

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY CROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34943

FILED

DEC 27 1999

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

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court granting the state's motion to dismiss appellant's post-conviction petition for a writ of habeas corpus.

On September 25, 1998, the district court convicted appellant, pursuant to a guilty plea, of one count of unlawful sale of a controlled substance. The district court sentenced appellant to serve a term of sixteen to fifty-four months in the Nevada State Prison. Appellant did not file a timely direct appeal.

On July 19, 1999, appellant filed a proper person petition for a writ of habeas corpus in the district court. The district court appointed counsel, and counsel filed a supplement to the petition. The state moved to dismiss the petition. The district court declined to conduct an evidentiary hearing. On September 27, 1999, the district court granted the state's motion and dismissed appellant's petition. This appeal followed.¹

Appellant contends that the district court erred in dismissing his habeas petition. Appellant contends that the

¹We note that appellant is represented by counsel in this appeal.

state breached the plea agreement at sentencing. Appellant claims that, pursuant to the terms of the written plea agreement, the state agreed only that it would "not object to probation if recommended by the Division of Parole and Probation." However, at sentencing, based on appellant's extensive criminal record, the Division recommended a prison term, not probation, and the state concurred with the Division's recommendation for prison. Appellant contends that the state's conduct constituted a breach of the plea agreement.

Our review of appellant's contentions and the appendix reveals that the state did not breach the plea agreement and the district court did not err in dismissing appellant's petition. At the time he waived his preliminary hearing, and at his arraignment, appellant expressly agreed that the negotiations were that the state would not object to probation if the Division of Parole and Probation so recommended, but that "otherwise, of course, the State will concur with that recommendation."²

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)). Due process requires that the bargain be kept when the guilty plea is entered. *Id.* (citing *Santobello v. New York*, 404 U.S. 257 (1971); *Gamble v. State*, 95 Nev. 904, 604 P.2d 335 (1979)). The prosecutor in

²It appears that at the time the parties negotiated the plea, prior to the preparation of the presentence investigation report, the state was unaware of appellant's true criminal record. When he signed the plea agreement appellant represented that he had only one prior felony conviction; in fact he had twelve prior felonies and twenty-five prior misdemeanor convictions.

this case did not breach the plea agreement; the state agreed not to oppose probation only if the Division of Parole and Probation recommended probation. The agreement cannot reasonably be read to mean that the state could not otherwise concur with the Division's recommendation.

We conclude that the record as a whole belies appellant's contention that the state was precluded from concurring with the Division's recommendation for prison time, and appellant is not entitled to relief. *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

Having reviewed the record and appellant's assignments of error, we conclude that the district court did not err, and we

ORDER this appeal dismissed.

Maupin, J.
Maupin

Shearing, J.
Shearing

Becker, J.
Becker

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Scott W. Edwards
Washoe County Clerk