

In the Indiana Supreme Court

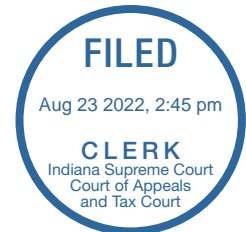
Britni N. Wihebrink,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
21A-CR-01749

Trial Court Case No.
18C04-1809-F1-5



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 8/23/2022.

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 our Court's decision to deny transfer. Britni Wihebrink appeals the trial court's sentencing decision, raising an issue often presented in our Court: whether a defendant may challenge a sentence based, in part, on an improper aggravating factor, even though the defendant agreed to waive appellate review of the sentence in the plea agreement with the State. In resolving Wihebrink's appeal, the Court of Appeals further divided legal authority on this issue. *Compare Wihebrink v. State*, 181 N.E.3d 448 (Ind. Ct. App. 2022), *with Haddock v. State*, 112 N.E.3d 763 (Ind. Ct. App. 2018), *trans. denied*; *Crouse v. State*, 158 N.E.3d 388 (Ind. Ct. App. 2020); *Fields v. State*, 162 N.E.3d 571 (Ind. Ct. App. 2021), *trans. denied*. I would grant transfer to reconcile the conflict between this precedent. But I also write separately to voice my concerns regarding these waiver provisions and offer guidance for counsel and trial courts in hopes of further assuring defendants in similar circumstances knowingly and voluntarily waive their right to appellate review of their sentences.

Here, Wihebrink agreed to plead guilty to neglect of a dependent resulting in death in exchange for the State's agreement to refrain from prosecuting a pending charge for obstructing justice. Consistent with the parties' agreement, sentencing was "left to the discretion of the Court with the exception that any sentence imposed on the [neglect charge] shall not exceed thirty (30) years." Appellant's App. Vol. II at 42. Most significantly, Wihebrink agreed to waive the right to appeal her sentence in a provision stating:

9. As further consideration for this Plea Agreement, the Defendant hereby waives any and all appellate review of a sentence imposed by the court that is consistent with the terms of this Plea Agreement. This waiver of appellate review includes but is not limited to: challenges

for abuse of discretion, challenges to the trial court's sentencing statement, and challenges to the appropriateness of the sentence pursuant to Indiana Appellate Rule 7(B). This waiver also includes the waiver of the Defendant's right to have an attorney appointed, at public expense, to prosecute the appeal, as well as the right to have a transcript of the proceedings prepared for the Defendant at public expense.

Id.

At a hearing on the plea agreement, the trial court confirmed with Wihebrink that she gave up certain rights by pleading guilty, including the right to a public trial, to confront and cross-examine witnesses, and to call and subpoena her own witnesses. But—although, unargued by the parties on appeal—the trial court did not inquire further into her additional waiver of significant appellate rights, including the right to appeal the trial court's sentence for an abuse of its discretion and to have an attorney appointed to prosecute her appeal, before accepting her guilty plea. And the trial court also failed to advise Wihebrink that she surrendered the right to appeal her conviction. After accepting the plea agreement, the trial court imposed the maximum sentence—thirty years—allowable under the agreement.

Defendants who plead guilty in return for favorable outcomes “give up a plethora of substantive claims and procedural rights.” *Creech v. State*, 887 N.E.2d 73, 74 (Ind. 2008) (quoting *Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001)). Because plea agreements are essentially contracts, a valid and enforceable appeal waiver precludes review only of those challenges that fall within its scope. *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019). Generally, a defendant may waive the right to appeal her sentence as part of her guilty plea. *Creech*, 887 N.E.2d at 75. But, as Wihebrink acknowledges, while this sort of waiver “[is] a valid prosecutorial tool to limit sentencing

appeals,” it is “not without limits.” Reply Br. at 4. A defendant’s waiver of the right to appeal her sentence must be knowing and voluntary. *Creech*, 887 N.E.2d at 74.

The very nature of this waiver calls into question whether it is knowing and voluntary. Accordingly, I write separately with hope that trial courts and counsel, alike, will treat such provisions with caution and apprehension, anticipating possible appellate issues well after the parties submit their plea agreement to the trial court in advance of sentencing. Sentencing waivers are, by their nature, prospective: a defendant waives the right to appeal her sentence before the trial court accepts her guilty plea. Supposing a plea agreement specifies a maximum potential sentence, the defendant, her counsel (if she is represented), and even the State are crucially unaware that the court may erroneously sentence the defendant or impose a sentence greater than permitted by the parties’ agreement. These waiver provisions essentially require the actual bargaining parties—the defendant and the State—to rely on the unpredictable actions of a third party—the trial court—no matter how egregious. While this Court has previously found a defendant’s assent to the express waiver language in a written plea agreement indicates she knowingly and voluntarily waives her right to appeal the sentence, *id.* at 77, the prospective nature of the waiver calls into question the propriety of this conclusion.

And so, I encourage my colleagues in the profession to do more. As a matter of best practice, trial courts confronted with agreements waiving appellate review of the defendant’s sentence should inquire into the terms and conditions of the plea agreement to their satisfaction. In doing so, the court should create a clear and meaningful record to minimize any outstanding uncertainty as to whether the defendant knowingly and voluntarily “give[s] up a plethora of substantive claims and procedural rights,” by entering into a plea agreement waiving the right to appeal the sentence.

Creech, 887 N.E.2d at 74. Additionally, I note the trial court failed to ask Wihebrink whether she understood she waived appellate review of her **conviction**. Therefore, I remind our trial judges to recite the dialogues and advisement of rights for receiving plea agreements set forth in the Indiana Criminal Benchbook.

Counsel, as the original bargaining parties to the plea agreement, also play an important role in safeguarding a defendant's knowing and voluntary waiver of her appellate rights. Trial counsel should not only thoroughly discuss the uncertainties as to sentencing with the defendant, but also scrutinize the language in these waiver provisions so they do not unwittingly allow their client to agree to an unconscionable contractual term. For example, here, Wihebrink waived the right to challenge the trial court's sentencing statement. Additionally, she surrendered the right to have counsel appointed to prosecute her appeal. But these sorts of waivers seem premature, if not ill-advised, especially since the events that may unfold at sentencing are simply unknown to trial counsel. These waiver provisions are worthy of criticism because they seemingly sanction any misstatement or abuse by the trial court and allow trial courts to deviate from the defendant's reasonable expectations—presumably those expectations existing at the time she bargained her guilty plea with the State—regarding sentencing, including the anticipation that the trial judge will determine her sentence using appropriate mitigating and aggravating factors.

Finally, I would also grant transfer to determine whether a sentence, such as Wihebrink's, based on allegedly erroneous aggravating factors is not in accord with law, and thus appealable notwithstanding the defendant's agreement to waive appellate review of the sentence as part of her plea. *See Crider v. State*, 984 N.E.2d 618, 623 (Ind. 2013). If the answer is in the affirmative, and other statutory requirements are satisfied, then Wihebrink qualifies as an "eligible defendant" under Post-Conviction Rule 2. *See Ind.*

Post-Conviction Rule 2. The Court of Appeals came to the contrary conclusion, finding Wihebrink did not challenge an illegal sentence. 181 N.E.3d at 452. But its opinion is not without conflict and other panels recently concluded comparable defendants were eligible to appeal their sentence despite the waiver-of-appeal provisions in their agreements. *Id.* at 452–54 (Najam, J., dissenting); *see also Haddock*, 112 N.E.3d 763, *trans. denied*; *Crouse*, 158 N.E.3d 388; *Fields*, 162 N.E.3d 571, *trans. denied*. Therefore, the Court should grant transfer to resolve this inconsistency in the Court of Appeals.

Rush, C.J., joins.