

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT MICHAEL PEARSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73504-COA

FILED

NOV 06 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT
JUDGMENT OF CONVICTION*

Robert Michael Pearson appeals from a judgment of conviction, pursuant to an *Alford* plea,¹ of attempted possession of a visual presentation depicting sexual conduct of a person under 16 years of age. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Pearson first contends the State breached the plea agreement. The State is held “to the most meticulous standards of both promise and performance in fulfillment of its part of a plea bargain.” *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999) (internal quotation marks omitted). Plea agreements are governed by contract principles tempered by concerns for due process. *State v. Second Judicial Dist. Court (Kephart)*, 134 Nev. ___, ___, 421 P.3d 803, 808 (2018). Thus where a defendant breaches a plea agreement, the breach must be “sufficiently material” to justify releasing the State from its obligations under the agreement. *Villalpando v. State*, 107 Nev. 465, 467, 814 P.2d 78, 79 (1991) (quotation marks omitted).

¹*North Carolina v. Alford*, 400 U.S. 25 (1970).

In exchange for Pearson's plea, the State agreed not to seek habitual criminal treatment and to recommend probation. However, according to the plea agreement, the State would be relieved from this obligation if "an independent magistrate, by affidavit review, confirms probable cause against [Pearson] for new criminal charges arising after" entry of his plea. After Pearson entered his plea in August 2016, he was bound over to district court for new crimes committed between June and October 2016. At Pearson's sentencing hearing in the instant case, the district court determined he had violated the plea agreement by committing new crimes between February and October 2016.²

Pearson argues there was insufficient evidence that he violated the plea agreement, the State violated the plea agreement, and the district court erred by not conducting an evidentiary hearing before concluding he had breached the plea agreement. Pearson's claims lack merit.

First, sufficient evidence supported that Pearson had breached the plea agreement. The preliminary hearing transcript in Pearson's new case supported that he committed crimes up to and in October 2016. Further, Pearson conceded at the outset of his sentencing hearing that he had been bound over to the district court for crimes committed through October 2016, and he did not question the validity of the date range. Pearson did not present any evidence—or request an evidentiary hearing to

²Because it was not clear from the record before this court what evidence the district court considered in reaching this conclusion, we remanded this appeal to the district court for the limited purpose of clarifying the record. The district court filed a response on October 23, 2018, indicating it relied on the preliminary hearing transcript in Pearson's new case. We urge both the parties and the district court to ensure all documents relied on by the district court are made a part of the trial record.

present evidence—to show the acts occurred only prior to the entry of his August 2016 *Alford* plea. Because Pearson was bound over for crimes committed through October 2016, a magistrate had necessarily found there was probable cause to believe he had committed crimes through October 2016, well after Pearson entered his guilty plea in this case. Thus sufficient evidence supported that Pearson breached the plea agreement.

Second, the record supports the district court's conclusion that the breach was sufficiently material to release the State from its promises. In addition to the facts above, Pearson had been warned at least twice during his plea hearing that his sentence would depend upon his behavior between the plea and sentencing. This, coupled with the terms of his plea agreement, indicates that Pearson's breach was sufficiently material. We therefore conclude the district court did not err by concluding the State was released from its obligations under the plea agreement.

Third, Pearson has not demonstrated an evidentiary hearing was necessary. Although the State filed a presentence notice of its intent to seek habitual criminal treatment on the ground that Pearson had violated his plea agreement, and it reiterated this position at the outset of Pearson's sentencing hearing, Pearson never requested an evidentiary hearing or attempted to introduce evidence to dispute that he was in fact in breach of the agreement. And as discussed above, it is clear Pearson breached the plea agreement. In light of this, Pearson has failed to demonstrate the district court abused its discretion by failing to conduct an evidentiary hearing.³ See *Villalpando*, 107 Nev. at 467-68, 814 P.2d at 80

³Although we conclude the district court did not abuse its discretion in this instance, we caution that in the future, courts should make more explicit factual findings regarding when new crimes were committed where,

(holding an evidentiary hearing is unnecessary where it is obvious who is to blame for the breach).

Pearson next contends terms of the plea agreement violated his due-process rights. Pearson's claim lacks merit. "[T]he proper time for [a defendant] to object to a particular term in the written plea agreement [is] prior to signing the agreement and entering his guilty plea in the district court." *Sparks v. State*, 121 Nev. 107, 112, 110 P.3d 486, 489 (2005). Further, insofar as Pearson claims a plea agreement that provides for a violation based on unproven allegations is unconstitutional, he agreed to this term and cannot now seek relief by claiming it violated his rights. See *id.* ("[A] defendant is entitled to enter into a plea agreement affecting fundamental rights."). And insofar as he claims a plea agreement that provides for a violation based on conduct that occurred before he entered his plea is unconstitutional,⁴ the Nevada Supreme Court has declined to condemn such provisions. See *Citti v. State*, 107 Nev. 89, 92, 807 P.2d 724, 726 (1991). We therefore conclude Pearson has failed to demonstrate he is entitled to relief on this claim.

Pearson next contends the district court improperly sentenced him as a habitual criminal because the documents noticing him of the State's intent to seek such treatment all reference NRS 207.010(1)(b) (providing a sentencing enhancement where a defendant has three or more prior felony convictions) but Pearson, who had only two prior felony

as here, a defendant is alleged to have committed new crimes over a period of time that both predates and postdates the plea agreement.

⁴As discussed above, Pearson's newer criminal activity was not limited to actions occurring exclusively before he entered his *Alford* plea in the instant case.

convictions, only met the requirements for NRS 207.010(1)(a). Pearson's claim lacks merit. The purpose of the notice requirement is simply to ensure the defendant knows the State is seeking habitual criminal adjudication, *LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014), and to advise the defendant of the prior convictions on which the State intends to rest its argument, see NRS 207.016(2). This was satisfied in Pearson's case by the amended information, which alleged a count for habitual-criminal enhancement and included the two prior felony convictions. Nothing in NRS 207.010 binds the State or the court to the level of habitual-criminal treatment indicated in the notice document. We therefore conclude the district court did not abuse its discretion by sentencing Pearson under the habitual-criminal provisions of NRS 207.010(1)(a). See *LaChance*, 130 Nev. at 276, 321 P.3d at 929 ("Adjudication of a defendant as a habitual criminal is subject to the broadest kind of judicial discretion." (internal quotation marks omitted)).


Pearson also appears to challenge the validity of his judgment of conviction because it states the district court found he had been convicted of four prior felonies and adjudicated him "a habitual criminal pursuant to NRS 207.010(1)(b)." These are clearly typographical errors. The record demonstrates the State only presented proof of two prior felony convictions. Further, the judgment of conviction goes on to state that Pearson had two prior felony convictions, and it reflects a sentence of 5 to 20 years, which is in accord with NRS 207.010(1)(a) but not with NRS 207.010(1)(b). Thus, after issuance of the remittitur in this appeal, the district court shall enter a corrected judgment of conviction that accurately indicates the number of prior felony convictions and the subsection under which Pearson was


adjudicated a habitual criminal. See NRS 176.565; *Buffington v. State*, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994).


Finally, Pearson contends the district court erred by quashing his petition for a writ of habeas corpus. As Pearson did not reserve in his plea agreement the right to challenge the district court's ruling, see NRS 174.035(3), he waived any challenge to that ruling, because it arose prior to the entry of his *Alford* plea. See *Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). We therefore decline to reach the merits of this claim.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kimberly A. Wanker, District Judge
Harry R. Gensler
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk