

IN THE SUPREME COURT OF OHIO

14-0733

State of Ohio,)
)
Plaintiff-Appellee,)
)
v.)
)
Issa Kona,)
)
Defendant-Appellant.)

Case No. _____

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals Case No.
CA-13-100191

MEMORANDUM IN SUPPORT OF JURISDICTION
OF AMICUS CURIAE CUYAHOGA CRIMINAL
DEFENSE LAWYERS ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Cuyahoga Criminal Defense Lawyers Association (CCDLA) is one of the largest professional organizations of criminal law practitioners in Ohio. The CCDLA meets regularly to provide a forum for material exchange of information concerning the improvement of criminal law, its practices and procedures. Through these meetings, and its active online community, the CCDLA promotes the study, research and advancement of knowledge of criminal defense law and promotes the proper administration of criminal justice.

CCDLA members practice in courts throughout Ohio, and regularly represent non-citizens facing criminal charges that can lead to severe immigration consequences, such as deportation. As such, the members of the CCDLA have a vested interest that the rights of non-citizens are protected. If the ruling of the Cuyahoga County Court of Appeals, Eighth Appellate District is not reviewed by this Court and overturned, non-citizen defendants in Cuyahoga County will face deportation even though they were never convicted of a crime. This Court cannot allow that to happen.

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

This case involves a felony, is a matter of constitutional, public and great general interest; and therefore, it should be reviewed by this Honorable Court. The decisions of the Cuyahoga Court of Common Pleas ("trial court") and the Cuyahoga County Court of Appeals, Eighth Appellate District ("appellate court") violated Kona's due process rights and resulted in a manifest injustice. As a matter of fact, the Eighth District Court of Appeals found that the application of the immigration laws in this matter resulted in a "manifest injustice."

Interestingly, after Kona's appeal, the Cuyahoga County Prosecutor amended the diversion program application packet to provide a warning on possible immigration consequences of a guilty plea, and as of January of 2014, now requires a guilty plea to be made on the record. Kona, unfortunately, was not afforded such a warning and is now facing deportation.

Furthermore, Kona was never brought into open court and advised on the record of *any* of his rights. The trial court merely made a Journal Entry. It never brought Kona into open court to discuss the rights he was waiving or engage in any meaningful colloquy. Moreover, the trial court failed to advise Kona as to the potential of deportation, exclusion from admission to the United States, or the potential for denial of naturalization based upon his written admission of guilt and entry into the diversion program. Despite not being fully informed of his rights before entering the diversion program, the trial court and appellate court somehow found that Kona's admission of guilt was knowingly, voluntarily or intelligently made. Forcing a non-citizen to admit their guilt in order to participate in the diversion program without warning the non-citizen 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 Cuyahoga County Diversion Program

As demonstrated above, this case involves a felony, has constitutional questions, and has public and great general interest; therefore, this Honorable Court should hear this case.

STATEMENT OF THE CASE AND FACTS

Amici respectfully directs this Court to the Appellant's recitation of the case and facts found in his Memorandum for Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A. PROPOSITION OF LAW I: 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 write an admission of guilt to the charges. But 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 diversion program.

The Eighth District held that a written admission of guilt was not a “guilty plea” that 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 diversion 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. Namely, 8 U.S.C. 1101(a)(48)(A) defines a conviction as:

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.

In order to participate in the diversion 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 (8th 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; 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 for immigration purposes pursuant to 8 U.S.C. 1101(z)(48)(A). Therefore, Kona entered a guilty plea at the time he was granted admission into the diversion program and was thus, entitled to the warning required by R.C. 2943.031(A)

B. PROPOSITION OF LAW NO. 2: A non-citizen 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 the spirit and intent of R.C. 2943.031(A), the trial court was required to advise Kona of the potential immigration consequences. Kona, however, was never so advised and in fact was never even asked if he was a U.S. citizen. See: *State v. Lucente*, 7th 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 non-citizen 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 non-citizen, 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) provides:

(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.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to a jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

R.C. 2943.031(A) provides an additional warning requirement for non-citizen 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 Court of Appeals 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 (9th 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 Court of Appeals 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 was faced by Kona. 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 Court of Appeals noted that this case resulted in a manifest injustice because of the immigration consequences for participating in the diversion program as a non-citizen. *Kona* at ¶19. In a similar case, the Eleventh District Court of Appeals also determined that where a defendant faced deportation upon completing a diversion program due to the trial court's failure to advise him of the potential consequences as required by R.C.

2943.031(A), a manifest injustice occurred. *Qasim, supra*. The Eleventh District Court of Appeals, much like the Eighth District Court of Appeals in this case, 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*, 8th Dist. No. 96755, 2012-Ohio-267, citing *State v. Sneed*, 2nd Dist. No. 8837 (January 8, 1986). It is manifestly unjust that a violent non-citizen defendant who pleads guilty receives a warning as to the potential immigration effects of his plea, but that a nonviolent non-citizen defendant who is unlikely 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 non-citizens of the consequences of their plea in order to ensure that every person receives due process under the law. In the present case, 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 Court of Appeals 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. As such, it was error to deny Kona's request to withdraw his plea and vacate the conviction.

CONCLUSION

For the reasons discussed above, this case involves a felony, substantial constitutional questions and issues of important public and general interest. The appellant requests that this Honorable Court accept jurisdiction in this case so that a manifest injustice is avoided. Due to the obvious error, the amicus curiae also suggests that a summary reversal is appropriate. Therefore,

this Court should hear this case and correct the lower court's error.

Respectfully submitted,



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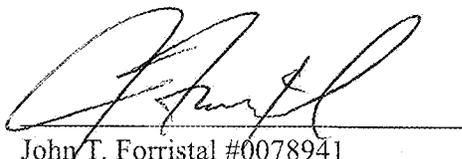
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Amicus Curiae's Cuyahoga Criminal Defense Lawyers Association 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., 9th Floor, Cleveland, Ohio 44113 and Joseph T. Burke, Polito, Paulozzi, Rodstrom & Burke, LLP, 21300 Lorain Road, Fairview Park, Ohio 44126, Counsel for Appellant Issa Kona, on this 10th day of May, 2014.



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