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**IN THE
COURT OF APPEALS OF INDIANA**

ABRAHAM ALVAREZ,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 44A03-1104-CR-169

APPEAL FROM THE LAGRANGE CIRCUIT COURT
The Honorable J. Scott VanDerbeck, Judge
Cause No. 44C01-0907-FB-20

October 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Abraham Alvarez (“Alvarez”), pursuant to a plea agreement, pled guilty to one count of Child Molesting, as a Class B felony.¹ He raises one issue for our review, whether the trial court breached the plea agreement when it required him to serve his sentence in the Department of Correction.

We affirm.

Facts and Procedural History

We take our statement of the facts from the affidavit of probable cause, the admission of which the parties agreed to in lieu of Alvarez’s testimony. When Alvarez’s daughter was eleven years old, Alvarez grabbed her and placed her onto his lap facing away from him. Alvarez then removed her underwear and his pants and underwear and forced his daughter to engage in anal and vaginal sex with him.

On July 25, 2009, when Alvarez’s daughter was twelve years old, his wife, P.A., awoke around midnight and heard a bed moving in her children’s room. Entering the room, P.A. found Alvarez at the foot of her daughter’s bed with his pants down and her daughter lying on the bed with her shorts and underwear completely off. After P.A. confronted him, Alvarez asked her to forgive him and left the home that night. P.A. contacted police the following day.

On July 31, 2009, the State charged Alvarez with one count of Criminal Deviate

¹ Ind. Code § 35-42-4-3(a).

Conduct, as a Class B felony², and one count of Child Molesting.

On February 14, 2011, the State and Alvarez entered into a plea agreement whereby Alvarez pled guilty to Child Molesting and the State would dismiss the charge of Criminal Deviate Conduct. The agreement further provided that Alvarez would serve ten years imprisonment with two years suspended to probation. In a paragraph specifying “other terms,” the agreement stated that Alvarez “[m]ay serve executed time in an alternative incarceration facility anywhere in the State of Indiana.” (App. 45.)

On February 24, 2011, a hearing was conducted wherein the trial court took the plea agreement under advisement pending preparation and submission of a pre-sentence investigation report.

On March 23, 2011, a sentencing hearing was conducted at which the trial court accepted the plea agreement and entered judgment against Alvarez. At the hearing, Alvarez informed the trial court that Michiana Community Corrections had determined that he qualified for home detention and electronic monitoring services. Based upon this, Alvarez requested that the trial court order him to serve his sentence with Michiana Community Corrections, arguing that this qualified as the “alternative incarceration facility” called for by the plea agreement. (App. 3.) The State argued that the “may serve” phrase in the plea agreement afforded the trial court discretion to determine whether Alvarez could serve his sentence outside the Department of Correction. After hearing argument from both parties, the trial court ordered that Alvarez serve his term of imprisonment with the Department of

² I.C. § 35-42-4-2.

Correction, with the opportunity that Alvarez “file a petition such that we can hear it in advance of 2 years to go [on the term of imprisonment] ... and we will see what’s available and what he qualifies for” with respect to alternative placements. (Tr. 9.)

On the same day as the sentencing hearing, March 23, 2011, Alvarez filed a Motion to Set Aside Sentence and Withdraw Plea Agreement. A hearing was conducted on March 30, 2011, at the conclusion of which the trial court denied Alvarez’s motion.

This appeal followed.

Discussion and Decision

On appeal, Alvarez challenges only the trial court’s decision to place him in the Department of Correction with an option to seek alternative placement at a later date.³ Alvarez contends that the plea agreement by its plain language requires the trial court to place him into an alternate placement in the event that he qualifies for such placement, or, alternately, that the language of the agreement is ambiguous and should be interpreted in his favor as a result. The State, for its part, argues the contrary on both matters, asserting that “may” is permissive language and that a home is not a “facility” such that Alvarez could properly have been placed on a home detention and monitoring program within the terms of the plea agreement.

A plea agreement is contractual in nature, and binds the defendant, the State, and the trial court. Valenzuela v. State, 898 N.E.2d 480, 482 (Ind. Ct. App. 2008), trans. denied.

³ Alvarez does not appeal from the trial court’s denial of his Motion to Set Aside Sentence and Withdraw Plea Agreement.

The State and defendant are parties to the agreement and the trial court, once it has accepted the agreement, is bound by its terms. Lee v. State, 816 N.E.2d 35, 38 (Ind. 2004). We therefore apply principles of contract interpretation to determine “what is reasonably due to the defendant,” Valenzuela, 898 N.E.2d at 482, though contract principles will not be dispositive in all cases. Lee, 816 N.E.2d at 38.

When interpreting contract language, we seek to “give effect to the intent of the parties as expressed within the four corners of the document.” Simon Prop. Group, L.P. v. Michigan Sporting Goods Distribs., Inc., 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005), trans. denied. We construe unambiguous language to give it “its clear, obvious meaning” and we may not add provisions to a contract, instead determining the contract’s meaning from “an examination of all its provisions, without giving special emphasis to any word, phrase, or paragraph.” Id.

Here, Alvarez and the State disagree about whether “may” and “alternative incarceration facility” are ambiguous and, if so, how those terms should be interpreted. “A contract term is not ambiguous merely because the parties disagree about the term’s meaning. Rather, language is ambiguous only if reasonable people could come to different conclusions about its meaning.” Id. (quoting Roy A. Miller & Sons, Inc. v. Indus. Hardwoods Corp., 775 N.E.2d 1168, 1173 (Ind. Ct. App. 2002)) (internal quotes and citations omitted).

Alvarez argues that the phrase in the plea agreement, “may serve executed time in an alternative incarceration facility,” did not afford the trial court discretion to decide on a placement in the event he qualified for community corrections or some other alternative. He

instead insists that the phrase means that the trial court was constrained to afford him an alternative placement if he qualified for such placement. In the alternative, he argues that the provision is ambiguous and that he therefore is entitled to the reading he proffers. The State, for its part, disagrees, arguing that “may” is permissive language and that, in any event, home detention is not a “facility” within the plain meaning of the word, and thus home detention through community corrections would not be a permissible placement even in the face of any ambiguity in the language of the plea agreement.

We find the use of “may” in the agreement to be dispositive here.⁴ Alvarez would have us interpret “may serve executed time in an alternative incarceration facility” to mean “shall, in the event he qualifies for such, serve executed time in an alternative incarceration facility.” Yet this is not what the plea agreement says, and if such was the intent of the parties, they could have stated as much in the agreement. Moreover, the ordinary usage of the word “may” does not bear the meaning Alvarez assigns to it, as the word indicates capacity or permission rather than a determined outcome upon fulfillment of a contingency. See Webster’s Third New International Dictionary Unabridged 1396 (2002) (identifying “may” as primarily denoting ability or permission, with a denotation of “shall” as secondary and specialized to legal matters); Black’s Law Dictionary 993 (7th ed. 1999) (identifying the “primary legal sense” of “may” as “the ‘permissive’ or ‘discretionary’ sense,” with a secondary meaning of “shall” frequently reserved for giving effect to legislative intent).

⁴ Because we find the interpretation of “may” to be dispositive, we offer no opinion on whether home detention through a community corrections program constitutes a “facility.”

Alvarez, by counsel, acknowledged as much when he told the court that “may is obviously a permissive term” and “[t]he court could reject the proposal from Michiana Community Corrections,” despite being “somewhat taken aback” that the State was purportedly seeking to “retract the plea agreement.” (Tr. 7.)

We therefore conclude that the trial court did not act counter to the terms of the plea agreement when it sentenced Alvarez to imprisonment with the Department of Correction with the possibility of seeking a revised placement later in his sentence.

Affirmed.

MATHIAS, J., and CRONE, J., concur.