

No. 14-112573-A

**IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

DANIEL BARLETT
Defendant-Appellant

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Wyandotte County, Kansas
Honorable Michael Russell, Judge
District Court Case No. 12 CR 1317

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Nature of the Case

Daniel Barlett appeals his criminal discharge of a firearm conviction.

Statement of Issues

REPLY ISSUE I: Mr. Barlett did not implicitly waive the right to appeal his criminal discharge of a firearm conviction.

Arguments and Authority

REPLY ISSUE I: Mr. Barlett did not implicitly waive the right to appeal his criminal discharge of a firearm conviction.

The State contends that Daniel Barlett implicitly waived the right to appeal a jury trial conviction by entering into a plea agreement for a distinctly charged crime. Since Mr. Barlett's appeal only challenges his trial conviction, the State is, effectively, asking this Court to dismiss this appeal. That request is without merit.

Factual Synopsis

In district court, the State charged Mr. Barlett with felony murder and criminal discharge of a firearm. (R. I, 23). Subsequently, a jury hung on the felony murder charge, and convicted on the criminal discharge charge. (R. XII, 1621-22). Following trial, Mr. Barlett entered into a plea contract with the State of Kansas. (R. I, 128).

The State's written plea contract states, in full:

Plead guilty to Voluntary Manslaughter, Level 3 person felony. Sentence would run consecutive to sentence for shooting into occupied vehicle. State & Defense agree to sentence of 106 months (59 + 47). No other departures. (R. I, 128).

At a plea hearing, the State clarified:

The defendant today will be pleading guilty to the amended Count I – or Count I in the Amended Information, which is voluntary manslaughter, a level 3 person felony. Our agreement is that that will run consecutive to the count that the jury convicted him on March 17th, 2014, criminal discharge of a firearm at an occupied vehicle, also a Level 3 person felony.

The State and the defendant are agreeing to a total term in prison of 106 months. That would be 59 months on one count and 47 months on the other. And there could be no – that would require a departure, I believe, on one of the counts, but there could be no other departures.

And that's the extent of the agreement. (R. XVII, 7-8).

When Mr. Barlett pled guilty to voluntary manslaughter, he explicitly waived the right to appeal his voluntary manslaughter conviction. (R. I, 127; XVII, 6-7). He did not waive the right to appeal his criminal discharge conviction. (R. I, 127; XVII, 6-7). And the State articulated no such waiver provision in its plea agreement contract. (R. I, 128; XVII, 7-8).

For the first time on appeal, the State claims that its plea agreement contract included an implicit waiver of Mr. Barlett's right to appeal his criminal discharge conviction. Appellee's Brief at 21-23. The State does not explain why it neglected to articulate that part of its contract until just now. Appellee's Brief at 21-23.

For his part, Mr. Barlett's trial attorney did not seem to understand the State's plea agreement contract as prohibiting an appeal from Mr. Barlett's trial conviction. One business day after Mr. Barlett's sentencing hearing, trial counsel

filed a notice of appeal, which specifically appealed from Mr. Barlett's "conviction following jury trial of one count of criminal discharge of a firearm at an occupied vehicle." (R. I, 131).

Analysis

By statute, criminal defendants have the right to appeal trial convictions. K.S.A. 22-3602(a). A defendant can waive that right as consideration for sentencing concessions made by the State. *State v. Campbell*, 273 Kan. 414, 424, 44 P.3d 349 (2002). However, courts may not read a non-express appeal waiver into a plea agreement contract. *State v. Patton*, 287 Kan. 200, 228, 195 P.3d 753 (2008). And, if an appeal waiver is ambiguous in its scope, that ambiguity must be strictly construed in favor of the defendant. *Patton*, 287 Kan. at 228-29.

In this case, the State did not draft an ambiguous plea agreement contract. The State drafted a contract that plainly does not include a waiver of Mr. Barlett's right to appeal his trial conviction. Evidently, the State is now dissatisfied with its draftsmanship. That dissatisfaction is not a legitimate reason for a court to read non-existent language into a contract. See *Ousterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011) ("If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract").

The State attempts to create contractual ambiguity by noting that Mr. Barlett agreed to recommend a 106 month prison sentence to the district court. The State notes that it would be impossible to impose a 106 month prison sentence, without

imposing consecutive sentences for Mr. Barlett's voluntary manslaughter and criminal discharge convictions. Appellee's Brief at 22.

The State's argument does not hold water. At sentencing, Mr. Barlett asked the district court to impose a 106 month prison sentence. (R. V, 7). By doing that, Mr. Barlett performed his end of the plea contract. Mr. Barlett never agreed to refrain from appealing his criminal discharge conviction, following his sentencing hearing.

At any rate, the State can't get this appeal dismissed by asserting contractual ambiguity. Any ambiguity in the State's contract must be construed strictly in Mr. Barlett's favor. *Patton*, 287 Kan. at 228-29. Clearly, a reasonable person could read the State's plea contract as not including a waiver of Mr. Barlett's right to appeal his criminal discharge conviction. Thus, the State's waiver argument is meritless.

Conclusion

Mr. Barlett did not waive the right to appeal his criminal discharge of a firearm conviction.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing reply brief was sent by emailing a copy to Jerome Gorman, Wyandotte County Attorney, at DAWyCoefiling@wycokck.org; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 11th day of December, 2015.

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