

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL DANIEL MARR,

No. 38290

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JAN 02 2002

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

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of battery causing substantial bodily harm. The district court sentenced appellant to a prison term of 12 to 48 months, and ordered appellant to pay restitution in the amount of \$2,090.74.

Appellant's sole contention is that the State breached the plea agreement at sentencing by introducing photographs into evidence and by cross-examining a defense witness. Pursuant to the guilty plea agreement, the State had agreed to concur with the recommendation of the Division of Parole and Probation (P&P) and otherwise stand silent.

The United States Supreme Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."¹ This court has held the State to the "most meticulous standards of both promise and performance" in the fulfillment of a guilty plea agreement.²

Where the State agrees to stand silent, "the defendant could reasonably understand the plain language of such an agreement to restrict the state's right to make certain types of statements to the court that would influence the sentencing decision."³ In this case, although the State agreed to concur with the recommendation of P&P the State further

¹Santobello v. New York, 404 U.S. 257, 262 (1971).

²Kluttz v. Warden, 99 Nev. 681, 683, 669 P.2d 244, 245 (1983).

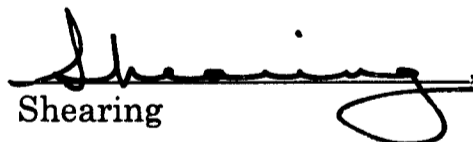
³Sullivan v. State, 115 Nev. 383, 388, 990 P.2d 1258, 1261 (1999).

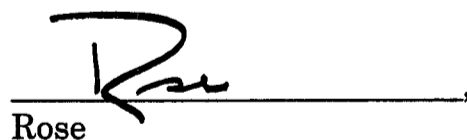
agreed to "otherwise stand silent." We conclude that appellant could have reasonably understood that the agreement restricted the prosecutor's right to present evidence and argue at sentencing.

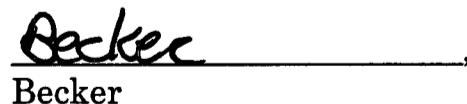
Moreover, the cross-examination by the prosecutor does not fit into the exception discussed in Sullivan, namely the correction of factual misstatements or production of relevant information not in the court's possession.⁴ We conclude that the State limited its right to present argument and evidence by agreeing to "otherwise stand silent" without explicitly retaining the right to present facts and arguments. Accordingly, we conclude that the presentation of evidence and cross-examination by the State was therefore a breach of the plea agreement.

Accordingly, we remand to the district court with instructions to vacate appellant's sentence and to hold a new sentencing hearing before a different district court judge. We further order the Washoe County District Attorney to 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 Polaha. Upon remand, if the sentencing judge pronounces a sentence that exceeds the sentence imposed by Judge Polaha, said sentence shall be automatically reduced to conform with Judge Polaha's lesser sentence.⁶ Based on the foregoing, we

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


Shearing, J.


Rose, J.


Becker, J.

⁴See id. at 388 n.4, 990 P.2d at 1261 n.4.

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

⁶See id.

cc: Hon. Jerome Polaha, District Judge
Attorney General/Carson City
Washoe County District Attorney
Larry K. Dunn & Associates
Washoe County Clerk