

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Case No. 2013-0382

Plaintiff-Appellant,

-vs-

On Appeal from the
Hamilton County Court
of Appeals, First
Appellate District

KAREEM GILBERT,

Court of Appeals
Case No. C-1100382

Defendant-Appellee.

**MEMORANDUM OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS
ASSOCIATION IN SUPPORT OF JURISDICTION OVER APPEAL BY STATE OF
OHIO**

Ron O'Brien 0017245
Franklin County Prosecuting Attorney
Steven L. Taylor 0043876
(Counsel of Record)
Chief Counsel, Appellate Division
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
e-mail: sltaylor@franklincountyohio.gov

Joseph T. Deters 0012084
Hamilton County Prosecuting Attorney
Melynda J. Machol 0040724
(Counsel of Record)
Assistant Prosecuting Attorney
230 East Ninth St., Suite 4000
Cincinnati, Ohio 45202
Phone: 513-946-3119
Fax: 513-946-3021

Counsel for *Amicus Curiae* Ohio
Prosecuting Attorneys Assn.

Counsel for Plaintiff-Appellant

Ravert J. Clark 0042027
Attorney at Law
114 East 8th Street, Suite 400
Cincinnati, Ohio 45202
Phone: 513-587-2887

Counsel for Defendant-Appellee

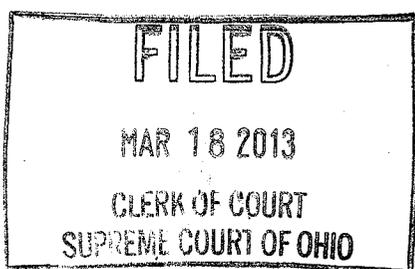


TABLE OF CONTENTS

TABLE OF CONTENTS..... i

**STATEMENT OF AMICUS INTEREST AND EXPLANATION OF WHY
THIS COURT SHOULD ACCEPT JURISDICTION** 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW..... 2

Proposition of Law No. 1: When a party breaches a plea agreement, the
trial court has the authority to vacate the plea.....2

Proposition of Law No. 2: Double jeopardy does not bar prosecution
where a defendant breaches a plea agreement and charges are
reinstated.....11

CONCLUSION..... 12

CERTIFICATE OF SERVICE..... 12

STATEMENT OF AMICUS INTEREST AND EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

The Ohio Prosecuting Attorneys Association (“OPAA”) is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice.

Because OPAA members engage in frequent plea bargaining and negotiation with defendants to ensure their cooperation in the investigation and prosecution of others, the OPAA has a proper interest in whether a trial court has the authority to vacate a defendant’s guilty plea when the defendant breaches the express terms of the plea agreement, which is the subject of the present appeal.

Accordingly, the OPAA respectfully requests that this Court accept jurisdiction over the State’s appeal.

STATEMENT OF THE CASE AND FACTS

Amicus OPAA adopts by reference the statement of the case and facts set forth in the memorandum in support of jurisdiction of plaintiff-appellant State of Ohio.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: When a party breaches a plea agreement, the trial court has the authority to vacate the plea.

Amicus agrees with the arguments set forth by appellant. Perhaps most significantly, the First District did not address this Court's decision in *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, recognizing that a trial court may vacate a plea based upon the defendant's breach of his plea agreement. In finding that the trial court lacked authority to vacate the plea based upon the breach by defendant, the First District failed to address well-settled law and contract principles.

The First District found that no authority exists to allow the State to enforce plea agreements when breach occurs post-conviction. However, the First District did not consider basic contract principles. Nor did the First District address this Court's decision in *State v. Bethel*, which generally recognizes the propriety of prosecution motions to vacate pleas based on breach.

1. State v. Bethel

In *Bethel*, this Court held that a defendant has no "right to renege" on a plea agreement:

In essence, Bethel claims a constitutional right to renege on his plea agreement, retain the benefit of the bargain that he broke, and avoid the agreed sanction for his breach. We decline to create such a right. To do so "would encourage gamesmanship of a most offensive nature. Defendants would 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." [*United States ex rel. Williams v.*

McMann (C.A.2, 1970), 436 F.2d 103,] 106-107. * * *

Bethel at ¶ 79. This Court reinforced the point that it is important to hold defendants to the terms of the plea bargains they enter into just as it would be important to hold the State to an agreement it made. A defendant's failure to fulfill the terms of a plea agreement relieves the government of reciprocal obligations under the contract. *United States v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986).

2. Principles of contract law

"Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements." *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50. *See also*, *State v. Billingsley*, 133 Ohio St.3d 277, 282, 2012-Ohio-4307, 978 N.E.2d 135, 141.

In this case, the contract between defendant and the State involved the State's agreement to reduce the charges in exchange for defendant's testimony. The court accepted the plea agreement and had the ability to enforce the agreement it accepted and thereby became a party to. *State v. Vari*, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, ¶ 24.

The contract ended when defendant refused to testify. Because the State fulfilled its promise under the plea agreement, the trial court had the authority to enforce the agreement and withdraw defendant's plea in order to reinstate the original charges. It is well accepted that "[p]lea agreements are an essential and necessary part of the administration of justice." *State v. Carpenter*, 68 Ohio St.3d 59, 61, 623 N.E.2d 66 (1993), citing *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427

(1971). Just as courts have found that the prosecution must keep its promise as part of a plea bargain, so must defendants. Should a prosecutor breach an agreement, the defendant is entitled to either rescission or withdrawal of the plea or specific performance. *Santobello*, 404 U.S. at 263. *See also*, *Billingsley* at ¶ 44. The same logic applies to defendants who breach agreements.

The Third Circuit noted the importance of upholding the integrity of plea agreements in *United States v. Williams*, 510 F.3d 416, 422-23 (3d Cir. 2007):

*** “Under the law of this circuit, [a defendant] cannot renege on his agreement.” *United States v. Cianci*, 154 F.3d 106, 110 (3d Cir.1998). When a defendant stipulates to a point in a plea agreement, he “is not in a position to make ... arguments [to the contrary].” *United States v. Melendez*, 55 F.3d 130, 136 (3d Cir.1995), *aff’d* 518 U.S. 120, 116 S.Ct. 2057, 135 L.Ed.2d 427 (1996). We have held that we have “no difficulty in holding [a defendant] to the plea agreement for he seeks the benefits of it without the burdens.” *Cianci*, 154 F.3d at 110 (quoting *United States v. Parker*, 874 F.2d 174, 178 (3d Cir.1989)).

Applying those principles, it is clear that if we did not enforce a plea agreement against a breaching defendant, it would have a corrosive effect on the plea agreement process. We have little doubt that if the government had argued for an upward departure in this case, we would have concluded that the government breached the plea agreement. Because a plea agreement is a bargained-for exchange, contract principles would counsel that we reach the same conclusion when a defendant breaches a plea agreement as we would reach if the government breached. *See Ricketts v. Adamson*, 483 U.S. 1, 9 n. 5, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (noting that a plea agreement is a bargained-for exchange). If that were not the case, the government would have no meaningful recourse if it performed its end of the agreement but did not receive the benefit of its bargain in return. *See United States v. Alexander*, 869 F.2d 91, 95 (2d Cir.1989) (stating the fundamental principle that “one party cannot be held to a bargain that the other party has breached”). That scenario

would make the current system of plea agreements untenable because it would render the concept of a binding agreement a legal fiction. That result would be unworkable because our criminal justice system depends upon the plea agreement process. *See Santobello*, 404 U.S. at 261, 92 S.Ct. 495 (explaining why disposition of charges by plea agreements is an essential part of the judicial process).

Id. at 422-23.

In the case at bar, the plea involved Gilbert's promise to testify, in exchange for the State's agreement to allow Gilbert to plead guilty to a reduced charge and to receive a sentence of eighteen years in prison. After this promise, the State, in good faith, negotiated the plea agreement with Gilbert. The plea specified the conduct that would constitute breach. The agreement also provided that should defendant breach the agreement, the parties would be returned to their initial positions; that is, defendant waived double jeopardy and the State would reinstate the charges.

Where an agreement ends by breach, the injured party may retain the remedy for breach under that agreement. *State v. Scruggs*, 356 F.3d 539 (4th Cir. 2001). Remedies for breach necessarily live on after breach, and to say otherwise is to defeat the obvious intent of the parties that the remedy provisions apply after breach. Under contract principles, a plea agreement necessarily "works both ways. Not only must the government comply with its terms and conditions, but so must [the defendant]." *United States v. Carrara*, 49 F.3d 105, 107 (3d Cir. 1995). Without the enforcement of remedy provisions, defendants could "attempt to manipulate investigations and prosecutions without fear of any consequences." *United States v. Tarrant*, 730 F.Supp. 30, 34 (N.D. Tx. 1990).

The fact that defendant breached the agreement post-sentence should be of no consequence. “Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.” *State v. Carpenter* at 61, citing *Santobello* at 261. Prompt disposition “enhances whatever may be the rehabilitative prospect of the guilty when they are ultimately imprisoned.” *Santobello* at 261. From a strategic perspective, when a prosecutor calls a cooperating witness to testify who has signed a plea agreement, the prosecutor and witness are viewed as more credible, as the sentence has been imposed and the parties cannot be accused of having the ability to change the terms of the agreement. Therefore, final disposition of the case benefits the parties.

The decision by the First District undermines the plea-bargaining process and renders the State unable to enforce plea agreements or to negotiate the same unless it can ensure that the judge assigned to the defendant’s case will delay sentencing until the defendant has fulfilled his end of the bargain. In cases where a defendant agrees to cooperate during the investigative or grand jury phase, it is unreasonable to expect that the judge will delay the defendant’s case so that the State can ensure the defendant fulfills his end of the plea agreement.

Federal courts have recognized the right to reinstate original charges where a defendant breaches a plea agreement post-sentence. In *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001), the court held that the government was entitled to reinstate two charges dismissed as part of a plea agreement where defendant breached the agreement. The court noted:

A defendant who promises as part of his plea agreement to provide truthful information or testify in some other case, and who does not carry through, forfeits the benefits of the agreement, and the United States is free to reinstate dismissed charges and continue the prosecution. See *United States v. Ataya*, 864 F.2d 1324 (7th Cir. 1988); *United States v. McCarthy*, 445 F.2d 587, 591 (7th Cir. 1971) (dictum). Cf. *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987)

Id. at 862. See also, *United States v. Jones*, 469 F.3d 563, 565-66 (6th Cir. 2006).

There is no dispute that Gilbert violated the terms of the plea agreement. This Court's decision in *Bethel* and contract principles require that the State be permitted to reinstate the charges (as agreed to by the parties in the plea agreement) because of his breach. To hold otherwise would allow defendants to manipulate the judicial system.

3. Rule Authority – Crim.R. 32.1

Although the First District mentioned various rules as *not* applying, the court was too quick to dismiss the potential applicability of Crim.R. 32.1. Although Crim.R. 32.1 is often used by defendants to seek the vacating of a plea, the language of the rule bears a construction that would allow the *prosecution* to file such a motion as well, particularly when the defendant has given the prosecution the contractual power to seek the vacating of the plea. Criminal Rule 32.1 provides, as follows:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

It is notable that the first clause of the rule does not mention whether the prosecution or defendant is filing the motion. The first clause states that a “motion to

withdraw a plea * * * may be made,” without limiting the identity of the party who may file such motion.

The next part of the rule is similarly silent on the identity of the filing party, stating that “to correct manifest injustice the court after sentence may set aside the judgment of conviction * * *.” Under this part of the rule, the ability of the court to “set aside the judgment” is not dependent on the identity of the party who is filing the motion. This part of the rule requires that a “manifest injustice” must be demonstrated, but that standard is easily satisfied under the present circumstances in which the defendant materially breached.

Finally, in the last part of the rule, the rule mentions a party, stating that the court “may * * * permit the defendant to withdraw his or her plea.” While this last part of the rule would generally suggest a defendant who is himself seeking permission to withdraw his plea, the last part of the rule is not a necessary pre-condition to the operation of the other parts. To be sure, the court “may * * * permit” the defendant to withdraw his plea, but the rule does not specify that a defendant himself must always be seeking such permission. The “set aside judgment” part of the rule based on manifest injustice can operate with or without any need for a defendant to seek “permission.” And given that the rule is stated in permissive “may” terms, the language of the rule does not require that in each case the setting aside of the judgment must always be accompanied by the granting of permission to a defendant to withdraw the plea. “Setting aside” can operate without also granting “permission.”

In any event, as part of the plea agreement, this defendant agreed to the vacating of his plea upon his breach. He thus actually agreed and gave his permission to the withdrawal of his plea.

It would be incorrect to insert a “no prosecution motion” clause into the rule. “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). “Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so * * *.” *Brogan v. United States*, 522 U.S. 398, 408, 118 S.Ct. 805, 139 L.Ed.2d 830 (1998). “We have held that a court may not add words to an unambiguous statute, but must apply the statute as written.” *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 15. If “[t]he statute does not limit its reach,” then courts should not do so. *Id.* at ¶¶ 10, 15. “We have long recognized that neither administrative agencies nor this court ‘may legislate to add a requirement to a statute enacted by the General Assembly.’” *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, ¶ 15. “This court should not graft * * * requirements to [the statute], because the statute has no text imposing them.” *Id.* ¶ 19.

The Criminal Rules are “intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice * * *.” Crim.R. 1(B). It is fair to construe Crim.R. 32.1 to allow a prosecutor to seek withdrawal of a plea based on the breach of a plea agreement, since that procedure is used by defendants seeking withdrawal of a plea

on the same grounds. Given that the rule authorizes a defendant to seek relief for the breach of a plea agreement, then, equally so, it is fair to allow the prosecution to invoke the same procedure. The rule will bear that construction.

4. Rule Authority – Crim.R. 57(B), Civ.R. 60(B)(4), and “Applicable Law”

If Crim.R. 32.1 does not allow the prosecution to seek relief, another avenue is available. The First District failed to address two rules that, in combination, would apply to this situation to allow the court grant the prosecution relief from a final judgment. Under Crim.R. 57(B), courts are allowed to apply the Civil Rules and “applicable law”:

(B) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

If Crim.R. 32.1 does not authorize the prosecutor to seek relief, then no Criminal Rule specifically addresses the prosecutor’s ability to vacate a plea based on a breach of a plea agreement. In that circumstance, Crim.R. 57(B) would allow the prosecutor to resort to the Civil Rules, including Civ.R. 60(B)(4), which provides that a court may relieve a party of a final judgment when “it is no longer equitable that the judgment should have prospective application.” In light of all of the equities involved, it was no longer equitable that defendant would be allowed to keep the benefits of the plea agreement while refusing to comply with that very agreement. As part of the plea agreement, defendant had agreed to the reinstatement of the original charges if he breached, and Civ.R. 60(B)(4) would allow the court to deprive him of the benefits he had earlier obtained based on his promise.

Allowing the prosecutor to seek the vacating of the judgment and the reinstatement of the original charges is also consistent with “applicable law,” as Crim.R. 57(B) allows the court to look to “applicable law if no rule of criminal procedure exists.” Under applicable contract-law principles, the plea agreement authorized the prosecutor to take action to seek reinstatement of the charges based on breach.

The State’s first proposition of law warrants review.

Proposition of Law No. 2: Double jeopardy does not bar prosecution where a defendant breaches a plea agreement and charges are reinstated.

Amicus agrees with the arguments set forth in the State’s memorandum and adopts the same. As noted by the State, in *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), the United States Supreme Court recognized that a double-jeopardy claim can be waived when a defendant enters a plea of guilty pursuant to a pre-arranged plea agreement. *Id.* at 14. The State’s second proposition of law warrants review.

CONCLUSION

For the foregoing reasons, *amicus* OPAA supports plaintiff-appellant State of Ohio and urges that this Court reverse the judgment of the First District Court of Appeals.

Respectfully submitted,

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Chief Counsel, Appellate Division

Counsel for *Amicus Curiae* OPAA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 18th day of March, 2013, to the following persons:

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

Ravert J. Clark
Attorney at Law
114 East 8th Street, Suite 400
Cincinnati, Ohio 45202



STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorney