

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	)	Case No. 2009-1987
	)	
Plaintiff-Appellant,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
ARTEM L. FELDMAN	)	
	)	Court of Appeals Case No. 2009-L-052
Defendant-Appellee.	)	

REPLY BRIEF OF APPELLANT STATE OF OHIO

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## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW NO. I

SUBSTANTIAL COMPLIANCE WITH R.C. 2943.031 DOES NOT MANDATE REFERENCE TO EACH OF THE THREE SEPARATE STATUTORY IMMIGRATION CONSEQUENCES.

**A. Mr. Feldman's statement of facts is not supported by the record.**

The Statement of Facts in Mr. Feldman's merit brief is not supported by the record in this case. No evidence was ever presented supporting Mr. Feldman's assertions that he was scammed by a man named Sergei or that he would not have entered a plea had he been advised of all three immigration consequences. Mr. Feldman did not even provide an affidavit swearing to these assertions at any point in the proceedings. As found by the trial court,

The only evidence that the defendant would not have entered into the plea agreement had he been advised that his plea could lead to deportation, exclusion, or denial of naturalization is the affidavit of Deborah Livingston, in which she indicates she asked if he would have pled guilty if it had been explained that he could be excluded and he responded "no." No evidence is presented indicating that the defendant did not understand that as a result of his conviction he could be sent back to Russia.

(T.d. 44 at ¶17).

Additionally, some facts provided by Mr. Feldman are simply inaccurate. Mr. Feldman states, "But in the case of inadmissibility, one who leaves and comes back to the U.S. finds oneself shocked at the boarder [sic], unable to return 'home.' This is what happened to Mr. Feldman." (Appellee's Br. 11). While Mr. Feldman was questioned upon reentering the country, he was not detained at the airport as his brief

suggests. He was permitted to return home, and proceedings were commenced against him. Mr. Feldman suggests that a person being “deported” is in a better position than one being “excluded” because “[i]f the government charges one with deportability, one goes through the proceedings, and if one loses, one packs his things and makes arrangements to leave.” (Appellee’s Br. 11). But the removal proceedings for both of these scenarios are the same. Mr. Feldman was not detained at the border and was able to return home.

**B. Courts should analyze a defendant’s subjective understanding of the possible immigration consequences he faced instead of whether three particular words were mentioned.**

In *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-8694, 820 N.E.2d 355, this Court addressed the standard that applies to a R.C. 2943.031 advisement. This Court held that while reading the statute verbatim was the better practice, strict compliance was not necessary:

“Although it would have been better practice for the trial court to have read the statute verbatim, strict compliance was not necessary to put the defendant on notice that a conviction could have implications beyond the state criminal justice system. To allow a defendant now, years after the charges were brought, and after the evidence has been destroyed, to withdraw a plea into which he entered knowingly and voluntarily would be to assert *form over substance*.”

Id. at ¶47, quoting *State v. Malcolm* (2001), 257 Conn. 653, 778 A.2d 134, 141 (emphasis added). This Court further held that if the warning was not given verbatim at the time of a defendant’s plea, a trial court considering a defendant’s motion pursuant to R.C. 2943.031(D) must exercise discretion and determine whether the

advisement substantially complied with R.C. 2943.031(A). *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. \* \* \* The test is whether the plea would have otherwise been made.’” *Id.* at ¶48, quoting *State v. Nero* (1990), 54 Ohio St.3d 106, 108, 564 N.E.2d 474.

Both Mr. Feldman and Amicus Curiae argue that substantial compliance with R.C. 2943.031(A) requires a reference to each of the three immigration consequences. But this view of substantial compliance misses the big picture and asserts form over substance.

Amicus Curiae insists that “[t]he *only* responsibility of the trial court judge is to address the three potential consequences that are specifically set forth by statute.” (Amicus Curiae Br. 23) (emphasis in original). This view of a trial court judge’s responsibilities regarding R.C. 2943.031 is incorrect. The statute itself requires that the trial court determine whether the defendant understands the advisement. R.C. 2945.031(A). Saying three particular words alone does not provide an understanding of what these consequences actually mean. Federal immigration law is complex. Amicus Curiae spent a majority of his brief defining and explaining the terms. And while Amicus Curiae does not believe that the complexity of the law is an issue in this case (Amicus Curiae Br. 23), it certainly affects whether or not a defendant understands the consequences that he faces, and therefore, whether there was substantial compliance.

In some cases, an allusion to all three consequences may be required for substantial compliance. Substantial compliance must be determined on a case-by-case basis because a court must look at the subjective understanding of each individual defendant. The finding of what a defendant subjectively understands is a factual finding that is within the trial court's sound discretion. This is precisely what happened in this case. The trial court looked at Mr. Feldman's subjective understanding of the possible consequences that he faced at the time of his plea. The Eleventh District Court of Appeals then threw out the factual findings of the trial court and imposed its own bright-line rule. The rule promulgated by the appellate court is not only unsupported by law, but is contrary to the standard set forth by this Court in *Francis*. This rule no longer requires a court to question whether a defendant subjectively understood the implications of his plea and whether the plea would have otherwise been made.

Both Mr. Feldman and Amicus Curiae aver that a defendant cannot have an understanding of something that he has never heard. The United States Supreme Court disagrees: "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.'" *Padilla v. Kentucky* (2010), --- U.S. ---, 130 S.Ct. 1473, 1481-1482, quoting *INS v. St. Cyr* (2001), 533 U.S. 289, 322, 121 S.Ct. 2271. While immigrants may not understand terms of art like "exclusion," "removal," and "inadmissibility," they do generally understand the colloquial term

“deportation”. Given the three immigration consequences listed in R.C. 2943.031(A), an advisement of deportation is certainly the most important. Although Amicus Curiae explains the intricacies of the differences between “deportation” and the other consequences, deportation is all-encompassing. A defendant understands that if he is deported from the United States that he cannot become a citizen. Also inherent in deportation is the fact that a person who is deported is not allowed to reenter the country. Mr. Feldman and Amicus Curiae’s view in effect asserts form over substance. A defendant’s subjective understanding is more important than the words being used when determining whether there was substantial compliance.

**C. Changes in federal immigration law are relevant to the analysis of a defendant’s subjective understanding.**

Mr. Feldman argues that changes in the federal immigration law are irrelevant to this case. (Appellee’s Br. 3). But that ignores the big picture. Ohio has no immigration consequences of its own. Any laws dealing with immigration are federal. When R.C. 2943.031 was enacted in 1989, there were two equally important purposes of the statute. *State v. Hernandez-Medina*, 2<sup>nd</sup> Dist. No. 06CA0131, 2008-Ohio-418, at ¶29. The first purpose of the statute was to inform non-citizen defendants of the “particular potential” immigration consequences. *Id.* The other purpose was for a trial court to “‘determine that the defendant understands the advisement.’” *Id.*, quoting R.C. 2943.031. Because the first purpose of the statute was to inform a defendant of the immigration consequences that he faces, the consequences provided

by the trial court should reflect the consequences that are actually in effect at the time of the defendant's plea.

At the time of the statute's enactment, deportation and exclusion were two possible federal immigration consequences. At that time, persons legally residing in the United States after a lawful inspection were free to come and go as they pleased as long as they left the country for "brief, casual, and innocent" trips abroad; they were not considered to be seeking admission when they returned. This is commonly referred to as the *Fleuti* Doctrine. See, generally, former Immigration and Nationality Act (INA), 8 USC §§ 1101 et seq.; Vail, *Essentials of Removal and Relief* (2006) 71, Chapter 3; *Rosenberg v. Fleuti* (1963), 374 U.S. 449, 83 S.Ct. 1804.

But in 1996, Congress completely revised federal immigration laws with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which eliminated the terms "deportation" and "exclusion" as terms of art in federal immigration law. Instead, these concepts were replaced by the term "removability". *Essentials of Removal and Relief* 12-13, Chapter 1. Additionally, the IIRIRA completely revised the *Fleuti* Doctrine. Legal permanent residents who had previously been convicted of certain crimes related to moral turpitude were considered to be seeking new admission and were required to prove admissibility when returning to the United States from abroad. *Id.* at 71, Chapter 3. In other words, after the amendment of the statute, an individual with any type of past criminal record that

might be a ground of inadmissibility can be found inadmissible upon return to the country even if the person had previously been admitted after a lawful inspection. *Id.*

It is incorrect that Mr. Feldman claims his removal is now most similar to the antiquated term “exclusion”. In fact, at the time he pleaded guilty in 2000, the federal law had already changed, and neither the term deportation nor exclusion existed as a concept in the law. Moreover, under the law in existence prior to 1996, Mr. Feldman would have been deported as opposed to excluded as he claims. At that time, permanent legal residents like Mr. Feldman were free to enter and exit the country under the *Fleuti* Doctrine as long as their trips abroad were “brief, casual, and innocent”. Thus, he would not have been excluded upon attempting to reenter the country under the law upon which R.C. 2943.031 is based.

It is also irrelevant that Mr. Feldman claims his removal is now most similar to the antiquated term “exclusion”. Mr. Feldman is splitting hairs between the terms “exclusion” and “deportation” instead of focusing on whether he would have otherwise entered a plea to determine whether there was substantial compliance. There is no evidence in the record that Mr. Feldman did not have a subjective understanding of the potential immigration consequences that he faced. In analyzing whether there was substantial compliance, Judge Rice, in dissent, correctly found that the substantial compliance standard was met:

Here, the trial court not only warned [Mr. Feldman] of the possibility of deportation, but also alerted [Mr. Feldman] that his plea could subject him to certain immigration laws over which the court had no control. [Mr. Feldman] stated he was aware of these potential consequences, but still

wished to plead guilty pursuant to the negotiated plea bargain. The record also indicates that counsel discussed the potential impact pleading guilty would have on his status as a non-citizen resident of the United States. There is no indication that counsel misinformed [Mr. Feldman] nor is there any allegation that counsel was ineffective.

\* \* \*

[T]he record is devoid of any testimony or evidence (either from [Mr. Feldman] or from his trial counsel) that the trial court's failure to warn him of his immigration status affected his plea or prejudiced the bargain he received at the time he entered the plea. As a result, I would hold [Mr. Feldman] failed to provide any basis for this court to conclude that he would not have entered his plea if the court gave a more detailed warning.

*Feldman* at ¶¶ 62, 65 (Rice, J., dissenting).

Not only are the changes in immigration law relevant to a substantial compliance analysis, but necessary. Since defendants are being advised of terms that no longer parallel federal immigration law, it is more important than ever to look to a defendant's subjective understanding as opposed to the specific words provided to the defendant by the trial court.

**D. Case law from Ohio district courts of appeals varies on what constitutes substantial compliance.**

Cases from Ohio district courts of appeals vary widely on what constitutes substantial compliance in terms of a R.C. 2943.031 advisement. Four cases hold that an advisement that did not mention all three immigration-related consequences could meet the definition of substantial compliance. See *State v. Oluoch*, 10<sup>th</sup> Dist. No. 07AP-45, 2007-Ohio-5560; *State v. Lopez*, 6<sup>th</sup> Dist. No. OT-05-059, 2007-Ohio-202; *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425, 861 N.E.2d 152; *State v. Pineda*,

8<sup>th</sup> Dist. No. 86116, 2005-Ohio-6386. These cases analyze a defendant's subjective understanding as opposed to the number of immigration consequences mentioned in the trial court's advisement. Conversely, there are two cases besides *Feldman* which have held that substantial compliance requires an advisement on all three immigration consequences. See *State v. Naoum*, 8<sup>th</sup> Dist. Nos. 91662, 91663, 2009-Ohio-618; *State v. Ouch*, 10<sup>th</sup> Dist. No. 08AP-79, 2008-Ohio-4894. These cases focus on the number of consequences in the advisement instead of whether the defendant would have otherwise entered a plea.

Mr. Feldman argues that "a full meditation on subjective understanding was not necessary to reach the Eleventh District's conclusion." (Appellee's Br. 14). But a "full meditation on subjective understanding" should be necessary for a R.C. 2943.031 analysis because this Court provided the standard for what is required: "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." *Francis* at ¶48, quoting *Nero* at 108. The Eleventh District Court of Appeals ignored this mandate and created its own bright-line rule.

Mr. Feldman cites *Olouch*, *Lopez*, *Encarnacion*, and *Pineda* and states that "[e]ach of these cases would fail a substantial compliance test." (Appellee's Br. 14). Each of these cases actually passed a substantial compliance analysis by their respective district court of appeals. While these cases may not pass the strict

compliance test prescribed by the Eleventh District Court of Appeals, they survived the standard set forth by this Court as applied by the appellate courts.

Even cases in which the appellate courts have found that substantial compliance was not met when the trial courts provided less than all three consequences are consistent with the State's position that each individual defendant's subjective understanding must be considered. A bright-line rule eliminates the factual case-by-case determination.

**E. *Padilla v. Kentucky* demonstrates the attitude of the Supreme Court of the United States towards immigration-related issues.**

R.C. 2943.031 is inextricably tied to federal immigration law. The State of Ohio does not have the authority to promulgate its own immigration laws and create its own immigration consequences. *Padilla v. Kentucky*, while not directly on point with the instant case, provides insight into the attitude of the Supreme Court of the United States. The Court recognized the importance of accurate legal advice for noncitizens and the complexity of immigration consequences. This attitude is contrary to the attitude displayed by the Eleventh District Court of Appeals, which essentially requires trial courts to provide antiquated, inaccurate legal advice.

Amicus Curiae argues that the difficulty faced by trial counsel in advising a noncitizen defendant of the potential immigration consequences does not also apply to a trial court. (Amicus Curiae Br. 23). But a trial court's duty is not limited to solely reading a statute. A trial court is entrusted with the responsibility of establishing that a defendant enters a knowing and voluntary plea. Part of this responsibility includes

ensuring that a defendant is properly advised of his rights and the consequences associated with entering a plea. If a defendant is misadvised of the consequences that he faces, his plea is not knowing and voluntary. By simply reading R.C. 2943.031 to a defendant, a trial court is not only providing out-dated consequences but failing to ensure that a defendant subjectively understands what he is being advised of. A trial court must provide a noncitizen defendant with enough accurate information to allow the defendant to stop entering a plea and seek counsel from an attorney familiar with the intricacies of immigration law. A common pleas judge generally has no more knowledge of immigration law than defense counsel but is entrusted with greater responsibility. Thus, *Padilla* should provide guidance on the issues involved in this case.

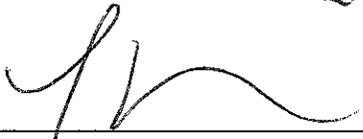
**CONCLUSION**

For the reasons discussed above, this Court should reverse the decision of the Eleventh District Court of Appeals in *Feldman* and hold that substantial compliance with R.C. 2943.031 does not mandate reference to each of the three possible immigration consequences. Instead, substantial compliance requires a court look at a defendant's subjective understanding that he faced possibly immigration-related consequences under the totality of the circumstances.

Respectfully submitted,

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**PROOF OF SERVICE**

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