

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. SCHUSTER

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STATE OF NEBRASKA, APPELLEE,
V.
BRIAN J. SCHUSTER, APPELLANT.

Filed June 12, 2012. No. A-11-767.

Appeal from the District Court for Otoe County: PAUL W. KORSLUND, Judge. Affirmed.
Rachel K. Alexander, of University of South Dakota School of Law, for appellant.
Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN and SIEVERS, Judges, and CHEUVRONT, District Judge, Retired.
IRWIN, Judge.

I. INTRODUCTION

Brian J. Schuster appeals from his no contest pleas and sentences imposed in Otoe County, Nebraska, related to four counts of violations of the Securities Act of Nebraska. See Neb. Rev. Stat. § 8-1101 et seq. (Reissue 2007, Cum. Supp. 2010 & Supp. 2011). On appeal, Schuster alleges that the State breached the terms of a plea agreement, that he received ineffective assistance from his initial trial counsel, that the court's sentences were based on uncharged and unadjudicated conduct, and that the sentences imposed were excessive and disproportionate to those imposed upon a codefendant. We find no merit and affirm.

II. BACKGROUND

This case arises out of a complex and lengthy investigation into allegations of securities fraud related to Schuster and a partner, Rebecca Engle. The Department of Banking and Finance conducted an investigation into the sale of common stock, debentures, and various promissory notes related to private placements of two Florida based entities between 2002 and 2006. That

investigation ultimately led to the filing of informations charging both Schuster and Engle with multiple counts of securities fraud.

The investors involved in this case had a lengthy history of investing with Schuster and Engle and had generally been involved in “very safe investments.” The securities related to the private placements involved in this case, however, were not safe investments, and the private placement memorandums related to the securities revealed that they were high risk investments. The investigation by the Department of Banking and Finance resulted in allegations that Schuster and Engle failed to disclose to the investors the risky nature of the investments. The companies invested in ultimately went bankrupt, and the investors lost substantial sums of money. The total combined loss to Nebraska families was estimated to exceed \$20 million.

On December 4, 2009, an information was filed charging Schuster with eight counts of securities fraud. The information alleged that Schuster had directly or indirectly misled or omitted information material to the investors.

During the pendency of Schuster’s case, Engle entered no contest pleas to two counts of securities fraud.

In April 2010, Schuster moved to dismiss his initial trial counsel. The court granted Schuster’s motion, and replacement counsel (the same counsel as represents Schuster on appeal) made an appearance on his behalf. In May 2011, a jury trial commenced, the jury was empaneled, and the parties presented opening statements. Before the first witness was called, however, Schuster and the State reached a plea agreement.

Pursuant to the plea agreement, Schuster agreed to plead no contest to four counts of indirect material omissions in connection with the offer, sale, or purchase of securities. The State agreed not to pursue additional charges, agreed not to make any specific recommendation about length of incarceration, and agreed to “acknowledge [at sentencing] that . . . Schuster has accepted responsibility for his actions.” The State presented a factual basis, and the court accepted Schuster’s no contest pleas.

On August 16, 2011, the court held sentencing hearings for Engle and Schuster. During both sentencing hearings, the State argued that Engle had desired to go to federal authorities about concerns with the investments and had wanted to end the investments, but that Schuster had felt strongly against such action and had convinced her to wait, resulting in additional investment and loss for the investors. The State also noted how cooperative Engle had been and argued that her level of cooperation was a justification for differing sentences between the two codefendants.

The court commented during Engle’s sentencing hearing that it was “perhaps” fair to point a finger at Schuster for his willingness to continue with the investments after Engle wanted to end them, but the court also recognized that Engle had more experience as a broker. The court felt that Engle was a low risk to reoffend, recognized that she had no prior criminal history, recognized her early and significant cooperation with the State, and recognized that she was convicted of two counts (as opposed to four counts for Schuster). The court ultimately sentenced Engle to 18 to 36 months’ imprisonment on each of the two counts to which she pled, to be served consecutively.

During Schuster’s sentencing hearing, the State specifically recognized that Schuster had accepted responsibility for his actions, but also argued that he had ultimately entered pleas

because he was “cornered.” The State argued that Schuster had consistently attempted to “spin” or explain away his conduct.

Schuster’s counsel argued that Engle had been the one in charge of the investments, as the senior partner, and argued that she had a more active role in communicating with the clients and had more experience than Schuster. Schuster’s counsel also argued that the charges Engle had entered pleas to were more serious because Schuster’s pleas were limited to indirect omissions, rather than material misrepresentations. Schuster’s counsel also argued that Schuster had urged his initial counsel to seek a plea early in the process and objected to the State’s suggestion that he had entered a plea only because he had been “cornered.”

Schuster’s counsel provided substantial argument to suggest that incarceration was not appropriate for Schuster. Schuster’s counsel argued that he had no prior record, was no longer involved in the industry, and was unlikely to ever reoffend; noted that he experienced no personal financial gain as a result of the transactions; and argued that he had undertaken substantial steps toward rehabilitation. Schuster himself argued to the court that he had worked to recover money for the victims and that “about 14 to 15 [million dollars had] been recovered.” Schuster’s counsel also argued that the impact on Schuster’s family would be devastating if he were incarcerated. Finally, Schuster’s counsel argued to the court that the plea agreement had required the State to acknowledge that Schuster had taken responsibility for his actions, but that the State’s argument had been to the contrary and was “contrary to the plea agreement.”

The court indicated that Schuster was “splitting hairs” by arguing that the charges he had pled to were less serious; the court noted that Schuster was very intelligent and was aware of what was going on with the investments. The court also concluded that there had been “active misleading” going on during the investments and concluded that Schuster had persuaded Engle not to take action sooner. The court recognized that Schuster had no prior record, agreed that it was unlikely he would reoffend, and recognized that he had cooperated extensively in civil proceedings. The court also recognized, however, that Schuster had not been as cooperative in the criminal proceeding. The court also recognized the impact that incarceration would have on Schuster’s family, but concluded that Schuster was responsible for his actions and that a sentence without incarceration would depreciate the seriousness of the offenses. The court sentenced Schuster to terms of 20 to 48 months’ imprisonment on each of the four counts, to be served consecutively. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Schuster has assigned four errors. First, Schuster asserts that the State breached the terms of the plea agreement. Second, Schuster asserts that he received ineffective assistance from his initial trial counsel. Third, Schuster asserts that the district court’s sentences were based on uncharged and unadjudicated conduct. Finally, Schuster asserts that the sentences imposed were excessive and disproportionate to those imposed upon Engle.

IV. ANALYSIS

1. BREACH OF PLEA AGREEMENT

Schuster first asserts that the State breached the terms of the plea agreement. Schuster argues that the plea agreement required the State to acknowledge that Schuster had accepted

responsibility for his actions, but that the State's arguments that Schuster was "cornered" and that he was attempting to "spin" the facts constituted a breach of the agreement. We find that there was no breach of the plea agreement in this case.

When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002); *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990). Relief for breach of a plea agreement may include specific performance of the agreement or the opportunity to withdraw a plea. *Id.* A defendant properly preserves an assertion that the State breached the plea agreement and that he is entitled to specific performance by objecting to the violation at sentencing. *State v. Birge, supra.*

The State asserts that Schuster failed to properly object to the State's alleged breach of the plea agreement, that Schuster did not seek to withdraw his plea, and that he has therefore waived the right to assert on appeal that the State breached the plea agreement. We disagree with the assertion that Schuster failed to preserve his challenge, but we find that there was no breach of the plea agreement.

In *State v. Birge, supra*, the Nebraska Supreme Court specifically held that a defendant need not move to withdraw the plea to preserve an allegation that the State has breached the plea agreement. Requiring a motion to withdraw the plea would force the defendant to risk giving up the benefit of the plea bargain, rather than allowing the defendant the benefits bargained for in the plea process. *Id.* Instead, the Nebraska Supreme Court specifically held that if a defendant objects at the trial level, despite failing to move for withdrawal of the plea, the defendant is nevertheless entitled to other relief for breach of a plea agreement, such as specific performance of the agreement. *Id.*

In the present case, after the State concluded its argument during Schuster's sentencing hearing, Schuster's counsel presented argument on his behalf. In that argument, Schuster's counsel specifically noted that the plea agreement required the State "to tell the court that [Schuster] has accepted responsibility for his behavior" and counsel specifically asserted that "[i]nstead of doing that, [the State] backed off that [and argued] he was cornered into it, but he has accepted responsibility." Schuster's counsel specifically asserted that the State's argument was "contrary to the plea agreement." As such, we conclude that Schuster did object at the trial level and preserved an assertion that there was a breach of the plea agreement.

Nevertheless, although we conclude that Schuster preserved this issue for our review, we find that there was not a breach of the plea agreement. The plea agreement specifically required the State to "acknowledge that . . . Schuster has accepted responsibility for his actions." At sentencing, the State specifically stated that Schuster "pled in this case and he's accepted responsibility - I don't take that away from him." The State did argue that Schuster accepted responsibility and pled to the charges because he had been cornered; however, the plea agreement did not include any agreement or promise on behalf of the State to refrain from questioning Schuster's motives or making argument concerning them.

We conclude that this is substantially different from the situation presented in cases cited by Schuster where courts have admonished that the State cannot do indirectly what the plea agreement prohibits the State from doing directly. See, e.g., *U.S. v. Clark*, 55 F.3d 9 (1st Cir.

1995); *State v. Fannon*, 799 N.W.2d 515 (Iowa 2011). In *U.S. v. Clark*, 55 F.3d at 10, the government agreed, as part of a plea agreement, that “it [would] not oppose a three (3) level reduction in the defendant’s Adjusted Offense Level under the Sentencing Guidelines” for the defendant’s acceptance of responsibility. During the preparation of a presentence investigation report, it was discovered that the defendant had attempted to induce two of his codefendants to lie to the court and had attempted to obstruct justice; the probation officer preparing the report recommended an increase in the defendant’s Adjusted Offense Level. Prior to the defendant’s sentencing hearing, the government submitted to the court a sentencing memorandum outlining proposed guideline adjustments to be taken in light of his alleged obstruction of justice. In that memorandum, the government specifically represented that although the plea agreement restricted the government from “a more vigorous argument” about the appropriate level adjustments, the government also indicated that it could not “close its eyes” to the defendant’s attempts to obstruct justice and indicated that it would rely on the court’s sound discretion. *Id.* at 12. The defendant sought to withdraw his plea, alleging that the government had breached the plea agreement. The trial court overruled the objection, found there had been no breach of the plea agreement, and imposed an upward adjustment in accordance with the government’s recommendation.

On appeal, the First Circuit Court of Appeals found that the government had breached the plea agreement. *U.S. v. Clark, supra*. The appellate court held that the government, in the sentencing memorandum, had informally opposed an acceptance-of-responsibility adjustment and recognized that prosecutors are prohibited not only from explicit repudiation of assurances, but also from end-runs around them. *Id.* The court held that the government’s statements indicated that the government would not have entered the plea agreement if it had more information and that its references to the agreement were grudging and apologetic. Thus, the court held that the government had breached the plea agreement.

Similarly, in *State v. Fannon*, 799 N.W.2d at 518, the government agreed to make no recommendation at sentencing, but instead, the prosecutor at the sentencing hearing specifically requested the court impose “an indeterminate term not to exceed 10 years on [each of two] counts and order that both those terms run consecutive to each other.” After defense counsel interrupted and the court held a brief discussion at the bench with the prosecutor and defense counsel, the prosecutor asked to “start again” and indicated that the government would “leave the matter of consecutive versus concurrent up to the court.” *Id.* On appeal, the government argued that the prosecutor’s initial statements during the sentencing hearing had been a misstatement and a mistake and argued that acknowledgment of the error remedied the problem.

On appeal, the Iowa Supreme Court addressed the question of whether the prosecution’s attempts to cure the improper remarks salvaged an otherwise broken promise. The Iowa Supreme Court held that breach of a plea agreement concerning statements to be made or refrained from being made during sentencing cannot be cured by the prosecutor’s withdrawal of the improper remarks. *Id.* The court held that prosecutors are held to strict, not substantial, compliance with the terms of plea agreements. *Id.*

In the present case, however, there was no comparable breach of the plea agreement. Unlike *U.S. v. Clark*, 55 F.3d 9 (1st Cir. 1995), where the conduct of the prosecutor amounted to an indirect representation of precisely what the plea agreement prevented the government from

representing, the conduct of the prosecutor in the present case was not an indirect violation of the terms of the plea agreement. The plea agreement required the State to acknowledge that Schuster had accepted responsibility, and the State did that. Indicating that Schuster had questionable motives for doing so did not amount to the same kind of indirect violation of the terms of the plea agreement as the government's statements in *U.S. v. Clark, supra*, where the court essentially inferred that it regretted entering into the plea agreement. The present case is also not a case where there was a clear violation of the plea agreement and an attempt to remedy the cure, as in *State v. Fannon*, 799 N.W.2d 515 (Iowa 2011).

The plea agreement in the present case did not require the State to acknowledge that Schuster had been cooperative, that he was remorseful, or that he had pure intentions in accepting responsibility. The plea agreement required only that the State "acknowledge" that Schuster had accepted responsibility. The State did this. We find that there was no violation of the plea agreement.

2. INEFFECTIVE ASSISTANCE OF COUNSEL

Schuster next asserts that his initial trial counsel was ineffective for failing to seek a plea agreement early in the process. Schuster asserts that Engle pled early and that her early cooperation and plea was a factor in her receiving more favorable sentences than he received. We find the record on direct appeal is insufficient for us to address this assertion of error.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). In most instances, it cannot, because the trial record reviewed is devoted to issues of guilt or innocence and will not disclose the facts necessary to decide either prong of the ineffective assistance of counsel analysis. *Id.* We conclude that such is true in this case.

Although Schuster is correct that the record contains evidence that Engle entered a plea early in the process and that Schuster did not do so until after a jury had been impaneled and opening statements had been made, the record does not contain sufficient evidence to demonstrate whether Schuster's initial trial counsel had sought a plea agreement early in the process or, if not, why. Schuster's second trial counsel did argue during his sentencing hearing that Schuster had contacted his initial counsel and had sent "dozens of e-mails" requesting that he seek a plea agreement. Counsel acknowledged, however, that "[w]e don't know whether [initial counsel] ever contacted the [State]." Moreover, although the State made comments during the sentencing hearing indicating that it had not been contacted about a plea agreement, it appears that the State's statements were in reference only to the 30 days prior to trial, after Schuster's second counsel was appointed.

The record is simply insufficient for us to make a meaningful determination of whether Schuster's initial trial counsel sought a plea agreement, whether Schuster's initial trial counsel performed in a deficient manner, or whether any performance prejudiced Schuster. As such, we decline to address this assignment of error.

3. SENTENCING FOR UNCHARGED CONDUCT

Schuster next asserts that the district court erred in imposing sentences based on uncharged and unadjudicated conduct. Schuster argues to great lengths that the statements of the

court at sentencing indicated that the court was imposing its sentences for misrepresentations, while Schuster specifically pled only to indirect omissions. We find no abuse of discretion by the court.

It has long been the rule in Nebraska that a sentencing court has broad discretion as to the source and type of information used in determining the kind and extent of punishment to be imposed. See, *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). The latitude allowed a sentencing court in determining the nature and length of punishment is almost without limitation as long as it is relevant to the issue. *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983); *State v. Rose, supra*.

The district court, during the sentencing hearing, specifically acknowledged that Schuster had entered pleas only to omissions and that it was very important to Schuster that the charges he was entering pleas to be omissions. The court also indicated its belief that the entire context of the case suggested that Schuster did know what was going on and that he was minimizing his role. At a different point in the sentencing hearing, the court indicated that “there was active misleading going on” in the case. Our reading of the record convinces us that the court imposed its sentences for the conduct to which Schuster entered no contest pleas, but based the severity of the sentences on the full context of the case, which is within the sentencing court’s discretion to do. We find no abuse of that discretion.

4. EXCESSIVE SENTENCES

Finally, Schuster asserts that the sentences imposed were excessive. Schuster argues that the sentences imposed upon him were disproportionate to those imposed against Engle and that the court “punished” him for not pleading sooner. We find no merit to these assertions.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). The issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether someone else received a lesser one. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). Similarly, the mere fact that a defendant’s sentence differs from those which have been issued to a codefendant in the same court does not make the imposition of the defendant’s sentence an abuse of discretion. *Id.*

In the present case, there is no assertion that the sentences imposed exceeded the statutory limits. Instead, Schuster asserts that the sentences he received for each count were more severe than those imposed upon Engle for each count, even though she entered pleas to offenses involving misrepresentation and he entered pleas to offenses involving only omissions and even though she had more experience and was the senior partner. We find no merit to these assertions.

While it is true that the offenses the parties pled to were different, the offenses each pled to were Class IV felony offenses. See §§ 8-1102 and 8-1117. Moreover, the record reflects grounds upon which the district court, within its discretion, could have reasonably elected to impose more severe sentences upon Schuster. There were assertions made, which the court appears to have accepted, indicating that Engle desired to end the fraudulent activity sooner but was convinced not to by Schuster; Schuster ultimately pled to more counts of fraudulent activity than Engle; and there was evidence that Engle was more cooperative in the criminal proceedings

than Schuster. We do not find the disparity in sentences in this case to be an abuse of discretion. We find no merit to this assignment of error.

V. CONCLUSION

We find no merit to Schuster's assertions on appeal. The State did not breach the plea agreement, and the court did not commit error in sentencing Schuster. The record presented is insufficient to allow review of the effectiveness of Schuster's initial trial counsel. We affirm.

AFFIRMED.