

ORIGINAL

**FILED**

SEP 25 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 64983

Dist Ct. Case. CR12-1160

---

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE PATRICK FLANAGAN

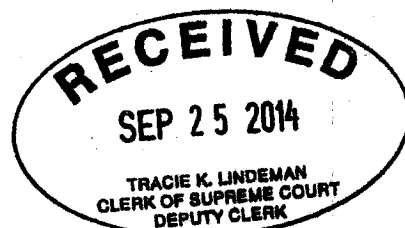
SECOND JUDICIAL DISTRICT COURT

---

APPELLANT'S REPLY BRIEF

KARLA K. BUTKO, Esq.  
Attorney for Appellant  
P. O. BOX 1249  
Verdi, Nevada 89439  
(775) 786-7118  
State Bar #: 3307

RICHARD A. GAMMICK  
Washoe County District Attorney  
Attorney for Respondent  
Box 11130  
Reno, Nevada 89520  
(775) 328-3200  
JENIIFER P. NOBLE, ESQ.



14-31951

IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 64983

Dist Ct. Case. CR12-1160

---

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE PATRICK FLANAGAN

SECOND JUDICIAL DISTRICT COURT

---

**APPELLANT'S REPLY BRIEF**

KARLA K. BUTKO, Esq.  
Attorney for Appellant  
P. O. BOX 1249  
Verdi, Nevada 89439  
(775) 786-7118  
State Bar #: 3307

RICHARD A. GAMMICK  
Washoe County District Attorney  
Attorney for Respondent  
Box 11130  
Reno, Nevada 89520  
(775) 328-3200  
JENIIFER P. NOBLE, ESQ.

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF CONTENTS & AUTHORITIES .....	i-ii
STATEMENT OF FACTS .....	1
STATEMENT OF THE ISSUES.....	1
LEGAL ARGUMENT .....	1-6
CONCLUSION .....	7
CERTIFICATE OF COMPLIANCE .....	8
CERTIFICATE OF SERVICE .....	9

## TABLE OF AUTHORITIES

<u>CASE NAME</u>	<u>PAGE</u>
<i>Echeverria v. State</i> , 119 Nev. 41, 62 P.3d 743 (2003)	6
<i>Kluttz v. Warden</i> , 99 Nev. 681, 683, 669 P.2d 244, 245 (1983)	4
<i>Santobello v. New York</i> , 404 U.S. 257, 262 (1971)	6
<i>Sullivan v. State</i> , 115 Nev. 383, 990 P.2d 1258 (1999)	4
<i>Van Buskirk v. State</i> , 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986)	5

## **STATEMENT OF FACTS**

Appellant realleges the Statement of Facts found in his Opening Brief, except as otherwise cited to herein.

## **STATEMENT OF THE ISSUES**

- I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RULED THAT MR. KING WOULD SERVE HIS NEVADA PRISON TIME CONSECUTIVELY WITH HIS CALIFORNIA PRISON TIME. THE DISTRICT COURT IMPROPERLY RELIED UPON SUSPECT EVIDENCE IN IMPOSITION OF SENTENCE.
- II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO AN ADDITIONAL 53-240 MONTH SENTENCE FOR THE USE OF A DEADLY WEAPON. GIVEN THE MITIGATING FACTORS IN THIS CASE, A LOWER SENTENCE SHOULD HAVE BEEN IMPOSED BY THE COURT.
- III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO A PERIOD OF TIME SEVERELY DISPROPORTIONATE TO THE TIME STATED IN THE PLEA BARGAIN.
- IV. THE STATE BREACHED THE SPIRIT OF THE PLEA BARGAIN IN VIOLATION OF THE FIFTH & FOURTEENTH AMENDMENTS. A NEW SENTENCING HEARING IS WARRANTED.

## **LEGAL ARGUMENT**

Respondent stated that because a guilty plea was entered in this case the facts of the incident were unknown. This statement ducks the truth. The facts of the case were disputed but a guilty plea negotiation was entered into

and Mr. King accepted responsibility for his role in the death of victim, Tommy Young. Factually, state investigators had very little credible information. This did not stop the State from admitting allegations of various criminal conduct against Mr. King at the sentencing proceeding. Notably, the State argued that Mr. King accessed a storage unit in which Sacramento authorities had recovered methamphetamine in but was not owned by Mr. King. In fact, the criminal charges relating to those drugs were dismissed by California authorities. 1AA 69, 71, 78.

The police appeared to rely upon the statements of Mr. Toy. One must note that Mr. Toy was a co-offender in this charge, that Mr. Toy fronted the victim methamphetamine and was owed money by the victim, that Mr. Toy brought the gun into the residence of the victim, that Mr. Toy kicked in the door of the residence, but then the Court was asked to believe that Mr. Toy did nothing more. PSI Page 6-7. Mr. King indicated in his statement to the sentencing court that he was not the person who pulled the trigger. This statement is consistent with virtually every other statement made by Mr.

Toy. Officer Gallop admitted that Mr. Toy's initial statements to police were false and could not be corroborated. Yet, the PSR relied upon this witness's version of the facts. 1AA 67. Mr. Toy claimed that he was shot in the legs. It makes logical sense that the victim would shoot the person firing at him, Mr. Toy. 1AA 70.

This case included 69 CDs of discovery. A three week trial was set. The two pages of facts in the PSI could not possibly tell the entire story of this case. 2AA 340; 380. The Defendant objected to relitigating the guilt or innocence of the various players in this case. 1AA 63. This is because the facts of the case were disputed but the criminal liability of Mr. King was admitted. Mr. King advised the Court at entry of plea that he was pleading guilty in that he accompanied Mr. Toy in the killing of Tommy Young.

1AA 29. Whether he pulled the trigger or was with Mr. Toy, who pulled the trigger, the criminal liability was there. The original Information was filed July of 2012. The guilty plea entered to the Amended Information which was filed November 22, 2013. Presumably, the parties worked on the case





during that period and discovered more information. In the presentence memorandum filed by the Defendant, the Court was reminded that the PSI included information from co-defendants, each accusing the other of having committed the crime. 1AA 34.

The State asked the Court to consider prior testimony of Officer Gallop, while Mr. King was represented by Mr. Molezzo, in its decision on sentencing. 1 AA 76.

The state's violation of either the terms or the spirit of the plea agreement requires reversal. In arguing in favor of a sentencing recommendation that the state has agreed to make, the prosecutor must refrain from either explicitly or implicitly repudiating the agreement. *Sullivan v. State*, 115 Nev. 383, 990 P.2d 1258 (1999). This court has held the state to the "most meticulous standards of both promise and performance" in fulfillment of its part of a plea bargain. *Kluttz v. Warden*, 99 Nev. 681, 683, 669 P.2d 244, 245 (1983). The violation of either the terms or the spirit of the agreement

requires reversal. *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986).

While the State remained free to argue on the consecutive or concurrent nature of the California drug term, the State remained obliged to honor its agreement, both factually and in spirit, for a 2-6 year term on the weapon enhancement. The reason this negotiation even made sense was because Mr. King repeatedly stated he was not the trigger man. Hence, Mr. King did not believe he deserved a maximum gun enhancement for his role in this case.

The prosecutor's conduct was inconsistent with a result of less than consecutive maximum sentences on each count. The State appears to argue that the comments of the prosecutor were harmless error because the State could argue any evidence it chose in support of its argument for consecutive prison terms to the California sentence. If this was true, the State should not have entered into a negotiation for 2-6 years on the enhancement penalty. The State should have remained free to argue in every aspect of sentencing.

The plea bargain was relied upon by Mr. King as is evidence in the plea transcript. When the court canvassed Mr. King about the possible consequences of his plea, he advised the Court the sentencing structure for the enhancement was 2-6 years in prison. 1AA 27.

The State's use of only a portion of the evidence available in this 69 CD case demonstrated the intention to breach the plea bargain. Harmless error does not apply. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003) See also *Santobello v. New York*, 404 U.S. 257, 262 (1971). With 94 % of State criminal cases being the subject of a plea bargain and 97% of federal cases being the subject of a plea bargain, this Court should insure that the Defendant obtains the benefit of his bargain.

////

////

## CONCLUSION

A new sentencing hearing is warranted. This Court should remand this case for a new sentencing proceeding before an impartial tribunal who has not been subjected to the proceedings at hand.

DATED this 24 day of September, 2014.

By: Karla K Butko  
KARLA K. BUTKO, ESQ.  
ATTORNEY FOR APPELLANT  
P. O. Box 1249  
Verdi, NV 89439  
(775) 786-7118  
Nevada State Bar No. 3307

## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S REPLY 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 Rule of appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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. There are 7 pages, 1110 words in this brief and 83 sentences with 113 lines of type. The Brief has been prepared in Word Perfect X4, 14 point Times New Roman font, spacing 2.45 to imitate Word.

DATED this 24 day of September, 2014.

By: Karla K Butko  
KARLA K. BUTKO, ESQ.  
ATTORNEY FOR APPELLANT  
P. O. Box 1249  
Verdi, NV 89439  
(775) 786-7118  
Nevada State Bar No. 3307

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of  
Karla K. Butko, P. O. Box 1249, Verdi, NV 89439, and that  
on this date I caused the foregoing document to be delivered  
to all parties to this action by

\_\_\_\_\_ placing a true copy thereof in a sealed, stamped

envelope with the United States Postal Service at

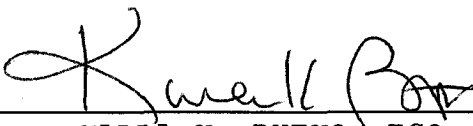
Reno, Nevada. (Client)

X Reno/Carson Messenger Service (DA's Office)

addressed as follows:

RICHARD GAMMICK  
Washoe County District Attorney's Office  
1 South Sierra St., Fourth Floor  
P. O. Box 30083  
Reno, NV 89501  
ATTN: Jennifer P. Noble, Esq.

DATED this 24 day of September, 2014.

  
\_\_\_\_\_  
KARLA K. BUTKO, ESQ.

