

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE LEOPOLDO RAMIREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85749-COA

FILED

JUN 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E. Brown*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, VACATING JUDGMENT, AND
REMANDING*

Jose Leopoldo Ramirez appeals from a judgment of conviction entered pursuant to a guilty plea of attempted lewdness by a person over 18 years old with a child less than 14 years old. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

First, Ramirez argues that the district court erred at sentencing by imposing a fee for the cost of the psychosexual evaluation. Ramirez contends that the purpose of his psychosexual evaluation was to ascertain whether he would be placed on probation. Ramirez further contends that such an evaluation was not necessary because he was not seeking probation and should not have been required to pay the costs of an unnecessary evaluation.

Whether the district court erred by ordering Ramirez to pay the cost of the psychosexual evaluation is a matter of statutory interpretation. “Statutory interpretation is a question of law subject to de novo review.” *Williams v. State Dep’t of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). “The goal of statutory interpretation is to give effect to the Legislature’s intent.” *Id.* (internal quotation marks omitted). “To ascertain the Legislature’s intent, we look to the statute’s plain language.” *Id.*

“If a defendant is convicted of a sexual offense for which the suspension of sentence or the granting of probation is permitted, the Division *shall* arrange for a psychosexual evaluation of the defendant as part of the Division’s presentence investigation and report to the court.” NRS 176.139(1) (emphasis added). Moreover, “[i]f a psychosexual evaluation is conducted pursuant to this section the court *shall*: (a) [o]rder the defendant, to the extent of the defendant’s financial ability, to pay for the cost of the psychosexual evaluation.” NRS 176.139(7) (emphasis added). “Generally in construing statutes, . . . ‘shall’ is construed as mandatory unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature.” *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972).

Ramirez was convicted of a sexual offense for which the granting of probation was permitted. *See* NRS 176.133(3)(i); NRS 176A.100(1)(c); NRS 193.153(1)(a)(1); NRS 201.230(1)(a). And he does not demonstrate that it is necessary to construe any use of “shall” in NRS 176.139 as permissive in order to carry out the clear intent of the Legislature. The plain language of NRS 176.139(1) thus required the preparation of a psychosexual evaluation as part of the presentence investigation report. Because the preparation of the psychosexual evaluation was required pursuant to the plain language of NRS 176.139(1), Ramirez does not demonstrate that such an evaluation was unnecessary or that he should not have been required to pay for its cost simply because he did not request to be placed on probation. Accordingly, we conclude that Ramirez fails to demonstrate that he is entitled to relief based on this claim.

Second, Ramirez argues that the district court erred by imposing a sentence greater than the parties agreed to in the plea

agreement without affording him the opportunity to withdraw his guilty plea. Ramirez contends he entered a conditional guilty plea and, under the circumstances of this case, the district court was required to permit him the opportunity to withdraw his plea after it decided to impose a sentence harsher than the parties' recommendation.

The parties entered into a plea agreement and agreed that Ramirez's guilty plea was conditioned upon him receiving a sentence of 6 to 20 years in prison. The written plea agreement specifically stated, "If the Court does not accept the recommended sentence, [Ramirez] will be allowed to withdraw [his guilty] plea." In addition, at the plea canvass the district court explained to Ramirez that he would be able to withdraw his guilty plea if the district court did not impose the parties' agreed-upon sentence.


At the sentencing hearing, the district court decided to impose a sentence of 8 to 20 years in prison, which was greater than the sentence agreed to by the parties. The district court did not give Ramirez the opportunity to withdraw his guilty plea after it decided to impose a sentence greater than the parties' agreed-upon sentence.

The State concedes that Ramirez should have been given the opportunity to withdraw his guilty plea after the district court decided to impose a harsher sentence than that agreed upon by the parties. The State also concedes that the judgment of conviction should be vacated and that this matter should be remanded to the district court to permit Ramirez the opportunity to withdraw his plea.

Therefore, we vacate the judgment of conviction and direct the district court upon remand to permit Ramirez the opportunity to withdraw his guilty plea. See NRS 174.035(4) ("[A] defendant and the district attorney may enter into a written conditional plea agreement, subject to the

court accepting the recommended sentence pursuant to the agreement.”); *cf. Cripps v. State*, 122 Nev. 764, 770-71, 137 P.3d 1187, 1191-92 (2006) (stating that if a judge expresses an inclination to follow a sentencing recommendation and later reconsiders and imposes a harsher sentence, a defendant must be given an opportunity to withdraw the plea.). Should Ramirez decline to withdraw his guilty plea, the district court shall file an order reinstating the original judgment of conviction. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk