Circuit Court for Baltimore City
Case No. 117114018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1740

September Term, 2017

STATE OF MARYLAND

v.

ERROL D. FULFORD

Wright,
Graeff,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: September 26, 2019

The question presented in this appeal is whether a circuit court can, after accepting the terms of a plea agreement, accepting the defendant's guilty plea, finding it to have been entered knowingly and voluntarily, hearing the factual basis of the plea, and finding the violation beyond a reasonable doubt, then find the defendant not guilty?

BACKGROUND

Errol Fulford was charged by indictment in the Circuit Court for Baltimore City with being a felon in possession of a firearm, and related firearms offenses. He appeared before the court, represented by counsel and, pursuant to a negotiated plea agreement, agreed to plead guilty to certain offenses, including felon in possession and obliterating a serial number.[1]

In plea negotiations, in which the court participated, it was agreed that the State would recommend a sentence of 15 years, with all but three years suspended on the felon in possession count and a five-year consecutive, but suspended, sentence on the obliteration count, with four years of probation to follow. The court accepted the agreement. Fulford's plea was qualified and found to be compliant with Md. Rule 4-242.[2] Based on the State's

[1] Fulford was but one of several defendants appearing simultaneously before the court, apparently for pre-trial plea hearings. Each, apparently, was advised individually.

[2] The qualification of Fulford's plea for voluntariness was conducted by a "Ms. Trivis." It may be inferred from the transcript that Ms. Trivis was the courtroom clerk, whose participation in the qualification of a defendant's plea would be contrary to Rule 4-242(c), which provides in relevant part:

> The court may not accept a plea of guilty, … until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the Defendant, or any combination thereof[.]

factual basis for the agreement, the court found beyond a reasonable doubt that Fulford "has indeed violated the laws of this [S]tate." Thereafter, the following occurred:

> THE COURT: (to the prosecutor) Where are the exhibits?
>
> [PROSECUTOR]: Your Honor, I didn't introduce any exhibits. I would just ask that the defense stipulate to the firearm and the conviction.
>
> * * *
>
> [PROSECUTOR]: There's nothing in the file.
>
> [DEFENSE COUNSEL]: -- I'll make a motion based on lack of evidence.
>
> [PROSECUTOR]: Judge, this is a guilty plea, it's not a not guilty of agreed statement of facts, so I mean this is essentially a -- I mean if the Court would give me a moment I could go back and get a copy of the true test unless --
>
> [DEFENSE COUNSEL]: Your Honor, I would object to the State being able to reopen its case. I would make a motion.
>
> THE COURT: The Court having heard and considered the statement of facts does find beyond a reasonable doubt -- well you know what -- well hold on….
>
> * * *
>
> THE COURT: I'll hear from you, defense.
>
> [DEFENSE COUNSEL]: Your Honor, the State still is required to be able to provide the -- either a stipulation or the evidence in their case and the State has closed their case without providing that evidence. And the State still has to do that even with a guilty plea and I'm making the motion to dismiss at this point based on lack of evidence that the judge in this case still has to decide whether the State can or has proven their case even with the guilty plea.
>
> [PROSECUTOR]: Judge, I think based on the facts proffered to the Court it is enough to find Mr. Fulford guilty for purposes of this plea.
>
> THE COURT: All right. The offenses that the State called was possession of a regulated firearm after being previously convicted of a crime of violence

> which does indeed require the State to provide evidence of a prior conviction for a crime of violence.
>
> The other offense is obliterated manufacturer's mark number on firearm which requires the firearm having [an] obliterated serial number.
>
> There's been no evidence presented to substantiate or sustain any of the charges. The verdict is not guilty. Motion [to dismiss] is granted.

DISCUSSION

The State argues that because the court erred in granting Fulford's motion to dismiss and entering a not guilty verdict, the State has been deprived of its bargain as established by the negotiated plea agreement. On appeal, we review, as questions of law, whether a judge agreed to the terms of the agreement and whether the agreement was breached *de novo*. *State v. Smith*, 230 Md. App. 214, 226 (2016) (citations omitted), *aff'd*, 453 Md. 561 (2017).

"A plea agreement is a contract between the defendant and the State." *Ridenour v. State*, 142 Md. App 1, 5 (2001) (citing *Ogonowski v. State*, 87 Md. App. 173, 182-83 (1991)). Maryland Rule 4-243(c)(3) provides, in part relevant to our discussion:

> 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.

Also relevant to our discussion is Rule 4-243(c)(4):

> 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 withdraw the plea; and (C) that if the defendant persists in the plea of guilty, conditional plea of guilty, or a plea of nolo contendere, the sentence or other disposition of the action may be less favorable than the plea agreement….

The State posits that the court was "fundamentally incorrect" in four aspects: 1) the court violated Rule 4-243 "by not imposing the agreed upon sentence;" 2) the court purported to find Fulford not guilty without striking his admission of guilt; 3) at the point in the proceedings at which the court purported to find Fulford not guilty, it was not sitting as a fact finder; and 4) the court erred in finding Fulford not guilty while, at the same time, granting his motion to dismiss.

The State refers us to *Johnson v. State*, 452 Md. 702, *cert. denied*, 138 S. Ct. 207 (2017) which, the State posits, is dispositive on the question of the court's authority. In *Johnson*, after having declared a mistrial, the trial court, weeks later, entered a judgment of acquittal. 452 Md. at 710-11. The State's subsequent recharging of Johnson was dismissed on double jeopardy grounds. *Id*. at 712-13. This Court's reversal was affirmed by the Court of Appeals, noting that double jeopardy principles were not implicated because, in entering the not guilty verdict after having declared a mistrial and discharged the jury, the judge was "'rendered powerless to enter a judgment of acquittal[,]'" *id*. at 713, 722 (quoting *Carlisle v. United States*, 517 U.S. 416, 430 (1996)), and, in doing so, had "acted without authority." *Id.* at 722. In rejecting Johnson's application of the Court's holding *State v. Taylor*, 371 Md. 617 (2002) for support, the Court of Appeals clarified that "only when the court has the authority to act does an acquittal implicate double jeopardy." *Id*. at 726. In conclusion, the Court held that "[t]he acquittal was granted, thus, not in the context of a mere procedural irregularity but in the circumstance in which the judge was totally without authority to act." *Id*. at 735.

Fulford responds that because the court pronounced him "not guilty" based on the State's failure to offer evidence to support his guilty plea, double jeopardy considerations preclude further prosecution of the charges, relying principally on *State v. Taylor*, *supra*. The Court's opinion in *Taylor*, a consolidation of two petitions for *certiorari* for four defendants, dealt with the double jeopardy implications of dismissal of charges, on evidentiary grounds, at the pretrial motions stage of the prosecution. 371 Md. at 620. For reasons that we shall discuss, we are not persuaded that *Taylor* is relevant to the questions before us in this appeal. Nor, do we find that double jeopardy considerations are relevant to the facts before us. As we shall discuss, we view this case as one dealing only with the consequences of the plea agreement and the trial court's abrogation of the agreement.[3]

As Judge Cathell noted, dissenting in *Taylor*, interjection of double jeopardy considerations into the instant case "appear to make the issue presented more complex than it is[.]" 371 Md. at 654.

Disposition of criminal cases by way of pleas of guilty under the terms of negotiated, binding plea agreements has long been recognized by the courts of Maryland and other states. *See Dotson v. State*, 321 Md. 515, 516-19 (1991) (providing a thorough discussion of the important role plea agreements play in the administration of Maryland's criminal justice system). Plea agreements are an essential element of docket management and the processing of criminal charges. *See Bonilla v. State*, 443 Md. 1, 11 (2015) (reiterating that

[3] Moreover, we are unaware whether the State has filed new or additional charges against Fulford. If the State has not refiled the charges, double jeopardy concerns are premature.

"'[p]lea bargaining is a significant, if not critical, component of the criminal justice system'" (quoting *Chertkov v. State*, 335 Md. 161, 170 (1994))); *Dotson*, 321 Md. at 517 ("observ[ing] that '[p]lea bargaining plays an indispensable role in the administration of criminal justice" (quoting *Banks v. State*, 56 Md. App. 38, 51 (1983))).

Indeed, in the fiscal years 2016-2018 there were filed in the circuit courts of Maryland an average of over 67,000 criminal cases.[4] In fiscal year 2018 alone, there were more than 165,000 criminal filings in the District Courts of Maryland.[5] It would not be an exaggeration to suggest that the overwhelming percentage of those cases were disposed of by plea agreements. As the Court of Appeals recognized in *Metheny v. State*, 359 Md. 576 (2000), "[a] guilty plea 'is an admission of conduct that constitutes all the elements of a formal criminal charge.'" 359 Md. at 599 (quoting *Sutton v. State*, 289 Md. 359, 364 (1981)). The Court continued:

> Indeed, [a] plea of guilty is more than a voluntary confession made in open court[,] … [serving] as a stipulation that no proof by the prosecution need [be] advanced…. It supplies both evidence and verdict, [thus] ending [the] controversy. Once accepted, a guilty plea amounts to a conviction and the only remaining tasks for the court to perform are to impose judgment and conduct sentencing proceedings.

Id. at 599-600 (internal quotations and citations omitted).

Plea agreements are enforceable by defendants and the State alike. It matters not whether the court's breach benefits the defense or the State, both sides are entitled to

[4] Admin. Off. of the Cts., *Annual Report of the Maryland Judiciary: Statistical Abstract* (*Statistical Abstract*), Table CC-1.2 at 15 (2018).

[5] *Statistical Abstract*, Table DC-4 at 40.

fulfillment of the bargain struck. *Smith*, 230 Md. App. at 219 (citing *Banks*, 56 Md. App. at 52). In *Bonilla v. State*, 217 Md. App. 299 (2014), *aff'd*, 443 Md. 1 (2015), Judge Salmon, writing for this Court, reaffirmed the principles of the persuasive *dicta* in *Chertkov v. State*, *supra*, concluding that the imposition of a sentence that is below that agreed upon in a binding plea agreement would constitute an illegal sentence. *Bonilla*, 217 Md. App. at 306-07. In support, we examined the rationale of the *Chertkov* Court, wherein it discussed considerations of both parties:

> "The facts in *Dotson* [*v. State*] do not limit the applicability to the case *sub judice* of the considerations underlying that decision. That it was critical in *Dotson* that the violation of the plea agreement prejudiced the defendant does not mean that a violation of a plea agreement that prejudices the State is beyond the reach of principles of fairness and equity or that the institution of plea bargaining cannot be adversely affected. Just as a defendant would be loathe to participate in plea bargaining if he or she could not be certain that the bargain that he or she made would be fulfilled, so too would the State. There would be no incentive for the State to engage in plea bargaining if it were possible for a defendant to enter into a binding plea agreement only to have the sentence contemplated by that agreement modified a short time later. Nor would it be fair to the State, which is, after all, one of the parties to the agreement. *See* Rule 4-243(a)."

Bonilla, 217 Md. App. at 307-08 (quoting *Chertkov*, 335 Md. at 174).

More recently, in *State v. Smith*, *supra*, Judge Moylan, writing for this Court, articulated the importance of the reliability of binding plea agreements:

> A plea agreement is, of course, a contract between a criminal defendant and the State in which each seeks to gain a benefit and, in return for such benefit, each agrees to pay a price. It is a very special contract, moreover, in that even after the basic quid pro quo is agreed upon by the primary contracting parties, the entire package may be submitted to a criminal court for its approval and its subsequent enforcement. If it should then be the enforcing authority (to wit, the court) that commits a breach of the contract, what even-handed justice requires is that each of the primary contracting parties, if suffering

> from the breach, is equally entitled to seek a remedy under equally conducive procedural conditions.

230 Md. App. at 218 (underlining in original).

In conclusion, we hold that the trial court was without authority to enter a judgment of acquittal after it had endorsed the plea agreement. The record is clear that the court understood and accepted the terms of the agreement. It is equally clear that the court was provided with an adequate factual predicate for the plea which was explained to Fulford and to which he agreed. On those facts, the court accepted Fulford's pleas of guilty and found as much:

> The Court having heard and considered the statement of facts without objection from the defense does find beyond a reasonable doubt that the Defendant in this matter, Errol Douglas Fulford-El, has indeed violated the laws of this [S]tate.

At that point, having accepted the State's evidentiary proffer as sufficient to support the guilty verdicts, and having pronounced the equivalent of a guilty verdict, the final step of the process was to sentence Fulford as agreed. Instead, the court called for "evidence" to substantiate the plea. The State, relying on the agreement, had no such physical or testimonial evidence at hand.[6] The court then entered a not guilty verdict.

We are aware of no requirement, and none has been pointed out to us, that the State must produce either physical or testimonial evidence, or both, when it has negotiated a binding plea agreement with a defendant who intends to enter a plea of guilty to all or some

[6] The preliminary discussion between counsel and the court at the plea hearing suggests that Fulford's case was a last-minute add-on to the court's plea hearing docket and that the prosecutor was standing in for another prosecutor. Before his addition to the plea hearing docket, Fulford's scheduled trial date was set for three days later on October 23, 2017.

of the charges. *See* Rule 4-242(c) (requiring only that "there is a *factual basis* for the plea" (emphasis added)); Rule 243(c) (discussing the presentation and approval of a plea agreement, but fails to contain any evidentiary or factual requirement). A significant benefit of the plea agreement process is expedience and efficiency and to obviate the need for either party to produce witnesses to testify in support of the plea. *See Metheny*, 359 Md. at 599-600.

In accepting the facts and pronouncing its verdict, the court ended the guilt phase of the proceedings. *See Metheny*, 359 Md. at 603 (explaining "under Maryland Rule 4-242(c), when facts are admitted by the defendant and are not in dispute, the judge need only apply the facts to the legal elements of the crime charged to determine if an adequate factual basis exists"). In our view, at that point, the court was obliged to impose a sentence in conformity with the plea agreement and was without authority to abrogate the agreement and enter a contrary verdict. To be clear, "[a]s a general rule, once a judge has accepted a guilty plea and bound the defendant to it, the sentencing judge cannot refuse to carry through the bargain that induced the pleas." *Banks*, 56 Md. App. at 47 (citing *United States v. Blackwell*, 694 F.2d 1325 (D.C.Cir. 1982)). *Accord State v. Poole*, 321 Md. 482, 496 (1991) (citing *Banks*, 56 Md. App. at 47); *State v. Chertkov*, 95 Md. App. 104, 112 (1993) (quoting *Banks*, 56 Md. App. at 47). Accordingly, we shall vacate the court's entry of the not guilty verdict and remand for the court to impose the sentences bargained for and agreed upon. The State, as is a defendant, is entitled to the benefit of its bargain.[7]

[7] In view of our resolution of the State's first assignment of error, we need not take up the latter.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED TO THAT COURT FOR THE IMPOSITION OF A SENTENCE IN ACCORD WITH THE PLEA AGREEMENT; COSTS ASSESSED TO APPELLEE.