

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY ALLEN TRAKAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74652-COA

FILED

DEC 04 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Terry Allen Trakas appeals from a judgment of conviction entered pursuant to a guilty plea of attempted sexual assault. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

First, Trakas argues the State violated the guilty plea agreement when the victim requested the district court to impose the maximum possible sentence during her victim impact testimony. Trakas contends the parties agreed to jointly recommend that Trakas receive probation, that portion of the agreement was made in consultation with the victim, and her victim impact testimony violated the agreement.

“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). “A plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea.” *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). We review an unpreserved allegation

that 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. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Our review of the record reveals Trakas failed to demonstrate plain error because he did not show either the terms or the spirit of the agreement was violated. In the written plea agreement, the parties agreed to jointly recommend Trakas be placed on probation with a condition that he serve 120 days in the Humboldt County Detention Center. The agreement also stated "The State explicitly reserves the right to present facts and/or argument through witnesses and/or victims at the time of sentencing. Furthermore, the State retains the right to comment on the Defendant's crimes and/or present evidence in any form." In both the written plea agreement and at the plea canvass, Trakas acknowledged that he had not been promised any particular sentence and the district court had the discretion to impose his ultimate sentence within the limits of the pertinent statutes.

During the sentencing hearing, Trakas' counsel urged the district court to follow the recommended sentence and informed the district court that the plea agreement was fashioned between the defense, the State, and a representative of the victim. The State also requested the district court to impose the recommended sentence. The victim then provided impact testimony pursuant to NRS 176.015(3), and Trakas acknowledged in the written plea agreement he understood the victim could testify at the sentencing hearing. Given our review of the record, we conclude Trakas

failed to demonstrate he suffered from a breach of the plea agreement. Therefore, we conclude Trakas failed to demonstrate plain error in this regard.


To the extent Trakas also argues the district court abused its discretion when imposing sentence due to the victim impact testimony, we conclude this claim lacks merit. We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). We will not interfere with the sentence imposed by the district court "[s]o long as the 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).

The district court stated it had listened intently to the arguments of the parties and the testimony presented at the sentencing hearing, and had reviewed all of the documentary evidence submitted at the sentencing hearing. The district court explained that going into the victim's home and having sexual intercourse with her while she was asleep is not acceptable behavior. The district court then imposed a sentence of 60 to 150 months in prison, which was within the parameters of the relevant statutes. *See* 193.330(1)(a)(1); NRS 200.366(2). The decision to decline to place Trakas on probation was within the discretion of the district court. *See* NRS 176A.100(1)(c); NRS 176A.110(1). Trakas fails to demonstrate the district court relied upon impalpable or highly suspect evidence when imposing sentence. *See Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("The district court is capable of listening to the victim's feelings without being

subjected to an overwhelming influence by the victim in making its sentencing decision"). Based on the record before this court, we conclude the district court did not abuse its discretion when imposing sentence. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Montero, District Judge
Richard F. Cornell
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk