

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CR 371948

STATE OF OHIO)
)
) Plaintiff)
)
) vs)
)
) ENGER TEJEDA)
)
) Defendant)

JOURNAL ENTRY

MICHAEL J. RUSSO, JUDGE:

Defendant filed a Motion to Vacate Plea on October 5, 2010 and a Supplemental Motion to Vacate Plea on October 7, 2010, along with supporting Affidavits. The State of Ohio filed a Brief in Opposition to Motion to Vacate Plea on October 14, 2010. Oral hearing upon the motion was held on January 13, 2011. Present on behalf of Defendant was Guy Rutherford, Esq.; present on behalf of the State was Assistant County Prosecutor Kristen Sobieski. Defendant's presence was waived by his counsel since Defendant currently is in custody in Seneca County awaiting hearing for removal from the United States due to conviction(s) for violation of law relating to possession of controlled substance(s). In this case Defendant was convicted of Attempted Drug Possession (M-1) on July 12, 1999; in CR 485758 Defendant was convicted of Drug Possession (F-5) on April 3, 2007.

Upon consideration of the evidence submitted, the arguments of counsel, and relevant

-taken and

should be denied for the following reasons.

Defendant is a citizen of the Dominican Republic living in the United States as a permanent resident. During the plea colloquy in this case on July 1, 1999, the trial court did not provide to Defendant verbatim the advisement set forth in R.C. §2943.031; however, the trial court did advise Defendant that he could be deported upon pleading to and being convicted of the amended charge of Attempted Drug Possession. Defendant indicated his awareness of this possibility, but affirmed his desire to plead guilty nevertheless. (See plea transcript at pg. 6).

As held in *State v. Francis*, 104 Ohio St. 3d 490, 2004-Ohio-6894 at ¶48, “if 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).” In this instance, the Court finds that, under the totality of the circumstances, the Defendant subjectively understood the implications of his plea and the rights he was waiving. Indeed, the exact negative consequence against which Defendant was warned during his plea — deportation — has arisen. The Court finds that Defendant would have entered into this plea bargain despite the possibility of deportation because the original three felony charges were reduced to one misdemeanor count, and the unlikelihood of deportation for a misdemeanor was discussed during the July 1, 1999 hearing. (See plea transcript at pg. 8). The Defendant thus entered into a favorable plea bargain in 1999 with knowledge that he could be deported; in effect, he accepted the risk of future deportation in exchange for a lighter penalty at that time. Of further significance in support of his original decision here is the fact that no removal proceedings were begun against Defendant until he was convicted of a second drug offense in 2007.

IT IS SO ORDERED.

—

Date: February _____, 2011

MICHAEL J. RUSSO, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing **Finds of Fact and Conclusions of Law** was sent by ordinary
U.S. Mail this _____ day of September, 2004 to:

Theodore M. Garver
PO Box 447
Canfield OH 44406

Stanley E. Stein, Esq.
Suite 714
75 Public Square
Cleveland OH 44113-2078

Jonathan F. Sobel, Esq.
Suite 403
25550 Chagrin Boulevard
Beachwood OH 44122

MICHAEL J. RUSSO, JUDGE