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SUPREME COURT NO. 98955-9
COA NO. 36960-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

EDUARDO SALAZAR,
Petitioner.

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

Walla Walla County Cause No. 15-1-00306-0

The Honorable M. Scott Wolfram, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Eduardo Salazar, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Eduardo Salazar seeks review of the Court of Appeals published opinion entered on July 28, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: The circumstances under which a court may amend a Judgment and Sentence are limited to those delineated by statute. Did the court exceed its statutory authority by amending Mr. Salazar’s sentence upon revocation of his DOSA sentence?

ISSUE 2: A prosecutor violates an accused person’s right to Due Process by failing to recommend the sentence agreed upon as part of a plea agreement. Did the prosecutor violate Mr. Salazar’s right to Due Process by recommending a high-end sentence (upon revocation of the DOSA sentence) when the plea agreement specified that he would recommend the mid-point of the standard range absent circumstances which had not come to pass?

IV. STATEMENT OF THE CASE

Eduardo Salazar pleaded guilty in 2015 to third degree assault, pursuant to a negotiated agreement with the state. CP 7-15.

As part of that agreement, the state pledged to recommend that Mr. Salazar be sentenced under the Drug Offender Sentencing Alternative (DOSA) statute. CP 10. The agreement clarified that the state would recommend that he be sentenced to serve 12.75 months in prison, followed, by 12.75 months of community custody. CP 10. The total of twenty-five months represented the mid-point of the standard range for the offense. CP 10.

Mr. Salazar's signed Statement on Plea of Guilty informed him that the state would increase its sentencing recommendation only if it was discovered that he had additional criminal history before his sentencing hearing. CP 9.

At Mr. Salazar's 2015 sentencing hearing, the prosecutor made the agreed-upon recommendation and the court imposed the recommended mid-range, prison-based DOSA sentence. *See* RP 8-16; CP 18-29.

The sentencing court signed the Judgment and Sentence, which delineated the maximum period of confinement that would be imposed upon Mr. Salazar if he failed to comply with the terms of his DOSA sentence as 12.75 months (the other half of his mid-range sentence):

IF THE DEFENDANT VIOLATES THE SENTENCE
CONDITIONS HEREIN.... THE COURT SHALL HOLD A
VIOLATION HEARING AND MAY IMPOSE SANCTIONS. IN
ADDITION, FOR ANY WILLFUL VIOLATION,
CONFINEMENT CONSISTING OF UP TO [] **THE HIGH**

END OF THE STANDARD RANGE, OR [X] THE REMAINING ONE HALF OF THE MIDPOINT OF THE STANDARD RANGE FOR THE OFFENSE HEREIN MAY BE IMPOSED.

CP 25 (emphasis in original).

In 2018, the state alleged that Mr. Salazar had violated the terms of his DOSA sentence by absconding from Community Custody. *See* CP 39-41.

A hearing was held in July 2019 and Mr. Salazar admitted to the alleged sentencing violations. RP 19-20 The court ordered that his DOSA sentence would be revoked. RP 22.

But the court did not order Mr. Salazar to serve the remaining 12.75 months of his original mid-range sentence. Instead, at the state's recommendation, the court imposed a *new, high-end* sentence of twenty-nine months (with credit for time served). RP 24, 29; CP 42-44.

Mr. Salazar vigorously objected, noting that his sentence was already final and that the state was, essentially, making an oral motion to modify his Judgment and Sentence, without any basis. RP 27-28.

Nonetheless, the court sided with the state. CP 29-30. The revocation court did not clarify any source for the authority it was exercising by resentencing Mr. Salazar, rather than imposing the sanction included in the Judgment and Sentence. RP 29-30; CP 42-44.

Mr. Salazar timely appealed. CP 46. The Court of Appeals affirmed his sentence in a published opinion. *See Appendix.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the DOSA-revocation court did not have the authority to amend Mr. Salazar's Judgment and Sentence almost four years after it became final, without any statutory basis.

Mr. Salazar's Judgment and Sentence, which became final in 2015 specified the sanction that would be imposed if he violated the terms of his community custody. CP 25. Specifically, the sentencing court ordered that, in the event of a willful violation, Mr. Salazar would be confined for up to "the remaining one half of the midpoint of the standard range." CP 25.

But, upon finding that Mr. Salazar had violated the terms of his sentence, that is not the sanction that the DOSA-revocation court imposed. CP 42-44. Instead, the court, in effect, amended the Judgment and Sentence by imposing the high end of the standard range instead. CP 42-44.

The court did not have the authority to amend the Judgment and Sentence in this manner because it was a final order and none of the statutory criteria for amendment had been met.

A court's sentencing authority is limited to that granted by statute. *State v. Bergen*, 186 Wn. App. 21, 28, 344 P.3d 1251 (2015) (citing *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986)); See also *State v. Yancey*, 193 Wn.2d 26, 30, 434 P.3d 518 (2019); *In re West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005).¹

The circumstances under which a court may amend a final Judgment and Sentence are also clearly delineated by statute and court rule. *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (citing *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)) ("The SRA allows modification only in certain specific and carefully delineated circumstances).

A sentencing court retains no inherent authority to modify a Judgment and Sentence when the statutory criteria for amendment are not met. *State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003).

Here, the DOSA-revocation court acted outside its statutory authority by attempting to amend Mr. Salazar's Judgment and Sentence, which had become final almost four years earlier, when none of the statutory criteria for modification had been met. *Id.* The court was

¹ Whether a sentencing court has exceeded its authority is a question of law, reviewed *de novo*. *Bergen*, 186 Wn. App. at 28.

required to impose the sanction ordered in the Judgment and Sentence: the remaining half of the mid-point of the standard range. CP 25.

Even so, the Court of Appeals affirms Mr. Salazar’s increased sentence, relying on RCW 9.94A.660(7)(c), which permits a court to “order the offense to serve a term of total confinement within the standard range” upon a sentencing violation. Appendix, pp. 2-3.

But the Court of Appeals ignores the critical language in Mr. Salazar’s Judgment and Sentence, in which the sentencing court had *already ordered* the sanction that would be imposed upon a violation:

IF THE DEFENDANT VIOLATES THE SENTENCE CONDITIONS HEREIN.... THE COURT SHALL HOLD A VIOLATION HEARING AND MAY IMPOSE SANCTIONS. IN ADDITION, FOR ANY WILLFUL VIOLATION, CONFINEMENT CONSISTING OF UP TO [] **THE HIGH END OF THE STNADARD RANGE, OR [X] THE REMAINING ONE HALF OF THE MIDPOINT OF THE STANDARD RANGE** FOR THE OFFENSE HEREIN MAY BE IMPOSED.

CP 25 (emphasis in original).

The only way to impose a sanction against Mr. Salazar beyond “the remaining one half of the midpoint of the standard range” would have been to modify the Judgment and Sentence. But the Court of Appeals is unable to point to any statute permitting the court to make such a modification under these circumstances.

The court exceeded its statutory authority by attempting to modify Mr. Salazar's Judgment and Sentence upon revocation of his DOSA. *Id.* Mr. Salazar's case must be remanded for entry of the sanction ordered by his Judgment and Sentence. *Id.*

This significant question of constitutional law is of substantial public interest. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that the prosecutor violated Mr. Salazar's right to Due Process by failing to adhere to the terms of the plea agreement.

The plea agreement between Mr. Salazar and the state specified the terms under which the state could increase its sentencing recommendation to the court. CP 9. Those circumstances were limited to situations in which Mr. Salazar was (a) convicted of new crimes before sentencing, or (b) discovered to have additional criminal history that was not previously known. CP 9.

Neither of those criteria were met here. *See RP generally.* Still, four years later, when Mr. Salazar's DOSA was revoked, the state did not recommend the sentence agreed upon in the plea agreement. RP 24. Instead, the state asked the court to impose the high end of the standard range. RP 24.

The prosecutor violated Mr. Salazar’s right to Due Process by failing to adhere to the terms of the plea agreement.

A plea agreement constitutes a contract between an accused person and the state. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015), *as corrected* (Apr. 13, 2015). The agreement imposes a duty upon the state to act in good faith and not to “undercut the terms of the agreement.” *Id.*

Constitutional Due Process also “requires a prosecutor to adhere to the terms of the agreement by recommending the agreed upon sentence.” *Id.* at 8; U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. This is because the accused waives significant constitutional rights by pleading guilty, in exchange for the “benefits of the bargain.” *Id.* When the state breaches the agreement, “it undercuts the basis for the waiver of constitutional rights implicit in the plea.” *Id.* at 9 (*quoting State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977)).²

Mr. Salazar waived his constitutional rights to a jury trial, etc. in exchange for the state’s promise to recommend a mid-range sentence. CP 10. As part of the plea agreement, the state further promised to increase its sentencing recommendation only if Mr. Salazar was convicted of new

² Whether the state has violated Due Process by breaching the terms of a plea agreement may be raised for the first time on appeal. *State v. Van Buren*, 101 Wn. App. 206, 212, 2 P.3d 991 (2000); RAP 2.5(b)(3).

crimes or if it was discovered that he had previously unknown criminal history. CP 9.

Nonetheless, the Court of Appeals holds that the prosecutor did not breach the plea agreement because the agreement “does not address the possible sanction the prosecutor might seek in the even that Mr. Salazar violated the sentence after it was imposed.” Appendix, p. 4.

But that is exactly the issue. The plea agreement sets out an exclusive list of circumstances in which the prosecutor would recommend a sentence higher than mid-range. CP 10. That list *does not include* the circumstance of a community custody violation. CP 10. The prosecutor’s recommendation of a higher sentence based on circumstances not included in the plea agreement’s list of potential triggers for such a recommendation violated the agreement.

The state violated the terms of its agreement with Mr. Salazar by recommending a high-end sentence even though none of the agreed-upon criteria for doing so had been met. RP 24; CP 9-10. That failure to comply with the plea agreement violated Mr. Salazar’s right to Due Process. *MacDonald*, 183 Wn.2d at 8. The proper remedy is remand for Mr. Salazar to choose either to withdraw his guilty plea or to specifically enforce the agreement against the state. *Van Buren*, 101 Wn. App. at 217.

This significant question of constitutional law is of substantial public interest because it could affect all cases involving a plea agreement to a DOSA sentence. This Court should accept review. RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State Constitution. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted August 27, 2020.



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Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to appellant's last known address:

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Connell, WA 99326

and I sent an electronic copy to

Walla Walla County Prosecuting Attorney
jnagle@co.walla-walla.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on August 27, 2020.



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Attorney for Appellant/Petitioner

APPENDIX:

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July 28, 2020

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CASE # 369609
State of Washington v. Eduardo Miranda Salazar
WALLA WALLA CO SUPERIOR COURT No. 151003060

Dear 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 the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. 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
Clerk/Administrator

RST:ko
Attach.

c: **E-mail** Hon. M. Scott Wolfram
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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 36960-9-III
Respondent,)	
)	
v.)	
)	
EDUARDO MIRANDA SALAZAR,)	PUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Eduardo Salazar appeals the revocation of his prison-based drug offender sentencing alternative (DOSA) entered following his guilty plea to a charge of third degree assault. Mr. Salazar contends the court erred by imposing the maximum standard range sentence when revoking his DOSA and claims the State violated the plea agreement when it argued for a higher sentence during the revocation hearing. We affirm.

Mr. Salazar faced a standard range of 22-29 months in prison. The parties jointly recommended the DOSA sentence of 25.5 months split between treatment in prison and community custody. The court accepted the recommendation and imposed the requested sentence. The judgment and sentence form noted that the 12.25 months of community custody could be revoked and Mr. Salazar returned to prison in case of violation.

Mr. Salazar did violate the conditions of community custody and stipulated that he committed three violations. Both the prosecutor and the Department of Corrections (DOC) recommended that the court impose a 29-month sentence; Mr. Salazar argued that the court was limited to imposing the remainder of the 25.5 month sentence.

The court revoked the DOSA and imposed a 29-month prison term with credit for time served. Mr. Salazar then timely appealed to this court. A panel considered his case without conducting argument.

ANALYSIS

Mr. Salazar argues that the court lacked authority to sentence him to 29 months after revoking the DOSA. He also argues that the prosecutor violated the plea agreement by recommending that sentence. We address his contentions in the order listed.

Court Authority

Mr. Salazar argues that the court could not “modify” his sentence as it did. The governing statute allowed the court to do what it did.

RCW 9.94A.660(7)(a) authorizes the court to take action if a violation of a DOSA sentence is brought before it. RCW 9.94A.660(7)(b) empowers the court to either modify the conditions of the DOSA or impose sanctions under RCW 9.94A.660(7)(c). In turn, that later provision states:

The court may order the offender to serve a term of total confinement within the standard range of the offender’s current offense at any time during the period of community custody if the offender violates the

conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

RCW 9.94A.660(7)(c).

In contrast, when an offender violates the DOSA conditions while in prison, DOC is authorized to take action. RCW 9.94A.662. In that instance, DOC is empowered to reclassify the offender and order him to serve the remaining balance of the original sentence. RCW 9.94A.662(3).

Mr. Salazar's argument confuses the authority of the court with that of DOC. In reclassifying an offender who fails his DOSA sentence while in prison, DOC simply converts the remainder of the original sentence, including the part that would have been served in the community, to a straight prison term. In contrast, the court deals with an offender who violates the DOSA sentence upon return to the community. In that instance, the trial court has *carte blanche* to maintain the DOSA sentence, modify it, or impose its own prison sentence within the standard range. Here, the trial court exercised that last option.

The judgment and sentence warned Mr. Salazar that he could face the remaining half of the sentence in prison if he failed to comply. That warning notice, however, did not circumscribe the trial court's statutory authority to impose its own sanctions if he violated the terms of community custody.

The trial court did not err by imposing the 29-month term.

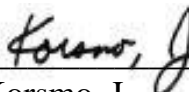
Plea Agreement

Mr. Salazar also argues that the prosecutor breached the plea agreement by failing to recommend the 25.5-month sentence upon revocation of the DOSA. We need not discuss this argument at any length because there is no factual support for it.

Mr. Salazar rightly contends that the government is bound to follow its plea agreement. However, he cannot show any breach of that agreement. The agreement does not address the possible sanction the prosecutor might seek in the event that Mr. Salazar violated the sentence after it was imposed. The prosecutor simply cannot violate an agreement he did not make. *State v. Church*, 5 Wn. App. 2d 577, 585, 428 P.3d 150 (2018), *review denied*, 192 Wn.2d 1020 (2019).

There was no breach of the plea agreement.

Affirmed.

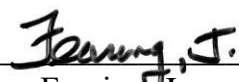


Korsmo, J.

WE CONCUR:



Pennell, C.J.



Fearing, J.

LAW OFFICE OF SKYLAR BRETT

August 26, 2020 - 6:12 PM

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