[Cite as *State v. McPherson*, 2019-Ohio-3482.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	Case No. 18CA4
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
ASHLEY D. MCPHERSON,	:	
Defendant-Appellant.	:	**RELEASED: 07/30/2019**

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.

Nicole Tipton Coil, Washington County Prosecutor, and David K.H. Silwani, Washington County Assistant Prosecutor, Marietta, Ohio, for appellee.

Hess, J.

{¶1} Ashley D. McPherson pleaded guilty to one count of illegal conveyance of drugs of abuse onto the grounds of a specified governmental facility, and she now appeals her conviction. McPherson asserts that the Washington County Sheriff's Office promised her immunity from prosecution in exchange for information, that trial counsel provided ineffective assistance by not seeking to enforce the purported non-prosecution agreement, and that this ineffective assistance precluded her from knowingly, intelligently, and voluntarily entering her guilty plea. However, even if members of law enforcement promised McPherson immunity from prosecution in exchange for information, they lacked authority to enter into a non-prosecution agreement on behalf of the Washington County Prosecutor, so trial counsel's failure to seek enforcement of the purported agreement did not constitute deficient performance or prejudice

McPherson. Thus, trial counsel did not provide ineffective assistance, and we affirm the trial court's judgment.

I. FACTS

{¶2} The Washington County grand jury indicted McPherson on three counts of illegal conveyance of drugs of abuse onto the grounds of a specified governmental facility, one count of possession of heroin, and one count of possession of criminal tools. Defense counsel moved to suppress statements McPherson made during a pre-indictment interview with Lieutenant Joshua Staats and Deputy Sheriff Greg Nohe of the Washington County Sheriff's Office on the grounds that her statements had been coerced. The trial court denied the motion after a hearing. McPherson pleaded guilty to one count of illegal conveyance. The trial court sentenced her to three years of community control for that count, and as a specific community control condition, ordered her to serve 180 days in the Washington County Jail. The trial court dismissed the remaining counts.

II. ASSIGNMENT OF ERROR

{¶3} McPherson presents one assignment of error:

> MCPHERSON'S GUILTY PLEA WAS UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY AS SHE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER BOTH THE OHIO AND UNITED STATES CONSTITUTIONS.

III. LAW AND ANALYSIS

{¶4} McPherson maintains that trial counsel provided ineffective assistance which precluded her from knowingly, intelligently, and voluntarily entering her guilty plea. Specifically, she asserts that if counsel had sought enforcement of a purported

agreement Lieutenant Staats and Deputy Sheriff Nohe made to not prosecute her if she provided information, all of the charges against her would have been dismissed. McPherson acknowledges that in *State v. Pittman*, 6th Dist. Lucas No. L-15-1043, 2016-Ohio-617, the Sixth District Court of Appeals, held that police officers do not have authority to enter into an enforceable non-prosecution agreement. She asserts this position lacks legal support and that the Supreme Court of Ohio and this court have never held that police officers lack such authority. McPherson contends that *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, which focused on a suspect's state of mind in determining the voluntariness of statements to law enforcement, should apply in this context and render the purported promise law enforcement made to her enforceable. She also cites *State v. Parris*, 6th Dist. Ottawa No. OT-14-015, 2014-Ohio-4863, as support for the proposition that law enforcement promises should bind the state. The state maintains that no valid non-prosecution agreement exists in this case because neither the Washington County Prosecutor nor an assistant prosecutor made such an agreement with McPherson.

{¶5} In *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317 (4th Dist.), we explained:

> Criminal defendants have the constitutional right to counsel, which includes the right to the effective assistance of counsel.
>
> To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The defendant bears the burden of proof because in Ohio, a properly licensed attorney is presumed competent. Failure to establish either part of the test is fatal to an ineffective-assistance claim.

(Citations omitted.) *Id.* at ¶ 20-21.

{¶6} "R.C. 309.08(A) expressly grants the county prosecuting attorney the authority to 'prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party.' " *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, ¶ 16. A county prosecuting attorney is "the only person authorized to enter into a plea agreement on behalf of the state with respect to crimes committed wholly" in the county in which the prosecuting attorney has been elected. *See State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, ¶ 38. Likewise, a county prosecuting attorney has authority to enter into non-prosecution agreements which "arises, in part, from the discretion a prosecutor has in initiating a criminal prosecution." *State v. Moore*, 7th Dist. Mahoning No. 06-MA-15, 2008-Ohio-1190, ¶ 61, citing *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996). "[I]n our system of justice 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring * * * generally rests entirely in his discretion[.]' " *State ex rel. Nagle v. Olin*, 64 Ohio St.2d 341, 347, 415 N.E.2d 279 (1980), quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

{¶7} McPherson cites no legal authority for the proposition that the Washington County Sheriff or the sheriff's appointees had the authority to enter into a non-prosecution agreement. R.C. 311.07 sets forth the general powers and duties of the sheriff, which do not include such authority. Moreover, such authority would be

inconsistent with the prosecutor's "sole discretion to determine whether to initiate criminal charges." *Pittman*, 6th Dist. Lucas No. L-15-1043, 2016-Ohio-617, ¶ 10.

{¶8} McPherson's suggestion that the existence of a non-prosecution agreement should depend on the suspect's state of mind is not well-taken. "[N]on-prosecution agreements are governed by contract law." *Parris*, 6th Dist. Ottawa No. OT-14-015, 2014-Ohio-4863, at ¶ 12. "And in contract law, an agent's authority to contract on behalf of its principal is ordinarily limited to the scope of the authority granted by the principal." *Billingsley* at ¶ 26. McPherson does not argue that the Washington County prosecuting attorney authorized Lieutenant Staats or Deputy Sheriff Nohe to negotiate with her on the prosecuting attorney's behalf. McPherson's belief that they had such authority is not dispositive because "an agent cannot through [the agent's] own words and actions create apparent authority to bind a principal where there is no evidence that the principal permitted the agent to act as if [the agent] had authority." *Id.* at ¶ 39, citing *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus. Here, there is no evidence that the Washington County prosecuting attorney permitted Lieutenant Staats or Deputy Sheriff Nohe to act as if they had authority to enter a non-prosecution agreement.

{¶9} McPherson's reliance on *Parris* for the position that members of law enforcement may enter a non-prosecution agreement is misplaced. McPherson is correct that *Parris* stated that " 'the promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the state, above all others, to keep its bond.' " *Parris* at ¶ 14, quoting *Moore*, 7th Dist. Mahoning No. 06-MA-15, 2008-Ohio-1190, at ¶ 62. However, *Parris* involved a

non-prosecution agreement entered into by a county prosecuting attorney and therefore did not consider whether members of law enforcement have authority to enter non-prosecution agreements. *Id.* at ¶ 8. And in *Pittman*, which was decided after *Parris*, the Sixth District held that police officers lack authority to enter such agreements. *Pittman*, 6th Dist. Lucas No. L-15-1043, 2016-Ohio-617, at ¶ 10.

{¶10} For the foregoing reasons, we conclude that even if members of law enforcement promised McPherson immunity from prosecution in exchange for information, they lacked authority to enter into a non-prosecution agreement on behalf of the Washington County Prosecutor. As a result, trial counsel's failure to seek enforcement of the purported agreement did not constitute deficient performance or prejudice McPherson. Thus, trial counsel did not provide ineffective assistance that precluded McPherson from knowingly, intelligently, and voluntarily entering her guilty plea. We overrule the sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J.: Concurs in Judgment and Opinion.
Abele, J.: Dissents.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.