[Cite as *State v. Billingsley*, 2011-Ohio-1586.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2010-P-0030 and 2010-P-0031**
DESMOND A. BILLINGSLEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0023.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Dennis Day Lager, Portage County Public Defender, and *John P. Laczko*, Assistant Public Defender, 209 South Chestnut Street, Suite 400, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Desmond A. Billingsley, appeals from a judgment of the Portage County Court of Common Pleas denying his motion to enforce a Crim.R. 11 plea agreement negotiated in Summit County, Ohio.

{¶2} Appellant was involved in a series of approximately 30 robberies that occurred in Summit County, Stark County, and Portage County, Ohio. As a result, appellant was indicted in Portage County, Ohio, on numerous charges of aggravated

robbery, each carrying a firearm specification. With the assistance of counsel, appellant negotiated a plea agreement with the Summit County Prosecutor. Under this agreement, appellant was to cooperate with the state and testify truthfully in the cases of his co-defendants. In exchange, the state agreed to the following, which was read into the record:

{¶3} "[THE COURT]: Is there an agreed upon sentence?

{¶4} "[SUMMIT COUNTY PROSECUTOR]: Judge, what we're going to do similar to what we did with Delaney, we're not asking to sentence him today, Billingsley today. He is going to sit down and give us information regarding remaining aggravated robberies we're aware of. There are certainly even – other than the five people that we have in this case, there are others who are involved in this group of robbers.

{¶5} "So we're going to sit down. The detective is here. He's going to sit down with Mr. Billingsley and get the information. If he is cooperative and truthful, then as to sentencing, State will recommend eight years. If not, then if he doesn't sit down and give information, subject to a polygraph, if we don't believe that he's telling the truth, then the recommendation by the State would be different.

{¶6} "There are potentially other charges from other counties. We have been in contact with those other counties and can say that's our recommendation to him, and they've agreed at least in the other defendant's cases, because we're getting these pleas here and we're resolving the cases here, that they will either not pursue charges on their robberies, or if they have already charged that, they'll run concurrent?

{¶7} "Is that it?

{¶8} "[DEFENSE COUNSEL]: In addition, Your Honor, if there are any cases that he talks about outside of the indictment, he would not be charged with those cases.

{¶9} "[SUMMIT COUNTY PROSECUTOR]: Correct. We would not be adding additional charges."

{¶10} After entering into the agreement, appellant cooperated with the authorities. Appellant informed the authorities regarding all of the aggravated robberies, including those that occurred in Portage County. Thereafter, appellant was indicted in Portage County in case No. 2009 CR 00023 for aggravated robbery, a violation of R.C. 2911.01(A)(1), with a firearm specification. Appellant was subsequently indicted in case No. 2009 CR 00509 for two counts of aggravated robbery, with each count carrying a firearm specification.

{¶11} Appellant filed a motion to enforce the Crim.R. 11 plea agreement entered into in Summit County. After a hearing, the Portage County Court of Common Pleas overruled appellant's motion. Appellant entered a plea of no contest to the charges. Appellant was sentenced to a mandatory term of imprisonment of three years for each firearm specification, to be served consecutively to one another, and a definite eight-year sentence to be served for each felony, to be served consecutively to one another and consecutively to the sentence for the firearm specifications. Appellant's sentence was to be served concurrently to the prison term of eight years that he is serving for the conviction in Summit County.

{¶12} Appellant filed a timely notice of appeal and asserts the following assignment of error:

{¶13} "The trial court abused its discretion to the prejudice of appellant by overruling his motion to enforce the Criminal Rule 11 plea agreement and motion to dismiss firearm specifications."

{¶14} At the outset, we recognize that the instant appeal does not arise from successive prosecutions of the same factual scenario, but successive prosecutions of separate crimes occurring in another jurisdiction.

{¶15} On appeal, appellant argues that he entered into an agreement with the state of Ohio, as represented by the Summit County Prosecutor. And, based on the agreement, appellant would not be prosecuted in either Summit County or any other jurisdiction if he gave truthful information regarding his involvement in numerous, unindicted robberies. Further, appellant maintains that pursuant to such agreement, his sentence would run concurrently to his sentence in Summit County if he was indicted in any jurisdiction. Appellant asserts that since he complied with the terms of the agreement, i.e., he cooperated with the authorities and disclosed information on the robberies, the Portage County Prosecutor was either barred from prosecuting him or required to run his sentence concurrently to the sentence in Summit County.

{¶16} First, appellant has offered an argument based on contract law. Appellant seeks specific performance of the plea agreement. "Generally, a plea bargain is a contract and subject to the principles of contract law." *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, at ¶50. Where a violation of a plea agreement is found, the remedy may be specific performance. See *Santobello v. New York* (1971), 404 U.S. 257, 263.

{¶17} As determined by the Portage County Court of Common Pleas, appellant did "not meet the burden of proof necessary to establish that [the] Portage County Prosecutor is bound by the Summit County Plea Agreement. No one with authority to enter into such an Agreement consented to the Criminal Rule 11 negotiation or authorized the Summit County Prosecutor's Office to negotiate or contract for them. Portage County was not a party to the contract."

{¶18} The Portage County Prosecutor's Office was not mentioned anywhere in the record of the plea hearing. Therefore, as observed by the trial court, the only parties to the contract were appellant and the Summit County Prosecuting Attorney's Office. Further, neither the prosecutor nor the judge from Summit County testified at the hearing on appellant's motion to enforce the Crim.R. 11 plea agreement. Since Portage County was not a party to the agreement, the Portage County Prosecutor cannot be bound by the terms of the agreement.

{¶19} In exchange for appellant's testimony, the Summit County Prosecuting Attorney's Office recommended, and appellant received, a sentence of eight years. Additionally, only Summit County was prevented from using appellant's statements in bringing additional charges against him.

{¶20} We therefore find that, under the principles of contract law, Portage County is not bound by Summit County's agreement with appellant.

{¶21} Appellant also advances an agency argument. That is, as an agent of the state of Ohio, the Summit County Prosecutor had the ability to bind all counties, including Portage County.

{¶22} The Second Appellate District, in *State v. Barnett* (1998), 124 Ohio App.3d 746, at 751-755, applied agency principles to determine the validity of such an agreement. In *Barnett*, the defendant pled guilty to one count of gross sexual imposition involving his stepdaughter. Id. at 747. The Warren County Prosecutor's Office, in exchange for the defendant's plea, agreed to dismiss the remaining charges and agreed that no additional charges would be filed. Id. at 748. Thereafter, the defendant was indicted in Montgomery County on five counts of gross sexual imposition involving his daughter and another victim. Id. Like the instant case, the crimes in *Barnett* were committed in two different counties and were not allied offenses of similar import. The Montgomery County trial court granted the defendant's motion to dismiss the indictment based on the Warren County plea agreement. Id. The state of Ohio appealed. Id. at 749.

{¶23} One of the issues before the Second Appellate District was whether "one county's prosecutor has the actual or apparent authority to prohibit a defendant's prosecution in a second county for an unrelated offense without the second county's consent." Id. at 752. The *Barnett* court first determined that the Warren County Prosecutor's Office did not have actual authority to prevent the defendant's indictment in Montgomery County. Id. at 754. With respect to actual authority, the *Barnett* court reasoned that, although a county prosecutor is an agent of the state, "the county prosecutor's agency authority extends to the county line when investigating and prosecuting crimes. Thus, the county prosecutor is an agent of the state with respect to crimes committed in his county." Id. at 755. See, also, *State v. Dumas*, 5th Dist. No. 02CA60, 2003-Ohio-4117, at ¶26. Unlike federal prosecutors, a county prosecutor's

authority is generally limited to the county he serves, as they "are elected by local residents and work on behalf of those constituents, inquiring into the commission of crimes within the county." Id.

{¶24} Appellant next argues it was his understanding that, based on the agreement at issue, he would receive an eight-year term of imprisonment for all of the robberies in which he was involved. Thus, appellant is arguing that the Summit County Prosecutor had apparent authority to bind Portage County to the agreement at issue.

{¶25} "In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority. *** Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority. ***." *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, at ¶41. (Internal citations omitted.)

{¶26} With respect to apparent authority, the court in *Barnett* found that the "laws of Ohio support no such inference." *State v. Barnett*, supra, at 755. As in *Barnett*, the state of Ohio did not represent that the Summit County Prosecutor was authorized to act as its agent and plea bargain to offenses committed outside of Summit County. Appellant has failed to establish the existence of apparent authority.

{¶27} Based on the opinion of this court, appellant's sole assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.