

80 A.D.3d 797
Supreme Court, Appellate Division, Third Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Charles DONNELLY, Appellant.

Jan. 6, 2011.

Synopsis

Background: Defendant was convicted in the County Court of Greene County, Lalor, J., of burglary in the third degree, and he appealed.

Holdings: The Supreme Court, Appellate Division, McCarthy, J., held that:

[1] the People failed to honor their promise under the plea agreement, and

[2] the County Court was required to offer defendant an opportunity to withdraw his guilty plea.

Affirmed as modified.

West Headnotes (2)

[1] **Criminal Law** 🔑 Representations, promises, or coercion; plea bargaining

By recommending a sentence of one and one-third to five years, which was greater than the sentence of one and one-third to four years that the People agreed to recommend in the plea agreement pursuant to which the defendant pleaded guilty to burglary in the third degree, the People failed to honor their promise under the plea agreement, and thus, the defendant was entitled to vacatur of his sentence of one and one-third to five years.

Cases that cite this headnote

[2] **Criminal Law** 🔑 Grounds for Allowance

Sentencing and Punishment 🔑 Plea bargain or other agreement

Although the County Court, in sentencing defendant after his guilty plea to burglary in the third degree, retained the discretion to impose a different sentence than the one recommended by the People, because the court had made statements at the plea colloquy that it intended to impose the plea agreement's recommended sentence of one and one-third to four years, the court was required to offer defendant an opportunity to withdraw his guilty plea before it deviated from those statements and imposed an enhanced sentence.

4 Cases that cite this headnote

Attorneys and Law Firms

****386** Martin J. McGuinness, Glens Falls, for appellant.

Terry J. Wilhelm, District Attorney, Catskill (Danielle D. McIntosh of counsel), for respondent.

Before: PETERS, J.P., SPAIN, ROSE, LAHTINEN and McCARTHY, JJ.

Opinion

McCARTHY, J.

***797** Appeal from a judgment of the County Court of Greene County (Lalor, J.), rendered April 28, 2009, convicting defendant upon his plea of guilty of the crime of burglary in the third degree.

Defendant pleaded guilty to a superior court information charging him with burglary in the third degree and waived his right to appeal. The People agreed, as part of the plea bargain, to recommend a sentence of 1 # to 4 years in prison. County Court indicated that it would impose that recommended prison sentence unless the court was “surprised by something” or defendant got “in trouble between now and the sentencing date.” The court then asked defendant if “anybody made any other promises” to induce his guilty plea, and he responded that they had not.

At sentencing, the People expressed concern that defendant ***798** did not accept responsibility for his actions during the presentence investigation. The People then recommended a sentence of 1 # to 5 years in prison. County Court, finding that defendant did not cooperate with the Probation Department in completing the presentence investigation report, imposed a prison sentence of 1 # to 5 years. Defendant appeals.

[1] Initially, although defendant has been released from prison, his appeal is not moot given that he remains on parole (*see People v. Hastings*, 24 A.D.3d 954, 956 n., 805 N.Y.S.2d 702 [2005]). Additionally, defendant's waiver of appeal does not preclude his argument concerning County Court's enhancement of his sentence beyond the terms of the plea agreement (*see People v. Armstead*, 52 A.D.3d 966, 967, 859 N.Y.S.2d 506 [2008]). This issue is unpreserved, however, due to defendant's failure to move to withdraw the plea or vacate the judgment of conviction (*see id.*). Despite this failure, we exercise our interest of justice jurisdiction to take corrective action. By recommending a sentence greater than agreed, the People failed to honor their promise under the plea agreement, thereby depriving defendant of part of his bargain (*see Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 [1971]; *People v. Tindle*, 61 N.Y.2d 752, 754, 472 N.Y.S.2d 919, 460 N.E.2d 1354 [1984]; *People v. Hoeltzel*, 290 A.D.2d 587, 588, 735 N.Y.S.2d 259 [2002]). This violation of the agreement, alone, entitles ****387** defendant to vacatur of his sentence (*see id.*).

[2] Further, while County Court retained the discretion to impose a different sentence than the one recommended by the People, because the court had made statements at the plea colloquy that it intended to impose the recommended sentence, the court was required to offer defendant an opportunity to withdraw his guilty plea before it deviated from those statements and imposed an enhanced sentence (*see People v. Schultz*, 73 N.Y.2d 757, 758, 536 N.Y.S.2d 46, 532 N.E.2d 1274 [1988]; *People v. Brunelle*, 47 A.D.3d 1067, 1067, 850 N.Y.S.2d 668 [2008], *lv. denied* 11 N.Y.3d 786, 866 N.Y.S.2d 612, 896 N.E.2d 98 [2008]). This is especially true where, as here, the court did not advise defendant of express conditions he needed to satisfy to be sentenced in accordance with the plea agreement, such as cooperating with the Probation Department and accepting responsibility during the presentence investigation (*see People v. Armstead*, 52 A.D.3d at 967, 859 N.Y.S.2d 506). Hence, we remit the matter to County Court to impose the agreed-upon sentence or permit defendant to withdraw his plea before imposing the enhanced sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the sentence imposed; matter remitted to the County Court of Greene County for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

PETERS, J.P., SPAIN, ROSE and LAHTINEN, JJ., concur.

Parallel Citations

80 A.D.3d 797, 914 N.Y.S.2d 385, 2011 N.Y. Slip Op. 00049

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