[Cite as *State v. Averett*, 2008-Ohio-5044.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 209
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JAZZMETRICE AVERETT,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR141.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Rhys Cartwright-Jones
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 26, 2008

VUKOVICH, J.

{¶1} Defendant-appellant Jazzmetrice Averett appeals from his sentence entered in the Mahoning County Common Pleas Court after his guilty plea to four counts of gross sexual imposition. First, appellant contends that the state breached the plea agreement to recommend five years in prison by allowing the mother of one of the victims to speak at sentencing. Second, appellant alleges that the court improperly failed to inform him at the plea hearing that it need not accept the state's recommended sentence. Third, appellant argues that the court should have held a sexual predator hearing notwithstanding his stipulation to such a classification as part of his plea agreement. As all of these arguments lack merit, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} On March 29, 2007, appellant was indicted on four counts of third degree felony gross sexual imposition for having sexual contact with two children under the age of thirteen in violation of R.C. 2907.05(A)(4) and (B)(2). The first two counts represented appellant's sexual contact with a nine-year-old girl in January of 2007. The next two counts represented his sexual contact with an eleven-year-old girl in late 2006 and early 2007. All counts contained a sexually violent predator specification under R.C. 2941.148. See, also, R.C. 2971.01(G)(1) (defining a sexually violent offense as a violent sex offense); (L)(1) (defining a violent sex offense as including a violation of division (A)(4) of R.C. 2907.05). This specification carried the risk of an indefinite sentence with a maximum range of life in prison. See R.C 2971.03(A)(3)(a).

{¶3} On September 28, 2007, appellant entered a plea agreement with the state whereby appellant agreed to plead guilty to the four counts and stipulate to a sexual predator classification in exchange for the state's agreement to dismiss the sexually violent predator specifications and recommend a total sentence of five years. The court advised appellant of the nature of the offenses and of the rights he was waiving and accepted the plea that same day. The court then ordered a presentence investigation and set the case for sentencing.

{¶4} On November 8, 2007, appellant appeared for sentencing. The state pointed out that appellant had agreed to stipulate to a sexual predator classification. The state then recommended five years in prison pursuant to its plea agreement. (Sent. Tr. 2). Thereafter, the eleven-year-old victim's mother spoke to the court. She revealed that appellant was a family friend who pursued her daughter as he would an adult. She noted that they no longer visit her own mother's house because it is the scene of the crime. She disclosed that her daughter requires counseling, her grades have suffered, she cannot sleep and she fears green cars. (Sent. Tr. 3-4).

{¶5} The court noted that the presentence investigation report disclosed that appellant's past record contained sexually oriented offenses and that appellant apparently cannot control his problem. Appellant stipulated to his sexual predator status and acknowledged that he knew the court could vary from the state's recommendation. The court then sentenced appellant to three years on each count to run consecutively, for a total of twelve years. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

{¶6} Appellant sets forth three assignments of error, the first of which alleges:

{¶7} "THE FAILURE OF THE PROSECUTION TO HONOR THE PLEA AGREEMENT AT THE SENTENCING HEARING PURSUANT TO CRIMINAL RULE 11 OF THE OHIO RULES OF CRIMINAL PROCEDURE RESULTED IN A GREATER SENTENCE THAN THE AGREEMENT ON WHICH THE APPELLANT HAD JUSTIFIABLY RELIED IN WAIVING HIS RIGHT TO A JURY TRIAL."

{¶8} Appellant contends that the state breached its agreement to recommend five years in prison because allowing the victim's mother to speak at sentencing constituted an implicit argument that more than five years was appropriate. He cites federal appellate court cases, which he believes support the general proposition that where the prosecutor highlights facts that support a longer sentence than he agreed to recommend, the plea agreement can be considered breached. See, e.g., *United States v. Taylor* (11th Cir. 1996), 77 F.3d 368, 371 (where the government recommended ten years as agreed but simultaneously urged the court to adopt the higher recommendation in a presentence investigation report).

{¶9} Assuming for the sake of argument that these cases are on point and are persuasive, the state here did not highlight any negative facts, encourage a "lengthy" sentence or endorse documents that recommend a sentence longer than set forth as its recommendation in the agreement. Rather, the state here specifically stated that it was recommending five years in prison. (Sent. Tr. 3). This was in accordance with the agreement. The state did not adopt or refer to the victim's mother's testimony or imply in any way that her disclosures required a lengthier sentence than recommended.

{¶10} Additionally, as the state emphasizes, it did not "allow" the child-victim's mother to speak. Rather, she had a constitutional right to do so, which the state could not prohibit. Ohio Const., Art. I, Sec. 10a (the victim shall be accorded rights to reasonable and appropriate notice, information, access and protection and to a meaningful role in the criminal justice process). There are also various laws providing notice to victims, referring to the impact of a criminal offense on the victim or his family as a factor in sentencing, and providing the right of a victim or member of his family to make a statement in open court. See, e.g., R.C. 2929.11(E); 2929.12(B); 2937.081, 2943.041, 2945.07; 2947.051. The state also points out that appellant did not have an agreement with the state to prohibit victim testimony at sentencing, which agreement the state maintains would have been illegal.

{¶11} We also note that the court had ordered a presentence investigation report, which typically contains victim impact statements anyway, and the court relied heavily on this document. See R.C. 2930.13(B). Finally, appellant failed to object to this oration at sentencing before the trial court, thus waiving this argument for purposes of appeal. For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶12} Appellant's second assignment of error contends:

{¶13} "THE TRIAL COURT ERRED WHEN IT FAILED TO ADVISE APPELLANT AT THE PLEA HEARING OF THE NON-BINDING NATURE OF THE PROSECUTOR'S RECOMMENDATION OF SENTENCE AT THE SENTENCING HEARING."

{¶14} Appellant complains that at the plea hearing, the court did not inform him that it was not bound by the state's recommendation. He believes that failing to so inform him is equivalent to those cases where the court misleads a defendant at plea into believing that it will adopt the state's recommendation at sentencing. See *State v. Patrick*, 163 Ohio App.3d 666, 2005-Ohio-5332, ¶26-27 (where the Eighth District explained that if the court expresses that it will impose the recommended sentence at the plea hearing, then the bilateral contract becomes trilateral, and the court cannot impose a greater sentence than it promised).

{¶15} As the state correctly points out, the trial court here never expressed an intent at the plea hearing to impose the recommended five-year sentence. In fact, and contrary to appellant's suggestion, the court informed appellant that it was not bound by the prosecutor's recommendation. See *State v. Jones*, 6th Dist. No. WD-06-082, 2007-Ohio-4090, ¶12, 14 (also noting the agreement's use of "recommendation" plainly means that the court is not bound); *State v. Darmour* (1987), 38 Ohio App.3d 160, 160-161 (defendant who is advised of maximum sentence that he can receive at later sentencing has knowledge that court is not bound by the state's agreement to recommend a certain sentence).

{¶16} Although the exact words "the court is not bound by the state's recommendation" were not used, the trial court stated that appellant could receive five years on each count, revealed that the sentences could be run consecutively and even explained that this means they could be ordered to be served one after the other. (Plea Tr. 8-9). Later, at sentencing, appellant admitted that he understood that this meant that the court was not bound by the state's recommendation. (Sent. Tr. 7). In urging the trial court to accept the recommended sentence, appellant's counsel also agreed that appellant was aware that the court was not bound by the recommendation. (Sent.Tr. 9). Consequently, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

{¶17} Appellant's third assignment of error alleges:

{¶18} "THE TRIAL COURT ERRED BY FAILING TO CONDUCT A HEARING TO DETERMINE WHETHER THE APPELLANT IS A SEXUAL PREDATOR AS REQUIRED BY SECTIONS 2950 AND 2929.19 OF THE OHIO REVISED CODE."

{¶19} As appellant concedes, he stipulated to a sexual predator classification. In keeping with the prior assignment, however, he claims that his agreement was based upon his assumption that he would receive only five years in prison, and he believes that when he was not so sentenced, he was entitled to a sexual predator hearing. The state contends that the lack of a sexual predator hearing is moot due to the new sexual predator statutes.

{¶20} In any case, this argument is without merit because, as aforementioned, appellant was advised and he acknowledged that he knew that the state's recommendation of five years was only that, a recommendation, and was not binding upon the court. The state abided by its agreement, as did appellant at the time. Where appellant stipulated to his sexual predator status and conceded to such classification, a sexual predator hearing was not required. *State v. Yeager*, 7th Dist. No. 03CA786, 2004-Ohio-36040, ¶50, citing *State v. McCarthy*, 7th Dist. No. 01BA33, 2002-Ohio-5185. This assignment of error is without merit.

{¶21} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs.
Waite, J., concurs.