IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

FILED

September 30, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,
APPELLEE,

v.

LARRY CUNNINGHAM,
APPELLANT.

No. 02-C-01-9506-CC-00172

Lauderdale County

Joseph H. Walker, Judge

(Possession of Cocaine with Intent to Sell or Deliver)

FOR THE APPELLANT:

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OF COUNSEL:

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FOR THE APPELLEE:

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OPINION FILED:______________________________

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Larry Cunningham, was convicted of possessing more than .5 grams of cocaine with the intent to sell or deliver, a Class B felony, upon his plea of guilty to the offense. The trial court found that the appellant was a standard offender and imposed a Range I sentence consisting of a $2,000 fine and confinement for eight (8) years in the Department of Correction. The trial court permitted the appellant to serve his sentence pursuant to the Tennessee Community Corrections Act, Tenn. Code Ann. § 40-36-101, et. seq. The appellant was permitted to reserve a certified question of law that is dispositive of the prosecution, namely, whether the trial court erred in denying his motion to dismiss the indictment when the State of Tennessee refused to honor its promise to dismiss the prosecution after he assisted police in several drug cases. After a thorough review of the record, the briefs of the parties, and the authorities that control the issue, it is the opinion of this Court that the judgment of the trial court should be affirmed.

On July 1, 1994, the appellant was arrested in Lauderdale County by Ripley police officers for possessing cocaine in excess of .5 grams with the intent to sell or deliver. Later, the appellant asked the officers if there was anything that he could do to avoid being incarcerated. The officers told the appellant that if he wanted to assist in the investigation of drug trafficking in Ripley, he should call the officers later. The appellant's bond was set at $10,000.

Counsel was appointed to represent the appellant. There were several court settings in the General Sessions Court. The co-defendant was ill. Given these circumstances, the appellant's bond was reduced to $1,500 so that he would not have to remain in jail while the co-defendant recovered from his illness. He was able to secure his release. The preliminary hearing was held on January 27, 1995. The Lauderdale County Grand Jury indicted the appellant on February 6, 1995.

The appellant contacted Investigator Gould, a Ripley police officer, after he was indicted. Investigator Gould told the appellant that if he provided information and assistance regarding drug trafficking, he, Gould, "would pass this information on to the Attorney General's Office that . . . he had assisted and see if they would help him." Officer

Gould never told the appellant that the prosecution would be dismissed. Moreover, the appellant's only concern was avoiding incarceration.

Investigator Gould informed the assistant district attorney general handling the appellant's case that the appellant was going to cooperate. Later, he advised the assistant district attorney general that the appellant was cooperating. When the officers were satisfied that the appellant had successfully completed his agreement to assist, Investigator Gould advised the assistant district attorney general. The assistant district attorney general told Gould that he "would take care of it." Gould relayed this message to the appellant. However, he did not tell the appellant what would occur. Gould said: "I couldn't tell him that, because I didn't know." It was Investigator Gould's understanding that the appellant would not have to serve any sentence that might be imposed.

On June 7, 1995, Investigator Gould had a conversation with defense counsel in a corridor inside the Lauderdale County Courthouse. Investigator Gould told defense counsel that the case would be dismissed. Gould testified that use of the word "dismissed" was a "mistake in terminology" on his part. No one from the District Attorney General's Office used the word "dismissed."

Investigator Gould and defense counsel went to the office of the District Attorney General, Elizabeth T. Rice, shortly after their conversation. During the dißß ßßß ßßß ßßß ßßß ßßß ßßß ßßß ßßßßßßßßdismissed.

The appellant testified on direct examination that he assisted the Ripley Police Department between his arrest, July 1, 1994, and the preliminary hearing, January 27, 1995. On cross-examination he testified that he did not actually begin cooperating with the

officers until after the indictment was returned, February 6, 1995. According to the appellant, the officers wanted to wait and see if he would be indicted. He also testified that he agreed to assist the officers to "help [his] case" so that he "could keep from going to jail." When asked what Investigator Gould had told him, the appellant echoed the testimony of Gould, namely the assistant district attorney general "would take care of it."

Although the appellant was represented by an attorney, he never told the attorney what he had agreed to do or what he was promised by the officers. He testified that he "didn't think it was necessary" because he "thought it [his case] would be taken care of."

There are two underlying flaws in this case. First, the appellant has failed to comply with the requirements of State v. Preston, 759 S.W.2d 647 (Tenn. 1988). There the appellant failed to set forth the certified question of law in the order counsel prepared for the trial court's signature. The question is stated in the following language: "The Court finds and hereby certifies that the correctness of its ruling on the motion to dismiss is a dispositive question of law as contemplated by Rule 37(b)(2)(iv), Tenn. Rules of Criminal Procedure." Preston provides that the precise certified question must be stated in the judgment. This Court has held on numerous occasions that reference to another document in the record does not comply with Preston. As a general rule, this Court dismisses appeals when the appellant fails to comply with Preston. There is absolutely no excuse for not following Preston. It has been the law in this state for the last eight years. Nevertheless, this Court will consider what purports to be the issue.

Second, the motion to dismiss does not allege that anyone promised the appellant that the prosecution would be dismissed if he provided relevant and material information and assistance to law enforcement officers. The motion simply alleges: "Counsel further learned that defendant was recruited and promised some consideration relative to the instant indictment by Investigator Lynn Gould and Investigator Jeff Fain of the Ripley Police Department for services rendered." (emphasis added). This allegation did not warrant an evidentiary hearing on the question of whether the indictment should be dismissed on the ground that the State of Tennessee breached an agreement to dismiss the indictment if the appellant assisted the officers. However, since the trial court granted the appellant an evidentiary hearing, this Court will reluctantly decide this issue on the merits.

The parties agree that there was an agreement between the officers and the appellant that the officers would "help" the appellant if he would help the officers make arrests for illicit drug trafficking. The parties also agree that the appellant successfully performed what the officers asked him to do. However, the parties disagree regarding the consideration the appellant was to receive for fulfilling his part of the bargain. The appellant contends that the officers agreed to have the prosecution dismissed if he fulfilled his part of the bargain. The State of Tennessee contends that the officers made no representations regarding the disposition of the prosecution or the sentence that would be imposed. The officers advised the appellant that if he cooperated, they would approach the assistant district attorney general handling the prosecution and advise him of the efforts made by the appellant. The officers hoped that the assistant district attorney general would recommend a sentence that would not require the appellant to be incarcerated. Ultimately, the trial court imposed an alternative sentence pursuant to the Tennessee Community Corrections Act that did not require a period of incarceration.

When the State of Tennessee and an accused enter into an agreement regarding the prosecution of a particular case in exchange for cooperation, and a disagreement occurs, the dispute is resolved by resorting to the laws governing contracts. State v. Howington, 907 S.W.2d 403, 407-08 (Tenn. 1995). Oral agreements of this nature are enforceable contracts in this jurisdiction. Howington, 907 S.W.2d at 408.

What constitutes a breach of the agreement is governed by the agreement itself. Howington, 907 S.W.2d at 410. If there are ambiguities contained in the agreement, the "ambiguities . . . must be construed against the State." Id.

If the State of Tennessee seeks to avoid the terms of a valid agreement based on a breach occasioned by the accused, "the State must be held to a high evidentiary standard" when "the accused has already acted in reliance on the agreement." Howington, 907 S.W.2d at 410. As previously stated, the State of Tennessee does not claim that the appellant breached the agreement. The only issue is the nature of the consideration the appellant was to receive if he successfully completed his part of the bargain.

The testimony of Investigator Gould and the testimony of the appellant conflicted. Thus, the trial court was required to determine the credibility of the witnesses. The court

observed their appearance, demeanor, and manner. The trial court resolved the conflicts in favor of the State of Tennessee. This is understandable. The appellant contradicted himself as evidenced by the summary of the evidence set forth above.

This Court finds that the officers did not tell the appellant the prosecution would be dismissed if he cooperated. They told the appellant that if he cooperated, they would attempt to help him. The help would be advising the assistant district attorney general about his efforts on behalf of the Ripley Police Department. The officers hoped the State of Tennessee would not seek to incarcerate the appellant. As Investigator Gould stated, he could not tell the appellant what would happen because he had no clue what the assistant district attorney general might do in the matter.

The assistant district attorney general did not mention the word "dismissed." Investigator Gould admitted he told defense counsel that the prosecution would be dismissed after the appellant had rendered the desired cooperation. However, there was an apparent misunderstanding between Gould and defense counsel, or Gould was confused regarding the policy. In any event, General Rice made it clear a few minutes later that she had not agreed to a dismissal of the prosecution, and that the prosecution would not be dismissed. She explained her policy: cases could be dismissed in the General Sessions Court, but cases would not be dismissed once the accused had been indicted and the case was pending in the Circuit Court. In summary, what Investigator Gould told defense counsel was not binding upon the prosecution. Moreover, the "new promise" for the past performance was not an enforceable agreement. See Price v. Mercury Supply Co., Inc., 682 S.W.2d 924, 933 (Tenn. Ct. App.), per. app. denied (Tenn. 1984). Also, the District Attorney General, not the police officer, controls the disposition of the prosecution; and defense counsel was, or should have been, aware that Investigator Gould could not bind the State of Tennessee regarding a pending prosecution.

This entire dispute could have been avoided if the appellant had advised the attorney representing him what the officers wanted him to do and the consideration that he would receive for his services. Counsel could have met with the officers and the assistant district attorney general. The agreement could have been reduced to writing so a future misunderstanding of the agreement could be avoided. However, the appellant

apparently did not want counsel to know about his relationship with the officers and what they had promised him.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

GARY R. WADE, JUDGE

WILLIAM M. BARKER, JUDGE