

IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD NELSON DEHNER,

No. 36476

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 27 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea entered in accordance with North Carolina v. Alford, 400 U.S. 25 (1970), of one count of lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve 30-75 months in prison, and ordered appellant to submit to lifetime supervision commencing upon his release from any term of probation, parole, or imprisonment. Appellant was given credit for 35 days time served.

Appellant contends the State breached the negotiated plea agreement at sentencing requiring a remand for a new sentencing hearing before a different district court judge. Appellant argues that comments made by the prosecutor regarding the facts of the case, the sufficiency of the evidence, and the credibility of witnesses violated the spirit and terms of the plea agreement and were an "explicit or implicit attempt" at persuading the district court to impose a harsher sentence. We

agree with appellant that the State breached the plea agreement.¹

When the State enters into a plea agreement, it is held to "the most meticulous standards of both promise and performance" in fulfillment of both the terms and 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)). Moreover, this court has stated that "[i]f the government agrees only to refrain from recommending a specific sentence and intends to retain the right to present facts and argument pertaining to sentencing, such a limited commitment should be made explicit." *Statz v. State*, 113 Nev. 987, 993, 944 P.2d 813, 817 (1997), overruled on other grounds by Sullivan, 115 Nev. 383, 990 P.2d 1258.

In this case, as part of the negotiated plea the State agreed to not make any recommendations at sentencing. The State also did not explicitly retain the right to argue at

¹Appellant did not object to the prosecutor's comments during the sentencing hearing. This court has stated that a defendant's failure to contemporaneously object to a prosecutor's improper comments during sentencing in breach of a plea agreement does not preclude the right to assign error on appeal where the violation implicates due process rights. See *Sullivan v. State*, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999); see also *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991).

sentencing. Nevertheless, the State made the following comment at sentencing:

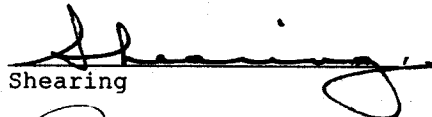
But these allegations came to the police, not initially through the victim in this case, but through an adult, confidential source, who reported to Boulder City Police. All of the drug going on that were going on in that house, all of the sexual going ons that were going on in that house. And, when the police executed a search warrant, they corroborated 95 percent of what that person said and 95 percent of [the victim's] allegations are corroborated by evidence they found in that search warrant your Honor.

This court has stated that "even where the state has agreed to stand silent or make no recommendation, it may nonetheless correct factual misstatements and provide the court with relevant information that is not in the court's possession." Sullivan, 115 Nev. at 388 n.4, 990 P.2d at 1261 n.4. Our review of the record on appeal reveals that the prosecutor's comments went beyond the limits imposed by Sullivan, and therefore constituted a breach of the plea agreement.

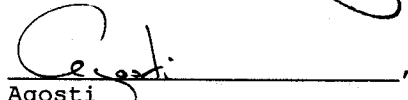
Accordingly, we remand to the district court with instructions to vacate appellant's sentence and hold a new sentencing hearing before a different district court judge. We further order the Clark County District Attorney to specifically perform the plea bargain agreement. See Citti v. State, 107 Nev. 89, 807 P.2d 724 (1991). Moreover, the new sentencing judge will be free to impose any sentence allowable under the relevant statutes, provided that the sentence does not exceed the sentence imposed by Judge Bonaventure. Upon

remand, if the sentencing judge pronounces a sentence that exceeds the sentence imposed by Judge Bonaventure, the sentence shall be automatically reduced to conform to the lesser sentence. See Citti, 107 Nev. at 94, 807 P.2d at 727.

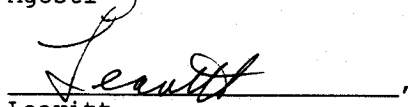
It is so ORDERED.



Shearing J.



Agosti J.



Leavitt J.

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General
Clark County District Attorney
Gloria M. Navarro
Clark County Clerk