IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 64983

RESPONDENT'S ANSWERING BRIEF

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TABLE OF AUTHORITIES

Statutes

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction pursuant to a guilty plea, of one count of second degree murder with the use of a deadly weapon. The first argument is that the State breached the plea negotiations at sentencing by presenting facts surrounding the offense. King presents three additional arguments, all of which are permutations of the basic claim that he should have received a lighter sentence. None of the arguments are meritorious, as discussed below.

II. ISSUES PRESENTED

A. Whether the State breached the plea bargain at sentencing.

B. Whether the district court abused its discretion in ordering that the sentence run consecutive to a California case.

C. Whether the district court abused its discretion in imposing the deadly weapon enhancement.

D. Whether the district court abused its discretion by deviating from the plea negotiations.

III. STATEMENT OF FACTS

Because there was a plea bargain in this case, many of the facts are undoubtedly unknown. On or about November 5, 2010, King shot Tommy Young to death over a drug debt. Appellant's Appendix, p. 9. Young died of injuries to his head, neck, and torso. AA, p. 7. King then fled to California. *Id.*, 73. When authorities located King, who was on parole for another offense, he was in possession of a gun. *Id.*, 76.

The State originally charged King with open murder with the use of a deadly weapon. *Id.*, 3-5. Pursuant to plea negotiations, the charge was later reduced to second degree murder. *Id.*, 6-7. The parties agreed to be free to argue as to the sentence, including whether or not it should run consecutive or concurrent with the new California charge. *Id.*, 12. The State agreed, however, not to seek more than 2-6 years on the deadly weapon enhancement. *Id.*

In his written statement to the court, King stated that he was "not actually the man who pulled the trigger that night" but apologized nebulously for his actions and role in the crime. *See* Presentence Investigation Report,

hereafter "PSI," p. 11. At sentencing, the prosecutor called Detective Ken Gallop as a witness in an effort to address King's exceptions to the Presentence Investigation Report, and to support the State's request for consecutive time. AA, 59. King's counsel objected to the testimony if it was offered to relitigate as to "who done what," but agreed that it was appropriate to introduce evidence as to King's role in the murder–which King had contested in his written statement. *Id.*, 63.

Detective Gallop testified that when the King was arrested, he had a cell phone in his possession. *Id.*, 66-73. Using computer software, the Sparks Police Department had created a "Penlink" report that showed cell phone communications between King's phone and the victim's phone. *Id.* Gallop also explained that Sacramento authorities had recovered in excess of 100 grams of methamphetamine in a storage unit accessed by King. *Id.*

In addressing the court, King told the judge that "I'm prepared to accept whatever you deem is appropriate." *Id.*, 80. After hearing from the victim's family and the prosecutor, the judge sentenced to King to life with the possibility of parole, and an additional 53-240 months for the weapons enhancement. This sentence was run consecutive with King's California case. *Id.*, 89-90. This appeal followed.

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IV. ARGUMENT

A. The State Did Not Breach the Plea Bargain.

In his first argument, King argues that the prosecutor violated the plea negotiations at sentencing. In support of this assertion, he cites the testimony of Detective Gallop and Exhibit I, which pertained to King's dealings with the victim and his apprehension in California. OB, p. 10. Yet this evidence was relevant to the question of consecutive versus concurrent time. The parties were free to argue, and the State had reserved the right to present facts at sentencing. AA, 12. Moreover, King had used his written statement to the district court to minimize his role in the murder. *See* PSI.

When the State enters into 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)). "The violation of either the terms or the spirit of the agreement requires reversal." *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). But "[e]fforts by the Government to provide relevant factual information or to correct misstatements are not tantamount to taking a position on the sentence and will not violate the plea agreement." *Statz v. State*, 113 Nev. 987, 994, 944 P.2d 813, 817 (1997)(*quoting United States v. Block*, 660 F.2d 1086, 1091 (5th Cir.1981)), *cert. denied*, 456 U.S. 907

(1982). In other words:

> ...the state is not required to stand mute in the face of factual misstatements or withhold relevant information from the court. Thus, even where the state has agreed to stand silent or make no recommendation, it may nonetheless correct factual misstatements and provide the court with relevant information that is not in the court's possession. This is a duty owed to the court separate and apart from the plea negotiations.

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

King argues that by introducing testimony regarding his communications and relationship with the victim, the plea negotiations were violated. He relies on Nevada cases regarding breaches of plea agreements, all of which are easily distinguishable from the case at bar. In *Echeverria v. State*, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003), the agreement was for the State to affirmatively recommend probation, but at sentencing, counsel for the State suggested that the defendant was not eligible for probation. *Echeverria* at 744-745. In *Doane v. State*, 98 Nev. 75, 639 P.2d 1175 (1982), the prosecutor agreed to stand mute at sentencing, but failed to do so. In *Wolf v. State*, 106 Nev. 426, 794 P.2d 721 (1990), the prosecutor agreed to a 5 year cap on sentencing, but then went into a detailed recitation of the defendant's criminal history and agreed with the Department of Parole and Probation's nine year recommendation.

No plea agreement was breached in this case. The State asked the court to follow the negotiations, and King's position that the prosecutor was not

allowed to introduce any evidence regarding the circumstances of the offense is contradicted by both the plea agreement and *Sullivan v. State,* 115 Nev. 383, 990 P.2d 1258 (1999). In *Sullivan*, the State agreed to concur with the Division's recommendation, but did not reserve the right to present facts and argument at sentencing. *Sullivan* at 386. When the Division recommended prison time, the State made comments regarding the defendant's violent nature and criminal history. *Id*. This Court made clear that a promise to recommend a sentence is not a promise to stand silent. *Id*. at 389. Such is the case here. The prosecutor's conduct was reasonably consistent with the negotiations and did not contravene the State's recommendation.

B. The District Court Appropriately Exercised its Discretion in Ordering That the Sentence in this Case Run Consecutive to the California Case.

King also claims that the district court abused its discretion by ordering that the sentence in this case run concurrent to his sentence on a California case. After the murder, King was arrested in California. He was on parole and still serving a California sentence when authorities apprehended King in possession of a gun. AA, 66-73.

Though he concedes that NRS 176.045 gave Judge Flanagan the discretion to run his sentence consecutive to the California sentence, he contends that he deserves concurrent time. In support of this assertion, King suggests the district court should have regarded his California case as mere "collateral damage," and, though he admits to murdering someone, suggests

that the court should have been more lenient because he attended classes while in custody. OB, p. 12. He even urges this Court to find that further incarceration "...could harm the public by depriving it of his new purpose in life–helping at-risk kids make the right choices." *Id*., p. 13. The State does not share this view.

This Court has consistently afforded the district court wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). A sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)(quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)). Here, the district court's decision was within its statutory authority, and the sentence imposed was within the time contemplated by the statute. King has not demonstrated that the court abused its discretion in imposing consecutive time.

C. The Deadly Weapon Enhancement Was Not An Abuse of Discretion.

King claims that the district court abused its discretion by sentencing him to 53-240 months on the deadly weapon enhancement contemplated by NRS 193.165. In support of this claim, King argues that his criminal history is "not the worst criminal history that this Court has seen." OB, p. 16. That history reveals the steady pursuit of crimes involving drugs and violence

dating back to 1995. *See* PSI. The State would suggest that King's history underscores the appropriateness of the sentence imposed by Judge Flanagan.

In addressing the impact of the crime on the victims, King observes that this factor is "interesting" and suggests that death is a natural consequence of the crime of murder, and that death does not make his crime "unique." *Id.* There is no such thing as a "run of the mill" murder case, and this very suggestion is abhorrent. He suggests that Judge Flanagan did not give his "reformation" due consideration, and alludes to the forgiveness offered by the victim's mother at the time of sentencing. *Id.*, p. 17. He complains that the judge "focused too heavily on the crime [of murder] in general." *Id.* The State observes that in a murder sentencing, it is appropriate for the district court to be somewhat focused on the actual crime. He also suggests that the sentencing judge should not have known that he was in possession of a gun when arrested in California, and claims that this information was inadmissible at sentencing. *Id.* No authority is offered in support of this contention. The enhancement imposed by Judge Flanagan did not exceed the court's statutory authority, and this Court should affirm this and all other aspects of King's sentence.

D. The District Court Had the Right to Deviate from the Plea Negotiations.

Finally, King asserts that the district court abused its discretion by deviating from the plea bargain. No authority–case, statutory, or otherwise–

is offered in support of this erroneous assertion. He suggests that because he did not know what the court would sentence him to, his plea was not voluntary. Yet he admits that he was advised that sentencing was up to the discretion of the sentencing court. In open court, King told the judge that he was willing to accept whatever sentence the judge deemed appropriate. AA, 80. King appears to be advancing the position that he was entitled to know what sentence he would receive prior to pleading guilty. There is no support offered for this position, and the State is not aware of any authority requiring this Court to disregard King's statements in writing and in open court that he understood the possible penalties and the sole discretion of the district court at sentencing.

V. CONCLUSION

King's sentencing hearing revealed pertinent, relevant, admissible information about the circumstances surrounding this offense and the California offense. The prosecution honored the plea negotiations, and the district court exercised its right to deviate from those negotiations. The court did not abuse its discretion and did not exceed its statutory authority in imposing sentence. Its decision should be affirmed.

DATED: September 17, 2014.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

DATED: September 17, 2014.

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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on September 17, 2014, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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