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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 12/14/2010  
RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DEBRA ANN TOMB, ) No. 1 CA-SA 09-0261  
 )  
 ) Petitioner, ) DEPARTMENT A  
 )  
 ) v. ) MEMORANDUM DECISION  
 )  
 ) THE HONORABLE EMMET RONAN, Judge ) (Not for Publication - Rule  
 ) of the SUPERIOR COURT OF THE ) 28, Arizona Rules of Civil  
 ) STATE OF ARIZONA, in and for the ) Appellate Procedure)  
 ) County of Maricopa, )  
 )  
 ) Respondent Judge, )  
 )  
 ) STATE OF ARIZONA, )  
 )  
 ) Real Party in Interest. )  
 )  
 )

Petition for Special Action  
from the Superior Court in Maricopa County

Cause No. CR 2008-031185-001 SE

The Honorable Emmet Ronan, Judge

**JURISDICTION ACCEPTED; ORDER VACATED AND REMANDED**

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By Thomas M. Baker  
Attorneys for Petitioner

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J O H N S E N, Judge

¶1 At issue in this appeal is an order by the superior court denying a defendant's motion to dismiss identity-theft charges brought against her in Maricopa County after a similar charge against her in Pinal County was dismissed by agreement. We reaffirm the rule that jeopardy does not attach to a criminal charge dismissed pursuant to a plea agreement. We also hold, however, that a plea agreement negotiated by one county attorney's office on behalf of the State may be enforceable against another county attorney's office and remand for further consideration of whether, by agreeing to the dismissal of the one charge, the State promised it would not bring other related identity-theft charges.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 By her own account, Debra Ann Tomb became addicted to prescription pain killers first prescribed for back pain. When her physician stopped prescribing the drugs for her, she stole a prescription pad from the medical office in which she had worked and wrote dozens of prescriptions for herself. She forged the name and license number of a nurse practitioner in the medical office and filled many of the prescriptions at pharmacies in Apache Junction, where she lives, and others at a pharmacy located about a mile west of the Apache Junction city limits.

Although most of Apache Junction lies within Pinal County, a portion of the west side of the city is part of Maricopa County. The Apache Junction pharmacies at which Tomb filled prescriptions are situated within Pinal County; the other pharmacy she used is located in an unincorporated area of Maricopa County.

¶13 Apache Junction and Mesa police both investigated Tomb and shared information about their respective investigations. Apache Junction police arrested Tomb, who waived her *Miranda*<sup>1</sup> rights and agreed to be interviewed without a lawyer at an Apache Junction police station. In the interview, which a Mesa police officer watched through a closed-circuit television, Tomb admitted she forged numerous prescriptions for herself at a number of pharmacies within the Apache Junction city limits. After Apache Junction police completed their interview, the Mesa officer entered the interview room and questioned Tomb, who admitted filling other prescriptions at the other location.

¶14 A Pinal County grand jury indicted Tomb on 35 counts of forgery in violation of Arizona Revised Statutes ("A.R.S.") section 13-2002(A)(2) (2001) and a single count of identity theft in violation of A.R.S. § 13-2008 (Supp. 2008), all Class 4 felonies. On October 2, 2008, Tomb signed a plea agreement in

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

which she agreed to plead guilty to two of the forgery charges in exchange for dismissal of the remaining charges. The Pinal County Superior Court accepted the plea agreement on October 6 and later imposed a four-year term of probation.

¶15 Two days after the Pinal County court accepted Tomb's plea agreement, the Maricopa County Attorney's Office issued a direct complaint charging Tomb with two counts of identity theft in violation of A.R.S. § 13-2008 in connection with prescriptions filled at the pharmacy outside the Apache Junction city limits in Maricopa County. Tomb moved to dismiss the charges, arguing they were barred by double jeopardy. After the State objected, the superior court denied the motion.<sup>2</sup>

¶16 Tomb moved for reconsideration, arguing that the Maricopa County charges constituted a breach of her plea agreement. The court denied the motion, reasoning:

It appears clear to the Court that the Arizona Legislature intended that prosecuting agencies should be permitted to consolidate identity theft complaints in different counties against the same defendant in one county so that they can all be heard in one court. . . . It also appears that could have (and should have) been done in this case. However, there is nothing in the charging documents or the

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<sup>2</sup> Following the court's denial of Tomb's motion to dismiss, the State amended the information to allege one of Tomb's Pinal County forgery convictions as an historical prior felony conviction and to assert that the charged felonies were multiple offenses not committed on the same day pursuant to A.R.S. § 13-702.02 (now § 13-703).

Pinal County plea agreement to indicate that the two prosecuting agencies in this case intended that to happen.

## DISCUSSION

### A. Jurisdiction.

¶7 The denial of a motion to dismiss is not an appealable order. *United States v. Super. Ct. In and For Maricopa County*, 144 Ariz. 265, 269, 697 P.2d 658, 662 (1985). We exercise our discretion to accept jurisdiction of Tomb's special action petition because she has no equally plain, speedy or adequate remedy by appeal from the court's decision that the Maricopa County charges were not precluded by the Pinal County plea agreement, see *Hovey v. Superior Court*, 165 Ariz. 278, 281, 798 P.2d 416, 419 (App. 1990), and because the question of whether double jeopardy bars the later charges is purely a question of law, see *Lewis v. Warner*, 166 Ariz. 354, 355, 802 P.2d 1053, 1054 (App. 1990).

### B. Jeopardy Does Not Attach to a Charge Dismissed Pursuant to a Plea Agreement.

¶8 Tomb argues that under double jeopardy principles, the negotiated dismissal of the Pinal County identity-theft charge bars her prosecution on the Maricopa County identity-theft charges. She cites no authority, however, for the proposition that jeopardy attaches to a charge dismissed pursuant to a plea agreement.

¶9 In arguing that double jeopardy does not apply, the State cites *Lewis*, in which the issue was whether a dismissal pursuant to a plea agreement “serves as an ‘acquittal’ for purposes of the double jeopardy clause.” *Id.* at 356, 802 P.2d at 1055. Because such a dismissal does not involve the presentation of evidence and because the superior court had made no “factual findings as to the merits” of the dismissed charge, the court in that case held jeopardy did not attach to the dismissed charge. *Id.* at 357, 802 P.2d at 1056. Courts in other jurisdictions agree that jeopardy does not attach in that situation. *E.g.*, *United States v. Green*, 139 F.3d 1002, 1004 (4th Cir. 1998); *United States v. Garner*, 32 F.3d 1305, 1311 n.6 (8th Cir. 1994); *United States v. Nyhuis*, 8 F.3d 731, 735 n.2 (11th Cir. 1993); *United States v. Fontanez*, 869 F.2d 180, 183 (2d Cir. 1989); *United States v. Vaughan*, 715 F.2d 1373, 1377 (9th Cir. 1983); *People v. Mezy*, 551 N.W.2d 389, 391 (Mich. 1996).

¶10 Accordingly, the superior court did not err by declining to hold that double jeopardy principles barred the identity-theft charges filed in Maricopa County.

### **C. Breach of Plea Agreement.**

¶11 Tomb argues in the alternative that the Maricopa County charges must be dismissed because they constitute a

breach of the plea agreement approved by the Pinal County Superior Court.

¶12 To this the State responds as an initial matter that Tomb waived this argument by failing to raise it in the Pinal County superior court prior to her sentencing on the charges to which she pled guilty. Although waiver usually is a question of fact, the State itself waived this argument by failing to raise it in response to Tomb's motion to dismiss the complaint.

¶13 Addressing the merits of Tomb's contention, a defendant has a due-process right to "fulfillment of the promises used to elicit" a plea. *Hovey*, 165 Ariz. at 281, 798 P.2d at 419; *see Santobello v. New York*, 404 U.S. 257, 262 (1971) ("when 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"); *cf. State v. Georgeoff*, 163 Ariz. 434, 436-37, 788 P.2d 1185, 1187-88 (1990) (although a plea agreement accepted by the court implicates due-process rights, prosecutor's breach of a plea agreement does not constitute fundamental error). We have held that when a prosecutor breaches a plea agreement, a defendant may move for specific

performance. *Hovey*, 165 Ariz. at 282, 798 P.2d at 420; see *United States v. Hawes*, 774 F. Supp. 965, 970 (E.D. N.C. 1991).<sup>3</sup>

¶14 As noted, Tomb's plea agreement provided for the dismissal of 33 forgery counts and the single identify-theft charge alleged in the indictment. Specifically, the written agreement recited, "[Those] charges are dismissed or, if not yet filed, shall not be brought against the Defendant." Tomb argues the State breached that agreement by filing the pair of identity-theft charges against her in Maricopa County.

¶15 In response, the State first argues that even if the Pinal County identity-theft charge that was dismissed was intended to encompass conduct underlying the Maricopa County identity-theft charges, the dismissal of the Pinal County charge was without prejudice, meaning that the State reserved the power to refile the dismissed charge. The basis of this argument is that neither the plea agreement nor the judgment expressly provided whether the dismissal was to be with or without prejudice. See Ariz. R. Crim. P. 16.6(d) (dismissal "shall be without prejudice to commencement of another prosecution, unless

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<sup>3</sup> Courts that reject double-jeopardy claims arising out of plea agreements sometimes suggest that defendants may receive relief by way of specific performance of the plea agreement. *E.g.*, *Vaughan*, 715 F.2d at 1377 n.1; *Hawes*, 774 F. Supp. at 970; *Lewis*, 166 Ariz. at 356 n.3, 802 P.2d at 1055 n.3.



the court order finds that the interests of justice require that the dismissal be with prejudice”).

¶16 We do not accept the State’s argument that in agreeing to plead guilty to certain charges, Tomb intended to allow for the possibility that the State would refile the charges she bargained to have dismissed. Rather, we construe the plea agreement as containing an implied promise by the State that as long as Tomb satisfied her obligations under the plea agreement, it would not refile the charges that were to be dismissed.<sup>4</sup>

¶17 The State also argues that the plea agreement does not bind the Maricopa County Attorney’s Office because it was entered into by the Pinal County Attorney’s Office. We disagree. The plea agreement approved by the superior court was not between Tomb and the Pinal County Attorney’s Office; it was between Tomb and the State of Arizona.<sup>5</sup> In charging Tomb in connection with the prescriptions filled in Maricopa County, the Maricopa County Attorney’s Office represents the State of Arizona and is bound by whatever obligations the plea agreement imposed on the State.

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<sup>4</sup> The State does not allege that Tomb has breached the plea agreement.

<sup>5</sup> The plea agreement began, “The State of Arizona and the defendant hereby agree to the following disposition of the case.”

¶18 In denying Tomb's motion to dismiss and her subsequent motion for reconsideration, the superior court concluded there was nothing in the indictment or plea agreement that indicated that "the two prosecuting agencies in this case" intended the plea agreement to dispose of all identity-theft charges relating to Tomb's theft of the prescription pad. Based on the record before us, however, the intent of the Maricopa County Attorney's Office would not bear directly on how the plea agreement should be interpreted. As we have said, the Pinal County Attorney's Office acted on behalf of the State in negotiating the plea agreement with Tomb; there is no indication in the materials before us that the Maricopa County Attorney's Office participated in those negotiations.

¶19 The State further argues that, as a matter of law, the identity-theft charge dismissed pursuant to the plea agreement cannot encompass the identity-theft charges filed in Maricopa County because the Pinal County Attorney's Office lacked authority to bring before the grand jury a crime committed outside Pinal County. Again, we disagree.

¶20 Under Arizona law, a crime may be charged in any county in which "conduct constituting an element of an offense or a result constituting an element of an offense occurs." A.R.S. § 13-109(B)(1) (2001). The identity-theft statute states this principle expressly by providing that "[i]f a defendant is

alleged to have committed multiple violations of this section within the state, the prosecutor may file a complaint charging all of the violations and any related charges under other sections that have not been previously filed in any county in which a violation is alleged to have occurred." A.R.S. § 13-2008(D). Under these provisions, the Pinal County Attorney's Office plainly had the power to charge Tomb with all identity-theft violations she had committed, even those committed in Maricopa County.

¶21 As the superior court noted, the three identity-theft charges all arise out of the same course of conduct - Tomb took the one prescription pad and repeatedly used the nurse practitioner's name and license number to write prescriptions from the pad. The Pinal County indictment broadly alleged Tomb had violated A.R.S. § 13-2008(A) over a 15-month period in a wide variety of ways (i.e., "taking, using, selling or transferring" the nurse practitioner's stolen identity).<sup>6</sup> The

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<sup>6</sup> A.R.S. § 13-2008(A) describes the crime of identity theft as follows:

A person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information . . . of another person . . . without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose . . . .

Maricopa County charges alleged that on January 4 and February 21, 2008 (within time period encompassed by the Pinal County charge), Tomb "took," "possessed" and "used" the stolen identity - the same allegations made in the Pinal County indictment.

¶122 The State acknowledges the breadth of the dismissed Pinal County charge but contends that each individual "use" of a false identity may be charged as a separate offense under A.R.S. § 13-2008(A). Thus, it contends that as alleged in the Maricopa County complaint, a use of the prescription pad and the nurse practitioner's identifying information on January 4, 2008 may be a separate offense from use of the prescription pad and the stolen identifying information on February 21, 2008 and from any of the occasions on which Tomb used the prescription pad to fill prescriptions in Pinal County. Accepting for purposes of argument the State's contention that each use of the stolen prescription pad could have been charged as a separate offense, given the broad scope of the Pinal County identity-theft charge, we cannot conclude on this record that it did not encompass one or both of the events charged in the Maricopa County complaint.

¶123 The State also argues the dismissed charge could not have been intended to encompass the acts in Maricopa County because the indictment alleged that Tomb committed identity theft "in or near Apache Junction, Arizona," not outside the city. As we have said, however, the lone Maricopa County

pharmacy at which Tomb is alleged to have filled forged prescriptions is located about a mile beyond the Apache Junction city limits, which is "near" Apache Junction. Contrary to the State's contention, a location "near" a city necessarily must be outside the city, not inside. That language, therefore, fairly may be read to imply that the conduct alleged in the dismissed charge took place at least a short distance beyond the Apache Junction city limits.

¶24 The State further argues that the introduction to the indictment recites that the grand jury "charg[ed] that [Tomb committed certain acts] in Pinal County, Arizona." Given that the law permits a charge to be brought within any county in which an element of the charged offense occurs, however, we cannot construe the quoted language as foreclosing the possibility that the identity-theft charge alleged in the indictment was intended to encompass the prescriptions Tomb filled in the Maricopa County pharmacy using the prescription pad she stole in Pinal County. See A.R.S. § 13-109(B)(1). This is particularly true because, as noted, the identity-theft statute expressly permits multiple identity-theft violations committed throughout the state to be charged at once. A.R.S. § 13-2008(D).

¶25 We note the plea agreement provided that not only would the specified Pinal County charges be dismissed, it also

provided that charges "if not yet filed, shall not be brought against the Defendant." Tomb argued in the superior court that she understood the latter provision to apply to charges that were under investigation by Mesa police, and she provided an affidavit to that effect. She pointed out that, as described above, Apache Junction police cooperated with Mesa police in investigating her use of the prescription pad and showed that a Mesa police detective was in the grand jury room when evidence supporting the Pinal County indictment was taken.

¶26 We concur with the superior court's observation that consolidation in the Pinal County indictment of all possible identity-theft charges against Tomb "could have (and should have)" occurred in this case. Based on the record before us, and for the reasons set forth above, we hold that, consistent with Tomb's affidavit, the plea agreement may be "reasonably susceptible" to the conclusion that the parties intended it to encompass the identity-theft charges contained in the Maricopa County complaint. See *Taylor v. State Farm Mutual Automobile Ins. Co.*, 175 Ariz. 148, 153-54, 854 P.2d 1134, 1139-40 (1993) (in attempting to "ascertain and give effect to the intention of the parties at the time the contract was made if at all possible," court may consider parol evidence if it finds that the contract language is "reasonably susceptible" to the interpretation offered by the proponent of the evidence, but may

not consider evidence that would vary or contradict the meaning of the written words of the contract; citing *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975), and Restatement (Second) of Contracts § 215 cmt. b (1979)).

¶127 Accordingly, we vacate the order denying the motion to dismiss and remand to permit the superior court to consider the relevant evidence, including parole evidence relating to Tomb's understanding of the plea agreement and the corresponding understanding of the Pinal County Attorney's Office, which negotiated the agreement on behalf of the State.

#### CONCLUSION

¶128 We hold the superior court correctly concluded that double jeopardy principles do not bar the identity-theft charges contained in the Maricopa County complaint. Further, we conclude that the Maricopa County Attorney's Office, as an agent of the State, is bound by the plea agreement Tomb negotiated with the Pinal County Attorney's Office. We grant relief insofar as we vacate the order denying the motion to dismiss and remand for proceedings consistent with this decision.

/s/  
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
MAURICE PORTLEY, Judge

**B A R K E R**, Judge, concurring in part; dissenting in part.

¶29 I agree with the majority's conclusion that Tomb is not entitled to relief on double jeopardy grounds. I disagree with the conclusion that she is entitled to relief based on the plea agreement.

¶30 When considering the scope of the plea agreement, we treat it as a contract and apply principles of contract interpretation. *Coy v. Fields*, 200 Ariz. 442, 445, ¶ 9, 27 P.3d 799, 802 (App. 2001) ("Plea agreements are contractual in nature and subject to contract interpretation."); *Mejia v. Irwin*, 195 Ariz. 270, 272, ¶ 12, 987 P.2d 756, 758 (App. 1999) ("A plea agreement is like a contract between the State and the defendant and is subject to contract interpretation.").

¶31 Notably absent from this plea agreement is any agreement as to charges that were not a part of the specific indictment at issue. The plea agreement has a specific section for the dismissal of unfiled charges. That section, section 3, states in whole as follows:

The following charges are dismissed or, if not yet filed, shall not be brought against the Defendant: **COUNTS 1-32;34,36; ALLEGATION OF § 13-702.02.**

By its terms, Section 3 is limited to "the following charges." The charges listed are those that were filed in Pinal County. There are no charges listed that had not yet been filed. It



would have been a simple matter to list potential charges out of the Mesa Police Departmental Report if that was what was intended. That was not done. To effectively write in the unfiled charges that were not listed would be to modify the plea agreement, as described below.

¶32 Further, the indictment to which the plea agreement refers is specifically limited to, and based upon, facts that occurred in Pinal County. The initial statement in the indictment, upon which each dismissed count is based, provides: "The grand jurors of Pinal County, Arizona, accuse Debra Ann Tomb, charging that *in Pinal County, Arizona.*" (Emphasis added.) The facts upon which the Maricopa County charges are based, however, are specifically limited to Maricopa County: "The complainant herein personally appears and . . . complains on information and belief against Debra Ann Tomb, charging that *in Maricopa County, Arizona . . . .*" (Emphasis added.) All conduct necessary for a jury to convict on counts 1 and 2 in the Maricopa County action occurred in Maricopa County. Thus, by the plain terms of the plea agreement and the language of the indictment in the Pinal County matter, an action based on such facts is not precluded.

¶33 We can still give meaning to the phrase "in or near Apache Junction" and be faithful to the express terms of the charging document, which limits the conduct to that which

occurred "in Pinal County." In short, the conduct must be in or near Apache Junction, but it also must be in Pinal County.

¶34 Given the express terms of the plea agreement and the charging document just referenced, to remand this matter for an evidentiary hearing to determine whether the parties intended to include conduct in Maricopa County as part of the dismissal of the Pinal County action is contrary to our established case law. In *Taylor v. State Farm Mutual Automobile Insurance Co.*, 175 Ariz. 148, 152-55, 854 P.2d 1134, 1138-41 (1993), our supreme court set forth the guiding principles as to when parol evidence may be considered in construing a contract. Because we treat plea agreements like contracts, those principles apply here. *Coy*, 200 Ariz. at 445, ¶ 9, 27 P.3d at 802; *Mejia*, 195 Ariz. at 272, ¶ 12, 987 P.2d at 758.

¶35 Under *Taylor*, "the judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." 175 Ariz. at 154, 854 P.2d at 1140. However, *Taylor* recognized "the parol evidence rule *prohibits extrinsic evidence to vary or contradict*" the agreement. 175 Ariz. at 152, 854 P.2d at 1138 (emphasis added). Here, permitting the introduction of extrinsic evidence that the plea agreement permits the dismissal of unfiled charges contradicts

the express language in Section 3, above, that is restricted to the "following charges," which are then expressly enumerated in the charging document at issue in Pinal County. That charging document in turn is limited to conduct that occurred "in Pinal County." By permitting it to apply to conduct outside of Pinal County we would be again modifying the plea agreement. Thus, to permit extrinsic evidence that the plea agreement was intended to cover conduct that was neither separately listed in Section 3 and occurred outside of Pinal County violates *Taylor*.

¶36 For these reasons, I would affirm the trial court and uphold the plea agreement as written.

/s/  
DANIEL A. BARKER, Judge