

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL F. ROMANO, SR.,	§
	§
Defendant Below-	§ No. 602, 1999
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN98-05-0358
Plaintiff Below-	§ through 0360
Appellee.	§ IN98-05-0504

Submitted: March 7, 2001

Decided: April 5, 2001

Before **WALSH, HOLLAND** and **STEELE**, Justices

ORDER

This 5th day of March 2001, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Paul F. Romano, Sr., appeals from an order of the Superior Court denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In light of the State's concession that it breached its plea agreement with Romano, we REMAND this matter to the Superior Court for further proceedings consistent with this Order.

(2) In 1999 during the first day of trial, Romano pleaded guilty to one felony theft charge and three felony bad check charges. At the time of the plea colloquy, the prosecutor agreed that, if Romano admitted to being an habitual offender, the State would recommend no more than 2 years incarceration at Level V. Romano admitted to being an habitual offender. At the time of sentencing approximately a month later, however, the prosecutor mistakenly recommended a total of 4 years incarceration at Level V, which the sentencing judge accepted over the objection of Romano and his attorney. On the theft charge, Romano was sentenced to 2 years incarceration at Level V, to be suspended for 2 years at Level II probation. On each of the bad check charges, Romano was sentenced to 2 years incarceration at Level V. On the third bad check charge, the Level V sentence was suspended for 2 years at Level III probation. Romano did not file a direct appeal from his convictions or sentences.

(3) In this appeal, Romano's primary claim is that the State breached its plea agreement¹ by recommending 4 years of Level V incarceration rather than the 2 years it promised it would recommend and that the sentencing judge improperly accepted the State's recommendation

¹Pursuant to Superior Court Criminal Rule 11(e) (1) (B).

of 4 years incarceration at Level V. On this basis, Romano requests that his convictions and sentences be vacated. Laudably, the State admits to the breach and proposes that this matter be remanded to the Superior Court for modification of Romano's sentence in accordance with the original agreement.

(4) Romano also claims that his counsel provided ineffective assistance in not pursuing an appeal on the basis of the State's breach and, in addition, claims ineffective assistance by his counsel at trial, improper refusal by the Superior Court to provide him with certain trial evidence and transcripts of the trial, plea colloquy and sentencing, improper amendment of the indictment by the Superior Court, and lack of foundation for the Superior Court's declaration that he was an habitual criminal.

(5) The government's breach of a plea agreement is ordinarily remedied either by specific performance of the agreement or by allowing the defendant to vacate his guilty plea.² In choosing a remedy, a court must exercise its "sound discretion . . . under the circumstances of each case."³ We conclude, in light of the State's conceded breach of the

²*Kingsley v. United States*, 968 F. 2d 109, 113-14 (1st Cir. 1992) (citing *Santobello v. New York*, 404 U.S. 257, 263 (1971)).

³*Id.* at 113 (quoting *United States v. Garcia*, 698 F.2d 31, 37 (1st Cir. 1983)).

agreement and in the interest of justice, that this matter must be remanded to the Superior Court. Specifically, the Superior Court is directed to consider the State's recommendation to modify Romano's sentence in IN98-05-0359⁴ to provide that the previously-imposed 2-year Level V sentence is to be suspended for 2 years probation at Level III.

(6) Romano's second claim that his counsel was ineffective for failing to pursue an appeal on the basis of the State's breach may become moot after this matter is returned from remand to the Superior Court. Accordingly, it will not be decided at this time.

(7) Romano's claims that the Superior Court improperly denied his request for certain trial evidence, made an impermissible amendment to the indictment and lacked an adequate foundation for declaring him an habitual criminal were not presented to the Superior Court in the first instance and we, therefore, decline to decide those claims in this appeal.⁵

(8) Romano's claim that he was denied transcripts of the trial, plea colloquy and sentencing is moot because the Superior Court ultimately granted Romano's request for transcripts.

⁴This is the second bad check charge. It appears that Romano has already begun serving the sentence on this charge.

⁵Supr. Ct. R. 8.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED to the Superior Court for reconsideration of Romano's sentence in accordance with the State's recommendation. Jurisdiction is not retained.⁶

BY THE COURT:
/s/ Randy J. Holland
Justice

⁶ *Supr. Ct. R. 19(c)*.