

State of New Hampshire
Supreme Court

NO. 2008-0138

2009 TERM

FEBRUARY SESSION

State of New Hampshire

v.

Bobby Dean Freeman

APPEAL OF FINAL DECISION OF
GRAFTON COUNTY SUPERIOR COURT

REPLY BRIEF OF DEFENDANT

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

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ARGUMENT

I. Rule of Lenity is Alive in New Hampshire

The State suggests that lenity does not exist. If this Court finds that Mr. Freeman's sentence is ambiguous, the rule of lenity is plainly alive in New Hampshire, having been most recently cited and applied in *State v. Dansereau*, 157 N.H. 596 (2008), decided shortly after Mr. Freeman filed his opening brief. The rule of lenity is applied equally to ambiguity in sentences as well as statutes. *State v. Rau*, 129 N.H. 126, 130 (1987).

II. The Words the Court Used at the Time of Sentencing Controls the Sentence

The State virtually ignores the plain words of the sentencing court, which “make clear at the time of sentencing in plain and certain terms,” *State v. Burgess*, 141 N.H. 51, 52 (1996), that for Mr. Freeman probation would not commence until “release from parole.”

Rather the State focuses on the fact that the sentence was a product of a plea, and cites federal cases regarding how plea agreements are to be interpreted.

Whatever federal law says about their interpretation, there is far too much law and policy behind federal plea agreements to simply cite a smattering of federal Circuit cases.

Federal plea agreements are based on federal criminal laws and sentencing guidelines that are uniform nationwide, and have generated an enormous body of knowledge. They have been honed by the Federal Department of Justice, and are the product of years of federal prosecutorial experience, litigation in all federal Districts and Circuits, and federal prosecutorial policy. Federal plea agreements thus are many-page documents spelling out in great detail exactly the obligations of each party, signed by defendants and lawyers for both the government and defendant, and governed by a body of rules. *See* FED.R.CRIM.PROC. 11, *Pleas*; FED.SENT.GUIDELINES §6B1.2, *Standards for Acceptance of Plea Agreements*. In New Hampshire, this is true of plea agreements entered by defendants represented by the New Hampshire Federal Defender’s Office, Criminal Justice Act (CJA) attorneys, and local and out-of-state law firms. One can view plea agreements for some well-known defendants on-line;¹ although the defendants may be exceptional, their agreements are not. *See e.g., United States v.*

¹Whether all federal plea agreements should be on-line as a matter of course is currently a topic of debate in the Justice Department and among the federal judiciary. *Federal Judge Defies DOJ Wishes, Orders All Plea Agreements to Be Posted Online*, NAT’L L.J. (Jan.28,2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427786758>.

Jack Abramoff, PLEA AGREEMENT, <http://news.findlaw.com/hdocs/docs/abramoff/usabrmff10306plea.pdf>.

Federal plea agreements bear no relation to any document in this case. The State did submit two documents to the court entitled “State Prison Sentence.” These were forms filled out by the prosecutor without any indication that they represent an agreement. They have no space for a signature by the defendant, his attorney, or even the State. They contain no disclosures normally associated with admissions of guilt. Rather the forms are essentially a note-taking instrument, submitted to the court by the prosecutor as a proposed sentence. STATE PRISON SENTENCE Nos. 2000-S-125 & 126 (Dec. 1, 2000), *Appx. to Opening Brf.* at 22, 24; *see Plea & Sent. Trn.* at 7-8. There is no known document evidencing an agreement in the record in this case. Indeed – in accord with New Hampshire practice – it is believed that any agreement between the parties was reached informally and that no document was ever generated.

Thus it is not clear how the State’s citation to federal law helps in the interpretation of these forms. Perhaps there is some mistaken or purposeful identity of language, not yet identified by the State, between federal law and the particular language used in Mr. Freeman’s sentence. But no known federal case has any ready application here to support any particular interpretation of the words the judge used when Mr. Freeman was sentenced.

All the State’s attention to a plea agreement and federal law is, however, a diversion. The language the court used at the time Mr. Freeman was sentenced is what controls. Those words unambiguously provide that probation would not commence until “release from parole.” The sentence must be enforced, and Mr. Freeman should be now be free.

III. Mr. Freeman Relied on the Terms of his Sentence

Mr. Freeman, in his brief, explained his jail-house calculations, and why he ultimately chose to serve the maximum sentence and thus be relieved from post-parole probation. The State, in its brief, misconstrued that explanation. The State hints that Mr. Freeman had a hidden agenda at the time of sentencing, or that he entered his plea in bad faith.

This is not the case, and there is nothing in the record to support it. Mr. Freeman developed his view while in prison after reading the terms of his sentencing documents, understanding he could not realistically complete the sexual offender program to be eligible for parole, and realizing after self-analysis that he might not be a good candidate for probation. Whether another inmate in Mr. Freeman's situation would reach the same conclusion is not relevant. As explained in his brief and to the court below, Mr. Freeman relied on the words of the judge spoken at the moment he was sentenced. To now change them would be a violation of his federal and state constitutional rights to definite sentencing. *United States v. Daugherty*, 269 U.S. 360, 363 (1926); *Stapleford v. Perrin*, 122 N.H. 1083 (1982); U.S. CONST. amds. 5 & 14; N.H. CONST. pt. I, art. 15.

CONCLUSION

Mr. Freeman requests this Court issue an order dissolving his probation status, and declare that his punishment has been fully exacted.

Respectfully submitted,

Bobby Dean Freeman
By his Attorney,

Law Office of Joshua L. Gordon

Dated: February 23, 2009

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

CERTIFICATION

I hereby certify that on February 23, 2009, copies of the foregoing will be forwarded to Nicholas Cort, Esq., Assistant Attorney General.

Dated: February 23, 2009

Joshua L. Gordon, Esq.