

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,

Plaintiff-Appellant,

v.

ARTEM L. FELDMAN,

Defendant-Appellee.

Case No. 2009-1987

On Appeal from the  
Lake County Court of Appeals,  
Eleventh Appellate District

Court of Appeals Case No. 2009-L-052

**NOTICE OF COURT OF APPEALS'S DECISION ON  
MOTION FOR A STAY OF EXECUTION OF JUDGMENT**

CHARLES E. COULSON (0008667)  
PROSECUTING ATTORNEY  
LAKE COUNTY, OHIO

Teri R. Daniel (0082157) (COUNSEL OF RECORD)  
ASSISTANT PROSECUTING ATTORNEY  
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RECEIVED  
DEC 01 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

COUNSEL FOR APPELLANT, STATE OF OHIO

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FILED  
DEC 01 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

COUNSEL FOR APPELLEE, ARTEM B. FELDMAN

Now comes the State of Ohio, by and through Charles E. Coulson, Lake County Prosecuting Attorney, and Teri R. Daniel, Assistant Prosecuting Attorney, and respectfully informs this Court that the State's motion to certify a conflict, filed with the Eleventh District Court of Appeals, has been overruled. A copy of the judgment entry is attached hereto.

Respectfully submitted,

CHARLES E. COULSON (0008667)  
PROSECUTING ATTORNEY

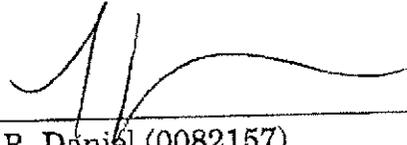


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**PROOF OF SERVICE**

A copy of the foregoing Notice, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Rhys B. Cartwright-Jones, Esquire, 100 Federal Pl. East, Suite 101, Youngstown, OH 44503-1810, on this 18 day of December, 2009.



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Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

**CHARLES E. COULSON**  
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December 1, 2009

Rhys B. Cartwright-Jones, Esquire  
100 Federal Pl. East, Suite 101  
Youngstown, OH 44503-1810

Re: STATE OF OHIO vs. ARTEM L. FELDMAN  
COURT OF APPEALS CASE NO: 2009-L -052

Dear Mr. Cartwright-Jones:

Enclosed please find a copy of the State's Notice filed in reference to the above-captioned case.

Thank you,

**CHARLES E. COULSON**  
**PROSECUTING ATTORNEY**

Teri R. Daniel

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Teri R. Daniel  
ASSISTANT PROSECUTING ATTORNEY

Enclosure

STATE OF OHIO )  
 )SS.  
COUNTY OF LAKE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,  
Plaintiff-Appellee,

JUDGMENT ENTRY

CASE NO. 2009-L-052

- vs -

ARTEM L. FELDMAN  
Defendant-Appellant.

RECEIVED  
COURT OF APPEALS  
NOV 27 2009  
JENNIFER KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

This case is presently before this court upon the motion of appellee, the State of Ohio, for certification of a conflict to the Supreme Court of Ohio pursuant to App.R. 25. Appellant, Artem L. Feldman, has filed a brief in opposition to the State's motion to certify.

On October 30, 2009, this court issued its opinion and judgment entry in *State v. Feldman*, 11th Dist. No. 2009-L-052, 2009-Ohio-5765, reversing the judgment of the trial court and remanding the matter for further proceedings. Our holding was premised upon the trial court's failure to substantially comply with the dictates of R.C. 2943.031 when Mr. Feldman, a non-citizen defendant, entered his plea of guilty to felony-four grand theft and felony-five forgery in June of 2000. In so holding, this court observed that "although a trial court need not provide a verbatim recitation of each consequence [set forth under R.C. 2943.031], it must provide some meaningful notification of all three separate statutory consequences (i.e., deportation, exclusion, and denial of naturalization). By failing to at least touch upon each possible consequence



contemplated by the General Assembly, a court cannot meet minimal standards of due process." *Feldman*, supra, at ¶42.

The State contends this holding stands in conflict with specific holdings rendered by the Second, Ninth, and Twelfth Appellate Districts; to wit, respectively, *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425; *State v. Gomez*, 9th Dist. No. 02C008036, 2002-Ohio-5255; and *State v. Lamba*, 2d Dist. No. 18757, 2001-Ohio-7024. The State contends that these districts have interpreted the substantial compliance standard to require something less than a reference to each separate statutory consequence and therefore stands in direct conflict with this court's holding in *Feldman*. The State submits the following issue for certification:

"Whether substantial compliance with R.C. 2943.031, as required by *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894. 821 N[.]E. 2d 355, requires a trial court's advisement to include a reference to each particular immigration consequence in the statute."

In *Feldman*, this court observed, in passing, that other courts have held that "substantial compliance does not demand an allusion to each separate consequence [set forth under R.C. 2943.031]." *Feldman*, supra, at ¶43. This court then cited the three cases the State now maintains stand in conflict with the underlying judgment. However, in making this remark, we were simply pointing out that other courts have previously affirmed trial courts' decisions denying a defendant's motion to withdraw where the record indicated less than all three statutory consequences were part of those trial courts' R.C. 2943.031

advisement. Unlike this court's holding in the *Feldman*, none of the cases cited specifically announced a positive rule regarding what constitutes a sufficient advisement.

First, *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425 (*Encarnacion II*), a Twelfth District case, resulted from an appeal of a trial court's ruling that it substantially complied with R.C. 2943.031 pursuant to *Francis*. *Encarnacion*, however, was actually an appeal from an order which was the result of a previous appellate ruling reversing the trial court's acceptance of a guilty plea for failure to comply with R.C. 2943.031. See *State v. Encarnacion*, 12th Dist. No. CA2003-09-225, 2004-Ohio-7043 (*Encarnacion I*). In *Encarnacion I*, the court reversed and remanded the matter based upon plain error, concluding "the trial court's error prejudiced appellant when it accepted his guilty plea which was made after only a partial notification of the consequences to which he was exposed." *Id.* at ¶31. Immediately prior to the release of *Encarnacion I*, the Supreme Court announced its holding in *Francis*. On remand, and, in light of *Francis*, the trial court ruled that the defendant failed to demonstrate that he was prejudiced by the court's failure to provide him with a verbatim statement of the R.C. 2943.031 warnings. Thus, the trial court held its original advisement, irrespective of its content, met the substantial compliance standard set forth in *Francis*.

On appeal in *Encarnacion II*, the defendant asserted the trial court's decision should be reversed because: (1) its failure to "order a new trial" in light of the ruling in *Encarnacion I*. *Id.* at ¶47-51; (2) its improper reliance on *Francis*

as an intervening decision and consequent failure to adhere to the law of the case doctrine. *Id.* at ¶¶52-62; (3) its failure to dismiss his indictment due to alleged speedy trial violations. *Id.* at ¶¶63-68; and (4) trial counsel was ineffective due to his improper reliance on *Francis* as an exception to the law of the case doctrine and his failure to assert a violation of the defendant's speedy trial rights. *Id.* at ¶¶69-73. In *Encarnacion II*, the defendant did not specifically raise the issue of the sufficiency of the trial court's warning and, therefore, no "rule of law" was announced on this issue. We cannot certify a conflict where the Twelfth District's judgment on a rule of law is not in conflict with the judgment of this court.

Next, *State v. Gomez*, 9th Dist. No. 02C008036, 2002-Ohio-5255 and *State v. Lamba*, 2d Dist. No. 18757, 2001-Ohio-7024 do not fit within the scope of the issue the State moves this court to certify. The issue the State submits asks whether *Francis* demands a reference to each particular immigration consequence set forth under R.C. 2943.031. However, both *Gomez* and *Lamba* were decided prior to the rule announced in *Francis*. Further, the courts in those cases employed a different standard (Crim.R. 32.1) to analyze a motion to withdraw under R.C. 2943.031 than that set forth in *Francis*. That said, the holding in *Feldman* represents this court's interpretation of the Supreme Court's holding in *Francis*. Given the timing of their release and the standard utilized in their opinions, the holdings in *Gomez* and *Lamba* cannot logically stand in conflict with the underlying opinion of this court.<sup>1</sup>

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1. Even if the rulings in these cases ostensibly conflicted with this interpretation, *Francis*, as we construe it, would supersede their rulings.

Because we discern no conflict of law between our holding in *Feldman* and the holdings of *Encarnacion*, *Gomez*, or *Lamba*, the State's motion to certify is hereby overruled.

  
\_\_\_\_\_  
PRESIDING JUDGE MARY JANE TRAPP

FOR THE COURT