[Cite as *State v. McCarthan*, 2024-Ohio-4751.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JON ONEY McCARTHAN Defendant-Appellant	JUDGES: Hon. John W. Wise, P.J. Hon. Craig R. Baldwin, J. Hon. Andrew J. King, J. Case No. 2023 CA 00126 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 84-4382
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 30, 2024

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, P. J.

{¶1} Defendant-appellant, Jon Oney McCarthan, brings this appeal from the judgment entry of the Stark County Common Pleas Court denying his motion to withdraw his guilty plea or alternatively his motion for new trial; motion to vacate his conviction and sentencing entry or, in the alternative motion for resentencing. Plaintiff-appellee is the State of Ohio. For the reasons that follow, we affirm the judgment entry of the Common Pleas court.

FACTS AND PROCEDURAL BACKGROUND

{¶2} The following is taken from the judgment entry of the trial court filed August 29, 2023.

{¶3} On September 13, 1984, an aggravated robbery occurred at a Clark Gas Station located at 903 12th St. S.E., Canton, Ohio. During the course of the aggravated robbery, K.M. was killed. On September 14, 1984, an individual by the name of Darrin Chester was interviewed regarding the Clark Gas Station robbery and the death of K.M. Darrin Chester told the police that the prior evening, the defendant, Jon Oney McCarthan, who had earlier asked to borrow money from him, asked him for a ride to the Clark Gas Station to purchse cigarettes. Darrin Chester drove himself, the defendant, and Harlan Scott Fisher, to the Clark Gas Station. The defendant went into the gas station while Darrin Chester and Harlan Scott Fisher remained in the vehicle. Thereafter, the defendant ran from the gas station and yelled at Darrin Chester to "go, go man." The defendant then stated that he "shot her." Additionally, when the defendant returned to the car, Darrin Chester heard change rattling about the defendant's person and believed that the defendant had the drawer from the cash register.

{¶4} Darrin Chester then drove to his brother's residence. While they were there, the defendant pulled money out of his pocket and counted $103.00, not including change. He then gave both Darrin Chester and Harlan Scott Fisher $25 and some change.

{¶5} Thereafter, all three went to a bar called Archie's, where they proceeded to lose the money gaming.

{¶6} On November 9, 1984, the Grand Jury of Stark County indicted the defendant on the following charges relative to the robbery of the Clark Gas Station and the death of K.M., as well as charges stemming from a robbery on September 12, 1984 at a Gastown Gas Station:

> Attempt to commit the offense of Aggravated Murder, with a firearm specification (Gastown); Aggravated Robbery with a firearm specification (Gastown); Aggravated Murder, with an aggravating circumstance (murder during aggravated robbery and was principal offender) and firearm specification (Clark Gas Station); Aggravated Robbery with a firearm specification (Clark Gas Station).

{¶7} On January 11, 1985, to avoid any appearance of impropriety relating to the Stark County Prosecutor who had been in office at the time of the aforementioned indictment having been elected to the bench of the Stark County Court of Common Pleas, a special prosecutor was appointed to handle the defendant's case. The special prosecutor filed a motion to impanel a special grand jury to consider specifications and/or offenses not originally presented to the grand jury that returned the November 9, 1984, indictment. Thereafter, on February 4, 1985, the grand jury returned a superseding indictment against the defendant ("Superseding Indictment

I") regarding the Gastown and Clark Gas Station robberies. Superseding Indictment I mirrored the original indictment filed on November 9, 1984, with one exception. The grand jury added an additional aggravating circumstance (course of conduct involving the purposeful killing of two or more persons) to count three (aggravated murder of K.M.).

{¶8} However, because the grand jury that had returned Superseding Indictment I had been impaneled only to hear the case against Darrin Chester, on February 26, 1985, the Court ordered that the grand jury that heard the case regarding Darrin Chester be recalled to hear the case regarding the defendant and Harlan Scott Fisher. No new testimony was presented before the grand jury and witnesses were not recalled. Rather, the grand jurors were asked to rely upon their memories of the testimony previously presented when considering the charges. On March 4, 1985, the grand jury returned "Superseding Indictment II," which was identical to "Superseding Indictment I." The defendant filed a motion to challenge the subsequent indictment, which were denied by the court.

{¶9} After a trial to a jury, the defendant was found not guilty of the charges relating to the Gastown robberies, specifically Counts one and two of Superseding Indictment II. On April 25, 1985, the defendant entered a negotiated plea of guilty to the remaining charges and specifications contained in Superseding Indictment II (with the exception of the course of conduct involving the purposeful killing of two or more persons specification that had been dismissed upon the jury verdict of not guilty regarding the Gastown robbery), with the understanding that the State of Ohio would not be seeking the death penalty on the specifications. In support of this agreement, the

charges listed in the plea form were "Aggravated Murder, 1 Ct. (With Agg. Circum. Specification) and Aggravated Robbery, 1 Ct. (With Gun Specification)." Moreover, the plea form specifically provided that the penalties associated with the offenses were "(Agg. Murder) Life with no possibility of parole for thirty (30) years and fine of $25,000 (Agg. Robbery) 5, 6, 7, 8, 9, or 10 to 25 years and up to $10,000 Determinate term of three (3) years for the Gun Specification (consecutive)." Additionally, the following was placed on the record by the special prosecutor prior to the defendant entering his plea:

> It is my understanding that the Defendant would waive his right to have his plea -presented to three (3) Judges and have it presented to one (1) Judge as the Court sits now. That the Defendant would plead guilty to Count Three (3), I believe, of aggravated murder. And also plead guilty to the aggravated circumstance that is also part of that count. And that the Defendant plead guilty to aggravated robbery and also the firearms specification that is part of that aggravated robbery charge, which I believe is Count Four (4).

{¶10} The State of Ohio would withdraw its request for the death sentence and would recommend that the Court impose a sentence of thirty (30) full years regarding Count number Three (3), aggravated murder, and would impose the maximum sentence of ten (10) to twenty-five (25) years regarding Count Four (4) aggravated robbery. And that also with the understanding that the three (3) year firearms specification be consecutive by operation of law with the thirty (30) full years of imprisonment on the life sentence.

> The State of Ohio would recommend also that the aggravated robbery and the aggravated murder offense, the ten (10) to twenty-five (25) be concurrent with the thirty (30) full years, for an understanding of a total sentence of thirty-three (33) full years.
>
> So that there is no misunderstanding, the State of Ohio is recommending that this Defendant have no possibility of a parole hearing till thirty-three (33) years. That's my understanding of this negotiated plea, Your Honor. (Transcript of Proceedings- Hearing on Change of Plea, attached to the Appendix to Motion filed by the defendant on March 6, 2017).

{¶11} Additionally, the following exchange at the plea hearing took place between the Court and the defendant:

> THE COURT: At this time do you wish to waive the taking of this plea and sentencing by a single-judge court as opposed to a three- judge panel court.
>
> MR. IAMS: We're satisfied to have this Court. We'll waive the three-judge panel.
>
> THE COURT: You have explained that to Mr. McCarthan also?
>
> MR. IAMS: Yes, I have.
>
> THE COURT: And you agree with that, Mr. McCarthan?
>
> THE DEFENDANT: Yes, I do.

{¶12} (Id.)

{¶13} Thereafter, the defendant entered a plea to counts three and four of Superseding Indictment II, including all specifications. The Court then sentenced the defendant in accordance with the terms of the negotiated plea as set forth on the record by the special prosecutor. The defendant's conviction and sentence were memorialized in the court's judgment entry filed on May 2, 1985.

{¶14} The defendant did not file a direct appeal of his conviction and sentence. Rather, the defendant filed the instant collateral attack 32 years after the imposition of his sentence. *Judgment Entry*, August 29, 2023 at 2-6.

Post-conviction proceedings

{¶15} On April 4, 1990, McCarthan filed a motion for leave to file a delayed appeal which was denied by this Court. *State v. McCarthan,* Stark No. 1991 CA 8149 (April 9, 1990). A jurisdictional appeal to the Ohio Supreme Court was denied. *State v. McCarthan,* Supreme Court No. 1990-0856 (Aug. 15, 1990).

{¶16} Some 32 years after his conviction and sentence, on March 6, 2017, McCarthan filed a *Motion of Defendant Jon Oney McCarthan to withdraw his Guilty Pleas Pursuant to Criminal Rule 32.1, or in the alternative Motion for New Trial, as the Trial was Never Completed or in the Alternative Motion to Vacate the conviction and Sentencing Entry or in the alternative Motion for Resentencing.*

{¶17} The state filed an opposition to the motion on June 15, 2018, and McCarthan filed a reply on October 13, 2020.

{¶18} An evidentiary hearing was held on August 18, 2022. Two defense witnesses appeared for McCarthan; his original defense counsel and an employee of the

Stark County Public Defender's Office who brought a copy of the McCarthan file on a flash drive.

{¶19} The trial court allowed the parties to file closing arguments; the state filed its written closing on September 27, 2022, and McCarthan filed his written closing on March 16, 2023.

Judgment Entry of August 29, 2023.

{¶20} The trial court issued its judgment entry on August 29, 2023 denying McCarthan's motion.

{¶21} First, it found that McCarthan's motion was, at its core, a motion to withdraw his guilty plea. It also rejected McCarthan's argument that the motion to withdraw a guilty plea should be treated as a presentence motion, having determined that it was a motion to withdraw a guilty plea after sentencing.

{¶22} Over thirty-two years after sentencing, it found that McCarthan must demonstrate a manifest injustice to withdraw his plea. The trial court further found that McCarthan's manifest injustice claims were based on alleged procedural errors barred by *res judicata* because McCarthan did not file a timely direct appeal.

{¶23} As to McCarthan's alleged fingerprint *Brady* violation, the trial court found that the fingerprints lifted from the vehicle belonging to a codefendant were not lifted from inside the gas station or the cash register as alleged by McCarthan.

{¶24} McCarthan filed this appeal from the trial court's judgment entry claiming five assignments of error:

ASSIGNMENTS OF ERROR

{¶25} "I. THE TRIAL COURT ERRED, AND ALSO ERRED TO THE PREJUDICE OF DEFENDANT AND ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTIONS. HIS PLEA VIOLATED R. C. 2945.06 AND CRIM. R. 11(C)(3) IN THAT THE TRANSCRIPT SHOWS THAT THE STATE DID NOT PROVIDE INDEPENDENT EVIDENCE, OR ANY EVIDENCE, OF GUILT OF AN AGGRAVATED-MURDER CHARGE WITH DEATH SPECIFICATIONS. THE PLEA WAS BEFORE A SINGLE JUDGE, WHO HEARD NO TESTIMONY FROM WITNESSES AT THE PLEA AND SENTENCING AND FAILED TO DETERMINE THE APPROPRIATENESS OF THE CHARGES. NO 3-JUDGE PANEL JOURNALIZED ANY FINDING OF GUILT IN AN OPINION OF THE PANEL, AS THERE WAS NO PANEL.

{¶26} "II. THE TRIAL COURT ERRED AND ALSO ERRED TO THE PREJUDICE OF DEFENDANT AND ABUSED ITS DISCRETION, IN DENYING DEFENDANT'S MOTIONS. DEFENDANT WAS UNCONSTITUTIONALLY THREATENED WITH DEATH TO PLEAD GUILTY TO THE CLARK CHARGES, AFTER HE WAS COMPLETELY ACQUITTED AT A TRIAL BY JURY OF THE GASTOWN MURDER CHARGES, AND HIS PLEA WAS NOT VOLUNTARY, INTELLIGENT OR KNOWING.

{¶27} "III. THE TRIAL COURT ERRED AND ALSO ERRED TO THE PREJUDICE OF DEFENDANT AND ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTIONS. THERE IS NO PROPER SENTENCING ENTRY OR FINAL APPEALABLE ORDER IN THIS CASE IN VIOLATION OF R.C. 2929.03(F) AND CRIM. R. 32(C). THE TRIAL, THEREFORE, WAS NEVER COMPLETED – THE PLEA WAS

NOT COMPLETED, AND THE SENTENCING WAS NOT COMPLETED. EVERY PART OF THIS CASE REVEALS A MANIFEST INJUSTICE.

{¶28} "IV. THE TRIAL COURT ERRED, AND ALSO ERRED TO THE PREJUDICE OF DEFENDANT AND ABUSED ITS DISCRETION, IN DENYING DEFENDANT'S MOTIONS. SUPERSEDING INDICTMENT I AND II WERE IMPROPERLY AND ILLEGALLY OBTAINED. WITHOUT A VALID CHARGING INSTRUMENT, THE COURT COULD NOT GO FORWARD.

{¶29} "V. THE TRIAL COURT ERRED, AND ALSO ERRED TO THE PREJUDICE OF DEFENDANT AND ABUSED ITS DISCRETION, IN DENYING DEFENDANT'S MOTIONS. DEFENDANT SHOULD BE PERMITTED TO WITHDRAW HIS PLEA TO PREVENT A FUNDAMENTALLY UNFAIR RESULT AND MANIFEST INJUSTICE."

I., III, IV.

{¶30} Appellant's assignments of error numbers One, Three and Four make several convoluted claims that will be considered together.

Motion to Withdraw guilty plea made after sentencing

{¶31} Appellant argues that his conviction and sentence were void ab initio and therefore the trial court erred in treating his hybrid motion as a motion to withdraw a guilty plea after sentencing.

{¶32} Crim.R. 32.1 provides as follows:

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed, but to correct manifest injustice the court after

sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

{¶33} The trial court properly recast McCarthan's hybrid, catch-all motion as a motion to withdraw guilty plea after sentencing. An appellate court reviews a trial court's decision on a motion to withdraw a plea under an abuse of discretion standard. *State v. Straley,* 2019-Ohio-5206, ¶ 15. An abuse of discretion connotes more than an error of law or judgment, it entails a decision that is unreasonable, arbitrary or unconscionable. *State v. Xie,* 62 Ohio St.3d 521, 526-527 (1992). In order to find an abuse of discretion, the trial court must have acted unjustly or unfairly and the ruling must be "unreasonable, arbitrary or unconscionable." quoting *State v. Adams,* 62 Ohio St.2d 151 (1980). *See also State v. Clark,* 71 Ohio St.3d 466, 470, 1994-Ohio-43.

{¶34} As the Supreme Court stated in its seminal *Smith* case, "A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *State v. Smith,* 49 Ohio St.2d 261 (1977) paragraph 2 of the syllabus.

{¶35} Finally, any "undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Id.* at paragraph three of the syllabus.

{¶36} McCarthan waited some 30 years before filing his motion to withdraw his guilty plea, a negotiated guilty plea that he sought in order to avoid a possible death penalty verdict.[1] This lengthy delay adversely impacts his credibility.

{¶37} After sentencing, a defendant may only withdraw his guilty plea to correct a manifest injustice. The appellant bears the burden of demonstrating manifest injustice. "[I]n general, manifest injustice relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Brown,* 2006-Ohio-3266, ¶ 5 (10th Dist.), citations omitted.

Res judicata bars McCarthan's motion.

{¶38} McCarthan raised several claims in support of his hybrid motion including that he should have been convicted and sentenced by a three-judge panel, that his judgment of conviction and sentencing was not a final appealable order, that his sentence was void because the death specification was never dismissed, and that the state never presented evidence of his guilt at his plea hearing.

{¶39} The trial court properly held that McCarthan's motion is barred by *res judicata. Judgment Entry,* August 29, 2023 at 7. "The doctrine of res judicata precludes a convicted defendant "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" at trial or on direct appeal. *State v. Hatton,* 2022-Ohio-3991, ¶ 22 quoting *State v. Szcfcyk,* 77 Ohio St. 3d 93 (1996), syllabus.

[1] McCarthan has served 39 years in prison and a parole board hearing is scheduled for September, 2024. https://appgateway.drc.ohio.gov.

McCarthan's Three-Judge Panel Claim

{¶40} McCarthan argues that his guilty plea was invalid since a single judge, as opposed to a three-judge panel, presided over his guilty plea and subsequently convicted and sentenced him. According to McCarthan, his guilty plea to a capital offense violated Crim.R. 11(C)(3) and R.C. 2945.06 as interpreted in *State v. Parker,* 2002-Ohio-2833, syllabus ("A defendant charged with a crime punishable by death who has waived his right to trial by jury must, pursuant to R.C. 2945.06 and Crim.R. 11(C)(3), have his case heard and decided by a three-judge panel even if the state agrees that it will not seek the death penalty.")

{¶41} McCarthan, however, did not object or otherwise challenge those procedures at the time of his plea and sentencing, and also did not timely appeal thereafter. He has therefore forfeited any challenges some 30 years later. So too, McCarthan cannot show that the guilty plea proceeding in his case would have been different had a three-judge panel, as opposed to a single judge, reviewed his guilty plea.

{¶42} Even so, McCarthan's argument is without merit.

{¶43} First, the argument ignores the fact that the guilty plea was entered as part of a negotiated plea agreement that spared McCarthan from facing the death penalty. And at the time of McCarthan's plea, *Parker* had not been decided – *State v. Griffin,* 73 Ohio App.3d 546 (Fifth Dist., 1992).

{¶44} Second, the Ohio Supreme Court has held that the failure to utilize a three-judge panel to accept a guilty plea for a capital defendant does not deprive the trial court of subject-matter jurisdiction and thus the conviction and sentence are not void *ab initio.*

The Ohio Supreme Court rejected the notion that the lack of a three-judge panel voids the conviction and sentence in *Pratts v. Hurley,* 2004-Ohio-1980:

> Although R.C. 2945.06 mandates the use of a three-judge panel when a defendant is charged with a death-penalty offense and waived the right to a jury, the failure to convene such a panel does not divest a court of subject-matter jurisdiction so that a judgment rendered by a single judge is void *ab initio.* Instead, it constitutes an error in the court's exercise of jurisdiction over a particular case, for which there is an adequate remedy at law by way of direct appeal. *Id* at ¶ 24.

{¶45} Finally, this Court has specifically held that a motion to withdraw a guilty plea is not the proper remedy to raise a *Parker* claim. In *State v. Dull,* 2020-Ohio-4229 (5th Dist.), the defendant, charged with capital aggravated murder, accepted a negotiated plea agreement from the state that precluded the imposition of a death sentence upon his guilty plea. Years later, the defendant filed a motion to withdraw his guilty plea based on *Parker* and R.C. 2945.06 grounds claiming that the failure to empanel a three-judge panel to entertain his guilty plea was a "manifest injustice." *Id.* at ¶ 7.

{¶46} This Court rejected this claim finding that at the time appellant would have appealed his sentence, the failure to convene a three-judge panel was not reversible error. *Id.* at ¶ 23 ("That the law may have changed a decade or more later does not justify . . . abandoning the law in place and the convictions based on it at the time of trial and the fact that the law may have changed in 2002 does not mean appellant had a valid ground for appeal in 1994." quoting *Ahart v. Bradshaw,* 122 Fed. Appx. 188 (6th Cir., 2005).

{¶47} So, too, the *Dull* Court rejected the claim on the principles of res judicata:

> In this case, it was obvious at the time appellant entered his plea of guilty that a single judge accepted his plea and imposed sentence. Consequently, appellant's argument that his plea was not knowing and voluntary due to the lack of compliance with R.C. 2945.06 and Crim.R. 11(C)(3) constitutes an error that must have been raised on direct appeal. Though appellant pled guilty and was sentenced in 1994, he did not seek a direct appeal of his sentence.

{¶48} *Id.* at ¶ 28. *See also State v. Mitchell,* 2008-Ohio-101, ¶ 39-40 (5th Dist.) ("… [T]he proper way to challenge a plea predicated on an error under R.C. 2945.06, without factual considerations of prejudice to a defendant, is a direct appeal. Appellant has or had an adequate remedy at law to rectify any asserted error on those grounds.")

McCarthan's other procedural claims

{¶49} McCarthan's argument that his conviction and sentence are void because the death penalty specifications were never dismissed and the state never presented independent evidence of guilt at the plea hearing suffers the same fate. *State v. Haddix,* 2017-Ohio-9212, ¶ 18 (5th Dist.) (holding that appellant's arguments regarding the purported lack of jurisdiction could have been raised on direct appeal.); *same State v. Flagg,* 2010-Ohio-4237, ¶ 37 (5th Dist.).

{¶50} "When a specific action is within a court's subject matter jurisdiction, any error in the exercise of that jurisdiction renders the judgment voidable, not void." *State v. Harper,* 2020-Ohio-2913, ¶ 26, citations omitted. "A voidable judgment may be set aside only if successfully challenged on direct appeal." *State v. Payne,* 2007-Ohio-4652, ¶ 28.

{¶51} McCarthan argues in both Assignments of Error 1 and 3 that he was convicted and sentenced with a judgment entry that was not a "final appealable order." This argument is undermined by the Ohio Supreme Court's holding in *State v. Griffin,* 2013-Ohio-5481, ¶ 22. In *Griffin,* a capital case, the Ohio Supreme Court held that the sentencing entry issued in 1990 [original sentencing entry] was a final appealable order. *Id.* at ¶ 22.

{¶52} The *Griffin* Court further held that even assuming arguendo that the defendant did not receive a final appealable order, the principles of *res judicata* applied and he failed to challenge the matter on direct appeal. *Id.* at ¶ 48.

{¶53} Appellant's assignments of error numbers One, Three and Four are overruled.

II.

{¶54} In his second assignment of error, appellant claims that his plea was not voluntary, intelligent or knowing because he was threatened with the death penalty by the state. Appellant claims such threat as well as his youth and threats to family members demonstrated that his plea was not voluntary. The trial court rejected McCarthan's claims noting that they were self-serving and did not support a manifest injustice. *Judgment Entry,* August 29, 2023 at 8.

{¶55} A self-serving affidavit is insufficient to establish manifest injustice. *State v. Rockwell,* 2008-Ohio-2162, ¶ 42 (5th Dist.).

{¶56} Appellant's bare assertions are not supported by the record. McCarthan signed a written plea of guilty which specifically sets forth that his plea is given freely, voluntarily and with understanding. The transcript of the plea hearing indicates that he

understood his plea, that no one threatened him, and that he was satisfied with his counsel.

{¶57} Appellant cites to no parts of the record or specific argument in support of his claim that his plea was coerced. *See* App.R. 16.

{¶58} We find that the trial court did not abuse its discretion in holding that he demonstrated no manifest injustice and that his plea was not coerced but spared him the fate of a possible death sentence.

{¶59} Appellant's second assignment of error is overruled.

V.

McCarthan's Brady Claim

{¶60} In appellant's final assignment of error, he essentially argues a *Brady* violation. McCarthan claims that he was not the shooter in the Clark Oil robbery and that the state withheld exculpatory evidence, namely a fingerprint card and a laboratory report that show the fingerprints of a co-defendant in the Clark gas station.

{¶61} The trial court found that the fingerprint card and laboratory report "do not support the defendant's assertion that he was not the shooter." *Judgment Entry,* August 29, 2023 at 8.

{¶62} As noted by the state, a *Brady* violation occurs when the state "withholds evidence that is favorable to the defendant and material to the defendant's guilt or punishment." *State v. Bethel,* 2022-Ohio-783, ¶ 19 quoting *Smith v. Cain,* 565 U.S. 73 (2012). There are three components to a *Brady* violation. To establish a *Brady* violation, (1) the defendant must demonstrate that the prosecutor failed to disclose evidence, (2) that the evidence was favorable to the defense, and (3) the evidence was material. The

accused bears the burden of proving a *Brady* violation. *State v. Vale,* 2023-Ohio-4287, ¶ 27 (10th Dist.), citations omitted.

{¶63} McCarthan's *Brady* violation claim is not supported by the record. The fingerprint card and laboratory report containing the fingerprints of a co-defendant were taken from the 1972 Pontiac used in the Clark Gas station robbery, not the inside of the gas station or the cash drawer. This was known at the time McCarthan pled guilty to the murder and robbery.

McCarthan's New Trial Claim

{¶64} Scattered among appellant's arguments is his request for a new trial. But, as noted by the trial court, McCarthan entered into a negotiated plea of guilty to avoid the possibility of a death sentence and never went to trial. Accordingly, he is not entitled to a new trial. *State v. Barnett,* 2016-Ohio-8070, ¶ 32 (5th Dist.) (". . . [B]ecause Barnett entered guilty pleas to all the charges and waived his right to have a jury determine his guilt or innocence, the trial court did not have jurisdiction to rule upon his motion for a new trial.")

{¶65} Appellant's fifth assignment of error is overruled.

CONCLUSION

{¶66} We find that the trial court did not err in treating McCarthan's motion as a motion to withdraw his guilty plea after sentencing.

{¶67} We further affirm the trial court's findings that appellant did not meet his burden to demonstrate a manifest injustice and that his claims are barred by *res judicata*.

{¶68} The judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, P. J.

Baldwin, J., and

King, J., concur.

JWW/kt 0924