

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Justin A. Warren,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 16, 2023

Court of Appeals Case No.
22A-CR-1653

Appeal from the Cass Superior
Court

The Honorable Lisa L. Swaim,
Judge

Trial Court Cause No.
09D02-2010-F3-16

Memorandum Decision by Judge Robb
Judges Crone and Kenworthy concur.

Robb, Judge.

Case Summary and Issue

- [1] Pursuant to a written plea agreement, Justin Warren pleaded guilty to Level 5 felony robbery and Class A misdemeanor invasion of privacy. The trial court sentenced him to consecutive terms of five years for Level 5 felony robbery and 180 days for Class A misdemeanor invasion of privacy, for a total sentence of five and one-half years.¹ Warren appeals the five-year sentence imposed for the robbery count, raising two issues for our review, which we restate as (1) whether he waived his right to appellate review of his sentence, and (2) whether the trial court abused its discretion in sentencing Warren. Concluding the plain terms of Warren’s plea agreement demonstrate that he waived his right to appellate review of his sentence – and his remedy is to seek to vacate his conviction through post-conviction proceedings, not to nullify his waiver through a direct appeal – we dismiss Warren’s appeal.

Facts and Procedural History

- [2] On October 1, 2020, Warren and Amber Johnson drove to the home of Ethan Shank, her former boyfriend, to retrieve items she left at the house during their relationship. When Warren and Amber drove up to Ethan’s house, Ethan fired a .22 caliber rifle at Warren’s car. Because the rifle was of a low caliber, loaded

¹ The trial court sentenced Warren to 180 days in the Cass County jail for the Class A misdemeanor invasion of privacy count, awarding him 180 days of jail-time credit, which resulted in time served. Warren’s five-year sentence was ordered executed in the Indiana Department of Correction.

with “bird shot[,]” and fired from a distance, it did not break the glass on Warren’s car. Appellant’s Appendix, Volume II at 140. Warren, assuming the rifle was a BB gun, exited his vehicle and engaged in a physical altercation with Ethan. Warren punched Ethan and took the rifle. Warren and Amber then left Ethan’s property, with Warren retaining possession of the rifle and Amber possessing Ethan’s cellphone. A subsequent investigation revealed a protective order from Carroll County was in effect on October 1, 2020, that ordered Warren not to have any contact with Amber.

[3] On October 2, 2020, the State charged Warren with eight counts: (1) armed robbery as a Level 3 felony, (2) robbery resulting in bodily injury as a Level 3 felony, (3) pointing a firearm as a Level 6 felony, (4) criminal recklessness as a Level 6 felony, (5) battery resulting in bodily injury as a Class A misdemeanor, (6) resisting law enforcement as a Class A misdemeanor, (7) invasion of privacy as a Class A misdemeanor, and (8) criminal mischief as a Class B misdemeanor. On February 14, 2022, Warren and the State filed a written plea agreement which provided Warren would plead guilty to Count 7, invasion of privacy as a Class A misdemeanor, and an uncharged Count 9, robbery as a Level 5 felony. In exchange, the State agreed to dismiss Counts 1-6, and 8.

[4] With regard to the sentence, the agreement provided that as to Count 9, the sentence would be “[o]pen, with all terms open to the judge after argument by the parties” and as to “Count 7 – 180 days [in the] Cass County Jail[,]” with the

two sentences to be served consecutively.² Appellant’s App., Vol. II at 147. As part of the plea agreement, Warren acknowledged:

(e) . . . Because [he] is pleading guilty, [he] understands that there will be no appellate review of the sentence. [He] acknowledges that [he] discussed this matter with counsel, and hereby makes a knowing and voluntary waiver of appellate review of the sentence imposed by the trial court. [He] may still appeal any illegal sentence which may be imposed.

* * *

(9) [He] hereby waives any right to challenge the trial court’s finding on sentencing, including the balancing of mitigating and aggravating factors and further waives his right to have the Indiana Court of Appeals review his sentence under Indiana Appellate Rule 7(B).

Id. at 147-48.³

[5] On March 14, 2022, the trial court held a plea hearing, and the parties established a factual basis for Warren’s guilty plea to robbery as a Level 5 felony and invasion of privacy as a Class A misdemeanor. The trial court accepted the plea agreement and ordered the preparation of the presentence

² The plea agreement also provided there would be “[r]estitution to Katherine Shank[, Ethan’s grandmother and the owner of the rifle,] in an amount to be agreed prior to sentencing. If no agreement as to restitution, this plea shall be rejected.” Appellant’s App., Vol. II at 147.

³ On March 14, 2022, the State filed Count 9 with the trial court, charging Warren with robbery as a Level 5 felony.

investigation report. The trial court scheduled a sentencing hearing for April 12, but by agreement of the parties, the trial court continued the sentencing hearing on three occasions so the Cass County probation department could clarify and update incomplete information on the presentence investigation report.

[6] The trial court held the sentencing hearing on July 6, 2022. Warren was the sole witness at the hearing. The State did not call any witnesses and did not introduce any evidence at the hearing. At the conclusion of Warren’s testimony, the prosecutor expressed to the trial court the need to allow for arguments from the parties, stating: “Judge, . . . I think we need to have a chance for argument. . . . I don’t mean to interrupt, necessarily, unnecessarily, but I [don’t] want to have to do this a second time later if the Court of Appeals take[s] exception to it.” Transcript of Evidence, Volume 2 at 24-25. The trial court then heard Warren’s statement of allocution and counsels’ arguments.

[7] When the arguments concluded, the trial court found Warren guilty of Level 5 felony robbery and Class A Misdemeanor invasion of privacy and sentenced him to five years for the robbery count, of which 730 days could be served in community corrections if Warren was qualified and accepted. The trial court sentenced Warren to 180 days for the invasion of privacy count, with the sentences ordered to run consecutively.⁴ Upon the State’s motion to dismiss the

⁴ The matter of restitution to Katherine Shank was not addressed.

remaining charged offenses, the trial court ordered Counts 1-6 and 8 dismissed.

The trial court then stated the following regarding Warren's right to appeal:

THE COURT: . . . You do have a right to a, well, no he does not because this was a plea.

[DEFENSE COUNSEL]: It's open. He does.

THE COURT: I'm sorry, it is open.

[DEFENSE COUNSEL]: It's discretionary so he, yeah.

THE COURT: You do have a right to appeal the sentence imposed. If you are asking to appeal the sentence, then you need to appeal within 30 days. Failure to enter a Notice of Appeal within that time period will result in forfeiture of your right to appeal. You do have a right to be represented by counsel at all stages of the proceedings including any appeal which you may wish to pursue. If you are unable to afford an attorney, I will appoint one to represent you at no cost. Would you like to appeal?

[WARREN]: Yes.

Tr. of Evid., Vol. 2 at 34-35. The prosecutor did not contradict or correct the trial court regarding Warren's ability to appeal his sentence.

- [8] On July 12, 2022, Warren's counsel filed a Motion to Appoint Public Defender for the Purpose of Appeal. The State did not file an objection to the motion, and on July 22, the trial court appointed a public defender to represent Warren for his appeal. Warren now appeals.

Discussion and Decision

Waiver

[9] We first address whether, under the terms of his plea agreement, Warren waived his right to appellate review of his sentence. Warren contends he did not waive his right to challenge his sentence on direct appeal. According to Warren, the “written waiver in the plea agreement was mutually revoked by the words and conduct of the judge, prosecutor, and defense counsel[,]” and the trial court’s “[finding] that there was no waiver of Warren’s right to appeal . . . is entitled to deference.” Appellant’s Brief at 12. Warren maintains the State’s “words and silence should be construed against it[,]” “ambiguity on the waiver issue should be decided in favor of protecting [Warren’s] right to appeal[,]” and the State is “estopped from enforcing the waiver language in the plea agreement because it remained silent when it had a duty to” contradict or correct the trial court regarding Warren’s ability to appeal his sentence. *Id.*

[10] The State argues the plea agreement provides that Warren had discussed the matter of the guilty plea with his counsel and was making a knowing and voluntary waiver of appellate review of the sentence imposed by the trial court, and Warren and his attorney both signed the plea agreement. Therefore, according to the State, “the waiver of [Warren’s] right to appeal his sentence is fully enforceable[,]” and it is of “no consequence” that the State “did not object or that the trial court erroneously granted Warren’s request to appeal during the sentencing hearing because [Warren’s] guilty plea had already been accepted

and he had received the benefit of his bargain.” Brief of Appellee at 7. We agree with the State that Warren has waived our review of his sentence.⁵

[11] “Plea agreements are contracts and once the trial court accepts it, a plea agreement and its terms are binding upon the trial court, the State and the defendant.” *Archer v. State*, 81 N.E.3d 212, 215-16 (Ind. 2017). Because a plea agreement is a contract, the principles of contract law can provide guidance when considering plea agreements. *Griffin v. State*, 756 N.E.2d 572, 574 (Ind. Ct. App. 2001), *trans. denied*. A defendant may waive his or her right to appeal a sentence as part of a plea agreement and such waivers are valid and enforceable. *Creech v. State*, 887 N.E.2d 73, 74-75 (Ind. 2008).

[12] In *Bonilla v. State*, we explained the law at the time on this issue as follows:

The Indiana Supreme Court held in *Creech v. State* that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement. 887 N.E.2d 73, 75 (Ind. 2008). The Court then analyzed whether, despite the express language of the waiver in Creech’s plea agreement, he knowingly and voluntarily waived his right to appellate review of his sentence because the judge advised him *at the close of the sentencing hearing* that he retained the right to appeal. The Court rejected Creech’s argument, explaining:

⁵ We note that prior to the completion of briefing on appeal, the State moved to dismiss the appeal in light of the language of Warren’s plea agreement. The motions panel denied the State’s motion to dismiss this case. However, we are not bound by the motions panel’s decision. See *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 12 (Ind. Ct. App. 2006), *trans. denied*.

While we take this opportunity to emphasize the importance of avoiding confusing remarks in a plea colloquy, we think the statements at issue are not grounds for allowing Creech to circumvent the terms of his plea agreement.

Creech does not claim that the language of the plea agreement was unclear or that he misunderstood the terms of the agreement at the time he signed it, but rather claims that his otherwise knowing and voluntary plea lost its knowing and voluntary status because the judge told him at the end of the sentencing hearing that he could appeal.

* * *

By the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain. Being told at the close of the hearing that he could appeal presumably had no effect on that transaction.

Id. at 76-77 (footnote omitted).

Bonilla, 907 N.E.2d 586, 588-89 (Ind. Ct. App. 2009) (emphasis added; footnotes omitted), *trans. denied*.

[13] We have since addressed this issue in various iterations. For example, in *Ricci v. State*, 894 N.E.2d 1089 (Ind. Ct. App. 2008), *trans. denied*, the trial court advised the defendant *at his plea hearing* that according to its reading of the plea agreement, the defendant had not waived the right to appeal his sentence. Neither the State nor the defendant contradicted or corrected the trial court by

drawing its attention to the waiver provision in the plea agreement. Therefore, we held the waiver provision was a nullity because “the trial court accepted the plea agreement, and [all parties] entered into the plea agreement with the understanding that [defendant] retained the right to appeal his sentence.” *Id.* at 1094.

[14] In *Brattain v. State*, 891 N.E.2d 1055 (Ind. Ct. App. 2008), the trial court appointed appellate counsel for the defendant at his request more than a week after his sentencing hearing. We held, based on the reasoning in *Creech*, that this action did not invalidate the provision of the defendant’s plea agreement waiving appellate review of his sentence. *Id.* at 1057.

[15] And in *Mechling v. State*, 16 N.E.3d 1015 (Ind. Ct. App. 2014), *trans. denied*, we addressed the defendant’s argument that the State was estopped from enforcing the waiver provision of a plea agreement because it did not correct the trial court when the trial court mistakenly advised him at his sentencing hearing that he had the right to appeal and offered to appoint appellate counsel. Because the trial court’s misstatement came at the conclusion of the sentencing hearing, we held the State had no duty “to object to a statement that carried no legal effect” and therefore application of estoppel was not warranted. *Id.* at 1017-18. We also noted that if there was a duty to correct the trial court, as officers of the court, the State and defense counsel would have an equal duty to do so. *Id.* at 1018.

[16] Thus, the timing of an advisement or action conflicting with the waiver provision of a plea agreement had been the crucial factor in determining whether it effectively waived appeal rights. However, this changed with our supreme court’s recent decision in *Davis v. State*, 207 N.E.3d 1183 (Ind. 2023), espousing an “all or nothing” approach to determining whether a guilty plea is knowing and voluntary despite a trial court’s misadvisement and holding that if the trial court’s misadvisement misleads a defendant to change his plea, the remedy “is to vacate his conviction through postconviction proceedings, not to nullify his appeal waiver through a direct appeal.” *Id.* at 1184, 1187.⁶

[17] In *Davis*, the defendant pleaded guilty to four theft-related charges in exchange for a more lenient sentence. The plea agreement, signed by both Davis and his attorney, provided that Davis waived his right to appeal his sentence. Davis, nevertheless, sought to appeal his sentence on grounds the statements the trial court made before accepting his change of plea “misled him to believe that, contrary to his written [plea] agreement, he was retaining his right to appeal his sentence.” *Id.* at 1184. The trial court had incorrectly advised Davis that he “would have the ability to appeal” his sentence. *Id.* at 1185. Our supreme court dismissed Davis’s appeal, holding that if the statements the trial court made before accepting Davis’s guilty plea misled him to change his plea, Davis’s remedy was to seek to vacate his conviction through post-conviction

⁶ On May 5, 2023, Warren filed with this court a Notice of Additional Authority, advising this court of the *Davis* decision and asking this court to apply contract law principles to Warren’s waiver argument.

proceedings and not to nullify his appeal waiver through a direct appeal. *See id.* at 1184.

[18] Our supreme court noted:

Here, both Davis and his defense counsel signed a plea agreement with the State, which the trial court accepted. In exchange for a lower ceiling on his sentence, Davis agreed to waive his “right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentence[d] [him] within the terms of th[e] plea agreement.” Because the trial court sentenced Davis within the terms of the plea agreement, his appeal waiver applies here. And as in *Creech*, Davis “does not claim that the language of the plea agreement was unclear or that he misunderstood the terms of the agreement at the time he signed it.” 887 N.E.2d at 76. In other words, he does not claim that when both he and his attorney signed the agreement waiving his appeal, he misunderstood what he was agreeing to or that his agreement was involuntary.

Id. at 1186.

[19] Regarding a defendant’s remedy when claiming a guilty plea was involuntary because the defendant was either not advised or misadvised about the rights he was waiving by pleading guilty, the Court explained that under such circumstances, the defendant

may obtain post-conviction relief to vacate the conviction and set aside the guilty plea only if the defendant can “prove that any erroneous or omitted advisement, if corrected, would have changed [the] decision to enter the plea.” “A plea entered after the trial judge has reviewed the various rights which a defendant

is waiving and made the inquiries called for in the statute is unlikely to be found wanting in a collateral attack.” But “defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.” One way a judge may mislead a defendant into pleading guilty is to mistakenly advise that the defendant is retaining appeal rights that have been waived in a plea agreement.

Id. at 1187 (internal citations omitted).

[20] The Court then stated:

We do not analyze whether a plea agreement’s appeal waiver was knowing and voluntary in light of a trial court’s misstatement separate from whether the guilty plea was knowing and voluntary. *It is all or nothing.* Either the guilty plea was knowing and voluntary despite the trial court’s misadvisement, in which case the plea agreement on which the guilty plea was based remains fully enforceable; or the guilty plea resulted from confusion about the terms in the written plea agreement, in which case the conviction must be vacated (if the defendant wishes), and all the plea agreement terms would be unenforceable.

Id. (emphasis added). The Court added:

Th[is] is because the plea agreement is a bargain between the defendant and the State, *Archer*, 81 N.E.3d at 215-16, and the defendant cannot retain the benefits of the bargain (a more lenient sentence) while escaping its burdens (the promise not to appeal for an even more lenient sentence). We cannot renegotiate the parties’ deal either. While trial judges have discretion to accept or reject plea agreements, courts are not empowered to change any of the terms. *Creech*, 887 N.E.2d at 77

n.3 (explaining that trial courts cannot accept a guilty plea and then modify the plea agreement even if the modification is more favorable to the defendant).

Id. at 1187-88.

[21] The Court concluded:

In sum, Davis's written plea agreement with the State, which both he and his attorney signed, unambiguously waived his right to appeal his sentence. If Davis's guilty plea was nevertheless not knowing and voluntary because the trial judge's misstatements misled him about which rights he was waiving, then Davis may demonstrate that through postconviction proceedings, and his conviction can be set aside. That would restore his right to appeal any sentence and all other rights he waived through his plea agreement and guilty plea. But we cannot decide in the first instance on a direct appeal whether Davis is able to make that showing.

Id. at 1189.

[22] Likewise, in the case before us, we cannot decide in the first instance on direct appeal whether Warren can establish his guilty plea, under the circumstances in which it was entered, was not knowing and voluntary. In the instant case, the plea agreement was referenced repeatedly at the guilty plea hearing, and the trial court explained to Warren the terms of the plea agreement and what rights he was giving up by entering into it, including the right to appeal. Warren acknowledged that he understood the rights he was waiving by pleading guilty and that he was entering into the plea agreement freely and voluntarily.

Warren does not claim that the language of the plea agreement was unclear.

And, as in *Creech*, it was not until the conclusion of Warren’s sentencing hearing – after his plea had been accepted and after his sentence imposed – that the trial court advised him of his right to appeal the sentence, that an appeal must be initiated within thirty days, and that he had a right to be represented by counsel, and then asked Warren if he wished to appeal.⁷ The trial court accepted the plea agreement and subsequently sentenced Warren on the robbery count to a term within the range provided by statute. *See* Ind. Code § 35-50-2-6(b) (stating a person who commits a Level 5 felony shall be imprisoned for a fixed term between one and six years). And the State had no duty to object to the trial court’s statements. *See Mechling*, 16 N.E.3d at 1017-18.⁸

[23] However, applying the reasoning of our supreme court in *Davis*, we must take an “all or nothing” approach. *Davis*, 207 N.E.3d at 1187. Thus, we do not decide whether the appeal waiver in Warren’s plea agreement was knowing or voluntary in light of the trial court’s misstatement separate from whether Warren’s guilty plea was knowing and voluntary. We, therefore, conclude Warren has waived his right to appeal his sentence, and his remedy is to seek to vacate his conviction through post-conviction proceedings.

⁷ To the extent Warren asks this court to reconsider our supreme court’s decision in *Creech*, we decline to do so.

⁸ The State’s failure to object to the trial court’s misstatement does not alter our analysis or the outcome of this case. However, we remind the State and counsel for the defense of their obligation of candor to the court.

Conclusion

[24] Warren entered into a written plea agreement with a provision waiving his right to appellate review of his sentence. Warren has thus waived his right to appeal his sentence directly, and this appeal is therefore dismissed.

[25] Dismissed.

Crone, J., and Kenworthy, J., concur.