IN THE SUPREME COURT OF THE STATE OF NEVADA

REUBEN CONWAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54145

FILED

JAN 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of attempted burglary. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Reuben Conway contends that the district court erred in determining that he breached the guilty plea agreement and thus erroneously allowed the State to present argument at the sentencing hearing. We agree.

The district court erred in three respects.

First, it improperly based its determination that Conway breached the plea agreement solely on the State's representation that Conway had been arrested. See Gamble v. State, 95 Nev. 904, 908, 604 P.2d. 335, 337 (1979) (a finding that a plea bargain has been breached must be supported by adequate evidence).

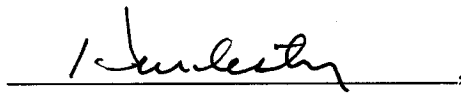
Second, the district court failed to hold a hearing to determine whether Conway committed a new crime and therefore breached the plea

agreement. See id. at 907, 604 P.2d at 337 ("[W]hen the prosecution contends that it should be released from its obligations under a plea bargain because of an alleged breach of the agreement by the defendant, an evidentiary hearing is required to determine whether the defendant actually breached the agreement.").

Third, and most critically, the district court erred by determining that Conway beached the plea agreement merely by being arrested. Conway agreed to refrain from committing a new criminal offense prior to sentencing, he did not agree not to be arrested. Thus, even if Conway's arrest had been proven by adequate evidence, that fact alone does not prove a breach of the plea agreement. See Spence v. Superintendent, Great Meadow Cor. Fac., 219 F.3d 162, 169 (2d Cir. 2000) ("Where a defendant agrees to avoid committing misconduct, it is manifestly wrong to void his side of the plea bargain based only upon the legitimacy of an arrest, absent proof that he most likely committed the act charged."); see also Neeld v. State, 977 So. 2d 740, 742-45 (Fla. Dist. Ct. App. 2008) (an affidavit of arrest does not constitute proof that a defendant committed a new offense).

Accordingly, we conclude that Conway is entitled to a new sentencing hearing, before a different district court judge, see Echeverria v. State, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003), at which the State is held to the terms of the plea agreement, unless a breach is proven after an evidentiary hearing. We therefore

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings before a different district court judge consistent with this order.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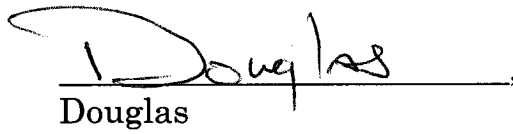
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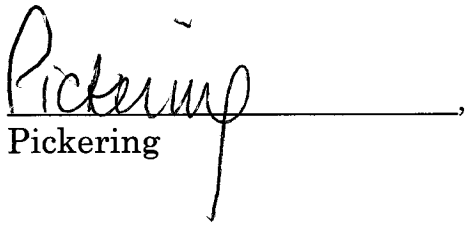
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Pickering

cc: Hon. T. Arthur Ritchie, Chief Judge
Hon. Stefany Miley, District Judge
The Almase Law Group LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk