

SUPREME COURT OF KANSAS

State v. Antrim

294 Kan. 632 (2012) · Decided June 29, 2012

SUMMARY

The Kansas Supreme Court considered whether the State breached a plea agreement by opposing the defendant’s sentencing arguments, whether the defendant’s parole eligibility was correctly calculated, and whether the district court could impose lifetime electronic monitoring. The court found no plea-agreement breach and upheld the parole-eligibility determination, but remanded for deletion of the unauthorized electronic-monitoring provision from the journal entry.

CASE DETAILS

COURT	Supreme Court of Kansas
WRITING FOR THE COURT	Moritz, J.
JURISDICTION	Kansas
DECIDED	June 29, 2012
DISPOSITION	affirmed_in_part_and_remanded
PROCEDURAL POSTURE	Direct appeal from sentences imposed after Antrim pleaded no contest to three counts of aggravated indecent liberties with a child.
STANDARD OF REVIEW	Unlimited review applies to whether the State breached a plea agreement because that issue presents a question of law. The court reviewed the sentencing and jurisdictional issues under the governing statutes and precedent.
PRECEDENTIAL VALUE	Published Kansas Supreme Court opinion; precedential.
PARTIES	William M. Antrim v. State of Kansas

TOPICS

- plea bargaining
- sentencing
- parole
- criminal procedure
- statutory interpretation

PRACTICE AREAS

- criminal law
- criminal procedure
- sentencing
- plea agreements
- parole

QUESTIONS PRESENTED

1. Whether the State breached the plea agreement by cross-examining the defense expert and arguing against Antrim's departure motion while recommending the sentence specified in the agreement.
2. Whether Antrim was eligible for parole after 20 years under K.S.A. 22-3717(b)(2), rather than after serving the mandatory minimum term under K.S.A. 21-4643(a) as incorporated by K.S.A. 22-3717(b)(5).
3. Whether the district court had authority to impose or include lifetime electronic monitoring as a condition of parole in the journal entry of judgment.

HOLDINGS

1. The State did not breach the plea agreement because it expressly made the promised recommendation of concurrent sentences and was entitled under the agreement to oppose Antrim's effort to obtain an alternative sentence, including a departure from the mandatory minimum.
2. An inmate sentenced under K.S.A. 21-4643(a) is not eligible for parole until serving the mandatory 25-year term, notwithstanding the overlapping 20-year parole-eligibility provision in K.S.A. 22-3717(b)(2). Antrim's parole eligibility was therefore properly calculated at 75 years for the consecutive sentences.
3. The district court lacked authority to impose lifetime electronic monitoring as a parole condition because that authority belongs to the parole board. The reference to lifetime electronic monitoring in the journal entry was therefore ordered deleted by nunc pro tunc order.

KEY QUOTATIONS

“Under these circumstances, we conclude the State did not breach the plea agreement.” (636)

“Instead, we remand this case to the district court for entry of a nunc pro tunc order deleting the reference in the journal entry to lifetime electronic monitoring.” (637)

FACTUAL BACKGROUND

Antrim agreed to plead no contest to three counts of aggravated indecent liberties with a child in exchange for dismissal of three rape counts and the State's recommendation of concurrent life sentences with 25-year mandatory minimum terms. The plea agreement allowed Antrim to seek any alternative sentence permitted by law but required the State to oppose such an effort. At sentencing, Antrim sought a departure from the mandatory minimum under Jessica's Law and presented expert testimony concerning his risk of reoffending; the prosecutor cross-examined the expert and argued for the plea-agreement disposition while opposing the departure. The district court imposed consecutive life sentences, denied the departure, and the journal entry included lifetime electronic monitoring even though that condition was not imposed from the bench.

PROCEDURAL HISTORY

Pursuant to a plea agreement, Antrim pleaded no contest to three aggravated-indecent-liberties counts, and the State agreed to dismiss three rape counts and recommend concurrent life sentences with 25-year mandatory minimum terms. The district court rejected the recommendation for concurrent sentences, imposed consecutive life sentences with a 25-year mandatory minimum on each count, denied Antrim's departure motion, and

included lifetime electronic monitoring in the journal entry. Antrim appealed, challenging the State's compliance with the plea agreement, parole eligibility, and the electronic-monitoring provision.

DISPOSITION

affirmed_in_part_and_remanded

REMAND INSTRUCTIONS

Remand to the district court for entry of a nunc pro tunc order deleting the reference to lifetime electronic monitoring in the journal entry of judgment. The remainder of the sentence is affirmed.

CASES CITED

- State v. Woodward, 288 Kan. 297, 202 P.3d 15 (2009)
- State v. Foster, 39 Kan. App. 2d 380, 180 P.3d 1074 (2008), rev. denied, 286 Kan. 1182 (2008)
- State v. Hyche, 293 Kan. 602, 265 P.3d 1172 (2011)
- State v. Cash, 293 Kan. 326, 263 P.3d 786 (2011)
- State v. Duong, 292 Kan. 824, 257 P.3d 309 (2011)
- State v. Jolly, 291 Kan. 842, 249 P.3d 421 (2011)

OPINION

MORITZ, J.

The opinion of the court was delivered by Moritz, J.: After pleading no contest to three counts of aggravated indecent liberties with a child, William M. Antrim appeals his sentence, arguing the State breached the plea agreement by arguing against the recommended sentence in the agreement. Further, he contends the district court erred in determining the minimum prison term he must serve before becoming eligible for parole and in including lifetime electronic monitoring in the journal entry of judgment.

Because the district court had no authority to impose lifetime electronic monitoring, we remand this case to the district court for entry of a nunc pro tunc order deleting the reference to electronic monitoring in the journal entry, but we affirm the remainder of his sentence. Factual and Procedural Background Pursuant to a plea agreement with the State, Antrim agreed to plead no contest to three counts of aggravated indecent liberties with a child in return for the State's agreement to dismiss three *633counts of rape and recommend a sentence of life with a mandatory minimum term of imprisonment of 25 years, on each count with the sentences to run concurrently.

The agreement specifically recognized that although Antrim was "free to seek any alternative sentence allowed by law," the State would oppose any such effort. At sentencing, Antrim moved for a departure from the manda-toiy minimum sentence of Jessica's Law, K.S.A. 21-4643(a)(l)(C),

and introduced the testimony of Dr. Gerard Steffan, a clinical psychologist, in support of the motion.

Dr. Steffan testified that Antrim's scores on various psychological tests placed him in the lowest category of risk for reoffending with another sexual offense. According to Dr. Steffan, research shows that child molesters who molest children within the family recidivate at lower rates than rapists and child molesters who molest children outside of the family.

On cross-examination, Steffan admitted he was aware that in-trafamily victims report less frequently than victims of incidents with strangers. Following Steffan's testimony, the court proceeded directly to sentencing.

The court expressly requested that the State incorporate its argument against the motion for departure into its recommendation for disposition. The defendant did not object to this procedure, and the prosecutor stated: "Judge, I'm asking the Court to follow the plea agreement. This is a situation where the defendant has had some concessions.

We dismissed some counts for this plea, three counts of aggravated indecent liberties. I'm asking the Court to run the counts concurrently. In the end it's one life sentence with a minimum of 25 years incarceration. "He has now perpetuated through his own daughter exactly what Dr. Steffan has diagnosed the defendant with, which is she's going to have difficulty in her future.

This has changed her life by his act. The defendant can say all he wants. He didn't force her. He asked and she gave in. She was 7. A 7-year-old does not give in to sexual requests. "I'm asking the Court to follow this plea agreement, Judge." Ultimately, the court declined to follow the plea agreement's recommendation of concurrent sentences, finding "this is one of the most deplorable and despicable things that could be perpetrated on a young girl." Instead, the court sentenced Antrim to 634 consecutive life sentences with a mandatory minimum term of imprisonment of 25 years on each count.

Further, the court denied Antrim's motion to depart. Analysis Breach of the Plea Agreement In this direct appeal, Antrim first argues the State violated his due process rights by failing "to abide by the terms of the plea agreement and effectively arguing against concurrent sentencing." Antrim focuses on the prosecutor's cross-examination of Steffan and the prosecutor's subsequent comment that Antrim "perpetuated through his own daughter exactly what Dr. Steffan has diagnosed the defendant with, which is she's going to have difficulty in her future." Whether the State breached the plea agreement presents a question of law over which we exercise unlimited review.

See *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). "The State can breach a plea agreement by effectively arguing against the negotiated sentencing recommendation. However, if the State actually makes the sentence recommendation that it promised, the prosecutor's further

comments in support of the recommended sentence do not breach the plea agreement so long as the comments do not effectively undermine the recommendation.” 288 Kan.

297, Syl. ¶ 3. In support of his claim that the State breached the plea agreement, Antrim relies almost exclusively on *State v. Foster*, 39 Kan. App. 2d 380, 180 P.3d 1074, rev. denied 286 Kan. 1182 (2008). There, the court considered whether the prosecutor breached the provision of the plea agreement requiring him to recommend probation when the prosecutor specifically recommended probation but failed to argue that probation would serve community safety interests by promoting offender reformation — a finding necessary for the court to grant probation.

39 Kan. App. 2d at 384. The court found that although the prosecutor made the minimum recommendation required by the plea agreement, she paid lip service to that recommendation by providing only negative information about Foster at sentencing. 39 Kan. App. 2d at 387. *635 But Antrim ignores decisive distinctions between this case and *Foster*.

In *Foster*, the court could not grant the sentence recommended in the plea agreement without making an additional factual finding. In contrast, the court here could have sentenced Antrim to consecutive sentences based solely upon the parties’ recommendations. See K.S.A. 21-4720(b). Further, unlike in *Foster*, the parties in this case specifically agreed that while the defendant was “free to seek any alternative sentence allowed by law,” the State would oppose that effort.

And that is precisely what the State did after Antrim moved to depart from the mandatory minimum sentence required by Jessica’s Law and supported his request with expert testimony. Consistent with the plea agreement, the prosecutor cross-examined the expert and argued against the expert’s conclusions.

Moreover, the court specifically requested that the prosecutor combine his argument against the motion for departure with the State’s recommended disposition, and the defendant did not object to this procedure. In this regard, we find *Woodward* more analogous to the facts of this case. There, the defendant argued on appeal that the court’s imposition of a greater-than-bargained-for sentence should be attributed to the manner in which the prosecutor presented the State’s recommendation.

We disagreed, noting that the prosecutor’s comments “appear to have been directly tailored to address the defense’s attempt to cast *Woodward* in a favorable light.” 288 Kan. at 302. The court concluded that because the bargained-for sentence was not the minimum sentence the court could impose, “the State was free to argue why the recommended sentence was also the most appropriate sentence to impose under the circumstances.

The plea agreement did not require the prosecutor to ignore the defense’s attempts to minimize *Woodward*’s culpability.” 288 Kan. at 302. Similarly, the plea agreement at issue here required the State to recommend concurrent sentences, and the prosecutor explicitly twice made that

recommendation. But the agreement also indicated that the State would oppose any attempt by Antrim to seek an alternative sentence, and the prosecutor acted in accordance *636with that agreement by opposing Antrim's motion for a departure from the mandatory minimum sentence of Jessica's Law.

Under these circumstances, we conclude the State did not breach the plea agreement. Parole Eligibility Next, relying on the rule of lenity, Antrim contends the district court erred in determining the minimum prison term he must serve before becoming eligible for parole. Specifically, Antrim argues he should be eligible for parole after 20 years of imprisonment as provided in K.S.A.

22-3717(b)(2) rather than after serving the mandatory minimum term imposed under K.S.A. 21-4643(a) as provided in K.S.A. 22-3717(b)(5). After both parties filed their appeal briefs in this case, we rejected this argument in *State v. Hyche*, 293 Kan. 602, 604, 265 P.3d 1172 (2011) (quoting *State v. Cash*, 293 Kan. 326, Syl. ¶ 1, 263 P.3d 786 [2011]) (“ ‘Notwithstanding the overlap in the parole eligibility rules contained in K.S.A.

2008 Supp. 22-3717(b)(2) and (b)(5), an inmate sentenced to an off-grid, indeterminate hard 25 life sentence pursuant to K.S.A. 21-4643 shall not be eligible for parole until that inmate has served the mandatory 25 years in prison.’ ”).

Therefore, we conclude the district court did not err in determining Antrim would be eligible for parole after serving the mandatory minimum term imposed under K.S.A. 21-4643(a), in this case 75 years. Lifetime Electronic Monitoring Finally, Antrim contests the inclusion of lifetime electronic monitoring in the journal entry of judgment as being outside the jurisdiction of the district court.

The State concedes that we have held that the imposition of parole conditions, including lifetime electronic monitoring, is within the authority of the parole board but outside the jurisdiction of the district court. See K.S.A. 22-3717(u); *Hyche*, 293 Kan. 602, Syl. ¶ 2; *State v. Duong*, 292 Kan. 824, 840, 257 P.3d 309 (2011); *State v. Jolly*, 291 Kan. 842, 848, 249 P.3d 421 (2011).

However, as the State points out, the district court did not include tire lifetime electronic monitoring condition when it imposed sentence from the bench. Accordingly, we need not vacate any portion of the sentence imposed by the court. Instead, we *637remand this case to the district court for entry of a nunc pro tunc order deleting the reference in the journal enti to lifetime electronic monitoring.

Affirmed in part and remanded with directions.