

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID C. SCHUBERT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 61515

**FILED**

DEC 12 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of possession of a controlled substance not for sale. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant David C. Schubert contends that he was denied due process of law because the district court rejected the guilty plea agreement. Specifically, he asserts that by not following the sentencing recommendation of the parties as set forth in the plea agreement, the district court violated the spirit of the plea bargain and thereby rejected the agreement. This contention lacks merit.

First, Schubert conflates a rejection of the plea agreement—the district court’s refusal to accept a defendant’s guilty plea entered pursuant to an agreement, *see, e.g., Sparks v. State*, 104 Nev. 316, 322-24, 759 P.2d 180, 184-85 (1988)—with a rejection of the sentencing recommendation made in the plea agreement. Although the district court did not follow the parties’ sentencing recommendation, it did not reject the plea agreement; the district court accepted Schubert’s guilty plea made pursuant to the plea agreement.

Second, the language of the guilty plea agreement did not bind the court to impose the sentence recommended by the parties, nor did it

condition Schubert's plea on the district court's imposition of the recommended sentence. In fact, it specifically stated that the court was not obligated to accept the parties' sentencing recommendation.

Third, we reject Schubert's contention that the district court's acceptance of the guilty plea somehow bound it to follow the sentencing recommendation therein. Schubert's reliance on Federal Rule of Criminal Procedure 11 for the proposition that a defendant must be afforded an opportunity to withdraw his plea if the district court does not follow the sentencing recommendation is misplaced because the Federal Rules of Criminal Procedure do not apply in Nevada's state courts. See Fed. R. Crim. P. 1(a)(1). Moreover, Nevada's legislature specifically rejected this proposition by repealing the statute that allowed this procedure, see 1993 Nev. Stat., ch. 279, § 1, at 828-29, and we decline Schubert's invitation to hold that a defendant must be allowed to withdraw his plea if the district court declines to follow the parties' sentencing recommendation.<sup>1</sup>

Finally, to the extent Schubert contends that his guilty plea was not knowingly, voluntarily, and intelligently entered, we decline to address this claim on direct appeal because he did not challenge the validity of his plea in the district court and his claim of error does not clearly appear in the record. See Bryant v. State, 102 Nev. 268, 272, 721

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<sup>1</sup>We decline to address Schubert's assertion, raised for the first time in his reply brief, that he was denied due process because Judge Ellsworth "stepped into the role of a prosecutor" by examining the propriety of the guilty plea agreement, adjudicating him of a felony before listening to argument, and deviating upward from the sentencing recommendation. See Diomampo v. State, 124 Nev. 414, 427 n.25, 185 P.3d 1031, 1039 n.25 (2008).

P.2d 364, 367-68 (1986), as limited by Smith v. State, 110 Nev. 1009, 1010-11 n.1, 879 P.2d 60, 61 n.1 (1994).

Schubert also contends that the district court exhibited implied bias at sentencing. First, he points out that the court adjudicated him guilty before providing him with the opportunity to address the court, and asserts this establishes that the court did not consider his statement before sentencing him and did not consider the possibility of a stayed adjudication. Second, Schubert points to the fact that the marshal placed him in handcuffs before the court imposed a term of incarceration and alleges this action shows that the marshal knew that the court was going to impose a term of incarceration, indicating that the sentence was predetermined.<sup>2</sup> We disagree.

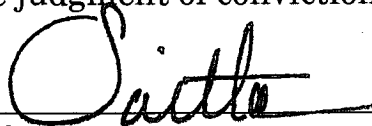
A district court's impartiality is reviewed de novo based on the uncontested facts. Ybarra v. State, 127 Nev. \_\_\_, \_\_\_, 247 P.3d 269, 272 (2011), cert. denied, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1904 (2012). A judge is presumed to be impartial and the burden rests on the challenger to demonstrate sufficient facts establishing bias. Id. The record here does not indicate that the district court "closed . . . her mind to the presentation of all the evidence," Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998), and Schubert has not demonstrated that the district court's action created the appearance of impropriety, especially in light of the

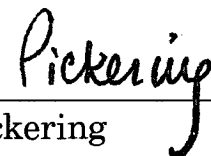
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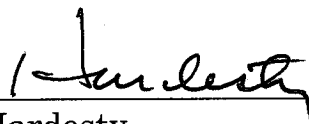
<sup>2</sup>We decline to address Schubert's contentions, raised for the first time in his reply brief, that Judge Ellsworth exhibited implied bias because the sentence imposed was disproportionate to sentences imposed on similarly situated defendants and she "stepped into the role of a prosecutor" by examining the propriety of the guilty plea negotiations and deviating upward from the sentencing recommendation. See Diomampo, 124 Nev. at 427 n.25, 185 P.3d at 1039 n.25.

presumption of impartiality, see NCJC Cannon 1.2; Ybarra, 127 Nev. at \_\_\_, 247 P.3d at 272 (discussing impartiality test); Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (“Disqualification must be based on facts, rather than mere speculation.”). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Carolyn Ellsworth, District Judge  
Louis C. Schneider, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Attorney General/Las Vegas  
Eighth District Court Clerk