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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JASON RAY TYLER, Petitioner.	)	2 CA-CR 2008-0139-PR 2 CA-CR 2008-0333-PR (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITIONS FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20051017; CR-20051760; CR-20053687; CR-20054669; CR-20061380

Honorable Richard Nichols, Judge
Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 In these consolidated petitions for review, petitioner Jason Ray Tyler contends the trial judges erred in denying his two of-right petitions for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., following his guilty pleas in Pima County Superior Court cause numbers CR-20051017, CR-20051760, CR-20053687, CR-20054669 (collectively, the "2005 charges"), and CR-20061380 (the "2006 charge").

Factual and Procedural Background

First Indictment and Guilty Plea

¶2 In February 2006, pursuant to a plea agreement with the Pima County Attorney, Tyler pled guilty to four felony offenses under separate cause numbers (the "2005 plea agreement"). In CR-20051017, Tyler pled guilty to possession of a dangerous drug for sale and was sentenced to a partially aggravated, twenty-year prison term. In CR-20051760, he pled guilty to transportation of a dangerous drug for sale and was sentenced to an aggravated, ten-year term of imprisonment. In CR-20054669, he pled guilty to possession of a deadly weapon by a prohibited possessor and was sentenced to an aggravated, three-year prison term. In CR-20053687, he pled guilty to facilitation to a fraudulent scheme and artifice and was sentenced to a one-year prison term. The trial court ordered all of the sentences to be served concurrently.

Second Indictment and Guilty Plea

¶3 Approximately one month after Tyler had been sentenced for those crimes, the Arizona Attorney General filed in Pima County Superior Court an indictment under cause number CR-20061380, charging Tyler with conspiracy and twenty-two counts of forgery.

Tyler filed a motion to dismiss the indictment, arguing the state had breached the plea agreement covering the 2005 charges by charging him with crimes that had arisen out of the same conduct charged in one of them, CR-20053687, and therefore allowing the case to proceed would violate his due process rights. He also argued the 2006 charge violated his double jeopardy rights.

¶4 Before the trial court ruled on that motion, however, Tyler withdrew it,[1] accepted a plea agreement, and pled guilty to the conspiracy count (the "2006 plea agreement"). The court sentenced Tyler to an aggravated, twelve-year prison term that, consistent with the plea agreement, was to be served concurrently with his sentences imposed pursuant to the 2005 plea agreement.

First Petition for Post-Conviction Relief

¶5 After pleading guilty, but before his sentencing in CR-20061380, Tyler filed a petition for post-conviction relief under the 2005 cause numbers. The petition was assigned to Judge Richard Nichols. In his petition, Tyler asserted that, before the first trial court had accepted the 2005 plea agreement, the state had orally agreed it would not file additional charges against him related to the same subject matter. Thus, Tyler reasoned, the state had violated the 2005 plea agreement by bringing the 2006 charge, because it relied on the same facts forming the basis of his guilty plea to one of the 2005 charges, CR-20053687.

[1]The state apparently conditioned its offer of a plea agreement in the case on Tyler's withdrawal of his motion to dismiss.

Tyler requested that the trial court "vacate his conviction and sentence," but without specifying to which conviction and sentence he was referring.

¶6 Judge Nichols held an evidentiary hearing, after which Tyler filed a "Relief Memorandum" that, as we understand it, asked Judge Nichols to set aside the 2005 plea agreement and dismiss the 2005 charges with prejudice. In his ruling, Judge Nichols found the state had "assur[ed]" Tyler "that no other charges arising from the course of conduct which led to the cases in which the defendant was pleading guilty would be filed against him." Judge Nichols concluded the 2006 charge involved the same course of conduct, and, therefore, the state had breached a material term of the 2005 plea agreement. Judge Nichols, however, ultimately denied relief, determining that Tyler's decision to withdraw "his cause of action concerning the breach," and instead pleading guilty to conspiracy, foreclosed relief. Judge Nichols reasoned:

> A major term of this second guilty plea agreement [related to the 2006 charge] was that this sentence was to be concurrent with the sentences in the [2005] cases which [Tyler] now seeks to set aside. This, in the Court's view, incorporates the cases into the agreement and accepts and validates them. Moreover, [in the 2006 plea agreement,] [Tyler] agree[d] to give up any motions[,] defenses[,] or other matters he ha[d] asserted or could assert in this (the new) case. This language covers his assertion that the filing of this (the new) case was a breach of a material term of his previous case. Once that assertion is waived in the new case, it is waived in the previous cases as well.

Second Petition for Post-Conviction Relief

¶7 Tyler then filed a petition for post-conviction relief in CR-20061380. That petition was assigned to Judge Nanette Warner. Tyler argued that, based on Judge Nichols's

finding that the 2006 charge and his 2005 plea agreement regarding CR-20053687 were based on the same course of conduct, double jeopardy barred the subsequent prosecution. He additionally argued, based on Judge Nichols's finding the state had breached the plea agreement resolving the 2005 charges, that the state had violated his due process rights. Tyler requested that Judge Warner vacate his conviction and sentence in CR-20061380.

¶8 After denying Tyler's alternative request to hold an evidentiary hearing, Judge Warner denied relief. Judge Warner determined she was not bound by Judge Nichols's findings because Tyler had not argued in the petition for post-conviction relief regarding the 2005 charges that there had been "a violation of [his] due process or his double jeopardy rights." After reviewing the evidence that had been presented at the evidentiary hearing held by Judge Nichols, Judge Warner rejected Tyler's contention that the state had agreed not to charge him with additional crimes related to the same events underlying the 2005 charges.

¶9 Judge Warner also concluded that, even if the state had made the promise Tyler asserted it had, the 2006 charge did not breach the 2005 plea agreement because the facts underlying the 2005 charges in the two cases were distinct from those upon which the 2006 charge was based. Judge Warner additionally found no double jeopardy violation and that, in any event, Tyler had waived that claim by pleading guilty in CR-20061380.

Discussion

¶10 In his petition for review of Judge Nichols's denial of his petition for post-conviction relief, Tyler argues that, once Judge Nichols determined the state had breached the 2005 plea agreement, the court was required to vacate his convictions and sentences and

either: (1) require specific performance of the 2005 plea agreement, that is, require the state to dismiss the 2006 charge, or (2) give Tyler the option to proceed to trial on the 2005 charges. In his petition for review of Judge Warner's decision, he makes similar arguments, asserting his conviction and sentence on the 2006 charge should be vacated because the state had breached the 2005 plea agreement and that any waiver of his constitutional rights or rights under the 2006 plea agreement was ineffective because "the Double Jeopardy Clause . . . prevent[ed] the State from bringing the charges [in CR-20061380] against him." On review, we will not disturb the judges' decisions absent a clear abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶11 Generally, a defendant may not collaterally attack a "counseled and voluntary" guilty plea. *See United States v. Broce*, 488 U.S. 563, 569 (1989). But a defendant may collaterally attack a guilty plea where the state has breached a material provision of the plea agreement. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971); *State v. Georgeoff*, 163 Ariz. 434, 435, 788 P.2d 1185, 1186 (1990). In *Santobello*, pursuant to a plea agreement, the state had agreed it would not make a sentence recommendation. 404 U.S. at 259, 262. After the defendant had accepted the agreement and entered a guilty plea, the state at sentencing nonetheless requested, and the trial court imposed, the maximum prison term. *Id.* at 259-60. The Court determined the state's promise to make no such recommendation "must be fulfilled" because it "can be said to be part of the inducement or consideration" of the plea agreement. *Id.* at 262. Therefore, the Court remanded the case to the trial court to determine, in its discretion, the "ultimate relief to which the petitioner is entitled," *id.* at 263,

that is, whether "there [should] be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether . . . the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty." *Id.*

¶12 Of course, *Santobello* presents a far different scenario than Tyler's. As we noted above, Tyler did not pursue his motion to dismiss the 2006 charge, but instead—voluntarily and with the assistance of counsel—pled guilty to the very charge he was contending the state was not permitted to allege. Judge Nichols found this conduct "accept[ed] and validate[d]" the 2005 plea agreement—essentially, a determination that Tyler had, by entering into the 2006 plea agreement, waived any objection to the state's alleged breach of the 2005 plea agreement. Similarly, Judge Warner found Tyler had waived not only enforcement of the 2005 plea agreement's alleged provision prohibiting the state from bringing charges based on the same conduct, but also any applicable double jeopardy protection.[2]

¶13 Assuming, without deciding, that the state's bringing the 2006 charge violated a term of the 2005 plea agreement, we agree with both judges' determinations that Tyler waived any claim that it did. Despite Tyler's assertion that *Santobello* "control[s]" the outcome here, nothing in that opinion precludes a finding that a defendant may waive the

[2]Tyler does not squarely address the apparent conflict between Judge Nichols's and Judge Warner's rulings regarding whether the state had agreed to not charge Tyler with any crimes arising out of the same conduct. We need not address any conflict in those rulings, however, because, as we explain, Tyler has waived both the first plea agreement's provisions and his double jeopardy rights.

state's breach of a plea agreement. "Plea agreements are contractual in nature and subject to contract interpretation." *Coy v. Fields*, 200 Ariz. 442, ¶ 9, 27 P.3d 799, 802 (App. 2001). Accordingly, their provisions are subject to waiver. *See, e.g., Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 164, 840 P.2d 1024, 1029 (App. 1992) (party may waive right to enforce contract term). "Waiver is the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right." *City of Tucson v. Koerber*, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957).

¶14 When responding to the 2006 charge, Tyler was aware of his rights under the 2005 plea agreement; indeed, he had filed a motion to dismiss the 2006 charge arguing the state had violated those rights. And Tyler's conduct—pleading guilty to a crime the 2006 charge alleged despite the existence of the 2005 plea agreement that arguably could bar his being charged with that crime—is clearly inconsistent with an intent to enforce that agreement. Finally, the 2006 plea agreement provided that Tyler "gives up any motions, defenses or other matters which he[] has asserted or could assert in this case," which plainly encompasses any defense based on the 2005 plea agreement's terms.

¶15 To the extent Tyler argues his waiver of his rights under the 2005 plea agreement was insufficient, we disagree. He relies on *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), in which the United States Supreme Court concluded it was improper to "[p]resum[e] waiver [of the right to counsel] from a silent record" where the defendant had not requested, nor was he offered, assistance of counsel. *Carnley* is readily distinguishable. First, waiver of the right to counsel raises concerns that are not present when a defendant

waives other constitutional, or contractual, rights. As the Court in *Carnley* observed, presuming a defendant has waived the right to counsel is improper, in part, because the defendant would "ha[ve] no way of protecting against [that presumption] except by requesting counsel." *Id.* at 514. Nor is the record here remotely "silent" on the question of waiver. As we have explained, not only did Tyler take affirmative steps wholly inconsistent with an intent to enforce any rights under the 2005 plea agreement, he expressly waived any such rights or defenses by entering into the 2006 plea agreement.

¶16 Recognizing that waiver of fundamental rights must be express and not implied, *see Quinton v. Superior Court*, 168 Ariz. 545, 549, 815 P.2d 914, 918 (App. 1991), we also agree with Judge Warner that Tyler waived his double jeopardy rights. Tyler abandoned his motion to dismiss that had raised the double jeopardy issue in order to plead guilty—a strategic choice—and entered the 2006 plea agreement waiving all rights and defenses. Nothing in the record suggests this conduct was not voluntary, knowing, and intelligent. *See id.*; *cf. State v. Rodriguez*, 126 Ariz. 28, 34, 612 P.2d 484, 490 (1980) (defendant bound by counsel's strategic waiver of constitutional rights absent "exceptional" circumstances).

¶17 Tyler asserts, however, that any such waiver was "irrelevant" because the Double Jeopardy Clause "prevent[ed] the State from bringing the charges against him initially." He relies on *Blackledge v. Perry*, 417 U.S. 21 (1974), in which the state initially had, in justice court, charged a defendant with misdemeanor assault with a deadly weapon, and the defendant was convicted after a bench trial. *Id.* at 22. While his appeal of that

conviction was pending,[3] the state charged the defendant in superior court with felony assault based on the same conduct that had resulted in his earlier conviction. *Id.* at 23. The defendant pled guilty to the felony charge and was sentenced to a prison term. *Id.* The Supreme Court determined the later charge violated the defendant's due process rights because of the possibility prosecutors might file felony charges against defendants convicted of a misdemeanor offense in order to discourage appeals. *Id.* at 28-29.

¶18 The Court in *Blackledge* then concluded the defendant's guilty plea to the second charge did not preclude him from raising his due process claims in a federal habeas corpus proceeding because it determined he had "the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against him in the Superior Court thus operated to deny [the defendant] due process of law." *Id.* at 30-31. In *Menna v. New York*, 423 U.S. 61, 62 (1975), the Supreme Court applied its holding in *Blackledge* to a possible double jeopardy violation, stating: "Where the State is precluded by [the Double Jeopardy Clause] from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."

¶19 Thus, Tyler reasons, because the 2006 charge violated his double jeopardy rights, the state was not permitted to bring that charge against him and that his waiver—by entering the 2006 plea agreement—of both his rights under the 2005 plea agreement and his

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[3]Under the applicable North Carolina statute, a defendant appealing a justice court conviction was entitled—even absent alleged error—to a new trial in superior court. *Id.*

constitutional rights was therefore of no effect. We agree that *Blackledge* and *Menna* create an exception to the general rule of *Broce* that informed guilty pleas are not subject to collateral attack. *See Broce*, 488 U.S. at 574. We need not decide, however, whether those cases render Tyler's waiver ineffective because the indictment in CR-20061380 does not violate double jeopardy.

¶20 The Double Jeopardy Clause protects criminal defendants from multiple prosecutions, convictions, and punishments for the same offense. *See Lemke v. Rayes*, 213 Ariz. 232, ¶ 10, 141 P.3d 407, 411 (App. 2006); *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000). In applying this test, we look to the elements of the offenses and not to the particular facts that will be used to prove them.[4] *See State v. Price*, 218 Ariz. 311, ¶ 5, 183 P.3d 1279, 1281 (App. 2008); *Lemke*, 213 Ariz. 232, ¶ 16, 141 P.3d at 413. We review de novo Judge Warner's determination that double jeopardy did not bar

[4]Despite Tyler's assertion to the contrary, we do not consider whether there is "a substantial overlap in the proof offered to establish the crimes." Tyler misquotes *Brown v. Ohio*, 432 U.S. 161 (1977), in which the Supreme Court stated the *Blockburger* test is satisfied if each crime requires proof of a fact the other does not, "'*notwithstanding* a substantial overlap in the proof offered to establish the crimes.'" *Id.* at 166, *quoting Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (emphasis added). Prosecution for distinct crimes arising out of the same conduct does not violate double jeopardy. *See Hernandez v. Superior Court*, 179 Ariz. 515, 520, 880 P.2d 735, 740 (App. 1994).

the second indictment. *See Lemke*, 213 Ariz. 232, ¶ 10, 141 P.3d at 411. As we explained above, in one of the 2005 charges, CR-20053687, Tyler pled guilty to facilitation of a fraudulent scheme and artifice. The 2006 indictment charged him with conspiracy and twenty-two counts of forgery. Tyler argues the conspiracy charge is "identical" to the facilitation conviction and therefore would be constitutionally barred.[5]

¶21 Again assuming, arguendo, that the conspiracy charge and facilitation conviction were based on the same acts or transactions, there is no double jeopardy violation because the facilitation and conspiracy charges each have an element the other lacks. To be guilty of facilitation, a person must "act[] with knowledge that another person is committing or intends to commit an offense, [and] . . . knowingly provide[] the other person with means or opportunity for the commission of the offense." A.R.S. § 13-1004(A). Conspiracy requires proof that a person, "with the intent to promote or aid the commission of an offense," "agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense." A.R.S. § 13-1003(A). Thus, conspiracy, unlike facilitation, requires proof of an agreement that the offense would be committed. And facilitation requires proof the defendant acted, that is, that he or she provided the "means or opportunity for the commission of the offense." § 13-1004(A). Conversely, beyond entering an agreement, conspiracy does not require any action by the defendant—only an overt act by any

[5]Tyler does not assert in his petition for review that the individual forgery charges violated his double jeopardy rights.

one of the conspirators. § 13-1003(A). Thus, for double jeopardy purposes, facilitation and conspiracy are not the same offense even if based on the same underlying course of conduct. *See Blockburger*, 284 U.S. at 304.

Disposition

¶22 Although we grant Tyler's petitions for review, for the reasons stated above, we deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge