

[Cite as *State v. Cruz*, 2015-Ohio-2472.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JUSTIN TYLER CRUZ

Appellant

C.A. No. 14CA010550

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 13CR087423
 13CR087424

DECISION AND JOURNAL ENTRY

Dated: June 22, 2015

MOORE, Judge.

{¶1} Defendant-Appellant Justin Tyler Cruz appeals from the judgment of the Lorain County Court of Common Pleas. This Court reverses and remands for proceedings consistent with this opinion.

I.

{¶2} In June 2013, Mr. Cruz was indicted on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4) in case 13CR087423 and one count of gross sexual imposition in violation of R.C. 2907.05(A)(4) in case 13CR087424. The cases were assigned to the same trial judge, and while not formally consolidated below, they appear to share the same procedural path.

{¶3} Mr. Cruz entered into written plea agreements with the State in both cases and agreed to plead guilty to the indictments. Both plea agreement forms asked if “anyone used any force or made any promises to [Mr. Cruz] in order to get [him] to plead guilty[.]” Mr. Cruz

responded, “Yes[.]*” At the bottom of the forms, next to another asterisk, a line was added that stated: “Court indicated CCS with the first 30 days at LCCF[.]” The forms were signed by the prosecutor, Mr. Cruz’s attorney, and Mr. Cruz.

{¶4} At the combined plea hearing for both cases, the State indicated that it “ha[d] made no agreement as to sentencing.” Towards the end of the hearing, while discussing the written plea agreement forms with Mr. Cruz, the following colloquy occurred:

[Trial court:] Other than the fact that I indicated to your attorney in the Prosecutor’s presence that I would be looking at giving you, in light of the fact that you have already done 90 days in and that you are taking responsibility for these offenses and that you will be getting treatment, I would be looking at a community control sanction here, but that you would be looking at the first 30 days of that community control sanction to be spent in the County Jail.

Other than that, were there any other promises made to you?

[Mr. Cruz:] No.

The trial court then accepted Mr. Cruz’s plea. Before adjourning, the trial court addressed Mr. Cruz again, stating:

You are going to be sentenced in about two months from now. There are a few things you need to know.

Right now, we have an agreement. We’ve had discussions. But that can all go up in smoke if there are problems between now and your sentencing. Okay?

If [you are] hoping for what we discussed, you have got to show me you can survive on community control.

What does that mean? You don’t catch new charges. You test clean for drugs. And you are respectful and cooperative with the probation department.

It also means you need to be here for your sentencing hearing. That means [your attorney] needs to have a good address and phone number at all times. If you move tomorrow, he needs to know tomorrow afternoon, because I’m going to send him notice of your sentencing, and he will send it to you.

* * *

So, in the meantime, you need to get over to the probation department right now, which just about a block away, and start the ball rolling on your presentence report.

You are to have no contact with the victims or their families, and you are to make sure that there are no problems during this time period. If there are, then you are looking at the possibility of up to ten years in prison.

{¶5} Prior to sentencing, Mr. Cruz filed motions in both cases to withdraw his plea. The trial court held a hearing on those motions immediately prior to the sentencing hearing. Mr. Cruz expressed his desire to proceed to trial so that he could establish his alleged innocence. The trial court denied the motions and proceeded to sentencing.

{¶6} The State maintained that it did not reach an agreement with respect to sentencing and requested a prison sentence. The trial court sentenced Mr. Cruz to a three-year community control sanction with the first 30 days to be served in the Lorain County Correctional Facility per the “prior discussions[.]” At the end of sentencing, as Mr. Cruz was leaving the courtroom, he stated, “Thank you for pulling the trigger, Your Honor.” The trial court then ordered Mr. Cruz back into the room. The trial court admonished Mr. Cruz, saying:

Did you understand that lipping off to a judge before you were taken to the county means that actually your sentence isn’t final until I sign this entry, file it, and you go to prison and go [to] jail? * * * So right now I’m reconsidering what was a really close case; a case I wasn’t entirely comfortable with where things were going, in light of the fact that you felt so unrestricted by the rules of society and rules of this court that you felt comfortable lipping off to me, to this court, in open court, it makes me really reconsider whether you are a good candidate for community control. I can’t imagine you succeeding on community control. * * *.

{¶7} After allowing the prosecutor, Mr. Cruz’s attorney, and Mr. Cruz the opportunity to speak, the trial court sentenced Mr. Cruz to two years in prison on each count, to run concurrently.

{¶8} Mr. Cruz filed a timely notice of appeal and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

[MR. CRUZ] WAS SENTENCED TO PRISON AFTER A PLEA AGREEMENT WAS REACHED WITH THE TRIAL COURT. THE TRIAL COURT UNAMBIGUOUSLY PROMISED A COMMUNITY CONTROL SANCTION IN EXCHANGE FOR A GUILTY PLEA IN [MR. CRUZ'S] CASES. THIS SUBSEQUENT BREACH MADE [MR. CRUZ'S] GUILTY PLEA INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT.

{¶9} Mr. Cruz argues in his first assignment of error that his guilty plea was involuntary because the trial court failed to impose the sentence it promised to impose. We agree.

{¶10} “Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.” *Santobello v. New York*, 404 U.S. 257, 261 (1971). That process is traditionally limited to negotiations between the prosecutor and the accused and does not involve the trial judge. *See State v. Byrd*, 63 Ohio St.2d 288, 293-294 (1980). In fact, “[d]ue to the high potential for coercion when the judge participates in the actual negotiation process, a number of courts have indicated that such participation is per se in violation of the Fifth Amendment.” *Id.* at 292. While the Ohio Supreme Court has not gone so far as to hold that a trial judge’s participation in the plea negotiation process automatically renders a plea invalid, it has “strongly discourage[d] judge participation in plea negotiations[.]” *Id.* at 293. Thus, when a trial judge does participate in the plea bargaining process, that participation must be carefully scrutinized to assure that the participation did not affect the voluntariness of the defendant’s plea. *Id.*

{¶11} “A plea cannot sustain a judgment of guilt unless it is voluntarily made.” *State v. West*, 9th Dist. Lorain No. 04CA008554, 2005-Ohio-990, ¶ 8. “If a defendant is induced into pleading guilty based upon a promise by the court and the court does not fulfill that promise, the

defendant's plea is not voluntary." *State v. Reeves*, 9th Dist. Summit No. 27230, 2014-Ohio-5259, ¶ 6, citing *State v. Bortner*, 9th Dist. Lorain No. 13CA010494, 2014-Ohio-4121, ¶ 15.

{¶12} The notation in the plea agreements and the trial court's statements during the plea hearing evidence that Mr. Cruz pleaded guilty based at least in part upon the trial court's representation that it would sentence him to community control. *See Reeves* at ¶ 6. Irrespective of the State's position with respect to sentencing, the trial court agreed to sentence Mr. Cruz to community control at the time of the plea. While the trial court did note, after it accepted Mr. Cruz's guilty plea,¹ that there were conditions Mr. Cruz had to abide by in order to be sentenced to community control, nothing in the record demonstrates that Mr. Cruz failed to abide by the stated conditions. At the plea hearing, the trial court stated that, in order to receive community control, Mr. Cruz would have "to show [the trial court that Mr. Cruz] can survive on community control." The trial court then specified that that meant that Mr. Cruz could not be arrested for any more crimes, he could not test positive for drugs, he had to be respectful and cooperative with the probation department, he had to be present at sentencing, and he had to have no contact with the victims or their families. The trial court never stated that a disrespectful or inappropriate comment by Mr. Cruz to the trial court after sentence was pronounced would result in his being sent to prison. In fact, when outlining circumstances that could cause the agreement to "go up in smoke[.]" at the plea hearing the court specifically provided the timeline when it said: "if there are problems *between now and your sentencing*." (Emphasis added.)

{¶13} Prior to the trial court reconsidering its sentence following Mr. Cruz's inappropriate comment, it appears that the trial court believed that Mr. Cruz had complied with

¹ For purposes of this appeal, we will assume that the conditions imposed by the trial court after the acceptance of the plea were binding on Mr. Cruz as neither side has asserted that they were not.

the conditions it set forth at the time of the plea as it did initially sentence him to community control as it had promised. While we understand the trial court's frustration with Mr. Cruz's behavior, under the circumstances of this case, his behavior did not breach the conditions stated by the trial court at the time of the plea. Moreover, prior to the time when it opted to reconsider its sentence, "the trial court never stated that it intended to deviate from [its promise]." *State v. Bonnell*, 12th Dist. Clermont No. CA2001-12-094, 2002-Ohio-5882, ¶ 20; *see also State v. Layman*, 2d Dist. Montgomery No. 22307, 2008-Ohio-759, ¶ 17, quoting *Bonnell* at ¶ 20. While the trial court still retained discretion to deviate from the promise it made if the circumstances warranted it, when the trial court decided to do so, it was obligated to first provide Mr. Cruz with the opportunity to withdraw his plea. *See Bonnell* at ¶ 21; *Layman* at ¶ 19. Based upon the record before us, we conclude that Mr. Cruz did not violate the conditions the trial court listed at the time of the plea, and the trial court failed to impose the promised sentence.

{¶14} Mr. Cruz's first assignment of error is sustained. "Either the trial court must sentence [Mr. Cruz] in accordance with [its promise], or if it determines such a sentence is no longer appropriate, it must allow [him] the opportunity to withdraw his guilty plea." *Bonnell* at ¶ 23.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ABUSED ITS DISCRETION WITH SENTENCING [MR. CRUZ] TO PRISON AFTER PROMISING A COMMUNITY CONTROL SANCTION IN EXCHANGE FOR A GUILTY PLEA ON THE DAY OF SENTENCING. IN LIGHT OF THE PLEA AGREEMENT, THE TRIAL COURT'S ACT OF SENTENCING [MR. CRUZ] WAS ARBITRARY, UNREASONABLE, AND UNCONSCIONABLE AND SHOULD BE REVERSED.

{¶15} Mr. Cruz asserts in his second assignment of error that the trial court abused its discretion in sentencing him to prison in light of the trial court's promise to sentence him to

community control at the time of the plea. Because the resolution of Mr. Cruz's first assignment of error has rendered this assignment of error moot, we decline to address it. *See* App.R. 12(A)(1)(c).

III.

{¶16} Mr. Cruz's first assignment of error is sustained. The matter is remanded to the trial court for it to elect whether to impose the sentence provided in the plea agreement or to allow Mr. Cruz to withdraw his plea. The judgment of the Lorain County Court of Common Pleas is reversed.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS.

CARR, P. J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶17} Although I agree that this matter must be remanded to the trial court, because I disagree about the appropriate remedy, I respectfully dissent from that portion of the Court's decision.

{¶18} A plea bargain is a resolution to a criminal case negotiated by two *parties*. Unlike the plea bargain defined in *Santobello*, an agreement between the prosecutor and the accused, the bargain in this case was between the accused and the trial court judge. The prosecutor was left out of the agreement, limited to voicing the State's contrary position on sentencing both at the time the plea was entered and at the time of sentencing. "Both the prosecution and the defense in this case are entitled to fair and impartial treatment." *State v. Griffey*, 35 Ohio St.2d 101, 109 (1973).

{¶19} However, what occurred in this case was not a plea bargain as envisioned in *Santobello* and *Byrd*. Accordingly, I would not analyze it as a typical plea bargain and, more importantly, a breach of that plea bargain. It is not enough in this case to scrutinize the trial court judge's participation in the plea bargaining process to determine whether it affected the voluntariness of the defendant's plea because there was no plea bargain process. Under the circumstances of this case, the *judge's* promise of a sentence, contrary to the *prosecutor's* wishes, did not create a plea bargain. Instead, Cruz's guilty plea was induced by a promise that deprived it of a voluntary act (and deprived the State of the impartial treatment the trial court

should have afforded to it). Accordingly, I would remand this matter with instructions to vacate Cruz's guilty plea.

APPEARANCES:

JOHN TOTH, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellee.