[Cite as *State v. Johnson*, 2023-Ohio-2282.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LAMONT TWAINE JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 BE 0009

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 16 CR 239

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:
Reversed, Vacated and Remanded.

Atty. J. Kevin Flanagan, Belmont County Prosecutor, *Atty. Jacob A. Manning*, Assistant Prosecutor, 52160 National Road, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Donald K. Pond, 567 E. Turkeyfoot Lake Road, Suite 107, Akron, Ohio 44319 for Defendant-Appellant.

Dated: June 29, 2023

Robb, J.

{¶1} Appellant, Lamont Twaine Johnson, appeals the trial court's February 28, 2022 judgment sentencing him after he pleaded guilty to one count of felonious assault in violation of R.C. 2903.11(A)(2). Appellant argues his plea agreement was a result of his reliance on the state's unfulfillable promises and resulted in an involuntary plea, and as such, his guilty plea and conviction must be vacated and the case remanded.

{¶2} Alternatively, he contends the trial court erred by failing to grant his pre-and post-sentence motions to withdraw his plea and the trial court's judgment sets forth the incorrect duration of post-release control, inconsistent with the pronouncement at the sentencing hearing and applicable statute.

{¶3} For the following reasons, the trial court's decision is reversed; Appellant's conviction vacated; and the case is remanded to allow Appellant to withdraw his plea.

Statement of the Case

{¶4} Appellant was indicted in September of 2016 and charged with six felony counts: count one, possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(e), in an amount in excess of 27 grams but less than 100 grams; count two, trafficking drugs, cocaine in an amount in excess of 27 grams but less than 100 grams, in violation of R.C. 2925.03(A)(2)(C)(4)(f); count three, tampering with evidence in violation of R.C. 2921.12(A)(1); counts four and five, two counts of felonious assault in violation of R.C. 2903.11(A)(2), for knowingly causing or attempting to cause physical harm to another with a dangerous weapon, i.e., a motor vehicle; count four identifies Sergeant Ryan Allar as the victim and count five identifies Deputy Michael Sabol as the victim; and count six, failure to comply with a police officer's order or signal in violation of R.C. 2921.331(B)(C)(5)(a)(ii).

{¶5} Appellant did not appear for his initial arraignment in September of 2016. He was apprehended in February of 2017 and entered a not guilty plea. After the exchange of discovery, Appellant filed a motion to suppress, which was overruled.

{¶6} The case was set for jury trial on May 4, 2017, which was canceled due to Appellant's intent to enter a plea. The plea hearing was held May 5, 2017. The corresponding judgment states Appellant was present with his attorney at the hearing and

agreed to plead guilty to count five in exchange for the remaining five counts being nolle prosequied and dismissed. The court ordered a presentence investigation and directed Appellant to cooperate. This judgment likewise indicates that the Addendum to the plea agreement, Exhibit A, was to be filed under seal. The court granted Appellant's recognizance bond and authorized his release from the Belmont County Jail pending sentencing, scheduled for June 5, 2017. (May 5, 2017 Judgment.)

{¶7} The part of Appellant's plea agreement not filed under seal states in part that Appellant was entering a plea of guilty to felonious assault, a second degree felony in violation of R.C. 2903.11(A)(2), with a maximum 8-year prison term and maximum $15,000 fine. This May 5, 2017 Plea of Guilty does not reference or incorporate the Addendum filed under seal. It also does not indicate whether there is any agreement regarding the remaining five charges against Appellant. (May 5, 2017 Plea of Guilty.)

{¶8} Nonetheless, the at issue aspects of Appellant's plea agreement are in Exhibit A, the Addendum filed under seal. This part of his plea agreement uses conditional language and provides the state will allow Appellant to withdraw his guilty plea if he cooperates. The Addendum states Appellant will be released on his own recognizance pending sentencing and for a three-week period after his guilty plea. It provided that Appellant agreed to "make himself available" and generally cooperate with law enforcement. It also states if Appellant failed to cooperate or comply, "the Court will be free to sentence Defendant as to his 'guilty' plea * * *." (Exhibit A, May 5, 2017 Addendum.) However, if Appellant fulfills his obligations under the Addendum, it states Appellant would be permitted to withdraw his guilty plea and plead to a lesser charged felony "[o]n that future date, not less than three (3) weeks from the entry of his ~~conditional~~ [sic] 'guilty' plea * * *." Alternatively, "the State of Ohio shall amend the charge to a lesser charged felony offense, which, in either situation, the lower level offense shall be mutually agreeable amongst the parties in light of what the Defendant accomplishes pursuant to this agreement * * *." The word "conditional" is crossed out and initialed by "LJ." The Addendum is signed by Appellant, his attorney, and the assistant prosecutor. (Exhibit A, May 5, 2017 Addendum.)

{¶9} At the plea hearing, the trial court initially inquired about the nature of the plea, asking the prosecutor: "Now, the plea that is to be made this morning is not a

conditional plea; correct, sir?" To which the state responded: "No, it is a plea * * *." The court then stated: "This is a firm, solid plea. And I do understand there is some other issues that may trigger a later motion. But at this point, it is a solid plea." (May 5, 2017 Tr. 2-3.)

{¶10} The trial court then reviewed Appellant's rights with him. The court engaged in a colloquy with Appellant, confirmed he graduated from high school, and he could read and write. Appellant agreed he was voluntarily entering a guilty plea to count five and was not under threat or force. Appellant was not on probation or parole at the time, and he agreed he was satisfied with his attorney's advice and performance. (Tr. 4-5.)

{¶11} During the colloquy, the court acknowledged there were certain promises made to Appellant in the Addendum. The court asked Appellant whether there were promises made to him other than those in "that agreement, which is going to be attached to the plea form?" Appellant answered no. (Tr. 5.) Appellant also acknowledged he understood his plea meant that he was admitting to the facts of the offense as set forth in the indictment and he was aware of the rights he was forgoing by entering the plea agreement. (Tr. 6.) Appellant also acknowledged and agreed he understood that the prosecution's and defense counsel's recommendations were influential on the court, but not binding. (Tr. 7.) He indicated he had no questions and then stated he was pleading guilty to felonious assault, count five of the indictment. (Tr. 9.) Appellant signed the plea agreement during the hearing. (Tr. 9.)

{¶12} The court ordered a presentence investigation report and then set the case for sentencing four weeks later. Counsel then discussed Appellant's release and a cooperation agreement that required him to be released to fulfill his obligation. There are no details indicating the extent of the agreement. However, the court was plainly aware of the nature of the Addendum. The judge indicated in part he was going to be "sentencing him on Felonious Assault, Felony 2, unless a motion is filed prior thereto, which I'll probably set that motion down for a hearing." (Tr. 10.) When discussing what day of the week sentencing would be held, defense counsel asked "in light of the agreement, the addendum," if the matter could be heard "without individuals in orange observing my argument." (Tr. 10.) The court agreed in part, indicating, "if no motion is

filed, it's a legitimate sentencing on a Felony 2. * * * However, if such a motion is filed, that motion would be set down on a non-Monday morning." (Tr. 12.)

{¶13} Upon addressing Appellant's release to facilitate his cooperation agreement, the following discussion occurred:

> [THE PROSECUTOR:] As this Court knows, we have a cooperation agreement in place. In order to fulfill his end of it, [the defendant] will need to be released. So it is the plan that Detective Benedict and I will meet with him on Sunday, as well as with Mr. Clyburn [defense counsel], and then hammer out a couple of things, as far as the cooperation agreement goes. And then the defendant can be released, without objection, to a recognizance bond a[t] 8:00 on Sunday.
>
> THE COURT: And that's acceptable to you, Mr. Clyburn?
>
> * * * Yes, Your Honor.
>
> * * *
>
> THE COURT: [Speaking to the defendant] * * * Now, nothing we do in this courtroom is really complicated. It's not, okay? So let's use our brains. Fair enough?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: No problems; show up when and where you're supposed to show up; do what you're supposed to do. Fair enough?
>
> THE DEFENDANT: Yes, Your Honor.

(May 5, 2017 Tr. 12-13.)

{¶14} There was nothing filed with the trial court in Appellant's case during the three-week period after Appellant executed his plea agreement and Addendum. He did not move to withdraw his plea during the specified three-week period. The state likewise did not file a motion to change the plea. On May 31, 2017, however, Appellant moved to continue his sentencing hearing, which the trial court granted. This motion to continue stated in part: "in line with matters discussed during plea proceedings * * *, the Defendant requests a reasonable continuance of the sentencing * * *. * * * the State of Ohio is not opposed to this Motion * * * [and] has encouraged the Defendant's counsel to file the

same." (May 31, 2017 Motion to Continue.) Appellant's sentencing was rescheduled to June 13, 2017 and then again to July 13, 2017. (June 14, 2017 Judgment.)

{¶15} On July 12, 2017, Appellant again moved to continue his sentencing, alleging he was out of the area and lacked transportation to return. The trial court overruled this request. (July 12, 2017 Judgment.) At the July 13, 2017 sentencing hearing, defense counsel explained Appellant was unable to appear, and the court issued a warrant for his arrest for his nonappearance. The court also emphasized Appellant was "extremely uncooperative" with the probation department during its preparation of the presentence investigation report. (July 14, 2017 Judgment.) (Tr. 2-4.)

{¶16} Appellant was arrested on May 20, 2021. He had absconded for approximately three years and ten months. (May 21, 2021 Judgment.) Appellant appeared via videoconference with new counsel at the June 1, 2021 failure to appear hearing, and the court set the matter for a status conference. Appellant's new attorney sought additional discovery and advised the court he would be filing a motion to withdraw Appellant's guilty plea. (July 13, 2021 Judgment.)

{¶17} On July 21, 2021, Appellant filed a motion captioned "Motion to Continue Plea Withdrawal Hearing." For cause, Appellant's new attorney alleged he was waiting to secure a copy of the plea hearing transcript and Appellant's file from his initial attorney. (August 9, 2021 Hearing.) The court continued the matter for another four weeks to allow new counsel additional time to file a motion on Appellant's behalf to withdraw his plea deal. (Tr. 6-7.)

{¶18} Appellant filed his first pre-sentence motion to withdraw his guilty plea on September 7, 2021. He argued the state's evidence did not support the charges and Appellant's first defense counsel had given him the poor advice to enter the plea agreement contending he would not get a fair trial as a black man in Belmont County. Moreover, Appellant claimed he had defenses, i.e., the videos of the incident do not depict his vehicle striking the officers' vehicles and the state's testing report showed the illegal substance he was charged with possessing and trafficking did not contain illegal drugs. (September 7, 2021 Motion.) (Defense Exhibit 1, Ohio BCI Report.)

{¶19} The hearing was reset and eventually heard on September 17, 2021. At this September 17, 2021 hearing on his first, pre-sentence motion to withdraw his plea,

Appellant engaged in a discussion with the trial court during which the court asked him whether the dismissal of the other charges against him had anything to do with his entering a plea agreement. Appellant responded: "It had a big thing to do with it * * *." Appellant said he was charged with all of these felonies, but he never committed the offenses. (Tr 16-17.) He then described agreeing to plead guilty to get out of jail on bond so he could work for the police. (Tr. 20-21.) He said the detectives told him that he was doing a good job for them after he "did the buy", and they were going to keep him out on the street with a continuance to keep him working for them.

{¶20} Appellant also testified at the September 17, 2021 hearing that his lawyer and the prosecutor did not show up for the meeting the day he was released in May of 2017. Appellant said he only met with and dealt with the detectives after his release. (Tr. 22-28.) He testified that he was released, but never had the meeting as promised, and after his release, he completed two controlled "drug buys." (Tr. 34.) Appellant also explained he did not return for his sentencing hearing because he had been identified as a "snitch," and he was afraid. He denied having illegal drugs, drug money, or striking a police cruiser, as alleged in the 2016 indictment. Appellant contended his original defense attorney never told him he had defenses to the charges. Had he been informed, Appellant claimed he would not have entered the plea agreement. (Tr. 25-31.)

{¶21} The trial court overruled Appellant's pre-sentence motion to withdraw his guilty plea, holding: "After undertaking the Court's own research, reviewing the file, listening to the arguments of counsel, and viewing the CD's presented with evidence, Motion to Withdraw Guilty Plea is hereby overruled." (September 20, 2021 Judgment.)

{¶22} Appellant's sentencing was set for October 4, 2021, and his second attorney moved to withdraw as counsel, noting a breakdown in communication and Appellant was retaining a new attorney. Sentencing was continued until November of 2021.

{¶23} Appellant's third attorney entered an appearance and appealed the judgment denying his pre-sentence motion to withdraw his plea agreement to this court. We dismissed his appeal as lacking a final appealable order. (November 3, 2021 Judgment Entry.)

{¶24} The trial court set the case for sentencing, and Appellant moved to reconsider its decision overruling his pre-sentence motion to withdraw his plea.

(November 12, 2021 Motion for Reconsideration.) His third attorney also filed a motion to compel discovery, indicating the prosecutor refused to duplicate evidence on compact disks. This motion was sustained in part. (November 29, 2021 Tr. 12.) Sentencing was scheduled for December 13, 2021, before being continued.

{¶25} On January 6, 2022, Appellant again moved to withdraw his plea and also requested the court dismiss the charges against him under Crim.R. 48(B). Appellant again contended there was no evidence showing his vehicle struck the police cruisers and no evidence he had illegal drugs in his possession. Thus, he claimed there should have been no drug charges and no felonious assault charges. He claimed he should have only been charged with failure to comply. (January 6, 2022 Combined Motion to Dismiss and Motion to Withdraw Plea.)

{¶26} The state opposed and Appellant filed a reply. In Appellant's Reply, he argued for the first time that his plea agreement was defective. Appellant urged the court to dismiss the charges and/or allow him to withdraw his plea, contending the filed part of the plea agreement does not incorporate or reference Exhibit A, the Addendum filed under seal. He also claimed the filed part of his plea agreement is incomplete and does not mention or resolve the remaining five charges, and it was signed by the parties and the trial court judge, whereas the Addendum is not signed by the trial court. (January 13, 2022 Reply.)

{¶27} This motion was heard at a January 13, 2022 hearing and subsequently overruled based in part on defense counsel's failure to appear. (January 14, 2022 Judgment.) Appellant's counsel moved the court to reconsider its decision, alleging that while on the way to the hearing his driver became ill. Counsel submitted an affidavit and exhibit in support of his claim that his office contacted the court before it was scheduled to begin at 10:00 a.m.; and he arrived at the court at 10:17 a.m., but the court overruled his motion to reconsider at 10:04 a.m. (January 14, 2022 Motion to Reconsider and Reschedule Hearing.)

{¶28} Appellant then sought to have the trial court judge disqualified via an application and affidavit filed with the Ohio Supreme Court, which it denied. (January 26, 2022 Judgment Entry and Decision.)

{¶29} Appellant's motion to reconsider was heard on February 15, 2022 and overruled. During this hearing, Appellant's counsel asked the trial court to dismiss the charges under Crim.R. 48(B) because justice required dismissal in light of newly discovered evidence, i.e., the officer identified as the victim in Appellant's felonious assault charge to which he had pled guilty allegedly denied the incident occurred. (February 15, 2022 Tr. 5-9.) The state's opposition focused on the fact that Appellant absconded for four years after he entered his plea agreement. The state argued his flight indicates guilt. (Tr. 11.) The court overruled the motion to reconsider. (Tr. 14.)

{¶30} On February 24, 2022, Appellant filed a motion seeking an in camera hearing regarding the plea agreement. This motion avers Appellant "fulfilled his contractual obligations prior to his 4-year absence." (February 24, 2022 Motion for In Camera Hearing.)

{¶31} Per the court's subsequent judgment, dated February 25, 2022, an in camera hearing was held at the beginning of sentencing and certain documents were filed under seal. The documents filed under seal include a copy of the filed plea agreement, a copy of the plea Addendum, and an email to Appellant's attorney dated February 24, 2022, which references another criminal case number and another individual's name.

{¶32} During the in camera hearing, defense counsel urged the court to consider that Appellant had satisfied his end of the agreement and completed two purchases of illegal drugs during the specified period and he only absconded afterward because he was identified in his community as an informant. Appellant claimed this identification caused multiple threats on his family and allegedly resulted in his daughter's rape. Defense counsel also proffered evidence allegedly showing Appellant did not commit the charged offenses. In response, the state did not challenge whether Appellant completed the two illegal drug purchases but claimed he did not make himself available for the prosecution in connection with these drug buys. (February 25, 2022 Tr.) After the in camera aspect of the hearing, the court held Appellant's sentencing hearing. The court issued its sentencing decision on February 28, 2022 and sentenced him to eight years in prison.

{¶33} After he was sentenced, Appellant again moved to withdraw his plea, contending his prior attorney withheld the BCI results from him, which established he had no illegal drugs. He also alleged this same attorney erroneously convinced him to plead guilty and, consistent with his prior argument, the officer whose vehicle was allegedly struck by the Appellant's vehicle had since agreed it did not occur. (March 10, 2022 Post-Sentence Motion to Withdraw Guilty Plea.) The trial court overruled Appellant's post-sentence motion to withdraw his plea without a hearing. (March 14, 2022 Judgment.)

{¶34} Appellant appealed the trial court's sentencing decision and raises three assigned errors.

First Assignment of Error: Validity of Plea Agreement

{¶35} Appellant's first assignment of error asserts:

"The trial court erred by finding Appellant guilty based on an invalid plea agreement and an involuntary plea. (T.p. May 5, 2017, 9)."

{¶36} Appellant argues the court erred in accepting his plea and convicting him of felonious assault because his plea was involuntary and constitutes a due process violation. He claims the state's promises in the plea agreement were illusory, there was a lack of mutual assent sufficient to constitute an enforceable agreement, and there was a lack of consideration.

{¶37} Appellant did not raise these precise arguments to the trial court, but he generally challenged the viability of the plea agreement and the Addendum filed under seal before his sentencing. He alleged the Addendum was not referenced in the filed plea agreement and the filed plea agreement was incomplete. Appellant also alleged he had satisfied his obligations under the cooperation agreement before he absconded. (February 24, 2022 Motion for In Camera Hearing.)

{¶38} As stated, the at issue aspects of Appellant's plea agreement are contained in Exhibit A, the Addendum filed under seal. It states it is an agreement between the prosecuting attorney, appellant, and appellant's defense attorney at the time. It also provides in part:

> By agreement of the parties, further proceedings relating to this matter shall be heard at a future date not less than three (3) weeks from the entry of the Defendant's ~~conditional~~ [sic] guilty plea, as set forth herein.

By agreement of the parties, following the Defendant's "guilty" plea as set forth herein, the Court will release the Defendant on his own recognizance until such time as he is directed to return, at a future date, for further proceedings on the matter.

On that future date, not less than three weeks from the entry of his ~~conditional~~ [sic] "guilty" plea, the Defendant *will be permitted to withdraw his "guilty" plea and plead anew to a lesser charged felony offense;* or in the alternative, *the State of Ohio shall amend the charge to a lesser charged felony offense,* which, in either situation, *the lower level offense shall be mutually agreeable amongst the parties in light of what the Defendant accomplishes pursuant to this agreement,* which shall encompass the following responsibilities on his part:

(1) The Defendant will make himself available and cooperate with law enforcement agencies in their investigation of certain individuals, to be named by law enforcement agencies, for a period of not less than three (3) weeks.

* * *

The Defendant understands that his failure to comply with each and every term of this agreement shall result in the termination of the Agreement, and the Court will be free to sentence the Defendant as to his "guilty" plea, above.

The Defendant understands and agrees that he cannot rescind his "guilty" plea on the basis of his failure to comply with any provision of this agreement.

* * *

The State of Ohio leaves sentencing to the sole discretion of the Court.

The *State of Ohio further agrees to dismiss the remaining counts of the Indictment* with prejudice.

It is agreed that any provision of this Agreement that is questioned by the Defendant or the State of Ohio will be interpreted and, ultimately,

> decided by the Court and that no future disagreement about any or all provisions contained within this Agreement will serve to nullify the Agreement.
>
> Any provision of this Agreement that is, either, voided or altered by the Court will not void or alter any of the provision(s) contained herein.
>
> Any alteration of this Agreement can only be done by the parties in writing and on the record or by the Court in a scheduled Court proceeding.

(Emphasis added.) (Exhibit A, May 5, 2017 Addendum.) The word "conditional" is crossed out three times in the Addendum, with the initials "LJ" next to each. (Exhibit A, May 5, 2017 Addendum.)

{¶39} The essence of the Addendum is that Appellant will cooperate with police for three weeks and if the state is satisfied with his cooperation efforts, the state agreed to allow Appellant to withdraw his guilty plea and enter a plea to a lesser charged felony, or the state will amend the charge to one of the lesser charged felony offenses. The Addendum states Appellant's failure to comply with the terms invalidates the agreement, and he cannot rescind his guilty plea based on his failure to comply. (Exhibit A, May 5, 2017 Addendum.)

{¶40} Appellant's arguments spring from the Tenth District's decision in *State v. Aponte*, 145 Ohio App.3d 607, 615, 763 N.E.2d 1205 (10th Dist.2001). The appellant in *Aponte* argued for the first time in his application for reopening that his plea agreement was invalid because it gave unilateral authority to the prosecutor to determine when the terms of the agreement had been fulfilled, and it stated the prosecutor would allow the defendant to withdraw his guilty plea and allow him to plead to reduced felony charges, a promise the prosecutor lacked the authority to make. *Id*. at 612-613. The Tenth District Court of Appeals agreed. It granted Appellant's application for reopening; found he was denied the effective assistance of appellate counsel; and vacated the trial court's judgment and remanded to allow Aponte to withdraw his guilty pleas. The *Aponte* Court noted that of the prosecutor's two unfulfillable promises, its promise agreeing to allow the defendant to withdraw his guilty plea, a decision which rests within the sole discretion of the trial court, was of "greater concern." *Id.*

{¶41} Like the defendant in *Aponte*, Appellant seeks to withdraw his guilty plea since he claims the state's promises therein were illusory, unenforceable, and consequently violative of his right to due process.

{¶42} Contract law principles generally govern and dictate the interpretation and enforcement of plea agreements. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50. The "essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). Whether there is consideration is a question of law for the court to decide. *Williams v. Ormsby,* 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 17.

> Although plea agreements are contractual in nature, a defendant's underlying right of contract is constitutional, and therefore implicates concerns in addition to those pertaining to the formation and interpretation of commercial contracts between private parties. Therefore, "[b]oth constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in the plea agreements."
>
> [*United States v. Johnson*, 979 F.2d 396, 399 (6th Cir.1992)] (citations omitted). Among the constitutional concerns referred to are those pertaining to the due process clause of the Fifth Amendment.

United States v. Randolph, 230 F.3d 243, 249, 2000 Fed.App. 0273P (6th Cir.2000).

{¶43} "Plea agreements are an essential and necessary part of the administration of justice." *State v. Carpenter*, 68 Ohio St.3d 59, 61, 623 N.E.2d 66 (1993), quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495 (1971).

> [Plea bargaining] produces prompt adjudication of many criminal prosecutions, thus reducing the period of pre-trial detention for those unable to make bail and permitting more extensive consideration of the appropriate disposition. These benefits flow, however, from the defendant's waiver of

> almost all the constitutional rights we deem fundamental. There must accordingly be safeguards to insure that the waiver is knowledgeable, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and voluntary, *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962).

Correale v. United States, 479 F.2d 944, 947 (1st Cir.1973).

{¶44} A guilty plea that is not knowing, intelligent, and voluntary does not comport with due process and violates the Ohio and United States Constitutions. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996), citing *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582 (1927). "Because the defendant's constitutional rights are at stake in the plea process, the concerns underlying a plea agreement differ from and go beyond those of commercial contract law." *State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 21, citing *Carpenter,* 68 Ohio St.3d at 61, 623 N.E.2d 66.

{¶45} "[W]hen 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." *Koresjza v. Harry*, 6th Cir. No. 16-2316, 2017 WL 6375583, *3, quoting *Santobello v. New York*, *supra*, at 261-62.

{¶46} Generally, a contract is improperly based on an "illusory promise" when one party, particularly the state, retains "an unlimited right to determine the nature or extent of his performance * * *." *Aponte*, *supra*, at 612-613.

{¶47} "[A] contract is illusory * * * when by its terms the promisor retains an unlimited right to determine the nature or extent of his performance; the unlimited right, in effect, destroys his promise and thus makes it merely illusory. 1 *Williston on Contracts* (3 Ed. 1957) 140, Section 43." *Century 21 Am. Landmark, Inc. v. McIntyre*, 68 Ohio App.2d 126, 129-30, 427 N.E.2d 534 (1st Dist.1980).

> Where an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration. Even if it were recognized by law, it would impose no obligation, since the promisor always has it within his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee.

> In such cases, where the promisor may perform or not, solely on the condition of his whim, his promise will not serve as consideration.

3 *Williston on Contracts*, Section 7:7 (4th Ed.2022).

{¶48} The inducement of a guilty plea, in part, by a prosecutor's promise that is illegal or otherwise unenforceable "negates the requisite voluntary and knowing character of the plea and thus voids the plea." *State v. Bowen*, 52 Ohio St.2d 27, 368 N.E.2d 843 (1977), syllabus (voiding a plea agreement induced in part by the prosecutor's agreement to recommend concurrent sentences when the governing statute required consecutive sentences.)

{¶49} In *Aponte,* the defendant entered a plea agreement in which he agreed to provide the state with information in exchange for being allowed to withdraw his guilty plea at a later time. The court found this was an "illusory promise" since the withdrawal of a guilty plea is subject to the sole discretion of the trial court, not the state or prosecutor. *Id.* Moreover, the extent of Aponte's required cooperation under his plea agreement was not set forth in definite terms, allowing the state to unilaterally decide if the defendant's obligation was met. *Id.*

{¶50} Here, there are strikingly similar problems with the state's promises in Appellant's plea agreement Addendum. First, the state promised to allow Appellant to withdraw his plea. This is an unfulfillable promise as it was not within the prosecutor's authority; instead, this power rests in the trial court. *Aponte*, *supra*, at 613, citing *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715, paragraph two of the syllabus (1992). "That the prosecutor lacked the power to implement the [promise] made it an 'unfulfillable' promise condemned by *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)." *United States v. Hammerman*, 528 F.2d 326, 330-31 (4th Cir.1975); *accord State v. Mays*, 3rd Dist. Marion No. 9-83-30, 1985 WL 9093 (March 15, 1985) (finding the plea involuntary and void because the state promised the defendant he would serve his sentence at a certain prison, which was a promise that was not performable and unfulfillable since it was contrary to a statutory provision).

{¶51} Second, the plea agreement was drafted in such a manner that one cannot ascertain what Appellant was required to do to satisfy his cooperation agreement. Although the Addendum states he was to cooperate for three weeks, there are no details

sufficient to enable us to determine what constitutes Appellant's compliance, which would in turn trigger the state's promise to allow him to withdraw his plea and plead to a lesser charged felony.

{¶52} In support of this argument, Appellant directs our attention to the prosecutor's statement at the plea hearing indicating future meetings were required so the parties could "hammer out a couple things, as far as the cooperation goes." (May 5, 2017 Tr. 12.) Moreover, Appellant contends he satisfied his obligation under the Addendum and completed two controlled "drug buys" during the three-week period.

{¶53} Like that in *Aponte*, the plea agreement here is drafted in such a manner that the prosecution seemingly had unilateral authority to determine when and if Appellant's cooperation was sufficient. Based on the unfulfillable state's promises, including the prosecution's lack of authority to do what it promised and its discretion to determine when and if Appellant's obligations under the agreement were satisfied, we must conclude these promises induced Appellant's reliance, and were essential elements of the plea agreement. "It does not matter that the * * * promise was made in good faith; what matters is it was probably relied upon, was not fulfilled and was unfulfillable." *United States v. Hammerman*, 528 F.2d 326, 330-31 (4th Cir.1975), citing *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *Correale v. United States, supra*.

{¶54} For these reasons, we conclude the prosecution's promises were illusory, and as such, the plea agreement lacks consideration and is invalid, is not knowing and voluntary, and does not comport with due process. *See State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). "There is thus no bargain which can be enforced. This is not a case where the prosecution promised there would be no further criminal process—something within its power to control." *United States v. Hammerman*, 528 F.2d 326, 330-332 (4th Cir.1975) (vacating plea induced in part by prosecutor's unfulfillable promise and finding no bargain that could be enforced).

{¶55} Consequently, we vacate Appellant's conviction and reverse and remand with instructions that Appellant be allowed to withdraw his guilty plea. *Aponte*, supra. In addition, the proceedings on remand should be conducted by a trial court judge who has not participated in the prior proceedings. *Hammerman*, *supra*, at 331, citing *Santobello*

v. New York, *supra*, at 262-63; *Mawson v. United States*, 463 F.2d 29, 31 (1st Cir.1972) (noting the defendant should be resentenced by a different judge "both for the judge's sake, and the appearance of justice * * *."); *United States v. Brown*, 500 F.2d 375, 378 (4th Cir.1974).

{¶56} As for the state's arguments to the contrary, it first contends that regardless, the contract had other valid consideration, i.e., the dismissal of the remaining five charges. The dismissal of a criminal charge is consideration for a plea agreement. *State v. Miller,* 7th Dist. Jefferson No. 98-JE-51, 2001 WL 1155853, *4 (Sept. 26, 2001); *State v. McMahon*, 2nd Dist. Clark No. 2014-CA-98, 2015-Ohio-2878, ¶ 22. In a commercial setting, a reviewing court addressing a comparable contract would likely invalidate the offending provisions upon finding other valid considerations. However, this cannot occur here in light of the fundamental legal rights Appellant gave up upon entering the plea agreement and the United State Supreme Court's pronouncement on the topic: "[W]hen 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." *Santobello v. New York*, *supra*, at 262.

{¶57} The state also argues Appellant's failure to appear at sentencing and failure to cooperate in the presentence investigation violated the agreement and invalidates his arguments. We agree that generally a defendant's failure to cooperate and failure to appear constitute a breach of the plea agreement. However, the cases the state relies on for these legal propositions do not involve plea agreements containing otherwise illusory and unfulfillable promises by the state. *See State v. Smith*, 8th Dist. Cuyahoga No. 107654, 2019-Ohio-2915, ¶ 20, and *State v. Snell*, 6th Dist. Wood No. WD-18-004, 2019-Ohio-1033, ¶ 13.

{¶58} Based on the foregoing, Appellant's first assignment of error has merit, and his remaining two assigned errors are moot. App.R. 12(A)(1)(c).

Conclusion

{¶59} Based on the foregoing, Appellant's first assignment of error has merit. We vacate Appellant's conviction and reverse and remand with instructions that Appellant be allowed to withdraw his guilty plea. In addition, the proceedings on remand should be

conducted by a trial court judge who has not participated in the prior proceedings. As a result, Appellant's second and third assignments are moot.

Waite, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is reversed. We hereby vacate Appellants conviction and remand this matter to the trial court with instructions that Appellant be allowed to withdraw his guilty plea. In addition, the proceedings on remand should be conducted by a trial court judge who has not participated in the prior proceedings, according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.