The Supreme Court of Ohio

CASE ANNOUNCEMENTS

February 12, 2024

[Cite as *02/12/2024 Case Announcements #2*, 2024-Ohio-476.]

APPEALS NOT ACCEPTED FOR REVIEW

2023-1177. State v. Leasure.
Sandusky App. No. S-22-017.
Kennedy, C.J., concurs, with an opinion.
Donnelly, J., dissents, with an opinion.

KENNEDY, C.J., concurring.

{¶ 1} I vote not to accept this jurisdictional appeal for review. I write separately to address concerns raised by the dissenting opinion and to explain why this case does not present us with the opportunity to review the possible illusory benefit of jointly recommended sentences.

{¶ 2} In this case, we cannot reach the question whether plea agreements that include jointly recommended sentences are illusory, because the propositions of law presented do not challenge the validity of such agreements. Rather, the propositions of law presented in this appeal question the effective assistance of counsel when a trial court simultaneously grants a defendant's pro se motion to withdraw a plea and denies a motion by defense counsel to withdraw from representation. Here, appellant-defendant, Nichalus Leasure, argues that "the [trial] court should have made sure he had counsel who could effectively represent him on the issue of the plea withdrawal, and its possible ramifications," not on the ramifications of entering a plea agreement with a jointly recommended sentence.

{¶ 3} Additionally, contrary to the dissenting opinion's assertion, this case does not present the "perfect example of the illusion of a 'jointly recommended sentence' within a plea agreement," dissenting opinion, ¶ 8, because Leasure acknowledges that he understood that the

trial court was not required to impose the recommended sentence. In his memorandum in support of jurisdiction, Leasure admits that "[n]either of the pleas entered was an agreed upon sentence, and there is no question from the record that [he] was aware that the sentencing court was not bound by any recommendation." Based on this acknowledgment, the record here does not allow this court to review whether Leasure agreed to a plea that included a jointly recommended sentence without understanding the ramifications of that plea.

{¶ 4} If this were a case about a plea agreement with an agreed sentence, then I would join the dissenting opinion and vote to grant jurisdiction to hear the appeal. However, this is not a case about a plea agreement with an agreed sentence; this is a case about a plea agreement with a jointly recommended sentence in which the defendant knew that the trial court was not bound by the parties' recommendation. Therefore, I find that this is not the appropriate case to address the possibility that plea agreements with recommended sentences offer only an illusory benefit to defendants, and accordingly, I vote to deny jurisdiction.

DONNELLY, J., dissenting.

{¶ 5} The resolution of criminal cases through guilty pleas procured as the result of plea agreements between the state and a criminal defendant is woven into the fabric of our criminal-justice system. By one estimate, less than 4 percent of federal criminal cases are disposed of through jury trials, and that figure might be close to just 1 percent for state felony cases. Diamond & Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 La.L.Rev. 119, 122 (2020). Ohio beats the state average, but only just—with about 2 percent of criminal cases being resolved through trial. Grasha, *'Can this case be won?' How a plea deal works in Ohio and why there are so many*, Cincinnati Enquirer (Dec. 19, 2023), available at https://www.cincinnati.com/story/news/crime/2023/12/19/heres-how-plea-deals-work-in-ohio
-and-why-there-are-so-many/71856932007/ (accessed Jan. 24, 2024) [https://perma.cc/D5LL-2NLP**]**. Given that plea agreements are part of the everyday administration of criminal justice in Ohio, this court has a responsibility to ensure robust oversight over the accuracy and integrity of the plea process. This case highlights serious issues with plea agreements involving jointly

recommended sentences, which this court should address.[1] Because this court has decided not to exercise its jurisdiction over this appeal, I respectfully dissent.

{¶ 6} Following negotiations with prosecutors, Nichalus Leasure entered guilty pleas to three counts of gross sexual imposition and one count of sexual imposition for alleged actions involving two minor victims. 2023-Ohio-2710, ¶ 2-4. In exchange for Leasure's pleas, the state agreed to dismiss the remaining charges against Leasure and to jointly recommend with defense counsel that Leasure serve an aggregate prison term of seven years. *Id.* at ¶ 4. After Leasure entered his guilty pleas but before the trial court proceeded to sentencing, Leasure's relationship with his appointed counsel apparently broke down. These developments prompted Leasure to ask the trial court for permission to withdraw his guilty pleas and for the appointment of new counsel. *Id.* at ¶ 5. Following a hearing, the trial court denied Leasure's request for new counsel but permitted him to withdraw his guilty pleas. *Id.* at ¶ 6-12.

{¶ 7} These events led to a second plea agreement. This time around, Leasure would plead guilty to the same four offenses as before, but the jointly recommended sentence increased to an aggregate prison term of 11 years. *Id.* at ¶ 13. Once again, the trial court accepted Leasure's guilty pleas. And during sentencing, the state requested that the trial court impose the jointly recommended sentence. *Id.* at ¶ 13-14. Yet after hearing statements from Leasure and from the victims and their mother, and weighing the relevant sentence considerations, the trial court went beyond the recommended sentence and imposed an aggregate prison term of 12 years. *Id.* at ¶ 15-22.

{¶ 8} This sequence of events is troubling. First, given the limited record available at this stage in the appellate proceedings, it is unclear why the recommended sentence that formed part of Leasure's plea deal *increased* between the first and second pleas, despite the fact that the number and severity of the offenses to which Leasure pleaded guilty remained the same. More unsettling, though, is that despite Leasure's maintaining his side of the bargain by pleading guilty and the state's requesting that Leasure receive the jointly recommended sentence, the trial court

1. The chief justice's concurring opinion points out that Leasure failed to squarely address the issues surrounding the jointly recommended sentence in his propositions of law. Concurring opinion, ¶ 2. Fair enough. But we have exercised our discretionary jurisdiction over cases with inartfully crafted propositions that involved much lower stakes. As this dissent points out, there are serious questions about what happened here that are representative of the issues arising from plea agreements with jointly recommended sentences and that implicate this court's responsibility to supervise Ohio's criminal-justice system. What's more, Leasure's liberty is at stake. That is enough for this court to accept his appeal.

nevertheless imposed a longer sanction. In this way, this case presents a perfect example of the illusion of a "jointly recommended sentence" within a plea agreement.[2]

{¶ 9} It is a settled principle that plea agreements are contracts between the state and a criminal defendant. As a result, "[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, 854 N.E.2d 150, ¶ 50, citing *United States v. Wells*, 211 F.3d 988, 995 (6th Cir.2000). These principles require plea agreements to possess the same elements as other contracts—offer, acceptance, consideration, a manifestation of mutual assent, and a meeting of the minds—to be enforceable. *State v. Perez*, 8th Dist. Cuyahoga No. 111296, 2023-Ohio-83, ¶ 22, citing *State v. Smith*, 8th Dist. Cuyahoga No. 109963, 2021-Ohio-3099, ¶ 34. Given the contractual nature of plea agreements, the parties to the agreement are entitled to the benefit of their bargain. These principles are especially at play when an agreed sentence is part of the plea agreement. In that situation, a defendant gives up his right to a trial and its attendant rights, as well as certain appellate rights, in exchange for the benefit of a guarantee that he will not be subject to a sentence greater than what he's agreed to. *State v. Huffman*, 8th Dist. Cuyahoga No. 105805, 2018-Ohio-1192, ¶ 16-18; *see also State v. Elliott*, 2021-Ohio-424, 168 N.E.3d 33, ¶ 5-6 (1st Dist.) (discussing a defendant's motivations for entering into a plea agreement and the rights waived following a guilty plea). Meanwhile, the state secures a conviction and an acceptable sentence but often gives up its right to prosecute more severe or additional offenses. *Huffman* at ¶ 19. In this context, it is easy to see the contractual nature of plea agreements. Each side agrees to withstand a detriment in exchange for a desired benefit.

{¶ 10} By contrast, these contractual elements that attach to a plea agreement with an agreed sentence do not exist with the type of plea agreement Leasure entered here, in which the state and Leasure agreed to a jointly recommended sentence. In a plea agreement in which the parties jointly make a sentencing recommendation, the sentencing recommendation is just that—a recommendation. *Elliott* at ¶ 15-16. To be sure, trial courts need not accept any plea

2. In her concurring opinion, the chief justice takes issue with my description of this case as a "perfect example" of the illusory nature of jointly recommended sentences, because Leasure was aware that the recommended sentence did not constrain the trial court's sentencing discretion. Concurring opinion at ¶ 3. Leaving aside the fact that the basis for that assertion comes from a single sentence in Leasure's memorandum in support of jurisdiction that lacks any citation to the record, I think the issue here goes deeper. The fact that Leasure was aware that the promised recommendation wasn't binding on the trial court does not somehow cure the illusory nature of the parties' plea agreement. Nor does that fact forestall broader concerns about the minimal weight such promises carry in the resolution of criminal cases through plea agreements.

agreement. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 28. But that is a contingency common to all plea agreements. The concern here is that not only is the recommended sentence not binding on the court, *id.*, but it doesn't even carry the hallmarks of the bargained-for exchange that comes with an agreed sentence. There is no limitation on the defendant's sentencing exposure. Nor is there any sacrifice by the state, beyond simply agreeing to suggest a possible sentence to the trial court during the sentencing process. I fail to see how this sort of arrangement provides any benefit to a criminal defendant and imposes any detriment to the state. It is closer to an illusory promise that imposes no real obligation or duty of performance on the state. *See Black's Law Dictionary* 1407 (10th Ed.2014). Under these circumstances, a defendant gives up his constitutional rights to trial in exchange for the mere suggestion of a sentence that the trial court can ignore. Meanwhile, the state gets a conviction without the time and expense of a trial, and all it needs to offer in return are—what a friend of mine who still sits on the trial bench calls—the sleeves from its vest.

{¶ 11} A criminal defendant should be made aware that a plea agreement that includes a jointly *recommended* sentence provides him no real benefit. Indeed, this case shows how meaningless jointly recommended sentences are. Even though Leasure pleaded guilty, and the prosecution requested that the trial court impose the jointly recommended sentence that formed part of Leasure's plea agreement, the trial court—without reference to or reliance on sentencing data for defendants convicted of offenses similar to Leasure's and without providing any other explanation for its decision—imposed a sentence that is a year longer than that which the parties recommended. An arbitrary additional year that no one had advocated for. What is more, the trial court did so with impunity because the 11-year sentence the state agreed to recommend during its bargaining with Leasure was simply a suggestion the trial court was free to ignore.

{¶ 12} It does not take much imagination to see how this process could be abused. Prosecutors could agree to a jointly recommended sentence to procure a guilty plea, knowing full well that the trial-court judge they are appearing before will impose a sentence far beyond the recommendation. Yet the defendant lacks any recourse because he ostensibly got what he bargained for. And all of this is above board under our caselaw.

{¶ 13} Because of their ubiquity, plea agreements are integral to our criminal-justice system. It is precisely because plea agreements are so widely used, however, that they must be subject to exacting scrutiny. This case provides this court with an opportunity to address the

illusory benefit of jointly recommended sentences within plea agreements. But this court declines to seize on that opportunity, and because it does so, I dissent.