

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNATHEN LEE HARRISON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45994

FILED

FEB 09 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of possession of a controlled substance. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Johnathen Lee Harrison to a prison term of 12-34 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 1 year. As a condition of probation, Harrison was required to serve 364 days in the White Pine County Jail.

Harrison's sole contention on appeal is that the State breached the plea agreement at sentencing. Harrison claims that the negotiated plea agreement "did not provide that the district attorney was free to argue for a maximum jail sentence," and that by doing so, the prosecutor breached the "spirit" of the agreement. We disagree.

In Van Buskirk v. State,¹ this court explained that when the State enters into a plea agreement, it is held to "the most meticulous standards of both promise and performance" in fulfillment of both the terms and the spirit of the plea bargain, and that due process requires that the bargain be kept when the guilty plea is entered. Moreover, "the violation of either the terms or the spirit of the agreement requires reversal."²

In this case, the formal plea agreement, signed by Harrison, provided in part that –

In consideration for my plea of guilty in this case, the District Attorney will dismiss all other charges now pending against me and will not file any new charges arising out of this incident or associated with this case. In addition the District Attorney will not oppose my request for Drug Diversion under NRS 453.3363. Both the District Attorney and counsel for the Defendant are free to argue consistent with this agreement.

(Emphasis added.) Nevertheless, at the sentencing hearing, Harrison did not request entry into a diversionary program, and instead, argued for probation. Defense counsel stated –

¹102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v. Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

²Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999); see also Echeverria v. State, 119 Nev. 41, 43, 62 P.3d 743, 745 (2003) (recognizing that the State's breach of a plea agreement is not subject to harmless-error analysis).

[W]e would recommend that Mr. Harrison be provided the opportunity to have probation. Mr. Harrison has informed me that when he was released he could not afford an evaluation and, therefore, did not want to proceed with the diversionary program.

(Emphasis added.) As a result, the prosecutor made the following statement which Harrison claims breached the plea agreement:

I was bound to argue for diversion. Since there's been no request for diversion, I suppose that leaves me free to argue. I would just submit that [the] PSI probably has it right, Your Honor.

The district court agreed with the State and imposed the sentence recommended by the Division of Parole and Probation.


Initially, we note that Harrison did not object to the prosecutor's statement. Failure to raise an objection with the district court generally precludes appellate consideration of an issue.³ Nevertheless, we have reviewed the record and, based on all of the above, conclude that the State did not breach the plea agreement. According to the terms of the plea agreement, the prosecutor was bound not to oppose Harrison's request for drug diversion. Harrison, however, affirmatively decided not to pursue entry into a drug diversionary program, and instead, argued at the sentencing hearing for a term of probation. The subsequent statement made by the prosecutor did not violate either the specific terms


³See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

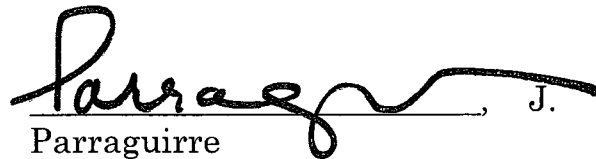
or spirit of the plea agreement. Accordingly, we conclude that Harrison is not entitled to relief.

Therefore, having considered Harrison's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General George Chanos/Carson City
White Pine County District Attorney
White Pine County Clerk