Supreme Court No. 94948-4
Court of Appeals No. 34577-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

LONNIE D. GLEIM, JR.,
Defendant/Appellant/Petitioner.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
Honorable M. Scott Wolfram Judge

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioner, Lonnie D. Gleim, Jr., is the appellant below and asks this Court to review the decision referred to in Section II.

## II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, published opinion filed August 1, 2017.[1] A copy of the opinion is attached as Appendix A.

## III. ISSUE PRESENTED FOR REVIEW

Whether a prosecutor's duty to abide by the terms of a plea agreement at resentencing after remand extends to a resentencing ordered pursuant to *In re Personal Restraint of McWilliams*[2] for the exercise of sentencing discretion by amendment of the term of community custody in violation of RCW 9.94A.701(9) or for other resentencing options consistent with the statute.

## IV. STATEMENT OF THE CASE

In July 2014, Lonnie Gleim, Jr. was charged with 12 counts of possession of depictions of a minor engaged in sexually explicit conduct.[3] CP 5–8. Mr. Gleim pleaded guilty to four counts of possession of

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[1] The current online version is found at *State v. Gleim*, No. 34577-7-III, 2017 WL 3381071 (Wash. Ct. App. Aug. 1, 2017).
[2] 182 Wn.2d 213, 217, 340 P.3d 223 (2014).

depictions of minors. 12/10/14 RP[4] 1-4. The standard range for each count was 77 to 102 months, based on an offender score of 9. CP 11. The statement of defendant on plea of guilty indicates pursuant to negotiation, the prosecuting attorney agreed to dismiss eight counts and recommend "36 months ... ." CP 14.

At the original sentencing hearing in 2015 the State and Mr. Gleim both requested an exceptional sentence downward of 36 months confinement followed by 36 months community custody. CP 94; *State v. Gleim*, No. 33209-8-III, 93 Wn. App. 1046, noted at *1 2016 WL 2343168 (Wash. Ct. App. May 3, 2016) (unpublished). The trial court instead sentenced Mr. Gleim to 102 months on each count, all to run concurrently. *Id.* The court also sentenced Mr. Gleim to "community custody for 36 months or for the period of earned ... early release awarded pursuant to RCW 9.94A.728, whichever is longer. *Id.*

Mr. Gleim appealed. CP 39–40; *see* Court of Appeals No. 33209-8-III. He successfully argued the trial court failed to conduct an individualized inquiry into his financial resources consistent with *State v.*

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[3] RCW 9.68A.020(1)(a) and (b).

[4] The current appeal arises from proceedings after remand for resentencing. The report of proceedings from the prior direct appeal, *State v. Gleim* (COA No. 33209-8-III), was

*Blazina*[5] and imposed a sentence that exceeded the statutory maximum of 120 months. CP 95–102; *Gleim*, *2–4 2016 WL 2343168. The appellate court remanded for an inquiry consistent with *Blazina* and to "either amend the community custody term or to sentence Mr. Gleim consistent with [RCW 9.94A.701(9)]," citing *In re Pers. Restraint of McWilliams,* 182 Wn.2d 213, 217, 340 P.3d 223 (2014). CP 97–98, 102; *Gleim*, *3, 5 2016 WL 2343168.

The court recognized the trial court upon remand had many resentencing options subject only to the statutory constraints of RCW 9.94A.701(9) and the Sentencing Reform Act (SRA), including discretion to determine the length of the new sentence:

> On remand, the trial court may decide to keep the 102-month term of confinement and impose 'community custody for a period of at least 18 months, plus all accrued earned early release time at the time of release, and this sentence would not be impermissibly indeterminate. *See [State v.] Bruch,* 182 Wn.2d [854,] 862–65[, 346 P.3d 724 (2015)]. However, this is one of many resentencing options the trial court has available, and neither the judgment and sentence nor the transcript of the sentencing hearing definitively indicates how the trial court would resentence Mr. Gleim. The trial court should be permitted to exercise its sentencing discretion on remand, subject to the foregoing statutory constraints.

CP 98; *Gleim*, *3 2016 WL 2343168.

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transferred into the current appeal by notation ruling dated August 31, 2016. All hearings will be cited to by date, e.g. "12/10/14 RP ___."

[5] 182 Wn.2d 827, 344 P.3d 680 (2015).

The mandate was filed on July 12, 2016. CP 91. The current appeal arises from proceedings after remand for resentencing. The resentencing hearings took place June 13 and 27, 2016, before the original sentencing judge. The court deleted discretionary legal financial obligation (LFO) costs previously imposed. CP 59; *see* CP 102 fn 4; 6/27/16 RP 8–9, 12.

At the June 13 hearing, the prosecutor told the court the Court of Appeals remand order "require[ed] the court to amend the community custody term to comply with RCW 9.94A.701(9)." 6/13/16 RP 1. The court inquired,

> THE COURT: Community custody would be 18 months?
>
> MR. NAGLE [PROSECUTOR]: Yes ... [a]nd I have prepared a proposed order amending that.

6/13/16 RP 2. Defense counsel protested categorization of the appellate directive as simply to amend the judgment and sentence, noting the Court of Appeals ordered a new sentencing. The trial court granted a continuance for defense counsel to consult with his client and prepare his sentencing arguments. 6/13/16 RP 2.

At the June 27 hearing the prosecutor again advised the trial court the appellate order "require[ed] the court to resentence the Defendant to

amend the community custody term." 6/27/16 RP 3. The prosecutor continued, "I went ahead and prepared an amended judgment and sentence. So I have in my hands for the Court's discretion either an ... order amending the previous judgment and sentence or an amended judgment and sentence that goes through everything,"

> So the only difference between this and the original judgment and sentence is that it specifies that the term of community custody is 18 months.

6/27/16 RP 4. The State had typed into the proposed Amended Judgment and Sentence, which was later signed by the judge, the previously imposed "102" months of total confinement on each of counts 1 through 4 and an amended term community custody of "18" months. *See* 6/28/16 RP 19; *compare* CP 60 (amended judgment and sentence) with CP 30 (original judgment and sentence). "And then we would anticipate that your Honor would go through and decide which of the discretionary legal financial obligations are appropriate." 6/27/16 RP 4. The prosecutor handed the proposed documents to the court. *Id.*

Defense counsel repeated his position the Court of Appeals ruling authorized a full resentencing at which the trial court could exercise discretion to make a new determination of what length of sentence and term of community custody would be appropriate, rather than simply

adjusting the existing term of community custody as the State advised the court. He noted Mr. Gleim had no countable criminal history (because it was too old) and the plea agreement with the prosecutor for an exceptional sentence downward was based on pleading guilty to four counts of possessing child pornography thereby yielding an offender score of 9. Defense counsel disputed the presentence report's conclusion that Mr. Gleim was a repeat offender based simply on his out of-state plea of guilty to a misdemeanor after spending over a year in jail on an unproven greater charge. Arguing nothing in Mr. Gleim's background or conduct warranted imposition of a high end sentence and one that exceeded a likely sentence had he actually molested a child, defense counsel asked the court to go along with the joint recommendation contained in the plea agreement and to not impose the high end of the standard range. 6/27/16 RP 4–8.

At the close of defense counsel's comments, the court asked if the prosecutor had anything to add. He stated he did not. 6/27/16 RP 9.

Defense counsel immediately made an oral motion to withdraw Mr. Gleim's guilty plea because the State failed to make the recommendation contemplated in the plea agreement, failed despite defense request to articulate why the State had agreed to make the recommendation, and undercut the agreement by misrepresenting verbally

and through pre-prepared documents the Court of Appeals directive.

6/27/16 RP 9–11; 6/28/16 RP 19–22. The State responded,

> PROSECUTOR: The State hasn't changed its recommendation. It is stated in what the plea of guilty says, your Honor. So, I guess, if that is a fundamental technicality, we reiterate what the plea agreement said, we reiterate our recommendation.
>
> THE COURT: I have the recommendation from both parties on that, counsel.
>
> MR. MAKUS [DEFENSE COUNSEL]: If his recommendation is forcing us to go ahead and recommend it, your Honor, we will. It is not a fulfilment of the plea agreement. When you make a plea agreement, the prosecutor is supposed to make the recommendation with some degree of advocacy. He has not done so in this case. ... I want to withdraw the guilty plea because the prosecutor has not fulfilled their agreement ... [c]learly has not fulfilled it. ...
>
> If the Court wants to deny the motion, I will prepare the appropriate papers and you can sign the appropriate papers saying our motion is denied for whatever the reason the Court wishes to give.

6/27/16 RP 10–11.

> The court ruled, "The motion is denied." 6/27/16 RP 11.
>
> DEFENSE COUNSEL: Does the Court wish to give a reason?
>
> THE COURT: The plea agreement is stated in the file and it has the recommendation from both parties. I know what the plea agreement is and what the recommendation is and it has not been changed.
>
> DEFENSE COUNSEL: The recommendation has not been changed, but why the recommendation was made has not been articulated.

THE COURT: You can do that if you would like.

DEFENSE COUNSEL: I'm asking the prosecutor to do it. He's the one who made the agreement that he would recommend it.

6/27/16 RP 11.

The court proceeded to re-sentence Mr. Gleim. Without discussion the court struck several pre-printed discretionary costs from the form provided by the State and set the LFOs at $800. CP 59, 75–76.

The trial court sentenced Mr. Gleim to 102 months concurrent on all four counts, with credit for 613 days served. 6/27/16 RP 12.

When again asked about the length of the community custody term to be used, the state responded,

PROSECUTOR: According to the Court of Appeals ... that is supposed to be 18 months, not 36.

THE COURT: It is 18 months. I didn't see it on the form. Community custody is 18 months. I'm signing the amended judgment and sentence. ...

6/27/16 RP 12–13.

Defense counsel thereafter submitted a proposed order denying Mr. Gleim's motion to withdraw the guilty plea. CP 68–69. At presentation of the order, the prosecutor remarked:

> PROSECUTOR: I wish to point out for the record that if it is deemed that this is a completely new sentencing and if it is deemed that [defense counsel] does have a valid argument that there has to be a complete reiteration of all the plea agreement, the State did reiterate the plea agreement before your Honor actually did pronounce the amended sentence.
>
> And again, this is all assuming that the Court was to do anything more than what the appellate court required it to do. ...

6/28/16 RP 17.

After further discussion, the court asked the prosecutor to also prepare a proposed order denying motion. 6/28/16 RP 23. Two weeks later, the court signed and filed the order submitted by the prosecutor. CP 70–71.

Mr. Gleim timely filed a Notice of Appeal of the resentencing. CP 72–73.

Division Three recognized "[a] prosecutor's duty to abide by the terms of a plea agreement applies both at an original sentencing hearing as well as at a resentencing after remand." *Slip Opinion* at p. 1. According to the court, however,

> What is unclear under our case law is the scope of a prosecutor's duty when a remand order permits the trial court to choose between full resentencing and a more limited remedy. In such circumstances, must a prosecutor advocate for full resentencing if doing so is the only way the trial court might issue a judgment consistent with the terms of the plea agreement?

*Slip Opinion* at p. 1–2. The court continued, "Our answer is no. Until the trial court makes clear that it has opted for full resentencing, a prosecutor's duties are akin to those on an appeal. The prosecutor may advocate for finality and oppose full resentencing, even if it means the sentence sustained against the defendant differs from the disposition recommended in the parties' plea agreement." *Slip Opinion* at p. 2.

## V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review under RAP 13.4(b)(1) and (2) to resolve a conflict with decisions of this Court and the Court of Appeals.

### 1. Division Three's decision is contrary to established precedent and Mr. Gleim is entitled to a full resentencing under the remand order.

In the initial sentencing, Mr. Gleim was given a standard range sentence of 102 months of incarceration plus 36 months of community custody. Under RCW 9.94A.701(1)(a), the trial court was required to impose a 36-month term of community custody for Mr. Gleim's sex offenses.[6] But the trial court was also prohibited from imposing a combined term of incarceration and community custody that exceeded the statutory maximum of 120 months. RCW 9.94A.505(5). The limited

[6] RCW 9.94A.701(1)(a) (trial court must impose 36–month community custody term when sentencing a person for "a sex offense not sentenced under RCW 9.94A.507").

remedy of a "ministerial correction" is appropriate only if the error does not implicate the trial court's discretion. *State v. Ramos*, 171 Wn.2d 46, 48–49, 246 P.3d 811 (2011).

However, a mistake regarding the period of community custody requires a full resentencing even if the correct term is fixed by statute (and thus is not subject to the trial court's discretion). *State v. Broadaway*, 133 Wn.2d 118, 135–36, 942 P.2d 363 (1997). This is so because the term of community custody and the term of incarceration are linked, so the trial judge must be allowed to "reconsider the length of the standard range sentence *in light of* the correct period of community [custody] required." *Id.* at 136 (emphasis added).

Division Three concluded —without citation to authority—that until the trial court's "selection" of remedy between "resentencing Mr. Gleim in full or merely amending the term of community custody," "the State's obligation to advance the terms of the plea agreement never ripened." *Slip Opinion* at p. 6–7. This disregards that from the outset of the resentencing hearing the trial court had an array of resentencing options from which to choose in exercising its sentencing discretion. Reducing the term of community custody to 18 months is one way to correct the error and ensure that the combined term does not exceed the

statutory maximum. But that is not the only way. Another way to comply with RCW 9.94A.505(5) would be to reduce the term of incarceration by 18 months. That approach is the only way to ensure that Mr. Gleim will eventually serve the full 36 months of community custody. Other options would be to reduce both the term of incarceration and term of community custody in some combination consistent with RCW 9.94A.701(9).

The point is that the trial court had a choice to exercise its discretion from the outset of the resentencing hearing, a sentencing discretion "in light of the correct period of community custody]" and one that was fully envisioned by the appellate court in its remand order. *See Broadaway*, 133 Wn.2d at 136. The State's obligation to advance the terms of the plea agreement was fully ripe once the hearing commenced, and its failure to do so was a breach of the plea agreement.

**2. The court erred in denying Mr. Gleim's motion to withdraw his guilty plea because the state breached the plea agreement at resentencing by acting explicitly and through conduct to undercut the terms of the agreement.**

A plea bargain is a binding agreement between the defendant and the state which is subject to the approval of the court. *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). Because such agreements are contractual in nature, the law imposes an implied promise by the state to act in good faith. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199

(1997). Because plea agreements concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to the terms of the agreement. Id. (citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)); U.S. Const. amend 14.

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled." *Santobello*, 404 U.S. at 262. When a prosecutor breaks the agreement, "he undercuts the basis for the waiver of constitutional rights implicit in the plea." *Santobello*, 404 U.S. at 268 (Marshall, J., concurring in part, dissenting in part); *Tourtellotte*, 88 Wn.2d at 584.

In return for the defendant's guilty plea, the state must make the promised recommendation. *Sledge,* 133 Wn.2d at 840. While prosecutors are not required to make the recommendation enthusiastically, the state has a corollary duty "not to undercut the terms of the agreement explicitly or by conduct evidencing intent to circumvent the terms of the plea agreement." *Sledge,* 133 Wn.2d at 840–41; *State v. Talley*, 134 Wn.2d 176, 187, 949 P.2d 358 (1998); *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781, *rev. denied*, 138 Wn.2d 1002 (1999).

"The State's duty under the plea bargain extends to resentencing, at which it must make the same recommendation before the new sentencing [court]." *State v. Arko,* 52 Wn. App. 130, 132, 758 P.2d 522 (1988). At the same time, a prosecutor owes duties as an officer of the court to participate in the sentencing proceedings, to answer the court's questions candidly in accordance with the duty of candor toward the tribunal and, consistent with RCW 9.94A.460, not to hold back relevant information regarding the plea agreement. *Sledge,* 133 Wn.2d at 840; *see also* RPC 3.3(a).

The test to determine breach of a plea agreement is whether the words and actions of the State, when viewed objectively, contradict a promise. *Sledge,* 133 Wn.2d at 840. Appellate courts apply an objective standard to determine whether the state has breached a plea agreement irrespective of the prosecutors' motivations or justifications for the failure to perform. *Jerde*, 93 Wn. App. at 780 (citations omitted).

**a. The State breached the plea agreement in several ways.**

The words and action of the State at resentencing, when viewed objectively, contradict its promise to recommend an exceptional downward sentence of 36 months followed by 36 months community custody. CP 14, 94.

From the outset the State repeatedly misrepresented that on remand the appellate directive limited the trial court's authority to changing the 36 month term of community custody to 18 months in order to avoid the problem of exceeding the statutory maximum of 120 months when combined with the previously imposed 102-month term of confinement. 6/13/16 RP 1; 6/13/16 RP 1–2, 6/27/16 RP 3–4, 12–13; 6/28/16 RP 17 ("And again, this is all assuming that the Court was to do anything more than what the appellate court required it to do. ...".

The State had sought this precise limited remedy in the prior appeal and the Court of Appeals rejected it. CP 97–98. The State's affirmative distortion of the appellate court directive not only directly undercut the recommendation promised in the plea agreement but was also a false statement of fact to the trial court in violation of RPC 3.3(a).

Instead, the appellate directive unambiguously held the proper remedy for violating RCW 9.94A.701(9)[7] is remand to the trial court to either amend the community custody term or to resentence consistent with the statute. CP 97–98, citing *In re Pers. Restraint of McWilliams,* 182

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[7] RCW 9.94A.701(9) provides:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Wn.2d at 217; *State* v. *Boyd,* 174 Wn.2d 470, 473, 275 P.3d 321 (2012); *State v. Winborne,* 167 Wn. App. 320, 330, 273 P.3d 454 (2012). The court elaborated that the trial court had many resentencing options available and "should be permitted to exercise its sentencing discretion on remand," subject only to the statutory constraints of the Sentencing Reform Act. CP 97–98.

The State additionally bolstered its misrepresentation and undercut the promised recommendation by submitting the proposed Amended Judgment and Sentence document, on which it had pre-typed the previously imposed "102" months of total confinement on each of counts 1 through 4 and an amended community custody term of "18" months. CP 60; 6/13/16 RP 2 ("... [a]nd I have prepared a proposed order amending [the term of community custody to 18 months]"); 6/27/16 RP 4 ("So the only difference between this and the original judgment and sentence is that it specifies that the term of community custody is 18 months."); 6/28/16 RP 19.

The State further failed to fulfill the promise of its plea agreement by refusing defense counsel's request to articulate even minimal reasons it entered into the agreement. *See* RCW 9.94A.431(1) (requiring the prosecutor and defendant to state to the court "on the record, the nature of

the agreement and the reasons for the agreement."); *see also Arko*, 52 Wn. App. at 132 ("The prosecutor is obliged to give full and wholehearted compliance with the plea bargain, (citation omitted) although he need not elaborate on the recommendation unless the defendant so requests, *State v. James*, 35 Wn. App. 351, 356–57, 666 P.2d 943 (1983) ... .").

A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. *Sledge*, 133 Wn.2d at 840. The prosecutor here did not utter the words of the actual sentencing recommendation, instead choosing to say four times the State "reiterated" what the plea agreement said. 6/27/16 RP 10; 6/28/16 RP 17, 18. This rendition of "making" the recommendation is arguably consistent with case authority saying the recommendation need not be made "enthusiastically." *Sledge*, 133 Wn.2d at 840; *Talley,* 134 Wn.2d at 183; *State v. Coppin*, 57 Wn. App. 866, 874, 791 P.2d 228, *rev. denied,* 115 Wn.2d 1011, 797 P.2d 512 (1990). However the State's words and actions, viewed objectively, violate its 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.

**b. The motion to withdraw guilty plea should have been granted because the prosecution's breach of the plea agreement amounted to manifest injustice.**

A trial court "shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). Our courts "have recognized the following circumstances as amounting to manifest injustice: the denial of effective assistance of counsel, the defendant's failure to ratify the plea, an involuntary plea, and the prosecution's breach of the plea agreement." *State v. Mendoza*, 157 Wn.2d 582, 586, 141 P.3d 49 (2006) (citation omitted). If an accused can show that the prosecutor has breached the plea agreement, he has demonstrated actual and substantial prejudice from the prosecutor's violation of his constitutional due process rights. *In re Lord*, 152 Wn.2d 182, 189, 94 P.3d 352 (2004).

In this case, the State breached the plea agreement. The actual effect of the prosecutor's arguments on the court is irrelevant. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 88, 143 P.3d 343 (2006). The prosecutor is required to act in good faith and advocate for the agreed sentence regardless of whether the court imposes that sentence. *Id.*; *see also Santobello*, 404 U.S. at 262–263 (remand is necessary even if the court did not base its exceptional sentence on those complaints or allegations). No harmless error test applies. *Carreno-Maldonado*, 135 Wn. App. at 88. Thus it is irrelevant whether the trial court would have

imposed the same sentence regardless of the state's breach of the plea agreement. *See, e.g.* 6/28/16 RP 23.

Fundamental fairness requires that, in a prosecution initiated in a state court, the terms of a plea agreement be enforced against the State. *Santobello*, 404 U.S. at 262, 30 L.Ed. 427, 92 S.Ct. 495 (fact that second prosecutor who made a specific recommendation was unaware of first prosecutor's agreement to stand silent on sentencing, did not excuse the breach). Thus it is immaterial that in this case the elected prosecutor as representative of the State at resentencing was not the deputy prosecutor who entered into the plea agreement. *Cf.* CP 19, 62.

The remedy for a breach is either a new sentencing hearing before a different judge, where the prosecutor provides specific performance on the agreement, or an opportunity for the accused to withdraw his plea. *Santobello*, 404 U.S. at 263; *see also Sledge*, 133 Wn.2d at 846 n.8 (sentencing before a different judge is appropriate when the sentencing judge has already-expressed views on the sentence). Because the fundamental rights waived by entering a guilty plea belong to the accused, the defendant's preference controls unless the State can show compelling reasons not to allow that remedy. *Tourtellotte*, 88 Wn.2d at 585; *Jerde*, 93 Wn. App. at 780; *Santobello*, 404 U.S. at 267 (Douglas, J., concurring). A

defendant's right to either remedy exists even though the sentencing judge was not bound or influenced by the prosecutor's recommendation. *Santobello*, 404 U.S. at 262–263; *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982).

The trial court erred in denying Mr. Gleim's motion to withdraw his guilty plea because the record substantiates the state breached the plea agreement in violation of his constitutional right to due process. The matter must be remanded for resentencing before a different judge.

## VI. CONCLUSION

For the reasons stated, Mr. Gleim respectfully asks this Court to accept review of his petition.

Respectfully submitted on August 30, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 30, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A (opinion filed 8/1/17):

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Teresa Chen, Special DPA

s/Susan Marie Gasch, WSBA #16485

# GASCH LAW OFFICE

## August 30, 2017 - 1:51 PM

## Transmittal Information

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| **Appellate Court Case Number:** | 34577-7 |
| **Appellate Court Case Title:** | State of Washington v. Lonnie D. Gleim, Jr. |
| **Superior Court Case Number:** | 14-1-00226-0 |

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August 1, 2017

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CASE # 345777
State of Washington v. Lonnie D. Gleim, Jr.
WALLA WALLA CO SUPERIOR COURT No. 141002260

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: **E-mail** Honorable M. Scott Wolfram
c: Lonnie D Gleim, Jr. #934937
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**FILED**
**AUGUST 1, 2017**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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|---|---|---|
| STATE OF WASHINGTON, | ) | No. 34577-7-III |
| | ) | |
| Respondent, | ) | |
| | ) | |
| v. | ) | PUBLISHED OPINION |
| | ) | |
| LONNIE DEAN GLEIM, JR., | ) | |
| | ) | |
| Appellant. | ) | |

PENNELL, J. — A prosecutor's duty to abide by the terms of a plea agreement applies both at an original sentencing hearing as well as at resentencing after remand. What is unclear under our case law is the scope of a prosecutor's duty when a remand

order permits the trial court to choose between full resentencing and a more limited remedy. In such circumstances, must a prosecutor advocate for full resentencing if doing so is the only way the trial court might issue a judgment consistent with the terms of the plea agreement?

Our answer is no. Until the trial court makes clear that it has opted for full resentencing, a prosecutor's duties are akin to those on an appeal. The prosecutor may advocate for finality and oppose full resentencing, even if it means the sentence sustained against the defendant differs from the disposition recommended in the parties' plea agreement.

Applying this principle to the present case, we reject Lonnie Dean Gleim Jr.'s claim that the prosecutor violated the terms of Mr. Gleim's plea agreement on remand by not advocating for full resentencing. We also disagree with Mr. Gleim's other assignment of error pertaining to the imposition of legal financial obligations (LFOs). The matter is therefore affirmed.

## BACKGROUND

Mr. Gleim pleaded guilty to four counts of first degree possession of depictions of a minor engaged in sexually explicit conduct. Pursuant to a plea agreement, the parties

agreed to a joint recommendation of 36 months' confinement. This recommendation was substantially lower than the standard range of 77 to 102 months.

At the original sentencing hearing in 2015, the State and Mr. Gleim both requested an exceptional sentence downward of 36 months' confinement followed by 36 months' community custody. It is undisputed that the prosecutor abided by his duties under the plea agreement at this hearing. However, the trial court opted for a high-end sentence of 102 months on each count, all to run concurrently, plus 36 months of community custody. The court also imposed a series of discretionary and mandatory LFOs. Pertinent to this appeal, the court imposed $200 in unspecified "Court costs." Clerk's Papers (CP) at 28.

Mr. Gleim appealed. During his first appeal, Mr. Gleim successfully argued the total sentence imposed by the court exceeded the statutory maximum and discretionary LFOs were imposed without an adequate inquiry into ability to pay. *State v. Gleim*, No. 33209-8-III, slip op. at 1-2 (Wash. Ct. App. May 3, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/332098.unp.pdf. We remanded Mr. Gleim's case "to the trial court to either amend the community custody term or to resentence Mr. Gleim consistent with [RCW 9.94A.701(9)]" and to conduct a proper LFO inquiry. *Id.* at 6-7, 11.

Mr. Gleim's case returned to the trial court for proceedings before the original sentencing judge. On remand, the prosecutor initially informed the court the general purpose of the hearing was to amend Mr. Gleim's term of community custody and to conduct an individualized inquiry into LFOs. The defense objected, claiming the purpose was to conduct a full resentencing. After a continuance, the prosecutor revised his statement, explaining the purpose was either to amend the previous judgment or to issue a new judgment and sentence "that goes through everything." 1 Verbatim Report of Proceedings (VRP) (June 27, 2016) at 4. Defense counsel then continued to argue for a full resentencing and advocated at length for the joint recommendation contained in the plea agreement. At the close of defense counsel's comments, the court asked if the prosecutor had anything to add. He stated he did not.

Immediately after the prosecutor declined further comment, defense counsel made an oral motion to withdraw Mr. Gleim's guilty plea. The defense claimed the State had violated its plea agreement obligation to recommend a 36-month term of incarceration. The prosecutor responded the State had never changed its recommendation and the State reiterated the same recommendation. The court noted it had the parties' recommendation. The motion to withdraw the plea was then denied. After the court's oral ruling, defense

counsel complained the prosecutor never articulated any reasons in support of its 36-month recommendation. The court stood by its ruling.

After disposing of Mr. Gleim's motion to withdraw his plea, the court resentenced Mr. Gleim to 102 months concurrent on all four counts and 18 months community custody. This was the first time during the proceedings that the court clarified it would be resentencing Mr. Gleim, as opposed to merely amending the term of community custody. As part of the resentencing, the court also imposed $800 in LFOs, noting it was "taking off those that are voluntary fines." 1 VRP (June 27, 2016) at 12. The $800 imposed by the court includes a $500 victim assessment fee, a $100 DNA (deoxyribonucleic acid) collection fee, and a $200 clerk's filing fee.

Mr. Gleim appeals the sentence imposed on remand, arguing the State breached the plea agreement and the court failed to recognize and strike a discretionary LFO.

## ANALYSIS

### *Breach of plea agreement*

Mr. Gleim argues the trial court abused its discretion[1] by denying the motion to withdraw his guilty plea based on breach of the plea agreement. Because there was no

[1] We review a trial court's denial of a motion to withdraw a plea for abuse of discretion. *State v. Jamison*, 105 Wn. App. 572, 589-90, 20 P.3d 1010 (2001).

breach, we disagree.

Both the law of contracts and due process require prosecutors to abide by the terms of their plea agreements in good faith. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188-89, 94 P.3d 952 (2004). This duty applies both at an original sentencing hearing and at resentencing. *State v. Arko*, 52 Wn. App. 130, 132, 758 P.2d 522 (1988). Thus, if a plea agreement obliges the prosecutor to make a certain recommendation at sentencing, the same recommendation generally must be made if the case is remanded for resentencing after appeal. *Id.* at 135. However, during the period between initial sentencing and resentencing, a prosecutor's obligations are different. If a trial court imposes a sentence different from what was contemplated by a plea agreement, the prosecutor may defend the sentence on appeal and argue against resentencing. *Id.* at 134.

The circumstances confronted by the prosecutor during Mr. Gleim's remand proceedings were similar to those faced on appeal. Our prior opinion did not definitively order resentencing. Instead, we permitted the trial court to choose between amending the term of community custody and resentencing. Prior to the trial court's selection of remedy, the prosecutor was free to argue against resentencing, just as had been true on appeal. Because the trial court waited until the conclusion of the proceedings to determine whether it would be resentencing Mr. Gleim in full or merely amending the

term of community custody, the State's obligation to advance the terms of the plea agreement never ripened.

Significantly, the prosecutor never said anything during the proceedings to undermine the reasoning behind his initial sentencing recommendation of 36 months. There was no statement of regret or suggestion that the court's initial sentence of 102 months was substantively appropriate. Had the prosecutor made such statements or representations, the plea agreement may well have been undermined once the court opted for resentencing. But because the prosecutor merely presented the trial court with its remand options in a fairly neutral manner, the persuasive value of the plea agreement was never undermined. The prosecutor's comments left no doubt that if the court opted to conduct full resentencing, his recommendation would still be 36 months. We discern no breach of the prosecutor's obligations.[2]

Mr. Gleim complains the prosecutor misrepresented the terms of this court's remand order by indicating the only issue before the court was modification of the community custody term. While a misrepresentation to the court would be improper, it would not violate the terms of the plea agreement. In any event, viewing the record as a

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[2] Because the prosecutor submitted proposed forms to the trial court prior to the court's selection of remedy, such paperwork did not undermine the prosecutor's obligations under the plea agreement.

whole, there was no misrepresentation. During the second hearing on remand, the prosecutor clearly articulated the two options before the court, as set forth above. The fact that the prosecutor did not dwell on the option of resentencing did not constitute a breach. To the contrary, because the prosecutor was entitled to argue in favor of finality and against resentencing, the prosecutor acted within his discretion to emphasize the court's option to amend Mr. Gleim's term of community custody in lieu of resentencing.

*LFOs*

Mr. Gleim argues the court failed to recognize a discretionary LFO, the $200 "Clerk's Filing Fee." CP at 59. Because the trial court stated it intended to waive all discretionary fees, Mr. Gleim claims this fee should have been stricken. We disagree.

At Mr. Gleim's initial sentencing hearing, the trial court imposed $200 in "Court costs." CP at 28. In our prior opinion, we noted the judgment did not specify whether this $200 assessment was discretionary or whether it constituted a mandatory criminal filing fee under RCW 36.18.020(2)(h). *Gleim*, slip op. at 11 n.4. In an apparent response to this portion of our opinion, the judgment on remand identified the $200 assessment as a "Clerk's Filing Fee." CP at 59. Although the amended judgment did not state as much, clerk's fees are authorized under RCW 36.18.020. The only clerk's fee that may be imposed in a criminal case is a mandatory fee under RCW 36.18.020(2)(h). Given this

context, the judgment makes sufficiently clear the court's intent to impose a nondiscretionary fee. There was, therefore, nothing overlooked that requires further action.

CONCLUSION

The sentence imposed on Mr. Gleim is affirmed in full. Mr. Gleim's request to deny costs is granted.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Korsmo, J.

## GASCH LAW OFFICE

## August 30, 2017 - 1:51 PM

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