

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES PEDICINI III,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0070

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17-CR-1217B, 17-CR-329A

BEFORE:

David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Joseph Gardner, 19 East Front Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: June 25, 2020

D'Apolito, J.

{¶1} Appellant James Pedicini III appeals his convictions and sentence by the Mahoning County Court of Common Pleas for five counts of breaking and entering, in violation of R.C. 2913.51(A)(C), felonies of the fourth degree, and six counts of receiving stolen goods, in violation of R.C. 2913.51(A)(C), three felonies of the fourth degree and three felonies of the fifth degree. In his sole assignment of error, Appellant contends that the state breached his plea agreement when it recommended a greater sentence than it had promised to recommend in the plea agreement. The state counters that Appellant's bond violation relieved the state of its obligations in the plea agreement, or, in the alternative, that Appellant has not established prejudice on plain error review.

{¶2} Based on the record in this case, we find that Appellant's municipal court charge, which was filed after the plea was entered but before Appellant was sentenced, constitutes a breach of the plea agreement and relieved the state of obligations under the agreement. In the alternative, we find that Appellant has not demonstrated prejudice, because the trial court imposed the same sentence the state was obligated to recommend under the terms of the plea agreement.

FACTS AND PROCEDURAL HISTORY

{¶3} On May 11, 2017, Appellant was indicted for five counts of breaking and entering, in violation of R.C. 2911.13(A)(C), felonies of the fifth degree, and one count of theft, in violation of R.C. 2913.02(A)(1)(B), a felony of the fifth degree. Case No. 2017 CR 00329. Appellant was released on bond, but the conditions of Appellant's bond are not in the record.

{¶4} Roughly six months later, on November 9, 2017, Appellant was indicted for six counts of receiving stolen property, in violation of 2913.51(A)(C), felonies of the fourth degree, one count of receiving stolen property, in violation of 2913.51(A)(C), a felony of the fifth degree; one count of possession of criminal tools, in violation of 2923.24(A)(C), a felony of the fifth degree; three counts of breaking and entering, in violation of 2911.13(A)(C), felonies of the fifth degree; and one count of engaging in pattern of corrupt

activity, in violation of ORC 2923.32(A)(1)(B)(1), a felony of the second degree. Case No. 17 CR 1217. Appellant was again released on bond.

{¶5} On April 18, 2018, Appellant was placed on probation by the Trumbull County Court of Common Pleas. Although the crime(s) committed in Trumbull County are not described in the record, they are presumably related to one or more of the alleged thefts committed by Appellant and his codefendants that resulted in the convictions in this case.

{¶6} At a plea hearing for both cases on January 14, 2019, Appellant executed a written plea agreement, in which he agreed to enter guilty pleas to five counts of receiving stolen property and three counts of breaking and entering, all fourth-degree felonies, in Case No. 17 CR 1217, in exchange for the state's recommendation of a six-year sentence. Appellant reserved the right to ask the trial court to impose a lesser sentence. The State moved to dismiss the remaining charges in the indictment. The written plea agreement reads, in pertinent part:

THE STATE OF OHIO, AS PART OF THIS CRIM. R. 11(F) AGREEMENT,
HAS AGREED TO RECOMMEND THE FOLLOWING:

(handwritten) State to recommend 6 years in the State Penitentiary,
Defendant to ask for less. Defendant to forfeit all property being held by the
appropriate police departments unless proof of ownership is established.

{¶7} Appellant also pled guilty to three counts of breaking and entering, all fifth-degree felonies, in Case No. 17 CR 329, in exchange for the state's recommendation of a concurrent six-year sentence. Appellant reserved the right to seek a lesser sentence. The written plea agreement reads, in pertinent part:

THE STATE OF OHIO, AS PART OF THIS CRIM. R. 11(F) AGREEMENT,
HAS AGREED TO RECOMMEND THE FOLLOWING:

(handwritten) State to rec. 6 years to be run concurrent w/ case no.
17CR1217B. Defendant to ask for less. Defendant to forfeit all property

being held by the appropriate police departments unless proof of ownership is established.

{¶8} At the plea hearing, the state summarized the terms of the plea agreement as follows:

In exchange for the defendant withdrawing his previously entered plea of not guilty on both aforementioned cases – in exchange for defendant pleading guilty on Case No. 17 CR 329 to three counts of breaking and entering, felonies of the fifth degree, and also pleading guilty on Case No. 17 CR 1217B to five counts of receiving stolen property, Counts One through Five, felonies on the fourth degree, and three counts, Counts Nine through Eleven, of breaking and entering, felonies of the fifth degree, in exchange for those guilty pleas, the state of Ohio would recommend six years to this Honorable Court at a later sentencing date. At that date the defense will argue for something less.

(1/14/19 Plea Hrg., p. 2-3.) The State moved to dismiss the remaining charges in the indictment.

{¶9} The state provided a detailed account of Appellant’s crimes at the plea hearing. Appellant and three co-defendants, including his father, committed a battery of thefts from work project sites and small businesses in both Mahoning County and Trumbull County. At the conclusion of the plea hearing, the trial court dismissed the remaining counts and ordered a presentence investigation report (“PSI”) to be prepared by Community Corrections Association (“CCA”) for both cases. The sentencing hearing was scheduled for February 26, 2019.

{¶10} The trial court provided the following admonition at the conclusion of the plea hearing:

When we come back here at the time of sentence, the state of Ohio as you have heard is going to recommend six years in the state penitentiary. That is not an agreed sentence. I understand that. And as [defense counsel]

has indicated, he will obviously have an opportunity to present mitigation so I could determine what the appropriate sentence will be. I don't know enough about you or this case to tell you what I'm going to do with two exceptions. The first is sometimes somebody enters a plea of guilty. There's a recommendation from the state, and a court at sentence, a judge, after hearing both sides might impose something greater than the recommended sentence. Based on your acceptance of responsibility, **as long as you stay out of trouble**, keep in touch with [defense counsel] get up to CCA so they can prepare the [PSI], and appear back here on the date and time that will be set for sentencing, I will not impose more than six years. I'm not telling you I'm imposing six. You're just capping your exposure.

(Emphasis added)(Plea Hrg., p. 14-15.)

{¶11} On February 22, 2019, Appellant was arrested and charged with Receiving Stolen Property in Struthers Municipal Court. The matter was set for a preliminary hearing on March 1, 2019. The same day, the state filed a motion to revoke Appellant's bond, which was sustained by the trial court. The state attached a copy of the Ohio Uniform Incident Report from the Struthers case to the motion.

{¶12} According to the report, a Dodge Ram was stolen from a repair shop in Warren, Ohio. Appellant had previously asked the owner of the stolen truck where it was being serviced, and joked that the truck would be easy to steal after the owner divulged the location of the repair shop. The victim told law enforcement officers that Appellant had offered five different accounts of his whereabouts on the evening that the truck was stolen.

{¶13} The victim further reported that his rims were on a black Dodge Ram parked outside the home of one of Appellant's associates, Brian Kelly, Jr. The victim also believed that his engine had been installed in a red Dodge located at the same location. Appellant had recently purchased the red Dodge, which had an inoperable motor at the time of sale.

{¶14} During the police investigation, Brian Kelly Sr. consented to a search of his property, and the victim identified components of his engine in the Red Dodge. The repair

shop owner identified a line bolt that he had installed in the victim's motor. A Vehicle Identification Number investigation revealed that the plates on the Red Dodge were registered to Appellant, but the truck had been transferred to Kelly Jr.

{¶15} After he was arrested, Appellant declined to speak to the police, stating that he “made a deal with the prosecutor downtown” and was “doing six years anyway.” Kelly Jr. told the police that he and Appellant had purchased a motor for the Red Dodge, but Appellant installed a different one. Appellant explained to Kelly that motor Appellant installed was “better than the motor the[y] purchased.”

{¶16} At the sentencing hearing on March 13, 2019, the prosecutor summarized the events leading to Appellant's arrest in Struthers and then stated that “[w]hat [Appellant] doesn't know is the State of Ohio could revoke their deal. Which the State of Ohio is going to do here today.” (2/26/19 Sent. Hrg., p. 20-21.) The prosecutor continued that “[t]here's no deal anymore because [Appellant] violated the terms of that deal.” (*Id.*, p. 21.) Based on the charges in Struthers Municipal Court, and Appellant's failure to accept responsibility in the PSI, the state recommended a twelve-year sentence. In lieu of the state's recommendation, the trial court continued the hearing to allow defense counsel additional time to consider and respond to the state's change of position.

{¶17} The sentencing hearing resumed on March 13, 2019. Defense counsel argued that Appellant was innocent until proven guilty of the municipal court charge, and, further, he opined that the municipal court case was “highly winnable.” (3/13/19 Sent. Hrg., p. 6.)

{¶18} The record reflects that Appellant and his counsel were aware that Appellant could withdraw his plea as a remedy for the state's alleged breach, but Appellant expressly waived that right. Defense counsel stated at the hearing:

I'll tell you how much [Appellant] is willing to stand forward, Your honor. I believe that at this point in time – the conversations were had with my client [sic], at this point in time I could have come before you and I could have said, you know, pursuant to Criminal Rule [32.1], Your Honor, we're withdrawing our pleas based upon the breach of the plea agreement. Let's go back and let's start at square one; let's go to trial on this thing. But my client stands ready to be punished. He does not want me to withdraw those

pleas. He has said to me in regards to this situation, let's do what we have to do. Let's do it. Let's get it done. Let me face the consequences in regards to the whole matter.

(*Id.*, p. 10.)

{¶19} The PSI recommended a period of local incarceration, followed by a period of community control. Defense counsel argued that Appellant had fulfilled the conditions of his probation in Trumbull County from April of 2018, when it was imposed, until his arrest in February of 2019. Appellant had been gainfully employed for a substantial period of that time, and had passed a series of drug tests. Defense counsel argued again that the pending charge was merely an allegation, and, in the event that Appellant was convicted, he would be subject to punishment in the municipal court case and the Trumbull County case, because the conviction would constitute a parole violation. Defense counsel conceded that, if Appellant had been convicted of the municipal court charge, he would not be arguing for a lesser sentence. Finally, defense counsel asserted that Appellant had “demonstrated that he’s capable of successfully being on probation.”

(*Id.*, p. 10.)

{¶20} Before imposing sentence, the trial court observed “for the record that that new charge certainly enabled the state of Ohio to file a motion to revoke bond, which this court did.” (*Id.*, p. 17.) The trial court continued:

The second question, of course, becomes whether or not that new charge is a sufficient reason, a sufficient basis, for the state to ask this court to deviate from the Rule 11 agreement previously entered and subsequently requesting that this court impose a sentence double that which was originally asked for. On the one hand, I think based upon the investigation from the state and the new charge, that if I were a prosecutor, I would certainly ask to deviate from the Rule 11 agreement, I’m not suggesting I’m going to follow the recommendation. I’m simply indicating that I think there is a sufficient basis to do that.

(*Id.*, p. 17-18.)

{¶21} The trial court imposed an aggregate sentence of six years – one year for each of the eleven convictions, with the sentences for the three convictions from the original indictment to be served consecutively, and the sentences for the first three convictions in the second indictment to be served consecutively to one another and the sentences imposed for convictions in the original indictment. The remaining five one-year sentences were to be served concurrently with one another and the six consecutive sentences.

{¶22} The trial court predicated the sentence on the harm caused to the local work projects and small businesses, which the trial court opined were particularly sensitive to problems created by missing equipment and stolen merchandise. The trial court rejected Appellants assertions that he was “young” and “dumb” based on the complexity of the series of thefts. Finally, the trial court opined that Appellant failed to accept responsibility for the crimes based on his statements in the PSI, wherein Appellant blamed a co-defendant for Appellant’s conduct.

{¶23} Citing the presumption of innocence, the trial court expressly declined to increase the sentence based on the pending municipal court charge, but reiterated that Appellant’s bond violation relieved the state from its obligations under the plea agreements. The municipal court charge was ultimately dismissed. This timely appeal followed.

ASSIGNMENT OF ERROR

BECAUSE THE STATE BREACHED THE PLEA AGREEMENT, THE TRIAL COURT SHOULD HAVE ORDERED SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT AND ASSIGNED THE DEFENDANT-APPELLANT’S SENTENCING TO A DIFFERENT JUDGE OR ALLOW [SIC] THE DEFENDANT TO WITHDRAW HIS PLEA.

{¶24} Appellant expressly waived his right to withdraw his guilty plea at the sentencing hearing. Furthermore, Appellant did not object to the imposition of the six-year sentence. Because Appellant did not object to the State’s recommendation during sentencing, he forfeited the alleged error and we review Appellant’s convictions and

sentence for plain error only. *State v. Hansen*, 7th Dist. Mahoning No. 11 MA 63, 2012-Ohio-4574, ¶ 15, citing *Puckett v. U.S.*, 556 U.S. 129, 173 L.Ed.2d 266, 129 S.Ct. 1423 (2009).

{¶25} Reversal based on the plain error doctrine requires an error that is obvious and affected a defendant’s substantial rights under exceptional circumstances. Crim.R. 52(B); *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). It cannot be utilized unless the outcome clearly would have been different but for the error. *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996). Where there is an error that is obvious from the record and outcome determinative, we have the discretion to remedy the error if it seriously affects the fairness, integrity or public reputation of judicial proceedings. *Puckett*. at 1425.

{¶26} “[P]lain error is a discretionary doctrine which may, but need not, be employed if warranted.” *State v. Donald*, 7th Dist. Mahoning No. 08 MA 154, 2009-Ohio-4638, at ¶ 68. The Ohio Supreme Court has acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus.

{¶27} Turning to Appellant’s substantive argument, it is well accepted that “[p]lea agreements are an essential and necessary part of the administration of justice.” *State v. Carpenter* (1993), 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). The United States Supreme Court has observed that:

[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261, 92 S.Ct. 495, 30 L.Ed.2d 427.

{¶28} At its core, a plea agreement is contractual in nature and subject to contract-law standards. *State v. Vari*, 7th Dist. Mahoning No. 07-MA-142, 2010-Ohio-1300, ¶ 27. We have recognized that plea agreements should be construed strictly against the government. *State v. Namack*, 7th Dist. Belmont No. 01 BA 46, 2002-Ohio-5187, ¶ 25.

{¶29} Appellant cites *Santobello, supra*, for the general rule that, where a prosecutor breaches a plea agreement, two remedies exist: The defendant may withdraw his plea, or he may demand specific performance, which requires the trial judge to transfer the matter to a different judge for sentencing. In *Santobello*, the original prosecutor promised to stand silent at sentencing in exchange for the defendant's guilty plea. An inordinate amount of time passed between the plea hearing and sentencing hearing, and, as a result, a different prosecutor appeared at sentencing and recommended the statutory maximum sentence of eight years. Although the trial judge represented that he did not consider the prosecutor's recommendation in imposing sentence, the United States Supreme Court held:

This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure [sic] the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello, 404 U.S. at 262, 92 S.Ct. 495, 30 L.Ed.2d 427.

{¶30} In 2009, the United States Supreme Court addressed the application of the *Santobello* rule on plain error review in *Puckett, supra*. The *Puckett* Court held that a defendant whose plea agreement is broken by the state will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event. *Puckett* at 1433.

{¶31} Last year, we held that a defendant's failure to appear for sentencing relieved the state of its obligations under a plea agreement in *State v. Turner*, 7th Dist. Mahoning No. 17 MA 0155, 2019-Ohio-934. The state argued that Turner's failure to appear at the sentencing hearing was a violation of an implied term of the plea agreement. Based on repeated references in the record that required Turner's timely appearance at court hearings, we concluded that Turner's appearance at sentencing was "an express contractual term." *Id.* at ¶ 45.

{¶32} In *State v. Bembry*, 7th Dist. Columbiana No. 13 CO 33, 2014-Ohio-5498, we recognized that "when 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." However, "a substantial change in the circumstances is sufficient to relieve the state of its obligation." *Id.* at ¶ 22. We held that Bembrey's violation of the conditions of his bond relieved the state of its obligation to recommend the sentence described in the plea agreement.

{¶33} The facts in *Bembry* are as follows. After Bembry entered guilty pleas to two counts of burglary and one count of attempted safe cracking, he was released on his own recognizance subject to certain pre-trial release conditions. The plea deal was subject to a cooperation agreement under which Bembry would provide information on other cases. Within a day or two of his release, Bembry was arrested and jailed in Columbiana County for theft/burglary following a reported safe burglary.

{¶34} We first opined that Bembry was unable to fulfill his obligation under the cooperation agreement due to the immediate revocation of his bond. However, we further found that Bembry's arrest constituted a violation of his bond conditions and relieved the state of its obligation to recommend 3 years under the plea agreement. Bembry had agreed to cooperate with the conditions of his bail, which required him to "obey all rules and regulations of the CCAPD." *Bembry, supra*, at ¶ 25-27.

{¶35} At the plea hearing in this case, Appellant was put on notice that the state's sentencing recommendation and the imposition of that sentence were conditioned on certain post-plea conduct, specifically Appellant's acceptance of responsibility, "stay[ing] out of trouble," maintaining contact with defense counsel, cooperating with the CCA, and

appearing for sentencing. Although Appellant’s bond conditions are not in the record, his bond was revoked immediately after the municipal court charge was filed. Because Appellant was notified at the plea hearing that that he must avoid any conduct that may result in new charges, and the municipal charge constitutes a bond violation, we find that Appellant breached the plea agreement and the state was relieved of its obligation to recommend a six-year sentence.

{¶36} Even assuming that the municipal charge did not constitute a breach of the plea agreement, we find that Appellant has failed to demonstrate that he suffered any prejudice. Appellant received the sentence that the state was obligated to recommend by the plea agreement. Applying plain error, the United States Supreme Court in *Puckett, supra*, opined that prejudice cannot be shown where a defendant obtained the benefits contemplated by the deal, that is, the sentence that the prosecutor agreed to recommend. *Puckett, supra*, at 1433. Accordingly, we find, in the alternative, that Appellant cannot demonstrate prejudice resulting from the state’s alleged breach.

CONCLUSION

{¶37} Based on the record in this case, we find that Appellant’s municipal court charge constituted a breach of the plea agreement. As a consequence, Appellant’s breach relieved the state from its obligations in the plea agreement. We find, in the alternative, that Appellant has failed to show prejudice because he was sentenced to six years – the prison term that the state was obligated to recommend pursuant to the plea agreement. As Appellant has failed to demonstrate plain error, we find that Appellant’s sole assignment of error has no merit, and his convictions and sentence are affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

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