

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Brandy R. Garner,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

April 6, 2021

Court of Appeals Case No.  
20A-CR-1794

Appeal from the Shelby Circuit  
Court

The Honorable Trent Meltzer,  
Judge

Trial Court Cause Nos.  
73C01-1705-F5-64  
73C01-1707-F6-335

**Weissmann, Judge.**

[1] Brandy Garner appeals the four-year aggregate sentence imposed by the trial court after she pleaded guilty to Level 5 felony fraud on a financial institution and Level 6 felony theft. Garner concedes that she knowingly and intentionally waived her right to appeal her sentence as part of her plea agreement with the State. But she claims the State relinquished its right to enforce that waiver by mistakenly advising the trial court—after sentencing—that she retained her right to appeal.

[2] Finding that Garner’s waiver of her right to appeal her sentence remains a binding term of her plea agreement with the State, we dismiss her appeal.

## Facts

[3] In 2017, Garner cashed a paycheck issued to and previously cashed by her daughter. The check’s payor reported the double transaction to police, and a warrant was issued for Garner’s arrest. Two police officers executed the warrant while Garner was at a local Dollar General store. Upon taking Garner into custody, the officers discovered in her purse beauty products that Garner admitted she was going to steal from the store.

[4] In connection with the check incident, the State charged Garner with Level 5 felony fraud on a financial institution, Level 6 felony forgery, and Class A misdemeanor check deception. The State also alleged Garner to be a habitual offender. In connection with the shoplifting incident, the State charged Garner with theft as both a Level 6 felony and a Class A misdemeanor.

[5] Garner subsequently entered into a plea agreement with the State. She agreed to plead guilty to Level 5 felony fraud and Level 6 felony theft in exchange for dismissal of the remaining charges. The agreement also capped Garner's potential aggregate sentence at eight years and included the following provision:

The defendant hereby **waives the right to appeal any sentence** imposed by the Court, under any standard of review, including but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of the plea agreement.

App. Vol. II, p. 47 (emphasis added).

[6] Garner signed the plea agreement and, at her plea hearing, acknowledged that she read and reviewed its terms with her attorney before signing. Garner and the trial court then discussed the agreement's waiver provision as follows:

THE COURT: You understand that if this case were to proceed to trial and you are found guilty that you would have the right to appeal that conviction to a higher court?

MRS. GARNER: Yes sir.

THE COURT: You understand that by pleading guilty you give up that right of a[n] appeal?

MRS. GARNER: Yes sir.

Tr. Vol. II, p. 7.

- [7] Garner pleaded guilty, as agreed, but failed to appear for her sentencing hearing. She then absconded for eighteen months. When Garner finally appeared for sentencing, the trial court imposed a four-year sentence for her fraud conviction and a two-year sentence for her theft conviction. These sentences were ordered to be served concurrently, for an aggregate sentence of four years executed.
- [8] At the conclusion of the sentencing hearing—after Garner’s sentence had been announced—the trial court asked, “[Y]ou have the right to appeal this sentence, right?” Tr. Vol. II, p. 27. The State responded, “Yes, Sir.” *Id.* Garner then indicated that she wished to file an appeal, and the court appointed her a public defender for that purpose. This appeal followed.

## Argument and Analysis

- [9] Garner seeks relief under Indiana Appellate Rule 7(B), arguing that the sentence imposed by the trial court is inappropriate in light of the nature of the offenses and her character. As a preliminary matter, however, Garner claims the State cannot enforce her plea agreement’s waiver provision. She is incorrect for two reasons: 1) the parties were already bound by Garner’s plea agreement wherein she waived her right to an appeal; and 2) the erroneous comment by the court and State did not resurrect her previously waived right.
- [10] The Indiana Supreme Court has held that a criminal defendant may waive the right to appellate review of their sentence as part of a written plea agreement.

*Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). The waiver must be knowing and voluntary, but a specific dialogue with the trial court judge is not necessary. *Id.* at 76. “Acceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court’s view, the defendant knowingly and voluntarily agreed to the waiver.” *Id.* at 77 (finding knowing and voluntary waiver where trial court accepted plea agreement with waiver provision but, after sentencing, mistakenly advised defendant of right to appeal his sentence).

[11] Garner concedes that she knowingly and voluntarily waived her right to appeal her sentence. Appellant’s Br. p. 9 (“Pursuant to *Creech* . . . the waiver provision in this case is valid, even though Garner was misadvised at sentencing of the retention of her right to appeal her sentence.”).<sup>1</sup> However, she claims the State waived its right to enforce her waiver by “mistakenly” informing the trial court that she retained her right to appeal. Appellant’s Br. p. 9.

[12] “Waiver is an intentional relinquishment of a known right.” *Pohle v. Cheatham*, 724 N.E.2d 655, 659 (Ind. Ct. App. 2000). Here, the trial court asked if Garner retained the right to appeal her sentence, and the State responded, “Yes, Sir.” Tr. Vol. II, p. 27. This exchange does not prove the State’s intent to relinquish

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<sup>1</sup> Our Supreme Court recently reminded trial court judges that “the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence.” *Williams v. State*, No. 21S-CR-113, 2021 WL 972392, at \*1 (Ind. Mar. 16, 2021). We reiterate that reminder here, even though Garner admits she was not misled by the trial court’s erroneous advisement.

its right to enforce Garner’s waiver. More importantly, it does nothing to modify the bargained-for terms of her plea agreement.

[13] Plea agreements are contractual in nature. *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994). During the plea-bargaining process, the State and the defendant “may negotiate to include and exclude certain terms with the hope that each party will receive a substantial benefit.” *Rodriguez v. State*, 129 N.E.3d 789, 794 (Ind. 2019). If the parties strike a deal, the agreement is submitted to the trial court for approval. *Id.* (citing Ind. Code § 35-35-3-3(b)).

[14] “Trial courts enjoy considerable discretion in deciding whether to accept or reject a proposed plea agreement.” *Id.* If a court rejects a plea agreement, subsequent plea agreements may be filed. Ind. Code § 35-35-3-3(b). But once the bargained-for plea is accepted, “the State, defendant, and trial court become bound by the agreement’s terms[.]” *Id.*; *accord* Ind. Code § 35-35-3-3(e) (“If the court accepts a plea agreement, it shall be bound by its terms.”).

[15] Garner’s plea agreement expressly provided that she waived the right to appeal her sentence. Because the trial court accepted Garner’s guilty plea, the parties and the court are bound by her waiver. *See State v. Holloway*, 980 N.E.2d 331, 335 (Ind. Ct. App. 2012) (“The court is not only bound to the specific charges and sentencing guidelines of a plea agreement[.]”). Even if the parties agreed to modify the plea agreement to allow Garner the right to appeal her sentence, that right could not be resurrected without the court’s approval. *See Rodriguez*, 129 N.E.3d at 794; Ind. Code § 35-35-3-3. Such approval was neither sought by

Garner nor given by the court. Rather, the court misspoke when it stated Garner had the right to appeal her sentence, and the State reinforced this mistake in its response. Nothing about that erroneous colloquy changed the terms of Garner's plea agreement which remain binding.

[16] Finding Garner knowingly and voluntarily waived her right to appeal her sentence, we dismiss her appeal.

[17] Dismissed.

Mathias, J., and Altice, J., concur.