IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. 93CR000413**
	)	
Plaintiff	)	**JUDGE EUGENE A. LUCCI**
	)	
vs.	)	**ORDER DENYING MOTION TO WITHDRAW PLEA**
	)	
JON P. KRUG	)	
	)	
Defendant	)	

{¶1} The court has considered the defendant's motion to withdraw plea, filed December 18, 2019, and the state's response, filed January 15, 2020.

{¶2} The defendant was indicted in this matter on August 25, 1993, on one count of felonious assault, an aggravated felony of the first degree. The indictment alleges that the defendant knowingly caused or attempted to cause physical harm to a police officer by means of a deadly weapon or dangerous ordnance. On November 1, 1993, the defendant pled guilty to the lesser included offense of felonious assault, a felony of the second degree.

{¶3} The police report indicates that the victim and a witness reported that the defendant, and others who were with him, instigated a verbal confrontation with the victim. The defendant and another individual brandished handguns, the defendant threatened to shoot the victim, and struck the victim on the neck and head with a handgun. The victim's statement to police indicated that he initially believed the firearms to be "plastic fake guns," but began to think the defendant's gun was real after the defendant stuck the gun into the victim's chest. The vehicle the defendant and the other participants to this incident were in was stopped after this incident was reported. A Browning .22 caliber handgun and a BB gun were recovered from the vehicle.

{¶4} The defendant's motion alleges that he has discovered new evidence to indicate that the victim was not sure whether the gun pointed at him was an operable firearm or an inoperable BB gun, that another one of the occupants of the vehicle has confirmed that the gun looked like a toy, and that a witness to the incident never stated that the defendant pointed the gun at the victim. The defendant alleges that as a result of this new evidence his guilty plea was not knowing, intelligent, and voluntary because he was not

aware of this information and he would not have pled guilty if he had known this information. He argues that the gun was inoperable and he did not point the gun at the victim, so that the state could not have proved felonious assault. He further argues that his plea was not knowing, intelligent, and voluntary because counsel provided ineffective assistance by pressuring him to plead guilty and failing to ensure that the defendant understood the significance of the inoperability of the weapon.

{¶5} Civ.R. 32.1 provides, "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Thus, a court may permit a defendant to withdraw a guilty plea after sentencing only to correct a manifest injustice. Further, the defendant has the burden of establishing the existence of a manifest injustice. *State v. Grigsby*, 80 Ohio App.3d 291, 299, 609 N.E. 2d 183 (8th Dist. 1992).

{¶6} A manifest injustice is "a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *State v. Okogie*, 8th Dist. Cuyahoga No. 86135, 2006-Ohio-1247, 2006 WL 668563, quoting *State v. Sneed*, 8th Dist. Cuyahoga No. 80902, 2002-Ohio-6502, 2002 WL 31667630.

{¶7} A hearing is not necessary if the facts alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn, *State v. Blatnik*, 17 Ohio App.3d 201, 478 N.E.2d 1016 (6th Dist. 1984); *State v. Perry*, 11th Dist. Trumbull No. 95-T-5315, 1997WL269202 (May 2, 1997), or if the record indicates the defendant is not entitled to relief and the defendant has failed to submit evidentiary documents sufficient to demonstrate manifest injustice. *State v. Okogie*, 8th Dist. Cuyahoga No. 86135, 2006-Ohio-1247, 2006WL668563; *State v. Perry*, 11th Dist. Trumbull No. 95-T-5315, 1997WL269202 (May 2, 1997).

{¶8} Here, the defendant's argument regarding the operability of the BB gun seems to be that if the gun was inoperable, the state could not prove that it was a deadly weapon, and that, if the defendant had understood that the gun had to be operable in order to be a deadly weapon, he would not have pled guilty. Assuming that the defendant's allegations that the weapon he used was an inoperable BB gun are true does not mean that the state could not prove that he used a deadly weapon. The defendant's argument

assumes that the state's allegations were based on the assumption that the defendant pointed an operable firearm at the victim, or that the state could only prove the deadly weapon element if the gun was an operable firearm and was pointed at the victim. Similarly, his ineffective assistance of counsel argument rests on the same presumption. In other words, he claims counsel was deficient in failing to inform him that that he must have possessed an operable firearm in order for it to constitute a deadly weapon.

{¶9} "The determination of whether a BB gun is a deadly weapon is a question of fact." *State v. Valentin*, 11th Dist. Portage No. 2009-P-0010, 2009WL3807173, ¶38. Depending on the facts and circumstances of a case, a trier of fact could find that a BB gun is capable of inflicting death if used as a bludgeon. *Id.* at ¶41. Here, the defendant, with a group of other people, was alleged to have instigated a confrontation with the victim, verbally threatened the victim, and struck the victim in the head and neck with some sort of gun. Although the victim initially thought the defendant's gun might have been a fake plastic gun, after feeling the gun against his chest, he thought the gun might be real. A trier of fact could have found that the defendant used a deadly weapon.

{¶10} Moreover, information that the victim was not sure whether the gun used by the defendant was real is not new evidence. This allegedly new evidence, in the form of a note on a document captioned as "Grand Jury Sheet" indicating that the victim was not sure which gun was pointed at him, is consistent with the victim's prior statement to the police, in which he indicated that he initially thought the defendant's gun may not have been real. Further, there were two guns recovered by police. One was a Browning .22 caliber handgun and one was a BB gun that the defendant alleges was inoperable. The defendant was in the best position to know at the time of the offense whether he used the Browning .22 caliber handgun or the BB gun and whether the BB gun was operable. The defendant was there. The defendant does not contend that he was not present, or that he did not engage in some sort of confrontation with the victim. Further, in support of his motion, the defendant submits the affidavit of Kevin Brown which indicates that the BB gun was inoperable and he knew it was inoperable because they had been playing with the BB gun the night before. Thus, taking the defendant's allegations as true, the defendant not only knew that the BB gun was inoperable, but that others could corroborate that information, so that this, too, is not new evidence. Additionally, the

defendant's allegation that he never pointed the gun at the victim would also have been known to him at the time.

{¶11} The defendant argues that he could not have had the BB gun tested to establish it was inoperable because it was missing. In support of this, he submits what appears to be notes from a pretrial held on October 1, 1993. The defendant alleges that these notes indicate that the BB gun "is long gone." The defendant's interpretation of these notes is, at best, strained. In relation to the BB gun, the notes state "wants to look at B.B. gun – looks like its [sic] still at LCSD." Immediately after this note is a note indicating that "Δ probably long gone." Δ is the symbol commonly understood in the legal community to mean "defendant." Moreover another note indicates that the defendant "FTA" (failed to appear) for the pretrial and a warrant would be issued. This note also used the Δ symbol in place of the word "defendant." Thus, the note clearly indicates that the defendant was long gone, not the BB gun. The defendant, therefore, could have had the BB gun tested for operability. Even if the BB gun had been missing, the defendant could have raised that issue with the trial court and on appeal. Instead, the defendant chose to plead guilty to a lesser included offense.

{¶12} For these reasons, the court finds that, taking the defendant's allegations as true, the defendant has failed to meet his burden to establish that a manifest injustice occurred. Accordingly, the defendant's motion is not well-taken and is hereby denied.

{¶13} IT IS SO ORDERED.

EUGENE A. LUCCI, JUDGE

c: Karen A. Sheppert, Esq., Assistant Prosecuting Attorney
Kimberly Kendall Corral, Esq., Attorney for Defendant

FINAL APPEALABLE ORDER
Clerk to serve pursuant to Civ.R. 58 (B)

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