IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN HENRY MARKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40368

FILED

AUG 13 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of causing substantial bodily harm to another while driving a vehicle under the influence of alcohol.[1] The district court sentenced appellant John Henry Marks to serve a prison term of 4 to 15 years.

Marks contends that the district court erred in imposing a sentence of 4 to 15 years because, at the plea canvass, the district court had twice promised Marks that "the worst sentence he could receive was 2 to 20 years in the Nevada State Prison." Rather than seek to withdraw his guilty plea, Marks asserts that this court should order the district court to specifically perform the promise it allegedly made at the plea canvass and reduce the minimum prison term Marks must serve to 2 years.[2] We disagree.

---

[1]The criminal charges arose when Marks, who had a blood alcohol level of approximately .16, ran a red light and hit a car injuring three people. Marks had three prior convictions before 1991 for driving while under the influence of alcohol.

[2]We note that Marks actually received a 15-year maximum prison term instead of the 20-year prison term allegedly promised by the district

continued on next page . . .

A guilty plea is unknowing and involuntary when the district court misinforms the defendant about the possible sentence at the time he enters his plea.[3] Where a plea is found to be invalid due to a breach of a promise, the usual remedies are to: (1) allow the defendant to withdraw the plea and proceed to trial on the original charges, or (2) specifically enforce the promise.[4] "Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances."[5]

We conclude that the remedy of specific performance is inappropriate. First, the record does not support a conclusion that the parties to the plea agreement bargained for a minimum prison term of 2 years. To the contrary, the State promised, in the plea agreement and at the plea canvass, that it would not argue for a minimum prison term of more than 4 years. Although Marks contends that he relied on the district court's alleged promise of a 2-year minimum prison term made at the plea canvass, neither Marks nor his defense counsel set forth that understanding on the record at the plea canvass, or objected when the

---

. . . *continued*
court. Marks claims, however, "there is no reason for the maximum sentence to be changed since he was aware at the entry of his guilty plea that [the maximum sentence] could be that high."

[3]Sierra v. State, 100 Nev. 614, 691 P.2d 431 (1984); Taylor v. Warden, 96 Nev. 272, 607 P.2d 587 (1980).

[4]See Van Buskirk v. State, 102 Nev. 241, 720 P.2d 1215 (1986).

[5]Id. at 244, 720 P.2d at 1216-17 (quoting People v. Mancheno, 654 P.2d 211, 215 (Cal. 1982)).

district court imposed a 4-year minimum prison term at the sentencing hearing.

Moreover, we conclude that specific performance is inappropriate because ordering the district court to reduce the sentence it imposed would interfere with the sentencing discretion afforded to the district court and bind it to a result that it expressly deemed unsuitable under the circumstances.[6] At the sentencing hearing, the district court stated that it was "surprised by the generosity of" the sentencing recommendation of 4 to 10 years in light of Marks' prior criminal history, which included 25 previous criminal charges, 7 of which were felonies. The district court noted that Marks was in prison "almost continuously from 1952 until 1991"[7] and that based on his criminal history and the "horrific nature" of the crime, the district court had decided to impose a term greater than that recommended by the State and the Division of Parole and Probation. In light of the district court's belief that Marks deserved a harsh sentence, we conclude that ordering the district court to reduce Marks' minimum term would improperly impinge upon the district court's sentencing discretion.

---

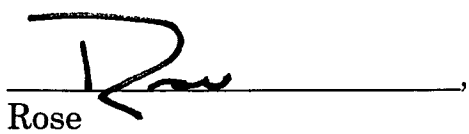
[6]See id.; see also Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.").

[7]As a mitigating factor, the district court noted that, in 1991, Marks "met a good woman" and stopped his criminal activity. Marks was apparently committed to his sobriety for approximately 10 years, until the day of the accident when Marks drank alcohol with a friend.

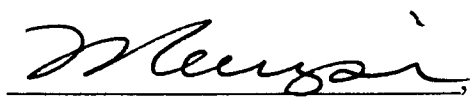
We note, however, that we agree with Marks that the district court's advisement that the "worst sentence" Marks could receive was 2 to 20 years is ambiguous in that the district court failed to explain that was the sentencing range for the offense, not the actual sentence Marks would receive. Likewise, the plea agreement was somewhat equivocal, stating: "I understand that I must be imprisoned for a period of two to twenty years in the Nevada State prison." We further note that Marks has not argued that he should be permitted to withdraw his plea based on an allegation that he was misinformed about the range of punishment. Such a claim should be raised in a post-conviction proceeding in the district court in the first instance.[8]

Having considered Marks' contention and concluded that he is not to entitled to the relief requested, we

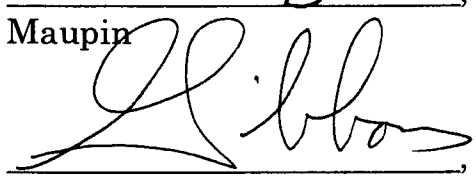
ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

---

[8]See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk