

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

DAMON CHRISTOPHER CRIM,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI

Damon Christopher Crim respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio refusing to hear an appeal of the decision of the Ohio Court of Appeals, Eighth Appellate District affirming his conviction.

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QUESTIONS PRESENTED

- I. When the record reveals that a criminal defendant misunderstands a key element of a plea bargain is his guilty plea void?
- II. When defense counsel tells his confused client that his misunderstanding of a term of the plea bargain is correct, and the defendant then enters the plea, has the defendant been denied his right to the effective assistance of counsel?

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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The decision of Ohio's Eighth District Court of Appeals affirming petitioner's conviction was entered September 19, 2019. *State v. Crim*, No. 108047, 2019-Ohio-3771, 2019 Ohio App. LEXIS 3841 (Sept. 19, 2019); it is not print published (Pet. Appx. 1-5). The Supreme Court of Ohio refused jurisdiction. Case Announcements, 157 Ohio St.3d 1524, 2019-Ohio-5327, 137 N.E.3d 104 (2019) (Pet. Appx. 6).

JURISDICTION

Petitioner seeks review from the December 31, 2019 decision of the Supreme Court of Ohio refusing to hear an appeal from the Ohio Court of Appeals, Eighth Appellate District decision affirming his conviction. *State v. Crim*, No. 1108047, 2019-Ohio-3771, 2019 Ohio App. LEXIS 3841 (Sept. 19, 2019, jurisdiction refused, 157 Ohio St.3d 1524, 2019-Ohio-5327, 137 N.E.3d 104 (2019)). Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Damon Crim entered a guilty plea and received consecutive sentences totaling 21 years in prison after his lawyer assured him, on the record, that he correctly understood a key term of the agreement to be that any sentences he received would have to be concurrent. The result was an invalid plea, one entered without an intelligent understanding of the consequences.

STATEMENT OF THE CASE

In the middle of trial on a twelve-count indictment, and by agreement with the state, appellant Damon Crim entered guilty pleas to two counts of felonious assault (one with a one-year firearm specification), and single counts of kidnapping, domestic violence, and possession of cocaine. All other counts and specifications were dismissed.

During the plea colloquy, Mr. Crim expressed confusion over one term of the agreement: That the offenses were not allied.¹

THE COURT: Pursuant to the recitation of the plea agreement, these are not allied offenses, which means that they do not

¹ Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one. Ohio Rev.Code § 2941.25(A).

merge for purposes of sentencing, and you may receive -- there is a possibility that these sentences will all run consecutive to one another.

Do you understand that?

THE DEFENDANT: No, ma'am.

THE COURT: Okay. So sometimes even if you plead guilty

to multiple offenses, based on the nature of the offenses, they can merge for purposes of sentencing. So the State would elect which count they would like the Court to proceed to sentencing on. These are all separate offenses, so you can receive -- the sentences can be stacked one upon the other.

Do you understand that?

THE DEFENDANT: No.

This time, defense counsel stepped in, leaving out the frankly confusing issue of merger and focusing on what was surely the only part that Mr. Crim would care about – whether the sentences would run consecutively or concurrently.

MR. CHRISTMAN [Defense Counsel]: It is a sentencing option for the Court. It is what her potential sentence is. She's explaining under the law these do not have to be run concurrently. They –

His client, who thought now he maybe got it but wanted to check, interrupted:

THE DEFENDANT: They all start off with the same time?

With, one would imagine, relief, but a stunning lack of attention to what Mr. Crim had just said, defense counsel said that was right, and the court asked Crim if he understood his own mistaken explanation, which of course he did.

MR. CHRISTMAN: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

(Trial TR 544-545)

The trial court accepted his plea and, at a sentencing hearing, imposed a prison sentence of 21 years, which included consecutive sentences.

In a timely appeal to Ohio's Eighth District Court of Appeals, Mr. Crim raised two assignments of error:

- I. Because Mr. Crim did not understand one of the terms of his plea agreement, there was no meeting of the minds, his guilty plea was not knowing, intelligent, and voluntary, and either the plea must be vacated or the sentences made concurrent to effect his understanding of the plea he was entering.
- II. Mr. Crim was denied his right to effective assistance of counsel when his attorney treated his stated understanding at the plea hearing that his sentences would run concurrently as an agreement that he understood they might be consecutive.

The appellate court overruled both assigned errors and affirmed Mr. Crim's convictions and sentence. *State v. Crim*, No. 108047, 2019-Ohio-3771, 2019 Ohio App. LEXIS 3841 (Sept. 19, 2019) (Appx. 1).

Mr. Crim timely filed for a discretionary appeal to the Supreme Court of Ohio raising two propositions of law:

- I. When a defendant does not understand one of the essential terms of a plea agreement, there is no meeting of the minds; his guilty plea may not be deemed to be knowing, intelligent, and voluntary, and either the plea must be vacated or the sentences adjusted to comport with and effect his understanding of the plea he entered.
- II. A defendant is denied his right to effective assistance of counsel when his attorney treats his stated understanding at a plea hearing that his sentences would be concurrent as agreement that he understood they could be consecutive.

Without explanation, the court denied jurisdiction, refusing to hear the appeal. Case Announcements, 157 Ohio St.3d 1524, 2019-Ohio-5327, 137 N.E.3d 104 (2019) (Appx. 6).

REASONS FOR GRANTING THE PETITION

This Court has long recognized that when a defendant waives the right to trial and elects instead to enter a guilty plea, that defendant's waiver of rights must be intelligent and voluntary. See, *e.g.*, *Kercheval v. United States*, 274 U.S. 220, 223-224 (1927); *Mabry v. Johnson*, 467 U.S. 504, 508-509 (1984); *Boykin v. Alabama*, 395 U.S. 238 (1969).

But an understanding of rights waived does not alone make a plea intelligent. As this Court said in *Brady v. United States*, 397 U.S. 742 (1970),

"[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).'" 242 F. 2d at page 115."

Id. at 755, quoting *Shelton v. United States*, 246 F.2d 571, 572, n. 2 (C.A. 5, 1957) (en banc) (in turn quoting 242 F. 2d 101, 115 (Tuttle, J., dissenting to panel opinion), rev'd on other grounds, 356 U.S. 26 (1958)).

Damon Crim's guilty plea in this case did not satisfy that requirement because he did not fully understand the consequences of his plea. There was a term he simply did not understand related to the sentence he might receive. Specifically, he believed that one term of the agreement guaranteed that whatever sentences he received would be run concurrently. In fact, that term specifically authorized the sentencing court to make the sentences consecutive to one another, which it did.

Although he was given repeated explanations, the record shows that Mr. Crim

affirmatively thought the term meant the opposite of what it did. And that his counsel told him that his understanding, his *misunderstanding*, was correct.

At the beginning of the plea hearing, the prosecutor set forth the terms of the agreement and, therefore, of Mr. Crim's plea. He would, the prosecutor said, enter guilty pleas to amended versions of Counts 4 and 7 and to Counts 6, 9, and 11 as they were charged in the indictment. The agreement had, the prosecutor said, additional provisions. “The defendant *must agree to the following further conditions*: That these are nonallied offenses of similar import and that the judge can sentence consecutively and to an agreed no-contact with the victim.” (Trial TR 536-537) (emphasis added).

As part of its colloquy with Mr. Crim, the court first got assurance that he understood the constitutional rights he would be waiving by entering his plea. The court then reviewed the terms of the plea agreement to ensure that Mr. Crim understood exactly what he would be agreeing to when he entered his pleas.

Next, the court explained, as the prosecutor had, the charges to which Mr. Crim would plead and the maximum possible penalty for each. Finally, the court addressed and explained the allied offenses term of the agreement.

Pursuant to the recitation of the plea agreement, these are not allied offenses, which means that they do not merge for purposes of sentencing, and you may receive -- there is a possibility that these sentences will all run consecutive to one another.

To be sure, and presumably because that was something different than a recitation of charges and penalties, the court asked the formulaic question, “Do you

understand that?" Mr. Crim's answer made clear that the question had been necessary. "No, ma'am."

The court tried again. Again Mr. Crim did not understand.

THE COURT: Okay. So sometimes even if you plead guilty to multiple offenses, based on the nature of the offenses, they can merge for purposes of sentencing. So the State would elect which count they would like the Court to proceed to sentencing on. These are all separate offenses, so you can receive -- the sentences can be stacked one upon the other.

Do you understand that?

THE DEFENDANT: No.

This time, defense counsel stepped in, leaving out the frankly confusing issue of merger and focusing on what was surely the only part that Mr. Crim would care about – whether the sentences could run consecutively or concurrently.

MR. CHRISTMAN: It is a sentencing option for the Court. It is what her potential sentence is. She's explaining under the law these do not have to be run concurrently. They –

His client, who thought now he maybe got it but wanted to check, interrupted:

THE DEFENDANT: They all start off with the same time?

With, one would imagine, some relief, but with a stunning lack of attention, to what Mr. Crim had just said, defense counsel said that was right. The court then got Mr. Crim to acknowledge that he understood his own mistaken explanation. which of course he did.

MR. CHRISTMAN: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

(Trial TR 544-545)

With that misunderstanding accepted as if it were understanding, the plea went forward.

It matters that what Mr. Crim said was exactly wrong. What he described, sentences beginning at the same time, is sentences running concurrently, not the potential for consecutive sentences. But the latter was a specific term the State demanded as part of the plea agreement (“the defendant must agree”) and that everyone apparently believed, or was willing to pretend to believe, Mr. Crim understood and accepted. And, of course, it was a term the court followed when it imposed consecutive sentences.

By accepting a plea made unintelligently, without understanding of its consequence, and by then imposing sentence in exactly the way Mr. Crim did not understand it could, the Court violated Mr. Crim’s rights to a fair proceeding, to be free of cruel and unusual punishment, and to due process of law, all in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments.

III. Because Mr. Crim affirmatively misunderstood a key term of the plea bargain, his plea must be vacated.

It is long since settled that plea bargains are essentially contractual. *Santobello v. New York*, 404 U.S. 257 (1971). It follows that courts use traditional principles of contract law in interpretation and enforcement of plea bargains. e.g., *United States v. Fentress*, 792 F.2d 461, 464 (CA 4, 1986); *Baker v. United States*, 781 F.2d 85, 90 (CA 6), cert. denied, 479 U.S. 1017 (1986); *United States v. Krasn*, 614 F.2d 1229, 1233 (CA9, 1980).

An essential feature of any contract, including a plea bargain, is that there be a meeting of the minds, that the parties – in a plea bargain both the state and the defendant – are aware of and in agreement about the terms. Over 140 years ago, this Court explained that “Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or in equity.” *Nat'l Bank v. Hall*, 101 U.S. 43, 50 (1879). And five years before that, it noted that “mutual assent, the meeting of the minds . . . is vital to the existence of a contract. Without it there is none, and there can be none.” *Ins. Co. v. Young's Adm'r.*, 90 U.S. 85, 107 (1874).

The Ohio court of appeals did not dispute the case law or its implications. Rather, it essentially misconstrued the record to make the precedent irrelevant. Thus, it accurately said that the trial court adequately insured that Mr. Crim was informed of the maximum penalties he could receive under the plea bargain. At the same time it declared the repeated and demonstratively unsuccessful efforts to get Mr. Crim to understand a key term of the agreement was “somewhat confusing.” *State v. Crim*, No. 108047, 2019-Ohio-3771, 2019 Ohio App. LEXIS 3841 (Sept. 19, 2019), ¶ 26 (Appx. 4).

Viewed objectively, that’s simply wrong. There was a key term of the agreement Mr. Crim understood to mean exactly the opposite of what it did. There was, then, no meeting of the minds, therefore no contract. It follows that the plea must be vacated.

IV. Mr. Crim was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel when his attorney

**wrongly told him that his misunderstanding of the terms of the
plea agreement was correct.**

A criminal defendant is entitled to the effective assistance of counsel. Sixth and Fourteenth Amendments, United States Constitution; *Strickland v. Washington*, 466 U.S. 668 (1984).

As *Strickland* and its progeny make clear, a violation of that right will only be remedied when counsel's performance is objectively deficient and the deficiency is prejudicial. And as *Strickland* explicitly states, the measure of prejudice is not whether the deficiency was outcome determinative. Indeed, the standard is not even a preponderance. A "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Rather, the test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

As detailed above, the state demanded, as part of the consideration for dropping some counts and amending others in this case, that Mr. Crim "must agree . . . [t]hat these are nonallied offenses of similar import." (Trial TR 536-537). That is, he was required to accept that he might be sentenced to consecutive prison terms. As part of its plea colloquy, the court attempted to explain what that would mean.

Pursuant to the recitation of the plea agreement, these are not allied offenses, which means that they do not merge for purposes of sentencing, and you may receive -- there is a possibility that these sentences will all run consecutive to one another.

The court then added the formulaic question, “Do you understand that?” Mr. Crim’s answer made clear that the question had been necessary. “No, ma’am.”

The court tried again. Again Mr. Crim said that he did not understand. This time, defense counsel stepped in, telling his client that the judge was “explaining under the law these do not have to be run concurrently. They – “

Mr. Crim interrupted. He thought now that he maybe understood, but wisely wanted to check: “They all start off with the same time?” he asked his lawyer.

Although that was exactly wrong, his counsel agreed. “Yes,” he said. And the court, either equally inattentive or overly eager to complete the plea hearing, asked Mr. Crim if he understood his own mistaken explanation, which of course he did.

With that misunderstanding accepted as if it were understanding, the plea went forward. Mr. Crim entered guilty pleas according to the terms proposed by the state rather than the terms he had just personally agreed to, the ones his lawyer had just assured him that he properly (mis)understood.

The result, as explained above, is that Mr. Crim entered a guilty plea while affirmatively misunderstanding a key term of the agreement. He thought he was guaranteed concurrent sentences. In fact, although not by intent and without understanding, he agreed that he could receive – and he in fact did receive – consecutive sentences. Had his lawyer been paying attention, that would not have happened. There would have been more explanation – perhaps more negotiation –

perhaps the deal would have collapsed – perhaps it would have gone forward as it ultimately did.

After his lawyer told him that he “did not have to worry about immigration status since he had been in the country so long,” Jose Padilla, a Honduran native but lawful permanent resident of the United States, entered a guilty plea to a drug offense that rendered him immediately deportable. *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010). Because “Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute,” and because counsel’s “false assurance” of the relevant consequence was clearly germane to the plea, *id.* at 369, counsel’s performance was objectively deficient and the case was remanded.

As with Jose Padilla, so with Damon Crim. Had his lawyer paid attention, he would not have provided inaccurate information on a key term and consequence of his client’s plea. Had counsel provided competent representation, Mr. Crim would not have entered guilty pleas where there was no meeting of the minds on the terms of the plea agreement. He would not have entered guilty pleas that were not intelligent and voluntary. As with Padilla, this Court should recognize that Mr. Crim’s Sixth and Fourteenth Amendment right to the effective assistance of counsel was violated.

That failure of the plea was entirely the fault of trial counsel’s inattention. And that inattention violated Mr. Crim’s right to effective assistance of counsel as

guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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