IN THE SUPREME COURT OF TEN

AT NASHVILLE

STATE OF TENNESSEE	)	FOR PUBLICATION
	)	
Appellee	)	FILED: OCTOBER
	)	
vs.	)	No. 01-S-01-9
	)	
DAVID EDWARD HOWINGTON	)	John H. Gasaway
	)	
Appellant	)	Montgomery Coun

For Appellee

Charles W. Burson
Attorney General

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For Appellant

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OPINION

REVERSED; SENTENCE VACATED; BRiErMcAhN,D EJ

The district attorney general re
immunity agreement[1] with David Edward How
The reason stated for this refusal
that Howington had not fulfilled hi
he had not testified fully at his preliminar
subsequently and convicted of first-
received a life sentence.

The Court of Criminal Appeals co
grant Howington's application for rev
is whether a agreement between Howington
generally enforceable and, if so, to what
result.

For the reasons discussed below
agreements between a prosecutor and a d
enforceable. In so holding Bgr,unwoe ve,x pS
204 S.W.522d8 (Tenn. 1951), to the exte

[1] In the case under submission, b t
describe including a promise of "imm
The district attorney general to recommend
magistrate who conducted the prelim
bound to the grand jury on second-degr
degree murder as the war rant charged. Prerah at pscha re ad.re
accurately described as a cooperation, or
charge-bargain agreement we use the three terms g
and interchangeably.

precluding judicial enforcement of agreement circumstances. Accordingly, he was convicted of degree murder.

I

As for the salient facts, including the defendant requests that we cons Tony DeVito[2] and the defendant had informati Trobaugh he, in fact, recently received a desired purchase amount of marijuana. DeVito for marijuana, the defendant planned to a friend or rand to rob him of his money. In a discussion, DeVito suggested that t

Several hours later, the defendant DeVito his trailer and invited them produced a large sum of cash that he payment for the marijuana. As the part a time when the defendant was seate living room, DeVito stood with his dh otth eh iv

[2] DeVito was subsequently convicted o murder upon evidence included Prof. Heolwi Mingtaorny' testimony.

head. DeVito and Howington, grabbing wallet, Unaware, apparently, Howington had a substantial amount of money, DeVito was the contrast and admonished him to "ke Trobaugh died from the wound inflic

The perpetrators then went to DeVit burned blood-stained clothing, from the money, and cleaned the firearm.

Before the preliminary hearing, general and the end of, through counsel, unwritten agreement. In exchange for How at his preliminary hearing, the district at to recommend that he be bound to the cognizance instead of the nolrigcie of first-deg Additionally, is attrtiocrtney general comgmreene defendant's case on an appeal amount to[3] of Apparently, State needed Howington's case against DeVito. At his prelimi testified; fully tiendcerVDiimtion-he fully himself.

In his testimony, the defendan receivendly the $500 DeVito had give

[3] We deem it unnecessary to address of his hep aargtr

evidence adduced during the prelimi
defendhaandtdeedmup with approximately $4
money.Although the district attorney
Howington's testimony in every othe
Howinghtaddnied abtoue amount of the vict
receiveAdc.tongthis conclusion, tghenedri
considethedState nondlonygaetrhrebeomuent, ar
informed the defendant. Neither of
madea,nd the magistrate boundjuHrowinthgt
chargoef first-degree murder. Subs
indictHeodwington on first-degree mu
premeditated.

Ina pretrial motisoghtHowingtor
preliminary hearing testimony from
his trial on the ground that it had
and was, therefore, not "voluntary.

Followainhgearthneg,trial court cha
incriminpaotritnigon of the testimony as
coturuled that it had been volunta
therefaorde,issible. ThoeuntdrsiealthcaoturHto
hadnot fulafil"lcondition precedent" hoef
testitfryuthfully. As a result of
prelimihneaarrying testimony was admitte
case-in-dcuhriienfg Howjiunrtgyrtioanl'sfor first-d

Asstated, the jury convicted Howing
murder.

On appeal to erdhie a tien court, Howi
that the trial coupretr meirtrteidngin the State
its case-in[4]-hcisiepfr, eliminatesytheanyingn
that the State had obtainoefd rietwabry. p
intermediate court considered Howin
that the trial court erred in allongwi
testimony to be admitted in the tri
state l'aswenforcement officials was s
petitioner [Howington's] will to resis
confessniootnsfrseeellfy-determined." lingvter
the other evidence, the court found
reasonable doubt.

Before this Court, Howington a
First, invites us to Boruonvendr, ulbey so d
authortihzee judiocricalentof agreements
here pertinent. Second, he contend
testimwoansy not a sufficient reason f
honor the agreement. Third, he ins
first two contentions, we should find
testimony was reversible error.

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[4]Howingctoonnceded threigShttattteoh'isusset estim
impeachment purposes should he test

The State, on the other hand, argues that reasons supporting Bruno and it should not Additionally, the State contends that the agreement in a material way and is not relief. Moreover, the State insists tha was proper because it had been volu

For the reasons herein holds that the between defendant prosecutors are enforcing ways as other contracts. This holding Bruno.[5] We do that now. Further, we fi fulfillled part of the agreement with DeVito's conviction, as Howington's, wa through the State's use of Howingto

II

As stated above, the issue we agreement enforceable. Because our analysis provides relief for, Howe ending to not reach the admissibility of his preliminary he

The traditional rule in Tiefnorm a immunity agreements are not Bruno, 240 S.W.2d 528 (Tex. 1951). As we Bruno noted expressly rule extent that it is a prerequisite judicial enforcement of immunity all circ

[5] 240 S.W.2d 528 (Tex. 1951). As we noted expressly rule extent that it is a prerequisite judicial enforcement of immunity all circ

S.W.2d 528 (Tenn. State 1951); Johnson S.W.2d 8
Crim. App. 1989), now in which involved an i
agreement between the defendant and a p
reasoned:

> "In the absence of a stat
> providing immunity, the fact
> a participant or accomplice
> commission of a crime testifies
> agrees to testify on behalf of
> prosecution fully and fairly
> disclosing the guilt of himself
> his associates, with the un
> standing promise, express
> implied, that he will be grante
> pardon or will not be prosec
> his offence does not entitle him to a
> pardon or immunity as a matter
> right; and such facts may not
> pleadable bar of prosecution." We
> have no such statute in this
> granting immunity to an accompl
> who gives the State aid in
> prosecution or apprehension of h
> co-workers in crime.

240 S.W.2d at 530 (citation omitted).
that had the district attorney gener
within his or the court's authority
enforceable. The Court stated:

> Normally, where such a promise
> made in good faith and the p
> then cooperates and gives the
> the necessary assistance the d
> attorney general may with the co
> of the trial court take care o
> matter but, when it has been done
> in this way the only thing th
> know that be and do is that the
> Chief Executive must be convi

that this is a tenable finding of his pardoning power.

Id. at 531. Thus, no cudwihnigle that infor agreement[6] are not enforceable, all the deed to under which they would be.

Although the facts in Brunson involve a pure agreement between an accused and a poli Criminal Appeals that the rehearsing also su rules as applied to an agreement with State. John, 781 S.W.2d 873 Ap(Tex 1989) Cr John, the district attorney agreement with the defendant, among other from state homicide charges in return for court held that Brunson "under 'immunity agreeme is of no legal effect." Id. at 879.

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[6] We use the phrase "informal immuni including agreements between the State and charge, plea, or sentence.

[7] We note, however, of the Court of Appeal the John court did find that "as consti would be violated if the promise of im ways so as to extract a statement fro the crime." 781 S.W.2d This concern not constitutional rights resulted in t statements were coerced by the prom and evidence obtained by way of the s State in its case-in-chief. John, the tr court determined, after a Johnson had agreement by being untruthful.

Thus, traditional immunity agreements not considered have generally been unenforc recent years, however, both state and resorted to the of uso operation-immunity ag increasing numbers. In this respec agreement have, a significant role in t accused of crime. By resorting to such often able to use agreements with "mi "marjo actors." Without this tool, be p unable to prosecute some of the worst a

Plea agreements, unlike immunity treated as contracts and are enforceable on precedies not met; that is, the trial ju Statve. St, 7 6 8 S.W.2d 703 (Tenn. Crim. Ap.); Chrein v. Sta, 589 S.W.2d 943 (Tenn. Crim. App with basic contract principles that an binding until the conditions Sep Croevciendget v. Robi, 7 2 3 S.W.2d 643 (Tenn. Crim. Ct. Ap. An City of Law, 611 S.W.2d 832 (Tenn. C

We find no substantive differenc and the charge agreement were Both at the

[8] It should be noted that even though not enforceable, it has been the accepted judge judgment must allow the defendant to be a with event that it is not accepted. Rep. Crim. P. 11(e)(prevents the defendant from being u

State's forts to prosecute crime. Bo
require a defendant to give up impo
to trial by jury or the right agains
Howings turn rendered the constitutiona
self-incrimin. At the preliminary h
discernable urgency existed for Howingt
magistrate could have, and would have, likely h
the original charge in any way; without his
Obviously, the big winner was the prosecu
of the evidence necessary to convict
irrespective of the truth or falsity of Ho
regards the amount of money he rece

We note with a proval number of other
recognize immunity agreements as a tur can
enforce and deer the pelseproinc contrariet d. Sta
Fit, ch 964 F.2d 571 (6th Cir. 1992) (
cooperation a criminal investigation
informally grant him immunity in exchang
agreement to prosecute is contractua
contract law and a ds.") (citations ses a Unit te
States v. , Pe8l9l8e tFi.e2rd 297 (U2ndi tCeidr .S t1a9
Pack, wo8o4d8 F.2d 1009 (U9nit Cir. S. t B1r9e8 v8) v1.
F.2d 352 (8th Cir. 1986) ; Unit 1986 Stat ers, dow 78 FR.2d
(10 tChir. 1U9n8i6t)e; d e S. t a Ir y i 756 F.2d 708
1985 C); l; osson v, . 8 S1t2 a tPe.2d 966 (SAtlaatsek a

Myrhow, 865 P.2d 231 (Mont. 1993); Law 1985 (1989) "Grants of immunity pursuant t method of acquiring immunity, but cour agreements whereby promises are made in ex cooperation. A cooperation-immunity of a contract and subject to contra

The State argues that Brunson should not be because "the content of verbal agre source of litigation.'" We observe tha it ever materializes, is easily sol to writing. Adding, we are not persuaded sufficient to allow the State to break trust, subject upon which the India eloquently articulated:

> We recognize that the publi benefits substantially from prosecutor's decision to withhol prosecution of one individual i exchange for information leading the arrest and conviction of a deemed more dangerous to the p welfare. The availability an usefulness of this strategy substantially neutralized if the prosecutor's promise is perc be unreliable. Substantial could result from a decision remove this weapon from th prosecutor's arsenal.

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[9] While the State asserted in its b numerous dangers in allowing courts to e immunity agreements, "enumerate not any addit to the threat of "prolific. . .liti

> **Furthermore, the promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond. . . . "It is important for all segments of our society to believe that our court systems dispense justice. This includes the criminals themselves as well as the law abiding citizens, and especially those criminals who have cooperated fully in police investigations."**

Bowers S, t a5t0e0 N.E.2d 203, *quoting* 204 Dubin v. Sta, t e275 N.E.2d.7,7911) (citations omit added). We embrace these principle

For the above reasons, we hold a prosecutor and a defendant is co enforceunder the law. of Accordingly, Bryans Sta, t e240 S.5W2.82d(T1e9n5n1.), and its progen[10]

III

We now consider whether Howing to the agreement. For the State to pre prove that Howfianigl teodn toon delis v part of t what are the evidentiary burdens in

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[10] As to the specific issue-o-wed the Burn-o-wed agreement entered into by a police off enofrceable-e-sweerve decision until th squarely presented.

This issue has been considered b
its analysis of the defense of Texas Court of the
Appeals stated:

> [W]e do not agree that immunity
> is a defense under the Cod
> Criminal Procedure. We do agree
> it is analogous to one. The
> burden is on the defendant to
> the existence of the evide
> Turney v. State, 51 S.W. 243 (Tex.
> Crim. App. 1899). In this it
> differs from ordinary defens
> the defendant is only requir
> raise his defense by producing
> evidence. However, once the
> burden is met the existence
> immunity agreement is shown by
> preponderance of the evidence, we
> hold that; procedurally, imm
> should be treated just like a d
> under the Code. Thus, the bu
> then shifts to the State to
> beyond reasonable doubt why
> agreement is invalid or why
> prosecution should be allowed desp
> the agreement.

Zani v., 57 S.W.2d 249, 254 (Tex. C
Zani case, the prosecution argued th
entitled to enforce immunity agreement the
term of the agreement which provided
caused the death of "It that 251 arriving at
holding, the court observed that

> [t]o place upon the State an
> burden creates a rather anoma
> situation. For example, in th
> instant case, if the State was
> held to a preponderance stand
> prove the violation of the imm

> agreement, it is quite possi
> the State could produce suff
> evidence to void the agreement
> thus prosecute, but insufficie
> obtain conviction. The State
> prove by a preponderance of
> evidence that appellant "direct
> caused the death of Dess, but
> not prove this beyond a reas
> doubt. However, they could ea
> prove he was party of fetnhsee.
> In such a case the State c
> invalidate the immunity agre
> the pre-trial hearing making
> and non-binding and then obt
> convict fioorn being a party t
> murder, offense for which imm
> was originally granted.

Id. at 254 n.3.

We agree with the reasoning of the burden of proof standard set for order for the State to prevail in prhoivse cbaesy reasonable doubt that Howington hfiapialretd otfo deal. The State contendist first excused because Hswington failed to satisfy a c perfaonrcmet; hat is, he failed to tSeeset Restate(mSeenctond) of Contractsrm§an 2c2e5 a duty subject to a condition cannot occurs or its non-occurrence is exc

We begin with the agreement it appears to be that the State agreed that Howington's case be rbaonudn djunorvyseerc ot degrmeurder and that his bond be redu for Howington's truthful testimony.

to perform a monc ditioned upon Howington'
Howington and his attorney insist that no la
used when the agreement was made.
pointing out that were tchoe i taigorne a lm, ent they
have so readily agrreeqeudi, reads Hiotwington t
against self-incrimination.

The following pgleps gruiindcei our decisio
contract that there is a general preference
be a condition precedent. Specific

> In resolving doubts as to wh
> event is made a condition of
> obligor's duty, and as to th
> of such an event, an interpr
> is preferred that will reduc
> obligee's risk of forfeiture
> the event is within the obli
> control or the circumstances ind
> that he has assumed the risk

Restatement (Second) of Contracts § 227
circumstances[11] do not indicate that Howin
Also, while the State contends Howington's
truthful testimony, which Howington con
actual condition it urges is its own s
Howington's testimony. This condition
Howington's, we find there was no condit

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[11] We do not find convincing that Howington
readily waived his right against se
first-degree murder charge if he had not be
bound under the agreement from the

agreement between the State[12] and Howington's condition was similar to Howington's agreement. Defendant did.

Second, this agreement is different commercial contract involves a criminal due process rights must be fiercely protected ambiguities in the agreement must be construed. See United States, v. 89 Bell Fed. 2 Cir. 1.9 (2 Cir. 1990). It results that the State must be held to standard as it attempts to avoid an where the accused has already acted in. We find that the State has not carried agreement was understood by all parties. States' subject to determination of the nature that the "truthful."

Next the State argues it has a deal from perfmole because Howington committed a condition which would constitute a breach of agreement are governed by the United States, 964 F. 571, 574 (6th Cir. 1992) (citing United States Pack, 848 F. 1009, 1012 (9th Cir. 1988)).

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[12] By analogy, we have to spell revae- agreement s only condition precedent is of the choice of the Once that takes place, the State's

Under the agreement, Howington's truthfully could constitute a breac maintain that Howington had regarding the amo received from the robbery.

Despite the State's contention Howington kept the bargain. The cr

> Q (by State): Let me ask what took place between you and his house immediately prior to t call to Kathy?
>
> A: Well, before we called h took my coat off. He [DeVit "Take your coat off because blood on it he said." "Let's burn it", [you] know, he took boots off and burned it. **He took Mike's wallet out and just started burning everything.**
>
> **Q: Were you ever <u>given</u> any of the money?**
>
> **A: Yes, I was. He <u>gave</u> me five hundred dollars to keep my mouth shut.**

Pressing, then State urges that t Kathy Dalton the effect that when Howington he had $4,500 blood-splattered money. examination of Dalton's testimony r to suggest how the defendant had co the $500 received from DeVito. So, if we Howington, unknownst to DeVito, grabbe

scene of the crime, then the above-
(also above-quoted) could very well
While this may be a fine distinction one, but cau
Statsehoul dexnpoetc t an accuser de to compake te
than necessary to answer the questi

In light of the above, it remai
Howing lt od after all. However, we nee
finding this regard because of ou
untruthful in his testimony. Inmatrey was I m det
whether failure to offer performance is m
following circumstances are signifi

(a) the extent to which the
part will be deprived of the b
which he reasonably expected

(b) the extent to which the
part can be adequately compen
for the part that he will be deprived;

(c) the extent to which the
failing to perform or to offer
perform will suffer forfeitu

(d) the likelihood that the
failing to perform or to offer
perform will cure his failure, t
account of all the circumstan
including any reasonable ass

(e) the extent to which the behavior
of the party failing to perform or
offer to perform comports w
standards of good faith and fa
dealing.

Restate(mSeenctond) of Contracts § 241. in the area of informal immunity a defendiasntnecessarily thieonsvtolivmepdo,rtant c is the incriminating nature of the the amount of information pr5vi,de9d64 F.2at 5c7i4ng United States, 861 Jo.2ds5 10 (8th Cir. 1988)).

In thicsase, the State enjoyed t reasonably expected; that is, eyewi Alsow,hileagtheement nporoveindedy f[13]orreavobkri theagreement certainly does nothing allegiendjury, and it is decidedly u Howingrteolnied on the agreement. Mor exceptionally incriminating evidenc alsoagainst himselyl,fn lifgintalof Howing cooperation, his answer regarding t hardlyndicates a lack of good faith a Thuswe conclude that any breathcfawtisc not material considering the circum

IV

[13] A charge of perjury mtaiyonnbdeeuratcho circumstances.

For all these reasons, we set a two-tal sd
obligation to redress from under the agreement i
Howington. It remains to the reeccsiudlet wohfat the
refusal should be. Fibres, elits swotuold go b
prelim ihneaarrying tbheecaaSuteeagreed reocnolmymtetono
the magistrate. Howington overbounnd second-d
The magistrate would have had no o
recommendation. Moreover, even if the magi
accepted the recommendation and bound Ho
the lesser charge, the grand jury w
charge foaupnpdlicable. NHeovweirntghteolnes wsa,s
the chance that the grand jury might
recommend (aitfiomnanddenoi) diacted upon the l
Howinggtaovne up a hlaotthafnocre; the receive
return. Fundamental prtincipdlaefsaiorf pjlus
requitrheat the parties to the unconsu
theifroerrm pitosions. Obviously, this i
Failinthgat, the only just remedy wo
defendaasnttthough all variablaedsvahnatda"gWeb.
Supreme Court . . . shall grant the
whicthhe party is entitled or the proc
maygrant any relief, including the
making of any order. . . ." Tenn.

Accordingly, we reverse the convicti
murdar and enter judgmethe conviction of

murder.We vacate the sentence and resentencing on second-degree murde

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ADOLPHO A. BIRCH,

CONCUR:

Anderson, C.J.
Drowota, Reid, White, JJ.