STATE V. GUTIERREZ

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
DON GUTIERREZ,
Defendant-Appellee.

NO. 33,019

COURT OF APPEALS OF NEW MEXICO

December 16, 2015

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Mark A. Macaron, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, M. Victoria Wilson, Assistant Attorney General, Albuquerque, NM, for Appellant

Jorge A. Alvarado, Chief Public Defender, David Henderson, Assistant Appellate Defender, Santa Fe, NM, Sergio Viscoli, Appellate Defender, Albuquerque, NM, for Appellee

JUDGES

RODERICK T. KENNEDY, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, M. MONICA ZAMORA, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Judge.

{1} The State appeals the district court's order running a habitual offender enhancement concurrently when the underlying offense was set to run consecutively. The State asserts that the plea agreement, in conjunction with the discussion during the change of plea hearing, divested the district court of any discretion in sentencing Defendant. We disagree. Where the plea agreement was silent as to whether Defendant's habitual offender enhancements were to run concurrent or consecutive, the district court had discretion to enter its order. We therefore hold that the district court's exercise of discretion did not run afoul of the provisions of the plea agreement as written. We affirm the district court's order running one of the enhancements concurrently.

I. BACKGROUND

{2} In 2010, Defendant was indicted on nine counts in case number CR-2010-02352. Defendant signed a plea agreement in that case, and the district court sentenced him pursuant to that agreement. Defendant violated his probation, and the district court sentenced him again, running one of three enhancements concurrent and the other two consecutive. The State disagreed with the sentence imposed and appeals the district court's post-probation violation sentence. We explain each of these steps below.

A. Original 2010 Plea Agreement and Probation

1. 2010 Plea Agreement

{3} In the original plea agreement with which we are concerned, Defendant admitted to three counts: two counts of residential burglary (counts one and two) and one count of conspiracy to commit residential burglary (count six). He also admitted to having been convicted in four prior cases.[1]

{4} Per the terms of the plea agreement, Defendant was to serve counts one, two, and six consecutive to one another, resulting in a seven and one-half-year sentence to be run consecutively to the sentence in a prior case for which Defendant had seven years' incarceration remaining. Upon completion of his sentence, Defendant was required to serve five years of supervised probation upon his release. In exchange, the State agreed to forego pursuit of any habitual offender enhancements for each of the three counts and to fully suspend Defendant's sentence for counts one, two, and six.[2] This forbearance applied only to the initial sentencing. No terms indicate that consecutive habitual offender enhancements were to be a definite consequence of any violations of the terms of Defendant's sentence.

{5} The plea agreement provided, "The Defendant's sentence can be enhanced by twenty-four . . . additional years of incarceration for being a habitual offender if he violates probation or parole in the future." The agreement includes a section entitled "habitual offender proceedings" that explains if Defendant violates the law, his probation, or his parole, he "will be subject to additional habitual offender proceedings"

based on four prior convictions,[3] and the State "may bring additional habitual offender proceedings."

B. 2010 Plea Hearing

{6} The district court held a change of plea hearing at which it accepted Defendant's guilty plea pursuant to the plea agreement. Throughout this hearing, there was a large amount of discussion regarding the time Defendant would potentially serve if he were to violate his probation. The language used to describe the potential enhancement time varies greatly, as does the parties' explanation of how the time would be served. Defense counsel acknowledged that the State wanted to run the three counts consecutive, but suggested that the court had discretion in sentencing. On the other hand, the State described the enhancement period as "stacked time," at a minimum. Neither party directly answered the district court's questions as to whether the court had sentencing discretion following a probation violation and whether the enhancements must be consecutive. The district court ultimately accepted Defendant's guilty plea and admissions of guilt.

{7} The district court entered a fully suspended sentence of seven and one-half years to run consecutive to the sentence imposed in a prior case. In total, all but seven years of incarceration were suspended. The district court also sentenced Defendant to two years on parole post-release, to be run consecutive with five years of supervised probation. No habitual offender enhancements were imposed.

3. Probation Violation

{8} Following his release from the Department of Corrections, Defendant was placed on probation. Defendant violated probation by failing to report to his probation officer and being arrested on new charges. As a result, the State filed a motion to revoke Defendant's probation as well as a supplemental information requesting that Defendant's sentence be enhanced pursuant to the plea agreement.

{9} The district court held a probation violation hearing,[4] during which Defendant admitted to violating his probation by failing to report. Defendant apparently entered his admission based on the belief that defense counsel was in the process of working toward a plea agreement with the State in exchange for his admission.[5] The district court acknowledged that a subsequent agreement as to sentencing would supersede the thirty-one-and-a-half year exposure delineated in the 2010 plea agreement. Defense counsel—a different attorney from the 2010 change of plea hearing—stated his belief that it was appropriate for his client to admit to violating probation. The district court accepted Defendant's admission, and set sentencing for a later date.

B. Sentencing on Probation Violation

{10} During the sentencing hearing, defense counsel—now the third attorney to represent Defendant in this case—suggested that the district court had discretion

pursuant to *State v. Triggs*, 2012-NMCA-068, 281 P.3d 1256, to run the habitual offender enhancements listed in the plea agreement concurrently. The State argued that because the underlying offenses were to run consecutively, the district court did not have the discretion to make the habitual offender enhancements run concurrently. The State also argued that Defendant's conduct, particularly his recidivism, did not entitle him to any leniency. Although the district court acknowledged that during the change of plea hearing, the parties seemed to have contemplated the enhancements running consecutively, it also pointed out that the language of the plea agreement does not preclude a sentencing court from giving a reduced enhancement, from running the enhancements concurrently, or from exercising its discretion. The district court therefore concluded that, in light of the discrepancies between the hearing transcript and the plea agreement, it had discretion to run the enhancements concurrently.

{11} Pursuant to this conclusion, the district court sentenced Defendant to a total of twenty years of imprisonment, rather than the thirty-one-year total that the State requested.[6] There was to be no probation to follow the twenty-year incarceration, but Defendant was required to serve a mandatory period of parole, the length of which was to be determined upon his release from the Department of Corrections. The State appealed the district court's order.

II. DISCUSSION

{12} The State asks us to decide that the district court had no discretion to run the habitual offender enhancement for count six concurrent with the enhancement for count two. We review the district court's sentencing determination for an abuse of discretion. *See, e.g.*, *State v. Bonilla*, 2000-NMSC-037, ¶ 6, 130 N.M. 1, 15 P.3d 491 (stating that the district court's sentencing is reviewed for an abuse of discretion); *see also State v. King*, 2007-NMCA-130, ¶ 4, 142 N.M. 699, 168 P.3d 1123 ("Generally, we review a [district] court's sentencing determination for abuse of discretion. However, we review de novo any question regarding the legality of the sentence." (citation omitted)). District courts have discretion in imposing sentences. *See, e.g.*, *Triggs*, 2012-NMCA-068; *State v. Rapchack*, 2011-NMCA-116, ¶ 17, 150 N.M. 716, 265 P.3d 1289 (acknowledging that original judgment does not bind a judge who revokes parole); *see also State v. Miller*, 2013-NMSC-048, ¶ 11, 314 P.3d 655 (acknowledging that the Legislature has "granted courts broad discretion over certain sentencing elements" and noting that "whether multiple sentences for multiple offenses run concurrently or consecutively is a matter resting in the sound discretion of the [district] court" (internal quotation marks and citation omitted)).

A. Sentencing Court May Exercise Discretion in Sentencing

{13} Although many cases acknowledge that district courts have discretion, our decision in *Triggs* is the most analogous to this case. In *Triggs*, the district court concluded that it had no discretion to order the habitual offender enhancements be served concurrently because the underlying convictions were consecutive. 2012-NMCA-068, ¶¶ 16, 23. On appeal, we looked to the principle enunciated in *Rapchack*, 2011-

NMCA-116, ¶ 17, that "the original judgment does not bind the judge who revokes parole." *Triggs*, 2012-NMCA-068, ¶ 17. We noted that the defendant's sentence was dictated entirely by the plea agreement, and we emphasized that the agreement was drafted specifically for the defendant and was not boilerplate. *Id.* ¶ 18. Using the plea agreement as a guide, we reasoned that nothing in the plea agreement required the district court to run the enhancements consecutively, even though it could have included such a requirement. *Id.* We concluded that an automatic twenty-eight-year enhancement to nonviolent property crimes, triggered by nonviolent technical violations of parole terms was "beyond the contemplation of the parties and the original sentencing court[.]" *Id.* ¶¶ 16, 19.

{14} In addition to the language of the plea agreement, we looked to other relevant case law and statutes to guide our analysis of whether the district court had sentencing discretion. We noted generally that deciding "whether multiple sentences for multiple offenses run concurrently or consecutively is a matter resting in the sound discretion of the [district] court." *Id.* ¶ 20 (alteration, internal quotation marks, and citation omitted). Looking to the habitual offenders statute for guidance, we noted that the Legislature expressly granted district courts discretion in enforcing enhancements based on one prior felony and remained silent regarding discretion for more than one prior felony. *Id.* ¶ 21. We declined to interpret the Legislature's silence as an attempt to limit discretion. *Id.* ¶ 22. Noting that nothing in the plea agreement, case law, or statute prevented the district court from exercising its discretion, *id.* ¶ 23, we concluded that the district court was incorrect in concluding that it had no sentencing discretion. *Id.*

{15} Our courts have long acknowledged the district courts' broad discretion in sentencing matters. The New Mexico Supreme Court has acknowledged that the Legislature has "granted courts broad discretion over certain sentencing elements[,]" *Miller*, 2013-NMSC-048, ¶ 11, and that "whether multiple sentences for multiple offenses run concurrently or consecutively is a matter resting in the sound discretion of the [district] court." *State v. Allen*, 2000-NMSC-002, ¶ 91, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted). We have applied that principle in *Rapchack*, 2011-NMCA-116, ¶ 17 (acknowledging that the original judgment does not bind a judge who revokes parole) and *State v. Mayberry*, 1982-NMCA-061, ¶ 15, 97 N.M. 760, 643 P.2d 629 (acknowledging the district court's discretion to run sentences consecutively, but stating that if it does not exercise this discretion, the common law rule required sentences to be served concurrently).

{16} Defendant correctly asserts that we should follow *Triggs* by pointing out that the plea agreement in this case, like the one in *Triggs*, contains nothing prohibiting the district court from exercising discretion and is silent as to whether the enhancements were to run consecutive or concurrent.

B. THE DISTRICT COURT PROPERLY EXERCISED DISCRETION

{17} Plea agreements must be in writing. Rule 5-304(B) NMRA. This is to "ensure that prosecutorial promises are kept, that the plea agreement accurately reflects the bargain

struck between the prosecutor and the defendant, and that a defendant is adequately informed of the consequences of the plea, and that the plea agreement is not secretive." *State v. Jonathan B.*, 1998-NMSC-003, ¶ 11, 124 N.M. 620, 954 P.2d 52. The State's position on appeal is that the written agreement was adequate to accomplish these purposes. The State additionally argues that even if the writing was inadequate to accomplish all these purposes, the change of plea hearing adequately supplemented the written agreement so as to clarify any ambiguities regarding whether the enhancements were to run consecutive. *See State v. Mares*, 1994-NMSC-123, ¶ 12, 119 N.M. 48, 888 P.2d 930 (concluding that the district court may resolve ambiguities in a plea agreement through subsequent discussions with the parties). That assertion is not supported by the facts in this case. The State cannot reap a result that would flow from explicitly making the enhancements consecutive in the written agreement when the term was not actually reduced to writing.

1. The Language Contained in the Written Plea Agreement Did Not Limit Sentencing Discretion

{18} Our Supreme Court has explicitly stated that plea agreements require the use of clear, unambiguous language:

> [I]t is vital that the language in a plea agreement unambiguously explain which sentencing element has been bargained-for in order to avoid any misunderstandings between the parties or between the parties and the court over whether a term applies to the sentence to be ordered, the term of years that must be suspended, the initial period of incarceration, or the maximum period of incarceration.

Miller, 2013-NMSC-048, ¶ 13. The plea agreement that Defendant signed contains hand-written alterations accompanied by the initials of defense counsel and the State. The district court questioned the parties regarding whether the enhancements were to run concurrent or consecutive in the event of a probation violation. As such, the State was alerted to the deficiencies in the language of the plea agreement in that regard. It is clear from the record, and the hand-written alterations to dates and sentences contained therein, that the parties were amenable to making agreed-upon changes to the written plea agreement. Perhaps, as the State suggests, and indeed the transcript seems to indicate, the parties agreed that the enhancements were intended to run consecutive. If so, that term should have been contained in the written agreement. It was not.

{19} The language of the written plea agreement gave the district court the ability to enhance Defendant's sentence, but did not bind it to a particular manner of doing so. Although the agreement states that "Defendant's sentence can be enhanced by twenty-four . . . additional years of incarceration[,]" nothing in the written agreement indicates whether twenty-four years is a minimum or maximum amount of enhancement time. Additionally, the plea's language indicating that the sentence "can" be enhanced could confer discretion on either the State to pursue the enhancements, or the district court to

impose the enhancements. While the plea agreement confers the ability to impose an enhancement, it is silent as to whether the district court was to run Defendant's three habitual offender enhancements consecutive or concurrent. In light of the agreement's silence regarding a key issue, and its unclear language regarding imposition of the enhancement, the plea agreement, when read in isolation, was ambiguous. *See Levenson v. Mobley*, 1987-NMSC-102, ¶ 7, 106 N.M. 399, 744 P.2d 174 (stating the rule that a contract is deemed ambiguous if it is reasonably and fairly susceptible to more than one interpretation).

2. The District Court Did Not Clarify the Plea's Ambiguity

{20} The State suggests that any apparent ambiguity that existed in the plea agreement was removed by the district court's inquiry and clarification during the change of plea hearing. We find no such support in the record.

{21} In its effort to prove that the district court exercised sentencing discretion where it had none, the State asserts that *Mares* stands for the proposition that a district court "must enforce the provisions of a plea agreement to which the parties agreed, including a provision limiting the [district] court's sentencing discretion." Ignoring whether this is a correct interpretation of *Mares*, we point out that no such provision existed in this case to limit the court's discretion. The written plea agreement was silent regarding whether the enhancements were to run concurrent or consecutive in the event that Defendant violated probation, and it did not explicitly limit sentencing discretion. The discussion during the change of plea hearing, despite being centered on that issue, provided no clear limitation to the district court's discretion. In fact, the district court's attempt to narrow the discussion to address whether any of the sentence could be run consecutive was unavailing. The silence of the written agreement, coupled with the parties' failure to expressly articulate any limitation of discretion, render the district court's actions as a proper exercise of sentencing discretion. Because an "abuse of discretion will not be presumed; it must be affirmatively established[,]" *Bonilla*, 2000-NMSC-037, ¶ 6, and the State has failed to meet this burden.

{22} In *Triggs*, we pointed to authorities that gave district courts discretion in sentencing matters, and emphasized the lack of authorities limiting that discretion. Although the State draws distinctions between this case and *Triggs*, it does not provide any citations to authorities in which the district court has no sentencing discretion where the terms of a plea provide no such limitation. We therefore conclude that the State has failed to meet its burden of proving the district court had no discretion to run Defendant's enhancement for count six concurrent to the count two enhancement.

III. CONCLUSION

{23} To allow an indefinite oral discussion during a change of plea hearing to append the written plea agreement, and to then allow the supplemental term to govern over the express language of the written agreement would create an unsound precedent.

Because the district court had discretion to enter its order running one of the enhancements concurrently, we affirm the district court's order.

{24} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

M. MONICA ZAMORA, Judge

1These case numbers include: CR-1997-03927, CR-2000-01679, CR-2000-01680, CR-2007-04955.

2Defendant's fully suspended seven and one-half-year sentence was to be served consecutive to the sentence imposed in case number CR-2007-04955. Defendant had seven years of incarceration remaining from that case.

3These prior convictions were listed in the plea agreement's "admission of identity" section, and include CR-1997-03927, CR-2000-01679, CR-2000-01680, and CR-2007-04955.

4This hearing was before a different, pro tem, judge of the Second Judicial District.

5The State confirmed that it was working on a deal with defense counsel, and eluded to the possibility of giving Defendant a twenty-year sentence if Defendant would undergo drug treatment.

6We note that the twenty-year sentence imposed is the same length as the sentence contemplated by the State in exchange for Defendant's admission at the probation violation hearing.