73008-8

NO. 73008-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ISAAC ZAMORA,

Appellant/Cross-Respondent.

FILED
Jul 18, 2016
Court of Appeals
Division I
State of Washington

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

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT ZAMORA

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A. ARGUMENT.

After Mr. Zamora entered a plea agreement to resolve the charges against him without having a trial, the State obtained changes in the laws that structured his plea agreement and under which he was confined. These changes were sought and enacted with Mr. Zamora in mind, intending to alter the framework of his bargained-for sentence. Upon inducing Mr. Zamora to plead guilty based on a particular legal framework that governed the terms of his incarceration, the State violates due process, its contractual obligations, and its ethical duties by working to change this legal framework in order transfer Mr. Zamora from a mental health hospital to prison.

1. Contractually and as a matter of due process, the State is bound by the plea agreement entered, including the parties' understanding of its terms under then-existing law.

a. The State is bound by the plea agreement.

The State agrees it is bound by the terms of the plea agreement as a matter of due process and under governing contractual law. DSHS Brief at 8. It does not deny the role it played in changing the statutory scheme and does not deny that the intent of these changes was to alter

the procedure for transferring Mr. Zamora from the mental hospital to prison, as detailed in Appellant's Opening Brief, at 8-10, 16-22.

It also agrees that Mr. Zamora's written guilty plea cites the then-existing version of RCW 10.77.120, and a case construing it, *State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988). CP 380. Under the statute in effect and *Sommerville*, the framework of the plea agreement mandated Mr. Zamora's immediate placement in the custody of DSHS for civil confinement, and permitted his release to the custody of DOC only upon a finding that he was eligible for release. CP 375, 380.

The State does not contest the plain evidence of Mr. Zamora's expectations under the plea agreement. He reasonably understood that his release could only be initiated by his own petition, where he would have to prove he is no longer a danger to others. CP 247, 268-69, 375. A defendant's reasonable understanding of the agreement at the time he entered the plea is the touchstone for determining whether the government violated it. *See United States v. Rewis,* 969 F.2d 985, 988 (11th Cir.1992).

A written agreement is viewed against the backdrop of negotiations. *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir.1990). Ambiguity is read against the government. *Id*.

The State treats Mr. Zamora's expectation as irrelevant, claiming it was not explicit enough in the plea agreement. But not only did the written agreement discuss the legal framework under which Mr. Zamora expected to be confined, it did not purport to be the sole source defining all of the parties' expectations and promises, as it could have. *See, e.g.*, *United States v. Smith*, 429 F.3d 620, 630 (6th Cir. 2005) (integration clause, providing that written agreement constitutes full and complete understanding of terms, may limit court's reference to other understandings regarding terms of plea agreement).

The backdrop of the negotiations demonstrates the intent of the parties. Mr. Zamora gave up a viable defense of not guilty by reason of insanity to all charges, and the State gained the benefit of assuring the public that Mr. Zamora would never be released in the event his mental health rebounded. Mr. Zamora had no expectation that the State would immediately work to undo the plea agreement's expectations by changing the laws on which it was based. "The State fulfills its obligations under a plea agreement if it acts in good faith and does not

contravene any of the defendant's reasonable expectations that arise from the agreement." *State v. McRae*, 96 Wn.App. 298, 305, 979 P.2d 911 (1999). Mr. Zamora reasonably expected that he was negotiating an agreement under a particular legal framework that he expressly cited in the plea agreement. The State pulled the rug out from under him by changing the statutes on which he relied after his plea. He is entitled to the benefit of his bargain, with which the State in good faith must comply.

b. The plea agreements rests on a particular framework for holding Mr. Zamora as governed by then-existing statutes and case law.

The State claims a loophole exists allowing it to evade the original understanding of the plea agreement. This loophole is that the plea agreement, while concededly citing RCW 10.77.120, did not expressly say that future changes to the statute would not apply.

The State's position is befuddling. The parties' understanding of the legal consequences of Mr. Zamora's plea were plainly part of plea discussions and were explicitly included in the plea agreement. CP 380. By citing the statute and case law, the plea agreement shows the parties' expectations were based on those procedural requirements.

And unlike a situation where an unanticipated change in the law occurs that might have caused parties to act differently at the plea bargaining stage, this change in the law was precipitated by the State, a party to the plea agreement. The State actively campaigned to change the governing statute in direct response to Mr. Zamora's case, for the purpose of undermining his expectations under the then-existing statutory scheme. The State cites no authority allowing to it alter the law after a plea agreement, for the purpose of changing the law that controlled the plea agreement, and thereby avoid the specific performance of a plea agreement that typically controls.

c. Contrary to the State's depiction of the issues, the "length" of Mr. Zamora's civil commitment is not contested, but rather the framework under which he would be confined as understood by his plea agreement.

The State further parses the language of the plea agreement to insist that because Mr. Zamora was not guaranteed a specific length of hospitalization, he cannot complain that his hospitalization is curtailed based on a new legal framework authorizing his release under different criteria.

This obfuscation is illogical. The length of the hospitalization was not specified, but its terms and condition were. The terms and

conditions were those set forth in the controlling statutes, cited in the plea agreement.

d. As a matter of policy and settled law, Mr. Zamora is entitled to the specific performance of his plea agreement, unless he asks to withdraw the plea.

Because plea agreements are based on the accused's waiver of fundamental rights, the State is held to "'meticulous standards of both promise and performance.'" *Palermo v. Warden,* 545 F.2d 286, 296 (2d Cir.1976) (quoting *Correale v. United States,* 479 F.2d 944, 947 (1st Cir.1973)). The State's "duty of good faith" when plea bargaining prohibits it from "explicitly or implicitly" engaging in conduct that may "circumvent the terms of the plea agreement." *State v. Carreno-Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006).

"Plea agreements are *like* contracts; however, they are not contracts, and therefore contract doctrines do not always apply to them." *United States v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990) (emphasis in original). To the extent a plea agreement is judged as a contract, "[t]he equity doctrine of estoppel prevents disavowal of a contract after one party in good faith relies to his own detriment on the representations of the other." *Palermo*, 545 F.2d at 295, citing1 S. Williston on Contracts, §§ 139-140 (3d Ed. 1975 Supp.).

It is settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The benefits from plea bargaining are contingent upon the fairness of the agreement between the accused person and prosecution. *Id*. at 260-61.

In a case where the State induces a guilty plea by promising to persuade the parole board to release a person, the State is specifically obligated to pursue this promised relief even though it cannot control the Parole Board's decision. *Palermo*, 545 F.2d at 296. Likewise, when the law changes after a guilty plea so the State cannot fulfill a sentencing promise, the defendant may be entitled to specific performance. *See Muhammed v. Kentucky Parole Bd*., 468 S.W.3d 331, 345 (Ky. 2015) (holding that defendant waived objection, but had he timely asked court to intervene, court had authority to order specific performance of parole promise notwithstanding unanticipated change in statute). Mr. Zamora's constitutional rights take priority over statutory provisions. *State v. Miller*, 110 Wn.2d 528, 533, 756 P.2d 122 (1988).

Mr. Zamora has a right to the benefit of his bargain. Subsequent statutes were drafted for the purpose of denying him this benefit, which undermines the plea agreement. The State's promise made to induce the pela agreement must be fulfilled.

2. The vague, retroactively implemented statute is not fairly applied to Mr. Zamora.

a. The statute hinges on unduly vague language that invites arbitrary enforcement.

A statute is unconstitutionally vague of it does not provide "ascertainable standards" to "protect against arbitrary enforcement." *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008); *see Johnson v. United States*, _ U.S. _, 135 S. Ct. 2551, 2556-57, 192 L. Ed. 2d 569 (2015). A law prescribing punishment violates due process if it is "so standardless that it invites arbitrary enforcement."

In *Johnson*, the Supreme Court struck down a sentencing law that increased punishment for a person with a prior violent felony, defined as involving "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). 135 S.Ct. at 2557. This language was too general, allowing a "wide ranging inquiry" which "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id*.

The State says that the vagueness of RCW 10.77.200(3)[1] is measured only by an after-the-fact assessment of how the trial court actually applied it. It reasons that only if the court actually applied it in a patently unreasonable way, then it would be too vague. But the court's application of the statute demonstrates its vagueness. CP 9, 300.

The statute asks if Mr. Zamora's mental illness is "manageable" by DOC to let DSHS wash its hands of him. Because a prison has to "manage" people with terrible behavioral issues all the time, this standard is without teeth or any structure at all. Moreover, the court did not find DOC could appropriately manage Mr. Zamora without mandating additional conditions and declared his transfer was contingent on additional considerations. . 9/10/14RP 86-88. DOC is appealing these conditions, claiming the court lacks authority to require it to do anything in treating Mr. Zamora.

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[1] The pertinent language in RCW 10.77.200 provides:
If the person who is the subject of the petition will be transferred to a state correctional institution or facility upon release to serve a sentence for any class A felony, the petitioner must show that the person's mental disease or defect is *manageabl*e within a state correctional institution or facility, but must not be required to prove that the person does not present either a substantial danger to other persons, or a substantial likelihood of committing criminal acts jeopardizing public safety or security, if released.
(emphasis added).

The State insists that being manageable must mean: "capable of being managed." DSHS Response Brief at 21. It also insists that a prisoner's recourse if not properly treated is to file a civil suit. See also DOC Brief in Response (reply brief of DOC at 11-12, explaining civil rights actions prisoner could file, proving deliberate indifference in violation of Eighth Amendment). The State ignores the unreasonableness of expecting a person who suffers a serious mental illness to effectively sue DOC when being treated with egregious cruelty by a prison. *See* Mr. Zamora's Opening Brief at 30.

Being manageable in a prison sets a bar so low as to be non-existent. Here, the State did not prove that DOC was capable of managing Mr. Zamora without placing restrictions on its treatment of him, even under this extremely deferential standard, but the State also appeals from the mere imposition of these conditions. Consequently, the State has not meet its burden of proof here, and the amorphous statute is unduly vague.

b. The substantive alterations in the standard for release from civil confinement, as well as its procedure, are being retroactively applied to Mr. Zamora.

The State's contention that the statutory changes are merely prospectively applied misrepresents the nature of these changes. RCW 10.77.200 changes the legal standard on which a person who has been found not guilty by reason of insanity is held for treatment, and it was under this substantive rule that Mr. Zamora opted to waive his rights to contest the charges. The changes in the law that mandate incarceration as opposed to treatment in a hospital is a markedly different type of treatment, punitive in nature, and Mr. Zamora would not have waived his rights to trial if he was going to be sent to prison before completing the treatment he needed.

The State does not dispute that these laws were changed for Mr. Zamora only, and no one else even seems to fit under its criteria for transfer to prison under the vague standard of being deemed "manageable." RCW 10.77.200(3). The State cannot evade the legal consequences of changing a law for the purpose of rapidly sending Mr. Zamora to prison. The changes to the substantive standards and procedural mechanisms for confining Mr. Zamora should not be applied to him because the statutes are unduly vague, constitute additional

punishment unfairly applied to him, and deny him due process by altering the basis of his plea.

B. CONCLUSION.

For the reasons discussed in Mr. Zamora's opening brief and as further explained herein, Mr. Zamora is entitled to have his the plea agreement enforced based on the parties' understanding at the time, including specific performance, the opportunity to withdraw his plea, and any other relief deemed proper. The State's failure to prove Mr. Zamora is properly released absent additional conditions further undermines the court order dissolving DSHS's jurisdiction over him and transferring him to the complete control of DOC for the rest of his life.

DATED this 18th day of July 2016.

Respectfully submitted,

s/ Nancy P. Collins

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF JULY, 2016.

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