NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1472

STATE OF LOUISIANA

VERSUS

MAURICE J. TASSIN

Judgment Rendered: March 25, 2011

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 451176

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Maurice J. Tassin, was charged by grand jury indictment with one count of vehicular homicide, a violation of LSA-R.S. 14:32.1(A), and pled not guilty. Subsequently, the State amended the indictment to charge the defendant with one count of negligent homicide, a violation of LSA- R.S. 14:32, and he again pled not guilty. Thereafter, in exchange for an agreed-upon sentence, the defendant pled guilty and was sentenced to "five years with the Department of Corrections, suspend three years, place him on five years probation and give him credit for time served on the balance of time owed that is not suspended." Following a victim impact statement, the court amended the sentence to add as a condition of probation "that the defendant not drive for two years following his release from jail." The defendant now appeals, contending the addition of the condition of probation breached the plea agreement. For the following reasons, we vacate the guilty plea and sentence, restore the pre-plea status of the defendant, and remand the case to afford the defendant an opportunity to plead anew and proceed to trial if he chooses to plead not guilty and a plea agreement is not confected.

FACTS

Due to the defendant's guilty plea, the matter did not proceed to trial. Thus, there is no trial testimony concerning the facts. Further, the State also did not set forth a factual basis for the guilty plea. In connection with the guilty plea, however, the defendant agreed that on June 15, 2007, he violated LSA-R.S. 14:32 by killing John Todd while operating a motor vehicle.

BREACHED PLEA AGREEMENT

In his sole assignment of error, the defendant argues the trial court erred in adding a condition of probation to the sentence that was not part of the plea agreement. He asks for the opportunity to plead anew.

Initially, we note LSA-C.Cr.P. art. 881.2(A)(2) does not preclude review of this assignment of error because the sentence under consideration before us is not in conformity with the plea agreement. See State v. Terrebonne, 2001-2632 (La. App. 1st Cir. 6/21/02), 822 So. 2d 149, 152.

A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. A defendant may not withdraw a guilty plea simply because the sentence imposed is heavier than anticipated. A defendant is not entitled to the luxury of gambling on his sentence, then being able to withdraw his plea if and when he discovers the sentence is not to his liking. Nevertheless, a guilty plea is constitutionally infirm if a defendant is induced to enter the plea by a plea bargain, or what he justifiably believes to be a plea bargain, and that bargain is not kept. In such cases, courts have determined that the guilty plea was not given freely and knowingly. State v. Roberts, 2001-3030 (La. App. 1st Cir. 6/21/02), 822 So. 2d 156, 158, writ denied, 2002-2054 (La. 3/14/03), 839 So. 2d 31.

In determining the validity of agreements not to prosecute or of plea agreements, the courts generally refer to rules of contract law. Contractual principles may be helpful by analogy in deciding disputes involving plea agreements. However, the criminal defendant's constitutional right to fairness may be broader than his or her rights under contract laws. Moreover, commercial contract law can do no more than to serve as an analogy or point of departure, since plea agreements are constitutional contracts. State v. Canada, 2001-2674 (La. App. 1st Cir. 5/10/02), 838 So. 2d 784, 787.

A long-standing rule of contract law is that consent of both parties is required for a valid contract. LSA-C.C. art. 1927. Consent may be vitiated by error, fraud, or duress. LSA-C.C. art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. LSA-C.C. art. 1949. "Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object ..., or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation." LSA-C.C. art. 1950. State v. Canada, 838 So. 2d at 786-87.

The sentencing function is exclusively within the province of the trial court's authority and, even if the parties agree to a specific sentence, a court that has not agreed to abide by any such agreement retains the discretion to reject such an agreement. Where the plea agreement calls for a legal sentence and the trial court agrees, however, the trial court is bound by the terms of the agreement. State v. Terrebonne, 822 So. 2d at 152.

On May 27, 2010, a guilty plea was entered and a sentencing hearing was held in this matter. At the beginning of the hearing, defense counsel stated, "we're withdrawing any former pleas of not guilty that were previously tendered and tendering to the state and to the [c]ourt a plea of guilty in conformity with plea negotiations carried on with the [c]ourt." Thereafter, the following colloquy occurred:

> [Court]: All right. Each of you are pleading guilty pursuant to an understanding which you have of your sentence, so I'm going to go over your sentence with you to make sure that you understand it and that it's agreeable to you.
>
> Mr. Tassin, I have agreed to sentence you as follows. I have agreed to sentence you to five years with the Department of Corrections, suspend three years and place you on five years probation.

[Defendant]: Excuse me, sir. I thought you said you were going to suspend three and that was it.

[Court]: That's not what I said?

[Defendant]: Not five years probation.

[Court]: Whenever there's a suspended sentence, there's going to be a probation period. You don't want to do it with any probationary period?

[Defendant]: I don't see how I can possibly do probation. I don't live in this jurisdiction, and I don't have any way to drive.

[Court]: I'm not going to – if that's a situation that's going to not allow you to plea, I have to place you on probation. I'm not going to give you any special conditions of probation. As I told you, I'm not going to suspend your license, but with a split sentence, I'm not going to give you no probation.

I will allow your probation to be transferred to whatever jurisdiction you reside in, and I'm not going to place any other conditions on your probation, and I'm not going to add a suspension of your license. Now, if that means you can't plea, that's fine. I didn't know that that was your understanding of the sentence.

[Defendant]: I didn't understand that, but I'll take the plea.

[Court]: You want to do it under those circumstances?

[Defendant]: Yes, sir.

[Court]: So that we're perfectly clear, this is what the sentence is going to be.

Thereafter, the court sentenced the defendant to "five years with the Department of Corrections, suspend three years, place him on five years probation and give him credit for time served on the balance of time owed that is not suspended."

On June 1, 2010, a victim-impact hearing was held in the case. The State noted that the original assistant district attorney had been called away on a family emergency and that the district attorney's office had neglected to inform the court at the sentencing hearing that the victim's parents had filed a victim's rights request to

be informed of all court proceedings, pursuant to LSA-R.S. 46:1844. The victim's family members and friends stated how the death of the victim had affected them. The court then asked for the sentencing minutes and advised the victim's family of the sentence that had been imposed in the matter. Thereafter, the State added, "Also a condition of probation he was not to drive during the course of his probation." The defense stated, "That was not a part of the plea. That was not made a condition of probation." The State indicated that the victim's mother had not wanted the defendant to be able to operate a vehicle while on probation. The court stated, "The only way for me to change any part of the demand is to set aside the entire sentence[.]" The State then moved that the defendant be prohibited from driving as a condition of probation "as contemplated in the previous pretrials." The court stated:

> I understand that. It was not made a condition of his plea. And the only way for me to add that as a condition is to either let him voluntarily do that or you set aside the plea, and he may disagree with that. I can't just add a condition of probation after he has been given certain considerations for the entry of the plea itself.
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> . . .
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> I can't just say, okay, now I'm going to add this condition of probation. I can't do that. It's in effect a bargain that was made with the court in giving the plea.

The State asked the defense if the defendant would "accept it as an added condition," and the defense refused. The court asked the State if it had a motion, and the State replied, "Judge, it was something the family wanted and it seems I am voted down and insists it needs to be a part of the plea for whatever – ." The court then "[g]rant[ed] the motion to set aside the plea." Following a recess, however, the court stated:

> I recently ruled that I would set aside the plea. I am now going to vacate that ruling or order and maintain the plea that was entered; however, I am changing a portion of it by adding a condition of

probation based on the victim impact statement that we just had, that the defendant not drive for two years following his release from jail.

The defense objected to the court's action.

The State argues the trial court's action was permissible under State v. Shoemaker, 461 So. 2d 334 (La. App. 2d Cir. 1984), and State v. Prescott, 431 So. 2d 85 (La. App. 1st Cir. 1983). However, those decisions did not involve plea agreements with specific sentences agreed upon, and thus, are clearly distinguishable.[1]

In this case, the State, the defendant, and the court agreed that in exchange for the defendant's guilty plea, the court would impose the sentence as ordered and imposed at the hearing on May 27, 2010. Thereafter, the defendant pled guilty, and the agreed-upon sentence was imposed in conformity with the plea agreement. The trial court's subsequent amendment of the sentence on June 1, 2010, to add as a condition of probation that the defendant not drive for two years following his release from jail, violated the plea agreement set forth on May 27, 2010. Accordingly, we are constrained to vacate the guilty plea and sentence, restore the pre-plea status of the defendant, and remand the case to afford him an opportunity to plead anew and proceed to trial if he chooses to plead not guilty and no plea agreement is reached. See State v. Jefferson, 2002-1038 (La. 1/10/03), 838 So. 2d 724, 725 (per curiam).

This assignment of error has merit.

GUILTY PLEA AND SENTENCE VACATED; REMANDED WITH INSTRUCTIONS.

[1]In State v. Shoemaker, the defendants each pleaded nolo contendere without any sentencing agreement. State v. Shoemaker, 461 So. 2d at 335. In State v. Prescott, the defendant pled guilty to two counts of negligent homicide, also without a sentencing agreement. State v. Prescott, 431 So. 2d at 86. Thus, the trial court clearly had sentencing discretion in each of these cases.