IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EUDIOS CARDOSO MONTALVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85582-COA

ORDER VACATING JUDGMENT AND REMANDING

Eudios Cardoso Montalvan appeals from a judgment of conviction, entered pursuant to an *Alford*[1] plea, of attempted lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Michael P. Villani, Senior Judge, and Carolyn Ellsworth, Senior Judge.[2]

Montalvan argues the district court erred at sentencing by revoking a drop-down provision in the plea agreement, which allowed for the withdrawal of Montalvan's *Alford* plea and for him to enter a plea of guilty to child abuse, neglect, or endangerment (non-sexual) if he received and successfully completed probation. The parties disagree as to the scope of the drop-down provision.

A plea agreement is a contract and "is construed according to what the defendant reasonably understood when he or she entered the plea." *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999); *see*

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

[2]Senior Judge Villani presided over Montalvan's entry of his *Alford* plea, and Senior Judge Ellsworth sentenced Montalvan.

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also State v. Second Jud. Dist. Ct. (Kephart), 134 Nev. 384, 391, 421 P.3d 803, 808 (2018). The plea agreement states, in relevant part, as follows:

> Provided I am not deemed a high risk to reoffend pursuant to the psychosexual evaluation, the State will not oppose my being granted probation at the rendition of sentence. Should I receive and successfully complete probation with an honorable discharge, I may withdraw the instant plea and enter a plea of guilty to CHILD ABUSE, NEGLECT, OR ENDANGERMENT . . . , non-sexual, with credit for time served.

The plea agreement also states, "I understand that . . . the question of whether I receive probation is in the discretion of the sentencing judge," "I know that my sentence is to be determined by the Court within the limits prescribed by statute," and "I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation."

Montalvan contends that under the plea agreement, if he received and successfully completed probation, he was entitled to withdraw his plea. The State contends that the plea agreement does not guarantee that Montalvan can withdraw his plea if he receives and successfully completes probation. The State gives three reasons in support of its contention.

First, the State argues that the plea agreement guarantees only that the State "would not oppose" a drop-down if he received and successfully completed probation. The non-opposition language in the plea agreement is only in the sentence related to the "grant[ing] [of] probation at the rendition of sentence." There is no language in the drop-down provision as to whether the State would or would not oppose it in the event that Montalvan received and successfully completed probation; rather, it

states Montalvan "may" withdraw his plea if he receives and successfully completes probation. Therefore, we reject this argument.

Second, the State argues that the phrase "[s]hould I receive" indicates the sentencing judge did not have to grant Montalvan the drop-down provision. The full phrase is, "Should I receive and successfully complete probation with an honorable discharge," and it constitutes the conditions precedent that, if satisfied, would entitle Montalvan to withdraw his plea. Although the district court had discretion in determining whether to grant Montalvan probation, there is no language indicating the district court could reject the drop-down provision in the event that it granted probation and Montalvan successfully completed probation. Therefore, we reject this argument.

Third, the State argues that the drop-down provision constitutes a sentencing recommendation that the district court was not obligated to accept. The State cites no authority to support the proposition that a term entitling a defendant to withdraw their plea under specified conditions constitutes a sentencing recommendation. Moreover, the drop-down provision does not recommend a sentence to the court; rather, it entitles Montalvan to withdraw his plea in the event that a certain sentence, i.e., probation, is imposed (and successfully completed). Thus, the drop-down provision implicates Montalvan's conviction, but it does not recommend a sentence.[3] *See Aldape v. State*, 139 Nev., Adv. Op. 42, 535

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[3]Even if the drop-down provision constituted a sentencing recommendation, the district court indicated at the plea canvass that it would honor the drop-down provision when it asked Montalvan if he understood that his sentence of lifetime supervision would end if he successfully completed probation. Because the district court expressed an indication to follow the drop-down provision when Montalvan entered his

P.3d 1184, 1189 (2023) (discussing the difference between a "conviction" and a "sentence"). Therefore, we reject this argument.

After review, we conclude that the plea agreement clearly indicates Montalvan is entitled to withdraw his plea if he receives and successfully completes probation. This is supported by the plea canvass, during which the district court confirmed that Montalvan understood that he would be subject to lifetime supervision and would be required to register as a sex offender for his lifetime if he was not successful on probation. Therefore, Montalvan reasonably understood that he would be entitled to withdraw his *Alford* plea and to enter a plea of guilty to child abuse, neglect, or endangerment (non-sexual) if he received and successfully completed probation, and the district court did not have discretion to reject the drop-down provision unless Montalvan failed to meet the conditions precedent.

Although the district court has some discretion in determining whether to reject a plea agreement, *see Sandy v. Fifth Jud. Dist. Ct.*, 113 Nev. 435, 442, 935 P.2d 1148, 1152 (1997) (stating "judges have the power to reject plea bargains so long as their decision-making process complies with" *Sparks v. State*, 104 Nev. 316, 759 P.2d 180 (1988)), the district court had already accepted Montalvan's plea when it rejected the drop-down provision at the sentencing hearing. Because of this, the district court was required to either (1) honor the terms of the plea agreement, including the drop-down provision; or (2) reject the plea agreement and grant Montalvan

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plea, Montalvan would have been entitled to withdraw his plea when the district court subsequently rejected it. *See Cripps v. State*, 122 Nev. 764, 771, 137 P.3d 1187, 1191-92 (2006) (stating a defendant must be given an opportunity to withdraw their plea if the judge "express[es] an inclination to follow the parties' sentencing recommendation" and subsequently "reconsiders and concludes that a harsher sentence is warranted").

the opportunity to withdraw his plea. *See Sandy*, 113 Nev. at 442, 935 P.2d at 1152 ("Judges must make findings of fact explaining their reasons for rejection with particularity, or they must accept the plea bargain."); *Gamble v. State*, 95 Nev. 904, 907, 604 P.2d 335, 337 (1979) ("[I]t is axiomatic that no guilty plea which has been induced by an unkept plea bargain can be permitted to stand." (internal quotation marks and punctuation omitted)); *see also United States v. Hyde*, 520 U.S. 670, 676 (1997) (stating a defendant may withdraw their plea if a court accepts their plea but subsequently rejects the plea agreement).[4]

Because the district court deprived Montalvan of the benefit of his bargain when it rejected the drop-down provision and failed to grant Montalvan an opportunity to withdraw his plea, we vacate the judgment of conviction and remand this matter to the district court.[5] On remand, the district court must either accept the plea agreement, including the drop-down provision, or reject the plea agreement in a manner consistent with *Sandy* and *Sparks*. If the district court accepts the plea agreement, it shall enter a new judgment of conviction incorporating the drop-down provision. If the district court rejects the plea agreement, it must afford Montalvan the opportunity to withdraw his plea; if Montalvan elects not to withdraw

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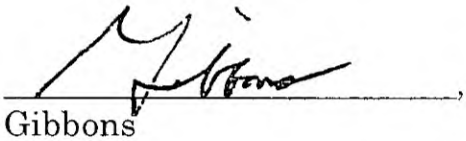
[4]This is consistent with the procedures attendant to guilty plea agreements that result from a defendant's voluntary participation in a settlement conference. *See* SCR Part V Rule 252(2)(f) ("If the parties reach a guilty plea agreement that involves any stipulations, such a settlement shall be conditioned on the trial judge's acceptance of and agreement to follow the stipulations. If the trial judge is unwilling to abide by the stipulations, then either side may withdraw from the guilty plea agreement.").

[5]In light of our disposition, we need not address Montalvan's remaining arguments.

his plea, the court may issue an order reinstating the judgment of conviction. Accordingly, we

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



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 17
Paul Padda Law, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk