

In the  
Indiana Supreme Court

Lindsay E. Grate,  
Appellant(s),

v.

State Of Indiana,  
Appellee(s).

Court of Appeals Case No.  
22A-CR-02224

Trial Court Case No.  
44D01-2105-F2-8



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 8/17/2023.

FOR THE COURT

A handwritten signature in black ink that reads "Loretta H. Rush".

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Loretta H. Rush  
Chief Justice of Indiana

Massa, Slaughter, and Molter, JJ., concur.

Rush, C.J., dissents from the denial of transfer with separate opinion in which Goff, J., joins.

## **Rush, Chief Justice, dissenting.**

Fifteen years ago, we held that defendants who plead guilty may waive the right to appellate review of their sentence if that waiver is knowing and voluntary. *Creech v. State*, 887 N.E.2d 73, 74 (Ind. 2008). On numerous occasions since, our appellate courts have confronted vaguely worded plea-agreement waivers or inconsistent statements made by judges during hearings that fail to establish a defendant's knowing and voluntary waiver. See, e.g., *Williams v. State*, 164 N.E.3d 724, 725 (Ind. 2021) (per curiam); *Johnson v. State*, 145 N.E.3d 785, 786–87 (Ind. 2020) (per curiam); *Merriweather v. State*, 151 N.E.3d 1281, 1283–85 (Ind. Ct. App. 2020); see also *Montgomery v. State*, 192 N.E.3d 169, 170–72 (Ind. 2022) (David, J., dissenting from denial of transfer) (Rush, C.J., joining); *Wihebrink v. State*, 192 N.E.3d 167, 167–69 (Ind. 2022) (David, J., dissenting from denial of transfer) (Rush, C.J., joining). Considering over 95% of criminal convictions in Indiana are resolved through guilty pleas, these recurring errors are alarming and, increasingly, deprive Hoosiers of their constitutional right to appeal their sentences, see Ind. Const. art. VII, § 6. Because Lindsay Grate's case exemplifies these concerns, we must intervene.

This record reveals a trifecta of errors establishing that Grate did not knowingly or voluntarily waive her constitutional right to appeal her sentence. Her plea agreement's waiver provision listed her constitutional rights before ambiguously stating, "Also, the right to appeal, so long as the Judge sentences the Defendant within the terms of this plea agreement[.]" At her subsequent guilty plea hearing, the trial court never mentioned Grate's right to appeal her sentence let alone that she was waiving this right by pleading guilty. Further compounding the confusion, after imposing a sentence, the court advised Grate she had "the right to appeal this sentence" and later appointed counsel for that purpose.

It is not surprising then that Grate filed an appeal in which she raised two issues related to her sentence. But the Court of Appeals dismissed her appeal, concluding "Grate waived her right to appeal her sentence as part of her written plea agreement." *Grate v. State*, No. 22A-CR-2224, 2023 WL

2657532, at \*1 (Ind. Ct. App. March 28, 2023). I disagree. Grate’s plea-agreement waiver is virtually indistinguishable from the generic, ambiguous waivers we have previously found insufficiently explicit to establish a knowing and voluntary waiver—transfer is warranted on that basis alone. *See* Ind. Appellate Rule 57(H)(2). But transfer is also warranted because the trial court made statements in two hearings that contradicted and raised confusion with the waiver provision, further establishing a lack of knowing and voluntary waiver. *See* App. R. 57(H)(6). For these reasons, I respectfully dissent from the Court’s decision to deny transfer.

Though a defendant can waive appellate review of their sentence in a written plea agreement, the waiver’s language must be specific and unequivocal to be enforceable. For example, in a split decision, the Court recently dismissed a defendant’s sentencing appeal because the waiver provision explicitly and unambiguously provided, “The Defendant hereby waives the right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of this plea agreement.” *Davis v. State*, 207 N.E.3d 1183, 1185 (Ind. 2023), *reh’g pending*; *see also Creech*, 887 N.E.2d at 74. Notably, in reaching that conclusion, we distinguished this provision with the ambiguously-written waiver provisions at issue in *Johnson* and *Williams*. *Davis*, 207 N.E.3d at 1186. In those cases, the plea agreements indicated that each defendant “waives right to appeal.” *Johnson*, 145 N.E.3d at 786; *Williams*, 164 N.E.3d at 725. We held that such generalized statements alone were insufficiently explicit to establish that the defendants knowingly and voluntarily waived the right to appeal their sentences. *Johnson*, 145 N.E.3d at 787; *Williams*, 164 N.E.3d at 725.

The appeal-waiver provision here suffers from the same flaws as those in *Johnson* and *Williams*. Grate’s plea agreement provides:

The Defendant waives [her] right to trial by this plea, and all constitutional rights accompanying that right, including; the right to a speedy and public trial by jury . . . . Also, the right to appeal, so long as the Judge sentences the Defendant within the

terms of this plea agreement, and the right to have the Court appoint counsel for trial or appeal should the Defendant be unable to pay for the same.

The Court of Appeals acknowledged that “Grate’s plea agreement does not specifically state she waives the right to appeal *her sentence*,” but the panel ultimately found “the subject of the waiver is clear” because of “the limited circumstances in which a defendant can appeal from a guilty plea at all, and the language immediately following that references the sentence.” *Grate*, 2023 WL 2657532, at \*2 n.3. I disagree.

In my view, the subject of the appeal waiver here is hardly clear. Just as in *Johnson* and *Williams*, the waiver purportedly applied broadly to Grate’s “right to appeal.” Additionally, the waiver is ambiguous as to the specific appellate rights Grate agreed to forego by pleading guilty. Though the provision references Grate’s sentence, there is no explicit indication the waiver covered an appeal from the sentence brought under Rule 7(B). *But see Davis*, 207 N.E.3d at 1186. And it’s similarly unclear whether the waiver also covered appeals from convictions. In these circumstances, we construe all ambiguities against the State. *State v. Smith*, 71 N.E.3d 368, 371 (Ind. 2017). In doing so, we should grant transfer and conclude that Grate’s written appeal waiver is insufficiently explicit to establish that she knowingly and voluntarily waived her right to appeal her sentence.

Aside from an insufficient written waiver, the colloquy at both the guilty plea and sentencing hearings further reveal that Grate did not knowingly and voluntarily waive the right to appeal her sentence. Recognizing “the critical role of the trial court in safeguarding the validity of” appeal waivers, *Johnson*, 145 N.E.3d at 786, we have twice recently reminded our courts to be clear, consistent, and accurate when making statements related to those waivers during hearings, *Williams*, 164 N.E.3d at 725; *Strack v. State*, 186 N.E.3d 99, 104 (Ind. 2022). And our Court of Appeals has found otherwise valid waivers a nullity when, during such a hearing, the court makes statements contradicting the written waiver. *See, e.g., Merriweather*, 151 N.E.3d at 1285.

A review of this record reveals the trial court made multiple, confusing statements that contradicted the appeal-waiver provision in Grate's plea agreement. At the guilty plea hearing, the court stated a litany of rights, including "the right to appeal any conviction entered after trial," and confirmed Grate understood "all those rights." All the while, the court neither mentioned Grate's right to appeal her sentence nor confirmed she was waiving that right—or any of the others for that matter—by pleading guilty. Then, at the sentencing hearing, the court informed Grate, contrary to the waiver provision, that she had "the right to appeal this sentence since it wasn't fixed in the terms of your plea agreement." And later, again contrary to the waiver provision, the court appointed Grate counsel to pursue her appeal. Thus, the trial court here fell short of safeguarding the validity of Grate's appeal waiver. And, in dismissing her appeal, the Court of Appeals erred in focusing only on what happened during sentencing. *Grate*, 2023 WL 2657532, at \*2.

To summarize, Grate did not knowingly and voluntarily waive her constitutional right to appeal due to a trifecta of errors: the plea agreement's general, ambiguous waiver clause; the trial court's incomplete advisement during the plea hearing; and the court's incorrect advisement during the sentencing hearing. By not granting transfer to rectify these errors, the Court passes up an important opportunity to cure a significant departure from law and to provide additional instruction on a recurring legal issue that will continue to impact defendants across our state. Indeed, our country's criminal justice system is "a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). This experience is confirmed in Indiana where, in 2022, 110,805 criminal cases were resolved through guilty pleas or admissions compared to just 3,884 criminal cases resolved through a bench or jury trial. It is thus imperative that we take cases like Grate's to ensure the tens of thousands of Hoosier defendants who plead guilty each year are not unwittingly deprived of their constitutional right to appeal. I therefore dissent from the Court's decision to deny transfer.

Goff, J., joins.