

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TORRANCE LYDA,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 JE 0012

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 19 CR 64

BEFORE:

Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed

Atty. Jane Hanlin, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee and

Atty. Lydia Spragin, 6100 Oak Tree Blvd., Suite 200, Independence, Ohio 44131, for Defendant-Appellant.

Dated:
June 16, 2021

Donofrio, J.

{¶1} Defendant-appellant, Torrance Lyda, appeals from a Jefferson County Common Pleas Court judgment accepting his guilty plea to attempted murder, felonious assault and having weapons while under disability. His assignments of error concern the guilty plea that he asserts was based on an agreement that his co-defendant/girlfriend receive time served and community control for her convictions. She received a 2-year prison sentence and was granted judicial release after serving 90 days.

{¶2} Appellant was indicted in Jefferson County for attempted murder and felonious assault, each with a firearm specification, and having weapons while under disability. On January 16, 2020, appellant, with counsel, executed a plea agreement in which he agreed to plead guilty to all of the charges. The plea agreement set forth the maximum sentence and fine for each offense, which totaled 22 years in prison and \$35,000, with the felonious assault conviction merging with the attempted murder conviction. The plea agreement also stated that no promises had been made “except as part of this plea agreement which is stated entirely as follows: ‘stipulated prison term of 9 years with the first three being mandatory. Co-D to receive community control with credit for time served.’” This was handwritten into the agreement.

{¶3} The trial court held a plea hearing and the prosecutor outlined the plea agreement, indicating that appellant agreed to plead guilty, but wanted his co-defendant and girlfriend, Quinchaya Thompson, to receive community control. Upon questioning appellant and explaining the rights he was waiving upon pleading guilty, the court found his guilty plea entered voluntarily, intelligently and knowingly.

{¶4} The court proceeded to sentencing, where it specifically acknowledged appellant’s position regarding Ms. Thompson’s sentence. The court accepted the recommended sentence for appellant and sentenced him to an indefinite minimum term of 6 years to a maximum of 9 years imprisonment for attempted murder, with a mandatory 3-year term of imprisonment for the firearm specification, which had to be served prior to and consecutive to all other counts. The court merged the firearm specifications and sentenced appellant to 3 years to be served first and consecutive to 6-9 years of

imprisonment on attempted murder, with felonious assault merging with attempted murder, and 12 months of imprisonment for weapons under disability, to run concurrent to the attempted murder sentence. Appellant was also sentenced to post-release control and a lifetime firearm disability.

{¶15} Ms. Thompson was present during appellant's hearing and she was sentenced after him. Appellant was present for Ms. Thompson's sentencing, where she received 2 years in prison. She was released after 90 days on judicial release.

{¶16} Appellant thereafter filed a motion to withdraw his guilty plea, asserting that he agreed to plead guilty on the condition that Ms. Thompson receive time served and community control, which did not occur. The trial court denied the motion, indicating that appellant and Ms. Thompson were both informed at their hearings that even though their negotiated plea agreements recommended such sentences, it was the sole discretion of the court to impose a sentence.

{¶17} Appellant filed a motion for specific performance, requesting that the court require the prosecution to perform the plea agreement provision or void the agreement and award him damages for breach of contract. The court denied the motion, finding that the State performed according to the plea agreement by presenting the sentence recommendation to the court. The court found that appellant was informed at the hearing that the court was not bound by the recommended sentence and appellant clearly understood this. The court also noted that appellant was sentenced to the recommended sentence in his plea agreement.

{¶18} On July 10, 2020, appellant filed the instant notice of appeal. We will address appellant's assignments of error out order for ease of discussion.

{¶19} In his third assignment of error, appellant asserts:

While it is an usual[sic] position for the Prosecutor to advocate for the rights of the accused, there are circumstances under which the Prosecutor should intervene to promote the integrity of the Plea of Guilty Agreement, the appearance of propriety in both the Office of the Prosecutor and in the judicial system. The Prosecutor erred due to the nature of the negotiations and the actual knowledge that Mr. Lyda entered into the Plea of Guilty Agreement largely because of

the negotiated leniency for Ms. Thompson when she did not speak up at the end of the Court proceedings involving Ms. Thompson when it became readily apparent that the negotiated plea was not followed to have the Court inquire as to whether Mr. Lyda wished to withdraw his plea as neither he nor Ms. Thompson received the benefit of his bargain rendering the Agreement void of consideration.

{¶10} Appellant asserts that the prosecution breached his plea agreement by failing to fulfill the condition that Ms. Thompson receive time served and community control. He contends that the prosecutor should have raised this during Ms. Thompson's sentencing and should have asked him whether he wanted to vacate his plea at that time. Appellant submits that his plea agreement was a third-party beneficiary contract and contract law requires the prosecutor to fulfill Ms. Thompson's sentence. He acknowledges that the United States Supreme Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 364, n. 8, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) reserved judgment on the constitutional ramifications of a prosecutor's offer for lenient treatment of a third-party during plea bargaining. However, he submits that other courts have held that such cases require special care to determine voluntariness because they pose a greater danger of coercion. *U.S. v. Nuckols*, 662 F.2d 566, 569 (5th Cir. 1979).

{¶11} We find that the prosecution fulfilled its duties in good faith at the hearings of appellant and Ms. Thompson. In *Bordenkircher*, the United States Supreme Court did expressly reserve judgment on the constitutional implications when a prosecutor threatens harsher or more lenient treatment of someone other than the accused during plea negotiations. *Id.* at 364, n.4. The Court held that such agreements may pose "a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." *Id.* Ohio courts have accepted plea agreements that include leniency for a third party. In *State v. Mix*, the defendant entered into a plea agreement which included the prosecutor's offer to reduce or dismiss charges against her co-defendant mother. 4th Dist. Gallia No. 18CA9, 2019-Ohio-3315. After she was sentenced, the defendant appealed, asserting that her plea was inherently coercive because the plea offer included the promise to reduce or dismiss her mother's charges. The Fourth District Court of Appeals found that this promise alone did not render the defendant's plea

coercive or involuntary because criminal defendants often face difficult decisions and that alone does not make such decisions involuntary. *Id.* at ¶ 12, citing *State v. Kesterson*, 2nd Dist. No. 95CA39, 1996 WL 280753 (May 24, 1996) at 4. The court relied on *State v. Parham*, 11th Dist. Portage No. 2001-P-0017, 2012-Ohio-2833 for support. In *Parham*, the Eleventh District Court of Appeals held that the prosecutor’s decision to dismiss charges against the defendant’s mother and brother did not render the defendant’s plea coercive or invalid. *Id.* The court cited to other appellate court decisions holding that a guilty plea is not coerced when a defendant pleads guilty in exchange for the dismissal of charges against family members. *Id.*, citing *Kesterson*; *State v. Vild*, 8th Dist. Cuyahoga No. 69574, 1996 WL 492273 (Aug. 29, 1996).

{¶12} In finding that appellant’s plea was voluntarily, knowingly, and intelligently made in *Mix*, the court explained that the appellant presented no evidence that the charges brought against her mother were without a legitimate basis, lacked probable cause, or were made in bad faith. *Mix*, 2019-Ohio-3315, ¶ 12. The appellate court also highlighted the trial court’s thorough plea colloquy where the defendant stated that she did not feel that she was coerced into making the plea and her plea was voluntarily made. *Id.* The *Mix* court concluded that although criminal defendants must make difficult decisions, “the issue is whether her plea was truly voluntary, knowing, and intelligent.” *Id.* Based upon its review of the record, the court found that the appellant’s plea was not coerced and was valid. *Id.* ¶ 13.

{¶13} In *State v. McIntosh*, the defendant asserted that his guilty plea was invalid because the prosecution induced him into pleading guilty with a provision in his plea agreement that his girlfriend would receive a sentence of community control rather than prison. 4th Dist. Nos. 17CA3792, 17CA3801, 2018-Ohio-51. The Fourth District Court of Appeals held that a defendant’s guilty plea is not per se invalid in such a situation. *Id.* at ¶ 29. The court quoted *United States v. Marquez*, 909 F.2d 738, 741-742 (2d Cir. 1990) which held that “[the inclusion of a third-party benefit in a plea bargain is simply one factor for a [trial] court to weigh in making the overall determination whether the plea is voluntarily entered.” *McIntosh* at ¶ 29, quoting *Marquez* at 741-742 and citing *U.S. v. Usher*, 703 F.2d 956, 958 (6th Cir.1983) (“A number of federal courts * * * have upheld pleas against assertions of involuntariness due to coercion where the prosecution offered

lenient treatment to a person other than the defendant”). The *McIntosh* court further quoted its own decision in *State v. Gibbs*, 4th Dist. Washington No. 96CA44, 1997 WL 341908, *4 (June 16, 1997) in which it held that “plea bargaining involving a third person may still present an accused with unpleasant alternatives, but the resulting guilty plea is not constitutionally involuntary if the state acts in good faith.” *McIntosh* at ¶ 29, quoting *Gibbs* at *4.

{¶14} This Court touched upon the validity of guilty pleas in *State v. Panezich* when a defendant asserted on appeal that his plea was coerced when the prosecution indicated that it would support the release of his mother from incarceration if he pled guilty. 7th Dist. Mahoning No. 18 MA 3636, 2020-Ohio-3636. We cited Ohio cases holding that familial pressure does not deem a guilty plea coerced or involuntary and held that the prosecutor’s offer “does not amount to coercion if there is no evidence showing appellant was incompetent or incapable of making his own decision.” *Id.*, citing *State v. Slater*, 8th Dist. Cuyahoga No. 101358, 2014–Ohio–5552, ¶ 13; *Parham*, 11th Dist. Portage No. 2011-P-0017, 2012-Ohio-2833, ¶ 26; *Kesterson*, 2nd Dist. Miami No. 95 CA 39, 1996 WL 280753 (May 24, 1996); *Vild*, 8th Dist. Cuyahoga No. 69574, 1996 WL 492273 (Aug. 29, 1996).

{¶15} In the instant case, appellant’s plea agreement stated “co-d to receive community control with credit for time served.” At appellant’s plea colloquy, the prosecutor set forth the terms of the plea agreement and stated:

This is a bit of an unusual case. There is a co-defendant in this case who is Quinchaya Thompson. She is also in the courtroom today. She has previously entered her guilty pleas to a count of felonious assault and one count of unlawful transaction in weapons but she has not been sentenced.

Mr. Lyda, through Counsel, indicated that he would accept the State’s offer as it’s been explained to the Court this morning but what he wanted was for Ms. Thompson to receive time served and a term of Community Control Sanctions as her sentence in the - - in the other case.

Mr. Miller and I both explained to him that we can relay that agreement and that recommendation to the Court but that the Court is not bound by it.

It would be the recommendation of both of the parties that the Court follow that agreement as I think it achieves the ends that the State is looking for in this case.

The primary offender in this case is Mr. Lyda. The person who is also involved in this case is Ms. Thompson. She has admitted her guilt but in terms of the events that led up to this action on April 5th of 2019, the overwhelming majority of the fault in that lies with Mr. Lyda.

(Tr. at 5). The trial court told appellant to listen very closely to the prosecutor and if he did not hear, did not understand or had any question, he should bring it to his attorney's attention. (Tr. at 5-6). Appellant's attorney then spoke to the court, stating that the prosecutor's statements were accurate and he had informed appellant about the constitutional rights that he was waiving by entering his guilty plea. (Tr. at 6-7).

{¶16} The trial court inquired of appellant, asking him whether anyone had threatened, forced or coerced him into pleading guilty. (Tr. at 8). He responded no. (Tr. at 8). The court asked appellant if anyone had promised him anything other than the terms of the plea agreement. (Tr. at 8). Appellant responded no. (Tr. at 8). The court asked appellant if he had read the plea agreement and understood it. (Tr. at 8). Appellant responded yes. (Tr. at 8). The court asked appellant if he had any questions about the plea agreement, including the sentence or the terms used. (Tr. at 8). Appellant responded no. (Tr. at 8). The court thereafter asked appellant:

THE COURT: Okay. All right. Now, do you understand that while your attorney and the State of Ohio and you have entered into a negotiated plea agreement with a recommendation of sentence, the decision to impose sentence lies solely with the Court. Do you understand what that means?

THE DEFENDANT: Yes.

THE COURT: That means I don't have to go along with the deal; right? THE DEFENDANT: Yes.

THE COURT: Okay. All right. Now, and do you still want to proceed?

THE DEFENDANT: Yes.

(Tr. at 10-11).

{¶17} Moreover, at Ms. Thompson's sentencing, the same prosecutor appeared in front of the same judge with Ms. Thompson, her counsel, and appellant. The prosecutor reiterated at that hearing appellant's acceptance of a 9-year sentence, "if Ms. Thompson were to be granted time served in terms of incarceration and a period of community control sanctions to follow her term of incarceration." Exhibit A to Br. of Appellant at 4. (Thompson Sentencing Tr.). The prosecutor told the court that she recommended that sentence. Exhibit A to Br. of Appellant at 4. (Thompson Sentencing Tr.). She highlighted Ms. Thompson's lack of a criminal history and her 286 days spent in jail, as well as other factors favoring the sentence. Exhibit A to Br. of Appellant at 4-5. (Thompson Sentencing Tr.). Ms. Thompson's counsel indicated that the agreement as set forth by the prosecutor was accurate. Exhibit A to Br. of Appellant at 6 (Thompson Sentencing Tr.). The court reviewed the relevant sentencing factors and specifically indicated that it considered the agreed recommendation to community control. Exhibit A to Br. of Appellant at 4. (Thompson Sentencing Tr.). However, the court did not agree with the recommended sentence and sentenced Ms. Thompson to 2 years in prison. Exhibit A to Br. of Appellant at 4. (Thompson Sentencing Tr. at 14-16). The court indicated that it would consider judicial release. Exhibit A to Br. of Appellant at 4. (Thompson Sentencing Tr. at 16).

{¶18} Appellant does not point to bad faith by the prosecutor, a lack of probable cause, or lack of a legitimate basis for the charges against Ms. Thompson. Further, there is no evidence that appellant was coerced into pleading guilty or that he was incompetent or incapable of making his decision. Most importantly, the prosecutor represented at appellant's hearing that she and appellant's counsel specifically explained to appellant that they could inform the court of the sentence that he agreed to for Ms. Thompson, and

they could recommend it, but the court was not bound by it. Tr. at 5 (Appellant's Plea Tr.). The court then conducted a thorough colloquy with appellant and before accepting his guilty plea, the court informed appellant that it was not required to accept the recommended sentence because this decision was solely for the court. (Tr. at 10-11). The court also informed appellant of the rights that he was entitled to and would be waiving upon entering a guilty plea. (Tr. at 23-25). The court asked appellant if he had any questions or needed to consult with his attorney. (Tr. at 25). Appellant responded that he did not. *Id.* The court found appellant's guilty plea to be voluntarily, intelligently, and knowingly made. (Tr. at 25-26).

{¶19} The court then proceeded to sentencing and informed appellant that it had considered his statement as to a sentence for Ms. Thompson. The court told appellant that it understood his position but Ms. Thompson made choices and everyone was responsible for their own actions. Appellant stated that he understood. (Tr. at 31-32).

{¶20} The court noted that the parties had agreed to a sentence recommendation for appellant and the court accepted that sentence. (Tr. at 32). At Ms. Thompson's sentencing, the prosecutor informed the court of appellant's plea negotiations which included the agreed sentence for Ms. Thompson to time served and community control. (Thompson Sentencing Tr. at 4). The prosecutor recommended that sentence to the court and explained why community control was appropriate for Ms. Thompson. The court informed Ms. Thompson that it had considered the appropriate sentencing factors and it reviewed those factors on the record. (Thompson Sentencing Tr. at 11-14). The court further stated that it had considered the sentence recommendation of the prosecution and her counsel, which was also the sentence recommendation that the prosecution had agreed to in its plea agreement with appellant. (Thompson Sentencing Tr. at 14). However, the court informed Ms. Thompson that it was not going along with this recommendation and explained the reasons for not doing so. (Thompson Sentencing Tr. at 14-16).

{¶21} Based upon the transcript and the case law, we find that the State fulfilled its obligations under the plea agreement by raising and recommending the community control sentence for Ms. Thompson at appellant's hearings and at Ms. Thompson's sentencing. The prosecutor also indicated on the record that she told appellant that the

court had the sole discretion to determine sentences. The court repeated its sole discretion in sentencing to appellant.

{¶22} Accordingly, appellant’s third assignment of error lacks merit and is overruled.

{¶23} In his first assignment of error, appellant asserts:

The trial court erred when it accepted the Written Plea Agreement pursuant to Rule 11 – Pleas, Rights upon Plea, Ohio Crim. R. 11 without “Informing the defendant of and determining that the defendant understood the effect the plea of guilty would have upon both him and his co-defendant for whom he had an expectation of a community control sentence and time served, and upon acceptance of the plea, the court may proceed with judgment and sentence without knowing whether the co-defendant would benefit from his plea bargain.[sic].

{¶24} Appellant spends most of his time asserting prosecutor error by not ensuring that Ms. Thompson receive time served and community control. He contends that he and his counsel entered into extensive negotiations with the prosecutor and they both informed the court at the plea hearing that his guilty plea was based on Ms. Thompson receiving time served and community control. He cites to *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971) and asserts that a prosecutor must negotiate a plea agreement in good faith and fulfill the promises in that agreement because it is part of the inducement or consideration for the plea. He contends that under *State v. Thompson*, 4th Dist. No. 03 CA 766, 2004-Ohio-2413, a plea bargain is a contract and when the prosecutor fails to follow through on the promise to recommend a sentence, the court has the discretion to require specific performance of the agreement or allow withdrawal of a guilty plea.

{¶25} As discussed above, we find that the prosecution fulfilled its duties in the plea agreement and there is no evidence of bad faith, a lack of probable cause, or a lack of legitimate basis for the charges against Ms. Thompson. The prosecutor informed the court of the plea agreement and stated that it agreed with the sentencing recommendation

for Ms. Thompson at appellant’s hearings and that of Ms. Thompson. However, the prosecutor also told appellant that sentencing was in the court’s sole discretion and the court also thoroughly informed appellant of his rights and the fact that sentencing was in its sole discretion.

{¶26} Appellant also asserts trial court error in this assignment of error. Citing again to *Bordenkircher*, 434 U.S. 357, 364 n.8, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), he contends that a court must use extra caution when accepting a guilty plea that is based on a plea agreement benefitting a third party. He asserts that the court was put on notice that his plea agreement involved a benefit to Ms. Thompson, which changed the way that the court should have conducted the plea colloquy. Appellant contends that since his plea was based on Ms. Thompson receiving community control, and the trial court knew that it was not going to grant that sentence when it conducted his plea colloquy, the court should have discussed this at his hearing to determine exactly what he understood about this statement. He contends that his plea was not knowingly, intelligently, and voluntarily made.

{¶27} We note that appellant’s plea agreement included not only the sentence recommendation for Ms. Thompson, but also a stipulated imprisonment term for appellant. Thus, Ms. Thompson’s sentence was not the only basis of appellant’s plea agreement. And the court did sentence appellant to the agreed-upon sentence of 9 years in prison as outlined in appellant’s plea agreement.

{¶28} As to the validity of his guilty plea, “[w]hen a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.” *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). In determining whether a guilty plea was entered knowingly, intelligently, and voluntarily, this Court conducts a de novo review to make sure that the trial court complied with constitutional and procedural safeguards. See *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014–Ohio–5601, ¶ 36, quoting *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014–Ohio–3024, ¶ 13.

{¶29} Entering a guilty plea involves the waiver of both constitutional and non-constitutional rights and thus the Court must determine if a guilty plea was made knowingly, voluntarily, and intelligently. *State v. Martinez*, 7th Dist. Mahoning No. 03–MA–196, 2004–Ohio–6806, ¶ 11, citing *Boykin* at 243. The United States Supreme Court has explained “that in order for a reviewing court to determine whether a guilty plea was voluntary, the United States Constitution requires the record to show that the defendant voluntarily and knowingly waived his constitutional rights.” *State v. Nero*, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990) citing *Boykin* at 242–243.

{¶30} Crim.R.11(C) “was adopted in order to facilitate a more accurate determination of the voluntariness of a defendant's plea by ensuring an adequate record for review.” *Nero* at 107, 564 N.E.2d 474 (citations omitted). Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain procedure for accepting guilty pleas in felony cases. The court must conduct a colloquy with the defendant to determine that he understands the plea he is entering and the rights that he is voluntarily waiving. Crim.R. 11(C)(2). If the plea is not knowing, intelligent, and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. Mahoning No. 03-MA-196, 2004-Ohio-6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709 (1969).

{¶31} Crim.R.11(C)(2)(c) considers the constitutional rights that a defendant waives by entering a guilty plea. Concerning those rights, this Court has explained:

A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R.11(C)(2)(c), applied.)

State v. Elmore, 7th Dist. Jefferson No. 08–JE–36, 2009–Ohio–6400, ¶ 9 quoting *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, syllabus. The non-constitutional rights of a defendant are that:

- 1) the defendant must be informed of the nature of the charges, 2) the defendant must be informed of the maximum penalty involved, which includes advisement on post-release control, if it is applicable, 3) the defendant must be informed, if applicable, that he is not eligible for probation or the imposition of community control sanctions, and 4) the defendant must be informed that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence.

Elmore at ¶ 10, citing Crim.R.11(C)(2)(a)(b); *State v. Philpott* 8th Dist. No. 74392, 2000 WL 1867395 (Dec. 14, 2000), citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418; see also *State v. Wright*, 7th Dist. No. 09 MA 1, 2009–Ohio–4636, ¶ 13, and *Veney* at ¶ 10–13, 897 N.E.2d 621. With regard to addressing non-constitutional rights under Crim.R.11, the Ohio Supreme Court has explained that while literal compliance with the Rule is preferred, substantial compliance by the trial court will suffice. *Nero* at 108, 564 N.E.2d 474. The Court explained that “[s]ubstantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.*

{¶32} In the instant case, the trial court strictly complied with informing appellant of both the constitutional and non-constitutional rights that he was entitled to and waiving upon pleading guilty. After informing appellant of each of these rights, the court asked appellant if he understood each right and appellant responded that he did. Tr. at 23-25. Appellant also stated that he understood that he was waiving each right to which he was entitled with a guilty plea. *Id.*

{¶33} Appellant contends that the trial court should have informed him at his plea hearing that it was not going to follow the sentence for Ms. Thompson and made sure that he understood this. The court did make sure that appellant knew that it was possible

that the court would not follow the sentencing recommendations. The transcript of the plea hearing shows that the court specifically informed appellant that even though he and the State of Ohio entered into a plea agreement with regard to a sentence, the decision to impose a sentence was solely for the court. Tr. at 10-11. The court asked if appellant understood what that meant and appellant responded that he did. Tr. at 11. The court further explained that this meant that the court did not have to follow the plea agreement and again asked if appellant understood this. Tr. at 11. Appellant stated that he understood. Tr. at 11. The court asked appellant if he wished to proceed. Tr. at 11. Appellant responded that he did. Tr. at 11. After informing appellant of all of the rights that he was waiving upon pleading guilty, the court and appellant discussed the following:

THE COURT: Okay. Knowing you have all these very important constitutional rights and all the ramifications with entering your plea, do you have any questions?

THE DEFENDANT: No.

THE COURT: Do you need to talk to your attorney?

THE DEFENDANT: No.

THE COURT: All right. So, how do you plead?

THE DEFENDANT: Guilty.

Tr. at 25. The court then found that appellant had entered his guilty plea voluntarily, knowingly, and intelligently. Tr. at 25.

{¶34} Upon being informed that the court was not required to follow the plea agreement regarding sentencing, appellant had ample opportunity to stop the colloquy, ask the court about Ms. Thompson's sentence, or his own for that matter, or consult with his attorney about the issue. He did not. He was asked numerous times during the proceeding if he had questions, understood everything, if he wanted to speak to his counsel, and if he wanted to proceed. Appellant chose to proceed. Further, before proceeding to sentencing, the court asked appellant if there was any reason not to proceed. Tr. at 26. Appellant responded no. Tr. at 26. The court also informed appellant

again at his sentencing hearing that it was not required to follow the sentencing agreement between appellant and the State of Ohio. Tr. at 31-32. The court had the following conversation with appellant on the record:

THE COURT: The Court has also considered your - - specifically your statement in that as it relates to Quinchaya Thompson and I understand your position but she is a very bright adult herself and she made choices. So, everybody is responsible for their own actions. Do you understand what I am telling you?

THE DEFENDANT: Yes.

Tr. at 31-32.

{¶35} Appellant acknowledges that package deal plea agreements are not per se impermissible. However, he cites to cases holding that when a defendant enters a plea based upon a promise of leniency for third parties, special care needs to be taken by the court to ensure that the defendant and the intended third-party understand the limitations of the State and defendant to enforce the agreement and the court's ability to choose not to follow the agreement. Reply Br. at 4-7.

{¶36} We find that the trial court conducted a very thorough plea colloquy in this case. It made known its sole discretion to impose a sentence and explained that it was not required to follow the sentence recommendations. The court gave appellant ample opportunity to ask questions, consult his attorney, question the plea agreement and its sentencing recommendations, and to elect not to proceed with his guilty plea. There is no indication in the record that appellant hesitated, indicated that he did not understand or want to proceed, or that he was otherwise was coerced.

{¶37} Accordingly, appellant's first assignment of error lacks merit and is overruled.

{¶38} In his fourth assignment of error, appellant asserts:

The Court erred when it did not engage in a colloquy to determine the extent to which Mr. Lyda had an understanding that acceptance of the Written Plea of Guilty Agreement meant that the Court could

still reject all or part of the Written Plea of Guilty, including, but not limited to any negotiation provision of leniency for Ms. Quinchaya Thompson, his co-defendant.

{¶39} Here, appellant repeats that a plea agreement is contractual and a court must use traditional contract law to interpret and enforce a plea agreement. Appellant cites a number of cases for support that the prosecution is required to fulfill promises that it makes in exchange for a guilty plea.

{¶40} As explained above, we find that the prosecution fulfilled its obligations by recommending the sentences on which appellant based his guilty plea. However, the prosecution had no control over the sentence to be imposed because it was in the trial court's sole discretion. The prosecution, defense counsel, and the court itself explained this to appellant and allowed him the opportunity to ask questions, clarify his understanding, consult with his counsel, or withdraw his decision to proceed with pleading guilty. Appellant chose to proceed.

{¶41} Accordingly, appellant's fourth assignment of error lacks merit and is overruled.

{¶42} In his fifth assignment of error, appellant asserts:

The Court err[sic] when the Court said "The Court has also considered your-specifically your statement in that as it related to Quinchaya.

Thompson and I understand your position, but she is a very bright adult herself and she made choices. So, everybody is responsible for their own actions. Do you understand what I'm telling you?" instead of conducting a detailed colloquy to actually determine what exactly was the nature of Mr. Lyda's understanding so that he could ask questions of either the court or his lawyer before he relied to his detriment upon his own understanding.

{¶43} Appellant contends that he had an expectation that every term in his plea agreement would be fulfilled and he had no opportunity to see if Ms. Thompson was going

to receive the sentence that he bargained for in his plea agreement until after he entered his plea and was sentenced. He asserts that the trial court should have asked him if he understood that acceptance of the plea agreement did not mean that the court had to accept the essential terms that induced him into pleading guilty. He cites to *State v. Darmour*, 38 Ohio App.3d 160, 161, 529 N.E.2d 208 (8th Dist. 1987) to assert that there is no abuse of discretion when the court forewarns a defendant that it is not bound by a sentencing agreement and a defendant decides not to change his plea.

{¶44} In the instant case, the trial court engaged appellant in a very thorough colloquy and gave him ample opportunity to ask questions, consult with counsel, stop the proceeding, and decide not to proceed with entering a guilty plea. The trial court did not change any of the terms of the plea agreement. Rather, the trial court chose not to sentence Ms. Thompson to the sentence that was agreed to in his plea agreement. The prosecution, defense counsel, and the trial judge all ensured that appellant understood that the trial court was not bound by the sentence they recommended for Ms. Thompson. Further, the court forewarned appellant before accepting his guilty plea that Ms. Thompson was most likely not going to receive the recommended sentence when it stated to him that Ms. Thompson was a bright person and made choices and that each person should be responsible for their own choices.

{¶45} Accordingly, appellant's fifth assignment of error lacks merit and is overruled.

{¶46} Finally, in his second assignment of error, appellant asserts:

The Trial court erred in denying defendant's motions to withdraw his guilty plea and/or to grant specific performance as his plea agreement was fully integrated and included not only a relinquishment of his constitutional rights but also extensively negotiated provision regarding Ms. Quinchaya L. Thompson, his co-defendant to receive community control and time served.

{¶47} The decision to grant or deny a defendant's motion to withdraw a guilty plea is within the trial court's discretion. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). Abuse of discretion connotes more than an error of law or judgment; it implies

that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶48} Crim.R. 32.1 governs motions to withdraw guilty or no contest pleas and states, “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.” Since appellant's motion to withdraw is a post-sentence motion to withdraw a guilty plea, it can only be granted to correct a manifest injustice. The Ohio Supreme Court has defined “a manifest injustice” as a “clear or openly unjust act.” *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). We have defined it as “an extraordinary and fundamental flaw in the plea proceedings.” *State v. Threats*, 7th Dist. Jefferson No. 18 JE 0003, 2018-Ohio-3825, ¶ 39. The burden of establishing the existence of a manifest injustice is on the party seeking to vacate the plea. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). Post-sentence plea withdrawal is allowable only in an extraordinary case. *Id.*

{¶49} Appellant does not present such a case. Even though he did not receive one of the two benefits of his bargain, he was informed repeatedly that the trial court had the sole discretion in sentencing and was given ample opportunity to ask questions, inquire further, consult his attorney, or stop the proceeding. He chose not to do so.

{¶50} As to his motion for specific performance, appellant is correct that contract law principles can apply to interpret and enforce plea agreements. *State v. Kocak*, No. 16 MA 0020, 7th Dist. Mahoning 2019-Ohio-8483. If the state breaches a plea agreement, a defendant may rescind the agreement by motion to withdraw his plea, or may move for specific performance. *Id.* ¶ 11. One of the agreed-upon conditions to appellant's plea agreement was that Ms. Thompson be granted time served and community control. However, as addressed above, the State did not breach the plea agreement as she recommended the sentences for appellant and Ms. Thompson, but also informed appellant that the court was not bound to impose these sentences. Further, the court committed no error in its thorough plea colloquy with appellant or by imposing a sentence different than the plea agreement because the court was not a part of the plea negotiations, conducted a thorough plea colloquy, explained to appellant that it was not

bound by the sentencing recommendations and allowed him the opportunity to not go forward with his plea.

{¶51} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶52} For reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.