

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN LOUIS TOMKO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35756

FILED

MAY 10 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of possession of a controlled substance. The district court sentenced appellant to twelve (12) to forty-eight (48) months in the Nevada State Prison, suspended the sentence, and placed appellant on probation for a period not to exceed three (3) years.

Appellant's sole contention is that the State breached the plea agreement wherein the State agreed not to oppose a diversionary program pursuant to NRS 453.3363. In particular, appellant argues that the prosecutor breached the spirit of the agreement when he concurred with the recommendation of the Division of Parole and Probation, for a suspended sentence of twelve (12) to forty-eight (48) months and three-year probationary term, after appellant indicated that he was not interested in participating in a diversionary

program.¹ Appellant contends that the prosecutor's comments in this regard violated the spirit of the plea agreement by insinuating that appellant did not have the proper attitude to be placed in a diversionary program and by concurring with the Division's recommendation, which did not include a diversionary program.

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. *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)). Due process requires that the bargain be kept when the guilty plea is entered. *Id.* 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. *See Wolf*

¹The prosecutor made the following relevant comment:

Your honor, pursuant to the plea negotiation we were not going to oppose the 3363 program. And it appears to me from my review of the defendant's criminal history and the 3363 provision, he is eligible.

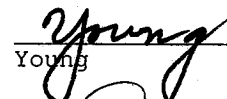
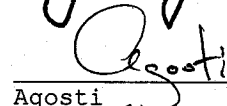
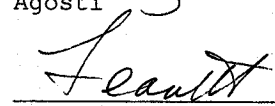
The State finds it discouraging that he is not interested in engaging in such a program. It's obviously our first interest to help drug offenders if we can. However, if he's not willing to, I guess we can't make him.

On that, the State would be concurring with the recommendation of Parole and Probation in this matter.

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.

The prosecutor's comments in this case, concurring with the Division's recommendation, were inconsistent with the plea bargain agreement. However, considering that appellant did not want to participate in a diversionary program, we conclude that the prosecutor's comments do not constitute a breach of the plea agreement. Accordingly, we conclude that appellant's contention lacks merit, and we

ORDER this appeal dismissed.

 _____ Young	J.
 _____ Agosti	J.
 _____ Leavitt	J.

cc: Hon. Michael E. Fondi, District Judge
Attorney General
Carson City District Attorney
State Public Defender
Carson City Clerk