No. 98193-1
COA No. 80640-8-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ACKERMAN, AKA JONATHAN BARTOSEK, AKA DAVID CAPRON,

Appellant.

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

The Honorable Chris Lanese Judge
Cause No. 16-1-01859-34

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the decision of the Court of Appeals conflicts with a decision of this Court or a published decision of the Court of Appeals pursuant to RAP 13.4(b)(1) or (2).

2. Whether this Court should grant review of the issue of fairness in plea negotiations pursuant to RAP 13.4(b)(3) when the case law already clearly delineates the process for review and the Court of Appeals followed the existing case law.

B. STATEMENT OF THE CASE.

The body of Dakota Walker was found near the Margaret McKenny campground with multiple gunshot wounds. CP 1. The Thurston County Sheriff's Office investigated and ultimately questioned the appellant, Jonathan Ackerman, and Vincent Garlock regarding the crime. CP 2-3. Ackerman indicated that Garlock had been the shooter and Garlock indicated that Ackerman had been the shooter. CP 3. Ackerman and Garlock were charged as co-defendants with murder in the first degree. CP 5.

Ackerman eventually accepted a plea offer to an amended charge of murder in the second degree/domestic violence. CP 8. In addition to the amendment from first degree murder to second degree murder, the State agreed to recommend 240 months

incarceration, with 36 months of community custody, with conditions to include restitution joint and severable with his co-defendant, that he forfeit all property collected as evidence except family and other personal photographs belonging to him that were found in a van, have no contact with certain individuals and that he complete a domestic violence evaluation and follow all recommended treatment. CP 11-12. As part of the recommendation, the State further agreed to recommend that the sentence run concurrent with his other pending cases and any federal time that may be imposed arising out of his felony conviction. CP 12.

At sentencing, the prosecutor began by stating, "This is an agreed recommendation," and stated, "the agreed recommendation is for 240 months in prison with 36 months of community custody." 3 RP 24.[1] The prosecutor then provided some background regarding the case indicating, "Dakota said that he had met Mr. Ackerman via an online dating app for men." 2 RP 26. In describing

[1] For purposes of this brief, the Change of Plea hearing on January 9, 2018, will be referred to as 1 RP, the continuance hearing on March 1, 2018, will be referred to as 2 RP, and the Sentencing Hearing on April 13, 2018, will be referenced as 3 RP as was done in the original Brief of Respondent in the Court of Appeals.

the victim, the prosecutor stated, "he seemed to be a vulnerable young man," later clarifying,

> I mean, nobody knew that he was missing during the time that his body lay in Capital Forest. So he was vulnerable, in that he wanted to get out. He maybe didn't have as much connection with all of his family members as you might hope for a 17-year-old young man.

3 RP 26.

The prosecutor discussed the fact that Ackerman and Garlock had engaged in mail thefts and took Dakota with them. 3 RP 27. She pointed out that when Dakota was found, "nobody seemed to notice that [he] was missing. He was living this transient lifestyle with Mr. Ackerman." 3 RP 27.

The prosecutor noted "when it became apparent that the suspects in this case were Mr. Ackerman and Mr. Garlock, both individuals gave a statement to law enforcement," and "they both gave nearly identical statements with the only difference being pointing the finger at the other guy." 3 RP 28. The prosecutor then noted, "it's clear that Ackerman had the motive to kill Dakota. Ackerman was Dakota's boyfriend. He was the one who was controlling Dakota." 3 RP 29. She then indicated,

> One of the people who was closest to Dakota said that Mr. Ackerman threatened her and said he would put a bullet between her eyes and shoot her when

> she was least expecting it. And the State believes that is what happened to Dakota, that he was shot when he was least expecting it.

3 RP 29.

The prosecutor continued to explain how the State arrived at the timeline and the State's reasons for believing that Ackerman was the shooter. 3 RP 29-30. The prosecutor indicated, "I tell you all that Your Honor because I know the Court is going to be sentencing Mr. Garlock later. Ultimately this was a difficult case," before continuing to distinguish between Ackerman and Garlock. 3 RP 30-31. Near the conclusion of her argument, the prosecutor stated,

> We've not been able to get information about why Dakota was shot at that particular moment. The only thing I can deduce is that Mr. Ackerman shot Dakota when he was least expecting it, just like he threatened to do to others.

3 RP 31.

The trial court then heard from the victim's mother, who indicated that she "already knew that true justice would not be served," and asked that the trial court impose the maximum sentence allowed. 3 RP 34, 36. The trial court indicated that he agreed with many of the things that the victim's mother had said, and imposed the high end of the standard range, 295 months. 3 RP

42, 43. Ackerman appealed arguing that the prosecutor breached the plea agreement that had been reached. Division I of the Court of Appeals disagreed and affirmed Ackerman's conviction and sentence.[2] Unpublished Opinion, No. 80640-8-1. Ackerman now seeks review of this Court as to the alleged breach of the plea agreement.

C. ARGUMENT

This Court will accept review when the decision of the Court of Appeals conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), conflicts with another decision of the Court of Appeals, RAP 13.4(b)(2), raises a significant question of law under the Washington or the United States Constitutions, RAP 13.4(b)(3), or involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). In his Petition for Review, Ackerman argues that RAP 13.4(b)(1), (2), and (3) apply to this case.

1. The Unpublished Opinion of the Court of Appeals does not conflict with a decision of this Court or a published opinion of the Court of Appeals.

The Court of Appeals correctly applied existing case law in

[2] The Unpublished Opinion remands the matter to the Superior Court to amend the judgment and sentence with a notation that the ordered restitution is joint and severable with the co-defendant.

finding that the prosecutor's argument at sentencing did not amount to a breach of the plea agreement. To the contrary, the Court of Appeals properly applied existing case law from this Court, the Court of Appeals and the federal courts to the facts of this case.

The Fourteenth Amendment's due process clause requires the plea-bargaining process to comport with principles of fairness. U.S. Const.amend XIV; Const. Art. 1 §3; Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Sledge, 133 Wn.2d 828, 839-840, 946 P.2d 1199 (1997). Whether a breach of a plea agreement has occurred is a question of law that is reviewed de novo. State v. Xaviar, 117 Wn. App. 196, 199, 69 P.3d 901 (2003). A prosecutor is entitled to present relevant facts that might not fully support the recommended sentence. State v. Gutierrez, 58 Wn. App. 70, 76, 791 P.2d 275 (1990). However, a prosecutor may not undercut the plea agreement explicitly or by conduct evidencing an intent to circumvent the terms of the agreement. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

The decision of the Court of Appeals is not contradicted by any of the cases that Ackerman argues are in conflict. In State v. Williams, the prosecutor agreed to recommend a standard range

sentence, but then filed a sentencing memorandum that set forth "aggravating circumstances," stated the court's authority to impose an exceptional sentence and emphasized that public safety required "at least" the high end of the standard range. 103 Wn. App. 231, 233, 11 P.3d 878 (2000).

In State v. Xavier, the prosecutor agreed to a 240-month sentence, but at sentencing the prosecutor emphasized the graveness of the situation, reiterated charges that the State did not bring, noted that the State had forgone the opportunity to ask for a 60-year exceptional sentence and highlighted aggravating circumstances that would support an exceptional sentence. 117 Wn. App. at 198. The statements included a comment that the defendant was "one of the most prolific child molesters that [the] office had ever seen," and specific comments that he exhibited no remorse and his conduct constituted a "monumental violation of trust." Id. at 200.

In State v. Van Buren, the prosecutor referenced the agreed recommendation "as listed in the plea form," and then stated, "if the Court is considering an exceptional sentence" before highlighting aggravating factors that were contained in a presentence investigation report. 101 Wn. App. 206, 215-216, 2 P.3d 991

(2000). In State v. Jerde, the prosecutors commented on a written presentence report, and two separate prosecutors outlined aggravating factors for grounds upon which the court could rely in imposing an exceptional sentence, despite the agreement for a mid-range sentence. 93 Wn. App. at 777-779.

In State v. Carreno-Maldono, 135 Wn. App. 77, 80-81, 143 P.3d 343 (2006), the State agreed to seek a low-end sentence and the prosecutor made arguments that implied a greater sentence was warranted on behalf of the victims, despite a statement in the record indicating that the victims "did not want to speak to the Court." The Court of Appeals correctly distinguished the low-end agreement in Carreno-Maldono from the mid-range recommendation in this case quoting Carreno-Maldono by stating, "we recognize it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence." Id. at 84; Unpublished Opinion at 8.

The Court of Appeals also correctly distinguished Xavier, noting that Xavier also involved an agreement for a low-end recommendation. Unpublished Opinion at 10. The Court of Appeals noted that in State v. Williams, the prosecutor agreed to a high-end standard range sentence, but then filed a 16-page sentencing

memorandum including a section regarding exceptional sentences. Unpublished Opinion at 11, Williams, 103 Wn. App at 236. Additionally, the Court of Appeals considered and followed the rationale in United States v. Whitney, 673 F.3d 965, 971 (9th Cir. 2012), noting that that decision also involved an agreed low-end recommendation. Unpublished Opinion at 11.

Applying all of the principals contained in the case law of this state, the Court of Appeals correctly concluded that the prosecutor remarks in this case were appropriate in the context of justifying the midrange sentence. Unpublished Opinion at 14. The Court of Appeals "objectively" reviewed the sentencing record in making its determination. Unpublished Opinion at 7; State v. Carreno-Maldonado, 153 Wn. App. at 83. Ackerman cannot demonstrate that the decision was contrary to a published decision of the Court of Appeals, a decision of this Court, or any federal decision.

2. The State agrees that fairness in plea agreements is an issue of substantial importance; however, this Court and prior decisions of the Court of Appeals have set forth the procedures for review and the Court of Appeals correctly followed those procedures.

The State agrees that the issue of fairness in plea negotiations is an issue of substantial importance. However, there is no reason for this Court to review the issue because, as noted

above and in the original Brief of Respondent, the procedures for review of plea agreements are clear. Those procedures were followed by the Court of Appeals in this case. There is no reason that this Court should accept review.

D. CONCLUSION.

The Court of Appeals correctly ruled that, viewing the entire record of the sentencing hearing objectively, the prosecutor did not breach the plea agreement that was entered in this case. Ackerman has not demonstrated that the decision of the Court of Appeals conflicts with any decision of this Court or published decision of the Court of Appeals. Though the issue of fairness in plea negotiates is of substantial importance, the law of this State already clearly defines the procedures for review of plea recommendations and the Court of Appeals properly followed those procedures. Ackerman has demonstrated no basis upon which this Court should accept review.

Respectfully submitted this 17 day of March, 2020.

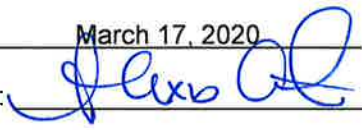
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Supreme Court using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: March 17, 2020

Signature: 

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