

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN LARUE CAIN,

No. 37149

Appellant,

vs.

FILED

THE STATE OF NEVADA,

FEB 21 2001

Respondent.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of felony driving under the influence in violation of NRS 484.379 and NRS 484.3792. The district court sentenced appellant to serve 24-60 months in prison and to pay a \$2,000.00 fine.

Appellant's sole contention is that the State breached the plea agreement. We agree and remand this matter for a new sentencing hearing before a different district court judge.

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.¹ Due process requires that the bargain be kept when the guilty plea is entered.² 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.³

¹Van 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)).

²Id.

³See 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).

Here, the State agreed to concur with the recommendation of the Division of Parole and Probation. The Division recommended a prison term of 16-72 months. At sentencing, the prosecutor noted that the State had agreed to concur in the Division's recommendation and did, in fact, concur in that recommendation. But the prosecutor also observed that appellant previously had been convicted of felony driving under the influence and commented:

We would ask that we believe that the recommendation of 16 months in the Nevada State Prison and 72 months is a very generous recommendation.

You will notice on his third offense as set forth in the PSI, it was 26 to 65, so P and P has--this is kind of a break.

Normally for his second DUI, I would have expected them to recommend a much higher sentence, but actually it's less, on the low end, than for a first felony DUI.

We conclude that the prosecutor breached the spirit of the plea agreement. Contrary to the State's argument on appeal, the prosecutor's comments were not simply proper argument regarding appellant's prior convictions. Rather, the prosecutor's comments regarding the recommendation in comparison to the sentence for appellant's prior DUI offense implicitly undercut the sentencing recommendation. The prosecutor implied that a harsher sentence was appropriate. This constituted a breach of the spirit of the plea agreement.

Having concluded that the State breached the plea agreement, 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.⁴ We further order the Humboldt County District Attorney to

⁴See *Santobello v. New York*, 404 U.S. 257, 262-63 (1971); *Riley v. Warden*, 89 Nev. 510, 512-13, 515 P.2d 1269, 1270 (1973).

specifically perform the plea bargain agreement.⁵ Moreover, the new sentencing judge will be free to impose any sentence allowable under the relevant statutes, provided that, under the circumstances of this case, the sentence does not exceed the sentence imposed by Judge Sullivan. Upon remand, if the sentencing judge pronounces a sentence that exceeds the sentence imposed by Judge Sullivan, said sentence shall be automatically reduced to conform with Judge Sullivan's lesser sentence.⁶ Accordingly, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order.

Young J.
Young

Rose J.
Rose

Becker J.
Becker

cc: Hon. Jerry V. Sullivan, District Judge
Attorney General
Humboldt County District Attorney
State Public Defender
Humboldt County Clerk

⁵See Citti v. State, 107 Nev. 89, 807 P.2d 724 (1991).

⁶See id.