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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45759**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-1623**
	)	
COLTYNE DANIELS CONLEY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Coltyne Daniels Conley appeals from the judgment of conviction entered upon his guilty plea to aggravated assault. Specifically, Conley contends that the state violated his due process rights by making a sentencing argument which impliedly disavowed the recommendation it was bound to present pursuant to the plea agreement. Conley also contends that the district court abused its sentencing discretion. A review of the record reveals that the state did not breach the plea agreement and that the district court acted well within its sentencing discretion.

Statement of Facts and Course of Proceedings

After midnight on January 8, 2017, B.H. went to Conley's residence in Boise. (PSI, p.3.[1]) Conley and the two other individuals who lived at the residence were friends with B.H. (Id.) B.H. woke Conley up and the two talked and smoked a cigarette together in the garage. (Id.) Both Conley and B.H. were intoxicated. (Id.) At some point, B.H. went to sleep on the couch. (Id.) While B.H. fell "in and out of sleep," Conley placed his penis in B.H.'s mouth, removed her bra, and had sex with her. (Id.; see also PSI, pp.89-92.) Conley also placed a pillow over B.H.'s face, making it difficult for her to breathe. (Id.) The next day, B.H. reported the incident to police. (Id.) In the course of the subsequent investigation, which included a confrontation call between Conley and B.H. (PSI, pp.94-96), Conley was initially deceitful and changed his story several times (PSI, p.4, 102-109). During an interview with a law enforcement officer, Conley eventually admitted that he placed his penis in B.H.'s mouth while she was still unconscious. (PSI, pp.106-107.)

[1] The PSI, including the attached evaluations and police reports, are contained within the electronic file, "Conley 45759 psi.pdf." Citations to page numbers of the "PSI" refer to the page numbers of this file.

The state charged Conley with rape, I.C. § 18-6101(5) (rape committed where the victim was prevented from resistance due to an intoxicating substance) and/or (7) (rape committed where the victim was asleep and/or unconscious at the time of the act). (R., pp.73-74.) Pursuant to an agreement with the state, Conley pled guilty to aggravated assault for placing the pillow over B.H.'s face. (R., pp.77-86; Tr., p.5, L.22 – p.17, L.8.) Pursuant to the terms of the agreement, the state agreed to recommend that Conley be placed on probation if a psychosexual evaluator concluded that Conley was a low risk to re-offend. (R., p.81; Tr., p.7, Ls.5-6.) In such an instance, the state would still be permitted to recommend that Conley be ordered to serve jail time, as long as it recommended that Conley be permitted work release for any portion of an ordered jail term that exceeded 30 days. (R., p.81; Tr., p.7, Ls.5-12.) A psychosexual evaluator concluded that Conley "appeared to be at the upper-end of the low risk to re-offend range." (PSI, p.62.)

At the sentencing hearing, the state asked the district court to follow the plea agreement, impose an "underlying" unified five-year sentence with three years fixed, and to order Conley to serve 365 days in jail, the first 30 of which without work release. (Tr., p.36, L.14 – p.46, L.12.) At the conclusion of the prosecutor's sentencing argument, Conley's counsel objected on the ground that the prosecutor breached the plea agreement by impliedly disavowing the sentencing recommendation range he was bound to present. (Tr., p.46, L.15 – p.47, L.4.) Conley's counsel went on to request that the court consider a withheld judgment and impose no additional jail time. (Tr., p.65, L.16 – p.66, L.2.) The district court overruled Conley's objection that the prosecutor breached the plea agreement. (Tr., p.78, L.24 – p.79, L.20.) The court imposed a unified five-year sentence with one year fixed but declined to suspend the sentence and place Conley on probation. (R., pp.96-99; Tr., p.78, Ls.1-9.) The court later denied Conley's I.C.R. 35(b) motion for reduction of sentence. (R., pp.100-104.) Conley timely appealed. (R., pp.109-113.)

ISSUES

Conley states the issues on appeal as:

1. Did the state breach the plea agreement by making statements that impliedly disavow[ed] its promised sentencing recommendation?

2. Did the district court abuse its discretion when it imposed a unified sentence of five years, with one year fixed, upon Mr. Conley, following his guilty plea to Aggravated Assault?

(Appellant's Brief, p.6.)

The state rephrases the issues on appeal as:

1. Has Conley failed to show that the district court erred by overruling his objection to the prosecutor's sentencing argument?

2. Has Conley failed to show that the district court abused its sentencing discretion?

ARGUMENT

I.
Conley Has Failed To Show That The District Court Erred By Overruling His Objection To The Prosecutor's Sentencing Argument

A. Introduction

Conley contends that the state breached the plea agreement during the sentencing hearing by impliedly disavowing the sentencing recommendation that it was bound to present. (Appellant's brief, pp.7-13.) A review of the record reveals no such breach because the prosecutor's argument was consistent with the state's recommendation, and because the prosecutor was entitled to vigorously argue in favor of this recommendation – particularly considering that it was substantially different than Conley's sentencing recommendation. Conley has therefore failed to demonstrate that the district court erred in overruling his objection to the state's sentencing argument.

B. Standard Of Review

"Whether a plea agreement has been breached is a question of law to be reviewed by this Court *de novo*, in accordance with contract law standards." State v. Jafek, 141 Idaho 71, 73, 106 P.3d 397, 399 (2005) (citing United States v. Bunner, 134 F.3d 1000, 1003 (10th Cir.1998)). To establish that that the state breached a plea agreement and violated a defendant's due process rights, however, it is the defendant's burden to prove both the existence of the plea agreement and the fact of its breach. State v. Gomez, 153 Idaho 253, 257, 281 P.3d 90, 94 (2012) (citing State v. Peterson, 148 Idaho 593, 595, 226 P.3d 535, 537 (2010) (and case cited therein)).

C. The Prosecutor Did Not Breach The Plea Agreement

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971); Peterson, 148 Idaho at 595, 226 P.3d at 537. This principle is derived from the Due Process Clause and the fundamental rule that, to be valid, a guilty plea must be both voluntary and intelligent. State v. Rutherford, 107 Idaho 910, 913, 693 P.2d 1112, 1115 (Ct. App. 1985).

The prosecution's obligation to recommend a sentence promised does not carry with it the obligation to make the recommendation enthusiastically. State v. Daubs, 140 Idaho 299, 300, 92 P.3d 549, 550 (Ct. App. 2004); State v. Jones, 139 Idaho 299, 302, 77 P.3d 988, 991 (Ct. App. 2003). A prosecutor may not circumvent a plea agreement, however, through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor impliedly disavow the recommendation as something which the prosecutor no longer supports. Daubs, 140 Idaho at 300, 92 P.3d at 550; Jones, 139 Idaho at 302, 77 P.3d at 991. Although prosecutors need not use any particular form of expression in recommending an agreed sentence, their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse. Jones, 139 Idaho at 302, 77 P.3d at 991. In Puckett v. United States, 556 U.S. 129, 140 (2009), the United States Supreme Court observed that the trial court is ordinarily in the best position to adjudicate a breach of plea claim "in the first instance."

In this case, there is no dispute as to the terms of the plea agreement. After the psychosexual evaluator concluded that Conley was a low-risk to re-offend, the prosecutor was bound to recommend that Conley be placed on probation, but was also permitted to recommend that Conley serve jail time (with work release options for any portion of an ordered jail term that

exceeded 30 days). (R., p.81; Tr., p.7, L.1 – p.8, L.14.) Consistent with this agreement, the state recommended that the court order Conley to serve 365 days in jail, the first 30 without work release. (Tr., p.36, Ls.14-19.) While not expressly arguing for or referencing probation, the prosecutor twice expressly asked that the court otherwise follow the plea agreement. (Tr., p.36, Ls.14-16; p.46, Ls.9-12.) The prosecutor also described the requested five-year unified sentence as an "underlying" sentence, implying a recommendation of probation. The district court overruled Conley's objection that the prosecutor breached the plea agreement in making his argument.[2] (Tr., p.78, L.24 – p.79, L.11.)

Notably, this was not a case where the parties presented a *joint* sentencing recommendation, or a case where the state was bound to recommend the minimum sentence permitted by law for a particular offense. Instead, consistent with the plea agreement, there was a substantial difference between the sentence recommended by the state and the sentence recommended by Conley. The state recommended 365 days in jail (Tr., p.36, Ls.16-19), and Conley requested a withheld judgment and that he not be required to serve *any* additional jail time (Tr., p.65, L.25 – p.66, L.2). The state was entitled to present a vigorous sentencing argument in an attempt to persuade the court that its recommended sentence was more appropriate than Conley's.

[2] In overruling Conley's objection, the district court did not expressly address the specific grounds for the objection set forth by Conley – that the prosecutor's sentencing argument impliedly disavowed the recommendation that he was bound to present. (See Tr., p.78, L.24 – p.79, L.11.) While it is the appellant's burden to obtain a ruling on an objection in order to preserve the issue for appeal, State v. Grube, 126 Idaho 377, 387, 883 P.2d 1069, 1079 (1994), the state acknowledges that Conley preserved this issue by specifically raising the same ground that he now does on appeal, and by obtaining a ruling from the district court that the state did not breach the plea agreement.

To this end, at the sentencing hearing, the prosecutor made various arguments and observations about the PSI, PSE, and the impact of Conley's crime on B.H. Specifically, portions of this argument, including those Conley has taken issue with on appeal (Appellant's brief, pp.11-13) include:

- Criticizing letters submitted in support of Conley as blaming the victim, and arguing that the sentiment presented in these letters may have been based upon untrue versions of the facts as relayed by Conley. (Tr., p.41, Ls.6-13.)

- Noting Conley's dishonesty with the presentence investigator in failing to disclose an arrest that occurred several months after the underlying incident. (Tr., p.41, Ls.14-17; see also PSI, pp.5, 71-75.)

- Criticizing the defense litigation strategy and noting its impact on B.H. Specifically, the prosecutor criticized defense counsel's pre-sentencing hearing phone call to B.H.'s brother, in which counsel attempted to elicit information about B.H.'s sexual proclivities (Tr., p.27, L.10 – p.32, L.1; p.42, Ls.8-12); and counsel's decision to seek a continuance of the sentencing hearing to attempt to disprove statements made in B.H.'s impact statement (Tr., p.22, Ls.12-23; p.36, L.22 – p.38, L.4; p.42, Ls.8-12).

- Discussing the impact of the crime on B.H. and noting B.H.'s courtroom demeanor. (Tr., p.44, L.24 – p.46, L.9.)

- Noting Conley's inconsistent statements about the underlying criminal incident as reflected in the PSI, confrontation call between Conley and B.H., and Conley's interview with police. (Tr., p.38, L.24 – p.41, L.5.)

- Referencing portions of the PSI and PSE unfavorable to Conley. (Tr., p.42, L.19 – p.44, L.23.)

- Describing conduct that Conley did not ultimately plead guilty to committing. (Tr., p.38, L.5 – p.40, L.19.)

The plea agreement did not obligate the state to refrain from making such observations and arguments. None of the arguments disavowed the state's recommendation that the court follow the plea agreement and order that Conley serve 365 days in jail – particularly considering that Conley, consistently with the agreement, requested that no further jail time be ordered. While the plea agreement bound the upper limits of the state's sentencing recommendation, it did not require

the prosecutor to, as Conley appears to argue on appeal (see Appellant's brief, p.11), either "give a single reason why Mr. Conley was an appropriate candidate for probation," explain "why the state agreed to recommend probation pursuant to the plea agreement," "articulate why the state had offered to resolve this case as an Aggravated Assault," or mention that "Mr. Conley had no criminal history prior to this incident."

The Idaho Court of Appeals' analysis in State v. Halbesleben, 147 Idaho 161, 164-168, 206 P.3d 867, 870-874 (Ct. App. 2009), is instructive. In that case, Halbesleben, similarly to Conley (though in the context of a fundamental error analysis), argued that the prosecutor gave the sentencing recommendation it was bound to present "only as an afterthought," and that the prosecutor "effectively renounced the recommendation through vigorous argument against Halbesleben and the graphic details and implications of her crimes." Halbesleben, 147 Idaho at 164, 206 P.3d at 870. Halbesleben relied upon several cases, (each of which were also cited by Conley in his brief (Appellant's brief, pp.7-13)), in which Idaho appellate courts held that prosecutors breached plea agreements during sentencing arguments. Halbesleben, 147 Idaho at 166-168, 206 P.3d at 872-874. The Idaho Court of Appeals distinguished each of these cases. Id.

In State v. Lankford, 127 Idaho 608, 617, 903 P.2d 1305, 1314 (1995), the state was bound to recommend the minimum sentence that could lawfully be imposed for the crime Lankford was convicted for. The state made the proper recommendation, but also presented extensive evidence in aggravation. Id. The Idaho Supreme Court held that this was fundamentally at-odds with the state's obligated position that the court impose the most lenient sentence permitted by law. Id. In Jones, 139 Idaho at 300-303, 77 P.3d at 989-992, the prosecutor was bound to recommend probation, but also argued that the presentence investigator advised *against* probation, and that when the plea agreement was made, the prosecutor was not aware of all of the relevant aggravating

information. In State v. Willis, 140 Idaho 773, 774-776, 102 P.3d 380, 381-383 (Ct. App. 2004), the prosecutor told the court that the state was showing "great restraint" by arguing only the sentence it was bound to recommend, and that that the defendant should receive the recommended sentence "at a very minimum." In Daubs, 140 Idaho at 301, 92 P.3d at 551, the prosecutor emphasized the sentence recommended in the PSI, which was more severe than the sentence the prosecutor was bound to recommend.

In Halbesleben, the Idaho Court of Appeals noted that in each of these cases, "the prosecutor acknowledged the recommendation required by the plea agreement but argued various other reasons why the district court should not accept the recommendation, and instead, impose a more severe sentence." Halbesleben, 147 Idaho at 168, 206 P.3d at 874. Or, in the case of Lankford, "the prosecutor presented additional aggravating evidence which, at a sentencing for first degree murder, only served to favor imposition of the death penalty or fixed life." Id. The Court explained that the prosecutor's argument at Halbesleben's sentencing hearing was different:

> In the present case, the prosecutor made no allusion to a more severe recommendation contained in the PSI nor gave any personal opinion that Halbesleben's crimes merited a greater punishment than what was recommended. The prosecutor's vigorous argument did not undermine the sentencing recommendation but, rather, buttressed it against any argument from defense counsel that Halbesleben merited even lesser sentences based on mitigating factors. Therefore, the prosecutor did not impliedly disavow the sentencing recommendation through her vigorous argument of the facts of Halbesleben's crimes and, thus, did not breach the plea agreement.
>
> Halbesleben next contends that, even if the prosecutor's vigorous argument served the purpose of rebutting defense counsel's argument for lesser sentences, the prosecutor's argument was "overkill." She alleges that the argument "far exceeded anything even remotely necessary to ensure ... a penitentiary sentence given the circumstances of this case." Beyond this bare assertion, Halbesleben provides no other argument or authority for this proposition. Furthermore, we disagree with Halbesleben's conclusion. As stated above, defense counsel had already indicated an intention to seek lesser sentences. When the prosecutor began her argument, she had to dissuade the district court from any downward deviation from the recommended sentences in light of defense counsel's impending

> argument. Her vigorous argument and description of the hard facts of this case and their impact on the lives of Halbesleben's children justified her later statement to the district court that lesser sentences would depreciate the gravity of the crimes and not serve the necessary goal of protecting society. The prosecutor even argued this while encouraging the district court to follow the recommendation. As noted previously, the prosecutor gave no indication of an ulterior motive to seek harsher sentences and the district court's discretionary decision to deviate from the recommendation in favor of harsher penalties does not prove the existence of one. Therefore, the prosecutor's vigorous argument detailing the difficult facts of the case and the effect on the lives of the children did not constitute a breach of the plea agreement.

Id.

The same is true in the present case. The prosecutor's sentencing argument, though vigorous, made no allusion to a more severe sentence than the one that the state was bound to recommend, nor did the prosecutor present any argument that was fundamentally inconsistent with this recommendation of probation and jail time. Thus, the prosecutor's argument did not undermine the sentencing argument, but rather, buttressed it against Conley's argument that a significantly lesser sentence was appropriate. Therefore, Conley has failed to demonstrate that the prosecutor breached the plea agreement or that the district court erred in overruling Conley's objection to the prosecutor's sentencing argument.

D. Any Error Was Harmless

When there has been a contemporaneous objection to an alleged breach of a plea agreement, the appellate court determines first if the plea agreement was breached. See State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). If the court concludes that there was a breach, it next determines whether the breach was harmless. See id. Where a breach is shown, the test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the sentence imposed would have been the same absent the breach. See id.; see also Chapman v. California, 386 U.S. 18, 24 (1967).

In this case, a review of the record, and particularly of the district court's comments at the sentencing hearing, reveal, beyond a reasonable doubt, that the court would have imposed the same sentence regardless of any breach. The court expressly stated that the prosecutor's arguments regarding the defense litigation strategy, and the state's ultimate recommendation that Conley serve 365 days in jail, had no bearing on its sentencing determination. (Tr., p.36, Ls.1-11; p.69, L.25 – p.71, L.7; p.79, L.12 – p.80, L.1.) Further, the court stated its disagreement with any implication by the state that any of these activities constituted harassment by Conley towards B.H. (Tr., p.70, L.23 – p.71, L.7.) The district court instead focused its sentencing analysis on the facts underlying the original criminal charge of rape, as relayed by Conley's own statements to authorities;[3] the act to which Conley ultimately pled guilty, placing a pillow over B.H.'s face; and the victim impact statement. (Tr., p.71, L.13 – p.77, L.9.) Because, in making its sentencing determination, the district court relied primarily on the facts of the underlying case as made available to it through the record, rather than the prosecutor's argument, it is clear that the court would have imposed the same sentence regardless of any breach of the plea agreement. Any error was therefore harmless.

II.
Conley Has Failed To Show An Abuse Of Sentencing Discretion

A. Introduction

Conley contends that the unified sentence of five years, with one year fixed, imposed upon his guilty plea to aggravated assault is excessive in light of mitigating factors. (Appellant's brief,

[3] As the district court noted, the law permitted it to consider these facts. (Tr., p.71, L.13 – p.73, L.6. (citing State v. Ott, 102 Idaho 169, 627 P.2d 798 (1981); State v. Thomas, 133 Idaho 800, 133 Idaho 800 (Ct. App. 1999).) Further, the court specifically informed Conley, at the change of plea hearing, that it would do so. (Tr., p.16, Ls.11-21.)

pp.13-14.) The record, however, supports the sentence imposed, and demonstrates that the district court appropriately considered relevant mitigating factors in making its sentencing determination. Conley has therefore failed to establish an abuse of discretion.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Anderson, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. Conley Has Failed To Show That His Sentence Is Excessive Under Any Reasonable View Of The Facts

Where a sentence is within statutory limits, an appellant is required to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden, Conley must show that his sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). The Court reviews the whole sentence on appeal and presumes that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

In making its sentencing determination in this case, the district court reviewed the PSI and PSE, and was aware of the appropriate sentencing objectives. (Tr., p.69, Ls.14-22.) The court

expressly noted that it had considered the factors set forth in I.C. § 19-2521 for determining whether a defendant should be placed on probation or sentenced to a term of incarceration. (Tr., p.77, Ls.18-25.) The court also indicated that it had considered the relevant mitigating factors – Conley's limited criminal history, strong support system, and psychosexual evaluator conclusion that he was a low risk to re-offend. (Tr., p.75, L.19 – p.76, L.10.)

The district court ultimately concluded that imposition of a one-year fixed sentence for aggravated assault was appropriate in light of the facts underlying the original charge, the facts pertaining to the charge Conley pled guilty to, and the impact of Conley's actions on B.H. The state summarized these facts above. (See supra, pp.1, 8-9; see also PSI, pp.244-246 (victim impact statement).) Additionally, as the prosecutor discussed at the sentencing hearing (Tr., p.42, L.19 – p.44, L.23), while the pscyhosexual evaluator concluded that Conley was at "the upper-end of the low-risk to re-offend range," the evaluation revealed more concerning factors as well. Specifically, the PSE included indications that Conley minimized his actions and claimed a belief that B.H. was consenting at the time of his acts; the MMPI II test indicated that Conley is motivated by self-interest, fear of being caught in dishonest behavior, and that he acts based on selfish motives; the PAI test indicated that Conley was defensive, tried to exaggerate certain problems, and may have a personality disorder; the MSI-II test indicated that Conley had thinking errors and does not accept full responsibility for his actions; and the Stable-2007 test concluded that Conley was a "moderate" risk to re-offend (PSI, pp.25-65).

Based on the nature of the offense, Conley's character, the impact of the crime on B.H., and the objectives of sentencing, a unified sentence of five years with one year fixed is not excessive under any reasonable view of the facts of this case. Conley has therefore failed to demonstrate an abuse of discretion.

CONCLUSION

The state respectfully requests that this Court affirm Conley's sentence.

DATED this 14th day of September, 2018.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of September, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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