

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
TOMMY STERIO,
Respondent/Cross-Appellant.

No. 50149

FILED

MAY 07 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order granting in part and denying in part respondent/cross-appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On July 20, 2005, respondent/cross-appellant Tommy Sterio was convicted, pursuant to a guilty plea, of four counts of extortionate collection of a debt. The district court sentenced Sterio to serve four consecutive prison terms of 28 to 72 months. Sterio did not file a direct appeal.

On May 24, 2006, Sterio filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, and counsel filed a supplement to the petition. The State filed a motion for partial dismissal of the supplemental petition, and counsel filed an opposition to the motion. Without conducting an evidentiary hearing, the district court denied two of Sterio's claims. After conducting an evidentiary hearing, the district court reconsidered one of the claims

previously denied and granted the petition in part.¹ The State filed this timely appeal, and Sterio filed a cross-appeal.

The State argues that the district court erred by finding that trial counsel was ineffective for failing to “strongly object” to a purported breach of the plea agreement. Specifically, the State argues that the district court erred because there was no breach of the plea agreement given that: (1) the prosecutor retained the right to argue for an appropriate sentence in the plea agreement; and (2) at the sentencing hearing, the prosecutor thrice recommended that the sentences imposed run concurrently. We conclude that the district court did not abuse its discretion in granting Sterio a new sentencing hearing.

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 spirit of the plea bargain.² Due process requires that the bargain be kept when the guilty plea is entered.³ When a prosecutor expressly recommends only the sentence agreed upon, but by

¹We reject the State’s argument that the district court erred in revisiting a claim previously denied “without notice and the opportunity to present evidence relevant to the claim.” We conclude that a district court has discretion to revisit its prior intermediate order limiting claims and may expand the scope of claims it will consider at the post-conviction hearing. See generally Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). We further conclude that the district court afforded the State an adequate opportunity to respond to the argument. See generally id.

²Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting Kluttz v. Warden, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

³Id.

his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit.⁴

In this case, the district court found, albeit implicitly, that defense counsel was ineffective for failing to object to a breach of the plea agreement. The district court's finding is supported by substantial evidence.⁵ In particular, at the sentencing hearing, the prosecutor argued:

Frankly, your honor, I believe that is absurd with a man of this defendant's criminal history and with what this defendant did, to stand up and not even suggest that he should get consecutive time with probation. I mean that at least might be some sort of plausible argument for [defense counsel].

(Emphasis added.) While the State notes that the prosecutor had the right to argue for a maximum prison term under the plea agreement, the prosecutor had no right to imply, much less expressly state, that defense counsel should request that the suspended prison terms run "consecutively." The prosecutor's argument exceeded the bounds of zealous advocacy and implicitly undercut the spirit of his agreement to recommend that the sentences imposed run concurrently.⁶ Notably,

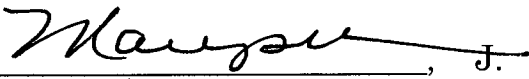
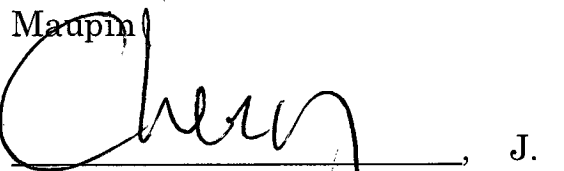
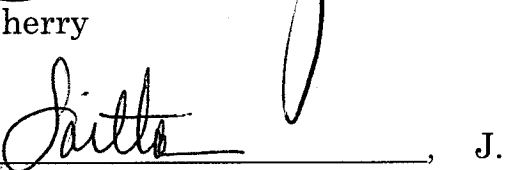
⁴See Wolf v. State, 106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990) (emphasis added); Kluttz, 99 Nev. at 683-84, 669 P.2d at 245-46.

⁵See Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994).

⁶We remind counsel that this type of technique should be avoided in the future. A prosecutor may not agree to recommend concurrent prison terms or a minimum prison sentence, and then proceed to undercut that recommendation at the sentencing hearing by making arguments that implicitly urge the sentencing court to impose a consecutive or maximum term.

defense counsel failed to object to the breach of the spirit of the plea bargain, and the sentencing court ordered all the prison terms to run consecutively.⁷ Accordingly, the district court did not err in finding that defense counsel was deficient and that Sterio was prejudiced under the standards set forth in Strickland v. Washington.⁸ Therefore, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, J.
Maupin

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Robert H. Perry, District Judge
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Karla K. Butko
Washoe District Court Clerk

⁷We note that Sterio was originally sentenced by Senior Judge Robison, but Judge Perry presided over both the plea canvass and post-conviction proceedings.

⁸466 U.S. 668 (1984).

⁹We note that the district court did not afford Sterio the Lozada remedy and therefore we decline to consider Sterio's challenge to the adequacy of the Lozada remedy. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).