

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE WILLIE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55553

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY J. M. P.
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of felony DUI. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Joe Willie Smith argues that the State breached the plea agreement at sentencing. We conclude that the district court erred in failing to rule on Smith's objection to the State's sentencing argument, that the ground asserted below to justify the State's failure to make the promised sentencing recommendation is invalid, and that reversal and remand for sentencing before a different district court judge is appropriate.

The written plea agreement required the State to make a sentencing recommendation of 12 to 30 months. The State's sentencing argument addressed Smith's performance in felony DUI court and his prior record, at which point Smith objected that the State was bound to make a specific recommendation and was breaching the plea agreement. The State responded by focusing on Smith's failure to successfully complete felony DUI court, suggesting that Smith's failure in this respect released the State from its promised sentencing recommendation. Smith

argued that his successful completion of felony DUI court was not a precondition to the State's promise. The court did not resolve the dispute over whether the State had breached the plea agreement, instead observing that the court would determine the sentence and was not bound by any agreement.

The district court erred in failing to determine whether the State breached the plea agreement. If the State breached the plea agreement, then under this court's decision in Echeverria v. State, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003), Smith had to be sentenced before a different judge with the State being held to specific performance. Accord Santobello v. New York, 404 U.S. 257, 262-63 (1971) (concluding that prosecutor's breach of plea agreement necessitated a remedy—either specific performance or withdrawal of the plea—despite the trial court's statements that prosecutor's recommendation did not influence sentencing decision). Thus, the district court should have determined whether the State breached the plea agreement.

The State's proffered reason for making a different sentencing recommendation was that Smith had violated the conditions of his release to felony DUI court. This is not a basis for the State to depart from its promised sentencing recommendation. This court has recognized that the State may be released from a plea agreement when the defendant has materially breached the agreement, see Villalpando v. State, 107 Nev. 465, 814 P.2d 78 (1991); Gamble v. State, 95 Nev. 904, 604 P.2d 335 (1979), and that the State may be released from a particular promise in a plea agreement when the plea agreement contains explicit language conditionally releasing the State from that promise, see Sparks v. State, 121 Nev. 107, 110 P.3d 486 (2005). Here, Smith's successful completion of

felony DUI court was not an express or implied condition of the plea agreement, and therefore, his failure to successfully complete DUI court did not amount to a breach on his part or otherwise release the State from its promised sentencing recommendation. Accordingly, Smith's failure to complete DUI court did not release the State from its promise to recommend a sentence of 12 to 30 months.

On appeal, the State offers an alternative basis to release it from its promised sentencing recommendation: Smith previously failed to appear for sentencing. The State relies on the following provision in the plea agreement: "I understand that if I fail to appear for any proceedings or commit any new crimes prior to sentencing, this plea negotiation is no longer valid." Smith clearly failed to appear for sentencing, but the consequences of that failure are not so clear. Although this court has approved of clauses that conditionally release the State from a specific promise based on a defendant's failure to appear or commission of new criminal offenses, Sparks, 121 Nev. at 112-13, 110 P.3d at 488-89, the clause at issue in this case is ambiguous. Unlike the FTA/new crimes clause in Sparks, the clause here does not provide that if the conditions are met, then the State will be free "to argue for any lawful sentence." Id. at 109, 110 P.3d at 487 (emphasis and quotation marks omitted). Instead, the plea agreement states that if the conditions are met, then the "plea negotiation is no longer valid." This could mean that if the conditions are met, then the State is free to argue while the defendant remains bound by the agreement. Alternatively, the provision could mean that if the conditions are met, then both parties are released from the agreement. Because the State did not argue below that Smith's failure to appear released it from its promise to make a particular recommendation, the

parties did not address this ambiguity in the plea agreement. That ambiguity presents questions that this court cannot resolve based on the record.

Under the circumstances, we reverse the judgment of conviction and remand for a new sentencing hearing before a different district court judge. If the State believes that Smith's failure to appear releases it from its promise to recommend a particular sentence, then it must address that issue to the district court on remand. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Hon. James E. Wilson, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk