



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-17-00169-CR

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**MARIO BECERRA, APPELLANT**

**V.**

**THE STATE OF TEXAS, APPELLEE**

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On Appeal from the 137th District Court  
Lubbock County, Texas  
Trial Court No. 2016-409,387, Honorable Bradley S. Underwood,<sup>1</sup> Presiding

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October 24, 2018

**MEMORANDUM OPINION**

**Before QUINN, C.J., and CAMPBELL and PARKER, JJ.**

Appellant, Mario Becerra, contends the trial court erred in overruling his request to enforce a plea bargain offer that was revoked by the State prior to acceptance by appellant. We affirm the judgment of the trial court.

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<sup>1</sup> Senior District Judge sitting by assignment.

## Factual and Procedural Background

Appellant was indicted for the offense of failure to register as a sex offender.<sup>2</sup> The State made a plea bargain offer of three years' imprisonment, but this offer was rejected by appellant and, consequently, revoked by the State. As trial approached, appellant asked his counsel whether the State would reopen the three-year offer. On Thursday morning, April 27, 2017, counsel met with the case prosecutors. Upon trial counsel's request, the State agreed to reopen the three-year offer "until the end of the day." Counsel was unable to make immediate contact with appellant, so he decided to wait until after lunch and try again. However, during lunch, the lead prosecutor sent appellant's counsel an e-mail indicating that the State was no longer willing to reopen the three-year offer. After receiving the State's e-mail, counsel drove to the jail to contact appellant who indicated that he wanted to accept the State's three-year offer. Counsel left a message with the prosecutor accepting the offer.

The case was called for trial on Monday, May 1, 2017. Appellant's counsel put the above facts into the record and argued that the State had given appellant an option contract that allowed him to accept the three-year offer before the end of the day and appellant did accept the offer within that period. After hearing argument on the issue, the trial court denied appellant's request to enforce the State's offer of three years' incarceration. Appellant then entered an open plea of guilty and, after hearing punishment evidence, the trial court sentenced appellant to five years' incarceration.

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<sup>2</sup> See TEX. CODE CRIM. PROC. ANN. art. 62.051 (West 2018).

## Standard of Review

The trial court's refusal to order the State to comply with a plea bargain is reviewed under an abuse of discretion standard. See *Easter v. State*, 740 S.W.2d 107, 110 (Tex. App.—Amarillo 1987, no writ). We view the record in the light most favorable to the trial court's conclusion and reverse the judgment only if it is outside the zone of reasonable disagreement. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.*

## Analysis

Appellant contends that the State created a binding verbal option contract<sup>3</sup> when it made its three-year offer and expressly indicated that the offer would remain open until the end of the day. While appellant acknowledges that the State can ordinarily withdraw offers at any time prior to the offer's acceptance by the trial court, he contends that the present case is different because the offer was made four days before trial and it was withdrawn in the absence of any newly discovered evidence justifying reconsideration of the offer.

We cannot agree with appellant that there are special circumstances here that justify the enforcement of an option period.<sup>4</sup> A plea agreement is a three-party contractual

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<sup>3</sup> An option contract has two components: (1) the underlying contract, which is not binding until accepted, and (2) a covenant to hold open to the optionee the opportunity to accept. *Wells v. Dotson*, 261 S.W.3d 275, 280 (Tex. App.—Tyler 2008, no pet.).

<sup>4</sup> There is no record evidence of bad faith on the part of the prosecution, nor is there any evidence that appellant detrimentally relied on the offer. The offer in question was on the table approximately ninety minutes and it was withdrawn before it was communicated to appellant. While the withdrawal of the offer could have prejudiced appellant had he been forced to trial without adequate time to prepare his defense,

arrangement among the State, the defendant, and the trial court. Until all of the necessary parties agree to the terms of the contract, the agreement is not binding. *Ortiz v. State*, 933 S.W.2d 102, 104 (Tex. Crim. App. 1996). Once a plea agreement is reached between the State and the defendant, the trial court must approve the terms of the agreement before it becomes operative. *Bland v. State*, 417 S.W.3d 465, 471-72 (Tex. Crim. App. 2013). The Court of Criminal Appeals and this Court have allowed the State to withdraw a plea agreement as long as the withdrawal occurs prior to acceptance of the plea by the trial court. *Moore v. State*, 295 S.W.3d 329, 332 (Tex. Crim. App. 2009); *Wingfield v. State*, 481 S.W.3d 376, 382 (Tex. App.—Amarillo 2015, pet. ref'd) (State can withdraw offer even if it promised to keep it open until a certain date). The State is permitted to withdraw a plea offer even after it has been accepted by a defendant so long as the plea has not yet been entered and the defendant has not otherwise been harmed by reliance on the agreement. *DeRusse*, 579 S.W.2d at 236; *Purser v. State*, 902 S.W.2d 641, 648-49 (Tex. App.—El Paso 1995, pet. ref'd).

Here, appellant was in the same position he would have been in had no agreement been made or had the trial court indicated that it would not follow the agreement and appellant had withdrawn his plea. See TEX. CODE CRIM. PROC. ANN. art. 26.13 (West Supp. 2018); *DeRusse*, 579 S.W.2d at 236. Further, the trial court did not have the authority to revive the offer. See *Thompson v. State*, 691 S.W.2d 627, 635-36 (Tex. Crim. App. 1984) (en banc) (recognizing trial court cannot enforce plea bargain if no agreement reached between prosecutor and defendant). Because appellant has not shown how he

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appellant did not seek a continuance in this case. *DeRusse v. State*, 579 S.W.2d 224, 236 (Tex. Crim. App. [Panel Op.] 1979).

was harmed by the State's withdrawal of the plea offer, the State's withdrawal of the offer prior to its entry was not error. See *DeRusse*, 579 S.W.2d at 236.

### Conclusion

Finding no error, we affirm the judgment of the trial court.

Judy C. Parker  
Justice

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