

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUTHER LARON CLAYTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47668

FILED

NOV 28 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of trafficking in a controlled substance. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Luther Laron Clayton to serve a prison term of 28 to 72 months, and it imposed the sentence to run consecutively with sentences Clayton received in two other cases.

Clayton's sole contention on appeal is that the State breached the plea agreement when the prosecutor informed the sentencing court that he was "required to . . . ask for concurrent time," and the Division of Parole and Probation (Division) representative recommended a consecutive sentence. Although Clayton failed to object to the comments made by the prosecutor and the Division representative, we conclude that appellate review is warranted.¹

¹See Sullivan v. State, 115 Nev. 383, 387-88 n.3, 990 P.2d 1258, 1260-61 n.3 (1999) (providing that "a defendant's failure to object does not necessarily preclude appellate review of an alleged breach of a plea agreement").

In Van Buskirk v. State,² we explained that when the State enters 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. We have held that "[t]he violation of either the terms or the spirit of the agreement requires reversal."³ When a prosecutor expressly recommends only the sentence agreed upon, but by his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit.⁴

Here, Clayton agreed to plead guilty to trafficking in a controlled substance and, in exchange, the State agreed to recommend that Clayton's sentence be imposed to run concurrent with the sentences he had received in two other cases. During sentencing, the prosecutor commented,

Your Honor, I'm required to be free to argue on the new trafficking case and ask for concurrent time. I'd ask you to sentence him on that one 28 to 72 months in prison, which is the maximum, and run it concurrent with the other two of them, and revoke him on the other two. We don't need him.

Because the reason he knows all of this stuff is because he's out there, he's selling drugs, he's

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

³Sullivan, 115 Nev. at 387, 990 P.2d at 1260.

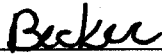
⁴Wolf v. State, 106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990); Kluttz, 99 Nev. at 683-84, 669 P.2d at 245-46.

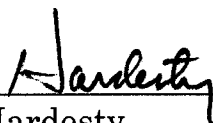
possessing it. Fourteen grams, Your Honor, is not personal use. He's a drug salesman. We don't need him.

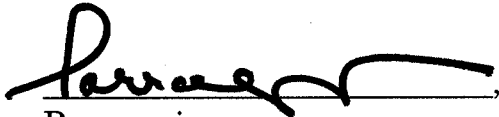
After the prosecutor finished his comments, the Division representative provided her reasons for recommending consecutive time.

We conclude from our review of the sentencing transcript that the State did not breach the terms or the spirit of the plea agreement, and that the sentencing court did not abuse its discretion by allowing the Division representative to comment on the reasons for her sentencing recommendation.⁵ Having considered Clayton's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Hardesty


_____, J.
Parraguirre

⁵See Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998) (the sentencing court retains discretion "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant"); see also NRS 176.015(6).

cc: Hon. Steven R. Kosach, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk