

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1148

Appellee

Trial Court No. CR08-1966

v.

Thomas Sabath, II

DECISION AND JUDGMENT

Appellant

Decided: October 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which found appellant guilty, pursuant to a negotiated plea agreement, of one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), a felony of the

fourth degree. Following a presentence investigation report, appellant was sentenced to a term of incarceration of 15 months. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Thomas Sabath II, sets forth the following three assignments of error:

{¶ 3} "I. THE STATE VIOLATED THE PLEA AGREEMENT

{¶ 4} "II. IT CONSTITUTED ERROR TO IMPOSE THE REGISTRATION REQUIREMENTS PROVIDED FOR IN THE ADAM WALSH ACT (S.B. 10) WHICH WAS NOT IN EFFECT AT THE TIME OF THE OFFENSE FOR WHICH APPELLANT WAS CONVICTED

{¶ 5} "III. APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING."

{¶ 6} The following undisputed facts are relevant to the issues raised on appeal. This case stems from an incident occurring on April 21, 2007, in Oregon, Ohio. The Oregon Police Department responded to a call for service to investigate a report of an underage alcohol party. Upon arrival at the premises, the police discovered multiple underage persons exhibiting indicia of extreme alcohol intoxication. Several teenage females were transported for emergency medical treatment based upon suspected alcohol poisoning, including the 15 year-old victim in this case.

{¶ 7} During the victim's examination and treatment, medical personnel discovered a multitude of bruise marks upon her neck, breasts, and stomach. Appellant, a 19 year-old attendee of this party, confessed to performing various sexual acts upon the victim, whom he was aware was 15 years-old, while she was highly intoxicated and during which she passed out.

{¶ 8} On July 27, 2007, appellant was indicted on one count of sexual battery, in violation of R.C. 2907.03, a felony of the third degree, and one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, a felony of the fourth degree.

{¶ 9} On April 30, 2008, appellant entered a negotiated plea of no contest to the lesser offense of unlawful sexual conduct with a minor in exchange for dismissal of the higher level offense charged against him. This voluntary plea agreement was reduced to writing, thoroughly reviewed with appellant on the record, and executed by appellant. Significantly, the record reflects that prior to imposing sentence, the trial court specifically advised appellant that the plea agreement would entail classification and registration as a Tier II sex offender. The trial court informed appellant of all that would be required of him in conjunction with that classification.

{¶ 10} Following the trial court's detailed colloquy with appellant, a no contest plea was entered and accepted by the court. Pursuant to the terms of the written plea agreement, the prosecution made a statement to the court delineating the evidence that would have been presented against appellant at trial. A presentence investigation report

was conducted. Appellant was sentenced to a term of incarceration of 15 months.

Timely notice of appeal was filed.

{¶ 11} In his first assignment of error, appellant asserts that the trial court violated the plea agreement underlying this case. In support, appellant relies on two primary arguments. First, appellant contends that the state violated its agreement not to oppose community control for appellant. While appellant concedes that the state did not oppose community control, and the record reflects that the trial judge acknowledged that the state was not opposed to community control, appellant nevertheless asserts that the state should have affirmatively recommended community control. Second, appellant asserts that the state violated the plea agreement by conveying, "a floridly lurid description of the offense conduct" at sentencing.

{¶ 12} It is well-established that principles of contract law are applicable to the interpretation and enforcement of criminal plea agreements. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853. Any provisions of the plea agreement determined to be ambiguous are to be construed against the state. *Bethel*, ¶ 52. An agreement is ambiguous if it is subject to more than one reasonable interpretation. *Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1990), 52 Ohio St.3d 174, 177.

{¶ 13} We have carefully reviewed the record of evidence, paying particular attention to the written plea agreement for purposes of assessing the veracity of appellant's first assignment of error. The written plea agreement contains no provision

from which it can be conceivably construed that a term of the agreement required the prosecution to affirmatively recommend community control rather than state its lack of opposition to same. Likewise, there is no other evidence in the record suggesting such a term was incorporated into the plea agreement. The sentencing transcript reflects that the trial court clearly confirmed on the record its knowledge that the state did not oppose community control. As such, the record establishes that the state abided by its agreement not to oppose community control.

{¶ 14} We have thoroughly reviewed and considered the portion of the sentencing transcript during which the state made its statement detailing the evidence which would have been presented at trial. This statement was specifically authorized by the written plea agreement. More importantly, the record reflects that the content of the statement was factual and objective, not subjectively gratuitous as suggested by appellant. The statement of evidence detailing what would have been presented at trial did not violate the terms or the spirit of the plea agreement. On the contrary, it was made in conformity with the plea agreement. Based upon all of the foregoing, we find appellant's first assignment of error not well-taken.

{¶ 15} In appellant's second assignment of error, it is argued that the trial court erred in imposing the sexual offender registration requirements set forth in S.B. 10 upon appellant. In support, appellant maintains that although the effective date of S.B. 10 was

prior to the sentencing, it was after the date of the original offense and thus should be construed as an improper ex post facto law.

{¶ 16} This court has repeatedly entertained and rejected the S.B. 10 ex post facto argument proffered by appellant. As determined by this court on this precise issue in a case likewise involving unlawful sexual conduct with a minor and a Tier II sexual offender classification, the amendments to the sexual offender registration requirements were civil and remedial in nature. As such, retroactive application of the amendments does not violate federal or state constitutional prohibitions against ex post facto or retroactive laws. *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397. We find appellant's second assignment of error not well-taken.

{¶ 17} In appellant's third assignment of error, the bases of the first two assignments are restated in the context of a third, supplemental assignment of error. This final assignment alleges that it constituted ineffective assistance of counsel to fail to object to the alleged breaches of the plea agreement and to the imposition of S.B. 10 sexual offender registration requirements.

{¶ 18} It is well-established that in order to prevail on a claim of ineffective assistance of counsel, one must establish both that the trial counsel's performance was deficient so as to fall below an objective standard of reasonableness and, simultaneously, establish a reasonable probability that, but for the deficient performance, the outcome would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. Given our

rejection of appellant's first two assignments of error, finding that the plea agreement was not breached and that the imposition of S.B. sexual offender registration requirements was proper, a substantively linked claim of ineffective assistance of counsel based upon these same rejected allegations is without merit. On the same grounds set forth in response to appellant's first two assignments of error, we find appellant's third assignment of error not well-taken.

{¶ 19} On consideration whereof, we find that substantial justice has been done. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

Charles D. Abood, J.
CONCUR.

JUDGE

JUDGE

Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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