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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1913**

State of Minnesota,
Respondent,

vs.

James John Geng, Jr.,
Appellant.

**Filed November 24, 2009
Affirmed
Minge, Judge**

Todd County District Court
File No. 77-CR-06-168

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Charles Rasmussen, Todd County Attorney, Social Services Building, 212 Second Avenue South, Long Prairie, MN 56347 (for respondent)

John E. Mack, Mack & Daby, P.A., P.O. Box 302, New London, MN 56273 (for appellant)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Minge, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his conviction of and sentence for controlled substance offenses, arguing that (1) the district court erred in refusing to grant a downward

departure that would have given appellant the benefit of his alleged agreement with the prosecutor; or (2) if a downward departure is not available as a remedy, then the case should be dismissed for prosecutorial misconduct. We affirm.

FACTS

Appellant James John Geng was arrested and charged with four felony controlled-substance crimes. On July 19, 2007, the prosecutor sent defense counsel a letter requesting that Geng provide a proffer of testimony concerning his knowledge of drug activity by certain other individuals so that the prosecutor could determine “whether to extend a formal [plea] offer” to Geng.

Geng and his attorney completed and signed the proffer form. Geng then provided a proffer of testimony in a one-hour meeting with law enforcement. Ultimately, the prosecutor informed defense counsel that the proffer testimony was far less forthcoming than it should have been and that the prosecutor would not make a plea offer based on Geng’s proffer.

Geng moved to dismiss the case for prosecutorial misconduct, claiming the prosecutor misled him into making a proffer and then unreasonably rejected the proffer. In the alternative, Geng moved for specific performance of the state’s alleged plea agreement. The district court denied this motion, finding that: (1) the state’s solicitation of a proffer from Geng did not constitute a plea offer—let alone a plea agreement; and (2) the prosecutor did not engage in misconduct in deciding not to extend a plea offer to Geng.

Appellant waived a jury trial, agreeing to allow the district court to decide the case based on stipulated facts pursuant to Minnesota Rule of Criminal Procedure 26.01, subdivision 4 (2007).¹ The district court found Geng guilty of three controlled-substance crimes. At sentencing on September 8, 2008, the district court denied Geng's motion for a downward departure and sentenced him to 104 months executed, a term within the presumptive-sentence range. Geng appeals.

DECISION

Although Geng argues that the prosecutor violated an alleged plea agreement, the dispositive threshold issue is whether the district court clearly erred in finding that there was no plea offer, and by extension, no plea agreement. Reviewing courts give great deference to a district court's findings of fact and accept those findings unless they are clearly erroneous. *State v. Gomez*, 721 N.W.2d 871, 883 (Minn. 2006). Such findings are not clearly erroneous if supported by reasonable evidence. *Id.* What parties agreed to in a plea agreement is a fact issue decided by the district court. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). Reviewing courts defer to a district court's determination of whether there was prosecutorial misconduct and whether that misconduct was prejudicial. *State v. Voorhees*, 596 N.W.2d 241, 253 (Minn. 1999). Such a district court determination will be reversed only when the misconduct is so "serious and prejudicial that a defendant's right to a fair trial is denied." *Id.* (quotation omitted).

¹ This proceeding under rule 26.01 supersedes the procedure outlined in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009).

Similarly, the decision on what sentence to impose is committed to the district court; a reviewing court cannot substitute its judgment for the district court's. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The presumptive sentence should be imposed unless the circumstances warrant a departure. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). Reviewing courts generally will not modify a sentence that falls within the presumptive-sentence range even if there are grounds justifying departure: "it would be a rare case which would warrant reversal of the refusal to depart." *State v. Back*, 341 N.W.2d 273, 275 (Minn. 1983).

I.

First, we consider the question of whether there was a plea agreement with a prosecution commitment to a particular sentence. The wording of the July 19 proffer letter from the prosecutor to Geng's attorney is critical in determining whether there was a plea agreement. Nowhere in the letter does the prosecutor extend to Geng a plea offer. Rather, the prosecutor wrote the following: "*In order to determine whether to extend a formal offer*, your client would need to provide a recorded proffer regarding his knowledge of drug activity by both [B.S.] and [R.M.]" (Emphasis added.) Geng ignores this language and instead argues that the language in the letter is equivalent to the prosecutor promising to agree to allow Geng to plead to a lesser charge and to recommend a conditional-release sentence if he cooperates. The critical language is: "Should Mr. Geng cooperate with the proffer, I *anticipate* allowing Mr. Geng to plead guilty to [a lesser charge]." (Emphasis added.) We disagree with appellant. The words "*anticipate*" and "*agree*" are very different.

The proffer form used here appears to be the standard proffer form used by the Minnesota Attorney General’s Office (AGO). Geng does not complain about this form. This form was referenced in and attached to the prosecutor’s July 19 letter. It sets forth the conditions under which the attorney general’s office is willing to accept proffers. Both Geng and his attorney signed this form before Geng made his recorded proffer of testimony. In signing, Geng and his counsel indicate that they “understand and accept the terms and conditions set forth in this [form].” Two of those terms provide:

5. It is understood that the *primary purpose of this proffer is* to provide the AGO with an understanding of the nature and extent of the Defendant’s knowledge concerning violations of law, as well as *to assist the AGO in plea negotiations* with the Defendant and counsel.

....

6. Finally, neither the proffer nor anything contained in this proffer agreement entitles the Defendant to a reduction of sentence, reduction of charge, declination to prosecute, or any other benefit, *nor does it obligate the AGO to enter into any plea agreement with the Defendant.*

(Emphasis added.) The language is clear that the proffer is not even a plea offer—much less a plea agreement.

The July 19 letter and the proffer form support the district court’s finding that the proffer was not a plea offer and there was no plea agreement. In fact, given the plain language of the July 19 letter and the signed proffer form, it would have been clearly erroneous for the district court to find that there had been a plea offer or plea agreement.

Because we conclude that there was no plea offer or plea agreement, we do not reach the thrust of the sentencing issue raised in Geng’s appeal. We further note that

Geng never pleaded guilty; he agreed to a trial on stipulated facts and was found guilty by the district court. None of the caselaw cited by Geng is helpful in this situation.

To the extent that Geng is arguing that cooperation alone with authorities is enough to justify a downward departure, his reliance on the decision of *State v. Carson*, 320 N.W.2d 432 (Minn. 1982), is misplaced. In *Carson*, the supreme court specifically declined to decide whether a defendant's cooperation is grounds for downward departure. *Id.* at 438. Assuming that cooperation with authorities is a mitigating factor, the district court's decision not to depart downward from the presumptive sentence would be within its discretion. *See Back*, 341 N.W.2d at 275. Thus, the district court did not abuse its discretion in declining to depart downward from the presumptive-sentence range.

II.

Finally, Geng argues that if there was not an agreement for a downward sentencing departure, then the case must be dismissed for prosecutorial misconduct. Geng intimates that the prosecutor misled him with the request for a proffer, manipulated him into providing helpful evidence, and then withdrew from the plea discussions. This would be a bait-and-switch tactic.

A prosecutor may permissibly withdraw from an actual plea agreement anytime “before a defendant enters a guilty plea and the [district] court accepts the plea, unless the defendant has detrimentally relied upon the agreement.” *State v. Johnson*, 617 N.W.2d 440, 443 (Minn. App. 2000). It follows that absent abusive conduct, a prosecutor may withdraw from plea negotiations without committing misconduct. This conclusion is

reinforced by the fact that discretion regarding plea bargaining “rests almost entirely with the prosecutor.” *State v. Streiff*, 673 N.W.2d 831, 834-36 (Minn. 2004).

Geng relies on *State v. Erickson*, 589 N.W.2d 481 (Minn. 1999), arguing that since the prosecutor’s behavior in his case was dishonorable, the July 19 letter should be considered a plea offer. In *Erickson*, the supreme court held that a county attorney’s blanket use of Minnesota Rule of Criminal Procedure 26.03, subdivision 13(4) to remove a particular judge from criminal cases violated the spirit of the rule and was prejudicial to the administration of justice. *Id.* at 485. Contrary to Geng’s arguments, the facts, analysis, and result in *Erickson* are so different from Geng’s situation as to provide no help. All that can be said is that if sufficiently egregious, prosecutorial misconduct can prompt corrective appellate action. Here, there is no evidence of an improper bait-and-switch tactic. There is only a generalized outline of a potential deal. Ultimately, the prosecutor explained why the proffer was inadequate. Geng had the opportunity to proceed to trial with all his rights intact. The refusal to offer a plea deal is unrelated to Geng’s ability to have a fair trial and does not so impinge on the basic functioning of the criminal process as to require extraordinary judicial intervention.

Affirmed.

Dated: