

[Cite as *State v. Duplessis*, 2010-Ohio-4920.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

2009 CA 101

: C.A. CASE NO.

v.

T.C. NO. 03 CR 0996

:

LEONARD DUPLESSIS

: (Criminal appeal from
Common Pleas Court)

Defendant-Appellant

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OPINION

Rendered on the 8th day of October, 2010.

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FROELICH, J.

{¶ 1} Defendant-Appellant Leonard Duplessis appeals from a trial court
decision denying his motion to withdraw his guilty plea. He argues that the trial court

abused its discretion in denying his motion, without holding a hearing, because the court had failed to advise him at the time of his plea, in accordance with R.C. 2943.031(A), that his guilty plea could have a negative impact on his immigration status. For the following reasons, the judgment of the trial court will be reversed.

I

{¶ 2} On December 3, 2003, Duplessis was indicted on one count of possession of crack cocaine. On February 4, 2004, he pled guilty to the charge, and the trial court sentenced him to two years of community control. More than five and one-half years later, on September 10, 2009, Duplessis filed a motion to withdraw his plea pursuant to R.C. 2943.031(D). The State filed no response. Without holding a hearing, the trial court overruled the motion on September 28, 2009. Duplessis appeals.

II

{¶ 3} Duplessis' sole assignment of error:

{¶ 4} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE HIS CRIMINAL CONVICTION PURSUANT TO OHIO REV. CODE 2943.031."

{¶ 5} Duplessis argues that the trial court should have granted his motion to withdraw his guilty plea because the trial court failed to advise him, as required by R.C. 2943.031(A), of the potential negative consequences of his plea in regard to his immigration status. We review a trial court's decision on a motion to withdraw a plea, whether filed pursuant to Crim.R.32 or R.C. 2943.031, under an abuse-of-discretion standard. *State v. Francis*, 104 Ohio St.3d 490,

2004-Ohio-6894, ¶32, citations omitted. “An abuse of discretion means an unreasonable, arbitrary, or unconscionable action.” *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶15, quoting *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶59.

{¶ 6} R.C. 2943.031(A) requires a trial court to give the following advisement to all defendants entering either a guilty plea or a plea of no contest: “If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading * * * 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.” The only exceptions are if the defendant states orally on the record that he is a U.S. citizen or signs a written plea form stating he is a citizen. R.C.2943.031(B). Neither happened in this case. When a trial court accepts a plea from a foreign citizen without providing the necessary advisement, the defendant may seek to withdraw his plea. R.C. 2943.031(D).

{¶ 7} Duplessis filed a motion to withdraw his plea pursuant to R.C. 2943.031(D). “The clear and unambiguous language of subsection (D) of the statute [R.C. 2943.031] requires the trial court to set aside a conviction and allow the defendant to withdraw his guilty plea if the following four requirements are met: ‘1) the court failed to provide the advisement described in the statute; 2) the advisement was required to be given; 3) the defendant is not a citizen of the United States, and 4) the offense to which the defendant plead guilty may result in the defendant being subject to deportation, exclusion, or denial of naturalization under federal immigration laws.’ *State v. Weber* (1997), 125 Ohio App.3d 120, 126, * * *. The Ohio Supreme Court

has held that timeliness of the motion to withdraw the plea is also a consideration in determining whether a defendant may withdraw a plea after sentencing under R.C. 2943.031. *State v. Francis*, (2004), 104 Ohio St.3d 490, * * * 2004-Ohio-6894.” *State v. Ayupov*, Montgomery App. No. 21621, 2007-Ohio-2347, ¶12.

{¶ 8} The record reflects and the State agrees that the trial court did not provide the R.C. 2943.031(A) advisement to Duplessis. We must next consider whether the advisement was necessary in this case. There was no mention during the plea or sentencing hearing of Duplessis’ citizenship. The only reference found to Duplessis’ citizenship in the record is in his motion to withdraw his plea, wherein he claims that he is at risk of deportation due to his conviction. In that motion, Duplessis refers to Exhibit B as evidence of this risk of deportation, but we find no Exhibit B actually attached to the motion. Nevertheless, the Ohio Supreme Court has stated that in order to ensure compliance with R.C. 2943.031, “a trial court accepting a plea should never assume that any defendant is a United States citizen * * * This practice also precludes a defendant who later reveals that he or she was not a citizen at the time of the plea from invoking R.C. 2943.031(D) as grounds for withdrawing the plea.” *Francis*, supra, ¶20. Thus, the trial court should have inquired about Duplessis’ citizenship on the record, at the plea hearing.

{¶ 9} A trial court is not required to hold a hearing on every R.C. 2943.031(D) motion to withdraw a plea; however, “it is sometimes difficult for an appellate court to review a trial court’s ruling on a motion to withdraw a plea * * * when no hearing occurred.” *Francis*, supra, at ¶50. “Furthermore, the trial court’s failure to specify any reasons in its journal entry denying the motion severely hampers any

consideration of whether an abuse of discretion occurred.” *Id.*, at ¶52. Here, the trial court’s decision merely stated, “Upon a review of the pleadings, the Court finds, that defendant’s motion to set aside his conviction and withdraw his guilty plea is not well taken and is hereby OVERRULED.” R.C. 2943.031(D) requires the court to set aside the judgment and permit a defendant to withdraw his plea of guilty or no contest if there is no advisement and “the defendant shows that he is not a citizen of the United States and that the conviction...may result in his being subject to deportation, exclusion...or denial of naturalization....” (Emphasis added.) It seems implicit, if not explicit, in the statutory mandate that the defendant have an opportunity to “show”, by means of a hearing if necessary, that he meets the criteria which would require the court to set aside the judgment. Therefore, a hearing was necessary to address both the statutory factors and the timeliness issue.

{¶ 10} Certainly the best practice is to ask all defendants routinely as part of the Crim.R. 11 dialogue, “Are you a citizen of the United States?” First, this is required by R.C. 2943.031; second, the few seconds it takes to ask might well save hours of lawyer and court time down the road (e.g., in addressing motions to withdraw pleas or appeals for ineffective assistance of counsel; see *Padilla v. Kentucky* (2010), ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284); third, it will go a long way toward ensuring that a defendant’s decision to plead to a particular charge is knowing, voluntary and intelligent. Moreover, by asking all defendants, the court will avoid even the appearance that defendants are being treated differently because the court assumes that “certain stereotypical attributes” constitute alien status. See, e.g., Castillo, A Duty to Warn: Representing a Non-Citizen in a Criminal Case, 44

Washburn L.J. 627, 647 (Spring 2005).

{¶ 11} We conclude that the trial court abused its discretion in overruling Duplessis' R.C. 2943.031(D) motion to withdraw his plea, without holding a hearing, when there is no indication in the record that he is an American citizen. The assignment of error is sustained. We remand the case to the trial court for a hearing to determine whether Duplessis is an American citizen, thereby necessitating the R.C. 2943.031(A) advisement. The trial court is also directed to consider the remaining R.C. 2943.031(D) factors, i.e., whether possession of crack cocaine is an offense that "may result in [Duplessis] being subject to deportation, exclusion, or denial of naturalization under federal immigration laws," *Weber*, supra, and the timeliness of Duplessis' motion. *Francis*, supra. See, also, *State v. Duplessis*, Clark App. No. 2009 CA 58, 2010-Ohio-2388.

{¶ 12} Duplessis' assignment of error is sustained.

III

{¶ 13} Having sustained Duplessis' sole assignment of error, the order of the trial court from which this appeal is taken is Reversed, and the case is remanded for further proceedings consistent with this opinion.

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DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

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