

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT MADSEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37451

**FILED**

SEP 12 2001

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

ROBERT MADSEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37452

ORDER OF REMAND

These are consolidated appeals from a district court order revoking probation in two 1998 cases. In Docket No. 37451, appellant was convicted, pursuant to a guilty plea, of possession of a controlled substance for the purpose of sale. In Docket No. 37452, appellant was convicted, pursuant to a guilty plea, of one count of conspiracy to commit grand larceny. The district court sentenced appellant to serve a prison term of 16 to 40 months for the possession count and a consecutive jail term of 12 months for the conspiracy count. The district court then suspended the execution of the sentences, and placed appellant on probation for four years.

While on probation, appellant was arrested and charged with possession of a controlled substance with intent to sell and possession of a dangerous drug without a prescription. Appellant entered into a plea agreement with the State wherein appellant agreed to plead guilty to possession of a controlled substance, second offense, in exchange for the State's agreement that it would recommend probation for the possession charge and reinstatement of appellant's probation in his 1998 cases.

On February 16, 2001, the district court held a revocation hearing in the 1998 cases. The State never affirmatively represented that it was recommending reinstatement of appellant's probation. However, the State did not object when counsel for appellant repeatedly informed the court that the State was recommending reinstatement of appellant's probation.

Appellant's sole contention is that he is entitled to a new probation revocation hearing because the State breached the plea agreement by failing to affirmatively state that it was recommending reinstatement of appellant's probation. We conclude that appellant's contention has merit.

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.<sup>1</sup> When the defendant enters his guilty plea, due process requires that the State meet the promises made to the defendant.<sup>2</sup>

In the instant case, the State breached the plea agreement by failing to make an affirmative recommendation that appellant's probation be reinstated. We conclude that the State's breach of the plea agreement is grounds for reversal of the order revoking appellant's probation in the 1998 cases.<sup>3</sup> We further conclude that appellant did not waive his right to raise this issue by failing to object.<sup>4</sup>

Accordingly, we remand this matter to the district court with instructions to vacate appellant's sentence and hold a new probation revocation hearing before a different district court judge. We further order the Nye County District Attorney to specifically perform the plea agreement by affirmatively recommending at the revocation hearing that

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<sup>1</sup>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)).

<sup>2</sup>Id. (citing Santobello v. New York, 404 U.S. 257 (1971)).

<sup>3</sup>See Van Buskirk, 102 Nev. at 243, 720 P.2d at 1216; see also Santobello, 404 U.S. at 262-63 (remand is appropriate regardless of whether the sentencing judge was influenced by the breach); Wolf v. State, 106 Nev. 426, 427-28, 794 P.2d 721, 722-23 (1990) (rejecting the state's harmless error argument).

<sup>4</sup>See Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991); Riley v. Warden, 89 Nev. 510, 512-14, 515 P.2d 1269, 1270-71 (1973).

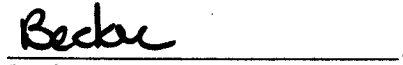
appellant's probation be reinstated.<sup>5</sup> After the district attorney has fulfilled its promise under the plea agreement, the district court may exercise its discretion with respect to whether appellant's probation should be revoked.

Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this case to the district court for proceedings consistent with this order.

  
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Shearing, J.

  
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Rose, J.

  
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Becker, J..

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

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