

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24609

Appellee

v.

LEOPOLDO JIMENEZ, JR.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 06 07 2694

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} The State told Leopoldo Jimenez that, if he pleaded guilty and had no issues in prison for two years, it would support a motion for judicial release. The trial court told Mr. Jimenez that, if he did not have any serious problems while in prison, it would grant him judicial release after two years. Mr. Jimenez, therefore, pleaded guilty to a number of the charges that were pending against him. He went to prison and did not get into trouble for two years. Nevertheless, after he moved for judicial release, the State did not support his motion and the trial court denied it. Mr. Jimenez has appealed, assigning as error that the court incorrectly refused to honor the sentence he had negotiated. Because the State did not support Mr. Jimenez’s motion, in breach of the plea agreement, this Court vacates the trial court’s decision and remands for a new hearing on Mr. Jimenez’s motion for judicial release.

FACTS

{¶2} The Grand Jury returned a forty-one count indictment against Mr. Jimenez, charging him with violating a protection order, intimidation, intimidation of a crime victim or witness, menacing by stalking, aggravated menacing, telecommunications harassment, and domestic violence. After the State offered him a plea deal, Mr. Jimenez agreed to plead guilty to some of the charges. At his combined plea and sentencing hearing, the State told the court that, “in two years if [Mr. Jimenez] files for judicial release and has not had any incidents or violations of any laws or rules, the State would remain silent on the judicial release question. . . . I’m not going to oppose judicial release in two years unless there’s a problem.” Following a conference off the record, the prosecutor clarified that, “for the record, if there are no other issues with Mr. Jimenez in the two years in prison, the State would support judicial release at that time”

{¶3} After the target of the domestic violence said that she also supported the plea agreement, the court asked Mr. Jimenez if he understood what was going on. It told him that “the proposal is . . . that if you don’t get in any trouble down in prison and you have a good record, that after two years the State would recommend that you be granted judicial release.” It also told him that it “will support that in two years if you enter this plea and if you don’t get into any trouble while you’re [in] prison.” Mr. Jimenez said he understood and, subsequently, pleaded guilty to two counts of violating a temporary protective order, two counts of intimidation, one count of stalking, two counts of aggravated menacing, three counts of telephone harassment, and one count of domestic violence. The court sentenced him to four years in prison, but said that it would “make a notation on the file that if you haven’t had any

serious problems while you're in prison and you file for judicial release after two years, that the court will grant judicial release."

{¶4} After two years in prison, Mr. Jimenez moved for judicial release. At a hearing on his motion, the prosecutor noted that the target of the domestic violence and a police detective opposed it. She also noted that a probation officer had assessed Mr. Jimenez and recommended that he remain in prison. She further noted that Mr. Jimenez had written to the mother of the domestic violence target while he was incarcerated. She argued that he was not allowed to have any contact with the mother and, therefore, had violated the plea agreement. Regarding Mr. Jimenez's contact with the mother, the court explained that it "led to some serious concerns about the safety of the victim and, . . . because of that, I had the head of the Domestic Violence Unit . . . do an assessment to try to determine whether you would be a danger to her or to her family and he concluded that she would be in danger." The court noted that it did not "bring it up to say that you're in violation of your rules." It told Mr. Jimenez, however, that, "based on the evaluation and assessment done by the probation office I'm going to deny your motion for judicial release."

BREACH OF PLEA AGREEMENT

{¶5} Mr. Jimenez's assignment of error is that the trial court incorrectly refused to honor his sentence as it was negotiated and imposed. He has argued that the prosecutor and court breached their agreements to grant him judicial release after two years if he did not get into trouble while in prison.

{¶6} This Court must first determine whether it has jurisdiction over the appeal. Ordinarily, the denial of a motion for judicial release is not a final, appealable order. *State v. Woods*, 141 Ohio App. 3d 549, 550 (2001). The Ohio Supreme Court, however, has implied that

there is an exception if the defendant's argument is that the State breached a plea agreement. *State ex rel. Rowe v. McCown*, 108 Ohio St. 3d 183, 2006-Ohio-548, at ¶5. In *McCown*, Mr. Rowe petitioned for a writ of mandamus, arguing that the State had breached their plea agreement. *Id.* at ¶1. The Supreme Court affirmed the court of appeals' dismissal of the petition, in part, because it concluded that Mr. Rowe had an adequate legal remedy. *Id.* at ¶5. It noted that he could have moved to withdraw his plea or to enforce the agreement, or could have appealed the trial court's denial of his motion for judicial release. *Id.* Because Mr. Jimenez has argued that his plea agreement was breached, this Court has jurisdiction, under *McCown*, to consider Mr. Jimenez's appeal from the trial court's denial of his motion for judicial release.

{¶7} Turning to the merits of Mr. Jimenez's argument, this Court notes that there is a difference between whether the State was required to support his motion for judicial release and whether the trial court was required to grant it. Although the court told Mr. Jimenez that it would grant him judicial release after two years if he stayed out of trouble, it did not write that in its journal entry. "A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." *Schenley v. Kauth*, 160 Ohio St. 109, paragraph one of the syllabus (1953). Mr. Jimenez did not appeal the omission, and he is barred, under the doctrine of res judicata, from challenging the journal entry at this time. *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967) ("a final judgment of conviction bars a . . . defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised . . . on an appeal from that judgment.").

{¶8} Regarding whether the State breached the plea agreement, the Ohio Supreme Court has recognized that "[p]rinciples of contract law are generally applicable to the

interpretation and enforcement of plea agreements.” *State v. Bethel*, 110 Ohio St. 3d 416, 2006-Ohio-4853, at ¶50. Moreover, the United State Supreme Court has held that, “[if] a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971).

{¶9} There was no written plea agreement in this case. The prosecutor, however, told Mr. Jimenez on the record that “I’m not going to oppose judicial release in two years unless there’s a problem” and that, “if there are no other issues with Mr. Jimenez in the two years in prison, the State would support judicial release at that time” Before Mr. Jimenez accepted, the court repeated the prosecutor’s offer, explaining to him that, “if you don’t get in any trouble down in prison and you have a good record, that after two years the State would recommend that you be granted judicial release.” The State did not suggest that the court had not accurately described the agreement.

{¶10} The State has argued that, because Mr. Jimenez wrote letters to the mother of the target of the domestic violence, he breached the plea agreement. The State failed to present any evidence or argument that Mr. Jimenez had gotten “in any trouble down in prison [or did not] have a good record” as a result of the letters or anything else he had done since his plea. The State did not say at the time of his plea that Mr. Jimenez could not have contact with the target’s mother. Accordingly, that was not part of the agreement. The State breached the plea agreement when it failed to support Mr. Jimenez’s motion for judicial release.

{¶11} “Ordinarily, the result of the breach of the plea-bargain agreement is a matter lying within the sound discretion of the trial court and may be either rescission or specific performance.” *State v. Mathews*, 8 Ohio App. 3d 145, 146 (1982). Depending on the

circumstances, the court may either allow the defendant to withdraw his plea or require the State to fulfill its end of the bargain. *Id.* This Court, therefore, vacates the decision of the trial court and remands for a new hearing on Mr. Jimenez's motion for judicial release. Mr. Jimenez's assignment of error is sustained.

CONCLUSION

{¶12} The State breached its agreement with Mr. Jimenez when it did not support his motion for judicial release. The judgment of the Summit County Common Pleas Court is vacated, and this cause is remanded for further proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

KAREN H. BROUSE, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.