

IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 1992-CR-239 H
PLAINTIFF,	:	
VS.	:	
GLENN W. TINNEY	:	<b>DECISION ON DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA</b>
DEFENDANT,	:	

This murder and aggravated robbery case is brought before the court by the defendant's October 29, 2009 motions for post conviction relief and to withdraw his guilty plea. These motions were filed by the defendant Glenn Tinney with the assistance of the Ohio Innocence Project.

This court previously overruled the defendant's motion for post conviction relief and granted the defendant's motion to withdraw his guilty plea on March 25, 2011. On appeal, the Fifth District Court of Appeals reversed only the order allowing the defendant to withdraw his guilty plea and remanded this case for an evidentiary hearing on withdrawing his May 6, 1992 guilty plea to Ted White's murder.

This court heard the evidence during four full days of hearings on September 27, September 28, October 2 and October 3, 2012 and three more part days of hearings on October 26, November 7 and December 19, 2012. Stenotype reporters were Linda Tackett and Cathy Boyer. Written closing arguments were filed by January 11, 2013.

The issue presented to the court for hearing is whether the evidence requires that the defendant be permitted to vacate his guilty plea in order to correct manifest injustice.<sup>1</sup> In general, the defendant contended his confessions were false and inconsistent with the known facts of the case and that his confessions were motivated by his mental illness. In general, the prosecutor

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<sup>1</sup> Crim. R. 32.1.

contended that Mr. Tinney's confession on March 31, 1992 was consistent with the known facts of the murder and that the subsequent statements were taken by police officers in order to sabotage the prosecutor's successful conviction of Mr. Tinney in a case the police could not solve.

## **FINDINGS OF FACT**

### **Factual Background**

On August 11, 1988, thirty-three year old Ted White was clubbed in the head and face in his place of business – the Akron Mattress and Waterbed Store located at 1425 Park Avenue West in Mansfield. He died of his injuries three days later without ever being able to say what happened. The crime took place between 12:45 and 1:55 p.m. No witnesses to the attack or the perpetrator's flight were ever found. There was no fingerprint or DNA evidence to assist in identifying the perpetrator.

The person police suspected of the murder was Matt Mason. More than three years later, a prosecutor's investigator was told that Glenn Tinney might know something about Mr. Mason's involvement in the White homicide. The investigator, Joe Masi, went to Lebanon Correctional Institution on March 31, 1992 to question Mr. Tinney. Mr. Tinney told Mr. Masi that he and Mason together had killed White. Two days later, Mr. Tinney told Mr. Masi that he did the crime alone. He agreed to plead guilty to the crime if some money held by the police was returned to him and he was permitted to drink coffee and smoke cigarettes when brought back to Richland County.

On May 6, 1992, he pled guilty to the White murder and was sentenced to 15 years to life in prison. On July 22, 1992, defendant's attorney Randall Fry filed a motion to withdraw Mr. Tinney's guilty plea and have competency and sanity evaluations done for Mr. Tinney. On September 14, 1994, the court overruled that motion.

On August 16, 2004, defendant filed a pro se motion to withdraw his guilty plea. On February 22, 2005 the court overruled that motion. Mr. Tinney timely appealed that decision, but his appeal was dismissed for want of prosecution on March 23, 2005 in appellate case number 05-CA-18.

On October 29, 2009, the present petition for post-conviction relief and renewed motion to withdraw Mr. Tinney's guilty plea was filed by attorneys involved in the Ohio Innocence Project.

The prosecutor contends, based primarily on defendant's confessions, that Mr. Tinney went to Ted White's waterbed store on August 11, 1989 to either rob or take revenge on Mr. White, that Mr. Tinney alone or with the help of Matt Mason struck Mr. White repeatedly in the head and face with a pipe wrench and that he then stole money, drugs and jewelry from Mr. White and fled. If the prosecutor's contentions are correct, the only eyewitness to the murder of Ted White are Glenn Tinney and perhaps Matt Mason. Matt Mason is serving prison time for another murder and is not talking about this case.

The defendant's attorneys contend that the only evidence of defendant's guilt is his own confessions and that those confessions are not consistent with the known facts of the case or with each other. The defendant's attorneys also contend that these confessions are the type of self destructive behavior motivated by Mr. Tinney's mental illness.

Between March 31 and June 24, 1992, Glenn Tinney made five statements confessing his guilt: (1) On March 31, 1992 when Joe Masi came to Lebanon Correctional Institution to question Mr. Tinney, (2) On April 1, 1992 when Mr. Tinney confessed to his unit manager, Julie Albright, at the prison, (3) on April 2, 1992 when Mr. Masi and assistant prosecutor David Masaros returned to the prison to interview Mr. Tinney. After Mr. Tinney pled guilty to murder on May 6, 1992, he gave additional interviews about his guilt, (4) on June 17, 1992 to Mansfield News Journal reporter Debra Baker at Lebanon Correctional Institution and (5) on June 24, 1992 to Captain Arcudi and Mr. Masi at the same prison. Because unit manager Julie Albright could not be found by either side, the confession to her was not authenticated or admitted into evidence at the oral hearings.

#### **Other Evidence of Defendant's Guilt**

The prosecutor contends that there is other evidence pointing to defendant's guilt. That evidence includes testimony that Mr. Tinney was an

acquaintance of Matt Mason and associated with him in criminal activities.

It is clear from the testimonial evidence that Mason and defendant knew each other, were frequently together and may have discussed each other's exploits. Tim Crawford, who was in 1988 a neighbor of defendant, said for the first time at the 2012 hearing that, back in August, 1988, defendant told him that he and Matt Mason were going to steal money from a waterbed store that night and asked him to go along. Mr. Crawford saw Mr. Tinney later in a local Kroger's grocery store and Mr. Tinney said Matt Mason told him that Mason went to the waterbed store, snuck up behind the proprietor and hit him over the head with the butt of a gun.

Judy Payton was a next door neighbor of Matt and Nancy Mason in August, 1988. She frequently saw defendant and Danny Miller at the Masons' house drinking and getting high. Defendant was the one Mason sent to run his errands. About four days after the White murder, she heard defendant say to Mason as they loaded Mason's U-Haul truck, "You know you did that shit."

Fred Kyles lived in Mansfield during the decade of the 1980s. He regularly bought marijuana from Mason, who worked for Aquarius Waterbeds and sold drugs. He said at the hearing on November 7, 2012 that he remembered Matt Mason and the defendant came to his house during the noon hour to sell him marijuana on a day near the date Ted White was murdered. He said he recalled Mr. Mason saying he was late because Park Avenue was blocked off because a man at the waterbed store got his head bashed in with a pipe. The defendant stood by, looking scared. Mr. Kyle's testimony was not convincing.

Mr. Kyles was interviewed more than five years ago by Detective Bosko of the Mansfield Police Department. Mr. Kyles told Mr. Bosko that Joe Griffith was with him when Mason came that day, that there was a skinny man that he didn't know who came with Mason and that he didn't remember whether the skinny man was with Mason the day he talked about the assault on the waterbed store owner. Mr. Kyles first identified defendant as the skinny man 24 years after the murder when the prosecutor showed him a picture of Mr. Tinney the night before

Mr. Kyles testified on November 7, 2012.

While the testimony of Tim Crawford and Judy Payton show that Mason and defendant were friends who talked about their exploits and that defendant thought Mason was involved in the assault on a waterbed store owner, they do not provide independent confirmation of defendant's participation.

### **Police Motive to Spoil the Conviction**

Prosecutor Mayer contends that the muddled confessions in this case and the belief of several police officers (including John Arcudi, John Wendling and Eric Bosko) that the wrong man is convicted of the White murder are products of police animosity toward him. He says they set out to prove Mr. Tinney did not do the murder. He argues that when he was elected in 1988, he campaigned on solving stale murder cases and that most police officers backed his opponent, the incumbent prosecutor. Mr. Mayer contended police also resented the Greenleigh report issued in August 1989. The Greeleigh investigation was requested, however, by the Mayor of Mansfield and exonerated the police from involvement in unsolved homicides. Mr. Mayer also remembered representing, as a private attorney, an inmate who, in 1981, claimed he was beaten by Officer Arcudi and other officers. That claim was settled without admission of fault. Mr. Mayer also remembered that he made officer Bosko and another officer testify before a grand jury when they shot a man who attacked them with a knife. That grand jury refused to indict the officers.

The court concludes, however, that the evidence at hearing did not show that police bias distorted their investigations. Captain Arcudi was asked by the police chief in 1992 after consulting with prosecutor Mayer to work with the prosecutor in attempting to further investigate Mr. Mason's involvement in the White homicide after defendant's conviction. His investigation had to start with the only alleged eyewitnesses to Mason's crime – the defendant. None of the three other confessions were taken by the police. The first two (3-31-92 and 4-2-92) were taken by the prosecutor's employees. The third was taken by a Mansfield News Journal reporter. Captain Arcudi's investigation was extensive and professional. He interviewed a large number of witnesses including the

attending neurosurgeon. Detective Bosko's investigation, a decade later, which led to his contact with the Innocence Project, was similarly professional. These officers sincerely believe from their investigations that defendant did not do this murder and are not taking that position out of animosity.

### **Defendant's Mental Condition**

Both defendant's expert psychologist Scott Bresler, Ph.D. and the state's expert psychologist James Karpawich, Ph.D. testified about the defendant's mental condition at the time of his change of plea in 1992 and at present.

The defendant's prison mental health records show Mr. Tinney has been taking psychiatric medications since 1984. Over time, he began taking medications which are not benign, including antipsychotics and antidepressants. With continued use, these medications commonly cause changes in brain chemistry and create mental illness. Many of the psychiatric medications Mr. Tinney was taking are not pleasant to take and are not sought by fakers.

Mr. Tinney had some history of cheeking his medications and not taking them as prescribed. The defendant's prison blood level tests in the month leading up to this confession shows he had not taken his medications as prescribed. A blood test on 3-16-92 before his initial confession on 3-31-92 showed the drugs below therapeutic levels.

Prison medical records show many inconsistent and false statements from the defendant about his family and criminal histories. For example he claimed grief over the death of a spouse and son he never had, and confessed to killing several unidentified people in Columbiana County between 1976 and 1980. He was diagnosed by prison mental health professionals as paranoid, schizophrenic, depressed, and antisocial. He was diagnosed as paranoid schizophrenic and prescribed antipsychotics and antidepressants on 7-25-91 – less than ten months before his 5-6-92 guilty plea.

The defendant did not testify at this hearing. He sat in apparent lethargy at counsel table throughout the proceedings, and rarely spoke even to his own counsel. He was interviewed by the psychologists who testified for the defendant and for the state.

The defendant's expert was Scott Bresler, Ph.D. Dr. Bresler stated that defendant told him during his evaluation that Mason told defendant that Mason had killed the victim. Dr. Bresler diagnoses the defendant with a major depressive disorder, severe with psychotic features (in partial remission) and personality disorder not otherwise specified with borderline and antisocial personality traits. He states, "Based on what we know about his diagnosis, it is certainly plausible that he might engage in impulsive masochistic acts such as falsely confessing to a crime while experiencing symptoms of an actively decompensated depressed (and possibly psychotic) state."

The state's expert, Dr. Karpawich, could not express an opinion whether or not Mr. Tinney was mentally ill when he confessed. Dr. Karpawich believes that the appropriate diagnosis for Mr. Tinney is borderline personality disorder. A person with that mental illness engages in self-defeating behavior. Dr. Karpawich conceded that confessing to a crime one didn't commit is an example of such behavior.

Mr. Tinney's focus at the time of his confession was on immediate gratification, like recovering a few hundred dollars and a radio from police and being permitted to smoke cigarettes and drink coffee at the jail if he came to Richland County to confess. Mr. Masi says in his 3-31-92 interview notes "Mr. Tinney replied that if we wanted to pin the homicide on him we could, he didn't care one way or the other."

The court concludes that Mr. Tinney's uncontrolled mental illness was a significant causative factor in his decisions to make his various confessions in 1992.

### **Mr. Tinney's Confessions**

Given that there is no independent evidence of Mr. Tinney's guilt, and given Mr. Tinney's inadequately controlled mental illness at the time of his confessions and plea, confidence in the validity and justice of his conviction for murder must depend on his confessions. Are they consistent with the facts which are known about Ted White's murder? Are they consistent with each other? The answer to both questions is that they are not.

The State contends that it is improper for the court to compare the defendant's confessions to each other for their consistency.<sup>2</sup> The State contends that so long as one confession matches the facts of the crime, others which do not match do not matter because criminals lie. The state contends it is the 3-31-92 confession which is consistent with the victim's murder and supports his conviction.

The defendant's 3-31-92 confession was not recorded. In Mr. Masi's two typed pages of notes about the interview, Mr. Masi records that the defendant began by getting information from Mr. Masi about the crime:

Mr. Tinney requested to know what I had heard and from what sources. At this point I decided to disclose some of the pertinent information that I had received to Mr. Tinney including the arrest and conviction of Matt Mason for the Gursha Johnson homicide.

...

He then asked, "Did you ever find the murder weapon?" I replied, "I don't believe they did." Tinney grinned. He then asked if the coroner or the police ever had an idea what kind of weapon was used. I told Tinney that I did not have access to that information at this time.

The information Mr. Tinney provided about the crime on 3-31-92 is contained in just four paragraphs on page 2 of Mr. Masi's notes. As the prosecutor admits at page 31 of his closing argument, Tinney reported to others back in 1988 that Mason told him "Mason had snuck up behind Ted White inside his waterbed store, knocked him in the head, took his money and ran out of the store." The 3-31-92 statement does not provide many details beyond what Tinney had already learned from Mason. A comparison of the first two columns (known facts vs. 3-31-92 confession) of the following table shows the lack of correspondence. If, as defendant contends in other statements, the murder weapon was a ten pound pipe wrench, it's difficult to see how he could have put such a murder weapon and a 9 mm handgun down the front of his pants and still walk.

The known facts and Mr. Tinney's confessions are summarized in the following table:

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<sup>2</sup> State's written closing argument at 92.



# Confessions

SUBJECT	KNOWN FACTS	3-31-92	4-2-92	6-17-92	6-24-92
Time of murder?	Between 12:45-1:55 pm on 8-11-88	Not discussed	Early in a.m.	Early in a.m.; could not remember date because "stoned"	Not discussed
Location in store?	Blood on a waterbed and floor at back of right aisle in showroom. Victim found in office restroom.	Akron Waterbed Store	In the showroom- did not know where in store it occurred; said "it's vague"	Store	Store – perhaps toward the front
How Defendant knew victim?	No other evidence that defendant and victim ever met. Defendant was on parole at the time and never told his parole officer about any job with victim. Neither victim's wife, who was the store's bookkeeper, nor store employee Ronnie Thompson ever saw or heard of defendant before.	Worked for victim	Worked for victim as a drug runner and on waterbeds.	Met victim at Rumors Bar and had a homosexual relationship with him. Knew him intimately and claimed they were lovers. Worked for him running drugs for about 6 mos. earning \$1,500 to \$3,000 every two weeks. Defendant did not know other workers because he worked non-store hours	Defendant did not know other workers because he worked non-store hours

## Confessions

SUBJECT	KNOWN FACTS	3-31-92	4-2-92	6-17-92	6-24-92
Motive?	Unknown	Knew drugs were coming in and wanted to "rob and torture" victim for firing him. Did not plan to kill victim.	I felt he had to die when he fired me. "My master Satan told me to kill him." Victim called defendant a "patsy" and "pawn." Planned to kill victim and take his money. He did the crime by himself because he wanted revenge.	Angry because called a "patsy" and a "pawn." Defendant told victim he was not going to run drugs any more. Defendant hit victim. Next day they got high together. Defendant threatened the victim if he got violated by his parole officer for losing his job, he'd "bash his brains in with a pipe wrench." Got high before he did it. Had no intention to torture when he went to store. Went there to kill him. Angry because he saw Victim at a gay bar (Rumors) with a "boy."	He intended on "taking him out." Robbery. Defendant expressed fear of Mason.
Events leading up to killing	The victim was taken to work by an employee in the employee's pick-up truck. The employee remained with him in the store until 12:45 p.m. The store had no alarm system.	Defendant and Mason rode together to the store and parked a short distance away. Came from behind to hit victim. Defendant and Mason were using drugs and alcohol.	One week from firing to killing. Defendant drove his car to store; waited outside for victim to arrive. Used copied key to enter. Came up behind him in store. Defendant parked his car 1/2 block east of the store. Defendant stoned on alcohol and drugs.	One day from def's threat to quit (not Victim's threat to fire) until firing and three weeks until murder. Waited outside for victim. Victim pulled in and Defendant went in store. Snuck up from behind and hit him.	Defendant and Mason went together in Tinney's car. The store's alarm system was shut off. Defendant parked his car straddling the curb on Park Avenue West with flashers on.

## Confessions

SUBJECT	KNOWN FACTS	3-31-92	4-2-92	6-17-92	6-24-92
Weapon and attack	Victim was struck with a long, straight object with well defined edges, like a pipe or tire iron. Caused a depressed right frontal skull fracture, associated with parallel oblique lacerations of the frontal scalp. Broken hand bone suggests a fight. Victim's bent sunglasses suggesting struggle found under victim's desk. Victim survived two days before dying.	Tinney had the unidentified murder weapon and a 9 mm handgun tucked in the front part of his pants under his clothing. They approached victim from behind. Tinney handed Mason the murder weapon who struck victim in the head. Tinney rummaged the store.	Hit him with a "huge, heavy pipe-wrench" and "I tightened it down so it wouldn't move when I started to swing." Hit victim like "I was swinging a ball bat with all the force I had." Victim was dead when he left.	Defendant hit him in the back of the skull three times with a pipe-wrench; the third hit killed him. It was a 10 pound pipe wrench and "I swung it like you would swing a ball bat." Said, "The dude [Mason] was still there when I left." Denies that they rode together or went to store to torture him or that they planned to do so. Denies saying previously that he gave Mason his weapon. Defendant also had a gun with him.	Hit him 2 times and then Mason hit him with the pipe-wrench one time. He would not have carried out murder without Mason's encouragement. Said he stayed in store and Mason left.
Number and placement of blows	At least 5 blows to right side and front of head. 2 large gashes in face, broken jaw, missing teeth, both lips lacerated, numerous skull fractures especially around right eye socket. Three teeth and clumps of hair found at the scene.	Number and placement of blows not discussed.	3 blows to back of head; (no equivocation on number of hits)	3 blows to the back of the skull; (no equivocation on number of hits)	2 blows by Tinney/1 blow by Mason.

## Confessions

SUBJECT	KNOWN FACTS	3-31-92	4-2-92	6-17-92	6-24-92
<p>What items were stolen?</p>	<p>No clear evidence of robbery. Cash register still contained money and showed no evidence of tampering. Victim's wallet was empty but in his pocket. Victim had coins in his pocket. His two rings were found in the store. Victim never owned a money clip.</p>	<p>Mason gave him \$1,000 and drugs. Defendant says we split money after we left.</p>	<p>Stole briefcase, money, drugs in briefcase, and a 9mm weapon. Said he took jewelry in response to leading question but can't remember what. Took money from wallet and folded up bankroll of \$3,500 to \$4,000. Did not remember what he did with wallet.</p>	<p>Watch, rings, necklace, \$30,000 and a suit case with 3 kilos of cocaine, a small package of heroin and a lot of marijuana and pills. Split money before we left. Bought a motorcycle with the money.</p>	<p>They split the money. \$30,000 bankroll and wallet; Mason may have taken wallet; bought a 73 Sportster (bike?); Mason left store first.</p>
<p>What defendant did afterward and with his weapons/clothes</p>	<p>Unknown. Defendant visited his wife in a Mansfield mental hospital the evening of the murder (Aug. 11) and again on Aug. 13, 17 &amp; 18, 1988.</p>	<p>Discarded weapon on 3<sup>rd</sup> St. property in Mansfield.</p>	<p>Drove his car back to his apartment, had blood on his hands and pants, changed clothes. Put clothes in garbage bag. Within a half hour or 45 min. drove to his hometown of Lisbon, Ohio where he threw the pipe wrench in Beaver Creek Falls and burned his clothes at the slate piles of an old clay mine outside town. Briefcase put in dumpster.</p>	<p>Went back to apartment, showered, changed clothes, left town and threw pipe-wrench in Beaver Creek at an unspecified location. Sold his gun and victim's gun in Akron.</p>	<p>Went to apartment, showered, changed clothes, and went to Lisbon, Ohio; put jeans, jean jacket, and short sleeve shirt in trunk of car; sold 9 mm gun to pawn shop in Akron. Pipe-wrench was thrown away at an unspecified location; burned clothes on slate pile.</p>

## Confessions

SUBJECT	KNOWN FACTS	3-31-92	4-2-92	6-17-92	6-24-92
Defendant able to identify victim?		Not discussed.	Not sure what victim was wearing because so long ago.	Said there was "money in the suit" but can't remember what victim was wearing because he was stoned. When he was asked to ID the victim from photos he did "not want to talk about that." He said he knew the people in the photos. News reporter told him the photo was of her family in New York, not of victim. He still insisted he recognized one person but wouldn't say which one.	In a response to a leading question as to whether victim was wearing a suit, Defendant said he thought he was, but he was not sure. When he was shown photos he refused to look at them and said you are asking for help from the wrong person. Did not want Mason to get away with murder.

The time of the murder on 8-11-88 was early afternoon. Defendant consistently said he did it early in the morning at the time the store opened. The murder happened at the rear of the store at the end of the right aisle as shown by the decedent's blood, teeth and hair found at that location. A blood trail went from there to the bathroom where the victim was found. Defendant could never say where the assault was made in the store.

There is no independent evidence that defendant knew the victim or had any motive to kill him. Neither the victim's wife/bookkeeper nor his employee Ronnie Thompson had ever seen or heard of defendant before. Defendant offered conflicting motives for the crime – that he worked for the victim in the store or in selling drugs outside the store and was insulted and called a "pawn" and a "patsy," that he was fired and feared his parole would be revoked, that he wanted to rob the victim of money or drugs or that the victim was his homosexual lover who left him for a "new boy."

Most importantly, the defendant's description of the weapon and attack do not match the known facts. Defendant consistently says he, or he and Mason, struck three blows to the back of the victim's head. After the defendant learned from Mr. Masi that police did not know what the murder weapon was, he said he hit the victim in the head with a ten pound pipe wrench swung as hard as he could "like a baseball bat." Such a blow, according to Dr. Timperman (the victim's treating neurosurgeon) would have crushed the victim's skull. There was no such injury. In fact, the victim was hit five or more times in the front and side of his head with a straight object like a pipe or tire iron, which caused parallel lacerations. The victim suffered a frontal skull fracture, a broken jaw, missing teeth, right eye socket fracture and facial lacerations.

Defendant says he, or he and Mason, stole \$1,000 or \$3,500 to \$4,000 or \$30,000 from the victim, depending which confession is reviewed. He says he also stole drugs – up to three kilos of cocaine, heroin, marijuana and pills. And he says he stole the victim's jewelry, gold money clip and a handgun. There was, in fact, no clear evidence of a robbery. The victim's wallet, though empty, was in place in his pocket. No money was taken from the store cash register and

there was no evidence of prying or tampering with the register. All the jewelry the victim's wife knew he had was still present after the crime. There was no other evidence that the victim had drugs in the store, other than small amounts of marijuana. The victim's widow says the victim never had a money clip and that none of his guns were missing.

There was evidence that the victim had withdrawn \$600 from the bank that morning. But there was also evidence of salesmen visiting the victim during the day and there is no evidence how much money was still in the cash register.

Finally, the defendant on two occasions was unable or unwilling to identify the victim from photographs presented to him.

The comparison of Glenn Tinney's confessions demonstrates they are not consistent with the known facts about the killing of Ted White or with each other. Mr. Tinney confessed to killing a man he could not identify, for conflicting motives which don't match the facts, at the wrong time of day, with a weapon that does not match the victim's injuries, by striking him in the wrong part of his head, and stealing items the victim either still possessed after the attack or probably never possessed.

### **CONCLUSIONS OF LAW**

Crim. R. 32.1 governs the withdrawal of guilt pleas and provides:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

A manifest injustice is a fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process.<sup>3</sup>

In considering such a motion, a trial court must assure that a defendant receives a "full and fair consideration" of the plea withdrawal request.<sup>4</sup> In making this determination, the Court should consider a number of factors, including: "(1)

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<sup>3</sup> *State v. Martin* (5<sup>th</sup> District) 2012-Ohio-4394, ¶11.

<sup>4</sup> *State v. Aleshire* (5<sup>th</sup> District) 2010 Ohio-2566, at ¶ 71.

whether the motion was made within a reasonable time; (2) whether the motion set out specific reasons for the withdrawal; (3) whether the accused understood the nature of the charges and the possible penalties; and (4) whether the accused was perhaps not guilty or had a complete defense to the charges.”<sup>5</sup>

The State contends that a more comprehensive list of factors a court of appeal uses in ruling on plea withdrawals is that provided by *State v. Fish*:<sup>6</sup> 1) whether the State will be prejudiced by withdrawal; 2) the representation afforded to the defendant by counsel; 3) the extent of the Ohio R. Crim. P. 11 plea hearing; 4) the extent of the hearing on the motion to withdraw; 5) whether the trial court gave full and fair consideration to the motion; 6) whether the timing of the motion was unreasonable; 7) the reasons for the motion; 8) whether the defendant understood the nature of the charges and potential sentences; and 9) whether the accused was perhaps not guilty or had a complete defense to the charge.

This court has previously ruled<sup>7</sup> that the defendant had adequate legal representation at his plea from an attorney who subsequently attempted to have a court-ordered mental exam. There was no apparent defect in the Crim. R. 11 plea hearing. The defendant was an institutionalized criminal, and it was difficult to detect overt mental illness during his plea discussions and hearing.

With the extensive hearing of the evidence and arguments which is taking place now, the parties have had a full and fair consideration of the motion to withdraw his plea.

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<sup>5</sup> *Id.*

<sup>6</sup> (1<sup>st</sup> Dist. 1995), 104 Ohio App. 3d 236, 239.

<sup>7</sup> March 25, 2011 decision at 14.



The court has also previously ruled that the timing of the motion was not unreasonable. Mr. Tinney has never been out of prison since his first confession and has not himself been able to assemble the evidence now used to support his motion. Neither did he, until he got the assistance of the Innocence Project, have any advocate outside the prison to obtain the evidence which has now been marshaled. Mr. Tinney's continuing mental illness limited his ability to assist in preparation of his motions. The court accordingly finds the delay not unreasonable.

Mr. Tinney's mental illnesses documented by prison medical records and attested to by the psychologists seriously interfered with his understanding of the charges and consequences of his confession and suggest other motives for his plea.

The remaining factors are the defendant's contention that he was not guilty of this murder balanced against the prejudice to the state in having to retry the defendant on the murder charge 24 years after the fact. The State contends that the police department's lead investigator, the coroner and other witnesses have died since the crime. That loss of evidence will jeopardize any effort they would make to try him now.

But the state never tried to prosecute the defendant on any of the fresh evidence in the four years after the crime. None of that evidence pointed to the defendant. He could not have been convicted but for the confession he made four years after the fact as they sought other information from him. In addition, the defendant has been in prison more than twenty years since receiving a 15 year to life sentence in May, 1992. If the State is correct about Mr. Tinney's guilt,

he has not escaped punishment.

On the other hand, while it is not possible to determine whether Mr. Tinney is innocent, his confessions do not provide any serious support for his conviction for murder, suggest that he is not guilty, and make it manifestly unjust to deny the withdrawal of his guilty plea. The correction of manifest injustice consequently justifies allowing Mr. Tinney to withdraw his guilty plea.

**JUDGMENT ENTRY**

It is therefore ordered and adjudged:

1. The defendant's October 29, 2009 motion to withdraw his guilty plea is granted. The court is not ruling that the defendant is actually innocent but only that vacation of his guilty plea is necessary to correct manifest injustice.

2. The prosecutor shall advise the court and counsel within 14 days after the date of this entry whether he intends to try Mr. Tinney, and if so, what bond he contends is appropriate. Otherwise the defendant shall be released from custody unless he is still serving sentences for other crimes.

3. The Clerk shall serve copies of this decision on James Mayer, Jr. and Donald Caster telling them the date it was entered on the court's journal.

  
JUDGE JAMES DEWEESE

SERVED BY Deputy Clerk: \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_