

ORIGINAL

IN THE OHIO SUPREME COURT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ISSA KONA

Defendant-Appellant

Supreme Court Case No.

14-0733

On Appeal from Eighth Dist. App.  
No. CA-13-100191

DEFENDANT-APPELLANT ISSA KONA'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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**I. THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION; INVOLVES A FELONY; AND CONCERNS MATTERS OF PUBLIC OR GREAT GENERAL INTEREST.**

Noncitizen defendants who previously entered the diversion program in Cuyahoga County, Ohio are left without any remedy to avoid immigration consequences that attach to the program due to the arbitrary prerequisite of providing a written admission of guilt to enter said programs. These noncitizen defendants are being denied due process, are being forced to enter pleas under duress, and are making pleas that are not knowingly, voluntarily or intelligently made due to the trial court's failure to provide the required warning concerning potential immigration consequences pursuant to R.C. 2943.031.

This case arises out of a first time arrest of Defendant-Appellant Issa Kona ("Kona"), whom was charged with Robbery arising out of the theft of a \$79.93 battery charger. As a first time offender, Kona was eligible to apply to enter the Cuyahoga County Diversion Program. In order to be admitted into the program, Kona was required to execute a written admission of guilt. Kona completed the written admission of guilt and was admitted into the program with the approval of the trial court. Upon his successful completion of the program, the charges were dismissed and the record sealed. However, his legal troubles did not end there.

After successfully completing the program, Kona applied for U.S. citizenship and was informed that he would be deported as soon as his application was finalized as his written admission of guilt and participation in the diversion program constituted a conviction for immigration purposes pursuant to 8 U.S.C. 1101(z)(48)(A). Kona has been advised by several immigration attorneys that in order to prevent his deportation, he must have his written admission of guilt withdrawn by the court in order to have the conviction vacated.

Unfortunately, a manifest injustice occurred as the Eighth District has determined that a written admission of guilt is not the functional equivalent of a guilty or no contest plea for state court purposes and therefore, noncitizen defendants are not entitled to a warning pursuant to R.C. 2943.031, even though the same written admission of guilt constitutes a guilty plea for federal immigration purposes. To compound this error, the trial court and the Eighth District have both erroneously found that they have no ability to correct this manifest injustice. The decisions of the trial court and Eighth District contradict the spirit and intentions of R.C. 2943.031, R.C. 2935.36, and the Cuyahoga County Diversion Program as well as the clear language of R.C. 2943.031. R.C. 2943.031(A) requires that the trial court personally address a noncitizen defendant prior to accepting any plea of guilty or no contest and provide the following warning:

Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor other than a minor misdemeanor if the defendant previously has not been convicted of or pleaded guilty to a minor misdemeanor, the court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:

"If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) 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."

Upon request of the defendant, the court shall allow him additional time to consider the appropriateness of the plea in light of the advisement described in this division.

The language of R.C. 2943.031 does not limit the warning to matters considered to constitute a guilty and/or no contest plea only under State law but rather applies to any plea of guilty or of no contest. By accepting his admission into the program which required the written admission of guilt as a condition precedent, the trial court accepted a guilty and/or no contest plea (at the very least for federal immigration purposes) and was required to provide the aforementioned warning.

However, Kona, and other noncitizen defendants that participated in the program and other similar diversion programs throughout Ohio, were not provided with this advisement.

R. C. 2943.031 was enacted in response to Congressional measures limiting deportation relief by revoking the authority of the U.S. Attorney General to grant discretionary waivers of deportation. *State v. Yanez*, 150 Ohio App.3d 510, 513, 2002-Ohio-7076, 782 N.E.2d 146. Thus, the purpose of the law was to inform noncitizens of potential consequences of the plea as it pertains to deportation, exclusion and/or naturalization so that the noncitizen could knowingly, voluntarily, and intelligently enter into a plea without later surprise as to the immigration consequences of that plea. *Id.* By enacting R.C. 2943.031, the General Assembly has transformed what could have otherwise been considered a collateral consequence of a guilty or no contest plea into a direct consequence. *Id.* at ¶8.

Diversion programs are permitted by the legislature to rehabilitate “adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.” R.C. 2935.36(A). The purpose of a diversion program is to effect rehabilitation without the stigma of guilt. *Daher v. City of Cleveland*, 8<sup>th</sup> Dist. App. No. 48579 (March 28, 1995) at dissent. As Judge Jackson noted in the dissent in *Daher*, “If a diversion program is to be effective, the collateral consequences must be less than the consequences of a conviction of the charged offense.” *Id.* The First District has noted that the legislature’s warning requirement provided in R.C. 2943.031 “is an acknowledgement, at least to some defendants, the collateral consequences of a plea, namely deportation, exclusion from admission to the United States, and the denial of naturalization, may well be a more serious sanction than the imposition of a prison term.” *Yantz* at ¶29. A noncitizen defendant will always be deemed to have plead guilty or no contest and have been convicted of the crime charged for immigration purposes

when he enters a diversion program that requires an admission of guilt, and therefore, they should, at minimum, be warned of the consequences of same.

In *Daher*, the Eighth District found that because “success in a diversion program is the constructive equivalent of serving a sentence for the crime charged,” the defendant in that case was guilty of being a “gambling offender” due to his mere participation in the diversion program. Judge Jackson noted in his dissent that: “By the majority’s opinion, a defendant is faced with the prospect of losing his property upon completion of a diversion program; the same defendant may instead demand a jury trial where upon acquittal of the charges, no forfeiture would occur. Such a result can hardly be said to promote a defendant’s participation in a diversionary program.” *Id.*

The same result is reached in the instant matter. Had Kona properly been advised that his mere participation in the program placed him at risk for deportation, Kona would have chosen to move forward to trial, where if acquitted, he would not face such a substantial penalty. Forcing a noncitizen to admit their guilt in order to participate in the program without warning the noncitizen of the consequences of same is manifestly unjust, results in a plea that is not knowingly, voluntarily, and intelligently made, violates due process and violates the intent, spirit and goals of R.C. 2943.031, R.C. 2935.36, and the diversion program.

Even more disturbing is that Ohio courts are now finding that because of the structure of the diversion program, there is allegedly no remedy available to prevent this manifest injustice. E.g. *State of Ohio v. Issa Kona*, 8<sup>th</sup> Dist. App. No. 100191 (March 27, 2014) at ¶19; *Willoughby Hills v. Qasim*, 11<sup>th</sup> Dist. No. 2006-L-199, 2007-Ohio-2860. The requirement to submit an admission of guilt is the equivalent of pleading guilty for immigration purposes. Because there is a guilty and/or no contest plea and punishment (i.e. time served upon the successful completion of the diversion program), a conviction exists for immigration purposes. Without a

way to vacate the written admission of guilt as part of the dismissal process or to subsequently vacate the written plea though R.C. 2943.031 or Crim.R. 32.1, a noncitizen defendant faces unintended immigration consequences by choosing to participate in a program designed to reduce the stigma of guilt and to prevent such unintended consequences.

This manifest injustice could have easily been prevented. The trial court very easily could have asked the defendant if he was a U.S. citizen and then apprised him of the potential immigration consequences prior to allowing the defendant into the program. As the Cuyahoga County Prosecutor requires a written admission of guilt as a condition to enter the program, the trial court was required to provide this warning pursuant to R.C. 2943.031. Interestingly, the Cuyahoga County Prosecutor has since revised the program to provide this necessary and required warning, and as of January of 2014, now requires a guilty plea to be made on the record.

As this case raises a substantial constitutional question of due process; involves a felony; and concerns matters of public or great general interest, this Honorable Court should grant jurisdiction and make a determination upon the merits of this matter.

## **II. STATEMENT OF THE CASE AND FACTS**

Kona is not a U.S. citizen, but a citizen of Palestine and has resided in the United States pursuant to a Green Card since 2002. He has been married for 18 years, has four daughters (all U.S. citizens), owns his own home, has been employed at O'Brien Cut Stone Co. for 8 years as a laborer and is a member of St. George Orthodox Church. He is living under the fear and specter of being dragged from his family, community and home every day and being deported back to Palestine. Words cannot describe the anxiety he has lived with every day for the past several years as to whether he will be arrested, removed from his family and deported.

After Kona was arrested and charged with two counts of Robbery, counsel for Kona sought guidance from an immigration attorney, who advised him that a Robbery or Attempted Robbery conviction would be a deportable offense. Kona requested to apply to the Cuyahoga County Diversion Program, mistakenly believing that he could resolve the charges without the fear of any immigration consequences that he may have faced if convicted at trial. The prosecution represented that his record would be expunged and/or sealed and the case dismissed without further consequences if he successfully completed the program.

As part of his entry into the program, Kona was required to complete a Diversion Packet, which required him to “admit his guilt, in regard to the pending charges, in a written statement” as a condition precedent to admission into the diversion program. Therefore, for all intents and purposes, this admission of guilt is tantamount to a guilty or no contest plea. However, at no time was Kona advised pursuant to R.C. 2943.031(A). Kona further was never advised that the admission of guilt or his participation in the program would result in a conviction for immigration purposes and subject him to deportation, exclusion from admission to the U.S. and/or denial of naturalization.

While the Diversion Packet provided a Waiver of Rights, the form similarly did not advise Kona of the rights provided pursuant to R.C. 2943.031, and Kona never waived any such rights. The program has clearly discovered the need to inform a defendant of the possibility of immigration consequences, as the Diversion Packet has since been revised to include the applicable warning pursuant to R.C. 2943.031 and most recently, a guilty plea on the record. Upon Kona’s submission of his written admission of guilt and approval of the Prosecutor, the trial court admitted Kona into the program:

IN ACCORDANCE WITH THE PROVISIONS OF R.C. 2935.36, THE PROSECUTOR’S OFFICE HAS FOUND THAT THE DEFENDANT HAS MET

ELIGIBILITY REQUIREMENTS FOR ACCEPTANCE INTO THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM. THE DEFENDANT, AS A CONDITION OF PARTICIPATION IN THE PROGRAM, HAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS/HER CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL, FROM THE DATE OF HIS/HER REFERRAL TO THE PROGRAM, UNTIL THE DATE YOU HIS/HER PARTICIPATION IN THE PROGRAM TERMINATES. SPECIFICALLY, THE DEFENDANT HAS WAIVED HIS/HER RIGHT TO HAVE THE CASE BROUGHT TO TRIAL WITHIN 90 DAYS OF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS INCARCERATED, OR 270 DAYS IF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS NOT INCARCERATED. FURTHERMORE, IF THE DEFENDANT FAILS TO COMPLETE THE PROGRAM, HE/SHE HAS GIVEN UP THE RIGHT TO HAVE THE GRAND JURY TAKE FINAL ACTION ON THIS CASE AND AGREES TO BE CHARGED BY WAY OF INFORMATION. THE DEFENDANT HAS WAIVED ALL PERIODS OF LIMITATION ESTABLISHED BY STATUTE OR RULE(S) OF COURT, THAT ARE APPLICABLE TO THE OFFENSE(S) FOR WHICH HE/SHE MAY BE CHARGED. IN ALL CASES ADMITTED INTO THE DIVERSION PROGRAM, THE DEFENDANT SHALL BE GRANTED A \$1000.00 PERSONAL BOND (CSR), AND SHALL BE PLACED UNDER THE SUPERVISION OF PROBATION DEPARTMENT'S COURT SUPERVISED RELEASE PROGRAM/DIVERSION UNIT. UPON CONSIDERATION, THE COURT HEREBY APPROVES THE DEFENDANTS PARTICIPATION IN SAID PROGRAM, AND ORDERS THAT THIS CASE TO BE PLACED IN AN INACTIVE STATUS UNTIL FURTHER NOTICE.

Journal Entry dated October 26, 2006. The trial court merely entered a Journal Entry and never brought Kona into open court to discuss the rights he was waiving or engage in any meaningful colloquy. The trial court never verified that the admission of guilt was knowingly, voluntarily or intelligently made, and failed to advise Kona as to the potential of deportation, exclusion from admission to the U.S. or the potential for denial of naturalization based upon his written admission of guilt and entry into the diversion program.

Upon his successful completion of the program the charges were dismissed and the record was sealed. Kona was under the mistaken belief that when the dismissal occurred, his fight over these charges had concluded. However, under federal immigration law a conviction includes an admission of guilt made in conjunction with a diversion program. 8 U.S.C.

1101(a)(48)(A). Kona was never advised that a conviction for purposes of the federal immigration statute would include admission into the diversion program even when the charges would be dismissed and his record expunged upon his successful completion of the program. In addition, the trial court failed to inquire as to whether or not Kona was a U.S. citizen and failed to advise him that his application and/or acceptance into the diversion program or any admission of guilt required to enter said program could subject him to deportation. At no time did the trial court advise Kona of his constitutional or statutory rights or that he was waiving same.

Subsequent to the dismissal, Kona submitted an Application for Naturalization and was questioned by the Department of Homeland Security/U.S.C.I.S. regarding his admission of guilt in this case and was advised that he will be subject to deportation upon the final processing of his application. Kona has been advised that the only way to avoid deportation is to withdraw the admission of guilt. Therefore, he filed a Motion to Withdraw Plea and Vacate Judgment. The trial court ultimately denied Kona's motion, without explanation.

The case proceeded to the Eighth District Court of Appeals, which noted that while the application of the immigration laws to this matter resulted in a "manifest injustice," there was nothing the court could do to rectify this result. The Eighth District also found that a written admission of guilt, even when required as a condition precedent for admission into the diversion program, was not the equivalent of a guilty plea for state law purposes and therefore, the Eighth District erroneously found that no warning was required to be provided to noncitizen diversion program participants pursuant to R.C. 2943.031(A). However, the language of R.C. 2943.031 does not limit the required warning to pleas constituting guilty and/or no contest pleas only under state law. As the admission of guilt constituted a guilty plea under federal immigration laws, the trial court was required to provide the warning contained in R.C. 2943.031, by virtue of the plain

language used by the legislature. The Eighth District's ruling not only violates the intent, spirit and goals of R.C. 2943.031, R.C. 2935.36, and the Cuyahoga County Diversion Program, but it also results in a manifest injustice to Kona and others who are similarly situated.

### III. PROPOSITIONS OF LAW AND ARGUMENT

#### A. **PROPOSITION OF LAW NO. 1: A written admission of guilt required by a diversion program is the functional equivalent of a guilty or no contest plea for purposes of R.C. 2943.031(A).**

In order to be accepted into the diversion program, Kona was required to make an admission of guilt to the charges. The trial court not only approved Kona's participation in the program, but also placed Kona under the supervision of the Probation Department. Despite allowing Kona's participation in said program and despite the supervision by the Probation Department, the trial court never asked Kona if he was a U.S. citizen or advised Kona of the potential immigration consequences of his admission of guilt or participation in the program.

The Eighth District held that a written admission of guilt was not a "guilty plea" which would require the trial court to provide the warning contained in R.C. 2943.031(A). However, an admission of guilt operates as a guilty or no contest plea in the program and under immigration laws. The purpose of the admission of guilt is to have an acknowledgement made that the defendant is guilty of the offense, which is the same thing as a guilty plea or no contest plea. Furthermore, any admission of guilt along with the successful completion of a diversion program constitutes a conviction under immigration laws:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, of, if adjudication of guilt has been withheld, where: (i) A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere **or has admitted sufficient facts to warrant a finding of guilt**, and (ii) The judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed.

8 U.S.C. 1101(a)(48)(A). In order to participate in the program, Kona was required to provide a “complete, detailed, and accurate statement admitting your involvement/guilt to the pending charges.” Additionally, a successful completion of a diversion program is the equivalent of time served or probated time for the offense as the expiation of consequences are the same. *State v. Urvan*, 4 Ohio App.3d 151, 446 N.E.2d 1161 (8<sup>th</sup> Dist. 1982) at paragraph 6 of the syllabus. As a defendant cannot be admitted into the program without the trial court’s approval, as he is required to admit his guilt as a condition precedent to admission; and as he has served time or probated time for the offense by successfully completing the program, the defendant has plead guilty and has been convicted of the offense pursuant to 8 U.S.C. 1101(z)(48)(A). Therefore, Kona entered a guilty plea or, at minimum, a no contest plea, at the time he was granted admission into the program and was thus, entitled to the warning required by R.C. 2943.031(A).

Kona’s admission of guilt and successful completion of the program resulted in Kona entering a guilty plea or no contest plea, being convicted, and having served a sentence. Accordingly, Kona entered into a guilty and/or no contest plea at the time he completed the admission of guilt and was convicted upon his successful completion of the program. As a guilty plea or no contest plea was entered by virtue of the trial court accepting the admission of guilt, the trial court was required to provide the requisite warning in R.C. 2943.031(A).

**B. PROPOSITION OF LAW NO. 2: A noncitizen is required to be advised as to potential immigration consequences pursuant to R.C. 2943.031 when required to provide a written admission of guilt as condition precedent for admission into a pretrial diversion program.**

As shown above, the required written statement of guilt is akin to a guilty and/or no contest plea and therefore, pursuant to R.C. 2943.031(A), and the spirit and intent thereof, the trial court was required to advise Kona of the potential immigration consequences, as required by statute. However, Kona was never so advised and in fact was never even asked if he was a U.S.

citizen. See: *State v. Lucente*, 7<sup>th</sup> Dist. No. 03 MA 216, 2005-Ohio-1657 (noting that a “plea agreement did not negate the duty of the trial court to substantially comply with R.C. 2943.031.”) As such, the plea/admission of guilt was required to be withdrawn and the conviction was required to be vacated pursuant to R.C. 2943.031(D).

**C. PROPOSITION OF LAW NO. 3: A written admission of guilt is not made knowingly, voluntarily, and intelligently when a noncitizen is not advised of potential immigration consequences.**

In order to ensure a knowing, voluntary, and intelligent plea, a trial court must, prior to accepting a plea from a noncitizen, advise the defendant of his constitutional rights pursuant to Crim.R. 11, including the advisement set forth in R.C. 2943.031(A), and such advisement must affirmatively appear in the trial court’s record. The failure of the trial court to advise Kona of his rights pursuant to Crim.R. 11 was absolutely prejudicial and requires the vacating of the involuntary plea. Crim.R. 11 (C)(2) provides, in relevant part:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

\* \* \*

R.C. 2943.031(A) provides and additional warning requirement for noncitizen defendants which must be provided pursuant to Crim.R. 11(C)(2) in order for a plea to be made knowingly, voluntarily, and intelligently. *Yanez* at ¶28-29.

The record must affirmatively demonstrate the plea of guilty or no contest was entered voluntarily, intelligently, and knowingly. *State v. Clark*, 119 Ohio St.3d 239, 243, 2008-Ohio-3748, 893 N.E.2d 462 at ¶25. “When a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no contest plea is invalid under the presumption that it was entered involuntarily and unknowingly.” *Id.* at ¶31.

The First District has found that unless a defendant is aware of the risk of deportation, the defendant cannot enter a knowing, voluntary, and intelligent plea:

Unless the defendant is aware of the risk of deportation, he cannot appreciate whether it is in his best interest to waive his rights by entering a guilty plea....The failure...to inform...of the consequences may well be critical to the defendant’s understanding of his rights and the voluntariness of his guilty plea.

*Yanez* at ¶43. Rather than providing the required warning, Kona was advised that upon a successful completion of the program, his record would be expunged and the case dismissed without further consequences. At no time did either the trial court or the Prosecutor’s office ask Kona if he was a US citizen or advise him that his participation in this program could result in his deportation, exclusion from admission to the U.S., or denial of naturalization. Kona was never advised that a conviction for purposes of federal immigration laws included the successful completion of the diversion program and/or deferred adjudications. *Acosta v. Ashcroft*, 341 F.3d 218, 223 (C.A. 3, 2003) (offender convicted for purposes of immigration law even when charges ultimately dismissed without an adjudication of guilt after successful completion of probation); *State v. Abi-Aazar*, 154 Ohio App.3d 278, 797 N.E.2d 98 (9<sup>th</sup> Dist. 2003) (involving a case where deportation proceedings were initiated based on a treatment in lieu plea agreement.) In fact, in *Abi-Aazar, supra*, the Ninth District held that the failure by the trial court to explain that a treatment in lieu plea was, for immigration purposes, a conviction, rendered the advisement ineffective and the decision to plead guilty uninformed. Thus, Kona did not knowingly,

voluntarily, and intelligently provide an admission of guilt/guilty and/or no contest plea and did not knowingly, voluntarily, and intelligently enter into the diversion program.

The trial court admitted during the hearing on the Motion to Withdraw Plea and Vacate Judgment that a defendant has the right to know the charges against him including the penalties he faces and that deportation is ultimately a penalty that he may be subject to as a result. Hearing Tr. at 34. Despite the trial court's conclusion and despite the fact that the trial court never advised Kona as to the potential immigration penalties he faced, the trial court denied the Motion without explanation. A guilty or no contest plea is only constitutionally valid to the extent that it is voluntarily, knowingly, and intelligently entered. Kona's plea was not knowingly, voluntarily, or intelligently made as the trial court failed to advise him that the admission of guilt could affect his immigration status. Accordingly, Kona's plea was not constitutionally valid.

**D. PROPOSITION OF LAW NO. 4: A trial court should, pursuant to Crim.R. 32.1, withdraw a written admission of guilt thereby vacating the conviction for immigration purposes, where a manifest injustice will otherwise occur.**

In addition to the aforementioned bases for withdrawing the plea and vacating the conviction, Kona was alternatively entitled to have the plea withdrawn and the conviction vacated pursuant to Crim.R. 32.1. Even the Eighth District noted that this case resulted in a manifest injustice because of the immigration consequences for participating in the diversion program as a noncitizen. *Kona* at ¶19. In a similar case, the Eleventh District also determined that a manifest injustice occurred where a defendant faced deportation upon completing a diversion program in a case where the court had failed to advise him of the potential consequences as required by R.C. 2943.031(A). *Qasim, supra*. The Eleventh District, much like the Eighth District, erroneously found that it was powerless to correct this manifest injustice: "We realize that the department of

immigration may choose to proceed utilizing a dismissed conviction and a null and void plea. This would create a manifest injustice...” *Id.* at ¶20. This is the type of situation Crim.R. 32.1 was designed to rectify.

The trial court retains limited jurisdiction over a dismissed case for purposes of correcting manifest injustices. *Logsdon v. Nicholas*, 72 Ohio St. 3d 124, 127-128, 647 N.E.2d 1361 (1995); Crim.R. 32.1. A manifest justice is defined as “a clear or openly unjust act” or a “fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.” *State v. Lababidi*, 8<sup>th</sup> Dist. No. 96755, 2012-Ohio-267, citing *State v. Sneed*, 2<sup>nd</sup> Dist. No. 8837 (January 8, 1986). It is manifestly unjust that a violent noncitizen defendant who pleads guilty receives a warning as to the potential immigration effects of his plea, but that a nonviolent noncitizen defendant who is unlike to commit another offense and is admitted into the diversion program, does not receive any such warning, despite having the same potential immigration consequences. Unless his written admission of guilt is withdrawn and the conviction vacated, Kona has no other means available to remedy this manifestly unjust flaw in the system.

The Ohio legislature has addressed the importance of advising noncitizens of the consequences of their plea in order to ensure that every person receives due process under the law. Kona’s right to due process was violated when the trial court failed to provide the mandatory advisements pursuant to R.C. 2943.031(A) and Crim.R. 11, thereby tainting Kona’s plea and everything that occurred subsequently, including the result of time served upon his successful completion of the program and the dismissal which followed. The result is a manifest injustice.

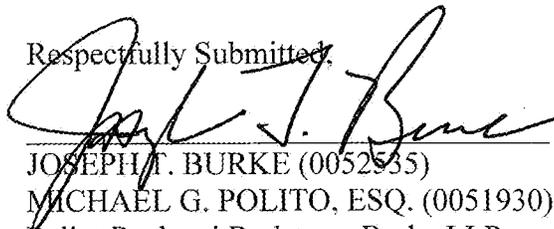
**E. PROPOSITION OF LAW NO. 5: A trial court has jurisdiction to withdraw a written admission of guilt and vacate the conviction after a dismissal.**

The trial court and the Eighth District erroneously believed that the trial court did not have jurisdiction to allow Kona to withdraw his written admission of guilt or vacate the conviction after the charges had been dismissed. However, a trial court retains jurisdiction pursuant to Crim.R. 32.1 and R.C. 2943.031(D) to withdraw a plea, vacate a conviction, to correct a manifest injustice and/or to correct the trial court's own reversible error created by its noncompliance with Crim.R. 11 and R.C. 2943.031. See R.C. 2943.031(D); Crim.R. 32.1. A trial court further retains jurisdiction to correct reversible error by vacating an erroneous dismissal entry. *Logsdon, supra*. Since the trial court failed to provide Kona with the required advisement pursuant to R.C. 2943.031(A) and failed to go on the record delineating Kona's Crim.R. 11 rights, the trial court retained jurisdiction to correct this error pursuant to R.C. 2943.031 and Crim.R. 32.1.

#### IV. CONCLUSION

A required written admission of guilt constitutes a guilty and/or no contest plea for federal immigration purposes and therefore Kona was entitled to the protections of R.C. 2943.031. To hold otherwise circumvents the clear legislative intent behind R.C. 2943.031 and defeats the purpose of the diversion program. As such, this Honorable Court should grant jurisdiction to prevent this manifest injustice and to ensure all defendants receive due process.

Respectfully Submitted,



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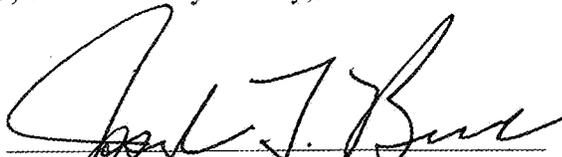
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing "Defendant-Appellant Issa Kona's Memorandum in Support of Jurisdiction" was forwarded via regular U.S. Mail to Timothy J. McGinty, Esq., Cuyahoga County Prosecutor and Diane Smilanick, Esq., Assistant Prosecuting Attorney, 1200 Ontario St., 9<sup>th</sup> Floor, Cleveland, Ohio 44113, on this 8<sup>th</sup> day of May, 2014.

  
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*Counsel for Defendant/Appellant Issa Kona*

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**APPENDIX**

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MAR 27 2014

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 100191

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ISSA KONA**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-06-480390

**BEFORE:** Boyle, A.J., Celebrezze, J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** March 27, 2014



MARY J. BOYLE, A.J.:

{¶1} Defendant-appellant, Issa Kona, appeals the trial court's judgment denying his motion to withdraw his plea and vacate judgment. He raises four assignments of error for our review:

1. The trial court erred when it failed to provide the non-citizen defendant-appellant with the required advisement as to potential immigration consequences as required by R.C. 2943.031, as defendant-appellant's admission of guilt is equated with a guilty plea for immigration purposes.
2. Defendant-appellant's plea was not made knowingly, voluntarily, and intelligently and therefore the plea was made in violation of his constitutional rights.
3. The trial court erred when it refused to withdraw Kona's plea and vacate the conviction pursuant to Crim.R. 32.1.
4. The trial court had jurisdiction to withdraw the plea and vacate the conviction after the dismissal was recorded in this case.

{¶2} Finding no merit to his appeal, we affirm.

#### Procedural History and Factual Background

{¶3} In May 2006, Kona was indicted on two counts of robbery in violation of R.C. 2911.02. The police report alleged:

On Saturday, April 1, 2006, Issa S. Kona stole a Dewalt 18 volt battery charger from Home Depot located at 11901 Berea Rd., Cleveland, Ohio 44111. When Kona was confronted by security personnel outside of the store, he refused to return the stolen property after which he fought with security personnel, refusing to return the property. Kona was finally handcuffed and brought to the security office where the stolen property was recovered.

{¶4} On the day of trial, Kona requested a continuance to apply for the Cuyahoga County pretrial diversion program. As part of the application for the diversion program, Kona was required to complete a written admission of guilt statement. In his admission statement, Kona said:

On April 1, 2006, I entered the Home Depot located at 11901 Berea Road, Cleveland, Ohio and took a battery charger, removed it from its package, and hid it in my coat. I purchased a window for \$180 and exited the store.

As I left the store, I was confronted and apprehended by three (3) store security men. The battery charger was found in my coat and recovered.

The total value was \$59.00[.]

{¶5} After the state found that Kona met the eligibility requirements for the diversion program, the court approved Kona's acceptance in the program and ordered that his case be placed in inactive status until further notice.

{¶6} In May 2007, upon the state's motion, the trial court found that Kona had successfully completed the diversion program. Subsequently, the trial court dismissed Kona's case with prejudice. Kona moved to expunge the record of the case, which the state did not oppose. The trial court granted Kona's motion to expunge the record and ordered that the record be sealed.

{¶7} According to Kona, he is a citizen of Palestine, but he has been a legal resident of the United States since 2002. After his criminal case was dismissed, Kona applied to become a naturalized citizen of the United States. He was advised that because he completed the admission of guilt statement as

part of his application to the diversion program, he will be “subject to deportation upon the final processing of [his] application.” Kona contacted several immigration attorneys, who advised him that he “must withdraw [his] guilty plea and vacate [his conviction] in order to avoid deportation.”

{¶8} After Kona talked to the immigration attorneys, he moved to unseal the record of his criminal case, which the trial court granted. Kona then moved to “withdraw his plea and vacate judgment.” The trial court held a hearing on Kona’s motion in April 2013. After the hearing, the trial court denied Kona’s motion. It is from this judgment that Kona appeals.

R.C. 2943.031 — Advisement as to Possible Deportation

{¶9} In his first assignment of error, Kona argues that his admission of guilt operated as a guilty plea in the diversion program. For this reason, he maintains that the trial court was required to give him the mandatory advisement as to potential immigration consequences under R.C. 2943.031. In his second assignment of error, he contends that his “plea” was not knowingly, voluntarily, and intelligently entered into because the trial court failed to properly advise him as to potential immigration consequences under R.C. 2943.031. In his third assignment of error, he argues that the trial court erred when it denied his motion to withdraw his “plea.” And in his fourth assignment of error, he argues that the trial court had jurisdiction to withdraw his “plea.”

{¶10} The crux of Kona's arguments throughout his appeal — or the threshold determination underlying each of his arguments — is that his admission of guilt statement that he made when applying to the pretrial diversion program was the equivalent of entering into a guilty plea. Therefore, he argues that he was entitled to all of the protections that he would have been afforded had he actually entered a plea of guilty, including those protections under Crim.R. 11 and R.C. 2943.031. Thus, before we can reach the substantive arguments that Kona is making in each of his assignments of error, we must first agree with his threshold argument that the admission of guilt statement that he made to enter the Cuyahoga County diversion program is the equivalent to a guilty plea.

{¶11} With two exceptions that are not applicable here, R.C. 2943.031(A) provides in relevant part that

[P]rior to accepting a plea of guilty or a plea of no contest to an indictment \* \* \*, the court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:

If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) 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.<sup>1</sup>

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<sup>1</sup>A trial court does not have to orally give this advisement if "(1) The defendant enters a plea of guilty on a written form, the form includes a question asking whether the defendant is a citizen of the United States, and the defendant answers that

{¶12} Crim.R. 11(C) details the steps a trial court must follow before accepting a plea of guilty or no contest in a felony case. The overall goals expressed in Crim.R. 11(C)(2) are to ensure that “the defendant is making the plea voluntarily,” understands “the nature of the charges” and “the maximum penalty” that may ensue, understands “the effect of the plea,” and understands the rights that he or she is waiving.

{¶13} Within that framework, Crim.R. 11(C)(2) lists specific matters the trial court is to inform the defendant of, including nonconstitutionally based matters (such as nature of the charges and the maximum penalty involved) and constitutional rights being waived (such as trial by jury and confrontation of witnesses), before the judge may accept the plea. R.C. 2943.031(A) creates an additional warning requirement to non-citizens. To the extent that R.C. 2943.031(A) goes beyond Crim.R. 11(C)(2), the General Assembly has created a substantive right that supplements the procedural rule. *See State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 28-29.

#### R.C. 2935.36 — Pretrial Diversion Program

{¶14} Pretrial diversion programs are governed by R.C. 2935.36. This provision provides:

The prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and

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question in the affirmative; [or] (2) The defendant states orally on the record that he is a citizen of the United States.”

whom the prosecuting attorney believes probably will not offend again. The prosecuting attorney may require, as a condition of an accused's participation in the program, the accused to pay a reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing. The programs shall be operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas[.]

R.C. 2935.36(A).

{¶15} Under R.C. 2935.36(B), an accused entering a pretrial diversion program must do each of the following:

(1) Waive, in writing and contingent upon the accused's successful completion of the program, the accused's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the accused, and arraignment, unless the hearing, indictment, or arraignment has already occurred;

(2) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court, that are applicable to the offense with which the accused is charged and to the conditions of the diversion program established by the prosecuting attorney;

(3) Agree, in writing, to pay any reasonable fee for supervision services established by the prosecuting attorney.

{¶16} The pretrial diversion program statute further mandates the following:

(C) The trial court, upon the application of the prosecuting attorney, shall order the release from confinement of any accused who has agreed to enter a pre-trial diversion program and shall discharge and release any existing bail and release any sureties on recognizances and shall release the accused on a recognizance bond conditioned upon the accused's compliance with the terms of the diversion program. \* \* \*

(D) If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court, upon the recommendation of the prosecuting attorney, shall dismiss the charges. If the accused chooses not to enter the prosecuting attorney's diversion program, or if the accused violates the conditions of the agreement pursuant to which the accused has been released, the accused may be brought to trial upon the charges in the manner provided by law, and the waiver executed pursuant to division (B)(1) of this section shall be void on the date the accused is removed from the program for the violation.

R.C. 2935.36(C) and (D).

{¶17} Cuyahoga County's pretrial diversion program requires a defendant to complete an admission of guilt statement as part of the application into the diversion program. The instructions (at the time Kona applied to the program) stated: "You are to provide a complete, accurate, and truthful statement concerning your present criminal charge(s). This statement must admit to the crimes for which you are charged."

{¶18} Kona maintains that because he had to admit to the crimes, it was the equivalent to entering a guilty plea. He therefore contends that the trial court was required to ensure that he was admitting to the crimes voluntarily, knowingly, and intelligently pursuant to Crim.R. 11, and because he was not a United States citizen, part of a voluntary, knowing, and intelligent plea would also include the protections set forth in R.C. 2943.031.

{¶19} Although we sympathize with Kona and agree that the application of the immigration laws in his case result in a manifest injustice, we cannot agree

with him that the trial court erred here. Although R.C. 2935.36(A) requires pretrial diversion programs to be “operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas[,]” there is nothing in the statute that requires a trial court to ensure that a defendant knowingly, voluntarily, and intelligently enters into a pretrial diversion program. Nor is there anything in R.C. 2943.031 that requires a trial court to advise a defendant of possible immigration consequences if that defendant is entering into a pretrial diversion program. Upon a plain reading of these statutes, it is clear that Kona would have only been afforded these protections had he entered a plea of guilty or no contest. Then the trial court would have been required to follow Crim.R. 11 and R.C. 2943.031.

{¶20} Kona cites to a number of cases dealing with a diversion program, claiming that they support his arguments. But in these cases, the defendant pleaded guilty — after a Crim.R. 11 hearing — prior to entering into the diversion program. See *State v. Abi-Aazar*, 154 Ohio App.3d 278, 2003-Ohio-4780, 797 N.E.2d 98 (9th Dist.); *State v. Curry*, 134 Ohio App.3d 113, 730 N.E.2d 435 (9th Dist.1999); *Strickland v. Ohio Bur. of Motor Vehicles*, 92 Ohio App.3d 755, 637 N.E.2d 95 (2d Dist.1994). Thus, these cases are not applicable here. Kona also cites to a number of other cases for different propositions — all of

which have been reviewed by this court. None of these cases, however, supports his arguments.

{¶21} Kona further contends that if he had “failed to satisfactorily complete the terms and conditions of the diversion program, the case would have proceeded to sentencing on his guilty plea.” This is simply not true. The trial court’s judgment admitting Kona into the pretrial diversion program stated that if he failed to complete the diversion program, he “has given up the right to have the grand jury take final action on [his] case and agrees to be charged by way of information.” And R.C. 2935.36(D) states that “if the accused violates the conditions of the agreement pursuant to which the accused has been released, the accused may be brought to trial upon the charges in the manner provided by law.”

{¶22} Thus, we conclude that because Kona did not enter a plea of guilty or no contest as part of his pretrial diversion program, the trial court was not required to follow the mandates of Crim.R. 11 and R.C. 2943.031. In reaching this conclusion, Kona’s remaining arguments must fail. A trial court cannot withdraw a plea that was never entered into, nor can it vacate a conviction that does not exist.

{¶23} Accordingly, Kona’s four assignments of error are without merit.

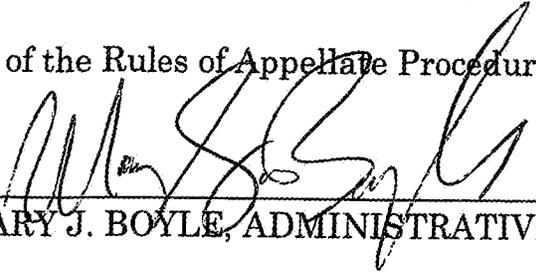
{¶24} Judgment affirmed.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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.



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MARY J. BOYLE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and  
EILEEN T. GALLAGHER, J., CONCUR