

[Cite as *State v. Wombold*, 2004-Ohio-1932.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20000
vs. : T.C. CASE NO. 94CR1624
JAMES C. WOMBOLD, II: (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the 16th day of April, 2004.

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Defendant-Appellant, Pro Se

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GRADY, J.

{¶1} Defendant, James C. Wombold, II, appeals from a judgment overruling Wombold's Crim.R. 32.1 motion for leave to withdraw the guilty pleas on which he was convicted of Rape and Gross Sexual Imposition and sentenced pursuant to law for those offenses.

{¶2} Wombold was indicted on three counts of Rape and three counts of Gross Sexual Imposition. Each GSI charge also contained a "caused physical harm" specification. The

State dismissed two Rape and two GSI charges and the specifications in exchange for Wombold's guilty pleas to the remaining Rape and GSI charges.

{¶3} On May 31, 2003, Wombold filed a Crim.R. 32.1 motion to withdraw his guilty pleas. He argued that he had suffered a manifest injustice when the Ohio Adult Parole Authority ("APA") subsequently classified him as eligible for parole on the basis of the greater number of offenses charged in the indictment, not the two offenses to which he had pleaded guilty and which carry an earlier parole eligibility date.

{¶4} The State filed a motion and memorandum contra. The State conceded that Wombold's classification by the APA was in violation of the rule subsequently set out in *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, which held that such misclassification breaches an underlying plea agreement and is therefore prohibited. However, the State also submitted an affidavit of Richard Spence, an officer of the Ohio Parole Board, who averred that the APA would re-classify Wombold properly in November of 2003, following a hearing that had been set for that purpose.

{¶5} On June 24, 2003, the trial court denied Wombold's motion for leave to withdraw his guilty pleas. The court found that the action promised by the APA would afford Wombold the specific performance of his plea bargain agreement he asked the court to enforce, fulfill the State's

promises in its agreement, and make Wombold whole again. On that basis, the court concluded that a manifest injustice necessary to grant Wombold's post-sentence motion to withdraw his guilty pleas was not shown.

{¶6} Wombold filed a timely notice of appeal from the trial court's judgment. He presents four assignments of error.

FIRST ASSIGNMENT OF ERROR

{¶7} "IT WAS ERROR FOR THE TRIAL COURT TO DENY THE MOTION FOR NEW TRIAL SINCE THERE IS NO WAY THAT SPECIFIC PERFORMANCE CAN BE APPLIED IN THE INSTANT CASE."

{¶8} Implicit in a plea bargain agreement is a promise that the State will classify a defendant for parole eligibility consistent with the offenses to which he agrees to plead guilty; imposition of a more onerous classification therefore breaches the terms of the agreement. *Layne*. The remedy for the state's breach of a plea agreement is either rescission, or to allow the defendant to withdraw his plea, or to order specific performance that requires the state to fulfill its promise. *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495; *State v. Davenport* (1996), 116 Ohio App.3d 6.

{¶9} The trial court found that the hearing which the APA had promised it would hold within several months would afford Wombold the remedy of specific performance, such that no manifest injustice necessary in order to grant Wombold's Crim.R. 32.1 motion was demonstrated. Wombold argues that

the trial court abused its discretion when it denied him the relief to which he is entitled based on a wholly prospective event.

{¶10} The term abuse of discretion connotes more than an error of law or judgment. It implies that the court's attitude concerning the matter before it was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶11} We cannot find an abuse of discretion on the aforementioned standard. The hearing the APA promised to hold was no different from the remedy of specific performance the court might order. An order requiring the State to do what it had promised to do would be an empty gesture. The court could reasonably rely on the State's promise to comply with the requirements of *Layne* by reclassifying Wombold. If that promise was not kept, that is, if no hearing was held in November of 2003 and/or Wombold was not reclassified consistent with *Layne*, he may file a new Crim.R. 32.1 motion seeking that relief.

{¶12} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶13} "IT WAS AN ABUSE OF THE COURT'S DISCRETION TO DISMISS THE MOTION OF THE APPELLANT PRIOR TO HIS BEING ABLE TO REPLY TO THE BRIEF OF THE APPELLEE."

{¶14} It appears from the record that the trial court denied Wombold's Crim.R. 32.1 motion before the time had

expired within which he might file a reply to the State's motion and memorandum contra. See Mont. Loc.R. 2.05, Section II(A)(4) and 3.01. Wombold argues that the court abused its discretion in that respect, and likewise in failing to comply with Crim.R. 46(D)(E)(sic) by ordering a hearing on his motion.

{¶15} Crim.R. 46 governs bail. Neither paragraph (D) nor paragraph (E) of that rule has any application to Wombold's Crim.R. 32.1 motion to withdraw his plea. He has not shown how he was prejudiced by the trial court's failure to await his reply brief. The remedy the State promised affords Wombold the full extent of the relief the court might on this record have been persuaded to order.

{¶16} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶17} "IT WAS ERROR FOR THE COURT TO DISMISS THE MOTION OF THE APPELLANT WITHOUT CONDUCTING AN IMPARTIAL HEARING INTO THE ISSUE OF SPECIFIC PERFORMANCE."

{¶18} The court was not required to conduct a hearing to determine whether the State breached its plea agreement, as Wombold appears to contend, because the State conceded the point. The only question remaining was the remedy. We previously stated why the court did not abuse its discretion in ordering specific performance of an agreement with which the State promised to comply.

{¶19} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶20} "THE TRIAL COURT ERRED WHEN IT FAILED TO PERMIT THE APPELLANT FROM WITHDRAWING A PLEA THAT WAS NOT MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY IN THAT HIS COUNSEL FAILED TO INFORM HIM OF THE FULL CONSEQUENCES OF THE PLEA."

{¶21} Wombold argues that his guilty pleas were not knowing and intelligent because he was unaware that the State would breach the agreement as it did. Any such infirmity will be cured by the State's performance of the promise it made to the trial court.

{¶22} The fourth assignment of error is overruled.

{¶23} The judgment of the trial court will be affirmed.

Judgment affirmed.

FAIN, P.J. and WOLFF, J., concur.

Copies mailed to:

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Hon. Barbara P. Gorman