IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDA LOUISE GRIGGS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37256

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of drawing and passing a check without sufficient funds and with the intent to defraud. The district court sentenced appellant to serve 12 to 34 months in prison. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this case.

Appellant first argues that she is entitled to withdraw her guilty plea because the district court did not follow the plea negotiations. Appellant relies on NRS 174.065(1). We conclude that this argument lacks merit.

NRS 174.065(1) provides that where a defendant pleads guilty to a crime divided into degrees, "the plea may specify the degree, and in such event the defendant shall not be punished for a higher degree than that specified in the plea." The offense involved in this case is not divided into degrees.[1] To the extent that it is possible to interpret the offense in

[1]See NRS 205.130(1) (passing check without sufficient funds is punished as either a misdemeanor or a category D felony depending on circumstances of offense); cf. NRS 200.030 (dividing murder into two degrees); NRS 200.310 (dividing kidnapping into two degrees).

this case as being divided into degrees because it is punishable as a misdemeanor or a felony depending on the circumstances,[2] we conclude that appellant is not entitled to relief under NRS 174.065(1). Appellant pleaded guilty to the felony offense and the district court punished her for that offense. Moreover, we note that the plea agreement in this case was not conditioned on the district court imposing the recommended sentence and appellant was explicitly informed that the matter of sentencing was wholly within the district court's discretion. Accordingly, we conclude that appellant is not entitled to withdraw her guilty plea.

Appellant next contends that the State breached the plea agreement at sentencing. We agree.

The plea agreement provided that the State agreed to recommend probation. At sentencing, the prosecutor made the following comment when the district court asked whether the State wished to be heard as to the sentence: "I would like to, Your Honor, but we've agreed to probation in this matter."

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.[3] Due process requires that the bargain be kept when the guilty plea is entered.[4] When a prosecutor expressly recommends only the sentence agreed upon,

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[2]NRS 205.130(1).

[3]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)).

[4]Id.

but by his comments implicitly seeks a higher penalty, the plea agreement is breached in spirit.[5]

We conclude that the State breached the spirit of the plea agreement in this case. Although the prosecutor acknowledged the agreed-upon recommendation, his prefatory comment implicitly undermined that recommendation. We conclude that the prosecutor's comment breached the spirit of the plea agreement.[6]

The State suggests that we should apply a harmless error analysis because it is clear that the prosecutor's comment played no part in the district court's sentencing decision and, therefore, appellant was not prejudiced by the comment. We decline to apply a harmless error analysis. In Santobello v. New York,[7] the United States Supreme Court indicated that a breach of a plea agreement must be remedied regardless of whether the sentencing judge was influenced by the breach. As we explained in Riley v. Warden,[8] pursuant to Santobello, a breach must be remedied even if the sentencing judge explicitly states that his sentencing decision was not affected by the breach. We also implicitly rejected a harmless error analysis in Wolf v. State.[9] Based on these decisions, we

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[5]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).

[6]We note that appellant did not object to the prosecutor's comment. Because appellant's claim that the State breached the plea agreement "implicates due process, we conclude that appellate review is warranted regardless of [appellant's] failure to object." Sullivan, 115 Nev. at 387 n.3, 990 P.2d at 1260 n.3 (citation omitted).

[7]404 U.S. 257, 262-63 (1971).

[8]89 Nev. 510, 512-13, 515 P.2d 1269, 1270 (1973).

[9]106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990).

conclude that the State's breach of the plea agreement is not subject to harmless error analysis.

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.[10] We further order the Clark County District Attorney to specifically perform the plea bargain agreement.[11] The new sentencing judge will be free to impose any sentence allowable under relevant statutes, provided that the sentence does not exceed that imposed by Judge Hardcastle. Upon remand, if the sentencing judge pronounces a sentence that exceeds the sentence imposed by Judge Hardcastle, said sentence shall be automatically reduced to conform with Judge Hardcastle's lesser sentence.[12]

For the reasons stated above, we

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

Shearing, J.

Rose, J.

Becker, J.

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[10]See Santobello, 404 U.S. at 262-63.

[11]Citti v. State, 107 Nev. 89, 807 P.2d 724 (1991).

[12]Id. at 94, 807 P.2d at 727.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County Public Defender
Clark County District Attorney
Clark County Clerk