No. CA-19-108687

OHIO EIGHTH DISTRICT COURT OF APPEALS

STATE OF OHIO,

Plaintiff-Appellee,

v.

SHARON COLLIER,

Defendant-Appellant.

On Appeal from the Cuyahoga County Court of Common Pleas,
Case No. CR-18-626420-A

REPLY BRIEF OF APPELLANT SHARON COLLIER

ORAL ARGUMENT REQUESTED

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In her opening brief, Mrs. Collier explained that the trial court and state committed several errors that were profoundly prejudicial to her and that require redress from this Court. The state, in its brief response, offers no reason to conclude otherwise. The state breached its plea agreement with Mrs. Collier; the trial court failed to make all of the findings required to impose consecutive sentences and failed to merge allied offenses; and the factual record does not support the maximum, consecutive sentences the trial court imposed. In short, it remains the case that Mrs. Collier's sentences cannot, and should not, stand.

ARGUMENT

I. The State's Violation of the Terms of Its Plea Agreement Is Dispositive of this Appeal.

In stating the terms of the parties' plea agreement on the record before the trial court, the prosecutor explicitly promised, "[T]he sentencing of Ms. Collier we're leaving to the wise discretion of the Court at the time of sentencing." Change-of-Plea Tr. at 7:18-21. But despite this promise, the state not only reneged and asked for a prison term at sentencing—it asked for *six-years* for this first-time offender, a prison term that could only be reached via *maximum, consecutive* sentences. Sentencing Tr. at 72:12-13. The trial court complied with the state's request, sentencing Mrs. Collier to precisely the six years sought by the state. *See id.* at 73:3-75:25. This breach of the plea agreement by the state is, as discussed in Mrs. Collier's opening brief, on all fours with the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), in which the Court held that the remedy for such a breach is vacation and remand for resentencing by a *different* trial judge (one not tainted by the state's breach). *Id.* at 263.

Faced with such a clear-cut error and black-and-white remedy, there is little the state can say in reply. Indeed, in other, similar cases, the state, to its credit, has conceded error when faced with such a violation. *See State v. Wilson*, 2d Dist. Clark No. 11-CA-04, 2011-Ohio-6184 (state "concede[d] error" where prosecution recommended sentencing range despite agreement to

"remain silent" at sentencing). But the state unfortunately takes a different route in this case, arguing unconvincingly that the prosecutor did not really mean it when he said the state would "leav[e]" sentencing "to the wise discretion of the Court."

This argument does not hold water, and that is why the state noticeably offers no case law or other support for its position. Instead, the state attempts linguistic gymnastics, baldly asserting that, in promising that "the sentencing of Ms. Collier we're leaving to the wise discretion of the Court at the time of sentencing," the state meant only that it would somehow permit the trial court to have final say on sentencing. That is, the state would make a recommendation as to sentence but promise to cede to the court the power to make the ultimate determination with respect to sentence. State's Br. at 3 (in committing to "leav[e]" sentencing "to the wise discretion of the court" the prosecutor was simply "informing the court" that "it was the court's discretion to determine an appropriate sentence"). This attempt to explain away its clear promise not to take a position at sentencing lacks merit and is completely illogical. It is black-letter law that the court, not the state, *always* has the final say on sentencing, *i.e.*, the "discretion to determine an appropriate sentence." State's Br. at 3. The state, by contrast, never holds that authority and accordingly was not here, and never is, in a place to "give" that authority to the court. Instead, the only logically and legally plausible interpretation of the state's promise to "leav[e]" sentencing "to the wise discretion of the Court" was that the state was agreeing *not* to weigh in on the issue of sentencing. That is, the promise to leave sentencing to the court is functionally identical to the promise made in *Santobello*, where the prosecutor "agreed to make no recommendation as to the sentence."

Santobello, 404 U.S. at 258.[1] And the promise and breach here are also on all fours with the Ohio precedents discussed in Mrs. Collier's opening brief. *See* Opening Br. at 10-13.

The only issue that remains, then, is whether the state's breach of the plea agreement may be redressed by this court—that is, whether either (1) the state's breach of the agreement constituted plain error or (2) Mrs. Collier's trial counsel was ineffective for failing to object to the breach in the trial court. In her opening brief, Mrs. Collier explained in detail why the breach constitutes plain error. Opening Br. at 9-14. In its response, the state is all but silent, asserting only that "[s]ince the plea agreement was not breached, there was no plain error." State's Br. at 5. Accordingly, if this Court finds, as the facts dictate, that the state did breach the agreement, then that is the end of the matter and vacation and remand for resentencing by a different trial-court judge is necessary. The state has waived all other argument on the issue of plain error.

Given the state's capitulation on the plain-error argument, discussion of the ineffective assistance route to this Court's review of the state's plea-agreement breach is, at this juncture, superfluous. For the sake of completeness, however, Mrs. Collier will briefly address the issue.

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[1] The state also argues that by committing to "leav[e]" sentencing "to the wise discretion of the Court," the prosecutor did not mean that the state was agreeing not to weigh in on sentencing but instead was trying to hint that the parties had not mutually agreed to a sentence. State's Br. at 3. But if that's what the prosecutor meant, then that is what he should have said. "[A] plea bargain itself is contractual in nature and subject to contract-law standards." *State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 21 (internal quotation marks omitted). And, in contract law, "[w]hen . . . words in their literal sense have a plain meaning, courts must be very cautious in allowing their imagination to give them a different one. *Kahn v. Bally Mfg. Corp.*, 8th Dist. Cuyahoga No. 62158, 1993 Ohio App. LEXIS 3645, at *9 (July 22, 1993).

Further, this creative reinterpretation is belied not only by the plain language of the statement but by context as well. In fuller context, the prosecutor's statement was as follows: "And there have been no threats or promises made to . . . defendant[] concerning any type of sentence, Your Honor. In fact, the sentencing of Ms. Collier we're leaving to the wise discretion of the Court at the time of sentencing." Change-of-Plea Tr. at 7:15-21. The first sentence thus already conveys that the parties had not reached a mutually agreed sentencing recommendation; it thus would have been redundant and nonsensical to say the very same thing in the next sentence.

The state's entire substantive argument on the issue is as follows:

> Here, Appellant has failed to demonstrate that objecting to the sentencing recommendation would have changed the outcome. The court heard from the victims and provided a rationale for the sentence it imposed. The Appellant has wholly failed to support the assertion that the case could have been transferred to a different judge had defense counsel objected. As the Appellant has failed to demonstrate the sentence would have been different, this claim should be rejected.

State's Br. at 5. The state thus does *not* argue that the first prong of the ineffective assistance test—that counsel's failure to object fell below an objective standard of reasonableness, *see State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 61—is not met here. And indeed no such argument is plausible, as there was nothing to be gained by not objecting to the state's breach in the trial court. Regarding the second prong of the ineffective-assistance test—whether there is a reasonable probability that, but for the error, the result would have been different, *id.*—the state argues that the sentence would have been the same because the court "heard from the victims and provided a rationale for the sentence it imposed." State's Br. at 5. But this argument is a *non sequitur*. Even more significantly, it is irrelevant given that, had trial-court counsel objected to the state's breach, the remedy would have been transfer to a different judge for sentencing, and thus Judge Saffold's "rationale for the sentence" would have been moot. Perhaps recognizing this fatal flaw in its argument, the state incorrectly argues that "[t]he Appellant has . . . failed to support the assertion that the case could have been transferred to a different judge had defense counsel objected." *Id.* But to the contrary, that is *precisely* the remedy Mrs. Collier discussed extensively in her opening brief because it is precisely the remedy mandated by the Supreme Court, and applied by the courts of this state, when addressing this type of breach. *Santobello*, 404 U.S. at 263; *State v. Adams*, 2014-Ohio-724, 8 N.E.3d 984 (7th Dist.), ¶ 39.

In short, every aspect of the state's breach argument falls flat. Mrs. Collier's sentence should be reversed, and the case remanded for resentencing before a different trial-court judge.

II. The Trial Court's Imposition of Consecutive Sentences Should Be Vacated for Failure to Comply with R.C. 2929.14(C)(4).

The state and Mrs. Collier agree that a trial court had to, among other things, make one of three findings—found in subparagraphs (a), (b), and (c) of R.C. 2929.14(C)(4)—before imposing consecutive sentences. And they agree that the findings in subparagraphs (a) and (c) could not possibly apply on these facts. Opening Br. at 17; State's Br. at 6. That leaves subparagraph (b):

> At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

R.C. 2929.14(C)(4)(b). But as explained in Mrs. Collier's opening brief, there also is nothing in the record to indicate that the trial court engaged in *any* analysis of subparagraph (b), let alone a thorough and "correct" one. Opening Br. at 18. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

In response, the state unconvincingly points to two—and only two—statements made by the trial court: (1) that "[b]oth Mr. and Ms. Taylor have been greatly impacted by this betrayal, as well as this financial stress that was caused on their family," and (2) that there was a "violation of the trust that the two parties had for each other." State's Br. at 7. But these assertions do not get the job done, and it would be error for this Court to uphold Mrs. Collier's maximum consecutive sentences based on them. Neither assertion includes the finding, required by R.C. 2929.14(C)(4)(b), that "[a]t least two of the multiple offenses were committed as part of one or more courses of conduct." *See, e.g.*, *State v. Squires*, 8th Dist. Cuyahoga No. 108071, 2019-Ohio-4676, ¶ 33 (vacating and remanding consecutive sentences because "the court did not address the initial portion of R.C. 2929.14(C)(4)(b) that '[a]t least two of the multiple offenses were committed as part of one or more courses of conduct'"). And neither assertion includes a finding, also

required by R.C. 2929.14(C)(4)(b), that "the harm caused *by two or more of the multiple offenses . . .* was *so great or unusual that no single prison term*" could suffice. (Emphasis added). Further, *Bonnell* makes clear that, while the trial court need not recite the statutory findings verbatim, it "must note that it engaged in the analysis and that it has considered the statutory criteria and specified which of the given bases warrants its decision." *Bonnell* at ¶ 26. Here, the trial court failed to comply with *any* of these requirements; accordingly, the state's suggestion that the trial court's sentence was within the bounds of the statute is clearly wrong.

Given this reality, it not surprising that the state fails to address any of the cases cited in this section of Mrs. Collier's opening brief, including cases in which clearer language than that cited by the state above was rejected as insufficient under R.C. 2929.14(C)(4)(b) *and* including one of this Court's past decisions reversing this very trial-court judge for failure to comply with R.C. 2929.14(C)(4). *See* Opening Br. at 19. Contrary to the state's argument, the statute "requires more than a statement of the serious nature of the crime." *State v. Farnsworth*, 7th Dist. Columbiana No. 12 CO 10, 2013-Ohio-1275, ¶ 11. By any measure, then, the trial court's statements fall woefully short, and Mrs. Collier's consecutive sentences should be vacated.

III. Aggravated Theft and Money Laundering Were Allied Offenses on These Facts.

"When a defendant has been found guilty of offenses that are allied offenses, R.C. 2941.25 prohibits the imposition of multiple sentences. Therefore, a trial court must merge the crimes into a single conviction and impose a sentence that is appropriate for the offense chosen for sentencing." *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, 950 N.E.2d 512, ¶ 17. In her opening brief, Mrs. Collier set forth the standard, adopted by the Ohio Supreme Court in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, for applying R.C. 2941.25's allied-offenses rule and explained, in detail, how application of that standard to the facts of this case means that Mrs. Collier's aggravated-theft and money-laundering offenses are indeed allied.

Opening Br. at 21-23. Accordingly, it was a violation of R.C. 2941.25 and *Ruff* for the trial court to sentence Mrs. Collier separately for these offenses.

The state, for its part, invests only a single page of its response brief to addressing this issue, and roughly half of that space is taken up by a legal-background discussion premised on sources from the 1970s and early 1980s. State's Br. at 8. Only a single paragraph includes actual argument as to why the theft and money-laundering offenses should not have merged here. In that paragraph, the state, citing *State v. Cody*, 8th Dist. Cuyahoga No. 100797, 2017-Ohio-1543, ¶ 25, notes that "the offenses of theft and money laundering are not necessarily allied offenses." State's Br. at 8. But this does nothing to advance the state's argument. First, it is of course the case that theft and money laundering are "not necessarily" allied offenses because, as noted in Mrs. Collier's opening brief, "'[a]t its heart, . . . allied-offense analysis is dependent upon the facts of a case.'" Opening Br. at 21 (quoting *Ruff* at ¶ 26). Second, this language from *Cody*—that theft and money laundering are "*not necessarily* allied offenses"—implies that, while theft and money laundering are not *always* allied, the *default* assumption is that they are. Third, *Cody*'s allied-offenses analysis is of little use here, as the court in *Cody* failed to apply the *Ruff* test and instead erroneously relied on the outdated *Johnson* test, its predecessor. *See Cody* at ¶ 25. *Cf. Ruff* at ¶¶ 1, 16 ("revisit[ing] the holding in *State v. Johnson*" and characterizing the test created by *Johnson* as "incomplete").

The state's only other argument is that "[t]he Appellant stole money . . . through . . . unauthorized ATM deposits, writing fraudulent checks, and making unauthorized credit card purchases. Then the Appellant would commit a separate act constituting the money laundering such as depositing the money into her own account." State's Br. at 8. These assertions are mistaken, and they do not support the argument that the theft and money-laundering offenses were committed separately.

First, the state is mistaken regarding its characterization of the ATM transactions. The record shows that Mrs. Collier executed ATM *withdrawals* from Taylored Construction's bank account(s), *e.g.*, Sentencing Tr. at 63:6-6, 65:16-17, not that she made "ATM deposits," State's Br. at 8. Second, neither the ATM withdrawals (made and used at a casino) nor unauthorized credit-card purchases would have involved "depositing the money into her own account," as the state speculates. Depositing checks into her account would, of course, have involved deposit, but there the deposit is also as essential component of the theft itself. Simply filling out a blank check—while it may constitute forgery, check fraud, or some other offense—does *not* constitute theft. Further, even if this were not the case, a hyper-technical distinction between the physical acts of filling out and depositing a check is clearly *not* what the Court in *Ruff* meant by "offenses . . . committed separately." *Ruff* at paragraph three of the syllabus.[2] Accordingly, Mrs. Collier requests this Court order merger of the theft and money-laundering counts.

IV. Mrs. Collier's Sentence Is Not Supported by the Record.

The state also fails to convincingly dispute Mrs. Collier's argument that her hefty, consecutive sentences are not supported by the record. As pointed out in Mrs. Collier's opening brief, the trial court cited only *one* alleged fact to justify its conclusion that Mrs. Collier posed an unusually high danger to the public (a required finding for the imposition of consecutive sentences): Mrs. Collier's alleged lack of remorse. Opening Br. at 27-28. But as also pointed out in that brief, the trial-court explicitly premised its finding of lack of remorse on erroneous information, mistakenly believing that a statement made in the initial police report two years earlier

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[2] The state does not even address Mrs. Collier's plain-error and ineffective-assistance arguments with respect to the allied-offenses issue. *Compare* Opening Br. at 23-25 *with* State's Br. at 7-8. As such, it has waived any argument on those topics.

was in fact a live statement made by Mrs. Collier to the probation officer who compiled her PSI. *See id.* at 28-30. Importantly, the state does *not* contest the fact that this was error. *See* State's Br. at 9-11. Instead, it argues that the finding of lack of remorse was appropriate because Mrs. Collier allegedly did not "turn around" and directly face the Taylors during her apology and because, in the *prosecutor's* opinion, "her demeanor was arrogant." *Id.* at 10. But neither of these "facts" is found anywhere in the record. The state apparently wants this Court to judicially notice the prosecutor's subjective opinions—opinions which are, of course, irrelevant to this appeal. That is, of course, anathema to the law. *See, e.g.*, *Papadelis v. First Am. Savs. Bank*, 112 Ohio App.3d 576, 581, 679 N.E.2d 356 (8th Dist.1996) (so-called evidence "not in the record before the trial court . . . cannot . . . be considered on appeal"); *State v. Combs*, 11th Dist. Portage No. 2007-P-0075, 2008-Ohio-4158, ¶ 38 (an appellate court "cannot consider [a party's] unsupported statement asserted in [its] appellate brief").

The state also attempts to distinguish two cases discussed at some length in this portion of Mrs. Collier's brief: *State v. Hicks* and *State v. Polizzi*. Opening Br. at 32-33. In *Hicks*, 2d Dist. Green No. 2015-CA-20, 2016-Ohio-1420, the court of appeals reversed maximum, consecutive sentences imposed on a 52-year-old first-time offender who had stolen $75,000 from disabled adults in her care. Opening Br. at 32-33. The court concluded that the "facts [were] not conducive to recidivism given [the defendant's] age, lack of prior incarceration, and otherwise decades of law-abiding life." *Hicks* at ¶ 22. In *Polizzi*, 11th Dist. Lake No. 2018L-063, 2019-Ohio-2505, the court reversed consecutive sentences totaling 33 years for a former teacher convicted of sex offenses against two students, concluding that the factors found in R.C. 2929.12(D) & (E)—factors which a trial court *must* consider in determining whether a defendant is likely to reoffend—weighed heavily in favor finding that the defendant's recidivism risk was low.

The state argues *Hicks* is not applicable here because Hicks "had stolen $75,000, unlike the Appellant who stole [$210,000]" and because the total sentence at issue for stealing from the disabled in *Hicks* was 9 years, not 6 as in this case. State's Br. at 9. And *Polizzi* is irrelevant, the state says, because Polizzi would never teach again and, while Mrs. Collier likely "will never be hired for a similar [office-manager] position again," still she could find some other way to reoffend. *Id.* at 10. But these arguments miss the point. Mrs. Collier certainly does not contend, and has never contended, that either *Hicks* or *Polizzi* was factually identical to her case. Rather, like most argument from case law, the argument is that *Hicks* and *Polizzi* address some of the legal issues present in her case and are, in important ways, analogous to her situation. The upshot of the discussion of *Hicks* is not that Hicks and Mrs. Collier stole identical sums of money or received identical prison terms but rather that appellate courts readily reverse excessive, consecutive sentences imposed on middle-aged, first-time offenders who—like Hicks *and* Mrs. Collier—are unlikely to recidivate. Likewise, the point of the *Polizzi* discussion is not that Polizzi and Mrs. Collier shared the same profession but that, just as—and even more so than—in *Polizzi*, in Mrs. Collier's case the mandatory R.C. 2929.12(D) & (E) factors weigh strongly, even unanimously, in favor of a finding that Mrs. Collier was not "likely to commit future crimes."

CONCLUSION

For these reasons, and as explained in more detail in Mrs. Collier's opening brief, in light of the state's plain-error breach of the parties' plea agreement, Mrs. Collier's sentence should be vacated in full and the case remanded to a different trial judge for resentencing. Alternatively, this court should vacate Mrs. Collier's sentences, reduce the term of the 36-month and 12-month sentences, and order that all sentences be served concurrently.

Dated: December 2, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, this Reply Brief of Appellant Sharon Collier was filed electronically. Notice of this filing will be sent to all parties through this Court's electronic filing system.

/s/Paul M. Flannery
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