NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1928

STATE OF LOUISIANA

VERSUS

REGAN M. TINGLE

Judgment Rendered: JUN 07 2013

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 489952-2 "H"

The Honorable Allison M. Penzato, Judge Presiding

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* * * * *

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

CRAIN, J.

The defendant, Regan M. Tingle, pled guilty to armed robbery and production or manufacture of marijuana. She was ordered to serve concurrent thirty year (armed robbery) and ten year (production or manufacture of marijuana) hard labor sentences. She filed a motion to set aside her guilty pleas and to dismiss the prosecution. The trial court denied the motion. We affirm.

PROCEDURAL BACKGROUND

The defendant and four co-defendants were charged by bill of information with armed robbery, a violation of Louisiana Revised Statute 14:64. The defendant initially pled not guilty; however, on April 11, 2011 she withdrew her not guilty plea and pled guilty to armed robbery and production or manufacture of marijuana, a violation of Louisiana Revised Statute 40:966A(1).[1] She was sentenced to thirty years at hard labor without benefit of parole, probation, or suspension of sentence for armed robbery and ten years at hard labor for the production or manufacture of marijuana, with the sentences to run concurrently.

On March 28, 2012, the defendant filed a pleading titled "Defendant's Motion To Set Aside Plea And Dismiss The Prosecution" seeking to set aside her guilty plea. The motion was summarily denied on April 2, 2012. On July 23, 2012, the defendant filed a notice of appeal from the April 2, 2012 denial. On the same date, the trial court denied the appeal as untimely. On September 4, 2012, the defendant filed a "Renewed Notice of Appeal" relative to the same April 2, 2012 denial. The trial court granted the appeal.

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[1] The drug charge was filed in Twenty-Second Judicial District Court docket number 489953 and was not included in this appeal record, which contains only docket number 489952-2. Nevertheless, the *Boykin* transcript and minutes in this appeal record reveal the defendant pled guilty to both the armed robbery and drug charges and was sentenced on both convictions.

FACTS

Because the defendant pled guilty, the facts were not fully developed at a trial. The factual basis for the guilty pleas, as derived from the *Boykin* transcript and the bill of information, is that the defendant participated in an armed robbery on April 25, 2010 that involved the use of a sawed-off shotgun and produced or manufactured marijuana.

TIMELINENESS OF APPEAL

The State contends that this appeal is untimely and should be dismissed. The motion for appeal was filed beyond the thirty day delay provided for in Louisiana Code of Criminal Procedure article 914B; and, to the extent the motion was considered an application for post-conviction relief, the procedural requirements for granting a post-conviction relief application were not followed. *See*, La. Code of Crim. Pro. arts. 927, 930; *State v. Counterman*, 475 So. 2d 336, 339 (La. 1985). However, the State failed to seek review of that ruling in a timely manner and objected to the timeliness of the appeal for the first time in its brief to this court. Under these circumstances, we find that the State is precluded from objecting to the grant of the defendant's out-of-time appeal. *See, State v. George*, 39,959 (La. App. 2 Cir. 10/25/05) 914 So.2d 588, 591, *writ denied*, 06-0707 (La. 10/6/06), 938 So. 2d 66; *State v. Charles*, 02-0443 (La. App. 3 Cir. 10/2/02), 827 So. 2d 553, 559, *writ denied*, 02-2707 (La. 3/28/03), 840 So. 2d 569.

DISCUSSION

In three related assignments of error, the defendant argues that her plea agreement was not entered freely and voluntarily; the trial court erred when it accepted the plea agreement; and the defendant did not have effective assistance of counsel. The essence of the defendant's argument in support of all three assignments is that her guilty plea should be withdrawn because it was

constitutionally infirm. In addition to these assigned errors, the defendant argues that her sentence was excessive.

Assignment of Error Nos. 1 and 2:
Voluntariness of Pleas and Acceptance by Trial Court

A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. *State v. Thornton*, 521 So. 2d 598, 600 (La. App. 1 Cir.), *writ denied*, 530 So. 2d 85 (La. 1988). A trial court may permit the withdrawal of a guilty plea at any time before sentencing. La. Code Crim. Pro. art. 559A. A trial court may permit the withdrawal of a guilty plea after sentencing only if it finds that the guilty plea is constitutionally infirm. *State v. Bell*, 00-1084 (La. App. 5 Cir. 2/28/01), 781 So. 2d 843, 847, *writ denied*, 01-0776 (La. 4/26/02), 813 So. 2d 1098. A guilty plea is constitutionally infirm if it was not entered freely and voluntarily, if the *Boykin* colloquy is inadequate, or if the defendant was induced to plead guilty by a plea bargain that was not kept. *State v. Lewis*, 421 So. 2d 224, 226 (La. 1982); *State v. Hayes*, 423 So. 2d 1111, 1114 (La. 1982). The court's decision whether or not to set aside a guilty plea is discretionary and subject to reversal only if that discretion is abused or arbitrarily exercised. *State v. Lewis*, 633 So. 2d 315, 317 (La. App. 1 Cir. 1993).

Under *Boykin v. Alabama*, 395 U.S. 238 (1969), before accepting a guilty plea, a trial court must ascertain that the defendant has knowingly and voluntarily waived his rights against self-incrimination, to a jury trial, and to confrontation. *State v. Fields*, 95-2481 (La. App. 1 Cir. 12/20/96), 686 So. 2d 107, 109.

The transcript of the defendant's *Boykin* examination shows, and the defendant does not contest, that the trial court thoroughly informed her of her constitutional rights and the consequences of waiving those rights. At the time of the plea, the defendant stated that she dropped out of school in the twelfth grade, but obtained her GED, and that she was not under the influence of drugs, alcohol

or other mind altering substances. The trial court then informed the defendant of the elements of each charged crime and the penalties for a conviction of those crimes, specifically, that an armed robbery conviction carried a possible sentence of not less than ten years nor more than ninety-nine years, without benefit of parole, probation or suspension of sentence, and that production or manufacture of marijuana carried a possible sentence of not less than five years nor more than thirty years. The defendant acknowledged her understanding of the charges.

The trial court informed the defendant that she had the right to hire a lawyer of her choice, or have an attorney appointed free of charge; that she had the right to a trial, with or without a jury; that she had the right to confront or cross-examine witnesses; that the State had to prove she committed the charged crimes beyond a reasonable doubt; that she could subpoena witnesses; that she could invoke her right against self incrimination and remain silent; and that if convicted at trial, she had the right to appeal her conviction with the assistance of a paid or appointed attorney. The defendant acknowledged her understanding of those rights and that she was waiving them by pleading guilty.

The *Boykin* transcript also shows, and the defendant does not contest, that her plea was the result of a plea bargain that has been kept. The trial court expressed its understanding that the defendant's willingness to plead guilty resulted from a plea agreement and that the substance of the agreement would be disclosed when she was sentenced. The trial court instructed the defendant that if the sentence was not in accordance with the defendant's understanding, then she could withdraw the guilty plea at that time. When asked if she understood, the defendant replied, "Yes, ma'am." The trial court then asked if the defendant was satisfied with her lawyer's work, to which she replied, "Yes, I am." When asked if her lawyer explained her rights to her, she answered, "Yes, he has." After the State and defense counsel stipulated to a factual basis for the plea, the trial court

imposed the sentences of thirty years for armed robbery and ten years for production and manufacture of marijuana, and ordered that they run concurrently. The trial court then asked the defendant if those sentences conformed to her plea agreement and she answered, "Yes, ma'am." Upon this record, we find that the *Boykin* colloquy was exceptionally thorough and complete and that the sentences complied with the defendant's plea agreement.

Nearly one year after they were entered, the defendant filed a motion to withdraw her guilty pleas and for the first time asserted that her pleas were not knowing and voluntary. In her motion and now on appeal, she contends that she was not informed of the consequences of the pleas and was forced to enter the plea agreement because the trial court threatened a longer sentence if she was convicted at trial. The defendant claims that her trial counsel informed her that the trial judge required her to accept a plea agreement for a thirty year sentence or if she refused and went to trial she would be sentenced to forty-nine years and the sentence for the drug offense would not run concurrently.

Attached to the defendant's motion presented to the trial court were the following documents:

Exhibit 1: Extract of court minutes from the April 11, 2011 guilty plea;

Exhibit 2: Email from Robert Stern to post-conviction counsel, Shawn P. Sirgo, dated September 26, 2011;

Exhibit 3: Affidavit of Regan Tingle, Affidavit of Devyn Michael Rome, and Affidavit of Jeward Miller;

Exhibit 4: Affidavit of Allen Tingle; and

Copy of *State v. Bienvenu*, 11-491 (La. App. 3d Cir. 11/2/11) (unpublished), 2011 WL 5241147.

The record was supplemented on April 5, 2012 with the Affidavit of Bryant Murray.

Although filed into the record, these documents were never admitted in evidence because the trial court summarily denied the defendant's motion. An evidentiary hearing on a motion to withdraw a guilty plea may be held, but is not required. *See, State v. Hipps*, 06-1785, (La. App. 1 Cir. 3/23/07) (unpublished), 2007 WL 866338 ; *State v. Lewis*, 633 So. 2d 318 (La. App. 1 Cir. 1993). However, having considered the substance of the documents, we find that they do not support defendant's claim that her plea should be set aside. *See*, *State v. Green*, 94-617 (La. App. 3 Cir. 12/7/94), 647 So. 2d 536, 540.

The affidavits of Rome, Miller and Murray express no knowledge of the defendant's plea process. The affidavit of the defendant's father, Allen Tingle, offers no personal knowledge of facts that support the defendant's assertion that her plea was not knowing and voluntary. His affidavit consists mostly of criticisms of trial counsel's handling of the case. Tingle also attested that trial counsel informed him that the trial judge was offering a thirty year sentence at eighty-five percent that would increase to forty-nine years if not accepted. According to Tingle, trial counsel told him that if he objected to the sentence, he would make the judge angry and could be held in contempt. Tingle attested that he was encouraged to come to court and talk his daughter into accepting the plea. Relative to the plea bargain process itself, the affidavit is not based on personal knowledge of any relevant facts and contains speculation and conclusory statements, none of which support the claim of a constitutionally infirm plea by the defendant.

In the defendant's affidavit, she states that she was advised by her trial counsel that the trial judge told him that the defendant "either take the 30 years or she goes to trial and I will sentence her to 49 years." According to the defendant, she asked trial counsel if she could tell the judge that she "was threatened by her" and was told "no." The defendant also claims that she believed she could "get

away from this judge and come back and fight it" if she pled guilty. The defendant attested that the only reason she pled guilty was because her trial counsel told her that the "judge demanded that I serve 30 years or she would punish me for not accepting the plea."

The only first-hand account of what transpired between the defendant's trial counsel and the trial court during the defendant's plea process is the September 26, 2011 email from trial counsel to appellate counsel that was attached to the motion. That account of the interactions between the court, defense counsel and the district attorney's office reflect the plea process. First, a meeting between defense counsel and the district attorney was held that was unsuccessful in obtaining leniency relative to the prosecution. Then efforts were made by defense counsel to obtain mitigation information for the court to consider in plea discussions. After available information about the crimes and the defendant's commission of them was gathered, the trial court gave a recommended sentence if the defendant pled guilty. The defendant was then faced with the unpleasant reality of accepting the plea agreement or going to trial and risking a greater sentence if she was convicted.

A trial commonly produces more detailed information about the commission of the crimes than is presented during plea negotiations. Consequently, a risk of proceeding to trial is the possible imposition of a longer sentence after a trial. Courts have consistently recognized that when a defendant chooses not to accept the plea bargains offered by the State, she takes the risk of a greater penalty upon a jury conviction. *See*, *State v. Douglas*, 10-2039 (La. App. 1 Cir. 7/26/11), 72 So. 3d 392, 402, *writs denied*, 11-2307 (La. 5/25/12), 90 So. 3d 406 and 12-2508 (La. 5/3/13), ___ So. 3d ____; *State v. Lewis*, 39,263 (La. App. 2 Cir. 1/26/05), 892 So. 2d 702, 710; *State v. Johnson*, 11-375 (La. App. 5 Cir. 12/28/11), 83 So. 3d 1116, 1123, *writ denied*, 12-0296 (La. 6/22/12), 91 So. 3d 966.

In *State v. Fortino*, 02-708 (La. App. 5 Cir. 12/30/02), 837 So. 2d 684, the defendant argued that the trial court penalized him with an excessive sentence for opting to go to trial rather than entering a plea agreement. In rejecting the claim, the court quoted the following relevant explanation of the plea bargaining process from *Bordenkircher v. Hayes*, 434 U.S. 357, 363-364 (1978):

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer...
>
> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" and permissible "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. [Citations omitted].

Fortino, 837 So. 2d at 691-692.

The record establishes that the defendant voluntarily and with assistance of counsel accepted a plea agreement to avoid the possibility of a harsher sentence if convicted at trial. The defendant had every right to reject the plea agreement and face the risk of a harsher result, and chose not to do so. Her choice appears reasoned when one considers that the defendant's own version of the plea bargain process, in which she claims that the trial court told her attorney that she "either take the 30 years or she goes to trial and I will sentence her to 49 years," assumes that she would be found guilty at trial of the charged offense of committing an armed robbery. The record reflects that the defendant has never claimed actual innocence, but only objects to the length of her sentence. It is well-settled that dissatisfaction with a sentence is not a basis for withdrawing a guilty plea. *State v.*

Boatright, 406 So. 2d 163, 165 (La. 1981); *State v. Cook*, 591 So. 2d 1248, 1252 (La. App. 5 Cir. 1991).

We find the pleas were knowingly and intelligently entered, that they were not forced or coerced, and were within constitutional dimensions. A plea agreement was offered to the defendant, it was accepted, and the terms were kept. The pleas were not rendered involuntary because of the communication to the defendant of the risk that she could receive a longer sentence if she proceeded to trial and was convicted. Considering the record as a whole, the trial court neither abused nor arbitrarily exercised its discretion in denying the motion to withdraw the defendant's guilty pleas. The defendant's first two assignments of errors are without merit.

Assignment of Error No. 3:
Assistance of Counsel

The defendant's final assignment of error asserts that her trial counsel was ineffective for failing to: (1) conduct further discovery regarding her involvement in the crimes, (2) file pre-trial motions, (3) protect the defendant's rights in connection with the plea agreement, (4) interview any potential witnesses or any of the co-defendants, (5) prepare a "probable defense" for the defendant, or (6) speak to her about any defenses.

A claim of ineffectiveness of counsel is generally relegated to post-conviction proceedings. *State v. Calhoun*, 96-0786 (La. 5/20/97), 694 So. 2d 909, 914. However, where the claim is raised as an assignment of error on direct review and where the record on appeal is adequate to resolve the matter, the claims should be addressed in the interest of judicial economy. *Calhoun*, 694 So. 2d at 914. The two-part test of *Strickland v. Washington,* 466 U.S. 668 (1984), applies to challenges of guilty pleas based on claims of ineffective assistance of counsel. *State v. West*, 09-2810 (La. 12/10/10), 50 So. 3d 148, 149. To establish that her

trial attorney was ineffective, the defendant must establish: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's inadequate performance prejudiced the defendant to the extent that the proceedings were rendered unfair and the convictions suspect. *West*, 50 So. 3d at 149. To satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty and would have insisted on going to trial. *State v. Washington*, 491 So. 2d 1337, 1339 (La. 1986) (quoting *Hill v. Lockhart,* 474 U.S. 52 (1985)).

The record does not support the defendant's claims that her trial counsel's performance was unreasonable or inadequate. Defense counsel filed numerous motions relative to the charges pending against the defendant, including a motion for preliminary examination, an omnibus motion and order that included an application for bill of particulars, motion for production of documents and tangible objections, motion for pre-trial discovery, motion for preliminary examination, motion to suppress evidence and motion to suppress exculpatory statements. The State produced "open file" discovery to the defendant. The defendant's motions were set for hearing several times before finally being continued until the trial date and then withdrawn at the time the plea agreement was entered. Defense counsel also retained the services of a psychiatrist who performed an independent psychiatric evaluation of the defendant for use in connection with the plea negotiations.

Before being sentenced, the trial court asked the defendant if she was satisfied with her lawyer's work and she responded "Yes, I am." She acknowledged that her attorney had explained her rights to her. Defense counsel also confirmed on the record that he was satisfied that the defendant "knowingly, intelligently, voluntarily, and willfully wants to plead guilty." He pointed out that

the psychiatrist's report contained nothing that would affect the defendant's ability to either understand the proceedings or to "enter a knowing, free and voluntary plea."

The defendant was charged with crimes that carried maximum sentences of ninety-nine years (armed robbery) and thirty years (production or manufacture of marijuana). Unless the charged offenses are based on the same act or transaction, or constitute part of a scheme or plan, sentences for convictions for multiple offenses "shall be served consecutively unless the court expressly directs that some or all of them be served concurrently." La. Code Crim. Pro. art. 883. No facts suggest that the armed robbery and the production or manufacture of marijuana were based upon the same act or transaction. Therefore, but for the plea bargain negotiated for, and agreed to by, the defendant, she was exposed to the possibility of lengthy consecutive sentences if convicted.

Having received concurrent sentences totaling thirty years for crimes which carried possible sentences of one hundred and twenty-nine years if imposed consecutively, the benefit of the plea bargain to the defendant is apparent. We cannot say that trial counsel's actions or inactions rendered the plea bargain constitutionally infirm. Nor can we say that but for trial counsel's representation, the defendant, faced with the risk of a guilty verdict and the possibility of lengthy consecutive sentences, would have maintained her not guilty plea and gone to trial.

The defendant also argues that her trial counsel failed to interview any potential witnesses or any of the co-defendants, and he did not prepare a "probable defense" for the defendant or speak to her about any defenses. She does not say what the witnesses would have said and does not say what her probable defense should have been. Nevertheless, decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond

what is contained in the instant record, could these allegations be sufficiently investigated.[2] Accordingly, the third assignment of error urging ineffective assistance of counsel is without merit or otherwise not subject to appellate review. *See, State v. Albert*, 96-1991 (La. App. 1 Cir. 6/20/97), 697 So. 2d 1355, 1363-64; *State v. Martin*, 607 So. 2d 775, 788 (La. App 1st Cir. 1992).

EXCESSIVE SENTENCE

Lastly, the defendant argues her sentences must be reviewed for excessiveness. However, a sentence imposed in conformity with a plea agreement set forth in the record at the time of the plea cannot be appealed or reviewed. La. Code Crim. Pro. art. 881.2A(2); *State v. Young*, 96-0195 (La. 10/15/96), 680 So. 2d 1171, 1175. Having been sentenced in accordance with a plea agreement, the defendant is procedurally barred from appealing her sentences.

CONVICTIONS AND SENTENCES AFFIRMED.

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[2] The defendant would have to satisfy the requirements of Louisiana Code of Criminal Procedure article 924, et. seq., in order to receive such a hearing.