

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 2011-0827
	:	
Appellee,	:	
	:	
-vs-	:	
	:	
DESMOND A. BILLINGSLEY,	:	On Appeal from the
	:	Portage County Appellate
	:	Court, Eleventh
Appellant.	:	Appellate District

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MERIT BRIEF OF APPELLANT  
DESMOND A. BILLINGSLEY

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## STATEMENT OF FACTS AND CASE

This appeal arises from a decision of the Portage County Common Pleas Court overruling the Defendant-Appellant, Desmond Billingsley's, (hereinafter referred to as "Appellant") Motion to Enforce a Criminal Rule 11 plea agreement and Motion To Dismiss Firearm Specification in this matter.

This matter encompasses the consolidation of two (2) separate criminal cases filed against Appellant in the Portage County Common Pleas Court. The initial 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 carrying the potential sentence of three (3) to ten (10) years incarceration and a three (3) year 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 finally to August 29, 2009, while awaiting the filing of the new indictments.

On August 27, 2009, the Appellant was indicted by the Portage County Grand Jury in an additional two (2) count indictment under Portage County Case Number 2009 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, carrying the potential sentence to three (3) to ten (10) years incarceration and a three (3) year 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, carrying the potential sentence of three (3) to ten (10) years incarceration and a three (3) year 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 Portage County Common Pleas Court. The basis for Appellant's motion arises from a Criminal Rule 11

plea agreement entered into by Appellant, his counsel and the Summit County Prosecutor in Summit County Common Pleas Court, 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 prosecutor, Appellant was required to give truthful testimony of his involvement with any and all criminal activity including additional aggravated robberies in Summit County and other jurisdictions. In exchange for Appellant's truthful testimony and complete cooperation, 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 testify to these potential charges. The Summit County Prosecutor, Rebecca Doherty, 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 testimony 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 met 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. Accordingly, on November 17, 2008, the Summit County Common Pleas Court conducted a sentencing hearing in Appellant's case and sentenced Appellant to a term of incarceration of five (5) years on each of two (2) counts of Aggravated Robbery to be served consecutive to a mandatory three (3) year sentence for the firearm specification, concurrently with a seven (7) year sentence for one (1) count of Attempted Aggravated Robbery, for a total of eight (8) years. (Attached hereto as Exhibit A-1). Subsequently, these statements resulted in the previously set forth charges being levied against Appellant herein being filed; which charges would not have been filed without Appellant's statements.

On December 21, 2009, the trial court conducted a 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 in Summit County, Larry Whitney, Detective James Pasheilich, and Appellant himself. At the conclusion of the testimony, the Motion hearing was recessed and a continuation hearing was set for January 9, 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. (Attached hereto as Exhibit A-2)

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 in cases numbered 2009 CR 00023 and 2009 CR 00509: 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 and consecutive to the mandatory three (3) year sentence for the firearm specifications; for a total of thirty-three (33) years. However, the trial court did not 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-3)

On April 14, 2010, counsel for Appellant filed a Notice of Appeal to the Eleventh District Court of Appeals and after the case was briefed by the parties, the case proceeded to oral argument on March 2, 2011, on the issue set forth herein to the court. The Eleventh District Court of Appeals affirmed Appellant's conviction and sentence in an opinion dated March 31, 2011. (Attached hereto as Exhibit A-4). In its opinion, the Eleventh District Court of Appeals agreed with the trial court and concluded that since the Portage County Prosecutor's office was not a party to the Appellant's Criminal Rule 11 plea agreement with Summit County, that they were not bound by Summit County's agreement with Appellant, and that he was not entitled to concurrent sentences pursuant to that agreement.

Thereafter, on May 16, 2011, Appellant filed a Notice of Appeal and Memorandum in Support of Jurisdiction to this Honorable Court requesting this Court accept jurisdiction of the instant matter to review the standards for enforcing Criminal Rule 11 Plea Agreements made with a county prosecutor involving crimes that occurred in another county. (Attached hereto as Exhibit A-5) After the Appellant's Response in

Opposition to Appellant's Memorandum in Support of Jurisdiction was filed on June 22, 2011, this court accepted jurisdiction of the within appeal in an entry dated September 21, 2011. (Attached hereto as Exhibit A-6).

## 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.**

Criminal Rule 11 Plea Agreements are by nature contracts made by and between criminal defendants, their respective counsel and the prosecuting attorneys representing the State of Ohio in the disposition of a criminal case. In a criminal case, of paramount importance to the completion of a valid, binding contract among other aspects, is the consideration that a criminal defendant puts forth in the completion and performance of his role in following the terms and conditions of the Criminal Rule 11 Plea Agreement. In most instances, as was the case herein, that requires a criminal defendant to give truthful testimony or statements of their knowledge and involvement in criminal activity, including items for which they may not be criminally charged. These criminal defendants comply with these requirements with the aid and assistance of legal counsel and admit to additional crimes pursuant to these Criminal Rule 11 Plea Agreements on the promise on the record in court from the prosecutor that they will not be sanctioned for these additional crimes.

However, this unfair and prejudicial practice, which we employ in our criminal justice system every day as a tool to try and solve crimes to clean up the streets and promote "justice", erodes the public's confidence in the criminal justice system when, as was the case herein, a prosecuting attorney for the State of Ohio in one county is not

required to abide by the terms of a plea agreement made between the criminal defendant and the prosecuting attorney for the State of Ohio in another county.

This is exacerbating and prejudicially unfair where in a fact situation as we have herein, there was an actual "meeting of the minds" which formulated the basis for the Criminal Rule 11 plea agreement (contract), where the defendant relied detrimentally on the promises and guarantees of a county prosecutor, purporting to act as an agent of the State in the exercise of State authority, all with the imprimatur of a Common Pleas judge who approved and sanctioned the agreement and imposition of sentence. Clearly, the Appellant herein was misled by the entire criminal justice system into cooperating with the Summit County Prosecutor by giving "truthful" statements of his involvement in these underlying criminal activities, prosecution of which would have been foreclosed and prevented absent his bargained cooperation.

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 Appellant's Criminal Rule 11 Plea Agreement herein are clear. The Summit County Prosecutor indicated 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, un-indicted 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)

Appellant's trial counsel testified the prosecuting attorney made specific provisions for the plea agreement and promises of sentence and also indicated that she personally had contacted other jurisdictions involved (i.e. Portage County) and indicated as follows:

We arrived at --Becky and I arrived at an agreement that he would plea to one gun spec, although he would be indicted for at least one other one --

Q. Okay.

A. -- and plea to one other one. He would get five years on the two armed robberies and the robbery, and that she indicated to me that she had talked with the Detectives in the other jurisdictions which would include in my mind Portage and Stark.

Q. Okay

A. And that they went along with this and that if he were charged they would run their time concurrent or they weren't going to charge him. They would clear him by exception.

Q. And do you remember the timeframe at which this was going on, that all these were being resolved by you and Becky?

A. It went on for -- a lot of it occurred between the plea and the sentencing. We continued the sentencing at least once so that he could fit in more -- I thought the more he talked the better off he did. And he was one of the best witnesses that's the reason why he only got eight years in comparison to some of the other Defendants who got fifteen, because he not only -- not only did he talk about the ones he knew about, but he talked about the ones that he didn't know about, particularly the two that only he would know, and he leaked other people in the case, other co-Defendants in the case, he leaked them to the prosecution, so I think he was a very valuable

witness to the prosecution. (Motion to Suppress Hearing dated December 21, 2009, p. 13, 14)

In outlining the specifics at the Criminal Rule 11 plea agreement, Appellant's trial counsel further testified:

A. I remember her telling the Judge or putting on the record that she had talked with the other jurisdictions, and that they were going to go along with the agreement that we made in Summit County.

Q. Okay.

A. I felt comfortable that the other jurisdictions would follow suit. They would either not indict or if they would indict, it would be concurrent sentence. (Motion to Suppress Hearing dated December 21, 2009 p.14)

Appellant's trial counsel established the Criminal Rule 11 Plea Agreement specifically included the Portage County cases based upon a list of robberies provided to counsel as part of its discovery. The Summit County Prosecutor had the same list, which included the Portage County cases as follows:

What I'm saying is that the Summit County Prosecutor, Becky Doherty, told me and told the Court and put on the record, that she had talked to the other jurisdictions, authorities in the other jurisdictions in which these robberies occurred and they were okay with this plea agreement.

By Mr. Muldowney:

Q But she didn't say what authorities, she didn't say what jurisdiction?

A. That's correct. She did not.

I knew where the authorities were and I knew where the jurisdictions were because I had a list of the robberies and jurisdictions in which they occurred. So I knew Stark and Portage and Summit.

Q. Okay (Motion Hearing Dated December 21, 2009 p. 25)

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 detrimental reliance and complete cooperation clearly established this apparent agency.

In reviewing Appellant's contentions herein, this Honorable Court must review the fundamental fairness and administration of justice by the Prosecuting Attorneys of the State of Ohio to resolve the conflict and prejudice to criminal defendants under the law. At the present time, those entrusted with enforcing the laws of the State of Ohio (Prosecutors) are entitled to every benefit and advantage to carrying out their duties without fear of prejudice for failure to act. The State of Ohio decides whom to prosecute and on what terms. If a Criminal Rule 11 Plea Agreement is made and a criminal defendant fails to follow through with his responsibilities thereunder, the Criminal Rule 11 Agreement is set aside. Yet conversely, as is the case herein, the defendant, upon following to the letter what is required of him by the State of Ohio, is rewarded with an additional thirty-three (33) years sentence in the Ohio Department of Corrections under the guise that the State of Ohio now suddenly is no longer a single entity, but rather eighty-eight (88) separate entities, with independent and unfettered authority to choose whom to prosecute, aided by the benefit of plea agreements negotiated by other

prosecutors which are not otherwise enforceable beyond the geographical boundaries of the county where the negotiated plea bargain occurred. Accordingly, the State of Ohio receives the benefit of these negotiated bargains through the concept of sovereign divisibility, but the defendant does not.

Perhaps the fundamentally fair approach to this query is to find as the Eighth District Court of Appeals did in *State v. Urvan* (1982) 4 Ohio App 3d 151, that the State of Ohio should be construed as a single entity whether acting through one (1) or other of its county prosecutors in prosecuting a criminal defendant for offenses which took place in multiple counties for offenses which occurred as part of a continuing course of conduct. This would be specifically proper in situations such as the instant case to prevent the "State of Ohio" from accepting and benefiting from the terms of a Criminal Rule 11 Plea Agreement and refusing to extend the benefit of the bargain to the criminal defendant by hiding under the cloak of eighty eight (88) separate entities. In order to protect the sanctity of the criminal justice system, prosecutors must live up to the Criminal Rule 11 Plea Agreements they make, just as criminal defendants, to alleviate detrimental reliance and misleading of criminal defendants into unfulfilled and meaningless plea agreements.

Thus, 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. Likewise, if a criminal defendant abides by the terms of the Criminal Rule 11 Plea Agreement and fully cooperates with statements and/or testimony, should not the contrary be true with respect to pre indictment agreements not to prosecute as was the case herein.

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 and through the witness and transcript testimony from Appellant's Summit County Plea hearing.

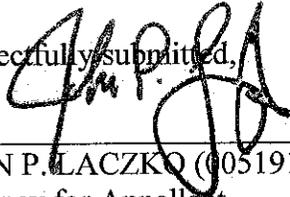
It is the duty of the trial court as a trier of fact to determine whether there has been compliance with a plea agreement. State v. Curry (1976) 49 Ohio App 2d 180. In order to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time 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**

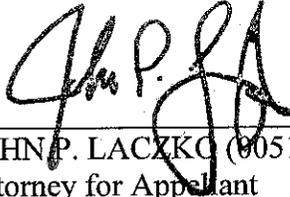
Based upon the proceeding case law and the argument, Appellant's Proposition of Law should be sustained and Appellant granted specific performance of concurrent sentences and the dismissal of the firearm specifications.

Respectfully submitted,

  
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**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 27<sup>th</sup> day of January, 2012.

  
\_\_\_\_\_  
JOHN P. LACZKO (0051918)  
Attorney for Appellant

JANEL M. HERRIGAN

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

2008 NOV 21 AM 7:31

SUMMIT COUNTY  
THE STATE OF OHIO  
CLERK OF COURTS

Case No. CR 08 01 0290 (D)

vs.

JOURNAL ENTRY

DESMOND A. BILLINGSLEY

THIS DAY, to-wit: The 17<sup>th</sup> day of November, A.D., 2008, the Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. Defense counsel, LAWRENCE WHITNEY, was present as was the Defendant, and who was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court finds that the Defendant heretofore on October 15, 2008 pled GUILTY to AGGRAVATED ROBBERY, as contained in Counts Twelve (12) and Twenty Four (24) of the Supplement Three to Indictment, with FIREARM SPECIFICATION ONE TO COUNT TWELVE, and FIREARM SPECIFICATION ONE TO COUNT TWENTY FOUR; and ATTEMPTED AGGRAVATED ROBBERY, as contained in the amended Count Twenty Three (23) of the Supplement Three to Indictment, which offenses occurred after July 1, 1996, which pleas were accepted by the Court, and the Court made a finding of guilty on each of these offenses.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, DESMOND A. BILLINGSLEY, be committed to the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION for an actual Three (3) Year **mandatory** sentence for possession of a firearm; for a period of Five (5) Years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of AGGRAVATED ROBBERY, on each of two (2) counts, Ohio Revised Code Section 2911.01(A)(1), felonies of the first (1<sup>st</sup>) degree; and for a period of Seven (7) Years for punishment of the crime of ATTEMPTED AGGRAVATED ROBBERY, Ohio Revised Code Section 2923.02./2911.01(A)(1), a felony of the second (2<sup>nd</sup>) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, 205 South High Street, Akron, Ohio 44308-1662.

IT IS FURTHER ORDERED that the Three (3) year mandatory sentence imposed in this case be served prior to, and CONSECUTIVELY, with the sentence imposed in Count Twelve (12), for a total of eight (8) years incarceration.

IT IS FURTHER ORDERED that the Court, pursuant to Section 2941.25(A), Ohio Revised Code, declines to sentence said Defendant on the FIREARM SPECIFICATION ONE TO COUNT TWENTY

FOUR, for the reason that said specification is merged with the FIREARM SPECIFICATION ONE TO COUNT TWELVE.

IT IS FURTHER ORDERED that the sentence imposed in Counts (12), (23), and (24) be served CONCURRENTLY with each other.

Thereupon, the Court advised the Defendant that after serving his prison term, he shall be placed on post release control for a period of five (5) years, and if he violates the terms of post release control, he may be imprisoned for an additional term in prison up to one half of the stated term of imprisonment.

IT IS FURTHER ORDERED, pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

Thereupon, based on an investigation by the Summit County Adult Probation Department, the Court finds that the Defendant is entitled to two hundred forty one (241) days of jail time credit toward the sentence imposed herein.

APPROVED:  
November 18, 2008  
jam

  
PAUL J. GALLAGHER, Judge  
Court of Common Pleas  
Summit County, Ohio

cc: Prosecutor Omar Siddiq/Beth Aronson  
Criminal Assignment  
Registrar's Office  
Adult Probation Department  
(Court Convey)  
(Attorney Lawrence Whitney)

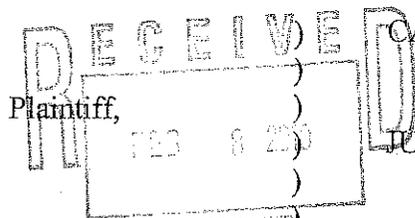
FEB 02 2010

IN THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

CASE NO. 2009 CR 00023



Plaintiff,

v.

JUDGE LAURIE J. PITTMAN

DESMOND A. BILLINGSLEY, PUBLIC DEFENDER

ORDER AND JOURNAL ENTRY

Defendant,

\*\*\*

This matter is before the Court upon the motion of the Defendant Desmond Billingsley seeking an Order to Enforce Criminal Rule 11 Plea Agreement and a Motion to dismiss Firearm Specifications.

The Defendant was indicted in Case No. 2009 CR 00023 for Aggravated Robbery with a firearm specification, in violation of ORC 2911.01(A)(1), a felony of the first degree, on January 16, 2009. The Defendant was subsequently indicted in Case No. 2009 CR 2009 CR 00509 for Aggravated Robbery with a firearm specification, in violation of ORC 2911.01(A)(1), a felony of the first degree, on August 27, 2009, that case is before Judge John A. Enlow.

The basis of the Defendant's motion is that the Defendant entered a Criminal Rule 11 plea negotiation in Case No. CR-2008-01-0290 in the Summit County Common Pleas Court before Judge Paul Gallagher on October 15, 2008. That plea negotiation, according to the Defendant, required the Defendant to give truthful testimony concerning various additional robberies or crimes that the Defendant was involved in Summit County and other jurisdictions. In exchange the Defendant would receive an eight year prison term on the Summit County charge and not be charged in any other case that the

Defendant implicated himself by his testimony in Summit County **and** in other jurisdictions.

The Defendant then talked with Detective James Pasheilich of the Akron Police Department and reportedly cleared approximately 35 aggravated robberies (see transcript of the sentencing hearing, joint exhibit B, TP-3). At the November 17, 2008 sentencing hearing, the Assistant Summit County Prosecutor, Becky Doherty, mentioned that the Defendant talked with a Kent Police Department detective (joint exhibit B, TP-3,4). The Defendant claims his talks with the Akron Detective and the Kent detective lead to the two indictments in Portage County.

In Ohio, Criminal Rule 11 plea agreements are regarded as contracts between the county prosecutor and the Defendant. The principals of contract law are generally applicable. If 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 indictment or consideration, such promise must be fulfilled. *State v Jimenez*, 2009-Ohio-4337. Therefore if one side breaches the agreement the other side may be entitled to rescission or specific performance.

The plea bargain was entered into the Summit County Common Pleas Court's record on October 15, 2008, at the Defendant's plea hearing. Apparently the Defendant had been one of several individuals indicted in a series of crimes of violence charged (transcript of the plea hearing, October 15, 2008, joint exhibit A, TP-4). Defendant's plea negotiation was handled similarly to a Defendant Delaney (joint exhibit A TP-4). At transcript page 4-5 of the plea hearing the text of the Agreement, which is the basis of the motion, before this Court, was read into 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. 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.

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.

Is that it?

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.

There is no question that Assistant Prosecutor Doherty entered into a plea agreement with the Defendant Desmond Billingsley in the Summit County case. The issue is whether she had the specific consent of the other counties to bind them to her Plea Agreement with the Defendant.

At the hearing on the Defendant's Motion to Enforce the Criminal Rule 11 Plea

Agreement several witnesses were called by the Defendant.

Attorney Larry Whitney testified that he believed there was an agreement for concurrent time with other counties. However Attorney Whitney also testified that no one from Portage County was present during the negotiations nor was any written agreement entered into with anyone from Portage County concerning the two very serious felonies which occurred in Portage County. In fact no one testified that anyone with authority to bind the Portage County Prosecutor's office ever was aware of the negotiated plea in Summit County.

Detective Pasheilich testified that the Defendant cooperated with him and helped clear 35 robberies in Summit and different counties. The information was given by the Defendant after the plea of October 15, 2008. Detective Pasheilich also testified that he was pleased with the Defendant's information which was shared with a detective from the Kent Police Department. The Akron detective also stated that he'd go to bat for the Defendant and recommend concurrent time. No Portage County prosecutor was involved in these discussions. The discussions with the Kent detective were not in the nature of a plea negotiation. A City of Kent detective cannot contract for the Portage Prosecutor's office unless he is specifically authorized to do so.

The Defendant, Desmond A. Billingsley, testified that he thought he had a deal which included all counties that he implicated himself and others in criminal activity.

Assistant Prosecutor Doherty was not called to testify. Judge Gallagher, although available, was not called to testify. The unnamed Kent detective was not called to testify. No one from the Portage County Prosecutor's Office was called to testify.

The Defendant's motion does not meet the burden of proof necessary to establish

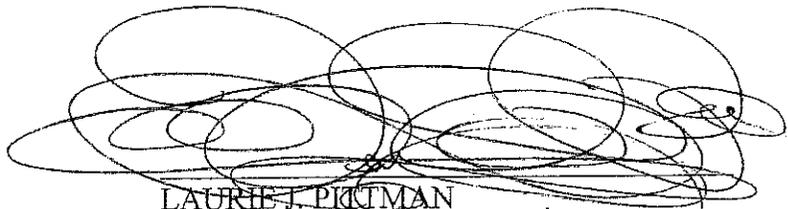
that Portage County Prosecutor is bound by the Summit County Plea Agreement. No one with authority to enter into such an Agreement consented to the Criminal Rule 11 negotiation or authorized the Summit County Prosecutor's Office to negotiate or contract for them. Portage County was not a party to the contract.

The Defendant must show there was specific authority given by the Portage County Prosecutor to the Summit County Prosecutor's Office or the Summit County detective to enter into a separate plea agreement or to join Portage County into the plea agreement of October 15, 2008. If any Kent detective made such a representation, (the representation may create an ethical delemina for the detective), that representation would not be binding upon the Portage County Prosecutor.

The Defendant may have a remedy by rescinding the plea negotiation in Summit County. Portage County was not a party to the Summit County Plea Agreement.

IT IS THEREFORE ORDERED that the Defendant's Motion to Enforce Criminal Rule 11 Plea Agreement, Motion to Dismiss Firearm Specifications is overruled. The Clerk shall serve a copy of this Order to all parties or their attorneys of record.

SO ORDERED



LAURIE J. PICTMAN  
JUDGE, COURT OF COMMON PLEAS

cc: Eugene Muldowney, Pros  
John Laczko, PD

IN THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

**FILED**  
COURT OF COMMON PLEAS

CASE NO. 2009 CR 0023

2009 CR 0509

Plaintiff

MAR 29 2010

JUDGE LAURIE J. PITTMAN

-vs-

LINDA K. FANKHAUSER, CLERK,  
PORTAGE COUNTY, OHIO

DESMOND A. BILLINGSLEY,

JUDGMENT ENTRY

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.

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.

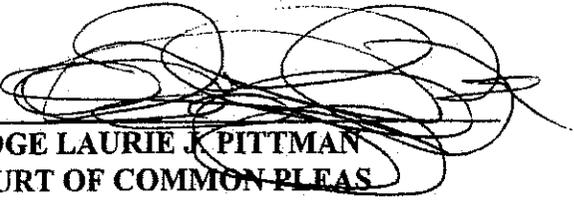
IT IS FURTHER ORDERED the bond previously fixed herein is discharged.

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 J. PITTMAN  
COURT OF COMMON PLEAS

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

RECEIVED  
APR 1 2011  
PUBLIC DEFENDER

FILED  
COURT OF APPEALS

MAR 31 2011

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

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

:

OPINION

Plaintiff-Appellee,

:

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

- vs -

:

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

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.

MAY 17 2011

PORTAGE COUNTY  
PUBLIC DEFENDER

**IN THE SUPREME COURT OF OHIO**

FILED  
MAY 18 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

11-0827

STATE OF OHIO,

CASE NO. \_\_\_\_\_

Appellee,

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

-vs-

Court of Appeals

DESMOND A. BILLINGSLEY,

Case No. 10 PA 00030 & 10 PA 00031

Appellant.

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**NOTICE OF APPEAL OF DEFENDANT-APPELLANT,  
DESMOND A. BILLINGSLEY**

---

Attorney for Plaintiff-Appellee

Attorney for Defendant-Appellant

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

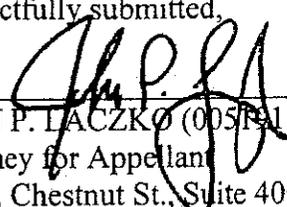
JOHN P. LACZKO  
Portage County Public Defender  
209 S. Chestnut St., Suite 400  
Ravenna, Ohio 44266  
(330) 297-3665

**NOTICE OF APPEAL OF APPELLANT, DESMOND A. BILLINGSLEY**

Appellant, Desmond A. Billingsley, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Portage County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 10 PA 00030 and 10 PA 00031 on March 31, 2011.

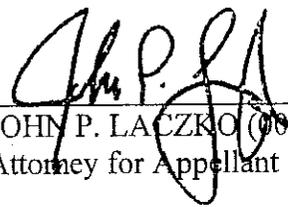
This case raises substantial constitutional questions and is one of public or great general interest.

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 this Notice of Appeal 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

FILED

The Supreme Court of Ohio

SEP 21 2011

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2011-0827

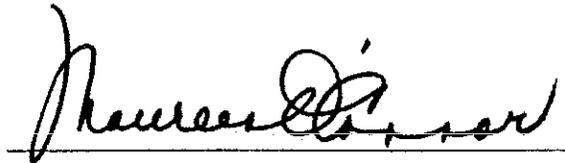
v.

ENTRY

Desmond A. Billingsley

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Portage County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Portage County Court of Appeals; Nos. 2010P0030 and 2010P0031)



Maureen O'Connor  
Chief Justice