Opinion issued December 14, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00657-CR

DION ANDRE HAWKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 25th District Court
Colorado County, Texas
Trial Court Case No. 20-044

CONCURRING OPINION

The panel has concluded that no reversible error exists in the record, there are no arguable grounds for review, and that Hawkins's appeal is therefore frivolous. I cannot disagree with the panel's reasoning or outcome, and therefore I join in its disposition, but I write separately to address the glaring injustice in this case that we

are compelled to overlook: Hawkins entered into a second plea bargain before the hearing to revoke his deferred adjudication; the trial court accepted his plea of "true" at the hearing but rejected the prosecutor's recommended sentence and instead imposed a sentence twice as long as that for which Hawkins bargained; and Hawkins did not then have the right to withdraw his plea. Surely even criminal defendants, and even the least among us, should be entitled to the benefit of their bargains in the State of Texas.

BACKGROUND

Hawkins entered into a first plea bargain with the State following his indictment: he agreed to plead guilty in exchange for four years of deferred adjudication community supervision and treatment in a substance abuse treatment facility. The trial court admonished Hawkins of the consequences of pleading guilty, determined that his plea was given freely and voluntarily, and accepted the plea bargain. The trial court then placed Hawkins on deferred adjudication community supervision and ordered treatment, as provided by the plea bargain.

Several months later, after Hawkins was discharged from the substance abuse treatment facility without completing treatment, the State filed a motion to revoke Hawkins's community supervision and to adjudicate his guilt. At that time, Hawkins entered into a second plea bargain in which he agreed to plead "true" to the allegation that he violated the terms of his community supervision in exchange for a

recommended sentence of four years in prison. The trial court admonished Hawkins of the consequences of pleading "true," informed Hawkins that the trial court did not have to accept the terms of the plea bargain, and then sentenced Hawkins to eight years in prison. The panel determined, as we must under *Gutierrez v. State*, that Hawkins's inability to withdraw his plea following the trial court's rejection of the plea bargain is not reversible error. 108 S.W.3d 304 (Tex. Crim. App. 2003) (holding defendant has no right to withdraw plea of "true" after court rejects plea bargain in revocation proceeding). I believe the holding in *Gutierrez* is wrong and would instead adopt the position of the learned appellate court that *Gutierrez* reversed: a defendant should have the right to withdraw a plea of "true" after the trial court rejects the plea bargain in a proceeding to revoke community supervision. *See Gutierrez v. State*, 65 S.W.3d 362, 366 (Tex. App.—Corpus Christi–Edinburg 2001), *rev'd*, 108 S.W.3d 304 (Tex. Crim. App. 2003).

DISCUSSION

When a defendant agrees to plead guilty in exchange for a lesser sentence, his plea constitutes a waiver of his constitutional rights and therefore is subject to federal due process and state due course of law protections. When a defendant agrees to plead "true" to the allegations in a community supervision revocation proceeding, his plea likewise constitutes a waiver of constitutional rights but is not subject to the same protections. The law creates a distinction without a difference for ordinary

individuals who justly believe that a deal is a deal, and this results in an unnecessary trap for unwary defendants.

1. Plea bargain protections at guilt/innocence phase

A guilty plea is a "serious and sobering occasion" because it constitutes a waiver of fundamental rights guaranteed by the United States Constitution: the right to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt. *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring); *see* U.S. CONST. amends. V, VI. The Texas Constitution similarly mandates and guarantees the right to trial by jury, and guarantees the right to confront one's accusers, to present witnesses in one's defense, and to remain silent. TEX. CONST. art. I, § 10; *see also Farris v. State*, 581 S.W.3d 920, 925–30 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (Goodman, J., dissenting) (explaining that article I, section 10 of the Texas Constitution mandates jury trials in certain felony prosecutions). These rights may not be infringed except by due process of law or, under the Texas Constitution, due course of law. U.S. CONST. amend. V; TEX. CONST. art. I, § 19. Because of the severity of the consequences of pleading guilty and the waiver of rights it requires, there are "strict federal and state guidelines and requirements" to protect a defendant's constitutional rights when he enters into a plea bargain. *Bitterman v. State*, 180 S.W.3d 139, 141 (Tex. Crim. App. 2005); *see, e.g.*, TEX. CODE CRIM.

PROC. art. 26.13 (listing admonitions trial court must give defendant before accepting guilty plea); *Boykin v. Alabama*, 395 U.S. 238 (1969) (holding record must affirmatively show guilty plea was made intelligently and voluntarily).

2. Revocation of community supervision

If a defendant is believed to have violated the terms of his community supervision, the State may move to revoke community supervision, and, in the case of deferred adjudication community supervision, adjudicate guilt pursuant to a guilty plea. In a community supervision revocation proceeding, the State must prove by a preponderance of the evidence that the defendant violated the terms of his community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). Guilt or innocence are not at issue in a revocation proceeding and thus the "full range of constitutional and statutory protections available at a criminal trial" are not implicated. *Ruedas v. State*, 586 S.W.2d 520, 523 (Tex. Crim. App. [Panel Op.] 1979) (quoting *Davenport v. State*, 574 S.W.2d 73, 75 (Tex. Crim. App. 1978)). This does not mean, however, that "all constitutional guarantees of due process fly out the window." *Id.* The defendant is still entitled to due process protections in the revocation proceeding. *Id.*; *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012) ("Revocation involves the loss of liberty and therefore implicates due process."). The defendant who has been placed on community supervision is also protected by the due course of law

provisions of the Texas Constitution. TEX. CONST. art. I, § 19; *Rogers v. State*, 640 S.W.2d 248, 252 (Tex. Crim. App. [Panel Op.] 1981) (first op. on reh'g).

Due process and due course of law, in connection with community supervision revocation proceedings, entitle a defendant to: (1) the written notice of the claimed violations of the terms of the community supervision order; (2) the disclosure of the evidence against him; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) a neutral and detached hearing body; (5) the opportunity to cross-examine adverse witnesses; and (6) a written statement by the factfinder as to the evidence relied on and the reasons for revoking community supervision. *See Black v. Romano*, 471 U.S. 606, 612 (1985); *Scarpelli*, 411 U.S. at 786; *see also Jimenez v. State*, 32 S.W.3d 233, 242 (Tex. Crim. App. 2000) (McCormick, J., concurring) (noting that "due process of law" provision in federal constitution and "due course of law" provision in Texas Constitution "mean the same thing").

A defendant may elect to waive the due process and due course of law required in a revocation proceeding by pleading "true" to the State's allegation that the defendant violated the terms of his community supervision. He may do so in exchange for a lower recommended sentence by the prosecutor—in effect, by entering into a second plea bargain. But if the trial court rejects this second plea

bargain and instead imposes a higher sentence, the defendant has no recourse. He is not entitled to withdraw his plea of "true." *Gutierrez*, 108 S.W.3d at 309–10.

A plea of "true" in a revocation proceeding constitutes a waiver of fundamental rights, like a guilty plea. A plea of "true" must be freely and voluntarily given, like a guilty plea. A defendant may enter into a plea bargain and agree to plead "true" in exchange for a reduced recommended sentence, like a guilty plea. A trial court is free to accept or reject the recommended sentence for which the defendant bargained, like with a guilty plea. And yet, unlike with a guilty plea, if the court rejects the plea bargain and imposes a higher sentence than that for which the defendant bargained, the defendant is not entitled to withdraw his plea. *Id.* The defendant, as Hawkins has done here, has bargained away fundamental rights based on a false promise and has no recourse. This offends common notions of justice, diminishes the role and responsibility of the prosecuting district attorney, and is just wrong. If a court rejects a plea bargain in a revocation proceeding, the defendant should be entitled to withdraw his plea and require the State to meet its burden to prove the allegations since "our system of law favors the assertion of constitutional rights, not their waiver." *Dukes v. Warden, Conn. State Prison*, 406 U.S. 250, 265–66 (1972) (Marshall, J., dissenting).

3. Gutierrez ignores defendants' rights under due process and due course of law

The Court of Criminal Appeals in *Gutierrez* rejected the appeals court's determination that a defendant should have a right to withdraw a plea of "true" in a revocation proceeding following the trial court's rejection of the plea bargain for two reasons: the history of plea bargaining in Texas and statutes that regulate plea bargaining. *Gutierrez*, 108 S.W.3d at 306.

The Court in *Gutierrez* explained the state's history with plea bargaining to argue there is no inherent right to withdraw a guilty plea. As the Court described:

> Of course, plea-bargaining in felony cases was virtually unknown before 1931, because punishment decisions were made by juries. The first legislature of the state enacted a statute requiring juries to assess punishment in every case in which a defendant pleaded guilty, a requirement that was limited to felony cases in 1879. In 1930 the Supreme Court of the United States held that the Sixth Amendment was not violated by the waiver of trial by jury in a criminal case in the federal courts. After that decision, the Texas legislature quickly enacted a statute to permit a defendant, upon entering a plea of guilty in a prosecution for a non-capital felony, to waive trial by jury. At that time, and until August 29, 1977, a statute forbade a trial court to receive a plea of guilty that was influenced by fear or persuasion. In 1975, the statute required an additional admonition that a recommendation of punishment by the prosecuting attorney was not binding on the court. But at no time before August 29, 1977 did a defendant have a right to withdraw a plea of guilty because a court did not assess the recommended punishment.

Gutierrez, 108 S.W.3d at 306–07 (footnotes omitted). The Court implies that to recognize a rule of law where a defendant may, as a matter of right, withdraw a guilty

plea when the trial court does not assess the recommended punishment would somehow be inconsistent with our history.

It is correct that pleading guilty in exchange for any type of promise was once condemned in this state. *See id.* at 306. Plea bargains directly contradict the state constitutional mandate for jury trial in criminal cases. *See* TEX. CONST. art. I § 10. Yet plea bargaining no longer exists as "some adjunct" to the criminal justice system, "it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)). In describing our state's history of plea bargaining, the Court has actually described the ever-increasing use of a procedure that was once viewed with disfavor, along with an increasing recognition of the need to protect the constitutional rights implicated when using the procedure—as plea bargains have increased, so have our protections of the rights under due process and due course of law for defendants relying on plea bargains. That we did not always require the multitude of strict federal and state guidelines and requirements we do now is no reason to prohibit more procedural safeguards in the process when, as here, the law allows an obvious injustice to occur.

The Court in *Gutierrez* further reasoned that, because the state had no history of an inherent right to withdraw a guilty plea, the legislature created that right by statute in 1977 for felony cases. *Gutierrez*, 108 S.W.3d at 309; *see* TEX. CODE CRIM.

PROC. art. 26.13(a)(2) (permitting defendant to withdraw guilty plea if trial court rejects plea bargain). The legislature did not expressly provide the same right in community supervision-revocation proceedings, the Court reasoned, and so the right to withdraw a plea of "true" must not exist. *Gutierrez*, 108 S.W.3d at 309–10.

Yet we need not rely on statute to find an inherent right to withdraw a guilty plea, and by extension, a plea of "true" in a revocation proceeding, given the important constitutional rights involved; many states have already acknowledged a defendant's right to withdraw a guilty plea as a requirement of due process based on the United States Supreme Court's holding in *Santobello v. New York*. The Supreme Court in *Santobello* vacated a judgment based on a defendant's guilty plea that was part of a plea bargain in which the prosecutor did not fulfill his end of the bargain. *Santobello*, 404 U.S. 257. The Court vacated the judgment not because of any statutory right, but out of concern for the "interests of justice" and the need to establish "safeguards to insure the defendant what is reasonably due," noting that when a plea is induced by a promise of the prosecutor, that promise must be fulfilled. *Id.* at 262. The Court remanded the case to the state court to determine the proper remedy: either specific performance of the plea bargain or withdrawal of the guilty plea. *Id.* at 262–63; *see also Bitterman*, 180 S.W.3d at 141 (after trial court accepts plea bargain in open court, defendant has right to enforce state's part of plea bargain).

The Court in *Gutierrez* recognized that many other jurisdictions read *Santobello* to require the right to withdraw a guilty plea when a trial court rejects the terms of a plea bargain. *Gutierrez*, 108 S.W.3d at 307–08; *see, e.g.*, *Arnold v. State*, 409 So. 2d 947 (Ala. Crim. App. 1981); *Quintana v. Robinson*, 319 A.2d 515 (Conn. Super. Ct. 1973); *State v. Fisher*, 223 N.W.2d 243 (Iowa 1974); *Snowden v. State*, 365 A.2d 321 (Md. Ct. Spec. App. 1976); *State v. Goodrich*, 363 A.2d 425 (N.H. 1976); *State v. Nuss*, 330 A.2d 610 (N.J. Super. Ct. App. Div. 1974); *King v. State*, 553 P.2d 529 (Okla. Crim. App. 1976). And this inherent right that should apply—regardless of statute—in plea bargains at the guilt/innocence phase of criminal proceedings should equally apply, out of constitutional due process and due course of law concerns, to plea bargains in community supervision revocation proceedings. As Justice Meyers argued in his dissent in *Gutierrez*, the majority "completely ignores the basic premise of the *Santobello* holding: that the waiver of fundamental rights inherent in the plea bargaining process necessarily implicates due process concerns. The premise is equally applicable . . . when an individual waives his or her right to a hearing and pleads true during a motion to revoke community supervision." *Gutierrez*, 108 S.W.3d at 310–11 (Meyers, J., dissenting).

Based on the fundamental federal due process right recognized in *Santobello*, and based on the fundamental due course of law rights guaranteed under the Texas Constitution, I would follow the holding of the Thirteenth Court of Appeals:

> We recognize that there is no express statutory command regarding the right to withdraw a plea of true in a motion to revoke. However, in light of the waiver of rights that is involved in the motion to revoke community supervision, and the important and beneficial role that plea bargains play in our justice system, we hold that the right to withdraw a plea of true after the trial court rejects the plea agreement should be applied in a motion to revoke community supervision.

Gutierrez, 65 S.W.3d at 365.

CONCLUSION

To allow a trial court to accept a defendant's plea bargain but reject the recommended sentence outright without allowing the defendant to then withdraw his plea—whether in the guilt/innocence phase of proceedings or at a community supervision revocation phase—ignores the defendant's state and federal constitutional rights and encourages the appearance of trickery in the courts. Plea bargaining is already a dangerous gamble in that it encourages defendants, in a coercive atmosphere with a considerable informational disadvantage, to bargain away fundamental rights. If our criminal justice system insists on using plea bargains, courts should insist that plea bargains are used fairly and transparently. Due process and due course of law require no less.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).