

APPENDIX B
The Supreme Court of Ohio

FILED
NOV 12 2019

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

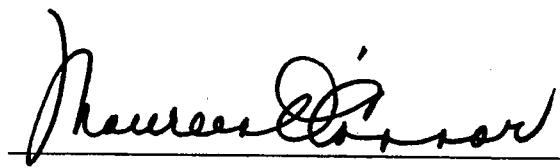
Rashan J. Hunt

Case No. 2019-1263

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Cuyahoga County Court of Appeals; No. 107125)



Maureen O'Connor
Chief Justice

APPENDIX C

SEP 30 2019

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107125

v. :

RASHAN J. HUNT, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED

RELEASED AND JOURNALIZED: September 30, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-618512-A
Application for Reopening
Motion No. 530394

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellant.*

Rashan J. Hunt, *pro se.*

ANITA LASTER MAYS, J.:

{¶ 1} Applicant, Rashan J. Hunt, seeks to reopen his appeal, *State v. Hunt*, 8th Dist. Cuyahoga No. 107125, 2019-Ohio-1643, claiming that appellate counsel

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was ineffective for failing to argue that a portion of Hunt's plea was invalid and that he was improperly sentenced for allied offenses. The application is denied.

I. Factual and Procedural Background

{¶ 2} Hunt was charged with various crimes as a result of an incident that occurred after he killed a person who Hunt alleged was attempting to rob him. Hunt eventually pleaded guilty to various offenses, including voluntary manslaughter, tampering with evidence, and gross abuse of a corpse. A repeat violent offender ("RVO") specification was attached to the voluntary manslaughter charge. Hunt received an aggregate 23-year prison sentence.

{¶ 3} He appealed, raising three assignment of error. He claimed that his sentences were contrary to law, the record did not support consecutive sentences, and he received ineffective assistance of counsel. *Hunt* at ¶ 7. This court, on May 2, 2019, overruled these assignments of error and affirmed his convictions and sentence. *Id.* at ¶ 55.

{¶ 4} On July 19, 2019, Hunt filed a timely application for reopening. The state timely filed a brief in opposition. In his application, Hunt sets forth two proposed assignments of error:

I. The trial court breached Hunt's plea agreement by sentencing him for a repeat violent offender specification (RVO) to which he did not plead guilty.

II. Hunt's constitutional protection against Double Jeopardy was violated when the trial court failed to merge Count 3 tampering with evidence and Count 4 gross abuse of a corpse as allied offenses of similar import.

II. Law and Analysis

A. Ineffective Assistance of Appellate Counsel Standard

{¶ 5} App.R. 26(B) provides a limited means to reopen a direct criminal appeal based on a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1). App.R. 26(B)(5) states that “[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.”

{¶ 6} To prevail, Hunt must set forth a “colorable claim” of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Sanders*, 75 Ohio St.3d 607, 665 N.E.2d 199 (1996). Under *Strickland*, Hunt must demonstrate: (1) Counsel was deficient in failing to raise the issues Hunt now presents; and (2) Hunt had a reasonable probability of success if the issue had been presented on appeal. *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

B. Repeat Violent Offender Specification

{¶ 7} Hunt’s first proposed assignment of error takes issue with the RVO specification in his case. Hunt initially couches his argument as a breach of the plea agreement by the trial court when the court sentenced Hunt for the RVO specification. However, the specification was a part of the plea agreement, so there can be no breach. He goes on to assert that he never pleaded guilty to the specification, and therefore, he could not be sentenced to an enhanced prison term as a result of the specification.

{¶ 8} Hunt did not raise this issue before the trial court, therefore he has forfeited all but plain error. “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). “A forfeited error is not reversible error unless it affected the outcome of the proceedings and reversal is necessary to correct a manifest miscarriage of justice.” *State v. Thomas*, 2018-Ohio-1081, 109 N.E.3d 616, ¶ 50 (8th Dist.).

{¶ 9} Generally, a separate charge, plea, and conviction for a specification that enhances a sentence is required. *State v. Moore*, 8th Dist. Cuyahoga No. 101658, 2015-Ohio-1026, ¶ 10, citing *State v. Davis*, 8th Dist. Cuyahoga No. 76085, 2000 Ohio App. LEXIS 4044 (Sept. 7, 2000). However, this issue is usually raised in the context of whether a plea was entered knowingly, intelligently, and voluntarily, which is subject to review for substantial compliance. *Id. See also State v. Cammon*, 8th Dist. Cuyahoga No. 105124, 2017-Ohio-5587. “[S]ubstantial compliance occurs if it appears from the record, despite the trial court’s error, that the defendant understood the effect of his plea and the waiver of his rights.” *State v. Hair*, 8th Dist. Cuyahoga No. 107964, 2019-Ohio-3572, ¶ 9, citing *State v. Tutt*, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 15 (8th Dist.). That is, whether Hunt subjectively understood that his plea to voluntary manslaughter included the RVO specification.

{¶ 10} During the plea colloquy, Hunt had questions about the RVO specification. The trial court explained the implication of the specification, its applicability to Hunt, and the fact that the plea agreement with the state required Hunt to plead guilty to voluntary manslaughter with the RVO specification. The

state placed the plea agreement on the record, which included the RVO specification, and the trial court's explanation of the consequences of the plea and the maximum penalties also explained the RVO specification. At one point, Hunt refused to plead guilty when the RVO specification was part of the plea deal.

{¶ 11} After the initial explanation of the terms of the plea agreement, the following colloquy took place.

THE COURT: Without getting into client confidences, is it your belief that Mr. Hunt is concerned about the application of an RVO specification in this case?

[DEFENSE COUNSEL]: He is concerned about an application, yes, Your Honor.

THE COURT: On that basis I think it's worthy of some discussion in Court today, Mr. Hunt, so that we can have an understanding of that. Mr. McNair, can you give me a little history with regard to the reasons why you believe this RVO specification was placed in the indictment as it applies to Mr. Hunt.

* * *

[THE PROSECUTOR]: Yes, Your Honor. In this instance, because this is the first time that Mr. Hunt has been charged with an RVO specification, it is on there as an option for the Court to exercise sentencing in discretion and impose some or all of that time, but it is not mandatory. So, for example, if this were his third time being charged with an RVO specification, then in that circumstance it would be mandatory that he be maxed out both on the base offense and on the RVO, but because this is only his first time being charged with an RVO specification, it is not mandatory that the Court impose any of that RVO time.

* * *

THE COURT: Now, Mr. Hunt, did you understand what I said? So let's assume that you plead guilty or you go to trial, either before me as the judge without a jury, or all the jury is in, all the evidence is presented, and they come back with a guilty verdict. Then we'll get some papers

together about your background and history. We'll get all that information. We'll hold a sentencing hearing, usually 30 days later, and I listen to all of the information about sentencing both from your side and the prosecutor's side, and then it's time for me to decide.

As it stands now, with your situation presently in this indictment, if I were to impose the maximum amount, eleven years, and only if I apply or decided that eleven years was appropriate, at that time I can then decide to consider the RVO statute, the repeat violent offender. It's not mandatory that I impose it, but if I choose to impose it, I can do so by adding an additional time period up to ten years. So the eleven years can be twenty-one, it can be twelve, it can be thirteen. It can be all the way up to twenty-one.

If I decide to impose a sentence less than eleven but within the range of three to eleven, let's just pick eight as a number, then I cannot apply the RVO statute. So I have to get to eleven first. That's the first decision.

Second is do I apply the RVO or not. If the answer is yes because of the circumstances of this situation, then how many additional years will it be in addition to eleven? Will it be one or all the way up to ten, which would be twenty-one.

Now, that's different for others who have repeat violent offender specifications on other cases or other indictments before them, and if you were coming before me with three RVO specifications in prior cases, then we're talking about a different situation.

Does that help you?

THE DEFENDANT: Yes, sir.

(Tr. 17-20.) After this discussion, Hunt indicated he did not wish to plead guilty.

{¶ 12} Proceedings reconvened several days later, and Hunt again said he did not wish to plead guilty to the RVO specification. The following discussion was had:

THE DEFENDANT: My understanding of the * * * [plea] today, Mr. Michael Jackson, sir, was that I was * * * [pleading] to the felony one.

THE COURT: Only the felony one?

[DEFENSE COUNSEL]: Yes, sir. And the three to 11 voluntary manslaughter, your Honor.

THE COURT: Where are we on the notice of prior conviction and repeat violent offender spec? Is that part of the plea?

[THE PROSECUTOR]: Those are still on there, your Honor. Yes.

* * *

THE DEFENDANT: I'm not copping to an RVO. I was not aware of that. Your Honor, I'm not willing to cop to a repeat violent offender, your Honor. I'm not willing to do that.

(Tr. 28.)

{¶ 13} After a lengthy discussion, Hunt changed his mind and agreed to accept the plea agreement as set forth on the record by the state. (Tr. 35-36.)

{¶ 14} The trial court then engaged Hunt in a thorough plea colloquy and explained,

Count 1 is the one we've begun discussing, voluntary manslaughter, a felony in the third degree with two furthermores as discussed, a notice of prior conviction and a repeat violent offender specification.

A felony in the first degree, as I mentioned, under these circumstances means three to 11 years in prison, and each year thereafter until 11. And under this situation it's mandatory. And as I've described, if I order the maximum 11 years, then I have to decide and I have the option to impose on the repeat violent offender specification an additional time period of one year and any year thereafter until ten, so one, two, three, up to ten.

And as I mentioned, all of that will be decided at sentencing based upon the evidence and information provided.

* * *

So, Mr. Hunt, how do you plead to Count 1, voluntary manslaughter, a felony in the first degree?

THE DEFENDANT: I plead no contest. No contest.
(Tr. 40-41, 44.)

{¶ 15} The state and the trial court then explained that the plea agreement required Hunt to plead guilty. After further discussion, Hunt agreed to plead guilty and the court accepted the plea.

THE COURT: So in light of all of that you're changing your initial view of no contest to Count 1 to pleading guilty to voluntary manslaughter, a felony in the first degree. Is that correct?

THE DEFENDANT: Yes.

(Tr. 46-47.)

{¶ 16} In *Moore*, this court analyzed a similar situation regarding firearm specifications and found substantial compliance:

[T]he transcript of Moore's plea hearing in this case demonstrates the trial court stated that Moore would be pleading guilty to "the underlying crime of attempted felonious assault" and, in addition, the "three-year firearm specification," which meant that Moore "must serve that time in prison" and "before any sentence on the amended Count 2." The court told Moore that, "after serving the 3 years, which must be done prior to and consecutive to the Felony 3," Moore would then be required to serve the sentence for attempted felonious assault. Under these circumstances, Moore cannot support a claim on this basis that his guilty pleas were not knowingly, voluntarily, and intelligently made.

Moore, 8th Dist. Cuyahoga No. 101658, 2015-Ohio-1026, at ¶ 11.

{¶ 17} In *Hair*, this court found that a defendant did not knowingly, intelligently, and voluntarily enter a guilty plea to an RVO specification and underlying offense. *Hair*, 8th Dist. Cuyahoga No. 107964, 2019-Ohio-3572. There, during the plea colloquy, the trial judge relayed incorrect information to the

defendant regarding the RVO specification. The judge, when explaining the charges, indicated that a count of the indictment did not include an RVO specification. *Id.* at ¶ 13. When accepting the defendant's guilty plea to this court, the court also indicated that the count did not include any specifications, and the defendant pled guilty to the count as indicated by the trial court. *Id.* at ¶ 14. However, when the court imposed sentence, it sentenced the defendant to an additional period of incarceration for an RVO specification attached to this count. *Id.* at ¶ 15. This court reversed, finding that the trial court did not substantially comply with Crim.R. 11(C)(2)(a) because the information relayed by the trial court during the plea colloquy was incorrect. *Id.* at ¶ 19. The *Hair* court classified the trial court's level of compliance as partial, but found that the lack of accurate information conveyed by the trial court during the plea colloquy prejudiced the defendant. *Id.*

{¶ 18} The present case is distinguishable from *Hair* and is similar to *Moore*. Here, the trial court explained the application of the RVO specification to the underlying offense and at all times indicated that it was a required part of the plea agreement. No inaccurate information was relayed. Further, it is clear from the record that Hunt was aware of the RVO specification, its applicability to him, and the penalty that he faced by accepting the plea deal and pleading guilty.

{¶ 19} It was not plain error for the trial court to impose sentence on the RVO specification that Hunt understood was a part of his plea agreement and his guilty plea to voluntary manslaughter. This does not constitute a manifest injustice. Further, this does not set forth a colorable claim of ineffective assistance of appellate

counsel. Appellate counsel was not ineffective for failing to raise this issue in Hunt's direct appeal.

C. Allied Offenses

{¶ 20} In his second proposed assignment of error, Hunt alleges that appellate counsel was ineffective for not arguing that his convictions for tampering with evidence and gross abuse of a corpse were allied offenses that should have merged.

{¶ 21} Again, this alleged error was not raised before the trial court when it could have been timely considered. Therefore, Hunt has forfeited all but plain error regarding this issue. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3, 21 (a defendant who fails to raise an allied offense issue in the trial court forfeits all but plain error). When not raised below, "the burden is solely on that defendant, not on the state or the trial court, to 'demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus.'" *State v. Locke*, 8th Dist. Cuyahoga No. 102371, 2015-Ohio-3349, ¶ 20, quoting *Rogers* at ¶ 3.

{¶ 22} R.C. 2941.25, which codifies protections consistent with the Double Jeopardy provisions of the federal and state constitutions, provides,

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses

of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

The test set forth by this statutory provision asks, "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation?" *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶ 23} The offense of tampering with evidence provides "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any * * * thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." R.C. 2921.12(A)(1). The offense of gross abuse of a corpse provides "[n]o person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities." R.C. 2927.01(B).

{¶ 24} Hunt pleaded guilty to these offenses and failed to raise the issue of allied offenses below. There was a discussion of allied offenses in the transcript, but only with respect to Count 1, voluntary manslaughter, and Count 2, felonious assault. The state conceded that these counts would merge. Hunt did not assert that any other offenses were allied. Hunt failed to raise any issue with regard to the offenses of tampering with evidence and gross abuse of a corpse, and fails to point to anything in the record that would indicate that these offenses should have merged.

{¶ 25} Hunt's failure to apply any of the aspects of allied offense analysis to his case is fatal to his claim. Hunt does not address whether these crimes were committed with a separate animus, by separate acts, or dissimilar import. *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at paragraph one of the syllabus. His citations to *State v. Crisp*, 4th Dist. Scioto No. 10CA3404, 2012-Ohio-1730, and *State v. Shears*, 1st Dist. Hamilton No. C-120212, 2013-Ohio-1196, are unavailing.

{¶ 26} The *Crisp* and *Shears* courts relied on *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, for their allied offense analysis, but that case has been modified by *Ruff*. Further, Hunt ignores the differences in procedural posture between those cases and his own. Those other cases were not reviewed for plain error, and were decided before the *Rogers* court squarely placed the burden on defendants to demonstrate a reasonable probability that offenses are allied. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 3, 21.

{¶ 27} There are instances where these two offenses would not merge. For instance, the Tenth District has found that the offenses of tampering with evidence and gross abuse of a corpse were not allied when committed with separate conduct. *State v. Flood*, 10th Dist. Franklin Nos. 18AP-206 and 18AP-738, 2019-Ohio-2524. Hunt has not pointed to anything in the record that would demonstrate that these two offenses should merge beyond a mere recitation of the statutory elements of each. This is insufficient to carry his burden of showing that there is a reasonable probability that the offenses are allied offenses of similar import.

{¶ 28} Hunt has not shown that appellate counsel was ineffective in failing to assert either of the instant proposed assignments of error in his appeal. Accordingly, his application for reopening is denied.

{¶ 29} Application denied.



ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107125

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RASHAN J. HUNT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-618512-A

BEFORE: Laster Mays, J., Boyle, P.J., and Celebreeze, J.

RELEASED AND JOURNALIZED: May 2, 2019



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ANITA LASTER MAYS, J.:

{¶1} Appellant Rashan Hunt (“Hunt”) appeals his conviction and 23-year sentence for the homicide of 19-year-old Tierra Bryant (“Bryant”). After review of the record, we affirm.

{¶2} On March 30, 2015, Hunt and Bryant went to a hotel to engage in sexual activity. Bryant allegedly attempted to rob Hunt and sprayed him with mace. A struggle ensued that resulted in Bryant’s death. Hunt picked up his cousin, purchased a large tote bag at WalMart, transported the body to Elyria where, unable to burn the body, he buried it.

{¶3} The mother of Hunt’s children told the Federal Bureau of Investigation that Hunt returned to their home that night covered in mud and scratches. Hunt subsequently told police that he dropped Bryant off after they left the hotel.

{¶4} Though investigators were unable to locate the body, as the result of evidence acquired during the ongoing investigation, Hunt was arrested in California in June 2017. Hunt ultimately confessed, and Bryant’s body was recovered.

{¶5} On July 5, 2017, Hunt was indicted for the following counts:

Count 1: Voluntary manslaughter, a felony of the first degree, R.C. 2903.03(A), with a notice of prior conviction (“NPC”), R.C. 2929.13(F)(6), and a repeated violent offender (“RVO”) specification, R.C. 2941.149.

Count 2: Felonious assault, a felony of the second degree, R.C. 2903.11(A)(1), with an NPC and an RVO.

Count 3: Tampering with evidence, a felony of the third degree, R.C. 2921.12(A)(1).

Count 4: Gross abuse of a corpse, a felony of the fifth degree, R.C. 2927.01(B).

Count 5: Obstructing official business, a misdemeanor of the second degree, R.C. 2921.31(A).

Count 6: Obstructing official business, a misdemeanor of the second degree, R.C. 2921.31(A).

{¶6} At the March 12, 2018 pretrial, the state amended the indictment to nolle Count 2, and Hunt pleaded guilty to the remaining charges. On April 9, 2018, Hunt was sentenced to a total of 23 years. Hunt appeals.

I. Assignments of Error

{¶7} Hunt proffers three assigned errors:

- I. The trial court's sentence was contrary to law.
- II. The record does not support the findings that consecutive sentences were appropriate.
- III. The appellant received ineffective assistance of counsel.

II. Discussion

A. Sentencing

{¶8} We combine the first and second assigned errors for analysis. The trial court's findings are affirmed.

{¶9} R.C. 2953.08 sets forth the parameters of an appellate court's review of felony sentences. It includes categories of sentences that may be appealed such as consecutive sentences under R.C. 2953.08(C)(1) or a maximum sentence under R.C. 2953.08(A).

{¶10} The Ohio Supreme Court prescribed the current standard for appellate review of felony sentences:

Applying the plain language of R.C. 2953.08(G)(2), we hold that an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law. In other words, an appellate court need not apply the test set out by the plurality in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. If upon making a determination in defendant's favor, the appellate court "may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing."

State v. Pluhar, 8th Dist. Cuyahoga No. 102012, 2015-Ohio-3344, ¶ 13.

{¶11} For a sentence to be contrary to law, the sentence must fall "outside the statutory range" for the offense or the record must reflect a failure by the trial court to "consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12." *State v. Lee*, 8th Dist. Cuyahoga No. 104190, 2016-Ohio-8317, ¶ 9, citing *State v. Hinton*,

8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13.

{¶12} There is no mandatory duty for a trial court to explain its analysis of the statutory sentences pursuant to our holding in *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 27. A trial court is only required to indicate that the statutory factors have been considered. *Id.*, citing *State v. Wright*, 8th Dist. Cuyahoga No. 100283, 2014-Ohio-3321, ¶ 10.

{¶13} There is a presumption in Ohio “that prison sentences should be served concurrently unless the trial court makes the findings outlined in R.C. 2929.14(C)(4) to warrant consecutive service of the prison terms.” *State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 67 (8th Dist.), citing *State v. Primm*, 8th Dist. Cuyahoga No. 103548, 2016-Ohio-5237, ¶ 64, citing *State v. Cox*, 8th Dist. Cuyahoga No. 102629, 2016-Ohio-20, ¶ 3; R.C. 2929.41(A).

{¶14} After a presentencing investigation and psychiatric examination regarding disposition of the case, Hunt was sentenced as follows:

Count 1: 11 years plus 8 years as a repeat violent offender; total of 19 years;

Count 3: 36 months;

Count 4: 12 months.

Counts 1, 3, and 4 to run consecutive to each other.

Counts 5 and 6: 90 days in jail on each count, concurrent to each other and concurrent to Counts 1, 3, and 4.

Journal entry No. 103349364 (Apr. 12, 2018).

{¶15} Hunt contends that the trial court failed to address the felony sentencing factors in R.C. 2929.11 and the seriousness of crime and recidivism factors of R.C. 2929.12.

R.C. 2929.11(A), governing the purposes and principles of felony sentencing, provides that a sentence imposed for a felony shall be reasonably calculated to achieve two overriding purposes of felony sentencing: (1) to protect the public from future crime by the offender and others, and (2) to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. Furthermore, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B).

R.C. 2929.12 delineates the seriousness and recidivism factors for the sentencing court to consider in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. The statute provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

State v. Martin, 8th Dist. Cuyahoga No. 104354, 2017-Ohio-99, ¶ 9-10.

{¶16} Hunt also argues that proper consideration of the requisite factors should have resulted in a lesser sentence and challenges imposition of the maximum sentence for the voluntary manslaughter that allowed imposition of the RVO specification.

{¶17} The consecutive sentencing statute, R.C. 2929.14(C)(4), provides:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶18} At the sentencing hearing, the trial court heard statements by the parents and grandparents of Bryant. Mitigating factors proffered on Hunt's behalf included the ongoing relationship between Hunt and Bryant, the macing of Hunt by Bryant during an attempted robbery and that Hunt was choking Bryant and she fell and hit her head.

{¶19} Hunt apologized to the family and thanked the investigators that afforded him the "opportunity to come clean with them." (Tr. 78.) Hunt

admitted that he made a "terrible mistake" and took "full responsibility for not being able to return her home. And I just want to say I'm sorry." (Tr. 78.)

{¶20} Pertinent excerpts of the trial court's determination follow:

Voluntary manslaughter, I do think the appropriate sentence is 11 years in prison. And as I mentioned that is mandatory time.

Tampering with evidence is a felony of the 3rd degree and related to that is offenses against human corpse. These are separate offenses, and the minimum is nine months, the maximum is 36 months for tampering with evidence. And I'm going to impose the maximum of 36 months for tampering with evidence. That's Count 3. The offenses against the human corpse is a felony of the 5th degree, which is the least serious felony that we have and is somewhat surprising to me that it is a felony of the 5th degree but that is what the law states. And the minimum of that is six months in prison up to 12 months in prison and I'm going to impose the maximum of 12 months. I'm not going to consider the alternative of probation in either Count 3 or Count 4 given the circumstances.

Obstructing official business are minor misdemeanors, or misdemeanors of the 2nd degree I should say, and I'm going to impose the maximum of 90 days in each of those counts and run those concurrent to each other.

I do think the maximum amount is for the time periods I've mentioned for the counts I've mentioned are appropriate. I do think it's also appropriate in this situation to run these counts consecutive to each other, which means that he serves a sentence on one, he serves a sentence on the next, he serves the sentence on the next. And I think that's appropriate because of the circumstances involved in this case, and that's based on Mr. Hunt's criminal record, specifically the prior attempted murder and there is a statutory finding that I must make if I'm going to do consecutive sentences.

And I do think that consecutive sentences are necessary to protect the public from future harm or to punish the offender, Mr. Hunt, and that consecutive sentences are not disproportionate to the

seriousness of the offender's conduct and to the danger that he poses to the public, and if the Court also finds at least one of the following, and based on his criminal conduct it demonstrates that consecutive sentences are necessary to protect the public from future harm by the offender.

I think under these circumstances it is appropriate given the totality of what's occurred in this situation.

(Tr. 81-84.)

{¶21} The sentences are within the statutory range. “[A] maximum sentence is not contrary to law when it is within the statutory range and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors.” *State v. Martin*, 2d Dist. Clark No. 2014-CA-69, 2015-Ohio-697, ¶ 8, citing *State v. Walker*, 2d Dist. Montgomery No. 25741, 2014-Ohio-1287, ¶ 17-19; *State v. Hayes*, 2d Dist. Clark No. 2014-CA-27, 2014-Ohio-5362, ¶ 15.

{¶22} The trial court enumerated the requisite findings to impose consecutive sentences under R.C. 2929.14(C). It is “clear from the record that the trial court actually made the findings required by statute.” *State v. Marton*, 8th Dist. Cuyahoga No. 99253, 2013-Ohio-3430, ¶ 13, citing *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 14, 17 (8th Dist.). “[T]alismanic words” are not required. *Id.*

{¶23} The sentencing judgment entry also reflects that:

The court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11. *** The

court imposes prison terms consecutively finding that consecutive service is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

Journal entry No. 103349364 (Apr. 12, 2018).

{¶24} Hunt's RVO charge is pursuant to R.C. 2941.149(A). As required by the statute, the specification is included in the indictment.

"Repeat violent offender" means a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (CC)(1)(a) of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (CC)(1)(a) or (b) of this section.

R.C. 2929.01(CC).

{¶25} Hunt's 1999 convictions included attempted murder, felonious assault, and aggravated burglary. The trial court is the sole arbiter of whether an accused is a repeat violent offender. R.C. 2941.149(B).

{¶26} R.C. 2929.14(B)(2)(a) allows for imposition of the RVO specification where the longest prison term is imposed on the underlying conviction.

Pursuant to R.C. 2929.14(B)(2)(a), in addition to the longest prison term authorized for the offense, the sentencing court may impose an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years for the repeat violent offender specification, if all of the following criteria are met:

- “(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.
- “(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is * * * any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole.
- “(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.
- “(iv) The court finds that the prison terms imposed * * * are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.
- “(v) The court finds that the prison terms imposed * * * are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender’s conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender’s conduct is less serious than conduct normally constituting the offense.”

State v. Richmond, 8th Dist. Cuyahoga No. 101215, 2014-Ohio-4842, ¶ 14, quoting *State v. Richmond*, 8th Dist. Cuyahoga No. 98915, 2013-Ohio-2887, ¶ 20.

{¶27} R.C. 2929.14(B)(2)(e) dictates the trial court “shall state its findings explaining the imposed sentence” “[w]hen imposing a sentence pursuant to division (B)(2)(a) or (b) of this section.”

{¶28} Hunt pleaded guilty to the RVO specification meeting the element of R.C. 2929.14(B)(2)(a)(I).

[A]s part of the continuing course of conduct for voluntary manslaughter, I do think it's appropriate to impose a sentence involving the repeat violent offender.

(Tr. 86.)

{¶29} Hunt pleaded guilty to voluntary manslaughter, a first-degree felony that is an offense of violence and he was not sentenced to life without parole, supporting R.C. 2929.14(B)(2)(a)(ii). Voluntary manslaughter “is nonetheless the most serious felony that we have.” (Tr. 80.)

{¶30} Hunt received the maximum sentence that was not life without parole, meeting R.C. 2929.14(B)(2)(a)(iii).

And the [voluntary manslaughter] felony of the [first] degree is three years at a minimum and 11 years at a maximum. * * * Voluntary manslaughter, I do think the appropriate sentence is 11 years in prison.

(Tr. 81.)

{¶31} The trial court also considered recidivism pursuant to R.C. 2929.14(B)(2)(a)(iv) and seriousness of the offense under R.C. 2929.14(B)(2)(a)(v). First, when considering the imposition of consecutive sentences under R.C. 2929.12 factors, the court pointed out: (I) Hunt's prior attempted murder conviction; (ii) the necessity of protecting the public and punishing the offender; and (iii) that consecutive sentences were not disproportionate to the serious of the crime. (Tr. 83-84.)

{¶32} The trial court also noted:

And given Mr. Hunt's prior circumstances and prior serious felonies, and one not so long ago involving attempted murder, he finds himself before me, not only pleading guilty to that charge, but also with a specification called repeat violent offender and notice of prior conviction. * * *

The issue for me is what do I do with regard to the repeat violent offender. Here I think it is important to note what this stands for. The words tell you clearly what it means, but in this situation we're dealing with conduct of both parties and clearly the much more serious conduct in causing the death of Miss Bryant by Mr. Hunt. * * *

The nature of Mr. Hunt's conduct after the event leads me to believe that the repeat violent offender specification should be included as a continuing course of conduct regarding the voluntary manslaughter and which has caused, and I suspect will cause for a considerable period of time. * * *

[A]s part of the continuing course of conduct for voluntary manslaughter, I do think it's appropriate to impose a sentence involving the repeat violent offender. * * *

I think under these circumstances [the RVO] is appropriate given the totality of what's occurred in this situation.

(Tr. 80, 85-87.)

{¶33} We find that the trial court complied with the statute.

There are no magic words the trial court is required to recite when making RVO findings under R.C. 2929.14(B)(2)(a). *State v. Watts*, 8th Dist. Cuyahoga No. 104269, 2017-Ohio-532, ¶ 11. As long as the reviewing court can discern from the record that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, the sentence on the RVO specification should be upheld. *Id.* at ¶ 12.

State v. Buchanan, 8th Dist. Cuyahoga No. 105706, 2018-Ohio-1086, ¶ 72.

{¶34} The first and second assignments of error are overruled.

B. Ineffective Assistance of Counsel

{¶35} Hunt argues that defense counsel's performance was deficient because the communication between Hunt and counsel fell below a reasonable standard. As a result, Hunt maintains that: (1) he did not understand the impact of the RVO specification; (2) he did not receive a true plea bargain because the second count would have merged into the first count so there was no true benefit to him; and (3) Hunt was not referred for a competency evaluation until after he entered the guilty plea in spite of evidence that Hunt was confused about the plea proceedings.

{¶36} A guilty plea must be made voluntarily, knowingly and intelligently. *State v. Bush*, 8th Dist. Cuyahoga No. 106392, 2018-Ohio-4213, ¶ 4, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25. "A guilty plea that lacks any of these elements is invalid." *Id.* An

appellate court reviewed the entire record to determine whether the plea was validly entered. *Id.*, citing *State v. Armstrong*, 8th Dist. Cuyahoga No. 101961, 2015-Ohio-3343, ¶ 18.

{¶37} Hunt argues ineffectiveness due to a breakdown in communications with defense counsel:

To prove ineffective assistance of counsel, a defendant is required to show (1) counsel's representation was both deficient, falling "below an objective standard of reasonableness," and (2) a reasonable probability that absent this deficient performance the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 671, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a guilty plea, a defendant must show both a deficient performance and "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty * * *." *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Id. at ¶ 17.

{¶38} It appears that Hunt's claim of ineffective assistance arises due to dissatisfaction of the sentence imposed. No breakdown in communication was demonstrated that served to jeopardize Hunt's Sixth Amendment right to the effective assistance of counsel. *State v. Vaughn*, 8th Dist. Cuyahoga No. 87245, 2006-Ohio-6577, ¶ 19, citing *State v. Coleman*, 37 Ohio St.3d 286, 292, 525 N.E.2d 792 (1988); *State v. Murphy*, 91 Ohio St.3d 516, 523, 2001-Ohio-112, 747 N.E.2d 765.

{¶39} The trial court in this case complied with Crim.R. 11(C)(2), which requires a court to recite each of the constitutional rights the defendant is

waiving and to specifically inquire whether the defendant is (1) “making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty involved,” (2) that the defendant “understands the effect of his plea of guilty,” and (3) that the defendant understands that the court “may proceed to judgment and sentence.” *State v. Elliott*, 8th Dist. Cuyahoga No. 102226, 2015-Ohio-3766, ¶ 12, quoting *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621. Hunt does not claim error on this issue.

{¶40} At the March 5, 2018 final pretrial, the trial court addressed a motion filed by Hunt to strike the RVO as unconstitutional. Hunt was advised that the motion must be filed by defense counsel. Defense counsel said that he reviewed the motion and believed it had no foundation in law in the case. When a criminal defendant is represented by counsel and there is no indication that defense counsel joins in the defendant’s pro se motion or otherwise indicates a need for the relief sought by the defendant pro se, the trial court cannot properly consider the defendant’s pro se motion. *State v. Thomas*, 8th Dist. Cuyahoga No. 103759, 2016-Ohio-4961, ¶ 213, citing *State v. Wyley*, 8th Dist. Cuyahoga No. 102899, 2016-Ohio-1118, ¶ 9.

{¶41} The parties engaged in an in-depth discussion of the grounds for the RVO, that the RVO could only be applied if the trial court imposed a maximum sentence on the underlying manslaughter count, and that imposition

of the RVO as well as the term of the RVO was within the trial court's discretion.

{¶42} The trial court then explained the RVO specification:

Now, Mr. Hunt, did you understand what I said? So let's assume that you plead guilty or you go to trial, either before me as the judge without a jury, or all the jury is in, all the evidence is presented, and they come back with a guilty verdict. Then we'll get some papers together about your background and history. We'll get all that information. We'll hold a sentencing hearing, usually 30 days later, and I listen to all of the information about sentencing both from your side and the prosecutor's side, and then it's time for me to decide.

As it stands now, with your situation presently in this indictment, if I were to impose the maximum amount, eleven years, and only if I apply or decided that eleven years was appropriate, at that time I can then decide to consider the RVO statute, the repeat violent offender. It's not mandatory that I impose it, but if I choose to impose it, I can do so by adding an additional time period up to ten years. So the eleven years can be twenty-one, it can be twelve, it can be thirteen. It can be all the way up to twenty-one.

(Tr. 19-20.)

{¶43} The court continued,

If I decide to impose a sentence less than eleven but within the range of three to eleven, let's just pick eight as a number, then I cannot apply the RVO statute. So I have to get to eleven first. That's the first decision.

Second is do I apply the RVO or not. If the answer is yes because of the circumstances of this situation, then how many additional years will it be in addition to eleven? Will it be one or all the way up to ten, which would be twenty-one.

Now, that's different for others who have repeat violent offender specifications on other cases or other indictments before them, and

if you were coming before me with three RVO specifications in prior cases, then we're talking about a different situation.

Does that help you?

Hunt: Yes, sir.

(Tr. 20.) The state and defense counsel agreed on the record to the accuracy of the trial court's recitation.

{¶44} In spite of the events of March 5, 2018, at the March 12, 2018 hearing, Hunt shared his understanding that he was only pleading to the three-to eleven-year voluntary manslaughter charge. "I'm not copping to an RVO. I was not aware of that." (Tr. 28.) "Your Honor, I'm not willing to cop to a repeat violent offender, your Honor. I'm not willing to do that." *Id.* "[T]hat's why I put that motion to strike RVO in this case as unconstitutional." *Id.*

{¶45} The parties revisited the impact of the RVO for the record.

Court: So the notice of prior conviction [specification] just makes [incarceration for the first degree manslaughter count] mandatory. It doesn't add anything other than that. Do you understand that?

Hunt: Yes, your Honor.

Court: The repeat violent offender that we talked about only applies in your situation to the following:

One, I must impose the maximum amount of 11 years. If I order something less than 11 years, then the repeat violent offender specification has no application whatsoever.

So, if I sentence you to ten years or 13 less, it's not in play. Do you understand that?

Hunt: Yes, sir.

Court: It only comes into play when I order 11 years which is the maximum amount for a felony in the first degree.

If I order 11, then I have the option of adding one to ten years in yearly increments to that if I so choose. And I would make that decision based on all the information made available to me at the time of sentencing.

So, it's basically a three to 11 standard felony in the first degree sentence with two changes, mandatory prison in place of probable prison, and only if I give you 11 years will then consider adding one, two, three all the way up 3 to ten which would be an additional time period to only the 11.

Do you understand that?

Hunt: Yes, your Honor.

Court: Isn't that what you understood when we left here before?

Hunt: No, your Honor. Sometimes it's hard for me to catch up with what you say because I'm kind of like a little slow learner, so it takes me a little while. But now that you — the way that you broke it down to me, your Honor, I fully understand.

Court: All right. Now, is that what you believed when you heard it here this morning? When the prosecutor said with regard to Count 1 there's a notice of prior conviction and repeat violent offender specification, you immediately said, no, I'm not going to plead to that.

Did you understand that what that meant is exactly what I said?

Hunt: No, your Honor. That's not what I understood.

Court: But did you kind of go back to what you thought it was before?

Hunt: Yes, your Honor.

Court: Now, do you want to talk about this to your attorney at this point?

Hunt: No, your Honor. Now, your Honor, the way that you broke it down to me, yes, I would like to enter a plea, your Honor.

Court: Okay. Now, there are no promises one way or the other about whether I impose the 11 or not impose the 11. Do you understand that?

Hunt: Yes, your Honor. I fully do.

Court: So I may; I may not, but it's going to depend upon all the facts and circumstances that I'll hear at sentencing. Do you understand?

Hunt: Yes, your Honor.

Court: And even if I did impose the 11, that doesn't mean I will or will not impose the additional one to ten. That's a possibility. You understand that? In other words, I'll listen to all the evidence and then I'll make up my mind whether or not if I order 11, additional prison time is warranted. Do you understand that?

Hunt: Nodding in the affirmative.

Court: Let me say it again. If I hear all the information at sentencing from you, your attorney, from the State, from the victim's representatives or family members,

and I decide that 11 years is appropriate, and then I hear additional information or the same information and I decide some additional time is needed or warranted under your situation and I impose anywhere from one to ten, I'll make all those decisions at sentencing. I haven't made any of these decisions at this point. Do you understand that risk?

Hunt: Yes, your Honor.

Court: And nothing I've said here today promises you one way or the other. Do you understand that?

Hunt: Yes, your Honor.

Court: And are you willing to go forward on that basis?

Hunt: Yes, your Honor. I am.

(Tr. 31-35.) Counsel for both parties' counsel expressed a belief that Hunt understood the trial court's explanation. During the colloquy, Hunt said that he was "100 percent" satisfied with the representation that he received from defense counsel. (Tr. 37.) There is nothing in the record indicating a breakdown in communication between Hunt and defense counsel.¹

{¶46} Hunt also stated during the colloquy that he had a ninth- or tenth-grade education. Coupled with Hunt's claimed confusion regarding the RVO,

¹ To be successful in an ineffective assistance of counsel claim, Hunt must show "a breakdown in the attorney-client relationship of such magnitude as to jeopardize defendant's Sixth Amendment right to effective assistance of counsel." *Vaughn*, 8th Dist. Cuyahoga No. 87245, 2006-Ohio-6577, at ¶ 19, citing *Coleman*, 37 Ohio St.3d at 292, 525 N.E.2d 792; *Murphy*, 91 Ohio St.3d at 523, 2001-Ohio-112, 747 N.E.2d 765.

Hunt offers that defense counsel should have requested a competency hearing prior to the plea entry.

[T]he conviction of a defendant who is not competent to enter a plea violates due process of law. *See State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 155. A defendant, however, is presumed competent to enter a guilty plea in the absence of any evidence rebutting the presumption. *State v. Pigge*, 4th Dist. Ross No. 09CA3136, 2010-Ohio-6541, ¶ 28, citing R.C. 2945.37(G), and *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 45.

Elliott, 8th Dist. Cuyahoga No. 102226, 2015-Ohio-3766, at ¶ 20.

{¶47} In addition,

The standard for determining competence to enter a guilty plea is the same as the standard for determining competence to stand trial. *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 57, citing *Godinez v. Moran*, 509 U.S. 389, 399, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). The United States Supreme Court has defined the test for competence to stand trial (or to plead guilty) as whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

Id. at ¶ 19.

{¶48} "[A]n evidentiary competency hearing is constitutionally required whenever there are sufficient indicia of incompetency to call" the defendant's competency into doubt. *Id.* at ¶ 21, quoting *State v. Were*, 94 Ohio St.3d 173, 2002-Ohio-481, 761 N.E.2d 591, paragraph two of the syllabus, following *State v. Berry*, 72 Ohio St.3d 354, 650 N.E.2d 433 (1995) (requiring a

competency inquiry where the record indicates it is necessary to protect the defendant's right to a fair trial).

{¶49} The record reflects two in-depth explanations regarding the RVO specification as well as the terms of the proposed plea. Hunt stated that any initial confusion was clarified by the trial court's subsequent explanation. Hunt initially entered a "no contest" plea to the counts. The state indicated that Count 2 would be nolled only for a guilty plea. The trial court next explained to Hunt that Count 2 would merge with the voluntary manslaughter count for sentencing if he desired to maintain a no contest plea. Hunt elected to enter guilty pleas.

{¶50} In response to the trial court's inquiry about presentence testing, defense counsel suggested a mental health assessment. The trial court asked whether a competency evaluation should also be conducted. The trial court decided to move forward with both tests over the state's objections.

{¶51} At the sentencing, the trial court cited its review of the presentence investigation report, defense sentencing memorandum, and the mental health assessment mitigation of penalty report prepared by the court psychiatric department. Defense counsel also reviewed the report and stated that there was no reason that the sentencing should not proceed.

{¶52} Hunt was not prejudiced by the timing of the mental health assessment request. Hunt was still entitled to withdraw his plea under

Crim.R. 32(1) "to correct a manifest injustice." *Id.* "In general, 'a presentence motion to withdraw a guilty plea should be freely and liberally granted.'" *State v. Maddox*, 2017-Ohio-8061, 98 N.E.3d 1158, ¶ 16 (8th Dist.), quoting *Xie*, 62 Ohio St.3d at 527, 584 N.E.2d 715. While the right to withdraw was not absolute, the trial court would be required to "conduct a hearing to determine whether there is a reasonable legitimate basis for the withdrawal of the plea." *Id.* "A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a guilty plea." *Id.* at ¶ 18, citing *State v. Westley*, 8th Dist. Cuyahoga No. 97650, 2012-Ohio-3571, citing *State v. Drake*, 73 Ohio App.3d 640, 645, 598 N.E.2d 115 (8th Dist.1991).

{¶53} Hunt has not established that "there is a reasonable probability that, but for counsel's deficient performance, he would not have pled guilty to the offense at issue and would have insisted on going to trial." *Id.* at ¶ 21, citing *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *Xie*, 62 Ohio St.3d at 524, and *Hill*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203; *State v. Wright*, 8th Dist. Cuyahoga No. 98345, 2013-Ohio-936, ¶ 12.

{¶54} The third assigned error is without merit.

IV. Conclusion

{¶55} The trial court's judgment is affirmed.

It is ordered that appellant bear the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The appellant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., CONCURS IN JUDGMENT ONLY;
FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY 02 2019

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
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