

NO. 69415-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RONALD MACDONALD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY MCCARTHY

**BRIEF OF RESPONDENT**

2013 JUN 21 PM 3:46

COURT OF APPEALS  
STATE OF WASHINGTON

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

LINDSEY M. GRIEVE  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	7
1. THE WASHINGTON CONSTITUTION GUARANTEES THE RIGHT OF A VICTIM'S REPRESENTATIVE TO MAKE A STATEMENT AT SENTENCING AND PROHIBITS A DEFENDANT FROM USING THAT RIGHT AS A BASIS FOR ERROR IN FAVOR OF THE DEFENDANT .....	7
a. The Trial Court Properly Exercised Its Discretion To Allow Detective Tompkins To Address The Court As A Representative Of The Deceased Victim .....	7
b. The State Adhered To The Plea Agreement Where It Did Not Undermine The Agreement And Alerted The Court That Tompkins Wanted To Address The Court As A Representative Of The Victim.....	10
D. <u>CONCLUSION</u> .....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

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

Santobello v. New York, 404 U.S. 257,  
92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)..... 10

Washington State:

State v. Carreno-Maldonado, 135 Wn. App. 77,  
143 P.3d 343 (2006)..... 11

State v. Davis, 43 Wn. App. 832,  
720 P.2d 454, review denied,  
106 Wn.2d 1017 (1986)..... 11

State v. Hixson, 94 Wn. App. 862,  
973 P.2d 496 (1999)..... 9

State v. Hunley, 175 Wn.2d 901,  
287 P.3d 584 (2012)..... 8

State v. Jerde, 93 Wn. App. 774,  
970 P.2d 781 (1999)..... 11

State v. Lindahl, 114 Wn. App. 1,  
56 P.3d 589 (2002)..... 9

State v. Mail, 121 Wn.2d 707,  
854 P.2d 1042 (1993)..... 9

State v. Sanchez, 146 Wn.2d 339,  
46 P.3d 774 (2002)..... 12

State v. Sledge, 133 Wn.2d 828,  
947 P.2d 1199 (1997)..... 10

<u>State v. Talley</u> , 134 Wn.2d 176, 949 P.2d 358 (1998).....	10
---------------------------------------------------------------------	----

Constitutional Provisions

Washington State:

Const. art. 1, § 35.....	7, 8
--------------------------	------

Statutes

Washington State:

RCW 7.69.010.....	8
RCW 7.69.030.....	8
RCW 9.92.060.....	3
RCW 9.94A.110 .....	8
RCW 9.94A.500 .....	8

Rules and Regulations

Washington State:

CrR 3.5.....	4
--------------	---

Other Authorities

Sentencing Reform Act .....	3
-----------------------------	---

**A. ISSUE PRESENTED**

1. The Washington Constitution guarantees the right of a representative of the victim to make a statement at sentencing and prohibits a defendant from using that right as a basis for error. Here, the victim of a 1978 homicide had no living family to speak on her behalf, and the sentencing court allowed the investigating officer to address the court as a representative of the victim. The detective asked the court to impose the maximum sentence on behalf of the victim. Where the State recommended the agreed-upon sentence and did not undermine the plea agreement, did the State adhere to the plea agreement?

**B. STATEMENT OF THE CASE**

Defendant Ronald MacDonald was originally charged by information with one count of murder in the first degree. CP 1. The Certification for Determination of Probable Cause described the underlying facts of the charge.<sup>1</sup> CP 3-9. In 1978, Arlene Roberts was an 80-year-old widow. CP 3. She lived alone in a trailer. CP 3. After noticing Roberts' absence, neighbors found her trailer in disarray and called the police. CP 3.

---

<sup>1</sup> MacDonald stipulated that the court could consider the facts set forth in the certification for determination of probable cause for purposes of the sentencing hearing. CP 193.

Officers located Roberts deceased on her bed. CP 3. Roberts' head was covered with a pillow, her blouse was unbuttoned, and she was naked from the waist down. CP 3. Roberts' wrists and ankles were bound with nylon stockings. CP 3. A garment had been tied around her mouth and a ligature made from a hair net was around her neck. CP 3. An autopsy determined that her cause of death was asphyxiation due to strangulation. CP 3. Roberts had also been beaten in the head and sustained a dislocated shoulder. CP 3.

When officers located Roberts' body, her trailer had been ransacked. CP 4. Her purse was missing, along with a diamond ring that she always wore. CP 4. The original detectives investigated several leads, but they were never able to develop a suspect and the case eventually became inactive. CP 4.

In 2010, a cold case detective submitted evidence from the scene to be re-examined due to technological advances. CP 4. The latent print examiner discovered that fingerprints on three documents matched MacDonald's fingerprints. CP 4. Upon investigating MacDonald, detectives learned that, at the time of Roberts' death, he lived seven blocks away from her trailer. CP 5. They also learned that MacDonald had been arrested for numerous

burglaries in several states, including two arrests in King County, Washington in 1978. CP 5.

In 2011, detectives traveled to Reno, Nevada, where MacDonald was living at the time. CP 5. While talking to detectives, MacDonald did not directly confess to killing Roberts. CP 5-9. However, MacDonald made several statements connecting himself to the murder. CP 5-9.

After beginning trial, the parties reached a plea agreement during voir dire. 4RP<sup>2</sup> 2. MacDonald pleaded guilty to manslaughter in the second degree pursuant to North Carolina v. Alford.<sup>3</sup> 5RP 3, 8. According to the plea, both parties agreed to recommend that MacDonald serve 16 months of confinement in the King County Jail.<sup>4</sup> CP 98. Pursuant to the agreement, the State would recommend a five-year period of suspended sentence and MacDonald would recommend a one-year period. CP 203.

---

<sup>2</sup> There are 5 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (June 11, 2012); 2RP (June 12, 2012); 3RP (June 13, 2012); 4RP (June 14, 2012); and 5RP (June 18, 2012). The transcript of the August 8, 2012 sentencing hearing appears at CP 188-211.

<sup>3</sup> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>4</sup> This sentence would have resulted in MacDonald's immediate release. CP 202. The sentence is pursuant to RCW 9.92.060. This sentence is not pursuant to the Sentencing Reform Act, because the crime was committed before the Sentencing Reform Act went into effect. CP 206.

At the sentencing hearing, the State asked the court to follow the terms of the plea agreement and impose 16 months of incarceration. CP 191. The State informed the court that Detective Tompkins wanted to address the court on behalf of the victim, who had no living family members to speak on her behalf.<sup>5</sup> CP 191-92. The prosecutor informed the court that she did not know what Tompkins would say, but affirmed her recommendation for the 16-month sentence. CP 192. The court agreed to hear from Tompkins. CP 192.

In Tompkins' address to the court on the victim's behalf, he stated:

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

CP 192. Tompkins then submitted photos of the crime scene to be marked as a sentencing exhibit. CP 192. Defense counsel objected to the submission of the photos and to Tompkins' request for the maximum sentence. CP 193.

---

<sup>5</sup> Detective Scott Tompkins was the lead cold case detective investigating Arlene Roberts' death. 2RP 4.

The court overruled the objection noting that:

The State is making its recommendation and it's adhering to that recommendation. As I understand it, Detective Tompkins is here speaking with respect to the victim. In many cases, if not all criminal cases, particularly serious ones such as this, a victim advocate very frequently speaks to the court on behalf of the victim. There is no victim advocate speaking here today, and I think Detective Tompkins may take that role.

CP 194.

Tompkins provided the photos to the judge and said that they portrayed how the victim was found in her trailer; "[s]he died a horrific death." CP 194. Tompkins addressed some of the evidentiary issues that defense counsel highlighted in their pre-sentence report. CP194-96. Tompkins also underscored the importance of the crime even though it occurred in 1978:

This woman was a part of our community. And whether it happened 34 years ago or last week, it needs to be held to the same standard. This happened to somebody, and somebody needs to be held accountable for it. No more and no less. And 16 months is not being held accountable. I think you'll agree once you take a look at the crime scene photos.

CP 196-97.

The court stated that it only considered the statements of Tompkins as statements made on behalf of the victim: "I want to

make clear that I allowed Detective Tompkins to speak insofar as he is speaking on behalf of the victim since there's not a victim advocate here today... [s]o I'll take his comments as they pertain to his advocacy on behalf of the victim." CP 197.

When the court issued its sentence, it noted that, "perhaps the most relevant thing about this case is the nature of the offense back in 1978." CP 207. The court imposed the maximum sentence of 60 months of confinement with a minimum sentence of 55 months. CP 208. The court stated that imposing "the sentence recommended by the parties" would result in "a miscarriage of justice" and "would seriously deprecate the nature of that crime, and would be an affront to justice as well as the memory of Mrs. Roberts." CP 208.

After defense counsel informed the court that the defendant was considering filing a motion to withdraw the plea of guilty based on Tompkins' statements, the court reiterated that it only considered Tompkins' statements as those of a representative of the victim. CP 210. Additionally, the court indicated that it would have imposed the same sentence regardless of Tompkins' statements to the court. CP 210.

**C. ARGUMENT**

1. THE WASHINGTON CONSTITUTION GUARANTEES THE RIGHT OF A VICTIM'S REPRESENTATIVE TO MAKE A STATEMENT AT SENTENCING AND PROHIBITS A DEFENDANT FROM USING THAT RIGHT AS A BASIS FOR ERROR IN FAVOR OF THE DEFENDANT.

MacDonald claims that the State violated the plea agreement when Tompkins addressed the court as a representative of the victim and asked for the maximum term of confinement on her behalf. This argument should be rejected. The Washington Constitution guarantees that a representative of a deceased victim may address the sentencing court, and, here, the trial court properly allowed Tompkins to speak as a representative of the victim. In any event, the State did not breach the plea agreement.

- a. The Trial Court Properly Exercised Its Discretion To Allow Detective Tompkins To Address The Court As A Representative Of The Deceased Victim.

Article 1, § 35 of the Washington Constitution grants crime victims constitutional rights during the sentencing phase of a defendant's trial and expressly provides that a defendant may not use those rights as a basis for error in the defendant's favor:

...victims of crime are hereby granted the following basic and fundamental rights... a victim of a crime charged as a felony shall have the right... to **make a**

**statement at sentencing[.] In the event the victim is deceased**, incompetent, a minor, or otherwise unavailable, **the prosecuting attorney may identify a representative to appear to exercise the victim's rights**. This provision **shall not constitute a basis for error in favor of a defendant** in a criminal proceeding[.]

Art. 1, § 35 (emphasis added).

Additionally, RCW 7.69.030, governing the rights of victims, survivors, and witnesses, requires that “any criminal court” “shall make a reasonable effort” to ensure the right of victims and survivors of victims “to **present a statement personally or by representation**, at the sentencing hearing for felony convictions.” RCW 7.69.030(14) (emphasis added). In RCW 7.69.010, the legislature articulated its intent that “the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are **honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants**.” (Emphasis added).

Finally, RCW 9.94A.500<sup>6</sup> directs that sentencing courts shall consider:

---

<sup>6</sup> This statute was previously codified as RCW 9.94A.110. The section of RCW 9.94A.500 regarding the burden of proof for prior convictions was found unconstitutional. State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012).

[A]ny victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, ***the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer*** as to the sentence to be imposed.

(Emphasis added). The Supreme Court observed that this statute, as codified in its previous form, provides “a baseline – a minimum amount of information which, if available and offered, *must* be considered in sentencing.” State v. Mail, 121 Wn.2d 707, 711, 854 P.2d 1042 (1993).

Furthermore, courts have discretion to decide who is allowed to speak at sentencing. State v. Lindahl, 114 Wn. App. 1, 56 P.3d 589 (2002). The list of persons entitled to speak contained in the statute governing sentencing hearings is inclusive rather than exclusive. State v. Hixson, 94 Wn. App. 862, 866, 973 P.2d 496 (1999). Additionally, the statute governing sentencing hearings does not limit the court’s discretion in hearing from others. Id.

Here, in light of the constitutional rights guaranteed to crime victims, and in light of the court’s discretion, the court properly allowed Tompkins to speak as a representative of the victim. Additionally, the constitution specifically prohibits a defendant from using a statement made by a representative of the victim as a basis

for error, thus. Thus, MacDonald's claim based on Tompkins' statement is barred.

- b. The State Adhered To The Plea Agreement Where It Did Not Undermine The Agreement And Alerted The Court That Tompkins Wanted To Address The Court As A Representative Of The Victim.

Due process requires a prosecutor to adhere to the terms of a plea agreement. Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). A plea agreement is a contract between the State and the defendant. State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997). Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the State must adhere to the terms of the agreement by recommending the agreed-upon sentence. Id. at 839.

The State need not make the sentencing recommendation enthusiastically. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). However, "[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 toward the tribunal] and... not hold back relevant information regarding the plea agreement." Id.

In declining to adopt a rule, the Supreme Court noted the difficulty in “forg[ing] a rule of general application that establishes a bright line between adherence and undercutting [the plea].” Id. at 187. A breach does not occur unless the State undercuts its obligations under the plea agreement explicitly or by conduct showing an intent to circumvent the terms. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999). Similarly, a breach does not occur when a prosecutor advises the court of individuals who wish to testify at a sentencing hearing. State v. Davis, 43 Wn. App. 832, 837, 720 P.2d 454, review denied, 106 Wn.2d 1017 (1986). To determine whether a breach occurred, reviewing courts examine a prosecutor’s actions and comments objectively from the sentencing record as a whole. State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006).

Here, in examining the entirety of the sentencing record, the State did not undercut the plea agreement explicitly or implicitly. The State twice recommended that the court impose the agreed-upon sentence of 16 months. CP 191-92. In making the State’s recommendation to the court, the prosecutor did not present argument nor did she reference the facts of the case. CP 191-92. After making the State’s recommendation, the prosecutor simply

informed the court that Tompkins wished to speak on behalf of the victim. Upon doing so, the prosecutor advised the court that she did not know what Tompkins was planning to say on behalf of the victim and reiterated her support for the agreed recommendation, stating, "My recommendation is still solidly for 16 months[.]" CP 192.

MacDonald relies on State v. Sanchez<sup>7</sup> to support his claim that Tompkins breached the plea agreement. This argument is misplaced. In a plurality opinion, the court in Sanchez held that investigating officers are bound by the plea agreement as an investigative arm of the prosecutor. 146 Wn.2d at 356-57 (J. Chambers, Concurring opinion). However, that decision is inapposite here. In Sanchez, both the victim and her parents addressed the sentencing court and the officer never claimed he was addressing the court on behalf of the victim. 146 Wn.2d at 343. These facts are unlike the present circumstances. Additionally, the court's decision in Sanchez is inapposite because it did not address the issue of whether an officer may address the sentencing court as a representative of the victim.

---

<sup>7</sup> 146 Wn.2d 339, 46 P.3d 774 (2002).

Here, as the court repeatedly noted, Tompkins addressed the court as a representative of Arlene Roberts, the deceased victim. By 2012, Roberts, who was born in 1898 and slain in 1978, had no living family members to address the court on her behalf. CP 1, 192. Tompkins conveyed information to the sentencing court regarding the victim's final living moments. CP 194. Additionally, Tompkins stressed that although Roberts had been killed many years before MacDonald was sentenced, she was "a part of our community, and whether it happened 34 years ago or last week, it needs to be held to the same standard." CP 196. There is no evidence that Tompkins' statements were anything but an effort to promulgate the victim's rights.

Furthermore, Tompkins' statements did not affect the sentence. The trial court was familiar with the essential facts of the case from reviewing the Certification for Determination of Probable Cause and from presiding over multi-day pretrial hearings. Before imposing the sentence, the court orally reviewed the facts, evidentiary issues, and acknowledged MacDonald's lack of recent criminal history. CP 204-07. The court stressed that in light of the nature of the offense, it would be a "miscarriage of justice" to impose the recommended sentence. CP 207-08. The court

repeated that it only considered Tompkins' statements as a substitution for a victim advocate and confirmed that the same sentence would have been imposed if Tompkins had not addressed the court. CP 210.

Here, the court properly allowed Tompkins to address the court as a representative of the victim and the constitution specifically prohibits a defendant from using a statement made by a representative of the victim as a basis for error. Additionally, because the State adhered to the plea agreement, MacDonald's due process rights were not violated and this Court should deny his request to have this case remanded.

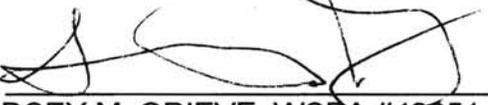
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to deny MacDonald's request for remand.

DATED this 21 day of June, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
LINDSEY M. GRIEVE, WSBA #42951  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer M. Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RONALD MACDONALD, Cause No. 69415-4 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 21<sup>st</sup> day of June, 2013

W Brame

Name

Done in Seattle, Washington