

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 13-0382
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
KAREEM GILBERT	:	Court of Appeals Case Number C-110382
Defendant-Appellee	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

Joseph T. Deters (0012084P)
Prosecuting Attorney

Melynda J. Machol (0040724P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3119
Fax No. (513) 946-3021

FILED
MAR 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR PLAINTIFF-APPELLANT, STATE OF OHIO

Ravert J. Clark
Attorney at Law
114 East 8th Street, Suite 400
Cincinnati, Ohio 45202
(513) 587-2887

Timothy Young
Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215-2998

COUNSEL FOR DEFENDANT-APPELLEE, KAREEM GILBERT

RECEIVED
MAR 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW..... 6

Proposition of Law No. 1: Plea agreements are contractual in nature and subjects to contract law standards. When any party breaches a plea agreement, the trial court has authority to vacate the plea. To find otherwise is to allow the breaching party to perpetrate a fraud on the court.6

Proposition of Law No. 2: The double jeopardy clause did not bar the prosecution of Defendant-Appellant where both parties bargained for and received substantial benefits, and Defendant-Appellant understood that if he breached the agreement the original charges could be reinstated.14

CONCLUSION..... 15

PROOF OF SERVICE..... 16

APPENDIX:

Judgment Entry, *State of Ohio vs. Kareem Gilbert*, C-110382,
(January 30, 2013) A-1.

Opinion, *State of Ohio vs. Kareem Gilbert*, C-110382,
(January 30, 2013) A-2.

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

The integrity of plea agreements and the ability to enforce them has been threatened by the First District Court of Appeals' decision, not only in the present case, where Kareem Gilbert's Murder conviction was reversed, but in all pending and future cases where plea bargains are struck to preserve the state's interest in justice and the defendant's interest in due process. The effects of the majority's decision are far-reaching.

Specifically, the issue is whether a trial court has the authority to vacate a defendant's guilty plea to Murder when the defendant breached the express terms of the plea agreement after sentencing where the defendant agreed that, if he breached the agreement, his plea would be set aside and the charges would be reinstated. This Court has stated that the principals of contract law generally apply to the interpretation and enforcement of plea agreements. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150. In a 2-1 decision, the majority's decision turned this principle on its head when it held that the trial court had no authority to enforce Gilbert's plea agreement. The dissent correctly argued that Gilbert perpetrated a fraud upon the court, and that this action constituted an exception to the rule regarding final judgments.

Here, Gilbert entered into an agreed plea and sentence under which, in exchange for his promise to testify for the state in a separate case, the state reduced and dismissed various charges against him. This agreement was not illusory. It was memorialized in a four-page document, wherein Gilbert agreed that his plea would be vacated, and that he would face the original indictment if he did not testify as promised. His refusal to testify came to pass and, upon a motion by the state, his plea was vacated as directed by paragraph six of the plea agreement. This paragraph provided that if Gilbert failed to cooperate fully with the state as agreed, the parties

would be returned to their respective positions which existed prior to the execution of the agreement.

The majority reversed Kareem Gilbert's conviction for Murder with firearm specifications because it found that the trial court lacked authority to grant the state's motion to vacate the original plea, despite the fact that the parties had agreed to allow the court to do so. The majority reversed the conviction even though Gilbert consented to having the plea withdrawn, admitted that he had violated the terms of the plea agreement, failed to appeal the trial court's decision, and then negotiated a new agreed plea and sentence with the state.

The analysis used by the majority is in conflict with the Ninth District's decision in *State v. Taylor*, which permitted the trial court to vacate the defendant's plea after she had begun serving her sentence where the defendant had reneged on her plea agreement. *State v. Taylor*, 9th Dist. No. 92CA005469, 1993 WL 164782 (May 19, 1993). The majority flatly disagreed with the *Taylor* court's reasoning, yet inexplicably refused to certify a conflict to this Court. By finding the state's reliance on *Taylor* to be "misplaced," the majority, in effect, rejected this Court's reasoning in *State v. Bethel, supra*. In *Bethel*, this Court held that plea agreements are contracts, and the principals of contract law are generally applicable to the interpretation and enforcement of plea agreements. *Bethel, supra*.

The dissent fully recognizes that the majority's opinion undermines the plea arrangement system in Ohio and is gravely unjust to the citizens of Ohio. The majority allows a criminal defendant to perpetrate a fraud on the court. Any rule of law that allows *any* party to perpetrate a fraud on the court *simply cannot stand*. This decision reflects a divided court and includes the majority opinion, a separate concurring opinion and a dissent, all of which demonstrate that this is a divisive issue.

The majority's decision affects the prosecution of cases statewide. In addition to not allowing such a fraud to occur, there are a host of practical reasons for the state and a defendant to enter into a plea agreement like the one in Gilbert's case, where a defendant's testimony is available and necessary in another case. The requirement of the majority that this testimony can only be used, even in the event of an express agreement to the contrary, *before* the defendant is sentenced cannot always be met. Where a defendant is needed to testify in a separate case, the judge for the pleading defendant would have to hold off resolution of his case until the other matter is resolved. Given the need for speedy resolution of criminal cases and a defendant's right to such, parties do not always have the luxury of delaying sentencing until a separate case is resolved. In such cases, the plea confers continuing jurisdiction on the court to enforce its terms even after sentencing. In fact, other appellate courts have recognized the jurisdiction of trial courts in post-verdict and post-sentencing cases. *Taylor, supra*; see *State v. Greene*, 5th Dist. No. 98CA71, 1999 WL 770203 (Sept. 20, 1999); see also *State v. Butts*, 112 Ohio App.3d 683, 679 N.E.2d1170 (8th Dist. 1996).

STATEMENT OF THE CASE AND FACTS

Defendant–Appellant was indicted on March 12, 2009, on two counts of Aggravated Murder with firearm specifications, two counts of Having Weapons While under Disability, and one count of Intimidation of a Witness.

On May 18, 2010, Gilbert entered into an agreed plea and sentence whereby he pled guilty to one count of Manslaughter with a firearm specification in exchange for a reduction from Aggravated Murder. Gilbert also pled guilty as charged to Having Weapons While under Disability and Intimidation of a Witness in exchange for a dismissal of the second Aggravated Murder charge with a firearm specification and Having Weapons While under Disability. Gilbert was sentenced to an agreed term of incarceration of 18 years. In exchange for this plea

and the reduction and dismissals, Gilbert agreed to cooperate with the state in another murder case. Gilbert signed and acknowledged a separate agreement with the state, whereby he agreed to provide truthful, complete and accurate information in the investigation of his father, Ruben Jordan, in the murder of Victor Davis, and to testify against Jordan at trial. This agreement was embodied in a four-page document which was filed and sealed by the trial court. Gilbert agreed that if he failed to cooperate fully and truthfully against Ruben Jordan, the state may reinstate the original charges, add any appropriate additional charges, and that the parties would be returned to their original positions, with the exception that Gilbert's proffer would be admissible against him at trial. Gilbert also expressly waived any double jeopardy or speedy trial rights. Because the agreement was that Gilbert would be brought back from prison to testify truthfully against Ruben Jordan, the trial court proceeded immediately to impose the 18-year agreed sentence upon Gilbert.

Exactly one year later, on May 18, 2011, the state asked the trial judge to vacate the plea after Gilbert failed to cooperate with the state against Ruben Jordan. Gilbert did not object to this motion, and it was granted by the trial judge. At this same time, Gilbert entered into an agreed plea to Murder with a firearm specification and Having Weapons While under Disability. The remaining charges of Aggravated Murder with a firearm specification, Intimidation of a Witness, and Having Weapons While under Disability were dismissed. Gilbert was sentenced to an agreed term of incarceration of 18 years to life.

On November 7, 2011, counsel for Gilbert filed a no-error brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). On March 30, 2012, the majority ordered briefing on the issues of whether the trial court had the authority to grant the state's motion to vacate the plea. *State v. Gilbert*, 1st Dist. No. C-110382, 2012-Ohio-1366.

In a 2-1 decision, on January 30, 2013, the majority found that the trial court's original sentence was a final judgment that could not be disturbed. The majority reversed Gilbert's May, 2011, conviction for Murder with the firearm specification and the conviction for Having Weapons While under Disability, remanding the matter to the trial court with instructions to reinstate Gilbert's May 2010 conviction for Manslaughter. *State v. Gilbert*, 1st Dist. No. C-110382, 2013-Ohio-238. The concurring opinion found it regrettable that Gilbert escaped a conviction, but believed Ohio courts lack authority to enforce plea agreements where a defendant's breach occurred post-conviction. *Id.* at ¶ 22.

The dissent found that Gilbert should be held to the agreements he made, and "[t]o do otherwise undermines the entire plea arrangement." *Id.* at ¶ 23. The dissent found that the trial court had jurisdiction to vacate the original plea, and that because Gilbert did not object to the state's motion to vacate the plea and did not appeal, he waived any error. *Id.* at ¶ 27. Accordingly, the appellate court could only reverse the trial court's decision upon a finding of plain error to prevent a manifest miscarriage of justice, and "[i]n this case, the manifest miscarriage of justice would be to allow Gilbert to avoid his conviction for murder through his own lies. * * * Left to stand, the decision of this court allows an injustice against the citizens of Ohio." *Id.* at ¶ 27-29.

Facts

On October 16, 2008, shortly after 1:00 a.m., in the area of 19 West Elder Street in Cincinnati, Ohio, Gilbert shot and killed Brian Austin. At the time of the shooting, Gilbert was under disability for a juvenile adjudication for Possession of Cocaine.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Plea agreements are contractual in nature and subjects to contract law standards. When any party breaches a plea agreement, the trial court has authority to vacate the plea. To find otherwise is to allow the breaching party to perpetrate a fraud on the court.

Subject Matter Jurisdiction vs. Exercise of Jurisdiction

The majority relied on this Court's analyses in *State v. Raber* and *State v. Carlisle*, in support of the general rule that trial courts lack the authority to modify a criminal sentence after a valid judgment of conviction is journalized. *State v. Raber*, ___ Ohio St.3d ___, 2012-Ohio-5636, ___ N.E.2d ___, paragraph one of the syllabus; *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 9. These analyses fall short of addressing the issue of Gilbert's fraud upon the court. Gilbert had no expectation of finality if he did not testify truthfully according to the agreement he signed at the time of his plea. A reading of this Court's decision in *Raber, supra*, distinguishes the general rule as argued, and the cases cited by the majority are inapplicable.

In *Raber*, the trial court neglected to designate the defendant as a Tier 1 sex offender when he received a sentence for his sexual imposition conviction. This Court held that the defendant had an expectation of finality at the time he was sentenced, and that double jeopardy prevented the trial court from reconsidering the judgment previously entered. But here, Gilbert expressly waived any double jeopardy argument, and the matter deals with much more than a sexual offender classification. Gilbert had an expectation of finality only if he fulfilled his part of the plea arrangement. For Gilbert to say otherwise would be to admit that he planned to defraud the court all along.

Gilbert breached the plea agreement by refusing to testify in an unrelated murder trial after having agreed to do so and after having received the benefit of such by way of a favorable

plea and sentencing agreement. Gilbert then consented to having the original plea withdrawn, admitted that he had violated the terms of the contract into which he had entered with the state and, essentially, joined in the State's motion to vacate the plea. The trial court granted the motion to withdraw the plea, a decision from which Gilbert chose not to appeal. Gilbert submitted to the court's jurisdiction without objection and, through his counsel, negotiated a new agreed guilty plea and agreed sentence with the state, which was accepted by the trial court.

In *Pratts v. Hurley*, this Court acknowledges the distinction between a court “that **lacks subject-matter jurisdiction** over a case and a court that **improperly exercises that subject-matter jurisdiction** once conferred upon it.” 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 10 (emphasis added). In another case, the First District relied on *Pratts* where the court's exercise of jurisdiction was implicated in a case involving a bench trial held without a jury waiver being signed by the defendant. *State v. Taylor*, 1st Dist. No. C-110062, 2011-Ohio-4648. The First District cited *Pratts* in distinguishing between a court's lack of subject matter jurisdiction and an error in the court's exercise of jurisdiction, finding that the trial court had subject matter jurisdiction, but it erred in the exercise of such jurisdiction when it did not strictly comply with a statutory requirement. *Taylor* at ¶ 15.

Here, the trial court clearly had subject matter jurisdiction, as jurisdiction had vested properly in the common pleas court. The allegations involved were Aggravated Murder, Having Weapons While under Disability and Intimidation of a Witness and, as felonies, they involved allegations over which the common pleas court has authority. Jurisdiction is present “where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act.” *Id.* at ¶ 22, citing *State v. Filiaggi, supra*, at 240.

Since the trial court had jurisdiction to hear the case, Gilbert can only challenge the trial court's exercise of that jurisdiction, and any error in a court's exercise of jurisdiction is something that is properly challenged on direct appeal. *Id.* at ¶ 21. In fact, "[p]urported errors in a court's decisions in the exercise of its jurisdiction may be waived and are waived by failure to interpose timely objections." *State v. Fugate*, 6th Dist. No. F-07-003, 2007-Ohio-6126, ¶ 10. To preserve the alleged error in the granting of the motion to vacate the plea, a contemporaneous objection is necessary or else the issue is waived for purposes of appellate review. *Bethel, supra.*

But Gilbert not only declined to object to the trial court's ruling on the motion to vacate his plea, he admitted that he violated the terms of the plea agreement he entered into with the court. He clearly understood that the finality of the matter was conditioned upon his performance under the terms of the plea which he, himself, had negotiated, and from which he had received a substantial benefit. Instead of appealing the trial court's ruling, Gilbert affirmatively acquiesced in the trial court's exercise of authority. Gilbert entered into a subsequent agreed plea and sentence with the state, which was accepted by the trial court. Because Gilbert had the opportunity to appeal the trial court's ruling on the motion to vacate the plea and failed to do so, it has been waived.

According to this Court, "[a]bsent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy at law by appeal." *State ex rel. Enyart v. O'Neill*, 71 Ohio St.3d 655, 656, 1995-Ohio-145, 646 N.E.2d 1110. As is set forth above, the trial court in Gilbert's case did not patently and unambiguously lack jurisdiction. And it is not contested that the Hamilton County Court of Common Pleas has jurisdiction over felonies committed in Ohio. R.C. 2931.03. Thus, the trial court properly could determine its own

jurisdiction, which it did when it vacated the plea. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 16.

The parties here were properly before the court upon the state's motion which invoked the subject matter jurisdiction of the court. *State v. Harack*, 12th Dist. No. CA2011-01-003, 2011-Ohio-6021. Subject matter jurisdiction cannot be waived and "does not magically disappear from the origins of the constitution, the Ohio Revised Code, or even Crim. R. 32.1," when a defendant breached an explicit plea agreement. *Id.* at ¶ 29. *See also State v. Beal*, 7th Dist. No. 11 BE 4, 2012-Ohio-1408, (where defendant filed a motion to withdraw his plea and had not filed a direct appeal, he properly invoked the trial court's jurisdiction). Given the facts in Gilbert's case, the trial court expressly retained jurisdiction to continue proceedings against Gilbert in the event that he breached the plea agreement.

Gilbert had an adequate remedy at law in the form of a direct appeal after the trial court granted the State's motion to vacate the plea. Any error by the trial court would have been in its exercise of jurisdiction, something which must be raised in a direct appeal. Gilbert failed to appeal and has, thereby, waived any alleged error.

Plea Agreements Are Contracts

Ohio law is clear that "a plea bargain itself is contractual in nature and subject to contract law standards. * * * Ohio law has consistently recognized that a settlement agreement constitutes a binding contract between the two parties." *State v. Harack, supra*, citing *State v. Butts, supra*, at 685, 686; *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1996); *Santobello v. New York* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). "Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements." *Bethel, supra* at ¶ 50. "As such, courts must examine what the parties reasonably understood at the time of the guilty plea

and determine if there has been a breach of contract.” *State v. Vega*, 1st Dist. No. C-020486, 2003-Ohio-1548; *United States v. Partida-Parra*, 859 F.2d 629, 633 (9th Cir. 1988). “A contract is generally defined as a promise, or a set of promises, actionable 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.” *State v. Robinson*, 8th Dist. No. 82801, 2004-Ohio-740.

In Gilbert’s case, all of these elements were present. Gilbert chose to breach the contract he entered into with the state. This permitted the state to take steps to enforce the agreement by moving the court to vacate the plea and rescind the agreement.

The Original Plea Agreement

On May 18, 2010, Gilbert freely and voluntarily entered into an agreed guilty plea and sentence with the state, which Gilbert acknowledged and signed, and which was accepted by the court. He also executed a four-page document in which he agreed to provide truthful, complete and accurate information in the investigation of his father, Ruben Jordan, and to testify against Jordan at trial. The agreement set out the expectations of both parties. In exchange for Gilbert’s cooperation, the State reduced the charges against him and agreed to a prison term of 18 years.

Gilbert agreed that the Hamilton County Prosecutor’s Office would determine whether he had met the terms of the agreement. If Gilbert violated the agreement, the original charges against him could be reinstated, and any new charges which may be appropriate could be filed. Gilbert also agreed that, in the event he violated the agreement, the parties would be returned to their respective positions prior to the execution of the agreement, with the exception that Gilbert’s proffered statement could be used against him. Gilbert agreed to waive any constitutional double jeopardy or speedy trial rights he might have in a new prosecution.

Both parties contemplated that Gilbert's cooperation would occur after he had been sentenced. All expectations were stated specifically. No ambiguities existed in the plea agreement or in any portions of it. The court was bound by the contract once it was accepted by all parties and the court. It is a basic principle of contract law that "[i]n the construction of a contract courts should give effect, if possible, to every provision contained therein * * *." *Bethel, supra*, at ¶ 50. The agreement in Gilbert's case was subject to only one interpretation, which was that a breach by Gilbert voided the plea and returned the parties to their original positions, with the exception that Gilbert's proffer could be used against him.

The Renegotiated Plea Agreement

One year later, Gilbert conceded that he violated the terms of the plea agreement. He had failed to give truthful testimony in the case against Ruben Jordan and admitted that he gave incomplete or inaccurate testimony at the time he signed the plea agreement. Following this, the trial court granted the state's motion to vacate the plea, without objection from the defense. The parties were returned to their original positions, with the exception that Gilbert's proffered statement would be admissible in the prosecution against him.

Now facing the original indictment, plus the proffer, and despite Gilbert's violation of the original plea agreement, counsel for Gilbert was able to negotiate another agreed plea and sentence with the state. Under the terms of this second plea agreement, Gilbert pled guilty to a reduced charge of Murder with a firearm specification and Having Weapons While under Disability, while the remaining charges were dismissed. The new plea agreement included an agreed sentence of 18 years to life. Gilbert then appealed, filing a no-error brief.

Breach of Plea Agreements

Where a defendant fails to fulfill his obligations under a plea agreement he has entered into, the government is relieved of its reciprocal obligations. *U.S. v. Verrusio*, 803 F. 2d 885 (7th Cir. 1986); *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, 829 N.E.2d 729 (4th Dist.). Because a plea agreement is a contract between the prosecution and a criminal defendant, if one side breaches that contract, the other side is entitled to rescission or specific performance. *State v. Gilroy*, 195 Ohio App. 3d 173, 2011-Ohio-4163, 959 N.E.2d 19 (2nd Dist.); *State v. Liskany*, 196 Ohio App.3d 609, 2011-Ohio-4456, 964 N.E.2d 1073 (2nd Dist.).

Under the terms of the plea agreement, both parties bargained for and were to receive substantial benefits. But Gilbert received his benefit without living up to his side of the bargain, behavior which the majority condones. Gilbert claimed that the trial court should have refused to entertain the state's motion to vacate the plea and left the 2010 order undisturbed. In effect, he argued for a right to renege on his express agreement with the state, to keep the benefit of the agreement and to avoid the sanction he agreed would result from a violation of the agreement. This is similar to the defendant's argument in *Bethel* where this Court declined to create such a right to renege, saying that "[t]o do so 'would encourage gamesmanship of a most offensive nature.'" *Bethel, supra*, at ¶ 79 quoting *United States ex rel. Williams v. McMann*, 436 F.2d 103, 106-107 (2nd Cir. 1970). This Court emphasized that defendants should not "be rewarded for prevailing upon the prosecutor to accept a reduced charge and to recommend a lighter punishment in return for a guilty plea, when the defendant intended at the time he entered that plea to attack it at some future date.* * * This is nothing more than a 'heads-I-win-tails-you-lose' gamble." *Bethel* at ¶ 79 quoting *McMann, supra*, at 106-107.

The dissent in the present case followed the Ninth District's ruling in *State v. Taylor*, where the defendant entered into an agreed plea and sentence in exchange for giving truthful testimony at trial against her husband for killing their child. *State v. Taylor*, 9th Dist. No. 92CA005469, 1993 WL 164782 (May 19, 1993). After being sentenced to community control, Taylor reneged on the plea agreement by refusing to cooperate with the prosecution. Her plea was vacated, and she was re-indicted and sentenced to a term of imprisonment. On appeal, she argued that the trial court had no authority to vacate the plea. The Ninth District disagreed and held that the motion to vacate was sufficient for setting aside the plea agreement because, "where a plea is accepted conditionally and the defendant fails to comply with the condition, the court is justified in vacating the plea." *Id.* at 2, citing *State v. Curry*, 49 Ohio App.2d 180, 183, 359 N.E.2d 1379 (9th Dist.1976).

As stated in the dissent, Gilbert "has gamed the system in the worst possible way" by failing to abide by the plea agreement and provide honest testimony. *Gilbert, supra*, at ¶ 24. The dissent found that *Taylor* properly applies to "effectuate justice in this case," and that the trial court acted within its jurisdiction. *Gilbert, supra*, at ¶ 26. Further, the dissent found that, because Gilbert did not object to the state's motion to vacate and did not appeal the decision, the court can only reverse for plain error in order to prevent a manifest miscarriage of justice. *Gilbert, supra*, at ¶ 27-28. "In this case, the manifest miscarriage of justice would be to allow Gilbert to avoid his conviction for murder through his own lies." *Gilbert, supra*, at ¶ 28.

In Gilbert's case, the parties *expressly agreed* that the completion of the terms of the agreement would be determined by the Hamilton County Prosecutor's Office. The trial court simply concurred with the parties when it determined that Gilbert had, in fact, violated the terms of the plea agreement. "Whether there has been a breach of a plea agreement is a determination

that initially rests within the sound discretion of the trial court, and is reviewed on appeal under an abuse of discretion standard.” *State v. Flowers*, 2nd Dist. No. 22751, 2009-Ohio-1945. The trial court here acted within its sound discretion. Consequently, there can be no argument that the trial court abused its discretion in deciding that Gilbert violated the terms of the plea agreement.

Proposition of Law No. 2: The double jeopardy clause did not bar the prosecution of Defendant-Appellant where both parties bargained for and received substantial benefits, and Defendant-Appellant understood that if he breached the agreement the original charges could be reinstated.

Finally, the majority’s decision completely ignores the United States Supreme Court’s decision in *Ricketts v. Adamson*, which held that double jeopardy does not bar the prosecution of a defendant who agreed to testify in exchange for reduced charges but later breached the agreement. *Ricketts v. Adamson*, 483 U.S. 1, 8, 107 S.Ct. 2680 (1987). This case is directly on point in that the defendant already had been sentenced and had begun serving his time when he violated the plea agreement by refusing to testify. *Id.* at 3.

In *Ricketts*, the plea agreement provided that the parties would be returned to the *status quo ante* if the defendant refused to testify. *Id.* at 10; *State v. Curry, supra*. As in Gilbert’s case, the agreement expressly provided that, if the defendant violated its terms, the agreement would be null and void, and the original charges would be reinstated. The Court explained, “ * * * an agreement specifying that charges may be *reinstated* given certain circumstances is, at least under the provisions of this plea agreement, *precisely* equivalent to an agreement waiving a double jeopardy defense.” *Id.* at 10.

The Court in *Ricketts* found it to be of no consequence that double jeopardy was not expressly waived in the agreement. In Gilbert’s agreement, double jeopardy was expressly waived. After he breached the agreement, Gilbert properly was returned to the position he was in prior to entering into the plea agreement. Such position did not violate his double jeopardy

rights. *Id.* at 10, citing *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187 (1978). In fact, where a plea is conditional on a defendant's cooperation with the government, jeopardy continues until all of the conditions have been satisfied. *Smith v. Phillips*, E.D. New York Nos. 02-CV-6329 & 04-CV-1725, 2012 WL 1340070 (Apr. 17, 2012).

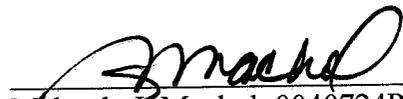
Permitting the state to enforce the terms of the plea agreement in this case does not violate double jeopardy because Gilbert and the state bargained for certain benefits, and Gilbert understood that, if he breached the agreement, the charges could be reinstated.

CONCLUSION

The State submits that this case presents issues of public or great general interest and involves a substantial constitutional question. The State, therefore, moves this Court to accept jurisdiction over this case and to reverse the majority decision of the First District Court of Appeals.

Respectfully,

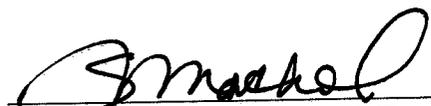
Joseph T. Deters, 0012084P
Prosecuting Attorney


Melynda J. Machol, 0040724P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

Attorneys for Plaintiff-Appellant, State of
Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Ravert J. Clark, 114 East 8th Street, Suite 400, Cincinnati, Ohio 45202, counsel of record and Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 7th day of March, 2013.



Melinda J. Machol, 0040724P
Assistant Prosecuting Attorney

APPENDIX

ENTERED

JAN 30 2013

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, : APPEAL NO. C-110382
Plaintiff-Appellee, : TRIAL NO. B-091283
vs. :
KAREEM GILBERT, :
Defendant-Appellant. :

JUDGMENT ENTRY.



D100781717

This cause was heard upon the appeal, the record, the briefs, and arguments.
The judgment of the trial court is reversed and cause remanded with instructions for the reasons set forth in the Opinion filed this date.

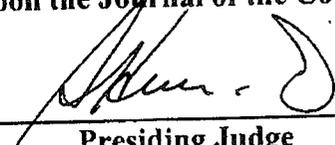
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on January 30, 2013 per Order of the Court.

By: _____


Presiding Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

**ENTERED
JAN 30 2013**

STATE OF OHIO, : APPEAL NO. C-110382
TRIAL NO. B-091283

Plaintiff-Appellee, :

vs. :

KAREEM GILBERT, :

Defendant-Appellant. :

OPINION.

**PRESENTED TO THE CLERK
OF COURTS FOR FILING**

JAN 30 2013

Criminal Appeal From: Hamilton County Court of Common Pleas

COURT OF APPEALS

Judgment Appealed From Is: Reversed and Cause Remanded with Instructions

Date of Judgment Entry on Appeal: January 30, 2013

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Melynda J. Machol*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Ravert J. Clark, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

ENTERED

JAN 30 2013

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Kareem Gilbert appeals from the trial court's May 2011 judgment of conviction for murder, an accompanying firearm specification, and having weapons under a disability.

{¶2} Previously appointed counsel for Gilbert filed a no-error brief stating that no meritorious issues existed to support Gilbert's appeal. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Contrary to appellate counsel's position, this court found that legal points arguable on the merits existed, including the trial court's authority to set aside Gilbert's prior final judgment of conviction upon the state's motion, and the subsequent resentencing of the defendant. Thus, we granted counsel's motion to withdraw, and we appointed new counsel for additional briefing. *State v. Gilbert*, 1st Dist. No. C-110382, 2012-Ohio-1366, ¶ 7-11.

Procedural and Factual Posture

{¶3} This court summarized the procedural and factual posture of the case in its March 30, 2012, opinion:

In May 2010, after entering into a detailed agreement with the state, Gilbert entered pleas of guilty to voluntary manslaughter with an accompanying firearm specification, having a weapon while under a disability, and witness intimidation. In exchange, the state dismissed other weapons charges and a count of aggravated murder with an accompanying firearm specification. The trial court accepted Gilbert's guilty pleas and sentenced him to an aggregate sentence of 18 years' imprisonment.

A year later, in May 2011, the state moved to vacate Gilbert's pleas, contending Gilbert had breached his 2010 plea agreement by failing to give truthful testimony in a criminal case against his father, Reuben Jordan. Gilbert's trial counsel informed the court that Gilbert did not object to the

state's motion to vacate his pleas. Gilbert admitted he had breached the plea agreement but maintained he had testified truthfully in the Jordan case.

The trial court granted the state's motion to vacate Gilbert's pleas. At the same hearing, Gilbert then pleaded guilty to murder with an accompanying firearm specification and to having a weapon while under a disability. The trial court accepted Gilbert's guilty pleas, withdrew the prior sentence, and imposed a new aggregate sentence of 18 years to life in prison.

Gilbert at ¶ 2-4.

{¶4} Gilbert now raises three assignments of error, which all concern the trial court's authority to set aside the final judgment of conviction and resentence him. First, he argues that after the May 2010 judgment of conviction had been journalized, the trial court lacked the authority to grant the state's 2011 motion to vacate his pleas and then to reconsider its own valid judgment and resentence him. We agree.

Reconsideration of Final Judgments in Criminal Cases

{¶5} Generally, Ohio trial courts lack the authority to reconsider their own valid final judgments in criminal cases. *See, e.g., State v. Raber*, ___ Ohio St.3d ___, 2012-Ohio-5636, ___ N.E.2d ___, paragraph one of the syllabus; *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 9; *Brook Park v. Necak*, 30 Ohio App.3d 118, 120, 506 N.E.2d 936 (8th Dist.1986).

{¶6} There are both judicially and legislatively created exceptions to this general rule, none of which apply in this case. The judicially created exceptions, for example, provide the trial courts with continuing jurisdiction "to correct a void sentence" and "to correct a clerical error in a judgment." *Raber* at ¶ 20, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. In addition, under Crim.R. 32.1, the trial court retains jurisdiction to review and grant a defendant's

ENTERED

JAN 30 2013

See State

postsentence motion to withdraw a plea when he has not taken a direct appeal. *See State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978). Further, the trial court retains jurisdiction to decide a motion for a new trial based on newly discovered evidence as permitted by Crim.R. 33, when that “specific issue has not been decided upon direct appeal.” *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 37.

{¶7} The legislatively created exceptions include habeas corpus and postconviction remedies as set forth by statute. *See R.C. 2725.01 et seq. and 2953.21 et seq.*

{¶8} The state argues that the general rule relating to the finality of judgments in criminal cases does not apply in this case. Instead, the state contends that the facts implicate the distinction between a trial court’s lack of subject-matter jurisdiction and a trial court’s improper exercise of jurisdiction or authority. *See Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992.

{¶9} In essence, the state argues that the parties were properly before the court on the state’s motion to vacate the pleas because the common pleas court has subject-matter jurisdiction over felony cases. According to the state, Gilbert, at best, could have argued that the trial court improperly exercised its jurisdiction when it granted the state’s motion to vacate his pleas, but that he “waived” his right to challenge the court’s exercise of jurisdiction in that instance when he acquiesced in the proceedings below.

{¶10} The state’s argument, however, ignores what we believe to be the crux of Gilbert’s argument. Gilbert does not merely argue that the trial court lacked subject-matter jurisdiction to rule on a postconviction motion. He argues, rather, that the trial court lacked the authority to reconsider its final judgment and to grant the relief sought. *See Raber*, ___ Ohio St.3d ___, 2012-Ohio-5636, ___ N.E.2d ___; *Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, at ¶ 9. The state’s argument is not responsive

JAN 30 2013

to Gilbert's argument concerning the finality of the judgment. Nor do we find the state's argument persuasive.

Continuing Jurisdiction to Enforce a Plea Agreement

{¶11} The state also suggests that the trial court "expressly retained jurisdiction to continue proceedings against Gilbert in the event that he breached the plea agreement." The plea agreement does state that, in the event of a breach, the state may reinstate the original charges against Gilbert.

{¶12} But the parties' agreement, even if incorporated into the judgment of conviction, could not give the trial court the authority to reconsider its final judgment, in the absence of authority affixed by law. See Ohio Constitution, Article IV, Section 4(B) ("The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law."). (Emphasis added.) In this case, the trial court did not reconsider its final judgment under any statute or under any judicially recognized source of authority.

Final Judgment

{¶13} It is undisputed that the judgment of conviction entered by the trial court in May 2010 met the requirements of finality set forth in Crim.R. 32(C). See *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus, *modifying State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163 (holding that a judgment of conviction is final, when the order sets forth "(1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk [of courts]."). For this reason, the state's reliance on the Ninth Appellate District's decision in *State v. Taylor*, 9th Dist. No. 92CA005469, 1993 Ohio App. LEXIS 2585 (May 19, 1983), is misplaced.

{¶14} *Taylor* was based on the Ninth District's earlier decision in *State v. Curry*, 49 Ohio App.2d 180, 359 N.E.2d 1379 (9th Dist.1976). In *Curry*, the court initially considered whether it was the duty of the trial court or the prosecutor to determine

ENTERED

JAN 30 2013

whether the defendant had complied with his plea agreement. The court decided that it was the duty of the trial court to make that determination, after a hearing on the issue. The *Curry* court then stated that if, on remand, the trial court found that the state had proven that the defendant had failed to perform under his plea bargain, then the trial court should either proceed to sentencing—which had not yet occurred—or vacate Curry's pleas. *Id.* at 183. See also *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 686 N.E.2d 267 (1997) (holding that, in the absence of formal journalization of a decision, the municipal court possessed authority to review and reverse its previous decision.).

{¶15} In contrast, in this case, the trial court granted the state's motion to vacate Gilbert's pleas after the court had already sentenced Gilbert and after the judgment of conviction including that sentence had been journalized in accordance with the criminal rules, resulting in a final judgment of conviction. Because the court below, unlike the trial court in *Curry*, reconsidered a final judgment, *Curry* does not support the state's position.

{¶16} The Ninth Appellate District in *Taylor* cited *Curry* to support its determination that the trial court had jurisdiction to grant the state's motion to vacate Taylor's plea and sentence after the sentence had become final. But the *Taylor* court did not reconcile its decision with the general rule that an Ohio trial court lacks the authority to reconsider its own valid final judgment in a criminal case. And the *Taylor* court failed to acknowledge the distinction between Curry's case and Taylor's case in that regard.

{¶17} Moreover, in *Taylor*, the state actually reindicted Taylor after the trial court found that she had breached the plea agreement by feigning amnesia in an attempt to avoid testifying at her husband's trial. The defendant again entered a plea and was again convicted upon the new indictment. Taylor's reindictment might well have influenced the *Taylor* court's disposition of the jurisdictional issue in the case. In this case, the state did not reindict Gilbert.

ENTERED

JAN 30 2013

{¶18} We, therefore, hold that the trial court lacked the authority to reconsider its own valid final judgment in this case. Accordingly, we sustain the first assignment of error.

{¶19} In his second assignment of error, Gilbert argues that the trial court violated his Double Jeopardy rights under the United States and Ohio Constitutions, when it reconsidered its final judgment. In his third assignment of error, Gilbert argues that he was denied his constitutional right to the effective assistance of trial counsel, when counsel failed to object to the trial court's exercise of jurisdiction to reconsider the May 2010 final judgment.

{¶20} We have already determined that the trial court lacked the authority to reconsider Gilbert's May 2010 judgment of conviction. Thus, our resolution of Gilbert's first assignment of error renders his second and third assignments of error moot, and we decline to address them. *See* App.R. 12 (A)(1)(c).

Conclusion

{¶21} The trial court lacked the authority to reconsider the May 2010 valid final judgment. Accordingly, we reverse the trial court's May 2011 judgment, and we remand this cause to the trial court with instructions to vacate its May 2011 order granting the state's motion to vacate the pleas and its May 2011 judgment of conviction and to reinstate its May 2010 judgment of conviction.

Judgment reversed and cause remanded with instructions.

FISCHER, J., concurs separately.

DINKELACKER, J., dissents.

FISCHER, J., concurring separately.

{¶22} Given the current state of the law, I am compelled to join the lead opinion in this case. Regrettably, Kareem Gilbert may escape a conviction because he was sentenced before he fulfilled a material obligation of his plea agreement. This case exposes an obvious deficiency in the power of Ohio's courts to enforce plea agreements, a central element of our criminal justice system. *See, e.g., Missouri v.*

ENTERED

JAN 30 2013

Frye, ___ U.S. ___, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012) (noting that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas). Even in civil cases, there is at least some law indicating that a civil judgment induced by fraud may be void. *See generally Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 23. Unfortunately, the legislature so far has not provided Ohio courts with the statutory authority in criminal matters for the state to enforce plea agreements when a breach by the defendant occurs postconviction. *Compare* Crim.R. 32.1. Absent such specific legal authority, with any attendant constitutional process therein, Ohio law, as it now stands, commands that I concur.

DINKELACKER, J., dissenting.

{¶23} Kareem Gilbert's scheme of dishonesty and disrespect for the justice system should not be rewarded. This court should hold Gilbert to the series of agreements he made with the state and the trial court. To do otherwise undermines the entire plea arrangement system.

{¶24} In this case, Gilbert entered into a detailed agreement with the state to provide honest testimony. He did not. Instead, he has gamed the system in the worst possible way. He clearly lied to the trial court at some point in order to garner his initial conviction for voluntary manslaughter, as opposed to the indicted offense of aggravated murder.

{¶25} The Ohio Supreme Court has held that the reasons for disfavoring collateral attacks do not apply in two principle circumstances: (1) when the issuing court lacked jurisdiction or (2) when the order was the product of fraud. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 23. Gilbert perpetrated a fraud of the highest order. I believe that his conduct places this case within this narrow line of exceptions to judgment finality that allows courts to

ENTERED

JAN 30 2013

correct grave injustices like the one that has occurred here. The trial court acted within its jurisdiction in reconsidering the May 2010 judgment of conviction.

{¶26} Since the trial court acted within its jurisdiction, I believe that the reasoning of the court in *State v. Taylor*, 9th Dist. No. 92CA005469, 1993 Ohio App. LEXIS 2585 (May 19, 1993), applies. The facts in that case are similar to the facts in the present case. The court in *Taylor* held that “where a plea is accepted conditionally and the defendant fails to comply with the condition, the court is justified in vacating the plea.” *Id.* at *4. This is exactly the case here. This would effectuate justice in this case.

{¶27} Further, in *Taylor*, the defendant had objected in the trial court to the state’s motion to vacate her plea. Here, Gilbert not only did not object to the state’s motion to vacate the plea, but acquiesced to it. He did not appeal the state’s motion. Consequently, he has waived any error, and we can reverse only upon a finding of plain error. *See State v. Underwood*, 3 Ohio St.3d 12, 13, 444 N.E.2d 1332 (1983); *State v. Tibbs*, 1st Dist. No. C-100378, 2011-Ohio-6716, ¶ 40.

{¶28} “[T]he plain error rule is to be applied with the utmost caution and invoked only under exceptional circumstances, in order to prevent a manifest miscarriage of justice.” *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983); *State v. Salaam*, 1st Dist. Nos. C-070385 and C-070413, 2008-Ohio-4982, ¶ 25. In this case, the manifest miscarriage of justice would be to allow Gilbert to avoid his conviction for murder through his own lies. Therefore, I cannot join in the majority opinion.

{¶29} My interpretation of the law surrounding the circumstances of this case does not allow me to join the majority. Gilbert did not seek justice, he thwarted

it. Left to stand, the decision of this court allows an injustice against the citizens of Ohio. The state committed no unfair act and broke no rule.

{¶30} Therefore, I dissent.

ENTERED

JAN 30 2013

Please note:

The court has recorded its own entry on the date of the release of this opinion.