

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1134

Appellee

Trial Court No. CR 99-3070

v.

Yilmaz Icke

DECISION AND JUDGMENT

Appellant

Decided: January 28, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Jonathan A. Bartell, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} On December 7, 1999, appellant pled no contest in the Lucas County Court of Common Pleas to the offense of aggravated vehicular assault, a violation of R.C. 2903.08(A) and a fourth degree felony. He was convicted of the offense. The trial court

imposed sentence in a judgment filed on January 12, 2000. Appellant took no direct appeal from that judgment.

{¶ 2} In this appeal, Icke appeals an April 23, 2010 trial court judgment that denied a motion to vacate his no contest plea or to permit him to withdraw it. This is the second time appellant has sought to set aside his no contest plea. He filed his original motion to vacate or to withdraw the plea on February 22, 2001. In both motions, he has asserted a failure to follow R.C. 2943.031 mandated procedure at the time of plea and ineffective assistance of counsel as grounds for relief.

{¶ 3} Icke is not a United States citizen. He is a citizen and native of Turkey. Central to his appeal is the claim that the trial court, at the time of plea, failed to comply with the requirements of R.C. 2943.031 and that the trial court should vacate the plea or permit him to withdraw the plea on that basis. "R.C. 2943.031 * * * supplies the language a trial court accepting a plea of guilty or no contest is to use to warn a noncitizen criminal defendant of the possible consequences (deportation, exclusion, or denial of naturalization) of a criminal conviction." *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 1.

Case History

{¶ 4} Under the January 12, 2000 sentencing judgment, the trial court imposed a sentence of three years community control on conditions with the first 90 days to be served at the Corrections Center of Northwest Ohio. The judgment provided that violations of the conditions of community control, "may lead to a longer or more

restrictive sanction for the defendant, up to and including a prison term of 12 months." It is agreed that appellant subsequently completed the terms of his community control without incident and met his obligations under the sentence in this case and those in a companion case.

First Motion to Vacate or Withdraw No Contest Plea

{¶ 5} In the year 2000, appellant received notice that proceedings had been initiated in Immigration Court for his removal from the United States. The notice contended that he was deportable because he was not a citizen or national of the United States, was a native of Turkey and a citizen of Turkey, that he was convicted of a violation of R.C. 2903.08(A), and that he was subject to a sentence of one year or longer because of the conviction. The notice claimed that under those circumstances appellant was subject to removal from the United States under "Section 237(a)(2)(A)(i) of the Immigration and Nationality Act (Act), as amended, in that you have been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed."

{¶ 6} On February 22, 2001, appellant filed his first motion to vacate or withdraw his no contest plea. He argued that the plea should be vacated first, because R.C. 2943.031 mandated procedure was not followed at the time of plea and, second, because he received ineffective assistance of counsel. Appellant filed a transcript of the plea hearing and copies of the notices of Immigration Court removal proceedings in support of his motion.

{¶ 7} The trial court denied the motion in a judgment filed on March 21, 2001.

Appellant took no appeal from that judgment.

April 9, 2010 Motion to Vacate or Withdraw No Contest Plea

{¶ 8} Appellant's assignments of error in this appeal also involve a claimed violation of R.C. 2943.031 and ineffective assistance of counsel:

{¶ 9} "I. The trial court erred when it overruled Appellant's Motion to Vacate No Contest Plea, without a hearing, when at the time of his plea, the trial court failed to provide the advisement pursuant to O.R.C. 2943.031(A) that his no contest plea may have possible consequences of deportation, exclusion from admission to the United States or denial of naturalization.

{¶ 10} "II. The trial court erred when it overruled Appellant's Motion to Vacate No Contest Plea, when at the time of his plea, the defense counsel failed to advise the defendant that he is deportable as a result of his plea pursuant to the recent Supreme Court Decision, *Padilla v. Kentucky*, March 31, 2010), 559 U.S. ___, Case No. 08-651."

{¶ 11} Under Assignment of Error No. I, appellant contends that the trial court erred in overruling the latest motion to vacate or withdraw plea because the trial court failed to substantially comply with the procedure set forth in R.C. 2943.031 before accepting his no contest plea. In the April 23, 2010 judgment, the trial court held that consideration of the issue was barred by res judicata because the issue of substantial compliance with R.C. 2943.031 was addressed in the March 21, 2010 judgment.

{¶ 12} The state argues that the trial court was correct both in holding that further consideration of the issue is barred by res judicata and the trial court's ruling on the merits in 2001 that there was substantial compliance with R.C. 2943.031 required procedure. Appellant has not addressed the issue of res judicata on appeal.

{¶ 13} "Under R.C. 2943.031(D), a defendant who has not received the advisement required by R.C. 2943.041(A) may move to set aside the judgment and withdraw his guilty plea. This motion and an appeal from the denial of the motion provide the exclusive remedies for an alleged violation of R.C. 2943.031(A)." *State ex rel. White v. Suster*, 101 Ohio St.3d 212, 2004-Ohio-719, ¶ 7. (Citations omitted.). Res judicata bars repeated attempts to raise R.C. 2943.031 claims. *Id.* at ¶ 8.

{¶ 14} In *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, the Ohio Supreme Court recognized that necessary proof to support such a claim may not exist within the record on direct appeal of the conviction. *State v. Francis* at ¶ 36. Here, however, the issue is not whether res judicata applies where a defendant fails to assert breach of R.C. 2943.031 procedure on direct appeal from a final judgment of conviction and sentence. Rather, appellant filed a postsentence motion to withdraw his plea under the statute and submitted material in support of the motion that would have been outside the record of any direct appeal.¹

¹Appellant filed notices of deportation proceedings in support of claimed prejudice from his plea.

{¶ 15} Appellant failed to appeal the trial court's judgment on his first motion to vacate or withdraw his no contest plea. The doctrine of res judicata prevents him from relitigating his rights under R.C. 2943.031 in subsequent motion to vacate or withdraw his plea. *State ex rel. McDonald v. Mitrovich*, 113 Ohio St.3d 167, 2007-Ohio-1258, ¶ 7-8; *State v. McDonald*, 11th Dist. No. 2003-L-155, 2004-Ohio-6332, ¶ 22; *State v. Zhao*, 9th Dist. No. 03CA008386, 2004-Ohio-3245, ¶ 7-8. Accordingly, we conclude appellant's Assignment of Error No. I is not well-taken.

{¶ 16} The state argues that appellant's claim of ineffective assistance of counsel is equally barred under res judicata. We agree. "Once ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation." *State v. Cheren* (1995), 73 Ohio St.3d 137, 138; *State v. Harper* (Aug. 28, 1998), 6th Dist. No. L-98-1126.

{¶ 17} Furthermore, as appellant is bound by the prior determination that the trial court substantially complied with the requirements under R.C. 2943.031, counsel cannot be found deficient in failing to secure compliance with the statutory procedure.

{¶ 18} We find appellant's Assignment of Error No. II is not well-taken.

{¶ 19} We conclude that substantial justice was done the party complaining and affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the court costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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