IN THE SUPREME COURT OF THE STATE OF NEVADA

EMBER SUSAN OTT A/K/A AMBER SUSAN OTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52748

FILED

JUN 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of attempted possession of personal identifying information of another. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. Appellant Ember Ott was sentenced to a prison term of 12 to 48 months.

First, Ott contends that the State violated the terms of the plea agreement by failing to affirmatively argue for the recommended sentence. Specifically, at sentencing, when the district court asked the State if it wished to argue, the prosecutor responded: "No, your Honor, we'll submit it." Ott argues that the prosecutor's response "ha[d] the effect of breaching the plea agreement." Because Ott failed to object to the prosecutor's response at the sentencing hearing, we review this claim for plain error. Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 163 (2008); see also Puckett v. United States, 129 S. Ct. 1423 (2009).

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. Van 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)). A plea agreement is interpreted according to the defendant's reasonable understanding of the agreement when he or she entered the plea. Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). Further, a prosecutor fulfills his duty with regard to a promise to make a sentencing recommendation when the promised recommendation is made; an agreement to recommend a specific sentence does not encompass an implied duty to "enthusiastically" make the recommendation. United States v. Benchimol, 471 U.S. 453, 455-56 (1985) (per curiam); Sullivan v. State, 115 Nev. 383, 389 n.5, 990 P.2d 1258, 1261 n.5 (1999).

Here, the plea agreement provides that "[t]he State has agreed to recommend gross misdemeanor treatment and probation."[1] The terms of the agreement did not require the prosecutor to advocate in favor of the recommended sentence. Accordingly, we conclude that Ott could not have reasonably understood the plea agreement to require the State to affirmatively argue for the recommendation. In addition, because the prosecutor submitted the sentencing determination to the district court based on the agreement contained in the guilty plea, we conclude that neither the terms nor the spirit of the plea agreement were violated and no plain error occurred.

Ott next contends that her sentence must be vacated because the district court "obviously relied on unsupported hearsay statements by another judge, and relied on the false statements to render sentence." Ott

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[1]Attempted possession of personal identifying information of another can be treated as either a felony or a gross misdemeanor. NRS 205.465(2)(b); NRS 193.330(1)(a)(4).

failed to object on this basis in the district court. Thus, this claim is also reviewed for plain error. Grey, 124 Nev. at ___, 178 P.3d at 163.

"The sentencing proceeding is not a second trial, and the court is privileged to consider facts and circumstances" that would not be admissible at trial. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). However, "this court will reverse a sentence if it is supported solely by impalpable and highly suspect evidence." Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

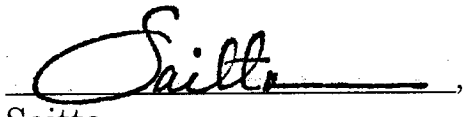
Here Senior Judge Thompson presided at Ott's arraignment and accepted her guilty plea. However, Judge Loehrer presided at the sentencing hearing. Before pronouncing sentence, Judge Loehrer stated: "I will show you what the judge who handled the case has recommended so that you don't think I'm not following his wishes." Although this statement indicates that Judge Loehrer considered a sentencing recommendation from Judge Thompson, it does not indicate that Judge Loeher relied on any hearsay or false statements. Thus, Ott has not demonstrated reliance on false or unreliable information, and we conclude no plain error occurred with regard to this contention.

Finally, Ott contends that the sentence imposed constitutes cruel and unusual punishment. We have consistently afforded the district court wide discretion in its sentencing decisions. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). A sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

Here, Ott has not alleged that the relevant statutes are unconstitutional. Further, we note that the sentence imposed is within the parameters provided by the relevant statutes. See NRS 193.130(2)(d); NRS 193.330(1)(a)(4); NRS 205.465(2)(b). Accordingly, we conclude that Ott's sentence does not constitute cruel and unusual punishment.

Having considered Ott's contentions and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Saitta

_____, J.
Gibbons

CHERRY, J., dissenting:

I respectfully dissent from my colleagues' conclusion that the State did not violate the terms of the plea agreement. 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. Van 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)). Here, the State agreed to recommend gross misdemeanor treatment and probation. I conclude the State was required to affirmatively make that recommendation at the sentencing hearing. I further conclude that the State's failure to make the agreed upon recommendation was plain error that affected Ott's substantial rights. Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 163 (2008); see also Puckett

v. United States, 129 S. Ct. 1423 (2009). Thus, I would reverse the judgment of conviction and remand for a new sentencing hearing before a different district court judge. Echeverria v. State, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003).

Cherry, J.

Cherry

cc: Eighth Judicial District Court Dept. 15, District Judge
Robert E. Glennen III
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk