DA 18-0062

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 207N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALECK JOHNSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. CDC-14-440
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Danny Tenenbaum, Assistant Appellate Defender, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Madison L. Mattioli, Assistant Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Kory V. Larsen, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: July 10, 2019

Decided: August 27, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Aleck Lee Johnson appeals his sentence from the Eighth Judicial District Court, Cascade County, arguing that the State breached its plea agreement at the sentencing hearing. Alternatively, Johnson argues that the District Court erred by designating him a Tier II sexual offender when he was not convicted of a sexual crime. We reverse in part and remand with instructions for the District Court to strike the tier designation from his sentence.

¶3 The State charged Johnson with sexual intercourse without consent and two counts of violating privacy in communications in October 2014. Johnson and the State entered into a non-binding plea agreement in October 2015. Under the agreement, the State agreed to amend the first charge to intimidation and to drop the two counts of violating privacy in communications. Under the agreement, both Johnson and the State agreed jointly to recommend a three-year deferred sentence with the requirement that Johnson complete sexual offender treatment at his own expense. In the presentence investigation report, Probation Officer Tim Hides recommended that Johnson complete phase 1 of sexual offender treatment in custody but did not recommend a length for the sentence. The District

Court held a sentencing hearing in November 2017. At the hearing, both the State and Johnson recommended a three-year deferred sentence. The District Court sentenced Johnson to the Montana State Prison for ten years with two suspended. Johnson appeals.

¶4 Johnson argues that the State paid only lip service to the plea agreement at the sentencing hearing and that its actions undermined the agreement. Johnson argues that the State implied that entering into the agreement was a mistake when the prosecutor commented during sentencing, "The Court is likely aware from the lengthy time it's taken to get from the change of plea to sentencing, there were some issues the State was unaware of when we entered into that plea agreement." Johnson argues that the State failed to provide evidence or argument to justify its recommendation of a deferred sentence to the District Court. He maintains that the State put on evidence to justify only the agreement's requirement that he enroll and complete sexual offender treatment with a MSOTA certified provider. In putting on this evidence, Johnson argues, the State emphasized that the three-year deferred sentence it was recommending was less than the evaluator's recommendation for treatment that would last three to four years.

¶5 Johnson did not object during the sentencing hearing to the State's comments and actions that he now argues undermined the plea agreement. We generally do not consider arguments raised for the first time on appeal. *State v. Bartosh*, 2007 MT 59, ¶ 23, 336 Mont. 212, 154 P.3d 58. "We will consider claimed errors raised for the first time on appeal if they implicate a fundamental constitutional right and if not doing so leaves unsettled the fundamental fairness of the proceeding." *Bartosh*, ¶ 23. Prosecutors and

defendants are bound by the plea agreements they make. *State v. Hill*, 2009 MT 134, ¶ 29, 350 Mont. 296, 207 P.3d 307. A prosecutor must meet strict and meticulous standards of both promise and performance and "must give more than lip service to [the] plea bargain." *Hill*, ¶ 29. But "there are no hard and fast criteria defining when a prosecutor has merely paid lip service to a plea agreement." *Hill*, ¶ 29. "Each case stands or falls on the facts unique to it." *Hill*, ¶ 29 (quoting *State v. Rardon*, 2002 MT 345, ¶ 21, 313 Mont. 321, 61 P.3d 132).

¶6 At the sentencing hearing, the State called one witness, Dr. Robert Page, who had completed Johnson's psychosexual evaluation. After Dr. Page testified that "usually a community-based treatment program lasts anywhere between three and four years to complete," the prosecutor asked whether, in Dr. Page's opinion, Johnson could complete the program in three years—the length of the recommended deferred sentence. Dr. Page answered yes. In contrast to Johnson's characterization of this exchange as undermining the plea agreement, the State sought testimony that Johnson could complete community-based treatment in three years, which supported its recommendation for a three-year deferred sentence. After reviewing the record as a whole, and in light of the relevant case law, the claimed error in this case is insufficient to raise a question concerning the fundamental fairness of the trial court proceeding. We decline to invoke plain error review.

¶7 Johnson alternatively argues—and the State concedes—that the District Court lacked the statutory authority to include a tier level designation as part of Johnson's

sentence because intimidation is not a sexual offense as defined in § 46-23-502, MCA. We agree. We remand the sentence to the District Court solely for the purpose of striking the Tier II sexual offender designation.

¶8 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The sentence imposed by the District Court is affirmed except as to the Tier II sexual offender designation. We remand this case to the District Court to strike the sexual offender tier designation from Johnson's sentence.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE