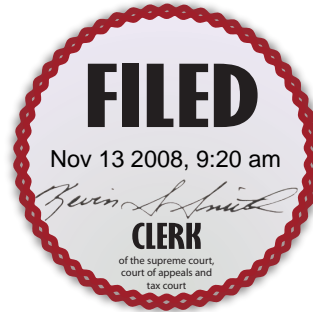


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GAR TERRY, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 13A01-0803-CR-111  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

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APPEAL FROM THE CRAWFORD CIRCUIT COURT  
The Honorable K. Lynn Lopp, Judge  
Cause No. 13C01-0710-FA-6

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**November 13, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Gar Terry appeals the trial court's denial of his motion to dismiss. Terry raises one issue, which we revise and restate as whether the trial court abused its discretion by denying his motion. We affirm.

The relevant facts follow. On or about April 9, 2000, Terry engaged in sexual intercourse with his daughter, M.T., and, on October 19, 2000, he pled guilty to incest as a class C felony pursuant to a plea agreement. The plea agreement provided, under the heading "Other Conditions" in a section containing his conditions of probation, "No additional charges to be filed." Appellant's Appendix at 27. At Terry's change of plea hearing, while the trial court was reading the proposed conditions of Terry's probation from the plea agreement, the following exchange occurred:

Court: . . . And the State agrees not to file any additional charges, I guess arising out of this incident is that correct?

[Prosecutor]: Yes.

Court: Okay, it[']s not just a blanket. It[']s just out of this . . . ?

[Prosecutor]: Yes.

Court: . . . relationship?

[Prosecutor]: Anything, any related charges.

Court: Any related charges? Is that your understanding of the plea agreement?

Terry: Yes.

Court: You understand the Court is not a party to this plea agreement. I have not accepted it nor have I rejected it yet. If I accept it, then I am bound by it. If I reject it, you are not bound by it. . . .

Transcript at 48.

At the sentencing hearing on October 26, 2000, the trial court accepted Terry's guilty plea and sentenced him to eight years with two years and nine months suspended to probation. While reciting the conditions of probation, the trial court repeated, "And no additional charges will be filed out of the allegations that are before, I guess, the Court here today." Id. at 56.

In August 2003, an employee at Crawford County Department of Child Services ("CCDCS") learned of allegations that Terry had sexually abused J.T., one of five children that Terry had fathered with his daughter, M.T. In 2006, CCDCS became aware of allegations that Terry had sexually abused another of his children with M.T. Based on these allegations, the State charged Terry with two counts of child molesting as class A felonies, child molesting as a class B felony, three counts of incest as class B felonies, and vicarious sexual gratification as a class B felony.

On December 17, 2007, Terry filed a motion to dismiss arguing that the State had violated the clause in his plea agreement providing that no additional charges would be filed. At a hearing on the motion, Keith Henderson, the prosecutor who drafted the plea agreement, testified over Terry's objection that, at the time he drafted the agreement, the only other alleged victim of sexual abuse by Terry that Henderson was aware of besides M.T. was D.T., another of Terry's daughters. Henderson testified that he could have filed further charges against Terry concerning M.T. and D.T. and that the clause providing that no additional charges would be filed referred only to Terry's abuse of M.T. and D.T.

Also over Terry's objection, the trial court heard a recording of Terry's change of plea and sentencing hearings in which the trial court clarified the clause at issue.

The trial court denied Terry's motion to dismiss, finding that the provision that no additional charges would be filed was ambiguous and that external evidence presented by the State revealed that the clause referred only to charges arising from the incidents with M.T. and D.T. The trial court also concluded that the provision at issue had been orally modified by the trial court to mean that "no related charges" would be filed. Appellant's Appendix at 21. Terry filed a motion to certify the trial court's order for interlocutory appeal. The trial court certified the order, and we accepted jurisdiction pursuant to Ind. Appellate Rule 14(B).

The issue is whether the trial court abused its discretion by denying Terry's motion to dismiss. We review a trial court's denial of a motion to dismiss for an abuse of discretion. Ingram v. State, 760 N.E.2d 615, 618 (Ind. Ct. App. 2001) (citing Sivels v. State, 741 N.E.2d 1197, 1202 (Ind. 2001); Johnston v. State, 530 N.E.2d 1179, 1180 (Ind. 1988)), trans. denied. In reviewing a trial court's decision for an abuse of discretion, we reverse only where the decision is clearly against the logic and effect of the facts and circumstances before the court. Id. (citing Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied).

Terry argues that the provision at issue is not ambiguous and that, therefore, the trial court erred in considering external evidence to interpret it. Terry also argues that the trial court has no authority to modify a plea agreement.

The Indiana Supreme Court has explained that there are five stages in the plea bargaining process:

First, there is the plea agreement itself. “‘Plea agreement’ means an agreement between a prosecuting attorney and a defendant concerning the disposition of a felony or misdemeanor charge.” Ind. Code § 35-35-3-1 (1993). As part of the plea agreement, the prosecuting attorney may include a recommendation. “‘Recommendation’ means a proposal that is a part of a plea agreement made to the court that: (1) a felony charge be dismissed; or (2) a defendant, if he pleads guilty to a felony charge, receive less than the presumptive sentence.” Id.

The second stage is reached once an agreement is concluded between a prosecuting attorney and a defendant. It is the role of the prosecuting attorney to submit to the trial court the agreement together with any recommendation. Ind. Code § 35-35-3-3(a) (1993). If the plea agreement is on a felony charge, the agreement must be in writing, and the prosecuting attorney must submit the agreement before the defendant has entered a guilty plea. Id.

At the third stage, it is up to the trial court to accept or reject the plea agreement as filed. If the court rejects the plea agreement, new agreements of the parties may be filed with the court; if the court accepts the agreement, it becomes bound by the terms of the agreement. Ind. Code § 35-35-3-3(e).

After the trial court has accepted a plea agreement, stage four is the actual entry of the guilty plea by the defendant. The fifth stage is sentencing . . . .

Badger v. State, 637 N.E.2d 800, 802-03 (Ind. 1994) (footnotes omitted).

“A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.” Coker v. State, 499 N.E.2d 1135, 1138 (Ind. 1986) (quoting Mabry v. Johnson, 467 U.S. 504, 507-508, 104 S.Ct. 2543, 2546 (1984)), reh’g denied. Acceptance of a plea bargain by the defendant does not create a right to have the agreement enforced. See id.

Here, the parties completed the first two stages of the plea bargaining process by filing the plea agreement with the trial court. At that point, the plea agreement was not a binding contract because it had not yet been accepted by the trial court. At the change of plea hearing, the trial court clarified that the clause providing that additional charges would not be filed referred to charges arising from “this incident,” and the prosecutor agreed. Transcript at 48. We note that Terry did not assert a different interpretation of the clause. The trial court then took the plea agreement under advisement.

At the sentencing hearing, the trial court accepted the plea agreement and recited that the State would not bring further charges arising from allegations then before the trial court. Terry again failed to object to this interpretation or to propose the one he now asserts on appeal, namely, that the State is unable to bring charges for any alleged misconduct, regardless of the identity of the victim, that occurred prior to his plea agreement. See Appellant’s Brief at 6-7. The parties explicitly agreed concerning the meaning of the clause at issue, and the trial court accepted the agreement, thereby rendering it a binding contract. In light of their agreement, we cannot say that the trial court abused its discretion by denying Terry’s motion to dismiss the new charges against him, as they do not arise from allegations previously before the trial court.<sup>1</sup>

For the foregoing reasons, we affirm the trial court’s denial of Terry’s motion to dismiss.

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<sup>1</sup> Terry cites Wright v. State, 700 N.E.2d 1153 (Ind. Ct. App. 1998), and Griffin v. State, 756 N.E.2d 572 (Ind. Ct. App. 2001), trans. denied, in support of his argument that the plea agreement was not ambiguous and that the trial court should not have considered extrinsic evidence in interpreting it. Those cases do not deal with the situation at hand, however, as here the defendant had assented to the trial court’s interpretation of the plea agreement, and the State later filed new, unrelated charges.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur