THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0416

The State of New Hampshire

v.

Nathaniel Smith

APPEAL PURSUANT TO RULE 7 JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT NORTHERN JUDICIAL DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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Pursuant to *Sup. Ct. R.* 36

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(Oral Argument Waived)

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ISSUE PRESENTED

Whether the sentencing court erred when it interpreted the plea agreement to mean that the defendant would serve his stand-committed sentence consecutively to his preexisting sentence.

STATEMENT OF THE CASE AND FACTS

A Hillsborough County grand jury indicted the defendant, Nathaniel Smith, on one count of first-degree murder, one count of second-degree murder, one count of conspiracy to commit murder, one count of conspiracy to commit sale of a controlled drug, and one count of possession of a controlled drug with intent to distribute. DA 1[1]; RSA 630:1-a; RSA 630:1-b; RSA 620:3; RSA 318-B:2. These charges stemmed from the defendant's involvement in the 2015 murder of Michael Pittman.

In February 2017, the New Hampshire Attorney General's Office presented the defendant with a Memorandum of Agreement. DA 26-31. The agreement required the defendant to plead guilty to conspiracy to commit the sale of controlled drugs and possession of controlled drugs with intent to distribute. *Id.* The agreement also required the defendant to cooperate with the State's prosecution of Adrien Stillwell, Michael Younge, and Paulson Papillon relating to the murder of Michael Pittman. *Id.* In exchange, the State agreed to enter a *nolle prosequi* on the first-degree murder, second-degree murder, and conspiracy to commit murder charges against the defendant. *Id.* The State also agreed to recommend the following sentence for each of the two remaining drug-related charges:

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[1] References to the record are as follows:
"DA" refers to the appendix to the defendant's brief;
"DB" refers to the defendant's brief;
"PH" refers to the March 2, 2017 plea hearing transcript;
"H" refers to the January 31, 2018 hearing transcript;
"MH" refers to the May 4, 2018 motion hearing transcript;
"SH1" refers to the June 18, 2018 sentencing hearing transcript; and
"SH2" refers to the June 26, 2018 sentencing hearing transcript.

> Conspiracy to Commit the Sale of Controlled Drugs (Waiver of Indictment)(Extended Term): a stand-committed sentence of not more than thirty (30) years, nor less than ten (10) years, with three (3) years of the minimum sentence deferred for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. If the terms of the deferred sentence are met, the deferred portion shall be suspended for a period of five (5) years upon his good behavior and compliance with the terms of his sentence.
>
> Possession of Controlled drugs with Intent to Distribute (Waiver of Indictment)(Extended Term): a sentence of not more than thirty (30) years, nor less than ten (10) years, suspended for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. This sentence is consecutive to the stand committed sentence reflected in [Conspiracy to Commit the Sale of Controlled Drugs paragraph] of this document and begins on the date of his release from incarceration on that sentence.

DA 26. Lastly, the State agreed to "recommend to the court and/or the Department of Corrections that Smith serve the incarcerated portion of his sentence at a secure facility separate and apart from Paulson Papillon, Adrien Stillwell and Michael Younge, so as to best ensure Smith's safety while incarcerated." DA 26-27. The defendant and his attorneys signed the agreement on February 21, 2017. DA 30-31.

On March 2, 2017, the defendant pleaded guilty pursuant to the terms of the memorandum of agreement. PH 4-11. At this hearing, the defendant stated that he had reviewed the plea agreement and that he fully understood the terms of that agreement. *Id.* The court informed the defendant that he would be sentenced in accordance with the terms of the plea agreement at a later date. *Id* at 6.

On December 27, 2017, the defendant filed a Motion to Enforce Plea Agreement. DA 8-15. The defendant argued that the stand-committed sentence contemplated in the agreement should run concurrently with the sentence he had been serving since March 29, 2016 for unrelated drug charges. *Id.* The State objected, explaining that it had never agreed to the defendant serving his existing sentence concurrently with the new sentences and invited the defendant to withdraw his plea. DA 41-48. Following a hearing, the court ruled that the presumption that both sentences should run concurrently did not apply and, therefore, ran the sentences consecutive to each other. DA 1-5. The court based its ruling on a finding that there was no evidence—in the agreement or elsewhere—that the State intended the sentences to run concurrently. *Id.* The court also noted that both sentences were not temporally or factually related: involving different prosecutorial bodies, crimes, judges, and dates of pleas. *Id.* The court further held that because no meeting of the minds took place between the parties as to whether the sentences should run concurrently or consecutively, the defendant was free to withdraw his plea. *Id.* The defendant declined to do so. H 3-4; SH1 2; SH2 8.

On May 31, 2018, the defendant filed a Motion to Reconsider the court's denial of the Motion to Enforce Plea Agreement. DA 60-62. The

State partially objected to this motion: agreeing that the sentencing court had made a factual error, but rebutting the defendant's legal arguments. DA 63-66. Although the court corrected a factual mistake in its original order, it otherwise denied the defendant's Motion to Reconsider. DA 6-7. On June 18, 2018, the court ran the defendant's new, stand-committed sentence consecutive to his preexisting sentence. SH1 2-11. On June 26, 2018, the court resentenced the defendant to reflect the correct charge ID numbers that the State had incorrectly read during the original sentencing hearing. SH2 2-9.

This appeal followed.

SUMMARY OF THE ARGUMENT

The court correctly analyzed the plea agreement. Whether the agreement is missing a term or, in the alternative, a term of the agreement is ambiguous, the sentencing court correctly interpreted the agreement to require the defendant to serve his new and preexisting sentences consecutively. In doing so, the sentencing court also correctly found that the defendant was not entitled to the presumption of concurrent sentencing because his case was factually distinguishable from the line of cases establishing that presumption. Finally, the sentencing court correctly concluded that because the parties did not have a meeting of the minds concerning the defendant's preexisting sentence, the defendant could withdraw his plea, but could not demand specific performance of a term not contained in the agreement.

ARGUMENT

1. THE SENTENCING COURT CORRECTLY CONCLUDED THAT THE PLEA AGREEMENT REQUIRED THE DEFENDANT'S SENTENCES TO RUN CONSECUTIVELY.

In analyzing the plea agreement, the sentencing court correctly applied contract law principles to determine that the agreement required the defendant to serve his new sentence consecutive to his existing sentence. Because the parties did not address the preexisting sentence in the plea agreement, the sentencing court concluded that withdrawal from the plea agreement was the defendant's only remedy. For the following reasons, this Court must affirm.

Although this Court has never expressly set a standard for interpreting plea agreements, courts generally interpret them as they do contracts. *United States v. Okoye*, 731 F.3d 46, 49 (1st Cir. 2013); *United States v. Gamble*, 917 F.2d 1280, 1282 (10th Cir. 1990) ("In determining the rights of a defendant, or the government, under a plea agreement in a criminal proceeding the courts have frequently looked to contract law analogies." (internal quotation marks omitted)). When interpreting contracts, this Court applies a reasonable person standard to determine what the parties agreed to. *IBM Corp. v. Khoury*, 170 N.H. 492, 501 (2017); *State v. Burr*, 142 N.H. 89, 92-93 (1997). This Court may also consider the agreement's context to inform its inquiry. *R. Zoppo Co. v. City of Dover*, 124 N.H. 666, 671 (1984). A sentencing court's interpretation of a contract is reviewed *de novo*. *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 501 (2006).

A. The sentencing court correctly found that the sentences must run consecutively because the plea agreement did not address the preexisting sentence.

This Court can reasonably conclude that the agreement intended the new, stand-committed sentence to run consecutively with the defendant's preexisting sentence. The State never agreed that the defendant would serve these sentences concurrently. DA 43. Moreover, the defendant did not present any evidence supporting his contention that he and the State had agreed that he would serve both sentences concurrently. Absent any representation from the State to support this contention, the defendant merely relied on an assumption unsupported by the agreement itself or the negotiations between both parties.

In *Burr,* this Court confronted the question of whether the parties had incorporated a particular statute into the terms of a plea agreement. *Burr*, 142 N.H. at 92-93. In concluding that the parties had not done so, this Court noted that the agreement did not mention the statute and that no evidence was presented suggesting that the parties had intended to incorporate said authority into their agreement. *See Id.* ("[g]iven the absence of any indication that the plea agreement resulted from prosecutorial promises or agreements relating to the defendant's ability to petition for annulment, we consider the defendant's reliance on the parties' general understandings or expectations misplaced."). Similarly, in this case, the defendant cannot cite to anything in the agreement supporting a finding that the parties intended for the defendant to serve his sentences concurrently. Therefore, the only reasonable interpretation of the agreement

is that the parties intended for the defendant to serve the sentences consecutively.

Although the defendant attempts to bolster his contention that his sentence should run concurrently by citing to *State v. Rau*, 129 N.H. 126 (1987) and *Crosby v. Warden, N.H. State Prison*, 152 N.H. 44 (2005), those cases are factually distinguishable from this case. DB 13-14. To the extent that the defendant relies upon the presumption established in *Rau* and *Crosby*, this Court should reject that argument for the following reasons.

i. The presumption established in *Rau* and *Crosby* does not apply to this case.

Generally, if plea agreements entered at the same time are silent as to whether a defendant will serve his multiple sentences concurrently or consecutively, this Court presumes that he will serve them concurrently. *Rau*, 129 N.H at 130. This presumption extends to instances where, on or about the same date, the same trial court sentences a defendant on multiple charges brought by the same prosecuting agency. *Crosby*, 152 N.H. at 47. However, when such similarities are not present, this presumption does not apply. *Id.*

In *Crosby*, this Court applied the *Rau* presumption when a judge imposed two sentences on a defendant within a week of each other for different crimes. *Id.* The State argued that this Court should adopt a presumption that sentences imposed on different days for different charges will run consecutively. *Id.* This Court noted, however, that the same judge imposed the sentences just five days apart. *Id.* Thus, this Court reasoned that these particular facts would overcome a presumption that concurrent

sentencing will only be afforded to defendants sentenced to multiple charges on the same day. *Id.*

This case is factually distinguishable from *Crosby*. As the sentencing court observed, "the sentences were not temporally or factually related" and "were not imposed by the same branch of prosecution." DA 6. In fact, both sentences were imposed almost a year apart. DA 85. When compared, the close procedural and temporal nexuses found in *Crosby* are absent in the instant case. *Crosby*, 152 N.H. at 47. Accordingly, the sentencing court correctly concluded that the presumption of concurrent sentences does not apply, and this Court must affirm.

ii. The sentencing court correctly supplied an omitted term of the agreement.

First, the agreement omits an essential term. Parol evidence may not be used to supply an essential term that was omitted from an agreement. *MacThompson Realty v. City of Nashua*, 160 N.H. 175, 179 (2010). The sentencing court may, however, still inquire as to what the omitted term of the agreement should be. Restatement (Second) of Contracts § 204 (1981). When parties to an agreement "have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Id.* In supplying this essential term, a court must look toward "community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process." *In re Grand Jury Proceedings*, No 02-S-1154, 2005 WL 678994, at *4 (N.H. Super. Mar. 22, 2005)(citing Restatement (Second) of Contracts § 204 (1981)). A court may also consider parol

evidence in determining what an appropriate term would be. *See* Restatement (Second) of Contracts § 204, Comment e ("where there is complete integration and interpretation of the writing discloses a failure to agree on an essential term, evidence of prior negotiations or agreements is not admissible to supply the omitted term, but such evidence may be admissible, if relevant, on the question of what is reasonable in the circumstances.").

In this case, the sentencing court noted that the agreement was silent as to whether the defendant's stand-committed sentence would run concurrently to his existing sentence and, based on the record before it, supplied a term to fill that gap. DA 4. In doing so, the sentencing court acted within its discretion in referring to the record. Based on the context surrounding the plea agreement, the sentencing court found that the defendant must serve his new, stand-committed sentence consecutive to his existing sentence. The sentencing court noted that there was no evidence that the State had intended for the sentences to run concurrently. The sentencing court correctly considered the context of the plea agreement in determining a fair and reasonable term of the agreement. Therefore, this court must affirm the sentencing court's ruling.

iii. This Court must resolve any ambiguity in the agreement as requiring the sentences to run consecutively.

As a threshold matter, the defendant has failed to properly preserve for appeal an argument that the agreement is ambiguous. To raise an issue on appeal, a party must first raise the issue before the trial court. *Halifax-*

American Energy Company, LLC v. Provider Power, LLC, 170 N.H. 569, 574 (2018); *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004) ("[i]t is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial."); *State v. Blackmer*, 149 N.H. 47, 48 (2003). It is the appealing party's burden to show that he raised a given issue at the trial court level. *Rix v. Kinderworks Corp.*, 136 N.H. 548, 553 (1992).

At the sentencing hearing, the defendant never argued that the plea agreement was ambiguous. DB 8, 15; MH 2-20. In fact, the defendant claimed the opposite: arguing that the sentencing court should interpret only the terms that are found within the four corners of the agreement. MH 7-9. The defendant now argues for the first time that the agreement was ambiguous. DB 15. Because the defendant failed to preserve the issue of ambiguity, this Court should decline to consider such a claim on appeal.

Assuming, *arguendo*, that the defendant preserved this argument, this Court must still affirm. Even if this Court found, as a matter of law, that a contract term is ambiguous, this Court nevertheless defers to the factual findings of the sentencing court. *Behrens*, 153 N.H. at 504; *Galloway v. Chicago-Soft, Ltd.*, 142 N.H. 752, 756 (1998). This Court has long recognized that "trial courts may use parol evidence to aid in interpreting an ambiguous term of a contract." *Behrens*, 153 N.H. at 501. Parol evidence may not be used to "contradict unambiguous terms of a written agreement." *Ouellette v. Butler*, 125 N.H. 184, 187-88 (1984). However, that could not possibly be the case here, as the agreement is silent on the matter. Therefore, the sentencing court correctly used the entire

record available to it to conclude that the defendant must serve his stand-committed sentence consecutively with his existing sentence.

The sentencing court acted within its discretion in considering parol evidence when interpreting the agreement. It is clear that the State intended that the defendant's new, stand-committed sentence would run consecutively with his existing sentence. DA 56-59. This evidence is sufficient to show that the only reasonable interpretation of the plea agreement is that the defendant was meant to serve both sentences consecutively.

To the extent that the defendant argues that any ambiguity in the agreement must be resolved against the State, as the drafter of the agreement, DB 12, 15, this Court must reject that argument. That principle of contract law applies only when analyzing insurance contracts. *See, e.g., Centronics Data Computer Corp. v. Salzman*, 129 N.H. 692, 695 (1987) ("[t]his court has applied the rule of construction that interprets ambiguous contract language strictly against its writer only in the context of insurance contracts."); *Thiem v. Thomas*, 119 N.H. 598, 602 (1979) ("no presumptions are to be indulged in either for or against a party who draws an agreement.")(internal quotation omitted); *see also EnergyNorth Natural Gas, Inc. v. Associated Elec. & Gas Ins. Servs.*, 1999 U.S. Dist. Lexis 23307, 17 n.4 (D.N.H. 1999) ("New Hampshire law ordinarily does not permit a court to construe ambiguous contract language against the drafter."). This exception exist in insurance contract disputes because "[insurance] policies usually are imposed on a take-it-or-leave-it basis...(t)he pretense that the parties had bargained for the resulting contract of insurance is an absurdity." *Trombly v. Blue Cross/Blue Shield*

of New Hampshire-Vermont, 120 N.H. 764, 771 (1980) (citing *Storms v. U.S. Fidelity & Guar. Co.*, 118 N.H. 427, 430 (1978)) Because the defendant actively negotiated for his plea agreement with the aid of several attorneys, this Court should not construe any ambiguities in the plea agreement against the State. *Id*, *see e.g.* DA 12 ([Attorney Shepard's March 28, 2017 letter to the defendant] "[t]he second deal you signed was better than the first—it was a year less. The deal was the exact deal you wanted and on the terms you proposed."). Therefore, this Court must affirm the sentencing court's ruling.

2. THE SENTENCING COURT CORRECTLY RULED THAT THE APPROPRIATE REMEDY WAS TO ALLOW THE DEFENDANT TO WITHDRAW HIS GUILTY PLEAS.

The sentencing court correctly determined that the only relief available to the defendant was the opportunity to withdraw his plea. It is a basic tenant of contract law that "[a] valid, enforceable contract requires offer, acceptance, *and a meeting of the minds on all essential terms. A meeting of the minds is present when the evidence, viewed objectively, indicates that the parties have assented to the same terms.*" *Glick v. Chocura Forestands Ltd. P'ship*, 157 N.H. 240, 252 (2008) (citation omitted and emphasis added); *see also IBM Corp.*, 170 N.H. at 500 ("...a contract requires a meeting of the minds about the contract's terms: each party must have the same understanding as to the terms of the agreement." (quotation omitted)); *Bel Air Assocs. v. N.H. Dept. of Health & Human Servs.*, 158 N.H. 104, 107-08 (2008) ("[f]or a meeting of the minds to occur, the parties must assent to the same contractual terms. That is, the parties must have the same understanding of the terms of the contract and manifest an intention, supported by adequate consideration, to be bound by the contract."). Absent such a mutual understanding, this Court may not grant specific performance of an unagreed upon term. *See Behrens*, 153 N.H. at 505 (stating that when there is no meeting of the minds, the issue of granting of specific performance is moot).

The evidence clearly shows that no meeting of the minds between the parties occurred on the issue of whether the defendant would serve his sentences concurrently or consecutively. The State never understood the terms of the plea agreement to mean that the defendant's stand-committed

sentence would run concurrently with his existing sentence. DA 39. The defendant asserted that he thought his sentences would run concurrently. DA 38. Therefore, the parties never came to a mutual understanding regarding the relationship between his new and preexisting sentences.

The sentencing court has already identified the proper remedy available to the defendant: withdrawal of his plea. While the defendant suggests that specific performance applies, DB 16, the State never promised, or even so much as implied, that the defendant's sentences would run concurrently. DB 15-16; DA 56-59. Therefore, there is no agreement to be specifically performed beyond those contained in the plea agreement. Accordingly, this Court must affirm.

To the extent that this Court determines that an enforceable agreement exists between the parties whereby that the defendant would serve his new and preexisting sentences concurrently, the defendant is still not entitled to specific performance of the agreement. *See Kernan v. Cuero,* 138 S. Ct. 4, 8-9 (2017). As the United States Supreme Court has held:

> "[the] ultimate relief to which [the defendant] is entitled must be left to the discretion of the [lower] court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, or alternatively, that the circumstances require granting . . . opportunity to withdraw his plea of guilty."

Id. at 241 (quoting *Santobello v. New York,* 404 U.S. 257, 262-63 (1971)). Remanding for further consideration of the remedy is, therefore, unnecessary as the sentencing court already determined that the proper

remedy is to allow the defendant to withdraw his plea, if he so chooses. DA 4-5. Accordingly, this Court must affirm.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
Gordon J. MacDonald
Attorney General

May 7, 2019

/s/ _____
Bradley S. Flagg
Pursuant to *Sup. Ct. R.* 36

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CERTIFICATE OF COMPLIANCE

I, Gordon P. Landrigan, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 3,667 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

May 7, 2019

/s/
Gordon P. Landrigan

CERTIFICATE OF SERVICE

I, Gordon P. Landrigan, hereby certify that a copy of the State's brief shall be served on counsel for the defendant, Stephanie Hausman, by first-class mail postage prepaid, at the following address:

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May 7, 2019

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