

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

GEORGE GUTIERRES,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 23 MA 0118**

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Criminal Appeal from the  
Court of Common Pleas of Mahoning County, Ohio  
Case No. 2019 CR 00109

**BEFORE:**

Carol Ann Robb, Mark A. Hanni, Katelyn Dickey, Judges.

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**JUDGMENT:**

Affirmed.

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*Atty. Gina DeGenova*, Mahoning County Prosecutor, *Atty. Edward A. Czopur*, Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office, for Plaintiff-Appellee and

*Atty. James R. Wise*, for Defendant-Appellant.

Dated: July 18, 2024

**Robb, P.J.**

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{¶1} Appellant, George Gutierrez, appeals two trial court decisions. He contends the trial court erred in granting the state’s motion to rescind its plea agreement and by denying his post-sentence motion to withdraw his plea. For the following reasons, we affirm.

Statement of the Facts and Case

{¶2} Appellant was indicted in February of 2019 and charged with three offenses, involuntary manslaughter, attempted possession of cocaine, and possession of criminal tools. He was appointed trial counsel and waived his right to a speedy trial.

{¶3} A superseding indictment was issued in April of 2019, and in September of 2019, a second superseding indictment was issued. The September of 2019 indictment charged Appellant with six counts: involuntary manslaughter with a firearm specification; attempted possession of cocaine; possession of criminal tools; aggravated murder with a firearm specification; murder with a firearm specification; and aggravated robbery with a firearm specification. This indictment also charges his co-defendant. (September 12, 2019 Superseding Indictment.)

{¶4} After the exchange of discovery, Appellant entered a guilty plea to one count, attempted possession of cocaine, a second-degree felony in violation of R.C. 2925.11(A)(C)(4)(e) and 2923.02(A). The state agreed to make a four-year prison recommendation with potential judicial release after six months and optional three-year post-release control. The state also moved to dismiss the other five counts. In exchange, Appellant agreed to testify “with full cooperation and truthful testimony” against his co-defendant. (December 27, 2019 Guilty Plea & December 23, 2019 Plea Hearing.)

{¶5} At the plea hearing, the trial court advised Appellant that the offense carried a maximum eight-year prison term and \$15,000 fine. (December 23, 2019 Plea Hearing.) The trial court accepted his plea, ordered a presentence investigation, and set the case for sentencing. (December 27, 2019 Judgment.)

{¶6} Appellant’s sentencing was repeatedly rescheduled because his co-defendant’s trial was recurrently continued, preventing Appellant from fulfilling his agreement to testify.

{¶17} On July 16, 2020, Appellant moved for his release. He sought to be released on either his own recognizance or to be on electronically monitored house arrest. (July 16, 2020, Motion.) The state opposed his release, and the trial court initially overruled the motion.

{¶18} However, the trial court subsequently granted Appellant's release on October 29, 2020 with a \$50,000 personal recognizance bond because his co-defendant's trial was continued again. (October 29, 2020 Judgment.)

{¶19} In August of 2021, the state moved to revoke Appellant's bond alleging he had new criminal charges. The state claimed Appellant had a pistol in his motor vehicle and was charged with improperly handling a firearm in a motor vehicle as a result. The state also alleged Appellant had a warrant for his arrest in Youngstown Municipal Court for possession of marijuana. (August 31, 2021 Motion to Revoke.) The state's motion was granted. (August 31, 2021 Judgment.)

{¶10} Appellant moved to reinstate bail in January of 2022, contending that the new firearm charge against him had been dismissed. (January 19, 2022 Motion.) The state opposed his release, claiming Appellant violated the terms of his bond. (January 24, 2022 State's Response.) Appellant's motion was overruled. (February 9, 2022 Judgment.)

{¶11} On March 10, 2022, however, Appellant was granted bail with the condition of electronically monitored house arrest. The entry indicates the charges against him in the firearm case were dismissed. (March 10, 2022 Judgment.)

{¶12} The state filed its second motion to revoke bond in July of 2022, alleging Appellant had recently been charged with domestic violence, a violation of a bond condition. (July 11, 2022 Motion to Revoke.) The motion was granted the same date.

{¶13} Appellant moved to reinstate bail again in February of 2023, which the court granted. (March 9, 2023 Judgment.) In April of 2023, the court granted Appellant's motion for work privileges. (April 1, 2023 Judgment.) In June of 2023, Appellant moved to remove his electronic monitored house arrest. (June 26, 2023 Motion.)

{¶14} The state moved to revoke Appellant's bond again in June of 2023, which the trial court granted. For cause, the state alleged Appellant had been arrested and

charged with domestic violence and/or assault following a June 2023 incident. (June 30, 2023 Judgment.)

{¶15} On September 18, 2023, the state moved to rescind the plea agreement because Appellant had been arrested at least three times during his release, showing he is incapable of abiding by the law. Further, the state claimed he violated his bond conditions at least three times.

{¶16} The trial court held the hearing on the state's motion to rescind in October of 2023. The state claimed it is implied in every plea agreement that the defendant will abide by the law. Thus, the state sought to have its agreed sentencing recommendation deemed null; the state did not seek to invalidate the plea agreement, but only the state's agreed upon sentence recommendation. (October 17, 2023 Sentencing Tr.)

{¶17} In response, the defense argued the state used the threat of Appellant's testimony in his co-defendant's case and benefitted from the agreement. The defense claimed the state successfully resolved his co-defendant's case because of Appellant's agreement to testify and that the state did not seek to withdraw its sentencing recommendation when Appellant was charged in other matters, only after the co-defendant's case was resolved. (October 17, 2023 Sentencing Tr.)

{¶18} The defense also emphasized the first criminal charge, improperly handling a firearm, against Appellant was dismissed. The defense claimed Appellant was found guilty of the second charge, unauthorized use of a motor vehicle. And on the third charge, Appellant pleaded not guilty and it was unresolved at the time of the hearing. (October 17, 2023 Sentencing Tr.)

{¶19} The trial court agreed with the defense that a criminal charge not yet resolved and the criminal charge that was dismissed should not be held against Appellant and not result in a revocation of an agreed sentencing recommendation. The trial court also agreed that the case against Appellant's co-defendant had countless delays and eventually ended in a plea agreement. (October 17, 2023 Sentencing Tr.)

{¶20} However, the court concluded the facts before it permitted the state to deviate from its agreed sentencing recommendation. The court found a conviction for a criminal offense following the plea of guilty, with a sentence held in abeyance, permits the state to deviate from an agreed upon sentence recommendation. The court agreed that

a defendant awaiting sentencing has an implied obligation to comply with the law, and the failure to do so enables the state to deviate from its original sentencing recommendation. Thus, the trial court sustained the motion and permitted the state to change its recommended sentence; it did not invalidate the plea. (October 17, 2023 Sentencing Tr.)

{¶21} Thereafter, the state argued Appellant’s was the worst form of the offense since it resulted in death, and as such, this plus Appellant’s bond violations, the state urged the trial court to impose the maximum sentence. (October 17, 2023 Sentencing Tr.)

{¶22} The court proceeded to sentencing and imposed a definite sentence of six years with costs and fines suspended. Defense counsel indicated Appellant had already served three years, four months, and 22 days awaiting sentencing. Appellant did not move to withdraw his plea at this hearing. (October 17, 2023 Sentencing Tr.)

{¶23} On October 25, 2023, Appellant moved to withdraw his guilty plea. He urged the court to find a manifest injustice in light of the state’s revocation of its agreed upon sentencing recommendation when it benefitted from their bargain and he complied with his agreement to testify against his co-defendant. (October 25, 2023 Motion.)

{¶24} Appellant appealed the trial court’s decision allowing the state to rescind its sentencing agreement in November of 2023. The trial court then denied his motion to withdraw. It held there was nothing showing a fundamental flaw or a miscarriage of justice. The court likewise found the revocation of bond did not preclude the state from rescinding its sentencing recommendation since the two are not mutually exclusive. Last, the trial court noted that had the state not rescinded its recommendation, the court was not obligated to impose the state’s sentencing recommendation. (January 5, 2024 Judgment.)

{¶25} We subsequently granted Appellant’s motion to amend his notice of appeal to include the trial court’s decision denying his motion to withdraw his plea. He raises two assignments of error.

State’s Motion to Rescind Sentencing Recommendation

{¶26} Appellant’s first assignment of error asserts:

“The trial court erred in allowing the state to nullify the sentencing recommendation contained in the plea agreement.”

{¶27} Appellant contends the state breached its agreement to recommend a four-year prison term after it received the benefit of the bargain. He also claims the court should have permitted Appellant to withdraw his guilty plea as a result of the state’s decision to renege on the parties’ agreement.

{¶28} The state argues, however, that the trial court correctly found the state was relieved of its sentencing recommendation obligation because Appellant had already breached by being charged and convicted of new criminal offenses before he was sentenced in this case.

{¶29} Trial courts have discretion to determine whether a plea agreement was breached. *State v. Bemby*, 2014-Ohio-5498, ¶ 23 (7<sup>th</sup> Dist.) The court must examine the nature of the promises and the language used in the plea agreement to determine whether a party breached. *Id.*

{¶30} Contract law principles generally govern and dictate the interpretation and enforcement of plea agreements. *State v. Johnson*, 2023-Ohio-2282, ¶ 42 (7<sup>th</sup> Dist.), citing *State v. Bethel*, 2006-Ohio-4853, ¶ 50. “[W]hen 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.” *Koresjza v. Harry*, 2017 WL 6375583 (6<sup>th</sup> Cir. Dec. 12, 2017), \*3, quoting *Santobello v. New York*, 404 U.S. 257, 262, (1971).

{¶31} After a plea agreement has been accepted by the court, a defendant has a contractual right to enforce the prosecutor’s obligations. *State v. Adams*, 2014-Ohio-724, ¶ 17 (7<sup>th</sup> Dist.). However, “a breach of the contract by the defendant relieves the prosecution of any obligations under the agreement.” *State v. Santiago*, 2023-Ohio-561, ¶ 17 (3<sup>rd</sup> Dist.), quoting *State v. Payton*, 2010-Ohio-5178, ¶ 11 (6<sup>th</sup> Dist.).

[W]hen a defendant enters a guilty plea in exchange for the prosecutor’s promise to recommend a certain sentence, there is an implied condition that the circumstances surrounding the bargain will remain substantially the same; a substantial change in the circumstances is sufficient to relieve the state of its obligation.

*State v. Bemby*, 2014-Ohio-5498, ¶ 22 (7<sup>th</sup> Dist.); accord *State v. Pedicini*, 2020-Ohio-3611, ¶ 32 (7<sup>th</sup> Dist.).

{¶32} Here, the state sought and was granted the trial court’s permission to deviate from its agreement to recommend Appellant serve a four-year prison term. He was facing up to eight years in prison.

{¶33} Although it is undisputed Appellant awaited sentencing for an extraordinary length of time—nearly four years—it is also undisputed that Appellant was in violation of his bond conditions before he was sentenced. This additional misconduct while he was out on bond and awaiting sentencing represents a change in circumstance from when the plea agreement was entered. *State v. Santiago, supra*, at ¶ 17, citing *State v. Dowler*, 2015-Ohio-5027, ¶ 26 (4th Dist.).

{¶34} Ohio appellate courts including this one have held that a defendant’s violation of bond conditions, committing another crime while awaiting sentencing, or failing to appear at sentencing constitutes a breach of a plea agreement and relieves the state of its obligation to recommend the sentence described in the agreement. *State v. Bemby*, 2014-Ohio-5498, ¶ 22 (7th Dist.); accord *State v. Hill*, 2013-Ohio-674, ¶ 20 (10<sup>th</sup> Dist.); *State v. Cox*, 1993 WL 548082 (11<sup>TH</sup> Dist. Dec. 10, 1993); and *State v. Payton*, 2010-Ohio-5178, ¶ 11 (6th Dist.).

{¶35} In light of the facts here, we decline to find the court abused its discretion by permitting the state to deviate from its agreed upon sentencing recommendation. We agree with the court’s conclusion that Appellant was in violation of the parties’ plea agreement, such that the state was relieved of its commitment to recommend a four-year prison term. Accordingly, this assigned error lacks merit.

#### Appellant’s Motion to Withdraw Guilty Plea

{¶36} Appellant’s second assignment of error contends:

“The trial court erred in overruling the Defendant’s motion to withdraw his plea.”

{¶37} Appellant contends there was a manifest injustice supporting the motion to withdraw his guilty plea, and the trial court should have granted the request.

{¶38} Crim.R. 32.1 states: “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.”

{¶39} A defendant seeking to withdraw a plea of guilty after the imposition of sentence bears the burden of establishing that a manifest injustice occurred. *State v. Smith*, 49 Ohio St.2d 261, (1977), paragraph one of the syllabus.

A “manifest injustice” is a “clear or openly unjust act,” \* \* \* and relates to a fundamental flaw in the plea proceedings resulting in a miscarriage of justice \* \* \*. The term “has been variously defined, but it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.”

*State v. Straley*, 2019-Ohio-5206, ¶ 14.

{¶40} We review post-sentence motions to withdraw guilty pleas for an abuse of discretion. *State v. Xie*, 62 Ohio St.3d 521, 527, (1992), citing *State v. Adams*, 62 Ohio St.2d 151, 157, (1980). Thus, we must affirm unless we determine that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *Id.*

{¶41} Appellant contends there was a manifest injustice in his case since the state benefitted from his willingness to testify and their plea agreement before revoking its commitment to recommend a four-year sentence. The state disagrees and contends there was no manifest injustice and instead its deviation from the agreement was warranted due to Appellant’s failure to abide by the law before sentencing.

{¶42} As detailed previously, the trial court overruled Appellant’s motion to withdraw his plea. It explained how Appellant’s bond violation supported both the revocation of his bond and supported the state’s motion to deviate from its agreed upon sentencing recommendation. The court concluded the state had a legitimate basis to deviate from its commitment, i.e., Appellant’s subsequent criminal conviction. (January 5, 2024, Judgment.)

{¶43} In *State v. Young*, 2022-Ohio-3527 (7th Dist.), this court found no abuse of discretion under similar facts where the defendant moved to withdraw his plea *before* his sentencing. We held the state need not abide by its agreement to make a certain sentencing recommendation when a defendant obtains additional criminal charges before sentencing. We also explained the opposite result could lead to more defendants disregarding the terms of their release on bond and fewer plea agreements. *Id.* at ¶ 37-40.



{¶44} We decline to find the trial court abused its discretion here. As stated, this court finds in Appellant’s first assigned error that the state was permitted to deviate from its agreement because Appellant had already violated the parties’ agreement. Thus, we find no manifest injustice or clear or openly unjust act such that Appellant should have been permitted to withdraw his plea after sentencing. This assignment of error is overruled.

Conclusion

{¶45} For the foregoing reasons, the trial court’s decisions are affirmed.

Hanni, J., concurs.

Dickey, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgments of the Court of Common Pleas of Mahoning County, Ohio, are affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**