

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY USHER,
Appellant
vs.
THE STATE OF NEVADA,
Respondent

No. 41142

FILED

SEP 04 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of causing substantial bodily harm to another while driving a vehicle under the influence of alcohol. The district court sentenced appellant to a prison term of 8 to 20 years for each count, to run concurrently. The district court further ordered appellant to pay restitution in the amount of \$468,525.00.

Appellant contends that the district court erred in imposing a minimum sentence of 8 years because, at the plea canvass, the district court informed appellant that he "must be imprisoned for a period of 2 to 20 years in the Nevada State Prison." Appellant argues 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 must serve to 2 years. We disagree.

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.¹ Where a plea is found to be invalid due to a breach of a

¹Sierra v. State, 100 Nev. 614, 691 P.2d 431 (1984); Taylor v. Warden, 96 Nev. 272, 607 P.2d 587 (1980), overruled on other grounds by David v. Warden, 99 Nev. 799, 671 P.2d 634 (1983).

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.² "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."³

We conclude that the remedy of specific performance is not warranted in this case. First, the record does not support a conclusion that the parties to the plea agreement bargained for a minimum prison term of 2 years. In fact, the agreement specifically provided that the State was free to argue for an appropriate sentence. Although appellant argues that he relied on the district court's alleged promise of a 2-year minimum prison term made at the plea canvass, neither appellant nor his defense counsel set forth that understanding on the record at the plea canvass, or objected when the district court imposed an 8-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.⁴ We conclude that ordering the district court to

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

³Id. at 244, 720 P.2d at 1216-17 (quoting People v. Mancheno, 654 P.2d 211, 215 (Cal. 1982)).


⁴See 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

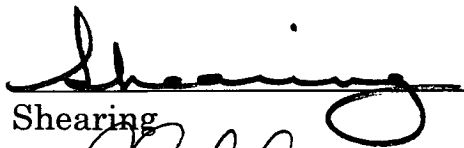
continued on next page . . .

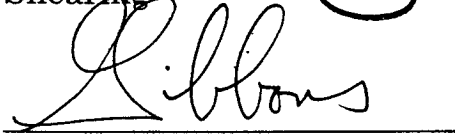
reduce appellant's minimum term would improperly impinge upon the district court's sentencing discretion.

Having considered appellant's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

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

... continued

consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.").