

Breach of a Plea Agreement

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Once a plea is entered pursuant to a plea agreement, the parties are bound by the agreement and failure to comply with it constitutes a breach. Occasionally questions arise about whether a breach has occurred and if so, what remedy should apply.

Typically the issue arises in a defense motion asserting a breach by the State. Common prosecutorial breaches include breaking a promise to take no position on sentencing, see *Santobello v. New York*, 404 U.S. 257, 259 (1971) (prosecutor breached by recommending a sentence); *State v. Rodriguez*, 111 N.C. App. 141, 146 (1993) (prosecutor breached by noting for the trial court certain available non-statutory aggravating factors), and breaking a promise to recommend a particular sentence. See, e.g., *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997) (prosecutor breached promise to recommend that the defendant receive a sentence of no more than 63 months and an adjustment for acceptance of responsibility). Of course, other types of prosecutorial breaches may occur. See *State v. Blackwell*, 135 N.C. App. 729, 730-32 (1999) (State breached promise not to use plead-to felony as a theory of first-degree murder under the felony-murder rule; although the State did not use the plead-to felony as the underlying felony, it used it derivatively to prove the underlying felonies).

Note that a promise to take no position on sentencing means that the prosecutor is to make *no comment* to the sentencing judge, either orally or in writing, that “bears in any way upon the type or severity of the sentence to be imposed.” *Rodriguez*, 111 N.C. App. at 145-46. Put another way, “taking no position” means “making no attempt to influence the decision of the sentencing judge.” *Id.* at 146. A breach of a promise to take no position on sentencing will not be excused on grounds that it was inadvertent, see *Santobello*, 404 U.S. at 262, or because it might not have influenced the sentencing judge. *Rodriguez*, 111 N.C. App. at 147 (rejecting the State’s argument that no breach occurred because none of the non-statutory aggravating factors suggested by the prosecutor were found by the judge); *Santobello*, 404 U.S. at 262-63 (remand required even though trial judge stated that prosecutor’s recommendation did not influence him). A promise to recommend a sentence does not require the prosecutor to advocate for the sentence or to explain the reasons for the recommendation. See *United States v. Benchimol*, 471 U.S. 453, 455-57 (1985).

Although less common, some cases deal with breach by defendants. See *Ricketts v. Adamson*, 483 U.S. 1, 4-5 (1987) (defendant breached by not testifying at his accomplices’ retrial).

Occasionally, ambiguity in the plea agreement complicates the determination of whether a breach has occurred. Although a plea agreement is a contract, it isn’t an ordinary commercial contract. *Blackwell*, 135 N.C. App. at 731. Because a guilty plea involves a waiver of constitutional rights, including the right to a jury trial, “due process mandates strict adherence to any plea agreement.” *Id.* This “require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.” *Id.* (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)); see also *State v. King*, 218 N.C. App. 384, 388 (2012) (quoting *Blackwell*). Thus, ambiguities are construed against the State.

Suppose the prosecution breaches the plea agreement. What next? When the prosecution breaches, a defendant cannot be held to a plea bargain. *Santobello v. New York*, 404 U.S. 257, 262 (1971). When such a breach occurs, the

defendant's remedies are either specific performance or withdrawal of the plea. *Id.* at 262-63; *Blackwell*, 135 N.C. App. at 732. The court should consider the following factors when deciding between these remedies:

- who broke the bargain;
- whether the violation was deliberate or inadvertent;
- whether circumstances have changed between entry of the plea and the present time;
- whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate; and
- the defendant's wishes.

Blackwell, 135 N.C. App. at 732-33.

Some appellate decisions order specific performance as a remedy for a prosecution breach. *See State v. King*, 218 N.C. App. 384, 390-98 (2012) (where the defendant pleaded guilty pursuant to a plea agreement that called for, in part, the return of over \$6,000 in seized funds, the court ordered specific performance even though the exact funds at issue had been forfeited to federal authorities; rescission could not repair the harm to the defendant where he already had completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs); *Rodriguez*, 111 N.C. App. at 148 (where the prosecutor breached a promise to take no position on sentencing, the court ordered a new sentencing hearing at which the State was to take no position on sentencing). Others have ordered rescission. *State v. Isom*, 119 N.C. App. 225, 227-28 (1995) (rescission ordered where the plea agreement called for sentencing the defendant as a committed youthful offender but he did not qualify for that status based on his age). Still others, noting that trial court is in the best position to determine the appropriate remedy, remand for the trial court to choose between the two remedies. *Santobello*, 404 U.S. at 263; *Blackwell*, 135 N.C. App. at 732.

When specific performance requires a new sentencing hearing, a different judge should conduct that proceeding. *See Santobello*, 404 U.S. at 263; *Rodriguez*, 111 N.C. App. at 148.

Finally, a defendant is not entitled to specific performance when the plea agreement contains terms that violate statutory law; in these cases, rescission is the appropriate remedy. *State v. Wall*, 348 N.C. 671, 676 (1998); *Rodriguez*, 111 N.C. App. at 148.