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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-245

Lamont Tarrence McGee, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 5, 2010
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CR-05-040486

Lamont Tarrence McGee, Rush City, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

U N P U B L I S H E D   O P I N I O N

LANSING, Judge

The district court denied Lamont McGee's postconviction motion to modify his sentence for third-degree assault. In this appeal McGee asserts a violation of his plea agreement, the denial of an opportunity to present mitigating evidence, the failure of the district court to provide notice that disciplinary infractions may extend a sentence, and the denial of due process and double-jeopardy protections. Because each of McGee's claims for sentencing modification lacks either a factual or a legal basis, we affirm.

F A C T S

Lamont McGee pleaded guilty to third-degree assault in April 2006. At the plea hearing McGee admitted, under oath, that during an argument in June 2005 he punched a man in the face and fractured his nose. He also stated that his actions were not in self-defense. The guilty plea was part of a negotiated agreement with the state under which the state agreed to dismiss pending charges for theft and fleeing a police officer and not to pursue charges on a criminal-sexual-conduct investigation involving McGee. In return, McGee agreed to an executed sentence of the presumptive guidelines duration. The plea negotiation was based on a criminal-history score of three. McGee's presumptive sentence was twenty-one months stayed. The plea negotiations provided for a sentence of twenty-one months' imprisonment.

The plea agreement provided that the state would not object to McGee's release pending sentencing, which was scheduled for April 27. The prosecutor also stated, on the record, that if McGee did not show up for sentencing, the state would argue that the

guilty plea on third-degree assault should stand, but the theft and fleeing-a-police-officer charges should not be dismissed and the state could withdraw its promise not to charge the criminal-sexual-conduct case. McGee confirmed that he understood the agreement and his contingent presentencing release, and the court accepted his plea.

McGee did not appear for sentencing on April 27. He was returned to custody in May, and the district court rescheduled sentencing. The presentence investigation showed that the criminal-history score McGee and the state relied on for their plea negotiations was incorrect. McGee's criminal-history score was actually five instead of three, and his presumptive sentence was an *executed* sentence of twenty-three to thirty-two months rather than a *stayed* sentence of twenty-one months. In light of the correct information on McGee's criminal-history score, the district court imposed an executed sentence of twenty-three months, which was at the low end of the presumptive range. McGee's attorney discussed the sentence with McGee before he appeared in court, and the district court explained it to him on the record. McGee indicated that he understood and that he wanted to proceed. He raised no other issues during the sentencing hearing.

The record indicates that the prosecutor did not reinstate the charges for theft and fleeing a police officer. But based on McGee's failure to show up for his April sentencing hearing, the state proceeded on its investigation of the criminal-sexual-conduct case. The investigation resulted in numerous charges, and McGee pleaded guilty in March 2007 to third-degree criminal sexual conduct and kidnapping. In April 2007 the district court sentenced him to 117 months for the criminal-sexual-conduct conviction.

In August 2009 McGee filed a pro se motion "for correction and/or modification of the . . . sentence of [twenty-three] months [imposed] unlawfully [in] September 2006." He argued that the state violated its agreement not to charge the criminal-sexual-conduct offense and also raised issues relating to his opportunity to present mitigating evidence, the lack of notice on the effect of disciplinary infractions during imprisonment, and due process and double-jeopardy claims related to his presentence release. The district court denied relief and McGee now appeals.

D E C I S I O N

"The district court has jurisdiction at any time [to] correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. A motion for correction is within the district court's discretion and we will reverse its ruling on appeal only when the district court does not properly exercise discretion or the sentence is unauthorized by law. *State v. Stutelberg*, 435 N.W.2d 632, 633-34 (Minn. App. 1989); *see also Fritz v. State*, 284 N.W.2d 377, 386 (Minn. 1979) (declining to reevaluate sentence on appeal when district court's discretion was properly exercised and sentence was authorized by law).

I

The principal issue raised in this appeal is whether the twenty-three-month sentence McGee received on the third-degree-assault conviction was unauthorized by law. McGee asserts that the sentence was illegal because the plea agreement provided for a twenty-one-month sentence rather than a twenty-three-month sentence and because the prosecutor defaulted on his agreement not to pursue charges in a criminal-sexual-conduct case that was under investigation.

"When a plea rests in any significant degree on a promise or agreement of the prosecutor," violation of that promise violates due process. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (quotation omitted). If a defendant shows that a promise has been unfulfilled, he must be given the opportunity to withdraw his plea. *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998). To determine whether a plea agreement was violated, "courts look to what the parties . . . reasonably understood to be the terms of the agreement." *Brown*, 606 N.W.2d at 674 (quotation omitted). A dispute on the substance of the plea agreement raises an issue of fact, but the interpretation and enforcement of the agreement are issues of law subject to de novo review. *Id.*

The record does not support McGee's contention that his plea agreement was violated. The discussion at McGee's initial plea hearing in April 2006 established that the duration of McGee's sentence would be based on his presumptive sentence under the guidelines. And the plea colloquy also established that McGee understood this basis. The prosecutor stated that "the defendant requests *the presumpti[ve] sentence be executed* and that is [twenty-one] months." (Emphasis added.) McGee's counsel confirmed McGee's understanding that "the guidelines sentence *given what your points are . . . would be* [twenty-one] months." (Emphasis added.) The twenty-one-month duration was based squarely on McGee's criminal-history score.

The presentence investigation that was completed before McGee's September sentencing showed that McGee's criminal-history score was higher than anticipated and amounted to five points rather than three points. McGee's presumptive sentence was thus twenty-seven months and the bottom of the presumptive range was twenty-three months.

McGee's counsel informed him of this new information before his September sentencing, and the district court explained the change on the record. McGee understood that his plea agreement had been amended to request a twenty-three-month sentence based on the new information. The sentence comported with McGee's understanding that he was pleading to a sentence based on the presumptive range; the plea agreement was not violated. In fact, the executed twenty-three-month sentence is at the low end of the range that McGee would have received without any plea agreement. If the district court had imposed a twenty-one-month sentence, it would have amounted to a downward departure that requires a reason for the departure, which the record does not provide. *See State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002) (holding plea agreement cannot be only foundation for sentencing departure).

Furthermore, the state's action on McGee's pending cases did not violate the plea agreement. The state dismissed the theft and fleeing-a-police-officer charges and did not attempt to reinstate them when McGee failed to appear for sentencing. McGee complains that the state filed charges in the criminal-sexual-conduct case despite its promise at the plea hearing. The state's promise not to charge that case, however, was plainly contingent on McGee's showing up for sentencing on April 27. The state's description of the plea agreement expressly stated this condition. The district court reiterated for McGee the consequences of not showing up and explicitly addressed the criminal-sexual-conduct case. McGee responded to the district court's specific explanation by saying, "I understand, sir." McGee's September sentence was imposed according to the terms of

the plea agreement. McGee has not shown a violation of the terms of the agreement or any other basis for claiming that his sentence was not authorized by law.

II

McGee raises three other arguments on appeal. First, he claims that the district court did not permit him to present evidence in mitigation of his sentence. He has not indicated, in his motion to the district court or in his appellate brief, that any mitigating evidence exists; and the record contains no indication of mitigating evidence. McGee went through a full presentence investigation and appeared in two court proceedings on the third-degree assault charges. Despite ample opportunity to raise any mitigating circumstances, he has offered no evidence. *See State ex rel. Krahn v. Tahash*, 274 Minn. 567, 567-68, 144 N.W.2d 262, 262 (1966) (holding that right to present mitigation may be satisfied when court conducts presentence investigation); *see also* Minn. Stat. § 631.20 (2008) (permitting court to hear issue if either party suggests mitigating circumstances); Minn. R. Crim. P. 27.03, subd. 3(C) (providing for defendant's statement before court imposes sentence).

McGee's second remaining claim is that the district court failed to inform him that his minimum period of incarceration on the twenty-three-month sentence could be extended if he committed disciplinary violations in prison. *See* Minn. Stat. § 244.101, subd. 2 (2008) (requiring court to explain length of sentence and possible extensions). The statute at issue is apparently directory rather than mandatory, because it does not state any consequence for the court's failure to provide the specified explanation. *See State v. Thomas*, 467 N.W.2d 324, 326-27 (Minn. App. 1991) (concluding requirement in

rule is directory because it does not "specify any sanction for its violation"). But, most significantly, the record does not indicate that McGee's period of incarceration for the assault sentence was extended. Because McGee's sentencing issues do not relate to the section 244.101 requirements, his substantial rights were not prejudiced. *See* Minn. R. Crim. P. 31 (requiring prejudice to trigger reversal).

Finally, McGee raises due process and double-jeopardy arguments based on his assertion that the district court placed him on probation when it released him between the entry of his plea and his sentencing hearing. Although his release was subject to conditions that were apparently supervised by the court's probation office, McGee's presentence release was not part of any probationary term. Therefore, he was not entitled to a probation-revocation hearing and the twenty-three-month executed sentence imposed in September was not a "second" sentence for his assault charge that would implicate or violate double jeopardy.

The district court did not abuse its discretion or impose an illegal sentence for McGee's conviction of third-degree assault. We affirm the postconviction court's denial of relief.

Affirmed.