

STATE OF OHIO)
)SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CR-330379 B

STATE OF OHIO)
)
) Plaintiff)
 vs.)
)
) AGWAR SULEIMAN)
)
) Defendant)

JOURNAL ENTRY

JOHN P. O'DONNELL, J.:

On April 3, 1996, Defendant Agwar Suleiman¹ entered a guilty plea to attempted drug trafficking (marijuana), a first-degree misdemeanor. The defendant is not a United States citizen. Before he entered the plea, the court did not provide the advisement required by Section 2943.031 of the Ohio Revised Code. The defendant was then sentenced to 60 days in county jail, fined \$200, and ordered to pay court costs. The jail time was suspended and the defendant placed on probation with conditions.

On October 23, 2001, the defendant filed a petition for post-conviction relief pursuant to O.R.C. §2953.21. On October 2, 2003, he filed a motion to vacate plea.

A hearing on both motions was held on October 22, 2003, and the court announces its decision as follows:

¹ Although the case caption shows the defendant's name as Suleiman Agwar, his name is actually Agwar Suleiman.

I. Post-Conviction Relief

In his motion for post-conviction relief the defendant argues that his trial counsel was ineffective by failing to inform him, either on or off the record, of the possible adverse immigration consequences of a guilty plea and conviction.

A proceeding for post-conviction relief under O.R.C. §2953.21 is an appropriate remedy when a defendant claims ineffective assistance of counsel based upon facts not of record. **State v. Fryer** (1993) 90 Ohio App. 3d 37, at 48. Pursuant to O.R.C. §2953.21, when no direct appeal is filed, a petition for post-conviction relief shall be filed no later than 180 days after the expiration of the time for filing an appeal. A review of the court's docket shows no appeal was filed. Hence, a motion for post-conviction relief was required to be filed no later than about October 3, 1996. The motion was not filed until October 23, 2001, and is, therefore, denied as untimely.

II. Motion to Vacate Plea

The defendant asserts two reasons in support of his motion to withdraw his guilty plea: that his plea was not truly knowing because of the court's failure to comply with O.R.C. §2943.031, and ineffective assistance or counsel. The second argument has already been discussed above and need not be addressed further.

As for the first argument, Criminal Rule 32.1 permits a Court to allow a defendant to withdraw his plea "to correct manifest injustice." The term "manifest injustice" has been variously defined, but it is clear that a post-sentence withdrawal is allowable only in extraordinary cases. **State v. Smith** (1977) 49 Ohio St. 2d 261, at 264.

A manifest injustice in this case would occur only if the defendant suffered consequences for a crime he did not commit. Despite his denials at the motion hearing, the record of the April 3, 1996, hearing reveals no equivocation by the defendant about his guilt. Therefore, a “manifest injustice” does not exist here.

Additional reasons to deny the motion to vacate include *res judicata* (the defendant could have filed a direct appeal and did not) and inability to show a prejudicial effect arising from the failure to give the statutory advisement. See **State v. White** (2001), 142 Ohio App. 3d 132.

Finally, the court’s docket shows that a prior motion to vacate plea was filed August 19, 1999, and denied November 8, 1999. Because of the clerk’s system of file retention that motion was not available for review prior to this decision but may constitute a further reason to deny the motion on the basis of *res judicata*.

For all of the foregoing reasons the defendant’s motion to vacate plea is denied.

IT IS SO ORDERED.

Date: November _____, 2003

JOHN P. O’DONNELL, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing journal entry was sent via regular U.S. mail on this _____
day of November, 2003, to the following:

Kent R. Minshall, Jr., Esq.
2189 Professor Avenue
Cleveland, Ohio 44113
Attorney for Defendant

Cuyahoga County Prosecutor's Office
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Attorneys for Plaintiff

JOHN P. O'DONNELL, JUDGE