

IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE DOUGLAS SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34618

FILED

NOV 19 1999

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

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of felony driving under the influence. The district court ordered appellant to serve twelve (12) to forty-eight (48) months in prison. The district court further ordered that the sentence be served consecutive to appellant's sentence in a case from Churchill County for felony driving under the influence.¹

Appellant first contends that the state again breached the plea agreement. Appellant argues that a comment made by the prosecutor at a hearing on appellant's motion to withdraw the guilty plea can be construed as an implicit argument against running the sentence in this matter concurrently with appellant's sentence in a burglary case from Churchill County. In the plea agreement, the state had agreed not to object to concurrent sentences. The comment in question, however, was merely a statement by the prosecutor in response to an inquiry by the district court, in which the prosecutor informed the court that appellant had already been

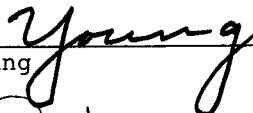

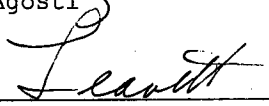
¹This court had previously remanded this matter to the district court because the prosecutor breached the plea agreement at the original sentencing hearing. *Smith v. State*, Docket No. 33164 (Order of Remand, February 26, 1999).

paroled from the burglary sentence. At the actual sentencing hearing, the prosecutor made no recommendation as to whether the sentences should be concurrent or consecutive. We conclude that the prosecutor's actions at the hearing on the motion to withdraw the plea and at the sentencing hearing cannot reasonably be construed as seeking a greater penalty at sentencing than provided by the plea agreement. Cf. Wolf v. State, 106 Nev. 426, 794 P.2d 721 (1990).

Appellant also contends that the district court did not fully consider his motion to withdraw his guilty plea. Specifically, appellant argues that the district court foreclosed the option of allowing appellant to withdraw his guilty plea because of this court's order of remand. The record shows, however, that the district court considered the option, but concluded that the better remedy was specific performance of the plea agreement. We conclude that the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

Having considered both of appellant's contentions and concluded that they are without merit, we

ORDER this appeal dismissed.


Young _____ J.

Agosti _____ J.

Leavitt _____ J.

cc: Hon. David R. Gamble, District Judge
Attorney General
Storey County District Attorney
State Public Defender
Storey County Clerk