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Eller v. State: Plea Bargaining in New Mexico

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ELLER v. STATE: PLEA BARGAINING IN NEW MEXICO

In *Eller v. State*[1] the New Mexico Supreme Court determined that a trial court's rejection of a sentence recommendation is a rejection of the plea agreement under Rule 21(g)(4) of the New Mexico Rules of Criminal Procedure.[2] This rule guarantees the defendant an absolute right to withdraw his guilty plea whenever the trial court rejects the plea agreement reached between the prosecutor and the defendant. Thus, when the court fails to follow the prosecutor's recommendation for sentence, the defendant must be permitted to withdraw his plea. This casenote presents an analysis of the New Mexico Supreme Court's liberal interpretation as compared with two federal decisions interpreting Rule 11(e) of the Federal Rules of Criminal Procedure.[3]

Calvin Eller and Dennis Richardson were each charged with multiple counts of issuing worthless checks and one count of conspiracy. The defendants entered into a plea agreement with the district attorney which provided that the defendants would plead guilty to all counts in exchange for a recommendation by the district attorney for a suspended sentence; the defendants would be placed on probation and would make full restitution within sixty days. The trial court did not follow the prosecutor's recommendation and imposed penitentiary terms. After sentencing, the defendants moved to withdraw their guilty pleas. The motion was denied.

The Court of Appeals refused to hear defendants' appeal on procedural grounds. However, the Supreme Court directed the Court of Appeals to hear the case and to determine, as a matter of law, whether a rejection of a sentencing recommendation amounts to a rejection of a plea agreement under Rule 21(g)(4).[4] Relying on two

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1. 92 N.M. 52, 582 P.2d 824 (1978).

2. N.M. R. Crim. P. 21(g)(4) (1978) states: "If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."
the defendant than that contemplated by the plea agreement."

3. *See* United States v. Savage, 561 F.2d 554 (4th Cir. 1977); United States v. Sarubbi, 416 F. Supp. 633 (D.N.J. 1976).

4. Eller v. State, 90 N.M. 552, 566 P.2d 101 (1977).

federal court decisions, *United States v. Sarubbi*[5] and *United States v. Savage*,[6] the Court of Appeals concluded that a failure to follow the prosecutor's sentencing recommendation was not a rejection of the plea agreement.[7] The Supreme Court disagreed. In New Mexico, therefore, when a trial court rejects the sentence recommendation contained in a plea and disposition agreement,[8] the defendant must be given the opportuntiy to withdraw his guilty plea and to enter a new plea.

THE NEW MEXICO AND FEDERAL RULES

Plea bargaining in New Mexico is regulated by Rule 21(g) of the New Mexico Rules of Criminal Procedure. While the New Mexico rule is based upon Rule 11(e) of the Federal Rules of Criminal Procedure,[9] two federal courts have interpreted that rule quite differently from the New Mexico interpretation in *Eller v. State.* In *United States v. Sarubbi,*[10] the Federal District Court of New Jersey concluded that Rule 11(e)(4) does not allow the withdrawal of a guilty plea when the trial court rejects the prosecutor's sentence recommendation contained in a plea agreement.[11] The court based its determination on the explicit language of Rule 11(e)(1) which provides that:

> [T]he attorney for the government will do any of the following: (A) move for dismissal of other charges; or (B) make a recommendation, or agree not to oppose the defendant's request for a particular sentence, *with the understanding that such recommendation or request shall not be binding upon the court;* or (C) agree that a specific sentence is the appropriate disposition of the case.[12] (emphasis added.)

If the trial court rejects a Type A (motion to dismiss) or Type C (specific agreement) arrangement, the defendant must be allowed to withdraw his plea as provided in 11(e)(4). However, if the trial court fails to follow the recommendation arrangement (Type B), the plea agreement itself is not rejected. The parties understand that the court

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5. 416 F. Supp. 633 (D.N.J. 1976).
6. 561 F.2d 554 (4th Cir. 1977).
7. State v. Eller, 17 N.M. St. B. Bull. 2550, 2551 (June 8, 1978).
8. Criminal Forms, Plea and Disposition Agreement, Form. 7.00, approved for the District Courts October 1, 1974.
9. M. Thompson, New Mexico Rules of Criminal Procedure for the District Courts–Commentaries (2d ed. 1975).
10. 416 F. Supp. 633 (D.N.J. 1976).
11. *Id.* at 636.
12. Fed. R. Crim. P. 11(e)(1).

is not bound by a *recommendation* but only by an *agreement.* The defendant, therefore, gets what he bargained for and should not be allowed to withdraw his plea simply because the recommendation is not followed. "Congress would have had no reason to use the critical language for the Type B agreement unless it meant that the *agreement* could be both approved and satisfied even though the recommendation or request failed to persuade the court to impose the very sentence recommended or requested."[13]

Similarly in *United States v. Savage,*[14] the Fourth Circuit Court of Appeals held that the district judge did not reject the defendant's plea agreement, under Rule 11(e)(4), when he refused to follow the government's *recommendation* on sentencing.[15] The *Savage* court approved the reasoning in *Sarubbi.*[16] Thus, in the Fourth Circuit, when the prosecutor recommends a sentence which the trial court refuses to accept, the agreement has not been rejected, only the recommendation. The federal cases rest on the rather tenuous distinction between an agreement and a recommendation.

In *State v. Eller,*[17] the New Mexico Court of Appeals, erroneously relied upon the reasoning of the federal courts in *Sarubbi* and *Savage.* The federal decisions were based upon the explicit language of Rule 11(e)(1) which authorizes a district attorney to make a recommendation "with the understanding that such recommendation . . . shall not be binding upon the court."[18] While the Court of Appeals recognized that Rule 21(g) is similar to Rule 11(e),[19] the crucial language of 11(e)(1) does not appear in the New Mexico rule. New Mexico's Rule 21(g)(1) provides that:

> The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the state will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.[20]

Under Rule 21(g)(1), the prosecutor may only move for *dismissal* of other charges, as in a federal Type A arrangement, or *recommend*

13. 416 F. Supp. at 636.
14. 561 F.2d 554 (4th Cir. 1977).
15. *Id.* at 556.
16. *Id.*
17. 17 N.M. St. B. Bull. 2550 (June 8, 1978).
18. Fed. R. Crim. P. 11(e)(1).
19. 17 N.M. St. B. Bull. at 2551.
20. N.M. R. Crim. P. 21(g)(1) (1978).

a particular sentence, as in a federal Type B arrangement. There is no provision for an agreement for a specific sentence as in a federal Type C arrangement. The Court of Appeals, however, found authorization for a Type C agreement in Rule 21(g)(2). This was an improper expansion of Rule 21(g)(2) because that section deals only with notice of plea agreements and not with the scope of the prosecutor's authority in the bargaining process. Section 21(g)(2) states that:

> If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere *in the expectation that a specific sentence will be imposed* or that other charges before the court will be dismissed it shall be reduced to writing on a form approved by the court administrator, and the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.[21] (emphasis added.)

The language of Rule 21(g) is confusing. Section 21(g)(2) provides that whenever a guilty plea is entered in the expectation of a "specific sentence," the plea agreement must be in writing, and yet Section 21(g)(1) does not authorize an agreement for a specific sentence. The legislature avoided any "specific sentence" language in Section 21(g)(1) but did not do so in Section 21(g)(2). "Expectation that a specific sentence will be imposed" should probably read "expectation that a recommendation will be followed."

In *Eller v. State*[22] the Supreme Court rejected the Court of Appeal's hair-splitting construction of Rule 21(g) and stated, "It is implicit in a plea agreement that the court will either accept the recommendation and plea to the charges, or reject *both* the recommendation and the plea."[23] This interpretation is consistent with paragraph five of the plea and disposition agreement form used in New Mexico[24] and is also consistent with American Bar Association standards.[25] As a result of this decision, if the court rejects the

21. N.M. R. Crim. P. 21(g)(2) (1978).

22. 92 N.M. 52, 582 P.2d 824 (1978).

23. *Id.* at ___, 582 P.2d at 825-26.

24. Criminal Forms, Plea and Disposition Agreement, Form 7.00, Paragraph 5 provides: "That, if after reviewing this agreement and any pre-sentence report the court concludes that any of its provisions are unacceptable, the court will allow the withdrawal of the plea, and this agreement shall be null and void. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceedings shall be admissible as evidence against the defendant in any criminal proceedings."

25. The trial judge is required to permit the defendant to withdraw his plea whenever the judge decides to impose a penalty not in compliance with the plea agreement. ABA Standards Relating to the Functions of the Trial Judge, § 4.1(c)(iii) (Approved Draft, 1972).

agreement, it rejects the plea as well regardless of any agreement made by the prosecutor.

PRIOR NEW MEXICO CASES

Prior to the adoption of Rule 21(g) of the New Mexico Rules of Criminal Procedure a defendant's assumption that the trial court would follow the prosecutor's sentence recommendation would have been an insufficient ground for withdrawal of a guilty plea which was voluntarily entered. In *State v. Ramos*[26] the New Mexico Court of Appeals held that the defendant was not denied due process on denial of his motion to withdraw his guilty plea after the trial judge imposed a more severe sentence than that recommended by the district attorney in the plea bargain. The court noted that, in arguing the motion to withdraw the plea, defense counsel stated that he had explained to the defendant that the court was not bound by the district attorney's recommendation.[27]

The facts in *State v. McClarron,*[28] decided on the same day as *Ramos,* differed only in that the motion to withdraw the guilty plea was made before, rather than after, sentence was imposed. The sentencing of the defendant in *Ramos* took place immediately prior to the sentencing of the defendant in *McClarron.* At oral argument, defense counsel stated that the motion to withdraw the plea was made because the court had declined to follow the recommendations in *Ramos.* This, however, was not ground for withdrawal. Observing that the prosecutor had kept his part of the bargain by recommending sentence, the court concluded that the defendant was fully aware of her rights, as well as the consequences of her acts, and simply did not get the result she desired.[29]

Eller v. State is a clear departure from the case law established by the Court of Appeals in *Ramos* and *McClarron.* In reaching its decision in *Eller,* the Supreme Court relied upon the reasoning of the Florida Court of Appeals in *Thomas v. State*[30] that "[t]o say in these circumstances that all which was bargained for and agreed to was fulfilled by the prosecutor's mere act of recommending probation would reduce the bargain to a trap or, at best, a formality."[31] This reasoning was also approved by the Colorado Supreme Court in a similar decision.[32]

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26. 85 N.M. 438, 512 P.2d 1274 (Ct. App. 1973).
27. *Id.* at 440, 512 P.2d at 1276.
28. 85 N.M. 442, 512 P.2d 1278 (Ct. App. 1973).
29. *Id.* at 443, 512 P.2d at 1279.
30. 327 So.2d 63 (Fla. App. 1976).
31. *Id.* at 64.
32. People v. Wright, 559 P.2d 249 (Colo. App. 1976), *aff'd* 573 P.2d 551 (1978).

THE NEW MEXICO AND FEDERAL DECISIONS COMPARED

The New Mexico Supreme Court's interpreation of Rule 21(g) is preferable to the federal interpretation of Rule 11(e) because it eliminates the arbitrary classification of plea bargains into recommendations or agreements. In most cases there is no difference between the two. A defendant's right to withdraw his guilty plea should not depend on such a fine distinction. In addition, the federal decisions will likely result in more post-sentencing appeals challenging the trial court's classification of the plea bargain as a recommendation or an agreement. This is illustrated by the Ninth Circuit's decision in *United States v. Henderson.*[33] The bargain in *Henderson* read as follows:

> FOUR YEARS MAXIMUM, CONCURRENT WITH OTHER CHARGES TO WHICH I HAVE MADE GUILTY PLEA. POSSIBLE I WILL RECEIVE LESSER SENTENCE, INCLUDING PROBATION.[34]

The Ninth Circuit Court of Appeals concluded that this was a recommendation (a Type B agreement) because the trial court had so determined. In addition, the trial court had clearly impressed upon the defendant that the court was not bound by the "recommendation." This "recommendation," however, could arguably be considered an agreement for a specific sentence, in which case the defendant would have an absolute right to withdraw his plea rather than relying on the court's discretion.[35]

The New Mexico decision in *Eller v. State* is consistent with the guidelines announced by the United States Supreme Court in *Santobello v. New York.*[36] In that case the Court insisted that the acceptance of a guilty plea, under a plea agreement, "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."[37] The required safeguards, however, were not delineated nor did the court state whether the defendant "gets his due" when he bargains for a recommendation which the prosecutor makes but the judge rejects.

In deciding that the defendant does not have the right to withdraw

33. 565 F.2d 1119 (9th Cir. 1977).

34. *Id.* at 1120.

35. Compare the *Henderson* plea agreement with that in State v. Holland, 91 N.M. 386, 387, 574 P.2d 605, 606 (Ct. App. 1978) which stated: "no more severe [than] DEFERRED sentence, and probation as the judge may require (not more than 5 years)." The N.M. Court of Appeals concluded that this was an agreement for a specific sentence (a Type C agreement).

36. 404 U.S. 257 (1971).

37. *Id.* at 262.

his plea when the trial court rejects the prosecutor's recommendation, the federal courts have given little thought to the defendant's expectations in bargaining for a recommendation. This oversight leads to misunderstanding and bitterness, as the *Henderson* court recognized when it suggested that the court might do well to allow a withdrawal of the plea even though Rule 11(e) does not so require.[38] In this respect, the federal courts have failed to implement the *Santobello* guidelines of insuring the defendant what is "reasonably due" when the "circumstances" involve a rejected recommendation.

Even though the defendant may be fully advised that the court is not bound by a recommendation, there is "always the possibility that the defendant may consider the warnings . . . as ritual incantations, not to be taken seriously."[39] It is also well recognized that a defendant will sometimes give an untruthful response to the judge's questions if he fears a truthful response would jeopardize the bargain.[40] In light of these considerations, a court's rejection of a recommendation removes the basis for which the defendant entered his plea, and draws into question the voluntariness of the plea. In deciding that the defendant has an absolute right to withdraw his plea if the recommendation is rejected, the New Mexico Supreme Court has gone farther than the federal courts in implementing the *Santobello* guidelines and assuring that the plea entered is completely voluntary.

CONCLUSION

In the federal courts, Rule 11(e) of the Federal Rules of Criminal Procedure does not require the withdrawal of a guilty plea when the court rejects a sentence recommendation negotiated during plea bargaining. In New Mexico, however, a rejection of a sentence recommendation is a rejection of the plea agreement under Rule 21(g) of the New Mexico Rules of Criminal Procedure and the defendant must be permitted to withdraw his plea. The New Mexico decision is consistent with the defendant's expectations in bargaining for a recommendation and will assure that a guilty plea entered as a result of plea bargaining is completely voluntary.

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38. United States v. Henderson, 565 F.2d 1119, 1123 (9th Cir. 1977).

39. *Id.*

40. In Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972), *cert. denied,* 409 U.S. 1129 (1973) the court stated that: "Examination of the defendant alone will not always bring out into the open a promise that has induced his guilty plea. It is well known that a defendant will sometimes deny the existence of a bargain that has in fact occurred; . . . out of fear that a truthful response would jeopardize the bargain."