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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)	
)	NO. CR 2008-145947-001
Plaintiff,)	
)	STATE'S RESPONSE TO DEFENSE
vs.)	PETITION FOR POST CONVICTION
)	RELIEF
BRIAN WILKINS,)	
)	(Assigned to the Honorable
Defendant.)	Judge Teresa Sanders)
_____)	

COMES NOW THE STATE OF ARIZONA, by and through undersigned counsel, and hereby submits this response to Defendant’s Petition for Post Conviction Relief. When the defendant does not show “manifest injustice,” and when he told the court during the change of plea colloquy that he understood the plea agreement and his rights and wanted to plead guilty, the trial court should deny the motion to withdraw from the plea agreement. Thus, the State of Arizona, by and through undersigned counsel, hereby respectfully requests this Court to deny the defendant's Petition for Post Conviction Relief, based on the following Memorandum of Points and Authorities.

Submitted July 27, 2009.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY _____
Neha Bhatia
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On July 29, 2008, the Defendant was offered a plea to a class 6 designated felony with a stipulation that he serve a term in the Department of Corrections. David Allen Brown was his attorney at this point in his case. The Defendant was in custody and had already been so for 7 days. Mr. Brown filed a written motion to have the case set for a Witness Preliminary Hearing to establish probable cause. At this time, Mr. Brown also requested the Defendant's bond be reduced.

Given the short time limitation because the Defendant was in custody the State made the decision to present his case before a Grand Jury. On July 31, 2008, the Defendant was indicted. After the Defendant had been indicted, Michael Ziemba took over the Defendant's case. Through his hard work he was able to secure a much better offer for the Defendant than had been offered at the pre-trial level. On March 2, 2009, before Judge Ronan the Defendant entered a plea of guilt. He was subsequently sentenced before Judge Sanders on March 30, 2009.

LAW AND ARGUMENT:

Plea agreements are an effective and approved tool for effectuating public policy; they serve both the interests of justice and judicial economy. *State v. Watton*, 164 Ariz. 323, 793 Ariz. 80 (1990). These views are incorporated in the Rules of Criminal Procedure that permit the parties to reach an agreement on any aspect of the disposition of a case. Rule 17.4(a), Ariz. R. Crim. P. When the court accepts a plea agreement, the acceptance of the plea terminates the parties' right to unilaterally withdraw from it. Rule 17.4(b), Ariz. R. Crim. P. The court may accept a plea agreement only after it is satisfied that the agreement was entered voluntarily and intelligently. Rule 17.4 (c), Ariz. R. Crim. P. The court retains discretion to reject the agreement if, after reviewing a presentence report, the Court finds any of the parties' agreements to be

inappropriate. Rule 17.4 (d), Ariz. R. Crim. P. A court may not *sua sponte* vacate a previously accepted plea agreement. *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990).

I. Rule 17.5, Ariz. R. Crim. P., requires the defendant to show a manifest injustice will result before a court may permit him to withdraw from an accepted plea agreement.

Once the court accepts a plea agreement, terminating the unilateral right of the parties to withdraw, a defendant may withdraw only when the court finds that withdrawal is necessary to correct a manifest injustice. Rule 17.5, Ariz. R. Crim. P. The Comment to Rule 17.5 states:

The term manifest injustice is intended to include denial of effective assistance of counsel, failure to follow the procedures prescribed by Rule 17, and incorrect factual determination made under Rule 17.3, and such traditional grounds as “mistake and misapprehension,” *State v. Corvelo*, 91 Ariz. 52, 369 P.2d 903 (1962) and “duress and fraud,” *Silver v. State*, 37 Ariz. 418, 295 P. 311 (1931); *State v. Murray*, 101 Ariz. 469, 421 P.2d 317 (1966).

While a court should liberally exercise its discretion to allow withdrawal from a plea, the court must only do so when the defendant has met his burden to show that manifest injustice will result if the court does not permit withdrawal. *State v. Ellison*, 111 Ariz. 167, 526 P.2d 706 (1974); *State v. Romers*, 159 Ariz. 271, 766 P.2d 623 (App. 1988).

The standard for withdrawal is a high one. *State v. Anderson*, 147 Ariz. 346, 710 P.2d 456 (1985). A defendant is not permitted to withdraw from a plea agreement because he made a bad bargain; he may not use a guilty plea as a device to test the attitude of the trial court, being reasonably sure he can later withdraw. *State v. Phillips*, 108 Ariz. 332, 498 P.2d 199 (1972). Nor is it sufficient that a defendant, after seeing the presentence report and its recommendation, decides he prefers to have a trial. *State v. Faunt*, 139 Ariz. 111, 677 P.2d 274 (1984).

Though case law dictates that a plea being a “bad bargain” is not grounds for withdrawal; the State asks that the Court understand that the plea he entered was an exceptional offer. The

Defendant was offered, and knowingly, intelligently, and voluntarily entered a plea that was out of Maricopa County Attorney's Office policy. The Defendant's original plea offer had been to a designated offense with a stipulation to the Department of Corrections. Moreover, had the Defendant taken the case to trial and been found guilty of either Count 1 or 2 he would have been sentenced to the Department of Corrections because both were deemed dangerous. As such, the Defendant's plea to two undesignated offenses was not a "bad bargain."

II. Manifest injustice includes ineffective assistance of counsel.

In deciding whether counsel was ineffective and whether such ineffectiveness warrants a withdrawal of the plea, this Court applies a two-prong test . . . (citations omitted) 1) was counsel's performance reasonable under all the circumstances, *i.e.* was it deficient? *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985), and 2) was there a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different," the prejudice requirement. *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

State v. Anderson, 147 Ariz. 346, 351, 710 P.2d 456, 461 (1985).

In the Defendant's pleading he alleges that David Allen Brown was not an effective counsel. This argument is irrelevant and has no bearing on the Defendant's eventual knowing, intelligent and voluntary decision to enter into a plea agreement. The Defendant's attorney at the time the plea was entered was Michael Ziemba not David Brown. Mr. Brown was the Defendant's pretrial attorney; this case was not resolved in pretrial. Moreover, it was not Mr. Brown's decision for the case to be heard by a Grand Jury, that decision rests solely with the State and the State exercised this power.

Nevertheless, both Mr. Brown and Mr. Ziemba pursuant to the two-prong test delineated in *Nash* acted as effective counsel to this Defendant. With regard to Mr. Brown, he is a pretrial attorney who handles a high volume of cases in an attempt to achieve a resolution efficiently. The Defendant's pleadings fail to show how Mr. Brown's caseload resulted in a manifest

injustice; especially when Mr. Brown was not the Defendant's attorney when he entered the plea. Moreover, the Defendant alleges that but for Mr. Brown's decision he would not have been indicted by a Grand Jury. Again this argument fails because that decision was made by the State not by Mr. Brown. Thus, Mr. Brown's actions had no effect on the result of the Defendant's case. Similarly, Mr. Ziembra was able to secure a more favorable plea for the Defendant than the one he was originally offered. Mr. Ziembra's actions were not only reasonable but also exemplary.

Lastly, the Defendant never filed a Motion for Change of Counsel, nor did he advise the Court of his dissatisfaction with his attorney. The Defendant has ample opportunity to raise this issue. The Defendant was in custody and present on July 29, 2008 at which point his discontent with David Brown should have been mentioned. The Defendant's plea was a standard form used daily in this Court, and advised the defendant of the charge to which he was pleading guilty; the sentence range; and the rights he was forfeiting by not going to trial. During the guilty plea proceeding, this Court also advised the Defendant of those same rights.

III. A defendant may not withdraw from a plea agreement based on a claim that he did not understand the plea proceeding when the record of the plea proceeding shows otherwise.

Appellate courts have upheld a trial court's discretion not to permit withdrawal from a plea when the defendant claims some defect in the plea proceeding that is not supported by the record. In *State v. Hamilton*, 142 Ariz. 91, 688 P.2d 983 (1984), the Arizona Supreme Court rejected Hamilton's claim that he entered a plea agreement because he was coerced by threats. The record showed that at the change of plea hearing the trial court extensively questioned Hamilton and Hamilton expressly told the judge that no force or threats were used to get him to plead guilty. *Id.* at 93, 688 P.2d at 985. The Court reasoned as follows:

A defendant must not tell the judge that his plea is entered into voluntarily if it is not. It is no excuse that appellant thought the judge might not be trustworthy. If we were to grant any type of relief on this ground, every intelligent defendant entering a plea would tell the trial judge that the plea was entered into voluntarily and then wait for imposition of the sentence; if the sentence imposed were more harsh than anticipated or desired, the defendant would claim he entered the plea involuntarily but could not tell the judge, fearing the judge could not be trusted. Such a sequence of event would make a mockery of our justice system and of course will not be allowed. It is also no excuse that appellant feared being returned to the Maricopa County Jail. If told about the threats, the judge could have ascertained if there really were any danger to appellant and, if so, could have arranged appropriate safety precaution. Both of these claims are foreclosed by the trial judge's *Boykin* questioning and appellant's responses at the time of the change of plea.

State v. Hamilton, 142 Ariz. at 93, 688 P.2d at 985. See also *State v. Chudy*, 146 Ariz. 385, 387-88, 706 P.2d 397, 399-400 (App. 1985) [defendant's claim about state representations about sentencing during plea negotiations was meritless in light of defendant's responses during change of plea hearing.]

Again, in this case the Defendant had the opportunity to review his rights when he signed the plea agreement. Additionally, the Judge reiterated these rights when he entered into the plea. The Defendant was fully aware of the nature of the plea and nothing on the records indicates that he was “unlawfully induced” into entering the plea. Rather it is clear from the record that the Defendant knowingly, intelligently, and voluntarily entered into the plea agreement.

CONCLUSION:

Based on the above points and authorities, the State respectfully requests this Court to deny the defendant's motion to withdraw from the plea.

Submitted July 27, 2009

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY /s/
/s/Neha Bhatia
Deputy County Attorney

Copy mailed\delivered
This 27th day of
July, 2009, to:

The Honorable Teresa Sanders
Judge of the Superior Court
222 E. Javelina Ave.
Mesa, AZ 85210

Brian A. Wilkins,
Pro Per Defendant
PO Box 66
Tempe, AZ 85280

BY _____
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