

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-14

Filed: 16 April 2019

Madison County, No. 15CRS050222

STATE OF NORTH CAROLINA

v.

KENNETH CALVIN CHANDLER, Defendant.

Appeal by defendant from judgment entered 11 August 2017 by Judge Mark E. Powell in Madison County Superior Court. Heard in the Court of Appeals 31 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the defendant-appellant.

BERGER, Judge.

A Madison County jury found Kenneth Calvin Chandler (“Defendant”) guilty of first-degree sex offense with a child and taking indecent liberties with a child. Defendant appeals, arguing that the trial judge improperly refused to accept a tendered guilty plea in violation of the statutory mandate in N.C. Gen. Stat. § 15A-1023(c). We disagree.

Factual and Procedural Background

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Defendant was indicted for first-degree sex offense with a child and indecent liberties with a child. Defendant reached a plea agreement with the State and signed a standard AOC-CR-300 Transcript of Plea to resolve these charges on February 6, 2017. Defendant's Transcript of Plea was also signed by his attorney and the prosecutor.

On page one of the Transcript of Plea, there are three boxes available to describe the type of plea a defendant is entering: (1) guilty, (2) guilty pursuant to *Alford* decision, and (3) no contest. Defendant checked that he was pleading guilty.

Page two of the Transcript of Plea has standard questions concerning the type of plea entered. In response to question 13, "Do you now personally plead guilty, [or] no contest to the charges I just described[.]" Defendant checked the box marked "guilty," and answered in the affirmative. Question 14 has subparts (a), (b), and (c). Each subpart concerns the different pleas available to a defendant. Subpart (a) is used with a guilty plea, (b) is for no contest pleas, and (c) is specifically for *Alford* pleas. Because Defendant was pleading guilty, in response to the question in subpart (a), "Are you in fact guilty[.]" Defendant again answered in the affirmative on the Transcript of Plea.

Page three of the Transcript of Plea addresses the plea arrangement made by the State. According to the Transcript of Plea, in exchange for Defendant's guilty plea, the State agreed to dismiss the charge of first degree sex offense. Page three

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also contains signature lines for Defendant, defense counsel, and the prosecutor. Defendant acknowledged that the terms and conditions stated in the Transcript of Plea were accurate. Defense counsel certified that he and Defendant agreed to the terms and conditions stated in the Transcript of Plea. The prosecutor's certification states that the conditions stated in the Transcript of Plea were agreed to by all parties for entry of the plea.

On February 7, 2017, the State called Defendant's case and indicated to the trial court that the Defendant planned to enter a plea. The prosecutor asked defense counsel how Defendant pleaded, and defense counsel responded, "Pursuant to negotiations, guilty." The Transcript of Plea was submitted to the trial court, and during the colloquy with Defendant, the following exchange occurred:

[The Court:] Do you understand that you are pleading guilty to the following charge: 15 CRS 50222, one count of indecent liberties with a minor child, the date of offense is April 19 to April 20, 2015, that is a Class F felony, maximum punishment 59 months?

[Defendant:] Yes, sir.

[The Court:] Do you now personally plead guilty to the charges I just described?

[Defendant:] Yes, sir.

[The Court:] Are you, in fact, guilty?

[Defendant:] Yes, sir.

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[The Court:] Now, I want to make sure you understand – you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you’re pleading guilty to the charge. If you need additional time to talk to [defense counsel] and discuss it further or if there’s any question about it in your mind, please let me know now, because *I want to make sure that you understand exactly what you’re doing.*

[Defendant:] Well, the reason I’m pleading guilty is to keep my granddaughter from having to go through more trauma and go through court.

[The Court:] Okay.

[Defendant:] *I did not do that*, but I will plead guilty to the charge to keep her from being more traumatized.

[The Court:] Okay, I understand, [Defendant]. Let me explain something to you. I practiced law 28 years before I became a judge 17 years ago, and I did many trials and many pleas of guilty and represented a lot of folks over the years. And I always told my clients, I will not plead you guilty unless you are, in fact, guilty. I will not plead you guilty if you say “I’m doing it because of something else. I didn’t do it.” And that’s exactly what you told me just then, “I didn’t do it.” *So for that reason I’m not going to accept your plea.* Another judge may accept it, but I will never, ever, accept a plea from someone who says, “I’m doing it because of another reason, I really didn’t do it.” And I’m not upset with you or anything like that, I just refuse to let anyone do anything, plead guilty to anything, that they did not – they say they did not do. I want to make sure that you understand you have the right to a trial, a jury trial. Do you understand?

[Defendant:] Yeah, I understand that. We discussed that, me and my lawyer.

[The Court:] Okay.

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[Defendant:] And like I say, *I did not intentionally do what they say I've done.*

[The Court:] Okay, that's fine. That's good.

[Defendant:] But like I say, I told [defense counsel] that *I would be willing to plead guilty to this, have a plea deal, to keep this child from having to be drug through the court system.*

[The Court:] That's fine. I'm not going to accept your plea on that basis because I really don't want you to plead guilty to anything that you stand there, uh, and you've said you didn't do. So I'm not going to accept your plea. We'll put it over on another calendar where another judge will be here. If you want to do that, you be sure and tell the judge what you told me if you still feel that way. I'm going to write it down here on this transcript of plea of why I didn't take your plea.

See, the easy thing for me to do is just take pleas and put people in jail or do whatever I need to do, or think is best for their sentence, and that's easy. But I can't lay down and go to sleep at night knowing that I put somebody in jail or entered a sentence of probation or whatever to something they did not do, or they say they did not do. I don't know any of the facts of your case; I don't know anything except what I just read in the indictment. That's all I know. But when a man or woman says, I didn't do something, that's fine, I accept that.

(Emphasis added.)

Defendant's case was continued and subsequently came on for trial on August 7, 2017. Prior to trial, Defendant was arraigned again, and pleaded not guilty. Defendant continued to maintain that he was factually innocent when he testified at trial that

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[Defendant:] I just remember saying that I don't, I don't understand why [the victim] would lie. I don't understand why all this whatever happened had happened, but I know that I didn't – . . . And I know it wasn't true.

. . . .

[Defense Counsel:] Did you ever knowingly touch [the victim]?

[Defendant:] No, sir.

A Madison County jury convicted Defendant of first degree sex offense and indecent liberties with a child, and received consecutive sentences of 192 to 291 months and 16 to 29 months in custody. Defendant argues for the first time on appeal that the trial court erred on February 7, 2017 when it rejected his plea. Specifically, Defendant asserts that a trial court judge is required to accept a guilty plea pursuant to N.C. Gen. Stat. § 15A-1023(c), even when a defendant maintains his innocence. We disagree.

Analysis

If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

N.C. Gen. Stat. § 15A-1023(c) (2017).

“A valid guilty plea . . . serves as an admission of all the facts alleged in the indictment or other criminal process.” *State v. Thompson*, 314 N.C. 618, 623-24, 336 S.E.2d 78, 81 (1985) (citations omitted). A guilty plea is “[a]n express confession” by a defendant who “directly, and in the face of the court, admits the truth of the accusation.” *State v. Branner*, 149 N.C. 559, 561, 63 S.E. 169, 170 (1908). “A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned.” *Id.* at 561-62, 63 S.E. at 170.

“A defendant enters into an *Alford* plea when he proclaims he is innocent, but intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.” *State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010) (citation and quotation marks omitted). *North Carolina v. Alford* notes that:

Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, . . . and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.

North Carolina v. Alford, 400 U.S. 25, 37-38 n.10 (1970) (citations omitted).

A defendant’s plea must be the product of his informed choice, and a trial court cannot accept a plea from a defendant unless it so finds. N.C. Gen. Stat. § 15A-1022(b) (2017). “[A] plea of guilty . . . may not be considered valid unless it appears

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affirmatively that it was entered voluntarily and understandingly.” *State v. Tinney*, 229 N.C. App. 616, 621, 748 S.E.2d 730, 734 (2013) (quoting *State v. Ford*, 281 N.C. 62, 67-68, 187 S.E.2d 741, 745 (1972)). Whether a defendant’s plea was the product of his informed choice is a question of law reviewed *de novo*. *Id.* (citation omitted).

The trial court correctly rejected Defendant’s tendered guilty plea because the trial court did not and could not find that it was the product of his informed choice. Here, the trial court expressed concern that Defendant did not fully understand what he was doing by tendering a plea of guilty:

Now, I want to make sure you understand – you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you’re pleading guilty to the charge. If you need additional time to talk to [defense counsel] and discuss it further or if there’s any question about it in your mind, please let me know now, because I want to make sure that you understand exactly what you’re doing.

Defendant did not respond that he understood what he was doing. When questioned about whether he understood what he was doing by pleading *guilty*, Defendant maintained his innocence.

Judge Pope was thus presented with a defendant who provided a plea transcript with “an admission of all the facts alleged in the indictment or other criminal process,” *Thompson*, 314 N.C. at 624, 336 S.E.2d at 81 (citation omitted), but who asserted factual innocence. This conflict in Defendant’s answers cannot result in a finding that Defendant knowingly, intelligently, and understandingly tendered

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a plea of guilty to the trial court because of the conflicting and contradictory information provided to the trial court by Defendant. To find otherwise would be to rewrite the plea agreement as an *Alford* plea.¹

Upon inquiry by Judge Pope about whether Defendant understood what he was doing, Defendant never “clearly expressed [a] desire to enter” a plea, and he never stated or intimated in any way that “his interests require entry of a guilty plea.” Defendant did not assert in the trial court, nor does he argue here, that it is in his best interest to plead pursuant to *Alford*. Defendant stated he was attempting to plead guilty so the victim would not have to go through the difficulty of testifying, but he did not and has not asserted that it was in his best interest to plead pursuant to *Alford*. Defendant maintained his innocence, and his plea of not guilty and subsequent testimony at trial demonstrate that he believed the presumption of innocence and trial by a jury of his peers were in his best interests.²

¹ Plea agreements are in essence contracts. *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999), *remanded on other grounds*, 353 N.C. 259, 538 S.E.2d 929 (2000). This Court has no authority to mandate that the prosecutor must offer Defendant an *Alford* plea. Based upon the plain language of the Transcript of Plea, the prosecutor here agreed to a concession on charges on the condition that Defendant plead guilty. It is the prosecutor who has the discretion to craft the terms of a plea and sign a plea transcript. “The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district[.]” N.C. Const. art. IV, § 18. “The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State.” *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991). This Court would exceed its authority were it to craft a plea arrangement for the State.

² We note that if we were to accept Defendant’s argument, the likelihood that factually innocent defendants will be incarcerated in North Carolina increases because it removes discretion and common sense from our trial judges. Judges would be required to accept guilty pleas, not just *Alford* pleas, when defendants maintain innocence. Such a result is incompatible with our system of justice.

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Conclusion

Because the trial court did not err in refusing to accept Defendant's plea of guilty, we will not disturb the judgment.

NO ERROR.

Judge STROUD concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

I. Summary of Dissent

Our General Assembly has provided that a trial court “must” accept a plea arrangement between the prosecutor and the defendant where the conditions of Section 15A-1023(c) are met. There is nothing in Section 15A-1023(c) which gives the trial court discretion to reject an arrangement simply because the defendant claims during the required colloquy that he did not, in fact, commit the crime.

Our General Assembly has empowered the *prosecutor* to decide whether to require a defendant to admit to the crime as a condition of agreeing to a plea arrangement. And if a defendant acts contrary to this condition of their deal by professing his innocence during the colloquy, it is the *prosecutor* who has the right to withdraw the offer. But it is of no concern of the trial court.

Here, the prosecutor did not withdraw from the plea deal based on Defendant’s profession of innocence during the colloquy. And there is no indication that the requirements of Section 15A-1023(c) were not met. Therefore, I must conclude that the trial judge was compelled by statute to accept the plea.

Further, I conclude that Defendant was prejudiced by the trial judge’s failure to accept the plea deal. Specifically, Defendant was charged with two crimes; the State agreed to dismiss one of the charges in exchange for his plea of guilty to the

other charge; and after the trial judge rejected his plea, Defendant was subsequently tried, convicted, and sentenced for *both* crimes.

II. Analysis

Defendant challenges his convictions arguing that the first judge who heard his guilty plea failed to follow a statutory mandate requiring that the judge accept the guilty plea. Defendant contends that, if he had been allowed to plead guilty to only the indecent liberties charge, he would have been exposed to sentencing for only one charge, rather than for both charges.³

Defendant and the prosecutor entered into a plea deal whereby Defendant agreed to plead guilty. During the colloquy, Defendant stated that he wanted to plead guilty but that he was, in fact, innocent. In North Carolina, there is no constitutional or statutory barrier for a defendant to plead guilty while maintaining his innocence. This type of plea is what is known as an *Alford* plea, named for the United States Supreme Court case *North Carolina v. Alford*.⁴

³ I acknowledge that Defendant failed to object to the first judge's refusal to accept his guilty plea. However, the trial judge had a *statutory* duty to accept the guilty plea in this case. N.C. Gen. Stat. § 15A-1023(c) (2017). And our Supreme Court has long held that "[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). Therefore, Defendant's failure to object is not fatal to our consideration of this appeal.

⁴ In *Alford*, the Court held that the federal constitution allowed for a trial court to accept a defendant's guilty plea, even where the defendant claims his innocence. *North Carolina v. Alford*, 400 U.S. 25, 37-8 (1970). However, the Court did not hold that state trial courts are *required* to accept *Alford* pleas, leaving the decision to "the States in their wisdom." *Id.* at 39. While many states, including North Carolina, allow *Alford* pleas, there are some states that have chosen not to accept *Alford* pleas where the defendant maintains his or her own innocence under their own state's

Our General Assembly has provided three types of pleas: guilty, not guilty, and no contest (*nolo contendere*). See N.C. Gen. Stat. § 15A-1022 (2017). Our General Assembly has not expressly delineated *Alford* pleas as a fourth type of plea nor has that body prescribed such pleas to be made in our courts. Rather, *Alford* pleas are a creation of the judicial branch and are recognized as a subset of *guilty* pleas, and not a subset of *no contest* or *not guilty* pleas. See, e.g., *State v. Ross*, 369 N.C. 393, 395, 794 S.E.2d 289, 290 (2016) (stating that the “[d]efendant entered an *Alford* plea of guilty”); *State v. Miller*, 367 N.C. 702, 705, 766 S.E.2d 289, 291 (2014) (“Defendant entered an *Alford* plea of guilty[.]”); *State v. Baskins*, ___ N.C. App. ___, ___, 818 S.E.2d 381, 387 n.1 (2018) (recognizing that “an *Alford* plea [is] when the defendant pleads guilty without an admission of guilt”); *State v. Salvetti*, 202 N.C. App. 18, 28, 687 S.E.2d 698, 705 (2010) (discussing *Alford* pleas as a subset of guilty pleas, and ensuring the defendant understood this relationship).

The extent of a trial judge’s discretion to accept or reject a plea arrangement has been set by our General Assembly. A judge’s discretion depends on *the type* of plea entered. For instance, the General Assembly has given discretion to trial judges whether to accept a “no contest” plea. N.C. Gen. Stat. § 15A-1022(d) (2017) (“The

constitutional provisions. See, e.g., *State v. Urbina*, 115 A.3d 261, 269 (N.J. 2015) (recognizing a strong disapproval of *Alford* pleas by the New Jersey Supreme Court); *Webster v. State*, 708 N.E.2d 610, 614 (Ind. Ct. App. 1999) (“For many years, Indiana has declined to accept a guilty plea where a defendant contemporaneously maintains his innocence.”).

judge *may* accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty” (emphasis added)).

On the other hand, however, *and relevant to this present case*, the General Assembly has provided that a trial judge “must” accept a guilty plea where (1) the plea is based on his or her own informed choice, (2) a factual basis exists for the plea, and (3) sentencing is left to the discretion of the court. N.C. Gen. Stat. § 15A-1023 (2017). The General Assembly has made no exception to this statutory mandate for the subset of guilty pleas known in the judiciary as *Alford* pleas.⁵

Here, Defendant wished to plead guilty to the indecent liberties charge in order to avoid possible punishment on the sex offense charge. The prosecutor agreed to this arrangement. Granted, the prosecutor’s acceptance was conditioned on the inclusion of a provision in the agreement that Defendant acknowledged that he was in fact guilty. To require this condition as part of a plea deal is certainly within a prosecutor’s discretion. Defendant signed the agreement. But during the colloquy when Defendant suggested that he did not in fact commit the crime, it was on the prosecutor to withdraw the offer, which the prosecutor had the discretion to do. *See State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980) (“The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the

⁵ My research failed to uncover the phrase “*Alford* plea” occurring anywhere in the text of our General Statutes.

actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement.”).

But whether Defendant’s guilty plea was an admission of actual guilt or an *Alford* plea was of no concern to the trial judge, as our General Assembly has not authorized the judge to consider this as a factor. Since the plea arrangement did not contain any sentencing recommendation, the trial court could have rejected the plea *only if* it found either (1) that the plea was not the product of Defendant’s informed choice or (2) there was not a factual basis for the plea. Here, there is no indication that Defendant did not make an informed choice. And it is apparent that there was a sufficient factual basis for Defendant’s plea, because a jury later found that Defendant had committed both crimes beyond a reasonable doubt.

The only plausible legal argument that could be made that the trial court had discretion under the statute to reject Defendant’s plea is based on the “factual basis” prong. Specifically, one could argue that there was no factual basis for the provision in the plea arrangement that Defendant was admitting guilt, as Defendant professed his innocence during the colloquy. For the following reasons, though, I do not believe that this argument is a winning one.

Specifically, whether or not a defendant actually admits to the crime is not part of the information which makes up the “factual basis” prong:

A defendant’s bare admission of guilt, or plea of no contest, always contained in [the Transcript of Plea], does not

provide the “factual basis” contemplated by G.S. 15A-1022(c) The statute, if it is to be given any meaning at all, must contemplate that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.

State v. Sinclair, 301 N.C. 193, 199, 270 S.E.2d 418, 421 (1980); *see also State v. Bollinger*, 320 N.C. 596, 603, 359 S.E.2d 459, 463 (1987) (stating that “[n]othing in N.C.G.S. § 15A-1022 requires the court to make [] an inquiry [of the defendant as to whether he was in fact guilty]”). The information which makes up the “factual basis” prong is the “information [from which] an independent judicial determination of defendant’s actual guilt” could be made. *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007). And the General Assembly has provided a number of sources from which this information could be presented apart from the words of the defendant. *See* N.C. Gen. Stat. § 15A-1022(c) (2017).⁶

Rather than being part of the information for the “factual basis” prong, Defendant’s admission of actual guilt is simply a condition which the State required to induce it to enter into the plea arrangement. And when Defendant acted contrary to this condition, it was certainly the right of the prosecutor to walk away from the deal based on this “breach.” But the prosecutor waived this potential breach by not speaking up during the colloquy.

⁶ The statute provides that the “factual basis” may be based on, for example, “[a] statement of the facts by the prosecutor,” “[a]n examination of the presentencing report,” or “sworn testimony” from third parties. N.C. Gen. Stat. § 15A-1022(c)(1), (3)-(4).

I note the State's waiver argument; namely that since Defendant was given a second opportunity to plead guilty before a different judge but elected to plead not guilty, he waived any argument on appeal. *See State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970) (“[I]t is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or *by conduct inconsistent with a purpose to insist upon it.*” (emphasis added)).

However, I further note that it is *the State's burden* to point to evidence of Defendant's waiver. Here, in order to show that Defendant waived any argument concerning the first judge's refusal to accept his guilty plea, the State must show that the same plea arrangement was still on the table when he later went to trial and pleaded not guilty. But the State has not pointed to any evidence and I found no evidence in the record showing that the plea arrangement allowing Defendant to plead guilty to indecent liberties in exchange for dismissal of the sex offenses charge was still available when his case went to trial. Indeed, the State does not make any argument in its brief that the deal was still on the table. Therefore, it cannot be said that Defendant waived his statutory rights by pleading not guilty at trial where there is no evidence that the prior deal was still on the table.

Accordingly, my vote is to remand the matter and to “instruct the district attorney on remand to renew the plea offer accepted by [D]efendant and presented to

the trial court.” *State v. Lineberger*, 342 N.C. 599, 607, 467 S.E.2d 24, 28 (1996). If Defendant agrees to the offer—even if he still verbally professes his innocence during the colloquy as he did before—the trial court must (1) accept the plea under Section 15A-1023(c), (2) vacate the current judgment, and (3) enter a new judgment based on the guilty plea to include a sentence as allowed by law. If Defendant rejects the plea offer on remand, then the current judgment should not be disturbed, as Defendant otherwise received a fair trial.⁷

⁷ I note that in *Lineberger*, our Supreme Court ordered that the defendant was entitled to a new trial if on remand his guilty plea was not accepted. *Lineberger*, 342 N.C. at 607, 467 S.E.2d at 28. However, the Court was construing Section 15A-1023(b), which gives the trial court discretion to accept a plea where a sentence *is* recommended, but which requires the trial court to grant the defendant a continuance if it does not accept the plea. N.C. Gen. Stat. § 15A-1023(b). In *Lineberger*, the Court held, not only did the trial court fail to properly exercise its discretion in considering the plea, but it also failed to grant a continuance when it rejected the plea. *Lineberger*, 342 N.C. at 606-7, 467 S.E.2d at 28. In the present case, Defendant makes no argument regarding the conduct of the trial itself. Therefore, we conclude that the judgment should be vacated only if Defendant accepts the plea previously offered.