

[Cite as *State v. Shie*, 2009-Ohio-5567.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92819

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID ZION SHIE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-458959

BEFORE: Dyke, J., Stewart, P.J., and Jones, J.

RELEASED: October 22, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, David Zion Shie (“appellant”), appeals the trial court’s denial of his motion to withdraw his guilty plea and his motion to enforce a plea contract. For the following reasons, we affirm.

{¶ 2} On April 6, 2005, appellant pled guilty to four amended counts of sexual battery and agreed to be classified as a sexual predator. On April 27, 2005, the trial court sentenced appellant to four years imprisonment on each of the counts, to be served consecutively, for a total of sixteen years imprisonment. On May 11, 2006, this court affirmed appellant’s convictions in *State v. Shie*, Cuyahoga App. No. 86464, 2006-Ohio-2314, but remanded the matter to the trial court for resentencing. *Id.*, appeal not allowed by 111 Ohio St.3d 1416, 2006-Ohio-5083, 854 N.E.2d 1994.

{¶ 3} On August 9, 2006, the trial court resentenced appellant per the directives of this court, imposing the same 16 year prison sentence as before. Appellant was also reclassified as a sexual predator. We affirmed appellant’s sentences in *State v. Shie*, Cuyahoga App. No. 88677, 2007-Ohio-3773, appeal not allowed by 116 Ohio St.3d 1440, 877 N.E.2d 991, 2007-Ohio-6518.

{¶ 4} Subsequently, the Ohio legislature enacted Senate Bill 10, which implemented the federal Adam Walsh Child Protection and Safety Act of 2006 (“AWA”).¹ The new law went into effect in Ohio on January 1, 2008. Accordingly, appellant, who had previously been classified as a sexual predator

¹ 42 U.S.C. § 16901 (2006).

under H.B. 180, Ohio Megan's Law (former R.C. Chapter 2950), was then re-classified as a Tier III offender under S.B. 10.²

{¶ 5} In light of the new classification and the registration and notification requirements associated with that classification, appellant filed a motion to withdraw his guilty plea on September 24, 2008. Additionally, on October 30, 2008, appellant filed a motion to enforce a plea contract. The trial court denied both motions on January 28, 2009. Appellant now appeals and presents the following assignment of error for our review:

{¶ 6} "The Trial Court abused its discretion by unreasonably denying Appellant's motions to withdraw guilty plea and enforce plea contract based on a decision clearly and convincingly contrary to law."

{¶ 7} Here, appellant argues that the state of Ohio breached its plea agreement with him when the AWA imposed new obligations and terms previously not agreed to with regard to his sexual predator classification. For the following reasons, we find appellant's argument without merit.

{¶ 8} First, we agree with the trial court that it lacked jurisdiction to entertain appellant's motions, although we reach this conclusion for a different reason. A trial court does not have jurisdiction to consider a motion to withdraw a guilty plea once the conviction has been affirmed on appeal. *State, ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d

² Hereinafter, for purposes of this appeal, the AWA and S.B. 10 will be used interchangeably throughout this opinion.

94, 97-98, 378 N.E.2d 162. The general rule is that a trial court loses its jurisdiction when the appeal is taken, and, absent a remand, it cannot regain jurisdiction subsequent to the court of appeals' decision. *Id.* at 97. The Supreme Court of Ohio explained:

{¶ 9} “While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.” *Id.* at 98.

{¶ 10} Even if the trial court had jurisdiction to entertain the motions, we would nevertheless reject appellant's argument that the application of the AWA breaches his plea agreement. There is no dispute that plea agreements are contracts between the state and criminal defendants. *Santobello v. New York* (1971), 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427. “Accordingly, if one side breaches the agreement, the other side is entitled to either rescission or specific performance of the plea agreement.” *State v. Walker*, Lucas App. No. L-05-1207, 2006-Ohio-2929, at ¶ 13, citing *Santobello*, *supra*. In this case, however, the plea agreement between appellant and the state had already been performed by each party at the time of the enactment of the AWA. Ohio courts have previously determined that once a defendant enters his guilty plea and the trial court imposes a sentence, a breach of contract can no longer occur because both sides have fully performed their respective parts under the contract. *Ball v.*

State, Lake App. No. 2008-L-053, 2009-Ohio-4099. See, also, *State v. Pointer*, Cuyahoga App. No. 85195, 2005-Ohio-3587; *Slagle v. State*, 145 Ohio Misc.2d 98, 114-115, 884 N.E.2d 109, 2008-Ohio-593. The court in *Ball*, supra, explained with the following:

{¶ 11} “Because the registration and notification requirements of the new law, just as in former R.C. Chapter 2950, are merely remedial conditions imposed upon offenders after their release from prison and not additional punishment, they do not affect any plea agreement previously entered into between the offender and the state.” *Ball*, supra.

{¶ 12} Moreover, we note that any alleged agreement would be unenforceable because neither the state prosecutors, nor the judiciary, possess the authority to enter into any agreement that would abrogate the right of the state legislature to revise the classification scheme. In *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031, we provided that:

{¶ 13} “In fact, ‘the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. Without the legislature’s creation of sex offender classifications, no such classification would be warranted. Therefore, * * * we cannot find the sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature.’” *Id.*, quoting *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, appeal not allowed by 120 Ohio

St.3d 1416, 2008-Ohio-6166, 897 N.E.2d 652.

{¶ 14} Finally, with respect to the issue of breach of contract, we recognize that our decision conforms with that of this court's in *Gildersleeve*, supra, albeit for different reasons. Consequently, we affirm the trial court's denial of appellant's motion to withdraw his guilty plea and motion to enforce plea contract. Appellant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

MELODY J. STEWART, P.J., and
LARRY A. JONES, J., CONCUR