In the
Indiana Supreme Court

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CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

Julie A. Montgomery,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
21A-CR-02331

Trial Court Case No.
83C01-2007-F3-1

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 8/25/2022.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

Massa, J., Slaughter, J., and Goff, J., vote to deny transfer.
David, J., dissents from the denial of transfer with separate opinion in which Rush, C.J., joins.

David, J., dissenting from the denial of transfer.

I respectfully dissent from my colleagues' decision to deny transfer in *Montgomery v. State*, 21A-CR-02331, and *Philhower v. State*, 21A-CR-02470. Both appellants challenge their sentences on appeal, even though each agreed by plea agreement to waive the right to appeal their sentences. Once again, these waiver provisions deserve this Court's attention and scrutiny. Accordingly, I write separately to reiterate many of the sentiments expressed in my dissent from the Court's denial of transfer in *Wihebrink v. State*, 21A-CR-01749, and continue to stress the necessity of developing a clear and meaningful record as trial judges advise defendants of their rights in cases in which the parties submit a written plea agreement and the trial court imposes a sentence upon its acceptance of the agreement.

As I explained in my dissent for *Wihebrink*, a defendant may waive the right to appeal her sentence as part of the plea agreement, so long as such waiver is knowing and voluntary. *Creech v. State*, 887 N.E.2d 73, 74 (Ind. 2008). But because such appellate waivers are inherently prospective, questions naturally arise as to whether a defendant knowingly and voluntarily assented to such waiver. This is because a defendant's front-end waiver of her appellate rights requires that she surrender the ability to appeal various errors potentially committed by the trial judge at the sentencing hearing, such as a misstatement of law, inflammatory or prejudicial commentary, or, as we saw in Wihebrink's appeal, reliance on improper aggravators in reaching a sentencing decision, all of which are simply unknown and unanticipated by the party that risks the most in the face of such uncertainty, the defendant. Therefore, additional assurance as to the validity of the waiver is necessary. Trial courts may provide such assurance by developing a clear record demonstrating a defendant understands the terms and conditions of the plea agreement and the rights, including appellate rights, surrendered by pleading guilty.

Under the circumstances before the Court, I would grant Montgomery's and Philhower's petitions to transfer because the record is simply inadequate for me to conclude that either defendant knowingly

and voluntarily waived their appellate rights. Here, Montgomery and Philhower, like Wihebrink, signed plea agreements containing provisions waiving "[t]he right to appeal an adverse decision of the Trial Court," as well as the "right to appeal any sentence imposed by the Court that is within the range of penalties set forth in th[e] plea agreement." Montgomery App. Vol. II at 55; Philhower App. Vol. II at 86.

However, each defendant received different advisements—with varying detail—at the hearings for their respective plea agreements. For example, the trial court advised Montgomery of the rights she gave up by pleading guilty, but the colloquy made no reference to the fact that she waived the right to appeal her conviction **and** sentence. At the hearing for Philhower's plea agreement, the same trial judge provided similar advisement. And to the trial court's credit, the judge further questioned, "Do you understand that if we had a trial and you were found guilty you would have certain appeal rights and by pleading guilty today you will be giving up those appeal rights?" Philhower Tr. at 6. But the judge did not specify the **nature** of these "certain" rights or whether such rights included the right to appeal his conviction or sentence, or both.

This Court previously rejected the argument that trial courts are required to make express findings that a defendant intended to waive their appellate rights because "neither the Indiana Rules of Criminal Procedure nor Indiana Code requires trial courts that accept plea agreements to make express findings regarding a defendant's intention to waive his appellate rights." *Creech*, 887 N.E.2d at 77. Rather, "[a]cceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, the defendant knowingly and voluntarily agreed to the waiver." *Id.*

But I am not convinced a written waiver, standing alone, adequately assures that a defendant knowingly and voluntarily waived their appellate rights. And I strain to reason how a trial judge may conclude that such waiver is knowing and voluntary if it does not actually inquire into the defendant's understanding of the rights otherwise waived by the plea agreement. Instead, I am persuaded by the decisions from other jurisdictions requiring that the record demonstrates the defendant's understanding of the terms and conditions, including any waiver

provisions, of the plea agreement. *See, e.g.*, *People v. Lopez*, 844 N.E.2d 1145, 1149 (N.Y. 2006); *People v. Brown*, 992 N.Y.S.2d 297, 303–304 (2014); *Rush v. State*, 579 S.E.2d 726, 727 (Ga. 2003); *Cubbage v. State*, 498 A.2d 632, 638 (Md. 1985).

Our trial courts must be the gatekeepers of defendants' knowing and voluntary waiver and therefore vigilant in their duties to provide careful and thoughtful advisement of a defendant's appellate rights before accepting the plea agreement. This is not to say that the trial court must utter some magical recitation for a waiver provision to withstand a defendant's challenge. As a matter of best practice, the Indiana Criminal Benchbook's dialogues and advisements of rights for receiving plea agreements provide an initial guide. For example, here, the court should have advised the defendant of each and every one of their rights, confirming their understanding of the right before proceeding to the next.

But the dialogues and advisements set forth in the Indiana Criminal Benchbook are a starting point; they do not account for plea agreements containing provisions waiving a defendant's right to appeal the sentence. Therefore, it is the trial judge's responsibility to treat these sort of waiver provisions with immediate suspicion and ensure it is evident on the face of the record that the defendant understands and knowingly and voluntarily surrenders this significant right. And the trial judge's conduct and statements at the sentencing hearing must justify enforcing the defendant's waiver.

To do so, trial judges should advise defendants of their appellate rights, as applicable, separate and apart from the other rights typically forfeited by pleading guilty, e.g., the right to a jury's determination of a defendant's guilt. The importance of this distinction stems from the prospective nature of appellate waivers. Waiver of the sort of rights that typically accompany a guilty plea occur upon execution. *See U.S. v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring). Consider that a defendant waiving the right to remain silent will speak or a defendant waiving the right to a jury to determine his guilt admits his guilt to the presiding judge. *Id.* But as to appellate waivers, the errors otherwise worth appealing are simply unknown at the time of the defendant's waiver. Consequently, trial courts should provide a separate

and distinct advisement for appellate rights before accepting the plea agreement.

In addition, it is incumbent on trial judges to pay just as much careful attention to its colloquy at the sentencing hearing. The problems that arise when the record fails to demonstrate a defendant's waiver is knowing and voluntary are further compounded when the trial court misadvises the defendant that they retain a right, such as the right to appeal the sentence, waived by the plea agreement. Specifically, at Montgomery's and Philhower's respective sentencing hearings, the judge advised them that they had the right to appeal their sentences, even though each defendant seemingly bargained away this right as part of the plea agreement.

Our Court recently granted transfer "for the sole purpose" of reminding trial judges that the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence. *See Williams v. State*, 164 N.E.3d 724, 725 (Ind. 2021). In doing so, the Court was motivated, at least in part, by the fact that it was not apparent from the plea agreement itself or colloquy at the sentencing hearing that Williams knowingly and voluntarily waived the right to appeal his sentence.

With *Williams* in mind, I would grant transfer not only to reiterate a similar reminder to our trial judges, but to explore the consequences of the State's failure to object when the trial court misadvises a defendant of their appellate rights at the sentencing hearing. The appellants argue the State's failure to object to the trial court's misadvisements at their sentencing hearings amounts to waiver of the issue on appeal. *See Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018). It is well-established that plea agreements are contracts and subject to certain principles of contract interpretation. *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004). Accordingly, Montgomery and Philhower argue a party may waive the right to enforce a contractual provision by failing to speak when they have a duty to do so, and because the prosecutors, as drafters of the agreement, failed to fulfill their duty of making a contemporaneous objection at the sentencing hearing, the State waived its right to enforce the waiver provision. I find this argument compelling, and I encourage the Court to give it serious

consideration in future appeals that will inevitably arise without more careful attention paid to establishing a clear and meaningful record detailing a defendant's knowing and voluntary waiver of their appellate rights.

Rush, C.J., joins.