

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANDREW PALERMO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45810

FILED

APR 05 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from an amended judgment of conviction. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge. Appellant Gene Andrew Palermo was originally convicted, pursuant to a guilty plea, of one count of attempted failure by a sex offender to change his address and provide updated information. The district court sentenced Palermo to serve a prison term of 12 to 30 months. The district court ordered the sentence suspended and placed Palermo on probation for a period not to exceed 24 months.

After sentencing, Palermo reported to the Division of Parole and Probation (Division) and signed the probation agreement, which contained the general conditions for probation as provided in NRS 176A.400 and referenced the special conditions for probation that were delineated in the judgment of conviction. The order admitting Palermo to probation was entered by the district court on April 18, 2005.

Subsequently, the Division requested a modification to Palermo's sentence. The Division specifically requested that the terms and conditions of Palermo's probation be modified to include the sex offender conditions listed in NRS 176A.410. Palermo opposed the request and the State filed a reply. The district court granted the Division's

request on the basis that Palermo was a tier-three sex offender. On July 27, 2005, the district court entered an amended judgment of conviction, which included all of the conditions listed in NRS 176A.410. This appeal follows.

First, Palermo contends that the district court violated his right to due process by basing its decision to amend the judgment of conviction on a mistake of fact. In a related claim, Palermo also argues that the State lacked the authority to request a modification to the judgment of conviction because the district court had not made a mistake of fact in the original sentencing. We conclude that these claims lack merit. The district court was not modifying a sentence,¹ it was modifying the conditions of probation -- something it can do at any time.²

Second, Palermo contends that the State violated the plea agreement by requesting a modification to the judgment of conviction. We disagree. In the plea agreement, the State stipulated "to felony treatment and probation." The plea agreement is silent on the issue of conditions of probation. Accordingly, we conclude that the State did not violate the terms or the spirit of the plea agreement.³

¹See Passanisi v. State, 108 Nev. 318, 322-23, 831 P.2d 1371, 1373-74 (1992) (generally, a district court can only modify a sentence after a defendant has begun to serve it if the sentence was based on a materially untrue assumption about the defendant's criminal record that worked to his extreme detriment).

²See NRS 176A.450(1).

³See Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (observing that when the State enters into a plea agreement, it is held to "the most meticulous standards of both promise and performance,"

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Third, Palermo contends that the Legislature did not intend for the sex offender conditions listed in NRS 176A.410 to apply to the crime of failure by a sex offender to change his address and provide updated information. We disagree. NRS 176A.400(1) provides in part that "In issuing an order granting probation, the court may fix the terms and conditions thereof, including, without limitation . . . [a]ny reasonable conditions to protect the health, safety or welfare of the community." And we have previously held that the provisions NRS 176A.400 and 176A.450 confer broad and virtually unlimited discretion upon the district courts in fashioning appropriate conditions of probation.⁴ In light of the crime with which Palermo was convicted, we conclude that the district court did not abuse its discretion by imposing the NRS 176A.410 conditions as conditions of his probation.

Fourth, Palermo contends that the imposition of additional conditions of probation more than 5 months after sentencing constitutes cruel and unusual punishment. After consideration of all of the circumstances of this case, we do not find that the additional conditions of probation or the fact that they were imposed 5 months after sentencing shocks the conscience; violates principles of fairness; or goes beyond what is necessary to protect the health, safety, and welfare of the community.⁵

. . . continued

and that violation of either the terms or the spirit of the agreement requires reversal).

⁴Creps v. State, 94 Nev. 351, 360-61, 581 P.2d 842, 848-49 (1978).

⁵See generally NRS 176A.400(1)(c); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

Having considered Palermo's contentions and concluded that they are without merit, we

ORDER the amended judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 16, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk