

NO. 14-733

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 100191

STATE OF OHIO,
Plaintiff-Appellee

-vs-

ISSA KONA
Defendant-Appellant

MERIT BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On May 2, 2006, Appellant, Issa Kona, (“Kona”) was indicted by the Cuyahoga County Grand Jury with two counts of Robbery pursuant to R.C. 2911.02. On September 20, 2006, Kona filed a motion asking to be referred for the Cuyahoga County Pretrial Diversion Program. The trial court granted Kona’s motion on October 26, 2006. As a part of the application for the diversion program, Kona was required to a written statement to the prosecutor as an admission of his involvement in the crime.

Kona successfully completed the pretrial diversion program and his case was dismissed at the state’s request on May 2, 2007. R.C. 2935.36(D). Kona immediately filed a motion to have his record expunged, which the court granted without opposition.¹

On July 29, 2008, Kona filed a motion to unseal his record after he was informed that his admission of guilt, which was required for acceptance into the pretrial diversion program, exposed him to deportation. On September 9, 2008, the trial court granted Kona’s motion over the state’s objection.

On October 20, 2008, Kona filed a *Motion to Vacate Plea*. However, the state was not served. On March 6, 2009, Kona filed an amended *Motion to Withdraw Plea, Vacate Judgment* and requesting an oral hearing. The state filed a response in opposition to the motion on March 25, 2009. On June 26, 2013, after a number of pre-trials, the trial court held a hearing on the motion, and on July 2, 2013, the motion was denied.

Kona appealed, and on March 27, 2014, the Eighth District affirmed the decision of the trial court. *State v. Kona*, 8th Dist. No. 100191, 2014-Ohio-1242. Kona filed a Notice of Appeal

¹ May 4, 2007.

and a Memorandum in Support of Jurisdiction in this Court on May 9, 2014. On September 3, 2014, this Court accepted jurisdiction of this case to determine the following propositions of law:

PROPOSITION OF LAW I (As stated by Appellant):

A written admission of guilt required by a diversion program is the functional equivalent of a guilty plea or no contest plea for purposes of R.C. 2943.031(A).

PROPOSITION OF LAW II (As stated by Appellant):

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.

PROPOSITION OF LAW III (As stated by Appellant):

A written admission of guilt is not made knowingly, voluntarily, and intelligently when a noncitizen is not advised of potential immigration consequences.

PROPOSITION OF LAW IV (As stated by Appellant):

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.

PROPOSITION OF LAW V (As stated by Appellant):

A trial court has jurisdiction to withdraw a written admission of guilt and vacate the conviction after a dismissal.

STATEMENT OF THE FACTS

Kona successfully completed the Cuyahoga County Pretrial Diversion Program. As agreed, the State asked the trial court to dismiss the case against Kona, and the trial court issued a judgment entry consistent with the state's recommendation. Appellant subsequently filed a *Motion for Expungement of Record*, which the court granted on May 4, 2007. A year later, Kona filed a motion to unseal his record, which the court granted.

Five years after the court unsealed Kona's record, a hearing was held on a motion that Kona filed under the title "*Amended Motion to Withdraw Plea, Vacate Judgment*." (Tr. 2-37.) At the hearing, Kona's attorney stated that the admission of guilt made by Kona to enter the pretrial diversion program was tantamount to a guilty plea. (Tr. 5.) Kona's attorney acknowledged that

Kona did not have a conviction, but asserted that from the perspective of the immigration authorities, Kona had a conviction, notwithstanding the state's dismissal of the case. (Tr. 6.)

Defense counsel maintained that, from the perspective of immigration authorities and under federal law, Kona's admission operated as a conviction. Therefore, he argued that Kona 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. (Tr. 5-7.)

In response, the trial court stated, "[o]f course, here with successful completion of diversion, there is no conviction. And, as a matter of fact, if there is an arrest on the record, the defendant becomes eligible to immediately seek expungement of that arrest on the record" (Tr. 10.) Kona's attorney replied, "I would agree with you, Your Honor, but immigration is a little different" (Tr. 11.) The court asked "what puts a judge on notice that down the road from the date of the filing of the diversion packet there may be some consequence that was unintended or perhaps even unforeseen?" (Tr. 12-13.)

The state noted that R.C. 2935.36, which governs pretrial diversion programs, do not require a trial court to ensure that a defendant knowingly, voluntarily, and intelligently enters into a pretrial diversion program. Furthermore, R.C. 2943.031 does not require a trial court to advise a defendant entering into a pretrial diversion program of possible immigration consequences. Kona was not entitled to these protections because he did not enter a plea of guilty or no contest. Hence, the state argued, the trial court was not required to follow Crim.R. 11 and R.C. 2943.031. On July 2, 2013, the trial court denied Kona's motion to withdraw plea and vacate. Kona appealed and on March 27, 2014, the Eighth District Court of Appeals affirmed the decision of the trial court. *State v. Kona* 2014 WL 1340566 (Ohio App. 8th Dist.), 2014-Ohio-1242.

LAW AND ARGUMENT

The threshold determination underlying each of Appellant's propositions of law is that the written statement he made when applying to the prosecutor's pretrial diversion program was the equivalent of entering into a guilty plea. Therefore, Appellant contends 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 under Crim.R. 11 and R.C. 2943.031 and despite never having entered a plea or having a conviction insists that the trial court can withdraw the plea.

Pretrial diversion programs are governed by R.C. 2935.36, which statute does not require a trial court to ascertain that a defendant is knowingly, voluntarily, and intelligently entering into a *pretrial diversion program*. Likewise, nothing in R.C. 2943.031 requires a trial court to advise a defendant of the possible immigration consequences of entering into a *pretrial diversion program*. Upon a plain reading of these statutes, it is clear that the Appellant would not have been afforded these protections unless he entered a plea of guilty or no contest.

The State respectfully submits that the Appellant's Propositions of Law do not present substantial constitutional questions or matters of great public or general interest and therefore asks this Honorable Court to affirm the judgment of the appellate court.

PROPOSITION OF LAW I (As stated by Appellant):

A written admission of guilt required by a diversion program is the functional equivalent of a guilty plea or no contest plea for purposes of R.C. 2943.031(A).

Appellant argument that the appellate court erred in this matter rests upon his contention that a written statement given in order to enter a pretrial diversion program requires both statutory and constitutional protections and that the trial court needs to treat such application as a complete plea of guilt. This is not the law in Ohio. Pretrial diversion programs are governed by R.C. 2935.36, which provides that:

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

Pursuant to R.C. 2935.36(B), an accused entering a pretrial diversion program must:

(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.

In addition, the statute requires that:

(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 di-ersion 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).

At the time Kona applied to the prosecutor's Cuyahoga County Pretrial Diversion Program², the accused was required "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." Kona maintains that this admission was tantamount to a guilty plea, requiring the trial court 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, a voluntary, knowing, and intelligent plea would require the court to advise him pursuant to R.C. 2943.031.

Kona's asserts that R.C. 2943.031 should be interpreted to govern statements that are part of the diversion program application process. The court of appeals rejected Kona's analysis, stating, "[T]here 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." *Kona* at ¶19.

² The prosecutor's diversion program has been amended. It now requires a full plea of guilt to be entered on the record, with the plea not accepted by the trial court.

Appellant summarizes his argument in this matter at page 39 of his brief as, “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.” The cornerstone of statutory interpretation is legislative intent. *State ex rel. Francis v. Sours*, 143 Ohio St. 120, 124, 53 N.E.2d 1021 (1944). In order to determine legislative intent, it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). “If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996).

A court may interpret a statute only where the words of the statute are ambiguous. *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs.*, 32 Ohio St.3d 24, 27, 512 N.E.2d 332 (1987). Ambiguity exists if the language is susceptible of more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498 (1996).

R.C. 2943.031(A) unambiguously states:

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... (Emphasis added)

If the meaning of the statute is unambiguous and definite, (as is the meaning of R.C. 2943.031), it must be applied as written and no further interpretation is necessary. *Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 660 N.E.2d 463, 106 Ed. Law Rep.

871, 1996 -Ohio- 291, at 545; *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 997.

Because the trial court did not accept a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or misdemeanor from Kona, the court of appeals properly affirmed the trial court's determination that R.C. 2943.031 did not apply to the diversion application. Moreover, the statute is not ambiguous and there is no need to extend the plain meaning of the statute beyond its stated application.

Appellant insists that the written admission statement was the functional equivalent of a plea, citing the U.S. Code. However, Appellant acknowledges that under Ohio law and R.C. 2943.031 or Crim.R. 11, the admission made in this case would not subject him to punishment and is not a finding of guilt. Moreover, no finding of guilt was made by the trial court in this case – the admission was not made in or accepted in court. Nor would the admission lead to such finding of guilt. The purpose of the written statement was not to enter a plea of guilty to any charges, rather it was a statement made outside of court in order to participate in a diversion program. Had Appellant not completed the diversion program, he would have been entitled to maintain his innocence of the charges and go to trial upon the indictment, with the state able to use the statement as evidence against him.

Appellant has not explained that the specific admission he made would constitute facts sufficient to warrant a finding of guilt to robbery in this case. Appellant was indicted for robbery; which requires that the state prove Appellant inflicted, attempted to inflict, or threatened to inflict physical harm on another, or that Appellant used force on another. See, R.C. 2911.02.

The admission submitted in this case does not indicate that Appellant used force or attempted to cause, or did cause harm to another as alleged in the indictment for robbery; rather Appellant wrote that he was simply “apprehended.” Because of this, Appellant’s argument that he would be subject to a finding of guilt in this case to charges of robbery solely upon his written statement is without merit and undercuts his argument that under federal law his admission operates as a conviction where he has not admitted to each and every element of the offense of robbery in his statement.

Further, the case law upon Appellant cites throughout his brief is factually dissimilar to the facts in this case. The procedure in this case did not require a plea of guilty. In contrast, the cases cited by Appellant all were based upon the fact that those defendants entered guilty pleas in court prior to participating in the diversion program. See, *Padhiyar v. Holder*, 560 Fed. Appx. 514, 2014 U.S. App. LEXIS 5444, (6th Cir. 2014), (“He entered a plea of guilty pursuant to Tenn. Code Ann. § 40-35-313 in December 2009 and was sentenced to three years of probation for the theft offense and one year of probation for the tax offense.”); *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir.2003), (Defendant entered a plea of nolo contendere); *State v. Abi-Aazar*, 154 Ohio App.3d 278, (9th Dist. 2003), (Defendant entered a plea of guilty to the charges); *State v. Curry*, 134 Ohio App.3d 113 (9th Dist. 1999), (Defendant entered guilty plea although not required by statute); *Strickland v. Ohio Bureau of Motor Vehicles*, 92 Ohio App.3d 755, 637 N.E.2d 95 (2d Dist.1994), (Defendant entered a written plea of guilt).

It is important to mention that Kona cites 8 U.S.C. 1101(a)(48)(A) in support of his claim that his admission exposed him to deportation or other immigration difficulties. That provision states:

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.

The record in this case is devoid of any formal judgment of guilt. No judge or jury found Kona guilty, and Kona did not enter a plea of guilty or nolo contendere. Nor did he admit sufficient facts to warrant a finding of guilty to the indictment in this case, there was no admission that he used force in committing a theft or caused physical harm to another. Appellant's third proposition of law is without merit.

Appellant's contention that the requirements of the diversion program constituted punishment under the federal law, a component of the definition does not overcome the fact that there was never an admission to a felony in this case, nor was there a plea, other than not guilty, entered in court and upon the record. Because of this, Appellant's argument under his first proposition of law that his admission was a plea of guilt necessitating an immigration advisement should be found to be without merit and the judgment of the trial court should be affirmed.

**PROPOSITION OF LAW II (As stated by Appellant):
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 formerly stated, nothing in R.C. 2943.031 (or R.C. 2935.36) requires a trial court to ensure that a defendant is knowingly, voluntarily, and intelligently entering into a pretrial diversion program. Nor does the statute require a formal plea of guilty in court. Therefore, R.C.

2943.031 did not apply to Appellant or others entering the prosecutor's diversion program at that time. R.C 2943.031(A) reads:

- (A) 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.

R.C. 2943.031

As argued supra, Appellant's statement in this matter was not a plea or an admission to the indictment. As such, Appellant's argument under this proposition of law that no R.C. 2943.031 advisement was made does not transform the statement he made into a guilty plea. Surely that is not the intention of the federal definition – rather the definition in the federal code requires a plea and punishment or an admission of facts sufficient to allow a finding of guilt and punishment. Neither of these scenarios was met in this case. Ohio law and procedure is limited to the formal plea within a courtroom, not a written statement that is made for acceptance into a diversion program. Accordingly, Kona's second proposition of law is without merit and the judgment of the appellate court should be affirmed.

PROPOSITION OF LAW III (As stated by Appellant):

A written admission of guilt is not made knowingly, voluntarily, and intelligently when a noncitizen is not advised of potential immigration consequences.

The Revised Code and Criminal Rules do not require a court direct or inquire as to any aspect of a defendant's written statement required by the prosecution for entry into its pretrial diversion program. In this case, Kona did not enter a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor, and again, R.C. 2943.031 does not apply to his application.

PROPOSITION OF LAW IV (As stated by Appellant):

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.

As stated in the Eighth District's opinion, "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..." As to Crim. R. 32.1, the appellate court correctly determined that, "[a] trial court cannot [grant a motion to] withdraw a plea that was never entered into, nor can it vacate a conviction that does not exist." *Kona* at ¶22.

It must also be mentioned that it is not at all clear that the admission prerequisite for pretrial diversion exposes him to deportation or any other immigration consequences under 8 U.S.C. 1101(a)(48)(A) as noted *supra*. In this matter, the admission does not allege sufficient facts to find Appellant guilty, nor did he enter a written plea or appear in court and enter a plea.

The state has already contested Appellant's conclusion that the written statement presented by Appellant to the Prosecutor in the diversion packet is the equivalent of a guilty plea and thus confers the right under R.C. 2943.031 to the court to withdraw the statement as if it were a plea. As such, the state asks that the court of appeals judgment be affirmed.

PROPOSITION OF LAW V (As stated by Appellant):

A trial court has jurisdiction to withdraw a written admission of guilt and vacate the conviction after a dismissal.

Appellant's fifth propositions of law fail for the reasons stated above and as succinctly and correctly stated by the appellate court: "a trial court cannot withdraw a plea that was never entered into, nor can it vacate a conviction that does not exist." *Kona*, 2014-Ohio-1242, at ¶ 22.

CONCLUSION

Kona did not enter a plea of guilty or no contest as part of his pretrial diversion program. Nor did he enter a written admission to the charges of robbery as indicted. Therefore, the trial court was not required to follow the mandates of Crim.R. 11 and R.C. 2943.031 and provide an advisement to him that he could be subject to immigration consequences by entering into a pre-trial diversion program that did not require a guilty plea.

Furthermore, a trial court cannot grant a motion to withdraw a plea that was never entered into, nor can it vacate a conviction that does not exist as requested by Appellant. For these reasons, the State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction in this case, and dismiss Appellant's Appeal.

Respectfully submitted,

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