[Cite as *State v. Smith*, 2010-Ohio-6229.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2009-CA-81
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-926
v.	:	
	:	
SHELDON SMITH	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of December, 2010.

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BROGAN, J.

{¶ 1} Sheldon Smith appeals from his conviction and sentence following a no-contest plea to numerous drug-related charges, including two counts of engaging in a pattern of corrupt activity, conspiracy to commit engaging in a pattern of corrupt activity, two counts of conspiracy to commit trafficking in cocaine, possession of cocaine with a firearm specification, trafficking in cocaine with a firearm specification,

complicity to commit trafficking in cocaine, possession of criminal tools, four counts of money laundering, and numerous criminal forfeiture specifications involving, inter alia, nearly $600,000 in cash and an automobile. Following a hearing, the trial court imposed an aggregate sentence of twenty years in prison.

{¶ 2} Smith advances five assignments of error on appeal. First, he contends the trial court erred in failing to enforce a valid plea agreement for a lesser sentence. Second, he claims the trial court erred in accepting a no-contest plea that was not knowingly, intelligently, and voluntarily entered. Third, he asserts that the trial court erred in denying a motion to continue a hearing on enforcement of the alleged plea agreement. Fourth, he maintains that he received constitutionally ineffective assistance of trial counsel. Fifth, he contends the trial court erred in partially overruling a motion to suppress.

{¶ 3} The record reflects that Smith was indicted on the foregoing charges in December 2008 after police executed search warrants at various places, including his home, and found large quantities of cash and cocaine. Smith subsequently moved to suppress the evidence against him. The trial court held an April 23, 2009 hearing on the motion. In a May 27, 2009 ruling, the trial court sustained the suppression motion in part and overruled it in part. (Doc. #47). Thereafter, Smith decided to enter a no-contest plea to the charges against him. The trial court held a June 1, 2009 plea hearing and accepted the plea after advising Smith that he faced a potential maximum prison term of seventy-eight years and a minimum mandatory term of eleven to twenty-one years. At the conclusion of the hearing, the following on-the-record exchange occurred between defense counsel Rion and prosecutor

Hayes:

{¶ 4} "MR. RION: It's my understanding that there is a pending motion by the Defense at this time and that if the Defense is successful in that motion the State of Ohio will not object to the Court having the discretion to sentence below the mandatory minimum, if it finds in the Defense's favor.

{¶ 5} "MR. HAYES: To put a more finer point on it, the Defendant has filed a motion specifically to compel specific performance of a plea agreement. Should the Court find that motion to be well taken, the State will not object to the Defendant withdrawing the plea entered today, knowing that there is mandatory time on that plea in an effort to put the Court in a position to impose the plea agreement, again, should the Defense's motion be well taken." (June 1, 2009 plea hearing transcript at 25).

{¶ 6} Thereafter, beginning on August 20, 2009, the trial court conducted a lengthy hearing on Smith's May 29, 2009 motion for an order requiring the State to honor an alleged plea agreement. The motion asserted that on May 27, 2008, Greene County assistant prosecutor Suzanne Schmidt had offered Smith a definite four-year prison sentence if he were able to provide law enforcement with information leading to the seizure of forty kilograms of cocaine. The motion further alleged that Smith had provided information leading to the seizure of more than forty kilograms of cocaine. As a result, the motion asked the trial court to enforce a plea agreement for a four-year sentence.

{¶ 7} During the hearing on the motion, the trial court took testimony from several witnesses, most notably defense attorney Richard Skelton and assistant

prosecutor Schmidt. Skelton testified that he had met with his client, Smith, in his office on May 27, 2008. (August 20, 2009, hearing transcript at 20). At that time, Skelton discovered that Greene County law enforcement officials believed Smith knew where an additional fifteen to twenty kilograms of cocaine were located. After speaking with Smith, however, Skelton learned that his client actually knew the whereabouts of more than forty kilograms of cocaine. (Id. at 22).

{¶ 8} Skelton then talked to assistant prosecutor Schmidt on a cell phone. According to Skelton, he asked her what kind of sentence Smith could expect if he "gave up" fifteen to twenty kilograms of cocaine. Schmidt allegedly responded that "he would certainly be under ten [years]." (Id. at 25). Skelton testified that he then "said something along the lines of well, if he's under ten for 15 to 20 [kilograms], I assume if he gives up above 40 [kilograms], he will get probation?" (Id.). Skelton did not believe his client actually would receive probation, but he wanted to shoot "low" and "get a little humor going[.]" According to Skelton, Schmidt was silent for a moment before responding: "If he were to provide the 40, then the number would be four." (Id. at 26). During the hearing, Skelton reiterated: "It was not said to me four to ten. It was just four. It wasn't said four to eight." (Id.). At that point, Skelton believed he and Schmidt had reached a clear plea deal for a four-year sentence in exchange for Smith leading police to at least forty kilograms of cocaine. (Id. at 27, 46, 70, 84).

{¶ 9} Skelton testified that Smith proceeded to cooperate with police and provide them with information leading to the seizure of more than forty kilograms of cocaine. (Id. at 29, 32-33, 49). Approximately two weeks later, Skelton attended a meeting at the prosecutor's office and was told that the deal was either four to eight

or four to ten years in prison. (Id. at 33-34). The meeting became "acrimonious" because Skelton insisted that the deal was for four years. After the meeting, he received a letter from the prosecutor's office indicating that the government's offer was four to ten years in prison. (Id. at 34). Skelton responded with a letter of his own, reiterating his understanding of a four-year deal. (Id. at 40). The following day, Skelton received a faxed letter from Schmidt offering Smith a stipulated eight-year sentence in exchange for full cooperation with state and federal agents. (Id. at 41, 67). Skelton responded with another letter because he believed the parties were getting "farther and farther away from what the original agreement was." (Id. at 43).

{¶ 10} Another witness for the defendant, attorney Thomas Schiff, testified that he helped represent Smith beginning in June 2008. Because discussions between Skelton and the prosecutor's office had not been going well, Schiff was "brought on board to be a peacemaker essentially[.]" (Id. at 99). Schiff testified that when he began representing Smith, Skelton told him about the alleged initial deal with Schmidt for a four-year sentence. (Id. at 100). Schiff also testified that no other plea agreement was reached during his involvement in the case. (Id. at 113, 122).

{¶ 11} For her part, Schmidt testified and recalled her initial telephone conversation with Skelton on May 27, 2008. Specifically, Schmidt remembered Skelton telling her that his client had information about the location of approximately ten to fifteen kilograms of cocaine. According to Schmidt, Skelton wanted her to commit to a specific number of years in prison in exchange for the information. (Id. at 177). Schmidt testified that she told Skelton she did not know enough about the case to give him a number. Instead, she suggested a range of four to ten years in prison.

(Id. at 177-178). Schmidt testified that she could not recall the exact amount of cocaine Skelton mentioned his client being able to locate. She merely recalled it being a "large amount." She had no recollection of Skelton specifically mentioning a quantity greater than forty kilograms. (Id. at 179). Schmidt denied telling Skelton that Smith would get a definite four-year prison term if he provided information leading to the seizure of forty kilograms of cocaine. (Id.). According to Schmidt, she only mentioned a range of four to ten years and made clear that Smith also would have to cooperate and provide truthful testimony to a drug task force. (Id. at 179-180, 194).

{¶ 12} Schmidt recalled later having a meeting with Skelton in which they disputed whether she had promised Smith a four-year sentence. (Id. at 182). Schmidt testified that Skelton accused her of being a liar, which she denied. (Id. at 200). After that meeting, she and Skelton communicated via letters. (Id. at 183). In one of her letters, Schmidt formalized an offer of four to ten years in prison. (Id. at 185). Skelton responded by indicating his understanding of a four-year deal. (Id. at 186). Schmidt testified that in another letter, she offered Smith a definite eight-year term and a promise of no federal prosecution if he provided additional and complete cooperation with Greene County authorities. (Id. at 187-188). Schmidt then reiterated that she never gave Skelton a definite four-year offer and that neither Skelton nor Schiff ever accepted any of the State's offers. (Id. at 190, 202-203).

{¶ 13} After hearing all of the testimony, the trial court filed a written entry in which it concluded that no enforceable plea agreement existed. In relevant part, the trial court reasoned:

{¶ 14} "In consideration of the foregoing, the Court focuses on the testimony

of Richard Skelton, counsel for the Defendant and Suzanne Schmidt, the attorney for the State.

{¶ 15} "Shortly after the search of the residence of the Defendant, Mr. Smith requested to speak to an attorney, Mr. Skelton. Thereafter, Mr. Skelton spoke to Mrs. Schmidt for the purpose of attempting to reach a plea bargain agreement. The desire of the Defendant was to reach a sentence recommendation from the State. After this conversation, a series of letters were written back and forth as to each side's understanding of what the sentence recommendation was to be.

{¶ 16} "This is the nub of this dispute. Both witnesses clearly state a different sentence agreement which they both state was made during their conversation on May 27, 2008. The letters subsequently written bear out this 'divergent' expectation of the underlying agreement.

{¶ 17} "The law is clear that even in a criminal case, the elements of a contract control. The elements of a contract include the following: an offer, an acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of object and of consideration. *Kostelnik v. Helper*, 2002-Ohio-2985; *Willey v. Blackstone*, 2008-Ohio-7035.

{¶ 18} "The Court now must determine what was said between the parties on May 27 and whether a contract arose from that conversation.

{¶ 19} "This Court has known both witnesses personally and professionally for over three decades. This Court holds both of these witnesses to the highest level of respect and integrity. This Court finds no reason at all to judge the credibility of either witness to be greater than the other. Thus, the only conclusion this Court can draw is

that each witness absolutely believes something different was said or heard regarding the recommended disposition to this case.

{¶ 20} "This finding now takes this analysis to whether an agreement and the elements of a contract have been met. The element in issue is that of a manifestation of mutual assent. The Court finds this element to be absent.

{¶ 21} "Both witnesses had a mutually exclusive understanding of an agreement. There was no mutual manifestation and therefore no contract.

{¶ 22} "The record further shows that during the ensuing seven (7) months before the Defendant's arrest, no other written offer made by the Prosecuting Attorney was accepted by the Defendant.

{¶ 23} "Based upon the evidence presented, the Defendant has not established that a contract was established in this case.

{¶ 24} "The Defendant's motion is DENIED." (Doc. #101).

{¶ 25} Thereafter, the trial court held an October 30, 2009 sentencing hearing. After hearing arguments from counsel and giving Smith an opportunity to speak, the trial court imposed an aggregate prison term of twenty years, with eleven of those years being mandatory. The trial court explained, in some detail, why it imposed the sentence that it did. (Sentencing hearing transcript at 52-58). Among other things, the trial court expressly took into consideration Smith's assistance to law enforcement officials, despite the absence of an enforceable plea agreement. (Id. at 54). This appeal followed.

{¶ 26} In his first assignment of error, Smith contends the trial court erred in failing to enforce a plea agreement for a lesser sentence. In particular, he disputes

the trial court's finding that no contract existed. Smith insists that a contract did exist and that, under *Santobello v. New York* (1971), 404 U.S. 257, the State was obligated to abide by it. The essence of Smith's argument is that the trial court erred in finding no mutual assent between defense counsel and the prosecutor. Smith contends there is "no dispute that [he] was to provide the State of Ohio with information and that for providing that information[,] namely a 40-plus kilogram seizure, that he would receive a benefit." Smith submits "that these facts cannot be disputed."

{¶ 27} The problem with Smith's argument is the trial court's finding that the parties never mutually assented as to the benefit he would receive. According to attorney Skelton, he believed he had reached a deal for a definite, four-year sentence. According to prosecutor Schmidt, she never agreed to a specific number and offered a range of four to ten years. Schmidt also testified that she later offered a definite, eight-year sentence. Schmidt stated that none of her offers were accepted by Skelton, who continued to insist that a four-year deal existed. Schiff, the other defense attorney involved in the case, likewise testified that no plea deal was reached during his participation, which commenced after the alleged four-year deal. For its part, the trial court determined "that each witness absolutely believes something different was said or heard regarding the recommended disposition to this case." As a result, the trial court found mutual assent lacking.

{¶ 28} The parties agree that mutual assent is required for the formation of a contract, and "plea bargains are essentially contracts." *Puckett v. United States* (2009), 129 S.Ct. 1423, 1430. Here the record supports the trial court's finding that

the parties never agreed on the benefit Smith would receive in exchange for his assistance. Therefore, the trial court properly concluded that no contractual plea agreement existed. While Smith argues that the trial court, at a minimum, should have held the State to its offer of four to ten years, the record contains testimony, which the trial court credited, indicating that Smith never accepted that offer. Instead, he held firm to his position that a definite, four-year agreement existed, an argument the trial court rejected.

{¶ 29} Smith next asserts that if no enforceable plea agreement existed, then he should have received the benefit of the State's offer based on implied contract or quasi-contract. We disagree. Even an implied contract requires proof of a "meeting of the minds" on all essential elements, which would include the benefit Smith would receive in exchange for his assistance. "The difference between an express contract and an implied contract (i.e., a contract implied-in-fact) is that in express contracts, assent to the terms of the contract is actually expressed in the form of an offer and acceptance, whereas in implied contracts, the parties' assent or 'meeting of the minds' is inferred from the surrounding circumstances, including the parties' conduct and declarations, which show that the contract exists as a matter of tacit understanding." *Rumpke v. Acme Sheet & Roofing, Inc*. (Nov. 12, 1999), Montgomery App. No. 17654.

{¶ 30} In the present case, the trial court was not required to find that Smith implicitly accepted the State's offer of a four to ten year sentence, particularly where the record contains evidence from at least two witnesses, Schiff and Schmidt, who testified that no such agreement ever was reached. Moreover, the record reflects that

the State made various proposals to Smith, the last of which apparently was for a flat, eight-year sentence, which, if anything, suggests continuing negotiations rather than the existence of a tacit agreement between the parties as to the particular benefit Smith would receive.

{¶ 31} Finally, we are unpersuaded by Smith's quasi-contract argument. "In Ohio, unjust enrichment is a claim under quasi-contract law that arises out of the obligation arising by law as to a person in receipt of benefits that he is not justly and equitably entitled to retain."*Saber Healthcare Group, L.L.C. v. Starkey*, Huron App. No. H-09-022, 2010-Ohio-1778, ¶15 (citation omitted). In addition to asserting unjust enrichment, Smith asserts that promissory estoppel should apply. Under either of these principles, he contends the State should be held to its offer of a four to ten year sentence because it benefitted from the information he provided and he received nothing in return.

{¶ 32} We find Smith's reliance on unjust enrichment and promissory estoppel unpersuasive for at least two reasons, even assuming, arguendo, that these equitable doctrines apply in the context of a plea bargain.[1] First, Smith's motion to enforce a plea agreement never mentioned either doctrine. The record reflects that Smith filed a motion under seal on May 29, 2009 for an order "requiring the State of Ohio to honor the initial plea agreement offered by the Greene County Prosecutor's office[.]" His memorandum in support alleged that he was offered a four-year sentence in exchange for helping police locate drugs and/or money. He argued that

[1]While plea bargains generally are treated as contracts, Smith has not cited any authority applying the equitable doctrines of unjust enrichment or promissory estoppel in the context of an attempted plea agreement.

the State's "recession of the plea agreement" violated *Santobello*. Accompanying the motion was an affidavit from attorney Skelton, who averred that prosecutor Schmidt originally told him Smith would receive a four-year sentence if he provided information leading to the confiscation of forty kilograms of cocaine. This is the plea agreement that Smith's motion sought to enforce.

{¶ 33} Just days later, on June 1, 2009, Smith proceeded to plead no contest to charges that carried a mandatory minimum sentence of eleven years and a maximum of seventy eight years. As set forth above, the parties recognized, at the conclusion of the plea hearing, that Smith would be permitted to withdraw his pleas if the trial could later found his motion to enforce a plea agreement well taken. The matter of the alleged plea agreement proceeded to a hearing that commenced on August 20, 2009. Following the hearing, Smith filed a post-hearing memorandum in which he first raised the issue of unjust enrichment.[2] (Doc. #90). He did not mention promissory estoppel at all. As noted above, the trial court subsequently denied his motion to enforce a plea agreement, finding that no such agreement ever arose. (Doc. #101). In its ruling, the trial court did not address the equitable doctrine of unjust enrichment, likely because Smith's motion itself never mentioned the issue. The trial court also did not address promissory estoppel, likely because Smith never raised that issue. Upon review, we cannot say the trial court erred in limiting its review to the issue actually raised in Smith's motion to enforce a plea agreement, namely whether the parties agreed that he would receive a four-year sentence in exchange for leading police to the discovery of forty kilograms of cocaine.

[2]Smith's post-hearing memorandum is captioned as a "Motion in Support."

{¶ 34} We find Smith's reliance on the doctrines of unjust enrichment and promissory estoppel unpersuasive for a second reason as well. He asserts that the State should be held to its initial offer of a four to ten year sentence under either doctrine. With regard to unjust enrichment, Smith contends that he conferred a benefit on the State when he helped police locate more than forty kilograms of cocaine and that it would be unjust to allow the State to retain this benefit without him receiving anything in return. Similarly, with regard to promissory estoppel, Smith contends that he reasonably relied on the State's promise of a four to ten year sentence, that he acted on the promise to his detriment by helping police locate the cocaine, and that injustice can be avoided only by enforcing the promise.

{¶ 35} One problem with Smith's argument is that, according to the State, its initial offer of a four to ten year sentence included a requirement that he provide information leading to the discovery of a large quantity of cocaine *and* that he provide additional cooperation and truthful testimony to the drug task force.[3] (Aug. 20, 2009 hearing transcript, Schmidt testimony at 177-178, 182, 188, 194, 205; Polston testimony at 215). Although Smith apparently did help lead police to a large quantity of cocaine, Schmidt subsequently received word that he was being uncooperative. (Id. at 181, 185, 204). Detectives Craig Polston and Lon Etchison confirmed that Smith continued being uncooperative and lied during a police interview. (Id. at 218-221; see, also, September 16, 2009 hearing transcript, Polston testimony at 18,

[3]Smith cannot reasonably dispute the terms of prosecutor Schmidt's alleged original offer of a four to ten year sentence since he denies that such an offer even was made. As set forth above, he continues to insist on appeal that the initial offer was for a four-year sentence.

28-31; Etchison testimony at 76-77). On the other hand, the record does contain testimony indicating that Smith provided at least some additional useful information after leading police to the large quantity of cocaine. (September 16, 2009 hearing transcript, Etchison testimony at 50-67). In any event, the record would support a finding that he did not provide complete cooperation and entirely truthful testimony. This calls into question whether it would be unjust to deny Smith the benefit of a four to ten year sentence.

{¶ 36} Absent a binding plea agreement, we believe the trial court was in the best position to assess the value of the information Smith provided to police. In fact, at sentencing, the trial court expressly stated that it had taken into consideration the assistance he provided. (Oct. 30, 2009 disposition transcript at 54). Although Smith is dissatisfied with his twenty-year sentence, we note that he pled no-contest to charges carrying a mandatory minimum of eleven years. (Id. at 61). The fact that Smith received an aggregate twenty-year sentence when he faced a maximum seventy-eight-year sentence suggests that the trial court did give him a benefit for the information he provided to law enforcement. Therefore, we do not find any injustice or inequity that must be remedied by holding the State to its offer of a four to ten year sentence based on the doctrines of unjust enrichment or promissory estoppel. The first assignment of error is overruled.

{¶ 37} In his second assignment of error, Smith claims the trial court erred in accepting a no-contest plea that was not knowingly, intelligently, and voluntarily entered. In particular, he contends his plea should not have been accepted while a motion to suppress and a motion to compel enforcement of a plea agreement

remained pending. Smith argues that it is "irregular" for a trial court to accept a defendant's plea while such motions remain unresolved. Alternatively, he asserts that the trial court erred by participating in plea-bargain negotiations.

{¶ 38} The foregoing arguments lack merit. The record reflects that on June 1, 2009, the trial court conducted a thorough Crim.R. 11 plea hearing with Smith. A transcript of that hearing convinces us that Smith knowingly, intelligently, and voluntarily pled no-contest to thirteen felony charges and numerous specifications. The trial court advised Smith, among other things, of the rights that he was waiving and that he faced a potential maximum sentence of seventy-eight years in prison. The State also provided a factual basis for the pleas. Before the trial court accepted them, counsel for both parties mentioned Smith's pending motion to enforce an alleged four-year plea agreement. As set forth above, the State indicated that if Smith prevailed on that motion, it would permit him to withdraw his pleas so he could enter new pleas to charges allowing a four-year sentence. At that point, the trial court accepted the pleas, finding that they had been entered knowingly, intelligently, and voluntarily and in compliance with Crim.R. 11.

{¶ 39} Because the parties specifically recognized the pending motion to enforce a plea agreement and established a post-plea procedure for dealing with it, we cannot agree that the motion's existence rendered Smith's pleas invalid. With regard to the suppression issue, the record reflects that the trial court held a hearing on a motion to suppress on April 23, 2009. Thereafter, on May 27, 2009, the trial court filed a decision and entry in which it sustained the motion in part and overruled it in part. This was done *before* Smith entered his no-contest pleas on June 1, 2009.

Thereafter, in October 2009, Smith sought to reopen the suppression issue and to file a supplemental motion to suppress. The trial court overruled this motion, which was filed well after Smith had entered his pleas. Contrary to Smith's argument on appeal, the record does not reflect that any motion to suppress was pending on June 1, 2009, when he entered his no-contest pleas.[4] Therefore, the existence of such a pending motion did not negate the knowing, intelligent, and voluntary nature of his pleas. But even if a suppression motion had been pending when Smith entered his pleas, this would not necessarily negate the validity of the pleas. Smith presumably would have been aware of any pending motion that existed when he pled no-contest. It would be his choice to abandon that motion and to plead no-contest without the motion first being resolved.

{¶ 40} Finally, we are unpersuaded by Smith's suggestion that the trial court erred by participating in plea-bargain negotiations. There is no evidence that the trial court did so. The record reflects that the trial court accepted Smith's no-contest pleas on June 1, 2009. Thereafter, on August 20, 2009, the trial court commenced a hearing on Smith's motion to enforce an alleged plea agreement for a definite, four-year sentence. Nothing in the record suggests that the trial court played any role in any of the alleged plea negotiations. The trial court simply heard testimony about the alleged deal and, ultimately, found no meeting of the minds. Accordingly, the

[4]The record indicates that Smith filed two suppression motions, the first on February 13, 2009 and the second on April 23, 2009. In reality, however, there was only one suppression motion. Defense counsel recognized during the suppression hearing that the April 23, 2009 filing was captioned as a "motion" but actually was a memorandum in support of the February 13, 2009 motion. (April 23, 2009 suppression hearing transcript at 57).

second assignment of error is overruled.

{¶ 41} In his third assignment of error, Smith asserts that the trial court erred in denying a motion to continue the August 20, 2009 hearing on enforcement of his alleged plea agreement. At the outset of the hearing, defense counsel requested the continuance because he had subpoenaed three federal agents who had failed to appear. (August 20, 2009 transcript at 7). Defense counsel explained that the purpose of subpoenaing the witnesses was to have them testify about the extent of Smith's cooperation, not just with Greene County officials, but with federal officials as well. (Id. at 10-15).

{¶ 42} In response, the State argued that such testimony was not relevant to the threshold issue of whether any plea agreement existed between defense counsel and the Greene County prosecutor's office. (Id.). The trial court denied the continuance and elected to go forward on the issue of whether a plea agreement existed. (Id. at 16). The hearing did not conclude that day, however, and it continued on two later dates, September 16, 2009 and October 2, 2009. In the mean time, the federal agents at issue moved to quash their subpoenas.[5] The trial court sustained the motion on September 9, 2009. (Doc. #87). Given that the trial court ultimately quashed the subpoenas, thereby refusing to require the federal agents to testify at all, we certainly cannot say the trial court abused its discretion in denying a continuance on August 20, 2009 when they failed to appear. The third assignment of error is overruled.

[5]The record reflects that defense counsel had subpoenaed the federal agents to testify on multiple dates, not just on August 20, 2009.

{¶ 43} In his fourth assignment of error, Smith maintains that he received constitutionally ineffective assistance of trial counsel. In particular, he contends his attorney provided ineffective assistance by (1) failing to have the parties' alleged four-year plea agreement reduced to writing and (2) allowing him to plead no-contest while his motion to enforce the alleged plea agreement remained pending.

{¶ 44} To prevail on his claim, Smith must show deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668. To establish deficiency, he must show that counsel's representation fell below an objective standard of reasonableness. Id. To show prejudice, he must demonstrate that counsel's deficiency had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136. Reversal is warranted if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Id.

{¶ 45} Upon review, we conclude that Smith cannot prevail on his ineffective-assistance claim. The problem with his first argument is that the trial court found no "meeting of the minds" on any plea deal. In other words, the trial court found that the parties never reached an agreement for a particular sentence in exchange for Smith's cooperation. As a matter of law and logic, defense counsel cannot have provided ineffective assistance by failing to reduce a non-existent agreement to writing.

{¶ 46} With regard to the second issue, we agree that it was unusual and procedurally awkward for Smith to enter no-contest pleas to charges that required a sentence of between eleven and seventy-eight years in prison while he had a motion

pending to enforce an alleged four-year plea agreement. We nevertheless conclude that Smith was not prejudiced by entering no-contest pleas while his motion remained pending. We reach this conclusion because the State agreed, at the conclusion of the plea hearing, to allow Smith to withdraw his pleas if he later prevailed on his motion to enforce the alleged plea agreement. (June 1, 2009 transcript at 25). In light of this concession by the State, Smith's entry of the no-contest pleas did not prejudice his ability to pursue his pending motion. Accordingly, the fourth assignment of error is overruled.

{¶ 47} In his fifth assignment of error, Smith contends the trial court erred in partially overruling a motion to suppress. Specifically, he challenges the trial court's finding that a search warrant affidavit established probable cause.

{¶ 48} This assignment of error concerns an affidavit from Beavercreek detective Craig Polston. The affidavit was presented to a Xenia Municipal Court judge who subsequently issued a search warrant. The affidavit, which contains nine single-spaced pages, alleged that Smith had engaged in a number of drug-related offenses and that various items, including cocaine, crack cocaine, drug paraphernalia, drug-related criminal tools, and drug money, were located in specified vehicles Smith owned, on his person, and in his Xenia residence.

{¶ 49} Polston, a long-time member of the Beavercreek Police Department and the Greene County drug task force, averred that in May 2008 his task force and other law-enforcement agencies began investigating a drug operation headed by an individual named Reginald Brooks. (Doc. #31 at Exh. A, Polston afffidavit, ¶2). According to Polston, he learned that Brooks was using several co-conspirators to

steal drugs and drug money from other drug traffickers' residences. (Id.). These co-conspirators used their own residences to store the stolen drugs and cash. (Id.). A confidential source ("CS 1") infiltrated Brooks' organization and recorded "numerous" meetings and phone calls in which Brooks discussed committing future robberies of known drug dealers. (Id. at ¶3). Polston averred that Brooks contacted CS 1 on May 7, 2008 about planning to rob Sheldon Smith's residence. (Id. at ¶4). Polston's task force subsequently obtained audio and video surveillance of Brooks, CS 1, and another individual driving to Smith's house and discussing the planned robbery. (Id.). On one of the audio tapes, Brooks stated "that Smith currently has over $200,000 in cash and kilograms of cocaine in the attic or basement area" of his residence. (Id.). Brooks later told CS 1 that he had several handguns available to use in robberies. (Id. at ¶5). Brooks proceeded to instruct CS 1 to go to a particular residence and obtain a handgun from a specified woman. (Id.). Police corroborated that the woman lived at the residence and worked where Brooks told CS 1 she did. (Id. at ¶7). Brooks changed the plan, however, and had CS 1 obtain the weapon, a loaded semi-automatic handgun, directly from him. (Id. at ¶6).

{¶ 50} On May 19, 2008, law-enforcement officers made undercover contact with Brooks and CS 1. They discussed "a home invasion of drug traffickers that were selling or in possession of over ten kilograms of cocaine." (Id. at ¶10). During the meeting, an undercover officer "informed Brooks that he could provide Brooks with a location where Hispanic males would have large quantities of U.S. Currency and potentially ten to fifty kilograms of cocaine." (Id.). Brooks responded that "he had the additional manpower and capabilities" to steal the drugs and money and proceeded

to discuss doing so. (Id.). After the meeting, Brooks investigated the undercover officer and incorrectly concluded that he was not associated with law enforcement. (Id. at ¶11).

{¶ 51} On May 22, 2008, Polston and other officers contacted a second confidential source ("CS 2"). According to Polston, CS 2 admitted having purchased crack cocaine from a person named Carlos Anderson between fifty and one-hundred times over the previous two years. (Id. at ¶12). CS 2 then made a recorded phone call to Anderson about purchasing two ounces of crack cocaine. Police watched as CS 2 proceeded to meet Anderson at an agreed-upon location to conduct the transaction. Anderson and a companion were arrested at the scene, and police found two ounces of crack cocaine in the possession of Anderson's companion. They also found marijuana and a large quantity of cash in Anderson's possession. (Id.).

{¶ 52} On May 23, 2008, CS 2 identified a particular residence as being one used by Anderson to distribute drugs. (Id. at ¶13). That same day, police obtained a search warrant and found marijuana and more than three-hundred grams of cocaine inside the residence. (Id. at ¶16). Detectives then interviewed a third confidential source ("CS 3"), who stated that the cocaine found inside the residence belonged to Anderson and had been obtained from a person named Donald Harrington. (Id. at ¶17). CS 3 told the detectives that Harrington worked for Sheldon Smith at the L.A. Lounge. (Id.). CS 3 added that Harrington also sold cocaine for Smith. CS 3 informed the detectives that the three-hundred grams of cocaine had been "delivered to Carlos Anderson at the L.A. Lounge parking lot by Donald Harrington." (Id.). According to CS 3, Harrington had taken the cocaine from an older, green, four-door vehicle

owned by Smith. (Id.). CS 3 "told the detectives that Harrington was familiar with Smith's drug trafficking business from working at L.A. Lounge and Smith had been Harrington's boss since the L.A. Lounge opened." CS 3 also stated "that after receiving the money for the cocaine Harrington took the money and placed it back in [Smith's] green vehicle."[6] (Id.). CS 3 added that "he/she purchased cocaine from Harrington numerous times at the L.A. Lounge and Harrington would always remove the cocaine from the vehicle and place the money back in the back seat or trunk area of the green vehicle." (Id.). Harrington told CS 3 that he "has seen several hundred thousand dollars of U.S. currency and kilograms of cocaine at the residence of Sheldon Smith in Xenia. Harrington bragged to CS 3 that Smith obtains fifty to sixty kilograms of cocaine from his Mexican connection each month."[7] (Id.).

{¶ 53} After reviewing the foregoing affidavit, a Xenia Municipal Court judge issued a search warrant based on a finding of probable cause to believe that Smith had engaged in various drug-related offenses and that cocaine and/or crack cocaine, drug money, and other drug-related items would be found inside his residence. (Doc. #31 at Exh. A). Upon review, the trial court determined that the issuing judge properly had found probable cause to issue a search warrant. (Doc. #47 at 9-11). The trial court then concluded that substantially similar affidavits from Polston did not support

[6]Police previously had determined that Smith owned a green 1992 Honda Accord and had seen the vehicle parked in front of Smith's house. (Polston affidavit, at ¶4).

[7]The remainder of the affidavit primarily concerns Smith's vehicle being seen at his mother's house, his mother being listed as the president of the L.A. Lounge, and Smith being seen driving a 2002 Cadillac Escalade and a 2002 Chrysler 300M, both of which were registered to him. (Id. at ¶18-20).

the issuance of search warrants for Smith's mother's home or for the L.A. Lounge. (Id. at 12-13).

{¶ 54} In its ruling, the trial court rejected an argument that Reginald Brooks was not a credible source of information. The trial court determined that Brooks' information was entitled to significant weight because he did not know he was speaking to a confidential source and to an undercover officer and, therefore, was more likely to be speaking truthfully. (Doc. #47 at 9). The trial court also noted that some of Brooks' statements were against his penal interests, adding to their reliability. The trial court found that the statements made by CS 1 and Brooks were "sufficiently corroborated from multiple sources." The trial court then found "that the affidavit sufficiently establishes the fact that Brooks was aware as well as the affiant that large quantities of cash and cocaine were maintained by Sheldon Smith in his residence[.]" (Id. at 10-11). Finally, the trial court stated:

{¶ 55} "In conclusion, under the totality of the circumstances, the Court finds that there is sufficient probable cause to believe based on the information provided by Reginald Brooks and the confidential sources under circumstances which have been corroborated, that Sheldon Smith is involved in trafficking large quantities of cocaine and large quantities of cash. Most importantly, the issuing magistrate was correct in concluding that Sheldon Smith receives quantities of cocaine on a monthly basis, that the information provided by the affiant is timely and not stale. The conclusion drawn by the issuing judge is correct that there is probable cause to search [Smith's residence]." (Id. at 11).

{¶ 56} On appeal, Smith disputes whether Polston's affidavit was sufficient to

establish probable cause to support the issuance of a search warrant for his residence. Specifically, Smith raises a "staleness" issue and contends the affidavit did not establish probable cause to believe anything illegal was in his house when the warrant was issued. He also argues that the affidavit lacked any "first-hand knowledge" about what was in his residence. He additionally asserts that the first half of the affidavit focused "almost exclusively on the criminal enterprise of the alleged reliable source[.]" He further alleges that the affidavit was "fundamentally defective for its failure to state when many of the allegations were to have occurred or [to provide] any supporting evidence to demonstrate reliability." Finally, Smith reiterates his claim that the affidavit failed to demonstrate the "present" existence of probable cause.

{¶ 57} "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. George* (1989), 45 Ohio St.3d 325, paragraph one of the syllabus, following and quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238-239.

{¶ 58} "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable

cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." Id. at paragraph two of the syllabus (citation omitted).

{¶ 59} We note too that "[t]he Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." Id. at paragraph three of the syllabus (citation omitted). The rationale for this "good-faith" exception is that when police have acted in good faith on a warrant issued by a judge or magistrate, there is no police misconduct and, thus, nothing to deter. Id. at 331. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination[.] * * * Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *United States v. Leon* (1984), 468 U.S. 897, 921. Nevertheless, an officer's reliance on a magistrate's probable-cause determination must be objectively reasonable. *George*, 45 Ohio St.3d at 331. Suppression remains proper "where (1) ' * * * the magistrate or judge * * * was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth * * * '; (2) '* * * the issuing

magistrate wholly abandoned his judicial role * * *'; (3) an officer purports to rely upon '* * * a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"'; or (4) '* * * depending on the circumstances of the particular case, a warrant may be so facially deficient- i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid.'" Id., quoting *Leon*, supra, at 923.

{¶ 60} In the present case, we believe the municipal court judge had a substantial basis for finding a fair probability that the items identified in the search warrant would be found in Smith's home. As noted by the trial court, it was reasonable to credit the statements Reginald Brooks made to CS 1 and an undercover officer because those statements were against Brooks' penal interest. Moreover, it is apparent from Polston's affidavit that the identity of all three confidential sources was known to police. This makes the information they provided more reliable than information provided by an anonymous tipster. Moreover, all three confidential sources generally provided the basis for their knowledge, and police corroborated at least some of the information they received.

{¶ 61} With regard to CS 1, we note that police received most of the information he provided through secret audio tapes in which they actually heard Brooks speaking. To the extent that police could listen to Brooks directly, they did not even need to rely on CS 1's veracity or reliability as a source. With regard to CS 2, he admitted to police that he had purchased crack cocaine from Carlos Anderson. He also helped police set up a controlled buy in which they caught Anderson's

companion with two ounces of crack cocaine, the amount CS 2 had arranged to buy. CS 2's participation in this transaction helped establish his veracity and reliability. The following day, CS 2 advised police that Anderson used a certain residence as a "stash house" for drugs. Police subsequently executed a search warrant and found more than three-hundred grams of cocaine inside that house. This successful search added to CS 2's veracity and reliability. With regard to CS 3, he admitted to police that he had purchased cocaine from Donald Harrington numerous times, thereby making a statement against his penal interests and adding to his reliability. CS 3 also told police that Harrington sold drugs for Sheldon Smith out of the L.A. Lounge. His basis for knowing this information presumably came from his prior purchases of cocaine from Harrington. CS 3 additionally stated that Harrington always put the money in an older green vehicle owned by Smith. Police independently confirmed that Smith owned a green 1992 Honda Accord, which helped to corroborate CS 3's claim. Police also established that Smith's mother was the president of the L.A. Lounge and owned its liquor license. CS 3 further told police that Harrington had admitted seeing several hundred thousand dollars in cash and kilograms of cocaine in Smith's residence. Harrington also told CS 3 that Smith obtains fifty to sixty kilograms of cocaine each month. CS 3 knew this information because Harrington told him, and Harrington presumably knew it because he sold drugs to CS 3 and others for Smith. Although CS 3 did not indicate when Harrington had seen the money and kilograms of cocaine in Smith's residence, we find it noteworthy that Harrington bragged to CS 3 about Smith receiving fifty to sixty kilograms of cocaine each month. The substantial size and regularity of this delivery gave the magistrate a

reasonable basis for concluding that drugs remained present in Smith's home at the time of the warrant request.

{¶ 62} Based on all of the information contained in Polston's affidavit, we cannot say the magistrate erred in finding a fair probability that contraband or evidence of a crime would be discovered in Smith's residence. In reaching this conclusion, we recognize that close or marginal cases should be resolved in favor of upholding a magistrate's probable cause determination. *George*, supra, at syllabus. But even if probable cause were lacking in the present case, we would find *Leon's* good-faith exception applicable.[8] There is no evidence that police misled the magistrate, that the magistrate wholly abandoned his judicial role, or that the affidavit was so lacking in indicia of probable cause as to make belief in its existence unreasonable. Accordingly, we overrule Smith's fifth assignment of error.

{¶ 63} The judgment of the Greene County Common Pleas Court is affirmed.

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DONOVAN, P.J., concurs.

FAIN, J., concurring in judgment:

{¶ 64} I concur fully in Judge Brogan's opinion for the court with respect to the disposition of Smith's Second, Third, Fourth and Fifth assignments of error. I write separately merely to indicate the narrow ground upon which I join in overruling Smith's First Assignment of Error.

{¶ 65} Smith believed, in good faith, that he had an agreement with the State

[8]The State raised the good-faith exception in the trial court and reiterated it as a fall-back argument on appeal.

wherein, if he performed certain acts, the State would agree to a four-year sentence. The trial court found that his trial attorney believed, mistakenly, but in good faith, that the State had so agreed. In fact, the State had expressed its willingness to agree to a sentence of from four to ten years if Smith would perform those acts.

{¶ 66} In civil contract law, where one party has conferred a benefit upon a second party, the second party has knowledge of the benefit, and the second party has retained the benefit under circumstances where it would be unjust to do so without payment, the first party has a claim for unjust enrichment. *Bldg. Industry Consultants, Inc. v. 3M Parkway, Inc.*, 182 Ohio App.3d 39, 2009-Ohio-1910, ¶ 16. Here, Smith led the State to 40 kilograms of cocaine, probably at substantial risk to his life and limb, believing, in good faith, that he had a deal with the State concerning his sentence. Under principles of unjust enrichment, it would be inequitable for the State to retain the benefit of that bargain without compensating Smith appropriately. We know that the State was willing to compensate Smith for his co-operation with an agreed sentencing range of from four to ten years, so that could be used as a measure of the value of Smith's co-operation to the State.

{¶ 67} In short, I would be willing to consider a reversal of the sentence in this case and a remand for the trial court to impose a sentence of from four to ten years, except for one important fact. Unjust enrichment is an equitable doctrine. *Bickham v. Standley*, 183 Ohio App.3d 422, 2009-Ohio-3530, ¶ 14. He who seeks equity must do equity; that is, one may not obtain equitable relief who has unclean hands.

{¶ 68} Obviously, the "unclean hands" equitable defense cannot reasonably be applied in a plea bargain context to a criminal defendant's conduct before the

defendant's performance of his undertakings, but I conclude that it can reasonably be applied to his conduct in performing, or failing to perform, the services to the State for which a sentencing concession is claimed as consideration. Here, as noted by Judge Brogan in his opinion for this court, "the record would support a finding that he [Smith] did not provide complete cooperation and entirely truthful testimony," which was also part of the obligations he understood, or should have understood, he was required to perform in exchange for the sentencing concession.

{¶ 69} In short, I conclude that this record supports a finding that Smith did not have "clean hands," and he is therefore not entitled to the remedy of unjust enrichment, or quantum meruit. For that reason, I join in overruling his First Assignment of Error.

a. . . . . .

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