

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL THOMAS BERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80523-COA

FILED

SEP 16 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

MICHAEL THOMAS BERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80524-COA

BY *S. Young*
DEPUTY CLERK

MICHAEL THOMAS BERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80525-COA

*ORDER AFFIRMING 80524-COA AND 80525-COA, VACATING AND
REMANDING 80523-COA*

Michael Thomas Berry appeals three separate judgments of conviction pursuant to three separate plea agreements with the State of Nevada. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

The State charged Berry in three separate cases: CR19-2420 (uttering a forged instrument), CR19-2421 (burglary), and CR19-2422 (burglary). Berry entered into separate guilty plea agreements for each of these cases. For CR19-2420, Berry agreed to plead guilty in exchange for the State recommending "that the sentence in [CR19-2420] run concurrently with the sentence in CR18-1945[,] but the State [is] otherwise free to argue for an appropriate sentence." Berry was on probation in CR18-

1945, a fourth case, awaiting a probation revocation hearing scheduled on the same date as the sentencing for the three other cases.

At the joint sentencing and probation revocation hearing, the State argued that the court should revoke Berry's probation and run the sentence in each case consecutively, despite the contrary term in the plea agreement in case CR19-2420. Berry did not object to the State's breach of the plea agreement, and the district court made no record of the breach. The district court sentenced Berry to 12 to 36 months for each of the three counts and revoked Berry's probation in the fourth case. Consistent with the State's argument, the court ran all sentences consecutively, for an aggregate sentence of 60 to 168 months.

On appeal, Berry argues that the State's violation of the plea agreement in CR19-2420 requires reversal and remand for new sentencing. He also argues that all three sentences should be reversed because the State breached the plea agreements in all three cases by arguing for consecutive sentences in each case. But there was no language in any of the plea agreements prohibiting the State from arguing for consecutive sentences except in CR19-2420, which required the State to recommend that the sentence run concurrent to CR18-1945. In both of the other cases, the State was free to argue for consecutive sentences. Thus, the State did not breach the plea agreements in these two cases, and we affirm the sentences imposed for CR19-2421 and CR19-2422.

In C19-2420, however, the State concedes that it breached the plea agreement, but argues for overruling the Nevada Supreme Court's decision in *Echeverria v. State*¹ and adopting the plain error standard set forth in

¹119 Nev. 41, 63 P.3d 743 (2003).

Puckett v. United States.² We decline to do so because we are bound by Nevada Supreme Court precedent.³

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” NRS 178.602. This court has discretion to correct a forfeited error; it may correct the error when it is “plain,” meaning that it is clear under current law from a casual inspection of the record, and . . . the error affected the defendant’s substantial rights.” *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). This court normally does not consider a forfeited error for plain error review unless plain error is argued on appeal. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (“[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.”). This court, however, may address plain error issues of a constitutional dimension *sua sponte* where, as here, a defendant fails to object to the State’s breach of the plea agreement. *See Sullivan v. State*, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999) (holding that violation of a plea bargain affects a substantial right in due process under the Fourteenth Amendment).

Because violation of a plea agreement implicates due process, *id.*, reversal is required when the State violates the terms of a plea

²556 U.S. 129, 140-43 (2009) (applying plain error review to a forfeited error arising out of the government’s breach of a plea agreement).

³We are bound by the Nevada Supreme Court and may not overrule *Echeverria*. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting that stare decisis “applies *a fortiori* to enjoin lower courts to follow the decision of a higher court”); *People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App. 2007) (“The Court of Appeal must follow, and has no authority to overrule, the decisions of the [California Supreme Court].” (alterations in original) (quotation marks omitted)).

agreement, *Echeverria*, 119 Nev. at 44, 62 P.3d at 745. Harmless error does not apply to the State's breach of a guilty plea agreement. *Id.* "[S]pecific performance of the agreement [is] the proper remedy" for the State's violation of the terms of the plea agreement. *Id.* Regardless of whether the sentencing court relies on the State's arguments in violation of the plea agreement, vacating the sentence and remanding for a new sentencing hearing with a different judge is automatically required. *Id.*

Here, the explicit terms of the plea agreement obligated the State to recommend that the sentence in CR19-2420 run concurrent to the sentence in CR18-1945, but it argued for a consecutive sentence at the hearing. Thus, the State breached the terms of CR19-2420's plea agreement. Although the sentencing judge was free to impose the sentence it did, and it did not explicitly rely on the State's arguments, the State's violation of the plea agreement requires reversal. *See Echeverria*, 119 Nev. at 43-44, 62 P.3d at 745. Accordingly, because this court is bound to follow *Echeverria*, and the State concededly breached the explicit terms of the CR19-2420 plea agreement, we

AFFIRM the judgments of conviction in cases 80524-COA (CR19-2421) and 80525-COA (CR19-2422), and VACATE the sentence AND REMAND in case 80523-COA (CR19-2420) to the district court for sentencing before a different judge.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Chief Judge, Second Judicial District Court
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk