

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92490

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARTIN LATIMORE

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490531

BEFORE: Blackmon, J., Gallagher, A.J., and Boyle, J.

RELEASED: March 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Martin Latimore appeals the trial court's acceptance of his guilty plea and assigns five errors for our review.¹ Having reviewed the record and pertinent law, we reverse and remand the trial court's judgment. The apposite facts follow.

Facts

{¶ 2} Latimore entered into a plea agreement with the state of Ohio. Pursuant to the plea agreement, Latimore pleaded guilty to aggravated robbery and attempted murder, both of which had three-year firearm specifications. The state agreed to a twelve-year sentence; the court accepted the agreement by advising Latimore that he would be sentenced to twelve years in prison. The court continued sentencing to the next day, without ordering a presentence investigative report.

{¶ 3} At the sentencing hearing, the victim was permitted to give his impact statement. The victim told the court that he felt the twelve-year prison term was not sufficient. He testified that Latimore taunted him while attempting to kill him by shooting him six times with a shotgun. One of the blasts blew off his arm.

{¶ 4} Upon hearing the victim's statement, the court concluded the plea was not in the best interest of justice and refused to accept the agreed

¹See appendix.

upon prison sentence and vacated the plea. The trial court offered Latimore the option of going forward with the trial or entering a plea to the entire indictment. After conferring with his attorney, Latimore entered a plea to the entire indictment. The court informed Latimore that the sentence would be more than twelve years, but that he would not receive the maximum of over 50 years. The trial court thereafter accepted his plea and sentenced him to 23 years in prison and ordered him to pay \$250,000 in restitution to the victim.

Validity of the First Plea

{¶ 5} In his fourth assigned error, Latimore argues that the trial court committed double jeopardy by vacating the first plea and accepting the second plea.

{¶ 6} “[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.” *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487. None of these abuses occurred in the instant case. Latimore’s first plea did not result in a conviction because the trial court did not impose a sentence as a result of his plea. A “conviction” consists of a guilty verdict and the imposition of a sentence or penalty. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶ 135;

State v. McGuire, 80 Ohio St.3d 390, 399, 1997-Ohio-335, 686 N.E.2d 1112; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5, 520 N.E.2d 568; *State v. Henderson* (1979), 58 Ohio St.2d 171, 389 N.E.2d 494. Because Latimore was not sentenced during the first plea, he did not have any expectation of finality.

{¶ 7} Nonetheless, we conclude the trial court erred by vacating the first plea. “A plea bargain itself is contractual in nature and subject to contract-law standards.” *State v. Butts* (1996), 112 Ohio App.3d 683, 679 N.E.2d 1170, quoting, *Baker v. United States* (C.A.6, 1986), 781 F.2d 85, 90. In order to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time the defendant entered his guilty plea. See *United States v. Partida-Parra* (C.A. 9, 1988), 859 F.2d 629; *United States v. Arnett* (C.A. 9, 1979), 628 F.2d 1162; *Smith v. Stegall* (C.A. 6, 2004), 385 F.3d 993, 999.

{¶ 8} In the instant case, Latimore agreed to plead guilty to aggravated robbery and attempted murder, both with three-year firearm specifications. In exchange, the state agreed to dismiss one count of aggravated robbery, and the two counts of felonious assault. The state also agreed upon a twelve-year prison term.

{¶ 9} A trial court is not bound by a plea agreement unless there has been active participation by the trial court in the agreement. *State v.*

Buchanan, 154 Ohio App.3d 250, 2003-Ohio-4772, 796 N.E.2d 1003. The record shows that the trial court actively participated in the negotiations regarding the plea when Latimore was not sure whether to accept the plea. Latimore desired less prison-time than twelve years. The following discussion took place:

“Court: Your own people want you to take the plea; your mother and your father, right? You tell me what you’re trying to accomplish here today, Mr. Latimore?”

Latimore: Nothing.

Court: Then why are you taking this case to trial?

Latimore: Don’t know.

Court: What do you want to do?

Latimore: I’m a do the twelve.

Court: Beg your pardon?

Latimore: Said I’m a take the twelve.” Tr. 42.

{¶ 10} The court then proceeded to accept Latimore’s plea. The prosecutor again set out the plea agreement and stated that the state agreed to a twelve-year prison sentence. After explaining to Latimore the constitutional rights he was waiving, the trial court stated as follows:

“By proceeding here today you waive these rights, you’re admitting your guilt, you must be sentenced to a state penal institution for twelve years pursuant to the plea. And you will be sentenced to twelve years to a state penal

institution, which means that you're going to do twelve years. * * * ." Tr. 42.

{¶ 11} Thus, the trial court agreed to the twelve-year sentence. Thereafter, Latimore again wavered whether to enter the plea, and the court stated as follows: "[T]he difference between a plea and a sentence is a potential forty years additional. Now you have to make a threshold decision whether you want to plead or whether you want to try this case." Tr. 44. Latimore proceeded to accept the plea and pled guilty to the charges.

{¶ 12} We conclude based on the fact that the state and Latimore had entered into a plea agreement with a jointly recommended sentence of twelve years and the trial court's subsequent acceptance of the plea and agreed upon sentence, Latimore's guilty plea constituted a valid contract that the court could not invalidate. This was not a case where the trial court forewarned the defendant that it was not bound by the sentencing agreement.

In this case, the court explicitly stated that it accepted the twelve-year sentence and that it would sentence Latimore to twelve years in prison. Thus, the court was bound to sentence Latimore to twelve years in prison.

{¶ 13} In *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427, the state had promised in a plea deal that it would not make a sentencing recommendation, but the prosecutor (apparently unaware of that commitment) asked the state trial court to impose the maximum penalty of one year. Over defense counsel's objection, the trial court imposed the

one-year maximum sentence, reassuring Santobello that the prosecutor's recommendation did not affect its decision. The United States Supreme Court held that based on the interests of justice and on the duty of the prosecutor to keep promises to a defendant, the matter was remanded to the circuit court, for either specific performance under the agreement or to permit the defendant to withdraw his plea. *Id.* at 262-263. Therefore, based on *Santobello*, we remand the matter to the trial court for Latimore to either request specific performance of the first plea with the agreed upon twelve-year sentence or to withdraw his plea.

{¶ 14} Given our disposition of the fourth assigned error, the remaining errors are moot and need not be addressed. App.R. 12(A)(1)(c).

Judgment reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR

APPENDIX

Assignments of Error

“I. The trial court erred, and violated Criminal Rule 11, during the second plea hearing, when it did not inform Latimore of the maximum possible fines.”

“II. The trial court did [sic] comply with Criminal Rule 11 during the second plea hearing and Latimore’s plea of guilty was not knowingly, intelligently, and voluntarily made.”

“III. The trial court erred when it ordered restitution in the amount of \$250,000.00 without any evidence on the record that the amount of restitution was based on the victim’s economic loss, without considering Latimore’s ability to pay, and without a hearing.”

“IV. The trial court erred and violated Latimore’s protection against double jeopardy, as guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution, when it sua sponte vacated his first guilty plea, after it had been accepted by the court.”

“V. The trial court erred when it inaccurately informed Latimore concerning the terms of post-release control at his plea hearing.”