

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 11-0827

Appellee,

On Appeal from the Portage County
Court of Appeals, Eleventh Appellate
District

-vs-

Court of Appeals
Case No. 10 PA 00030 & 10 PA 00031

DESMOND A. BILLINGSLEY,

Appellant.

MEMORDANDUM IN SUPPORT OF JURISTITION OF
DEFENDANT-APPELLANT

Attorney for Plaintiff-Appellee

Attorney for Defendant-Appellant

VICTOR V. VIGLUICCI
Portage County Prosecutor
241 S. Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850

JOHN P. LACZKO
Portage County Public Defender
209 S. Chestnut St., Suite 400
Ravenna, Ohio 44266
(330) 297-3665

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This court must review the applicable standards for enforcement Criminal Rule 11 Plea Agreements made by criminal defendants with prosecutors in one county, which involve crimes that occurred in another county, when a criminal defendant admits to crimes under the belief and promise he will not be sanctioned for those crimes by abiding by the terms of the plea agreement. The Eleventh District Court of Appeals agreed with the trial court herein that Portage County cannot be made to abide by the terms of the plea agreement of the Appellant with Summit County since it was not a party to the agreement contrary to Santobello v. New York (1971) 404 U.S. 257. Further the courts herein have erroneously concluded that one county prosecutor does not have the apparent authority to bind another county prosecutor to plea agreements contrary to Curse v. Larson 2007-Ohio-5926.

The assigned proposition of law affords this Honorable Court with an opportunity to review, update and clearly articulate the Appellate Review Standards involving the enforcement of Criminal Rule 11(F) plea agreements entered into by criminal defendants, where a county prosecutor induces a criminal defendant to give statements of involvement of all criminal activities as part of a plea agreement after articulating a deal to subject the criminal defendant to no additional punishment, then failing to enforce the plea agreement when Appellant is subsequently indicted.

STATEMENT OF FACTS AND CASE

This matter encompasses the consolidation of two (2) separate criminal cases filed against Appellant in the Portage County Common Pleas Court. The first case was case number 2009 CR 00023, where on January 16, 2009, the Appellant was indicted by the Portage County Grand Jury for one (1) count of Aggravated Robbery pursuant to R.C. 2911.01(A)(1), a felony of the first degree and firearm specification pursuant to R.C. 2929.14(D) and 2941.145. It was alleged in the indictment that on or about January 24, 2008, the Appellant in attempting or committing a theft offense at the McDonald's restaurant in Kent, Ohio, did have a deadly weapon or dangerous ordinance on his person and used said weapon in the commission of the offense. On February 17, 2009, Appellant appeared in court for his arraignment and entered a plea of not guilty to the charge and the firearm specification contained in the indictment. After inquiry, the trial court determined Appellant to be indigent and appointed the Portage County Public Defender's Office to represent Appellant and set his bond at \$100,000 with the case set for trial on March 24, 2009.

As the case proceeded, trial counsel filed normal discovery motions, which were responded to by the State of Ohio (hereinafter referred to as "Appellee") wherein, Appellee informed the trial court at a case pretrial on April 30, 2009, that they intended to present additional charges against Appellant to the Portage County Grand Jury. Appellant's case was subsequently continued on May 18, 2009, May 29, 2009, and August 29, 2009, while awaiting the filing of the new indictments.

On August 27, 2009, the Appellant was finally indicted by the Portage County Grand Jury in an additional two (2) count indictment under case number 2008 CR 00509.

Count one (1) charged Appellant for one (1) count of Aggravated Robbery, pursuant to R.C. 2911.01(A)(1), a felony of the first degree and a firearm specification pursuant to R.C. 2929.14(D) and 2941.145. It was alleged in count one (1) of the indictment that on or about February 12, 2008, the Appellant in attempting or committing a theft offense at the Wendy's Restaurant in Brimfield, Ohio, did have a deadly weapon or dangerous ordinance on his person and used said weapon in the commission of the offense. Further, count two (2) of the indictment charged Appellant with one (1) count of Aggravated Robbery, pursuant to R.C. 2911.01(A)(1), a felony of the first degree and a firearm specification pursuant to R.C. 2929.14(D) and 2941.145. It was alleged in count two (2) of the indictment that on or about February 24, 2008, the Appellant in attempting or committing a theft offense at the Subway Restaurant in Brimfield, Ohio, did have a deadly weapon or dangerous ordinance on his person and used said weapon in the commission of the offense.

On November 30, 2009, Appellant filed a Motion to Enforce Criminal Rule 11 Plea agreement and Motion to Dismiss the firearm specifications with the Court. The basis for Appellant's motion stems from a Criminal Rule 11 plea agreement entered into by Appellant in Summit County from his indictment on March 19, 2008, for multiple felony counts including Aggravated Robbery, pursuant to R.C. 2911.01(A)(1) with firearm specifications in case number CR-2008-01-290 before Judge Paul Gallagher. As part of his Criminal Rule 11 plea agreement with Summit County prosecutors, Appellant was required to give truthful testimony of his involvement with those and additional aggravated robberies in Summit County and other jurisdictions. In exchange for Appellant's testimony the State of Ohio, through the Summit County Prosecutor, agreed

to recommend eight (8) years of incarceration as Appellant's sentence for his guilty plea therein.

This Criminal Rule 11 plea agreement was memorialized on the record at Appellant's plea hearing in Summit County Common Pleas Court on October 15, 2008, where the State of Ohio, Appellant, and his trial counsel set forth these agreements on the record. It was stated that potential charges for other aggravated robberies from other counties, including Portage County, were being investigated and that Appellant would be required to provide truthful statements of his involvement in all criminal events and to testify to these potential charges. The Summit County Prosecutor at the plea hearing acquiesced that she had spoken with representatives from other counties, who agreed to either not pursue their charges for robbery or would agree to run any sentences concurrent with the Summit County cases. This is illustrated by the following discussion on the record:

The Court: Is there an agreed upon sentence?

Ms. Doherty: Judge, what we're going to do similar to what we did with Delaney, we're not asking to sentence him today, Billingsley today. His is going to sit down and give us information regarding remaining aggravated robberies we're aware of. There are certainly even - - other than the five people that we have in this case, there are others who are involved in this group of robbers.

So we're going to sit down. The detective is here. He's going to sit down with Mr. Billingsley and get the information. If he is cooperative and truthful, then as to sentencing, State will recommend eight years. If not, then if he doesn't sit down and give information, subject to a polygraph, if we don't believe that he's telling the truth, then the recommendation by the State would be different.

There are potentially other charges from other counties. We have been in contact with those other counties and can say that's our recommendation to him, and they've agreed at least in the other defendants' cases, because we're getting these pleas here and we're resolving the cases here, that they will either not pursue

charges on their robberies, or if they have already charged that, they'll run concurrent.

Mr. Whitney: In addition, Your Honor, if there are any cases that he talks about outside of the indictment, he would not be charged with those cases.

Ms. Doherty: Correct. We would not be adding additional charges.

After the plea hearing, Appellant sat with Detective James Pasheilich of the Akron Police Department and gave multiple truthful statements of his involvement in various aggravated robberies in both Summit and Portage County pursuant to the terms of his plea agreement. These statements resulted in the charges levied against Appellant herein being filed, were the only source of evidence linking Appellant to these crimes, which charges would not have been filed without Appellant's statements.

On December 21, 2009, the trial court concluded the first part of the hearing on Appellant's Motion to Enforce Criminal Rule 11 Plea Agreement and Motion to Dismiss Firearm Specifications. Appellant presented the testimony of three (3) witnesses; his trial counsel, Larry Whitney, Detective Pasheilich, and Appellant himself. At the conclusion of the testimony, the Motion hearing was recessed and a continuation hearing was set for January 8, 2010. On that date, the parties reconvened and provided arguments to the court, but did not present any further witnesses. Thereafter, on February 2, 2010, the trial court overruled Appellant's Motion to Enforce Criminal Rule 11 Plea Agreement and Motion to Dismiss Firearm Specifications in its Order and Journal Entry. The trial court erroneously concluded Appellant's "negotiation did not meet the burden of proof necessary to establish the Portage County Prosecutor is bound by the Summit County plea agreement" (Order and Journal Entry dated February 2, 2010, p. 4-5) The trial court simply concluded that since Portage County was not a party to the contract, the terms of the Criminal Rule 11 Plea Agreement did not apply to Appellee herein and as reiterated

by the Eleventh District Court of Appeals, the Portage County Prosecutor cannot be bound by terms of the agreement.

Thereafter, on February 19, 2010, Appellant appeared in court with counsel and entered a written plea of no contest to all counts of both indictments three (3) counts of Aggravated Robbery, pursuant to R.C. 2911.01(A)(1), felonies of the first degree and three (3) firearm specifications, attached to each count, pursuant to R.C. 2929.14(D) and 2941.145. The Appellant's case was referred to the Adult Probation Department and an expedited pre-sentence investigation report was ordered.

On March 26, 2010, the trial court conducted Appellant's sentencing hearing and after statements of counsel and the Appellant, sentenced Appellant to a term of incarceration of eight (8) years for each of the three (3) counts of Aggravated Robbery to be served consecutive to one another, consecutive to the mandatory three (3) year sentence for the firearm specifications; which were also consecutive to one another and consecutive to the sentences for the Aggravated Robberies. However, the trial court did run Appellant's sentence concurrent with his sentence in Summit County case number CR-2008-01-290. (Judgment Entry dated March 29, 2010) (Attached hereto as Exhibit 'A')

On March 31, 2011, the Eleventh District Court of Appeals rendered its Judgment Entry and Opinion affirming Appellant's conviction and sentence from the Portage County Common Pleas Court. (Attached hereto as Appellant's Exhibit "B" and "C")

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

THE TRIAL COURT AND THE ELEVENTH DISTRICT COURT OF APPEALS ABUSED THEIR DISCRETION TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS MOTION TO ENFORCE THE CRIMINAL RULE 11 PLEA AGREEMENT AND MOTION TO DISMISS FIREARM SPECIFICATIONS.

A plea agreement is generally “Contractual in nature and subject to contract law standards.” State v. Latimore 2010-Ohio-1052, State v. Adkins 2005-Ohio-2577, State v. Namack 2002-Ohio-5187, State v. Butts (1996) 112 Ohio App 3d 683. A contract is generally defined as a promise, or set of promises, acceptable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration. Perlmutter Printing Co. v. Strome Inc. (ND Ohio 1976) 436 F. Supp 409. Plea agreements should be construed strictly against the government. United States v. Fitch (CA 6, 2002) 282 F. 3d 364. When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v. New York (1971) 404 U.S. 257. When an allegation is made that a plea agreement has been broken, the Defendant must really show that the agreement was not fulfilled. State v. Legree (1988) 61 Ohio App 3d 568. A prosecutor’s failure to comply with the terms of a plea agreement may, in some circumstances, render a Defendant’s plea involuntary and undermine the constitutional validity of a conviction based upon that plea. Namack supra

In the instant case, Appellant was presented with a Criminal Rule 11 plea agreement in Summit County, Ohio, which was to encompass his guilty plea and sentencing recommendation in exchange for his truthful testimony regarding numerous other unsolved aggravated robberies in Summit and other counties, including Portage County. The plea agreement was specifically articulated on the record at the Appellant's guilty plea hearing in Summit County on October 15, 2008, as previously set forth herein. The agreement was enunciated by the Portage County Prosecutor, a State "employee" pursuant to R.C. 2969.21(C) as an officer or employee of the state or a political subdivision who is acting under color of law. Curse v. Larson 2007-Ohio-5926. The Summit County Prosecutor is a State employee who binds the State of Ohio to the terms of its contracts, i.e. Criminal Rule 11 Plea Agreements, not merely to Summit County, but contrary to the conclusion of the trial court and the Eleventh District Court of Appeals herein to, all counties including Portage County and its prosecutors.

The terms of the Criminal Rule 11 Plea Agreement are clear. The Summit County Prosecutor intimated she had spoken with officials from other county jurisdictions and informed Appellant and his counsel that he was advised to give truthful testimony regarding his involvement in these other, unindicted aggravated robberies, even in these other counties. Pursuant to the words of the Summit County Prosecutor, neither Summit County, nor any other jurisdiction would indict Appellant for these charges, but if he was indicted, sentences for those charges would run concurrent with the Summit County sentences. A review of the transcript testimony from Appellant's hearing on his motions indicates this was his understanding of the terms of the

agreement, as well as that of his trial counsel; to receive only an eight (8) year sentence for all charges. (Motion Hearing dated December 21, 2009, p. 12, 13, 14, 15, 46)

A further review of the testimony from the motion hearing indicated Appellant completely fulfilled his obligation to give truthful testimony through Detective Pasheilich, who testified Appellant cooperated with him and helped him clear 35 robberies in Summit and other counties, including Portage, and that he was pleased with Appellant's information which he shared with authorities from Portage County. (Motion Hearing dated December 21, 2009, p. 33)

Accordingly, counsel for Appellant at the hearing on the Motion to Enforce Criminal Rule 11 Plea Agreement acquiesced what Appellant had bargained for and the Portage County Prosecutor refused to provide concurrent pleas and sentences for all charges and a dismissal of the firearm specification as follows:

She even went to the limit of stating on the record that she had, in fact, contacted other jurisdictions. There were cases in I believe Stark County, I believe this county and perhaps the Detective can tell us any other county. But she indicates that she had contacted those other jurisdictions, they were on board with respect to if he cooperated that he would get no additional time as far as any of these cases even in other jurisdictions.

Obviously, Judge, it's our position that since she is the State of Ohio, she is not simply the State of Ohio for Summit County, she is the State of Ohio throughout the county and she's bound by the terms and agreements that she's made in a Criminal Rule 11 (F) agreement, since the Defendant, through his cooperation relied on those agreements in making all the statements that he made, we're asking for enforcement for the Criminal Rule 11 (F) agreement and at the very least a dismissal of the firearm specification in this matter, because, obviously, those would be operations of law and have to run consecutive.

And we would entertain a disposition of the remaining charges for no additional time, exactly what was promised to this Defendant as part of this Criminal Rule (F) agreement. (Motion Hearing dated December 21, 2009, p. 4-5)

However, the trial court judge in her Order and Journal Entry dated February 8, 2010, overruling Appellant's motions, ignored the plea agreement, testimony, and case law and in fact issued an opinion void of any legal authority.

The trial court judge concluded Appellant did not meet the burden of proof necessary to establish that the Portage County Prosecutor is bound by the Summit County plea agreement. This assertion was erroneously upheld by the Eleventh District Court of Appeals, who simply concluded that since Portage County was not a party to the contract, they were not bound by its terms. Appellant's plight is further offended by the Court of Appeals disregarding Appellant's argument that the Summit County Prosecutor has the ability to bind all counties in Ohio under an agency theory. Based upon the Summit County Prosecutor's own words and holding itself out to Appellant as having apparent authority to bind Portage County to the Criminal Rule 11 agreement coupled with Appellant's reliance and complete cooperation clearly established this apparent agency.

A reviewing court must look to case law to review Appellant's position here that he is entitled to the specific performance requested at the hearing based upon his pre-indictment agreement with the State of Ohio for non-prosecution on the instant charges. A pre-indictment, non-prosecution agreement exists when a suspect agrees to provide truthful information about a crime on the condition that he will not be prosecuted at all. State v. Small (1987) 41 Ohio App 3d 252. The prosecutor's power to enter into non-prosecution agreements arises, in part, from the discretion a prosecutor has in initiating a criminal prosecution. Mootispaw v. Eckstein (1996), 76 Ohio St. 3d 383. Non-prosecution agreements made before criminal proceedings are initiated are not subject to court approval because, 'the decision whether to prosecute its discretionary and not

normally subject to judicial review.’ *Id.* Pre-indictment agreements do not arise out of the Ohio Rules of Criminal Procedure or out of the immunity statute, and they are not subject to requirements of Criminal Rule 11 or R.C. 2945.44. In contrast, non-prosecution agreements which arise after there has been an indictment are subject to court approval. Crim. R. 48(A); R.C. 2941.33. State v. Moore 2008-Ohio-1190. We must also acknowledge in this discussion that, ‘the promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond.’ Bowers v. State (1986) 500 N.E. 2d 203, Santobello, supra. Pre-indictment agreements not to prosecute are bargained-for in the same way as Criminal Rule 11 plea bargains, and are subject to review under the same contract law principles. United States v. Wood (C.A. 11, 1986) 780 F. 2d 929. If the agreement is conditioned upon a defendant’s testimony, the defendant’s failure to testify nullifies the government’s promise not to prosecute. Small, supra

It is clear Appellant alleges that he entered into a pre-indictment prosecutorial plea bargain with the State of Ohio before he was suspected of committing the crimes for which he was indicted herein. As Appellant raised these issues of a pre-indictment agreement as an affirmative defense and was in effect a request for specific performance, this action for specific performance requires a contract which is valid and mutually binding upon the parties to the contract. The Appellant clearly established that at the hearing on his motions through the witness testimony and transcript testimony from Appellant’s Summit County Plea hearing.

It is the duty of the trial court as a trier of fact to determine whether there has been compliance with a plea agreement. State v. Curry (1976) 49 Ohio App 2d 180. In order

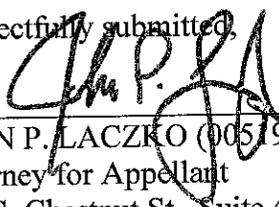
to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time the Defendant entered his guilty plea. United States v. Partida-Parra (C.A. 9, 1988) 859 F. 2d 629. Accordingly, if one side breached the agreement, the other side is entitled to either rescission or specific performance of the plea agreement. State v. Walker 2006-Ohio-2929.

Ordinarily, it is within the sound discretion of the trial court to determine a Defendant's remedy when the State has breached a plea agreement. State v. Mathews (1982) 8 Ohio App 3d 145. The trial court and the Eleventh District Court of Appeals clearly abused their discretion herein by overruling Appellant's Motions to Enforce the Criminal Rule 11 Plea Agreement and to Dismiss the Firearm Specifications, Appellant contends his proposition of law should be sustained and Appellant's case remanded to the trial court for specific performance of the Criminal Rule 11 plea agreement.

CONCLUSION

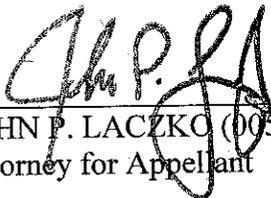
Based upon the proceeding case law and the argument, Appellant's Proposition of Law should be sustained and Appellant granted specific performance of concurrent sentences and the dismissal of the firearm specifications.

Respectfully submitted,


JOHN P. LACZKO (0051918)
Attorney for Appellant
209 S. Chestnut St., Suite 400
Ravenna, Ohio 44266
Phone: (330) 297-3665

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's brief was hand delivered to the Assistant Prosecutor's Office, 241 S. Chestnut Street, Ravenna, Ohio 44266, on this 13 day of May 2011.



JOHN P. LACZKO (0051918)
Attorney for Appellant

THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	FILED COURT OF COMMON PLEAS	CASE NO. <u>2009 CR 0023</u>
Plaintiff	MAR 29 2010	2009 CR 0509
-vs-	LINDA K. FANKHAUSER, CLERK, PORTAGE COUNTY, OHIO	JUDGE LAURIE J. PITTMAN
DESMOND A. BILLINGSLEY,)	<u>JUDGMENT ENTRY</u>
Defendant)	

On Friday, March 26, 2010, Defendant's Sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19.

Defense Attorney, Carolyn Mulligan, the Assistant Prosecuting Attorney, Eric Finnegan, were present as was the Defendant, Desmond A. Billingsley, who was afforded all rights pursuant to Crim. R. 32. Also present was Adult Probation Department.

The Court has considered evidence presented by counsel, oral statements, any victim impact statement, the pre sentence report and Defendant's statement.

The Court finds that the Defendant, Desmond Billingsley, has entered a Written Plea of No Contest pursuant to Crim. R. 11(F) Plea Negotiations in Case No. 2009 CR 0023 to Count One of the Indictment and in Case No. 2009 CR 0509 to Counts One and Two of the Indictment, charging the Defendant with the offense of "Aggravated Robbery" felonies of the first degree, and in violation of R.C. 2911.01(A)(1), with Firearm Specifications, in violation of R.C. 2929.14(D) and 2941.145.

IT IS THEREFORE ORDERED that the Defendant is sentenced to the Ohio Department of Rehabilitation and Correction, Grafton, Ohio to a mandatory term of imprisonment of three (3) years to be served for each "Specification", of which shall run consecutive to one another and a definite eight (8) years to be served for each felony one, of which shall run consecutive to one another and consecutive to the aforementioned sentence and concurrent to the prison term Defendant is presently serving for Summit County Case No. CR-2008-01-0290D, or until such time as he is otherwise legally released.

Appellant's
Exhibit 'A'

The Court thereupon notified the Defendant that after release from prison, the Defendant will be supervised under post release control R.C. 2967.28 for five years and that if the Defendant violates the terms of the post-release control the Defendant could receive an additional prison term not to exceed 50 percent of his original prison term which will be sixteen and one half years.

IT IS FURTHER ORDERED Defendant shall receive credit for the three hundred forty-one (341) days he has spent in the Portage County Jail in the above styled offense(s). This credit included jail time up to the date of sentencing and does not include any subsequent time awaiting conveyance to the reception facility. That time is to be calculated by reception facility.

IT IS FURTHER ORDERED Defendant shall pay restitution through the adult probation in the amount of \$1,710.00 to McDonalds, \$1,000.00 to Wendy's and \$590.00 to Subway, within twenty years.

The Court notified the Defendant of his right to appeal the Plea and Sentence in this matter of which the Public Defender shall remain appointed as counsel.

The Court notified Defendant under federal law persons convicted of felonies can never lawfully possess a firearm and that if you are ever found with a firearm, even one belonging to someone else, you may be prosecuted by federal authorities and subject to imprisonment.

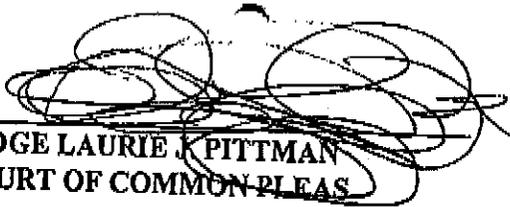
IT IS FURTHER ORDERED the bond previously fixed herein is discharged.

IT IS FURTHER ORDERED that the pre sentence investigation report and any victim impact statements that may have been provided to the Court are made part of the record and sealed.

IT IS FURTHER ORDERED that the Defendant is assessed a \$300.00 fine, the costs of these proceedings and the assessment and recoupment fee, to be paid within twenty years or all of which execution shall issue.

IT IS FURTHER ORDERED that the Clerk of this Court prepare a warrant to issue to the Sheriff of Portage County commanding him to convey this Defendant as hereinabove directed, and that the Defendant be remanded into the custody of the Portage County Sheriff to be so conveyed.

IT IS SO ORDERED.



JUDGE LAURIE PITTMAN
COURT OF COMMON PLEAS

cc: Eugene Muldowney, Assistant Prosecuting Attorney
Carolyn Mulligan, Attorney for Defendant
Adult Probation Department
Sheriff

STATE OF OHIO) IN THE COURT OF APPEALS
) SS.
 COUNTY OF PORTAGE) ELEVENTH DISTRICT
 FILED
 COURT OF APPEALS

STATE OF OHIO, MAR 31 2011

Plaintiff-Appellee
 LINDA K FANKHAUSER, CLERK
 PORTAGE COUNTY, OHIO JUDGMENT ENTRY

- vs -

DESMOND A. BILLINGSLEY,
 Defendant-Appellant.

CASE NOS. 2010-P-0030
 and 2010-P-0031

For the reasons stated in the opinion of this court, appellant's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.



 PRESIDING JUDGE TIMOTHY P. CANNON

FOR THE COURT

APPELLANT'S EXHIBIT
 "B"

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 PUBLIC DEFENDER

IN THE COURT OF APPEALS
 ELEVENTH APPELLATE DISTRICT
 PORTAGE COUNTY, OHIO

FILED
COURT OF APPEALS
 MAR 31 2011
 LINDA K. FANKHAUSER, CLERK
 PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	OPINION
	:	
Plaintiff-Appellee,	:	
	:	CASE NOS. 2010-P-0030 ✓
- vs -	:	and 2010-P-0031
	:	
DESMOND A. BILLINGSLEY,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0023.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Dennis Day Lager, Portage County Public Defender, and *John P. Laczko*, Assistant Public Defender, 209 South Chestnut Street, Suite 400, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Desmond A. Billingsley, appeals from a judgment of the Portage County Court of Common Pleas denying his motion to enforce a Crim.R. 11 plea agreement negotiated in Summit County, Ohio.

{¶2} Appellant was involved in a series of approximately 30 robberies that occurred in Summit County, Stark County, and Portage County, Ohio. As a result, appellant was indicted in Portage County, Ohio, on numerous charges of aggravated

APPELLANT'S EXHIBIT
 "C"

robbery, each carrying a firearm specification. With the assistance of counsel, appellant negotiated a plea agreement with the Summit County Prosecutor. Under this agreement, appellant was to cooperate with the state and testify truthfully in the cases of his co-defendants. In exchange, the state agreed to the following, which was read into the record:

{¶3} "[THE COURT]: Is there an agreed upon sentence?

{¶4} "[SUMMIT COUNTY PROSECUTOR]: Judge, what we're going to do similar to what we did with Delaney, we're not asking to sentence him today, Billingsley today. He is going to sit down and give us information regarding remaining aggravated robberies we're aware of. There are certainly even – other than the five people that we have in this case, there are others who are involved in this group of robbers.

{¶5} "So we're going to sit down. The detective is here. He's going to sit down with Mr. Billingsley and get the information. If he is cooperative and truthful, then as to sentencing, State will recommend eight years. If not, then if he doesn't sit down and give information, subject to a polygraph, if we don't believe that he's telling the truth, then the recommendation by the State would be different.

{¶6} "There are potentially other charges from other counties. We have been in contact with those other counties and can say that's our recommendation to him, and they've agreed at least in the other defendant's cases, because we're getting these pleas here and we're resolving the cases here, that they will either not pursue charges on their robberies, or if they have already charged that, they'll run concurrent?

{¶7} "Is that it?

{¶8} “[DEFENSE COUNSEL]: In addition, Your Honor, if there are any cases that he talks about outside of the indictment, he would not be charged with those cases.

{¶9} “[SUMMIT COUNTY PROSECUTOR]: Correct. We would not be adding additional charges.”

{¶10} After entering into the agreement, appellant cooperated with the authorities. Appellant informed the authorities regarding all of the aggravated robberies, including those that occurred in Portage County. Thereafter, appellant was indicted in Portage County in case No. 2009 CR 00023 for aggravated robbery, a violation of R.C. 2911.01(A)(1), with a firearm specification. Appellant was subsequently indicted in case No. 2009 CR 00509 for two counts of aggravated robbery, with each count carrying a firearm specification.

{¶11} Appellant filed a motion to enforce the Crim.R. 11 plea agreement entered into in Summit County. After a hearing, the Portage County Court of Common Pleas overruled appellant's motion. Appellant entered a plea of no contest to the charges. Appellant was sentenced to a mandatory term of imprisonment of three years for each firearm specification, to be served consecutively to one another, and a definite eight-year sentence to be served for each felony, to be served consecutively to one another and consecutively to the sentence for the firearm specifications. Appellant's sentence was to be served concurrently to the prison term of eight years that he is serving for the conviction in Summit County.

{¶12} Appellant filed a timely notice of appeal and asserts the following assignment of error:

{¶13} "The trial court abused its discretion to the prejudice of appellant by overruling his motion to enforce the Criminal Rule 11 plea agreement and motion to dismiss firearm specifications."

{¶14} At the outset, we recognize that the instant appeal does not arise from successive prosecutions of the same factual scenario, but successive prosecutions of separate crimes occurring in another jurisdiction.

{¶15} On appeal, appellant argues that he entered into an agreement with the state of Ohio, as represented by the Summit County Prosecutor. And, based on the agreement, appellant would not be prosecuted in either Summit County or any other jurisdiction if he gave truthful information regarding his involvement in numerous, unindicted robberies. Further, appellant maintains that pursuant to such agreement, his sentence would run concurrently to his sentence in Summit County if he was indicted in any jurisdiction. Appellant asserts that since he complied with the terms of the agreement, i.e., he cooperated with the authorities and disclosed information on the robberies, the Portage County Prosecutor was either barred from prosecuting him or required to run his sentence concurrently to the sentence in Summit County.

{¶16} First, appellant has offered an argument based on contract law. Appellant seeks specific performance of the plea agreement. "Generally, a plea bargain is a contract and subject to the principles of contract law." *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, at ¶50. Where a violation of a plea agreement is found, the remedy may be specific performance. See *Santobello v. New York* (1971), 404 U.S. 257, 263.

{¶17} As determined by the Portage County Court of Common Pleas, appellant did "not meet the burden of proof necessary to establish that [the] Portage County Prosecutor is bound by the Summit County Plea Agreement. No one with authority to enter into such an Agreement consented to the Criminal Rule 11 negotiation or authorized the Summit County Prosecutor's Office to negotiate or contract for them. Portage County was not a party to the contract."

{¶18} The Portage County Prosecutor's Office was not mentioned anywhere in the record of the plea hearing. Therefore, as observed by the trial court, the only parties to the contract were appellant and the Summit County Prosecuting Attorney's Office. Further, neither the prosecutor nor the judge from Summit County testified at the hearing on appellant's motion to enforce the Crim.R. 11 plea agreement. Since Portage County was not a party to the agreement, the Portage County Prosecutor cannot be bound by the terms of the agreement.

{¶19} In exchange for appellant's testimony, the Summit County Prosecuting Attorney's Office recommended, and appellant received, a sentence of eight years. Additionally, only Summit County was prevented from using appellant's statements in bringing additional charges against him.

{¶20} We therefore find that, under the principles of contract law, Portage County is not bound by Summit County's agreement with appellant.

{¶21} Appellant also advances an agency argument. That is, as an agent of the state of Ohio, the Summit County Prosecutor had the ability to bind all counties, including Portage County.

{¶22} The Second Appellate District, in *State v. Barnett* (1998), 124 Ohio App.3d 746, at 751-755, applied agency principles to determine the validity of such an agreement. In *Barnett*, the defendant pled guilty to one count of gross sexual imposition involving his stepdaughter. *Id.* at 747. The Warren County Prosecutor's Office, in exchange for the defendant's plea, agreed to dismiss the remaining charges and agreed that no additional charges would be filed. *Id.* at 748. Thereafter, the defendant was indicted in Montgomery County on five counts of gross sexual imposition involving his daughter and another victim. *Id.* Like the instant case, the crimes in *Barnett* were committed in two different counties and were not allied offenses of similar import. The Montgomery County trial court granted the defendant's motion to dismiss the indictment based on the Warren County plea agreement. *Id.* The state of Ohio appealed. *Id.* at 749.

{¶23} One of the issues before the Second Appellate District was whether "one county's prosecutor has the actual or apparent authority to prohibit a defendant's prosecution in a second county for an unrelated offense without the second county's consent." *Id.* at 752. The *Barnett* court first determined that the Warren County Prosecutor's Office did not have actual authority to prevent the defendant's indictment in Montgomery County. *Id.* at 754. With respect to actual authority, the *Barnett* court reasoned that, although a county prosecutor is an agent of the state, "the county prosecutor's agency authority extends to the county line when investigating and prosecuting crimes. Thus, the county prosecutor is an agent of the state with respect to crimes committed in his county." *Id.* at 755. See, also, *State v. Dumas*, 5th Dist. No. 02CA60, 2003-Ohio-4117, at ¶26. Unlike federal prosecutors, a county prosecutor's

authority is generally limited to the county he serves, as they "are elected by local residents and work on behalf of those constituents, inquiring into the commission of crimes within the county." *Id.*

{¶24} Appellant next argues it was his understanding that, based on the agreement at issue, he would receive an eight-year term of imprisonment for all of the robberies in which he was involved. Thus, appellant is arguing that the Summit County Prosecutor had apparent authority to bind Portage County to the agreement at issue.

{¶25} "In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority. *** Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority. ***." *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, at ¶41. (Internal citations omitted.)

{¶26} With respect to apparent authority, the court in *Barnett* found that the "laws of Ohio support no such inference." *State v. Barnett*, *supra*, at 755. As in *Barnett*, the state of Ohio did not represent that the Summit County Prosecutor was authorized to act as its agent and plea bargain to offenses committed outside of Summit County. Appellant has failed to establish the existence of apparent authority.

{¶27} Based on the opinion of this court, appellant's sole assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.