SUPREME COURT NO. 89912-6
NO. ~~69414-5-I~~ 69415-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD WAYNE MACDONALD,

Petitioner.

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

The Honorable Harry McCarthy, Judge

PETITION FOR REVIEW







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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Ronald Wayne MacDonald asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals' unpublished decision in State v. MacDonald, filed January 21, 2014 ("Opinion"), attached as an Appendix.

C. ISSUE PRESENTED FOR REVIEW

Contrary to the plea agreement negotiated by the State and the Petitioner, the "investigating officer," here the lead detective, legally an "arm" of the prosecution, argued for imposition of the statutory maximum term of imprisonment.

Under the holding of the majority of Justices – but not the lead opinion – in State v. Sanchez,[1] did the State breach the plea agreement in violation of the petitioner's state and federal constitutional due process rights by arguing in violation of its own promise?

[1] State v. Sanchez 146 Wn.2d 339, 46 P.3d 774 (2002).

D. STATEMENT OF THE CASE[2]

The State charged MacDonald with first degree felony murder of Arlene Roberts, who was killed during an apparent burglary of her trailer home in 1978. CP 1-10, 76-78. Police suspected MacDonald, who was leading a quiet life in Reno, Nevada, based on their belief that his fingerprints matched prints found on traveler's checks and bank documents found in Roberts's trailer. CP 52, 102-03.

Following plea negotiations, the State amended the charge to second degree manslaughter. CP 78. MacDonald entered an Alford[3] plea. CP 79-84; 5RP 8-13. The parties' agreed-upon recommendation was five years of incarceration[4] suspended on the condition that MacDonald serve 16 months in the King County jail. CP 98, 101-10, 191-92; RCW 9.92.060 (authorizing such a sentence). The primary detective on the more recent investigation, Scott Tompkins, was party to the plea

[2] The petition refers to the verbatim reports as follows: 1RP – 6/11/12 (CrR 3.5 hearing and motions in limine); 2RP – 6/12/12 (CrR 3.5 hearing and motions in limine); 3RP – 6/13/12 (motions in limine and jury selection); 4RP – 6/14/12 (discussion of possible resolution); and 5RP – 6/18/12 (Alford plea). The transcript of the August 8, 2012 sentencing hearing appears at CP 188-211.

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

[4] MacDonald argued the sentence should be suspended for one year whereas the State argued it should be suspended for five years. CP 98, 198.

negotiations and would have sat with the prosecutor at trial as permitted by ER 615. CP 112, 147-48; 1RP 9-10.

At the sentencing hearing, the prosecutor made the agreed-upon 16-month recommendation but alerted the court that Detective Tompkins also wished to address the court. The prosecutor informed the court she believed such argument was permissible because case law "tend[ed] to support"[5] permitting a separate recommendation. Tompkins explained he was speaking on behalf of the deceased Roberts. Over defense objection, Tompkins presented pictures of the crime scene and Roberts, suggested that the DNA evidence (which excluded MacDonald) was contaminated, opined that the crime was one a 17-year-old (MacDonald's age in 1978) could have easily committed, and made other arguments in favor of the statutory maximum sentence. CP 192-97 (attached to Petitioner's opening brief as an Appendix).

The court imposed a minimum sentence of 55 months of incarceration, with a maximum term of 60 months, the statutory maximum for the offense. CP 99-100, 144-45, 203-08.

MacDonald moved to withdraw his plea, arguing Tompkins breached the plea agreement. CP 111-78. The superior court denied the motion and ordered the case transferred to the Court of Appeals. CP 212-

[5] CP 193-94.

14. MacDonald also filed a notice of appeal of the judgment and sentence. CP 215-19.

On appeal, MacDonald argued that under the holding of a majority of justices in this Court's Sanchez opinion, the State breached the plea agreement in violation of the petitioner's state and federal constitutional due process rights. Brief of Appellant.

In response, the State argued the lead detective was merely acting as a victim advocate, which was permitted by statute and the State constitution. Brief of Respondent.

In reply, the Petitioner reiterated that, under Sanchez, the lead detective was an arm of the prosecution, which had entered into a contract to make a specific recommendation, and therefore Tomkins was not entitled to assume that role. Petitioner explained that even if the controlling portion of Sanchez did not *explicitly* discuss whether the lead detective could also wear the hat of victim advocate, the State cited no authority for the proposition that this representative *must* be the lead detective, nor any policy in favor of such. Because the victim's rights provision of the state constitution could be harmonized with state and federal due process rights, petitioner argued, the Courts were required to interpret the provision in a manner that gives effect to both. Such an interpretation precluded a sentencing recommendation by a lead detective

– a party – that undermines a plea agreement because it violates state and federal due process rights. Reply Brief of Appellant at 3.

In its January 21, 2014 unpublished opinion, the Court of Appeals accepted the State's argument and affirmed the trial court. Opinion at 4-7.

E. REASONS REVIEW SHOULD BE ACCEPTED

WHERE THE LEAD DETECTIVE ARGUED FOR IMPOSITION OF THE MAXIMUM SENTENCE, CONTRARY TO THE PLEA AGREEMENT, AND IN VIOLATION THE DECISION OF THE MAJORITY OF JUSTICES IN STATE V. SANCHEZ, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (3).

This Court should accept review under RAP 13.4(b)(1). The Court of Appeals' opinion conflicts with the holding of a majority of the justices in State Sanchez, 146 Wn.2d 339, 46 P.3d 774 (2002). Yet because the lead opinion does not reflect the holding of the case, it appears some confusion has resulted in the lower courts. See State v. Carreno-Maldonado, 135 Wn. App. 77, 84, 143 P.3d 343 (2006); State v. Lindahl, 114 Wn. App. 1, 11-12, 56 P.3d 589 (2002) (both cases misstating the holding of the de facto Sanchez majority as to advocacy by primary investigating officer).

This Court should also accept review of the Petitioner's case under RAP 13.4(b)(3) because it involves an important constitutional question involving the rights of an accused – as well as a crime victim – in the plea

bargaining process. Moreover, as the Court of Appeals' decision reveals, additional clarification is needed as to the propriety of an "arm" of the prosecution, a party to the plea contract, acting as the victim advocate at sentencing.

1. Federal and state constitutional due process protect the sanctity of plea agreements.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). In addition, constitutional "[d]ue process requires a prosecutor to adhere to the terms of the agreement." Id. at 839 (citing, inter alia, Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984)). When the State breaches a plea agreement, it "undercuts the basis for the waiver of constitutional rights implicit in the plea." State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977).

A plea agreement is a contract between the State and the accused; because the accused gives up important constitutional rights by pleading guilty, the State must adhere to the terms of the agreement by recommending the agreed-upon sentence. Sledge, 133 Wn.2d at 839. The State's duty of good faith requires it not undercut the terms of the agreement either (1) explicitly or (2) implicitly, by conduct indicating

intent to circumvent its terms. Sledge, 133 Wn.2d at 840; State v. Talley, 134 Wn.2d 176, 183-84, 949 P.2d 358 (1998); State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999).

The breach of a plea agreement is never harmless error. The plea bargaining process requires that both the State and the accused adhere to their promises. When this process is frustrated, the fairness of the sentencing hearing is in question. Such an error infects the entire proceeding and, as such, cannot be harmless. Carreno-Maldonado, 135 Wn. App. at 88.

2. Review is warranted under RAP 13.4(b)(1)

Because certain police officers act as an investigating arm of the prosecutor's office, "principles of fairness and agency" require that, at a minimum, the investigating officer be bound to the prosecutor's bargain. Sanchez, 146 Wn.2d at 356 (Chambers, J., concurring and dissenting) (joining four-judge "dissent" and thus constituting de facto majority on this issue). Sanchez consolidated two appeals: one involved an alleged plea breach by a Community Corrections Officer's argument at sentencing; the other involved an alleged breach by an investigating officer, Sergeant Dave Ruffin who argued strenuously against a proposed SSOSA at sentencing following a plea to multiple counts of child

molestation. Id. at 342-44. The lead opinion holds that neither officer breached the plea agreement. Id. at 355-56.

The "dissenting" opinion on this point – joined by Justice Chambers – holds that an investigative officer's recommendation differing from the prosecutor's recommendation constitutes a breach of the plea agreement. Id. at 362-63. This is so despite former RCW 9.94A.110,[6] which permits an "investigative officer" to *address* the court at sentencing. Sanchez, 146 Wn.2d at 363. That statute also allows the prosecutor to address the sentencing court, for example, but obviously does not permit the prosecutor to undercut a plea agreement. Id.

With Justice Chambers' "dissenting" vote on this point, this portion of the dissent constitutes the opinion of the majority of justices, and is thus the holding of the case.

The State's argument, accepted by the Court of Appeals in this case, was that Tompkins was acting as nothing more than the victim's representative. But this argument does not withstand the holding of the majority of justices in Sanchez that an investigating officer, an arm of the prosecution, is not permitted to make such a recommendation. Id. at 358-59, 364. In fact, majority of Supreme Court justices explicitly rejected that the sentencing court had no choice but to accept Sergeant Ruffin's

[6] This provision has been recodified as RCW 9.94A.500.

sentencing recommendation under former RCW 9.94A.110. But that statute also requires the court to hear from a victim's representative. See RCW 9.94A.500(1) (current codification). Because the Sanchez court considered and rejected a statute that mandates victim advocacy at sentencing as a basis for a disparate recommendation, that case controls the result here. For the foregoing reasons, this Court should therefore accept review under RAP 13.4(b)(1) because the Court's opinion conflicts with Sanchez.

3. Review is warranted under RAP 13.4(b)(3)

The Court of Appeals holding nonetheless purports to distinguish Sanchez with an assertion that the sergeant in Sanchez case did not explicitly offer his statements on the victim's behalf. Opinion at 6. The Petitioner will assume for the sake of argument that it is not clear from Sanchez that a lead detective may not, as a party to the plea agreement, simultaneously wear the hat of victim advocate. If that is the case, this Court should now take the opportunity to provide clarification on this important matter. RAP 13.4(b)(3).

While former RCW 9.94A.110 permits argument from individuals including an "investigative law enforcement officer" at sentencing, these provisions must be read in conjunction with the United States Supreme Court authority, which holds that a party's recommendation that

undermines a plea agreements violates constitutional due process. Sanchez, 146 Wn.2d at 367 (Madsen, J., dissenting), citing, inter alia, Santobello, 404 U.S. 257; Sanchez, 146 Wn.2d at 358 (Chambers, J., dissenting in part and concurring in part). This makes sense under the facts of this case.

The controlling portion of Sanchez does not, however, discuss Article 1, section 35. In the event the victim is unable to address the court, the "prosecuting attorney *may* identify a representative to exercise the victim's rights." Const. art. 1, § 35 (amend. 84) (emphasis added). But the Court of Appeals opinion cites no authority for the proposition that this representative *must* be the lead detective, nor any policy in favor of such. Opinion at 7. Because the victim's rights provision may be harmonized with state and federal due process rights, this Court should – and must – interpret the provision in a manner that gives effect to both. State v. Gentry, 125 Wn.2d 570, 625, 888 P.2d 1105 (1995) (citing Port of Longview v. Taxpayers, 85 Wn.2d 216, 232-33, 533 P.2d 128 (1974)). Such an interpretation precludes a sentencing recommendation by a lead detective – a party – that undermines a plea agreement because it violates state and federal due process rights.

In summary, the Court of Appeals opinion conflicts with Sanchez, and there has been confusion in the lower courts as to the holding of that

case. RAP 13.4(b)(1). But in the event that Sanchez does not control the result here, clarification of this matter is imperative. This Court should therefore accept review under RAP 13.4(b)(3) to resolve an important and potentially far-reaching constitutional question regarding the intersection of due process in plea bargaining on one hand, and the rights of a victim on the other..

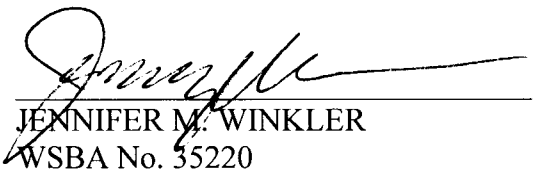
F. CONCLUSION

This Court should accept review of Mr. MacDonald's case under RAP 13.4(b)(1) and (3).

DATED this 7TH day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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# APPENDIX

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>RONALD WAYNE MACDONALD,<br>Appellant. | No. 69415-4-I<br>DIVISION ONE<br>UNPUBLISHED OPINION<br>FILED: January 21, 2014 |



LEACH, C.J. — Ronald MacDonald pleaded guilty to second degree manslaughter. He claims that the State breached his plea agreement when an investigating officer addressed the court as a representative of the victim and recommended a sentence greater than that set forth in the plea agreement. Because the plea agreement did not bind the investigating officer, we affirm.

Background

On June 11, 2012, the State charged MacDonald by amended information with murder in the first degree for killing Arlene Roberts in 1978.[1] After the trial began, the parties entered into a plea agreement. The State amended the

[1] At the time of the murder, the original detectives investigated several leads but did not develop a suspect, and the case became inactive. In 2010, technological advances allowed police to match MacDonald's fingerprints with the crime scene. During interviews with MacDonald in June 2011, police obtained additional evidence connecting him to the murder.

information to charge MacDonald with second degree manslaughter, and MacDonald entered an Alford[2] plea.

According to the plea, the parties agreed to recommend that MacDonald serve 16 months of confinement. The State would recommend a 5-year suspended sentence, and MacDonald would recommend a 1-year suspension.[3]

At the sentencing hearing, the prosecutor requested a 5-year sentence suspended on the condition that MacDonald serve 16 months of confinement. The prosecutor then informed the court,

> [Detective Tompkins] has asked me to ask the court if he could speak. Arlene Roberts has no family. Detective Tompkins has—I've made clear to him that I don't want to know what he's going to say. I have no idea what it will be. It doesn't do anything to affect my recommendation. My recommendation is still solidly for 16 months because that's what the agreement was.[4]

The court permitted Tompkins to speak on behalf of the victim.

In his address to the court, Tompkins stated,

> I feel obligated to ask for the maximum sentence in this case.
>
> This woman was born in 1898, and she has no living family. No one to speak on her behalf. And so[,] I know that you heard a lot in the 3.5 hearing about what happened in Reno in our interview of the defendant, but I also would like to introduce what happened to the victim. And I don't think you saw those, and I'd like to present those to you.

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[2] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[3] The parties recommended these sentences based upon former RCW 9.92.060 (1967). Because the crime here took place in 1978, before the enactment of the Sentencing Reform Act of 1981, chapter 9.94A RCW, the court applied the sentencing rules in effect at that time.

[4] Detective Tompkins was the lead detective in the recent investigation in this case.

Tompkins marked photos of the crime scene as an exhibit to the sentencing hearing. MacDonald objected, arguing, "I think he is an agent of the State. I think that does breach the plea agreement." In overruling this objection, the court explained, "In many cases, if not all criminal cases, particularly serious ones such as this, a victim advocate very frequently speaks to the court on behalf of the victim. There is no victim advocate speaking here today, and I think Detective Tompkins may take that role."

Tompkins argued that the victim "died a horrific death," addressed a number of evidentiary issues that MacDonald raised in his presentence report, and stated, "This happened to somebody, and somebody needs to be held accountable for it. No more and no less. And 16 months is not being held accountable." Following Tompkins's statements, the court stated, "I want to make clear that I allowed Detective Tompkins to speak insofar as he is speaking on behalf of the victim since there's not a victim advocate here today. . . .So I'll take his comments as they pertain to his advocacy on behalf of the victim."

On August 8, 2012, the court imposed the maximum sentence of 60 months of confinement with a minimum sentence of 55 months. The court explained, "I think to impose the sentence recommended by the parties would seriously deprecate the nature of that crime, and would be an affront to justice as well as the memory of Mrs. Roberts." The court noted that it would have imposed the same sentence regardless of Tompkins's statements.

On September 6, 2012, MacDonald filed a CrR 7.8 motion to withdraw his guilty plea, claiming that Tompkins "acted as an advocate to undercut the negotiated plea that he and the prosecutor had negotiated. The State's attempt to use the label of victim advocate to avoid the reality of Detective Tompkins's role and purpose at sentencing does not stand up to scrutiny." On September 14, 2012, the court entered a memorandum opinion and order of transfer to the Court of Appeals.

MacDonald appeals.

Analysis

"A plea agreement is a contract between the State and the defendant."[5] Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the State must comply with the terms of the agreement by recommending the agreed-upon sentence.[6] The State must not "undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement."[7] To determine if a prosecutor violated his duty to adhere to a plea agreement, "we review the entire sentencing record and ask whether the prosecutor contradicted by words or conduct the State's recommendation for a standard range sentence."[8] A prosecutor's breach

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[5] State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006) (citing State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997)).

[6] Carreno-Maldonado, 135 Wn. App. at 83 (citing Sledge, 133 Wn.2d at 839).

[7] Carreno-Maldonado, 135 Wn. App. at 83 (citing Sledge, 133 Wn.2d at 840; State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999)).

[8] State v. Halsey, 140 Wn. App. 313, 320, 165 P.3d 409 (2007) (citing State v. Williams, 103 Wn. App. 231, 236, 11 P.3d 878 (2000)).

of a plea agreement at sentencing violates due process.[9] Good motivations or a reasonable justification do not excuse a breach.[10]

MacDonald does not claim that the prosecutor breached the plea agreement by her own words or conduct. Rather, he claims that the State violated the plea agreement because, as an "investigating arm" of the prosecutor's office, the investigating officer is bound by the plea agreement. MacDonald cites State v. Sanchez,[11] in which five justices agreed that an investigating officer is part of the prosecution team and is bound by the prosecutor's plea agreement.

Article I, section 35 of the Washington Constitution grants a victim of a crime charged as a felony the right to "make a statement at sentencing . . . . In the event the victim is deceased, . . . the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding." RCW 7.69.030(14) requires a court to make a reasonable effort to ensure that crime victims have the right to present a statement personally or by representation at the sentencing hearing for felony convictions. Before a court imposes a sentence, RCW 9.94A.500(1) requires the court to consider "the risk assessment report and presentence reports, if any, including any victim impact

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[9] State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002).

[10] Halsey, 140 Wn. App. at 320 (citing State v. Van Buren, 101 Wn. App. 206, 213, 2 P.3d 991 (2000)).

[11] 146 Wn.2d 339, 46 P.3d 774 (2002) (Chambers, J., concurring/dissenting) (Madsen, C.J., dissenting).

statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer" about the appropriate sentence to impose.

In Sanchez, the prosecutor made no recommendation at the sentencing hearing.[12] The victim and her parents addressed the sentencing court.[13] The investigating officer also addressed the court, stating his own opinions and beliefs about the appropriate sentence.[14] Unlike Tompkins, the investigating officer in Sanchez did not purport to address the court on the victim's behalf.

Here, the prosecutor twice recommended a sentence in accordance with the terms of the plea agreement. After making her recommendation, the prosecutor informed the court that Tompkins wished to address the court on the victim's behalf. She explained that she did not know what he would say and that his statements would not affect the State's recommendation.

Notwithstanding the holding in Sanchez that an investigating officer was bound to a prosecutor's plea agreement based on basic principles of fairness and agency,[15] a victim advocate employed by the prosecutor's office is not prohibited from testifying contrary to the prosecutor's recommendation. Here, Tompkins made clear to the court that he spoke solely as a representative of the

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[12] Sanchez, 146 Wn.2d at 343.
[13] Sanchez, 146 Wn.2d at 343.
[14] Sanchez, 146 Wn.2d at 343.
[15] Sanchez, 146 Wn.2d at 356.

victim. He conveyed the victim's history and the circumstances of her death to the court in that capacity, not as a prosecution team member. Therefore, his request that the court reject the parties' recommended sentence was not part of an effort of the prosecutor's office to affect the sentencing procedure; rather, his purpose was an effort to accord the victim the "due dignity and respect" contemplated by article I, section 35 of the Washington Constitution.

Conclusion

Because Tompkins addressed the court as an advocate of the victim and not as an agent of the State, his statements did not constitute a breach of the plea agreement. We affirm.

Leach, C. J.

WE CONCUR:

Ian, J.

Schindler, J.

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON<br><br>Respondent,<br><br>v.<br><br>RONALD MACDONALD,<br><br>Petitioner. | ) | SUPREME COURT NO. _____<br>COA NO. 69415-4-I |

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD MACDONALD
DOC NO. 902835
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 7TH DAY OF FEBRUARY 2014.

X Patrick Mayovsky