

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN LANIER LIBBEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47741

KEVIN LANIER LIBBEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47742

FILED

JAN 24 2007

ORDER OF REMAND

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

These are consolidated appeals from judgments of conviction entered pursuant to guilty pleas. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

In Docket No. 47741, appellant Kevin Lanier Libbee was convicted of one count of issuance of a check without sufficient funds and sentenced to serve a prison term of 12 to 36 months. In Docket No. 47742, Libbee was convicted of one count of theft and sentenced to serve a prison term of 22 to 96 months. The district court ordered the sentence imposed in Docket No. 47742 to run consecutively to the sentence imposed in Docket No. 47741.

Libbee contends that resentencing before a different district court judge is appropriate because the State breached the plea agreement

by insinuating that Libbee should not be assigned to drug court. We agree.

In Van Buskirk v. State,¹ 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."² When a prosecutor expressly recommends the sentence agreed upon, but by his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit.³

We conclude that the prosecutor violated the spirit of the plea agreement by commenting on Libbee's criminal history and outstanding warrants. While the prosecutor believed he was merely "pointing out factors as to eligibility" for the drug court program, his comments amounted to an implicit opposition to Libbee's application for drug court.

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).

³Wolf 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.

We further reject the State's argument that Libbee waived the breach of the plea agreement.⁴ Libbee's subsequent waiver of the breach of the plea bargain was invalid because the district court did not advise him on the record that he was foregoing his right to specific performance of the plea bargain and a new sentencing hearing before a different district court judge.⁵

Having concluded that the State breached the plea agreement and that Libbee's waiver was invalid, we remand this matter to the district court with instructions to vacate Libbee's sentence and hold a new sentencing hearing before a different district court judge. We further order the Pershing County District Attorney's Office to specifically perform the plea agreement. Moreover, the new sentencing judge will be free to impose any sentence allowable under the relevant statutes, provided that the sentence does not exceed the sentence imposed by Judge Wagner. Upon remand, if the sentencing judge pronounces a sentence that exceeds the sentence imposed by Judge Wagner, the sentence shall

⁴In support of its argument, the State cites to Glover v. State, 469 So. 2d 771 (Fla. Dist. Ct. App. 1984) (holding that appellant waived the State's breach of the plea agreement where he was aware of the breach prior to sentencing but did not move to withdraw his plea until after sentencing).

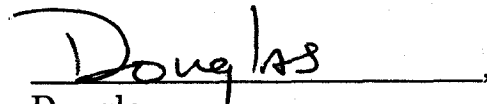
⁵See Van Buskirk, 102 Nev. at 243-44, 720 P.2d at 1216 (noting that specific performance and a new sentencing hearing is one remedy for a breach of a plea bargain).

automatically be reduced to conform to the lesser sentence. Accordingly,
we

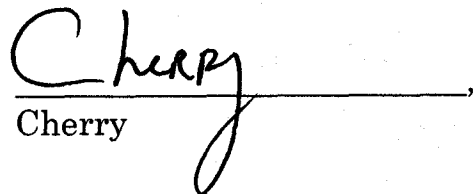
ORDER this matter REMANDED to the district court for
proceedings consistent with this order.



Gibbons J.



Douglas J.



Cherry J.

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
State Public Defender/Winnemucca
Attorney General Catherine Cortez Masto/Carson City
Pershing County District Attorney
Pershing County Clerk