NO. 91514-8

SUPREME COURT OF THE STATE OF WASHINGTON

GENE PALMER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY OF RESPONDING PARTY

The responding party is the State of Washington.

II. COURT OF APPEALS DECISION

Two years and four months after an order setting the amount of restitution was entered, Petitioner Gene Palmer appealed his Restitution Order. Palmer complained that his appeal was timely since the State could not prove Palmer knowingly, intelligently and voluntarily waived his right to appeal the restitution order since Palmer's attorney represented him at the restitution hearing where Palmer's presence was waived and he chose not to appear. On March 9, 2015, the court of appeals denied review as untimely in an unpublished opinion. *See* Appendix A.

III. ISSUE PRESENTED FOR REVIEW

The issues presented by the petitioner are not appropriate for review under the considerations of RAP 13.4(b). If review were accepted, the issues would be:

A. **Does the record show a knowing, intelligent and voluntary waiver of a right to appeal a restitution order when the defendant waived his right to be present at the restitution hearing after being informed of the date and purpose of the hearing, and that the court was ordering restitution?**

B. **Does a prosecutor breach a plea agreement by complying with the court's directive to provide factual accounting information during a court-ordered restitution hearing while maintaining her sentencing recommendation of no restitution?**

IV. STATEMENT OF THE CASE

On March 3, 2007, Appellant, Gene Palmer, was charged by Information with one count of First Degree Theft. CP at 114-15. Thereafter, Palmer filed for Chapter 13 bankruptcy which was approved on May 21, 2010. CP at 11-16. On October 27, 2011, pursuant to a plea agreement, the State filed an amended information charging Palmer with one count of False Information by a Claimant. CP at 109-110. The State's sentencing recommendation was six months of confinement and "[n]o restitution." RP (10/27/11) at 9; CP at 92-108.

At the Plea and Sentencing hearing, the court advised Palmer that it did not have to follow the parties' sentencing recommendation. RP (10/27/11) at 6-9. With that information before him, Palmer knowingly, intelligently, and voluntarily waived his right to appeal. RP (10/27/11) at 6-9. Palmer's counsel advised the court that Palmer had "[g]one line through line through" of the Statement of Defendant on Plea of Guilty and is "freely, [and] voluntarily agreeing into this [plea]." RP (10/27/11) at 6. The court asked if Palmer understood the Statement of Defendant on Plea of Guilty and whether he was pleading guilty freely and voluntarily. Palmer responded, "Yes, sir." RP (10/27/11) at 7. Palmer requested the court review the Affidavit of Probable Cause to establish the

factual basis for his *Alford*[1] plea. RP (10/27/11) at 8-9; CP at 98, 100, 105. The Court told Palmer "whatever the recommendation is by either your attorney or the prosecuting attorney, I don't have to go along with that recommendation"; Palmer affirmed that he understood. RP (10/27/11) at 7-8. Palmer also acknowledged he understood "one of the consequences of this [plea] is that I [the court] could also order restitution in the full amount of the amount that's being claimed here." RP (10/27/11) at 8. Following entry of Palmer's plea, the State recommended a sentence within the standard range: six months' time served and did not request restitution. RP (10/27/11) at 9-11. The prosecutor advised the court the State was not seeking restitution due to a number of factors including the difficulty of determining the restitution amount due to the complexity of the case, the number of claims/awards, the status of recoupment, and that certain claims against Palmer had been adjudicated in other civil cases. RP (10/27/11) at 9-11, 15-16.[2]

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

[2] Palmer had received Labor & Industry (L&I) benefits under two claims, no. X277743 and no. X563970, during the time periods at issue in this case. The defendant was awarded permanent partial disability (PPD) in the amount of $7,013.61 which was applied to the outstanding amount due to L&I. CP at 73-76. According to Revenue Agent Sandra Vandraiss, the overpayment amount remaining for the charging period of this claim is $10,929.93 (without penalty or interest). CP at 78. However, the total amount still owed by Palmer for all overpayments assessed by L&I is $20,710.19, as of October 27, 2011 (including penalties and interest). CP at 80.

After hearing from the parties, the trial court stated, "[I] have the independent authority [to order restitution] if I believe that restitution is required in this case[,]" notwithstanding the plea agreement and the State's recommendation of no restitution. RP (10/27/11) at 13. The court emphasized that it "can order a restitution hearing and make that determination myself." RP (10/27/11) at 13. When asked if he wanted to say anything else, Palmer stated, "No." RP (10/27/11) at 15.

The court followed the parties' agreed sentencing recommendation except that it also "order[ed] restitution in an amount to be determined" and "set it on for a restitution hearing." RP (10/27/11) at 15-17. The trial court set a November 10, 2011 restitution hearing after establishing that Palmer was available that date if he elected to appear. RP (10/27/11) at 17-20.

The restitution hearing was set to determine the amount of restitution outstanding and to allow further briefing whether restitution is dischargeable in bankruptcy. RP (10/27/11) at 17; CP at 86. The court ordered the parties to brief: 1) the amount of outstanding restitution Palmer still owed the victim (L&I); and 2) whether restitution is dischargeable in bankruptcy. RP (10/27/11) at 17. The court and defense counsel advised Palmer that he could waive his presence at the restitution hearing if he wished. RP (10/27/11) at 19-20.

Palmer signed the Judgment and Sentence acknowledging his sentence, the restitution order, and the hearing date. CP at 81-91. Palmer signed acknowledging he was advised of his right to appeal in paragraph 5.8 including that his right must be exercised within 30 days or it would be "IRREVOCABLY WAIVED." CP at 89 (emphasis in original).

At the November 10, 2011 restitution hearing, Palmer was represented by his trial attorney but elected not to appear. RP (11/10/11) at 21. Through his attorney, Palmer indicated "[w]e are definitely waiving his right to be... here," that "we thought... his presence was not necessary here for this hearing because it's just restitution... based on numbers of what's been presented to the court[,]" and "we ask the court make the decision today." RP (11/10/11) at 21-22. The Court made a finding that Palmer voluntarily waived his presence. RP (11/10/11) at 22.

As ordered, each party filed a memorandum regarding restitution. RP (11/10/11) at 22-23. The State's brief correctly pointed out that the trial court asked the parties to brief the amount of restitution outstanding to the victim (L&I). CP at 59. The State's accounting of that outstanding balance was $10,929.93 which was "determined based upon the orders that were provided by Labor & Industries for the underlying facts of this case, minus any payments that have been made, and also without the

penalties and interest." RP (11/10/11) at 23; CP at 59-80. The State did not request restitution. RP (11/10/11) at 23-24, 30-32; CP at 59-80.

Palmer, in his brief and oral argument, suggested various ways by which the amount owing might be calculated, argued that restitution is dischargeable in bankruptcy, and repeatedly reminded the court that neither the State nor the victim were requesting restitution. RP (11/10/11) at 23-37; CP at 19-58. Palmer's counsel argued that Palmer did not owe any outstanding balance to L&I and if the Court insisted, Palmer might be found to owe $4,019.14. RP (11/10/11) at 24-30. He further argued that any restitution owing would be less than the $7,013.61 permanent partial disability award he received from L&I. CP at 29.

In response, the State corrected Palmer's factual misstatement and accounted for how L&I arrived at the $10,929.93 figure. RP (11/10/11) at 30-32. The State outlined which time periods were used by L&I and explained that the permanent partial disability award had already been subtracted from that amount (contrary to the statement made by Palmer's counsel), clarifying that:

> [T]he reason that we come up with a much higher number than defense counsel is because the orders that are setting forth what the amount is owed . . . show that these are the times that [L&I] knew that [Palmer] was working or capable of working. . . . [L&I] took the whole time period except for the time period that he was actually incarcerated and they knew he wasn't capable of working at that time,

> deducted that time period, and then imposed the amount of all of the funds that he had received, and that's what's calculated in the actual orders.

RP (11/10/11) at 31-32.

Palmer's trial attorney responded by disputing that the State had proven, or could prove, the math for the restitution or the underlying factual basis to support the $10,929.93 figure. RP (11/10/11) at 32-35. Palmer again requested zero restitution explaining the case was negotiated this way because the State could not prove that portion of the theft and thereby that portion of the restitution. RP (11/10/11) at 32-35. The State did not respond to this argument.

The trial court, reiterating the State's recommendation and confirming the parties position regarding the plea, read the part of the plea agreement stating this was an "Alford plea" and the State's recommendation was "[c]redit for time served, six months, no restitution, no active or inactive probation." RP (11/10/11) at 35. The trial court then asked "[d]o you want to withdraw your plea? That's the remedy if you're taking the position that now L & I or that the State is reneging on their agreement." RP (11/10/11) at 35.

Palmer's trial attorney responded that the State was "not reneging" on the plea agreement, emphasizing that "[t]hey've never said they're reneging," that "[t]here is no restitution requested by the State of

Washington here," and that "[i]t's Your Honor that asked us to come back." RP (11/10/11) at 35-36.

In its oral ruling, the Court explained that it had authority to order restitution per statute, that Palmer did not claim the State violated its plea agreement, that the Court was "shocked" the State was not asking for restitution, and that Palmer "indicates that this is solely the decision of the court to entertain the concept of restitution." RP (11/10/11) at 37-42.

The Court ordered Palmer to pay restitution in the amount of premiums outstanding. RP (11/10/11) at 41; CP at 17-18. The court indicated it was exercising its discretion not to "either double or increase the amount," but was "order[ing] that restitution be set in the amount of $10,929.93." RP (11/10/11) at 41. The Court, the State, and Palmer's trial attorney signed the Restitution Order. CP at 18. Palmer did not seek review of that Order.

On May 3, 2013, the Superior Court Clerk filed a Declaration and Notice of Community Supervision Violation and Affidavit of Probable Cause for Violation noting Palmer had not paid any restitution, that the Clerk had sent delinquency notice(s) to Palmer, and that Palmer "feels he does not owe restitution because he filed bankruptcy." CP at 7-10. When the Clerk explained to Palmer that legal financial obligations are not

dischargeable in bankruptcy, Palmer responded, "If we don't stop harassing him he is going to sue us." CP at 9-10.

A hearing date to address Palmer's failure to pay restitution was set for September 17, 2013. On August 28, 2013, counsel who represented Palmer at his plea and sentencing hearing withdrew. CP at 17-58, 81-108, 118-20. The September 17, 2013 hearing was continued at Palmer's request to give him time to obtain new counsel. RP (9/17/13) at 7-9. At this hearing, it was noted that the issue of restitution and bankruptcy had already been adjudicated and there is an "order [that] amended [the] restitution total [entered on] November 10, 2011." RP (9/17/13) at 3-5.

On October 8, 2013, a hearing to address Palmer's failure to pay restitution was held. At that hearing, Palmer admitted that a restitution hearing had been held and that he "didn't have to be present . . . ." RP (10/8/13) at 17. After hearing from all parties, the court entered an Order Modifying Sentence which set a new payment schedule. CP at 3-5.

On October 22, 2013, Palmer filed a notice of appeal of the Order Modifying Sentence but never alleged any error in that order. CP at 1-2. On April 24, 2014, Palmer filed a brief asking this court for relief from the 2011 Restitution Order with a motion to expand the appeal to include the 2011 Restitution Order. April 24, 2014 was the first time Palmer noted the sole issue of this appeal: the 2011 Restitution Order.

On March 9, 2015, in an unpublished opinion, the Court of Appeals Division I found the State met its burden that Palmer knowingly, intelligently and voluntarily waived his right to appeal the Restitution Order. *Slip Op.* at 8. Although Palmer never argued there were extraordinary circumstances to warrant an extension from the 2010 Judgment and Sentence or Restitution Order, the Court of Appeals found that Palmer's flawed legal analysis, that restitution was dischargeable in bankruptcy, was not extraordinary circumstances. *Slip Op.* at 8-9. The Court of Appeals also noted in footnote 9 that if the appeal was timely, Palmer's sole claim, that the prosecutor breached the plea agreement, would fail since the record is clear that the prosecutor did not breach the plea agreement. *Slip Op.* at 9. Rather, it found the Superior Court Judge was very clear that he believed it was his right and obligation to order restitution despite the parties' agreement and recommendations. *Slip Op.* at 9.

V. ARGUMENT

Palmer alleges in his petition that he has met the limited circumstances for review under RAP 13.4(b)(2) by stating that the court of appeals decision conflicts with the court's decision in *State v. Sweet. State v. Sweet*, 90 Wn.2d. 282, 581 P.2d 579 (1978). However, to the contrary, the court of appeal's decision followed *State v. Sweet* when it

found that the State met its burden that Palmer knowingly, intelligently and voluntarily waive his right to appeal the Restitution Order. *See Id.* Since Palmer has not met any of the criteria governing acceptance of review under RAP 13.4(b)[3] this court should deny Palmer's petition.

A. The Court of Appeals Decision Followed *State v. Sweet* when it Found the State met its Burden that Palmer Knowingly, Intelligently, and Voluntarily Waived His Right to Appeal.

Reviewing the same record and citing to the same cases as Palmer, *State v. Sweet* and *State v. Kells* as well as citing to *State v. Chetty,* the Court of Appeals decision was clear that it followed *State v. Sweet* in finding the State met its burden that Palmer knowingly, intelligently and voluntarily waived his constitutional right to appeal. *Slip Op. at* 8; *Sweet*, 90 Wn.2d. at 282; *State v. Chetty*, 184 Wn. App. 607, 612, 338 P.3d. 298 (2014); *State v. Kells*, 134 Wn.2d. 309, 949 P.2d. 818 (1998).

While Palmer continues to argue that he did not waive his right to appeal because he did not know restitution was ordered and did not know that he had a right to appeal, the record reflects the contrary. Petition of Appellant (Pet. App.) at 6. Palmer was present when the court "order[ed]

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[3] RAP 13.4(b) A petition for review will be accepted by the Supreme Court only:
(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

restitution in an amount to be determined, and . . . set it on for a restitution hearing." RP (10/27/11) at 15-17. Palmer participated in picking the restitution hearing date. RP (10/27/11) at 19. The Judgment and Sentence shows restitution was ordered since the box next to the word "RESTITUTION" was checked. CP at 86 (emphasis in original). Palmer signed the Judgment and Sentence that ordered restitution and set the restitution hearing date. CP at 89. Palmer was advised of his right to appeal in paragraph 5.8 of the Judgment and Sentence, including that his right must be exercised within 30 days otherwise it would be "IRREVOCABLY WAIVED." CP at 89 (emphasis in original). This paragraph begins with the words "RIGHT TO APPEAL." CP at 89 (emphasis in original). Palmer signed the Judgment and Sentence on the same page as the advisement of the right to appeal. CP at 89. Palmer chose to appear at the restitution hearing solely through his attorney and have his presence waived. RP (11/10/11) at 21-22; CP at 89. Subsequently, Palmer was contacted by the clerk's office for non-payment of restitution. CP at 9-10. Lastly, Palmer admitted he knew a restitution hearing had been held and he "didn't have to be present . . . ." RP (10/8/13) at 17. Clearly, Palmer was aware restitution was ordered and was advised he had a right to appeal. His failure to appeal the Restitution Order or the Judgment and Sentence simply shows he waived his right to appeal.

Alternatively, the doctrine of invited error is applicable and is not precluded by *State v. Sweet* as noted in the Court of Appeals Decision. *Slip Op.* at 8-9 *citing In re Pers. Restrain 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); *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); *State v. Lewis*, 15 Wn. App. 172, 177, 548 P.2d 587 (1976). Since Palmer affirmatively created the alleged error that caused him to waive his right to appeal, the doctrine of invited error caused him to lose his right to appeal, not the absence of a knowing, intelligent, and voluntary waiver of the right to appeal, and thus the Court of Appeals' decision does not conflict with *State v. Sweet. See Id.*

Palmer's petition should be denied since Palmer's petition does not meet the requirements of RAP 13.4(b) because the Court of Appeals Decision followed rather than conflicted with *State v. Sweet* when it found the State met its burden that Palmer knowingly, intelligently, and voluntarily waived his right to appeal the Restitution Order. Alternatively, under the doctrine of invited error, Palmer is precluded from receiving appellate relief since Palmer's purported lack of knowledge that restitution was ordered was because he chose not to attend the restitution hearing and appeared solely through his attorney.

B. The State Did Not Breach the Plea Agreement by Participating in the Court's Restitution Hearing, Answering the Trial Court's Direct Questions, and Correcting a Factual Misstatement, While Maintaining Its Plea Recommendation of No Restitution.

Palmer's second argument, alleging the prosecutor breached the plea agreement, does not set out or meet any of the limited circumstances for review under RAP 13.4(b); thus his argument should be discounted and his petition denied. If this court reviews Palmer's argument on its merits, likewise the appeal should be denied since the prosecutor did not breach the plea agreement by answering the court's questions. As noted by the Court of Appeals in footnote 9, Palmer's argument fails since the record is clear that the prosecutor did not breach the plea agreement, rather the Superior Court Judge was very clear that he believed it was his right and obligation to order restitution despite the parties' agreement and recommendations. *Slip Op.* at 9.

When a defendant gives up constitutional rights by accepting a plea bargain, the State's sentencing recommendation to the court must adhere to the terms of the agreement. *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). Nevertheless, "[the State] is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with [the duty of candor towards the tribunal] and, consistent with RCW 9.94A.460, not hold back relevant

information regarding the plea agreement." *Id.* at 840. The State, as an officer of the court, has a duty of candor toward the tribunal under the Rules of Professional Conduct 3.3, and has an ethical obligation to answer questions honestly and to correct factual inaccuracies. *See United States v. Mondragon*, 228 F.3d 978, 980 (9th Cir. 2000).

The State does not breach a plea agreement by participating in court proceedings. *State v. Talley*, 134 Wn.2d. 176, 185-186, 949 P.2d 358 (1998). Further, "[p]resenting evidence that will help the court make a decision does not amount to advocating against its earlier recommendation. Thus it does not violate the terms of the plea agreement." *Id.* at 186 (quoting *State v. Talley,* 83 Wn. App. 750, 759, 923 P.2d 721 (1996)).

"[N]o rule of general application" exists "to guide an appellate court in determining whether the State adhered to or undercut a plea agreement." *State v. Van Buren*, 101 Wn. App. 206, 215, 2 P.3d 991 (2000) (internal quotations omitted). Using an objective standard, courts review the totality of a prosecutor's actions and comments from the entire sentencing record to determine if a prosecutor breached a plea agreement. *State v. Jerde*, 93 Wn. App. 774, 780, 782, 970 P.2d 781 (1999).

The parties agreed "the court indicated that it was inclined to order restitution notwithstanding any agreement[.]" Brief of Appellant at 7.

The parties also agree the State had an obligation to participate in the restitution hearing and answer the trial court's questions candidly. Pet. App. at 10. The prosecutor in this case did just that. The State, in accordance with the plea agreement, asked the court to order "no restitution" and went into detail as to why the State was not requesting that restitution be ordered. RP (10/27/14) at 9-11, 15-16; CP at 92-108. Despite this agreed recommendation, the trial court ordered counsel to provide an accounting of what Palmer owed to the victim to determine what restitution, if any, should be ordered. RP (10/27/11) at 17. At the restitution hearing, the State reiterated that it "provided the briefing and documents to the court based upon the court's request for a determination of what restitution, if any, is owing." RP (11/10/11) at 23. At no time did the State ask the trial court to order restitution. RP (11/10/11) at 23, 30-32.

Palmer's argument, that the State breached the plea agreement by affirmatively arguing for restitution and by not presenting a unified front, is not substantiated by the record. Pet. App. at 10. To the contrary, the totality of the sentencing records show that the State, through its memorandum and statements in court, asked the court not to impose restitution while complying with its ethical obligations to honestly answer the court's direct questions. RP (10/27/11) at 9-11, 15-16; RP (11/10/11) at 23, 30-32; CP at 59-80.

Palmer claims the State breached the plea agreement when it advised the court "we come up with a much higher number than defense." RP (11/10/11) at 31, Pet. App. at 10. Palmer mischaracterizes the State's position by relying on a partial quote and taking it out of context. The cited statement was made to account for the differing figures, first by correcting Palmer's trial attorney's factual misstatement, and then to explain the differing accounting methods. Specifically, Palmer's counsel incorrectly advised the court that L&I had not subtracted the $7,000 permanent partial disability award they recouped from the unpaid monies owing. RP (11/10/11) at 29-31. Then, to explain to the court how the parties came up with different amounts owing to L&I, the prosecutor said:

> And the reason that we come up with a much higher number than defense counsel is because the orders that are setting forth what the amount is owed as attached in Exhibit A and B, show that these are the times that they [L&I] knew that the defendant was working or capable of working.

RP (11/10/11) at 31.

Further, this quote is merely a portion of a fuller accounting showing how L&I concluded that the restitution amount in this case totaled $10,929.93. The prosecutor did not ask for this higher amount or any amount of restitution, she simply pointed out the differences in the parties accounting, so that the court could make an informed decision.

RP (11/10/11) at 31. This presentation of the accounting evidence proffered to help the trial court decide what, if any, restitution was owing, does not amount to advocating against the State's recommendation and therefore did not violate the terms of the plea agreement. *See Talley,* 134 Wn.2d at 186. (Presenting evidence that will help the court make a decision does not amount to advocating against an earlier recommendation therefore does not violate the terms of the plea agreement.) Instead, she simply complied with the Court's directive to have L&I do an accounting of how much money Palmer owed L&I.

In the instant case, the State answered the trial court's specific questions by giving only pertinent specific facts of the accounting of the restitution amount outstanding; accounted for "the reason" why L&I arrived at a "much higher number than defense counsel," and did not advocate for the court to impose either amount. RP (11/10/11) at 23, 30-32; CP at 59-80. In reviewing the totality of the sentencing record, the State's words and deeds at the plea, sentencing, and restitution hearing can only be construed as mere participation, not advocacy for restitution.

Palmer's second argument seems to be that the State did not present a "united front" because the State did not agree with his accountings of restitution. Pet. App. at 10. This argument fails since the State, as an officer of the court, has a duty of candor toward the tribunal

under Rules of Professional Conduct 3.3, and has an ethical obligation to answer honestly and to correct factual inaccuracies. *See United States v. Mondragon*, 228 F.3d 978, 980 (9th Cir. 2000); *See also United States v. Maldonado,* 215 F.3d 1046, 1051-1052, (9th Cir. 2000). Here the prosecutor's fulfillment of her ethical responsibilities to honestly answer the court's questions and correct a factual inaccuracy cannot form the basis for finding that she breached the plea agreement, therefore, this Court should deny Palmer's petition.

Contrary to Palmer's current contention, Palmer's trial attorney, at the time of the hearings, clearly believed the State was not asking for restitution or breaching the plea agreement. First, at the beginning of his statements at the restitution hearing, Palmer's trial attorney stated, "I want to thank the State for agreeing in the sentencing agreement, 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) at 24. Then, after hearing all statements by the prosecutor at the restitution hearing, including the quote currently utilized by Palmer, he said "[t]here is no restitution requested by the State of Washington here." RP (11/10/11) at 35-36.

This unified belief that the prosecutor was not requesting restitution or breaching the plea agreement is clearly shown by the prosecutor asking that restitution not be ordered, the trial court reiterating

that the State's recommendation was for "no restitution[,]" the trial court's statement that it was "shocked" the State was not asking for restitution, and Palmer's trial attorney's repeated comments that the State was not asking for restitution and was not "reneging" on the plea agreement. RP (10/27/11) at 9-11, 15-16; RP (11/10/11) at 24, 35-36, 39-40.

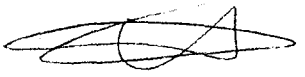
A full review of the totality of a prosecutor's actions and comments from the entire sentencing record shows that the prosecutor did not breach the plea agreement. Rather, the prosecutor supported its recommendation, gave all the reasons why the Court should not order restitution, and only in response to a court order provided the Court the bare and neutral facts so it could make an informed decision. Since Palmer has not met the limited circumstances of review under RAP 13.4(b) in any of his arguments the Court should deny Palmer's Petition for Review.

VI. CONCLUSION

For the reasons set forth above, the State asks this Court to deny Palmer's Petition for Review.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

ROBERT W. FERGUSON
Attorney General of Washington



TIENNEY MILNOR, WSBA #32701
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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.

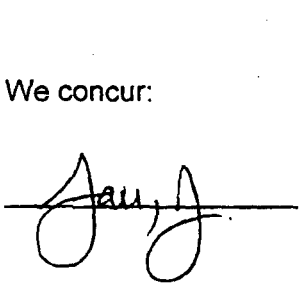
Palmer's motion is denied.

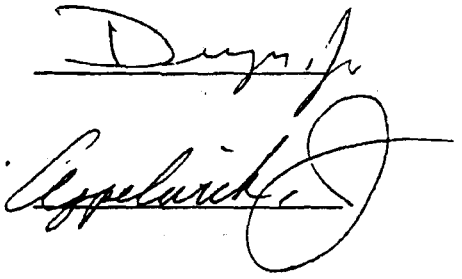
III

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.

NO. 91514-8

SUPREME COURT
OF THE STATE OF WASHINGTON

GENE ALFRED PALMER, II, Appellant, v. STATE OF WASHINGTON, Respondent.	DECLARATION OF SERVICE

TONI KEMP declares as follows:

On April 15, 2015, I deposited into the United States Mail, first-class postage prepaid and addressed as follows:

WASHINGTON APPELLATE PROJECT
Attn: Lila J. Silverstein
1511 Third Avenue, Suite 701
Seattle, WA 98101

A copy of the following documents:

1) State's Answer to Petition for Review
2) Declaration of Service.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

TONI KEMP

OFFICE RECEPTIONIST, CLERK

To: Kemp, Toni (ATG)
Cc: Milnor, Tienney (ATG)
Subject: RE: Gene Palmer v. State of Washington, WSSC No. 91514-8

Received 4/15/15

From: Kemp, Toni (ATG) [mailto:ToniK@ATG.WA.GOV]
Sent: Wednesday, April 15, 2015 3:34 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Milnor, Tienney (ATG)
Subject: Gene Palmer v. State of Washington, WSSC No. 91514-8

To the Supreme Court:

Attached for filing, please find the State of Washington's Answer to Petition for Review with Appendix and Declaration of Service.

Sincerely,

Toni Kemp, Legal Assistant to
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