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IN THE
COURT OF APPEALS OF INDIANA

Jeremiah Jordyn Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 25, 2022

Court of Appeals Case No.
22A-CR-364

Appeal from the Tippecanoe
Superior Court

The Honorable Daniel J. Moore,
Judge

Trial Court Cause Nos.
79D07-2108-F6-770
79D07-2102-CM-555

Weissmann, Judge.

- [1] Prosecuting attorneys have broad discretion to bargain with a defendant in resolving criminal charges through a pretrial diversion program. But once the State enters into a valid diversion agreement, it may not unilaterally revoke the agreement based only on buyer's remorse.
- [2] That is what happened here. Despite arresting Jeremiah Smith for both misdemeanor trespass and felony lifetime parole violation, the State charged Smith with the misdemeanor alone. The State and Smith then entered into a valid pretrial diversion agreement to resolve the charge. But barely a week later, the State regretted not also charging Smith with the felony. To remedy this oversight, the State revoked Smith's diversion agreement and added the felony count. This was a breach of the State's agreement with Smith.
- [3] We reverse and remand with instructions to dismiss the case against Smith with prejudice.

Facts¹

- [4] This case began when Smith's parole officer asked the West Lafayette Police Department to investigate whether Smith was violating his lifetime parole for sex offenders by visiting his 16-month-old child. Police officers found both Smith and his child inside the apartment where the child resides. They also

¹ We conducted oral argument in this case on September 15, 2022. We thank counsel for their participation and commend them for the quality of their advocacy.

learned that the apartment complex had issued Smith a lifetime ban from the premises due to his status as a registered sex offender.

- [5] Officers arrested Smith for Level 6 felony lifetime parole violation and Class A misdemeanor criminal trespass, listing both offenses in their police reports. The State, however, only charged Smith with the misdemeanor offense, which the parties quickly resolved through a pretrial diversion agreement. Under the agreement, the State agreed to withhold prosecuting Smith for one year if Smith complied with various terms dictated by the State. App. Vol. II, p. 23. The State also reserved “the right to revoke th[e] agreement for any reason prior to its execution and for any violation of its terms thereafter.” *Id.* (emphasis omitted).
- [6] Both parties signed the diversion agreement and filed it with the trial court as required by statute. A week later, the State moved to revoke the agreement and to add a count for Level 6 felony lifetime parole violation. According to the State, this decision was based on the discovery of “additional information related to this case,” but the State never articulated what new information had been discovered. *Id.* at 24. Nor did the State allege that Smith violated any terms of the executed diversion agreement. In fact, the trial court specifically found that Smith “ha[d] been compliant with the terms of the agreement since entering into the same.” *Id.* at 33.
- [7] Acknowledging the lack of certainty in the law concerning the State’s ability to unilaterally revoke a valid pretrial diversion agreement, the trial court

determined that the prosecutor’s broad charging discretion allowed the State to renege on its agreement. We disagree.

Discussion and Decision

- [8] Smith argues that the trial court erred in granting the State’s motion to revoke his diversion agreement because he never violated the agreement’s terms. The State claims it was never bound by the diversion agreement because such agreements lack consideration and, thus, are not enforceable as contracts. According to the State, it acted within its discretion by revoking the agreement and adding the additional charge.
- [9] Diversion agreements are contractual in nature. *See Bowers v. State*, 500 N.E.2d 203, 203 (Ind. 1986); *Barton v. State*, 192 N.E.3d 970, 977 (Ind. Ct. App. 2022). As authorized by Indiana Code § 33-39-1-8(d), “a prosecuting attorney may withhold prosecution against an accused person if,” among other things, “the person agrees to conditions of a pretrial diversion program offered by the prosecuting attorney,” and “the terms of the agreement are recorded in an instrument signed by the person and the prosecuting attorney and filed in the court in which the charge is pending.” Ind. Code § 33-39-1-8(d)(2), (3). We therefore turn to principles of contract formation and breach in determining the parties’ rights and obligations under Smith’s diversion agreement. *See Bowers*, 500 N.E.2d at 203; *Barton*, 192 N.E.3d at 977.

A. Contract Formation

[10] A contract requires an offer, acceptance, and consideration. *Stardust Ventures, LLC v. Roberts*, 65 N.E.3d 1122, 1127 (Ind. Ct. App. 2016). Only the latter is disputed in this case. “To constitute consideration, there must be a benefit accruing to the promisor or a detriment to the promisee.” *Ind. Dep’t of State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d 174, 179 (Ind. 2010).

A benefit is a legal right given to the promisor to which the promisor would not otherwise be entitled. A detriment on the other hand is a legal right the promisee has forborne. The doing of an act by one at the request of another which may be a detrimental inconvenience, however slight, to the party doing it or may be a benefit, however slight, to the party at whose request it is performed, is legal consideration for a promise by such requesting party. In the end, consideration—no matter what its form—consists of a bargained-for exchange.

Id. (internal quotation marks and citations omitted).

[11] The bargained for exchange in Smith’s diversion agreement is clear: the State agreed to “dismiss all charges in this case” in exchange for Smith “successfully and timely complet[ing] all terms of th[e] agreement.” App. Vol. II, p. 23. Those terms were detrimental to Smith and included that he: (1) pay a \$454 diversion fee; (2) “maintain good and lawful behavior”; (3) “NOT use or consume alcohol”; (4) “NOT enter any bar, tavern, or liquor store”; and (5) submit to random alcohol and drug screens. *Id.* Additionally, the agreement provided that Smith waived his rights against unlawful search and seizure, his right to trial by jury, and his right to a speedy trial. *Id.* The State also benefitted

by avoiding trial. *See Bowers*, 500 N.E.2d at 204 (“[P]re-trial disposition of criminal charges . . . facilitate[s] the essential conservation of limited judicial and prosecutorial resources.”).

[12] Smith’s diversion agreement was supported by consideration, and the State was bound by the agreement’s terms.

B. Breach of Contract

[13] Having concluded that the State was bound by Smith’s diversion agreement, we have no trouble finding the State’s revocation of the agreement was a breach of its terms. The agreement specifically provided: “The State reserves the right to revoke this agreement for any reason prior to its execution and for any violation of its terms thereafter.” App. Vol. II, p. 23 (emphasis omitted). As it is undisputed that the agreement had been properly executed and Smith did not violate any of its terms, the State had no right to revoke it.

[14] The State also failed to support its claim that revocation was warranted by the discovery of “additional information.” *Id.* at 24. When the trial court inquired about the alleged information, the State ambiguously replied: “We couldn’t, we didn’t have any way, we didn’t have enough information about that and didn’t know that, any details, and were unable to get additional details until we were later contacted with additional information. They gave us specifics.” Tr. Vol. II, pp. 9-10. The State neither identified these “specifics” nor explained why they were necessary to charge Smith with felony lifetime parole violation when he

had already been arrested for the offense. The State’s lack of explanation leaves us firmly convinced that nothing other than a charging error occurred.

[15] “[T]he promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded.” *Bowers*, 500 N.E.2d at 204. “The public justifiably expects the State, above all others, to keep its bond.” *Id.* Because revoking Smith’s diversion agreement without cause was a breach of the agreement’s terms, the trial court erred in granting the State’s motion to revoke the agreement.

[16] Accordingly, we reverse the trial court’s judgment and remand with instructions to dismiss the case against Smith with prejudice².

Robb, J., and Pyle, J., concur.

² Smith also claims the State violated his substantive due process rights and committed prosecutorial misconduct in the handling of this case. Because we reverse and remand on other grounds, we do not address these issues.