

[Cite as *State v. Jones*, 2009-Ohio-6585.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23156
v.	:	T.C. NO. 07 CR 5171/2 08 CR 1532
LEONARD JONES	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 11th day of December, 2009.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Leonard Jones appeals his conviction and sentence in Case Nos. 2007-CR-5171/2 and 2008-CR-1532 for one count of possession of cocaine, in violation of R.C. § 2925.11(A), a felony of the third degree, and one count of felonious assault, in violation of R.C. § 2903.11(B)(1), a felony of the second degree.

{¶ 2} Jones was indicted on January 14, 2008, in Case No. 2007-CR-5171/2, for one count of possession of cocaine in an amount greater than five grams and less than ten grams. On April 24, 2008, Jones was indicted for felonious assault in Case No. 2008-CR-1532 for failing to disclose his HIV positive status to an individual with whom he was having sexual contact.

{¶ 3} The two cases were subsequently consolidated. On October 3, 2008, Jones plead guilty to both counts in the indictments after the State agreed to recommend a sentence between two and four years. At the sentencing hearing held on October 30, 2008, the trial court sentenced Jones to three years for possession of cocaine and seven years for felonious assault. The court also ordered that the sentences run consecutively for a total of ten years imprisonment. On December 19, 2008, Jones filed a motion for leave to file a delayed appeal with this Court. We sustained Jones' motion on January 9, 2009, and the instant appeal followed.

{¶ 4} Jones' first assignment of error is as follows:

{¶ 5} "THE TRIAL COURT ERRED BY ALLOWING THE GOVERNMENT TO BREACH ITS PLEA AGREEMENT WITH MR. JONES."

{¶ 6} Jones contends that the trial court erred when it allowed the State to ignore its plea agreement in which the State initially agreed to recommend a range of between two and four years imprisonment. At the sentencing hearing, the State failed to recommend the previously agreed to sentencing range, and the trial court ordered Jones to serve an aggregate sentence of ten years. Thus, Jones argues that he was improperly induced into pleading guilty by the State's promise to recommend a two to four year sentence, which the State

subsequently failed to honor at the sentencing hearing. Jones, therefore, argues that his conviction should be vacated; in the alternative, Jones requests that the Court order specific performance from the State and require it to affirmatively recommend a sentence consistent with the plea agreement.

{¶ 7} At Jones' plea hearing, the State made the following representations to the trial court:

{¶ 8} "The State: Yes, Your Honor, it's – at this time the State recall 2007-CR-5171.

{¶ 9} "And, with the Court's permission, Your Honor, we have a second case involving Mr. Jones, which is 2008-CR-1532. That matter is a felonious assault and at a separate jury trial on Monday, October 6th.

{¶ 10} "It's the State's understanding that while we've been having some discussions about a resolution to both of these cases, *the defendant now wishes to enter a guilty plea on both of these cases in exchange for a recommendation of the State that he receive a prison sentence between two and four years, and that the Court can – can obviously pick the number in there where the State and defense would argue for – for the max and the minimum with regard to that sentence.*"

{¶ 11} The trial court subsequently stated the following in regards to the State's promise to recommend:

{¶ 12} "The Court: Now, *I understand there'll be some recommendations at the time of sentencing by the State of Ohio*, but you understand the Court's not bound by any of those recommendations?

{¶ 13} “You understand that?”

{¶ 14} “Jones: Yeah.”

{¶ 15} “When a prosecutor induces a defendant to plead guilty based upon certain promises, the prosecutor has a duty to keep those promises.” *State v. Simpson*, 158 Ohio App.3d 441, 443, 2004-Ohio-4690, citing *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. We also stated in *Simpson* that when the prosecutor there remained silent at the sentencing hearing and did not recommend that defendant receive an aggregate sentence of only one year, the State failed to perform on its promise and thereby breached the plea agreement. *Id.* “Under those circumstances, the trial court should either require specific performance by the [S]tate or allow defendant to withdraw the plea.” *Id.*

{¶ 16} At the sentencing hearing, it was apparent from the statements made by defense counsel that Jones expected the State to recommend a sentence between two and four years as agreed in exchange for Jones’ guilty pleas.

{¶ 17} “Defense Counsel: *** Your Honor, I would submit that the *lowest end of our range, which would be two years* would be sufficient to meet the principles and purposes behind sentencing. It would protect the public. It would certainly punish my client. He’s been punished quite a bit so far, Judge.

{¶ 18} “I think it would be sufficient and we would submit that *nothing more than two years* knowing it’s appropriate in this case, Your Honor.”

{¶ 19} When the State was given a chance to speak, the prosecutor did not even mention the recommendation, and instead made the following comments:

{¶ 20} “The State: *** Mr. Jones was out of prison by the State’s count about six

months before he picked up the felony three possession of cocaine, which as the Court's aware is a [sic] mandatory time. And, then shortly thereafter also picked up the felonious assault case he's also here for sentencing on.

{¶ 21} “The State did have a lengthy discussion with the victim in this case. The woman – woman, S.J., who is now HIV positive due to a sexual relationship with this Defendant, she expressed to the State that, – that she really wasn't sure if she was going to be – be able to be here today because it would be difficult for her to be in the same room with Mr. Jones.

{¶ 22} “She obviously is not here, so I guess she it'd be easier for her to – to make no appearance today.

{¶ 23} “But I know that this matter obviously has deeply affected her and she has to live with this disease for the rest of her life.

{¶ 24} “*And the State would ask that the Court take that into consideration when making its sentence.*”

{¶ 25} The State did not mention the recommendation it had previously agreed upon. More importantly, the State essentially advocated for a harsher sentence by emphasizing that Jones was arrested for possession of cocaine only six months after he had been released from prison. The State also noted the impact that Jones' behavior had on the victim, whom he had infected with HIV. The State, in fact, did the opposite of what it agreed to do in exchange for Jones' guilty pleas. We note further that the State's recommendation does not appear as part of the pre-sentence investigation report which provides the prosecutor an opportunity to address sentencing in writing.

{¶ 26} The sentencing judge stated that he made his decision to sentence Jones based upon a review of Jones' presentence investigation report and the victim's impact statement. It is true that the trial court acknowledged some understanding between Jones and the State and explicitly informed Jones that it would not honor it at the disposition. After the court sentenced Jones, defense counsel referenced the plea agreement in the following excerpt:

{¶ 27} "Defense Counsel: Excuse me, Your Honor, with all due respect, it was my understanding we had an agreement that there was a sentencing range between two and four years.

{¶ 28} "The Court: ***[W]hen I looked at the pre-sentence investigation report the Court does not feel that that is an appropriate range of sentencing in light of – in light of the seriousness of this conduct.

{¶ 29} "*The Court – the Court will not honor that. The Court feels it's not appropriate.*"

{¶ 30} The evidence before us establishes that the trial court did not consider the recommendation of the State when it imposed sentence. Rather, the court's statements reveal that it only considered Jones' pre-sentence investigation report and the victim's statement, not the entire record, when sentencing Jones. See *State v. Montgomery*, Adams App. No. 07CA858, 2008-Ohio-4753 (stating that the trial court was aware of the plea agreement containing the prosecutor's recommendation because the court *expressly* said that it had considered the record, which contained the plea agreement).

{¶ 31} The State chose to completely disregard its prior agreement with Jones, and instead, made statements emphasizing Jones' criminal history, as well as the harm caused to

his victim. In light of its prior agreement which was acknowledged during the plea hearing, the State's failure to live up to the plea negotiations necessitates a reversal is warranted.

{¶ 32} On this record, specific performance is not a meaningful remedy, under *Santobello*, the interests of justice necessitate rescission of the pleas.

{¶ 33} Jones' second and third assignments of error are as follows:

{¶ 34} "THE COURT ERRED IN DENYING MR. JONES HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS BECAUSE HIS GUILTY PLEA WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY."

{¶ 35} "MR. JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶ 36} Jones' first assignment of error having been sustained, his plea and sentence are vacated, and this matter is remanded for further proceedings consistent with this opinion.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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