

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-1001
	:	(C.P.C. No. 06CR-07-5428)
Mohamed S. Muhumed,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on December 27, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Susan M. Suriano*,  
for appellee.

*Mohamed S. Muhumed*, pro se.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Mohamed S. Muhumed ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas denying his motion to withdraw guilty plea and motion to vacate and correct void sentence. Because we find denial of the motion to withdraw guilty plea and motion to vacate and correct void sentence is proper, although for reasons different than those cited by the trial court, we affirm the trial court's decision to deny both motions.

**I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} On July 26, 2006, appellant was indicted in a multi-count indictment on charges of aggravated robbery and robbery. Many of those charges also included firearm specifications. The charges arose as a result of a string of armed robberies committed over a period of several weeks on the west side of Columbus at numerous businesses. On

November 28, 2006, appellant executed an entry of guilty plea form and a plea hearing was held. Appellant pled guilty to seven second-degree robbery offenses. The remaining charges, along with all of the firearm specifications, were dismissed in exchange for the plea. On December 21, 2006, the trial court sentenced appellant to an aggregate sentence of 17 years of incarceration and advised appellant of a mandatory three-year period of post-release control. On December 26, 2006, the trial court filed an entry journalizing appellant's convictions and sentencing. A corrected judgment entry was later issued on January 16, 2007.

{¶ 3} Appellant did not file a timely appeal. On June 21, 2007, this court denied his May 24, 2007 motion for leave to file a delayed appeal, finding appellant failed to provide a reasonable explanation for his untimeliness. *See State v. Muhumed*, 10th Dist. No. 07AP-437 (June 21, 2007) (memorandum decision). Appellant's discretionary appeal to the Supreme Court of Ohio was not accepted for review. *See State v. Muhumed*, 115 Ohio St.3d 1475, 2007-Ohio-5735.

{¶ 4} On April 1, 2008, appellant filed a motion for withdrawal of guilty plea pursuant to Crim.R. 32.1, arguing the plea agreement was breached and his counsel was ineffective in negotiating and executing the plea agreement. On May 6, 2008, plaintiff-appellee, the State of Ohio ("the State"), filed a memorandum contra to appellant's motion to withdraw guilty plea, arguing there was no breach of the agreement and appellant failed to demonstrate manifest injustice. On August 18, 2008, the trial court denied appellant's motion to withdraw.

{¶ 5} Appellant requested leave to file a delayed appeal from the trial court's August 18, 2008 judgment entry. On December 29, 2009, we granted appellant's motion for leave to file a delayed appeal. However, we found no abuse of discretion in the trial court's denial of appellant's motion to withdraw his guilty plea and, consequently, we upheld that denial on appeal. *See State v. Muhumed*, 10th Dist. No. 09AP-936, 2010-Ohio-3968.

{¶ 6} On August 31, 2011, appellant filed a motion to vacate and correct void sentence, claiming post-release control had not been properly imposed, consecutive sentences had been improperly imposed without the necessary findings, and the trial court failed to inform him of the mandatory nature of his sentences. On that same date, appellant also filed a motion to withdraw guilty plea, pursuant to R.C. 2943.031(D),

arguing that because the trial court failed to provide him with the proper advisements for non-citizens prior to accepting his guilty plea, the plea was not properly entered and he should be permitted to withdraw it. On September 13, 2011, the State filed a memorandum contra appellant's motion to vacate and correct void sentence. The following day, the State filed a memorandum contra to appellant's motion to withdraw guilty plea. On October 17, 2011, the trial court denied appellant's motion to withdraw guilty plea, as well as his motion to vacate and correct void sentence, finding both were barred by res judicata. This appeal now follows in which appellant raises six assignments of error:

## **II. ASSIGNMENTS OF ERROR**

[I.] The trial court committed error that was prejudicial when it denied the appellant's motion to withdraw guilty plea, when Ohio Revised Code 2943.031(D) mandates the judgment [sic] of conviction be set aside and Appellant be permitted to withdraw his plea in the absence of the advisement of Ohio Revised Code 2943.031(A).

[II.] The trial court erred when it held that res judicata barred consideration of the trial court's failure to give the Ohio Rev. Code 2943.031 warning as a basis for granting [Appellant's] motion to withdraw guilty plea.

[III.] The trial court erred and abused it[s] discretion where it failed to hold an evidentiary hearing on Appellant's motion to withdraw his guilty plea and vacate his conviction pursuant to Ohio Revised Code 2943.031(A), despite Appellant[']s clear and unequivocal request.

[IV.] The trial court erred and abused it[s] discretion where it failed to conduct a substantial compliance analysis in determination of the trial court's compliance with R.C. 2943.031.

[V.] The trial court erred in failing to properly impose post[-] release control at the plea and sentencing hearings in violation of R.C. 2943.032, R.C. 2929.19(B)(3)(a), and Crim.R. 11(C)(2)(A).

[VI.] The trial court erred in sentencing Appellant to consecutive terms of incarceration without setting forth the mandatory findings required by R.C. 2929.14(E)(4), in light of House Bill 86 and the repeal of 2929.19(B)(2)(c).

### III. DISCUSSION

{¶ 7} Appellant's first, second, third, and fourth assignments of error all address the trial court's denial of his motion to withdraw guilty plea. Because these assignments of error are intertwined, we shall address them together.

#### A. Standard of Review

{¶ 8} 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).

{¶ 9} "However, the manifest injustice standard does not apply to plea withdrawal motions filed pursuant to R.C. 2943.031(D)." *Oluoch* at ¶ 9, citing *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 26. "R.C. 2943.031(D)'s explicit language mandates that a trial court set aside a judgment of conviction and allow a defendant to withdraw his guilty plea if the defendant satisfies four requirements. Showing manifest injustice is not included as one of the requirements." *State v. Weber*, 125 Ohio App.3d 120, 129 (10th Dist.1997). The four requirements to be demonstrated are: (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. *Id.* at 126.

{¶ 10} The same abuse of discretion standard of review applies to the trial court's decision on a motion filed pursuant to R.C. 2943.031(D). *Francis* at ¶ 32. However, "when a defendant's motion to withdraw is premised on R.C. 2943.031(D), the standards within that rule guide the trial court's exercise of discretion." *Id.* at ¶ 33; *see also Oluoch* at ¶ 25. To clarify, the exercise of discretion "applies to the trial court's decision on whether the R.C. 2943.031(D) elements have been established (along with the factors of timeliness and prejudice \* \* \*), not generally to the trial court's discretion once the statutory provisions have been met." *Id.* at ¶ 34. "[A] defendant seeking relief under R.C.

2943.031(D) must make his or her case before the trial court under the terms of that statute, \* \* \* the trial court must exercise its discretion in determining whether the statutory conditions are met, and \* \* \* an appellate court reviews a trial court's decision on the motion under an abuse-of-discretion standard in light of R.C. 2943.031(D)." *Id.* at ¶ 36.

{¶ 11} The applicability of *res judicata* is a question of law, which an appellate court reviews *de novo*. *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 249, 2005-Ohio-5799, ¶ 15 (10th Dist.), citing *Prairie Twp. Bd. of Trustees. v. Ross*, 10th Dist. No. 03AP-509, 2004-Ohio-838, ¶ 12.

### **B. Crim.R. 32.1 Motion to Withdraw**

{¶ 12} Although appellant's current motion, filed August 31, 2011, is titled "Motion To Withdraw Guilty Plea(s) Pursuant To Ohio's O.R.C. 2943.031(D); {Failure Of Trial Court To Comply With O.R.C. 2923.031(A) Statutory Requirements For A Non-Citizen Defendant}," within the body of the motion, appellant also refers to his request as a "Motion to withdraw guilty plea(s) under Crim.R. 32.1, pursuant to failure of the trial court to comply with O.R.C. 2943.031(A) & (D)." In addition, appellant argues he should be permitted to withdraw his plea because his plea was not knowingly, voluntarily, and intelligently entered and his trial counsel was ineffective. While it seems likely that the latter claims stem from the court's alleged failure to provide the advisement set forth in R.C. 2943.031(A), it is also possible that the claims asserted are ones which do not necessarily fall within the scope of R.C. 2943.031, but rather the traditional realm of Crim.R. 32.1. Furthermore, under the third assignment of error in his appeal, appellant seems to make an argument for manifest injustice and cites to the ineffective assistance of counsel, despite the fact that the language contained in the assignment of error itself states the trial court erred by failing to hold a hearing on his motion to withdraw pursuant to R.C. 2943.031. Because the manifest injustice standard does not apply to plea withdrawal motions filed pursuant to R.C. 2943.031(D), and in the interests of thoroughness, we begin our analysis by addressing appellant's motion to withdraw in the context of a general Crim.R. 32.1 motion to withdraw.

{¶ 13} "Res judicata prevents repeated attacks on a final judgment and applies to issues that were or might have been previously litigated. *State v. Sappington*, 10th Dist. No. 09AP-988, 2010-Ohio-1783, ¶ 10, citing *State v. Brown*, 8th Dist. No. 84322, 2004-

Ohio-6421. "The doctrine of res judicata is applicable to successive motions to withdraw a guilty plea under Crim.R. 32.1." *State v. Tinney*, 5th Dist. No. 2011 CA 41, 2012-Ohio-72, ¶ 27. " '[R]es judicata \* \* \* acts to bar raising issues in a successive Crim.R. 32.1 motion to withdraw a plea of guilty where those issues could have been raised in the prior Crim.R. 32.1 motion." *State v. Tran*, 10th Dist. No. 11AP-146, 2012-Ohio-1072, ¶ 11, quoting *State v. Ikharo*, 10th Dist. No. 10AP-967, 2011-Ohio-2746, ¶ 11, citing *State v. Gallegos-Martinez*, 5th Dist. No. 10-CAA-06-0043, 2010-Ohio-6463, ¶ 12. *See also Sappington* at ¶ 10 (courts have applied res judicata to preclude a defendant from raising an issue in a second motion to withdraw where he could have, but did not, raise the issue in a previously filed motion to withdraw).

{¶ 14} In April 2008, appellant filed his first motion to withdraw guilty plea, titled "motion for withdrawal of guilty plea pursuant to Crim.R. 32.1." (R. 121.) In that motion, he moved to withdraw his guilty plea on the grounds that the plea agreement had been breached and his trial counsel had been ineffective. The trial court denied his request to withdraw his plea. On August 24, 2010, we affirmed that denial.

{¶ 15} Therefore, because res judicata applies to successive motions to withdraw a guilty plea under Crim.R. 32.1 and to issues raised in a post-sentencing Crim.R. 32.1 motion that were or could have been raised in a direct appeal, and because appellant either did raise or could have raised the present issues regarding the ineffective assistance of counsel and the knowing, intelligent, and voluntary nature of his plea in his first motion to withdraw guilty plea pursuant to Crim.R. 32.1, we find the trial court did not err in finding these claims to be barred and in denying the motion to withdraw on the basis of res judicata to the extent it asserted successive claims under Crim.R. 32.1.<sup>1</sup>

### **C. Motion to Withdraw Under R.C. 2943.031**

{¶ 16} Next, we address appellant's motion to withdraw guilty plea in the context of R.C. 2943.031. Appellant argues that res judicata does not apply to bar a motion to withdraw guilty plea made pursuant to R.C. 2943.031 where the trial court fails to provide the proper advisements for non-citizens prior to accepting a guilty plea. As a result,

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<sup>1</sup> We note that in the recently decided case of *Tran*, we determined our court has " 'consistently concluded that res judicata bars a party from raising issues in a post-sentencing Crim.R. 32.1 motion that were or could have been raised in a direct appeal.' " *Id.* at ¶ 11, quoting *Ikharo* at ¶ 11. *See also State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123, ¶ 12; *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144, ¶ 10; and *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶ 6.

appellant argues the trial court erred in failing to conduct a hearing and in failing to conduct a substantial compliance analysis in order to determine whether appellant should be permitted to withdraw his guilty pleas. Appellant further argues that the absence of such advisements under R.C. 2943.031(D) mandates that he be permitted to withdraw his guilty pleas, and that the trial court erred in denying his motion to withdraw guilty plea.

{¶ 17} R.C. 2943.031(A) requires a trial court to give the following advisement to defendants entering either a guilty plea or a plea of no contest unless the defendant indicates that he is a citizen, in accordance with R.C. 2943.031(B):

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 \* \* \* 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.

{¶ 18} R.C. 2943.031(D) specifies the remedy for a trial court's failure to advise as required under R.C. 2943.031(A). *State v. Yuen*, 10th Dist. No. 01AP-1410, 2002-Ohio-5083, ¶ 18. "Under R.C. 2943.031(D), a defendant who has not received the advisement required by R.C. 2943.031(A) may move to set aside the judgment and withdraw his guilty plea. This motion and an appeal from the denial of the motion provide the exclusive remedies for an alleged violation of R.C. 2943.031(A)." *State ex rel. White v. Suster*, 101 Ohio St.3d 212, 2004-Ohio-719, ¶ 7. *See also Oluoch* at ¶ 26 (an R.C. 2943.031(D) plea withdrawal motion and an appeal from the denial of said motion are the exclusive remedies for an alleged violation of R.C. 2943.031(A)).

{¶ 19} R.C. 2943.031(D) reads in relevant part as follows:

Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty \* \* \* if \* \* \* the court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division, and the defendant shows that he is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

{¶ 20} In the context of a claim asserting a violation of R.C. 2943.031, our court has suggested that the defendant is not required to file a direct appeal of his conviction in

order to preserve the issue so it can be raised in a motion to withdraw. *Totten* at ¶ 7, citing *Yuen* at ¶ 31. *See also Oluoch* at ¶ 26 (res judicata does not apply to bar a defendant from asserting R.C. 2943.031 contentions in a guilty plea withdrawal motion, even if the defendant failed to raise those contentions through a direct appeal after the plea).

{¶ 21} Furthermore, in *Weber*, this court found that the General Assembly's inclusion of specific language in R.C. 2943.031(F),<sup>2</sup> along with the explicit language of R.C. 2943.031(D) (which sets forth the four requirements to be demonstrated in order to withdraw the plea), "persuades us that the General Assembly intended that R.C. 2943.031(D) be an independent means of withdrawing a guilty plea separate and apart from and in addition to the requirements of Crim.R. 32.1." *Id.* at 129. Similarly, in *Lakewood v. Shurney*, 8th Dist. No. 80885, 2002-Ohio-4789, ¶ 10, the Eighth District found:

R.C. 2943.031(D) provides a method for withdrawing a guilty plea outside of that provided in Crim.R. 32.1; a defendant who satisfies the four elements stated in that division need not show the "manifest injustice" normally required to justify post-sentence withdrawal of a guilty plea pursuant to Crim.R. 32.1. Moreover, even though there is some question concerning the applicability of res judicata to Crim.R. 32.1 motions, a motion for relief under R.C. 2943.031(D) cannot be raised until the element of prejudice is present. Because of this element, res judicata does not apply to motions under R.C. 2943.031 unless all the elements of the claim, including prejudice, could have been raised in an earlier proceeding.

{¶ 22} The question then arises as to whether appellant's filing of a motion to withdraw guilty plea pursuant to Crim.R. 32.1, in which he did not raise the issue of the trial court's failure to provide the advisement set forth in R.C. 2943.031(A) for non-citizens as grounds for the withdrawal, serves to prevent appellant from subsequently pursuing a motion to withdraw, pursuant to R.C. 2943.031(D), on the grounds that res judicata applies because the second motion is a successive motion and we previously addressed his motion to withdraw on its merits. We answer this question in the negative.

{¶ 23} Res judicata bars repeated attempts to raise R.C. 2943.031 claims. *State ex rel. White* at ¶ 8; *State v. Icke*, 6th Dist. No. L-10-1134, 2011-Ohio-364, ¶ 13. "The

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<sup>2</sup> The specific language reads as follows: "Nothing in this section shall be construed as preventing a court, in the sound exercise of its discretion pursuant to Criminal Rule 32.1, from setting aside the judgment of conviction and permitting a defendant to withdraw his plea."

doctrine of res judicata prevents [defendant] from relitigating his rights under R.C. 2943.031 in [a] subsequent motion to vacate or withdraw his plea." *Id.* at ¶ 15, citing *State ex rel. McDonald v. Mitrovich*, 113 Ohio St.3d 167, 2007-Ohio-1258, ¶ 7-8.

{¶ 24} In the instant case, however, appellant has not repeatedly attempted to raise claims under R.C. 2943.031. Appellant has not previously litigated his rights under R.C. 2943.031. Instead, he litigated his rights via a Crim.R. 32.1 motion to withdraw guilty plea based on breach of the plea agreement and the ineffective assistance of counsel. Appellant did not assert a violation of R.C. 2943.031(A) in his initial motion to withdraw. Although a Crim.R. 32.1 motion to withdraw guilty plea and a motion to withdraw guilty plea under R.C. 2943.031 share similarities, "the General Assembly intended that R.C. 2943.031(D) be an independent means of withdrawing a guilty plea separate and apart from and in addition to the requirements of Crim.R. 32.1." *Weber* at 129. Furthermore, these two motions have different standards and requirements.

{¶ 25} As previously stated above, Crim.R. 32.1 post-sentence motions to withdraw guilty pleas are subject to a manifest injustice standard, but that standard does not apply to a motion to withdraw under R.C. 2943.031. "[A]n examination of R.C. 2943.031 in its entirety makes apparent the General Assembly's intent to free a noncitizen criminal defendant from the 'manifest injustice' requirement of Crim.R. 32.1 and to substitute R.C. 2943.031(D)'s standards in its place. The General Assembly has apparently determined that due to the serious consequences of a criminal conviction on a noncitizen's status in this country, a trial court should give the R.C. 2943.031(A) warning and that failure to do so should not be subject to the manifest-injustice standard even if sentencing has already occurred." *Francis* at ¶ 26. Thus, consideration of these two motions to withdraw requires different analyses. In our opinion, the two motions filed here do not constitute "successive" motions.

{¶ 26} The next question that arises is whether appellant could have moved to withdraw the guilty plea based upon the R.C. 2943.031 violation at the time he filed his initial motion to withdraw in April 2008. The State argues that appellant was aware of potential prejudice issues that he could have raised in the April 2008 motion to withdraw guilty plea because appellant was aware of his immigration issues "around middle of January, 2007." (R. 196 at 2.) Therefore, because appellant previously filed a motion to withdraw in April 2008 and purportedly had all of the knowledge and information

necessary to assert a claim for a violation of R.C. 2943.031 at that time but failed to do so, the State argues he is barred by *res judicata* from raising such a claim now.

{¶ 27} We disagree with the State's contention because we find the record does not support the assertion that appellant had all of the knowledge and information that would give rise to filing a motion to withdraw pursuant to R.C. 2943.031 in April 2008.

{¶ 28} In this case, appellant did not support his motion to withdraw with documentation affirmatively demonstrating that the conviction resulting from his guilty plea has caused prejudice. In other words, appellant has not produced documentation demonstrating the issuance of a notice of deportation proceedings or that a deportation order was issued against him. Nor has appellant attached an affidavit averring that he will be deported, excluded, or denied citizenship, or that he has received notice that deportation proceedings are pending, or that his convictions at issue are the proximate cause of the purported deportation proceedings. Instead, appellant has simply made unsupported assertions in his motion to withdraw and in his appellate brief claiming he faces the possibility of deportation because he has received notification of a pending deportation proceeding.

{¶ 29} In his August 31, 2011 motion to withdraw guilty plea, appellant states:

[A]s a result of a visit from Immigration and Customs Enforcement {ICE}, around middle of January, 2007 at Corrections Reception Center {CRC}, Ohio; And, a more recent follow up of a "Notice to appear in Immigration Court" by ICE Agents, notifying defendant Muhumed of a pending deportation proceeding(s); Moreover, it is important for this Honorable Court to recognize that, O.R.C. 2943.031, does not provide a time limitation within which to file a motion to withdraw guilty plea(s).

(R. 196 at 2.)

{¶ 30} In his appellate brief, appellant states:

Appellant received a visit from Immigration and Customs Enforcement (ICE), in January Of 2007, along with a follow up Notice to Appear in Immigration Court with notification of a pending deportation proceedings. (See Exh "F").<sup>3</sup> Thus, Appellant more recently has become aware through the ICE Agents that his felony conviction will not only result in deportation, but would also include the consequences of

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<sup>3</sup> Exhibit "F" is not attached to appellant's brief and we have not located an Exhibit "F" in the record.

warnings, (2) exclusion from admission into the United States, and (3) denial of Naturalization.

(Appellate Brief at 5.)

{¶ 31} As noted above, appellant has not filed a notice of deportation proceedings or an affidavit swearing that he will be deported, excluded, or denied citizenship in support of his claim of prejudice resulting from his plea. Thus, there are no documents or other evidence in the record indicating when appellant was notified as to a pending deportation proceeding. Furthermore, it is unclear, based upon appellant's motion to withdraw, exactly when appellant became aware of the fact that he was facing deportation due to a pending proceeding. Appellant's unsworn statements regarding the timing of his receipt of any notice of deportation and the information that he received during the January 2007 visit from the Immigration and Customs Enforcement agents are not definitive.

{¶ 32} Thus, without more, and contrary to the State's assertions, it cannot be said that appellant had all of the knowledge and information giving rise to the filing of a motion to withdraw pursuant to R.C. 2943.031 in April 2008. "[R]es judicata does not apply to motions under R.C. 2943.031 unless all the elements of the claim, including prejudice, could have been raised in an earlier proceeding." *Lakewood* at ¶ 10.

{¶ 33} Based upon the evidence in the record, we cannot find that the violation of R.C. 2943.031 could have been raised at the time the April 2008 Crim.R. 32.1 motion to withdraw was filed. Because the record is unclear as to when appellant became aware of pending deportation proceedings, we cannot find that appellant's August 2011 motion to withdraw is barred by res judicata to the extent that it addresses a violation of R.C. 2943.031. Therefore, we find the trial court erred in applying the doctrine of res judicata to bar appellant's R.C. 2943.031 motion to withdraw guilty plea. Accordingly, we sustain appellant's second assignment of error.

#### **D. Substantial Compliance**

{¶ 34} Appellant submits the trial court failed to comply with R.C. 2943.031(A) by failing to notify him of the collateral consequences of a guilty plea. Although he was advised of the possibility of deportation as a consequence of his guilty plea, appellant asserts the trial court failed to notify him that a guilty plea could result in exclusion from admission to the United States and/or denial of naturalization. However, because the

trial court found (incorrectly) that appellant's motion to withdraw guilty plea was barred by the doctrine of res judicata, the court did not conduct a substantial compliance analysis regarding its compliance with R.C. 2943.031(A) at the time of the plea or hold a hearing on the issue. We now address whether or not that was error.

{¶ 35} A review of the transcript of the plea proceedings reveals that the trial court was aware that appellant was not a citizen of the United States. The trial court addressed the issue and the following exchange occurred:

THE COURT: Quite frankly, Mr. Muhumed, I do not know exactly what position the INS would take with regards to this case. I do not know. I'm going to have to assume the worst and for purposes of this plea I would like you to do that as well. And so I will ask you, do you understand that there is a possibility that the INS might come and say, look, given the number of crimes, given the nature of the crimes that we feel we have no choice but to deport you. I have to assume that that's a possibility. Do you understand that?

[APPELLANT]: Yes, sir.

THE COURT: Do you understand that that could happen to you?

[APPELLANT]: Yes, sir.

THE COURT: All right. Any questions in that regard?

[APPELLANT]: No, sir.

(Tr. 7-8.)

{¶ 36} Based upon the transcript of the plea proceedings, it is apparent that the trial court did not provide verbatim the advisement set forth in R.C. 2943.031(A). In fact, the trial court only notified appellant of the possibility of deportation, and failed to advise appellant of the possibility of exclusion from admission into the United States and denial of naturalization.

{¶ 37} "[I]f some warning of immigration-related consequences was given at the time a noncitizen defendant's plea was accepted, but the warning was not a verbatim recital of the language in R.C. 2943.031(A), a trial court considering the defendant's motion to withdraw the plea under R.C. 2943.031(D) must exercise its discretion in determining whether the trial court that accepted the plea substantially complied with

R.C. 2943.031(A)." *Francis* at ¶ 48. "[A] defendant seeking relief under R.C. 2943.031(D) must make his or her case before the trial court under the terms of that statute, \* \* \* the trial court must exercise its discretion in determining whether the statutory conditions are met, and \* \* \* an appellate court reviews a trial court's decision on the motion under an abuse-of-discretion standard in light of R.C. 2943.031(D)." *Id.* at ¶ 36.

{¶ 38} "Substantial compliance with R.C. 2943.031(A) requires a defendant to be informed of the possibility not only of deportation, but also of exclusion from admission into the United States and denial of naturalization pursuant to the laws of the United States." *State v. Oluch*, 10th Dist. No. 10AP-1038, 2011-Ohio-3998, ¶ 13, citing *State v. Ouch*, 10th Dist. No. 06AP-488, 2006-Ohio-6949, ¶ 28, discretionary appeal not allowed, 114 Ohio St.3d 1410, 2007-Ohio-2632, citing *State v. Batista*, 10th Dist. No. 03AP-1009, 2004-Ohio-5066, ¶ 9. Substantial compliance means " 'under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. \* \* \* The test is whether the plea would have otherwise been made.' " *Francis* at ¶ 48, quoting *State v. Nero*, 56 Ohio St.3d 106, 108 (1990).

{¶ 39} Before we undergo a substantial compliance analysis, however, we note that a defendant is not automatically entitled to relief when a trial court fails to provide the advisement required by R.C. 2943.031(A). *State v. Garmendia*, 2d Dist. No. 2002-CA-18, 2003-Ohio-3769, ¶ 12. To obtain relief pursuant to R.C. 2943.031(D), the defendant must show he is not a citizen of the United States and that the offense to which he pled guilty may result in deportation, exclusion from admission to the United States, or denial of naturalization. *Id.* In other words, appellant must show prejudice. *See Francis* at ¶ 45 ("As one of the showings that must be made to prevail on an R.C. 2943.031(D) motion, a defendant must demonstrate that he or she was prejudiced by the trial court's alleged failure to comply with R.C. 2943.031(A).").

{¶ 40} We have previously found that a trial court's failure to substantially comply with R.C. 2943.031(A) did not warrant reversal where the defendant failed to show he was prejudiced by the trial court's error. In *Batista*, we found the defendant did not assert that hearing the full advisement would have impacted his decision to plead guilty and did not set forth any evidence demonstrating he was facing exclusion from admission to the United States or denial of naturalization. As a result, we determined he failed to

demonstrate he suffered a prejudicial effect as a result of the trial court's error. Therefore, we deemed the error harmless.

{¶ 41} In the case before us, appellant's motion is lacking in evidence to support his unsworn assertions. Appellant has not filed a notice of deportation proceedings or even an affidavit averring he is facing deportation proceedings as a result of his convictions or, more importantly, that he is facing exclusion from admission to the United States or denial of naturalization as a result of his convictions.<sup>4</sup> Nor has appellant submitted an affidavit averring that, had he received the full advisement, such advisement would have impacted his decision to plead guilty (i.e., he would not have entered his guilty plea). In fact, appellant has not filed any type of affidavit or evidence at all in support of his claimed prejudice from his plea. Instead, appellant has simply asserted in his motion and in his brief, without supporting documentation, that he faces deportation, due to a pending proceeding.

{¶ 42} Without a notice of deportation or a sworn statement or any other evidence in the record, appellant has not sufficiently established prejudice from his guilty pleas entered in this case. *See State v. White*, 142 Ohio App.3d 132 (8th Dist.2001) (because no deportation order had been issued, and therefore the defendant only faced the possibility of deportation as a result of his plea, he did not show prejudicial effect); *State v. Isleim*, 8th Dist. No. 66201 (Aug. 18, 1994) (some showing of prejudicial effect caused by the trial court's failure to advise a defendant as to possible deportation is required before a motion to vacate a guilty plea will be granted); and *State v. Balderas*, 2d Dist. No. 07-CA-25, 2007-Ohio-4887 (because the defendant failed to show the convictions resulting from his guilty pleas in state court in the case at issue—rather than his federal convictions—adversely affected his immigration status, there was no error in the trial court's decision to deny his motion to withdraw).

{¶ 43} Therefore, even if we conducted a substantial compliance analysis and determined the trial court failed to substantially comply with the advisement set forth in R.C. 2943.031, without a showing of prejudice, any error by the trial court is harmless.

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<sup>4</sup> Notably, appellant *was* advised of the possibility of deportation. However, he was not advised of the possibility of exclusion from the United States or of denial of citizenship. Appellant has neither alleged nor produced evidence demonstrating he has been prejudiced by the trial court's failure to advise him of these two consequences. *See Batista* at ¶ 12 ("there is no evidence appellant is facing exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States as a result of his guilty plea, which is insufficient to show prejudicial effect.").

*State v. Esqueda*, 10th Dist. No. 96AP-118 (Sept. 30, 1996). *See also State v. Browley*, 8th Dist. No. 66038 (Sept. 29, 1994) (because appellant failed to demonstrate he was prejudiced by the court's failure to advise him with respect to deportation, the court's omission was harmless); *State v. Bisono*, 8th Dist. No. 74446 (Aug. 5, 1999) (trial court's error was harmless where the defendant failed to indicate in what manner she was prejudiced by the trial court's failure to provide the advisement regarding deportation and citizenship, she faced only the possibility of deportation because no deportation order had been issued yet, and no further prejudice could be gleaned from the record); and *Broadview Heights v. Cvekic*, 8th Dist. No. 77933 (Nov. 21, 2001) (withdrawal of plea not required where the record reflected the effect of the trial court's failure to issue the advisement was not prejudicial as to appellant's possible deportation because even if the conviction at issue was vacated, there were still unrelated grounds for deportation and appellant was not prejudiced by the trial court's error). Here, appellant has failed to meet his burden of producing evidence showing he was prejudiced as a result of any non-compliance with R.C. 2943.031.

#### **E. Failure To Hold A Hearing**

{¶ 44} Finally, we address the issue of the trial court's failure to hold a hearing. In *Francis*, which addressed an appeal from the trial court's denial of the defendant's motion to withdraw pursuant to R.C. 2943.031, the Supreme Court of Ohio determined:

[A]s a general rule, in the absence of specific requirements to the contrary, decisions as to whether to hold a hearing and as to whether to explain reasons for a ruling are matters entrusted to the sound discretion of the trial court. Sometimes, a trial court's explanation of the reasons underlying the decision to deny the motion will illuminate why a hearing was not necessary. Sometimes, the record will reveal the reasons for denial with sufficient clarity to show that it was not error to fail to hold a hearing or to specify the reasons for denial. We simply find that, in this case, the combination of a failure to hold a hearing and a failure to explain the reasoning are so significant that appellate review is impossible and that further proceedings by the trial court are necessary.

*Id.* at ¶ 56.

{¶ 45} Recently, this court addressed the issue of when a hearing is required. In *State v. Yahya*, 10th Dist. No. 10AP-1190, 2011-Ohio-6090, we considered the defendant's

motion to withdraw guilty plea pursuant to Crim.R. 32.1 on the grounds that her trial counsel was ineffective in incorrectly advising her that her guilty plea would not adversely affect her immigration status. We followed our previous determination that "[a] trial court is not always required to hold a hearing on a post-sentence motion to withdraw a guilty plea, but '[a] hearing is required if the facts alleged by the defendant and accepted as true would require the court to permit that plea to be withdrawn.'" *Id.* at ¶ 6, quoting *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 6.

{¶ 46} Although *Yahya* involved a motion to withdraw based upon ineffective assistance of counsel with respect to counsel's advice regarding the defendant's immigration status, rather than a motion to withdraw pursuant to R.C. 2943.031, we believe the same rationale applies here. Therefore, we believe a hearing is required if the facts alleged and accepted as true require that withdrawal of the plea be permitted.

{¶ 47} The lack of evidence in the record to support appellant's unsworn assertions makes it readily apparent that no hearing is warranted here, as appellant has failed to meet his burden and withdrawal of the plea is not required. Despite the fact that the trial court did not conduct a substantial compliance analysis (due to its belief that *res judicata* applied to bar appellant's motion to withdraw guilty plea), we believe it is not necessary to remand this matter to the trial court to hold a hearing and/or conduct a substantial compliance analysis, based upon the evidence (or lack thereof) provided by appellant. Where the defendant fails to "carry his burden of presenting facts from the record or supplied through affidavit that establish manifest injustice or warrant a hearing," we are not required to permit withdrawal of the plea or to hold a hearing. *State v. Garcia*, 10th Dist. No. 08AP-224, 2008-Ohio-6421, ¶ 15.

{¶ 48} Our decision in *Garcia* was premised upon our examination of the defendant's motion to withdraw his guilty plea under a manifest injustice standard and a determination that the defendant failed to meet that standard or to demonstrate that a hearing was warranted. Nevertheless, we believe the standards set forth in R.C. 2941.031 can be substituted here for the manifest injustice standard. *See Francis* at ¶ 26. Upon doing so, we find appellant failed to meet that standard by presenting facts from the record or via affidavit, and because he did not, he failed to demonstrate that a hearing was warranted. Consequently, appellant failed to meet his burden in asserting he was prejudiced by the trial court's failure to provide the advisement in R.C. 2943.031, and we

find the trial court did not err in denying appellant's motion to withdraw guilty plea without a hearing.

{¶ 49} Based upon our analysis as set forth above, we overrule appellant's first, third, and fourth assignments of error.

#### **F. Denial of Motion to Vacate and Correct Void Sentence**

{¶ 50} Appellant's fifth and sixth assignments of error both address the denial of his motion to vacate and correct void sentence. Therefore, we shall address these assignments of error together.

{¶ 51} In these two assignments of error, appellant contends the trial court erred by failing to properly notify him of post-release control and by imposing consecutive periods of incarceration without making the necessary statutory findings as required by H.B. No. 86. Because of these errors, appellant argues the trial court erred in failing to grant his motion to vacate and correct void sentence.

{¶ 52} Appellant's motion to vacate and correct void sentence is a petition for post-conviction relief. *See State v. Hollomon*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶ 12 ("A motion to correct or vacate a sentence filed subsequent to a direct appeal is properly treated as a petition for post-conviction relief under R.C. 2953.21."). *See also State v. Cataraso*, 4th Dist. No. 01CA2636, 2002-Ohio-3211, ¶ 14 (because the defendant filed his motion subsequent to the time allowed for a direct appeal, claimed a denial of his constitutional right to be sentenced in accordance with the law, and asked the court to void or vacate his sentence, his motion constitutes a motion for post-conviction relief); and *State v. Reynolds*, 10th Dist. No. 06AP-1006, 2007-Ohio-2189, ¶ 6 (motion meets definition of petition for post-conviction relief because it was filed subsequent to the expiration of the time for filing a direct appeal, asserted a denial of constitutional rights, and sought to vacate the sentence). Here, appellant brought his motion after the time to file a direct appeal had expired and after his request for leave to file a delayed appeal was denied.

{¶ 53} The standard of review used by an appellate court in reviewing a trial court's decision to dismiss a postconviction petition for relief without an evidentiary hearing involves a mixed question of law and fact. *State v. Stewart*, 10th Dist. No. 09AP-817, 2009-Ohio-6423, ¶ 4. The trial court's decision on factual issues is reviewed under a

manifest weight standard, while the trial court's decision on legal issues is reviewed de novo. *Id.*

{¶ 54} The right to seek post-conviction relief is governed by R.C. 2953.21(A)(1)(a) which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, \* \* \* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 55} Post-conviction petitions must also be timely, pursuant to the time limits set forth in R.C. 2953.21(A)(2) ("a petition \* \* \* shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal \* \* \*. If no appeal is taken, \* \* \* the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."). Here, appellant did not file a direct appeal, so in calculating the time period for filing a timely post-conviction petition, his petition was due to be filed 210 days after the filing of the judgment entry journalizing his convictions and sentencing. Because the judgment entry finalizing appellant's convictions and sentence was filed on December 26, 2006, appellant's petition was due to be filed on or about July 24, 2007. Appellant's August 31, 2011 petition, which was filed more than four years after the deadline, is untimely.<sup>5</sup>

{¶ 56} When a post-conviction petition is untimely, the trial court lacks jurisdiction to consider it, unless the petitioner demonstrates that he can meet one of the exceptions set forth in R.C. 2953.23(A). *See State v. Satterwhite*, 10th Dist. No. 10AP-78, 2010-Ohio-3486, ¶ 8; *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 8; *State v. Backus*, 10th Dist. No. 06AP-813, 2007-Ohio-1815, ¶ 5; and *State v. Soulivong*, 10th Dist. No. 11AP-12, 2011-Ohio-3601, ¶ 11. "If a petition for post-conviction relief is untimely filed, a trial court has jurisdiction to entertain the petition only if the

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<sup>5</sup> Even if we calculated the deadline from the date the corrected judgment entry was filed (January 16, 2007), appellant's petition is still untimely.

limited conditions of R.C. 2953.23(A) are satisfied." *State v. Easley*, 10th Dist. No. 04AP-290, 2004-Ohio-7200, ¶ 10.

{¶ 57} Pursuant to R.C. 2953.23(A)(1), a court may not entertain an untimely petition unless the petitioner satisfies a two-pronged test by demonstrating that: (a) he was unavoidably prevented from discovering the facts upon which he relies to advance his petition, or that his claim is based upon a newly recognized federal or state right that applies retroactively to persons in his situation and the petition asserts a claim based upon that right; and (b) clear and convincing evidence demonstrates that no reasonable fact finder would have found him guilty in the absence of the alleged constitutional error or, if the claim challenges a sentence of death, in the absence of the constitutional error that occurred at the sentencing hearing.

{¶ 58} Alternatively, the trial court could also consider an untimely petition if the petitioner presented DNA evidence establishing his actual innocence by clear and convincing evidence. *See* R.C. 2953.23(A)(2).

{¶ 59} Because appellant has failed to demonstrate that he meets one of the exceptions to the timely filing requirement, denial of his request for relief is proper.

{¶ 60} Under the first exception, a trial court may consider an untimely petition if the petitioner shows he was unavoidably prevented from discovery of the facts upon which he must rely to present his claim for relief. *See* R.C. 2953.23(A)(1)(a). However, in the instant case, appellant cannot invoke this exception because there are no "new" facts at issue here. Instead, appellant has based his claims upon evidence which is already in existence in the record, not on any "new" evidence.

{¶ 61} With regard to the second alternative under the first prong of R.C. 2953.23(A)(1)(a), this exception is not applicable. Appellant has not argued, and furthermore, cannot demonstrate, that the United States Supreme Court has recognized a new federal or state right that applies retroactively to persons in his situation that would entitle him to relief.<sup>6</sup>

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<sup>6</sup> While appellant's argument on this issue is somewhat unclear, we note that appellant has argued that new legislation, specifically H.B. No. 86, requires mandatory findings for consecutive sentences. However, even if we were to construe this as a "new right," it is not one recognized by the United States Supreme Court, and it does not apply retroactively to persons in appellant's situation. This issue shall be analyzed more fully in addressing the merits of appellant's arguments.

{¶ 62} Finally, the exception for actual innocence established via DNA evidence is clearly not applicable here, as there is no DNA evidence at issue.

{¶ 63} Therefore, because appellant's petition was not timely filed, and because appellant has not met one of the exceptions which could overcome this jurisdictional bar, we find the petition was untimely.

{¶ 64} We also find appellant's petition is barred by res judicata.

{¶ 65} Under the doctrine of res judicata, a "[f]inal judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Jackson*, 10th Dist. No. 2002-Ohio-3330, ¶ 42 (emphasis sic), quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996); and *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. "Res judicata is applicable in all postconviction relief proceedings." *Szefcyk* at 95.

{¶ 66} Here, all of appellant's claims for relief were based on evidence in the record and all of the arguments raised could have been raised at sentencing or in a direct appeal without resorting to evidence outside of the record. As a result, res judicata applies to this post-conviction petition to bar him from raising an issue that was or could have been raised at sentencing or in a direct appeal. *See State v. Scudder*, 131 Ohio App.3d 470, 475 (10th Dist.1998) ("A petition for postconviction relief may be dismissed without a hearing, based upon the doctrine of res judicata, when the trial court finds that the petitioner could have raised the issues in his petition at trial or on direct appeal without resorting to evidence which is beyond the scope of the record."). *See also State v. Mason*, 10th Dist. No. 12AP-120, 2012-Ohio-4510, ¶ 10, quoting *Scudder* at 475 (" 'It is well settled that constitutional issues may not be considered in a postconviction proceeding where they have already been, or could have been, litigated by the defendant on direct appeal.' ").

{¶ 67} Consequently, we find res judicata bars appellant from raising these arguments now in a post-conviction petition, and therefore, we find the trial court properly denied the motion.

{¶ 68} Furthermore, even if the trial court had jurisdiction and if the motion was not barred by *res judicata*, it is readily apparent that appellant's challenges to post-release control and the imposition of consecutive sentences would still fail on the merits.

{¶ 69} Regarding the imposition of post-release control, both the sentencing judgment entry and the transcript from the plea and sentencing hearings demonstrate that appellant was properly advised he was subject to a mandatory three-year period of post-release control. (Tr. 6-7, 27-28; R. 86 at 3; R. 77 at 3.) As to appellant's challenge to his consecutive sentences, the trial court acted properly in imposing the sentences without making findings pursuant to R.C. 2929.14, as the provision requiring findings for consecutive sentences was severed under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at the time appellant was sentenced. Furthermore, although H.B. No. 86 became effective September 30, 2011, and reinstated the requirement for making judicial findings before imposing certain consecutive sentences, this reinstatement does not apply retroactively here.

{¶ 70} For all of the reasons cited above, appellant's fifth and sixth assignments of error are overruled.

#### **IV. DISPOSITION**

{¶ 71} In conclusion, we overrule appellant's first, third, fourth, fifth, and sixth assignments of error. We sustain appellant's second assignment of error because we find the trial court did err in determining that *res judicata* applied to bar appellant's motion to withdraw guilty plea pursuant to R.C. 2943.031. Nevertheless, based on other grounds, we find the denial of appellant's motion to withdraw guilty plea was proper, as well as the denial of appellant's motion to vacate and correct void sentence, and therefore we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

SADLER and FRENCH, JJ., concur.

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