

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KELSIE DENISE HOOVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72554

FILED

APR 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Kelsie Denise Hoover appeals from a judgment of conviction, entered pursuant to a guilty plea, of burglary; possession of a document or personal identity information to establish false status, membership, license, or identity; fraudulent application for driver's license; false application to obtain vehicle registration; and stolen valor. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

First, Hoover claims the district court abused its discretion at sentencing by imposing the maximum sentence and ordering the counts to run consecutive where two of the five counts were category E felonies, two of the counts were gross misdemeanors, and the fifth count was simple burglary. Hoover claims she did not have an extensive criminal record, the offenses were nonviolent and relatively victimless, the sentence is unjust, and the sentence appears to be based on the highly suspect or impalpable notion that former and current military personnel need to be protected from persons stating falsehoods about their military service.

The district court has wide discretion in its sentencing decision. *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed by the district court “[s]o long as the

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record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Hoover fails to demonstrate the district court relied on impalpable or highly suspect evidence. The Legislature has determined people should not benefit from lying about their military service or record and has made it a crime to do so. See NRS 205.412. Further, Hoover’s sentence of 86 to 216 months in prison with consecutive terms totaling 728 days in jail are within the parameters provided by the relevant statutes. See NRS 483.530(2); NRS 482.555(1)(b); NRS 205.465(4); NRS 205.412(2); NRS 205.060(2); NRS 193.130(2)(e); NRS 193.140; NRS 193.150. Finally, the district court specifically stated it was taking into consideration Hoover’s prior criminal history, the psychological examination performed on Hoover, the effect on the victims, the purposes of punishment, and rehabilitation. Therefore, we conclude the district court did not abuse its discretion at sentencing.

Second, Hoover claims the State breached the plea agreement by not affirmatively requesting the counts run concurrently as required by the plea agreement. Pursuant to the plea agreement, the State was free to argue as to count 1, burglary, and to argue the sentences imposed in this case run consecutive to Hoover’s sentences in Oregon. The plea agreement further provided “[t]he State will recommend that the sentences imposed in this case run concurrent to one another.” At sentencing, the State recommended the maximum sentence for count one, 48 to 120 months, and was silent on the remaining counts and how they should run in conjunction

to count one. Hoover did not object to the State's failure to affirmatively recommend concurrent sentences.

"When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted). "The violation of either the terms or the spirit of the agreement requires reversal." See *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). However, we review an unpreserved allegation the State breached a plea agreement for plain error. See *id.* at 387 n.3, 990 P.2d at 1260 n.3. In conducting plain error analysis, we must determine whether there was error and whether the error was plain from the record. See *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "[A]n error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (internal quotation marks omitted). "Although a defendant's failure to object does not necessarily preclude appellate review of an alleged breach of a plea agreement . . . such a failure may be considered as evidence of the defendant's understanding of the terms of the plea agreement." *Sullivan*, 115 Nev. at 387 n.3, 990 P.2d at 1260 n.3.

We conclude the State erred by failing to affirmatively recommend the sentences run concurrently. Further, we conclude this error affected Hoover's substantial rights. The State gave a very lengthy statement of the facts of this crime and other crimes allegedly committed by Hoover, used strong terms to recommend the maximum sentence on

count one, and stayed silent as to the other counts and whether they should run concurrently or consecutively. The district court sentenced Hoover to the maximum sentence on all counts and ran all counts consecutively. Given this record, we conclude the State breached the plea agreement, and this constitutes plain error warranting reversal.

Accordingly, we remand to the district court with instructions to vacate Hoover's sentence and to hold a new sentencing hearing. We further order the Washoe County District Attorney to specifically comply with the terms of the plea agreement. Based on the foregoing, we

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



Silver

C.J.



Gibbons

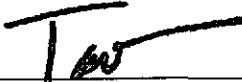
J.

TAO, J., dissenting:

Hoover never objected to the State's silence at the time, which to me suggests that she didn't think that any breach of the plea bargain took place when it happened; only when she didn't ultimately receive the sentence she wanted did she then become unhappy.

More important, she fails to demonstrate that her substantial rights were violated. The district court canvassed her during her guilty plea and accepted her plea. The terms of the plea bargain were accurately

described both in the written guilty plea agreement filed with the court, as well as in the Pre-Sentence Investigation Report submitted by the Division of Parole and Probation. There's just no evidence that the sentencing court was misled in any way regarding the terms of the agreement. Hoover therefore fails to demonstrate that the State's silence caused actual prejudice to her or created a miscarriage of justice, especially not under the deferential standard of "plain error" that adheres when no timely objection was made, and I would therefore affirm.


_____, J.
Tao

cc: Chief Judge, Second Judicial District Court
Second Judicial District Court, Dept. 7
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk