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LORAIN COUNTY

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IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

STATE OF OHIO,	}	CASE NO. 94CR045429
Plaintiff,	}	JUDGE EDWARD M. ZALESKI
vs.	}	
DANIEL SMITH,	}	**JUDGMENT ENTRY**
Defendant.	}	

This cause came before the Court upon the Defendant's Petition for Post Conviction Relief and Motion to Vacate Sentence and Plea. The Court reviewed, in making the determination whether substantive grounds for relief exist, the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The Court having found that substantive grounds for relief existed, held a hearing on this matter on May 5, 1997.

The Court finds as follows:

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EXHIBIT 66

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On June 29, 1994, the defendant, Daniel Smith was indicted by the Lorain County Grand Jury in case no. 94CR045429, on six counts of Aggravated Trafficking in Drugs, violations of R.C. §2925.03(A)(1), all felonies of the third degree. All of the alleged offenses took place between January 13, 1994 and March 15, 1994. Each of the six sales involved amounts less than bulk amount. The total amount of cocaine involved in the six sales totaled 0.861 grams, for a total price of $250.00. Bulk amount for cocaine is 10 grams. §2925.01(D)(1)(a)

Defendant had been previously convicted of corruption of a minor, a third degree felony in case no. 91CR040794. He was sentenced to prison for a term of 18 months on March 25, 1992. He was granted shock probation on June 9, 1992.

His attorney, Michael Provenza advised the Defendant, that the State had four tape recordings in connection with his case, but only two of the tapes were audible.

On October 6, 1994, the defendant entered a plea of guilty to all six of the drug charges in case no. 94CR045429. The Defendant alleges he was advised by his attorney that if he plead guilty to all six counts, the judge would sentence him to a two (2) year concurrent sentence on all of the counts. The Defendant further alleges that based upon Mr. Provenza's assertions, he entered a plea of guilty to all six of the counts.

On November 17, 1994, the defendant was sentenced to a term of 2 years on each of the six trafficking charges and the terms were run consecutively to each other. Shortly thereafter, the defendant called his attorney and expressed a desire to withdraw his plea or to appeal. Mr. Provenza told him that he no longer represented him. No appeal was ever filed. On September 20, 1996, Defendant filed a Petition for Post-Conviction Relief through a new attorney, Phillip J. Korey. On April 23, 1997, Attorney Korey filed a Motion to Vacate Plea and Sentence.

On 3/8/95, the defendant was indicted by the Lorain County Grand Jury in case no. 95CR046839, on one count of Aggravated Murder with Specifications, a violation of §2903.10(A)(1). The state was seeking the death penalty against the defendant. On February 28, 1996, the Defendant was indicted for Bribery, a violation of R.C. §2921.02(C). The cases were tried together before a jury and on April 25, 1996, the defendant was found not guilty of Aggravated Murder but guilty of Bribery. On May 13, 1996, Judge Glavas sentenced the defendant to a term of 2 years on the Bribery charge.

Prior to the sentencing on November 17, 1994 in this case, Detective Alan Leiby of the Elyria Police Department went to Common Pleas Judge Lynett McGough to inform her that the defendant was suspected to be involved in the murder of a drug informant. The Defendant was alleged to have killed Ronald Lally on January 19, 1994, for which the defendant was subsequently indicted on March 8, 1995. Defendant, the prosecuting attorney nor the defendant's attorney were present during Det. Leiby's meeting with Judge McGough. Additionally, there is no transcript of their meeting.

Detective Leiby later admitted during the trial of *State of Ohio v. Jalowiec,* case no. 95CR046840, T. 339-340, Exhibit G to Petition for Post Conviction Relief, that he had Danny Smith's "sentencing stacked". Det. Leiby testified that he made Judge McGough aware of his homicide investigation of Danny Smith. Leiby testified in the defendant's Aggravated Murder case and in the Aggravated Murder case of Stanley Jalowiec as follows:

Q. And you took such an interest in that case that when this came to sentencing, you came to court that day?

A. That's correct

Q. And you went in to see the judge, Judge McGough; is that correct?

A. I did speak to Judge McGough; that is correct.

Q. And this is before Danny was charged with anything relating to the case; is that correct?

A. Thats correct.

Q. And you went and told Judge McGough that Danny was involved, possibly involved, in a homocide, right?

A. I made her aware of my investigation, yes, sir.

Q. And you advised her you wanted her to consider that in giving her sentence, right?

A. I advised her I wanted to make her aware of that, yes, sir.

Q. And Danny's lawyer wasn't there?

A. No, sir.

Q. And the prosecutor wasn't there?

A. No, sir.

Q. Just you and Judge McGough?

A. Yes, sir.

Transcript p. 49, Case no. 95CR046839, Exhibit "F" to Defendant's Petition for Post Conviction Relief.

Q. And do you feel your conversation with Judge McGough contributed to that sentence being so severe?

A. You'd have to ask Judge McGough.

Q. No, I'm asking you if you feel that way?

A. I made her aware of the facts.

Q. What was the purpose of making her aware of the facts?

A. Because my witnesses were scared to death that Danny –

Q. No.

A. You asked me a question. Do you want me to answer it?

Q. Yeah.

A. My witnesses were scared to death of Danny, and everybody was pointing out to me that he was involved in killing the last witness that was going to testify against him. I felt if I could get him locked up, people would be more apt to cooperate with me.

Transcript p. 50-51, Case no. 95CR046839, Exhibit "F" to Defendant's Petition for Post Conviction Relief.

Q. Just answer my questions, all right. And did you, did you ever tell Terry Hopkins that you went to Judge McGough and got Danny Smith's sentences stacked; did you ever tell him that?

A. I may well have told him that, Mr. Duff.

Transcript p. 51, Case no. 95CR046839, Exhibit "F" to Defendant's Petition for Post Conviction Relief.

Q. Did you go to Judge McGough?

A. Yes.

Q. Did you speak to Judge McGough outside the presence of Smith's attorney, Mr. Smith's attorney in those other cases?

A. Yes.

Q. And did you claim later that you had the sentencings stacked?

A. Did I claim that?

Q. Yes.

A. No, sir, not that I remember.

Q. Do you recall in a statement given with Terry Hopkins, one of the witnesses in this case, that you had Danny Smith's sentences stacked again on January 4th of '95?

A. If you have that in a statement, then I am sure I said it.

Q. Is that correct, sir?

A. That's exactly what I just said, yes sir.

Transcript p. 53, Case no. 95CR046839, Exhibit "F" to Defendant's Petition for Post Conviction Relief and Transcript p. 339, Case no. 95CR046840, Exhibit "G" to Defendant's Petition for Post Conviction Relief.

Q. Did you testify previously in this case that you are a man of influence around the courthouse?

A. Yes, I did.

Transcript p. 56, Case no. 95CR046839, Exhibit "E" to Defendant's Petition for Post Conviction Relief.

Q. In this case, and the people we have talked about, the people you wanted in jail are in jail, the people you wanted out are out?

A. Yes.

* * *

Q. I mean, in the case of every person involved in this particular trial, every one of those people that you wanted out are out and the people you wanted in are in, correct?

A. The two I wanted out are out, correct. The three I wanted in are in.

Transcript p. 348-349, Case no. 95CR046840, Exhibit "G" to Defendant's Petition for Post Conviction Relief.

The Defendant alleges that after receiving his 12-year sentence on this case that Det. Leiby followed him to the holding cell and told him "I am the one who got you the twelve (12) years. If you tell me something about the homicide, then I'll give you your two (2) years back." Exhibit A. Detective Leiby did not deny that the conversation took place. Rather he stated that he could not remember, but said that it was possible he had the conversation. It must be noted that Det. Leiby had no knowledge of the details of the Defendant's drug case.

POST CONVICTION RELIEF

The Court must first determine whether post-conviction relief is the proper remedy for the Defendant to be seeking. In filing for postconviction relief, R.C. §2953.21(A)(1), states:

> Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

In *State v. Powell* (1993), 629 N.E.2d 13, 90 Ohio App. 3d 260 at 264, the Court held:

> Under R.C. 2953.21, success on a postconviction claim is dependent upon a showing that "there was such a denial or infringement of [the petitioner's] rights" in the proceedings that resulted in his conviction that the conviction has been rendered void or voidable under either the Ohio Constitution or the United States Constitution. It is manifest from the terms of the statute that two elements are of fundamental importance: the violation upon which the petitioner relies to establish his right to relief must be of constitutional dimension, and it must have occurred at the time the petitioner was tried and convicted of a criminal offense. The absence of either element in a given case is, in law, fatal to a postconviction claim.

In *State v. Powell* at 264, fn. 2 the Court further held:

> "A clear definition for the term "voidable" has yet to be given by the Ohio Supreme Court in the context of proceedings for postconviction relief. It would appear, from a reading of R.C. 2953.21, that a voidable judgment is meant to be one obtained only at the cost of a constitutional error resulting in prejudice to the rights of the accused."

Where allegations of constitutional deprivation require for their determination consideration of facts not appearing in the record, the appropriate remedy is through a petition for post-conviction relief, pursuant to R.C. 2953.21, and not through direct appeal. *State v. Cooperrider* (1983), 4 Ohio St.3d 226. In *State v. Rodriguez* (1989), 65 Ohio App. 3d 151, the Court found "We held that post-conviction relief is appropriate only when it concerns errors based upon facts and evidence *dehors* the record."

In *State v. Perry* (1967), 10 Ohio St. 2d 175, 39 O.O.2d 189, 226 N.E.2d 104, the Supreme Court of Ohio held:

> A prisoner is entitled to postconviction relief under Section 2953.21 et seq., Revised Code, only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution of the United States Constitution.
>
> * * *
>
> Where a judgment of conviction is rendered by a court having jurisdiction over the person of the defendant and jurisdiction of the subject matter, such judgment is not void, and the cause of action merged therein becomes *res judicata* as between the state and the defendant.

> Constitutional issues cannot be considered in postconviction proceedings under Section 2953.21 et seq., Revised Code, where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him.
>
> * * *
>
> Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. (Emphasis sic.) Id. at paragraphs four, six, seven and nine of the syllabus.

In *State v. Milanovich* (1975), 42 Ohio St. 2d 46, 325 N.E.2d 540, The Ohio Supreme Court held in paragraph 1 of the syllabus:

> Where a claim raised by a petition for postconviction relief under R. C. 2953.21 is sufficient on its face to raise an issue that petitioner's conviction is void or voidable on constitutional grounds, and the claim is one which depends upon factual allegations that cannot be determined by examination of the files and records of the case, the petition states a substantive ground for relief.

It is clear that the determination of this case requires the examination of evidence *dehors* or outside of the record in this case. The claims of irregularities in this case were not and could not have been raised upon direct appeal because they were not discovered until some 17 months later, at the defendant's subsequent trial. It is clear that the post conviction relief is the appropriate remedy for the Court to consider in this case, because it necessarily involves the consideration of facts that are not in the record of this case. As such, the Defendant's Petition for Post Conviction Relief is not barred by *res judicata*.

JUDICIAL CONDUCT

A trial court has broad discretion in sentencing a defendant and a reviewing court will not interfere with the sentence unless the trial court abused its discretion. However, in exercising its discretion, the trial court must consider the factors set forth in R.C. 2929.12. *State v. Yontz* (1986), 33 Ohio App. 3d 342, 343. *State v. Cable* (1985), 24 Ohio App. 3d 88, 90, 24 OBR 158, 159-160, 493 N.E.2d 285, 286-287; *Columbus v. Bee* (1979), 67 Ohio App. 2d 65, 77, 21 O.O. 3d 371, 379, 425 N.E.2d 409, 418.

Judicial Canon 3(G)(1), effective May 1, 1997, provides:

(1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

This canon of ethics required the judge to disqualify himself to avoid the appearance of impropriety and protect the Defendant's right to due process. Because judges must not only avoid any impropriety, but also the appearance of impropriety, a judge must be constantly aware of the potential for the public to misunderstand his or her actions.

A judge should disqualify himself and not preside over a case if the judge is biased or prejudiced, or if the judge has expressed an opinion giving the impression that the judge may be biased or prejudiced. See, *State v. Bainter* (July 29, 1994), 1994 Ohio App. LEXIS 3443, Pickway App. No. 93 CA 22, unreported; 22 Ohio Jurisprudence 3d

(1980), 210-211, Courts and Judges, Section 121; Canon 3(C)(1)(a) of the Code of Judicial Conduct. A judge should avoid the appearance of impropriety.

Bias or prejudice on the part of a judge is not supposed to exist. 22 Ohio Jurisprudence 3d (1980) 210-211, Courts and Judges, Section 121. If it does, the judge should disqualify himself. Canon 3(C)(1)(a) of the Code of Judicial Conduct. Even if a judge is not biased or prejudiced, but has expressed a fixed opinion giving that impression, the judge should disqualify himself from further participation in the matter so as to avoid even the appearance of impropriety. See *Columbus v. Pierce* (1991), 77 Ohio App.3d 841, 844, 603 N.E.2d 1104. The remarks of the court below are the sort which indicate a noticeable bias or prejudice against appellant or, at the very least, give the appearance of such.

Canon 3 provides: A judge shall perform the duties of judicial office impartially and diligently. Code of Judicial Conduct Canon 3(B)(7) states: A judge shall not initiate, receive, permit, or consider communications made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding . . . "

All Canons of the Code of Judicial Conduct, except Canon 4, establish mandatory standards of conduct for Ohio judges. *In re Complaint Against Harper* (1996), 77 OS3d 211, 673 NE2d 1253.

The test for compliance with Canon 2 appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

The Defendant submitted sentencing synopsis of six cases in which Judge McGough had sentenced the individuals. See, Exhibit "A" to DEFENDANT'S REPLY

BRIEF TO STATE'S MOTION TO VACATE PLEA AND SENTENCE. The list contains cases that can be generally classified as either similar or more serious than the offenses committed by this Defendant. Each of the Defendants received sentences that were less than Defendant Smith's sentence. Without reiterating each case cited in Exhibit "A", the basic inference of this exhibit is that the Defendant received a higher sentence for some additional reason. The Defendant alleges that this reason was Det. Leiby's communication to the Judge.

From the foregoing analysis it is this Court's opinion that the sentence received by the Defendant creates the appearance of impropriety.

The Court will now examine whether the facts cited above violate any constitutional rights guaranteed by the Ohio Constitution and the United States Constitution.

DUE PROCESS

A trial court's discretion to impose a sentence within the statutory guidelines is very broad and an appellate court cannot hold that a trial court abused its discretion by imposing a severe sentence on a defendant where that sentence imposed is within the limits authorized by the applicable statute. See *United States v. Tucker* (1972), 404 U.S. 443; *City of Toledo v. Reasonover* (1965), 5 Ohio St. 2d 22; and *Columbus v. Bee* (1979), 67 Ohio App. 2d 65. An abuse of discretion connotes more than just an error of law. It exists where the court's attitude, evidenced by its decision, was unreasonable, arbitrary or unconscionable. *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 222.

The submissions upon which the judge may rely in imposing sentence are rather broad. In the decision of *Williams v. New York* (1949), 337 U.S. 241, the Supreme Court held: "Highly relevant-if not essential-to selection or an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Id.* at 247.

Then in *Williams v. Oklahoma* (1959), 358 U.S. 576, the Supreme Court further clarified by holding: "In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances in the crime." *Id.* at 577.

However, the scope of this information is not without limitation. In *United States v. Weston* (C.A. 9, 1971), 448 F. 2d 626, certiorari denied (1972), 404 U.S. 1061, the court noted: "A rational penal system must have some concern for the probable accuracy of the information imputs in the sentencing process." *Id.* at 634.

Ohio Revised Code § 2929.12 sets out the factors appropriate for consideration in sentencing. The statute extends the trial court a very broad discretion. That discretion may nevertheless be abused, see *State v. Longo* (1982), 4 Ohio App. 3d 136, 140-141. And the trial court's latitude is circumscribed by constitutional limits. See, *United States v. Tucker* (1972), 404 U.S. 443, 446-447. In this case it appears that the court considered charges which the Defendant was not even charged with and which he was subsequently acquitted. In *Townsend v. Burke* (1948), 334 U.S. 736, the sentencing court had recited earlier crimes of the defendant, some of which had been dismissed and some of which resulted in acquittals. In reversing, the Supreme Court said: "We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving."

* * *

"[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law." *Id.* at 740-741.

Of course, a sentencing judge is not limited to the often far-ranging material compiled in a pre-sentence report. '[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' *United States v. Tucker*, 404 U.S. 443, 446, 92 S. Ct. 589, 591, 30 L.Ed. 2d 592 (1972).

In the case of *Gardner v. Florida,* (1977), 430 U.S. 349, the United States Supreme Court held that the due process clause was applicable to the sentencing process and then goes on to state that if due process of law is to be given to the defendant-appellant, she must have an opportunity to deny or explain information presented against her.

The requirements of the Due Process Clause are applicable to the sentencing process, as well as the trial itself. *Gardner v. Florida* (1977), 430 U.S. 349. In *Gardner,* supra, the United States Supreme Court held "* * * that petitioner was denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362. In *Gardner,* the court concluded that there was no opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information.

In one Ohio case a letter allegedly written by the victim to the judge formerly assigned to the case was read by the trial court at the sentencing hearing. This unauthenticated ex parte communication was not part of any pre-sentence report and was not submitted to the trial court through any proper channel. The Court found that the letter should not have been read by the court and should not have been used in the sentencing of the appellant. *State v. Whitmire* (1988), 1988 Ohio App. LEXIS 4867. The Court in *Whitmire* went on to hold:

> "There is, however, an inherent danger and inappropriate cast involved in the reception and utilization of extra-judicial, unauthenticated matters by a trial judge in criminal proceedings, even if it is ostensibly from a victim of the crime being prosecuted. It is these mechanics of submission that are highly suspect here, and not necessarily the substance or character of the material itself.
>
> It is this method which is out of tune with fundamental concepts of balanced fairness that should be reproached. It is of little significance that a resentencing exercise would produce the same results. It is of utmost importance that due process be applied. The first assignment of error is with merit."

The Court in *Whitmire* opined that it is a violation of due process of law to allow the trial court to receive extra-judicial communications at the sentencing. The Court recognized the intrinsic hazard in receiving any ex parte communications in a criminal proceeding. The court further held the sentencing exercise in the trial court violated the Due Process Clause of the fourteenth amendment since the Defendant had not seen the letters, before the hearing and since he denied their accuracy at the hearing and he was thus unable to defend against the allegations.

In this case, Defendant contends the trial court's alleged reliance on Det. Leiby's ex parte information, during the sentencing violated the Due Process Clause of the fifth and fourteenth amendments to the United States Constitution since he had not opportunity to rebut the information before the sentencing and since he denies the accuracy of the information. He argues that he was thus unable to defend against the allegations.

The Court agrees with the contention of the Defendant that the transmission of unsworn, ex parte information to the trial court was a violation of the Defendant's Due Process rights as guaranteed by the Ohio and United States Constitutions. Due process implies fundamental fairness to accused in all stages of criminal proceedings, including sentencing. The Court does not believe that fundamental fairness or due process include the kind of conduct that was displayed in this case by the facts stated above.

CONFRONTATION

Defendant also contends that by the ex parte communications of Det. Leiby with Judge McGough, he was denied his confrontation clause rights as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 10, of the Ohio Constitution. Article I, § 10 entitled "Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases." provides in part:

> "* * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; **to meet the witnesses face to face,** and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *" (Emphasis added)

The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; **to be confronted with the witnesses against him**; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Emphasis added)

The Ohio Constitution art I, § 10 provides greater protection for the confrontation rights of an accused than does the sixth amendment to the United States Constitution. *State v. Storch* (1993), 66 Ohio St. 3d 280 at 291.

Confrontation implies the right to oppose, challenge, dispute or contradict that which is being put forth. In this case the Defendant has no knowledge that the Det. Leiby wished to communicate with the trial judge and in fact was secretly passing this information on, therefore he could not oppose, challenge, dispute or contradict Det. Leiby's testimony. Additionally, the Defendant was unaware that such a meeting took place until some 17 months later. Under no circumstances can this type of communication conform with the confrontation requirements of the rights as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 10, of the Ohio Constitution.

The defendant's confrontation rights under the Sixth Amendment of the United States Constitution and Ohio Constitution art I, § 10, were violated when Det. Leiby had unsworn, exparte communications with Judge McGough, without a meaningful chance by the Defendant to rebut the communications.

This sentencing process in this case absolutely was a violation of the Defendant's right to Confrontation and Due Process.

INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, the Court must decide whether the Defendant was denied the effective assistance of counsel by allegedly being promised a two-year sentence.

In *State v. Blatnik* (1984), 17 Ohio App. 3d 201, 203, 17 OBR 391, 394, 478 N.E.2d 1016, 1020, which stated:

> "There is also authority which suggests that under certain circumstances, erroneous advice of counsel regarding the sentence which is to be imposed may result in manifest injustice. In [*United States v. . Becklean* (C.A. 8, 1979), 598 F. 2d 1122], the Eighth Circuit stated that if a guilty plea is entered solely because of erroneous advice, [or] if the erroneous advice plays a substantial part of inducement for the guilty plea, manifest injustice may result. *Becklean*, supra, {*104} at 1125. Also, it has been held that if a guilty plea is entered pursuant to counsel's representation, as opposed to counsel's likely prediction, that such a plea would result in a lesser sentence than the sentence actually received, it is necessary to permit post-sentence withdrawal of the guilty plea in order to prevent manifest injustice. * * *" (Citation omitted.)

Ohio Criminal Rule 32.1, titled *Withdrawal of Guilty Plea* provides:

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

The Court is not persuaded that the Defendant was promised a two (2) year sentence by his attorney. The following testimony elicited from Mr. Provenza provides substantiation:

Q. Did you advise Danny Smith in this case what you expected the sentence to be?

A. Yes, did.

Q. Could you tell us what you advised him, please?

A. One to two years.

Transcript p. 104, Case no. 95CR046839, Exhibit "E" to Defendant's Petition for Post Conviction Relief.

The testimony does not support the Defendant's contention that he was promised a specific sentence, rather Defendant's counsel expressed his opinion as to the expected range of the sentence. Therefore, the Court does not find any ineffective assistance of counsel with regard to the allegation that the Defendant was promised a specific sentence.

The Defendant further alleges that he was denied his right to appeal by ineffective assistance of counsel. He claims that an appeal should have been filed on his behalf after receiving the sentence. The Ohio Supreme Court has held that when a Defendant "was denied his right to appellate counsel as a result of an error made at the trial level, [his] proper remedy is to file a petition for postconviction relief under." R.C. §2953.21. *State v. Gover* (1995), 71 Ohio St. 3d 577. We do not need to reach this issue as the Court is already granting the Defendant postconviction relief under R.C. §2953.21 on other grounds.

CONCLUSION

The Court finds that a manifest injustice occurred in this case. The secret, exparte, and unsworn meeting by Det. Leiby with Judge McGough was improper and violated the Defendant's rights to Confrontation and Due Process as guaranteed by the Ohio Constitution and United States Constitution. Additionally, the meeting along with the sentence imposed has the appearance of impropriety. This manifest injustice would permit the withdrawal of the guilty plea. But the Court is of the opinion that the manifest injustice occurred after the plea but before the sentence was imposed, making the sentence void and/or voidable under the Ohio Constitution and United States Constitution. Therefore, the Court orders that only the sentence imposed in this case be vacated.

This Defendant and indeed the public at large have the right to be sure that justice will be administered and that the sentences handed out by the judicial branch in every case are based upon the law and the facts as presented in an open courtroom.

Petition for Post Conviction granted. Motion to Vacate Sentence is granted. Motion to Withdraw Plea is denied. The Court orders that the Defendant be re-sentenced by a visiting judge appointed by the Supreme Court of Ohio.

Dated: April 9, 1998

Edward M. Zaleski, Judge