

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**FILED**  
2017 AUG 15 AM 9:06  
BARBARA A. WIEDENBEN  
CLERK OF COURT  
CLERMONT COUNTY, OHIO

**STATE OF OHIO,** :  
 :  
 Plaintiff : **CASE NO. 1997 CR 005209**  
 :  
 vs. :  
 : **Judge McBride**  
**BRIAN MANN,** :  
 : **DECISION/ENTRY**  
 Defendant :

Darren Miller, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Brian Mann, *pro se* defendant, Inmate No. A351-324, P.C.I. Prison, P.O. Box 209, Orient, Ohio 43146

This cause is before the court for consideration of a motion to withdraw a guilty plea and request for an evidentiary hearing filed by the defendant Brian Mann on March 23, 2017. The court took this motion under advisement on May 31, 2017.

Upon consideration of the motion, the written arguments of the state and the defendant, the evidence submitted, the record of this case, and the applicable law, the court now renders this written decision.

**FACTS OF THE CASE AND PROCEDURAL BACKGROUND**

On June 11, 1997, the defendant Brian Mann was indicted on one count of aggravated murder with a firearm specification in violation of R.C. 2903.01(A), a felony of the first degree.

On October 20, 1997, the day scheduled for his trial to begin, the defendant entered a plea of guilty to one count of murder in violation of R.C. 2903.02, a felony of the first degree. The defendant was sentenced the same day.

During the hearing, counsel for the state indicated that the defendant wished to change his plea "from not guilty to the charge of aggravated murder with a gun specification to a guilty plea to a negotiated charge of murder in violation of 2903.02 of the Revised Code, carrying a penalty of 15 years to life and a discretionary fine up to \$15,000."<sup>1</sup> The state's counsel also stated that "In exchange for that plea of guilty to the reduced charge of murder, the State of Ohio would ask the Court to dismiss the specification which is appended to that original charge. I believe that is the extent of any plea negotiations."<sup>2</sup> Counsel for the defense and the defendant confirmed to the court that the state's representation of the negotiated plea deal was correct.<sup>3</sup>

During the hearing, the court confirmed with the defendant that no one had "threatened or made any promises to [the defendant] or made any inducements other than those stated in Court this morning to be a part of the plea agreement \* \* \*."<sup>4</sup> As to the amended charge of murder, the court told the defendant that the murder charge " \* \* \* is punishable by an indefinite term of imprisonment. That indefinite term being not

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<sup>1</sup> Hr'g Tr., 2:10-15, (October 20, 1997).

<sup>2</sup> Hr'g Tr., 2:16-20.

<sup>3</sup> Hr'g Tr., 2:25-3:6.

<sup>4</sup> Hr'g Tr., 6:17-22.

less than 15 years and not less than life imprisonment.”<sup>5</sup> The defendant indicated that he understood this, and then the court corrected itself to state “Not more than, excuse me. Not less than 15 years and not more than imprisonment for the remainder of your lifetime.”<sup>6</sup> Following this, the court exchanged with the defendant as follows:

“THE COURT: And do you understand the maximum possible punishment that you can receive upon conviction of that charge?

THE DEFENDANT: Yes, sir.

THE COURT: And do you require any further explanation of the charge itself or of the possible penalty?

THE DEFENDANT: No, sir.

THE COURT: In this case, Mr. Mann, as Mr. Breyer indicated when he recited the plea agreement, the Court has no discretion with respect to the sentence. It is a mandatory sentence. You are not eligible for probation or community control or a non-prison sanction. The sentence that must be imposed upon your conviction is the sentence of imprisonment I have just gone over with you. Do you understand that?

THE DEFENDANT: Yes, sir

THE COURT: Now, with respect to that sentence, because it is an indefinite term of imprisonment, you are not eligible for parole until you have served the minimum term of imprisonment and that being 15 years. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That is not to indicate that you will be released on parole at that time, that is a decision that is made by the parole authorities. But do you understand you are not even eligible to be released on parole until you have served 15 years in prison?

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<sup>5</sup> Hr’g Tr., 8:23-9:2.

<sup>6</sup> Hr’g Tr., 9:5-7.

THE DEFENDANT: Yes, sir.<sup>7</sup>

\* \* \*

THE COURT: Has anyone made you a promise that you will receive community control or a non-prison sanction and that you will not be imprisoned?

THE DEFENDANT: No, sir.<sup>8</sup>

\* \* \*

THE COURT: Do you understand that you have the right to have an attorney appointed to defend you if you cannot afford to retain an attorney to represent you in these proceedings. And, in fact, Mr. Kelly and Mr. Erhardt were appointed to represent you in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked this case over fully with Mr. Kelly and Mr. Erhardt?

THE DEFENDANT: Yes, sir.

THE COURT: Have you explained to them all the facts and circumstances that are pertinent to this case as you know them to be?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have confidence in Mr. Kelly and Mr. Erhardt in their representation? Do you believe that their representation has been competent and they represented you diligently throughout these proceedings?

THE DEFENDANT: Yes, sir.<sup>9</sup>

\* \* \*

THE COURT: Do you have any questions about everything I have gone over with you?

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<sup>7</sup> Hr'g Tr., 8:10-9:13.

<sup>8</sup> Hr'g Tr., 10:14-17.

<sup>9</sup> Hr'g Tr., 11:5-23.

THE DEFENDANT: No, sir.

THE COURT: Have you understood everything I have gone over with you?

THE DEFENDANT: Yes, sir.

THE COURT: And is it still your desire to withdraw your plea of not guilty and enter a plea of guilty instead to the charge of murder?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Kelly and Mr. Erhardt, you submitted to the Court the written plea of guilty form; is that correct?

MR. KELLY: Yes, sir.

THE COURT: Did you go over the contents of this form with Mr. Mann?

MR. KELLY: We read it to him.

THE COURT: Did he sign the form in your presence?

MR. KELLY: Yes.

THE COURT: Have you discussed with him the plea which he is entering today and the effects of this plea?

MR. KELLY: Extensively.

THE COURT: Is all that correct, Mr. Mann?

THE DEFENDANT: Yes, sir.

THE COURT: And prior to signing this written plea of guilty form, did you read the form and do you understand all the contents of that form?

THE DEFENDANT: Yes, sir."<sup>10</sup>

The defendant's written plea of guilty, submitted on October 20, 1997, indicated that "The Court informed the Defendant as to \* \* \* the maximum penalty involved \* \* \*."

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<sup>10</sup> Hr'g Tr., 13:25-15:4.

The form also stated the penalty for murder under R.C. 2903.02 as "15 – Life" and \$15,000. The form went on to read that a "nolle prosequi will be entered at sentencing as to specification."

On November 3, 1997, the court journalized the sentence of the court which was 15 years to life in prison.

The defendant filed his first motion to withdraw his guilty plea on December 2, 2013. On December 4, 2013, Judge Ferenc of the Clermont County Court of Common Pleas denied the defendant's motion.

On March 23, 2017, the defendant filed a second motion to withdraw guilty plea, which requested an evidentiary hearing. The defendant claims that a manifest injustice occurred because his attorney promised that he would serve no more than 20 years in prison if he pled guilty to the offense of murder. However, after serving 15 years in prison, the parole board "continued him" for another ten years in prison. The defendant argues that his counsel had promised him the parole board would continue his prison sentence for only five years, at the most, and thus he would serve no more than 20 years. The defendant refers the court to his attached affidavit, which was not, in fact, submitted.

However, the defendant submitted the affidavits of Ray Mann, Gloria Mann, and Kelly Levangie, who are the defendant's father, mother, and sister, respectively. Their affidavits all claim that Christian Erhardt, one of the two attorneys representing the defendant at the time he pled guilty, "repeatedly pushed Brian to agree to plead guilty."<sup>11</sup> Further, the father, mother, and sister all aver that Mr. Erhardt told them that "\*\* \* \* if Brian agreed to this deal, he would serve fifteen years, most likely, but in any event

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<sup>11</sup> R. Mann Aff., ¶ 2; G. Mann Aff., ¶ 2; K. Levangie Aff., ¶ 2.

no more than twenty \* \* \*."<sup>12</sup> Mr. and Mrs. Mann claim that "Brian was also going through withdrawal from his meds at the time and we were worried about his ability to withstand the rigors of a trial, which contributed to the consensus to take the deal offered by counsel \* \* \*."<sup>13</sup>

The defendant submitted a letter from Christian Erhardt, dated June 11, 2012, which states as follows regarding the plea deal: "\* \* \* You are correct that we expected that you would get bounced on at least your 1st parole review but had hopes you would be considered for the second after a five year extension. Much of this was based on current guidelines and standards in effect at the time. \* \* \*"

The state filed a responsive memorandum in opposition to the defendant's motion on April 4, 2017. The defendant filed his reply on May 10th. The court took the motion under advisement on May 31st.

## LEGAL ANALYSIS

Crim.R. 32.1 governs the withdrawal of guilty pleas. Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."<sup>14</sup> Hence,

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<sup>12</sup> R. Mann Aff., ¶ 4; G. Mann Aff., ¶ 4; K. Levangie Aff., ¶ 3.

<sup>13</sup> R. Mann Aff., ¶ 3; G. Mann Aff., ¶ 3.

<sup>14</sup> Crim.R. 32.1.

a criminal defendant who wishes to withdraw a guilty plea after sentencing “has the burden of establishing the existence of manifest injustice.”<sup>15</sup>

“In general, ‘manifest injustice relates to a miscarriage of justice or is inconsistent with the demands of due process.’”<sup>16</sup> “The requirement of demonstrating a manifest injustice is designed to discourage a defendant from pleading guilty to test the weight of the potential reprisal, and later attempting to withdraw the plea if the sentence was unexpectedly severe.”<sup>17</sup> As such, showing a manifest injustice is an “extremely high standard that is allowable only in extraordinary circumstances.”<sup>18</sup>

The decision whether to grant a motion to withdraw a guilty plea is within the trial court’s discretion.<sup>19</sup> The court resolves the “good faith, credibility, and weight of the movant’s assertions in support of the motion.”<sup>20</sup> Additionally, the “trial court need not

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<sup>15</sup> *State v. Smith*, 40 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. See

*State v. Pringle*, 12th Dist. Brown No. CA2015-08-023, 2016-Ohio-1149, ¶ 6, citing *State v. Degaro*, 12th Dist. Butler No. CA2008-9-227, 2009-Ohio-2966, ¶ 10 (stating that a criminal defendant who wishes to withdraw a guilty plea after sentencing must “demonstrate that such action is necessary to remedy a manifest injustice.”); *State v. Reeder*, 12th Dist. Butler Nos. CA2013-05-075, CA2013-07-126, 2014-Ohio-2233 at ¶ 23, quoting *State v. Williams*, 12th Dist. Clermont No. CA2012-08-060, 2013-Ohio-1387, ¶ 11 (“On the other hand, ‘[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of a manifest injustice.’”).

<sup>16</sup> *State v. Jordan*, 12th Dist. Warren No. CA2014-04-051, 2015-Ohio-575, ¶ 10, quoting *State v. Kelly*, 12th Dist. Butler No. CA2013-01-020, 2013-Ohio-3675, ¶ 19. See *State v. Murray*, 12th Dist. Brown No. CA2015-12-029, 2016-Ohio-4994, ¶ 15, quoting *State v. Hobbs*, 12th Dist. Warren No. CA2012-11-117, 2013-Ohio-3089, ¶ 9 (“A manifest injustice is defined as ‘a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the demands of due process.’”).

<sup>17</sup> *State v. Sturgill*, 12th Dist. Clermont No. CA2014-09-066, 2015-Ohio-1933, ¶ 9, quoting *State v. Daugherty*, 12th Dist. Clermont No. CA2013-08-063, 2014-Ohio-2236, ¶ 14.

<sup>18</sup> *State v. Lampe*, 12th Dist. Warren No. CA2015-03-028, 2015-Ohio-3837, ¶ 9, citing *State v. Worthington*, 12th Dist. Brown No. CA2014-12-022, 2015-Ohio-3173, ¶ 14. See *Sturgill*, 2015-Ohio-1933 at ¶ 9, citing *Daugherty*, 2014-Ohio-2236 at ¶ 14 (holding same).

<sup>19</sup> *State v. McGlosson*, 12th Dist. Butler No. CA2012-03-057, 2013-Ohio-774, ¶ 9, citing *Smith*, 49 OhioSt.2d at 264. See *State v. Powell*, 12th Dist. Clermont No. CA2009-05-028, 2009-Ohio-6552, ¶ 10 (stating that a Crim.R. 32.1 motion is addressed to the trial court’s sound discretion).

<sup>20</sup> *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 13, citing *Smith*, 49 Ohio St.2d at paragraph two of the syllabus.

hold an evidentiary hearing on every postsentence motion to withdraw a guilty plea."<sup>21</sup> The trial court is "not required to hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea where the record is devoid of evidence warranting relief."<sup>22</sup> To warrant an evidentiary hearing, the "defendant must establish a reasonable likelihood that a withdrawal of his guilty plea is necessary to correct a manifest injustice \* \* \*."<sup>23</sup>

A defendant's guilty plea must be made "knowingly, intelligently, and voluntarily," in order to be constitutional.<sup>24</sup> To ensure that pleas are knowingly, intelligently, and voluntarily made, the trial court is required pursuant to Crim.R. 11(C) to engage the defendant in a plea colloquy.<sup>25</sup> Crim.R. 11(C)(2) provides:

"(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

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<sup>21</sup> *McMahon*, 12th Dist. Fayette No. CA2009-06-008, 2010-Ohio-2055 at ¶ 8, citing *Degaro*, 2009-Ohio-2966 at ¶ 13.

<sup>22</sup> *Pringle*, 2016-Ohio-1149 at ¶ 14, citing *State v. Taylor*, 12th Dist. Madison No. CA2007-12-037, 2009-Ohio-924, ¶ 34. See *Reeder*, 2014-Ohio-2233 at ¶ 28, citing *McMahon*, 2010-Ohio-2055 at ¶ 8 (stating that the trial court is not required to have an evidentiary hearing unless the defendant has established a "reasonable likelihood that a withdrawal of plea was necessary.").

<sup>23</sup> *Murray*, 2016-Ohio-4994 at ¶ 16, quoting *Williams*, 2009-Ohio-6240 at ¶ 14.

<sup>24</sup> *Reeder*, 2014-Ohio-2233 at ¶ 13, quoting *State v. Ackley*, 12th Dist. Madison No. CA2013-04-010, 2014-Ohio-876, ¶ 8.

<sup>25</sup> *State v. Henson*, 12th Dist. Butler No. CA2013-12-221, 2014-Ohio-3994, ¶ 10, citing *State v. Butcher*, 12th Dist. Butler No. CA2012-10-206, 2013-Ohio-3081, ¶ 8.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."<sup>26</sup>

When the trial court complies with Crim.R. 11(C)(2) in accepting a defendant's guilty plea, "there is a presumption that the plea was knowingly, voluntarily, and intelligently made."<sup>27</sup> The defendant bears the burden of rebutting this presumption by submitting supporting materials that indicate he is entitled to relief.<sup>28</sup> "A defendant's own self-serving declarations or affidavits are insufficient to rebut a record that shows a plea was made knowingly, intelligently, and voluntarily."<sup>29</sup>

A defendant's claim of ineffective assistance of counsel "is an appropriate basis for seeking to withdraw a guilty plea in the wake of sentencing."<sup>30</sup> "However, a defendant who has entered a guilty plea waives his right to claim he was prejudiced by ineffective assistance of counsel, 'except to the extent that such ineffective assistance made the plea less than knowing, intelligent, and voluntary.'"<sup>31</sup>

"When the alleged error underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the movant must show that (1) his counsel's performance was deficient and (2) there is a reasonable probability that, but for

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<sup>26</sup> Crim.R. 11(C)(2).

<sup>27</sup> *Murray*, 2016-Ohio-4994 at ¶ 20, citing *State v. Kennell*, 12th Dist. Clermont No. CA2015-01-002, 2015-4817, ¶ 29.

<sup>28</sup> *Murray*, 2016-Ohio-4994 at ¶ 20, citing *Kennell*, 2015-4817 at ¶ 29.

<sup>29</sup> *Murray*, 2016-Ohio-4994 at ¶ 20, citing *Kennell*, 2015-4817 at ¶ 29.

<sup>30</sup> *Pringle*, 2016-Ohio-1149 at ¶ 7, citing *State v. Eberle*, 12th Dist. Clermont No. CA2009-10-065, ¶ 56.

<sup>31</sup> *Murray*, 2016-Ohio-4994 at ¶ 25, citing *McMahon*, 2010-Ohio-2055 at ¶ 33.

counsel's errors, he would not have pled guilty."<sup>32</sup> The court may approach this two-pronged analysis beginning with either requirement, and need not continue to analyze the remaining requirement if either is unsatisfied.<sup>33</sup> The defendant bears the burden of showing that counsel was ineffective and that he consequently suffered prejudice.<sup>34</sup>

To show counsel was deficient, the defendant must "establish that counsel's representation 'fell below the objective standard of reasonableness.'"<sup>35</sup> "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."<sup>36</sup>

In *State v. Robinson*, 12th Dist. Butler No. CA2013-050-085, 2013-Ohio-5672, the Twelfth District Court of Appeals had to decide whether the defendant should be allowed to withdraw his post-sentence guilty plea on the basis that he received ineffective assistance of counsel. Specifically, the defendant alleged that his trial counsel was ineffective when, among other things, he advised the defendant that he "would be convicted and spend a lot of time in prison" if he did not accept the plea deal.<sup>37</sup> The appellate court found that, even if these allegations were true, they amounted to "nothing more than counsel's attempts to provide [the defendant] with informed advice, to relay worst case scenarios to him, and to make recommendations

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<sup>32</sup> *Jordan*, 2015-Ohio-575 at ¶ 12, citing *Williams*, 2009-Ohio-6240 at ¶ 15.

<sup>33</sup> *Reeder*, 2014-Ohio-2233 at ¶ 32, citing *State v. Bradley*, 43 Ohio St.3d 136, 143 (1989).

<sup>34</sup> *State v. Graham*, 12th Dist. Warren No. CA2013-07-066, 2014-Ohio-1891, ¶ 22, citing *State v. Hackney*, 12th Dist. Clermont No. CA96-08-071, 1997 WL 10916, \*1 (Jan. 13, 1997).

<sup>35</sup> *Reeder*, 2014-Ohio-2233 at ¶ 32, citing *Stickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984).

<sup>36</sup> *Sturgill*, 2015-Ohio-1933 at ¶ 12, citing *Hendrix*, 2012-Ohio-5610 at ¶ 14. See *State v. Richards*, 12th Dist. Clermont No. CA97-06-059, 1997 WL 779084, \*4 (Dec. 15, 1997), citing *State v. Lytle*, 48 Ohio St.2d 391, 397, 358 N.E.2d 623 (1976) ("In Ohio, a properly licensed attorney is presumably competent.").

<sup>37</sup> *State v. Robinson*, 12th Dist. Butler No. CA2013-050-085, 2013-Ohio-5672, ¶ 23.

on how to proceed."<sup>38</sup> Indeed, "an attorney's advice to take a plea deal is not ineffective assistance of counsel."<sup>39</sup> As such, the appellate court affirmed the trial court's decision to deny the motion to withdraw the defendant's guilty plea.

In *State v. Neeley*, 12th Dist. Clinton No. CA2008-08-034, 2009-Ohio-2337, the Twelfth District Court of Appeals dealt with a post-sentence motion to withdraw a guilty plea filed by a defendant who alleged his trial counsel made misrepresentations to him. In particular, the defendant claimed that his counsel promised him at a pre-trial hearing that counsel "could probably" get concurrent sentences for him.<sup>40</sup> During the plea hearing, the court informed the defendant of the maximum possible sentence and the state's recommendation of consecutive sentences.<sup>41</sup> Moreover, the court received affirmative answers from the defendant regarding his understanding of the proceedings and his satisfaction with counsel.<sup>42</sup> The appellate court explained that a manifest injustice does not occur when the "defendant holds a mistaken belief that sentence would be significantly lighter, nor when attorney says a particular sentence would probably result."<sup>43</sup> As such, the appellate court found that the trial court did not abuse its discretion in finding that there was no manifest justice on this basis.<sup>44</sup>

In *State v. Reeder*, 12th Dist. Butler Nos. CA2013-05-075, CA2013-07-126, 2014-Ohio-223, the defendant sought to withdraw his guilty plea after sentencing on the basis that his counsel was deficient for advising him of a promised sentencing range

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, quoting *State v. Shugart*, 7th Dist. Mahoning No. 08 MA 238, 2009-Ohio-6807, ¶ 37.

<sup>40</sup> *State v. Neeley*, 12th Dist. Clinton No. CA2008-08-034, 2009-Ohio-2337, ¶ 8.

<sup>41</sup> *Id.* at ¶ 9.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at ¶ 10, citing *State v. McComb*, 2d Dist. Montgomery Nos. 22579, 22571, 2008-Ohio-295, ¶ 9.

<sup>44</sup> *Neeley*, 2009-Ohio-2337 at ¶ 9.

and then failing to take steps to ensure that the promised range would be fulfilled at the sentencing hearing.<sup>45</sup> The court found it questionable as to whether the defendant satisfied either of the two prongs in the *Strickland* test, but irrespective of that test, held that the defendant's plea was knowing and voluntary.<sup>46</sup>

The court concluded that the defendant's plea was knowing and voluntary, regarding the length of his sentence, because the record showed that the defendant "clearly understood the maximum term of imprisonment" he faced at the time of his plea hearing. In support of this conclusion, the court highlighted that the defendant signed a guilty plea form that stated the maximum prison term the judge could impose, the form gave no indication that there was a promise of a lesser sentence, the defendant acknowledged in open court that he did not receive a promise in exchange for his plea, and he acknowledged that he understood that his plea could lead to a potential maximum sentence.<sup>47</sup> As such, the trial court properly denied the defendant's motion to withdraw his guilty plea.<sup>48</sup>

The Tenth District Court of Appeals had to determine whether a defendant received ineffective assistance of counsel such that he suffered a manifest injustice in *State v. Bryant*, 10th Dist. Franklin No. 12AP-703, 2013-Ohio-5105. In *Bryant*, the defendant argued that his counsel was ineffective because he told the defendant he had

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<sup>45</sup> *Reeder*, 2014-Ohio-223 at ¶ 33.

<sup>46</sup> *Id.* at ¶ 34.

<sup>47</sup> *Id.* at ¶ 35.

<sup>48</sup> See *State v. Peters*, 12th Dist. Clermont No. CA2015-07-066, 2016-Ohio-5288, ¶¶ 15-16 (in dealing with a postconviction petition for relief, the court found that the defendant had not shown ineffective assistance of counsel where he claimed that he pled guilty because counsel advised him that he would receive a shorter sentence than he actually did because the court advised him of the potential maximum sentence he could receive upon pleading guilty).

his "word \* \* \* that [he] would be sentenced to probably between 11 and no more than 15 years."<sup>49</sup>

The appellate court first determined that the defendant's contention that he was unaware of the sentence he faced was contradicted by the record.<sup>50</sup> The record showed that the guilty plea the defendant signed stated the potential maximum sentence, the prosecutor noted the potential maximum sentence for each charge, the trial court informed the defendant of the maximum sentence that each count carried, and the defendant was fully informed of his rights under Crim.R. 11.<sup>51</sup>

Second, the court found that even if the defendant's trial counsel had misinformed him of the sentence, "an attorney's mere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim."<sup>52</sup> Further, the court noted that "where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel."<sup>53</sup> Accordingly, the appellate court affirmed the trial court's denial of the defendant's motion to withdraw his guilty plea.<sup>54</sup>

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<sup>49</sup> *State v. Bryant*, 10th Dist. Franklin No. 12AP-703, 2013-Ohio-5105, ¶ 31.

<sup>50</sup> *Id.* at ¶ 30.

<sup>51</sup> *Id.*

<sup>52</sup> (Internal quotations omitted.) *Id.*, quoting *State v. Boyse*, 3d Dist. No. 15-10-09, 2011-Ohio-1732, ¶ 11. See *Peters*, 2016-Ohio-5288 at ¶ 15, quoting *State v. Bryant*, 10th Dist. Franklin No. 12AP-703, 2013-Ohio-5105, ¶ 32 (internal quotations omitted.) (noting that, even if the defendant's attorney "indicated that he would receive a lesser sentence, an attorney's mere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim.").

<sup>53</sup> *Bryant*, 2013-Ohio-5105 at ¶ 32, quoting *Wiant v. United States*, S.D. Ohio No. 2:04-CV-256, 2005 WL 165716 (2005).

<sup>54</sup> *Bryant*, 2013-Ohio-5105 at ¶ 35.

In turning to the case at bar, the defendant claims that he suffered a manifest injustice because his plea was not made knowingly, intelligently, and voluntarily. He claims that the manifest injustice occurred when his counsel, Mr. Erhardt, promised the defendant that he would serve no more than 20 years in prison if he pled guilty to the offense of murder. However, after serving 15 years in prison, the parole board "continued him" for another ten years, meaning he would serve at least another 10 years in prison.

The defendant states in his reply that he is not limited to showing he suffered a manifest injustice by demonstrating that he received ineffective assistance of counsel.<sup>55</sup> Even so, since the defendant is solely claiming that he suffered a manifest injustice due to his trial counsel's incorrect sentence prediction, the court will first examine whether the defendant has demonstrated that he received ineffective assistance of counsel sufficient to warrant withdrawing his guilty plea.

To demonstrate ineffective assistance of counsel, the defendant must be able to show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty.<sup>56</sup> The defendant has failed to make such a showing. Simply, the defendant has not submitted evidence in relation to the present motion that shows he would have not pled guilty. Although the defendant argues in his brief that he would have rejected the plea, he did not submit an affidavit with his motion swearing that he would have done so.<sup>57</sup>

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<sup>55</sup> Defs. Reply, pg. 3.

<sup>56</sup> *Jordan*, 2015-Ohio-575 at ¶ 12, citing *Williams*, 2009-Ohio-6240 at ¶ 15.

<sup>57</sup> However, even when defendants do submit their own affidavits stating that they would not have accepted a guilty plea, courts often find such self-serving statements to be inadequate evidence to show a manifest injustice. See *Jordan*, 2015-Ohio-575 at ¶¶ 22-23 (affirming trial court's finding that the defendant did not show he would have rejected a plea agreement, in his

The defendant did submit the affidavits of his father, mother, and sister. "Ohio's courts have consistently held that affidavits from interested parties such as defendants, co-defendants, and family members are self-serving and may be discounted."<sup>58</sup> Furthermore, "a trial court may, in its exercise of discretion, judge the credibility of affidavits submitted in support of a motion to withdraw a plea in determining whether to accept the affidavits as true statements of fact."<sup>59</sup> In this instance, the court finds that the affidavits of the defendant's father, mother, and sister do not demonstrate that the defendant suffered a manifest injustice due to his counsel's ineffectiveness.

The affidavits all state that Mr. Erhardt "repeatedly pushed Brian to agree to plead guilty,"<sup>60</sup> and that Mr. Erhardt told them that " \* \* \* if Brian agreed to this deal, he would serve fifteen years, most likely, but in any event no more than twenty \* \* \*."<sup>61</sup> The fact that all three of the affiants are close relatives of the defendant casts doubt as to whether defense counsel did, in fact, promise that the defendant would not serve more than 20 years in prison. However, even if the court credits the entirety of the three affidavits, none of them indicate that the defendant would have rejected the guilty plea had the defendant known he could serve more than 20 years in prison.

To the contrary, the affidavits of the defendant's father and mother suggest that there was another reason that contributed to the defendant's acceptance of the plea deal that is separate from trial counsel's sentence advice. Mr. and Mrs. Mann claim that

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claim involving ineffective assistance of counsel, where the defendant submitted his own affidavit and moved to withdraw his guilty plea three years after sentencing); *McGlosson*, 2013-Ohio-774 at ¶ 12 (finding that the defendant's self-serving affidavit was insufficient to show a manifest injustice).

<sup>58</sup> *State v. Chamberlain*, 12th Dist. Brown No. 2015CA-03-008, 2015-Ohio-2987, ¶ 19, quoting *Robinson*, 2013-Ohio-5672 at ¶ 17.

<sup>59</sup> *Williams*, 2009-Ohio-6240 at ¶ 17.

<sup>60</sup> R. Mann Aff., ¶ 2; G. Mann Aff., ¶ 2; K. Levangie Aff., ¶ 2.

<sup>61</sup> R. Mann Aff., ¶¶ 2, 4; G. Mann Aff., ¶¶ 2, 4; K. Levangie Aff., ¶¶ 2-3.

"Brian was also going through withdrawal from his meds at the time and we were worried about his ability to withstand the rigors of a trial, which contributed to the consensus to take the deal offered by counsel \* \* \*."<sup>62</sup> In addition, nothing in the letter from Mr. Erhardt states that the defendant's decision to accept the plea deal was solely based on a promise of a 20 year sentence. Accordingly, the defendant has failed to show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty.<sup>63</sup>

Second, even if the court assumes that the defendant's counsel advised that he would only serve 20 years in prison, the defendant has still failed to show that his counsel's representation was deficient.<sup>64</sup> As discussed in multiple cases above, even if the defendant's attorney "indicated that he would receive a lesser sentence, an attorney's mere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim."<sup>65</sup>

This case is most akin to *State v. Bryant*, discussed above, in which the defendant argued that his counsel was ineffective because he told the defendant he had his "word \* \* \* that [he] would be sentenced to probably between 11 and no more than 15 years."<sup>66</sup> Similarly, here the defendant claims that he was promised that he would serve 15 years in prison, most likely, but no more than 20 years. As with the *Bryant* case, the court here finds that Mr. Erhardt's advice that a certain prison sentence would probably result is not sufficient to demonstrate that Mr. Erhardt performed deficiently.

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<sup>62</sup> R. Mann Aff., ¶ 3; G. Mann Aff., ¶ 3.

<sup>63</sup> *Jordan*, 2015-Ohio-575 at ¶ 12, citing *Williams*, 2009-Ohio-6240 at ¶ 15.

<sup>64</sup> *Jordan*, 2015-Ohio-575 at ¶ 12, citing *Williams*, 2009-Ohio-6240 at ¶ 15.

<sup>65</sup> *Peters*, 2016-Ohio-5288 at ¶ 15, quoting *Bryant*, 2013-Ohio-5105 at ¶ 32.

<sup>66</sup> *Bryant*, 2013-Ohio-5105 at ¶ 31.

Moreover, the record supports a finding that the defendant's counsel was competent. When questioned by the court during his plea colloquy, the defendant agreed that his counsel had fully discussed the case with him, he had explained all the pertinent facts and circumstances to counsel, and he was satisfied with their representation.<sup>67</sup> In sum, the record does not reflect that counsel was ineffective, and the defendant has likewise failed to show a reasonable probability that he would not have pled guilty had counsel not made the alleged errors. Accordingly, the defendant has failed to show a substantial likelihood that he suffered a manifest injustice due to ineffective assistance of counsel.

Setting aside the above ineffective counsel analysis, the record shows that the defendant's guilty plea was voluntary, intelligent, and knowing. The record before the court belies the defendant's claim that he did not know he could serve a sentence of greater than 20 years in prison. As discussed, when the court satisfies Crim.R. 11(C)(2), a presumption exists that the defendant's plea was entered knowingly, intelligently, and voluntarily. The defendant has not argued that the court failed to satisfy Crim.R. 11(C)(2) at the defendant's plea hearing. Upon reviewing the record, the court finds that Crim.R. 11(C)(2) was satisfied. As such, the defendant has a reciprocal burden, which he has not satisfied, of showing that his plea was less than knowing, intelligent, and voluntary. The defendant has failed to satisfy this burden. The record demonstrates that the defendant was aware that he may serve time in prison for more than 20 years.

First, at the outset of the hearing, the prosecutor indicated that the defendant was changing his plea to guilty "to a negotiated charge of murder in violation of 2903.02

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<sup>67</sup> Hr'g Tr., 11:5-23.

of the Revised Code, carrying a penalty of 15 years to life and a discretionary fine up to \$15,000."<sup>68</sup> The prosecutor also stated that, in exchange for the guilty plea, the state would dismiss the firearm specification. The defense agreed that there were no other agreements regarding sentencing or parole.

Additionally, the defendant's written plea of guilty listed the penalty for murder under R.C. 2903.02 as "15 – Life" and \$15,000. During the plea hearing, defense counsel represented that the defendant signed the form in front of them after they read it to the defendant. The defendant confirmed that he had read the form and understood it.

Finally, and most significantly, the court disabused the defendant of the notion that he would serve, at most, no more than 20 years in prison. The defendant affirmatively responded that he understood that he would serve 15 years *to life* for his guilty plea of murder.<sup>69</sup> The court also engaged in the following exchange with the defendant regarding his sentence:

**"THE COURT:** And do you understand the maximum possible punishment that you can receive upon conviction of that charge?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** And do you require any further explanation of the charge itself or of the possible penalty?

**THE DEFENDANT:** No, sir.

**THE COURT:** In this case, Mr. Mann, as Mr. Breyer indicated when he recited the plea agreement, the Court has no discretion with respect to the sentence. It is a mandatory sentence. You are not eligible for probation or community control or a non-prison sanction. The sentence that must be

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<sup>68</sup> Hr'g Tr., 2:10-15.

<sup>69</sup> Hr'g Tr., 9:5-7.

imposed upon your conviction is the sentence of imprisonment I have just gone over with you. Do you understand that?

THE DEFENDANT: Yes, sir

THE COURT: Now, with respect to that sentence, because it is an indefinite term of imprisonment, you are not eligible for parole until you have served the minimum term of imprisonment and that being 15 years. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That is not to indicate that you will be released on parole at that time, that is a decision that is made by the parole authorities. But do you understand you are not even eligible to be released on parole until you have served 15 years in prison?

THE DEFENDANT: Yes, sir.<sup>70</sup>

\* \* \*

THE COURT: Has anyone made you a promise that you will receive community control or a non-prison sanction and that you will not be imprisoned?

THE DEFENDANT: No, sir.<sup>71</sup>

At every opportunity, the defendant confirmed to the court that he understood his sentence, which was a sentence of 15 years to life in prison. The court also made clear that the decision to grant the defendant parole after 15 years would be made by the parole board. The court gave the defendant multiple opportunities throughout the hearing to ask questions, which the defendant declined to do.

Furthermore, the defendant confirmed that he had not received any promises for his guilty plea and had not been induced into agreeing to plead guilty. This thorough

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<sup>70</sup> Hr'g Tr., 8:10-9:13.

<sup>71</sup> (Emphasis added.) Hr'g Tr., 10:14-17.

dialogue with the defendant eviscerates the defendant's argument that his guilty plea was less than knowing, voluntary, and intelligent. The defendant's counterargument that the plea colloquy is "a dog and pony show" that serves no meaningful purpose for defendants is unpersuasive.<sup>72</sup> The defendant clearly understood the sentence he was facing at the time he entered a guilty plea to murder.<sup>73</sup> As such, his guilty plea was knowing, intelligent, and voluntary.

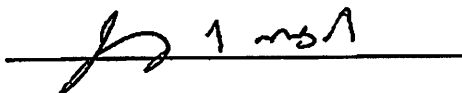
For all of the forgoing reasons, the defendant has failed to establish a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice warranting a hearing.

**CONCLUSION**

For the above reasons, the defendant's motion to withdraw his guilty plea and his request for an evidentiary hearing are not well-taken and are hereby denied.

**IT IS SO ORDERED.**

DATED: 8-14-17



Judge Jerry R. McBride

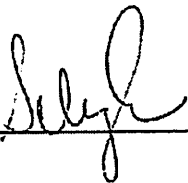
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<sup>72</sup> See Defs. Reply, pg. 5.

<sup>73</sup> See *Reeder*, 2014-Ohio-223 at ¶ 35; *Neeley*, 2009-Ohio-2337 at ¶ 9.

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of this Decision/Entry were sent on this 15<sup>th</sup> day of August 2017 by e-mail to Darren Miller, at [dmiller@clermontcountyohio.gov](mailto:dmiller@clermontcountyohio.gov), and Nick Horton, at [nhorton@clermontcountyohio.gov](mailto:nhorton@clermontcountyohio.gov), Assistant Prosecuting Attorneys, and by regular U.S. Mail to Brian Ray Mann, Defendant, #A351324, Pickaway Correctional Institution, P.O. Box 209, Orient, Ohio 43146.



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Judicial Assistant to Judge McBride