

NOT DESIGNATED FOR PUBLICATION

No. 125,472

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RANDIN ALONSO HERRERA-LOZANO,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed September 1, 2023.
Affirmed.

Jacob Nowak, of Kanas Appellate Defender Office, for appellant.

David Lowden, deputy county attorney, *Barry R. Wilkerson*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Randin Alonso Herrera-Lozano pled guilty to one count of attempted rape in violation of K.S.A. 2016 Supp. 21-5503(a)(1)(B) and K.S.A. 2016 Supp. 21-5301, a severity level 3 person felony. His plea agreement with the State included a provision that the State recommend a 36-month period of postrelease supervision.

After the plea but prior to imposing a sentence, the district court informed Herrera-Lozano that K.S.A. 2022 Supp. 22-3717(d)(1)(G) required the court to impose lifetime postrelease supervision because he was being sentenced for a sexually violent crime. The

district court then granted a three-week continuance to allow Herrera-Lozano time to consider whether he wanted to withdraw his plea.

At sentencing, Herrera-Lozano confirmed that he wished to continue with his plea. The State acknowledged that despite the plea agreement, the district court was bound to impose lifetime postrelease supervision under K.S.A. 2022 Supp. 22-3717(d)(1)(G). The district court sentenced Herrera-Lozano to 59 months in prison and imposed lifetime postrelease supervision.

Herrera-Lozano now argues that the State breached the plea agreement by opposing the imposition of a 36-month period of postrelease supervision. A term of 36 months of postrelease supervision for the crime of attempted rape would have constituted an illegal sentence under K.S.A. 2022 Supp. 22-3717(d)(1)(G). The district court informed Herrera-Lozano that K.S.A. 2022 Supp. 22-3717(d)(1)(G) required lifetime postrelease supervision and granted him additional time to reconsider his plea. Herrera-Lozano chose to proceed with his plea even though the district court had informed him he would be allowed to withdraw his plea. Under these circumstances, we find any error resulting from the State's breach of the terms of the plea agreement amounted to harmless error. Thus, we affirm the district court's decision to impose lifetime postrelease supervision.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2018, the State charged Herrera-Lozano with one count of rape, a severity level 1 person felony, for conduct occurring on March 4, 2017. In June 2021, the State amended the charge to alternative counts of rape, both severity level 1 person felonies.

On May 13, 2022, the State and Herrera-Lozano signed a plea agreement in which he agreed to plead guilty to an amended charge of attempted rape, a severity level 3

person felony. As part of the plea agreement, the parties agreed to recommend a mid-number grid sentence and a postrelease supervision term of 36 months. As part of the agreement, Herrera-Lozano also agreed not to ask for probation. An acknowledgment and waiver of rights form incorrectly informed Herrera-Lozano that the maximum penalties included 36 months of postrelease supervision.

At the plea hearing, Herrera-Lozano acknowledged the plea agreement and the rights he was waiving by entering his plea. The district court informed Herrera-Lozano of the maximum possible penalties, including the "mandatory post-release supervision duration [of] 36 months." The district court then found a factual basis for the crime of attempted rape and accepted Herrera-Lozano's guilty plea. The court set the matter over for sentencing and ordered a presentence investigation (PSI) report.

The completed PSI report listed the postrelease supervision duration as lifetime postrelease supervision rather than 36 months. Herrera-Lozano's counsel filed a motion for a downward dispositional departure to probation. The State filed a response, arguing that Herrera-Lozano's motion violated the terms of the plea agreement, in which he specifically acknowledged that he would not request probation. The next day, Herrera-Lozano moved to withdraw his motion because it was not permitted under the plea agreement.

On June 27, 2022, the district court held the first of two sentencing hearings. After reviewing the terms of the plea agreement, the court granted Herrera-Lozano's motion to withdraw his departure motion. Pursuant to the terms of the plea agreement, the State recommended a mid-number sentence of 59 months and the agreed-upon postrelease supervision duration. The court immediately noted that the PSI report indicated lifetime postrelease rather than 36 months. Initially, the parties both maintained that 36 months was the correct duration for postrelease supervision.

After reviewing K.S.A. 2022 Supp. 22-3717(d)(1)(G), the district court determined that the statute mandated that the court impose lifetime postrelease supervision. The court expressed concern that the difference in duration might affect Herrera-Lozano's desire to maintain his guilty plea. Herrera-Lozano stated he would like some time to consider withdrawing his guilty plea. The district court agreed to continue the sentencing hearing until July 18, 2022, to give Herrera-Lozano time to reconsider the consequences of his plea.

Before the second sentencing hearing, defense counsel filed a motion to reduce postrelease supervision on July 13, 2022. In the motion, he acknowledged that both parties worked under the mutual mistake that the required term of postrelease supervision was 36 months rather than lifetime. Defense counsel argued that Herrera-Lozano was unlikely to reoffend and reducing his postrelease supervision would free up the limited resources of the parole officers "to monitor more violent offender[s]." Herrera-Lozano provided no caselaw or statutory authority to support his position that the district court had the discretion to impose less than the statutory mandate of lifetime postrelease supervision.

On July 18, 2022, the district court convened the second sentencing hearing and readdressed the postrelease supervision issue. At the outset, the district court advised it would grant a motion to withdraw plea if Herrera-Lozano requested to do so due to the misunderstanding about the mandatory lifetime term of postrelease supervision. Herrera-Lozano declined the offer to withdraw his plea and instead argued that the district court should grant his motion to reduce postrelease supervision to 36 months. The State then gave a sentencing recommendation that included the district court's statutory duty to impose the mandatory term of lifetime postrelease supervision and argued against Herrera-Lozano's motion to reduce postrelease supervision. The State maintained that the district court was required to impose lifetime postrelease supervision, and Herrera-Lozano's request for 36 months would constitute an illegal sentence. Herrera-Lozano did

not object to the State's recommendation or indicate that the State had breached the plea agreement.

The district court sentenced Herrera-Lozano to 59 months' imprisonment and imposed lifetime postrelease supervision. The court noted that by pleading guilty to an amended charge of attempted rape, Herrera-Lozano avoided the risk of a conviction for rape with a standard guidelines sentence of 155 months' imprisonment. The district court found that it lacked authority to impose a lesser period of postrelease supervision. Herrera-Lozano filed a timely notice of appeal.

ANALYSIS

Herrera-Lozano is not seeking to withdraw his plea. His sole issue on appeal is that the State breached the plea agreement, which he claims violated his constitutional right to due process. He asks this court to vacate his sentence and remand to require the State to comply with the terms of the plea agreement by requesting the court impose 36 months of postrelease supervision.

Herrera-Lozano raises this constitutional issue for the first time on appeal. Generally, appellate courts do not review constitutional issues raised for the time on appeal, but there are three recognized exceptions to this rule. Those exceptions include: (1) The newly asserted issue involves only a question of law on proved or admitted facts and is finally determinative of the case; (2) the issue's consideration is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021).

Herrera-Lozano claims that the second exception—consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights—applies because the State's breach of a plea agreement violates his fundamental right to

due process. See *State v. Meyer*, 51 Kan. App. 2d 1066, 1070, 360 P.3d 467 (2015) (recognizing a due process right is a fundamental right that may be challenged for the first time on appeal). Whether the State has breached the terms of a plea agreement presents a question of law over which appellate courts exercise unlimited review. *State v. Urista*, 296 Kan. 576, 582-83, 293 P.3d 738 (2013).

The State recognizes that it did not fulfill the portion of the written plea agreement that required it to recommend the district court impose 36 months of postrelease supervision. Even so, the State argues remand is not necessary because any error amounts to harmless error.

The written plea agreement shows that the State agreed to recommend 36 months of postrelease supervision. At the first sentencing hearing, the State proceeded to make this recommendation before the district court pointed out that the PSI report indicated that lifetime postrelease supervision was required under K.S.A. 2022 Supp. 22-3717(d)(1)(G). After the district court confirmed that lifetime postrelease supervision was required, Herrera-Lozano was given the chance to reconsider his plea, and the district court noted that he would be allowed to withdraw his plea if desired.

Several weeks later, the district court held a second sentencing hearing, and Herrera-Lozano unequivocally expressed his intent to go forward with his plea despite being informed that lifetime postrelease supervision would be required. At that point in time, the State also agreed that lifetime postrelease supervision was required, and it did not recommend a lesser term of 36 months as required in the plea agreement.

Herrera-Lozano was convicted of attempted rape in violation of K.S.A. 2016 Supp. 21-5503(a)(1)(B) and K.S.A. 2016 Supp. 21-5301, a severity level 3 person felony. K.S.A. 2022 Supp. 22-3717(d)(1)(G) sets forth the postrelease supervision term to be imposed upon sexually violent offenders, and the statute requires lifetime postrelease

supervision for a conviction of attempted rape. Our Supreme Court has held that in this circumstance, the district court does not have the discretion to impose anything other than lifetime postrelease supervision. *State v. Ballard*, 289 Kan. 1000, 1012, 218 P.3d 432 (2009); see *State v. Baber*, 44 Kan. App. 2d 748, 754, 240 P.3d 980 (2010). Thus, the imposition of a term less than lifetime postrelease supervision for a conviction of attempted rape would constitute an illegal sentence. See 44 Kan. App. 2d at 754. Rather than follow the terms of the plea agreement and recommend an illegal sentence, the State informed the district court that lifetime postrelease supervision was required.

The State does not dispute that it breached the plea agreement. We now turn to whether the State's breach of the plea agreement is harmless error. In *Urista*, the Kansas Supreme Court found that such an error may be harmless if a reviewing court determines beyond a reasonable doubt that the State's promise had little, if any, influence on the defendant's decision to enter into a plea agreement. 296 Kan. at 594-95.

Herrera-Lozano argues that the error cannot be harmless because there is such a difference between 36 months and lifetime postrelease supervision, and "[i]t cannot be said that [he] would have accepted the State's offer if he knew the State would argue the district court lacked authority to impose a sentence less than lifetime." But the record shows otherwise.

At the first sentencing hearing on June 27, 2022, after the district court and the State recognized that lifetime postrelease supervision was required under K.S.A. 2022 Supp. 22-3717(d)(1)(G), the district court expressed concern that the difference in duration might affect Herrera-Lozano's desire to maintain his guilty plea. After Herrera-Lozano stated he would like some time to consider withdrawing his guilty plea, the district court agreed to continue the sentencing hearing until July 18, 2022, to give Herrera-Lozano time to reconsider the consequences of his plea.

When the parties reconvened for sentencing, the district court asked: "Your attorney says that after time for you to consider the situation, you're wanting to go forward with this plea, understanding that the law provides for lifetime post-release; is that correct, sir?" To which Herrera-Lozano responded: "Yes, Your Honor." The record confirms that Herrera-Lozano chose to continue with his plea and sentencing with the knowledge that lifetime postrelease supervision would be imposed. Under these circumstances, the State has shown that its breach of the plea agreement amounted to harmless error. See *United States v. Gaona*, 697 F.3d 638, 641-42 (7th Cir. 2012) (holding Gaona unambiguously waived right to challenge State's breach of a plea agreement when she unambiguously chose to ignore the breach and proceed with sentencing).

Although Herrera-Lozano filed a motion to reduce lifetime postrelease supervision, admittedly he had no legal authority for such a request. On appeal, he requests a remand for specific performance of the plea agreement. With this request, he provides three potential remedies: (1) The State can argue the district court did not make the requisite finding that Herrera-Lozano was over the age of 18 at the time of the offense; (2) the State can recommend a dispositional departure conditioned upon an immediate surrender and revocation of probation and thereafter rely on K.S.A. 2022 Supp. 22-3716(c)(1)(C) and request the court impose 36 months of postrelease supervision; or (3) the State can argue that the imposition of lifetime postrelease would result in a cruel or unusual punishment. Essentially, Herrera-Lozano is asking this court for a second chance at sentencing. Herrera-Lozano is not arguing the merits of these issues on appeal but instead provides the State with these suggestions for resentencing. We decline to address Herrera-Lozano's hypothetical guidance for the State. K.S.A. 2022 Supp. 22-3717(d)(1)(G) requires the imposition of lifetime postrelease supervision for a conviction of attempted rape; Herrera-Lozano provides no persuasive legal authority otherwise.

Under these circumstances, the State's breach of the plea agreement resulted in harmless error. Even if the State had argued for a reduced term of postrelease supervision, any term other than lifetime postrelease supervision would have resulted in an illegal sentence. See *Ballard*, 289 Kan. at 1012. Despite being given additional time and the chance to withdraw his plea, Herrera-Lozano decided to continue with his plea knowing that K.S.A. 2022 Supp. 22-3717(d)(1)(G) mandated lifetime postrelease supervision. As such, we can determine beyond a reasonable doubt that the State's breach of its promise to recommend 36 months of postrelease had little, if any, influence on Herrera-Lozano's decision to enter into the plea agreement. See *Urista*, 296 Kan. at 594-95. Additionally, a remand to require the State to comply with the terms of the plea agreement would be futile because the district court cannot impose an illegal sentence. Accordingly, we affirm the district court's order imposing lifetime postrelease supervision as part of Herrera-Lozano's sentence for attempted rape.

Affirmed.