NO. 328988-III

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

MICHAEL D. NEISLER

Petitioner/Appellant

BRIEF OF RESPONDENT

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3. THE SENTENCING COURT ERRED BY IMPOSING 36 MONTHS OF COMMUNITY CUSTODY.

II. ISSUES PRESENTED

1. DID THE PROSECUTING ATTORNEY VIOLATE THE TERMS OF THE PLEA AGREEMENT WHEN THE PROSECUTOR AGREED NOT TO MAKE A SENTENCING RECOMMENDATION AND, ULTIMATELY, ARGUED THAT THE INJURIES SUSTAINED BY THE VICTIM AMOUNTED TO A FATE WORSE THAN DEATH?

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    B. WERE THE TERMS OF THE PLEA AGREEMENT VIOLATED?

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2. DID THE SENTENCING COURT ERR BY CLASSIFYING VEHICULAR ASSAULT AS A SERIOUS VIOLENT FELONY?

3. DID THE SENTENCING COURT ERR BY IMPOSING 36 MONTHS OF COMMUNITY CUSTODY?

III. STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case.

IV. ARGUMENT

1. THE PROSECUTING ATTORNEY DID NOT VIOLATE THE TERMS OF THE PLEA AGREEMENT WHEN THE PROSECUTOR AGREED NOT TO MAKE A SENTENCING RECOMMENDATION AND, ULTIMATELY, ARGUED THAT THE INJURIES SUSTAINED BY THE VICTIM AMOUNTED TO A FATE WORSE THAN DEATH?

A. THE PETITIONER IS PROHIBITED FROM ASSIGNING ERROR TO THE IMPOSITION OF AN EXCEPTIONAL SENTENCE.

The core issue in the Petitioner's appeal is not the statements that the prosecution made at the time of sentencing but rather the fact that he was sentenced to an exceptional sentence. The Petitioner believes that he was sentenced to an exceptional sentence based on the statements made by the State. The Petitioner states,

> Consequently, the State's remarks likely influenced the judge to impose an exceptional sentence as can be seen by the fact that the judge did impose a sentence of 72 months for count 2; specifically, Vehicular Assault with Aggravating Circumstances.
>
> *See* Brief of Appellant at 6

He also argues that the State's, "...communication conveys to the court one thing; Mr. Neisler should have been sentenced to an exceptional sentence which the court did." *See id* at 8. The Petitioner goes on to state,

> In conclusion, the State implicitly undercut the terms of the plea agreement by making statements that supported the imposition of an exceptional sentence when, originally, it was understood that the State would not opine as to the length of imprisonment that should be imposed.
>
> *See id* at 12.

The real issue at the heart of this appeal is that the court imposed an exceptional sentence. However, the Petitioner is prohibited from arguing that an exceptional sentence was improperly imposed pursuant to the invited error doctrine. Under the invited error doctrine, a criminal defendant may not set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson,* 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine applies when counsel takes affirmative action that induces the trial court to take an action that party later challenges on appeal. Id. at 723-24.

In the present case Petitioner's trial counsel urged the court to impose an exceptional sentence. The Petitioner cannot now assign error to the imposition of the exceptional sentence. The Petitioner pled guilty to two counts of vehicular assault. CP 19 – 17. With respect to the second count the Petitioner also pled guilty to an aggravator that alleged, "The

victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." This aggravating factor is codified at RCW 9.94A.535(3)(y). By pleading guilty to this aggravator the court could sentence outside of the standard range. Essentially, by the defendant's plea to this aggravator he was agreeing that there were facts sufficient that could result in the imposition of a 120 month sentence by the court. This was specifically discussed by the parties, and acknowledged by the Petitioner, at the time of the plea and sentencing. *See* 10/21/14 RP at 2, 4.

At the sentencing, Petitioner's counsel commented on the seriousness of the case and stated, "We would ask that the Court impose an exceptional sentence. We realize that 12 to 14 months isn't fitting in this case. We would ask the Court to go higher than that, to go 16 months or 18 months." *Id.* at 15.

It would appear the Petitioner is dissatisfied with the length of the exceptional sentence which was imposed. However, the Petitioner cannot now claim that an error occurred with the imposition of an exceptional sentence and attribute this error to a comment made by the State when he himself advocated for the imposition of such a sentence.

B. THE TERMS OF THE PLEA AGREEMENT WERE NOT VIOLATED.

The State did not violate the terms of the plea agreement in the present case when it addressed the court. There was no recommendation contained in the plea agreement that could have been undercut. The question as to whether the State has breached a plea agreement may be raised for the first time on appeal because the question has constitutional magnitude. *State v. Sledge,* 133 Wash.2d 828, 839, 947 P.2d 1199 (1997). A plea agreement is a contract between the State and the defendant. *Id.* at 838-39, 947 P.2d 1199. Basic contract principles of good faith and fair dealing impose upon the State an implied promise to act in good faith in plea agreements. *Id.* at 838-39, 947 P.2d 1199. Due process concerns reinforce the State's duty to comply with plea agreements. *Id.* 839-40, 947 P.2d 1199.

Accordingly, a plea agreement obligates the State to recommend to the court the sentence contained in the agreement. *State v. Talley,* 134 Wash.2d 176, 183, 949 P.2d 358 (1998); *Sledge,* 133 Wash.2d at 840, 947 P.2d 1199. This obligation does not, however, require the State to make the sentencing recommendation enthusiastically. *Talley,* 134 Wash.2d at 183, 949 P.2d 358; *Sledge,* 133 Wash.2d at 840, 947 P.2d 1199. But, at the same time, the State must not undercut the terms of the agreement.

Talley, 134 Wash.2d at 183, 949 P.2d 358; *Sledge,* 133 Wash.2d at 840, 947 P.2d 1199; *State v. Jerde,* 93 Wash.App. 774, 780, 970 P.2d 781 (1999). The State can undercut a plea agreement either explicitly or implicitly through conduct indicating an intent to circumvent the agreement. *Sledge,* 133 Wash.2d at 840, 947 P.2d 1199; *Jerde,* 93 Wash.App. at 780, 970 P.2d 781; *In re Palodichuk,* 22 Wash.App. 107, 110, 589 P.2d 269 (1978).

An objective standard is applied in determining whether the State breached a plea agreement "'irrespective of prosecutorial motivations or justifications for the failure in performance.'" *Jerde,* 93 Wash.App. at 780, 970 P.2d 781 (quoting *Palodichuk,* 22 Wash.App. at 110, 589 P.2d 269); *see also Sledge,* 133 Wash.2d at 843 n. 7, 947 P.2d 1199 ("The focus of this decision is on the effect of the State's actions, not the intent behind them."). "The test is whether the prosecutor contradicts, by word or conduct, the State's recommendation for a standard range sentence." *Jerde,* 93 Wash.App. at 780, 970 P.2d 781 (citing *Talley,* 134 Wash.2d at 187, 949 P.2d 358). In making this determination, the entire sentencing record is reviewed. *Jerde,* 93 Wash.App. at 782, 970 P.2d 781.

The Statement of Defendant on Plea of Guilty in this case set forth the State's recommendation. It provided, in relevant part, "State will defer to the Court with respect to sentencing..." No specific recommendation

regarding the length of incarceration was made in the plea agreement or orally by the State. This plea agreement did not prohibit the State from commenting on the case or what had happened to the two victims. At the beginning of the hearing the State informed the court,

> Given the history of the case, the nature of the injuries, judge, we have agreed not to make a recommendation as far as a specific amount of imprisonment and I'll get to some of the reasons for that later. But ultimately we are asking the Court to hear from the victims in the case. I'll supplement a little bit about the history of the case, how we got here today and ultimately we're deferring to Your Honor on what should be the appropriate sentence.
>
> *See* 10/21/14 RP at 2

The Petitioner agreed that this was the resolution that had been reached. *See id* at 3. The parties engaged in a discussion at the time of sentencing about the range of confinement the court could impose. *See id* at 2, 4. The Petitioner pled guilty as charged to an aggravator and thereby stipulated to the possibility that the court could impose up to 120 months of incarceration if the court saw fit.

The Petitioner cites to *State v. Sledge* to support his argument. The facts in *Sledge* are distinguishable from those in this case. In *Sledge* the State had agreed to make a standard range disposition recommendation to the court. *Sledge* 133 Wash. P.2d at 830, 647 P.2d 1199. In *Sledge* the State made the agreed upon recommendation but then insisted on a

disposition hearing to present evidence. *Id.* At the disposition hearing the State presented evidence regarding aggravating factors that would support an exceptional sentence. *Id.* The court ultimately imposed an exceptional disposition in *Sledge*. *Id.*

In *Sledge* the State conducted an evidentiary hearing which was not necessary to impose a standard range disposition. In addition to demanding an unnecessary evidentiary hearing the State engaged in extensive affirmative conduct that was not required to support the imposition of the bargained for disposition. The Petitioner, in this case, equates a comment made by the State about the evidence to what transpired in *Sledge*. Commenting on the impact the Petitioner's actions had on the victims' lives in this case is not the same as demanding a superfluous evidentiary hearing and presenting extensive testimony when it was not necessary.

The Petitioner's brief also seems to suggest that it was the State's comment which led to the imposition of the exceptional sentence. The record reflects that Petitioner not only agreed that there were sufficient facts to support the imposition of an exceptional sentence but himself requested that the court impose an exceptional sentence. This fact makes this case distinguishable from *Sledge*.

The case law which is referenced above, and is cited by the Petitioner, involves cases in which the State had agreed to make a specific sentencing recommendation with respect to the length of incarceration. In the present case no such recommendation was made to the court. Rather, the parties negotiated a resolution in which the State agreed to defer to the court with respect to the length of sentence that should be imposed. The court was given carte blanche to fashion any sentence it saw fit. This fact was made abundantly clear at the time of sentencing.

It would appear that the Petitioner is now displeased with the length of the sentence the court imposed. However, the record is clear that he was made aware of what could happen at the sentencing and chose to proceed; knowing that the imposition of the sentence he received was within the realm of possibility.

C. THE RECORD IS CLEAR AS TO WHY THE COURT IMPOSED THE SENTENCE THAT IT DID.

Since the Petitioner is barred from assigning error to the imposition of an exceptional sentence and since the plea agreement was not breached by the state the only issue remaining is whether the court imposed a lawful sentence. The Petitioner attributes the sentence which was imposed by the court to the comments the State made at sentencing. *See* Brief of

Appellant at 6. No authority or support for this claim is provided. This court need not speculate as to the reasons the trial court had for imposing the sentence it did. The record is clear as to reasons the trial judge had for imposing the sentence. *See* CP 44 - 48.

RCW 9.94A.535 provides, "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.585(4) provides, "To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient."

In the instant case the court heard from both victims regarding the impact the Petitioner's actions had on their lives. The court also heard from the State. The Petitioner's counsel addressed the court and provided letters in support of the Petitioner to assist the court in deciding what an appropriate sentence should be. The court was provided with an abundance of information regarding this incident and the impact it has had on the lives of those involved in this case. The trial court made a finding of fact that, "The prosecuting attorney made no recommendation and the

defense counsel recommended 16 to 18 months. The victims recommended 120 months." *See* CP at 45.

The sentence which was imposed by the court was supported by the evidence. The court went into detail with respect to the reasons behind imposing a 72 month sentence. *See* generally CP 44 - 48. The court reflected on past cases that had been prosecuted in Stevens County and conducted legal research into other cases from across the state in which exceptional sentences were imposed. After taking into account everything the court had heard as well as the legal research it conducted a proper and lawful sentence was imposed.

The trial court stated what facts it was relying on when it decided to impose a 72 month sentence. The court found,

> B. The harm suffered by Caroline H. Enns on June 19, 2013, as she described at the hearing was immediate and permanent loss of vision in both eyes; sheared off right elbow; broken left ankle; both shoulders crushed, the bones shattered; both arms with multiple breaks, and legs broken. This harm substantially exceeds the level of bodily harm necessary to comprise substantial bodily harm.
>
> C. In the aftermath she uses a walker, out of fear she might fall; she has had eight surgeries, taking five to eight hours each; she has incurred $650,000 in medical bills; she is unable to pursue her career as an artist; and she is totally dependent on the care of her daughter. She has suffered unremitting pain since June 29, 2013.
>
> *Id.* at 45.

The trial court's decision is made clear in its written findings, and from that writing it is apparent that the State's comments at sentencing did not influence the court in reaching its decision. Rather the court focused on the injuries of the victims and weighed this case against others it had heard when it decided to sentence the Petitioner to 72 months.

2. THE SENTENCING COURT DID ERR BY CLASSIFYING VEHICULAR ASSAULT AS A SERIOUS VIOLENT FELONY.

The State concedes that the trial court improperly classified the offense of vehicular assault as a serious violent offense. RCW 9.94A.030(54)(xiii) states that vehicular assault is a "violent offense" when, "...caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner."

In the present case the Petitioner pled guilty to two counts of vehicular assault committed while under the influence. The State does not object to amending the Petitioner's judgment and sentence to correct this error.

3. THE SENTENCING COURT DID ERR BY IMPOSING 36 MONTHS OF COMMUNITY CUSTODY.

The State concedes that the trial court improperly imposed 36 months of community custody. RCW 9.94A.701(2) provides, "A court shall... sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense."

The State does not object to amending the Petitioner's judgment and sentence to reflect a term of community custody of eighteen months.

V. CONCLUSION

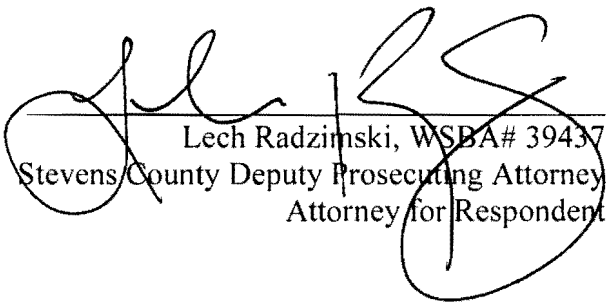
The Petitioner reached an agreement with the state that resolved his case. This resolution involved the possibility that he could be sentenced to an exceptional sentence up to 120 months. He is now dissatisfied with the sentence that was imposed and points to one comment made during the sentencing hearing made by the State to support a claim that the plea agreement had been breached. However, when the record is reviewed in its entirety it becomes clear as to what transpired at sentencing. The Petitioner was made aware of the possibility he could be sentenced to an exceptional sentence. The Petitioner himself asked for an exceptional sentence. The trial court listened to everyone, conducted

research, and imposed a sentence which is supported by the facts and the law.

The State respectfully requests that this court deny the relief the Petitioner seeks with respect to this first issue. The State further respectfully requests that the court remand this matter so that the remaining issues conceded by the State may be remedied by entry of an amended judgment and sentence.

Respectfully submitted this 20th day of May, 2015

Tim Rasmussen, WSBA # 32105
Sevens County Prosecutor



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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905 and to Anthony P. Martinez, Attorney at Law, Law Office of Steve Graham, 1312 North Monroe, #140, Spokane, WA 99201 and to Michael D. Neisler, #378161, Department of Corrections, P.O. Box 900, Shelton, WA 98584, on May 20, 2015.

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