

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN FREDERICK SCRAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53242

FILED

DEC 03 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 attempt by a convicted sex offender to fail to register. First Judicial District Court, Carson City; James E. Wilson, Judge. The district court sentenced appellant Bryan Frederick Scram to serve a prison term of 12-48 months.

Separation of Powers

Scram contends that the district court violated the separation of powers provision in the Nevada Constitution by “ordering” the State to amend the criminal information to charge him with a felony as well as a gross misdemeanor. See Nev. Const. art. 3, § 1(1). Scram claims the district court “interfered with the prosecutor’s unfettered discretion to charge the case.” We disagree with Scram’s characterization of the events occurring below and conclude that his contention is without merit.

The State initially charged Scram by way of a criminal information with gross misdemeanor attempt by a convicted sex offender to fail to register pursuant to former NRS 179D.550(1) and NRS 193.330(1)(a)(5). At Scram’s arraignment, District Judge Maddox noted that attempting to commit a category D felony was a “wobbler” and

correctly explained that the court retained the sentencing discretion to treat the offense as either a category E felony or a gross misdemeanor regardless of the State's recommendation. At that point, the prosecutor stated, "[I]f the Court prefers an amended criminal information, we can do that." Later that same day, the State filed an amended criminal information, charging Scram pursuant to the same statutes, but noting that the offense was a "wobbler," treatable as either a category E felony or a gross misdemeanor. Scram did not object to the filing of the amended information.

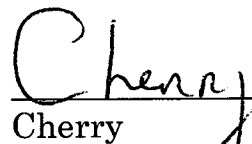
Based on the above, we conclude that the district court did not violate the separation of powers provision in the state constitution. The State offered to file an amended criminal information after the district court correctly explained its sentencing discretion and noted that it was not bound by the State's recommendation. The district court did not improperly "order" the State to amend the information. In fact, the amended criminal information merely clarified the court's sentencing discretion while charging Scram with the same offense. Accordingly, the district court did not unconstitutionally intrude on the State's prosecutorial discretion. See generally Mendoza-Lobos v. State, 125 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 49, October 29, 2009), at 7.


Breach of the Plea Agreement

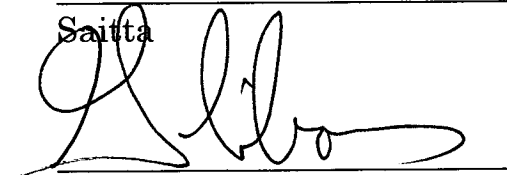
Scram contends that the prosecutor breached the plea agreement at sentencing by asking the district court to treat the offense as a felony rather than as a gross misdemeanor. Scram claims that, "[a]lthough it was not specifically stated," the prosecutor was required to argue for gross misdemeanor treatment. We disagree.

Initially, we note that Scram did not object to the prosecutor's argument at sentencing. Failure to raise an objection with the district court generally precludes appellate consideration of an issue unless appellant demonstrates plain error. See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997); Puckett v. United States, 129 S. Ct. 1423 (2009). Nevertheless, we have reviewed the record and conclude that the State did not breach the plea agreement. Notably, the written plea agreement memorandum, signed by Scram, contained a clause providing that the plea negotiations were no longer valid if Scram failed to appear at any subsequent court proceedings or committed new crimes. Scram failed to appear for his sentencing hearing and committed new crimes in California. This court has specifically held that a failure to appear clause in a written plea agreement memorandum is enforceable. See Sparks v. State, 121 Nev. 107, 113, 110 P.3d 486, 490 (2005). Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
State Public Defender/Carson City
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk