COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2013 CR 00119**
vs.	:	**Judge McBride**
FELICIA ANN CLANCY	:	**DECISION/ENTRY**
Defendant	:	

Catherine Adams, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Laufman & Napolitano, Gretta Herberth, counsel for the defendant Felicia Ann Clancy, 4310 Hunt Road, Cincinnati, Ohio 45242.

This cause is before the court for consideration of a motion to withdraw guilty plea filed by the defendant Felicia Clancy.

On December 4, 2013, the defendant, through counsel Christopher Feldhaus, filed a motion to withdraw her guilty plea and requesting a new trial.

On December 20, 2013, attorney Gretta Herberth, who was substituted as counsel for the defendant, filed a new motion to withdraw guilty plea to replace the

motion filed by Attorney Feldhaus.

On December 23, 2013, the court, without making a finding that the facts alleged by the defendant if accepted as true would require that the defendant be allowed to withdraw her guilty plea, instructed counsel to schedule an evidentiary hearing on the motion through the office of the Assignment Commissioner.

On January 13, 2014, an evidentiary hearing was held on the defendant's motion to withdraw her guilty plea. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the defendant's motion, the record of the proceeding, the evidence presented for the court's consideration, and the oral and written arguments of counsel, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On February 27, 2014, the defendant was indicted in this case on Counts #1 & 2: Theft in violation of Section 2913.02(A)(1), felonies of the fifth degree. At the same time, the codefendant Marcus Armacost was indicted on two counts of receiving stolen property, felonies of the fifth degree.

The defendant failed to respond to a summons, and the summons was withdrawn and a warrant issued on March 7, 2013. On March 22, 2013, the defendant was arrested on this warrant.

On March 25, 2013, the defendant appeared for arraignment and entered a plea of not guilty. The defendant was granted a $20,000 OR bond which was made subject

to standard reporting requirements including no alcohol or illegal drugs and random chemical screens. Attorney Chris Feldhaus represented the defendant at the arraignment hearing and was assigned the responsibility to represent the defendant as an assistant public defender.

Attorney Feldhaus filed a request for a bill of particulars and a demand for discovery on March 26, 2013. On April 2, 2013, the state filed a discovery response and a bill of particulars.

The bill of particulars stated with respect to each count that the defendant and her codefendant Marcus Armacost stole a large amount of silver jewelry from Kohl's. The first count was alleged to have occurred on or about December 10, 2012, and the second count was alleged to have occurred on or about December 20, 2012. The state alleged with respect to each count that the value of the property stolen exceeded one thousand dollars. With respect to Count 1, it was alleged that both defendants sold the stolen jewelry at Damon's Gold Mine, and with respect to Count 2 it was alleged that only the codefendant sold the stolen jewelry there.

The discovery that was provided to Attorney Feldhaus included, among other things, a report prepared by Kohl's Loss Prevention itemizing the value for each item taken on December 10th from the tags for the items, which were found "hidden in the mens basics department" the following day, and listing a total value for all of the items stolen of $2,600. The incident report from the police department also listed the total value of the items stolen as $2,600. There was no incident report provided by Kohl's for the December 20th incident, but the value in the police report for the jewelry stolen on that date is $2,000. Photographs were also included of the defendant and codefendant

which were taken from a video camera in the store and of large amounts of silver jewelry which were sold to Damon's.

David Suhre, a loss prevention supervisor at Kohl's, testified that he provided to the police a report for the December 20th theft which was comparable to the report from December 10th and which contained a list of the items taken on December 20th and their values. Since the police put a value in their report of $2,000 for the jewelry taken on December 20th, and they provided a value of $2,600 in their report for December 10th that was obviously based on the information provided them by Kohl's, it appears probable that the value in the police report for December 20th was also provided by Kohl's. However, for whatever reason, no such report for December 20th from Kohl's was provided to Attorney Feldhaus.

The values provided by Suhre were calculated using the "white ticket price" for each item, which is the regular price prior to any sales discount. Suhre testified that Kohl's has sales and that the jewelry stolen could have been sold for less than the sticker prices. However, he stated that he was unable to provide the sales price for each item stolen as of the relevant dates in December 2012.

On April 11, 2013, Attorney Feldhaus and Assistant Prosecuting Attorney David McCune were present for a criminal pretrial conference and the state indicated that the defendant confessed in a recorded statement to stealing the silver jewelry from Kohl's.

Attorney Feldhaus states that he then sent the defendant one or two letters and also attempted to make telephone contact with the defendant but did not receive any response.

On April 30, 2013, the defendant failed to appear for a bond review hearing

which was scheduled because she had stopped reporting to the Probation Department on her reporting bond. A bench warrant was ordered and a bond was set of $50,000 Cash/Professional. The warrant was signed and was journalized on May 3, 2013.

The defendant was arrested on the bench warrant on May 25, 2013, and on May 28, 2013, she appeared before the court and a new bond was set of $25,000 Cash/Professional. At that time, Attorney Feldhaus informed the court that a preliminary plea agreement had been reached but that they needed more time to discuss the details of the plea agreement. He indicated that he would be meeting with the defendant within the next couple of days.

Although the defendant states that Attorney Feldhaus did not meet with her at the Clermont County Jail on May 30th as he alleges, the court does not find her testimony to be credible on this point. Not only did Attorney Feldhaus announce his intention to the court to see the defendant within a couple of days, but he indicated in his testimony that he made a notation of the meeting in his records.

At the meeting between Attorney Feldhaus and the defendant at the Jail on May 30th, they discussed the plea offer that had been made by the state. The defendant had told Feldhaus that "she pleads guilty when she commits the offense." At this meeting, he showed her the discovery provided by the state and asked her if "this sounds right" regarding what was alleged by the state, and her answer was yes. He recalls that he specifically discussed with her the $2,600 value as to the offense charged in count number one and that her answer as to the value was that it sounded right. As to the value of $2,000 for the property alleged to be stolen in count number two, he doesn't recall discussing that value with her because he already knew that the state's

agreement was to dismiss that count.

Feldhaus explained that the plea offer was for her pleading guilty to one count of theft and testifying against Marcus Armacost in return for the second count of theft being dismissed. He doesn't recall whether she indicated first that she wanted to take the offer or if he first recommended to her that she accept the state's offer. In any event, they both agreed that the plea offer was something that she should accept. Feldhaus explained that in his opinion she was going to get a prison sentence and that this would be a way to reduce her possible exposure from 24 months to 12 months, and the defendant states that she accepted the state's offer for that very reason. The defendant did not at any time indicate that she had any disagreement with the values of the stolen items that were included in the reports.

Attorney Feldhaus testified that he did not call Suhre to try to talk to him about the case because, for five years, when he worked as an assistant prosecuting attorney, he had experienced difficulty in reaching Suhre, and Feldhaus believed that he would have even more difficulty now that he was an assistant public defender.

On June 4, 2013, the defendant entered a plea of guilty to Count 1: Theft in violation of Section 2913.02(A)(1), a felony of the fifth degree. The plea agreement in the case was that Count 2: Theft, also a felony of the fifth degree, would be dismissed; that restitution would be paid on all counts; that the defendant would testify against the codefendant Marcus Armacost; and that the state would recommend treatment if the defendant disclosed the location of the codefendant in order that he could be apprehended.

During the plea hearing, the court held an exhaustive Crim.R. 11 dialogue with

the defendant. At the beginning of the plea hearing, and because the defendant was thirty-five weeks pregnant, the court permitted the defendant to remain seated and told her that the plea hearing would be stopped at any time if she became too uncomfortable to proceed.

During the plea hearing, the court went over each of the elements of the offense of theft as set forth in Count 1 of the indictment, including the requirement that the value of the property be one thousand dollars or more. The defendant acknowledged that she understood what she was being charged with. Near the end of the proceeding, Assistant Prosecuting Attorney Catherine Adams provided a statement of the facts that were the basis of the charge. According to Adams, the defendant and her codefendant Marcus Armacost entered Kohl's and stole "a large amount of silver jewelry." She indicated that the restitution amount on Count 1 was approximately $2,600 and that the restitution amount of Count 2 was approximately $2,000. The defendant stated that she did not have any disagreement with the Adams' statement, and she indicated that her plea was being made voluntarily and of her own free will. The court accepted the defendant's guilty plea and found that it had been entered knowingly, intelligently, and voluntarily.

A presentence investigation was ordered, and the sentencing was scheduled for June 18, 2013 at 8:30 a.m. On that date, the defendant appeared, represented by Attorney Feldhaus, for sentencing.

At the time of the sentencing hearing, the defendant was 27 years old and had prior felony convictions for two theft offenses in Clermont County Common Pleas Court Case No. 2004 CR 00891, theft of drugs in Clermont County Common Pleas Court

Case No. 2004 CR 00960, forgery in Brown County Common Pleas Court Case No. CR-2007-2110, and theft from an elderly person and misuse of a credit card in Clermont County Common Pleas Court Case No. 2012 CR 00243. She had served prison sentences in each of these cases. She also had misdemeanor convictions for four theft offenses, unauthorized use of a motor vehicle, possession of drug abuse instruments, and persistent disorderly conduct. She had an extensive history of abusing drugs, including daily use of heroin by her own admission from 2004 through May 2013, and had been unsuccessfully terminated from both outpatient and residential substance abuse treatment as an adult. Her ORAS score was 31, which placed her in the high range for risk of recidivism. Based on all of the above, the court imposed a twelve-month stated prison term which was imposed as a risk reduction sentence and ordered the payment of restitution in the amount of $685.00, which was the amount that was required to be paid by Kohl's to Damon's Gold Mine in order to be able to retrieve the stolen jewelry.

Some time later, on August 29, 2013, the codefendant Armacost was arrested on a warrant which had been issued in his case, and his case was scheduled for a jury trial on November 25-26, 2013. Attorney Brian Goldberg was appointed to represent him in the case.

Attorney Goldberg's position on behalf of his client was that Armacost was not involved in the offense in the first count of the indictment related to the theft of jewelry on December 10, 2012, and that the value of the property in each count of the indictment was less than $1,000 and that he should only be guilty of a misdemeanor offense.

In order to try to establish the prices that the items were sold for on December 10th, Attorney Goldberg issued a subpoena duces tecum to the loss prevention manager at Kohl's to bring with him to court by November 15th the retail and sale prices of the items on December 10th, and if that information was not available, to bring with him the current price of the items.

David Suhre, loss prevention supervisor at Kohl's, subsequently contacted Goldberg and told him that he would bring in the requested information on the first day of trial, being November 25th. However, sometime prior to November 25th, Assistant Prosecuting Attorney Adams and Attorney Goldberg reached a plea agreement whereby Armacost would plead guilty to receiving stolen property in count number two, count number one would be dismissed, and the defendant would pay restitution. As a result of this plea agreement, Suhre was told that he no longer needed to appear at court with the requested information.

During his sentencing hearing, which was held immediately following the acceptance of his guilty plea, Armacost stated that he had been charged with two Class D felonies for receiving stolen property in Boone County, Kentucky and that a holder was in place. Attorney Goldberg did not request a presentence investigation and Assistant Prosecuting Attorney Adams represented that the defendant had previously been convicted of assault in 2001, trafficking in drugs in 2007, cruelty to animals in 2009, a probation violation in 2011, and violation of a protection order. The defendant was sentenced to a 90-day jail term with credit for time served.

LEGAL ANALYSIS

The defendant in her motion argues that she should be able to withdraw her guilty plea on the basis of ineffective assistance of counsel. In her oral argument on the motion, Attorney Herberth on the defendant's behalf added as a second basis for her argument of manifest injustice that the defendant and the codefendant were treated differently with respect to their pleas and sentences.

Crim.R. 32.1 provides that a trial court may grant a defendant's postsentence motion to withdraw a guilty plea only to correct a manifest injustice.[1] Therefore, "[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.[2]

Although no precise definition of "manifest injustice" exists, in general, " 'manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process.' "[3] Under this standard, a postsentence withdrawal motion is allowable only in extraordinary cases.[4] "The reason for such a high standard for granting a post-sentence motion to withdraw a guilty plea 'is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly

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[1] *State v. Brown*, 167 Ohio App.3d 239, 241-242, 2006-Ohio-3266, 854 N.E.2d 583, at ¶ 5 (10th Dist.).
[2] Id., citing *State v.* Smith, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of syllabus; see, also, State *v. Finkbine*, 12th Dist. Warren No. CA2005-06-068, 2006-Ohio-1788.
[3] Id., citing *State v. Wooden*, 10th Dist. Franklin No. 03AP-368, 2004-Ohio-588, ¶ 10, quoting *State v. Hall*, 10th Dist. Franklin No. 03AP-433, 2003-Ohio-6939. See, also, *State v. Odoms*, 10th Dist. Franklin Nos. 04AP-708, 04AP-709, 2005-Ohio-4926, ¶ 9, quoting, *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998) ("[a] manifest injustice has been defined as a 'clear or openly unjust act' ").
[4] Id., citing *Smith*, supra, 49 Ohio St.2d at 264.

severe.' "[5]

Ineffective assistance of counsel, which is the primary prong of the defendant's motion, is a proper basis for seeking a post-sentence withdrawal of a guilty plea.[6] When an alleged error underlying a motion to withdraw a guilty plea is the ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty.[7]

In order to show Attorney Feldhaus' performance was deficient, the defendant must prove that her counsel's performance fell below an objective standard of reasonable representation.[8] She must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance.[9] Furthermore, in *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court cautioned that judicial scrutiny of counsel's performance must be highly deferential to account for the wide latitude counsel must have to make tactical decisions.[10] Accordingly, a court must presume that counsel's conduct fell within the wide range of reasonable professional assistance.[11]

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[5] *State v. Brody*, 11th Dist. Lake Nos. 2012-L-050, 2012-L-051, 2012-L-052, 2013-Ohio-340, ¶ 15, citing *State v. Clark*, 11th Dist. No. 2009-A-0038, 2010-Ohio-1491, ¶ 13, quoting 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985).
[6] *State v. Degaro*, 12th Dist. Butler No. CA2008-09-227, 2009-Ohio-2966, ¶ 12, citing *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶ 8.
[7] Id., citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992). See, also, *State v. Williamson*, 3rd Dist. Marion No. 9-10-11, 2010-Ohio-5060, ¶ 16.
[8] *State v. Tovar*, 10th Dist. Franklin No. 11AP-1106, 2012-Ohio-6156, ¶ 10, citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 133.
[9] Id., citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
[10] *Strickland*, supra, 466 U.S. at 689.
[11] Id. See, also, *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995); *State v. Brown*, 4th Dist. Highland No. 95CA869, 1996 WL 665042 (Nov. 7, 1996).

Regarding prejudice, a plea of guilty waives the right to claim that one was prejudiced by ineffective assistance of counsel, except to the extent that such ineffective assistance made the plea less than knowing, intelligent, and voluntary.[12] To prove a claim of ineffective assistance of counsel with a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty and would have insisted on going to trial.[13]

The essence of Attorney Herberth's claim on the defendant's behalf is that Attorney Feldhaus, the defendant's previous counsel, failed to perform his duty of investigation in this case. She argues that Feldhaus "failed to provide effective representation when he chose not to investigate the one determinative issue in this case- the value of the stolen property."[14] She concludes that "[h]ad Ms. Clancy known that the value of the items could not be determined, and subsequently, that the State could not prove its case, she would not have pled guilty."[15]

With regard to this argument, effective representation carries with it a duty to investigate.[16] "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to

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[12] *State v. McMahon*, 12th Dist. Fayette No. CA2009-06-008, 2010-Ohio-2055, ¶ 33, citing *State v. Bene*, 12th Dist. Clermont No.CA2005-09-090, 2006-Ohio-3628, ¶ 26.
[13] *State v. Neeley*, 12th Dist. Clinton No. CA2008-08-034, 2009-Ohio-2337, ¶ 34, citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Caldwell*, 12th Dist. Butler No. CA99-08-144, 2001 WL 908943, *1 (Aug. 13, 2001); and *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992).
[14] Motion to Withdraw Guilty Plea, p. 4.
[15] Id, p. 5.
[16] *Degaro* at ¶15, citing *State v. Bradley*, 42 Ohio St.3d 136, 583 N.E.2d 373 (1989).

counsel's judgments."[17] The reasonableness of counsel's determination regarding the extent, method, and scope of any criminal pretrial discovery necessarily depends upon the particular facts and circumstances of each case.[18]

In this case, the defendant admitted to Detective Eric Combs of the Union Township Police Department that she committed the thefts set forth in the indictment. The only real issue in the case pertained to the valuation of the items stolen.

Attorney Feldhaus demanded discovery and received discovery with an itemization of the jewelry stolen and the value of each item, as well as a total value for the property stolen, as to Count 1 and a total value for the property stolen as to Count 2. The itemization and value of each item and the total value for the property stolen as to Count 1 was provided by Kohl's. There was no itemization provided to Attorney Feldhaus as to the items stolen as to Count 2, but it is only reasonable to assume that this value was also provided by Kohl's. Additionally, Attorney Feldhaus received from the prosecutors photographs of the jewelry taken in the thefts, and he made prints of these photographs so that he could show them to the defendant.

The defendant absconded on an OR bond so Feldhaus could not meet with her initially. After she was arrested on the bench warrant issued by the court, and was confined on a Cash/Professional bond, Attorney Feldhaus met with the defendant at the Clermont County Jail. He explained to her the charges and showed her the discovery, and in response to a question from Feldhaus, the defendant stated that it "sounded

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[17] *Bradley* at 145, 538 N.E.2d 373, 382, citing *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. See, also, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).
[18] *Degaro*, supra, at ¶15. See *State v. Wilson*, 8th Dist. Cuyahoga No. 61199, 1992 WL 309378.

right." She did not at any time question the values for the items or the total values or indicate that she had any issue with the values attributed to the thefts.

Attorney Feldhaus informed the defendant of the plea offer from the state that she plead guilty to one count of theft in return for the other count being dismissed and conditioned on her testifying against the codefendant. She accepted the plea offer because her attorney told her that she was looking at a prison sentence either way and so she could limit her possible exposure to twelve months rather than twenty-four months.

The record indicates that Attorney Feldhaus conducted some investigation, just not to the defendant's satisfaction now. The court cannot find based on the evidence presented that there was any substantial deviation by Attorney Feldhaus from his essential duties to his client. The defendant was in the best position to know the values of the property stolen, being the person who admittedly stole it. If she disagreed with the valuations for the property that were provided by the state, or if she just felt that she really couldn't estimate the values, all that she had to do was to say that to Attorney Feldhaus, which would have alerted him to the need to conduct further investigation. Instead, she said that it all "sounds right."

Even if the court could find, which it cannot, that Attorney Feldhaus' representation was ineffective, there is no evidence that the defendant was prejudiced by any alleged ineffectiveness on the part of her attorney. In this regard, Attorney's Herberth's argument as to prejudice is reflected in the following statement from her motion: "Had Ms. Clancy known that the value of the stolen items counsel could not be determined, and subsequently, that the State could not prove its case, she would not

have pled guilty."

The defendant's argument that the value of the items could not be determined appears to assume that the state could not prevail at trial because of having no evidence as to value. It is true that the state's only evidence with regard to the values of the items stolen is based on the sticker prices (referred to by the witness David Suhre as the "white ticket prices"). In this regard, the state of Ohio has been unable to determine the discounted price, if any, for each item stolen by the defendant. Likewise, the defense apparently has been also unable to determine the amounts of any discounted prices for the items. However, this does not translate, as Attorney Herberth appears to be suggesting, to an inability of the state to prevail at trial on the issue of value.

R.C. 2913.02, the theft statute under which the defendant was charged in this case, provides in relevant part that "no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * without the consent of the owner or person authorized to give consent." If the value of the property stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, the theft is a felony of the fifth degree.[19]

R.C. 2913.61 then sets forth various rules that apply in determining value and states in pertinent part:

> "(E) Without limitation on the evidence that may be used to establish the value of the property or services involved in a theft offense:
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> "(1) When the property involved is personal property held for sale at wholesale or retail, the price at which the property was *held for sale* is prima-facie evidence of

[19] R.C. 2913.02(B)(2).

its value."

The price listed on sales tags to clothing has been found to be prima facie evidence of the clothing's value.[20]

In *State v. Cunningham*, 67 Ohio App.3d 366, 87 N.E.2d 310 (2nd Dist. 1990), the state's own witnesses testified the items of clothing in question could be purchased at the registers for at least twenty percent less than their tagged prices totaling $334.91.[21] Finding that it was undisputed that the clothing had some value and therefore the appellant could properly be convicted of theft, but not of theft of property over the value of $300, the First District Court of Appeals reversed the defendant's conviction for felony theft.[22]

On the other hand, in *State v. Collins*, 8th Dist. No. 87522, 2006-Ohio-4898, the defendant stole boxes of shoes. At trial, the assistant manager of the Footlocker store testified that the value of the shoes was the amount determined by scanning the shoes though a register which effectively gave the sticker price.[23] The value using this method was $1,100. However, on cross-examination she testified that the shoes were defective and could not have been sold at the sticker price, and that she did not know the value of the shoes in their defective condition.[24] The jury returned a verdict finding that the value of the property stolen exceeded $500.00.[25]

On appeal, the defendant argued that the state failed to prove the value of the goods stolen. The court distinguished *Cunningham* by noting that the value of the

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[20] *State v. Speigner*, 8th Dist. Cuyahoga No. 47171, 1984 WL 5491 (Apr. 12, 1984).
[21] See *State v. Cunningham*, supra, 587 N.E.2d at 311.
[22] Id. at 312.
[23] *State v. Collins*, supra, 2006-Ohio-4898, ¶ 8.
[24] Id.
[25] Id. at ¶ 9.

merchandise in that case was only slightly greater than the $300 base amount for the charged offense and that the items were tagged to reduce their price to an amount below the base amount.[26] The court noted that the testimony at trial established that the sales or sticker price for the shoes was around $1,100, more than double the base amount of $500 for the charged offense, and there was no evidence that the shoes were being sold at a lower price, as in *Cunningham*.[27]

In *State v. Holter*, 9th Dist. No. 26251, 2012-Ohio-3784, evidence was admitted at trial as to the value of a computer and monitor stolen from a Walmart store by using the combined "sticker prices" for the items.[28] The defendant argued on appeal that this evidence was insufficient to sustain a conviction because the six employees who testified as to the value of these items acknowledged that they did not know whether the equipment was on sale on the day of the theft.[29] In ruling against the defendant, the court noted that the testimony regarding the "sticker price" of the merchandise constituted prima facie evidence of the market value of the property, and that "if [the defendant] believed that evidence to be inaccurate, he should have offered some contrary evidence for the jury to consider."[30]

In *State v. Rodriguez*, 6th Dist. No. WD-05-026, 2006-Ohio-2121, a police officer was permitted to read the price tags contained on stolen baseball gloves from sporting goods stores and to testify to the total value by adding up the price tags. Citing R.C. 2913.61(E)(1), the court upheld the admission of this evidence against the assertion

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[26] Id. at ¶ 17.
[27] Id. at ¶¶ 18-20.
[28] *State v. Holter*, supra, at ¶ 10.
[29] Id. at ¶ 9.
[30] Id. at ¶ 12.

that it constituted inadmissible hearsay.[31] In doing so, the court cited *State v. Edwards* (June 13, 1991), 2nd Dist. No. 2755, which held as follows: "Price tags are accompanied by sufficient indicia of trustworthiness to be admissible as an exception to the hearsay rule. If there is any reason to believe that the price showing on the price tag is erroneous, the defendant is free to contradict that evidence with evidence of his own concerning the retail price of the items in question."[32]

Based on this caselaw, if the case at bar had gone to trial, the court would have admitted as evidence the testimony of Douglas Suhre that the sticker price values for the items stolen in Ct. #1 totaled $2,600 and that the corresponding values for the items stolen in Ct. #2 totaled $2,000. These amounts obviously are considerably in excess of $1,000, and it appears from the evidence presented on the motion to withdraw guilty plea that David Suhre's testimony would be that one or more of the items may have been on sale at the time but that he does not know and cannot obtain the discounted price for the jewelry at this time.

Other than Kohl's, the person who would seemingly best have knowledge of any discounted price would be defendant, who by her own admission stole jewelry from Kohl's on two separate dates in December 2012. However, there is no indication that she has any evidence as to the amount of any discounted price, and although Attorney Herberth faults Attorney Feldhaus for not having investigated and determined the amounts of any discounted prices, she also has presented no evidence as to such prices or even given an inkling that she has determined what those discounted prices are. Instead, her argument has been seemingly premised on the insufficiency of the

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[31] *State v. Rodriguez*, supra, 2006-Ohio-2121, ¶¶ 23-26.
[32] Id. at ¶ 25, quoting *State v. Edwards*, 2nd Dist. Clark No. 2755, 1991 WL 102729, *8 (June 13, 1991).

state's evidence to even present the case to a jury, and on this point she is simply mistaken.

With the sticker prices being 160% over the $1,000 threshold as to Ct. #1, and 100% over the $1,000 threshold as to Ct. #2, it is certainly conceivable, despite the anticipated defense argument that the state had not proven its case, that a jury would have convicted on one or both counts at the conclusion of the trial. At best, it is entirely speculative as to what a jury would have found based on this evidence.

As a result, notwithstanding any alleged ineffectiveness on the part of the defendant, it is not reasonably probable that the defendant would have rejected the state's plea offer of a dismissal of one count in return for a plea to the other count or that she would have decided to go to trial and risk being convicted of both counts, particularly since her mindset was to reduce her possible exposure to a longer prison sentence.

The defendant also argues that there is "manifest injustice" by virtue of the fact that the codefendant Marcus Armacost was treated more favorably in terms of his plea and sentencing than was the defendant. There is no manifest injustice in the fact that the defendant and codefendant were treated differently. The codefendant was charged with two counts of receiving stolen property. In contrast to the case against the defendant, where she confessed to committing both theft offenses, the defendant's position was that he did not commit the first offense. In order to avoid a trial that was imminent at that point, the state elected to dismiss the first count and to take a plea to a reduced misdemeanor offense as to the second count, at least in part because of the room prosecutor's apparent misunderstanding as to what is required to prove value.

The defendant had already served approximately 90 days in jail and his record was not nearly as extensive as that of the defendant. He was sentenced to 90 days with credit for time served and was returned to Kentucky to face pending felony charges there. The differences, and the reasons for these differences, in the treatment of the two parties are obvious. The court cannot find any manifest justice on these facts which would warrant the court in allowing the defendant to withdraw her guilty plea.

CONCLUSION

Based on the above analysis, the court finds that the defendant has failed to demonstrate that her trial counsel's performance was deficient. She has failed to show that she would not have pled guilty to count one of the indictment absent her trial counsel's alleged ineffectiveness or that she was in any other way prejudiced by alleged deficiencies. She has failed to point to any specific evidence to show that she would have been acquitted, received a more favorable plea deal, or received a lesser sentence but for her counsel's alleged ineffectiveness. She has failed to show that her guilty plea was anything but knowingly, intelligently, and voluntarily made. The defendant has failed to demonstrate any manifest injustice which would warrant the court in allowing her to withdraw her previous guilty plea.

The court finds that the defendant's motion to withdraw her guilty plea is not well-taken and is hereby overruled.

IT IS SO ORDERED.

DATED: 2-21-14

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 21st day of February 2014 to all counsel of record and unrepresented parties.

D. Cribbet

Administrative Assistant to Judge McBride