

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOAN KATHRYN WENGER,
Appellant,
vs.

Electronically Filed
Case No. **84003** 2022 02:38 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

THE STATE OF NEVADA,
Respondent.

_____ /

APPELLANT'S OPENING BRIEF
FIRST JUDICIAL DISTRICT COURT, CARSON CITY

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1 **I. JURISDICTIONAL STATEMENT**

2 The Supreme Court’s jurisdiction in this case is pursuant to NRS
3 177.015(3).

4 **II. ROUTING STATEMENT**

5 This case is preemptively assigned to the Court of Appeals. NRAP 17(b)(1).

6 **III. STATEMENT OF THE ISSUES**

7 A. Whether the prosecutor breached the plea agreement.

8 **IV. STATEMENT OF THE CASE**

9 Appellant, Joan Kathryn Wenger, was charged by Criminal Information of
10 Vehicular Homicide, a violation of NRS 484C.130(1) and NRS 484.440(1).
11 Appellant’s Appendix at 1-2.¹ Appellant entered a guilty plea to the charged count,
12 with an agreement that the parties mutually recommend a sentence of a definite
13 term of 10 to 25 years. AA at 6-11. Appellant was sentenced to life in the Nevada
14 Department of Corrections, with parole eligibility after 10 years. AA at 1371-72.
15 AA at 55-56.

16 **V. STATEMENT OF THE FACTS**

17 Appellant caused a vehicular accident when she was under the influence of
18 alcohol, causing the death of 70-year-old Laura Staugaard and injuring Ms.

19
20

Hereinafter “AA.”

1 Staugaard's son, Thomas Staugaard. She was charged by Criminal Information on
2 July 29, 2021 of Vehicular Homicide.

3 On August 23, 2021, Appellant entered a guilty plea to the charged crime of
4 Vehicular Homicide. AA at 6-11. Language in the plea agreement stated "with
5 regard to sentencing, the parties have agreed to mutually recommend that I be
6 sentenced to serve a definite term of 25 years in prison, with eligibility for parole
7 beginning when a minimum of 10 years has been served." AA at 6:22-24. The plea
8 agreement also included the following language:

9 I understand that, at the time of sentencing, the State may present
10 arguments, facts, and/or witnesses in support of the plea agreement. I
11 understand that the State also reserves the right at sentencing to
12 provide the court with relevant information that may not be in the
13 court's possession; to call victims to make a victim impact statement;
14 to question my character witnesses; to comment on the circumstances
15 of the crime and my criminal history; and to correct factual
16 misstatements made by me or my character witnesses.

17 AA at 6:26-7:3.

18 During the sentencing hearing, the prosecutor addressed the court stating
19 "we are standing by the joint recommendation in this case for Ms. Wenger. Ten to
20 25 and ten to life are very similar, essentially the same. She's likely to spend the
rest of her days in prison, and that is the State's recommendation." AA at 25:12-
16.

1 Following a discussion and photographs of Ms. Staugaard and how much
2 her family would miss her, the State then proceeded with the following argument:

3 This wasn't an accident. This was a reckless and intentional act by
4 Ms. Wenger. The circumstances of the crash, Your Honor, I think it's
5 clear in the PSI, she was driving recklessly. Witnesses witnessed her
6 in different lanes, on the shoulder, moving in and out of the travel,
7 speeding down the highway. And when she struck Thomas
8 Staugaard's vehicle, it was actually driving. She rear-ended a vehicle
9 as it was driving on 395. This was a reckless, dangerous and
10 intentional act by Ms. [Wenger].

11 AA at 29:1-10.

12 Following a discussion on the accident itself, the prosecutor continued
13 with the following argument:

14 Finally, Your Honor, I would move to admit Exhibit 7, I believe,
15 which is a letter that Mr. Thomas Staugaard wrote to his mother
16 shortly after the accident, and I would ask that it be part of the record,
17 but I'd also like to read it and then I will finish my remarks. . . .

18 ***

19 Again, this is a letter that Mr. Staugaard wrote to his mother shortly
20 after this accident. Not this accident. This crime.

Dear Mom, I know I never said it or even expressed it in my
actions, but I do love you. I miss you so much. I know it's too
late to tell you in person, but hopefully you're looking down on
me and BooBoos. I'm trying to stay strong, but it's hard. John,
Pam, Johnny Lewis and Connie came up to get stuff in order.
John took care of all of the money stuff so I didn't have to
worry about it.

I saw the headlight coming, but there wasn't any time to warn
you. I did black out in the beginning after you grabbed my arm
and started to scream. I rolled in the car about four to six times.

1 When it stopped, I looked over and you weren't there. I knew
2 instantly what happened. I crawled out of the car and went to
3 your side to check on you. Several other people were with me,
and I rolled you over hoping for something, but I knew the
result already.

4 I got on the phone with dispatch and asked for Care Flight for
5 you but knowing they were not going to use it. I watched as
several bystanders worked on you. At some point, they
6 declared it, put a blanket over you. I was then taken to the
ambulance for treatment. I looked at you for a second but I do
7 regret it now. Not stopping for one last minute. And I'm sorry.
BooBoos didn't know until she got to the hospital.

8 So far, we are okay. I lose it at times, and Bells know when it's
9 coming and comes to my side. I just hope you didn't feel any
pain and it was quick. Hopefully, you are in a place now and
10 will keep watching over us as we go along. Hopefully you and
Grammy can find peace together and watch over all of us.
11 Please show us that you too are there every now and then.
Love and miss you.

12 AA at 31:14-32:22.

13 Thomas Staugaard took the stand later in the hearing and made a
14 statement and gave the district court an additional letter by him. AA at 43:9-
15 12, 46:3-7. There was no reason that Mr. Staugaard could not have read his
16 letter or submitted it to the district court without the prosecutor reading the
17 letter to the court.

18 Rather than sentence Appellant to the joint recommended sentence of a term
19 of ten to 25 years, the district court opted to sentence Appellant to the highest
20 possible sentence of life with parole eligibility after 10 years. 50:9-51:15, 55-56.

1 **VI. SUMMARY OF THE ARGUMENT**

2 The prosecutor implicitly breached the plea agreement.

3 **VII. ARGUMENT**

4 **A. STANDARD OF REVIEW**

5 The Nevada Supreme Court has consistently held that the State's violation of
6 a plea agreement "requires reversal," and that harmless error does not apply.

7 *Echeverria v. State*, 119 Nev. 41, 44, 62 P.3d 743, 748 (2003), citing *Citti v. State*,
8 107 Nev. 89, 91, 807 P.2d 724, 726 (1991), quoting *Van Bushirk v. State*, 102 Nev.
9 241, 243, 720 P.2d 1215, 1216 (1986); see also *Kluttz v. Warden*, 99 Nev. 681,
10 684, 669 P.2d 244, 246 (1983); *Riley v. Warden*, 89 Nev. 510, 513-14, 515 P.2d
11 1269, 1271 (1973). Further, in a case when the State breaches the plea agreement,
12 the case must be reassigned to a different sentencing judge for resentencing.
13 *Echeverria*, 119 Nev. at 44, 62 P.3d at 748.

14
15 **B. THE PROSECUTOR BREACHED THE PLEA AGREEMENT**

16 **1. Prosecutor Implicitly Breached the Plea Agreement**

17 "[W]hen a plea rests in any significant degree on a promise or agreement of
18 the prosecutor, so that it can be said to be part of the inducement or consideration,
19 such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 261-62
20 (1971). "[I]t is the defendant's rights which are being violated when the plea

1 agreement is broken or meaningless.” *Correale v. United States*, 479 F.2d 944,
2 949 (1st Cir. 1973). “For this reason, the cause of the prosecution’s failure to keep
3 its promises is irrelevant. *Gamble v. State*, 95 Nev. 904, 908, 604 P.2d 335, 337
4 (1979), citing *Santobello, supra*; *United States v. Brown*, 500 F.2d 375 (4th Cir.
5 1974). “When the State enters into a plea agreement, it is held to the most
6 meticulous standards of both promise and performance with respect to both the
7 terms and the spirit of the plea bargain.” *Sparks v. State*, 121 Nev. 107, 110, 110
8 P.3d 486, 487(2005); see also *Van Burskirk v. State*, 102 Nev. 241, 720 P.2d 1215
9 (1986).

10 A breach of a plea agreement occurs where the State "explicitly or implicitly
11 undercut[s] the sentencing recommendation by attempting to persuade the
12 sentencing court to impose a harsher sentence than that which it agreed to
13 recommend." *Sullivan v. State*, 115 Nev. 383, 389, 990 P.2d 1258, 1262 (1999). A
14 "prosecutor's overall conduct must be reasonably consistent with the
15 recommendation," *id.*, and while "a defendant's failure to object does not
16 necessarily preclude appellate review of an alleged breach of a plea agreement, . . .
17 such a failure may be considered as evidence of the defendant's understanding of
18 the terms of a plea agreement," *id.* at 387 n.3, 990 P.2d at 1260 n.3.

19 Despite the plea agreement containing language seeming to protect its right
20 to argue at the sentencing hearing, the prosecutor here went beyond the language

1 and breached the spirit of the plea agreement and implicitly argued for the higher
2 sentence that what was agreed to.

3 The prosecutor misstated the law and argued that vehicular homicide in this
4 case was an intentional act, despite the fact that NRS 484C130 has no requirement
5 that the act be "willful" or "intentional," and Appellant's blood alcohol content
6 was over a .300 BAC.

7 NRS 484C.130 states:

8 1. A person commits vehicular homicide if the person:

9 a. Drives or is in actual physical of a vehicle on or off the
highways of this State and:

- 10 1) Is under the influence of intoxicating liquor;
- 11 2) Has a concentration of alcohol of 0.08 or more in
his or her blood or breath;
- 12 3) I found by measurement within 2 hours after
driving or being in actual physical control of a
vehicle to have a concentration of alcohol of 0.08
or more in his or her blood or breath;

13 ***

14 (b) Proximately causes the death of another person while
driving or in actual physical control of a vehicle on or off the
highways of this State; and

15 (c) Has previously been convicted of at least three offenses.

16 No intent is required, nor was it likely to be proven in the present case
17 based on Appellant's BAC.

18 The prosecutor then went on to read a letter written by Thomas
19 Staugaard to his dead mother. This was obviously an attempt to convince
20 the judge of sentencing Appellant to a higher sentence, and specifically after

1 informing the judge of his opinion that there was basically no difference in
2 the sentences.

3 Counsel did not object to the prosecutor's breach of plea. If the Court
4 decides that the failure to object bars review, plain error applies. In conducting
5 plain error review, an appellate court must examine whether there was "error,"
6 whether the error was "plain" or clear, and whether the error affected the
7 defendant's substantial rights. *Anderson v. State*, 121 Nev. 511, 516. 118 P.3d
8 184, 186 (2005). Here the error was clear and violated Appellant's substantial
9 rights to be sentenced to the recommended sentence.

10 VIII. CONCLUSION

11 Based on the foregoing argument, Appellant respectfully requests the Court
12 find that the prosecutor breached the plea agreement, and reverse and remand for a
13 new sentencing hearing.

14 RESPECTFULLY SUBMITTED this 7th day of June, 2022.

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1 **VERIFICATION AND CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
4 the type style requirements of NRAP 32(a)(6) because:

5 This brief has been prepared in a proportionally spaced typeface using
6 Microsoft Word 2000, Version 9.0 in Times New Roman 14 pt.

7 2. I further certify that this brief complies with the page- or type-
8 volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief
9 exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14
10 points or more, and contains 2257 words.

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

18 //

19 //

1 subject to sanctions in the event that the accompanying brief is not in conformity
2 with the requirements of the Nevada Rules of Appellate Procedure.

3 RESPECTFULLY SUBMITTED.

4 DATED this 7th day of June, 2022.

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