

In the Indiana Supreme Court

Devin Powell,
Appellant,

v.

State of Indiana,
Appellee.

Court of Appeals Case No.
25A-CR-447

Trial Court Case No.
49D27-2207-MR-018032



Published Order

Devin Powell pled guilty to murder, and the trial court sentenced him to 55 years in prison. Through a plea agreement, Powell waived “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 the plea agreement. App. Vol. 2 at 78. But at sentencing, the trial court said the opposite—the judge told Powell he could appeal his sentence if the sentence was within the terms of the plea agreement.

The prosecutor agreed. When the judge was advising Powell, the prosecutor interjected to confirm that while Powell couldn’t appeal his conviction, he could appeal a sentence that was within the terms of the plea agreement.

Powell then did just that. On appeal, he argued his 55-year sentence, which was within the plea agreement’s terms, was inappropriate and should be revised under Appellate Rule 7(B) considering the nature of the offense and his character. In response, the State moved to dismiss based on Powell’s appeal waiver. Citing *Davis v. State*, 217 N.E.3d 1229, 1232–36 (Ind. 2023), the State argued that if Powell wished to appeal his sentence, he had to first set aside his plea agreement, which had waived his appeal, through post-conviction relief proceedings.

Powell disagreed. He responded that he wasn’t making the argument the defendant made in *Davis*, which was that the plea was not knowing and voluntary. Rather, he was arguing that parties can waive contractual terms, which is what the State did when, notwithstanding the appeal waiver, the prosecutor interjected during the court’s advisement to confirm that Powell could appeal his sentence. The State did not seek leave to reply to the motion to dismiss, so it did not address Powell’s argument in the Court of Appeals.

A Court of Appeals motions panel then granted the State’s motion in a short order without explaining the court’s reasoning. Powell now seeks transfer, and one of the questions he presents is whether “the State waive[d] the plea agreement’s provision foregoing Powell’s right to appeal his sentence.” Pet. to Trans. at 2. That question was not fully briefed in the Court of Appeals before the

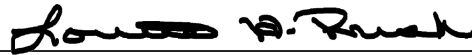
court dismissed the appeal, and that court should be the one to consider the question in the first instance.

To be sure, the State responded to Powell's transfer petition in our Court, and it again invoked *Davis v. State*. But it still has not addressed Powell's argument squarely. *Davis* held that, as with any other term of a plea agreement, when a defendant challenges an appeal waiver on the basis that the waiver was not knowing and voluntary, the defendant must pursue that claim through post-conviction proceedings and not through a direct appeal. *Davis*, 217 N.E.3d at 1234. But Powell doesn't claim his appeal waiver was not knowing and voluntary. He instead argues the State waived that provision.

If the State contends *Davis* should extend to the distinct argument Powell makes, the State must explain why. Of course, even if the State is wrong about the scope of *Davis*, that does not mean Powell is right that the State waived the appeal provision. That is something the Court of Appeals must decide in the first instance. But that argument at least deserves appellate vetting.

Being duly advised, the Court votes to GRANT transfer, VACATE the May 30, 2025 order dismissing this appeal, and REMAND the case to the Court of Appeals to set a briefing schedule for the parties to address the second question presented in Powell's transfer petition: "Did the State waive the plea agreement's provision foregoing Powell's right to appeal his sentence?" We express no opinion on the merits.

Done at Indianapolis, Indiana, on 10/10/2025.



Loretta H. Rush
Chief Justice of Indiana

Rush, C.J., and Massa, Goff, and Molter, JJ., concur.

Slaughter, J., dissents, believing transfer should be denied and the appellate court's dismissal affirmed.