IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE MEANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49865

FILED

JAN 09 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of attempted sexual assault. Fifth Judicial District Court, Nye County; John P. Davis, Judge. The district court sentenced appellant Clyde Means to serve a prison term of 96 to 240 months.

First, Means contends that reversal of his conviction is warranted because he was not properly canvassed and he was not advised about the requirements of lifetime supervision before the entry of his guilty plea. Generally, this court will not consider a challenge to the validity of the guilty plea on direct appeal from the judgment of conviction.[1] "Instead, a defendant must raise a challenge to the validity of his or her guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea, or by initiating a post-

[1]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); but see Smith v. State, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994).

08-00617

conviction proceeding."[2] Here, there is no allegation, or indication in the record on appeal, that Means previously challenged the validity of his guilty plea in the district court. Accordingly, we decline to consider Means' contention.

Second, Means contends that his due process rights were violated when he was ordered to pay $900 for a second psychosexual evaluation. Means did not object in the district court to the preparation of a second psychosexual evaluation or to the imposition of the $900 fee for the cost of the evaluation.[3] Further, Means has failed to cite any relevant legal authority in support of his contention that imposition of the $900 fee for the cost of a second evaluation violated his constitutional right to due process.[4] Accordingly, we conclude that Means has failed to demonstrate that his due process rights were violated.

Finally, Means contends that the prosecutor breached the spirit and the terms of the plea agreement at sentencing by arguing for the maximum prison term, without also referencing the minimum prison term. Means further argues that the prosecutor implicitly sought a harsher sentence by "speaking for" the victim and "harshly criticizing

---

[2]Bryant, 102 Nev. at 272, 721 P.2d at 368.

[3]See generally Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (failure to object precludes appellate consideration).

[4]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[Means] for his actions and alleged lack of remorse and acceptance of responsibility." We conclude that Means' contention lacks merit.

In Van Buskirk v. State, we explained that when the State enters into a plea agreement, it "is held to 'the most meticulous standards of both promise and performance'" in fulfillment of both the terms and the spirit of the plea bargain, and that due process requires that the bargain be kept when the guilty plea is entered.[5] We have held that "[t]he violation of either the terms or the spirit of the agreement requires reversal."[6] When a prosecutor expressly recommends the sentence agreed upon, but by his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit.[7]

Here, the prosecutor expressly recommended the sentence of "up to sixteen years," as agreed upon in the plea negotiations. Although the prosecutor did not expressly state the minimum prison term and commented upon the nature of Means' crime, we conclude that the prosecutor's comments did not implicitly seek a greater penalty than that agreed upon by the parties. Accordingly, the prosecutor did not violate the terms or the spirit of the plea agreement at the sentencing hearing.

---

[5]102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v. Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

[6]Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999).

[7]Wolf v. State, 106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990); Kluttz, 99 Nev. at 683-84, 669 P.2d at 245-46.

Having considered Means' contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.[8]

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. John P. Davis, District Judge
Dan M. Winder
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk

---

[8]On December 31, 2007, counsel for appellant filed a motion for an extension of time within which to file a reply to the fast track response. We note that the provisions of NRAP 3C do not authorize the filing of a reply to the fast track response, and we conclude that a reply to the fast track response is not warranted. Accordingly, we deny the motion.