

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY WAYNE LEWELLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51355

FILED

MAY 13 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of burglary. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Gary Wayne Lewellin to serve a prison term of 20 to 120 months.

Lewellin contends that the State breached the plea agreement. Specifically, Lewellin asserts that the Division of Parole and Probation's recommendation of a sentence that fell outside of its published guidelines and the prosecutor's concurrence with the higher recommendation constituted a repudiation of the State's agreement not to seek any sentence enhancements. We disagree.

"In determining whether the state has fulfilled its part of a plea bargain, the state is held to the most meticulous standards of both promise and performance. The violation of the terms or the spirit of the plea bargain requires reversal." Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (internal quotations and citation omitted). "[I]n arguing in favor of a sentencing recommendation that the state has agreed to make, the prosecutor must refrain from either explicitly or

implicitly repudiating the agreement.” Sullivan v. State, 115 Nev. 383, 389, 990 P.2d 1258, 1262 (1999).

The written guilty plea agreement provided that the State would concur with the Division’s sentencing recommendation and the State would not file any additional criminal charges resulting from Lewellin’s arrest. The State specifically reserved the right to present arguments, facts, and/or witnesses at sentencing but agreed not to seek a sentence enhancement. The plea agreement did not require the Division to recommend a specific sentence, and Lewellin was informed that as a result of his plea he could be sentenced to a term of 1 to 10 years. Lewellin was further informed that the district court was not bound by the agreement of the parties and sentencing was to be determined solely by the district court.

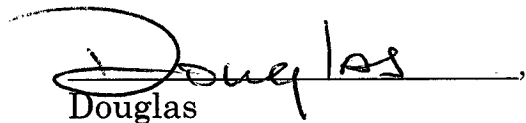
In the presentence investigation report (PSI), the Division informed the district court that based on the published guidelines the suggested recommended sentence would normally be for a term of 16 to 72 months. However, in this case, the Division recommended deviating from the guidelines and recommended a sentence of 48 to 120 months because the instant case was Lewellin’s seventh felony conviction, he had accrued a total of 26 prior convictions, and he had received another misdemeanor conviction while awaiting sentencing in this case. The prosecutor concurred with this recommendation. Although the recommended sentence was higher than the sentence listed in the Division’s published guidelines, the Division was not obligated to recommend the sentence listed in the published guidelines, the recommended sentence fell within the statutory parameters, and the deviation from the published guidelines did not constitute a sentence enhancement. See NRS 205.060(2).

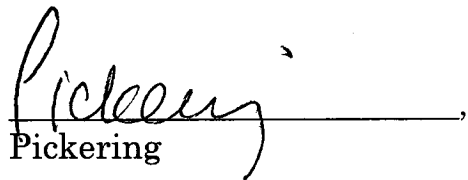
Therefore, we conclude that Lewellin failed to demonstrate that the State repudiated the plea agreement.

Having considered Lewellin's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk