

[Cite as *State v. Thompson*, 2004-Ohio-2413.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

The State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 03CA766
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Larry Thompson,	:	
	:	FILE-STAMPED DATE: 5-11-04
Defendant-Appellant.	:	

APPEARANCES:

Kenneth R. Spiert, Columbus, Ohio, for Appellant.

David Kelley, Adams County Prosecutor, West Union, Ohio for Appellee.

Kline, P.J.:

{¶1} Larry Thompson appeals the Adams County Court of Common Pleas' judgment entry convicting him of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, a felony of the third degree. Thompson asserts that the state breached its plea agreement with him when it did not recommend a two-year prison sentence at the sentencing hearing. We agree. Thompson further contends

that the trial court erred when it did not appoint an attorney to represent him at his sentencing and sexual predator classification hearings. We do not address this argument because it is rendered moot based on our disposition of Thompson's "breach of the plea agreement" argument. Accordingly, we vacate the judgment entries that resulted from the sentencing and sexual predator classification hearings. We remand this case for consideration as to whether the circumstances require only specific performance of the plea agreement, or whether the trial court must permit Thompson to withdraw his guilty plea.

I.

{¶2} The Adams County Grand Jury indicted Thompson on charges of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, a felony of the third degree. Later the grand jury issued a superseding indictment charging Thompson with unlawful sexual conduct of a minor, in violation of R.C. 2907.04, a felony of the second degree. Thompson entered a plea of not guilty.

{¶3} Pursuant to a plea agreement, Thompson entered an Alford plea after the state amended the indictment from a felony of the second degree to a felony of the third degree and said that it would recommend a sentence of two years in prison. The court accepted his Alford plea and found him guilty.

{¶4} Before the date of sentencing, the trial court granted Thompson's attorney's motion to withdraw. Two days later the court granted Thompson's motion to withdraw his Alford plea. The trial court appointed an attorney to represent Thompson.

{¶5} Pursuant to a second plea agreement, Thompson entered a plea of guilty to the charge after the state amended the indictment from a felony of the second degree to a felony of the third degree, and the state further said that it "will, as part of the plea agreement, recommend a prison sentence of two years." The trial court found him guilty and ordered a pre-sentence investigation.

{¶6} Six days later at the sentencing and sexual predator classification hearings, the trial court asked the prosecutor, "[I]s there anything you wish to say?" The prosecutor said, "Your honor, we would submit the case to the Court for sentencing consistent with the plea of guilty that was entered on March 13, of this year." The trial court sentenced Thompson to four years in prison.

{¶7} Near the beginning of the sentencing hearing, Thompson's attorney asked the court to withdraw from the case, and Thompson asked the court for permission to fire his attorney and to withdraw his guilty plea. The trial court denied Thompson's motion to withdraw his plea. The court also granted Thompson's attorney's request to withdraw. However, there is a dispute as to when

the trial court meant for the withdrawal to be effective. Thompson alleges that the withdrawal was effective at the moment the trial court said, “I will grant it,” but the judgment entry indicates that it was effective at the end of the hearings.

{¶8} After Thompson’s attorney renewed his request for withdrawal, the trial court said, “That will be considered by the Court, and I will grant it, but I want you to remain in the courtroom. I think we’ve supplied two attorneys to this defendant, and I’m not supplying any more, so you remain in the courtroom. Do you understand sir?” Thompson’s attorney responded, “Yes your Honor.” The trial court then proceeded with the hearings.

{¶9} Thompson appeals the trial court’s judgment and asserts the following two assignments of error: “[I.] THE TRIAL COURT VIOLATED MR. THOMPSON’S RIGHTS TO COUNSEL AND TO DUE PROCESS UNDER THE OHIO AND UNITED STATES CONSTITUTIONS WHEN IT GRANTED MR. THOMPSON’S REQUEST TO DISCHARGE COUNSEL WITHOUT ADVISING MR. THOMPSON THAT IT WOULD NOT APPOINT SUBSTITUTE COUNSEL AND WITHOUT CONDUCTING THE INQUIRY REQUIRED BY *FARETTA v. CALIFORNIA*, 422 U.S. 806 (1975). MR. THOMPSON WAS FORCED TO PROCEED TO SENTENCING AND TO ADJUDICATION AS A SEXUAL OFFENDER WITHOUT THE ASSISTANCE

OF COUNSEL. [II.] THE STATE BREACHED THE PLEA AGREEMENT WHEN IT FAILED TO RECOMMEND A TWO-YEAR SENTENCE AT THE SENTENCING HEARING. THIS BREACH VIOLATED MR. THOMPSON'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS AND INVALIDATES THE GUILTY PLEA.”

II.

{¶10} Thompson argues in his second assignment of error that the state breached the plea agreement when it failed to recommend a two-year prison sentence at his sentencing hearing. Thompson asserts that, when a plea is induced by a promise or agreement of the prosecutor, the state must fulfill the promise. Thompson concludes that the state's breach invalidates his guilty plea.

{¶11} The state in *Santobello v. New York* (1971), 404 U.S. 257 breached the plea agreement when it did not carry through with one of its promises. The defendant in *Santobello*, charged with several offenses, agreed to enter a guilty plea to a reduced charge in exchange for a promise by the prosecutor that the state would make no sentencing recommendation to the trial judge. The state later recommended to the trial judge that the defendant receive the maximum penalty. When the defendant objected, the trial judge stated that he was not influenced by

the state's recommendation. The trial judge later sentenced the defendant to the maximum penalty. *Id.* On appeal, the United States Supreme Court held that due process requires the state to honor any promise or representation it makes to induce a guilty plea by a defendant. *Id.* at 262. The Court determined that it did not need to reach the question of whether the sentencing judge allowed the state's recommendation to influence him. *Id.* Rather, the Court concluded that the overriding concerns in enforcing "plea bargain" agreements are "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas." *Id.* at 263. The *Santobello* court therefore vacated the sentence, remanded the case and ordered the state trial court "to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case [the defendant] should be resentenced by a different judge, or whether, * * * the circumstances require granting * * * the opportunity to withdraw his plea of guilty." *Id.*

{¶12} Following *Santobello*, Ohio courts adopted the rule that when a valid plea agreement is breached by the state, the trial court, within its sound discretion, may either allow the negotiated plea to be withdrawn, or may require the state to fulfill its end of the bargain. *State v. Mathews* (1982), 8 Ohio App.3d 145. See, also, *State v. Davenport* (1996), 116 Ohio App.3d 6, 10-11; *State v. Quinn* (Oct. 24,

2003), Miami App. No. 02CA54; *State v. Ford* (Feb. 18, 1998), Lawrence App. No. 97CA32; *State v. Woyan* (July 21, 1997), Athens App. No. 96 CA 1772; *State v. Hess* (Dec. 24, 1991), Adams App. No. 515. The trial court is in the best position to decide whether circumstances require specific performance of the agreement, or whether the circumstances require granting the defendant the opportunity to withdraw his plea. *Mathews, supra*, at 146, citing *Santobello*. However, while the trial court may choose between these two remedies within its discretion, failure to grant either remedy constitutes an error as a matter of law. *Santobello* at 263; *Mathews* at 146.

{¶13} A plea agreement is contractual in nature. *Woyan, supra*, citing *United States v. Arnett* (C.A.9, 1979), 628 F.2d 1162 and *Santobello*. Therefore, we must identify the terms of the plea agreement before we can determine if the state breached the agreement. At Thompson’s second change of plea hearing, the prosecutor, in exchange for Thompson’s guilty plea, amended the indictment from a felony of the second degree to a felony of the third degree, and the state further said that it “will, as part of the plea agreement, recommend a prison sentence of two years.”

{¶14} The intent of the parties to a contract presumptively resides in the ordinary meaning of the language employed in their agreement. *Kelly v. Med. Life*

Ins. Co. (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. Contractual language giving rise to doubt or ambiguity must be interpreted against the party who used it. *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313 citing *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411; *Bellish v. C.I.T. Corp.* (1943), 142 Ohio St. 36, paragraph one of the syllabus.

{¶15} The state asserts that the trial court was aware of the plea agreement because the agreement was entered on the record twice, i.e. at each of the change of plea hearings, and the plea agreement was reduced to writing on the plea of guilty entry. The state further contends that it incorporated the plea agreement by reference at the sentencing hearing when it stated, “[W]e would submit the case to the Court for sentencing consistent with the plea of guilty that was entered on March 13th, of this year.” The state concludes that the trial court had notice of its recommendation and “gave it proper consideration[.]”

{¶16} Here, we find that the state did not incorporate by reference at the sentencing hearing the plea agreement because it never mentioned the plea agreement. To the extent that the state’s words are ambiguous, we must construe the meaning of those words in favor of Thompson. Furthermore, while we agree with the state that both plea agreements were essentially the same at each of the change of plea hearings and that the plea agreement was included in the plea of

guilty entry, nevertheless, the state must strictly comply with a promise that induces a guilty plea. *Santobello*. The state had to recommend the two-year prison sentence at the sentencing hearing even if the trial court remembered all the terms of the plea agreement. See, e.g., *Quinn*, supra. Hence, we find as a matter of law that the state breached the plea agreement when it did not recommend a two-year prison sentence at the sentencing hearing.

{¶17} The remedy for the breach of a plea agreement by the state courts “is a matter lying within the sound discretion of the trial court and may be either rescission or specific performance.” *Mathews* at 146. Thus, while the trial court has discretion in granting a remedy, that discretion is limited as a matter of law to two choices. The trial court can order specific performance of the agreement and assign Thompson’s sentencing to a different judge or allow Thompson to withdraw his guilty plea. *Santobello* at 263; *Mathews* at 146. See, also, *Ford*, supra.

{¶18} Accordingly, we sustain Thompson’s second assignment of error.

III.

{¶19} Thompson’s first assignment of error, which alleges that he did not have counsel during his sentencing and sexual predator classification hearings, is

moot based on our disposition of Thompson's second assignment of error. Hence, we do not address it. See App.R. 12(A)(1)(c).

IV.

{¶20} Accordingly, we vacate the judgment entry on sentencing imposed by the trial court and the judgment entry following the sexual predator hearing. We remand this case to the trial court for it to determine, in its discretion, whether the state must specifically perform its end of the plea agreement before a different sentencing judge or whether Thompson may withdraw his guilty plea.

**JUDGMENT VACATED AND
CAUSE REMANDED.**

Harsha, J., concurring:

{¶21} I agree that the second assignment of error merits reversal. I also agree that the first assignment of error is moot but write separately to clarify my position.

{¶22} Appellant started the sentencing and sexual classification hearings in

the trial court with appointed counsel. Accordingly, I concur that the first assignment of error is moot because I am assuming that on remand the trial court will appoint counsel for appellant before deciding whether to enforce the plea agreement or, alternatively, to allow appellant to withdraw his plea.

Harsha, J.: Concur in Judgment and Opinion with Concurring Opinion.
Evans, J.: Not Participating.

For the Court

BY: _____
Roger L. Kline, Presiding Judge