

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Case No. 11-1384

Plaintiff-Appellant,

vs.

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District
Case No. 10AP-992

Travell L. Blake,

Defendant-Appellee.

MEMORANDUM OPPOSING JURISDICTION OF DEFENDANT-APPELLEE

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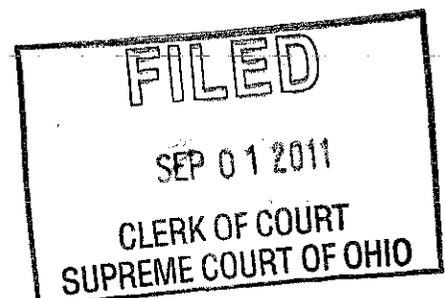


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EXPLANATION WHY FURTHER REVIEW IS NOT WARRANTED IN THIS CASE

As in the trial court, the state attempts to expand its anger and disappointment that the trial judge did not follow a jointly recommended sentence, though conceding this to be his prerogative, to broader claims not supported by the law or facts.

In the trial court the prosecution never took the obvious and appropriate step of submitting a motion to set aside the plea. Instead the trial prosecutor, on the brink of being found in contempt, asked that counts on which a nolle prosequi had already been accepted be set for trial. Before the Court of Appeals the sole assignment of error stated:

The trial court improperly dismissed counts one, two, three, four, five, and seven over the objection of the state.

Appellant's proposition of law reflects a further change of direction from the approach taken in the Court of Appeals. Now appellant submits:

Where the parties have agreed to jointly recommend a sentence, any deviation from the agreement constitutes a breach and the non-breaching party is entitled to a remedy as provided by law.

More troubling is appellant's attempt to construe proceedings in the trial court as a flagrant abandonment of the joint sentence recommendation by the defendant:

Upon argument by the state that the statements of by defendant constituted a breach of the plea agreement, defense counsel stated she did not believe that the joint recommendation was a contractual agreement, and defendant indicated that he never intended to go along with the sentence and only signed the agreement because he knew he could ask the court for a lesser sentence.

(Memorandum in support of jurisdiction, p. 2.) This misrepresents the sequence of events and what was actually said. The jointly recommended sentence was noted at the beginning of the sentencing hearing. Offered allocution, appellee asked for leniency, but did not directly ask the judge to ignore the joint recommendation and grant community control. Counsel's statements that followed reflected that appellee had put his family and business affairs in order and he had come to court prepared to go to prison. Counsel's statement concerning the contractual or non-contractual nature of a joint sentence recommendation came only after a recess, and was in the nature of

distinguishing a joint sentence recommendation from an agreed sentence.

The Tenth District properly reviewed the record and, applying contract law principles, found the plea agreement was not breached. The printed plea form used by the parties stated the terms of the agreement, including the joint sentence recommendation. It further set forth that the court might immediately proceed to judgment and sentence, and that the defendant placed himself, "completely and without reservation of any kind upon the mercy of the court with respect to punishment." State v. Blake, Franklin App. No. 10AP-992, 2011-Ohio-3318, ¶19. All those conditions were met with the entry of the guilty plea. Id. ¶19. Because the form advised the defendant that the ultimate decision lay in the hands of the court, his "request for leniency did not constitute a material breach of contract." Id. ¶21. "Further, the record clearly establishes that appellee, when given a chance to speak, did not ever specifically ask the trial court to disregard the joint sentencing recommendation in contravention of the plea agreement." Id., ¶22.

Appellee was not under a contractual obligation to stand mute at sentencing. He expressed in layman's terms his concerns and his sadness faced with the prospect of imprisonment, having until then led a law abiding life. The judge properly acknowledged the joint recommendation and never treated it as repudiated, but he also properly asserted that the final sentencing decision was his to make.

Because this case was properly resolved in the lower courts further review is not warranted.

STATEMENT OF THE CASE

Appellee Travell L. Blake was indicted in Franklin County for one count of aggravated burglary (R.C. 2911.11), one count of burglary (R.C. 2911.12), three counts of kidnapping (R.C. 05.01), one count of tampering with evidence (R.C. 2921.12), and one count of carrying concealed weapons (R.C. 2923.21). All but the CCW count carried three year firearm specifications. All charges arose a December 2, 2009 incident at 2999 Sunbury Ridge Drive. The three counts of kidnapping pertained to Sherma Brown, Lauren Cummings, and Joseph Cariea who were at that

address.

On July 22, 2010 appellee appeared before the Honorable Guy L. Reece, II of the Franklin County Court of Common Pleas, and pursuant to a plea agreement that is at the center of this appeal, pleaded guilty to tampering with evidence as charged in count six, minus the firearm specification. Tampering being a third degree felony, appellee faced a sentence of between one and five years in prison. The jointly recommended sentence was four years, with judicial release after serving six months. A nolle prosequi was entered with respect to the remaining counts. A presentence investigation was ordered and bond was continued.

A sentencing hearing was conducted on September 20, 2010. As will be developed in the statement of facts, matters rapidly became contentious, and the prosecutor threatened to file a motion to withdraw the guilty plea. This was never done.

Instead of imposing the jointly recommended sentence, appellee was sentenced to community control sanctions, including sixty days in jail, a fine, basic supervision, no contact orders, and an order appellee not possess weapons. The prosecutor asked that the nollied counts be set for trial. The court refused.

The state pursued both a claimed appeal as a matter of right and a motion for leave to appeal. The Tenth District denied leave to appeal but in a subsequent nunc pro tunc entry clarified that the appeal would proceed as an appeal as of right. The Franklin County Public Defender was not trial counsel, but was appointed as counsel on appeal.

The state's sole assignment of error was overruled in a decision rendered June 30, 2011. State v. Blake, Franklin App. No. 10AP-992, 2011-Ohio-3318. The state now seeks leave to appeal in a case involving a felony.

STATEMENT OF THE FACTS

I. The plea hearing

The printed plea form, in the midst of considerable scratched out writing, reflects the agreement previously described. Nothing in the form expressly addresses what consequences would follow if the court did not accept the jointly recommended sentence.

At the plea hearing appellee was asked, "And you are willing for the Court to dispose of this matter, realizing that, if followed, the Court -- if the joint recommendation is followed in this case, the Court will impose a prison term." Appellee responded, "Yes, sir."

After asking the questions required by Criminal Rule 11, but before formally accepting the plea, the judge asked appellee, "Mr. Blake, what did you do to cause these charges to be filed against you?" The response was, "Wrong place, wrong time." Elaborating, appellee said he and the victim had been in a relationship for seven years, but he was in the process of starting a business in Georgia:

She was coming down to move to Georgia, and I was coming up here to see her about every four months and I had no idea that she had another companion. And she had been talking to that companion for two years.

And at that point, when I came up here, I had only been gone from Ohio for one year, and when I found out about -- I mean, when -- I caught them, basically, I caught them together, and I handled it the best I could. I tried not to lead to nothing...

Appellee said he used a key to enter his girlfriend's (Sherma Brown) apartment, and got into a struggle with the other man she was seeing (Joseph Cariea). Appellee had been able to talk through the situation with Mr. Cariea, but Ms. Brown's roommate (Lauren Cummings) was upset and had pushed for charges to be filed. As to the gun, which was the subject of the tampering with evidence count appellee pled to, appellee said that he had an Ohio concealed carry permit and always carried his weapon.

The prosecutor took exception to some of this. She understood the relationship to have

been long over, and the new relationship only went back a few months. She maintained appellee had never had a key to the apartment during the seven years the couple were together. Ms. Brown was finishing graduate school and living in an apartment paid for by her parents. "She said she would not have disrespected her parents that way, that he never lived there, never had a key." The prosecutor complained, "I don't hear him admitting that he was drunk and out of control and did something very stupid..." "I don't know what crime he admitted to."

The plea was accepted, nolle prosequis were entered as to the remaining counts, and the case was set over for sentencing.

II. Did appellee ask the court to disregard the jointly recommended sentence?

The sentencing hearing began with a recitation by the judge as to the posture of the case:

Mr. Blake appeared in court on the 22nd of July, entered a plea of guilty to one count of tampering with evidence, a felony of the third degree without specifications.

There was a joint recommendation at that time that Mr. Blake be sentenced to four years' incarceration with judicial release after serving six months, if he presents a good prison record at that time.

I think there was also an agreement -- a recommendation that one of the things that occurs is that he participate in the CBCF, and that is fine too, but I will say that normally I don't try to hold that as a thing, but I understand the joint recommendation in this case.

The prosecutor said she hoped appellee was "willing to admit the facts of the case." Defense counsel gave a brief account of the underlying situation, including the explanation that the tampering with evidence count was based on appellee putting his gun under sofa cushions.

As to appellee's current circumstances, he had moved to Atlanta shortly after being indicted:

He basically is a contractor. He has a delivery service, and he contracts with other companies independently to run around and do their deliveries, whatever it may be.

I also have an independent contractor agreement that he signed with a company to do all of their deliveries.

Appellee had sole custody of his eight-year old daughter. He also shared custody of and supported a four-month old baby. Appellee was 31. He had no record. He maintained close contact with counsel and the bondsman. Counsel closed, "And, again, I can't tell you how many times I've heard him say how sorry he is that this situation escalated out of control."

After appellee's mother spoke, appellee made the following statement, during which the state's brief contends he "asked the trial court to disregard the joint recommendation and 'show [him] leniency.'"

THE DEFENDANT: Your Honor, I am -- I am not a criminal. I spent 31 years without a record, and I guarantee you I can be on 66 years of probation and never get in trouble again.

I'm very sorry for even being over there, you know, and my whole thing -- what I learned out of this situation is honesty, and what I mean by that is that I had a girlfriend in Atlanta and she had a boyfriend here. I didn't tell her about her, and she didn't tell me about him.

If both of us had been honest with each other, none of this would have ever happened. So I just -- I'm a working man. I work -- I work my fingers to the bone for my family, and I work like 17 hours a day. You know, sometimes I get off at 5:00 and off at 10:00 11:00 at night.

You know, I got a brand new son. I would like to see every breath he takes. You know, four months old, and I spend a lot of time with my kids and I do a lot of things for my kids, so I'm just asking you could you please show me some leniency, if you can.

THE COURT: You know, you signed an agreement here when you signed this plea form that you would serve -- go to prison. That was the agreement you signed. What am I supposed to do about that?

THE DEFENDANT: Well -- well, I know that I didn't - I didn't want to, you know, I know that ultimately it's your decision at the end, you know, and that's what I was kind of -- basically keeping faith, keeping hope, hoping that, you know, I could see if you can help me out of this situation, if I could see my way out of this situation.

Counsel then spoke:

MS. JINES: Your Honor, he signed the plea agreement and was fully aware that

he was facing prison time and is facing prison time.

He did that because he wanted to take responsibility for the tampering with evidence and the entire situation being caused.

THE DEFENDANT: Yeah, because I did tamper with evidence.

MS. JINES: We have talked quite a bit about what he's going to do is and when he goes to prison, with his family, his business, that type of thing. He's had more than the past month to situate stuff.

As I understand it, everything is situated. He would just like the chance to prove himself to this Court because he's never had a record before. Thank you.

III. Did the prosecutor's conduct during the balance of the hearing push the judge towards placing appellee on community control?

The prosecutor asked to be heard, but first the judge wished to confer off the record with the probation officer. Back on the record the prosecutor spoke as to her view of the evidence, closing:

He -- what -- you know, if he had stood up and said "I did all of it, I did it, and I almost ruined my life, thank you for this gift, that I will not have ruined my life with this guilty plea," but he is still minimizing his behavior.

If he chooses to do that, then the State is, I've already notified the defense attorney that the State will be filing a motion to withdraw the guilty plea because it was based on the joint recommendation of the defendant.

The judge said he understood and didn't disagree. But while he usually followed joint recommendations, he did not always do so, sometimes imposing an increased sentence and sometimes a lesser sentence, based on his own assessment of the circumstances, "especially in the situation or scenario like this." The prosecutor responded angrily, threatening, "I certainly will never do another joint recommendation in this courtroom. The judge had difficulty getting the prosecutor to allow him to speak. He said he had hoped the sentencing hearing would be short enough he could attend calling hours that morning, but would now like to speak with the victims before deciding what to do.

When court resumed that afternoon the court heard from Ms. Brown, Ms. Cummings and Mr. Cariea. The prosecutor argued the defendant had breached the plea agreement by asking for

less than the recommended sentence. She maintained defense counsel had told he in the hall it was her custom to ask for less than the joint recommendation. This shocked her, since she took lawyers, as officers of the court, at their word, though "we have no control over what the Court is going to do."

The judge repeated that he usually, but not always, followed joint recommendations, and noted the distinction between a joint recommendation and an agreed sentence. Seemingly picking up on this point, defense counsel stated, "I'm not aware of joint recommendations being a contractual agreement." As to apologies, counsel pointed out appellee was subject to no contact orders. Appellee apologized directly to Mr. Cariea, who had earlier complained he had not received a direct apology. The judge asked appellee how he had entered the apartment. The response was, "Through the key I had in my ashtray."

The judge then stated his reasoning in terms of the statutory factors guiding felony sentencing, concluding, "I don't feel prison is the appropriate sanction." He did include sixty days in jail, "because I want to reinforce what I think is the sense that prison is always there and potentially there."

After the victims declined an opportunity to make final comments, the September 20th hearing concluded as follows:

THE COURT: All right. Thank you. That's my sentence.

MS. REULBACH: Judge, at this point in time, the State is going to request that we set a trial date for the counts that were agreed to be dismissed based upon the plea agreement.

THE COURT: Hold on. Let me say this, those counts -- ma'am, you can't

DEPUTY: Have a seat.

THE COURT: You can't come up. Those counts were nolle'd. If you wish to appeal --, Ms. --

MS. REULBACH: But they haven't been journalized, Your Honor, and we would request that they be set for trial.

THE COURT: They will be journalized.

MS. REULBACH: Because I believe he was only sentenced on the tampering.

THE COURT: I had previously nolle'd those at the time of the plea. They will -

MS. REULBACH: Well, but you also accepted --

THE COURT: Ms. Reulbach, I'm going to say what I'm going to do.

MS. REULBACH: So you are not going to call -- you are not going to set a trial date for the other counts?

THE COURT: Let me -- please listen.

MS. REULBACH: Okay.

THE COURT: And you'll hear what I'm going to do.

MS. REULBACH: Okay.

THE COURT: I have disposed of this case. I will enter a judgment entry in this case, and that judgment entry will be the nolle'ing of all the counts. The Court previously entered an oral order at the time of the plea nolle'ing those counts.

This is the Court's decision. If you wish to appeal it, you may do so. I have no problem.

MS. REULBACH: But you would agree that - the Court also accepted the joint recommendation of the parties?

THE COURT: I'm adjourned on this case.

MS. REULBACH: Thank you, Your Honor.

THE COURT: All right.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW

I. The state did not make a meaningful effort to seek a remedy in the trial court.

Though the prosecutor mentioned filing a "motion to withdraw the guilty plea." she never did so. The prosecutor's claimed rationale was that appellee was now claiming his plea had not been voluntary. Instead the prosecutor requested that a trial date be set "for the counts that were agreed to be dismissed based upon the plea agreement." This would have maintained the tampering conviction.

Those counts had already been resolved at the conclusion of the plea hearing:

The Court will accept your plea of guilty; will enter a finding of guilty; and will enter nolle prosequis with respect to counts one, two, three, four, five and seven; will request a presentence investigation report; will set this matter down for sentencing for the 20th of September.

There was nothing tentative or conditional in this pronouncement. While the court could have put on a judgment entry reflecting the action taken at the plea hearing, the custom in Franklin County is to wait until sentence is pronounced, then incorporate the plea, dismissed counts, entry of conviction and sentence in a single entry. Accordingly, at the sentencing hearing the judge properly noted that the nollies were final and would be journalized.

Nothing in the plea agreement expressly conditioned entry of the nolle prosequis on the court actually imposing the jointly recommended sentence. A joint recommendation is different from an agreed sentence, where the judge would only have the choice of imposing the specified sentence if he accepted the plea.

If the prosecutor actually wished to revive the nollied charges, the proper approach, once the court refused to follow the joint recommendation, would have been a motion, preferably in writing, to strike the plea bargain based on the claimed breach of the agreement by the defense. This was the action taken by the defense in Santobello v. New York (1971), 404 U.S. 257, the leading case on holding parties accountable on the terms of plea bargains. In Santobello the defendant sought to withdraw his plea. On remand the lower court was also allowed to weigh specific performance of the plea agreement. Here the prosecutor could have requested either that the plea be set aside, or

the alternative remedy from Santobello that the defendant be resentenced before another judge. Instead the prosecutor asked that nollied counts be set for trial. The state's failure to seek timely relief in the trial court waives any claim of error on appeal.

Alternately the state might have assigned as error that the trial court abused its discretion in deviating from the jointly recommended sentence. Neither 2901.01 nor 2929.01 defines "jointly recommended sentence." The consequences of a "jointly recommended sentence" appear in R.C. 2953.08(D)(1):

A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by the sentencing judge.

While the refusal to impose a jointly recommended sentence does not give the defendant the right to appeal a sentence pursuant to R.C. 2953.08(A) or (C) or the state under (B), the prosecutor might have argued the failure to impose the jointly recommended sentence was an abuse of discretion, and thus contrary to law. It did not do so, perhaps because the unusual circumstances of this case would make it difficult to demonstrate an abuse of discretion when the ultimate comparison is between two and six months in custody.

II. Appellee did not repudiate the jointly recommended sentence.

Referring back to Part II of the statement of facts, when allowed to speak, appellee asked for leniency, but did not expressly ask the judge to disregard the joint recommendation. Allowing judicial release after six months in prison, as per the joint recommendation, would certainly be a form of leniency. Appellee did not ask to be put on probation instead of being sent to prison. Instead he said "I guarantee you I can be on 66 years of probation and never get in trouble again." The focus was on his law abiding life up until the time of this incident, and the likelihood of future law-abiding conduct.

Even when the judge called appellee's attention to the joint recommendation appellee did not repudiate it. He simply stated he had retained some hope to "see my way out of this situation." Nor did counsel ask the judge to disregard the joint recommendation. She said appellee had used

the last month to place his business and personal affairs in order for "if and when he goes to prison."

The jointly recommended sentence remained before the court. Ultimately it was the equities of the case that led to it not being imposed.

III. The court acted within its discretion by granting community control.

Had imprisonment been the essence of the plea agreement the parties should have framed the plea bargain in terms of an agreed sentence.

A jointly recommended sentence does not bind the court, which retains authority to impose a greater or lesser sentence, in its discretion, without voiding the plea bargain struck. State v. Georgakopoulos, 152 Ohio App. 3d 288, 2003-Ohio-1531. The judge properly drew the distinction between a joint recommendation and an agreed sentence. Also see State v. Patrick, 163 Ohio App. 3d 666, 2005-Ohio-5332, ¶23-28. Even an outright breach by the prosecutor -such as asking for the maximum after agreeing to stand silent - does not require reversal when the record indicates the sentencing decision was based on the judge's own assessment. State v. Murnahan (1996), 117 Ohio App. 3d 71. The sentence imposed did not encompass six months in prison and judicial release, but did include sixty days in jail and a presumptive five year sentence in the event of a community control violation. At the time of sentencing this meant is imposed the defendant would not become eligible for judicial release.

While the initial charges were certainly serious, there was no suggestion appellee entered the premises intending to harm those present. While not all the facts are in evidence, appellee's arrival at the apartment appears to be the product of not understanding the current status of his relationship with Ms. Brown, not retaliation for whatever new relationship she may have entered. Since appellee now lives in Georgia, recurrence is highly unlikely. Community control was the appropriate sanction.

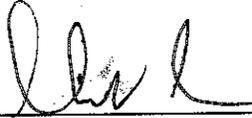
CONCLUSION

For the above stated reasons, further review of this cause is not warranted.

Respectfully submitted,

Yeura R. Venters 0014879
Franklin County Public Defender

By

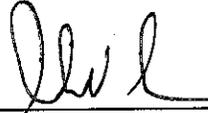


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PROOF OF SERVICE

I hereby certify that a copy of this Memorandum Opposing Jurisdiction was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio this 1st day of September, 2011.



Allen V. Adair, Counsel of Record
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