

[Cite as *State v. Voskoboynikov*, 2009-Ohio-4882.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92423

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MIKHAIL VOSKOBOYNIKOV

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-450377

BEFORE: Rocco, J., Gallagher, P.J., and Boyle, J.

RELEASED: September 17, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Mikhail Voskoboynikov appeals from the trial court's denial of his motion to vacate his guilty plea.

{¶ 2} Appellant presents one assignment of error, arguing the trial court abused its discretion in denying his motion without conducting an oral hearing, since the record reflects the court failed during his plea hearing to comply with the advisement mandated by R.C. 2943.031(A).

{¶ 3} Upon a review of the record, this court agrees. The trial court's advisement was incomplete and also was diluted, thus potentially compromising its statutory effect. Under the circumstances presented in this case, appellant's assignment of error is sustained. The trial court's order is reversed, and this case is remanded with an order for the trial court to conduct an oral hearing on appellant's motion.

{¶ 4} Appellant originally was indicted in this case in April 2004 on eleven counts; he was charged with committing drug-related offenses on three separate dates in October 2003. Eventually, he entered into a plea agreement.

{¶ 5} When the case was called for a hearing, the prosecutor informed the court that in exchange for the dismissal of eight of the counts, appellant would plead guilty to counts four, seven, and ten. These counts charged him with trafficking in cocaine in an amount less than five grams on October 17

and October 24, 2003, and, additionally, with possession of cocaine in an amount less than five grams on the latter date.

{¶ 6} In stating the potential penalties involved, the prosecutor made no reference to appellant's status as an immigrant. Appellant's attorney simply acknowledged his client had agreed to the prosecutor's offer.

{¶ 7} The trial court proceeded to address appellant in pertinent part as follows:

{¶ 8} "THE COURT: Now, you are not a U. S. Citizen, correct?"

{¶ 9} "THE DEFENDANT: Yes.

{¶ 10} "THE COURT: So I have to tell you that if you enter a plea here today, you're subject to a hearing before the Immigration and Naturalization Service, which could include the administration of a sanction up to and including deportation. Do you understand that?"

{¶ 11} "THE DEFENDANT: Yes.

{¶ 12} * *

{¶ 13} "THE COURT: * * *[You are] pleading to three counts; * * *. They're all F-5s, punishable by six to twelve months in [a] state penal institution, twenty-five hundred dollar fine, driver's license suspension, and as I said, some follow-up by the Immigration and Naturalization Service that

may occur, may not occur, and I cannot predict the outcome. Do you understand this?

{¶ 14} “THE DEFENDANT: Yes.

{¶ 15} “THE COURT: Do you have any questions?

{¶ 16} “THE DEFENDANT: No, sir.”

{¶ 17} (Emphasis added.)

{¶ 18} The trial court concluded the colloquy by suggesting to appellant that, if his criminal record consisted of only misdemeanors, the court would “work with” him. Perhaps as further reassurance, the court then added, “Hopefully, you can work with the Immigration and Naturalization Service. Other than that, any threat or promises been made to induce this plea?” (Emphasis added.) Appellant answered, “No, sir.”

{¶ 19} The trial court thereafter accepted appellant’s pleas. On January 7, 2005, the court sentenced him to a three-year term of conditional community control.

{¶ 20} The record reflects that appellant initially filed a motion to vacate his plea on March 17, 2005. Appellant argued therein that, in conducting its colloquy with him, the trial court had failed to comply with R.C. 2943.031(A). Appellant attached to his motion a copy of the transcript of his plea hearing.

{¶ 21} However, after the state filed a brief in opposition, and before the trial court ruled on appellant's motion, appellant withdrew it.¹ Appellant apparently subsequently completed his sentence without incident.

{¶ 22} On January 22, 2008, appellant filed a second motion to vacate his plea. He asserted therein that: 1) his convictions in the instant case constituted the only ones he had "since he entered the United States as a refugee over twenty-five (25) years ago from the Ukraine"; 2) he was a permanent resident; 3) he was a "national" of Ukraine; and, 4) he was not advised in accordance with R.C. 2943.031(A) of the ramifications of his plea. Appellant neglected to attach any evidentiary material to his motion.

{¶ 23} After the state filed a brief in opposition, the trial court issued a journal entry denying appellant's motion. The journal entry indicated appellant's motion was denied because he "was specifically informed by [the] court he was subject to deportation which is the sanction currently being imposed by Immigration and Naturalization Services, I.N.S." (Emphasis added.)

{¶ 24} Appellant appeals from the foregoing order. He presents the following assignment of error:

¹Appellant gave no explanation for this action.

“I. The trial court erred when it overruled Appellant’s Motion to Vacate Guilty Plea, without a hearing, when at the time of the his [sic] plea the trial court failed to provide the advisement pursuant to O.R.C. 2943.031(A) that he was subject to possible deportation, exclusion from the United States or denial of naturalization pursuant to the United States.”

{¶ 25} Appellant argues that the trial court failed during his plea hearing to “substantially comply” with the requirement set forth in R.C. 2943.031(A); therefore, it abused its discretion in denying his motion to vacate his guilty pleas without a hearing.

{¶ 26} When a trial court entertains a guilty plea from a defendant who is not a United States citizen, R.C. 2943.031(A) mandates the trial court to issue a preliminary warning as follows: the plea “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.”

{¶ 27} The Ohio Supreme Court has held that a trial court, in the first instance, must read the statutory requirement verbatim. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶46. However, in evaluating a motion to withdraw a plea, substantial compliance with the statute’s notification is acceptable. *Id.* “Substantial compliance” means that, under the totality of

the circumstances, the defendant subjectively understands the implications of his plea; the test is whether the plea would have otherwise been made. *Id.*, at ¶48.

{¶ 28} This court, as it must, has followed *Francis*. See, e.g., *State v. Naoum*, Cuyahoga App. Nos. 91662 and 91663, 2009-Ohio-618; *State v. Pineda*, Cuyahoga App. No. 86116, 2005-Ohio-6386. The trial court is required to exercise its discretion in making its decision on the defendant's motion to vacate his plea. *Francis*, supra. This court, then reviews the trial court's decision under an abuse of discretion standard. *State v. Naoum*, supra, ¶22, citing *Francis*, ¶36.

{¶ 29} The supreme court explained the process as follows: "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, * * * 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)." *Francis*, at ¶36.

{¶ 30} "[I]t sometimes is difficult for an appellate court to review a trial court's ruling on a motion to withdraw a plea to determine whether an abuse of discretion occurred when no hearing was held.

{¶ 31} “In *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715, at paragraph one of the syllabus, this court acknowledged the importance of a hearing to aid in developing a record that could be examined by a reviewing court to determine whether a trial court properly exercised its discretion in ruling on a motion to withdraw a plea. *Xie* stands for the proposition that, unless it is clear that denial of the motion is warranted, a trial court should hold a hearing. See, also, [*State v.*] *Garmendia*, supra, Montgomery App. No. 2002-CA-18, 2003-Ohio-3769, 2003 WL 21658528, at ¶12, which mentions the importance of a trial-court hearing on an R.C. 2943.031(D) motion to establish whether the defendant has met the statutory factors, including that the defendant has shown that he or she is not a citizen of the United States and that there may be immigration-related consequences from the conviction resulting from the plea. In some situations when a hearing should have been held, a trial court's failure to have held a hearing amounts to an abuse of discretion. We find this case to be one in which a hearing should have been held.” *Francis*, supra at ¶50-51. (Emphasis added.)

{¶ 32} As noted in *Francis*, the legislature placed the R.C. 2943.031(A) advisement in quotation marks for a reason; the statute is clear that, at the plea hearing, the trial court must advise the non-citizen defendant of three separate consequences that might result from a guilty plea: 1) deportation; 2)

exclusion from admission into the United States; and 3) denial of naturalization.

{¶ 33} In this case, the trial court informed appellant that he “could” be “sanctioned” by the immigration authorities “up to” possible “deportation.” In spite of the statute’s mandate, no other consequence was stated.

{¶ 34} In addition, the trial court later indicated that immigration authorities might do some “follow-up” on his case, but diluted this comment by indicating appellant nevertheless might be able to “work with” them. This was insufficient for purposes of the statute.² *Id.* See, also, *State v. Schlaf*, Cuyahoga App. No. 90825, 2008-Ohio-6151.

{¶ 35} Nevertheless, the trial court denied appellant’s motion without a hearing. The court justified its decision on the basis that it “specifically informed” him he was subject to deportation “which is the sanction currently being imposed” by the federal immigration authorities.

{¶ 36} Nothing in the record, however, suggests how the trial court came by this information. Thus, this court is forced to conclude that the trial court gathered this information without affording appellant any opportunity to respond to it. *Cf., State v. Pineda, supra.*

²Since appellant’s plea occurred after the events of September 11, 2001, when immigration-related consequences became much more likely, such comments by the trial court are particularly troublesome.

{¶ 37} Since the trial court failed to provide the R.C. 2943.031(A) advisement verbatim, and no evidentiary materials are extant, only at a hearing could the trial court fully explore whether appellant subjectively understood the immigration-related consequences of his plea.³ Under the circumstances presented in this case, therefore, the trial court abused its discretion in issuing its decision on appellant's motion without conducting a hearing. *State v. Oluoch*, Franklin App. No. 07AP-45, 2007-Ohio-5560.

{¶ 38} For the foregoing reasons, appellant's assignment of error is sustained.

{¶ 39} The trial court's order is reversed, and this case is remanded with an order that the trial court conduct an oral hearing on appellant's motion to withdraw his plea.

It is ordered that appellant recover from 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. Case remanded to the trial court for further proceedings.

³Indeed, the hearing might reveal that appellant objectively understood the consequences of his plea.

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

KENNETH A. ROCCO, JUDGE

MARY J. BOYLE, J., CONCURS;
SEAN C. GALLAGHER, P.J.,
CONCURS IN JUDGMENT ONLY