

Circuit Court for Anne Arundel County
Case No. 02-K-13-001015

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2420

September Term, 2018

STATE OF MARYLAND

v.

MARK HOUSER

Wright,
Graeff,
Kehoe,

JJ.

Opinion by Wright, J.

Filed: September 27, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, the State of Maryland, challenges the Circuit Court for Anne Arundel County's modification of appellee, Mark Houser's, sentence to a probation before judgment ("PBJ").¹ Houser was indicted on two counts of sexual abuse of a minor, one

¹ A [PBJ] means that "with the consent of a person guilty of a criminal offense, the court exercising criminal jurisdiction has power to stay the entering of judgment, defer further proceedings, and place the person on probation." *State v. Griswold*, 374 Md. 184, 190 n.3 (2003) (quotations and citations omitted).

The statutory authority for a PBJ is found in Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-220(b), which states that:

(1) When a defendant pleads guilty or *nolo contendere* or is found guilty of a crime, a court may stay the entering of judgment, defer further proceedings, and place the defendant on probation subject to reasonable conditions if:

- (i) The court finds that the best interests of the defendant and the public welfare would be served; and
- (ii) The defendant gives written consent after determination of guilt or acceptance of a *nolo contendere* plea.

(2) Subject to paragraphs (3) and (4) of this subsection, the conditions may include an order that the Defendant:

- (i) pay a fine or monetary penalty to the State or make restitution or
- (ii) participate in a rehabilitation program, the parks program, or a voluntary hospital program.

(3) Before the court orders a fine, monetary penalty, or restitution, the defendant is entitled to notice and a hearing to determine the amount of the fine, monetary penalty, or restitution, what payment will be required, and how payment will be made.

(4) Any fine or monetary penalty imposed as a condition of probation shall be within the amount set by law for a violation resulting in conviction.

count of fourth-degree sexual offense, and one count of second-degree assault for abusing his fourteen-year-old stepdaughter.

At the plea hearing, the State informed the circuit court of the parties' plea agreement. According to the plea agreement, Houser's counsel would not request a PBJ, and the court could not grant a request to modify Houser's sentence without consent from the State's Attorney. Houser's counsel informed the court that it planned to submit a Motion to Reconsider Houser's sentence.

Pursuant to a plea deal, Houser pled guilty to fourth-degree sexual offense and second-degree assault, and the court sentenced him. The State *nolle prossed* the additional charges against him in exchange for his plea. The court sentenced Houser to one year of incarceration for the fourth-degree sexual offense and four years for the second-degree assault. For each sentence, all the time was suspended but fifteen days, and the court placed Houser on three years of supervised probation. As promised, Houser's counsel submitted a Motion to Reconsider within ninety days of the circuit court's imposition of Houser's sentence, requesting that the court hold the Motion *sub curia*.

After completing his fifteen days of incarceration and three years of supervised probation, Houser requested a modification of his sentence. After a hearing, the circuit court modified Houser's sentence to a PBJ.

(5) As a condition of probation, the court may order a person to a term of custodial confinement or imprisonment.

The State appealed and presents the following questions for our review:

1. Was the circuit court's modification of Houser's sentence to [PBJ] illegal because it violated the binding plea agreement?
2. Was the circuit court's modification of Houser's sentence to [PBJ] illegal because, at the time the sentence was purportedly modified, there was no longer an active sentence in existence?

For the reasons to follow, we answer yes to the first question and reverse the judgment of the circuit court. As such, there is no need to answer the second question.

BACKGROUND

The Plea Hearing

On September 26, 2013, the parties appeared before the circuit court for a plea hearing. A lengthy discussion regarding the plea agreement occurred:

[STATE]: It is my understanding the Defendant is going to be entering a plea of guilty to count number three which charges him with fourth degree sex offense, as well as count number four which charges him with second degree assault *As part of the plea the Defense has agreed not to ask for a probation before judgment and the Court is unable to give a probation before judgment without prior State's Attorney approval.* At the time of sentencing the State would be asking for some jail time and deferring to the Court for the amount of jail time. In addition to that jail time we would be asking for a suspended sentence along with supervised probation[.]

THE COURT: [Defense], is that your understanding?

[DEFENSE]: Yes, sir, it is. I believe if I could further add, I think the State is cognizant of our pending request. *I think we asked that the Court hold [the request for modification] for some time in the future in order to re-evaluate his registration and the benefit of probation before judgment.*

THE COURT: A request for modification?

[DEFENSE]: That's correct.

THE COURT: Well, the Court will keep it under advisement.

As defense counsel qualified Houser for his guilty plea pursuant to Md. Rule 4-242(a),² he stated:

[DEFENSE]: [T]his plea is unique in that it would actually require the State's permission or at least accession to the idea that you could receive this probation before judgment benefit in the future. Do you understand that?

After finding that Houser had entered into the guilty pleas “freely, voluntarily, knowingly, and intelligently,” the circuit court accepted Houser's guilty pleas:

THE COURT: All right. The [c]ourt will accept [Houser's] guilty pleas. I find the facts support the plea and that [Houser] has knowingly and voluntarily waived his right to a jury trial and his right to a court trial. He pleaded guilty freely and voluntarily that he is guilty of count three of fourth-degree sex offense and count four, second degree assault.

The State then continued to address the court as to sentencing:

[STATE]: Your Honor, we would ask for some incarceration in this matter. You can see that the guidelines are probation but based on the serious nature of these facts we do feel that incarceration is appropriate. We will defer to Your Honor for the amount of time in addition to that incarceration.

The court then sentenced Houser as follows:

THE COURT: All right. [Houser], the Court is going to sentence you with respect to the fourth-degree sex offense to a period of one year

² Md. Rule 4-242(a) states that “[a] defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. In addition to any of these pleas, the defendant may enter a plea of not criminally responsible by reason of insanity.”

incarceration. I am going to suspend all except for fifteen days of that You are entitled to credit for ten days that you previously served between the time of your arrest and the time that you made bond You are going to be on probation for a period of three year With respect to the second-degree assault charge . . . the Court will sentence you to a period of four years and suspend all but fifteen days subject to the same credit. And probation, likewise, will be three years.

Within ninety days of the imposition of the sentence, Houser filed a “Motion to Reconsider Sentence.” In the Motion, Houser stated:

At the time of the plea, the Court indicated that it would be amenable to holding the present motion *sub curia* and would possibly review the conviction in the present matter after a period of four and one-half years should the Defendant successfully complete probation and only if the State was in agreement.

As part of the plea, the State indicated that it would keep an open mind as to a modification in the indefinite future.

On October 21, 2013, the circuit court ruled on Houser’s motion. The court indicated that it would not set the matter for a hearing “without consent from the State’s Attorney” and held the matter *sub curia*.

Five years later, after completing his active incarceration and supervised probation, Houser requested a hearing on his motion to modify his sentence. The parties appeared before the circuit court on September 19, 2018. After hearing argument from the parties, the court granted Houser’s Motion for a Modification of Sentence and stayed his previous judgment, in effect granting Houser a PBJ. The State’s timely appeal followed.

DISCUSSION

I. Illegality of Houser’s Sentence

The parties disagree as to whether the circuit court entered into a binding plea agreement. We conclude that it did and also hold that the PBJ provision in the plea agreement was not ambiguous.

Md. Rule 4-345(a) provides that a “court may correct an illegal sentence at any time.” For a sentence to be “illegal” under Md. Rule 4-345(a), the “illegality must inhere in the sentence itself[. . ..]” *Matthews v. State*, 424 Md. 503, 512 (2012). In the context of plea agreements,³ a sentence is inherently illegal if it exceeds that which was agreed upon in a plea agreement. *Id.* at 514.

³ Md. Rule 4-243. Plea agreements.

- (a) **Conditions for agreement.** (1) Terms. The defendant may enter into an agreement with the State’s Attorney for a plea of guilty or nolo contendere on any proper condition, including one or more of the following:
- (A) That the State’s Attorney will amend the charging document to charge a specified offense or add a specified offense, or will file a new charging document;
 - (B) That the State’s Attorney will enter a nolle prosequi pursuant to Rule 4-247(a) or move to make certain charges against the defendant stet on the docket pursuant to Rule 4-248(a);
 - (C) That the State’s Attorney will agree to the entry of a judgment of acquittal on certain charges pending against the defendant;
 - (D) That the State will not charge the defendant with the commission of certain other offenses;
 - (E) That the State’s Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence disposition, or other judicial action;
 - (F) That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.

(2) Notice to victims. The State’s Attorney shall give prior notice, if practicable, of the terms of a plea agreement to each victim or victim’s representative who has filed a Crime Victim Notification Request form or submitted a request to the State’s Attorney pursuant to Code, Criminal Procedure Article, § 11-104.

(b) **Recommendations of State’s Attorney on sentencing.** The recommendation of the States Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection (a)(1)(E) o this Rule is not binding on the court. The court shall advise the defendant at or before the time the State’s Attorney makes a recommendation that the court is not bound by the recommendation, that it may impose the maximum penalties provided by law for the offense to which the defendant pleads guilty, and that imposition of a penalty more severe than the one recommended by the State’s Attorney will not be grounds for withdrawal of the plea.

(c) **Agreements of sentence, disposition, or other judicial action.** (a) Presentation to the court. If a plea agreement has been reached pursuant to subsection (a)(1)(F) of this Rule for a please of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State’s Attorney shall advise the judge of the terms of the agreement when the defendants pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

(2) Not binding on the court. The agreement of the State’s Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.

(3) Approval of plea agreement. If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

(4) Rejection of plea agreement. If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (a) that the court is not bound by the plea agreement; (b) that the defendant may

In *State v. Smith*, 230 Md. App. 214, 226 (2016), this Court explained the standard of review that governs judicial review of plea agreements:

To determine whether there actually is an agreement between the State and a defendant, further to determine precisely what the terms of that agreement mean, to determine whether the trial judge signed on to that agreement, and finally to determine whether the agreement was breached are questions of law for the appellate court to decide *de novo*. *Cuffley v. State*, 416 Md. 568, 581 (2010) (“Whether a trial court has violated the terms of a plea agreement is a question of law, which we review *de novo*.”); *Tweedy v. State*, 380 Md. 475, 482 (2004) (“Whether a plea agreement has been violated is a question of law which we review *de novo*.”).

Plea agreements are contracts between the defendant and the State. *Smith*, 230 Md. App. at 218. These agreements “eliminate many of the risks, uncertainties, and practical burdens of trial. . . .” *Id.* at 219 (quoting *Dotson v. State*, 321 Md. 515, 517

withdraw the plea; and (c) that is the defendant persists in the plea of guilty, conditional plea action may be less favorable than the plea agreement. If the defendant persists in the plea, the court may accept the plea of guilty only pursuant to Rule 4-242(c) and the plea of nolo contendere only pursuant to Rule 4-242(e).

(5) Withdrawal of plea. If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.

(d) **Record of proceedings.** All proceedings pursuant to this Rule, including the defendant’s pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.

(1996)). As contracts, plea agreements are governed by principles of “fairness and equity.” *Cuffley v. State*, 416 Md. 568, 580 (2010) (citations omitted).

Md. Rule 4-243 governs the formation of binding plea agreements. An agreement between the State and the defendant is “not binding on the court unless the judge to whom the agreement is presented approves it.” Md. Rule 4-243(c)(2). If a judge approves the plea agreement, he or she “shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement[.]” Md. Rule 4-243(c)(3). The court can only impose a more lenient sentence than called for in the plea agreement “with the consent of both parties.” *Id.*

A plea agreement becomes binding when 1) the State submits the plea agreement as binding and the court accepts that it is bound and 2) the court begins “talking in the language” of the plea agreement and embodies the agreement in its sentence. *Smith*, 230 Md. App. at 227. The Court of Appeals was presented with the first State challenge to a binding plea agreement in *Bonilla v. State*, 443 Md. 1 (2015). There, the State proposed a binding plea agreement to the circuit court. *Id.* at 4. The court accepted the defendant’s guilty plea and stated on the record that it was “bound” to the plea agreement. *Id.* In *Smith*, this Court determined that the court bound itself to a plea agreement when it accepted the State’s proposed binding plea and agreed to “sentence [the defendant] within the ranges recommended by the attorneys.” *Smith*, 230 Md. at 229. If a judge violates a binding plea agreement, “even-handed justice requires . . . that each of the primary contracting parties, if suffering from the breach, is equally entitled to seek a remedy

under equally conducive procedural conditions.” *Smith v. State*, 453 Md. 561, 572 (2017) (quoting *Smith*, 230 Md. App. at 218).

Here, the plea agreement between the parties was binding because the State presented it to the court as such. The State asked the circuit court not to modify Houser’s sentence without the State Attorney’s consent. The State also stated to the court that it was deferring to the court’s discretion as to the probationary term; the plea agreement was open-ended only as to *this term* of the agreement. While the court accepted Houser’s guilty plea, it did so within these limited guide rails. The court “[spoke] in the language” of the plea agreement, when it agreed to keep the “request for modification under advisement” and sentenced Houser to fifteen days of active incarceration and three years of supervised probation. The colloquy between the State, the defense, and the circuit court judge was entirely consistent with a proposed binding plea agreement, and the circuit court’s actions thereafter were totally consistent with a proposed binding plea agreement as presented by the State and the defendant and approved by the court.

If the agreement is breached, either by the prosecutor or the court, then the defendant is entitled to the benefit of the bargain, which, at the defendant’s option, is either specific enforcement of the agreement or withdrawal of the plea. *Id.* at 583. If, however, the record is ambiguous insofar as it concerns a disputed term of the agreement, then the ambiguity must be resolved in the defendant’s favour. *Id.* at 583. *See Baines v. State*, 416 Md. 604, 615 (2010). The circuit court found that the plea agreement was ambiguous as to what constituted the State’s Attorney’s “consent” to a PBJ, and the court

resolved the ambiguity in favor of Houser. The State argues that the plea agreement was clear on the issue. We agree with the State.

Any ambiguity in a plea agreement is resolved in favor of the defendant. *See Solorzano v. State*, 397 Md. 661, 673 (2007). Our analysis of alleged ambiguity is guided by “the reasonable understanding of the defendant when he pled guilty.”

First, we must determine whether the plain language of the agreement was “unambiguous as a matter of law.” *Ray v. State*, 454 Md. 563, 577 (2017). If it is, our analysis ends. If the plain language is ambiguous, we then “determine what a reasonable lay person in the defendant’s position . . . would have understood the agreement to mean” based on the plea record. *Baines*, 416 Md. at 615 (quoting *Cuffley*, 416 Md. at 582). If we examine the plea record and find ambiguity, that ambiguity must be resolved in favor of the defendant. *Matthews*, 424 Md. at 525. We have found ambiguity, for example, when it was unclear whether a sentencing cap referred to total years of incarceration and suspended time or time actually served. *Id.*

In this case, Houser was charged with two counts of sexual abuse of a minor, one count of fourth-degree sexual offense and one count of second-degree assault for abusing his fourteen-year old step daughter. He pled guilty to fourth-degree sexual offense and second-degree assault. The plea agreement was in two parts. The first was the amount of time Houser would serve. The second was the issue of PBJ and if he would be eligible for that disposition sometime in the future.

Here there was no ambiguity as to whether the circuit court could strike the guilty finding and offer Houser PBJ. That could only be done with the State's permission or at least accession. The State reserved the right to object sometime in the future to a sentence that it was unwilling to offer at the time of the plea. Imposing a lesser sentence than that agreed upon in a binding plea agreement would constitute an illegal sentence.

Bonilla v. State, 217 Md. App. 299, 301-07, *aff'd*, 443 Md. 1 (2015).

Assuming *arguendo* that there was some ambiguity, there is nothing in the plea record that would lead a reasonable person in defendant's position to understand otherwise. Houser plead guilty to serious charges and received a relatively light sentence. We would have to ignore the obvious to accept the notion that the State did not want to hold some sort of leverage over Houser's conviction. A reasonable lay person in the defendant's position would not have thought otherwise.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
REVERSED; COSTS TO BE PAID BY
APPELLEE.**