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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1546**

State of Minnesota,
Respondent,

vs.

Dominique Lamar Brehm,
Appellant.

**Filed June 11, 2018
Reversed and remanded
Larkin, Judge**

Blue Earth County District Court
File No. 07-CR-15-4119

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

Patrick McDermott, Blue Earth County Attorney, Susan DeVos, Assistant County
Attorney, Mankato, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this direct appeal from judgments of conviction and sentences for being a felon in possession of ammunition and fifth-degree controlled-substance crime, appellant argues that the district court should be required to resentence him to a stayed sentence as he was promised under his plea agreement or he should be allowed to withdraw his guilty plea. Because appellant's plea agreement included an unconditional promise that he would receive a stayed sentence, we reverse and remand for the district court to either resentence appellant in accordance with his plea agreement or allow him to withdraw his plea.

FACTS

In October 2015, respondent State of Minnesota charged appellant Dominique Lamar Breham with two counts of being a prohibited person in possession of ammunition, one count of fifth-degree controlled-substance possession, and one count of possession of a synthetic cannabinoid. The complaint alleged that law-enforcement officers executed a search warrant at Breham's home and discovered ammunition, cocaine, synthetic marijuana, and drug paraphernalia. The complaint also alleged that Breham had been convicted of a first-degree controlled-substance crime in May 2007.

In March 2017, Breham entered an *Alford* guilty plea to one count of being a prohibited person in possession of ammunition and one count of fifth-degree controlled-substance possession pursuant to a plea agreement in which the state agreed, among other things, to "waive the mandatory minimum sentence" for the ammunition count and "sentence to a guideline [sentence], with a stay of execution."

Breham submitted a petition in support of his guilty plea, which summarized the plea agreement as follows:

Plead to Count 2 Ammun[ition] Violat[ion]
Waive Man[datory] Min[imum] – Sentence to
Guideline Sente[nce] with Stay of Ex[ecution]
(anticipated, 33 months)
Plead to Count 3 controlled substance 5th-degree
Dismiss 07-CR-16-1381 & Misd[emeanor]
Obstruct[ion] 07-CR-16-2698 & Count 1 4119

During the plea hearing, the district court told Breham that the mandatory minimum sentence for the ammunition charge was 60 months in prison, but that the state was “willing to waive that and I’ll tell you, I am willing to go along with that in this unique circumstance, but your sentence will likely be 33 months in prison, stayed based upon the Sentencing Guideline[s] Grid.”

On April 25, 2017, Breham moved to withdraw his guilty plea, arguing that his “plea was rushed during a delay in his jury trial,” that he “[did] not believe that his plea was voluntary and was coerced due to the circumstances surrounding the plea,” and that he “[did] not believe that he knowingly and voluntarily waived his right to a jury trial.” The district court denied Breham’s motion to withdraw his guilty plea, reasoning that his plea “was intelligent, voluntary and accurate.”

When Breham appeared for sentencing on July 7, 2017, he had been charged with a new crime: prohibited person in possession of a firearm. The state asked the district court to impose the mandatory minimum sentence, arguing that because Breham had been charged with a new crime, there was “no basis for a downward departure.” Breham asked the district court to impose a sentence consistent with the plea agreement.

The district court sentenced Breham to serve 45 months in prison for the ammunition conviction based on his behavior between the plea and sentencing hearings. The district court sentenced Breham to a concurrent 19-month stayed sentence for the fifth-degree controlled-substance conviction. Breham appeals.

D E C I S I O N

Breham asks this court to remand with instructions that the district court allow him to either “choose to withdraw his guilty plea, or choose to receive the bargained-for sentence required under the plea agreement, with stayed sentences for both counts.” Breham argues that “[t]he parties specifically agreed that [he] would receive a stayed sentence” and that “[t]his promise plainly induced Breham’s plea, as he entered into the agreement with the understanding that he would not go to prison.” Instead of filing a responsive brief, the state filed a letter stating that it “does not object to appellant’s request to remand for resentencing.”

The interpretation and enforcement of plea agreements involves issues of law that we review de novo. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). This court looks to “what the parties to the plea bargain reasonably understood to be the terms of the agreement in determining whether a plea agreement has been violated.” *State v. Wukawitz*, 662 N.W.2d 517, 527 (Minn. 2003) (quotation omitted).

Two cases are relevant to our analysis. In the first, *State v. Kunshier*, this court held that the district court “erred by denying [Kunshier’s] motion to withdraw his guilty plea when the record show[ed Kunshier’s] guilty plea was induced by a promise as to sentencing which was not fulfilled.” 410 N.W.2d 377, 378 (Minn. App. 1987), *review denied* (Minn.

Oct. 21, 1987). Like Brehm, Kunshier pleaded guilty under a plea agreement that promised a particular sentence and allegedly committed new offenses between his plea and sentencing hearings. *Id.* The state argued for consecutive sentencing, even though it had promised concurrent sentencing under the plea agreement. *Id.* at 378-79. Kunshier moved to withdraw his plea, and the district court denied his motion. *Id.* at 379. This court reversed, reasoning that “if an unqualified promise is made on the sentence to be imposed, a defendant should be allowed to withdraw his guilty plea if that promise is not fulfilled.” *Id.*

This court explained:

At sentencing, if [the district court] does not wish to impose the offered sentence, it must inform [the defendant] of his right to withdraw the guilty plea and his right to take his chances at trial on all counts. See Minn. R. Crim. P. 15.04, subd. 3(1). Here, the court sat silent after both counsel put the offered plea agreement on the record, and allowed [Kunshier] to plead guilty under circumstances indicating [Kunshier] reasonably thought he had a firm agreement. The court could not, at the subsequent sentencing, exercise its right to impose any sentence deemed proper, within statutory limits, without first offering [Kunshier] his right to withdraw his guilty plea and stand trial.

Id. (footnote omitted). Because Kunshier’s plea was based on a promise, the district court “had no discretion to reject [that promise] without tendering to [Kunshier] his right to withdraw [his] plea and stand trial.” *Id.* at 379-80.

“Defendants, once they offer qualified guilty pleas, do not forfeit their right to withdraw those pleas of guilty and stand trial if, because of later events, the [district] court or the prosecution ethically change their minds about previous agreements that were

reached.” *Id.* at 380. In such circumstances, “[district court] judges at sentencing . . . have the right to change their minds about a previous plea agreement they earlier deemed acceptable.” *Id.* at 379 n.1. However, “whenever a defendant has pleaded guilty pursuant to his understanding that there is a plea bargain as to the charges or to the ultimate sentence,” the defendant “must be offered the right to withdraw that plea of guilty and stand trial if, for any reason, the [district court] judge exercises the discretion that is his not to follow the proposed agreement.” *Id.* Similarly, the state cannot “claim that an offered plea agreement can be withdrawn because of subsequent bad acts but, because of the claimed bad acts, determine the defendant forfeited his right to withdraw his qualified guilty plea.” *Id.* at 380 n.2.

The second case that is relevant is *State v. Montez*, 899 N.W.2d 200 (Minn. App. 2017). In *Montez*, this court clarified that *Kunshier* is inapplicable in a case involving a conditional plea agreement, holding:

When a plea agreement provides that a particular sentence will be imposed if a defendant complies with certain conditions and the defendant does not comply with those conditions, a district court’s imposition of a different sentence is not a violation of the plea agreement and does not entitle the defendant to withdraw the plea.

899 N.W.2d at 201.

Like Breham and Kunshier, Montez pleaded guilty pursuant to a plea agreement, allegedly committed new crimes between his plea and sentencing hearings, and the district court therefore declined to sentence Montez consistent with the terms of the plea agreement. *Id.* at 202-03. However, Montez’s plea petition expressly stated that he

understood that if he did not comply with several conditions, “then the above plea agreement is in jeopardy and the court [could] sentence [him] without regard to that agreement, as if I entered a ‘straight plea.’” *Id.* at 201. Those conditions included that Montez remain law-abiding and not be charged with a new crime. *Id.*

In *Montez*, this court affirmed the district court’s refusal to sentence in accordance with the terms of the plea agreement, reasoning that “*Kunshier* has been distinguished in cases like [Montez’s] where the defendant did not receive an unqualified promise regarding the sentence to be imposed.” *Id.* at 203 (quotation omitted). This court reasoned, “[i]t is clear from the record that [Montez] understood the direct consequences of his plea, including the fact that a reduced sentence was contingent upon his remaining law abiding and not being charged with any new crimes.” *Id.* at 204 (quotation omitted). This court concluded that “[b]ecause [Montez’s] plea agreement included conditions and he did not comply with those conditions, the district court had no obligation to impose the sentence in the plea agreement and did not violate the plea agreement by imposing a different sentence, and [Montez] is not entitled to withdraw his plea.” *Id.* In sum, the holding of *Kunshier* does not apply if a defendant agreed to a conditional plea agreement and violated the agreement. In such circumstances, the district court is not bound by the sentencing terms of the plea agreement. *Id.* at 202.

The record here does not indicate that Breham’s plea agreement was conditional, much less conditioned on his remaining law-abiding. Although such a condition is entirely reasonable and perhaps intuitive, under caselaw, the record must reveal the existence of such a condition before a defendant’s failure to remain law-abiding is a basis to depart from

the sentencing terms of the plea agreement. *See id.* at 203 n.3 (discussing unpublished cases in which plea agreements were expressly conditioned on post-plea conduct). We therefore reverse and remand for the district court to either sentence Breham to a stayed sentence for the ammunition charge, consistent with the plea agreement, or allow him to withdraw his plea.¹

Reversed and remanded.

¹ In deciding how to proceed on remand, the district court should consider the requirements of Minn. Stat. § 609.11, subds. 5, 8 (2014) (describing mandatory minimum sentence and requirements for a departure from that sentence).