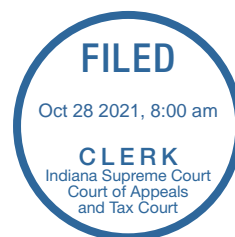


MEMORANDUM DECISION

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

Joshua McKenzie,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 28, 2021

Court of Appeals Case No.
21A-CR-658

Consolidated Appeal from the
Vermillion Circuit Court

The Honorable Jill D. Wesch,
Judge

Trial Court Cause Nos.
83C01-1906-F6-106
83C01-2010-F5-31

Crone, Judge.

Case Summary

- [1] Joshua McKenzie signed a plea agreement in which he agreed to plead guilty to level 6 felony failure to register as a sex offender, receive a sentence suspended to probation, and register as a sex offender. The State alleged that McKenzie violated his probation by failing to register, and it charged him with level 5 felony failure to register as a sex offender. McKenzie signed a plea agreement in which he agreed to admit to violating his probation and receive a four-year sentence for the level 5 felony. The trial court revoked his probation and sentenced him to four years executed for the level 5 felony. In this consolidated appeal, McKenzie argues that the trial court abused its discretion in revoking his probation and that a fully executed sentence is inappropriate. The State argues that McKenzie waived his right to appeal the trial court's sentencing decisions. We agree with the State and therefore dismiss McKenzie's appeal.

Facts and Procedural History

- [2] In June 2019, the State charged McKenzie in cause number 83C01-1906-F6-106 (Cause 106) with level 6 felony failure to register as a sex offender. In October 2019, McKenzie signed a plea agreement in which he agreed to plead guilty as charged, receive a sentence of two and a half years suspended to probation, and register as a sex offender as a condition of probation.
- [3] In October 2020, the State filed a motion to revoke McKenzie's probation, alleging that he violated his probation by failing to register. Also, the State charged McKenzie in cause number 83C01-2010-F5-31 (Cause 31) with level 5

felony failure to register as a sex offender. On February 11, 2021, McKenzie signed a plea agreement in which he agreed to plead guilty as charged and receive a four-year sentence in Cause 31, as well as admit to violating his probation and “be subject to a sentence equivalent to the remainder” of his sentence in Cause 106; the sentences “shall run consecutive[,]” with the “terms and conditions” left to the trial court’s discretion, and the parties reserved “the right to argue for a certain sentence.” Appellant’s App. Vol. 2 at 65. The plea agreement also contains a provision, which McKenzie initialed, stating,

[McKenzie] understands that if the Court accepts the Plea Agreement, then [he] will be bound by the terms of the Plea Agreement, and that [he] will waive the following rights: ... The right to appeal an adverse decision of the Trial Court. Furthermore, by [his] signature, the Defendant acknowledges that [he] is waiving [his] right to appeal any sentence imposed by the Court that is within the range of penalties set forth in this plea agreement.

Id. at 66.

[4] On February 12, the trial court held a change-of-plea hearing, during which McKenzie acknowledged that he had “sufficient time to go over [the] plea agreement with [his] attorney prior to signing it[.]” Tr. Vol. 2 at 24. The trial court asked him, “You also understand that if we have a trial and you are found guilty you would have certain appeal rights and by pleading guilty here today you would be giving up those appeal rights?” *Id.* at 28. McKenzie replied, “Yes.” *Id.* McKenzie admitted to violating his probation in Cause 106 and

admitted to the factual basis alleged in Cause 31. The court set a sentencing hearing for March 12.

- [5] At the sentencing hearing, following argument by the parties, the trial court found that McKenzie violated his probation in Cause 106, revoked his probation, and ordered him to serve the remainder of his sentence in the Department of Correction. The court also entered judgment of conviction in Cause 31 and ordered the four-year sentence to be executed in the Department of Correction. The court then advised McKenzie that he had the right to appeal his sentence “since this is an open plea, or somewhat open plea.” *Id.* at 54. McKenzie filed a notice of appeal in each cause, and those appeals were consolidated at his request.

Discussion and Decision

- [6] McKenzie argues that the trial court abused its discretion in revoking his probation in Cause 106 and that a fully executed sentence in Cause 31 is inappropriate. The State argues that McKenzie waived his right to appeal the trial court’s sentencing decision in both causes and therefore his appeal should be dismissed. We agree with the State.
- [7] The Indiana Supreme Court has held that “a defendant may waive the right to appellate review of his sentence as part of a written plea agreement.” *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). A plea agreement is a contract, and once the trial court accepts it, the agreement and its terms are binding on the trial court, the State, and the defendant. *Archer v. State*, 81 N.E.3d 212, 215-16 (Ind.

2017). “Most waivers are effective when set out in writing and signed.” *Creech*, 887 N.E.2d at 76 (quoting *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995)) (alteration in *Creech* omitted). “The content and language of the plea agreement itself, as well as the colloquy where necessary, govern [the] determination as to the validity of the waiver.” *Creech*, 887 N.E.2d at 76 (quoting *United States v. Williams*, 184 F.3d 666, 668 (7th Cir. 1999)) (alteration in *Creech*). “[A] specific dialogue with the judge is not a necessary prerequisite to a valid waiver of appeal, if there is other evidence in the record demonstrating a knowing and voluntary waiver.” *Id.* (quoting *United States v. Agee*, 83 F.3d 882, 886 (7th Cir. 1996)) (alteration in *Creech*).

[8] Here, the waiver provision initialed by McKenzie states that he “acknowledges that [he] is waiving [his] right to appeal *any* sentence imposed by the Court that is within the range of penalties set forth in this plea agreement.” Appellant’s App. Vol. 2 at 66 (emphasis added). The plea agreement states that McKenzie would receive a four-year sentence in Cause 31 and “be subject to a sentence equivalent to the remainder” of his suspended sentence in Cause 106. *Id.* at 65. The trial court sentenced him accordingly. At the change-of-plea hearing, McKenzie confirmed that he had “sufficient time” to review the plea agreement with his attorney before signing it, and he further confirmed his understanding that by pleading guilty he would be giving up “certain appeal rights[.]” Tr. Vol. 2 at 24, 28. In light of the foregoing, we conclude that McKenzie knowingly

and voluntarily waived his right to appeal the trial court’s sentencing decision in both causes.¹ Therefore, we dismiss.

[9] Dismissed.

Bailey, J., and Pyle, J., concur.

¹ The trial court’s erroneous advisement at the conclusion of the sentencing hearing has no bearing on the validity of McKenzie’s waiver. *Creech*, 887 N.E.2d at 76-77. Regarding Cause 31, McKenzie argues that “[a]lthough the plea agreement specifically stated [he] waived his right to appeal his sentence, it did not clearly state he was also giving up his right to appeal his conviction.” Appellant’s Br. at 12. Whether McKenzie waived his right to appeal his conviction is not at issue here; nevertheless, we observe that he waived his right to “appeal an adverse decision of the Trial Court.” Appellant’s App. Vol. 2 at 66.