IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD B. CROSS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37626

FILED

JUN 05 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of causing substantial bodily harm to another by driving while having 0.10 percent or more by weight of alcohol in the blood. The district court sentenced appellant to serve 32 to 144 months in prison.

On March 17, 1999, the district court convicted appellant, pursuant to a guilty plea, of causing substantial bodily harm to another by driving while having 0.10 percent or more by weight of alcohol in the blood. At that time, the district court sentenced appellant to serve 48 to 144 months in prison. This court dismissed appellant's direct appeal.[1]

Appellant then filed a post-conviction petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court concluded that trial counsel had provided ineffective assistance at sentencing and ordered a new sentencing hearing.

The new sentencing hearing was held before a different district court judge on February 21, 2001. At the conclusion of the hearing, the district court sentenced

[1]Cross v. State, Docket No. 34109 (Order Dismissing Appeal, June 13, 2000).

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appellant to serve 32 to 144 months in prison and entered a new judgment of conviction. This appeal followed.

Appellant contends that the State breached the plea agreement at the new sentencing hearing. The plea agreement in this case provided that the State would recommend no more than five years in prison. The agreement further provided that the district court was not bound by the agreement and had sole discretion to determine the appropriate sentence. Appellant contends that the prosecutor breached the plea agreement by implicitly suggesting his disagreement with the negotiations when he paused before making his recommendation and later reminded the district court that it had discretion to impose any sentence within the statutory range. We disagree.

In Van Buskirk v. State,[2] we explained that 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, and that due process requires that the bargain be kept when the guilty plea is entered. We have held that the "violation of either the terms or the spirit of the agreement requires reversal."[3] 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.[4]

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[2]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)).

[3]Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999).

[4]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.

Here, the prosecutor expressly recommended the sentence agreed upon in the plea agreement. Based on our review of the record, we conclude that the prosecutor's pause and comment clarifying the district court's sentencing authority did not implicitly seek a higher penalty. The pause was innocuous at best and, considering the somewhat confusing discussion about the sentence recommendation and the district court's authority, the prosecutor had an obligation to make sure that the district court understood its authority. The prosecutor did not belabor the point or implicitly seek a higher sentence. We therefore conclude that the State did not breach the plea agreement at the new sentencing hearing.

Next, appellant contends that the district court abused its discretion by imposing a maximum sentence that exceeded that recommended by the parties and was the same as the maximum sentence imposed in the original judgment of conviction. We disagree.

This court has consistently afforded the district court wide discretion in its sentencing decision.[5] Accordingly, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[6]

Here, appellant has not alleged that the district court relied on impalpable or highly suspect evidence. Moreover, we conclude that the mere fact that the district court imposed the same maximum sentence as the first

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[5]See, e.g., Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[6]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

sentencing judge does not mean that the district court abused its discretion. Additionally, we note that the district court was not bound by the plea negotiations and that it imposed a lower minimum sentence that the first sentencing judge. Under the circumstances, we conclude that the district court did not abuse its discretion at sentencing.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk