STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2167

State of Minnesota,
Respondent,

vs.

Johnny Jackson Jr.,
Appellant.

Filed February 3, 2009
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. CR-07-9306

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Melissa Sheridan, Assistant State Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

HALBROOKS, Judge

Appellant argues that he is entitled to specific performance of his plea agreement. Because we conclude that appellant breached the terms of his plea agreement and waived specific performance of the agreement at sentencing, we affirm.

FACTS

On February 9, 2007, appellant Johnny Jackson, Jr. was charged with one count of aiding and abetting first-degree aggravated robbery. Appellant told police that he and a friend, Michael Jeffrey Washington, committed the robbery. Appellant entered into a plea agreement with the state. The substance of the agreement is undisputed: in exchange for truthful testimony at Washington's trial, appellant would receive a sentence within the range of 27 to 35 months.[1]

At his plea hearing, appellant testified that on the evening of February 2, 2007, he and Washington drove to Bloomington in Washington's car. Appellant stated that he and Washington decided to take money from a random person who was leaving a check-cashing business. Appellant testified that Washington hit the victim over the head with a crowbar and then punched and kicked the victim; appellant took the victim's wallet. Appellant stated that during the violence, the victim's blood got on Washington's jacket and on appellant. Appellant testified that he and Washington fled the scene in Washington's car, and Washington threw his bloody jacket out the car window near a

[1] The presumptive range for aggravated robbery with appellant's criminal-history score is 67 to 93 months.

freeway-entrance ramp. Appellant stated that Washington dropped him off at a house on the north side of Minneapolis, where appellant was later arrested.

Appellant testified at Washington's trial under subpoena. He admitted his own involvement in the robbery but persistently refused to implicate Washington, claiming that his previous statements to police and to the district court were false. When the prosecutor asked appellant if he remembered statements he had made at the plea hearing, appellant said he did not remember and that his memory could not be refreshed. Appellant declined to provide details about the robbery, stating that he only remembered committing the crime with a man who was not Washington.[2]

Appellant was sentenced on August 17, 2007. The prosecutor requested 67 months, arguing that appellant had breached the plea agreement. Appellant's counsel requested a sentence in the range of 42 to 45 months. Appellant's counsel argued that appellant was entitled to "some consideration" because he had been threatened in county jail and in prison by third parties and because Washington had been convicted "at least in part due to some of the cooperation that [appellant] gave."[3] Appellant gave a statement: "I had to do what I did, or not get out at all. I had no choice. If I hadn't, then I wouldn't be here now, because they would have got me when I went in. That's all." The district court then sentenced appellant, stating:

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[2] The district court later allowed the state to introduce the relevant portion of appellant's guilty plea as an exhibit for the jury.

[3] Washington was convicted of first-degree aggravated robbery. *State v. Washington*, No. A07-1879 (Minn. App. Jan. 27, 2009). On appeal, this court reversed and remanded for a new trial on the ground that Washington was not given an accomplice jury instruction.

> I understand that there are certain circumstances surrounding this case, [including] some documented threats, some other allegations. It's clear to me that [appellant] was under substantial stress at the time of his testimony. It's also clear that he did not testify as expected by [the prosecutor] when he made that initial offer. So I'm taking those factors into account.
>
> I am going to sentence you . . . to the Commissioner of Corrections for a period of 50 months.

This appeal follows.

D E C I S I O N

We first address whether appellant waived the issue of specific performance of the plea agreement by not requesting it at sentencing.

This court generally will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). A defendant who fails to object at sentencing may forfeit the right to consideration of a sentencing issue on appeal. *See State v. Henderson*, 706 N.W.2d 758, 760 (Minn. 2005); *State v. Witte*, 308 Minn. 214, 215, 217, 245 N.W.2d 438, 439-40 (1976) (noting that "it seems unjust for defendant and his counsel to sit idly by without objection [to prosecutor's remarks] and, after finding out what the sentence is, to then cry foul," and remanding for development of the record); *State v. Ferraro*, 403 N.W.2d 845, 848 (Minn. App. 1987) (holding that appellant's failure to object to prosecutor's violation of plea agreement at sentencing constituted a waiver of the issue).[4]

[4] Some sentencing issues are not waived by a defendant's failure to raise them at sentencing. *See Henderson*, 706 N.W.2d at 759–60. An illegal sentence—for example, one based on an erroneous criminal-history score—can always be appealed. *See State v.*

At sentencing, appellant's counsel did not argue for specific performance of the plea agreement. In fact, appellant's counsel explicitly requested a longer sentence than the 27 to 35 months set forth in the plea agreement: "I guess my request would be—I'm not quite prepared to argue for the whole bargain, but I think something between the compromise we [sought] in chambers and the bargain. I would say something in the neighborhood of 42 months, 42 to 45, something like that, would be fair." Nor did appellant or his counsel object to the 50-month sentence once it was imposed.

Because appellant did not request specific performance of the plea agreement at sentencing and did not object to the 50-month sentence when it was imposed, we conclude that appellant has waived the issue of specific performance.

But even if we were to reach the merits of appellant's specific-performance argument, we would conclude that appellant is not entitled to specific performance of the plea agreement because he breached the agreement. A defendant who breaches a plea agreement is not entitled to specific performance of the agreement. *See State v. Rud*, 372 N.W.2d 434, 435 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985); *see also State v. Williams*, 418 N.W.2d 163, 168 (Minn. 1988). To determine whether a plea agreement has been breached, we examine what the parties to the agreement reasonably understood as to its terms. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). A dispute over the substance of the plea agreement raises an issue of fact for the district

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Maurstad, 733 N.W.2d 141, 146–47 (Minn. 2007). Appellant does not argue that his sentence was prohibited by law.

court's resolution, but the interpretation and enforcement of the agreement are issues of law subject to de novo review. *Id.*

Here, it is undisputed that appellant was required under the plea agreement to give truthful testimony at Washington's trial. Appellant argues that the state did not prove that his testimony was not truthful: "Rather, the state only proved that [appellant] did not testify as the prosecutor expected him to. Thus it is just as likely that [appellant]'s testimony at his plea hearing was not truthful and that his testimony at Washington's trial was." In his supplemental pro se brief, appellant claims to have told the truth at Washington's trial. We conclude that the record clearly supports the determination that appellant testified falsely at Washington's trial, breaching his plea agreement. Appellant's trial testimony is inconsistent with statements that he made to the police that implicated Washington. After being sworn at the plea hearing, appellant reaffirmed the truthfulness of his statements to police:

> Q: And you have given a statement that is true; right? The statement that you give in your testimony will be truthful?
> A: Yes.

At the plea hearing, appellant testified that he and Washington committed the robbery.

At Washington's trial, appellant declared that his plea-hearing testimony "was a lie," and stated for the first time that Washington was not the second person who committed the robbery. These two versions of events cannot be reconciled. Furthermore, appellant's vague description of his accomplice and his refusal to provide details as to the commission of the robbery indicate that he was not being truthful at trial. Finally, neither

appellant nor his attorney argued at sentencing that appellant had testified truthfully at trial. Instead, appellant told the district court: "I had to do what I did, or not get out at all. I had no choice. If I hadn't, then I wouldn't be here now, because they would have got me when I went in. That's all." Appellant argues in his supplemental pro se brief that he testified truthfully at Washington's trial. But the reasonable interpretation of appellant's statement at sentencing is that he lied at Washington's trial because he feared for his safety if he testified against Washington.[5]

Appellant also contends that the state did not prove that he "willfully" breached the plea agreement. Appellant cites *Rud* for the proposition that a defendant's breach of a plea agreement must be deliberate and knowing. In *Rud*, the appellant agreed to give complete and honest statements and to turn state's evidence. 372 N.W.2d at 435. Prior to sentencing, the appellant recanted the statements that he had made when he pleaded guilty. *Id.* At sentencing, the district court found that appellant had breached the plea agreement by being untruthful and destroying his credibility as a witness. *Id.* This court noted that the appellant "was repeatedly told that he must be truthful or he would face a long prison sentence. He repeatedly stated he understood his responsibilities and the consequences that would flow from his violation of the agreement." *Id.* This court concluded that the appellant had clearly breached the terms of the plea agreement. *Id.*

[5] If, as he now contends, appellant was telling the truth at Washington's trial, the implication would be that appellant bargained for a reduction in his sentence by falsely implicating Washington. Appellant does not explain why such a plea agreement should be enforced.

Here, appellant was warned at Washington's trial that his testimony was putting his plea agreement at risk. Appellant acknowledged this and proceeded to testify that Washington was not involved in the robbery:

> Q: [The prosecutor] told you [yesterday] if you didn't testify accurately your deal is going to get taken away; is that right?
> A: Yeah.
> Q: And given all that, you still want to—you're willing to say that [Washington] didn't do it?
> A: He didn't do it.
> . . . .
> Q: And you understand here, Mr. Jackson, your sentencing day is coming up, right?
> A: Yeah.
> Q: And at sentencing this prosecutor is going to stand up and argue that you didn't do your deal?
> A: Right. So be it, man. . . . [Washington] didn't do it.

The record clearly supports the conclusion that appellant, despite warnings that false testimony would jeopardize his sentence reduction, breached the plea agreement by testifying falsely at Washington's trial.

Affirmed.