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STATE OF NEBRASKA, APPELLEE, V. ANGEL R. LANDERA, APPELLANT.

816 N.W.2d 20

Filed July 17, 2012. No. A-11-940.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
4. **Juvenile Courts: Jurisdiction: Waiver: Pleas: Appeal and Error.** Although a voluntary guilty or no contest plea generally waives all defenses to a charge, an appellant's voluntary plea following the denial of his or her motion to waive jurisdiction to the juvenile court does not preclude the appellant's challenge to such action on appeal.
5. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Words and Phrases.** The district court and the separate juvenile court have concurrent jurisdiction over felony prosecutions of a juvenile, defined as a person who is under the age of 18 at the time of the alleged criminal act.
6. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Waiver.** When a felony charge against a juvenile is filed in district court, the juvenile may file a motion requesting that court to waive its jurisdiction to the juvenile court for further proceedings under the Nebraska Juvenile Code.
7. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** Upon a juvenile defendant's motion in a felony case, the district court shall transfer a case to juvenile court unless a sound basis exists for retaining jurisdiction.
8. **Courts: Juvenile Courts: Jurisdiction: Proof.** The burden of proving a sound basis for retention of a juvenile case in the district court lies with the State.
9. **Courts: Juvenile Courts: Jurisdiction.** In order to retain juvenile proceedings in the district court, the court does not need to resolve every factor set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010) against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor.
10. ____: ____: ____. Considering the factors set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010) on a motion to transfer to juvenile court is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
11. **Plea Bargains: Prosecuting Attorneys: Sentences: Specific Performance: Appeal and Error.** Where the prosecutor has breached a plea agreement, the defendant is precluded from obtaining trial or appellate relief in the form of withdrawal of the plea unless the defendant moves to set aside the plea in the trial court; however, if the defendant objects at the trial level, despite failing to move to withdraw the plea, the defendant is nevertheless entitled at trial and on

appeal to consideration of relief in another form, such as specific performance of the plea agreement.

12. **Plea Bargains: Prosecuting Attorneys: Courts: Sentences.** Once the State has violated a plea agreement at sentencing by way of prosecutorial comments, the violation cannot be cured either by the prosecutor's offer to withdraw the comments or by the trial court's statement that it will not be influenced by the prosecutor's comments in imposing sentence.
13. **Sentences: Time.** A defendant cannot be sentenced to a minimum of more than 20 months' imprisonment for the conviction of a Class IV felony.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Sentences vacated, and cause remanded for resentencing.

Nathan J. Sohriakoff, Deputy Platte County Public Defender, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Angel R. Landera pled guilty to 10 counts of possession of child pornography, all Class IV felonies, and was sentenced by the district court for Platte County to a term of 30 months' to 4 years' imprisonment on each count, to be served concurrently. We determine that the State violated the plea agreement it made with Landera, and therefore, we vacate Landera's sentences and remand the cause for resentencing before a different judge. As required by Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), no oral argument is allowed for this appeal.

BACKGROUND

On October 29, 2010, Landera was charged by information in the district court for Platte County with two counts of distribution of child pornography and 20 counts of possession of child pornography. That same day, Landera filed a motion to transfer jurisdiction to the juvenile court. At the hearing on the motion, an investigator with the Columbus Police Department explained how the charges against Landera arose. She testified

that on February 11, she was contacted by an electronics store employee who was repairing a laptop computer that had been brought into the store. While working on the computer, the employee became concerned about the content of some of the computer's files and contacted law enforcement. The investigator viewed the files on the computer and observed them to be child pornography. She then contacted Landera, the owner of the computer. Landera admitted during an interview with the investigator that he had downloaded pornography and stored the files on his computer. He also admitted that he liked viewing child pornography at the same level as adult pornography and that he knew that possessing the child pornography was wrong. He stated that in viewing child pornography, he preferred prepubescent children.

Landera's computer was seized, and it was determined that the computer contained 195 still images and videos that met the criteria for child pornography. The images and videos were predominantly of prepubescent children between the ages of 4 and 12 who were involved in sexual abuse or penetration.

The evidence also showed that Landera was born in June 1992 and that he was only 6 months from his 19th birthday at the time of the hearing. He had graduated from high school and had been attending the University of Nebraska at Kearney, living in a college dormitory. At the time of the hearing, he was not attending college, because he had been placed on suspension and had withdrawn voluntarily. The suspension was due to the discovery of a large box of adult pornographic videotapes in his dormitory room.

A juvenile services officer with the Nebraska Department of Health and Human Services testified that in her opinion, a juvenile could not receive satisfactory treatment for a sex-related offense in 6 months. She testified that sex offender treatment programs are generally 6 to 12 months in length. She testified that treatment would hardly begin in the 6-month timeframe before Landera turned 19 and "age[d] out" of the juvenile court system, given the initial evaluations that take place and the time it takes to find placement for treatment.

Following the hearing, the district court denied Landera's motion to transfer.

On March 21, 2011, Landera pled guilty to 10 counts of possession of child pornography pursuant to a plea agreement with the State. Prior to the entry of Landera's pleas, Landera's counsel advised the district court of the terms of the plea agreement:

> [Landera] is going to plead [guilty] to Counts III, IV, VI, VII, XIII, XIV, XV, XVI, XVII and XX.
>
> . . . .
>
> . . . The State will dismiss the balance of the charges and agree to recommend probation provided [Landera] obtain[s] a psychiatric evaluation and a sex offender evaluation from a reputable individual and follow[s] through with all recommendations.

The State and Landera both agreed with the recitation of the plea agreement. Landera also indicated to the district court that there were no terms or conditions of the plea agreement other than what had been recited into the record by his counsel. After finding that an adequate factual basis had been established, the district court accepted Landera's pleas and found him guilty on all 10 counts.

On June 15, 2011, the district court continued the sentencing hearing set for that day because it was of the opinion that imprisonment might be appropriate, but wanted more detailed information than had been provided in the presentence investigation report. The court ordered Landera committed to the Nebraska Department of Correctional Services for a 90-day evaluation.

After the evaluation was completed, a sentencing hearing was held. The State informed the court that it was recommending that Landera be sentenced to a term of probation with a period of incarceration imposed as a condition of that probation. The State explained that it had initially intended to recommend a sentence of extensive probation with challenging treatment, but that after reading Landera's 90-day evaluation, it felt compelled to recommend that a period of incarceration be imposed as a condition of the probation. While the State was explaining the sentencing recommendation to the court, Landera's counsel made an objection. The following is the exchange that took place:

[Prosecutor]: I think . . . Landera presents an interesting question for the Court. Prior to reviewing the evaluation from [the Diagnostic and Evaluation Center], the State was prepared to recommend probation, extensive probation, with challenging treatment. . . .

In reviewing the presentence [report], again, for today's sentencing, along with the [Diagnostic and Evaluation Center's] evaluation, I'm struck and I can't recommend probation —

[Defense counsel]: Your Honor, I object. The State entered into a plea agreement with the State — with [Landera]. I'll read the agreement verbatim. The State will dismiss the balance of the charges and agree to recommend probation provided [Landera] obtain[s] a psychiatric evaluation, not merely a psychological evaluation and a sexual offender evaluation from a re[pu]table provider and follow[s] through with all recommendations. All of those elements were satisfied. The State is bound to recommend probation.

[Prosecutor]: I'm aware of the plea agreement and I will explain that.

THE COURT: But you'll follow it, right?

[Prosecutor]: I have always stood by my plea agreements.

THE COURT: Okay. I understand.

[Prosecutor]: There are conditions, however, as a matter that can be adjudged — that can be sentenced according to probation that I had not intended to ask the Court to impose. . . .

. . . .

I'm well aware of the plea agreement and, as I said, I had fully intended to ask the Court to place him on probation with treatment. I believe that there must be a term of incarceration as a condition of probation and I believe that that term should be upfront.

. . . .

I don't understand how [Landera] would be able to function without continuing treatment programs that he has made, again, one step toward. But I also believe that

there should be a punishment element and that should be made clear to [Landera]. I'd submit on that fact.

THE COURT: [Defense counsel]?

[Defense counsel]: I'm a little taken aback as the Court, I'm sure, might understand. I entered into today, [Landera] entered into today's sentencing expecting a recommendation of probation, an unqualified recommendation of probation from the [prosecutor]. We got, only after my objection, an extremely qualified recommendation of probation. I'm very surprised by this.

Landera's counsel made further arguments regarding sentencing and concluded by asking the court to honor the plea agreement that the State and Landera signed and asking the court to order probation.

The district court sentenced Landera to concurrent prison sentences of 30 months' to 4 years' imprisonment on each of the 10 counts of possession of child pornography.

ASSIGNMENTS OF ERROR

Landera assigns that the trial court erred in (1) denying his motion to transfer to juvenile court, (2) failing to grant his motion for specific performance of the plea agreement by the State, (3) imposing minimum sentences that exceed the minimum sentences authorized by statute, and (4) imposing excessive sentences.

STANDARD OF REVIEW

[1] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Fenin*, 17 Neb. App. 348, 760 N.W.2d 358 (2009).

[3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *Id.*

ANALYSIS

Motion to Transfer to Juvenile Court.

[4] Landera first assigns that the trial court erred in denying his motion to transfer the matter to juvenile court. Although a voluntary guilty or no contest plea generally waives all defenses to a charge, an appellant's voluntary plea following the denial of his or her motion to waive jurisdiction to the juvenile court does not preclude the appellant's challenge to such action on appeal. See *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994).

[5-8] The district court and the separate juvenile court have concurrent jurisdiction over felony prosecutions of a juvenile, defined as a person who is under the age of 18 at the time of the alleged criminal act. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). When a felony charge against a juvenile is filed in district court, the juvenile may file a motion requesting that court to waive its jurisdiction to the juvenile court for further proceedings under the Nebraska Juvenile Code. *State v. Goodwin, supra*. The district court "'shall'" transfer the case unless a sound basis exists for retaining jurisdiction. *Id.* at 951, 774 N.W.2d at 740. The burden of proving a sound basis for retention lies with the State. *Id.*

At the time the district court considered Landera's motion, it was statutorily required to consider the following factors for each offense: (1) the type of treatment Landera would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) Landera's age and the ages and circumstances of any others involved in the offense; (5) Landera's previous history, including whether he had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) Landera's sophistication and maturity as determined by consideration of his home, his school activities, his emotional attitude and desire to be treated as an adult, his pattern of living, and whether he has had previous contact with

law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for Landera's treatment and rehabilitation; (8) whether Landera's best interests and the security of the public may require that he continue in secure detention or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose; (9) whether the victim agrees to participate in mediation; (10) whether there is a juvenile pretrial diversion program established pursuant to Neb. Rev. Stat. §§ 43-260.02 to 43-260.07 (Reissue 2008); (11) whether Landera has been convicted of or has acknowledged unauthorized use or possession of a firearm; (12) whether a juvenile court order has been issued for Landera pursuant to Neb. Rev. Stat. § 43-2,106.03 (Reissue 2008); (13) whether Landera is a criminal street gang member; and (14) such other matters as the county attorney deems relevant to his or her decision. See Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010).

[9,10] In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id.*

Landera does not argue that the trial court failed to adequately consider the factors in § 43-276. Rather, Landera argues that the State's position against moving the case to the juvenile court rested entirely on the fact that Landera would be 19 years old in 6 months and would no longer be subject to the juvenile court at that time. Landera suggests that the State purposely delayed filing charges against him to ensure that there would not be sufficient time for treatment in the juvenile court system and that he would be tried as an adult. The record does not reflect why Landera was not charged until October 2010, whereas the crimes were discovered in February 2010, and there is no evidence that the State intentionally delayed filing charges against him.

Further, the trial court did not rely solely on Landera's age in denying the motion to transfer. The court also noted Landera's maturity, that is, the fact that he was a high school graduate and had also been a college student living independently as an adult. In addition, the court noted that although Landera had no criminal history, the motivation for the offenses appeared to be the desire to view and distribute pornography, predominantly involving young children, and that such sexual preference may be associated with someone afflicted with pedophilia, a very serious and problematic affliction.

We conclude that the trial court did not err in denying Landera's motion to transfer the matter to juvenile court.

Specific Performance of Plea Bargain.

Landera next assigns that the trial court erred in failing to grant his motion for specific performance of the plea bargain by the State. Landera argues that the State did not comply with the plea agreement to recommend probation when it recommended probation with an additional condition that was not part of the agreement. Landera contends that as a result of the State's failure to comply with the agreement, his sentences should be vacated and the cause remanded to the district court for resentencing by a different judge with an order that the State specifically comply with the agreement it made with him.

Landera relies on *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002), to support his argument. In *Birge*, the Nebraska Supreme Court held that where the State fails to comply with a plea agreement and the defendant objects at sentencing, the defendant is entitled to specific performance of the plea agreement before a new tribunal. The defendant in *Birge* entered into a plea agreement wherein the State agreed to dismiss certain charges and stand silent at the time of sentencing if the defendant entered no contest pleas to the remaining charges. At the sentencing hearing, defense counsel asked that the sentences run concurrently and argued for the minimum sentences allowed by law. The court asked the State if it wished to be heard, and the State responded that it asked the trial court to consider the full range of available sentences. Defense counsel

did not immediately object, but later called the trial court's attention to the fact that the State had agreed as part of the plea agreement to remain silent at sentencing and argued that the prosecutor had violated the agreement by making the comments it made. The State indicated a willingness to withdraw the remarks, and the court indicated that the State's statements had not affected the court's ultimate sentencing of the defendant. Defense counsel again objected to the prosecutor's comments, and the objection was overruled. The court then sentenced the defendant.

On appeal to this court, the defendant in *Birge* assigned as error the trial court's imposition of excessive sentences and the State's violation of the plea agreement. We determined that the prosecutor's comments at sentencing violated the State's plea agreement with the defendant, and we vacated the sentences and remanded the causes to the district court for resentencing before a different judge. See *State v. Birge*, Nos. A-00-984, A-00-1029, 2001 WL 968393 (Neb. App. Aug. 28, 2001) (not designated for permanent publication).

[11,12] The State petitioned the Nebraska Supreme Court for further review, which was granted. The State argued that the defendant had waived all errors with respect to the violation of the plea agreement because although he objected, he did not move to withdraw his pleas in the district court, and, in the alternative, that the error was harmless, as the district court had indicated that it was not influenced by the State's comments. The Supreme Court rejected both of these arguments and found:

> [T]he defendant is precluded from obtaining trial or appellate relief in the form of withdrawal of the plea unless the defendant moves to set aside the plea in the trial court; however, if the defendant objects at the trial level, despite failing to move to withdraw the plea, the defendant is nevertheless entitled at trial and on appeal to consideration of relief in another form, such as specific performance of the plea agreement.

State v. Birge, 263 Neb. 77, 84, 638 N.W.2d 529, 535 (2002). The Supreme Court concluded that because the defendant preserved the issue for review on appeal by noting his objection,

the Court of Appeals properly granted relief in the form of specific performance. The Supreme Court further concluded that once the State had violated the plea agreement at sentencing, the violation could not be cured either by the prosecutor's offer to withdraw the comments or by the trial court's statement that it will not be influenced by the prosecutor's comments in imposing sentence. The Supreme Court affirmed the decision of the Court of Appeals.

In the present case, Landera entered into a plea agreement with the State wherein Landera agreed to enter guilty pleas to 10 counts of possession of child pornography and to receive a psychiatric evaluation and a sex offender evaluation and follow through with all recommendations. In exchange, the State agreed to dismiss the remaining counts and to recommend probation. At the sentencing hearing, the State began its allocution by stating: "In reviewing the presentence [report], again, for today's sentencing, along with the [Diagnostic and Evaluation Center's] evaluation, I'm struck and I can't recommend probation." Landera's counsel immediately objected, read the plea agreement to the court, and requested that the State be ordered to comply with the agreement. The State went on to indicate that it was complying with the agreement, but only with a new condition that was not present in the initial agreement, the new condition being an upfront term of incarceration as a condition of probation. Although the State indicated that it intended to comply with the agreement and recommend probation, it did so only with an additional term not contemplated when the plea agreement was made with Landera.

We conclude that Landera's counsel preserved the issue of the State's violation of the plea agreement for appellate review, and we further conclude that the State violated the plea agreement when it recommended a term of incarceration. Landera is entitled to specific performance of the plea agreement, and therefore, we vacate the sentences and remand the cause to the district court for resentencing by a different judge.

Landera's Sentences.

Landera was sentenced to 30 months to 4 years in prison for each of the 10 counts of possession of child pornography.

Possession of child pornography is a Class IV felony. Neb. Rev. Stat. § 28-813.01(2) (Cum. Supp. 2010). Landera contends, and the State agrees, that the trial court erred in imposing a minimum sentence of 30 months' imprisonment on a Class IV felony because the greatest statutorily allowable minimum is 20 months. Although we have already determined that Landera should be resentenced by a different judge, this issue could come up again in resentencing, and therefore, we address it here.

With regard to sentences for Class IV felonies, Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Reissue 2008) mandates that the sentencing court "shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term."

[13] The maximum statutory sentence of imprisonment for a Class IV felony is 5 years, or 60 months. See Neb. Rev. Stat. § 28-105 (Reissue 2008). Therefore, since one-third of 60 months is 20 months, Landera could not be sentenced to a minimum of more than 20 months' imprisonment for the conviction of a Class IV felony. See *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999) (holding that defendant cannot be sentenced to minimum of more than 20 months' imprisonment for conviction of Class IV felony pursuant to § 29-2204(1)(a)(ii)(A)). Therefore, the minimum term of 30 months' imprisonment imposed by the trial court on each charge exceeds the minimum term of imprisonment provided by law.

Landera also argues that the overall sentence imposed for each charge is excessive. Given that Landera will be resentenced, we need not address whether his sentences are excessive.

CONCLUSION

We conclude that the trial court did not err in denying Landera's motion to transfer to juvenile court. We further conclude that the State violated the plea agreement with Landera and that thus, Landera is entitled to specific performance of the plea agreement. Therefore, we vacate Landera's sentences and remand the cause to the district court for resentencing by

a different judge. The State is ordered to specifically comply with the plea agreement it made with Landera when resentencing takes place. We also note for purposes of resentencing that the trial court erred in imposing minimum sentences that exceed the minimum sentence authorized by statute.

SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V.
RUSSELL S. PITTMAN, APPELLANT.
817 N.W.2d 784

Filed July 24, 2012. No. A-11-415.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Proof: Appeal and Error.** To show prejudice due to ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
7. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.