IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA



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| **GERALD R. BOHANAN,** | ) | |
| **Appellant,** | ) | |
| **-vs.-** | ) | **No. RE-99-419** |
| **STATE OF OKLAHOMA,** | ) | |
| **Appellee.** | ) | |

**ACCELERATED DOCKET ORDER**

On April 18, 1997, Appellant received a five-year suspended sentence for Robbery by Force or Fear in the District Court of Logan County, Case No. CF-96-145. On March 19, 1999, the Honorable Donald L. Worthington, District Judge, revoked Appellant's suspended sentence in full for violating the probationary terms of the suspension. From this revocation order, Appellant has perfected this appeal.

The appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (1999). Oral argument was held on October 7, 1999, and the Court duly considered Appellant's single proposition of error raised upon appeal, to wit:

Proposition

> The trial court's decision to revoke Appellant's suspended sentence was an abuse of discretion; in a separate case, the State had promised not to seek revocation against Appellant in this case.

After hearing oral argument and after a thorough consideration of Appellant's proposition of error and the entire record before us on appeal, by a vote of three (3) to one (1), we reverse with instructions to dismiss. The record reveals that subsequent to being placed upon probation Appellant was charged in Logan

County District Court, Case No. CF-97-116, with feloniously Obtaining Money and/or Property (Under $500.00) by False Pretense, After Former Conviction of a Felony. The second page of the Information in CF-97-116 alleged a single prior felony, that being Appellant's robbery conviction in CF-96-145. The issue on appeal is not whether Appellant did or did not commit this second offense and thereby violate his probation. Instead the question is whether the State may under the circumstances hereinafter described rightly prosecute Appellant for this alleged probation violation.

In the course of Appellant's prosecution in CF-97-116 a plea agreement was struck between Appellant and the State. The evidence offered at Appellant's revocation hearing consisted of a written stipulation as to the terms of this plea agreement. In relevant part, the stipulation read as follows:

> [The Assistant District Attorney] offered the Defendant the following plea bargain, which the Defendant accepted: in exchange for a plea of guilty by the Defendant and his acceptance of a five (5) year penitentiary sentence in CF-97-116, the State would agree to dismiss the then existing Second Page of the Information in CF-97-116 and would further agree to not file an Application to Revoke the Defendant's suspended sentence in CF-96-145 on the basis of the offense charged in CF-97-116.

(O.R. 17-18.)

Both below and now on appeal, Appellant claims he accepted and complied with the plea agreement because he entered his plea of guilty to the Information once its second page was stricken and did thereupon receive a felony conviction as agreed and a sentence of five-years imprisonment. For this reason, Appellant argues the State is bound by the above-described promise not to revoke his suspended sentence. Appellant therefore concludes it was an abuse of discretion and hence error for the District Court to permit the State to prosecute its application to revoke and to grant revocation of Appellant's suspended sentence on the sole grounds of his offense in CF-97-116.

The State does not deny it made an agreement with Appellant not to revoke his suspended sentence on grounds of the subsequent False Pretense charge. Instead, the State contends it is no longer bound by its promise not to revoke because Appellant, subsequent to receiving Judgment and Sentence in CF-97-116, brought a post-conviction proceeding wherein he challenged his five-year sentence as unlawful.[1] The State contends that because Appellant's post-conviction claim was upheld and he succeeded in having himself resentenced to a term of one year in CF-97-116, Appellant has thereby breached his plea agreement with the State. The State therefore concludes it may commence revocation proceedings despite its former promise not to do so.

At the conclusion of the revocation hearing and after hearing the arguments of both counsel, Judge Worthington asked Appellant if at his sentencing he understood and agreed he was to serve five years in prison. Upon receiving an answer in the affirmative, Judge Worthington, without making any specific findings as to whether Appellant had breached his plea agreement or whether there had been a whole or partial failure of consideration for the plea agreement, ordered Appellant's suspended sentence revoked in full with credit for time served.

Neither below nor on appeal does the State cite any authority for its position that Appellant's post-conviction action amounts to a breach or repudiation of his plea agreement with the State. We are, however, directed by Appellant to *United States v. Barron*, 172 F.3d 1153 (9th Cir. 1999). In *Barron*, a defendant moved to set aside a sentence for the possession of a firearm in relation to drug

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[1] Appellant's post-conviction action was founded on the authority of *Walker v. State*, 1998 OK CR 14, 953 P.2d 354. On appeal of the District Court's order denying post-conviction relief, this Court remanded Appellant's matter to the District Court with instructions it resentence Appellant to no more than the maximum one-year term allowed by law for an unenhanced felony offense of Obtaining Money and/or Property (Under $500.00) by False Pretense. *Gerald Bohanan v. State of Oklahoma*, No. PC-98-772 (Okl.Cr., December 28, 1998) (unpublished).

trafficking; a sentence he had received along with two other related convictions as part of a plea agreement which required him to enter guilty pleas and be convicted on each of the three offenses filed. It was conceded by both the government and the defendant that under case law decided subsequent to his firearm conviction, the acts to which defendant admitted through his plea of guilty did not constitute the crime of possessing a firearm in relation to drug trafficking.

A five member majority of the Ninth Circuit believed the loss of the governments firearm conviction did not entitle it to renew prosecution of other charges which it had as part of its plea agreement with the defendant agreed not to file. The majority did find the defendant should be resentenced on the remaining two convictions and the government allowed to prove any relevant sentencing enhancement factors despite a provision within the plea agreement not to seek such enhancement. *Id.* at 1160. Notably, both the majority and the four dissenters agreed that the defendant's action to set aside his conviction was not a breach of his plea agreement. *Id.* at 1158 (majority) & 1161 (minority).

In the case at hand, the parties agree that the portion of the plea agreement calling for Appellant to receive a five-year sentence for his False Pretense crime was the result of a mutual mistake. We find it untenable to construe Appellant's decision to subsequently rectify that mistake by lawful process a breach or repudiation of his plea agreement. Indeed, it would be contrary to public policy to hold that a party breaches a plea agreement by taking legal action to have a plainly illegal sentence set aside and a lawful sentence imposed in its place. We therefore find there was no breach by Appellant of his plea agreement with the State. Having found Appellant did not breach his plea agreement, the only question remaining is whether the State should, under contract or some other theory, be excused from its promise not to revoke Appellant's suspended sen-

tence in CF-96-145 by reason of a subsequent partial failure of consideration for that promise.

Generally the law of contracts will by analogy apply in interpretation and enforcement of plea agreements; however, the analogy is not perfect. "[P]lea agreements, like contracts, are instruments used to protect the rights and expectations of the parties. Hence, plea agreements get a contract law analysis tempered with an awareness of due process concerns for fairness." *United States v. Padilla*, 186 F.3d 136, 140 (2d Cir. 1999).[2] Although a possible contract remedy would be to return the parties to the status quo prior to the plea agreement, in the criminal context this remedy is less than perfect.

> A plea bargain is not a commercial exchange. It is an instrument for the enforcement of the criminal law. . . . On recession of the agreement, the prisoner can never be returned to his "original position": he has served time by reason of his guilty plea and his surrender of basic constitutional rights; the time he has spent in prison can never be restored, nor can his cooperation in his punishment.

*Barron*, 172 F.3d at 1158.

Even if we were to agree with the State's contract theories of breach or loss of consideration, we would be forced to observe that contract law requires the measure of damages be commensurate with the loss incurred. Were we to find the State should be permitted to proceed with revocation, the State would receive a virtual windfall. It would not only gain the benefit of Appellant's guilty plea and his conviction in CF-97-116 and the benefit of the maximum sentence allowed by law for the False Pretense offense, but also the benefit of revoking Ap-

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[2] *See also United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) ("Plea agreements are contracts, and their content and meaning are determined according to ordinary contract principles. . . . Plea agreements, however, are 'unique contracts' and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause.").

pellant's suspended sentence in full.[3] Allowing the State to proceed with revocation would also end in an equally undesirable result of having to allow Appellant to withdraw his guilty plea in CF-97-116, set aside his conviction, and require trial upon a crime years after its commission. *See Bumpus v. State*, 1996 OK CR 52, 925 P.2d 1208 (where guilty plea was entered upon the promise of particular sentence incapable of being fulfilled, defendant must be given the opportunity to have his judgment and sentence set aside by the withdrawal of his plea of guilty).[4]

The State would have us find that the partial loss of consideration incurred by it at Appellant's resentencing was so significant and material as to have frustrated the entire purpose of the plea agreement, hence, justifying its repudiation of its promise not to revoke. *See United States v. Bunner*, 134 F.3d 1000, 1004 (10th Cir. 1998) (holding the government was relieved of its plea agreement obligations when "a reasonably unforeseeable event intervenes, destroying the basis of the contract" and thereby causes "one party's performance [to] become[ ] virtually worthless to the other"). Such a finding would not be a true assessment of either the plea agreement or of that for which the State bargained.

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[3] The dissent's apparent rationale is that the trial court's decision to revoke and incarcerate Appellant for five years on his suspended sentence for Robbery I restored the parties to that for which they originally bargained. Such reasoning, however, fails to take into account at least two points. First it treats as valueless that which Appellant gave up in return for the State's promise not to revoke. Secondly, it ignores the disadvantages which will occur to Appellant in sentence administration when placed in Department of Corrections custody on a five-year sentence for the violent crime of Robbery I as opposed to being in custody on a five-year sentence for the property crime of False Pretenses. It is therefore apparent that the Solomonic approach to the problem taken by the trial court and endorsed by the dissent provides a solution that is less than perfect.

[4] *See also Santobello v. New York*, 404 U.S. 257, 267, 92 S.Ct. 495, 501, 30 L.Ed.2d 427 (1971) (concurring opinion of J. Douglas) ("Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges.")

We first observe that the primary consideration within the State's plea agreement with Appellant was Appellant's guilty plea to the alleged felony in CF-97-116 thereby rendering Appellant eligible for a minimum twenty-year sentence should he commit a third felony. 21 O.S.1991, § 51(B). Moreover, the five-year sentence the State planned for Appellant to receive following his plea of guilty was only a sentencing recommendation which the trial court was not by law bound to follow if it accepted the guilty plea. Accordingly, it was never a legal certainty that Appellant would receive a five-year sentence.

We also note the State at oral argument frankly admits it would not have been grounds for it to abandon its promise not to revoke if Appellant had effectively shortened his term of imprisonment by obtaining early release through parole or clemency. Lastly, there remains preserved for the State the right to seek revocation of Appellant's suspended sentence for any probation violation other than that of Appellant's offense in CF-97-116. Appellant continues to be under all terms of probation within the CF-96-145 suspension order until the same expires or is revoked.

When each of these circumstances are factored into the whole of that for which the parties bargained, it becomes evident that the partial failure of consideration of which the State complains was insufficient to permit it to proceed upon its Application to Revoke in CF-96-145.

**IT IS THEREFORE THE ORDER OF THIS COURT** that the March 19, 1999 Order of the District Court of Logan County revoking Appellant's suspended sentence in Case No. CF-96-145 should be, and hereby is, **REVERSED WITH INSTRUCTIONS TO DISMISS** the State's February 12, 1999 Application to Revoke.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 21st day of October, 1999.

**RETA M. STRUBHAR, Presiding Judge**

**NOT PARTICIPATING**
**GARY L. LUMPKIN, Vice Presiding Judge**

**CHARLES A. JOHNSON, Judge**

Chas S. Chapel (specially concurring)
**CHARLES S. CHAPEL, Judge**

**DISSENTS**
**STEVE LILE, Judge**

ATTEST:

Clerk

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**CHAPEL, JUDGE, SPECIALLY CONCURRING:**

The prosecutor offered a plea agreement which was accepted by Appellant. The agreement was that if Appellant entered a plea to obtaining Property by False Pretenses and accepted a five year sentence, the prosecutor would not seek to revoke a sentence in a prior case. Significantly, the deal which was on the record, *did not* provide that Appellant was required to *serve* five years. Thereafter, Appellant was successful in getting his five year sentence thrown out and in being sentenced to a lesser term. The prosecutor then sought to revoke, and the trial judge did revoke.

A deal is a deal. The prosecutor was not required to offer a deal, and the trial judge was not required to accept the deal. The deal could have been conditioned upon many things which might have protected the prosecutor's interest if he expected Appellant to serve five years. But the deal contained no such conditions. All Appellant was required to do was enter a plea and receive a five year sentence. He did that. No reason exists for this Court or the trial court to reform the contract for the benefit of the prosecutor. What if the Appellant had been released early pursuant to an early release program, or received an early release based upon good time credits, or been released early upon parole, or been awarded clemency by the executive? Under these circumstances, would the prosecutor also expect the Court to rewrite his deal?

**Lile, J.: Dissents**

There were two people, at the trial level, who understood this case: Judge Worthington and the Appellant. Judge Worthington asked Appellant: "Did you understand that you were to serve five years in prison?" Appellant answered: "yes". Judge Worthington then sentenced Appellant to five years with credit for time served. I would affirm the decision.