[Cite as *State v. Blake*, 2011-Ohio-3318.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 10AP-992
v.	:	(C.P.C. No. 09CR-12-7293)
Travell L. Blake,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellant.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, State of Ohio ("the state"), appeals the dismissal/nolle prosequi of Counts 1, 2, 3, 4, 5, and 7 of the indictment, as noted in the July 22, 2010 Entry of Guilty Plea, and the September 20, 2010 judgment entry of the Franklin County Court of Common Pleas, in which defendant-appellee, Travell L. Blake ("appellee"), pled guilty to, was found guilty of, and was sentenced for tampering with evidence, a felony of the third degree, in violation of R.C. 2921.12. For the following reasons, we affirm.

{¶2} On December 7, 2009, appellee was indicted by the Franklin County Grand Jury on seven counts, including: (1) one count of aggravated burglary with specification, a

felony of the first degree, in violation of R.C 2911.11; (2) one count of burglary with specification, a felony of the second degree, in violation of R.C. 2911.12; (3) three counts of kidnapping with specification, felonies of the first degree, in violation of R.C. 2905.01; (4) one count of tampering with evidence with specification, a felony of the third degree, in violation of R.C. 2921.12; and (5) one count of carrying a concealed weapon, a felony of the fourth degree, in violation of R.C. 2923.21. On December 9, 2009, appellee pled not guilty at his arraignment and was released on bond.

{¶3} On July 22, 2010, two months prior to the sentencing hearing, appellee withdrew his former plea of not guilty and pled guilty to Count 6, tampering with evidence without specification, in violation of R.C 2921.12. (July 22, 2010 Tr. 2.) Appellee signed an Entry of Guilty Plea stating that the maximum prison term for tampering with evidence is five years. The Entry of Guilty Plea also outlined the joint sentencing recommendation as follows: "I understand that the prosecution and defense jointly recommended to the Court sentence(s) of R.C. 2953.08(D), [for] Ct [sic] 6, 4 years with Judicial Release after serving 6 months ODRC if the defendant presents with a good prison record then CBCF." The Entry of Guilty Plea stated, in relevant part, that:

> I understand that the Court upon acceptance of my plea(s) of 'Guilty' may proceed with judgment and sentence * * * thereby placing myself completely and without reservation of any kind *upon the mercy of the Court with respect to punishment*[.]

(Emphasis added.) In addition, the Entry of Guilty Plea stated that:

> The Court, being fully advised as to the facts, hereby accepts the defendant's plea(s) of 'Guilty,' entered hereinabove, as voluntarily and intelligently made, with full knowledge of the consequences thereof, including waivers of all applicable rights and defenses and understanding of

> maximum penalties. Upon recommendation of the Prosecuting Attorney, in consideration of said plea(s) of 'Guilty,' the Court hereby enters a Nolle Prosequi as to Count(s): 1, 2, 3, 4, 5, 7[.]

The record reflects that appellee, appellee's attorney, the prosecutor, and the trial judge signed the Entry of Guilty Plea.

{¶4} At the plea hearing, the prosecutor stated, on the record, that "[i]n return for that guilty plea [to tampering with evidence], the State will be requesting a nolle as to counts one, two, three, four, five and seven." (July 22, 2010 Tr. 2.) Further, the prosecutor informed the trial court that "[appellee] has been notified that he *could receive* a maximum penalty of five years. However, there is a joint recommendation that he receive four years, that he go to prison and serve six months; and with a good prison record, the State would join the defense in a request for judicial release in the community-based corrections program." (July 22, 2010 Tr. 2-3.) (Emphasis added.)

{¶5} The trial court, in its colloquy, inquired pursuant to Crim.R. 11(C) as to whether appellee entered the guilty plea "voluntarily, knowingly, and with understanding," and advised appellee of his constitutional rights. (July 22, 2010 Tr. 3-6.) The following dialogue ensued regarding appellee's understanding of both the guilty plea and joint sentencing recommendation before the court:

> THE COURT: Now, my understanding is you do not want a trial; is this correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you are willing for the Court to dispose of this matter, realizing that, *if* followed, the Court—*if the joint recommendation is followed in this case*, the Court will impose a prison term.

> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right, sir. I have here a guilty plea form here that appears to be signed by Travell Blake; did you sign this?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Did Ms. Jines go over it with you prior to your signing it?
>
> THE DEFENDANT: Yes, sir.
>
> * * *
>
> THE COURT: All right, sir. What's your plea to one count of tampering with evidence, a felony of the third degree?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: The Court will accept your plea of guilty; will enter a finding of guilty; and will enter nolle prosequis with respect to counts one, two, three, four, five, and seven; will request a presentence investigation report; will set this matter down for sentencing for the 20th of September.

(July 22, 2010 Tr. 6, 12.) (Emphasis added.) The Entry of Guilty Plea was journalized on July 22, 2010.

{¶6} On September 20, 2010, at the sentencing hearing, the trial court allowed appellee to make the following statement prior to imposing sentence:

> THE DEFENDANT: You know, I got a brand-new son. I would like to see every breath that he takes. You know, he [is] four months old, and I spend a lot of time with my kids and I do a lot of things for my kids, *so I'm just asking you could you please show me leniency, if you can*.
>
> THE COURT: You know, you signed an agreement here when you signed this plea form that you would serve—go to prison. That was the agreement you signed. What am I supposed to do about that?

> THE DEFENDANT: Well—well, I know that I didn't—I didn't want to, you know. I didn't really—I understood, you know, what I was doing, but, you know, I—*I know that ultimately it's your decision at the end*, you know, and that's what I was kind of—basically keeping faith, keeping hope, hoping that, you know, I could see if you can help me out of this situation, if I could see my way out of this situation.
>
> MS. JINES: Your Honor, he signed the plea agreement and was fully aware that he was facing prison time and is facing prison time.
>
> * * *
>
> MS. JINES: We have talked quite a bit about what he's going to do if and when he goes to prison, with his family, his business, that type of thing. He's had more than the past month to situate stuff. As I understand it, everything is situated. *He would just like the chance to prove himself to this Court because he's never had a record before.*

(Sept. 20, 2010 Tr. 8-9.) (Emphasis added.) Upon completion of appellee's statement, the prosecutor commented that appellee continues to "minimize" his behavior and further stated that, if he chooses to do that, "the State will be filing a motion to withdraw the guilty plea because it was based on the joint recommendation of the defendant." (Sept. 20, 2010 Tr. 10-11.) According to the record, the state never filed a motion to withdraw the guilty plea. The trial judge, in an attempt to explain his reasoning with regard to joint plea recommendations, stated:

> [O]ne of the things that I always say generally—I don't know if I specifically said it in this, you can check with the court reporter and see—but normally I advise folk that I normally follow joint recommendations, and everyone I [sic] will say that I normally do, but there are occasions that I do not, and it works both ways.
>
> I've increased the sentence that has been jointly recommended and I have decreased the sentence or not followed the joint recommendation, as they have been made,

> and I think that, in doing my duty as a judge, that I'm required to do that.
>
> I have to evaluate it myself and make the best decision I can make, and I understand the give-and-take of a joint recommendation, what has occurred there with the victim. I understand what has occurred with the defendant, especially in the situation or scenario like this. I understand that and I understand the ramifications of me following or not following the joint recommendation.

(Sept. 20, 2010 Tr. 11.)

{¶7} The record shows that, again, the state took issue with the trial court's inclination to possibly *not* follow the joint recommendation and, as such, threatened to "never do another joint recommendation in this courtroom." (Sept. 20, 2010 Tr. 13.) In response, the trial court stated "[t]hat's your decision, counsel * * *. To tell me you are not going to make a joint recommendation tells me that you are going to put how you feel I've acted on one case against what may be the appropriate the [sic] thing to do in a case later." (Sept. 20, 2010 Tr. 13.)

{¶8} Following a recess, the trial court heard testimony from the three victims and allowed the state to present its argument that appellee breached the plea agreement by requesting less time in prison than jointly recommended to the trial court. (Sept. 20, 2010 Tr. 23-27.) Without specific citations, the state referenced several cases wherein the prosecution reneged on a joint plea agreement. The prosecutor contended, however, that, in this case, "it's the [appellee] breaching," because he has asked for something less than the jointly recommended sentence. (Sept. 20, 2010 Tr.23.) The state argued "it's one thing if [the appellee] had not said a word and just stood up and let the Court makes [sic] its ruling, but to stand up and argue against what he had agreed to would turn—and

if that were the rule and allowed—that would turn plea bargaining on its end." (Sept. 20, 2010 Tr. 26.)

{¶9} In response, the trial judge reiterated that, generally, he *does* follow joint recommendations; however, there are occasions when he either extends or lessens the jointly recommended sentence based upon the circumstances "at the time of sentencing." (September 20, 2010 Tr. 28.) The trial judge further stated, "[n]ow, with the joint recommendation, that's what it is, a joint recommendation. Now, if it's an agreed sentence, that's something totally different, where the parties have come in and said this is the sentence and the Court has said this is the sentence I will impose, if that's the case, then that be the case. Then I've bound myself to something." (Sept. 20, 2010 Tr. 28.) The prosecutor clarified that "[m]y objection is not with anything the Court has done. My objection is what the defense attorney and the defendant have done which are in violation of our joint recommendation." (Sept. 20, 2010 Tr. 29.) Appellee's attorney then stated that "[t]his was a joint recommendation. I'm not aware of joint recommendations being a contractual agreement." (Sept. 20, 2010 Tr. 29.)

{¶10} The record shows that, after weighing several factors and reviewing the probation department's presentence investigation report, the trial court determined that, prior to this incident, appellee had no criminal record and that recidivism is unlikely to occur. (Sept. 20, 2010 Tr. 32.) In lieu of incarceration, the trial court placed appellee on community control for a period of three years and required that he serve 60 days in the Franklin County Correctional System. In addition, the trial court imposed a five-year suspended prison term should appellee violate the terms of his community control. (Sept. 20, 2010 Tr. 32-33.)

{¶11} Immediately following sentencing, the state requested that the trial court "set a trial date for the counts that were agreed to be dismissed based upon the plea agreement." (Sept. 20, 2010 Tr. 33.) The trial court refused to set Counts 1, 2, 3, 4, 5 and 7 for trial because it "had previously nolle'd those at the time of the plea." (Sept. 20, 2010 Tr. 34.)

{¶12} On October 19, 2010, appellant timely filed its notice of appeal, setting forth the following assignment of error for our consideration:

> THE TRIAL COURT IMPROPERLY DISMISSED COUNTS ONE, TWO, THREE, FOUR, FIVE AND SEVEN OVER THE OBJECTION OF THE STATE.

{¶13} Prior to discussing the merits of appellant's sole assignment of error, we must determine the appropriate standard of review to apply. We consider, first, that the record indicates that, although the state asserted that it *would* "be filing a motion to withdraw the guilty plea," subsequent to the hearing, that motion was never filed. (Sept. 20, 2010 Tr. 11.) Therefore, it is not appropriate to review this matter under an abuse of discretion standard for denying a motion to withdraw a plea agreement.

{¶14} Second, although the state claims that the trial court erred by improperly dismissing several counts of the indictment, it does not directly challenge the trial court's absolute discretion regarding sentencing. Therefore, because appellee's actual sentence, as to tampering with evidence, is not at issue in this case, we will not review this matter pursuant to R.C. 2953.08: whether the sentence is clearly and convincingly contrary to law.

{¶15} Finally, the state, in support of its sole assignment of error, claims that appellee materially breached the plea agreement by "asking the court to impose a

sentence of community control rather than the jointly recommended prison term," and therefore, it "was justified in requesting that the court schedule the remaining counts for trial." (See appellant's brief at 6-7.) We note, as summarized above in our recitation of the facts, that the prosecutor consistently claimed throughout the sentencing hearing that appellee had breached the plea agreement. Therefore, it is logical to review this assignment of error in a contractual context because, in order to decide whether the trial court erred in dismissing Counts 1, 2, 3, 4, 5, and 7 of the indictment, we must first determine if, in fact, appellee breached the plea agreement.

{¶16} "It has been recognized that plea agreements are essential to the prompt disposition of criminal proceedings." *State v. Burks*, 10th Dist. No. 04AP-531, 2005-Ohio-531, ¶18, citing *Santobello v. New York* (1971), 404 U.S. 257, 261, 92 S.Ct. 495, 498. In *Burks*, this court stated that "[a] plea bargain is subject to contract law standards." Id. at ¶18. "Generally, however, a plea agreement between the State and the defense is not binding on the court, as the ultimate decision of whether or not the agreement is accepted rests with the trial judge." Id. Further, "[b]ecause a plea bargain is contractual in nature, we must first examine the nature of the plea agreement to determine what the parties understood at the time of [the plea] and determine whether and when a breach occurred." Id. at ¶19.

{¶17} Generally, where the facts are undisputed, a trial court's determination as to whether a certain act constitutes a breach of contract is a question of law to be reviewed de novo. See *Little Eagle Properties v. Ryan*, 10th Dist. No. 03AP-923, 2004-Ohio-3830, ¶13-17; see also *Luntz v. Stern* (1939), 135 Ohio St. 225, paragraph five of the syllabus. However, Ohio case law exists whereby the determination as to whether a plea bargain

has been breached was reviewed pursuant to an abuse of discretion standard. See *State v. McCartney*, 12th Dist. No. CA2005-03-008, 2005-Ohio-5627, ¶8; *State v. Willis*, 6th Dist. No. E-05-026, 2005-Ohio-7002; and *State v. Payton*, 6th Dist. No. E-09-070, 2010-Ohio-5178. Other Ohio courts do not specify which standard of review was applied in determining whether a breach of plea bargain occurred.

{¶18} Here, regardless of whether this court reviews the matter de novo or under an abuse of discretion standard, we find that the trial court did not err in its implied determination that appellee did not breach the plea agreement.

{¶19} In the present matter, because a written plea agreement is absent from the record, we review the Entry of Guilty Plea. The Entry of Guilty Plea states, in relevant part, that "[u]pon recommendation of the Prosecuting Attorney, *in consideration of said plea(s) of* '*Guilty*' the Court hereby enters a Nolle Prosequi as to Count(s): 1, 2, 3, 4, 5, 7." (Emphasis added.) It also states that the prosecution and defense *jointly recommended* to the trial court a sentence of four years with judicial release after serving six months if appellee has a good prison record, then CBCF. In addition, the Entry of Guilty Plea indicates that, upon acceptance of appellee's guilty plea, the trial court "may proceed with judgment and sentence." Finally, the Entry of Guilty Plea unequivocally advises that, in pleading guilty to tampering with evidence, appellee is placing himself "completely and without reservation of any kind upon the *mercy of the court with respect to punishment*." (Emphasis added.)

{¶20} Based upon the plain language in the Entry of Guilty Plea, the state agreed to recommend that the trial court enter a nolle prosequi as to Counts 1, 2, 3, 4, 5 and 7 of the indictment, in exchange for appellee entering a plea of guilty as to tampering with

evidence. Also, based upon the plain language, it is reasonable to believe that the state, and appellee, understood that the ultimate sentencing decision remained within the trial court's discretion, notwithstanding the terms set forth in the joint sentencing recommendation. The record clearly shows that appellee did, in fact, enter a plea of guilty to tampering with evidence and, in consideration of appellee's guilty plea, the state recommended that the trial court dismiss Counts 1, 2, 3, 4, 5 and 7 of the indictment. Therefore, both parties met the specific conditions set forth in the Entry of Guilty Plea.

{¶21} In addition, while the Entry of Guilty Plea *does* set forth a joint recommendation regarding sentencing, it *does not* contain conditional language regarding any negative ramifications should the trial court not follow the joint sentencing recommendation. Also, the Entry of Guilty Plea clearly advises appellee that the trial court possesses the ultimate power to determine his sentence. As such, appellee's request for "leniency" did not constitute a material breach of contract. (Sept. 20, 2010 Tr. 8.)

{¶22} Further, the record clearly establishes that appellee, when given a chance to speak, did not ever specifically *ask* the trial court to disregard the joint sentencing recommendation in contravention to the plea agreement. (Sept. 20, 2010 Tr. 8.) Specifically, appellee asked the trial judge to "please show me leniency, if you can," and properly stated that, ultimately, it is the trial court's decision as to his sentencing in this matter. (Sept. 20, 2010 Tr. 8.) In addition, appellee's attorney merely stated that "[h]e would just like the chance to prove himself to this Court because he's never had a record before." (Sept. 20, 2010 Tr. 9.) Appellee's attorney also stated that appellee "signed the plea agreement and was fully aware that he was facing prison time and is facing prison

time." (Sept. 20, 2010 Tr. 8-9.) Although it is unclear as to whether appellee's attorney's statement, "I'm not aware of joint recommendations being a contractual agreement," refers to appellee or the trial court being bound by the plea agreement, we still do not find that a breach occurred based upon appellee's statements to the trial court summarized above. (Sept. 20, 2010 Tr. 29.) As such, we find that neither appellee, nor his attorney, breached the terms set forth therein.

{¶23} Therefore, because we find that appellee did not breach the terms of the plea agreement, we also find that the trial court did not err in refusing to set Counts 1, 2, 3, 4, 5 and 7 for trial.

{¶24} Appellant's sole assignment of error is overruled.

{¶25} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.

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