

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

State of Ohio, :
 :
 Plaintiff-Appellee, : Case No. 08CA3252
 :
 v. :
 :
 John Pasturzak, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. : **Released 8/17/09**

APPEARANCES:

Kevin M. Schad, Schad & Schad, Lebanon, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Chadwick K. Sayre, Assistant Scioto County Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

Harsha, J.

{¶1} John Pasturzak appeals the denial of his post-sentence motion to withdraw his guilty plea to aggravated murder. Because the prosecutor’s office failed to assist him in obtaining a parole hearing, Pasturzak, who has been imprisoned for twenty-four years, argues the State breached the terms of a plea agreement that entitled him to parole eligibility after serving twenty-three years. However, nothing in the plea agreement placed an affirmative duty upon the prosecutor to assist Pasturzak in obtaining a hearing before the parole board. If Pasturzak has a remedy, it lies in a declaratory judgment action against the Ohio Adult Parole Authority, not in the withdrawal of his plea based upon the prosecution’s inaction.

{¶2} Pasturzak also contends the trial court erred in relying upon the doctrine of res judicata when denying his motion. Even if we find that res judicata does not apply,

the trial court still was correct in denying the motion based upon the plain meaning of the plea agreement. Because we review judgments, and not their underlying rationale, we reject this argument.

{¶3} Finally, Pasturzak argues the trial court was required to conduct a hearing before ruling on the motion. No hearing is necessary where the facts alleged, i.e., that the plea agreement required the prosecution to assist him in obtaining a hearing, clearly are not true on the face of the record and thus, cannot support withdrawal of the plea.

I. Facts

{¶4} In 1984 as part of a plea agreement, Pasturzak pled guilty to one count of aggravated murder with a firearm specification. He did so in return for the State's agreement to "not seek a 30 year parole eligibility(.)", i.e., to consent to a sentence that allowed parole eligibility after twenty-three years. The State also agreed not to pursue twelve or thirteen other crimes that Pasturzak allegedly committed. The court sentenced Pasturzak to life in prison with parole eligibility after twenty years for the aggravated murder, and also imposed a mandatory three year, consecutive term for the firearm specification. The court also found Pasturzak had violated the terms of probation on several other criminal charges, so it revoked the probation and reimposed its prior prison sentences for those convictions.

{¶5} Over time, Pasturzak filed a seemingly endless series of post sentencing motions, none of which had any merit. One of them concerned the failure of the Ohio Adult Parole Authority to consider his eligibility for parole prior to the service of the minimum sentence. We rejected an appeal on that issue in *State v. Pasturzak*, Scioto App. No. 01CA2822, 2003-Ohio-1085.

{¶6} In August of 2008, Pasturzak filed his third motion under Crim.R. 32.1 to withdraw his guilty plea. This motion was based upon the fact that he had now served more than twenty-three years without being eligible for parole and the allegation that the plea agreement required the prosecution to assist him in obtaining a meaningful review by the Ohio Adult Parole Authority. After the trial court denied the motion because “the issue has been before this court on several occasions and has been reviewed by the Fourth District Court of Appeals(.),” Pasturzak filed his latest appeal.

II. Assignments of Error

{¶7} Pasturzak presents three assignments of error for our review:

1. The court of common pleas erred in determining that the claims raised were barred by res judicata. (Judgment Entry, 8/25/08)
2. The Appellant provided sufficient evidence that the prosecution materially breached the terms of the plea agreement by not ensuring that the Appellant had an opportunity for parole after 23 years. (Judgment Entry, 8/25/08)
3. The trial court was required to hold a hearing on the Appellant’s claims. (Judgment Entry, 8/25/08)

III. Crim.R. 32.1

{¶8} Crim.R. 32.1 states:

Withdrawal of Guilty Plea

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

A. Standard of Review

{¶9} Under the rule, a trial court may grant a post-sentence motion to withdraw a guilty plea only to correct a manifest injustice. This decision lies within the sound

discretion of the trial court. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. Accordingly, we review that decision under the deferential abuse of discretion standard. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52, 620 N.E.2d 72; *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218. An abuse of discretion involves far more than a difference in opinion. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, 313, certiorari denied (1985), 472 U.S. 1031; *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 482 N.E.2d 1248, 1252.

B. Res Judicata

{¶10} Pasturzak characterizes the trial court’s decision to deny his motion as being based upon the doctrine of res judicata. That doctrine precludes a party from relitigating an issue that either was actually litigated or could have been litigated in a previous proceeding. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph 9 of the syllabus. While the trial court’s judgment does not use the term, we agree with Pasturzak’s characterization of the court’s rationale based upon the language referring to previous reviews of “the issue.” We also agree that our prior decision in *Pasturzak*, supra, did not address “the issue” he raises here and that it could

not have been raised at that time. Nonetheless, we cannot reverse the trial court's judgment based upon Pasturzak's first assignment of error. Appellate courts are charged with the duty of reviewing judgments for legal propriety. They do not reverse a correct judgment simply because the lower court used an improper rationale in reaching the right result. *State v. Lozier*, 101 Ohio St.3d 161, 803 N.E.2d 770, at ¶46. Based upon our rejection below of Pasturzak's claim that the prosecution breached the plea agreement, we conclude the trial court reached the proper legal conclusion in this case. So we disregard its rationale and reject the first assignment of error.

C. The Plea Agreement

{¶11} Pasturzak claims the prosecution has the affirmative duty under the terms of the plea agreement to assist him in obtaining meaningful parole consideration after twenty-three years. He insists that the prosecution's failure to do so, in spite of his written request, amounts to a breach of the plea agreement. According to Pasturzak, this breach entitles him to withdraw from the agreement and to withdraw his plea.

{¶12} We start with the premise that a plea agreement is a contract and subject to interpretation under contract law standards. *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, at ¶7. See, also, *Papp v. State Adult Parole Authority*, Franklin App. No. 01AP-892, 2002-Ohio-199. Where a contract is unambiguous on its face, we interpret it as a matter of law without reference to extrinsic evidence. *Graham v. Drydock Coal* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949, 1996-Ohio-393.

{¶13} Due process requires the State to honor any promise it makes to induce a guilty plea. When the State breaches a valid plea agreement, the trial court may allow withdrawal of the negotiated plea or it may require the State to fulfill its end of the

bargain. *State v. Ford* (Feb. 18, 1998), Lawrence App. No. 97CA32, 1998 WL 79885, citing *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427.

{¶14} Our review of the sentencing hearing transcript and the sentencing entry fails to reveal any language that can reasonably be interpreted as a commitment by the prosecution to affirmatively assist Pasturzak in his efforts to obtain a meaningful parole hearing. In fact, neither the hearing nor the entry reflects the specific terms of the plea agreement upon which Pasturzak bases his argument. Rather, they speak only in general terms of “parole eligibility after twenty years” (sentencing hearing p. 2 and p. 8) and “with parole eligibility after 20 years” (sentencing entry).

{¶15} Pasturzak refers to the language found in a letter from the prosecuting attorney dated February 2, 1984, that states: “ * * * the first parole eligibility being after twenty years, plus three years. For this, we will not seek a 30-year parole eligibility.” The letter also indicates the State will not pursue criminal charges on twelve or thirteen other matters involving Pasturzak in return for the plea of guilty to a single count of aggravated murder with a firearm specification. Even though this language of the agreement does not appear in the sentencing transcript or entry, we will assume it is in fact part of the plea bargain because the State does not contend otherwise.

{¶16} Looking at this language, we see nothing that would bind the prosecution to affirmatively assisting Pasturzak in his efforts to obtain a hearing after serving twenty-three years in prison. The prosecution’s failure to honor his request for assistance does not amount to a breach of the plea agreement. That agreement was to recommend a sentence of life imprisonment with parole eligibility after serving twenty years for the

aggravated murder and three years for the firearm specification. The court imposed that exact sentence.

{¶17} The decision of when to conduct a parole hearing and whether to grant it lies with the Adult Parole Authority, not the office of the Scioto County Prosecuting Attorney. Pasturzak's remedy, if any, is an action against the Adult Parole Authority for declaratory relief and/or injunctive relief. See, *State v. Davis*, 158 Ohio App.3d 478, 2004-Ohio-5354, ¶¶11-13. Accordingly, we reject his second assignment of error.

D. Evidentiary Hearing

{¶18} In his final assignment of error, Pasturzak asserts that he was entitled to an evidentiary hearing prior to the trial court's decision on the motion. He cites our decision in *State v. Waugh*, Pickaway App. No. 07CA16, 2008-Ohio-308, at ¶8, for the proposition that a trial court must conduct an evidentiary hearing to determine whether there is a reasonable and legitimate basis for a motion to withdraw a plea under Crim.R. 32.1. However, he misinterprets our decision. *Waugh* and the case it cites, *Xie*, supra, both dealt with presentence motions to withdraw. The presentence motion is entitled to much more liberal treatment than the post-sentence version. *Xie* at 526. Thus, an evidentiary hearing is not required where the record conclusively and irrefutably contradicts the allegations in the post-sentence motion to withdraw. *State v. Legree* (1988), 61 Ohio App.3d 568, 574. See, also, *State v. Jacobson*, Adams App. No. 01CA730, 2003-Ohio-1201, at ¶6.

{¶19} We have already determined as a matter of law, that the unambiguous language of the plea agreement does not place an affirmative duty upon the prosecution to assist Pasturzak in obtaining a hearing. Thus, the record and the materials

supporting the motion conclusively and irrefutably contradict the claim that the prosecution breached the plea agreement. The trial court did not abuse its discretion in deciding the motion without an evidentiary hearing. We reject the third assignment of error.¹

JUDGMENT AFFIRMED.

¹ Our disposition of Pasturzak's assignments of error render the State's motion to dismiss moot.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.