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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-55

Filed: 18 December 2018

Robeson County, No. 11 CRS 052162

STATE OF NORTH CAROLINA

v.

QUINTIN SHAROD TAYLOR

Appeal by defendant from judgment entered 6 April 2017 by Judge Robert F. Floyd in Robeson County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Kimberly P. Hoppin, for defendant-appellant.

DAVIS, Judge.

Quintin Sharod Taylor (“Defendant”) appeals from his convictions for second-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On appeal, he argues that the trial court erred by denying his motion to withdraw his guilty plea. Alternatively, he contends that he received

ineffective assistance of counsel. After a thorough review of the record and applicable law, we affirm the trial court's denial of Defendant's motion to withdraw and dismiss his ineffective assistance of counsel claim without prejudice to his right to raise it in a future motion for appropriate relief.

Factual and Procedural Background

On 11 July 2011, Defendant was indicted by a Robeson County grand jury for first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. A pretrial conference was held on 11 October 2011 during which the State announced its intention to seek the death penalty.

A plea hearing was held in Robeson County Superior Court on 24 June 2014 before the Honorable James G. Bell. Pursuant to a plea agreement with the State, Defendant pled guilty to second-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery. His plea was conditioned on his continued cooperation with the State in the pending prosecutions of his co-defendants.

At the 24 June 2014 plea hearing, Defendant acknowledged that he was, in fact, guilty of the charged offenses and consented to the State summarizing the factual basis supporting his guilty plea. The prosecutor then summarized the evidence as follows upon entry of Defendant's guilty plea:

[F]or purposes of this plea, the State would show to the Court that the victim in this case, Brandon Lee Hunt, was murdered on March 13, 2011. He died as a result of a gunshot wound inflicted on him by . . . Taurus Locklear

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who is a co-defendant to [Defendant].

The Fairmont -- this occurred inside the city limits of Fairmont. The Fairmont Police Department began an investigation, requested the assistance of the North Carolina State Bureau of Investigation. As a part of that joint investigation and as they began -- they began interviewing some witnesses who raised three names of people of interest. [Defendant], Taurus Locklear, the co-defendant, and an individual by the name of Shawn Jones.

As the investigation continued within the first 24 hours, [Defendant] actually came to the Fairmont Police Department and was interviewed. He made a statement that an unknown Indian male and unknown black male were walking in the area of Market Street and McDaniel Street when the victim was shot and killed.

[Defendant] said that he saw the victim and walked up to him. He said that after walking up to him that an unknown Indian male . . . walked up, and as [Defendant] was, quote, licking a blunt, he stated he heard a smack. He heard Mr. Hunt, the victim, say they've got a gun. And he heard another shot fired as he got up to try to run himself.

In addition to that, within the first 24 hours, an officer with the Fairmont Police Department -- and I apologize to the Court. I don't have his name in front of me. But an officer who was on patrol that night reported that [Defendant] had actually come up to him within minutes following the shooting of Brandon Hunt and stated to the officer that he saw an unknown Indian male and an unknown black male running from the area of where the shooting had occurred.

The officer, after getting that information and calling back in, he actually observed [Defendant] then walk back over to two individuals and start walking with them. The officer described those two individuals as being an Indian male and a black male.

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As officers continued their investigation, they interviewed multiple witnesses. During the course of this investigation, multiple witnesses stated that they saw [Defendant] in the company of an Indian male by the name of Taurus Locklear and a black male by the name of Shawn Jones within the 24-hour period prior to the shooting. These witnesses stated that they were together. One of the witnesses stated that during that time frame she observed [co-]defendant Taurus Locklear with a gun.

Witnesses also then stated that within the hours prior to the shooting that they observed [Defendant] along with [co-]defendant Locklear and Mr. Jones at a house there in the city limits of Fairmont within a few blocks of the shooting site. The house was known to serve liquor by the drink also where others would congregate, would stand around, would talk, other things such as smoking marijuana, and other things would occur.

These witnesses stated they saw [Defendant] there within the hours prior to the shooting. They stated that they also saw Taurus Locklear and Mr. Jones there as well. Several of those witnesses stated that they saw over the course of the time that they were there and within the hours prior to the shooting the three of these individuals, Mr. Locklear, [Defendant], and Mr. Jones, standing off to the side talking. They did not know specifically what they were talking about.

One witness stated that just prior to the shooting he saw [Defendant] walking off with Mr. Locklear and Mr. Jones. He stated that [Defendant] -- he asked [Defendant] where they were going. [Defendant] told him that they had something to take care of, they would be right back. They did not come back.

During the course of the investigation as well, Mr. Jones, was interviewed by law enforcement. He stated that at the time of the shooting that there had been a discussion

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between [Defendant] and Mr. Locklear that Mr. Locklear was going to rob the victim, Brandon Hunt. He stated that he was going to stick him -- going to basically hold him up, going to rob him of some money. They knew he had some money. They knew he kind of sold drugs at a very low level, but they knew he -- Mr. Locklear knew he had money. And so there was an agreement.

They started walking over. Mr. Jones reported that he stayed across the street from where this happened. He stated that [Defendant] walked up first, that he knew the victim. They started talking, just standing there kind of hanging out talking. That Mr. Locklear approached. Mr. Jones stated that he turned to start walking back towards the Subway which is located there about a block or so away, and as he's turning around and started to walk away, he heard a shot. He started running. He said that Mr. Locklear then caught up with him. Mr. Locklear was out of breath. He was in a frenzy. That they ultimately were able to call someone to come pick them up. That witness, that person who picked them [up] was interviewed by law enforcement. The individual picked them up and took them to I think it was the Social Services building out on 711.

In any event, during the ride out there, Mr. Jones reported that Mr. Locklear was agitated. He was upset. He was nervous. That he at some point made the statement that he had just shot a guy, indicating that he shot Mr. Hunt. Mr. Jones also reported that at some point during that ride Mr. Locklear then pulled a gun on him. Mr. Jones told him that he wasn't going to say anything about it. They were dropped off, and then they separated at that point.

Based upon that, officers then went back to [Defendant] and spoke with him. And after being interviewed, he admitted that he knew that there was going to [be] a robbery. He knew that they -- there was a conversation had taken place. He had said that Mr. Jones

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and Mr. Locklear were the ones that were planning to rob Mr. Hunt. [Defendant] stated that he knew Mr. Hunt. He knew that he wasn't any -- he wasn't going to do anything if he were robbed. He was kind of -- he was a very easy going guy. He was not the kind of guy that anybody wanted to rob. And so his plan was to go along with this up to the point to try to get Brandon Hunt away from the situation.

He stated that -- in this interview as well as subsequent interviews, he stated that when they went over there he was trying to get Mr. Hunt alone. There were other individuals that were around. And ultimately, [by] the point he got him alone to try to tell him they needed to leave, it was too late. Mr. Locklear was there. Within a matter of a minute or so, Mr. Locklear pulled out a gun, shot Mr. Hunt, and then everybody scattered at that point.

Based upon the investigation, there were multiple witnesses that put Mr. Locklear, [Defendant], and Mr. Jones together in the day prior. They put them also together not only within the hours prior but also together talking amongst themselves. There -- one witness as well as Mr. Jones and [Defendant], stated that there was an agreement, there was a discussion about robbing . . . Mr. Hunt. That there was an agreement between them to do that even though at some point [Defendant] had decided to change his mind. [Defendant] did confess to what he knew and it's his involvement which constitute the charges that he is pleading guilty to.

The trial court accepted Defendant's plea and deferred sentencing until the resolution of the State's pending case against Locklear.

On 25 August 2015, the State dismissed all charges against Locklear. In explaining the reasons for the dismissal, the prosecutor noted on the dismissal form that several key witnesses stated that they were afraid to testify against Locklear

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and would not testify truthfully if called upon. In addition, the dismissal form indicated that one item of evidence was missing and several other items had been improperly labeled. On 10 November 2015, Defendant filed a motion to dismiss the charges to which he had previously pled guilty. He subsequently filed a motion to withdraw his guilty plea on 28 December 2015.

On 7 April 2016, an evidentiary hearing on Defendant's motion to dismiss was held before the Honorable Robert F. Floyd in Robeson County Superior Court. At the hearing, Detective Roy Grant of the Fairmont Police Department and SBI Special Agent Paul Songalewski testified with regard to their involvement in the investigation of Defendant.

During his testimony, Detective Grant read into evidence a report he prepared on 7 August 2012 documenting an interview that he and Special Agent Songalewski had conducted with Defendant over a year earlier. Although the report indicated that the interview occurred on 7 April 2011, Detective Grant testified that he wrote down the incorrect date on the document and that the interview had actually taken place on 25 March 2011.

Detective Grant's report stated, in pertinent part, as follows:

Agent Songalewski then started talking to [Defendant] who then told us that he had set the victim Mr. Brandon Hunt up to be robbed. [Defendant] stated that Bobby Deshawn Jones and himself had called or spoke with Mr. Hunt and told him to meet them. [Defendant] said he took Taurus Locklear with them. There was an exchange of

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words between Brandon and Taurus and Taurus pulled out a gun and shot.

Detective Grant further testified that Defendant's statements were made prior to a reading of his *Miranda* rights and were not recorded.

Special Agent Songalewski testified that although the SBI interviewed Defendant "at least four times" during the course of its investigation, he did not participate in an interview of Defendant on 7 April 2011. Rather, the only date upon which he interviewed Defendant was 25 March 2011. With regard to statements attributed to Defendant in Detective Grant's report, the following exchange occurred between Defendant's counsel and Special Agent Songalewski:

[DEFENSE COUNSEL]: All right. I'm inviting your attention to lines -- line 6, it states, "Agent Songalewski then started talking to [Defendant], who then told us that he had set the victim, Mr. Brandon Hunt, up to be robbed."

[Defendant] never said that to you on April 7th of 2011 or any other time, did he?

[SPECIAL AGENT SONGALEWSKI]: No, sir.

[DEFENSE COUNSEL]: All right. It goes on to state . . . "[Defendant] stated that Bobby Deshawn Jones and himself had called or spoke with Mr. Hunt and told him to meet them."

[Defendant] didn't say that to you on April 7th of 2011, did he?

[SPECIAL AGENT SONGALEWSKI]: No, sir.

[DEFENSE COUNSEL]: And it stated, "[Defendant] said

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he took Taurus Locklear with them.”

All right. [Defendant] didn't tell you that, did he?

[SPECIAL AGENT SONGALEWSKI]: No, sir.

At the conclusion of the hearing, the trial court orally denied the motion to dismiss as “a little bit premature.”

On 7 June 2016, a hearing was held on Defendant's motion to withdraw his guilty plea. At the hearing, Defendant's counsel informed the trial court that although Defendant “always denied” making the inculpatory statements in Detective Grant's report, Defendant's counsel had nevertheless advised Defendant to plead guilty based upon the statements contained in Detective Grant's report that were purportedly made by Defendant. Defendant's counsel explained that he had so advised Defendant because he believed that if Defendant had, in fact, stated that he “set the victim up to be robbed” then “that would have been an admission of felony murder . . . and that would have been it for us at trial.”

Defendant's counsel further stated that he did not realize that the conflicting reports of Detective Grant and Special Agent Songalewski potentially referred to the same interview until the State's dismissal of the charges against Locklear prompted him to reexamine the discovery he had received from the State in Defendant's case. He asserted that “but for that discrepancy, which was, we believe, not just a discrepancy, but an outright falsehood on the part of Detective Grant my client would

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not have taken the plea.” Defense counsel argued that Defendant was entitled to withdraw his guilty plea based upon ineffective assistance of counsel, concluding as follows:

[O]ur position is that my client clearly, clearly is entitled to effective assistance of counsel and also is entitled to be in a position where he can make an intelligent decision whether to take an offer, a plea offer, and he’s had neither of these in this situation because counsel was rendered ineffective by receiving information that was not correct from the State, which the State did not correct.

And because of the fact that my client could not have made an intelligent decision under these circumstances given the state of advice he received from me based on what I had received from the State and based on the information that he also reviewed in the discovery I gave him, Your Honor, we believe that my client is clearly entitled to withdraw the plea.

Special Agent Songalewski testified once again that he only interviewed Defendant on one occasion — 25 March 2011. He stated that during that interview he confronted Defendant with inconsistencies in his prior statements to law enforcement in which Defendant gave evolving accounts of both the shooting and his association with his co-defendants. Upon being informed that several witnesses observed him in conversation with Locklear and Jones immediately prior to the shooting, Defendant stated “Okay, let me go ahead and tell you what’s up.”

At that point, according to Special Agent Songalewski, Defendant gave an account of Hunt’s murder that included him overhearing Locklear and Jones

formulating a plan to rob Hunt and hearing Locklear state that he would shoot Hunt if the robbery “did not go down right.” Defendant informed Special Agent Songalewski that he only agreed to accompany Locklear and Jones to Hunt’s apartment because he did not want Hunt to get shot. Special Agent Songalewski testified that — prior to this statement on 25 March 2011 — Defendant had never admitted to being with Locklear and Jones on the date of Hunt’s murder or accompanying them to Hunt’s apartment. Special Agent Songalewski also testified that Defendant never stated during the interview that he “set [Hunt] up to be robbed.”

Detective Grant also testified at the hearing on Defendant’s motion to withdraw. He maintained that although he wrote down the incorrect date on his report memorializing Defendant’s 25 March 2011 interview, he had, in fact, heard Defendant state during the interview that Defendant had set Brandon Hunt up to be robbed.

Although Defendant was called to the witness stand during the hearing, he ultimately elected not to testify after being informed by the trial court that no limitation would be placed upon the scope of cross-examination and that anything he said “may be used against him in any further trial.”

On 5 April 2017, the trial court entered an order denying Defendant’s motion to withdraw his guilty plea. On that same day, pursuant to Defendant’s plea agreement, the trial court sentenced him to consecutive terms of imprisonment of 157

to 198 months on the charge of second-degree murder, 64 to 86 months on the charge of robbery with a dangerous weapon, and 25 to 39 months on the charge of conspiracy to commit robbery with a dangerous weapon. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred by denying his motion to withdraw his guilty plea because he established a fair and just reason for withdrawal. In the alternative, he asserts that he was denied effective assistance of counsel.

I. Motion to Withdraw Guilty Plea

In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, this Court "does not apply an abuse of discretion standard, but instead makes an independent review of the record." *State v. Villatoro*, 193 N.C. App. 65, 68, 666 S.E.2d 838, 841 (2008) (citation omitted). "Although there is no absolute right to withdraw a plea of guilty, a criminal defendant seeking to withdraw such a plea, prior to sentencing, is generally accorded that right if he can show any fair and just reason." *State v. Marshburn*, 109 N.C. App. 105, 107-08, 425 S.E.2d 715, 717 (1993) (citation and quotation marks omitted).

Our Supreme Court has set forth the following factors for consideration with regard to such motions to withdraw:

Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

State v. Handy, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990) (internal citations omitted). "The State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *Id.* However, "[t]he State need not even address concrete prejudice until the defendant has asserted a fair and just reason why he should be permitted to withdraw his guilty pleas." *Villatoro*, 193 N.C. App. at 68, 666 S.E.2d at 841 (citation, quotation marks, brackets, and ellipsis omitted).

A. Assertion of Legal Innocence

Defendant first contends that — despite his evolving and inconsistent statements to law enforcement officers — he did, in fact, assert his legal innocence because he never admitted to participating in Hunt's robbery or murder. We disagree.

In *State v. Chery*, 203 N.C. App. 310, 691 S.E.2d 40 (2010), the defendant claimed that he had asserted his legal innocence "based upon his plea of no contest to the charge of conspiracy . . . and his subsequent testimony at a co-defendant's trial that he did not agree to participate in a robbery." *Id.* at 313, 691 S.E.2d at 44. This

Court concluded, however, that the mere fact that the defendant entered a plea of no contest failed to “conclusively establish the factor of assertion of legal innocence for purposes of the *Handy* analysis.” *Id.* at 315, 691 S.E.2d at 44. We further held that the defendant’s subsequent testimony that he “did not agree to take part in any robbery” was “negated by the fact that defendant stipulated to the factual basis of the plea[.]” *Id.* at 315, 691 S.E.2d at 45.

In the present case, Defendant entered a plea of guilty, rather than a no contest or *Alford* plea. At the 24 June 2014 plea hearing, he stated under oath that he was “in fact guilty” of second-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant also acknowledged that there was a factual basis supporting his guilty plea and stipulated to a summary of that factual basis by the State.

We are unpersuaded by Defendant’s argument that his inconsistent statements to law enforcement prior to his arrest are sufficient to negate his later guilty plea for purposes of this factor of the *Handy* test. Therefore, we hold that this factor does not weigh in favor of Defendant.

B. Strength of the State’s Proffer of Evidence

Defendant next contends that the State’s proffer of evidence against him was weak based upon the State’s subsequent dismissal of the charges against Locklear and the State’s notation on its dismissal form that certain pieces of evidence relevant

to Locklear's trial were either missing or mislabeled. As an initial matter, this Court has held that the strength of the State's proffer of evidence must be assessed based upon the factual basis presented at the plea hearing. *See Chery*, 203 N.C. App. at 315, 691 S.E.2d at 45 ("We must view the State's proffer based upon what was presented to the court at the plea hearing . . . and not based upon what occurred at the subsequent trial of co-defendant Wexler."). Therefore, the fact that Locklear's charges were later dismissed has no bearing upon our analysis of this factor.

Here, the State's proffer of evidence at the plea hearing was uncontested. It included statements from multiple witnesses indicating that they saw Defendant conversing with Locklear and Jones during the time period immediately prior to Hunt's killing. The State's summary showed that Defendant made multiple inconsistent statements to law enforcement before ultimately admitting that he was aware of the existence of a plan to rob Hunt, as well as the fact that Defendant was conversing with Hunt at the time that Locklear shot and killed him.

Thus, we are satisfied that the State's proffer of evidence against Defendant — while not overwhelming — was sufficient. Therefore, this factor likewise fails to support withdrawal of his guilty plea.

C. Length of Time Between Entry of Guilty Plea and Filing of Motion to Withdraw

Our appellate courts have "placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea." *Villatoro*,

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193 N.C. App. at 71, 666 S.E.2d at 842 (citation and quotation marks omitted); *see, e.g., State v. Robinson*, 177 N.C. App. 225, 230, 628 S.E.2d 252, 255 (2006) (affirming denial of motion to withdraw guilty plea where motion was filed three and one-half months after entry of guilty plea); *Marshburn*, 109 N.C. App. at 109, 425 S.E.2d at 718 (affirming denial of withdrawal motion and holding that reasons given by a defendant for seeking withdrawal “must have considerably more force [in the context of an eight-month delay] than would be the case if a motion comes only a day or so after the plea was entered” (citation and quotation marks omitted)).

Here, eighteen months passed between the entry of Defendant’s guilty plea on 24 June 2014 and the filing of his motion to withdraw on 28 December 2015. In his appellate brief, Defendant nevertheless asserts that “where a defendant [has] established a fair and just reason for withdrawal of his plea, an 18-month lapse between entry of the plea and a motion to withdraw does not mandate the denial of that motion.” For this proposition, he directs our attention to *State v. Suites*, 109 N.C. App. 373, 427 S.E.2d 318, *disc. review denied*, 333 N.C. 794, 431 S.E.2d 29 (1993). In *Suites*, the defendant pled guilty to being an accessory before the fact to second-degree murder. *Id.* at 374, 427 S.E.2d at 319. Following her co-defendant’s acquittal of murder, the defendant in *Suites* filed a motion to withdraw nineteen months after the entry of her guilty plea. This Court held that she was entitled to withdraw her guilty plea because “acquittal of the named principal operates as an

acquittal of the accessory before the fact.” *Id.* at 378, 427 S.E.2d at 321 (citation omitted).

As Defendant concedes in his brief, however, the circumstances at issue in *Suites* do not exist here. Accordingly, Defendant’s eighteen-month delay between the entry of his guilty plea and the filing of his motion to withdraw weighs against the granting of his motion.

D. Competency of Counsel

Defendant next asserts that he lacked competent counsel because his trial attorney failed to realize that the reports written by Detective Grant and Special Agent Songalewski recounted the same interview and advised Defendant to plead guilty based upon a misunderstanding of the evidence.

In response, the State points out that because Defendant faced the death penalty he was appointed two trial attorneys. As evidence of the competence of Defendant’s trial counsel, the State further notes that his attorneys successfully negotiated a plea deal reducing his charge to second-degree murder — thereby eliminating any chance that he would face the death penalty — and that Defendant expressed satisfaction with his trial counsel at the 24 June 2014 plea hearing.

As discussed below, we are unable to determine based upon the record before us whether Defendant received effective assistance of counsel in deciding to plead

guilty. Therefore, we express no opinion as to whether this factor weighs in favor of Defendant or the State for purposes of the *Handy* factors.

E. Misunderstanding of the Consequences of a Guilty Plea, Hasty Entry, Confusion, and Coercion

With regard to the final factors enumerated in *Handy*, Defendant does not contend that he misunderstood the consequences of his plea or that he entered into his guilty plea hastily or involuntarily. He does assert, however, that the State's decision to proceed capitally against him "certainly increased the State's leverage given the potential sentencing exposure with a loss at trial." He also contends that because he could only read at an eighth-grade level he was "without the skills to independently evaluate the evidence against him" in deciding whether to accept the State's plea offer.

To the extent that Defendant is attempting to argue that his guilty plea was inherently the result of coercion based upon the possibility that he would receive a death sentence if he proceeded to trial, his argument is unavailing. By that logic, *any* guilty plea to a lesser offense by a defendant who has been charged with a capital crime would be based, at least in part, upon coercion. In addition, we observe that Defendant affirmed during his plea hearing that he entered his guilty plea "of [his] own free will." Thus, by his own admission, any leverage gained by the State in proceeding capitally against him did not amount to coercion for purposes of a *Handy* analysis.

Finally, Defendant's argument with regard to the effect of his low reading level on his ability to make an informed decision to accept the State's plea offer also lacks merit. During his plea hearing, Defendant stated that his attorneys had explained the charges facing him, that they had discussed possible defenses, and that he fully understood what he was doing. Thus, having examined all of the factors set forth in *Handy*, we conclude that Defendant has failed to demonstrate a fair and just reason for the withdrawal of his plea.

F. Prejudice to the State

Even assuming *arguendo* that Defendant could show that he has established a fair and just reason supporting the withdrawal of his guilty plea, his motion was still properly denied because the State presented concrete evidence at the withdrawal hearing of prejudice to its case against him should the motion be granted.

"Prejudice to the State is a germane factor against granting a motion to withdraw." *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 718 (citation and quotation marks omitted). This Court has held that examples of such prejudice include the death or unavailability of important witnesses and "the destruction of important physical evidence." *Id.* (citations omitted); *see also State v. Arias*, 186 N.C. App. 294, 297, 650 S.E.2d 458, 460 (2007) (holding State demonstrated concrete prejudice where evidence connected with defendant's case was destroyed two years after entry of guilty plea).

Here, during the period between Defendant's guilty plea and the filing of his motion to withdraw, multiple material witnesses for the State became unavailable to testify against Locklear due to witness intimidation. These witnesses either refused to testify outright or informed the State that they would not testify truthfully if called upon, thereby resulting in the dismissal of Locklear's charges. In addition, problems were noted in connection with missing and mislabeled items of evidence. These evidentiary concerns would likewise apply to the State's case against Defendant if his motion to withdraw was to be granted.

Therefore, we hold that the State has demonstrated that prejudice to its case would result if Defendant's motion to withdraw his guilty plea was allowed. Accordingly, the trial court did not err in denying Defendant's 28 December 2015 motion to withdraw.

II. Ineffective Assistance of Counsel

Alternatively, Defendant argues that he received ineffective assistance of counsel ("IAC") because his trial counsel advised him to plead guilty based upon an inaccurate assessment of the evidence against him. As discussed below, we are unable to rule upon the merits of this argument based on the record that is currently before us.

In order to prevail on an IAC claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense."

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State v. Phillips, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Generally, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Where a reviewing court determines that an IAC claim has been asserted prematurely on direct appeal, "it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

In the present case, we are unable to adequately assess Defendant's IAC claim based upon the cold record before us. Accordingly, we decline to rule upon the merits of this issue and dismiss Defendant's claim without prejudice to his right to file a motion for appropriate relief based upon his allegations of IAC. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) (dismissing IAC claim prematurely asserted on direct appeal without prejudice to defendant's right to raise claim in future motion for appropriate relief).

Conclusion

For the reasons stated above, we affirm the trial court's denial of Defendant's motion to withdraw his guilty plea.

AFFIRMED.

Judge DILLON concurs.

Judge ELMORE concurring in part and dissenting in part by separate opinion.

Report per Rule 30(e).

No. COA18-55 – *State v. Taylor*

ELMORE, Judge, concurring in part and dissenting in part.

I concur with the judgment to dismiss defendant’s independent ineffective assistance of counsel (“IAC”) claim without prejudice to his right to reassert it in a motion for appropriate relief (“MAR”) in the superior court. However, because I disagree with the majority’s application and balance of the *Handy* factors, and believe defendant has satisfied his burden of establishing “any fair and just reason” to allow the withdrawal of his guilty plea that the State’s showing of concrete prejudice failed to refute, I respectfully dissent from the judgment to affirm the denial of defendant’s motion to withdraw his plea.

I. Analysis

A. Assertion of Legal Innocence

Defendant asserts that because he has consistently maintained his legal innocence, this *Handy* factor weighs in favor of withdrawal. I agree.

In *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), the defendant entered into a guilty plea, not a no contest or *Alford* plea, *id.* at 534, 391 S.E.2d at 160; our Supreme Court identified the assertion of legal innocence as a factor favoring withdrawal, *id.* at 539, 391 S.E.2d at 163; and it held that the “defendant, *in seeking to withdraw his plea*, asserted his innocence of the armed robbery underlying the felony murder plea[.]” *id.* at 539–40, 391 S.E.2d at 163 (emphasis added). Here,

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ELMORE, J., concurring in part and dissenting in part

defendant also entered into a guilty plea and, in seeking to withdraw his plea, also asserted his legal innocence. I therefore disagree with the majority's categorical approach to treat all guilty pleas as foreclosing further consideration of this *Handy* factor. To do so would render meaningless a factor developed in the context of assessing whether to allow a defendant to withdraw his guilty plea in every instance a defendant enters a guilty plea.

As defendant argues, despite any inconsistencies in his pre-arrest statements, they were consistent in his assertion that he did not formulate a plan with Locklear to rob or kill Hunt. And despite Detective Grant's testimony that defendant confessed to him and Special Agent Songalewski during an interview that he "set . . . Hunt up to be robbed," defense counsel argued that defendant "always denied to [him] that he made that statement[,]" and, significantly, Special Agent Songalewski testified that defendant never made such a confession during the interview or at any other time.

In his written withdrawal motion, defendant addressed the *Handy* factor of the assertion of legal innocence as follows:

43. [Defendant] told law enforcement that he overheard Taurus Locklear discussing that he was owed money by [Brandon Hunt], that [Taurus Locklear] planned to get his money from [Brandon Hunt], and that he saw Taurus Locklear shoot [Brandon Hunt].

44. *Never in any of [defendant's] statements to law enforcement officers, did he say that he participated in robbing or killing Brandon Hunt. To the contrary, [defendant] told law enforcement investigators that he was*

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not complicit in Brandon Hunt's killing.

45. The inadmissible, discredited utterance that former, fired Fairmont Police Department detective Roy Grant alleges is problematic and unhelpful to the prosecution . . . and does not credibly dispute the fact that *[defendant] frequently and consistently denied any complicity in Brandon Hunt's killing.*

. . . .

78. [Defendant] agreed to plead guilty, to cooperate and to testify. He did not agree to . . . allow the reputed, alleged triggerman to walk free, after the alleged reputed triggerman, and other[s] acting [o]n his behalf, allegedly threatened, attempted to bribe, and frightened away all of the State's witnesses.

79. [Defendant] was Brandon Hunt's friend, and, as such, felt awfully about Brandon Hunt's death. [Defendant] foolishly spoke with law enforcement officers on several occasions, without legal counsel, and gave wildly disparate claims of the events. *He was consistent, however, in maintaining that he neither shot Brandon Hunt, nor participated in Brandon Hunt's killing, and tha[]t he was not complicit in Brandon Hunt's robbery or killing. [Defendant] maintains his innocence[.] . . .*

(Emphasis added.) Based on defendant's consistent pre-arrest statements that he did not agree to rob or kill Hunt, in conjunction with the assertions of legal innocence in seeking to withdraw his plea, I conclude this *Handy* factor favors withdrawal.

B. Strength of the State's Proffer of Evidence

Notwithstanding defendant's "addition[al]" contentions in his brief that the State's dismissal of Locklear's charges, the undisputed shooter, and the State's

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admission that it had lost or mislabeled certain evidence, indicates its case against him is weak, defendant's primary argument on this factor was grounded in the trial court's finding that "the State's evidence of [his] guilt was not strong but . . . would withstand a motion to dismiss." Because I agree the State's proffer as to defendant's guilt was weak, I conclude this *Handy* factor also favors withdrawal.

Here, the trial court found that "[a]lthough the evidence presented by the State as to defendant's guilt is not strong, the Court finds there is enough evidence to withstand a motion to dismiss, and thus, defendant has not met his burden under this factor of the Handy standard." The majority points to the State's plea hearing proffer that several witnesses indicated they saw defendant speaking with Locklear and Jones immediately before the incident, that defendant initially denied but later admitted to knowing Locklear's plan to rob Hunt, and that defendant was speaking with Hunt when Locklear fatally shot him. Based on this proffer, the majority concludes it is "satisfied that the State's proffer of evidence against Defendant – while not overwhelming – was sufficient."

I agree the State's proffer of evidence was "not overwhelming," but I respectfully disagree that conclusion does not favor withdrawal. Although the majority does not explain its standard, a factor developed to assess the *strength* of the State's proffer of evidence should not be equated to the low evidentiary standard developed to assess whether the State produced sufficient evidence to bring a charge

to the jury. Doing so would render this *Handy* factor meaningless—if the factual basis underlying a plea would not survive a later motion to dismiss for insufficient evidence, it necessarily would be insufficient for a trial court to accept a guilty plea. As the State’s plea hearing proffer of evidence as to defendant’s guilt was certainly not overwhelming, I conclude this *Handy* factor favors withdrawal.

C. Length of Time Between Entry of Guilty Plea and Filing of Motion to Withdraw

Defendant next contends that despite the eighteen-month delay between the 24 June 2014 entry of his guilty plea and his 28 December 2014 withdrawal motion, “an 18-month lapse . . . does not mandate the denial of that motion.” He also argues that the State’s 25 August 2015 dismissal of Locklear’s charges “prompted [defendant’s] trial counsel to review the evidence and legal basis for [defendant’s] pleas” and that his trial counsel “only noticed after . . . Locklear’s charges were dismissed the possibility that the conflicting statements of Agent Songalewski and Detective Grant concerning [defendant’s] alleged statement implicating himself in the robbery might be describing the same interview.” I agree the changed circumstances attendant to defendant’s counsel discovering the true import of this conflicting evidence is relevant in considering any delay here. Therefore, I respectfully disagree with the majority’s conclusion that eighteen months is the appropriate delay with which to assess the weight of this *Handy* factor.

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“[I]f the defendant has long delayed his withdrawal motion, *and has had the full benefit of competent counsel at all times*, the reasons given to support withdrawal must have considerably more force.” *Handy*, 326 N.C. at 539, 391 S.E.2d at 163 (emphasis added) (quoting *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975 (en banc))). As discussed below, I believe defendant did not receive the full benefit of competent counsel because he was misadvised on the vital evidence supporting his decision to plead guilty. But based upon the changed circumstances of the State’s dismissal of Locklear’s charges, which prompted his trial counsel to further investigate the matter, and later discover that Detective Grant had been fired for corruption and that Detective Grant’s and Special Agent Songalewski’s reports were recounting the same interview, I believe the delay clock should start when defendant first learned the true import of the vital piece of evidence supporting his decision to accept the State’s plea to avoid the death penalty.

In his written withdrawal motion, defendant addressed the *Handy* factor of delay as follows:

51. The federal constitutional basis for [defendant’s] motion to set aside this guilty plea[] . . . *first occurred* to [defendant] and to his undersigned counsel, *following* their thorough review of the facts and circumstances, and pertinent legal principles and legal authorities, regarding *the State’s dismissal with prejudice of the case against codefendant Taurus Locklear*. Reviewing the three (3) codefendants’ cases, and reviewing the legal principles and relevant authorities, and discussing all of the same with client, has been time-consuming and arduous.

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52. Having posited the issue herein (i.e. whether the State's admission that it could not prove the factual theory for its case against either [defendant] or Taurus Locklear, and then refusing to dismiss its case against [defendant], although it dismissed its case against Locklear), [defendant's] undersigned counsel, has drafted two (2) motions, i.e. a motion to dismiss the State's case against [defendant], and this motion to withdraw [defendant's] guilty plea.

53. [Defendant's] earlier-filed Motion to Dismiss the indictment, and this Motion to Set Aside the Guilty Plea, were made a "short" time following [t]he State's dismissal of its charges against Taurus Locklear.

(Emphasis added.)

However, at the 7 June 2016 withdrawal hearing, defense counsel admitted he failed to discover Detective Grant's and Special Agent Songalewski's reports recounted the same interview until sometime after he filed the 10 November 2015 motion to dismiss the indictment. The following relevant exchange occurred:

THE COURT: How and when did you learn that there was only one interview and not two separate interviews, March 25 and April 7?

[DEFENSE COUNSEL]: I'm not sure of the exact date, but . . . I had filed a motion to dismiss And I recall that we were in Your Honor's chambers one day and [the prosecutor] and I were talking about the case with Your Honor, and I remember [the prosecutor] had made a comment . . . in chambers . . . that the motion to dismiss aside, [the prosecutor] could prove my client's involvement in this thing out of my client's own mouth.

.....

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[DEFENSE COUNSEL]: And I thought . . . [the prosecutor] was talking about . . . Grant's statement that my client had said that he set [Hunt] up.

And . . . after that, I went and talked to my client and I was telling him, . . . again, this is the problem that we've got, we can't do anything about what [Grant] has said, and my client reminded me that he has always told me that he never made that statement, but that he didn't think there was anything that we could do about it.

And at that point, . . . I'm not sure when it finally dawned on me, but at some point I concluded that the distinction between what these two detectives were saying — . . . if they were by any chance talking about the same conversation, and I did not know that they were, but if they were . . . what we had was a contradiction[.] . . .

THE COURT: So, when was this motion to dismiss you say and the conference you say we had in chambers where it was first revealed to you?

. . . .

[DEFENSE COUNSEL]: It was prior to me filing the motion to set aside the plea because the first motion I filed in this case was a motion to dismiss . . . [based upon] the argument . . . that if the State had no evidence to support the factual theory that they claimed, namely that . . . Locklear shot [Hunt] and that my client was an accomplice, then if they didn't have any case against Locklear, . . . since the factual theory was the same, then they had no evidence against my client either.

. . . .

[DEFENSE COUNSEL]: But it was only . . . later that, . . . just thinking about it, going through it, . . . that rather than Grant saying one thing on the one date and Special Agent Songalewski saying another thing on the other date, if, by any chance, they were talking about the

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same conversation, which I couldn't be sure about, then we had a conflict and we needed to vet that out. I don't remember the exact date, sir.

.....

[PROSECUTOR]: It would have been . . . somewhere after . . . the beginning of November of last year. That's when the . . . first motion [to dismiss the indictment] . . . was filed.

As reflected, defense counsel failed to realize until sometime after filing the 10 November 2015 dismissal motion that the critical piece of evidence he relied upon in advising defendant to accept the State's plea offer may have carried little weight. I believe defense counsel's late discovery of the true import of this crucial piece of evidence amounts to a changed circumstance that should be the start of the delay clock. *Cf. State v. Hatley*, 185 N.C. App. 93, 100, 648 S.E.2d 222, 227 (2007) (starting the clock in assessing this *Handy* factor not when the defendant entered his guilty plea, but when he argued there occurred "a 'significant change of circumstances in that the District Attorney had withdrawn from the plea arrangement' "); *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 343 (1992) ("[A] change of circumstances might, under the facts of a given case, constitute a fair and just reason for allowing the withdrawal of a guilty plea prior to sentencing[.]"). Even the most conservative calculation of that delay would only be forty-eight days. And given that defense counsel filed the dismissal motion on 10 November 2015, attended a later status

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conference on that motion, later met with defendant to strategize, only later realized the detectives' reports recounted the same interview, and then had to research for and draft the thirty-two page withdrawal motion he filed on 28 December 2018, I conclude the delay here was reasonably short under the circumstances.

Although this delay is longer than the one found favorable in *Handy*, it is shorter than the one found unfavorable in *Meyer*. Compare *Handy*, 326 N.C. at 540, 391 S.E.2d at 163 (“Defendant sought to withdraw his plea less than twenty-four hours after he initially offered it.”), with *Meyer*, 330 N.C. at 744–45, 412 S.E.2d at 343 (“[D]efendant’s motion to withdraw his guilty pleas came more than three and one-half months after he pleaded guilty[.] . . .”). Additionally and significantly, the delay here was attributable solely to defense counsel, not defendant. Compare *State v. Deal*, 99 N.C. App. 456, 464, 393 S.E.2d 317, 321 (1990) (allowing a defendant with “low intellectual abilities” to withdraw his guilty plea despite a four-month delay where the delay “appear[ed] to have resulted from his erroneous expectations and lack of communication with his attorney”) (emphasis added), with *State v. McGill*, ___ N.C. App. ___, ___, 791 S.E.2d 702, 708 (2016) (not allowing a defendant to withdraw his only plea nine days after entry where “[i]t was only after the State ultimately declined to offer him a reduction that he resolved to withdraw his guilty plea[,]” which “reflect[ed] a . . . calculated tactical decision on Defendant’s part . . . after his endeavor

to receive a sentence reduction . . . did not bear fruit”), *disc. rev. denied*, 369 N.C. 534, 797 S.E.2d 12 (2017).

Therefore, I respectfully disagree with the majority’s decision to calculate the delay here as the eighteen-month period between defendant’s plea entry and withdrawal motion without considering any reason for that delay. Under these particular circumstances, I believe the delay clock should start when defendant became aware that his counsel misinterpreted the crucial piece of evidence he used to advise him to plead guilty. Given that reasonably short delay, I conclude this *Handy* factor weighs heavier in favor of withdrawal than an unaccounted for eighteen-month delay.

D. Competency of Counsel

Defendant asserts he lacked competent counsel because his trial attorney failed to recognize that the two detectives’ reports recounted the same interview, and this critical evidentiary misunderstanding formed the sole basis upon which his trial attorney advised defendant to accept the State’s plea offer. Because I believe defendant has established he lacked the full benefit of competent counsel at all relevant times, I conclude this *Handy* factor weighs heavily in favor of withdrawal.

Included in the State’s pretrial discovery materials were Special Agent Songalewski’s 23 May 2011 report, in which he recounted that he and Detective Grant interviewed defendant on 25 March 2011, during which defendant “confessed that he

did not know about the planned robbery”; as well as Detective Grant’s 7 August 2012 report, in which he recounted that he and Special Agent Songalewski interviewed defendant on 7 April 2011, during which defendant “told [them] that he had set . . . Hunt up to be robbed.”

At the withdrawal hearing, defense counsel explained that, based upon the detectives’ reports listing two different interview dates and starkly contrasting descriptions of defendant’s alleged interview statements, he believed Detective Grant’s and Special Agent Songalewski’s reports recounted “two separate interviews. And in [defense counsel’s] misconception, . . . [he] thought that that second interview, the one on April 7th of 2011, was the last interview.” Defense counsel thus interpreted as irrefutable Detective Grant’s anticipatory trial testimony that defendant confessed to setting Hunt up to be robbed, which he advised defendant would conclusively establish his guilt of felony murder and subject him to the death penalty. Defense counsel emphasized it was his misunderstanding of this critical evidence that formed the sole basis for advising defendant to accept the plea offer; without it, defendant “would not have taken the plea” and defense counsel “wouldn’t have . . . advised him to take the plea.” Defense counsel argued he was rendered ineffective by the State’s inaccurate pretrial discovery that it failed to correct, and later conceded he had been ineffective by failing to recognize the reports recounted the same interview.

Given the majority's inability to "determine based upon the record . . . whether Defendant received effective assistance of counsel in deciding to plead guilty[.]" it "express[es] no opinion as to whether this factor weighs in favor of Defendant or the State for purposes of the *Handy* factors." I respectfully disagree.

First, I disagree with the majority's reason for not addressing this factor to the extent it conflates a defendant's burden to establish he lacked competent counsel in the context of a *Handy* balance, with the much heavier burden required to establish a claim of IAC. Interpreting this factor as requiring a defendant to establish a claim of IAC under *Strickland* would render it meaningless—if a defendant proves he received IAC in deciding to plead guilty, the plea would be set aside for that independent reason. I believe incompetent counsel and constitutionally deficient counsel are two distinct legal standards that should be analyzed differently. For this reason, I concur in part with the majority's decision to dismiss defendant's IAC claim without prejudice to his right to reassert it in a subsequent MAR in superior court.

Second, I disagree with the majority's decision not to address this factor in conducting a *Handy* balance. *See Handy*, 326 N.C. at 539, 391 S.E.2d at 163 (relying on *Gooding v. United States*, 529 A.2d 301, 306–07 (D.C. 1987), in developing the *Handy* factors); *see also Gooding*, 529 A.2d at 306 ("None of these factors [adopted by our Supreme Court in *Handy*] is controlling and *the trial court must consider them cumulatively in the context of the individual case.*" (emphasis added)). Since

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defendant asserted this factor as a ground for his withdrawal motion and argued it on appeal, it should be balanced cumulatively with the other *Handy* factors.

In addressing this *Handy* factor, I believe defendant established he failed to receive the full benefit of competent counsel in deciding to plead guilty to a degree weighing heavily in favor of withdrawal—that is, his trial counsel misinterpreted and failed to reasonably investigate the crucial piece of pretrial discovery evidence he solely relied upon in advising defendant to accept the State’s plea offer. *Cf. Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and *strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.*” (emphasis added)); *Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 2588, 91 L. Ed. 2d 305 (1986) (finding deficient performance where “[c]ounsel’s failure to request discovery, . . . was not based on ‘strategy,’ but on counsel’s mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense”); *see also State v. Ballard*, 333 N.C. 515, 521–22, 428 S.E.2d 178, 182 (1993) (“The effective assistance of counsel requires adequate trial preparation[.]” (citations omitted)).

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Despite the two reports' inconsistent dates and starkly different recount of defendant's interview statements, they shared key elements that should have prompted further investigation if defendant were to receive the full benefit of competent counsel. Special Agent Songaelweski's report, dated 23 May 2011, provided in part as follows:

SA Songaelwski interviewed [defendant] on March 25, 2011, at the SBI field office in Fayetteville North Carolina. [Defendant] voluntarily came to the SBI office for a scheduled polygraph examination. [Defendant] was not able to submit to a polygraph examination on that date because of a heart condition that he brought up during the pre-interview. SA Songalewski and Detective Grant then interviewed [defendant] about the inconsistencies in his prior interviews. [Defendant] confessed that he did know about the planned robbery and Taurus Locklear threatened to shoot Brandon Hunt. [Defendant] stated that the only reason he agreed to go with Taurus Locklear and Shawn Jones was because he did not want Locklear to shoot Brandon Hunt. [Defendant] stated that he retrieved a 25 caliber pistol prior to making contact with Brandon Hunt just in case Locklear tried to shoot Hunt. [Defendant] said that as he and Locklear were talking with Hunt, that he observed Locklear hit Hunt in the head with a gun. As [defendant] attempted to run away he saw Locklear shoot Hunt in the back. Hunt continued running after he was shot while [defendant] fled to Paco's store. [Defendant] said he pulled out his 25 caliber pistol and shot back at Taurus Locklear and Shawn Jones. After taking a break SA Songalewski and Detective Grant re-approached [defendant] who was waiting in the lobby area of the SBI office. SA Songalewski and Detective Grant advised [defendant] that after consulting and reviewing over the facts to the case, that Probable Cause existed to arrest him. [Defendant] refused to give any additional information without a lawyer present and he was taken to the Robeson

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County Jail. [Defendant] was charged with First Degree Murder and Conspiracy to commit armed robbery with a dangerous weapon.

On April 7, 2011, Taurus Locklear and Shawn Jones were also charged with Conspiracy to commit armed robbery with a dangerous weapon.

Detective Grant's report, dated 7 August 2012, provided in part as follows:

On April 7, 2011 I Detective Roy Grant . . . drove [defendant] to Fayetteville N.C. to the SBI branch quarters. Upon arrival met with Agent Songale[w]ski and Agent Long reference a polygraph for [defendant]. After Agent Long explained the process for the polygraph [defendant] expressed he had a heart condition and was on medications for it. Agent Songale[w]ski and I went into the room where [defendant] was. Agent Songale[w]ski then started talking to [defendant] who then told us that he had set the victim Mr. Brandon Hunt up to be robbed. [Defendant] stated that Bobby DeShawn Jones and himself had called or spoke with Mr. Hunt and told him to meet them. [Defendant] said he took Taurus Locklear with them. There was an exchange of words between Brandon [Hunt] and Taurus [Locklear] and Taurus [Locklear] pulled out a gun and shot. [Defendant] stated that everybody started running and he circled back around to check on Brandon [Hunt]. Brandon [Hunt] told [defendant] that he had been shot. [Defendant] then stated that is when he ran through Bo's parking lot and saw Officer Oxendine and told him where Brandon [Hunt] was and that he had been shot. Agent Songale[w]ski and I walked out the room. Agent Songale[w]ski spoke with someone in his department and came back to me and stated that none of what was said had been recorded. Agent Songale[w]ski then got a hand held recorder and we went back into the room with [defendant]. Agent Songale[w]ski then started recording. . . . Then Agent Songale[w]ski read [defendant] his Miranda rights and asked [defendant] if he wanted to tell his story again. [Defendant] stated no he wanted his

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lawyer.

As reflected, both Special Agent Songalewski and Detective Grant recounted in their reports that they interviewed defendant together, and neither referenced another interview conducted with the other; that they interviewed defendant at the SBI's Fayetteville office; that at the start of the interview, defendant planned to undergo a polygraph examination but did not; that the reason defendant did not undergo the examination was because of his heart condition; that after defendant's initial statements, the detectives left the room for a short time and when they returned, they advised defendant he was being charged in connection with the incident; that after learning about the charges, defendant refused to speak further without a lawyer; and then the interview ended.

Additionally, Detective Grant's report was dated one year and four months after the purported interview, raising questions about the accuracy of the interview date and his recollection of defendant's statements. Further, Special Agent Songalewski's report, which recounted the SBI's entire involvement with the investigation from 14 March 2011 until 23 May 2011, only identified one interview that occurred at the SBI Fayetteville headquarters; it recorded notes on 7 April not involving defendant; and stated that following the 25 March 2011 interview, defendant was arrested, charged with first-degree murder, and transported to the Robeson County jail, raising questions about the probability that thirteen days later,

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according to Detective Grant's report, defendant would have been transported from jail back to the SBI's Fayetteville headquarters for another interview, and reread his *Miranda* rights.

Comparing both reports, I believe competent counsel would have either recognized they recounted the same interview, thereby interpreting Detective Grant's statement that defendant allegedly confessed to setting Hunt up for the robbery as impeachable and not relying on its anticipated infallibility as the primary basis for advising defendant to accept a plea offer, or competent counsel would have sought further discovery to investigate the accuracy of Detective Grant's report, including requesting any contemporaneously written notes that Detective Grant might have used to create a report dated one year and four months later, a written statement from Detective Grant on his account of what transpired at the 25 March 2011 interview Special Agent Songalewski's report recounted, and a written statement from Special Agent Songalewski on his account of what transpired at the 7 April 2011 interview Detective Grant's report purported to recount.

Indeed, at the withdrawal hearing, defense counsel recognized he had provided defendant ineffective counsel in advising defendant to accept the plea:

[DEFENSE COUNSEL]: . . . Your Honor, . . . while it was never my intention to say that I was ineffective based on my failure to follow up on the common element of the polygraph being discussed in both [detectives' reports], that is — I did miss that. I mean, I missed it.

I absolutely thought that what we were dealing with

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was two different statements because of the two different dates and the two different substantive statements about what my client said in those two statements.

But as Your Honor points out, the fact that that polygraph was discussed, the fact that he couldn't take the polygraph, and reading from that it looked as if this was the last statement because he would have been taken into custody or was taken into custody at whatever was the last interview, and I missed that.

And I don't like calling myself ineffective, but that was big. And based on that, my client relying on my advice, because, as I said, he always said I never said that I -- that I set Brandon [Hunt] up to be robbed.

So, Your Honor, based on that, . . . I think that one thing [defendant's] entitled to, effective assistance of counsel, he did not have that.

Defense counsel continued:

[DEFENSE COUNSEL]: . . . [M]y understanding was that there was that final interview that was a different interview. We couldn't refute what Detective Grant said.

And . . . if he went into that at trial he was going to be caught in a crossfire and was going to be convicted solely based on his confession -- alleged confession to Special Agent Songalewski.

[B]ecause it was uncounseled at the time, it was not custodial, there was no requirement of recordation, we were stuck with whatever Grant said. If that statement was something that could come out at trial, it would destroy his defense. He'd be found guilty based on felony murder.

And my view was for him to go to trial under those circumstances, he would . . . certainly be convicted of first degree murder, it was based on that he took the deal.

My view was I was rendered ineffective because I had incomplete or inadequate or inaccurate discovery, but the point Your Honor raises, which was looking at that polygraph -- the polygraph was mentioned in both and, I guess, I should have put it together. I did not.

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But either way, whether it's because I'm ineffective because I failed to put together . . . the significance of the polygraph information or was rendered ineffective because I was advising my client that he basically was in a position that he had to take the guilty plea because of the fact that . . . he would not be able to refute at trial the statement of Detective Grant that he admitted to felony murder by saying I set [Hunt] up.

Either way, . . . there [was] no . . . effective assistance of counsel on the crucial decision of what he needed to do. And . . . he was not in a position to intelligently make his decision whether to accept the offer.

The two minimum things [defendant's] entitled to in making his decision [to plead guilty]; effective assistance of counsel and being in a position to make an intelligent decision.

[Defendant] couldn't have done it because either I dropped the ball or I had inadequate discovery.

Either way, both -- it's not even an either/or, . . . on both of those points . . . [defendant] was in a bad situation and he would not have made the decision otherwise.

Because I believe that defendant has established he did not have competent counsel at the most crucial time and on the most significant matter guiding his decision to accept the State's plea offer, I conclude this *Handy* factor weighs heavily in favor of withdrawal.

Therefore, after my independent review of the record, I believe the cumulative weight these *Handy* factors on balance tilts heavily in favor of allowing withdrawal, and thus conclude that defendant has satisfied his burden of establishing a "fair and just reason" to allow withdrawal of his guilty plea.

E. Prejudice to the State

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Defendant contends the State had not refuted his showing because it failed to present evidence of concrete prejudice by allowing his withdrawal. He argues the “State’s problems in prosecuting this case—uncooperative witnesses, an inaccurate police report, missing or improperly stored evidence, officers not responding to attempts to communicate—would not be affected by a withdrawal of [defendant’s] plea,” nor would the State “be prejudiced by undoing [defendant’s] obligation to testify against . . . Locklear because even when they had this guarantee of testimony in place, they were unable to prosecute . . . Locklear and dismissed his charges.”

The majority holds that the State demonstrated evidence of concrete prejudice because between entry of defendant’s plea and his withdrawal motion, “multiple material witnesses for the State became unavailable to testify against Locklear due to witness intimidation[,]” “thereby resulting in the dismissal of Locklear’s charges,” and “problems were noted in connection with missing and mislabeled items of evidence[,]” which would “likewise apply to the State’s case against Defendant if his motion to withdraw was to be granted.” I respectfully disagree.

Our Supreme Court in *Handy* instructed that the State “*may refute* [a defendant’s] showing by evidence of concrete prejudice to its case *by reason of the withdrawal of the plea*. Prejudice to the State is a germane factor against granting a motion to withdraw.” 326 N.C. at 539, 391 S.E.2d at 163 (emphasis added) (citing *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977); *State v. Olish*, 164 W.Va. 712,

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717, 266 S.E.2d 134, 137 (1980); other citation omitted). The *Savage* decision our Supreme Court partially relied upon in deriving this rule reasoned that leave to withdraw a guilty plea “should not be as freely granted when *the government has been prejudiced by reliance on the defendant’s guilty plea*. The trial court *must weigh the defendant’s reasons* for seeking to withdraw his plea *against the prejudice which the government will suffer.*” *Id.* at 556–57 (emphasis added).

Examples of substantial prejudice include: the destruction of important physical evidence, *United States v. Jerry*, 487 F.2d 600, 611 (3d Cir. 1973); death of an important witness, *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir.), *cert. denied*, 411 U.S. 970, 93 S. Ct. 2163, 36 L. Ed. 2d 692 (1973); and other defendants with whom defendant had been joined for trial had been tried in a lengthy trial, *United States v. Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908, 91 S. Ct. 1379, 28 L. Ed. 2d 648 (1971).

State v. Marshburn, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993).

In my view, the State failed to demonstrate it would suffer concrete prejudice by its reliance on defendant’s plea, and thus failed to tilt the scales against defendant’s considerably weighty showing. Defendant’s promise to the State in agreeing to plead guilty was to be debriefed by the State, which he performed, and to testify truthfully against all co-defendants. Although defendant was willing to testify, the State dismissed the charges against Locklear. And none of *Marshburn’s* examples exist here. The State did not destroy or discard physical evidence in reliance on defendant’s plea; and any physical evidence issues are attributable to the

State's mishandling of evidence, not to the delay between defendant's plea and withdrawal motion. No witness had died; the State argued witnesses were afraid to testify against Locklear, but not against defendant. Nor did the State argue that co-defendant Jones had already been through a lengthy trial, and it dismissed Locklear's charges before trial.

The State intended to try Locklear based upon essentially the same factual basis it intended to try defendant. The delay between the State's 25 August 2015 dismissal of Locklear's charges and defendant's 28 December 2015 withdrawal motion was only four months. The State failed to argue any of the prejudice it identified occurred during that four-month delay. Although the State "may refute" defendant's showing by presenting evidence of "concrete prejudice to its case by reason of the withdrawal of the plea," I conclude it failed to do so here.

II. Conclusion

On balance, I conclude the State's showing of concrete prejudice barely tilted the scales against defendant's considerably weighty showing of "any fair and just reason" to allow withdrawal of his plea. Therefore, I respectfully dissent in part from the majority's decision to affirm the trial court's denial of defendant's motion to withdraw his guilty plea. However, because I believe the standard and analysis applicable to assessing whether a defendant has established weight to the *Handy* factor of incompetent counsel differs from that of assessing whether a defendant has

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ELMORE, J., concurring in part and dissenting in part

established a valid claim of IAC, I concur in part with the majority's decision to dismiss defendant's IAC claim without prejudice to his right to reassert it in a subsequent MAR in superior court.