IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES KERRY RUTHERFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50975

FILED

JAN 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of burglary and possession of a credit or debit card without the cardholder's consent. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court adjudicated appellant Charles Kerry Rutherford as a habitual criminal and sentenced him to serve two consecutive prison terms of 5-20 years.

First, Rutherford contends that his guilty plea was not entered voluntarily and intelligently. Specifically, Rutherford claims that he was misinformed about the possible sentencing range. This court, however, has held that, generally, challenges to the validity of a guilty plea must be raised in the district court in the first instance by either filing a motion to withdraw the guilty plea or commencing a post-conviction proceeding pursuant to NRS chapter 34. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also O'Guinn v. State, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002). Because Rutherford has not challenged the validity of his guilty plea in the district court, his claim is not appropriate for review

on direct appeal from the judgment of conviction, and therefore, we need not address it. Bryant, 102 Nev. at 272, 721 P.2d at 368.

Second, Rutherford contends that the State breached the plea agreement at the sentencing hearing by taking no position on whether the prison terms should be ordered to run concurrently or consecutively. We disagree with Rutherford's contention.

In Van Buskirk v. State, this court 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. 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)). "The violation of either the terms or the spirit of the agreement requires reversal." Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999); see also Echeverria v. State, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003) (recognizing that the State's breach of a plea agreement is not subject to harmless-error analysis).

We conclude that the State did not breach the plea agreement. Prior to the entry of Rutherford's plea, the prosecutor informed the district court, in the presence of Rutherford and defense counsel, that he would seek "small habitual" criminal status for sentencing purposes and request a prison term of no more than 8-20 years. See NRS 207.010(1)(a). During Rutherford's plea canvass, the district court reiterated the State's sentencing position, which Rutherford claimed he understood. At the sentencing hearing, the following exchange took place:

> THE COURT: Are you talking about total or eight to 20 on per count?
>
> [PROSECUTOR]: Eight minimum, 20 on the top. That's a small habitual. I told the Court I would not ask for more than that.
>
> The Defendant even came back and wanted to firm up whether or not I would be asking for it to be consecutive. I told him I wasn't concerned about that. That's your call. I wouldn't be asking for that.
>
> The main thing I wanted was eight on the bottom and 20 years on the top. The Parole Board can deal with him in the future.

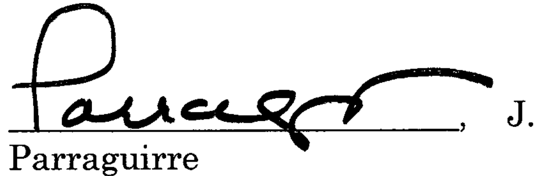
Based on the above, we conclude that the State did not violate either the specific terms or spirit of the plea bargain.

Third, Rutherford contends that his due process rights were violated by the State's failure to memorialize the plea negotiations with a written guilty plea agreement memorandum as required by NRS 174.035(7). We disagree.

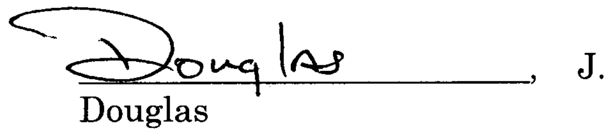
Initially, we note that Rutherford did not object below to the absence of a written guilty plea agreement memorandum. Moreover, Rutherford expressly waived the requirement prior to the entry of the plea. And finally, we note that the district court thoroughly canvassed Rutherford about the voluntariness of his plea, his understanding of the consequences of the plea, and his waiver of rights. Therefore, any violation of NRS 174.035(7) was harmless beyond a reasonable doubt. See Ochoa-Lopez v. Warden, 116 Nev. 448, 451, 997 P.2d 136, 138 (2000) (finding that under the totality of the circumstances, the failure to execute a signed guilty plea memorandum was harmless error).

Having considered Rutherford's contentions and concluded that they are without merit, we

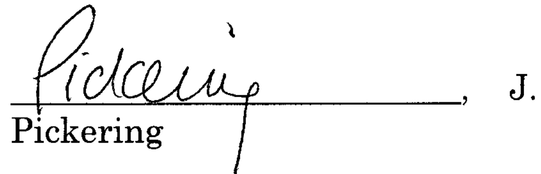
ORDER the judgment of conviction AFFIRMED.



_______________, J.
Parraguirre



_______________, J.
Douglas



_______________, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk