91514-8

Supreme Court No. _____
(Court of Appeals No. 71106-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GENE PALMER,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Gene Palmer asks this Court to review the opinion of the Court of Appeals in *State v. Palmer*, No. 71106-7-I. A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to prove that Mr. Palmer knowingly, intelligently, and voluntarily waived his right to appeal the restitution order, where he was not present at the restitution hearing, the plea agreement stated "no restitution," and there is no evidence in the record that Mr. Palmer was informed that over $10,000 in restitution was imposed and that he had a right to appeal that order?

2. Did the prosecutor breach the plea agreement and violate 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?"

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 the opening brief, Mr. Palmer 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. In the brief, Mr. Palmer argued that the

prosecutor breached the plea agreement by arguing in favor of over $10,000 in restitution after promising to request "no restitution."

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **This Court should grant review because the right to appeal is a fundamental constitutional right and the Court of Appeals' decision conflicts with this Court's decision in *State v. Sweet.***

The Washington Constitution guarantees criminal defendants the right to appeal. Const. art. I, § 22. Because the right is explicitly provided in our state constitution, "it is to be accorded the highest respect." *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). The right to appeal includes the right to appeal restitution. *State v. Kinneman*, 122 Wn. App. 850, 859, 95 P.3d 1277 (2004) *aff'd*, 155 Wn.2d 272, 119 P.3d 350 (2005).

A defendant may waive his constitutional right to appeal, but courts will not presume waiver. *Sweet*, 90 Wn.2d at 286. The State bears the burden of proving that a defendant has made a knowing, intelligent, and voluntary waiver of the right to appeal. *Id.*

Although RAP 5.2(a) requires a litigant to file a notice of appeal within 30 days of the entry of the order appealed, RAP 18.8(a) allows the court to enlarge the time within which an act must be done in a particular case in order to serve the ends of justice. *State v. Chetty*, 167 Wn. App. 432, 438-39, 272 P.3d 918, 922 (2012). The ends of justice require

enlargement of the time to file an appeal where the defendant did not knowingly waive his constitutional right to appeal. *City of Seattle v. Klein*, 161 Wn.2d 554, 561, 166 P.3d 1149 (2007).

"[A] procedural defect (failure to file or failure to appear), without notice that the right to appeal may be lost, does not constitute knowing waiver of the core constitutional right." *Id.* "[I]naction by the appellant may establish a valid waiver only when the appellant has been *informed* of the consequences of his or her conduct." *Id.* (emphasis in original). "[A]n involuntary forfeiture of the right to a criminal appeal is never valid." *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998).

In this case, Mr. Palmer was not present at the restitution hearing, did not know restitution had been imposed, and was not told he had the right to appeal the restitution order. Thus, he did not knowingly waive his right to appeal the restitution order.

At the two hearings on the State's motion to modify sentence for failure to pay restitution, Mr. Palmer repeatedly insisted he did not have to pay restitution *at all*. Clearly, he did not understand that restitution had been ordered and did not knowingly and competently waive his right to appeal the restitution order.

In ruling to the contrary, the Court of Appeals erred in several respects. First, it conflated the right to be present with the right to appeal.

The court averred that by waiving his right to be present at the restitution hearing, Mr. Palmer simultaneously forfeited any claim that he did not knowingly waive his right to appeal the resulting order. Slip Op. at 6-7. But the rights to be present and to appeal are separate rights, and a waiver of one does not automatically effect waiver of the other. Const. art. I, § 22; *Cf. City of Seattle v. Klein*, 161 Wn.2d 554, 166 P.3d 1149 (2007) (defendants did not waive their rights to appeal by failing to appear at review hearings); *cf. also In re Morris*, 176 Wn. 2d 157, 166, 288 P.3d 1140 (2012) (Waiver of the right to be present should not be conflated with waiver of the right to a public trial).

The Court of Appeals also improperly shifted the burden to Mr. Palmer to prove he did not knowingly waive his constitutional right to appeal. The Court stated, "Palmer makes no claim that his counsel failed to inform him of the result of the hearing or his right to appeal from the order entered...." Slip Op. at 7. This is not true, as Mr. Palmer stated, "Mr. Palmer was not present, was not aware that restitution was ordered, and was unaware of his right to appeal the restitution order." Motion to Expand Notice of Appeal at 1. In any event, it is the *State's* burden to prove that Mr. Palmer knowingly waived the right to appeal; it is not Mr. Palmer's burden to prove that he did not. *State v. Sweet*, 90 Wn.2d 282,

283-84, 581 P.2d 579 (1978) ("We hold that it is the State's burden to affirmatively demonstrate waiver.").

Finally, the Court of Appeals implied that Mr. Palmer knowingly waived his right to appeal on October 27, 2011, when he pleaded guilty and the judgment and sentence was entered. Slip Op. at 7-8. The court repeatedly quoted the portion of the judgment that says a notice of appeal must be filed within 30 days of the entry of the judgment or the right to appeal the judgment is "irrevocably waived." Slip Op. at 3, 7.

But of course, at this point, no restitution had been ordered. Mr. Palmer did not want to appeal the judgment entered on October 27, 2011, because it imposed the agreed-upon term of incarceration and stated only that restitution "may be set by later order of the court." CP 86. Mr. Palmer was not required to preemptively appeal something that had not yet been set, especially since he believed the State would comply with its agreement to request no restitution. The State never demonstrated that Mr. Palmer was advised of his right to appeal the restitution order as opposed to the pre-restitution judgment. *Cf. Kells*, 134 Wn.2d at 314 (guilty plea waived right to appeal determination of guilt, but not right to appeal declination order).

In sum, this Court should grant review because the right to appeal is a fundamental constitutional right in Washington and the Court of

Appeals misapplied this Court's caselaw and improperly shifted the burden of proof to Mr. Palmer. RAP 13.4(b)(1), (3).

2. The prosecutor breached the plea agreement by arguing in favor of over $10,000 in restitution after promising to request "no restitution."

On the merits, a new restitution hearing should be granted because the prosecutor breached the plea agreement. 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); U.S. Const. amend. XIV. 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.

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." *United States v. Alcala-Sanchez*, 666 F.3d 571, 575 (9th Cir. 2012). There can be no doubt that the State breached the plea agreement in this case by urging the court to impose restitution – and

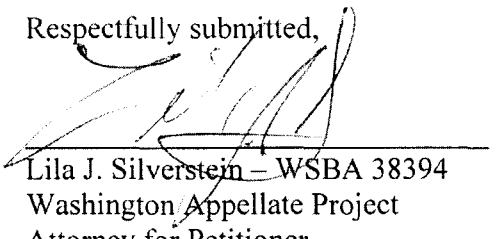
to impose a large sum – after agreeing to recommend no restitution. *See* *Talley*, 134 Wn.2d at 187 (State may participate in hearing and present evidence to assist court, but may not, through words or conduct, contradict the agreed recommendation). For this reason, too, this Court should grant review.

E. CONCLUSION

Gene Palmer respectfully requests that this Court grant review.

DATED this 16th day of March, 2015.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GENE ALFRED PALMER II Appellant.	DIVISION ONE No. 71106-7-I UNPUBLISHED OPINION FILED: March 9, 2015

DWYER, J. — Gene Palmer pleaded guilty to one count of false information by a claimant. At sentencing, the trial court ordered restitution but set a separate hearing at which the amount of restitution would be determined. Palmer voluntarily waived his right to be present at that hearing. More than two years later, Palmer now requests leave of this court to appeal from the trial court's restitution order, entered at the later hearing, claiming that he was not aware of the restitution order and did not knowingly waive his right to appeal therefrom. Palmer's motion is denied. As Palmer asserts no error in the proceeding from which he filed his appeal, we affirm.

I

On March 3, 2007, Palmer was charged by information with one count of theft in the first degree.[1] On October 27, 2011, pursuant to a plea agreement, the State, in open court, filed an amended information charging Palmer with one count of false information by a claimant.[2] Palmer's counsel informed the court that his client intended to change his plea to guilty.

Later that day, a plea and sentencing hearing commenced. Palmer's counsel advised the court that Palmer had "[g]one line through line" through the statement of defendant on plea of guilty and was "freely, [and] voluntarily agreeing into this [plea]." The court asked Palmer if he understood the statement of defendant on plea of guilty and whether he was pleading guilty freely and voluntarily. Palmer responded, "[y]es, sir." Palmer affirmed that he understood that "whatever the recommendation is by either your attorney or the prosecuting attorney, I [the court] don't have to go along with that recommendation." Palmer also acknowledged that he understood that "one of the consequences of this [plea] is that [the court] could also order restitution in the full amount of the amount that's being claimed here." Palmer requested that the court review the affidavit of probable cause to establish the factual basis for his Alford[3] plea.

After accepting the guilty plea, the court turned to sentencing. The State's sentencing recommendation was six months of confinement (with credit for time served) and no restitution. The trial court once again informed Palmer that, notwithstanding the plea agreement and the State's recommendation, it could

[1] RCW 9A.56.030.
[2] RCW 51.48.020(2).
[3] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

order restitution. The court specifically stated that, "I have the independent authority [to order restitution] if I believe that restitution is required in this case." The court then asked Palmer if there was anything he wanted to say to the court. He replied, "No, sir."

The court then pronounced sentence, following the parties' agreed sentencing recommendation with regard to incarceration.[4] However, it "order[ed] restitution in an amount to be determined." A restitution hearing was set for November 10, 2011, two weeks later, after confirming that Palmer would be available to attend on that date. Palmer was advised that, if he wished, he could waive his right to be present at the restitution hearing. His counsel repeated this advisement in open court, with Palmer at his side.

Palmer signed the judgment and sentence, which included the restitution order and hearing date. Paragraph 5.8 of the judgment and sentence also informed Palmer of his right to appeal. Specifically, it stated, "This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED."

At the November 10, 2011 restitution hearing, Palmer was represented by his trial attorney. Palmer did not appear. Palmer's attorney stated that Palmer's presence was waived and requested to proceed with the hearing.[5] The court found that Palmer voluntarily waived his presence.

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[4] The sentencing court also imposed mandatory financial obligations of a $500 victim penalty assessment and a $100 DNA testing fee.

[5] "The discussion we thought walking out of here was that his presence was not necessary here for this hearing because it's just restitution. . . . He is not here. We're not asking

Palmer's decision to voluntarily absent himself from the restitution hearing is not without context. Palmer had filed for Chapter 13 bankruptcy, which was approved on May 21, 2010, and he was of the belief, which he has since often repeated, that any restitution ordered would be dischargeable in bankruptcy.[6]

In making its oral ruling, the trial court reiterated the State's recommendation and read aloud the part of the plea agreement that provided: "This is an Alford plea. Credit for time served, six months, no restitution, no active or inactive probation." The court asked Palmer's attorney whether he understood that the court was not bound by the plea agreement. Counsel stated that he did. The court explained that it had the statutory authority to order restitution and expressed that it had been shocked when the State had taken the position that it was not going to seek restitution. The court then ordered Palmer to pay restitution in the amount of $10,929.93. The court, the State, and Palmer's attorney signed the restitution order. Palmer did not timely seek review of either the judgment and sentence or the November 10 restitution order.

On May 3, 2013, the clerk of the superior court filed a declaration and notice of community supervision violation and affidavit of probable cause for violation noting that Palmer had not paid any restitution, that the clerk had sent delinquency notices to Palmer, and that Palmer "feels he doesn't owe [restitution] because he filed bankruptcy."

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for a continuance. We are definitely waiving his right to be – his right to be here, and we ask the court [to] make the decision today."

[6] This belief is also consistent with Palmer's decision not to timely appeal from the restitution order.

A review hearing to address Palmer's failure to pay restitution was set for September 17, 2013. At that hearing, in response to Palmer's repeated assertions that no restitution was ever ordered in the case, the court stated, "There's an order [dated] November 10th that says that you owe the restitution." The review hearing was thereafter continued at Palmer's request to allow him to obtain new counsel.

On October 8, 2013, a hearing to review Palmer's failure to pay restitution was again commenced. At that hearing, Palmer admitted that a restitution hearing had been held and that he "didn't have to be present." After hearing from all parties, the court entered an order modifying the sentence, which set forth a new payment schedule.

On October 22, 2013, Palmer filed a notice of appeal from the order modifying sentence. On April 24, 2014, Palmer filed a merits brief seeking relief from the 2011 restitution order. This was filed in conjunction with a motion "to expand the notice of appeal to include [the 2011] restitution order."[7] The merits brief did not set forth or argue any issue stemming from the October 22, 2013 hearing or order.

[7] We understand this pleading to be a motion to seek relief from the requirement of RAP 5.2(a) that an appeal be filed within 30 days of the entry of the final order from which the appeal is taken.

II

Palmer asserts that he was not present at the restitution hearing, did not know that restitution had been imposed, and was not told that he had the right to appeal from the restitution order. Thus, he contends, he did not knowingly waive his right to appeal the restitution order. We disagree.

RAP 5.2(a) requires a litigant to file a notice of appeal within 30 days of the entry of the order appealed. Moreover, pursuant to RAP 18.8(a), the appellate court will only extend the time within which a party must file a notice of appeal in extraordinary circumstances and to prevent a gross miscarriage of justice.

We recently explicated the application of RAP 18.8(a) in criminal cases:

> [I]n a criminal case, we must balance strict application of that filing deadline with the defendant's state constitutional right to an appeal. State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998); see Const. art. 1, § 22 (amend.10). The State bears the burden of showing that the decision to waive the constitutional right to appeal was knowing, intelligent, and voluntary. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Consequently, the State must demonstrate that "a defendant understood his right to appeal and consciously gave up that right before a notice of appeal may be dismissed as untimely." Kells, 134 Wn.2d at 314.

State v. Chetty, __ Wn. App. __, 338 P.3d 298, 301 (2014).

The state and federal constitutional rights to be present at trial may be waived, provided the waiver is voluntary and knowing. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); CrR 3.4(b).

There is no dispute that Palmer herein waived his right to be present at the restitution hearing. He thereby waived any claim that he was not aware of facts or legal circumstances of which he would have been made aware of had he

attended that hearing. In particular, Palmer forfeited any claim that the trial court erred by not informing him of the amount of the restitution ordered or his right to appeal from that order.

By choosing not to attend, Palmer left himself reliant on his attorney to inform him of what transpired at the restitution hearing. Palmer makes no claim that his counsel was constitutionally deficient in the discharge of his duties to Palmer either before, during, or after the restitution hearing. Setting aside Palmer's claim of ignorance related to his voluntary absence from the restitution hearing, the State presented significant evidence that Palmer voluntarily waived his right to appeal from the restitution order.

The record establishes the following: Palmer was present at sentencing when the court ordered restitution in an amount to be determined at a later hearing and set a date for that hearing at a time that Palmer could attend. Palmer also signed the judgment and sentence, which included the restitution order and stated the date on which the restitution hearing was set. It also advised Palmer of his right to appeal, including that his right must be exercised within 30 days or be "irrevocably waived."

The restitution hearing was held as scheduled. Palmer did not attend but was represented by his attorney. Upon the representations of Palmer's counsel, the trial court found that Palmer had voluntarily waived his right to be present. Palmer makes no claim that his counsel failed to inform him of the result of the hearing or his right to appeal from the order entered or that counsel's performance was otherwise constitutionally deficient.

Thus, to the extent that Palmer's claim is that he was unaware that the court would order restitution, and thus did not appeal, the record demonstrates otherwise. The judgment and sentence set forth that restitution would be ordered in an amount to be determined on November 10. It also informed Palmer that he had 30 days to appeal from this determination. To the extent that Palmer contends that the trial court had an obligation to personally inform him of the amount of restitution ordered and that he had 30 days to appeal from the order memorializing that calculation, Palmer forfeited this claim by voluntarily choosing not to appear. Palmer does not claim that his lawyer did not inform him of the results of the November 10 hearing or of his appellate rights. It is clear that he did not file a notice of appeal within 30 days of his sentencing or within 30 days of the restitution hearing.

The State has met its burden of showing that Palmer's decision to waive his right to appeal was knowing, intelligent, and voluntary.[8]

Palmer may now feel remorse over his flawed legal analysis that restitution was dischargeable in bankruptcy, but that is not an "extraordinary

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[8] Alternatively, the doctrine of invited error precludes Palmer from receiving appellate relief. The doctrine of invited error prohibits a party from setting up an error in the trial court and then complaining of it on appeal. In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The defendant must take knowing and voluntary action to set up the error. Call, 144 Wn.2d at 328. The invited error doctrine applies even to purported errors of constitutional magnitude. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). A defendant is "not denied *due process by the State* when such denial results from his own act, nor may the state be required to protect him from himself." State v. Lewis, 15 Wn. App. 172, 177, 548 P.2d 587 (1976) (emphasis added).

Here, at sentencing, Palmer was told that he had 30 days to appeal from the judgment and sentence, which included the trial court's order that payment of restitution was a condition of the sentence. Palmer waived his presence at the hearing setting the amount of restitution but knew the date and time of the hearing and could have attended. He did not. Thus, to the extent that his present claim is dependent on an assertion that he did not know the amount of restitution, as set by the court, or that the 30-day appeal period ran anew from the entry of the November 10 order, it was he who created the state of affairs, thus inviting the error of which he presently complains.

circumstance" justifying an extension of the time to file a notice of appeal from the October 27 judgment and sentence or the November 10 order setting the amount of restitution.

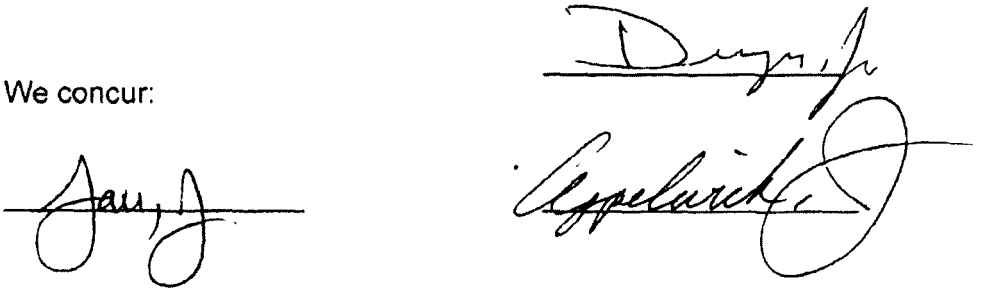
Palmer's motion is denied.

III

Although Palmer's appeal is taken from the trial court's October 8, 2013 order setting a new restitution payment schedule, he does not, in his briefing, assign error to that order or otherwise establish a basis for a grant of appellate relief.[9]

Affirmed.[10]

We concur:



[9] In his merits briefing, Palmer's sole claim of error is that the prosecutor breached the plea agreement by urging the trial court to impose restitution in a certain amount. Were this claim timely presented, it would fail.

The record is clear that the prosecutor at all times adhered to the agreed sentencing recommendation of no restitution. However, the record is equally clear that the experienced superior court judge repeatedly and forcefully declared his right and obligation to order restitution when he saw fit to do so. The prosecutor's actions in supplying information to the court on the amount of the losses subject to restitution, and in correcting deficiencies in the calculations Palmer put forth to the court, did not constitute a breach of the plea agreement. Rather, the prosecutor was simply complying with the court's directions and honoring the prosecutor's duty of candor to the court. There was no breach of the plea agreement. See State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1998); State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997); State v. Van Buren, 112 Wn. App. 585, 49 P.3d 966 (2002).

[10] Palmer's statement of additional grounds does not present any basis upon which relief can be granted.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71106-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Tienney K-M Milnor, AAG
[tienneym@atg.wa.gov] [crjsvpef@atg.wa.gov]
Office of the Attorney General - Criminal Justice Division

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: March 17, 2015