacation of the 1995 plea would therefore have no effect on the numerous cases with which Lein was involved. Thus, in light of the numerous other criminal convictions, Lein cannot establish that he was prejudiced by the court’s alleged failure to comply with the R.C. 2943.031(A) advisement in one case, namely CR-94-319412, despite the attorney’s letter advising Lein that as a result of his convictions in CR-94-319412 and CR-95-318081, he “might be placed in deportation proceedings and/or denied naturalization.” Therefore, Lein cannot satisfy the fourth element — the prejudice component — of R.C. 2943.031(D).

{¶12} Additionally, Lein filed a motion to withdraw his plea more than 20 years after his plea. Meanwhile, in the intervening years, he had several additional pleas and

convictions, until as recent as 2005. Yet, he waited until 2015 to file a motion to vacate the 1995 plea. In his appellate brief, Lein states that ten years after his initial plea, he learned of the possible consequences of the plea when he retained an immigration attorney to prepare a citizenship application. He provides no explanation, however, for waiting an additional ten years to withdraw the plea.

{¶13} Moreover, the 20-year delay in seeking to withdraw his no contest plea has severely prejudiced the state's ability to prosecute the 1995 charges. As the Ohio Supreme Court has stated,

[t]he more time that passes between the defendant's plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable. The state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time. It is certainly reasonable to require a criminal defendant who seeks to withdraw a plea to do so in a timely fashion rather than delaying for an unreasonable length of time.

Francis, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, at ¶ 40.

{¶14} Here, more than 20 years has passed and the case against Lein has been effectively closed. Certainly, the state has an interest in maintaining the finality of a conviction that has been considered closed for 20 years. Given this exceptionally lengthy period of time, it is likely that the state's evidence has become stale and the witnesses would be unavailable. Thus, the state would be severely prejudiced in attempting to "recreat[e] a case to prosecute." *Lovano* at ¶ 19.

{¶15} Lein's first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶16} In his second assignment of error, Lein contends that his trial counsel was ineffective for failing to advise him of the possible negative immigration consequences resulting from his no contest plea. He argues that in light of counsel's failures, the trial court erred in denying his motion to vacate his plea.

{¶17} In order to establish a claim of ineffective assistance of counsel, the defendant must show (1) his trial counsel's performance was deficient in some aspect of his representation, i.e., the performance fell below an objective standard of reasonable representation, and (2) this deficiency prejudiced his defense, i.e., there is a reasonable probability that but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶18} Trial counsel has a duty to advise a noncitizen client of the risk of negative immigration consequences associated with a plea. *State v. Ayesta*, 8th Dist. Cuyahoga No. 101383, 2015-Ohio-1695, ¶ 15, citing *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). The failure to do so may result in counsel's deficient performance, thus satisfying the first prong of the *Strickland* analysis. *Padilla*.

{¶19} Notwithstanding counsel's deficiency, the defendant must still show that he was prejudiced by his counsel's performance. *State v. Bains*, 8th Dist. Cuyahoga No. 94330, 2010-Ohio-5143, ¶ 25. In the context of a plea, the defendant must demonstrate that there is a reasonable probability that were it not for counsel's errors, he would not

have pleaded guilty and would have insisted on going to trial. *Ayesta* at ¶ 14. The defendant must convince the court that the decision to reject the plea ““would have been rational under the circumstances.”” *Id.*, quoting *Padilla* at 372. Additionally, the defendant must demonstrate that he would have prevailed at trial. *State v. Preciado*, 8th Dist. Cuyahoga No. 101257, 2015-Ohio-19, ¶ 17; *State v. Huang*, 8th Dist. Cuyahoga No. 99945, 2014-Ohio-1511, ¶ 14.

{¶20} Here, Lein alleged in his motion to vacate and in his accompanying affidavit that he “does not recall receiving” an advisement that his plea would subject him to negative immigration consequences. He also stated that had he received such advisement, he “would not have accepted the plea.” However, Lein fails to show, much less, allege, that but for counsel’s failure to advise him of the possibility of deportation, had he proceeded to trial, he would have prevailed on the charges against him. Lein has therefore failed to demonstrate the second *Strickland* prong — that he was prejudiced by counsel’s performance. *See Preciado* at ¶ 17 (“Even if this court were to accept in the absence of a transcript of the plea hearing that * * * counsel should have done more to advise him of the ramifications of a guilty plea,” the defendant failed to demonstrate prejudice where he failed to show he would have prevailed at trial.).

{¶21} Lein’s second assignment of error is overruled.

{¶22} 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 issue out of this court directing the common pleas 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.

TIM McCORMACK, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR