LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date July 20, 2023 Case No. 20CR103520

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

FRANCISCO VELAZQUEZ
Defendant

Troy Murphy
Defendant's Attorney

This matter is before the Court on Defendant's Motion To Withdraw Guilty Plea, filed April 7, 2023, and the State's Objection, filed April 21, 2023.

Hearings had June 8, 2023, and July 10, 2023; evidence taken. State's Exhibit "1," and Defendant's Exhibits "A, B, & C," admitted. The Transcript of Proceedings is filed concurrently herein.

The motion is not well-taken and hereby DENIED.

IT IS SO ORDERED. See Judgment Entry. No Record.

JUDGE D. CHRIS COOK

cc: Griffin, Asst. Pros. Atty.
Murphy, Esq.
Budway, Esq.

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I. INTRODUCTION

This matter is before the Court on Defendant's Motion To Withdraw Guilty Plea, filed April 7, 2023, and the State's Objection, filed April 21, 2023.

Hearings had June 8, 2023, and July 10, 2023; evidence taken. State's Exhibit "1," and Defendant's Exhibits "A, B, & C," admitted.[1]

II. PROCEDURAL HISTORY

On November 19, 2020, the Defendant, Francisco Velazquez ("Velazquez"), was indicted for one count each of rape, kidnapping (with a sexual motivation specification), and gross sexual imposition.

On November 5, 2021, after extensive negotiations with the State, Velazquez plead guilty to an amended indictment of abduction and gross sexual imposition. On the same day, he was sentenced to five years of community control and designated a Tier I Sex Offender. During these proceedings, Velazquez was represented by private counsel, R.J. Budway ("Attorney Budway").

Velazquez did not file a direct appeal challenging any issues germane to this case.

[1] Defendant's exhibits were filed as part of his motion and are admitted by way of stipulation.

On March 14, 2023, Velazquez was arrested by The Department of Homeland Security's Immigration and Customs Enforcement ("ICE") division and ordered to appear for removal proceedings.

As of the date of this Order, Velazquez remains in federal custody and his immigration case is pending.

III. ANALYSIS

First, the timing of Velazquez' motion is highly suspect. Recall that he plead guilty and was sentenced on November 5, 2021, yet filed his motion to withdraw 16 months later, on April 7, 2023. Moreover, all of the issues he raised to justify withdrawing his plea, to wit: the trial court's failure to comply with R.C. 2943.031, the ineffective assistance of his prior counsel, Attorney Budway, and to correct a manifest injustice, could have been raised months ago.

TIMING

Although Crim.R. 32.1 does not provide a time limit for moving to withdraw after a sentence is imposed, "an undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Smith,* 49 Ohio St. 2d 261, 264, (1977), citing *Oksanen v. United States*, 362 F.2d 74, 79 (8th Cir.1966).

See also: *State v. Francis,* 104 Ohio St. 3d 490, 2004-Ohio-6894, "We reject appellant's argument that timeliness of the motion cannot ever be a factor in an R.C. 2943.031(D) consideration. Timeliness of the motion is just one of many factors that the trial court should take into account when exercising its discretion in considering whether to grant the motion." *Francis,* at ¶ 40.

RES JUDICATA

And generally, *res judicata* bars a defendant from raising claims in a Crim.R. 32.1 post-sentencing motion to withdraw a guilty plea that he raised or could have raised on direct appeal. See *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 59, emphasis added.

IN GENERAL: POST-SENTENCE MOTION TO WITHDRAW PLEA

Normally, in order to withdraw a post-sentence guilty plea, the defendant must be able to demonstrate a manifest injustice – a high bar indeed. But, such is not the case herein.

In the case at bar, as to this argument, the Court is well-aware that Velazquez need not show manifest injustice *if* the statutory elements of his R.C. 2943.031 challenge are met.

> 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, supra, at ¶ 26.

This Court is further aware that its discretion is limited to the determination of *whether* Velazquez has established the elements of a R.C. 2943.031(A) challenge and if so, it must grant the motion to withdraw.

> The exercise of discretion we discuss 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 discussed below), not generally to the trial court's discretion once the statutory provisions have been met.

Francis, at ¶ 34.

In this matter, the sole reason that Velazquez moves the Court to withdraw his guilty plea is the nascent immigration consequences he faces as a result of being a convicted sex offender. But contra Velazquez' assertions, this Court clearly advised him of the possibility of immigration consequences at the time of his plea, gave him a number of opportunities to reconsider the matter, and found his plea to be knowingly, voluntarily, and intelligently made.

As such, the motion lacks merit as a matter of law because Velazquez cannot establish the first prong of the *Francis* test, to wit, that, (1) the court failed to provide the advisement set forth in the statute. Moreover, as is discussed *infra,* Attorney Budway provided Velazquez with competent legal representation under a *Strickland* analysis and no manifest injustice has occurred.

Nevertheless, this Court will address his arguments *seriatim*.

A) THIS COURT FAILED TO COMPLY WITH R.C. 2943.031

Velazquez first argues that this Court failed to comply with R.C. 2943.031. The statute requires a trial court to provide a criminal defendant with a special statutory advisement regarding the potential for adverse immigration action when the defendant is not a U.S. citizen.

The statute mandates that the Court provide the following warning,

> 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.

R.C. 2943.031(A).

Importantly, the statute also mandates the following,

> **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(A), emphasis added.

It is undisputed by the record and conceded by Velazquez in his motion that this Court fully complied with R.C. 2943.031(A) by reading the statutory language to him *verbatim*. The Court then inquired of Velazquez if he still wanted to proceed with his plea to which he replied "Yes."

In addition, Velazquez reviewed his rights with Attorney Budway and Velazquez signed written Plea Sheets[2] advising him of his "legal rights" in the presence of an interpreter after the Court took a break, at Velazquez's request, to allow him to consult further with his counsel and the interpreter.

[2] See State's Exhibit "1."

In addition to these precautions, early on in the plea hearing, Attorney Budway stated,

> **I have advised him that the eventual sentence on these charges could result in an immigration proceeding filed against him.**[3]

Given that both the Court and Velazquez' counsel advised him of the possibility of immigration consequences if he plead guilty, what does he complain of? The answer lies at Page 6 in his brief, first full paragraph. It is here that we learn the crux of his argument - that because the Court did not repeat the R.C. 2943.031 advisement after the parties took a break for Velazquez to consult further with counsel and the interpreter, the initial advisement was somehow nullified and all for naught.

This argument is inapposite.

Contra Velazquez' position, a trial court has no duty to give repeated immigration warnings to a non-citizen defendant unless it is clear to the court or counsel that the defendant did not understand them the first time.

More importantly still, at no time did Velazquez request the Court "give him additional time to consider the appropriateness of the plea in light of the advisement described . . ." in R.C. 2943.031(A) nor did he request clarification or further explanation of the warning or possible immigration consequences.

In reality, the actual reason for the break that the Court took for Velazquez' edification had absolutely nothing to do with immigration concerns but was occasioned when the Court asked him if he understood that he would have to register as a sex offender and if he understood the maximum possible penalties that could be imposed. At no time during this part of the plea colloquy, immediately prior to the break, did Velazquez raise, mention, discuss, or allude in any way to immigration concerns.

> THE COURT: Okay. I just went over with you a minute ago the possible penalties that you could face, including the maximum penalties . . . I also advised you that you will have to register as a sexually-oriented offender . . . do you still want to plead guilty?
>
> THE DEFENDANT: No.[4]

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[3] See Defendant's Exhibit "B," Transcript of Plea Hearing, Pg. 10, Lines 13-15, emphasis added.
[4] See Exhibit "B,"Transcript, Pages 17-18, Lines 20-25, 1-12.

At this point the Court recessed the proceedings and instructed the parties to be ready for trial the following Monday and to talk further if they wished. About 90 minutes later, the Court was informed that Velazquez wished to proceed with the plea.

Immediately after this break, Attorney Budway stated the following to the Court,

> MR. BUDWAY: Well, your Honor, we actually had a chance, with the interpreter, to read through the plea of guilty sheets, and I do believe now **he understands everything**. And it is his wish to continue his plea of guilty.[5]

After this exchange, the Court carefully inquired of Velazquez if he had a chance to review the plea sheets, go over them and ask questions about his rights, and if he wished to proceed with the plea. His response, "Yeah, yeah."[6]

It is also worth noting that after this discussion with the Court, consistent with what occurred immediately before the break, at no time did Velazquez raise, mention, discuss, or allude in any way that he had any concerns regarding immigration consequences.

The Court then proceeded with a constitutionally valid Crim. R 11 colloquy, determined that Velazquez made his change of plea knowingly, intelligently, and voluntarily, then proceeded to sentence him to the agreed, recommended sentence of community control.

As before, at no time during the balance of the plea hearing or the entirety of the sentencing hearing, did Velazquez ever bring up the issue of immigration consequences or express any concerns about deportation.

Moreover, in order to get around the obvious fact that this Court did provide Velazquez with the R.C. 2943.031 advisement, he argues that while it in fact was given, ". . . during the early part of his plea hearing . . ." that "he did not understand it."

First, so what if it was given during the "first part of the plea hearing?" There is nothing in the statute or case law that says *when* the advisement must be given. In fact, it makes sense to give it early in the proceedings so that the defendant can change his mind about the plea once learning it may impact his status or allow him additional time to investigate the repercussions.

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[5] Exhibit "B," Transcript, Page 19, Lines 7-11, emphasis added.
[6] Exhibit "B," Transcript, Page 19, Lines 12-23.

Second, as noted *infra,* at no time did Velazquez ever bring-up the issue of deportation or immigration, inform this Court (or his attorney) that he did not understand the advisement, nor did he ever express any concerns about it. While not arguing it directly, Velazquez implies that the Court had some obligation to serendipitously ascertain that he did not understand the immigration advisement despite absolutely no indication elicited in the courtroom or in the record to indicate as much.

Moreover, this Court's view of the facts is bolstered by Attorney Budway's testimony at the hearing on June 8, 2023, when the following exchange occurred:

> THE COURT: So the - - at the point at the hearing that he stopped the proceedings and no longer wanted to proceed was after the penalty - - the penalties were read to him. It had - - **it had nothing to do with immigration. He stopped the hearing at the penalty phase, when I told him what he was facing, correct?**
>
> THE WITNESS: **Correct.**[7]

As such, Velazquez' own attorney confirmed that at the time of the plea, Velazquez was not concerned about immigration but instead, the possible penalties he was facing. Of course, once he was arrested by ICE and is now facing removal proceedings and possible deportation, the effect of the plea on his status in this country is paramount.

Regardless, under circumstances like these, where the statutory advisement is given to the defendant *verbatim*, surely he has *some* obligation to inform the Court or counsel that he does not understand it, wishes further explanation, or seeks to continue the hearing in order to look into the effect of his plea on his legal status as a non-citizen.

In this matter, where the advisement was in fact given, Velazquez' failure to raise the issue at all, in any manner, or at any time prior to the completion of his sentencing constitutes a forfeiture of any irregularities which *may* have occurred. And, it also constitutes *res judicata* as he did not take a direct appeal.

Notably, Velazquez signed an Affidavit[8] attached to his motion where he avers that when the Court provided him with the R.C. 2943.031 advisement, he ". . . did not

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[7] See Transcript of Proceedings, June 8, 2023, Pages 61-62, Lines 24-25, Lines 1-6, emphasis added.
[8] See Exhibit "A."

understand what the court was explaining . . ."[9] He also testified to this at the hearing on July 10, 2023.[10]

This testimony, however, is sorely lacking in credibility when viewed through two lenses. First, as discussed above, the reason that Velazquez sought a recess of the plea hearing had nothing to do with immigration issues. He sought a break in the proceedings when the Court reiterated that he would have to register as a sex offender and reviewed the maximum possible penalties that he could face. It was this exchange that prompted Velazquez' concerns, not any confusion or lack of understanding about the immigration consequences. In fact, after the immigration advisement was given to him, he clearly and unequivocally stated that he understood it and that he wished for the plea to proceed.[11]

Second, as discussed *ad nauseam*, at no time after the recess, during the balance of the plea hearing, or during the sentencing hearing that occurred immediately thereafter, did Velazquez ever express any concerns, misunderstanding, lack of clarity, or confusion about the immigration advisement and/or the risks of deportation.

Finally, torpedoing his own case, but to his credit for his veracity, Velazquez testified as follows on July 10, 2023,

> Q. Okay. Had you known that you would be deported because of the plea you entered in this courtroom back in November of 2021, would you have still plead guilty knowing that it would make you deportable?
>
> A. The truth is I don't remember if - - **no, I don't remember. That's the truth.**[12]

As a result of the foregoing, it is clear to this Court that Velazquez was properly advised at the time of his plea of the risks of deportation and voluntarily, knowingly, and intelligently chose to reap the benefits of the favorable plea deal that Attorney Budway negotiated for him despite the risk of adverse immigration action.

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[9] See Exhibit "A," Para. 6.
[10] See Transcript of Proceedings, July 10, 2023, Page 9, Lines 2-9.
[11] See Exhibit "B," Pages 12-13, Lines19-25, 1-5.
[12] See Transcript of Proceedings, July 10, 2023, Pages 14-15, Lines 21-25, Line1, emphasis added.

B) THE MOTION SHOULD BE GRANTED PURSUANT TO *PADILLA* AND CRIM. R. 32.1

The gravamen of Velazquez' argument here is that his counsel, Attorney Budway, performed below an objective standard of reasonableness and was ineffective. "Not holding counsel accountable for omitting to inform a client of possible immigration sanctions, or blatantly misinforming a client would be 'fundamentally at odds with the critical obligation of counsel to advise the client on the advantages and disadvantages of a plea agreement.'"[13]

This argument also fails and asserts a number of factual allegations that are not supported by the record.

First, a word on *Padilla*. Velazquez is correct in his analysis of *Padilla v. Kentucky,* 599 U.S. 356, (2010), and its applicability to this case. Essentially, *Padilla* stands for the proposition that an attorney must inform a non-U.S. citizen client whether his plea **"carries a risk"** of deportation.[14] In addition, *Padilla* applies the *Strickland* test for ineffective assistance of counsel to determine if 1) counsel's representation fell below an objective standard of reasonableness; and 2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.[15]

In *Padilla,* the attorney failed to inform his client about the consequences of his plea and in fact, told Padilla "not to worry about deportation." Such is not the case herein.

In the case at bar, Attorney Budway informed Velazquez on multiple occasions that deportation was a risk and advised him at the time of the plea to seek immigration counsel. More importantly, the Court advised Velazquez of the risks of deportation and he testified that he was aware that there were issues involving his status as a non-citizen in early meetings with Attorney Budway.

At the time of the plea, Attorney Budway stated,

> MR. BUDWAY: I have advised him that the eventual sentence on these charges could result in an immigration proceeding filed against him.[16]

And at the hearing on June 8, 2023, Attorney Budway testified,

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[13] See Defendant's motion, Pages 11-12.
[14] *Padilla,* at Para. 2, *syllabus*, emphasis added.
[15] *Strickland v. Washington,* 466 U.S. 668, (1984).
[16] See Exhibit "B," Page 10, Lines 13-15.

A. Yes. I have advised him that the eventual sentence on these charges could result in an immigration proceeding filed against him . . .[17]

Also at the hearing on June 8, 2023, Attorney Budway confirmed that *prior to the plea,* Velazquez was aware of the risk of deportation and was concerned about it.

A. That's correct. And in that - - you know, with the charge of rape, again, **we believed and he believed** that if he was convicted of rape, he's, you know, likely going to get deported.[18]

In addition, Velazquez stated in his Affidavit that Attorney Budway, "knew that my immigration status was a serious issue for me."[19] Obviously, the only way that Attorney Budway would know that immigration status was a series issue for Velazquez is if Velazquez himself informed Attorney Budway of this fact. This exchange leads to the conclusion that Velazquez was well-aware of the risk of deportation and valued his reduced plea and lower SORN requirement over the likelihood of deportation.

In this matter, Attorney Budway completely fulfilled his professional obligations to Velazquez by informing him of the risk of deportation, advising him to seek immigration counsel (advice which Velazquez rejected), and negotiating a very favorable plea for him.

There are two additional observations worth noting: First, in his Affidavit, Velazquez avers that, "I did not learn that my plea would have the adverse consequences of deportation . . . until I was placed in removal proceedings . . ."[20] This statement is patently false, as demonstrated *infra,* both the Court and Attorney Budway advised Velazquez of the possibility of adverse immigration action *prior* to his plea.

Moreover, how can Velazquez aver in paragraph eight of his Affidavit that immigration was a "serious issue for him" and in paragraph 11 that he was unaware that there were "adverse consequences of deportation" if he plead guilty or was convicted? He can't have it both ways. Either he was aware of the risks of deportation, which of course would be a "serious issue for him," or he was not aware of the "adverse consequences" of a plea or conviction, in which case they would not be an issue at all.

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[17] See Exhibit "B," Page 18, Lines 6-8.
[18] See Transcript of Proceedings, July 10, 2023, Page 46, Lines 9-12, emphasis added.
[19] See Exhibit "A," Affidavit, Para. 8.
[20] See Exhibit "A, Affidavit, Para. 11.

The truth is that Velazquez was properly, and reasonably, concerned about his immigration status but nevertheless, chose to proceed with a very favorable plea deal. In other words, he weighed the risks of a possible lengthy prison sentence against the possibility of deportation and he chose freedom.

Velazquez makes one additional argument that is inapposite. He claims that getting the name of an immigration lawyer during his plea is "too late." Why? The logical inference here is that if Velazquez was truly more concerned about his immigration status than possibly going to prison, he could have requested a continuance of the hearing in order to consult immigration counsel. After all, the Court paused the hearing once for him and the state did not place any time restrictions on the viability of the plea offer.

Finally, Velazquez cannot demonstrate the second prong of the *Strickland* test, that is, but for Attorney Budway's "unprofessional errors," the results would have been different. It is true that in his Affidavit, Velazquez avers that had the Court or his attorney told him that his plea would lead to deportation, he would not have entered the plea.

This statement, however carefully worded by the Affidavit's author, conflates the requirements of both *Padilla* and R.C. 2943.031, which mandate that a non-citizen criminal defendant be advised, prior to a plea, that a conviction "**may** have the consequences of deportation . . ." (Emphasis added.) Not that a conviction *will result* in deportation.

As discussed in a recent Ohio Supreme Court case, the real test is whether or not counsel fulfilled his professional obligations under *Strickland*, even if the court fulfilled its.

> *Judicial* advisement *of* immigration *consequences.* As we explained earlier, a court's advisement under R.C. 2943.031(A) does not cure counsel's deficient performance under the first *Strickland* prong. But a judicial advisement about the immigration consequences of the defendant's plea **may weigh against a finding of prejudice**. *See State v. Galdamez*, 2015-Ohio-3681, 41 N.E.3d 467, ¶ 29 (10th Dist.)

State v. Romero, 156 Ohio St. 3d 468, 2019-Ohio-1839, at ¶ 33, emphasis added.

While this Court does find that Attorney Budway provided satisfactory representation to Velazquez under a *Strickland* analysis, even if he did not, Velazquez cannot satisfy the second prong of the test.

As noted above, Velazquez' testimony at the July 10, 2023, hearing fundamentally contradicts, or at least undermines, his Affidavit, where he testified that, **"I don't remember – that's the truth"** when asked if he would have still plead guilty knowing that it would make him deportable. (Emphasis added.)

The entire point of evaluating the second prong of the *Strickland* analysis is to determine whether counsel's deficient performance was prejudicial to the defendant because "but for" the deficient performance, the result of the proceedings would have been different.[21]

In the case at bar, who knows? Velazquez testified that he could not remember if he would have plead guilty if he knew he was deportable. How can this Court conclude that the results of the proceedings (the plea vs. a trial) "would have been different"? It cannot.

In addition, the Court notes the conflict in Velazquez' Affidavit and live testimony.[22] On this point, the Court resolves this contradiction by giving Velazquez' live, in-court testimony much more weight than his professionally drafted, self-serving Affidavit.

This Court is mandated with weighing the conflicting evidence, including the credibility of witnesses in light of the totality of the circumstances. In doing so, the Court finds that the live testimony of a witness, particularly the defendant, tested by the crucible of cross-examination, provides much more probative value than an uncontested Affidavit.

> From these and other factors present in a given case, the trial court will determine whether the totality of circumstances supports a finding that counsel's performance was deficient and, if so, whether the deficient performance was prejudicial to the defendant. The credibility and weight of the defendant's assertions in support of a motion to withdraw a plea and the decision as to whether to hold a hearing are **matters entrusted to the sound discretion of the trial court**. *Smith*, 49 Ohio St.2d at 264; *Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶ 56.

Romero, at ¶ 34, emphasis added.

Attorney Budway's representation of Velazquez, while perhaps not perfect, was more than satisfactory. Attorney Budway took the necessary precautions to advise Velazquez of the risks of deportation, recommended he seek immigration counsel, and

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[21] *Strickland, infra.*

[22] Recall that in his Affidavit, Velazquez avers that he would not have plead – at the hearings, he testified that he could not remember.

negotiated a plea deal that resulted in a community control sanction as opposed to the 19 to 26 years in prison he faced with the rape and kidnapping charges.

Moreover, at no time did Velazquez inform Attorney Budway or the Court that Velazquez did not understand the risks of deportation, nor did he ask for further clarification or a continuance.

It is axiomatic that this Court is charged with considering all of the factors present to determine not only whether counsel's representation was deficient, but if so, was it prejudicial to the defendant.

This Court carefully reviewed the briefs, held two hearings, considered the facts, the credibility of the witnesses, and analyzed the applicable statutes and caselaw. The Court finds that there was no professionally deficient performance afoot and even if there was, it did not prejudice Velazquez as upon direct examination on the seminal issue, he could not remember if he would have still plead guilty (or not) if he was advised that his plea would make him deportable. To that end, Velazquez has failed to demonstrate any deficiency in counsel's performance, let alone that it was prejudicial.

In reality, Velazquez was completely and thoroughly advised of the risks of deportation and when weighing the risks of going to trial verses accepting a favorable plea deal, he chose to take the deal and roll the dice with ICE.

C) CRIM. R. 32.1 PROVIDES AN INDEPENDENT BASIS FOR VACATING THE CONVICTION AND WITHDRAWING THE GUILTY PLEA

In his final argument, Velazquez alleges that the "Failure to reopen Mr. Velazquez' case would be a manifest injustice to Rule 32.1."[23]

A criminal defendant has no right to withdraw a post-sentence guilty plea and must show 'manifest injustice' in order to prevail. The term manifest injustice has been described as a "clear or openly unjust act." *State v. Graham,* 9th Dist., 2017-Ohio-908, citing, *State v. Ruby,* 9th Dist. Summit No. 23219, 2007-Ohio-244, quoting *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208.

> Under the manifest injustice standard, a post-sentence 'withdrawal motion is allowable only in extraordinary cases.' *Id.* at ¶7. An evidentiary hearing on a post-sentence motion to withdraw a guilty plea is not required when the movant fails to submit evidentiary materials demonstrating a manifest injustice. *State v. Buck,* 9th Dist. Lorain No. 04CA008516, 2005-Ohio-2810.

[23] See Defendant's Motion, Page 17.

Appellate courts review a trial court's ruling on a Crim. R 32.1 motion for an abuse of discretion standard. *State v. Cargill,* 9th Dist. Summit Nos. 27011, 27590, 2015-Ohio-661. A trial court abuses its discretion when its decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 21, 219.

> Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed.

State v. Xie, 62 Ohio St.3d 521, 527, (1992).

The gravamen of this argument is that Attorney Budway provided Velazquez with "erroneous advice" because Attorney Budway confused the event triggering possible deportation, to wit: the plea of guilty verses the sentence. Apparently, Attorney Budway focused his discussion of the immigration risks relative to Velazquez' *sentence* when according to Velazquez, it is the *plea itself* that makes him deportable.

Whether accurate or not, the confusion results in a difference without a distinction.

First, the Court notes that the R.C. 2943.031 plea advisement title reads,

> Court to advise defendant as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea.

And, the body of the statute reads,

> ". . . prior to accepting a plea of guilty . . ."

To that end, regardless of how ICE determines deportability, this Court is mandated to advise the defendant *at the time of the plea* of the risks of deportation. A mandate the Court (and Attorney Budway) fulfilled.

Second, and more importantly, Velazquez' plea and sentencing were conducted jointly, at a combined plea-sentencing hearing with an agreed upon plea and sentence. As such, because both events, the plea and sentence, occurred almost simultaneously, it is irrelevant which one actually triggered possible deportation.

An example is instructive; if defense counsel informed his client that deportation was not applicable after a plea but only after sentencing, this could be problematic if incorrect. In such a case, a defendant subject to deportation could be arrested by ICE and face removal proceedings after the plea but before sentencing. But that possibility could not have occurred in this case because Velazquez' plea and sentencing happened simultaneously.

More importantly, Velazquez was aware at the time of the joint plea and sentence that his *plea* could result in deportation proceedings (because the Court told him so), even if during their discussions, Attorney Budway focused on the sentence.

In support of his manifest injustice argument, Velazquez relies upon a 20-year old case from the Tenth Appellate District, *State v. Dalton,* 153 Ohio App. 3d 286, 2003-Ohio-3813. This case is easily distinguished from the case at hand. In fact, it has absolutely nothing to do with immigration or deportation issues.

Dalton was charged with possession of child pornography and plead guilty to same. Importantly, the images he possessed were of fictional children (not real or actual) children. After violating community control, he was sent to prison. He moved to withdraw his plea based upon, relevant hereto, ineffective assistance of counsel.

Dalton argued that his attorney was ineffective because she did not understand the nature of the charges brought against him and that it is not a crime to possess fictional images of child pornography.[24]

In a very well-written decision by Judge William Klatt, the Tenth District agreed,

> For counsel to render effective assistance to a criminal defendant, she should, at the least, understand the basis of the criminal charges and possible defenses of those charges. See *Scarpa v. Dubois* (C.A.1, 1994), 38 F.3d 1, 10; cf. *Rinehart v. Brewer* (C.A.8, 1977), 561 F.2d 126, 131–132 (finding ineffective assistance of counsel where, among other things, counsel was confused about criminal charges). "[I]f an attorney does not grasp the basics of the charges and the potential defenses to them, an accused may well be stripped of the very means that are essential to subject the prosecution's case to adversarial testing." *Scarpa,* supra. Given trial counsel's misunderstanding of the basis of the charges and the potential defenses to the charges, and the impact of this misunderstanding on her advice to appellant, we find that trial counsel's assistance to appellant was deficient.

Dalton, at ¶ 29.

Here, there is absolutely no allegation made by Velazquez, and certainly none supported by the record, that Attorney Budway failed to understand the basis for the criminal charges Velazquez was facing. Quite the opposite, in fact.

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[24] *Ashcroft v. The Free Speech Coalition,* 535 U.S. 234, (2002); *State v. Anderson,* 151 Ohio App.3d 422, 2003-Ohio-429, at ¶ 31.

Attorney Budway is a highly respected and experienced criminal defense attorney well-versed in the complexities of criminal sex offenses. So much so that he was able to negotiate a substantial reduction of the charges for Velazquez, a community control sanction, and the lowest SORN classification. Hardly the work of an attorney with no understanding of the "basis of the criminal charges" Velazquez was facing.

Velazquez next revisits his argument that "but for" Attorney Budway's "erroneous" advice, Velazquez would not have plead guilty. This argument failed above and for the same reasons, fails here.

Ultimately, for all of the reasons discussed above, there is no manifest injustice here, just a defendant who has changed his mind about his plea, after the fact, now that he is facing the jeopardy of deportation – jeopardy he was repeatedly warned about.

Under a rational Crim. R. 32.1 analysis, the facts of this case as presented by Velazquez in his motion, by his evidence, and significantly, by his own testimony, come nowhere close to demonstrating "extraordinary circumstances" that justify withdrawing his plea.

IV. CONCLUSION

In the case at bar, this Court fully complied with the mandates of R.C. 2943.031. The deportation advisement was given to the Defendant *verbatim*, and, at no time during the combined plea and sentencing hearing, did the Defendant ever express any concerns, trepidation, or lack of understanding of the risks his plea could have upon his immigration status.

In addition, his trial counsel independently explained the risks of deportation, recommended that the Defendant seek advice from immigration counsel, and negotiated a very favorable resolution for him. Moreover, when he testified at his plea withdrawal hearing, the Defendant "could not remember" if he would have rejected the plea deal and gone to trial if he was advised more clearly or completely about the risks of deportation.

Finally, the fact that trial counsel focused his discussion about deportation concerns on the Defendant's sentence, as opposed to his plea, is of no accord. The plea and sentence hearing occurred jointly and it would have made no difference if counsel would have discussed immigration issues impacted by the plea instead of based upon the sentence. And, even if there was some confusion on this issue by trial counsel, the Court rectified it by giving the proper deportation advisement.

The motion to withdraw guilty plea is without merit and hereby denied.

JUDGE D. Chris Cook