IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0527

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBIN REID COLLINS,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from Montana Sixth Judicial District Court, Park County
The Honorable Brenda R. Gilbert Presiding

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Respectfully submitted this 29th day of June, 2022.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The State breached and undermined the plea agreement by emphasizing the victim's dissatisfaction with the plea agreement and that the plea agreement did not provide them justice, rather than arguing for the sentence agreed to by the parties 1

a. The issue presented on appeal, whether the State breached the plea agreement, is subject to *de novo* review on appeal 1

B. The State breached the plea agreement and Mr. Collins did not misstate the record or concede that the State performed its obligations under the plea agreement 3

II. The district court was not authorized to require as part of its sentence that Mr. Collins register as a sex offender 10

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Page(s)

Cases

Central Montana Elec. V. Adm'r of Bonneville Power (9th Cir. 1988),
840 F.2d 1472.....10

Johnson v. Costco Wholesale,
2007 MT 43, 336 Mont. 105, 152 P.3d 727.....2

Santobello v. New York (1971),
404 U.S. 257, 92 S. Ct. 495, 30 L.Ed. 2d 427.....8

State v. Berger,
259 Mont. 364, 856 P.2d 552.....10

State v. Couture,
2010 MT 201, 357 Mont. 398, 240 P.3d 987.....2

State v. Grana,
2009 MT 250, 351 Mont. 499, 213 P.3d 783..... 12, 13, 14

State v. Hill,
2009 MT 1334, 350 Mont. 296, 207 P.3d 307..... 2, 5, 6, 8

State v. Lawrence,
2001 MT 299, 307 Mont. 487, 38 P.3d 809.....15

State v. McDowell,
2011 MT 75, 360 Mont. 83, 253 P.3d 812.....2

State v. Munoz,
2001 MT 85.....1

State v. Newbary,
2020 MT 148, 400 Mont. 210, 464 P.3d 999.....2

State v. Olson,
2014 MT 8, 373 Mont. 262, 317 P.3d 159.....15

State v. Rardon (Rardon II),
2002 MT 345, 313 Mont. 321, 61 P.3d 132 ..... 2, 8, 9

State v. Warclub,
2005 MT 149, 327 Mont. 352, 114 P.3d 254 1

State v. Webb,
2005 MT 5, 325 Mon. 317, 106 P.3d 521 10

State v. Winkel,
2008 MT 89, 324 Mont. 267, 182 P.3d 54 10

State v. Zimmerman,
2014 MT 173, 375 Mont. 374, 328 P.3d 1132 2

Statutes

Montana Code Annotated § 46-23-512 ..... *passim*

Montana Code Annotated § 46-12-211 15

Other Authorities

Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*,
vol. 9A, § 5236, 238 (2d ed., West Supp. 2006) 2

I. The State breached and undermined the plea agreement by emphasizing the victim's dissatisfaction with the plea agreement and that the plea agreement did not provide them justice, rather than arguing for the sentence agreed to by the parties.

a. The issue presented on appeal, whether the State breached the plea agreement, is subject to *de novo* review on appeal.

In its Response Brief, the State attempts to recharacterize the issue on appeal as an appeal from the district court's denial of Mr. Collins' motion to withdraw his guilty plea. Appellee Response, 24. The State then contends that the 'clearly erroneous' standard of review applies to its restated issue on appeal, citing *State v. Warclub*, 2005 MT 149, ¶ 16, 327 Mont. 352, 114 P.3d 254. Appellee Br., 24.

In restating the issue on appeal as whether the district court correctly denied his motion to withdraw his guilty plea, the State conflates Mr. Collins' claim that the State breached the plea agreement during the sentencing hearing with the relief available to Mr. Collins as a result of the State's breach, which includes option to rescind the agreement and withdraw his guilty plea, or to require specific performance by the State at a new sentencing hearing. *State v. Munoz*, 2001 MT 85, ¶¶ 18, 38, 305 Mont. 139, 23 P.3d 922.

Mr. Collins did move the district court for the relief of Resentencing or Rescission of Plea, but it was based upon the prosecutor's breach of the plea agreement during the sentencing hearing. Appellee Appendix 1. Therefore, the

issue presented to the district court and to this Court on appeal is whether the State breached the plea agreement at the sentencing hearing.

Because a plea agreement is a contract, it is subject to contract law standards. *State v. Hill*, 2009 MT 1334, 350 Mont. 296, 207 P.3d 307. The question of whether a plea agreement was breached is a question of law which this Court reviews *de novo*. *State v. Rardon*, 2002 MT 345, ¶ 15, 313 Mont. 321, 61 P.3d 132 (*Rardon II*); *State v. Newbary*, 2020 MT 148, ¶5, 400 Mont. 210, 464 P.3d 999 (citing *State v. McDowell*, 2011 MT 75, ¶ 12, 360 Mont. 83, 253 P.3d 812 (further citation omitted). The parties are entitled to full review by the appellate court of questions of law, without special deference to the views of the trial court. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶18, 336 Mont. 105, 152 P.3d 727 (citing Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, vol. 9A, § 5236, 238 (2d ed., West Supp. 2006)); accord *State v. Couture*, 2010 MT 201, ¶ 47 n. 2, 357 Mont. 398, 240 P.3d 987; *State v. Zimmerman*, 2014 MT 173, ¶ 11, 375 Mont. 374, 328 P.3d 1132.

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b. The State breached the plea agreement and Mr. Collins did not misstate the record or concede that the State performed its obligations under the plea agreement.

The State further claims that Mr. Collins misstates the record with regard to trial counsel's statements at the sentencing hearing in response to the State's breach of the plea agreement. The State claims that trial counsel "acknowledged, acquiesced and conceded on the record at sentencing that the State's remarks did not undermine or breach the plea agreement." Appellee Br., 19. The State's interpretation of defense counsel's statements as gratuitous confirmation that the prosecutor had *not* breached the plea agreement is disingenuous when read in context of the sentencing hearing. When correctly read as the defense's response to the prosecutor's statements to the Court undermining the plea agreement, defense counsel's comments were a reaction to the State's breach.

The transcript shows that at the Sentencing hearing, the State presented testimony from the alleged victim of the dismissed count, and the mother of the victim from Count III and previous foster-mother to the victim in Count I. The court then asked whether the State wished to make any argument to the Court concerning the plea agreement. Tr. 8/20/21 at 62. The prosecutor offered no argument but acknowledged she was bound by the plea agreement, and with the next breath highlighted the victims' opposition:

> Well, not necessarily argument, your Honor, we did reach the plea agreement in good faith, so we will abide by our commitment to ask the Court to follow the terms of the plea agreement. Of course, we understand that the Court will take into account the victim impact statements, as well.

Tr. 8/20/21 at 63.

The court then turned to counsel for Mr. Collins, who argued at length in favor of the plea agreement. *Id*, at 63-69.

Immediately before the court pronounced its sentence, and after already having made its sentencing argument, the prosecutor interjected with arguments that undermined the plea agreement. Rather than join in the defense's argument in support of the plea agreement, the prosecutor reminded the court of the victims' "completely understandable" dissatisfaction with how the matter was resolved and the plea resolution's failure to deliver justice to these victims. Tr. at 70. The prosecutor undermined the legitimacy of the plea bargain and emphasized the victims' emotional trauma, rather than arguing at all in support of the six-year suspended sentence. *Id.*

The prosecutor then addressed defense counsel's arguments in support of the plea agreement that Mr. Collins was already in counseling and agreed to register as a sex offender under the plea agreement. *Id.* Rather than agreeing that these or any other facts supported acceptance of the parties' plea agreement, the prosecutor trivialized Mr. Collins' argument and pre-sentence rehabilitative

efforts by emphasizing the deep dissatisfaction of this resolution for the victims due to the dismissal of Count II and life-long trauma to the victims:

> Nonetheless, the only thing that I would say in response to Ms. Whipple's comments is that, you know, obviously, we appreciate that he's undertaken the obligation to undergo counseling, that he's agreed to register as a sexual offender when the statutory charges to which he's pleading, or which he's agreed to plead in the plea agreement, don't mandate that, but in the end, you know, he is trying to remediate himself within the community, *I get that, but as we've heard, today, from the victims*, they really, you know – these are traumas that they're have to deal with for the remainder of their lives, and, you know, particularly for Count II, which was dismissed because of the statute of limitations, that victim, through no fault of her own, because as Ms. Whipple pointed out, you know, we all get why there is a delay or failure to report sexual crimes on a minor, it is dissatisfying, deeply dissatisfying in terms of perceiving that justice has been had.

Tr. 8/20/21 at 70-71 (emphasis supplied).

Again, the prosecutor said that she entered into the plea agreement in good faith and would ask the court to follow it, "taking into consideration the victims' impact statements" that she had just stated should outweigh the defense's arguments in favor of the plea agreement. Tr. 8/20/21 at 71. At no time during the prosecutor's argument did she say anything to support or encourage the sentencing court to accept the sentencing recommendation in the plea agreement, except that she entered into it in good faith and was bound by it. The prosecutor simply stated the obvious requirement and expectation that parties to an agreement enter the contract in good faith and are legally bound by it. *See, e.g. Hill*, ¶ 29. The prosecutor recited words expressing adherence or allegiance to

the agreement, but paid no more than lip service to the fact that the plea agreement existed.[1] Each of the prosecutor's statements that weakly acknowledged her legal obligations to be bound by the plea agreement were immediately undercut by her compelling description of the reasons for which the victims' opposed and were deeply dissatisfied with the resolution contemplated by the plea agreement.

It was in this context that defense counsel expressed her concern that the State's argument breached the plea agreement:

> Your honor, if I may, one final remark. I just want to be clear for the record that Ms. Lassiter inviting the court to consider the victim impact statements submitted in this matter and to consider a fine larger than the one – which was none, by the way, in the plea agreement that we had considered- that she is not suggesting to the court that the plea agreement is invalid or should not be followed, because as you know the State is required to give more than lip service to that agreement. And for the record, in case there's any further discussion of this, I just wanted to affirm that that is not the case here, that this is not just lip service, and that the State stands by the plea agreement as negotiated.

Tr. 8/20/21 at 71.

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[1] "Lip service: service consisting only of avowed expressions of adherence, devotion or allegiance; service by words but not by deeds." *Hill*, ¶ 29 at fn. 3 (quotation omitted).

The State's characterization of this statement as a concession by Mr. Collins, or that counsel's remark should be viewed as a gratuitous affirmation by the defense that the State *was in fact honoring* the plea agreement, is nonsensical and not credible. The prosecutor had actively undermined the plea agreement by directing the Court's sympathy and understanding toward the victims who claimed they were denied justice and were opposed to the plea resolution. In this context, it is clear that defense counsel's statements were not meant to make "absolutely clear" for the record that the State was fulfilling its end of the bargain. Response at 25.

Instead, defense counsel's remarks are properly understood as an invitation to the prosecutor prior to the court's pronouncement of the sentence to make an argument in support of the plea agreement, and a protest that the prosecutor was paying mere lip service to the agreement while suggesting to the court that the plea agreement should not be followed. Mr. Collins made no concession at sentencing regarding the prosecutor's breach of the plea agreement. Read in context, it is obvious that defense counsel's remarks were not intended to "affirmatively acknowledge[], acquiesce[], and concede[]" that the prosecutor did not undermine the plea agreement.

As set forth above, the record makes clear that the prosecutor breached the plea agreement. The prosecutor paid only lip service- service by words but not

deeds- to the plea agreement and failed to meet the strict and meticulous standards of both promise *and performance*. *Hill*, ¶29 at fn. 3. As in *Rardon II*, the prosecutor's argument was intended to cause the court to question the appropriateness of the recommended sentence and convince the sentencing court that the sentencing recommendation in the plea agreement should not be accepted. *Rardon II*, ¶ 22.

The district court stated that the prosecutor's argument did not influence her sentencing decision. Tr. 8/20/21 at 71-72; App. 4. The prosecutor's statements cannot be taken back, and it is impossible to "un-ring" that bell or measure what effect they may have had. Even where the judge imposed a sentence within its statutory authority and stated he was not influenced by the prosecutor's argument, this Court has reversed the judgment of the district court upon a breach of the plea agreement. This Court reversed the district court in the interest of justice and appropriate recognition that the duties of the prosecution in relation to the promises made in the plea agreement. *Rardon II*, ¶ 23, (citing *Santobello v. New York* (1971), 404 U.S. 257, 262-63, 92 S. Ct. 495, 499, 30 L.Ed. 2d 427, 433). This Court reasoned that "the sentencing judge should have the benefit of making such decision based on a good faith and fair presentation of the State's case." *Rardon II*, ¶ 25.

In this case, the district court expressly considered the presentence investigation that included the statements of the victims, the statements made by the victims at the sentencing hearing, and the statements of counsel at sentencing. Tr. 8/20/21 at 72. Even if those statements were lawfully considered by the Court in sentencing, the prosecutor was not entitled to use them to undermine the plea agreement. Furthermore, the district court stated that the prosecutor entered into the plea agreement in good faith "with an awareness of the mother's and step-daughter's positions," and therefore eliciting testimony from the victims at sentencing did not undermine the plea agreement. (Appellee's Appendix 4 at 1-2). But the plea agreement was entered into on the morning of the change of plea hearing (Tr. 6/7/21 at 40), and during that hearing the prosecutor represented to the court and to Mr. Collins that the victims supported the plea agreement. (Appellant's Br., 7). Consequently, it was critical for the prosecutor argue in favor of the non-binding plea agreement, particularly after learning of the victims' opposition to it.

As detailed above, the prosecutor did not argue in favor of the sentencing recommendation thereby breaching the plea agreement. This Court should reverse and remand the matter to the district court to allow Mr. Collins to withdraw his guilty plea or, in the alternative, to require specific performance of the plea agreement before a new judge and with a different prosecutor. *Rardon II*, ¶ 26.

II. The district court was not authorized to require as part of its sentence that Mr. Collins register as a sex offender.

This Court reviews a criminal sentence for its legality; that is, whether the sentence is within statutory parameters. A trial court's statutory interpretation is a question of law, which this Court reviews *de novo* to determine whether it is correct. *State v. Winkel*, 2008 MT 89, ¶ 20, 324 Mont. 267, 182 P.3d 54; *State v. Webb*, 2005 MT 5, ¶8, 325 Mon. 317, 106 P.3d 521.

Montana Code Annotated § 46-23-512 authorizes the sentencing court to order a defendant to subject to sex offender registration in circumstances where the offense of conviction does not require it. The statute reads:

> A defendant convicted of an offense that would otherwise not be subject to registration under this part may agree to comply with the registration requirements of this part as part of a plea agreement, and a court accepting the plea agreement may order the defendant to comply with this part.

Mont. Code Ann. §46-23-512.

Courts must avoid any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used. *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (citing *Central Montana Elec. V. Adm'r of Bonneville Power* (9th Cir. 1988), 840 F.2d 1472, 1478). The language of the statute is clear. The State contends that the statute permits the court to require sexual offender registration if the defendant agrees to it in a plea agreement. Response, at 30. The State ignores the statute's two requirements listed which are

listed in the conjunctive, requiring not only that the defendant agree to register in a plea agreement, but also that the court accept the plea agreement in order to require the defendant comply with sexual offender registration. Mont. Code Ann. § 46-23-512. The State's interpretation of the statute to only require the defendant agree to sexual offender registration in a plea agreement would render superfluous the second clause that reads "a court *accepting the plea agreement* may order the defendant to [register]." *Id* (emphasis supplied). Thus, this Court should reject the State's argument that would fail to give effect to the words "the court accepting the plea agreement…" The statute requires that the court may require Mr. Collins to register if he agrees to do so in the plea agreement and if the court accepts the plea agreement.

The State also argues that the district court accepted Mr. Collins' plea agreement. State's Response, 29 ("Contrary to Collins's argument on appeal, the district court did not 'reject' the plea agreement.") The State's position ignores the sentencing judge's words: "[H]aving considered everything presented here, the Court concludes that the plea agreement and sentence recommended in the plea agreement is wholly inadequate in terms of accountability and punishment." Tr. 8/20/21 at 74. The court also stated, "the sentence provided for in the parties' plea agreement was simply inadequate. The sentence proposed failed to meet the sentencing policies set by the legislature." State's App. 4 At 2. The court did not

accept the recommended six-year suspended sentence and instead entered a Judgment and Order imposing the maximum ten year prison term on each count. Doc. 76, Def. Appx 1.

The sentencing recommendation was the only meaningful aspect of the plea agreement that called for any acceptance or rejection by court, and the court acknowledged that it had no role to play in the amendment of the charges because "the State has discretion to amend those charges." Tr. 8/20/21 at 25. Thus, what the court could reject, the court did reject. The district court clearly did not accept the plea agreement, and therefore could not require Mr. Collins to register as a sexual offender.

The State's relies on *State v. Grana* for its contention that a court can impose the registration requirement when a defendant agrees to it in a plea agreement. *State v. Grana*, 2009 MT 250, 351 Mont. 499, 213 P.3d 783. *Grana* is inapposite because the district court accepted Grana's plea agreement, bringing the case within Mont. Code Ann. § 46-23-512 and authorizing the district court to require registration. *Grana*, ¶ 13.

In *Grana*, the defendant was charged with seven counts of burglary based upon his entry into women's homes which he admitted to entering to commit sexually offensive acts towards the occupants. *Grana*, ¶ 5. The defendant entered a plea agreement to plead to three counts of burglary. *Id*, ¶ 6. The plea agreement

also included an express provision that the district court could require him to register as a sexual offender subject to his right to argue that registration was not appropriate. *Id*, ¶ 13. The defendant filed an objection. *Id*, ¶ 6. The district court deferred imposition of sentence for six years for each of the three burglaries upon conditions including that the defendant register as a sexual offender. *Id*, ¶ 7. The defendant did not appeal the original sentence, but did appeal a later judgment imposed on a revocation proceeding which also required the defendant to register as a sexual offender. *Id*. In other intervening proceedings, Grana expressly acknowledged that he agreed to register as a sexual offender even though burglary was not an enumerated offense requiring registration. *Id*, ¶ 14. This Court found that the district court properly ordered as part of a sentence that the defendant register as a violent/sexual offender. *Id*, ¶ 13.

Grana is inapposite because the district court accepted Grana's plea agreement. This Court found that Grana "obtained the full benefit of the plea agreement." *Id*, ¶ 13. Moreover, Grana expressly acknowledged in the proceedings that he had agreed to register as a sexual offender. *Id*, ¶ 14. Unlike Grana, Mr. Collins' plea agreement contained no similar provision to the one in Grana's that expressly enabled the district court to require sexual offender registration even if Grana objected to it. As this Court noted, "the effect of [Grana's] plea agreement was that Grana conceded that the District Court could

require him to register as a sexual offender if his objection to registration did not prevail." *Id*, ¶ 13. By the terms of his plea agreement, Grana effectively waived any right to contest the sex offender registration even if he objected to it.

By contrast, Mr. Collins simply agreed to register as a term of the plea agreement pursuant to the confines of Mont. Code Ann. § 46-23-512, and he did not waive his right to contest registration as unlawful if the district court did not accept the plea agreement as required by the statute. Mr. Collins did not obtain the benefit of the plea agreement like Grana did through dismissal of four of Grana's burglary charges and a deferred sentence of six years. At Mr. Collins' sentencing, Count II had already been dismissed by the court and only Counts I and III remained. Doc. 33, 41, 47. The district court rejected the plea agreement as "wholly inadequate in terms of accountability and punishment." Tr. 8/20/21 at 74. The district court rejected the plea agreement's six-year suspended sentence, and instead imposed the maximum ten-year prison term for each count. Appellant's Appx 1. Because the district court did not accept the plea agreement, it lacked the authority under Mont. Code Ann. § 46-23-512 to require Mr. Collins to register as a sexual offender.

Mr. Collins agreed to the sexual offender registration in a bargained-for exchange within the plea agreement. Consequently, it is unfair and contrary to the statute for the district court to reject the favorable sentencing recommendation

within the plea agreement while holding Mr. Collins to the unfavorable concession to register as a sex offender where the statute of conviction does not otherwise authorize it.

The State contends that the parties performed the terms of the plea agreement, and the court 'departure' to the maximum ten-year prison terms was not a rejection of the plea agreement. Response, at 29-30. The State's position that the district court accepted the plea agreement when it imposed the maximum possible sentence instead of the recommended six-year suspended sentence defies logic. The State conflates a non-binding plea agreement with a judge's inherent authority to accept or reject any plea agreement. A trial court may reject or accept any plea agreement, it is simply that in rejecting a so-called "binding" plea agreement the court must then afford the defendant a right to withdraw their plea. Mont. Code Ann. § 46-12-211. See, e.g., *State v. Olson*, 2014 MT 8, ¶ 16, 373 Mont. 262, 317 P.3d 159 (District Court rejected plea agreement, even though it was non-binding, when it gave a harsher sentence than recommended); *State v. Lawrence*, 2001 MT 299, ¶¶6, 11, 307 Mont. 487, 38 P.3d 809 (In context of IAC claim, trial court rejected non-binding plea agreement by going above the State's sentencing recommendation).

The district court rejected the sentencing recommendation that the parties contemplated in the plea agreement. The district court stated repeatedly that the

plea agreement was wholly inadequate and did not meet the legislature's sentencing policies. The district court unequivocally rejected the plea agreement, thereby divesting it of the authority to require Mr. Collins to register as a sexual offender under Montana Code Annotated § 46-23-512.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and remanded for Mr. Collins to elect either a hearing for resentencing before a new judge with specific performance of the plea agreement by a different prosecutor at that sentencing hearing, or the option of rescission of the agreement. The Court should strike the condition that requires Mr. Collins to register as a sex offender.

Respectfully submitted this 29th day of June, 2022

/s/ Jennifer A. Dwyer

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quotes and indented mater, and the word count calculated by Microsoft Word for Windows is 3,820 words, excluding certificate of services and certificate of compliance.

By: /s/ Jennifer A. Dwyer

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