

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS BAUSTISTA-MORA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35434

**FILED**

NOV 21 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

ORDER GRANTING EN BANC RECONSIDERATION, RECALLING REMITTITUR

AND REMANDING

This is a petition for en banc reconsideration of the panel's decision in Baustista-Mora v. State, Docket No. 35434 (Order Dismissing Appeal, May 10, 2000). We have reviewed appellant's petition and conclude that en banc reconsideration of the panel's decision is warranted. See NRAP 40A.<sup>1</sup>

Appellant was convicted, pursuant to a guilty plea, of possession of a controlled substance. The district court sentenced appellant to serve 12 to 48 months in prison, suspended the sentence, and placed appellant on probation for 3 years.

Appellant's sole contention is that the State breached the plea agreement. It appears that the parties did not execute a written plea agreement. When appellant waived his preliminary hearing in justice court, the State informed the court that it had reviewed appellant's NCIC report, that it appeared that appellant would be eligible for a diversion program, and that the State would recommend such a program. At entry of appellant's guilty plea in district court,

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<sup>1</sup>We recall the remittitur previously issued on July 31, 2000.

appellant's counsel set forth the following negotiations: "[T]he State will not oppose [a diversion program] if, in fact, he is eligible." At sentencing, the prosecutor twice recommended a diversion program. However, after the district court expressed concern over appellant's history of being deported and returning to this country, the court asked the prosecutor to explain the reasoning behind the State's recommendation. The prosecutor responded, "Well, my reasoning is because I don't have [the deputy district attorney who negotiated the plea] here to explain to me that we won't recommend the Diversion program contrary to [defense counsel's] notes . . . ." Thereafter, the district court rejected appellant's request for a diversion program.

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.* When a prosecutor expressly recommends only the sentence agreed upon, but by his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit. *See Wolf v. State*, 106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990); *Kluttz*, 99 Nev. at 683-84, 669 P.2d at 245-46; *see also Sullivan v. State*, 115 Nev. 383, 389-90, 990 P.2d 1258, 1262 (1999).

After reviewing the documents submitted with this appeal, we conclude that the State breached the spirit of the plea agreement. In particular, the prosecutor's response did not give an accurate picture of why the case was negotiated on the terms represented by defense counsel. We conclude that

this response breached the spirit of the plea agreement. We further conclude that specific enforcement of the plea bargain is the appropriate remedy in this case. See Van Buskirk, 102 Nev. at 243-44, 720 P.2d at 1216 (explaining circumstances in which remedies of withdrawal of plea or specific enforcement are appropriate). Accordingly, we remand this matter to the district court with instructions to vacate appellant's sentence and hold a new sentencing hearing before a different district court judge. See Santobello v. New York, 404 U.S. 257, 262-63 (1971); see also Riley v. Warden, 89 Nev. 510, 512-13, 515 P.2d 1269, 1270 (1973). We further order the Nye County District Attorney to specifically perform the plea bargain agreement. See Citti v. State, 107 Nev. 89, 807 P.2d 724 (1991).

It is so ORDERED.

Rose, C.J.  
Rose

Young, J.  
Young

Maupin, J.  
Maupin

Shearing, J.  
Shearing

Agosti, J.  
Agosti

Leavitt, J.  
Leavitt

Becker, J.  
Becker

cc: Hon. John P. Davis, District Judge  
Attorney General  
Nye County District Attorney  
Robert E. Glennen, III  
Nye County Clerk