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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0667**

State of Minnesota,
Respondent,

vs.

Zhaokun Tong,
Appellant.

**Filed December 17, 2018
Affirmed in part, reversed in part, and remanded
Jesson, Judge**

Crow Wing County District Court
File No. 18-CR-16-786

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

Donald F. Ryan, Crow Wing County Attorney, Rockwell J. Wells, Assistant County
Attorney, Brainerd, Minnesota (for respondent)

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Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Florey,
Judge.

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

JESSON, Judge

Appellant Zhaokun Tong agreed to plead guilty to one count of prostitution with a
minor. One of the terms listed in his plea agreement was that he would have no travel
restrictions. When Tong petitioned the district court to remove a requirement that he

provide two weeks notice before traveling out-of-state for business, the district court agreed to remove that requirement but, without consulting the parties, added several other travel conditions. Tong appeals the imposition of these additional conditions and seeks correction of a clerical error in the amount of his penalty assessment in the warrant of commitment. Because the district court did not increase Tong's sentence or abuse its discretion by imposing additional travel conditions, we affirm the travel conditions that do not conflict with the plea agreement. But we reverse those conditions that conflict with the plea agreement and remand with instruction to correct the penalty assessment amount in the warrant of commitment.

FACTS

Appellant Zhaokun Tong is originally from China and has family members who still reside there. Tong lives in the United States and owns his own company, which sells and maintains restaurant equipment.

This case stems from Tong's online subscription to a website called "Seeking Arrangements." Through this website, Tong met a person who told him that she was 18 years old, which he believed. Tong arranged to meet her and offered to pay her money to engage in sexual contact with him.¹ But despite Tong's belief otherwise, the girl was only 14 years old. In connection with this encounter, the state charged Tong with four counts

¹ Tong did pay the individual money and met her again about one month later and engaged in sexual acts with her, but it appears that the charge to which he pleaded guilty only involved the initial meeting.

of violating the law, including third- and fourth-degree criminal sexual conduct, prostitution, and soliciting a child to engage in sexual conduct.

Through plea negotiations, Tong pleaded guilty to one count of prostitution. Tong agreed to a stay of imposition of 45 days of jail time, provided that he complete “John School” within one year, and pay a fine plus a penalty assessment, in addition to probation and other requirements relevant to his offense. During the plea negotiations, Tong noted that he had an upcoming trip to visit his family in China, and one part of the plea agreement stated that there would be “no travel restrictions.”

When presented with the plea agreement, a district court judge found that Tong entered the plea freely and voluntarily after consulting with his attorney. Acceptance of the plea was withheld until after a presentence investigation was completed. A second district court judge then adjudicated Tong guilty at the sentencing hearing and imposed a sentence according to the terms of the plea agreement. The district court ordered Tong to pay a \$750 penalty assessment and ordered ten years of probation with the ability to petition for discharge after four years. With respect to Tong’s ability to travel, the district court stated that “[i]n terms of travel, I am going to honor the [plea] agreement. You are eligible to go back to your home country for visits . . . but you are to set those up with your probation officer so they know when you are going to be gone and when you are coming back, okay?” Tong agreed.

But afterwards, when the probation department set up Tong’s probation agreement, it included the requirement that he obtain permission two weeks in advance to leave the state of Minnesota. Tong filed a motion to remove this two-week advance notice

requirement for out-of-state business travel because the new travel restriction was hindering his potential business growth. At a hearing on the motion, Tong noted that because he responds to customers when their equipment malfunctions, he was not able to know two weeks in advance when he would need to leave the state. Further, Tong argued that his original plea agreement contained the term “no travel restrictions.” The state responded by noting that the plea agreement discussions about travel only pertained to Tong’s ability to travel to China to visit his family, not out-of-state travel within the United States. The state further cited concerns about Tong’s unlimited travel conflicting with the Interstate Compact for Adult Offender Supervision’s requirements.

The district court removed the two-week notice requirement for Tong’s business travel outside of Minnesota. But, after waiving that requirement, the district court sua sponte imposed additional conditions on Tong’s out-of-state business travel. Tong appeals those conditions.

D E C I S I O N

Tong raises two arguments that the district court erred by imposing additional travel conditions not imposed by the original sentencing court. First, Tong argues that the district court erred as a matter of law by imposing additional travel conditions because the additional travel conditions effectively increased his sentence. We review this question of law—whether the travel restrictions increased his sentence—de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016). Second, Tong contends that the district court abused its discretion by adding travel conditions that conflicted with the terms of his plea agreement, which stated that he would have no travel restrictions. We afford the district

court significant discretion to impose sentences and only reverse sentencing decisions for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). But while issues of fact surrounding *what* the parties agreed to in a plea agreement are for the district court to determine, interpretation and enforcement of a plea agreement are issues of law to be reviewed de novo. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000).

I. The district court did not err as a matter of law by modifying Tong’s sentence because the additional travel conditions did not increase his sentence.

Tong first argues that the district court erred as a matter of law by imposing additional restrictions on his travel because it effectively increased his sentence. After removing the two-week notice requirement for out-of-state business travel, the district court imposed the following travel conditions:

- (a) Defendant shall inform his probation officer of where Defendant will be traveling and the business purpose requiring the travel as soon as Defendant is made aware of the need for the travel.
- (b) Defendant shall inform his probation officer of both the departure date and return date of the business travel. Once the business purpose for the travel outside of Minnesota is complete, Defendant shall immediately return to Minnesota.
- (c) Defendant shall inform his probation officer of where Defendant is staying during the duration of Defendant’s business travel, and any changes that take place throughout the travel.
- (d) While out of Minnesota on business related travel, Defendant shall return to where he is staying once his business related activities are concluded for the day. Defendant shall not have any visitors where he is staying unless for a business related purpose within the scope of the travel.

(e) Defendant shall keep in contact with his probation officer every day while traveling outside of Minnesota, whether it be actual conversation or a voice message, to inform Defendant's probation officer of any change in travel plans or accommodations and to update Defendant's probation officer on the status of the travel.

Tong points out that the district court accepted his plea agreement including the term “no travel restrictions” and sentenced him according to the plea agreement. Accordingly, Tong contends that the two-week-notice requirement in the probation agreement and the subsequent conditions imposed by the district court constituted travel restrictions that directly conflicted with his unambiguous plea agreement. Tong argues that because his original sentence contained no travel restrictions, the later-imposed conditions constituted an increase in his sentence that constituted error as a matter of law.

Minnesota Rules of Criminal Procedure 27.03, subdivision 9, allows the court to “modify a sentence during a stay of execution or imposition of sentence *if the court does not increase the period of confinement.*” (Emphasis added.) Here, the district court's order imposing conditions on Tong's out-of-state travel in no way increased Tong's period of confinement. The district court did not increase the amount of time Tong was sentenced to serve or increase the length of his probation. Accordingly, the additional travel conditions cannot be properly characterized as an increase in Tong's sentence.

The cases cited by Tong are not to the contrary. Those cases primarily involve sentence modifications that resulted in a longer prison sentence. See *State v. Braun*, 487 N.W.2d 232 (Minn. 1992) (holding that a sentence could not be increased by switching from concurrent to consecutive sentencing); *State v. Montjoy*, 354 N.W.2d 567 (Minn.

App. 1984) (holding that when the time frame for an appeal from a prison sentence authorized by law has expired, the district court cannot increase the term of sentence). Because all of these cases involved district court decisions that resulted in an increased length of confinement, they are not instructive here.

Because the imposition of conditions for Tong's out-of-state travel did not increase his sentence, the district court did not err as a matter of law.

II. Although it was within the district court's discretion to impose additional travel conditions, those conditions must adhere to Tong's plea agreement.

Alternatively, Tong argues that the district court's decision to impose travel restrictions as a probation condition constitutes an abuse of discretion because they conflict with his plea agreement which contained the term "no travel restrictions."² An abuse of discretion occurs when the district court's decision "is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

In many ways, plea agreements are analogous to a contract between a defendant and the state. *State v. Meredyk*, 754 N.W.2d 596, 603 (Minn. App. 2008). In essence, plea agreements represent "a bargained-for understanding between the government and

² The district court has broad discretion to determine conditions of probation, so long as the conditions are "reasonably related to the purposes of sentencing" and not "unduly restrictive of the probationer's liberty or autonomy." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Probation conditions can include restrictions on employment, places the probationer may go, and with whom he may associate. *Id.* at 515-16 (citation omitted). Accordingly, the district court's decision to impose the additional probation conditions that *are* reasonably related to Tong's sentence and do not unduly burden his liberty was not an abuse of discretion.

criminal defendants in which each side foregoes certain rights and assumes certain risks in exchange for a degree of certainty as to the outcome of criminal matters.” *Id.* (quoting *United States v. Porter*, 405 F.3d 1136, 1145 (10th Cir. 2005)). Similar to a contract, an unqualified promise included in a plea agreement must be honored. *Id.* To determine if a plea agreement was violated, courts look at what the parties “reasonably understood to be the terms of the agreement.” *Brown*, 606 N.W.2d at 674 (quotation omitted). If a plea agreement has been breached, courts may allow “withdrawal of the plea, order specific performance, or alter the sentence if appropriate.” *Id.*

The district court found that one of the conditions listed in Tong’s plea agreement was that he would not be placed on any travel restrictions. Additionally, the district court determined that the presentence investigation also stated that, according to the plea agreement, no travel restrictions were placed on Tong, and that the amended sentencing order allowed Tong to leave the country to visit China. Although the state argues that the only travel discussed during plea negotiations was Tong’s travel to China, the plea agreement listed “no travel restrictions” as part of the agreement. It is the district court’s role to determine what the parties agreed to in a plea agreement, and here, it appears that the district court determined that the parties agreed to “no travel restrictions.” *See Brown*, 606 N.W.2d at 674.

Therefore, we examine the additional travel conditions imposed by the district court to see which, if any, are restrictions on Tong’s ability to travel. Some of the conditions in the district court order—found in subdivisions a, c, and e, and portions of subdivisions b and d—do not constitute travel restrictions. Conditions a, c, and e require Tong to inform

his probation officer where he is traveling, where he is staying, and any changes that take place, and to keep in contact with his probation officer every day while traveling outside of Minnesota. None of these conditions impairs Tong's ability to travel where he needs to go; they simply require him to keep probation updated about his whereabouts and travel plan and are more properly characterized as notice requirements. Similarly, a requirement found in subdivision b that Tong must inform probation of the dates of his travel is a notice requirement and not a travel restriction. Finally, a condition found in subdivision d forbids Tong from having any visitors where he is staying unless it is within the scope of his business travel. This requirement does not constitute a travel restriction because it does not prevent Tong seeing visitors in a different location and does not impact his ability to go where he needs or wishes to. Because these conditions are not travel restrictions, they do not violate the plea agreement.

The district court's removal of the two-week-notice requirement for Tong's business travel—but not all travel—is also consistent with the plea agreement. The district court determined that the two-week-notice requirement hindered Tong's ability to travel last-minute for his job and therefore removed the notice requirement for the business travel. But the court left the notice requirement for personal travel in place. The notice requirement for personal matters does not prevent Tong from traveling anywhere. It simply requires that he give probation sufficient advance notice. This is not a travel restriction and thus is consistent with Tong's plea agreement.

But two travel conditions, portions of subdivisions b and d, do constitute travel restrictions. One condition, found in subdivision b, requires that Tong immediately return

to Minnesota once the business purpose for his travel is complete. Requiring Tong to immediately return to Minnesota once he completes his business activities restricts his ability to travel and accordingly violates the plea agreement. Similarly, another condition, found in subdivision d, requires Tong to return to where he is staying after concluding his business activities for the day. Again, this restricts Tong's ability to travel because it does not allow him to go where he wishes once he has reached his destination.³ Because these travel conditions amount to restrictions on Tong's ability to travel, they violate his plea agreement.⁴

Accordingly, we affirm the travel conditions that do not conflict with Tong's plea agreement, which are subdivisions a, c, and e in their entirety and the identified conditions from subdivisions b and d. But we reverse the conditions that are travel restrictions that violate the plea agreement, which are the requirements in subdivisions b and d that Tong immediately return to Minnesota when the business purpose of his travel is complete and that Tong must immediately return to his hotel room once his business activities are concluded for the day.

³ The state noted its concern about the term "no travel restrictions" conflicting with requirements outlined in the Interstate Compact for Adult Offender Supervision. But the Interstate Compact primarily deals with relocation, rather than temporary travel. See Minn. Stat. § 243.1605 (2018). Even if Tong's travel raised concerns under the Interstate Compact, the notice requirements that remain in place allow probation to monitor Tong's whereabouts.

⁴ Tong also argues that the district court's sua sponte decision to impose the additional travel conditions deprived him of notice. But it is unclear how Tong was prejudiced by a lack of notice. Tong brought the motion to modify his sentence and had a hearing at which he argued that his understanding of the plea agreement was that it contained the term "no travel restrictions."

III. The warrant of commitment contained a clerical error regarding the amount of Tong's penalty assessment.

Both Tong and the state agree that the district court committed a clerical error in the warrant of commitment regarding the amount of Tong's penalty assessment. The warrant of commitment lists the amount of the assessment for the prostitution charge as \$1,000, while the district court ordered Tong to pay \$750.

Minnesota Rules of Criminal Procedure 27.03, subdivision 10, allows clerical mistakes to be corrected by the court at any time. Here, it is clear from the record that Tong was ordered to pay a \$750 penalty assessment and that the \$1,000 amount listed was erroneous. Accordingly, we remand with instructions to modify the warrant of commitment to reflect that Tong was ordered to pay a \$750 penalty assessment for prostitution.

Affirmed in part, reversed in part, and remanded.