[Cite as *State v. Norris*, 2019-Ohio-3768.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107894

v. :

TIMOTHY NORRIS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: September 19, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-16-611512-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Mary M. Frey, and Anthony T. Miranda, Assistant Prosecuting Attorneys, *for appellee*.

Mark A. Stanton, Cuyahoga County Public Defender, and Erika B. Cunliffe, Assistant Public Defender, *for appellant*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Defendant-appellant Timothy Norris appeals the trial court's denial of his motion to withdraw his guilty plea after he pled guilty to aggravated murder. Norris contends that his motion sufficiently demonstrated a manifest injustice to

support the withdrawal of his guilty plea based on ineffective assistance of counsel during the plea process and that the trial court abused its discretion in denying his motion without an evidentiary hearing. For the reasons that follow, we reverse the trial court and remand the matter for an evidentiary hearing on Norris' motion to vacate his guilty plea.

Procedural History and Factual Background

{¶ 2} On December 2, 2016, a Cuyahoga County Grand Jury indicted Norris on one count of aggravated murder, one count of murder, two counts of felonious assault, one count of discharge of a firearm on or near prohibited premises, one count of improperly discharging into a habitation and one count of tampering with evidence in connection with the November 11, 2016 shooting death of Tiyon Brown. With the exception of the tampering with evidence charge, all of the offenses included one-year and three-year firearm specifications and a forfeiture specification. Norris shot Brown in a parking lot in East Cleveland after his daughter's mother allegedly told Norris, falsely, that Brown had raped Norris' oldest daughter. During a police interview after the shooting, Norris confessed to shooting Brown. Norris initially pled not guilty to the offenses. Norris' father retained Attorney Michael Cheselka to defend Norris.

{¶ 3} The state and Norris reached a plea agreement and, on March 6, 2017, the trial court held a change-of-plea hearing. At the outset of the hearing, the state set forth the terms of a plea agreement on the record, i.e., that Norris would plead guilty to the aggravated murder count as indicted and the state would dismiss the

remaining counts. Attorney Cheselka confirmed that this was "a fair and accurate restatement of the plea [agreement] as we understand it." The trial court then proceeded with the plea colloquy. In response to the trial judge's preliminary questions, Norris indicated that he was 36, was a citizen, had graduated from Life Skills and had "a little bit" of difficulty reading and writing. The trial judge asked Norris: "Has anything been put in front of you in writing, with respect to the charges in this case, that you don't understand?" Norris responded: "No." The trial judge did not otherwise inquire regarding the extent or nature of Norris' difficulties with reading and writing.

{¶ 4} The trial judge advised Norris of his constitutional rights and Norris indicated that he understood the rights he would be waiving by entering his guilty plea. The trial judge then identified the offense and specifications to which Norris would be pleading guilty and outlined the potential penalties he faced as follows:

> THE COURT: Do you understand the offense to which you will be pleading in Count 1 is what they call an unspecified or unclassified felony. It carries with it a possible term of 20 years to life; 25 years to life, 30 years to life or life without [p]arole. Do you understand that?
>
> MR. NORRIS: Yes.
>
> THE COURT: All right. And also you'll be pleading to two firearm specifications which merge so you will be serving three years; which means that the three will subsume the one year prior to and consecutive to the underlying offense. You will be serving a three-year mandatory firearm specification. Mandatory means no judicial release, no reduction in sentence, no good time. All right? Do you understand that?
>
> MR. NORRIS: Yes.

{¶ 5} Norris indicated that he was satisfied with the representation he had received from his trial counsel, that his trial counsel had "explained everything" to him and "answered all [his] questions" and that no threats or promises had been made to him to induce him to change his plea other than what had been stated on the record.

{¶ 6} Norris pled guilty to aggravated murder and the associated firearm and forfeiture specifications. The trial court found that Norris "knowingly, voluntarily, with a full understanding of his rights" entered his guilty plea. The trial court accepted Norris' guilty plea and referred the matter for a presentence investigation and report. The remaining counts were nolled. Both the state and defense counsel indicated that they were satisfied that the trial court had complied with Crim.R. 11. A sentencing hearing was scheduled for the following month.

{¶ 7} On April 11, 2017, the trial court sentenced Norris to an aggregate prison sentence of 28 years to life, i.e., the one-year and three-year firearm specifications merged for sentencing and the trial court sentenced Norris to three years on the three-year firearm specification to be served prior to and consecutive to 25 years to life on the aggravated murder charge.

{¶ 8} On August 9, 2017, Norris filed, pro se, a "motion for resentencing due to a Crim.R. 32(B) and due process violation," alleging that the trial court had failed to advise Norris of his right to appeal and his right to appointment of appellate counsel. On October 4, 2017, the trial court denied the motion for lack of jurisdiction.

{¶ 9} On October 23, 2017, Norris filed, pro se, a "motion requesting essential findings on defendant's motion for resentencing," asserting that the trial court had failed to include "essential findings of fact" pursuant to Crim.R. 12(F) in its order denying his motion for resentencing. Once again, the trial court denied the motion.

{¶ 10} On November 15, 2017, Norris filed, pro se, a notice of appeal of the April 17, 2017 judgment of conviction. His appeal was dismissed as untimely. In January 2018, Norris, now represented by counsel, was granted leave to file a delayed appeal of his conviction (Appeal No. 106689).

{¶ 11} In June 2018, while his direct appeal was pending, Norris filed a motion to vacate his guilty plea with the trial court. Norris argued that his plea should be vacated because he was denied effective assistance of counsel in connection with his guilty plea and, as a result, did not enter a knowing and intelligent guilty plea. Specifically, Norris contended that (1) his guilty plea was based on "erroneous information provided by his trial counsel," (2) Norris suffered from certain "intellectual deficits," of which trial counsel was allegedly aware but ignored, that rendered Norris "unable to understand" the Crim.R. 11 colloquy when pleading guilty to aggravated murder and (3) there was "significant evidence" to "mitigate" and/or "acquit" Norris of aggravated murder, such that, had this evidence been developed and presented at trial, Norris may have been found guilty of murder or voluntary manslaughter rather than aggravated murder.

{¶ 12} In support of his motion, Norris submitted his own affidavit, affidavits from his wife and father, a psychological evaluation report prepared by James Karpawich, Ph.D., select cell phone records from November 10-12, 2016 and an article posted on Cleveland.com (dated April 10, 2017) discussing the shooting and surrounding events.

{¶ 13} In his affidavit, Norris averred that Attorney Cheselka met with him twice while he was in jail. He claimed that Attorney Cheselka told him initially that he thought he "could get the charges reduced" because this was "not a planned killing" and Norris was "acting under duress." Norris averred that Attorney Cheselka later told him that the "best way to handle the case" was for Norris to plead guilty. He claimed that Attorney Cheselka told him that if he pleaded guilty, the state "would take the life sentence off" and he would get "flat time of 20 years."

{¶ 14} Norris stated that "[b]efore the change of plea hearing," Attorney Cheselka told him "to go along and agree to whatever the judge was saying and that, in the end, everything would work out as he had promised." Norris claimed that he "did not understand what was going on" during the change-of-plea hearing and that he "really needed [Attorney Cheselka] to explain more of what was happening." He stated that when the trial court imposed a sentence of 28 years to life at the sentencing hearing he "did not understand what had happened" because Attorney Cheselka had "promised" him that he "would not receive any life sentence" if he pled guilty. Norris claimed that if he had known the trial court was "going to impose a

sentence that involved some kind of life sentence and not flat time," he would not have pled guilty to aggravated murder.

{¶ 15} Norris' father averred in his affidavit that he had hired Attorney Cheselka to represent Norris because he had previously represented his nephew in a rape case and had obtained a "good result." According to Norris' father, Attorney Cheselka initially told him and Norris' parents "not to worry, that we could beat this case." Attorney Cheselka later told them the case "would have to be resolved with a guilty plea" but that he had "convinced the state to take the death penalty off the charges." Norris' father claimed that a few days before the change-of-plea hearing, Attorney Cheselka visited him and Norris' parents and informed them that he "had gotten the state to take any life sentence off of the table" and that Norris "would get a flat time sentence" and "might do 20 years." Norris' father stated that when the trial court imposed a sentence of 28 years to life, he was "stunned, because the lawyer had promised that there was no longer the possibility of a life sentence."

{¶ 16} In her affidavit, Norris' wife averred that Attorney Cheselka initially told her that this was "a crime of passion" and that he "could get [Norris] 'off' for the offense." She stated that Attorney Cheselka later told her, Norris and other family members that he had "worked out an agreement with the State that [Norris] would receive a 20 years [sic] sentence with no life" and that he "explicitly said" "'life was off the table' if [Norris] entered the guilty plea." Norris' wife claimed that she had told Attorney Cheselka that Norris had "intellectual deficits," that he had been in special education classes in high school and has "trouble understanding written and

oral concepts" and that Norris "would not understand what was happening" unless Attorney Cheselka "carefully explained the process to [Norris] more than once and gave him time to process the information, ask questions, and re-explain the information independently." She stated that she had given Attorney Cheselka phone records "show[ing] the very quick timelime of how this incident developed" and statements from Norris' oldest daughter and her mother in support of Norris' claim that he had been provoked and had been trying to protect his daughter when he shot Brown.

{¶ 17} In his report, Dr. Karpawich stated that, in his opinion, based on psychological testing, his review of Norris' school records and an interview with Norris, Norris has "significant intellectual, cognitive, and academic deficits which may have affected his ability to comprehend information which was given to him during his legal proceedings, to remember this information, and to make the decision to plead guilty to the offense of aggravated murder." He indicated that Norris has had "cognitive and intellectual limitations since childhood" and that he attended special education classes due to a learning disability. Dr. Karpawich stated that Norris' "overall intellectual functioning is in the borderline range," that his "vocabulary, general fund of information, and reasoning ability are in the low borderline/mild mental retardation range" and that his reading skills are at a third-grade level.

{¶ 18} The state opposed the motion. The state argued that Norris' motion should be denied because (1) the "self-serving affidavits" Norris submitted in

support of his motion were insufficient to "rebut the record of [the trial court's] compliance with Crim.R. 11(C)," (2) "Norris had an opportunity to present trial counsel's alleged "promise" of a "flat time of 20 years" to the trial court during the plea colloquy and failed to do so, (3) neither Norris nor any family member raised any objection to Norris' sentence at or immediately following the sentencing hearing and (4) Norris did not establish that he was prejudiced as a result of any deficiency in trial counsel's performance. The state argued that the trial court should deny the motion without a hearing because the affidavits of Norris and his family were "not credible" and "conflict[ed] with each other" regarding what Attorney Cheselka told them and because the evidence Norris submitted in support of his motion was otherwise insufficient to demonstrate a manifest injustice.

{¶ 19} On October 23, 2018, after considering the transcripts from the change-of-plea and sentencing hearings and the evidence Norris submitted in support of his motion, the trial court denied Norris' motion to vacate his guilty plea without a hearing, reasoning as follows:

> Review of the plea and sentencing hearings indicate that all was conducted in compliance with Crim.R. 11. [Defendant] did not assert incompetence or innocence during the hearings. [Defendant] was attentive and responsive to the court's inquiry and answered all questions put to him. [Defendant] was fully advised of the reduction of the charge and the possible ranges of sentencing. There was never a flat 20 years on the table as part of a plea, only the range of sentences stated by the court. Accordingly, [defendant's] motion to vacate his guilty plea is denied.

{¶ 20} Norris appealed the trial court's denial of his motion to vacate his guilty plea (Appeal No. 107894) and filed a motion to consolidate his appeals. This

court consolidated Appeal Nos. 106689 and 107894 for purposes of the record, briefing and oral argument, but not disposition.

{¶ 21} In his appellate brief, Norris raises the following two assignments of error for review:

> ASSIGNMENT OF ERROR I
> Mr. Norris' motion to vacate his guilty plea sufficiently demonstrated a manifest injustice to warrant the remedy he requested, or at least an evidentiary hearing to address the grounds he raised.
>
> ASSIGNMENT OF ERROR II
> Mr. Norris received ineffective assistance of counsel in connection with his guilty plea and sentencing proceeding.

Law and Analysis

{¶ 22} Norris argues that the trial court abused its discretion in denying his motion to vacate his guilty plea without an evidentiary hearing. Norris asserts that his guilty plea was "induced" and "undermined" by the ineffective assistance of his trial counsel and was, therefore, not knowingly and intelligently made, resulting in a manifest injustice. Specifically, Norris contends that his trial counsel (1) "misled" Norris and his family about the "sentencing exposure" Norris would face by pleading guilty to aggravated murder and (2) failed to ensure that proper consideration was given to Norris' known "intellectual deficits," which Norris claims caused him to have "difficulty understanding anything beyond the most basic concepts." Norris asserts that he pled guilty to aggravated murder because his trial counsel told him — incorrectly — that he would receive a flat 20-year sentence if he pled guilty to aggravated murder. He contends that trial counsel's "improper handling" of Norris'

guilty plea "rendered it not knowingly or intelligently entered" and that if his trial counsel had "accurately represented the legal consequences of pleading guilty" to aggravated murder, he would not have entered a guilty plea, because he had "a plausible partial defense that mitigated the seriousness of his underlying misconduct" and could have potentially supported a conviction for murder or voluntary manslaughter rather than aggravated murder.

Motion to Withdraw Guilty Plea

{¶ 23} A motion to withdraw a guilty plea is governed by Crim.R. 32.1. Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty * * * may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The defendant bears the burden of establishing the existence of "manifest injustice." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Manifest injustice is a "clear or openly unjust act," *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), "that is evidenced by 'an extraordinary and fundamental flaw in the plea proceeding,'" *State v. McElroy*, 8th Dist. Cuyahoga Nos. 104639, 104640 and 104641, 2017-Ohio-1049, ¶ 30, quoting *State v. Hamilton*, 8th Dist. Cuyahoga No. 90141, 2008-Ohio-455, ¶ 8; *see also State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 41 (8th Dist.); *State v. Stovall*, 8th Dist. Cuyahoga No. 104787, 2017-Ohio-2661, ¶ 17 ("'Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due

process.'"), quoting *State v. Williams*, 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123, ¶ 5. As such, the postsentence withdrawal of a guilty plea is permitted "only in extraordinary cases." *State v. Rodriguez*, 8th Dist. Cuyahoga No. 103640, 2016-Ohio-5239, ¶ 22.

{¶ 24} The requisite showing of manifest injustice must be based on specific facts in the record or supplied through affidavits submitted with the motion. *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 10, citing *Cleveland v. Dobrowski*, 8th Dist. Cuyahoga No. 96113, 2011-Ohio-6071, ¶ 14, and *State v. Barrett*, 10th Dist. Franklin No. 11AP-375, 2011-Ohio-4986, ¶ 15. A self-serving affidavit by the moving party, in and of itself, is generally insufficient to demonstrate manifest injustice. *See, e.g., State v. Passafiume*, 2018-Ohio-1083, 109 N.E.3d 642, ¶ 13 (8th Dist.); *Geraci* at ¶ 10.

{¶ 25} Although "self-serving affidavits present credibility issues," they must still be given due consideration in light of the surrounding facts and circumstances. *State v. Carter*, 8th Dist. Cuyahoga No. 104351, 2016-Ohio-8150, ¶ 13. "[E]ven self-serving affidavits are more or less credible depending on the circumstances of the case and facts in the record." *Id.,* citing *State v. Calhoun*, 86 Ohio St.3d 279, 285, 714 N.E.2d 905 (1999) (identifying factors for courts to consider in assessing the credibility of supporting affidavits in postconviction relief proceedings); *see also State v. Miller*, 12th Dist. Butler No. CA2016-01-007 2016-Ohio-7360, ¶ 14, fn. 1 (A defendant's affidavit in support of a motion to withdraw a guilty plea "is not disqualified merely because it is 'self-serving.' Rather, an affidavit properly

characterized as 'self-serving' is subject to the analysis established by the Ohio Supreme Court in *Calhoun* to determine the weight to which it is entitled.").

Evidentiary Hearing on Crim.R. 32.1 Motion

{¶ 26} A trial court is not required to hold a hearing on every postsentence motion to withdraw a guilty plea. *See, e.g., State v. Norman*, 8th Dist. Cuyahoga No. 105218, 2018-Ohio-2929, ¶ 16; *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818, ¶ 11. However, "'[a] hearing is required * * * if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea."' *Norman* at ¶ 16 quoting *Vihtelic* at ¶ 11; *see also State v. Tringelof*, 12th Dist. Clermont Nos. CA2017-03-015 and CA2017-03-016, 2017-Ohio-7657, ¶ 11 ("'A defendant must establish a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice before a court must hold an evidentiary hearing on his motion.'"), quoting *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 14.

{¶ 27} We review a trial court's decision to deny a defendant's postsentence motion to withdraw a guilty plea under an abuse of discretion standard. *See, e.g., Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, at ¶ 42, citing *Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, at paragraph two of the syllabus. Likewise, we review a trial court's decision whether to hold a hearing on a postsentence motion to withdraw a guilty plea for an abuse of discretion. *See, e.g., State v. Grant*, 8th Dist. Cuyahoga No. 107499, 2019-Ohio-796, ¶ 13.

Ineffective Assistance of Counsel

{¶ 28} The Sixth Amendment to the United States Constitution guarantees a defendant the effective assistance of counsel at """critical stages of a criminal proceeding," including when he enters a guilty plea.'" *State v. Romero*, 156 Ohio St.3d 468, 2019-Ohio-1839, 129 N.E.3d 404, ¶ 14, quoting *Lee v. United States*, 582 U.S. ___, 137 S.Ct. 1958, 1964, 198 L.Ed.2d 476 (2017), quoting *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "[I]neffective assistance of counsel can constitute manifest injustice sufficient to allow the post-sentence withdrawal of a guilty plea" where it causes a guilty plea to be "less than knowing, intelligent and voluntary." *See, e.g., State v. Davner,* 2017-Ohio-8862, 100 N.E.3d 1247, ¶ 38 (8th Dist.); *State v. Montgomery*, 8th Dist. Cuyahoga No. 103398, 2016-Ohio-2943, ¶ 4; *State v. Ramirez*, 12th Dist. Butler No. CA2018-12-233, 2019-Ohio-3050, ¶ 21 ("Ineffective assistance of counsel is a proper basis for seeking a post-sentence withdrawal of a plea.").

{¶ 29} When an allegation underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the defendant must show that (1) that counsel's performance was deficient, i.e., counsel's performance fell below an objective standard of reasonable representation, and (2) there is a reasonable probability that, but for counsel's deficiencies, the defendant would not have pled guilty to the offenses at issue and would have, instead, insisted on going to trial. *Romero* at ¶ 14-16; *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing

State v. Xie, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203; *see also Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

Knowing, Intelligent and Voluntary Guilty Plea

{¶ 30} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *see also State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7. Accordingly, if a defendant shows that he or she did not enter a plea knowingly, intelligently or voluntarily, the defendant may establish a manifest injustice sufficient to warrant withdrawal of the guilty plea under Crim.R. 32.1. *See, e.g., State v. Brown*, 10th Dist. Franklin No. 18AP-112, 2018-Ohio-4984, ¶ 8; *State v. Riley*, 4th Dist. Washington No. 16CA29, 2017-Ohio-5819, ¶ 18; *State v. Fry*, 7th Dist. Mahoning No. 12MA156, 2013-Ohio-5865, ¶ 12.

{¶ 31} Whether a guilty plea was entered into knowingly, intelligently and voluntarily is based on the totality of the circumstances. *See, e.g., Davner,* 2017-Ohio-8862, 100 N.E.3d 1247, at ¶ 40; *State v. Sojourney*, 8th Dist. Cuyahoga No. 92087, 2009-Ohio-5353, ¶ 14. When a trial court complies with Crim.R. 11(C)(2) in

accepting a guilty plea to a felony, there is a presumption that the defendant's plea was knowingly, intelligently and voluntarily made. *See, e.g., State v. Alexander*, 8th Dist. Cuyahoga No. 103754, 2016-Ohio-5707, ¶ 11; *State v. Murray*, 12th Dist. Brown No. CA2015-12-029, 2016-Ohio-4994, ¶ 20. A defendant seeking to withdraw the plea has the burden of rebutting that presumption "by demonstrating that the plea is infirm." *Alexander* at ¶ 11.

{¶ 32} Here, Norris does not dispute that the trial court fully complied with Crim.R. 11(C)(2) prior to accepting his guilty plea. However, he contends that his guilty plea was nevertheless not knowing, intelligent and voluntary because it was based on "misinformation" and incorrect legal advice, i.e., the assurance that if he pled guilty to aggravated murder, he would receive a flat 20-year sentence — a sentence the trial court could not legally impose.

{¶ 33} An attorney's "mere inaccurate prediction" of a defendant's sentence does not constitute ineffective assistance of counsel sufficient to vacate a guilty plea. *See, e.g., Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, at ¶ 32 ("'A good faith but erroneous prediction of sentence by defense counsel does not render the plea involuntary. Where the representations made by defense counsel were hopeful, good faith estimates, not promises, the fact that defendant may have had expectations of leniency is not sufficient, absent evidence that the government induced such expectation, to justify withdrawal of the plea.'"), quoting *State v. Sally*, 10th Dist. Franklin No. 80AP-850, 1981 Ohio App. LEXIS 10295, 10-11 (June 11, 1981); *see also State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d

607, ¶ 10 (8th Dist.) ("A lawyer's mistaken prediction about the likelihood of a particular outcome after correctly advising the client of the legal possibilities is insufficient to demonstrate ineffective assistance of counsel."). However, "[a] defendant does not enter a knowing, intelligent or voluntary plea if the plea is premised on incorrect legal advice." *Davner*, 2017-Ohio-8862, 100 N.E.3d 1247, at ¶ 55, 57, citing *Engle*, 74 Ohio St.3d at 527-28, 660 N.E.2d 450.

{¶ 34} The state argues that Norris could not have been misled regarding his sentence because the trial court informed Norris of the maximum penalty he could receive by pleading guilty to aggravated murder during the plea colloquy in accordance with Crim.R. 11(C)(2)(a). However, a "proper Crim.R. 11 colloquy" does not necessarily "obviate" a defendant's claim of being prejudiced by ineffective assistance of counsel. *Carter*, 2016-Ohio-8150, at ¶ 10.

{¶ 35} In this case, when identifying the sentencing ranges that could be imposed during the plea colloquy, the trial court indicated that these were "possible" sentences, not sentences mandated by statute. Further, Norris has presented evidence — not only in the form of "self-serving" affidavits from himself and family members but also in the form of Dr. Karpawich's psychological evaluation report — of compromised intellectual functioning and a reduced ability to process and grasp information, including information relevant to the decision of whether to enter a guilty plea. There is nothing in the record to indicate that Norris' alleged intellectual limitations were explored or taken into account during the plea colloquy or otherwise during the plea process. Accordingly, it cannot be assumed that the trial

court's advisements during the plea colloquy "cured" the misinformation defense counsel allegedly provided to Norris and his family regarding Norris' sentencing exposure if he were to plead guilty. *Carter* at ¶ 11, citing *State v. Ayesta*, 8th Dist. Cuyahoga No. 101383, 2015-Ohio-1695, ¶ 19-20 (fact that trial court correctly advised defendant that his plea "may" have immigration consequences "did not cure" prejudice associated with defense counsel's alleged failure to advise defendant of the "mandatory" deportation consequences resulting from his plea).

{¶ 36} In addition, the trial court's journal entry appears to reflect some confusion regarding the facts of the case. Although this has never been a capital case, at the outset of its journal entry denying Norris' motion to vacate his guilty plea, the trial court stated:

> [Defendant] was charged with capital murder and retained the services of a single private counsel to defend him. The state offered an opportunity to [defendant] to plead to a reduced charge of aggravated murder with sentencing options of 20 yrs to life, 25 yrs to life, 30 yrs to life, or life without parole.

{¶ 37} Following careful consideration of the record and the particular facts and circumstances of this case, we believe Norris presented sufficient supporting evidence to warrant an evidentiary hearing on his motion to withdraw his guilty plea. Accordingly, the trial court abused its discretion in denying Norris' motion to vacate his guilty plea without a hearing. We sustain Norris' first assignment of error, reverse the trial court's decision denying his motion to vacate his guilty plea and remand the case for a hearing on the motion. Based on our ruling on Norris' first assignment of error, his second assignment of error is premature.

{¶ 38} Judgment reversed; case remanded for a hearing on Norris' motion to vacate his guilty plea to be held within 60 days of the journalization of this judgment entry and opinion.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry out this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

____
EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
MICHELLE J. SHEEHAN, J., CONCUR