

IN THE SUPREME COURT OF OHIO

State of Ohio,)	Case No.: 2014-0733
)	
Plaintiff-Appellee,)	
)	On Appeal from the Cuyahoga
v.)	County Court of Appeals,
)	Eighth Appellate District
)	
Issa Kona,)	Court of Appeals Case No.
)	CA-13-100191
Defendant-Appellant.)	

MERIT BRIEF 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 Honorable Court and overturned, non-citizen defendants in Cuyahoga County will face deportation, exclusion from admission to the United States, or denial of naturalization even though they were never convicted of a crime. This Honorable Court cannot allow that to happen.

STATEMENT OF THE CASE AND FACTS

Amici respectfully directs this Honorable Court to the Appellant's recitation of the case and facts found in his merit brief.

LAW & ARGUMENT

1. ***Kona was convicted of a deportable felony according to federal immigration laws.***

Even though Kona was never convicted of a felony in Ohio, he was convicted of a deportable offense according to Immigration and Customs Enforcement (ICE). Kona was convicted, and thus subject to deportation, because of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009 (1996). Section 322(a) of IIRIRA, codified at 8 U.S.C. § 1101(a)(48)(A), defined the term "conviction" as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, **or, 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.

Id. (emphasis supplied).

The diversion program met both prongs: 1) Kona had to write a complete, detailed and accurate statement admitting his guilt; and 2) Kona was placed on probation for six months. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 640 n. 11, (1988) (“a fixed term of probation is itself a punishment that is criminal in nature”). Therefore, under immigration law, 8 U.S.C. § 1101(a)(48)(A), Kona was convicted of a felony and possibly subject to deportation.

After successfully completing the six month diversion program, the felony charges were dismissed with prejudice and the matter sealed. Unfortunately for Kona, the dismissal and sealing of the record by the Ohio court could not change the fact that under immigration law he was still a convicted felon. Even when the court dismisses the charges after a delayed adjudication, the offender has been “convicted” for the purposes of federal immigration law as long as the two requirements of § 1101(a)(48)(A) are met. *See In re Salazar-Regino*, 23 I. & N. Dec. 223, 235 (BIA 2002) (*en banc*); *In re Devison-Charles*, 22 I. & N. Dec. 1362, 1371-72 (BIA 2001); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (BIA 1999), overruled on other grounds by *Lujan-Armendariz v. Immigration and Naturalization Serv.*, 222 F.3d 728 (9th Cir. 2000); *see also Uritsky v. Gonzales*, 399 F.3d 728, 732-36 (6th Cir. 2005).

The Congressional Conference Committee Report accompanying the IIRIRA commented on Congressional intent in drafting IIRIRA § 322. The Report provides:

This section deliberately broadens the scope of the definition of “conviction” beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*, 19 I & N Dec. 546 [1988 WL 235459] (BIA 1988). As the Board noted in *Ozkok* there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered “convicted” have escaped the immigration consequences normally attendant upon conviction. * * * ***In some***

States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. ***This new provision, by removing the third prong of Ozkok, clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws.***

H.R. Conf. Rep. No. 828, 104th Cong., 2nd Sess.1996, 1996 WL 563320 at *496-97. (emphasis supplied).

Therefore, the dismissal and sealing of the charges provided no protection to Kona from being possibly deported. Since his participation in the Cuyahoga County diversion program met both prongs of 8 U.S.C. § 1101(a)(48)(A), Kona was considered convicted under federal immigration law and thus subject to deportation.

The trial court was required to give the R.C. 2943.031 advisement.

R.C. 2943.031(A) requires a trial court to: 1) give an advisement to all non-citizen defendants of possible immigration consequences when entering a guilty or no contest plea; and 2) determine that the defendant understands the advisement. The advisement in R.C. 2943.031(A) provides:

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.

If a non-citizen does not receive the advisement, R.C. 2943.031(D) allows that defendant to have the guilty or no contest plea vacated. A defendant seeking to withdraw a plea pursuant to R.C. 2943.031(D) must show: (1) the court failed to provide the defendant with the advisement contained in R.C. 2943.031(A); (2) the advisement was required; (3) the defendant is not a United States citizen; and (4) the offense to which the defendant pled guilty may result in deportation under the immigration laws of the federal government. *State v. Weber*, 125 Ohio App.3d 120, 125 (10th Dist.1997). The language in R.C. 2943.031(D) is mandatory; and

therefore, a court has no discretion and must allow a defendant to withdraw his plea if the R.C. 2943.031(D) statutory requirements are met. *Willoughby Hills v. Qasim*, 2007-Ohio-2860, 11th Appellate Dist. (2007), J. William M. O'Neill dissenting at ¶30.

"[I]n order for the R.C. 2943.031 advisement to apply, the record must affirmatively demonstrate that a defendant is not a citizen of the United States through affidavit or other documentation." *State v. Almingdad*, 151 Ohio App.3d 453, 2003-Ohio-295, at ¶19. In addition, "[a] defendant must show he suffered a prejudicial effect from the trial court's failure to comply with R.C. 2943.031(A)." *State v. White*, 163 Ohio App.3d 377, 2005-Ohio-4898, at ¶21, citing *State v. Gegia*, 11th Dist. No. 2003-P-0026, 2004-Ohio-1441, at ¶29. Kona demonstrated, by way of an affidavit attached to his motion to withdraw his plea, that: 1) he was not a United States citizen; and 2) that he was prejudiced because ICE had begun deportation proceedings. The record also demonstrates the Kona did not receive the advisement. Therefore, the only R.C. 2943.031(D) requirement remaining is whether or not the advisement was required.

RC 2943.031(A) mandates that the trial court gives the advisement whenever a non-citizen enters a guilty and no contest plea. Clearly, under 8 U.S.C. § 1101(a)(48)(A), if a non-citizen defendant enters a no contest or guilty plea, and the judge orders some form of punishment, penalty or restraint on the alien's liberty, that defendant is considered "convicted" not only under federal immigration law, but also under Ohio law. In that situation, R.C. 2943.031 mandates the advisement. But, the spirit of R.C. 2943.031 indicates that the advisement is also required when a non-citizen defendant has "admitted sufficient facts to warrant a finding of guilt." 8 U.S.C. § 1101(a)(48)(A)(i). Congress made it clear that in broadening the definition of a "conviction" for federal immigration purposes, that it would treat an admission of sufficient facts to warrant a finding of guilt the same as if the non-citizen defendant plead guilty or no contest. *See* H.R. Conf. Rep. No. 828, *supra*, 1996 WL 563320 at *496-97. Despite this broad definition of conviction, that was adopted in 1996, the Ohio General Assembly failed to include the "admitted sufficient facts to warrant a finding of guilt" language in R.C. 2943.031. But, its exclusion contradicts the purpose of the statute:

The purpose of the deportation advisement is not only to inform a defendant that deportation is a possible consequence of the guilty plea, but also to ensure that a defendant is willing to accept that possible consequence.

State v. Lucente (March 29, 2005), Mahoning App. No. 03 MA 216, 2005-Ohio-1657.

By leaving out the admission to guilt language, the General Assembly has created a situation where a non-citizen who has to admit his guilt in order to get the benefits of a diversion program (dismissal and sealing of the charge) is subject to deportation, exclusion or denial of naturalization without ever being advised of that possibility. This is not the result intended. Such a non-citizen is clearly considered "convicted" by the immigration authorities and is in no different position, *vis a vis* negative immigration consequences, as one who plead guilty or no contest. If R.C. 2943.031 is to provide warning to non-citizen defendants from possible immigration consequences, the advisement must be given whenever a non-citizen would be subject to them. That is the case here with Kona. He was convicted per federal immigration laws, regardless of what Ohio law says, and this result was entirely foreseeable and expressly addressed by Congress in passing 8 U.S.C. § 1101(a)(48)(A): "this new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws." H.R. Conf. Rep. No. 828, *supra*, 1996 WL 563320 at *497.

Ohio courts have recognized that because of the potentially extremely harsh collateral consequences a conviction may have on a non-citizen, that the General Assembly wrote R.C. 2943.031 in such a way to ensure that defendants were aware of the potential negative consequences and that they truly understood them. That is why the General Assembly mandated that the advisement be read verbatim. As *State v. Zabala*, 2011-Ohio-2947, 5th Appellate Dist. (2011), held:

The General Assembly has put the three required warnings-deportation, exclusion from the United States, and denial of naturalization-in quotation marks. We find no other criminal statute in which the General Assembly has used quotation marks to designate the trial court's colloquy with a defendant. *See, also, State v. Quran*,

2002-Ohio-4917, 2002 WL 31087704, at ¶ 21. The use of quotation marks and the command to the trial court that it 'address the defendant personally' and 'provide * * * the advisement' indicate a clear intent by the General Assembly that each warning should be given to ensure that a person pleading guilty or no contest knows exactly what immigration consequences his plea may have. It is an acknowledgement that, at least to some defendants, the collateral consequences of a plea, namely deportation, exclusion from admission to the United States, and denial of naturalization, may well be a more serious sanction than the imposition of a prison term. See, e.g., *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. at 322-323, 121 S.Ct. 2271, 150 L.Ed.2d 347; see, also, *Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L.Rev. at 700. The words of the statute, bracketed by quotation marks, do not permit any other interpretation. *Id.* at paragraph 29.

Id. at ¶ 28.

Similarly, the Eighth District Court of Appeals has provided:

To understand the reason for this unique statute [R.C. 2943.031], one must understand the effect of deportation. As the Second Appellate District observed, "deportation may result in loss of all that makes life worth living, *Ng Fung Ho v. White* (1922), 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938, and is 'close to punishment,' *Galvan v. Press* (1954), 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911." *Mason, supra*. Adverse consequences such as deportation can be substantially disproportionate to the seriousness of the crime, which in the case at bar was the failure to return two rental chain saws.

State v. Tabbaa, 151 Ohio App. 3d 353, 2003-Ohio-299, 8th Appellate Dist. (2003), dissent at ¶ 52.

Like the defendant in *Tabbaa*, Kona is facing deportation for the relatively minor infraction of stealing a \$79.93 battery charger. The prosecutor and trial court apparently agreed the offense was minor, and that Kona's action was an anomaly, because they agreed to allow him to enter the diversion program and the charges were ultimately dismissed and sealed.

In *Qasim*, 2007-Ohio-2860, *supra*, Qasim was charged with misdemeanor domestic violence. Like Kona herein, Qasim entered the court's diversion program, successfully completed the program, and the charge was dismissed and sealed. Unlike Kona, however, Qasim entered a no contest plea on the record.

Because he was facing deportation as a result of the domestic violence "conviction," as defined in 8 U.S.C. § 1101(a)(48)(A), Qasim filed a motion to withdraw the plea and vacate the

dismissal pursuant to R.C. 2943.031(D) and Crim.R. 32.1. The trial court denied the motion and the appellate court, in a two to one opinion, upheld the denial. The appellate court held that:

In the case at bar, although appellant demonstrates that he is not a United States citizen through his affidavit, and shows that he suffered prejudice due to the fact that deportation proceedings had begun against him, the trial court's failure to advise him of the R.C. 2943.031(A) advisement was error with respect to the facts in this case. Again, pursuant to its December 13, 2000 judgment entry, the trial court referred appellant to domestic violence diversion. Due to appellant's compliance, the trial court dismissed the domestic violence charge on April 3, 2001 making appellant's plea null and void. Appellant filed a motion to withdraw plea and vacate dismissal on August 10, 2006, along with his affidavit. However, since there was no case pending or in existence, the case having been dismissed with prejudice by the time appellant filed his motion, the trial court properly exercised its discretion in denying the motion. We realize that the department of immigration may chose to proceed utilizing a dismissed conviction and a null and void plea. This would create a manifest injustice which this appellate court is powerless to correct.

Id. at ¶20.

The court found that the dismissal made the plea "null and void." Unfortunately for Qasim, the federal immigration authorities did not agree that the plea was "null and void" and used the plea as the basis for his deportation. Likewise with Kona herein, the federal immigration authorities are treating Kona's written admission of guilt (and his probationary period while in the diversion program) as the basis for his deportation, even though he was never convicted under Ohio law, the charges were dismissed and they were sealed.

The dissent in *Qasim* explained the absurdity of the situation:

Unfortunately, this salutary outcome is about to become undone by a bureaucracy that threatens to impose a penalty far more severe than could be justified by Qasim's plea of no contest. Qasim is about to be deported based upon the plea he entered and which, in a real sense, was erased by the trial court. These facts do not warrant the outcome that is looming.

Qasim's dilemma was foreseen when the Ohio General Assembly mandated that all non-citizens be advised of the potential consequences of a plea. The General Assembly added this additional protection in R.C. 2943.031(D) for non-citizens entering a no contest plea in order to notify them of the harsh consequences of their plea. The mandatory nature of this notice must not be treated lightly.

* * * *

Qasim is caught in a bureaucratic quagmire not entirely of his own making. Had the trial court told him that he was going to be deported based solely upon his plea, he would have had much more to consider than a conviction for a misdemeanor. His whole future in his new country was at stake, and he did not know it. Mistakes were made, both by Qasim and the trial court. It is within the power of this court of appeals to correct them. I believe that justice requires that we take that step in this case.

Qasim, supra, J. O'Neill dissenting at ¶27, 28 and 41.

The same could be said about the bureaucratic quagmire Kona finds himself in. Even though he admitted his guilt to the crime (stealing a \$80 battery charger), because he did not do so as a "plea," the trial court, and appellee, believe the advisement was not required. But, this outcome goes against the purpose of the statute: namely to make sure non-citizens are aware of the consequences of a conviction. Under federal immigration law, Kona was convicted pursuant to 8 U.S.C. § 1101(a)(48)(A). The trial court should have realized that a written admission of guilt is a conviction per immigration laws; and therefore, that Kona would possibly be subject to deportation. The advisement should have been given. The Cuyahoga County prosecutor's office has since added the advisement to their diversion application and now require a plea on the record before a defendant can enter into the diversion program. They recognize that mistakes were made and corrected them going forward. Unfortunately for Kona, this correction happened too late. This Honorable Court can correct that mistake.¹

Kona's plea should be withdrawn pursuant to Crim. R. 32.1

Kona was alternatively entitled to have the plea withdrawn and the conviction vacated pursuant to Crim.R. 32.1. R.C. 2943.031(F), provides that nothing in the statute prevents a court from setting aside a conviction and guilty plea pursuant to Crim.R. 32.1. *Qasim, supra*, at ¶17. The trial court retains limited jurisdiction over a dismissed case for purposes of correcting manifest

¹ If the trial court failed to deliver the advisement, O.R.C. 2943.031 permits that defendant to withdraw her guilty plea and reset the case for trial. If the plea is withdrawn for this type of error, the defendant cannot be deported based on the admission she made. The immigration court cannot consider the old plea and the underlying proceedings as grounds for deportation. *See In re Adamiak*, 23 I&N Dec. 878 (BIA 2006).

injustices. *Logsdon v. Nicholas*, 72 Ohio St. 3d 124, 127-128, 647 N.E.2d 1361 (1995); Crim.R. 32.1.

Crim.R. 32.1 post-sentence motions to withdraw guilty pleas are subject to a manifest injustice standard. *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶ 9, citing *State v. Xie*, 62 Ohio St.3d 521, 526 (1992). An appellate court will not reverse a trial court's denial of a motion to withdraw a plea absent an abuse of discretion. *State v. Totten*, 10th Dist. No. 05AP-278, 2005-Ohio-6210, ¶ 5. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151 (1980).

The Eighth District Court of Appeals noted that the case herein resulted in a manifest injustice because of the immigration consequences for participating in the diversion program as a non-citizen. *Kona* at ¶19. A manifest injustice 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.

CONCLUSION

Amicus curiae requests that this Honorable Court overrule the lower court's denial of

Kona's motion to withdraw plea and vacate his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing “Amicus Curiae's Cuyahoga Criminal Defense Lawyers Association Merit Brief ” was filed electronically through the Supreme Court of Ohio's e-filing portal and 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 17th day of November, 2014.

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