[Cite as *State v. Fenderson*, 2015-Ohio-565.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Appellee

v.

Takye S. Fenderson

Appellant

Court of Appeals No. E-14-015
E-14-021

Trial Court No. 2012-CR-437
2013-CR-188

DECISION AND JUDGMENT

Decided: February 13, 2015

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Michael E. Stepanik, Jack W. Bradley, and Charles J. Wilkins, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is a consolidated appeal from a February 27, 2014 sentencing judgment of the Erie County Court of Common Pleas, which sentenced appellant to a 12-year term

of incarceration following appellant's conviction on two counts of complicity to commit aggravated robbery, one count of complicity to commit grand theft, and one count of complicity to commit aggravated burglary.

{¶ 2} A hand written provision incorporated into the plea agreement, consistent with discussions by both counsel and the trial court as reflected by the transcript of the plea colloquy, together show that the trial court agreed that appellant would be sentenced to a six-year term of incarceration. For the reasons set forth below, this court reverses the sentencing judgment of the trial court and remands this matter for resentencing in conformity with the plea agreement.

{¶ 3} Appellant, Takye Fenderson, sets forth the following sole assignment of error:

> THE TRIAL COURT ERRED WHEN IT SENTENCED MR. FENDERSON TO A TERM OF INCARCERATION IN EXCESS OF WHAT THE COURT AGREED TO AT THE TIME MR. FENDERSON'S PLEA WAS ACCEPTED.

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On November 6, 2012, appellant was indicted on 16 felony offenses. Counts 1 through 3 of the indictment were for complicity to commit aggravated burglary, in violation of R.C. 2911.11(A)(2), felonies of the first degree. Counts 4 through 6 of the indictment were for complicity to commit aggravated robbery, in violation of R.C. 2911.01(A)(1), felonies of the first degree. Counts 7 through 9 of the indictment were for complicity to commit

felonious assault, in violation of R.C. 2903.11(A)(2), felonies of the second degree. Counts 10 through 12 of the indictment or for complicity commit kidnapping, in violation of R.C. 2905.01(A)(2), felonies of the first degree. Count 13 of the indictment was for complicity to commit disruption of a public service, in violation of R.C. 2909.04(A)(1), a felony of the fourth degree. Count 14 of the indictment was for tampering with evidence, in violation of R.C. 2921.12(A)(1), a felony of the third degree. Counts 15 and 16 of the indictment were for complicity to commit theft, in violation of R.C. 2913.02(A)(1), felonies of the fifth degree.

{¶ 5} Subsequently, on May 8, 2013, appellant was separately charged on a nine count indictment. Count one of the indictment was for complicity to commit burglary, in violation of R.C. 2911.12(A)(3), a felony of the third degree. Count two of the indictment was for complicity to commit safe cracking, in violation of R.C. 2911.31(A), a felony of the first degree. Counts three and four of the indictment were for complicity to commit grand theft, in violation of R.C. 2913.02(A)(1), felonies of the fourth degree. Counts five and six of the indictment were for complicity to commit felonious assault, in violation of R.C. 2903.11(A)(2), felonies of the second degree. Count seven of the indictment was for complicity to commit aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree. Count eight was for complicity to commit aggravated burglary, in violation of R.C. 2901.11(A)(1), a felony of the first degree. The final count of the second indictment was for complicity commit theft, in violation of R.C. 2913.02(A)(1), a felony of the fifth degree.

{¶ 6} Following extensive pretrial discussions between the parties, a plea agreement was reached whereby appellant agreed to plead guilty to two counts of complicity to commit aggravated robbery from the first set of indictments, one count of complicity to commit grand theft from the second set of indictments, and one count of complicity to commit aggravated burglary from the second set of indictments. In exchange, the remaining charges were to be dismissed. In addition, as expressly incorporated into the written plea agreement, was a hand written provision of the plea agreement characterized as a "promise" being made to appellant that he would serve a six-year term of incarceration.

{¶ 7} Consistent with the above discussed relevant portion of the written plea agreement, the transcript of the September 16, 2013 change of plea colloquy consistently shows through affirmative statements made to the trial court by both counsel that the plea agreement between the parties encompassed an agreement that appellant would serve a six-year term of incarceration.

{¶ 8} Most significantly, following these discussions, the trial court itself consistently initiated a discussion with both counsel that reflected its understanding and assent that appellant would be eligible to pursue judicial release in either five or five and one-half years. This discourse by the trial court can only reasonably be construed as reflective of trial court assent to the otherwise agreed upon six-year term of incarceration contained in the written plea agreement and the plea colloquy. Lastly, the record of evidence contains no indicia that the agreed upon six-year term of incarceration was ever

articulated by either counsel or by the trial court as contingent or conditioned upon additional prerequisites, such as a favorable presentence report or of the consent of the victim.

{¶ 9} On February 28, 2014, the trial court sentenced appellant. The trial court notably stated at the onset, "I don't make up my mind until the very last minute. I know there was an agreed – agreement between counsel and, by the way, the attorneys in this case have worked very hard." Following the reference to the agreement, the trial court proceeded to sentence appellant to a 12-year term of incarceration, an amount double the agreed upon term of incarceration hand written in as a promise to appellant and as an express term of the executed plea agreement, double the term of incarceration expressly stated by both counsel as the agreement at the plea colloquy, and double the term of incarceration reflected by a related trial court discussion with counsel at the plea colloquy pertaining to judicial release. This appeal ensued.

{¶ 10} In the single assignment of error, appellant contends that the trial court erred in failing to abide by the term of incarceration promised in the executed plea agreement and consistently discussed at the plea colloquy. In support, appellant ultimately contends that the entirety of the record shows that the trial court entered into a binding promise to impose a term of incarceration consistent with the plea agreement. Based upon our review of the record and relevant case law, we concur.

{¶ 11} In reviewing the enforceability of plea agreements, it is widely recognized that as a general rule plea agreements between the state and defense counsel are not

binding upon the trial court, as the ultimate discretion and sentencing determination lies with the trial judge. *State v. Matthews* (1982), 8 Ohio App.3d 145, 456 N.E.2d, 539 (1982).

{¶ 12} However, additional caselaw evaluating plea agreement enforceability also conversely reflects that there are cases exhibiting compelling facts and circumstances such that it can be properly determined that a trial court conducted itself so as to have promised to accept the terms of the disputed plea agreement and is thereby bound by the terms of the agreement.

{¶ 13} In *State v. Burks*, 10th Dist. No. 04-AP-531, 2005-Ohio-1262, the court of appeals determined that the plea colloquy reflected that the understanding of counsel and the trial court was that the defendant would be granted shock probation after a period of five years and that there were no conditions placed on and breached by appellant that precipitated that portion of the plea agreement being disregarded. The court stated in pertinent part, "Based on the colloquy between the court and appellant at the hearing on August 10, 1998, we find the plea agreement herein became binding on the court at that time. The court clearly promised to impose a prison term in which shock probation would be granted after appellant served five full years of incarceration. When a trial court accepts a plea bargain and makes a promise to impose sentence in a certain manner, consistent with the agreement, it becomes bound by said promise." *Burks* at ¶ 19.

{¶ 14} In applying the framework of *Burks* to the instant case, we must determine whether the facts and circumstances of this case warrant enforcement of the six-year term

of incarceration portion of the plea agreement given appellant's refusal to withdraw his plea subsequent to discovering that the sentencing court would not adhere to that portion of the plea agreement.

{¶ 15} We have carefully reviewed and considered the record of evidence in this matter. The record reflects that after extensive discussions and negotiations between the parties, a voluntary plea agreement was reached. The record encompasses a written plea agreement filed on September 17, 2013, in which an additional term of the agreement was handwritten into the agreement clearly stating that a "promise" was made as part of the plea agreement that, "Defendant agrees to serve a 6 year sentence." On September 16, 2013, the written plea agreement was executed by the parties and by the trial court. On September 17, 2013, it was filed with the trial court. The record contains no indicia that the trial court's adherence to the disputed term of the plea agreement was contingent upon any specific conditions or stipulations, such as victim consent or a favorable presentence report.

{¶ 16} In conjunction with the above, the transcript of the plea colloquy similarly reflects the unconditional inclusion of a six-year term of incarceration as part of the disputed plea agreement. Counsel for appellee states at the onset of the hearing, "The defendant has been advised, Your Honor, of all those potential penalties and he is agreeing to serve a six year prison term and that will be with both cases, your honor, together." Counsel for appellee likewise states, "[T]he victims in this case would like to come to sentencing, they would be asking to speak to the court, they have the right to do

that under the statute. The agreement is still six years from the state." Counsel for appellant goes on to verify to the court, "There have been no other promises or representations made to Takye in order to get him to enter a plea of guilty in these two cases other than the fact that I've represented to Takye that he would receive six years in prison as a result of his plea in these two cases." Most significantly, during the course of the change of plea colloquy shortly after the above quoted exchanges, the trial court itself unconditionally conveys, "Okay. You understand that, we didn't talk about this, he would be eligible for judicial release after 5 ½?"

{¶ 17} The trial court and both counsel proceed to engage in a discussion to determine whether appellant's judicial release eligibility would occur in either five or five and one-half years, as consistent with the six-year term of incarceration incorporated into the plea agreement. This discussion by the trial court was not presented as contingent upon any other specific conditions being satisfied.

{¶ 18} We find that the term of incarceration provision of the plea agreement, hand written into the plea agreement as a "promise," considered together with the related portions of the transcript of the plea colloquy, shows that the six-year term of incarceration provision of the plea agreement was a promise by the trial court and became binding on it.

{¶ 19} Wherefore, we find that the record of evidence shows that the trial court erred in deviating from the term of incarceration provision promised by the written plea agreement, explicitly discussed by both counsel at the plea colloquy without mention of

conditions, and consistently discussed by the trial court itself without conditions during the judicial release discussion at plea colloquy.

{¶ 20} Lastly, nothing in the record reflects that specific performance of the original plea agreement is impossible under the facts and circumstances of this case so as to render a change of plea the only available course of action.

{¶ 21} Based upon the foregoing, we find appellant's assignment of error well-taken. The sentencing judgment of the Erie County Court of Common Pleas is hereby reversed. The matter is remanded for resentencing consistent with this opinion. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE