

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN MATTHEW TUCKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55113

FILED

JUN 09 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Ingersoll*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

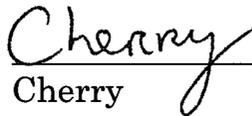
This is an appeal from a judgment of conviction, pursuant to a guilty plea, of driving under the influence of alcohol after a prior felony DUI conviction. First Judicial District Court, Carson City; James E. Wilson, Judge.

Tucker contends that the State breached the negotiated plea agreement at sentencing by implicitly repudiating its sentencing recommendation of a prison term of 28 to 70 months. Because Tucker failed to object to the prosecutor's comments, we review for plain error. See Sullivan v. State, 115 Nev. 383, 387-88 n.3, 990 P.2d 1258, 1260-61 n.3 (1999); see also Puckett v. United States, 129 S. Ct. 1423 (2009). The State is held "to the most meticulous standards of both promise and performance in fulfillment of its part of a plea bargain," and must avoid violating either the terms or the spirit of the agreement. Sullivan, 115 Nev. at 387, 990 P.2d at 1260 (internal quotation marks omitted). "[T]he prosecutor must refrain from either explicitly or implicitly repudiating the agreement." Id. at 389, 990 P.2d at 1262. Here, the prosecutor recommended the agreed-upon sentence but implicitly repudiated the agreement by indicating that he had overlooked a prior DUI conviction

when negotiating the plea agreement and making comments regarding Tucker's criminal history that tended to undermine the State's sentencing recommendation. See Kluttz v. Warden, 99 Nev. 681, 684, 669 P.2d 244, 245-46 (1983) (prosecutor's comment that State entered into plea agreement without knowledge of all salient facts regarding defendant's criminal history violated the spirit of the agreement). We conclude that Tucker has demonstrated plain error warranting relief, Puckett, 129 S. Ct. at 1432-33, and is therefore entitled to a new sentencing hearing before a different district court judge at which the State is held to the terms of the plea agreement, Echeverria v. State, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003). Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings before a different district court judge consistent with this order.

  
Saitta, J.

  
Cherry, J.

  
Gibbons, J.

cc: Hon. James T. Russell, Chief Judge  
Hon. James E. Wilson, District Judge  
State Public Defender/Carson City  
Attorney General/Carson City  
Carson City District Attorney  
Carson City Clerk