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No. 71106-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GENE PALMER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State breached the plea agreement and violated Mr. Palmer's Fourteenth Amendment right to due process by advocating for the imposition of over \$10,000 in restitution after agreeing to recommend "no restitution."

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State must strictly comply with the terms of a plea agreement and its failure to do so violates the defendant's Fourteenth Amendment right to due process. Here, the plea agreement plainly states that the parties would jointly recommend "no restitution," but after the court indicated it was inclined to order restitution, the prosecutor advocated for the imposition of over \$10,000 in restitution. Did the prosecutor breach the plea agreement and violate Mr. Palmer's right to due process?

C. STATEMENT OF THE CASE

The State and Gene Palmer entered into a plea agreement under which Mr. Palmer agreed to plead guilty to one count of False Information by a Claimant in exchange for the State recommending six months of confinement and "[n]o restitution." CP 101-05. The prosecutor at first complied with this agreement, telling the court:

Your Honor, the parties have an agreed recommendation to the court of six months. The defendant's already served six months on this particular offense. We're not asking the

court to order restitution in this case. It's my understanding restitution was repaid to DSHS already, and the restitution to L&I has been ordered in a civil hearing, and that restitution has already been litigated along with the civil penalty.

RP (10/27/11) 10. The prosecutor further explained that because restitution is not dischargeable in bankruptcy, it could be recouped from future benefits. RP (10/27/11) 10.

The judge was unsatisfied with this remedy, stating that he preferred to have the option of threatening people with jail for failure to pay. RP (10/27/11) 10. The court accordingly scheduled a restitution hearing, stating:

[T]his is my duty, not the State, and I can order a restitution hearing and I can have these fraud investigators show up and tell me in person why they think there is no restitution when I'm sitting here reading an affidavit of probable cause that says there was \$13,000 that was taken.

RP (10/27/11) 13.

Mr. Palmer waived his presence at the restitution hearing, with the understanding that the attorneys were still complying with the plea agreement and recommending no restitution. RP (11/10/11) 21-22; RP (10/8/13) 4-5. Defense counsel reminded the court that "the whole basis of the plea of guilty here, the basis of that was this agreement that there would be no restitution." RP (11/10/11) 24. The State, however, filed a

written memo and made an oral presentation urging the court to impose over \$10,000 in restitution. CP 59-80; RP (11/10/11) 23-24, 30-31, 37-39.

Although defense counsel's primary position was that there should be no restitution, his alternative argument was that Mr. Palmer should pay approximately \$4,000, not \$10,000. Mr. Palmer had already paid back over \$7,000 and he was unable to work during a significant portion of the periods the State represented that he was able to work. RP (11/10/11) 27-29, 32. The prosecutor fought this alternative argument as well, insisting that "we come up with a much higher number than defense counsel." RP (11/10/11) 31.

The court ruled in favor of the State, and set restitution in the amount of \$10,929.93. RP (11/10/11) 41; CP 17.

Mr. Palmer did not pay the restitution. The State moved to modify the sentence, asking the court to impose jail time for the failure to pay. CP 6. Mr. Palmer appeared at the hearing *pro se*, and said "I don't have any restitution. ... I pleaded my case out for no restitution." RP (9/17/13) 3. The court continued the hearing so counsel could be appointed for Mr. Palmer. RP (9/17/13) 7.

At the next hearing, Mr. Palmer again insisted he did not owe any restitution. His newly appointed attorney acknowledged that the judgment and sentence indicated that there would be a restitution hearing, but he

was concerned because “Mr. Palmer indicates that he never agreed to restitution on the plea form itself or on the plea itself. And the plea form does indicate no restitution which was signed by the judge.” RP (10/8/13) 4.

Given the uncertainty surrounding the issue, the court said, “I’m not inclined to try to impose any kind of punitive sanctions or anything like that at this point given the posture of the case and the apparent questions that have arisen.” RP (10/8/13) 10. The State agreed that the court did not need to impose sanctions, but stated that because Mr. Palmer insisted he had no restitution, there should be “a clear order from the court that the defendant has to pay this.” RP (10/8/13) 11.

The parties argued about what monthly payment amount the court should set. RP (10/8/13) 14-15. Mr. Palmer himself spoke, and again said, “I pleaded it out. No restitution. I made sure of that. He agreed.” RP (10/8/13) 16.

The court ordered Mr. Palmer to pay 40 dollars per month. RP (10/8/13) 19; CP 3-5. Mr. Palmer appealed from the order entered on October 8, 2013. CP 1-2. Concurrent with this brief, Mr. Palmer has also filed a motion to enlarge the time to file a notice of appeal from the underlying restitution order, because Mr. Palmer did not knowingly waive the right to appeal that order.

D. ARGUMENT

The restitution order should be vacated and the case remanded for a new hearing before a different judge because the prosecutor breached the plea agreement by arguing in favor of over \$10,000 in restitution after promising to request “no restitution.”

1. A prosecutor breaches a plea agreement and violates a defendant’s Fourteenth Amendment right to due process by failing to comply strictly with the terms of the agreement.

“A plea agreement is a contract, and the government is held to its literal terms.” *United States v. Alcala-Sanchez*, 666 F.3d 571, 575 (9th Cir. 2012). “[W]hen 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.” *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The government’s strict compliance with the agreement is essential “because it ensures that a defendant gets the benefit of his or her bargain – the presentation of a ‘united front’ to the court.” *Alcala-Sanchez*, 666 F.3d at 575.

Although a plea agreement is a contract, it is also much more. Plea bargaining “is an essential component of the administration of justice.” *Santobello*, 404 U.S. at 260. Plea agreements implicate the accused’s fundamental right to due process, and a prosecutor’s breach of the plea

agreement violates the Fourteenth Amendment. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997); *United States v. De la Fuente*, 8 F.3d 1333, 1336 (9th Cir. 1993); U.S. Const. amend. XIV.

In construing a plea agreement, a reviewing court determines what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty. *De la Fuente*, 8 F.3d at 1337. Where the terms are ambiguous, “the government ordinarily must bear responsibility for any lack of clarity.” *Id.* at 1338; *accord United States v. Camarillo-Tello*, 236 F.3d 1024, 1027 (9th Cir. 2001) (“Ambiguities are construed in favor of the defendant”). Furthermore, although the prosecutor has a duty to participate in sentencing and answer the court’s questions candidly, “the State has a concomitant duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.” *Sledge*, 133 Wn.2d at 840.

2. The prosecutor breached the plea agreement and violated Mr. Palmer’s Fourteenth Amendment right to due process by advocating for over \$10,000 in restitution after agreeing to request “no restitution.”

The prosecutor in this case breached the plea agreement and violated Mr. Palmer’s Fourteenth Amendment right to due process. The terms of the plea agreement clearly called for the State to recommend no restitution, because Mr. Palmer had already repaid DSHS and the

restitution owed to Labor & Industries was being addressed in civil proceedings. CP 101-05; RP (10/27/11) 10. Nevertheless, at the hearing the prosecutor recommended over \$10,000 in restitution. CP 59-80; RP (11/10/11) 23-24, 30-31, 37-39.

To be sure, the court had indicated that it was inclined to order restitution notwithstanding any agreement, and the prosecutor was obligated to participate in the hearing and answer any of the court's questions truthfully. *See Sledge*, 133 Wn.2d at 840; *State v. Talley*, 134 Wn.2d 176, 178, 949 P.2d 358 (1998). But this does not absolve the State of its duty to comply with the terms of the agreement. *Sledge*, 133 Wn.2d at 840. Although a prosecutor may participate in a court-ordered evidentiary hearing, he or she is still "obliged to make the agreed upon sentencing recommendation." *Talley*, 134 Wn.2d at 186-87.

Here, the prosecutor did not make the agreed upon recommendation. Instead, the State affirmatively argued in favor of restitution, and even fought Mr. Palmer's attempts at a fallback position of \$4,000 in restitution. CP 59-80; RP (11/10/11) 23-24, 30-31, 37-39. The prosecutor insisted, "we come up with a much higher number than defense counsel." RP (11/10/11) 31. The prosecutor took an adversarial position throughout the hearing, but Mr. Palmer was entitled to "the presentation of a 'united front' to the court." *Alcala-Sanchez*, 666 F.3d at 575. There can

be no doubt that the State breached the plea agreement in this case by urging the court to impose restitution – and to impose a large sum – after agreeing to recommend no restitution. *See Talley*, 134 Wn.2d at 187 (State may participate in hearing and present evidence to assist court, but may not, through words or conduct, contradict the agreed recommendation).

Even if the terms of the plea agreement or the prosecutor's actions were ambiguous, reversal would be required because ambiguities must be resolved in favor of the defendant. In *Mondragon*, for example, the plea agreement provided that the government “would make no recommendation regarding sentence.” *United States v. Mondragon*, 228 F.3d 978, 979 (9th Cir. 2000). Consistent with this agreement, the prosecutor did not technically request any particular sentence at the sentencing hearing. However, he rebutted the defendant's assertion that all of his prior crimes were “petty in nature,” by stating “we just point out to the Court the serious nature of some of the listed offenses in there.” *Id.* The trial court did not think that this comment constituted a “recommendation regarding sentence,” but, contrary to the defendant's request, it imposed a sentence at the top of the applicable sentencing range. *Id.*

The Court of Appeals reversed. Even though the government claimed it was not recommending a sentence but merely correcting factual misstatements, “the comments could have been made for only one purpose: to influence the district court to impose a harsher sentence than that suggested by appellant’s counsel.” *Id.* at 980. The appellate court accordingly held that the prosecutor’s action constituted a “recommendation regarding sentencing,” which violated the plea agreement. *Id.* at 980-81.

Similarly, in *Sledge*, the prosecutor technically complied with an agreement to recommend a particular sentence. *Sledge*, 133 Wn.2d at 831. But the prosecutor also called two witnesses who advocated an exceptional sentence based on several aggravating factors, and the prosecutor discussed these aggravating factors in summation. *Id.* at 833-838. Although the prosecutor concluded his remarks by again advocating for the agreed-upon sentence, the court imposed an exceptional sentence. *Id.* at 838.

The Supreme Court reversed, holding the State breached the plea agreement. *Id.* at 843. The Court noted that “a conflict may result when the State assumes the role of presenting evidence to a court that may contradict the State’s sentencing recommendation” *Sledge*, 133 Wn.2d at 843 n.7. However, given the paramount due process rights of a

defendant, the State nevertheless “may not act so as to undermine” the plea agreement. *Id.* “The trial court has ample means for eliciting evidence and taking testimony that need not involve the State in conflict of interest.” *Id.*

The prosecutor correctly struck this balance in *State v. Van Buren*, 112 Wn. App. 585, 49 P.3d 966 (2002). There, the State agreed to recommend a standard-range sentence of 292 months. *Id.* at 589. The prosecutor did so, but after the court read a letter from the victim’s mother, the judge asked if the attorneys could corroborate one of the statements in the letter. *Id.* at 590. The prosecutor asked the court not to order him to present evidence on that issue, in light of the plea agreement. *Id.* at 591. The court nevertheless ordered an evidentiary hearing. *Id.* at 592.

In a memorandum in response to the court’s order, the prosecutor recommended a 292-month sentence, stated that he would participate in the evidentiary hearing only if the court ordered him to do so, and said that he would limit this participation to avoid compromising the plea agreement.

Van Buren, 112 Wn. App. at 593. The prosecutor provided the requested evidence, and also questioned the witnesses after the court ordered him to do so. *Id.* at 593-96. But at the close of evidence, the prosecutor still recommended a 292-month sentence. *Id.* at 596.

This Court held the prosecutor did not breach the plea agreement, and properly walked the difficult line discussed in *Talley* and *Sledge*. *Van Buren*, 112 Wn. App. at 598-99. Importantly, although the prosecutor presented the evidence the court requested, he “continued to request the standard range sentence as agreed to in the plea agreement and continued to assert that this sentence was appropriate despite the court’s apparent interest in examining additional facts.” *Id.* at 599.

In contrast, in this case the prosecutor did *not* continue to assert that the agreed amount of restitution was appropriate. To the contrary, he repeatedly urged imposition of over \$10,000 in restitution. Although the sentencing court requested evidence regarding loss amount, the prosecutor did not simply present evidence, but improperly undermined the plea agreement by advocating for the imposition of over \$10,000 in restitution after agreeing to recommend that no restitution at all be imposed. As in *Sledge* and *Mondragon*, the breach violated Mr. Palmer’s Fourteenth Amendment right to due process.

3. The remedy is vacation of the restitution order and remand for a hearing before a different judge.

Where the State breaches a plea agreement, the defendant has the choice to either withdraw his plea or receive specific performance of the agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003).

“[T]he defendant is entitled to a remedy which restores him to the position he occupied before the State breached.” *Id.*


Mr. Palmer requests specific performance of the plea agreement. That remedy “requires the State to make its promised recommendation” at a new hearing. *Harrison*, 148 Wn.2d at 557.

Furthermore, a different judge should preside over the new hearing. *Id.*; *Sledge*, 133 Wn.2d at 846 n.9 (we “provide for a new judge at the disposition hearing in light of the trial court’s already-expressed views on the disposition”); *Alcala-Sanchez*, 666 F.3d at 577 (Remanding for resentencing before a different judge – regardless of the prior judge’s impartiality – because it is necessary “to eliminate the impact of the government’s prior mistake and breach”).

E. CONCLUSION

For the reasons set forth above, Mr. Palmer asks this Court to vacate the restitution order and remand for a hearing before a different judge.

Respectfully submitted this 23rd day of April, 2014.


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71106-7-I
)	
GENE PALMER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X _____ 