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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0270**

State of Minnesota,
Respondent,

vs.

Scot William Yard,
Appellant.

**Filed January 2, 2018
Affirmed
Reilly, Judge**

Anoka County District Court
File No. 02-CR-15-3973

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

On appeal from his conviction of second-degree criminal sexual conduct (CSC), appellant Scot William Yard argues that, because the prosecutor's statements at sentencing

violated a promise under the plea agreement to accept Yard's claim he had amnesia due to intoxication as part of his *Norgaard* plea,¹ he is entitled to specific performance and resentencing. We affirm because Yard forfeited his challenge when he failed to object to the prosecutor's statements at sentencing. We also conclude that the state did not violate the plea agreement at sentencing when the prosecutor challenged Yard's assertion that he could not remember the offense due to intoxication.

FACTS

In September 2016, Yard pleaded guilty to second-degree CSC by way of a *Norgaard* plea. During the plea colloquy, and in his plea petition, Yard claimed that he was "so drunk or so under the influence of drugs or medicine that [he] did not know what [he] was doing at the time of the crime." Yard entered his guilty plea with the understanding that the state would dismiss the first-degree CSC charge and that at sentencing the state would argue for a presumptive sentence under the Minnesota Sentencing Guidelines. After Yard's counsel and the state created a proper foundation for a *Norgaard* plea, the district court accepted the plea.

Yard moved for a downward durational departure before sentencing arguing that because he suffers from chemical dependency and mental illness, and was intoxicated during the incident, he "lacked substantial capacity for judgment." In November 2016, the state opposed Yard's motion at sentencing and asked the district court to sentence Yard to

¹ A *Norgaard* plea allows a defendant to plead guilty "even though he or she claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense." *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994) (citing *State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961)).

108 months in prison, the high end of the sentencing guideline's presumptive range. To justify the request, the prosecutor highlighted the effect Yard's behavior had on the minor victim. The prosecutor also attacked Yard's assertion that he could not remember the events due to intoxication:

When Mr. Yard came in and testified before this Court in his factual basis, he entered a *Norgaard* plea, which is concerning to the State in the sense that this wasn't a mistake and this was not a blackout, and all of Mr. Yard's reactions to being caught demonstrate beyond any doubt that he knew what he was doing. He knew that he had done—he had sexually abused [the victim], and he knew he had been caught. He planned it. He waited until nighttime. He waited until [the victim's mother] was in bed. . . . He pretended to be coming out of the bathroom when [the victim's mother] got up to find him. He was hiding under a boat when law enforcement was looking for him. He was texting his employer, giving a rational reason why he might miss work the next day. That's not somebody who is blacked-out or drunk or doesn't know what they are doing. That's somebody that's planned something that absolutely knows what they are doing.

. . . .
. . . Mr. Yard clearly did this and he did it on purpose and he did it knowingly, and this wasn't the product of some drunken escapade and it shouldn't be treated as such.

Yard did not object to the prosecutor's statements and argued for a downward departure.

The district court denied Yard's departure motion, explaining that it could not make a causal link between Yard's chemical dependency and mental illness on one hand, and a finding that his behavior was less serious or culpable on the other hand. The district court explained, though, that what it heard was sufficient to sentence Yard to the bottom of the sentencing guideline's presumptive range.

Yard now appeals, arguing that the state violated the plea agreement.

DECISION

I. Appellant Forfeited His Challenge

As a threshold matter, the state contends that Yard forfeited his challenge to the prosecutor's statements at the sentencing hearing because he did not object before the district court. We agree.

Generally, if a prosecutor violates a promise that induced a plea agreement, and the defendant timely objects, the defendant is entitled to a remedy, such as resentencing with specific performance of the plea agreement or an opportunity to withdraw the plea. *State v. Ferraro*, 403 N.W.2d 845, 848 (Minn. App. 1987). However, this court held in *Ferraro* that when a defendant fails to object to a violation of the plea agreement at sentencing, and is not prejudiced by any such violation, the defendant forfeits challenging the violation.² 403 N.W.2d at 848. In *State v. Anderson*, we similarly found that a defendant's failure at a plea or sentencing hearing to object to the imposition of restitution as violating a plea agreement constituted forfeiture of the issue. 507 N.W.2d 245, 247 (Minn. App. 1993).

Furthermore, in *State v. Witte*, the supreme court suggested in dicta that an issue involving the state's violation of a plea bargain may be forfeited when the defendant does not object. 308 Minn. 214, 215, 245 N.W.2d 438, 439 (1976). In *Witte*, the defendant argued that he should be allowed to withdraw his plea because the state broke its promise

² The plain-error rule does not apply to this case. The rule allows this court to review unobjected-to errors that are "plain" and "effect substantial rights." Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). But a "plain error" is one that affects a defendant's right to have a fair trial and is inapplicable to cases involving a guilty plea. *State v. Thole*, 614 N.W.2d 231, 236 (Minn. App. 2000).

to make no recommendation as to his sentence. 302 Minn. at 214-15, 245 N.W.2d at 438. The supreme court determined that it appeared “there may have been a [forfeiture], as defendant did not object,” and that “it seems unjust for defendant and his counsel to sit idly by without objection and, after finding out what the sentence is, to then cry foul.” *Id.* at 215, 245 N.W.2d at 439. But, because of the sparse record, the supreme court remanded the case back to the district court. *Id.*

Despite this authority, Yard relies on *James v. State*, 699 N.W.2d 723 (Minn. 2005), and *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989), to support his argument that “[a] claim that the state violated a plea agreement may be raised for the first time on appeal.” But those cases involve challenges to the validity of a guilty plea. In *James* the supreme court determined the defendant’s plea was not “knowingly or understandably made” because the state’s promise was unfulfillable. 699 N.W.2d at 726, 730. The supreme court in *Brown* determined that “[a] defendant is free to simply appeal directly from a judgment of conviction and contend that the record made at the time the plea was entered is inadequate” regarding the requirement that a guilty plea must be accurate, voluntary, and intelligent. *Brown*, 449 N.W.2d at 182. Because Yard is not making an argument that the state made an unfulfillable promise or that “the record made at the time of the plea was entered is inadequate” to show that his plea was accurate, voluntary, and intelligent, *James* and *Brown* are inapposite. *Id.* This case is more in line with *Ferraro*, *Anderson*, and *Witte*.

Here, when the prosecutor at sentencing challenged Yard’s contention that he could not remember the offense due to intoxication Yard failed to object. Yard raises this issue for the first time on appeal. Yard cannot show he was prejudiced by any alleged plea-

agreement violation because the district court explained in detail its reasoning for not departing, and that reasoning did not include the state's allegation that Yard misrepresented that he had amnesia due to intoxication. Accordingly, we conclude Yard forfeited his challenge because he failed to object at sentencing and no prejudice occurred.

II. The State Did Not Violate the Plea Agreement

Even if Yard did not forfeit his challenge, Yard's argument that the state violated the plea agreement fails because the record does not show that the state promised to accept Yard's claim of amnesia from intoxication.

In determining whether a plea agreement was violated, appellate courts examine "what the parties to [the] plea bargain reasonably understood to be the terms of the agreement." *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (alteration in original) (quotation omitted). What the parties agreed to is a question of fact to be resolved by a district court. *Id.* Appellate courts review a district court's factual determination of the terms of the parties' agreement for clear error. *State v. Robledo-Kinney*, 615 N.W.2d 25, 32 (Minn. 2000). "Issues involving the interpretation and enforcement of plea agreements, however, are issues of law that we review de novo." *Brown*, 606 N.W.2d at 674.

A valid guilty plea must be accurate, voluntary and intelligent (i.e., knowingly and understandingly made). The voluntariness requirement insures that a guilty plea is not entered because of any improper pressures or inducements. When 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. Allowing the government to breach a promise that induced a guilty plea violates due process. On demonstration that a plea agreement has been breached, the court may allow

withdrawal of the plea, order specific performance, or alter the sentence if appropriate.

Id. (alterations omitted) (quotations and citations omitted).

Yard and the state disagree on the facts regarding the terms of the plea agreement. Yard asks this court to “conclude that the state agreed to accept the *Norgaard* plea as part of the plea bargain.” The state asserts that its “only promise” was to dismiss the remaining charge, and that Yard said at the plea hearing he understood that the state would be arguing against a downward departure.

At the plea hearing, the district court recited its understanding of the plea agreement to Yard: “As I understand it, the agreement is that you would be pleading guilty to Count 2. That is the second degree criminal sexual conduct. Count 1 would be dismissed.” The district court stated that it understood that the parties agreed that defense counsel would argue for a downward dispositional or durational departure, the state would probably oppose the departure motion, and there were no agreements on the departure issue. The court stated that the Minnesota Sentencing Guidelines presumptive range for a second-degree CSC offense was 90 to 108 months. Finally, the court stated that it understood that Yard would “be entering a guilty plea under what we know here as the *Norgaard* case, in which you would say that, because of voluntarily having consumed some chemicals; alcohol in your case, that you don’t recall . . . all of the elements of the crime. . . .” The district court made no mention of any promise from the state agreeing to accept at sentencing Yard’s assertion that he had amnesia during the offense due to intoxication.

After reviewing the plea petition and colloquy, we conclude that the district court did not clearly err in its recitation of the plea agreement. Yard's plea petition, which he signed and went over with his attorney, specifically stated that in exchange for pleading guilty to second-degree CSC, count two of the complaint, the state would "[d]ismiss count one, [the] defense will seek [a] downward dispositional or in [the] alternative downward durational departure, [and the] state will seek [a] guidelines sentence." The plea transcript shows that Yard entered his guilty plea with the understanding that the state would dismiss the first-degree CSC charge and that at sentencing the state would argue for a presumptive sentence under the Minnesota Sentencing Guidelines. Yard also understood that the sentencing guideline's presumptive range for count two was 90 to 108 months in prison. He stated on the record that he understood that no other promises had been made.

Yard's contention that the prosecutor "agreed not to challenge the necessary memory component of the *Norgaard* plea" and ratified this promise by acquiescing to Yard's testimony during the plea has little basis in the record. The state made no expressed promise to not challenge the lack-of-memory component of the *Norgaard* plea. Yard also suggests that the state *impliedly* promised that it would accept his contention that he had amnesia. Yard asserts that "all the parties knew that a *Norgaard* plea necessarily included Yard's statement that he did not remember the incident." But, Yard cites no caselaw—nor are we aware of any—that recognizes the existence and violation of an implied promise in a plea bargain.

Yard relies on *In re Ashman*, arguing that in close cases, when the terms of a plea agreement are ambiguous, the plea agreement must be construed in the defendant's favor.

608 N.W.2d at 858. Whether a plea agreement is ambiguous is a question of law. *Id.* In *Ashman*, the supreme court determined no ambiguity existed in the plea agreement when the plea transcript showed clear and “unequivocally expressed” terms. *Id.* Here, the plea agreement was not ambiguous because the only unequivocally expressed promise under the agreement was that the state would dismiss the first-degree CSC charge.

Finally, Yard relies on one unpublished case from this court, asserting that this court has “disapproved of ‘bait and switch’ tactics by the prosecution.” We reviewed that case and disagree that the prosecutor here engaged in such a “bait-and-switch” ploy because the prosecutor never promised to recognize appellant’s claim of amnesia at sentencing.

Because the state did not violate the plea agreement, Yard is not entitled to resentencing or specific performance.

Affirmed.