IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 22-672
Case No. 15-F-302
Circuit Court of Cabell County

RACHEL LOUISE ADKINS,

Defendant below, Petitioner.

PETITIONER'S REPLY

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REPLY ARGUMENT

To clear the oldest case from its docket, the Cabell County Circuit Court entered plea negotiations, made a promise, and broke it.[1] Petitioner appeals, seeking specific performance of the sentence the judge promised her.

Below, there was no dispute concerning the judge's promise: he acknowledged it, but believed new information absolved him from honoring it.[2] But now, the State disputes whether Petitioner can prove it. The Response argues Petitioner got what she bargained for and suggests she deserves no better.[3] The record does not support these assertions.

Petitioner's case languished for seven years,[4] in part because the lawyers could not negotiate an agreement in good faith.[5] Petitioner initially struggled with addiction,[6] but later quit drugs, homeschooled her daughter through graduation, and became a trusted manager at Taco Bell.[7] Despite her progress, the State could not offer a binding plea to home confinement.[8] The decedent's family followed the proceedings and attended hearings.[9]

To resolve the impasse, an assistant prosecutor and public defender unconnected with the case approached the judge for a private meeting.[10] The court then met with counsel of record.[11] Moments before the plea hearing, the judge confirmed to Petitioner's actual lawyer what occurred in the prior meeting, and recommitted to the agreement.[12] Petitioner accepted the offer over her lawyer's discomfort.[13] After a seven-year stalemate, the meeting with the judge resolved the case.

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[1] *See* A.R. 445–46; A.R. 448; A.R. 292; A.R. 293–94; *see also* A.R. 320.
[2] *See* A.R. 284–86; A.R. 291–92; A.R. 293–95.
[3] Resp.'s Br. 10; *see also id.* at 25.
[4] *Compare* A.R. 331–32 *with* A.R. 272.
[5] *See* A.R. 283; A.R. 320–21.
[6] *See*, *e.g.*, A.R. 212; A.R. 288–89.
[7] *See*, *e.g.*, A.R. 222–23; A.R. 233–34; A.R. 258; A.R. 264; A.R. 304–05; A.R. 448.
[8] *See* A.R. 295; *see also* A.R. 280–82; A.R. 452–53; A.R. 466.
[9] *See*, *e.g.*, A.R. 280–82.
[10] A.R. 241; A.R. 285; A.R. 321–22; A.R. 445–46.
[11] *See* A.R. 241; A.R. 447–48.
[12] *Id.*; *but see* Resp.'s Br. 15 (missing that the judge made the promise to counsel of record also).
[13] *See* A.R. 293–95.

The Response suggests that the judge merely offered opinions, and the parties reached a non-binding plea on their own.[14] This is not a reasonable interpretation. Rather, the record shows that the judge saw the prosecutor's dilemma[15] and agreed to a solution. If Petitioner accepted what appeared to be a non-binding plea, then he, the judge, promised to order home confinement.[16] Defense counsel was uncomfortable with this arrangement, and wanted credit for time served on home confinement already.[17] The judge agreed to a PSI and to hear argument but was doubtful he would grant credit.[18]

Petitioner's counsel, as an officer of the court, asserted as much on the record and no one disputed his representations.[19] But you don't have to take his word for it. Here's what the prosecutor said:[20]

From: Sean Hammers [redacted]@cabellcounty.org>
Sent: Tuesday, February 8, 2022 9:33 AM
To: Gerald Henderson <[redacted]@CCPDO.ORG>
Subject: RE: Rachel Adkins

As we previously discussed in a phone conversation with Mr. Reynolds, I agreed to a Kennedy plea to DUI causing death with the other charges in the indictment being dismissed. I also agreed to a maximum of 1 year on parole once granted (this would presumably be after 2 years). Judge Ferguson indicated he would allow your client to serve a 2-10 year sentence on home confinement if she enters this plea. So, just to be clear, your clients 2-10 year sentence on home confinement will not be the result of an agreement she made with the State.

The prosecutor has since remained mum.[21] At the Rule 35(b) hearing, he feared commenting would violate the State's promise not to oppose Petitioner's sentencing request.[22] The Response brief is the first time the State has changed its position to deny what the court told the prosecutor and Petitioner's lawyer in chambers.[23]

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[14] *See* Resp.'s Br. 4–5; *id.* at 14.
[15] *See supra.* n. 9.
[16] A.R. 445–46; A.R. 447–48.
[17] A.R. 445–46.
[18] *See id.*
[19] *See* A.R. 445–46; A.R. 448.; *see also* A.R. 320 (Excepting a few explicit reservations, the court found that "[b]asically, the facts are not in dispute on the motion to withdraw.").
[20] A.R. 466 (emphasis added, addresses redacted).
[21] A.R. 302–03.
[22] *See id.*
[23] *See* Resp.'s Br. 15; A.R. 447–48; A.R. 466.

The court, too, acknowledged its promise.[24] The Response argues that the judge made clear that he never promised anything.[25] The record refutes this. Before sentencing Petitioner, the judge sought to justify his breach.[26] At the private meeting, he was too focused on clearing his docket.[27] He regretted losing sight of the case's gravity.[28] And so, he had begun to think of his promise in contract terms.[29] He decided that new information vitiated the original meeting of the minds.[30] "I strongly looked to see was I actually bound by what I told you all, and I came up with the opinion that I am not - - that I'm not."[31]

This contradicts the Response's interpretation. If the agreement were only between Petitioner and the State, there would be no reason for the judge's ambivalence.[32] The deal would have nothing to do with him. Instead, he lost sleep over it.[33] The fact he changed his mind necessarily means he had once settled it differently. And when trial counsel represented that the judge had made a promise in chambers to his face, the judge did not disagree.[34] With a few reservations, the judge said Petitioner's assertions were correct.[35] He simply felt that latent developments—nothing patent about the original meeting—absolved him of his promise.[36]

The Response even concedes that *subsequent* information led the court to question the binding nature of what it had told counsel.[37] But unless duped by intentional fraud, a court may not simply change its mind.[38]

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[24] *See*, *e.g.*, 286 (acknowledging full bargain was not memorialized).
[25] *See* Resp.'s Br. 14–15.
[26] A.R. 285–86; A.R. 289; A.R. 291–92.
[27] *See* A.R. 285.
[28] *Id.*
[29] A.R. 285–86.
[30] *Id.*
[31] A.R. 294.
[32] *See* A.R. 319–20 (court stating the dispute was between it and Petitioner, not the State).
[33] A.R. 284.
[34] *See* A.R. 447–48.
[35] *See* A.R. 320.
[36] *See* A.R. 293–94.
[37] Resp.'s Br. 15.
[38] Syl. Pts. 5 and 6, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995).

The Response argument that Petitioner understood the plea to be non-binding is also unpersuasive. Defense counsel vouched for the judge's trustworthiness and assured Petitioner that if she pled, home confinement was certain.[39] The Response derides this as an unsupported claim,[40] but as an officer of the court, counsel's representations were tantamount to sworn testimony.[41] Moreover the court agreed with Petitioner's general description of the plea.[42] The plea colloquy, too, was consistent with the off-the-record agreement, including the PSI.[43] Excepting credit for time served, for which Petitioner wanted to argue, the entire point was to assure a sentence the parties accepted without placing it on the record for spectators. Petitioner only accepted the plea after the State assured her, per the above email, that the judge had promised home confinement.[44]

And when the judge reneged, counsel immediately objected. "But the only reason she entered the plea is she was assured at that time that she - -"[45] The court cut off counsel before he could finish his sentence with the decedent's family present.[46] Petitioner tried to withdraw her plea, but the court would not let her.[47] Counsel asked how he could advise clients if judges could promise one thing and do another, and the court had no response.[48] No one disputed what Petitioner had bargained for.[49] Until now.

Even if the Response were correct that this was a non-binding plea, the court violated Rule 11, entitling Petitioner to withdraw. The Response re-envisions the plea as non-binding, and that the State would not oppose Petitioner's home confinement request.[50] But for

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[39] A.R. 451.
[40] Resp.'s Br. 15.
[41] *Cf. Holloway v. Arkansas*, 435 U.S. 475, 485 (1978).
[42] A.R. 320.
[43] *See* A.R. 286; A.R. 294–95; A.R. 445–46.
[44] *See* A.R. 466; *see also* A.R. 294 ("[T]he only reason she entered the plea against my advice is -- several times I said, Judge told us this is what he's going to do.").
[45] A.R. 294.
[46] *Id*.
[47] A.R. 295.
[48] A.R. 296–97.
[49] *See* A.R. 320.
[50] *See* Resp.'s Br. 12; W. Va. Crim. P. R. 11(e)(1)(b).

a type B plea, the judge must warn the defendant that they cannot back out if dissatisfied with the sentence.[51] The court did not do so, and Petitioner may withdraw.[52]

But the Response is not correct. The reason the plea colloquy conformed to that for a binding plea rather than a non-binding one is that the parties understood—albeit with a wink and a nod—that the court had promised home confinement.[53] He should honor that promise, and specific performance is appropriate.[54]

CONCLUSION

It is simply unfair for a party to change its position after the other has relied upon it. Even more so when the court is the defector. Reasonable people can disagree over an appropriate disposition, but not after a court promises a sentence.

Petitioner should receive the benefit of her bargain. But at the very least, if subsequent events relieved the court from honoring its promise, then they should absolve Petitioner from hers as well.

Respectfully submitted,
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By Counsel

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[51] W. Va. Crim. P. R. 11(e)(2).
[52] *See* A.R. 261–63; Syl. Pt. 2, *State v. Cabell*, 176 W. Va. 272, 342 S.E.2d 240 (1986); *see also State v. Griffy*, 229 W. Va. 171, 179, 727 S.E.2d 847, 855 (2012) (per curiam).
[53] *See* A.R. 466
[54] *See Brewer*, 195 W. Va. at 198; *see also id.* at n. 18.