71106-7

71106-7

NO. 71106-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GENE PALMER,

Appellant.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

Tienney K. Milnor
Assistant Attorney General
WSBA No. 32701
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

On November 10, 2011, the court entered a restitution order directing Palmer to pay $10,929.33. In October 2013, the 2011 restitution order was modified only for the purpose of setting a monthly payment schedule. Palmer's attempt to appeal the 2011 order two years and four months later is time-barred under RAP 18.8(b), because he has not shown any extraordinary circumstances as required to grant an expansion under this rule. Palmer's time-barred appeal should be dismissed.

In the alternative, Palmer's appeal should be denied as his claim that the prosecutor breached the plea agreement when she complied with the court's directive to compile an accounting for a court-ordered restitution hearing is without merit.

II. RESTATEMENT OF THE ISSUES

A. When Palmer failed to timely appeal a restitution order entered on November 10, 2011, is his attempt to appeal that order two years and four months later based only on the court modifying his monthly payment amount in October 2013 time-barred under RAP 18.8(b) when he has failed to show any extraordinary circumstances permitting expansion under RAP 18.8(b)?

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?

C. If the court finds that Palmer's appeal is not time-barred and that the prosecutor breached the plea agreement, is the proper remedy to vacate the restitution order and remand the case for resentencing before a different judge?

III. 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" 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, "[y]es, 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. 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." RP (10/27/11) at 7-8. Palmer also acknowledged that he understood that "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. RP (10/27/11) at 9-11. The State did not request restitution. RP (10/27/11) at 9-11. The prosecutor advised the court that she was not seeking restitution due to a number of factors including the difficulty of determination the restitution amount due to the complexity of the case, the number of claims/awards, the status of recoupment, and the fact that

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

certain claims against Palmer had been adjudicated in other civil cases. RP (10/27/11) at 9-11, 15-16.[2]

After hearing from the parties, the trial court stated that it had "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. Unconvinced that no restitution should be ordered, the trial court set a November 10, 2011 restitution hearing after establishing that Palmer was available for that date if he wished to attend. RP (10/27/11) at 17-20. The

---

[2] Palmer's guilty plea to one count of False Information by a Claimant under RCW 51.48.020(2) covered the period of June 6, 2005 through February 10, 2006. CP at 92-108. Palmer had received Labor & Industry (L&I) benefits under two different claim numbers, no. X277743 and no. X563970, during the time periods at issue in this case.

Under claim no. X277743, on June 19, 2006, L&I issued an overpayment in the amount of $10,899.77, plus a 50% penalty in the amount of $5,449.88 for the periods of June 6, 2005 to October 24, 2005 and November 6, 2005 to January 11, 2006. This overpayment was based on the fact that Palmer was working while collecting time-loss compensation and failed to inform L&I that he had returned to work. CP at 65-67.

Under claim no. X563970, L&I issued an overpayment on June 19, 2006, in the amount of $2,136.11 plus a 50% penalty in the amount of $1,068.05 for the periods of June 6, 2005 to October 24, 2005 and November 6, 2005 to January 11, 2006. CP at 69-71.

The defendant was awarded permanent partial disability (PPD) in the amount of $7,013.61. CP at 73-74. The PPD award was applied to the outstanding overpayments in the order as determined by L&I. CP at 73-76.

The orders above total $13,035.88 (without penalties and interest). The orders issued by L&I which include the overpayment penalty of 50% indicate that the payments were induced by fraud or wilful misrepresentation or omission of a fact required in the claim. 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.

court emphasized that it "can order a restitution hearing and make that determination myself." RP (10/27/11) at 13. The court asked Palmer 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 I will set it on for a restitution hearing." RP (10/27/11) at 15-17.

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, which included the restitution order and hearing date. CP at 81-91. Palmer was advised of his right to appeal in paragraph 5.8, including that his right must be exercised within 30 days otherwise 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 did not appear. RP (11/10/11) at 21. Palmer, through his attorney, indicated Palmer's presence was waived and requested to proceed with the hearing. 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 that if the Court insisted, Palmer might be found to owe $4,019.14. RP (11/10/11) at 24-30.[3]

[3] Palmer argued if L&I were owed restitution for the days Palmer worked while claiming benefits, he would only owe $4,019.14. CP at 27-30. Even if a 50% penalty were applied to that amount, it would still total less than the $7,013.61 Palmer was owed for his partial permanent disability. CP at 29.

In response, the State corrected Palmer's factual misstatement and accounted for how L&I came up with 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 that 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. When Palmer's trial attorney was asked whether he understood that the court was "not bound by that [plea] agreement," he stated, "I understand that." RP (11/10/11) at 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 that 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.[4] The court gave Palmer until May 12, 2012 to begin paying. RP (11/10/11) at 42; CP at 17-18. 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 Clerk of the Superior Court 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

[4] $10,929.93 is the amount outstanding to L&I without penalties or interest. CP at 59-60, RP (11/10/11) at 23.

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 that there is an "order amended 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. CP at 1-2. On April 24, 2014, Palmer filed a brief asking this court for relief from the 2011 Restitution Order in conjunction with a motion to expand the appeal to include the 2011 Restitution Order. April 24, 2014 is the first time Palmer notes this appeal of the 2011 Restitution Order, which is the sole issue in this appeal.

IV. ARGUMENT

A. Palmer's Appeal Should be Dismissed Because it is Time-Barred and He Has Failed to Establish Any Extraordinary Circumstances Which Warrant Expanding the Time for Filing the Appeal.

Palmer's Motion to Expand Appeal should be denied because his appeal is time-barred under Washington Rules of Appellate Procedure (RAP) 18.8(b).[5] Palmer was specifically aware of the RAP's concomitant time constraints since he was specifically notified of this at the time of his plea and they are in the public domain. CP at 89. Palmer acknowledged and accepted this time constraint when he signed the Judgment and Sentence, wherein Paragraph 5.8 states that the defendant has 30 days to appeal before the right to appeal is "IRREVOCABLY WAIVED." CP at 89 (emphasis in original).

Since Palmer's sole issue on appeal is the restitution order entered two years and four months prior to the notice of appeal, and Palmer has not shown any extraordinary circumstances as required under RAP 18.8(b) for this Court to hear an untimely appeal, this Court should deny Palmer's Motion to Expand Appeal and grant the State's Motion to Dismiss.

---

[5] See State's Answer to Motion to Expand Notice to Include Restitution Order and Motion to Dismiss, filed May 19, 2014.

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.

A plea agreement is a contract between the State and the defendant. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Since 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. *Id.* at 839. 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 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). While the State may not, through words or deeds contradict the agreed recommendation, the State, represented by the prosecutor, is obliged to participate and present evidence to help the Court make its

decision. *Id.* at 185-186. 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." *Talley*, 134 Wn.2d 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) (*Van Buren* I*)* (internal quotations omitted). Courts review the totality of a prosecutor's actions and comments from the entire sentencing record to determine whether a prosecutor breached a plea agreement using an objective standard. *State v. Jerde*, 93 Wn. App. 774, 780, 782, 970 P.2d 781 (1999).

The parties agree that "the court indicated that it was inclined to order restitution notwithstanding any agreement[.]" Brief of Appellant (Br. App.) at 7. The parties also agree that the State had an obligation to participate in the restitution hearing and answer the trial court's questions candidly. Br. App. at 7. 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 the victim in order to determine what restitution, if any, should be ordered. RP (10/27/11) at 17.

Similar to *Allen, Maldonado,* and *Van Buren* II, discussed below, the State provided the requested accounting neutrally and briefly and did not ask the court to impose restitution in its memorandum. *United States v. Allen*, 434 F.3d 1166 (9th Cir. 2006); *United States v. Maldonado,* 215 F.3d 1046 (9th Cir. 2000); *State v. Van Buren,* 112 Wn. App. 585, 49 P.3d 966 (2002) (*Van Buren* II); RP (11/10/11) at 23, 30-32; CP at 59-80. 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. Br. App. at 6-7. 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, Br. App. at 3, 7. Palmer mischaracterizes the State's position by relying on this partial quote and taking it out of context. The "we come up with a much higher number than defense counsel" statement was made to account for the differing figures, first by correcting the factual misstatement made by Palmer's trial attorney, and then to explain the differing accounting methods. Specifically, Palmer's counsel incorrectly advised the court that L&I had not subtracted the recoupment of the over $7,000 permanent partial disability award from the outstanding monies owing to L&I. 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. The prosecutor's statement, 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.)

The instant case is similar to *Van Buren* II in that both defendants entered an *Alford* plea and the court, after reviewing the agreed factual basis for the plea agreement, ordered the prosecutor to participate in an evidentiary hearing regarding sentencing. *Van Buren* II, 112 Wn. App. 585. The Court of Appeals in *Van Buren* II found that the prosecutor did not breach the plea agreement by participating in the evidentiary hearing and calling witnesses since the prosecutor did not indicate whether or not he believed an exceptional sentence was

appropriate, did not independently draw the court's attention to aggravating factors, did not initiate or suggest the hearing, and did not comment on the weight of the evidence. *Id.* at 599. Similar to *Van Buren* II, the prosecutor in this case did not indicate that she rethought the appropriateness of her recommendation, did not independently draw the court's attention to factors which would support the imposition of restitution, did not initiate or suggest the hearing, did not call witnesses, and did not comment on the weight of the evidence. RP (11/10/11) 23, 30-32; CP at 59-80. Instead, she simply complied with the Court's directive to have L&I do an accounting of how much money Palmer failed to pay the agency.

A breach of the plea agreement does not occur when the trial court imposes a sentence outside of the plea agreement after the prosecutor gives honest and direct answers to the court's direct questions, even though the court uses the information as a basis to impose a sentence outside of the plea agreement. *See U.S. v. Allen*, 434 F.3d 1166; *see also U.S. v. Maldonado,* 215 F.3d 1046. The Court in *Allen* found no breach when the prosecutor's answers to the Court, given during court-ordered proceedings, were "neutral and brief[.]" *Allen*, 434 F.3d at 1175. Similarly, the prosecutor in Palmer's case gave a neutral and brief accounting of restitution owing and did so only in response to the Court's

direct order to do so. RP (11/10/11) 23, 30-32; CP at 59-80. The prosecutor did not use inflammatory language, provide outside or additional aggravating facts, or ask the court to order restitution. RP (11/10/11) 23, 30-32; CP at 59-80. Rather, in this case, the trial court, utilizing the neutral and brief information provided by the parties, chose not to agree with the parties agreed recommendation and exercised its authority, under RCW 9.94A.750, to order Palmer to pay restitution.

Unlike *Mondragon,* the case analogized by Palmer, the State complied with its obligation to provide the Court with the requested accounting and nothing more. In *Mondragon,* the appellate Court found a breach "because the prosecutor's comments did not provide the district judge with any new information or correct any factual inaccuracies, the comments [calling attention to the seriousness of that defendant's prior offenses] could have been made for only one purpose: to influence the district court to impose a harsher sentence than that suggested by appellant's counsel." *Mondragon*, 228 F.3d at 980.

In the instant case, contrary to the facts in *Mondragon,* 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 came up with a "much higher number than defense counsel," and did not advocate for the court to impose either

amount. RP (11/10/11) 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. Br. App. at 7. 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. *Mondragon*, 228 F.3d at 980. The prosecutor's answer and the fulfillment of her ethical responsibilities to honestly answer the court's questions cannot form the basis for finding that the she breached the plea agreement.

A prosecutor does not breach a plea agreement by correcting a factual misstatement since the State has a "duty to ensure that the court has complete and accurate information, enabling the court to impose an appropriate sentence." *Maldonado,* 215 F.3d at 1051-1052. In *Maldonado,* the Court found that a prosecutor did not breach the plea agreement when he provided the Court with the corrected offender level. *Id.* Similarly in the present case, the prosecutor provided the Court with the correct calculation of outstanding restitution as requested by the Court.

Since the prosecutor simply complied with her obligation to participate in the hearing and to ensure the Court had complete and accurate information, this Court should deny Palmer's appeal and affirm the restitution order.

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 statement to the trial court 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, Palmer's trial attorney stated that "[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, by the trial court reiterating that the State's recommendation was for "no restitution[,]" by the trial court's statement that it was "shocked" the State was not asking for restitution, and by Palmer's trial attorney 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 trial court with the bare and neutral facts so the Court could make an informed decision. Since, upon review of the totality of the sentencing record, the prosecutor did not by words or deeds breach the plea agreement, the Court should deny Palmer's appeal.

C. If This Court finds that Palmer's Appeal is Timely and the Prosecutor Breached the Plea Agreement, the Requested Remedy of Vacating the Restitution Order and Remanding the Case for a Restitution Hearing with a Different Judge is Appropriate.

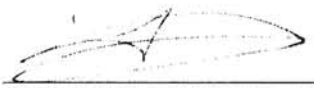
If this Court grants Palmer's Motion to Expand Appeal, denies the State's Motion to Dismiss, and finds that the State breached the plea agreement, the State concurs that the remedy of vacating the Restitution Order and remanding the case for a new restitution hearing before a different judge is appropriate.

V. CONCLUSION

For the reasons set forth above, the State asks this Court to deny Palmer's Motion to Expand Appeal and grant the State's motion to dismiss or deny his appeal.

RESPECTFULLY SUBMITTED this 4th day of August, 2014.

ROBERT W. FERGUSON
Attorney General of Washington



TIENNEY MILNOR, WSBA #32701
Assistant Attorney General

NO. 71106-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GENE ALFRED PALMER, II,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF SERVICE

TONI KEMP declares as follows:

On August 4, 2014, 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) Brief of Respondent
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 4th day of August, 2014.

T. Kemp

TONI KEMP