

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2013-0382
Plaintiff-Appellant,	:	On Appeal from the
v.	:	First Appellate District,
	:	Hamilton County, Ohio
KAREEM GILBERT,	:	Court of Appeals
Defendant-Appellee.	:	Case No. C-110382

BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, IN SUPPORT OF APPELLEE KAREEM GILBERT

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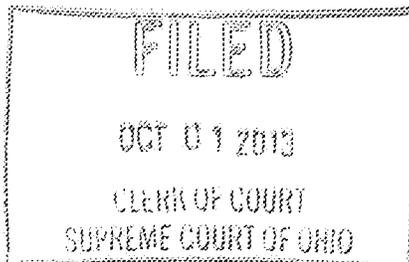


TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER	1
ARGUMENT	2
Proposition of Law:	
Trial courts lack authority to vacate a defendant’s guilty plea, upon the State’s motion, after the defendant’s sentence has been executed.	2
A. Contract principles do not confer authority upon the trial court to modify a criminal sentence by reconsidering its own final judgment.	2
B. No exception exists within Ohio statutory and rule authority to allow a trial court to vacate a defendant’s plea after sentencing upon the State’s motion.	5
1. Crim.R. 32.1 only allows a defendant to file a post-sentence motion to withdraw a guilty plea.	5
2. Civ.R. 60(B) provides no authority for the trial court to vacate the defendant’s guilty plea.	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>Arizona v. Washington</i> , 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).....	2
<i>Binion v. Makis</i> , 11th Dist. No. 98-T-0020, 1998 Ohio App. LEXIS 6004 (Dec. 11, 1998).....	9
<i>CitiMortgage, Inc. v. Fishel</i> , 7th Dist. Mahoning No. 11 MA 97, 2012-Ohio-4117	9
<i>Dier v. State</i> , 524 N.E.2d 789 (Ind.1988).....	4,5
<i>GTE Automatic Electric v. ARC Industries</i> , 47 Ohio St.2d 146, 351 N.E.2d 113 (1976)	8
<i>Mitchell v. Mill Creek Sparkle Mkt.</i> , 7th Dist. No. 97 CA 230, 1999 Ohio App. LEXIS 3153 (June 29, 1999).....	9
<i>Moore v. State</i> , 686 N.E.2d 861 (Ind.App.1997)	4
<i>Morrison v. Steiner</i> , 32 Ohio St.2d 86, 290 N.E.2d 841 (1972)	2
<i>Pursel v. Pursel</i> , 8th Dist. Cuyahoga No. 91837, 2009-Ohio-4708.....	9
<i>State v. Bethel</i> , 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150.....	2,3,4
<i>State v. Carlisle</i> , 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671	2
<i>State v. Gilbert (“Gilbert I”)</i> , 1st Dist. Hamilton No. C-110382, 2012-Ohio-1366.....	2
<i>State v. Gilbert (“Gilbert II”)</i> , 1st Dist. Hamilton No. C-110382, 2013-Ohio-238.....	5,9
<i>State v. Jordan</i> , 1st Dist. Hamilton No. C-110833, 2012-Ohio-3793	9
<i>State v. LaMar</i> , 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166.....	3
<i>State v. Lowe</i> , 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512	6
<i>State v. Minkner</i> , 2d Dist. Champaign No. 2010 CA 8, 2011-Ohio-3106	3
<i>State v. Ross</i> , 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992	8
<i>State v. Schlee</i> , 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431	7

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>State ex rel. Herman v. Klopfleisch</i> , 72 Ohio St.3d 581, 651 N.E.2d 995 (1995).....	6
<i>State ex re. Potts v. Comm'n on Continuing Legal Edu.</i> , 93 Ohio St.3d 452, 755 N.E.2d 886 (2001).....	6
<i>Strack v. Pelton</i> , 70 Ohio St.3d 172, 637 N.E.2d 914 (1994).....	8
<i>United States v. Wilson</i> , 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975).....	2
CONSTITUTIONAL PROVISIONS:	
Article IV, Section 4, Ohio Constitution.....	2
Article IV, Section 18, Ohio Constitution.....	2
RULES:	
Civ.R. 60.....	7,8,9,10
Crim.R. 32.1.....	5,6,7
Crim.R. 57.....	7

STATEMENT OF THE CASE AND FACTS

The parties, and the opinion of the court of appeals, have adequately set forth the procedural and factual history of this case.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The mission of the Office of the Ohio Public Defender (OPD) is to represent criminal indigent defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. A key focus of the OPD is on the post-trial phase of criminal cases, including direct appeals and collateral attacks on convictions. The OPD protects the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court may address the finality of plea agreements and trial courts' ability to modify criminal sentences by reconsidering their own final judgments.

ARGUMENT

PROPOSITION OF LAW

Trial courts lack authority to vacate a defendant's guilty plea, upon the State's motion, after the defendant's sentence has been executed.

A. Contract principles do not confer authority upon the trial court to modify a criminal sentence by reconsidering its own final judgment.

Judgments of conviction or acquittal are said to bar a second prosecution precisely because of the “public’s strong interest in the finality of criminal judgments ***.” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (acquittal); *United States v. Wilson*, 420 U.S. 332, 343, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) (conviction). Contrary to that interest, both the State and amici curiae contend that because principles of contract law apply to the interpretation of plea agreements, such contract principles operate as an exception to the well-settled rule that “[a]bsent statutory authority, a trial court is generally not empowered to modify a criminal sentence by reconsidering its own final judgment.” *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 1. But as the First District Court of Appeals aptly held below: “No matter what term we attach to it—subject-matter jurisdiction or authority—the trial court’s power to hear and its authority to decide cases is conferred ‘by law,’ and not by the parties.” *State v. Gilbert* (“*Gilbert I*”), 1st Dist. Hamilton No. C-110382, 2012-Ohio-1366, ¶ 8, citing Ohio Constitution, Article IV, Section 18; *see also Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus; Ohio Constitution, Article IV, Section 4(B).

Under Ohio law, issues regarding interpretation and enforcement of plea agreements are subject to contract-law principles. *See State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50 (“Principles of contract law are generally applicable to the interpretation and

enforcement of plea agreements.”). But this *general* principle fails to address that contract principles do not control whether a trial court can modify a criminal sentence once that sentence has been executed. The State appears to argue that Mr. Gilbert consented to the trial court’s jurisdiction to withdraw the plea and resentence him. Essentially arguing that Mr. Gilbert has waived his ability to contest the motion to vacate the plea, or has invited any error that the trial court may have made. See *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 102 (“Under the invited-error doctrine, a party cannot take advantage of an error that the party invited or induced the court to commit.”). However, regardless of what the parties agreed to in the plea agreement or whether Mr. Gilbert consented to the withdrawal of his plea, such consent or invited error cannot confer authority upon the trial court to modify Mr. Gilbert’s sentence:

Parties to an action cannot, through invited error, confer jurisdiction where none exists. E.g., *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 2001-Ohio-1281, 751 N.E.2d 1051 (stating that the invited error is “merely a branch of the waiver doctrine” and did not preclude the argument that the trial court lacked subject matter jurisdiction); *State v. Purnell*, 171 Ohio App.3d 446, 450-51, 2006-Ohio-6160, ¶12, 871 N.E.2d 613 (invited error did not apply to allow court to hold a second restitution hearing and to modify valid final judgment); *State v. Taogaga*, Cuyahoga App. No. 79845, 2002-Ohio-5062 (invited error doctrine did not apply to give trial court jurisdiction to resentence the defendant while his appeal was pending). The trial court had no jurisdiction to modify its valid executed sentence, and the parties could not agree to a complete resentencing hearing and to permit the court to modify an executed sentence in the absence of a clerical error or a void judgment. Thus, despite the parties’ statements to the trial court at the resentencing hearing, the trial court’s reduction of [defendant’s] sentence to eight years must be reversed. See, e.g., *Ex parte Hitt* (Ala. 2000), 778 So.2d 159, 162 (holding that when trial court modified sentence without jurisdiction, the original sentence must be reinstated); *Purnell*, supra (reversing modified restitution amount and reinstating original restitution portion of sentence).

State v. Minkner, 2d Dist. Champaign No. 2010 CA 8, 2011-Ohio-3106, ¶ 25.

Contrary to the State’s arguments, this Court’s decision in *Bethel* does not compel a different conclusion. In *Bethel*, this Court applied contract-law principles in

interpreting the terms of a plea agreement wherein the defendant agreed to testify against other defendants in exchange for dismissal of the death specifications. *Id.* at ¶ 34, 50-54. Following the defendant's refusal to testify, the trial court granted the State's motion to void the agreement and reinstate the charges, and the defendant's proffer was used at his trial in accordance with the terms of the plea agreement. *Id.* at ¶ 40-41, 46. In response to the defendant's argument on appeal that he had a constitutionally protected right to remain silent and that reinstatement of the original charges amounted to prosecutorial retaliation for his refusal to testify, this Court held that the defendant had no constitutional right to renege on the plea agreement. *Id.* at ¶ 77-79.

Importantly, however, *Bethel* involved circumstances where the defendant breached the plea agreement by refusing to testify after the trial court accepted the agreement, but *before* the defendant was sentenced. *Id.* at ¶ 39-40. Thus, *Bethel* is distinguishable from the instant case because it involved a State's motion to vacate a plea agreement prior to sentence, and the trial court clearly had authority to void the plea agreement and reinstate the original charges before sentencing. But *Bethel* did not address how the contract principles that are generally applicable to plea agreements would confer authority upon a trial court to vacate a plea upon the State's motion *after* sentencing. Neither did the Court examine what statutory authority would allow a trial court to modify a defendant's executed sentence in such circumstances. Thus, *Bethel* does not support the State's argument that a trial court may reconsider its final judgment under the authority of contract law.

Other jurisdictions have considered this issue and similarly concluded that a trial court lacks jurisdiction to vacate a breached plea agreement after the defendant's sentence had been executed. For example, in *Dier v. State*, 524 N.E.2d 789 (Ind.1988), the defendant's original

sentence was modified by the trial court pursuant to an agreement between the defendant and the State whereby the defendant testified against a codefendant. *Id.* at 789-790. After the trial court resentenced the defendant, he recanted his prior testimony during the codefendant's postconviction proceedings, and the trial court vacated the resentencing and reinstated the original charges upon the State's motion. *Id.* at 790. On appeal to the Indiana Supreme Court, the State argued that the defendant committed fraud and breached his contract with the State, but the Court rejected those arguments. It held: "[W]hatever merit there is to this contention fails to give jurisdiction to the trial court" to vacate the sentence and reinstate the original sentence. *Id.*; see also *Moore v. State*, 686 N.E.2d 861 (Ind.App.1997) (applying the rule in *Dier* to a plea agreement breached post-sentence and holding the trial court lacked jurisdiction to vacate plea agreement and reinstate original charges). And while contract-law principles generally apply to the interpretation of plea agreements, such principles do not confer authority upon a trial court to modify an executed criminal sentence. If this Court accepts the State's argument on this issue, it would greatly expand the trial court's subject-matter jurisdiction and run contrary to the public's interest in the finality of criminal judgments.

B. No exception exists within Ohio statutory and rule authority to allow a trial court to vacate a defendant's plea after sentencing upon the State's motion.

1. Crim.R. 32.1 allows only a defendant to file a post-sentence motion to withdraw a guilty plea.

The First District Court of Appeals correctly determined that Crim.R. 32.1 does not create an exception to the general rule that Ohio trial courts lack jurisdiction to reconsider their own final judgments in criminal cases. See *State v. Gilbert* ("*Gilbert II*"), 1st Dist. Hamilton No. C-110382, 2013-Ohio-238, ¶ 5-6. This conclusion appropriately recognizes that the plain

language of Crim.R. 32.1 permits only a defendant to file a post-sentence motion to withdraw a guilty plea.

When faced with an issue of statutory or rule interpretation, this Court first looks to the plain language of the statute or rule and applies it as written if its meaning is unambiguous and definite. *See State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9; *see also State ex re. Potts v. Comm'n on Continuing Legal Edu.*, 93 Ohio St.3d 452, 456, 755 N.E.2d 886 (2001) (stating that the principles of statutory construction may be used in interpreting rules). If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *State ex rel. Herman v. Klopffleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (1995).

Crim.R. 32.1 governs the procedure for filing a motion to withdraw a guilty plea: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

The first clause of Crim.R. 32.1 addresses a pre-sentence motion to withdraw a guilty plea and does not specify who may file such a motion. Instead, this portion of the rule states that a motion “may be made only before sentence is imposed.” Crim.R. 32.1.

In contrast, the second clause of the rule allows post-sentence motions to withdraw to be filed in order “to correct manifest injustice,” and this portion of the rule specifically refers to the defendant and does not mention the State at all: “* * * the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” *Id.* This portion of the rule clearly gives the trial court the discretion, as evidenced by the permissive use of “may,” to set aside a defendant’s conviction and allow the defendant to withdraw his or her plea.

Thus, it is simply not reasonable to construe the rule to mean that the trial court may undo a guilty plea upon the State's request. Moreover, because the "set aside judgment" portion of the clause is linked with the "permission" portion with a conjunctive "and," it is not a reasonable interpretation that these phrases may operate independently to allow the trial court to set aside the conviction based upon the State's motion. The rule plainly states that the trial court may set aside the judgment of conviction *and* permit the *defendant* to withdraw the plea. *Id.*

Simply put, if the drafters of the rule had intended to allow the State to file post-sentence motions to withdraw, they could have easily written the rule to say so. Instead, the rule only refers to granting *the defendant* permission to withdraw his or her plea. Accordingly, because Crim.R. 32.1 is unambiguous, it must be applied as written to allow only a defendant to file a post-sentence motion to withdraw a plea.

2. Civ.R. 60(B) provides no authority for the trial court to vacate the defendant's guilty plea upon the State's motion.

Amicus curiae Ohio Prosecuting Attorneys Association claims that if Crim.R. 32.1 does not allow the State to seek withdrawal of Mr. Gilbert's plea, then Crim.R. 57(B) would allow the State to seek a motion for relief from judgment under the Ohio Rules of Civil Procedure, specifically Civ.R. 60(B). But that argument misconstrues the circumstances under which a court in a criminal case may apply the rules of civil procedure. Criminal Rule 57(B) allows recourse to the civil rules only if "no procedure is specifically prescribed by rule," and if "no rule of criminal procedure exists." As this Court has observed, "the plain language of Crim.R. 57(B) permits a trial court in a criminal case to look to the Rules of Civil Procedure for guidance *when no applicable Rule of Criminal Procedure exists.*" (Emphasis added.) *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 10. Because Crim.R. 32.1 specifically

prescribes the procedure for the withdrawal of guilty pleas, it would be inappropriate to apply Civ.R. 60(B) and allow vacation of Mr. Gilbert's guilty plea.

Under Civ.R. 60(B), a party in a civil case may move the court for relief from a final judgment based on grounds such as "fraud," when "it is no longer equitable that the judgment should have prospective application," or for "any other reason justifying relief from the judgment." Civ.R. 60(B)(3),(4), and (5). But Criminal Rule 32.1 specifically prescribes the procedure governing motions to withdraw guilty pleas, including the procedure for filing and granting of a post-sentence motion to withdraw. While the criminal rule does not specifically address a post-sentence motion filed by the State, "it can hardly be said that 'no procedure is specifically prescribed by rule' " regarding the filing of a post-sentence motion to withdraw a guilty plea. *State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, ¶ 43. Accordingly, because a rule of criminal procedure specifically addresses post-sentence withdrawal motions, it is not necessary to look to the rules of civil procedure to fill any alleged gap in the rule.

Even assuming that Civ.R. 60(B) could apply in this case, the State cannot satisfy the requirements of such a motion. A party seeking relief from judgment under Civ.R. 60(B) must demonstrate: (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief based on one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the timeliness of the motion. *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). The movant must establish all three requirements in order to succeed on a Civ.R. 60(B) motion. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994).

Here, had the trial court considered the State's motion as filed pursuant to Civ.R. 60(B), the State's motion would fail on the timeliness prong. A Civ.R. 60(B) motion must be made

within a reasonable time, and for motions filed under subsections (1) through (3), not more than one year after the judgment, order or proceeding was entered. *Id.* Regardless of which ground for relief the motion alleges, “every Civ.R. 60(B) motion is subject to a ‘reasonable time’ requirement.” *CitiMortgage, Inc. v. Fishel*, 7th Dist. Mahoning No. 11 MA 97, 2012-Ohio-4117, ¶ 10. “When a movant is aware that there are grounds for relief and delays filing the motion, the courts will require the movant to explain the reasons for the delay.” *Pursel v. Pursel*, 8th Dist. Cuyahoga No. 91837, 2009-Ohio-4708, ¶ 15.

Amicus curiae Ohio Prosecuting Attorneys Association argues that the State would be entitled to relief under Civ.R. 60(B)(4), which would require that the motion for relief from judgment be filed within a reasonable amount of time. Here, the parties entered into the original plea agreement in May 2010. *Gilbert II*, 2013-Ohio-238, at ¶ 3. Mr. Gilbert testified at the trial of his father, Ruben Jordan, in January 2011. *State v. Jordan*, 1st Dist. Hamilton No. C-110833, 2012-Ohio-3793, ¶ 5, 8. The State then moved to vacate Mr. Gilbert’s plea on May 18, 2011, on the basis that Mr. Gilbert had breached the plea agreement by failing to give truthful testimony at Jordan’s trial. Brief of Appellant, p. 2; *Gilbert II* at ¶ 3. The State thus moved to vacate the plea approximately four months after learning of the alleged grounds for relief, and Ohio courts have denied Civ.R. 60(B) motions as untimely based on similar lengths of time when the movant failed to allege reasons for the delay in filing. *See, e.g., Mitchell v. Mill Creek Sparkle Mkt.*, 7th Dist. Mahoning No. 97 CA 230, 1999 Ohio App. LEXIS 3153, 7 (June 29, 1999) (Civ.R. 60(B) motion was untimely where less than three-month delay was unexplained); *Binion v. Makis*, 11th Dist. Trumbull No. 98-T-0020, 1998 Ohio App. LEXIS 6004, 8-10 (Dec. 11, 1998) (three-month delay in filing Civ.R. 60(B) motion held untimely where movant failed to explain the delay).

Accordingly, absent a reasonable explanation for the State's four-month delay in filing, the Civ.R. 60(B) motion was untimely.

CONCLUSION

The trial court lacked authority to vacate Mr. Gilbert's guilty plea and modify his sentence upon the State's motion after his sentence had been executed. While contract-law principles generally apply to the interpretation of plea agreements, such principles do not confer authority upon a trial court to modify an executed criminal sentence. Moreover, no statutory or rule authority permits the trial court to vacate the defendant's plea under the circumstances here. Accordingly, the Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Brief of Amicus Curiae, Office of the Ohio Public Defender, In Support of Appellee Kareem Gilbert* was sent by regular U.S. mail, postage prepaid to the offices of Melynda J. Machol, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, Counsel for Appellant, State of Ohio; and to Ravert J. Clark, Attorney at Law, 114 East 8th Street, Suite 400, Cincinnati, Ohio 45202, Counsel for Appellee, Kareem Gilbert, this 1st day of October, 2013.



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