

2013 IL App (2d) 120703-U  
No. 2-12-0703  
Order filed February 11, 2013

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-CF-3484
	)	
SOLONGOMAA TSERENDORJ,	)	Honorable
	)	James K. Booras,
Defendant-Appellee.	)	Judge, Presiding.

---

PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices Jorgensen and Hudson concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court erred in dismissing a prostitution charge on the ground that defendant did not receive a plea offer as favorable as one extended to a co-worker who had also been charged with prostitution: due process did not apply, and defendant did not establish an equal-protection violation, as the record facts about the previous case did not establish that the two defendants were similarly situated, and in any event they could not have been, in light of the cases' distance in time.
- ¶ 2 An indictment charged defendant, Solongomaa Tserendorj, with prostitution (720 ILCS 5/11-14(a) (West 2010)). Defendant moved to dismiss the indictment, alleging that she was denied due process and equal protection because she was not offered the same plea bargain as a defendant in an

unrelated case. The trial court granted the motion and the State appeals. The State contends that the court erred in finding a due process and equal protection violation. We reverse and remand.

¶ 3 Defendant was charged with prostitution after she allegedly agreed with an undercover police officer to perform a sex act. Defendant moved to dismiss the indictment. She alleged that, 18 months earlier, another defendant, Myeng Lim, had been charged with prostitution at the same business establishment. Lim had been allowed to plead guilty to disorderly conduct, a misdemeanor, but defendant had been offered only a sentence of probation in exchange for a guilty plea to felony prostitution. Defendant alleged that this unequal treatment violated her rights to due process and equal protection. The trial court agreed with defendant that the failure to offer her the same plea bargain as another defendant charged with the same offense at the same location violated her rights to due process and equal protection. Thus, the court granted defendant's motion. The State timely appeals.

¶ 4 The State contends that the trial court erred in dismissing the indictment. The State argues that due process is not implicated here and that the record contains no facts on which to base an equal protection claim. We agree.

¶ 5 A trial court has the inherent authority to dismiss a charging instrument where the failure to do so would result in a deprivation of due process or a miscarriage of justice. *People v. Rose*, 342 Ill. App. 3d 203, 205 (2003). Where, as here, the facts are not in dispute and the issue is purely legal, our review of such a dismissal is *de novo*. *Id.*

¶ 6 Initially, we agree with the State that due process is not implicated here. "Due process concerns fairness between the State and the individual dealing with the State, regardless of how other similarly situated persons may be treated." *People v. Warren*, 173 Ill. 2d 348, 361 (1996) (citing

*Evitts v. Lucey*, 469 U.S. 387, 405 (1985)). Defendant here does not complain about the plea-bargaining process itself, but complains only about the way she was treated as compared to another defendant. Thus, defendant's claim is properly characterized as one of an equal protection violation.

¶ 7 We further agree with the State that defendant falls far short of stating an equal protection claim. "The equal protection clause requires that the government treat similarly situated individuals in a similar fashion, unless the government can demonstrate an appropriate reason to treat them differently." *People v. Masterson*, 2011 IL 110072, ¶ 24. It is axiomatic that an equal protection claim requires a showing that the individual raising it is similarly situated to the comparison group. *People v. Whitfield*, 228 Ill. 2d 502, 512 (2007). Thus, when a party fails to make that showing, her equal protection challenge fails. *Masterson*, 2011 IL 110072, ¶ 25.

¶ 8 In evaluating defendant's equal protection claim, we begin with the principle that the prosecution has broad discretion in deciding whether to file charges and which charges to file. *People v. Peterson*, 397 Ill. App. 3d 1048, 1055 (2010). "No defendant has an absolute right to pick and choose his prosecution and his punishment." *People v. Simpson*, 57 Ill. App. 3d 442, 449 (1978). Moreover, defendants have no constitutional right to plea bargain. *People v. Curry*, 178 Ill. 2d 509, 530 (1997). Thus, while we cannot say that the plea-bargaining process can never implicate equal protection concerns, a defendant claiming such a violation will face a heavy burden to show that the prosecutor's decisions were outside the wide scope of legitimate prosecutorial discretion. See *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995) (defendant claiming equal protection violation in plea bargaining had to establish a *prima facie* case of invidious discrimination, by showing that (1) others similarly situated to him were not prosecuted or were given more favorable plea bargains; and (2) his prosecution was based on an impermissible motive,

*i.e.* a discriminatory purpose or intent). “Within the limits set by the legislature’s constitutionally valid definition of chargeable offenses, ‘the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation’ so long as ‘the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’ ” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

¶9 While repeatedly insisting that she and Lim are similarly situated, defendant does not provide even the most rudimentary information on which to base an equal protection claim. We do not know, for example, Lim’s age or race. We do not know defendant’s race, for that matter. We do not know their respective criminal records, if any. Most importantly, we have no information about Lim’s offense. Prostitution necessarily encompasses a wide variety of conduct and, absent evidence that defendant and Lim were charged with identical offenses, defendant’s equal protection claim cannot succeed. See *People v. Flores*, 404 Ill. App. 3d 155, 159 (2010) (most important sentencing factor is seriousness of offense).

¶10 Moreover, as the State points out, the offenses at issue occurred approximately 18 months apart. That fact in itself defeats any notion that the defendants are similarly situated. The fact that defendant is alleged to have committed an act of prostitution after another employee of the same business was charged with the same offense could very well justify a more severe sentence. In any event, in light of the myriad factors that could justify the different treatment, defendant cannot show that her allegedly harsher treatment was the result of a discriminatory intent.

¶11 Defendant cites numerous cases comparing the sentences of codefendants. However, the rationale for such a comparison is that the codefendants were charged with exactly the same crime.

Precisely because the factors that can influence a defendant's sentence are potentially limitless, the supreme court refuses to consider claims based on the sentence imposed on a defendant in an unrelated case. *People v. Fern*, 189 Ill. 2d 48, 58-59 (1999) (“Extending that principle to compare the sentences imposed in unrelated cases, on the other hand, opens up the process to a potentially vast pool of comparables.”).

¶ 12 In summary, defendant has failed to show that the disparate treatment of her and Lim was based on any improper motive by the prosecution or the result of an unjustifiable standard or arbitrary classification. Accordingly, the trial court's order dismissing the indictment is reversed, and the cause remanded.

¶ 13 Reversed and remanded.