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WASHINGTON STATUTES

RCW 9.94A.5356

I. ISSUES

Did the prosecutor breach the terms of the plea agreement by vigorously advocating for the sentencing recommendation represented in the plea agreement?

II. STATEMENT OF THE CASE

On December 4, 2013, the defendant entered a plea of guilty to one count of possession of a controlled substance with intent to manufacture or deliver. The plea paperwork indicated the state agreed to recommend a mid-range sentence of 90 months; and, the defendant would not be agreeing with that recommendation. CP 35-39. At the plea hearing, the defendant, through his attorney, requested the court set the quickest sentencing date he could get as it needed to be before the defendant was sentenced on multiple matters he had pending sentencing in King County. RP 12/4/13 7. The court set the sentencing date for the following Tuesday, December 10, 2013. RP 12/4/13 8.

It is not clear from the record when the trial court and prosecuting attorney received the defendant's 13 page sentencing memorandum in support of his recommendation the court impose a sentence at the low end of the sentencing range, 60 months, however, the document is dated December 9, 2013. 2 CP 56. This

document included a letter of recommendation and medical records for the defendant's parents. The prosecutor responded with a Summary of Plea Agreement and Sentencing Memorandum that was filed on December 10, 2013. The sentencing hearing took place on December 17, 2013. 2 CP 53-66.

A. FACTS BEFORE THE SENTENCING COURT.

The police came in contact with the defendant when he stole Robert Gifford's iPad and Apple laptop from his car. Mr. Gifford had installed an anti-theft GPS tracking program in his iPad, so he was able to tell the police in real time, the movements of the items. Based on this information, the police contacted the defendant as he was driving a short distance away. After he had been advised of his rights, the defendant voluntarily directed the officers to Mr. Gifford's stolen items in his car. As there were other stolen laptops in the car, the police impounded the vehicle and obtained a search warrant. 1 CP 43-45; 1 CP 33 (incorporating affidavit of probable cause into defendant's statement on plea of guilty).

During the service of the search warrant, the officers noted a cell phone in the car that was continuously ringing. The officers also located suspected heroin. They stopped the search and obtained an addendum to encompass the potential controlled

substances. They then continued the search and located 158.6 grams of cocaine broken into multiple different sized baggies in the trunk of the car and 2.3 grams of heroin. They also located several hydrocodone-acetaminophen pills, necklaces, earrings, rings a few women's purses, and identifications belonging to two other individuals. 1 CP 45-50; 1 CP 33.

III. ARGUMENT

A PROSECUTOR DOES NOT BREACH A PLEA AGREEMENT BY PROVIDING INFORMATION TO THE COURT, SO LONG AS SHE DOES NOT ADVOCATE FOR A SENTENCE GREATER THAN HER PROMISED RECOMMENDATION.

A plea agreement is a contract between the state and the defendant. As such, basic contract principles of good faith and fair dealing require the state to act in good faith when negotiating and entering into plea agreements. Furthermore, the state has a further duty to comply with plea agreements to protect the defendant's due process rights. State v. Sledge, 133 Wn.2d 828, 838-40, 947 P.2d 1199 (1997). 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). A prosecutor may not, however, "undercut the plea bargain explicitly or by conduct evidencing an intent to circumvent the terms of the plea

agreement.” State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

Unlike the parties in State v. Xaviar, the parties in this case did not have a joint recommendation. State v. Xaviar, 117 Wn. App. 196, 198, 69 P.3d 901, 903 (2003). The agreement reached by the parties in this case contemplated a disagreed recommendation at sentencing. The defendant was reasonably aware the prosecutor, at sentencing, would advocate for her position by pointing out those facts that make a sentence higher than that proposed by the defendant more appropriate.

Although referring to potential grounds for an exceptional sentence would may imply an intent to undercut or circumvent the plea agreement, in the present case, that is not the case; the prosecutor was simply countering the defendant’s petition for a low-end sentence and supporting her request for the mid-range. When the prosecutor’s statements at sentencing are considered in context, there is no indication she was seeking an exceptional sentence but she was advocating for a 90 months sentence. A prosecutor does not undercut a plea agreement merely by vigorously advocating the State’s position for a sentence recommendation that the parties did not fully agree with.

In his memorandum, the defendant argued for the court to impose the low end of the range, 60 months, as opposed to the state's recommendation of a 90 months mid-range sentence. To support his recommendation, the defendant argued to a number of mitigating factors supporting his request for a low-end sentence, including the defendant's age, studies on recidivism, that the defendant had quickly entered pleas on this case and his King County cases. The defendant requested leniency, explaining that he only committed this offense to provide pain medication, he could not otherwise afford, to his sick and dying parents. The defendant also argued for the court to disregard his prior criminal history as having quite some time ago. 2 CP 53-54.

The prosecutor responded to these arguments in her sentencing memorandum and her oral presentation at sentencing by providing potentially aggravating factors. She presented these to the sentencing court as a counter balance to the mitigating factors presented by the defendant and thus supported her recommendation for a mid-range sentence. The prosecutor was entitled to explain why the defendant should be sentenced to a mid-range sentence, rather than receiving some lesser sentence. In context, her arguments were clearly purposed to defend her

recommendation of 90 months. The entire thrust of her argument was to repeatedly say, "A low-end sentence is not appropriate for this individual." 2 CP 68-70.

Although the prosecutor touched on a few potential grounds for an exceptional sentence, she did not go into detail and concluded by saying, "...however, the state is merely seeking a mid-range sentence to run consecutively to his other sentences. A low end or a concurrent sentence [with the King County matters] would result in these offenses going unpunished or obviously too leniently punished...." 2 CP 68. When taken in context the prosecutor's statements were not a breach of the plea agreement, but advocacy for the state's mid-range recommendation. "As to the mid-point sentencing recommendations...we recognize that it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence." State v. Carreno-Maldonado, 135 Wn. App. 77, 84, 143 P.3d 343, 347 (2006).

At no time did the state request the court impose an exceptional sentence. The state did not refer the court to any specific section of RCW 9.94A.535. The state had not charged any factor under RCW 9.94A.535 and did not ask the court to make any

factual findings that would support an exceptional sentence. The prosecutor did repeatedly argue against the court imposing a low-end sentence as requested by the defendant. 2 CP 68; RP 12/17/13 2, 4.

At no time did the defense attorney object to the prosecutor's prior comments regarding the potential grounds for an exceptional sentence. It appears it was clear to all in the courtroom that the prosecutor's argument with regard to the aggravating factors was to counter the defendant's request for a low-end sentence and to support the State's request for a mid-range sentence.

During the prosecutor's oral recommendation the defendant did object twice. Once to her statement, "Here his score alone and the quantity alone support 90 months or more. I would ask that you follow the State's recommendation." The defendant objected to the state not adhering to plea agreement by stating "or more" with her recommendation. The prosecutor's comment was immediately followed by a request for the hoped-for result of the implied balancing, a mid-range sentence. The prosecutor was advocating for the sentencing court to balance the aggravating factors with the mitigating factors and to arrive in the middle, a sentence of 90 months, which was exactly what the state had agreed to

recommend. This is how the sentencing judge said he had interpreted the statements, "I took it as she was asking for 90 months. I didn't hear that she was asking for more than 90 months." RP 12/17/13 4. Again, the statement "or more" was consistent with the prosecutor's intent to counter the defendant's arguments for a low-end sentence.

The other objection was to the prosecutor providing the court with the facts of the King County offenses. RP 12/17/13 3. In her argument the prosecutor appropriately presented relevant facts to counter the defendant's representation he was only dealing drugs to help his parents obtain necessary pain medication; specifically, the facts surrounding the pending King County convictions.

"Chad Zachariasen is not a man of moderate means, selling drugs to help his parents with access to medical necessities. By the quantities of drugs (both in terms of variety and volume) as well as the cash and stolen property it's apparent that the defendant is a mid to high level dealer who has made a considerable income from drug sales. A low-end sentence is not appropriate for this individual."

2 CP 70.

The intent of prosecutor's argument was clearly to counter the defendant's plea for leniency based on his parents' illnesses and need for pain medications.

The sentencing court spelled out what it considered when deciding on the sentence. The sentencing judge indicated he rejected the defendant's claim that he had committed this offense to get medication for his parents. He looked at the types of drugs seized and the length of the defendant's criminal history and determined the defendant deserved the high end of the range and that was his sentence. RP 12/17/13 7.

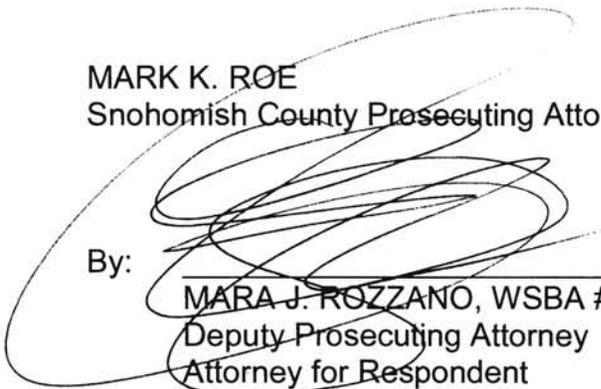
IV. CONCLUSION

There was no breach of the plea agreement. The sentence imposed was within the court's discretion. The judgment and sentence should be affirmed.

Respectfully submitted on July 8, 2014.

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By:



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COURT OF APPEALS
STATE OF WASHINGTON
2014 JUL -9 PM 1:40

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. CHAD R. ZACHARIASEN, Appellant.

No. 71348-5-I
AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9th day of July, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 27th day of July, 2014.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is stylized and cursive.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit