

No. 75206-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RYAN ERKER,

Appellant.

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FILED  
October 10, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Bruce E. Heller

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BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Ryan Erker pleaded guilty as part of an agreement with the State that included a joint agreed recommendation for the low end sentence. At sentencing, the prosecutor undercut the plea agreement by alleging Mr. Erker was more culpable than he was willing to admit. The prosecutor then provided the court with information suggesting a higher sentence than the parties the parties agreed to. The court rejected the agreed recommendation and imposed a mid-range sentence. Mr. Erker seeks reversal and remand in order to allow him his choice of remedies for the breach of the plea agreement.

B. ASSIGNMENT OF ERROR

The prosecutor violated Mr. Erker's right to due process when she violated the plea agreement at sentencing.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where a prosecutor agrees to make a particular sentencing recommendation in return for a guilty plea, the prosecutor cannot thereafter do anything to undercut that recommendation at sentencing. The prosecutor's breach of the plea agreement Mr. Erker entitled to his choice of remedies

between withdrawing his guilty plea or specific performance, where the prosecutor undercut the plea agreement and suggested facts that supported a higher sentence. Is Mr. Erker entitled to reversal and remand for his choice of remedies?

#### D. STATEMENT OF THE CASE

Ryan Erker pled guilty as part of a plea agreement to one count of second degree felony murder with a firearm enhancement. CP 32-57; RP 6-7. In return for Mr. Erker's plea, the State agreed to recommend that Mr. Erker be sentenced to the low end of the standard range of 183 months.<sup>1</sup> CP 36, 57; RP 6-7.

At sentencing, after making the promised low end standard range sentence recommendation, the prosecutor, without prompting, gratuitously argued:

It is significant, however -- and I will say this in response to defense Pre-Sentence Report, and the final sentence therein, which was that Mr. Erker had great difficulty coming to terms and grasping the felony murder role. And I'd like to make a few comments about that that are not meant at all to undermine our agreed recommendation, but that are meant to edify him, and edify the families as to why we have this felony murder ruling.

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<sup>1</sup> The low end of the standard range of 123 months for the felony murder plus 60 months for the firearm enhancement. CP 56.

Because it's tempting for people to think well, felony murder; I arrange a felony, a burglary, and unintended things happen, something goes wrong. Why should I be on the hook for something that somebody else did?

But here's what felony murder is really about. It's -- it's really about willingness to disregard the cost of the crime, the perfectly foreseen cost of human life when one arranges a home invasion burglary and robbery. And when one arranges such a crime with full knowledge of the folks who wanted to institute it. Mr. Erker knew David Marshall -- knew Steven Marshall, and he knew what he was capable of. And knew that going in and burglarizing someone who is a marijuana dealer, for hopefully getting marijuana and money, could involve violence. And would involve violence. And he accepted that consequence by doing this.

And in some ways, that disregard for another's life -- it's no different than the sentiment behind an intentional murder. And that is why we have felony murder. And I genuinely hope that Mr. Erker can understand that, and that that is why it took two years of negotiations, which really were two years to get him to plead guilty as charged. Because the State held fast that the consequences were completely foreseen, and he accepted them when he did his part in this crime. And again, I don't say that for any other reason than to respond to Ms. Gaisford's comment that he's had a difficult time understanding it. And I hope that some day he does understand that what he did -- if he had never initiated this event, Ryan Prince would still be alive. It's a great weight for him to bear, but I think it's important that he bear it.

RP 18-19.

Counsel for Mr. Erker expressed concerns over the prosecutor's unsolicited improper argument:

I do have some concern, which as Mr. Erker's counsel, I have to express to the Court. And that is what I perceive as Mr. Erker's counsel, a subtle effort that disturbs me, having reached at least an agreed recommendation with the Office of the King County Prosecuting Attorney. I will temper my remarks only to say I'm not here to argue the nuances of the felony murder rule, or the reasons for negotiations, or my role in this case, except to say that I prepared on Mr. Erker's behalf as much as possible an appropriate, and accurate pretrial statement.

I am constrained to say to the Court, there is an upcoming trial of a co-Defendant Marshall in this case. We believe the evidence shows to be one of the shooters in this case. And our understanding is the State's case was strong and that no testimony from Mr. Erker was needed. But that's in the future, and we have nothing to do with that.

Mr. Erker is prepared to go to prison for a very long time. And that's the reason he's here today. And whether his counsel took time to negotiate this case, or whether I worded something to which someone took exception, I ask the Court not to allow that to weigh against Mr. Erker in this Court's decision here today.

RP 33.

The trial court rejected the parties agreed sentence recommendation and sentenced Mr. Erker to an aggregate sentence of 233 months.<sup>2</sup> CP 61; RP 40-41.

E. ARGUMENT

**1. The prosecutor undercut the plea agreement at sentencing violating Mr. Erker's right to due process.**

- a. *Due process requires the State to comply with the terms of a plea agreement.*

The State and the defendant enter into a contract when entering into a plea agreement. *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). But, a criminal defendant's rights arising from a plea agreement are constitutionally based and fundamentally broader than those under commercial contract law. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997).

Because plea agreements concern fundamental rights, due process requires the prosecutor to strictly adhere to the terms of the agreement. U.S. Const amend. XIV; *Santobello v. New York*, 404 U.S. 257, 261-63, 92 S.Ct. 495, 30 L.Ed.2d 427

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<sup>2</sup> The midrange sentence consisted of 173 months plus the 60 month firearm enhancement. CP 56, 61.

(1971); *Sledge*, 133 Wn.2d at 839. Thus, a plea agreement obligates the prosecutor to recommend to the court the sentence contained in the agreement. *Talley*, 134 Wn.2d at 183. Although the prosecutor does not have to make the sentencing recommendation enthusiastically, the prosecutor must not undercut the terms of the agreement. *Talley*, 134 Wn.2d at 183; *Sledge*, 133 Wn.2d at 840.<sup>3</sup>

The constitutional dimensions of the plea agreement make it essential that the State fulfill its “implied promise to act in good faith.” *State v. Williams*, 103 Wn.App. 231, 235, 11 P.3d 878 (2000). To do so, it “must adhere to its terms by recommending the agreed upon sentence.” *State v. Jerde*, 93 Wn.App. 774, 780, 970 P.2d 781 (1999).

Moreover, the State may not undercut the plea bargain “either explicitly or implicitly through conduct indicating an intent to circumvent the agreement.” *Williams*, 103 Wn.App. at 236. This Court determines whether the State violated its duty to

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<sup>3</sup> In entering into a plea bargain, the defendant gives up important constitutional rights. *State v. Van Buren*, 101 Wn.App. 206, 211, 2 P.3d 991 (2000). For this reason, the defendant can raise the prosecutor’s breach of the plea agreement for the first time on appeal. *State v. Sanchez*, 146 Wn.2d 339, 346, 46 P.3d 774 (2002).

adhere to the agreement by reviewing the entire sentencing record and applying an objective standard. *Id.* Neither good motivations nor a reasonable justification will excuse a breach. *Van Buren*, 101 Wn.App. at 213.

b. *A breach of the plea agreement occurs when the State offers unsolicited information or argument that undercuts the agreement.*

A breach occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State's obligations under the plea agreement. *State v. Carreno-Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006).

Breaches of plea agreements have been found where the prosecutor offered unsolicited information or argument that undercut the State's obligations. *See State v. Xaviar*, 117 Wn.App. 196, 200-01, 69 P.3d 901 (2003) (prosecutor highlighted aggravating sentencing factors and unfiled charges and called the defendant "one of the most prolific child molesters that this office has ever seen"); *Van Buren*, 101 Wn.App. at 217 (breach where prosecutor made only fleeting reference to sentencing recommendation and highlighted three

aggravating factors for an exceptional sentence); *Jerde*, 93 Wn.App. at 777-78(breach where prosecutor emphasized aggravating factors despite obligation to make mid-range sentencing recommendation); *Matter of Palodichuk*, 22 Wn.App. 107, 108, 110, 589 P.2d 269 (1978) (prosecutor’s expression of “second thoughts” in submitting a bargained-for recommendation sufficiently tainted the recommendation constituting a breach of the plea agreement).

The decision in *Carreno-Maldonado* provides guidance. In *Carreno-Maldonado*, the State’s sentencing recommendation was an agreed recommendation by both parties. 135 Wn.App. at 79-80. The agreed recommendation was for the low end of the standard range on a first degree rape charge and a mid-range sentence on additional second degree rape charges. *Id.* At sentencing, and in response to the trial court’s inquiry whether the prosecutor had anything to add to the recommendation, the prosecutor stated that she wanted to speak “on behalf” of the victims who were present but did not wish to address the court. *Id.* at 80. The prosecutor then described facts supporting aggravating factors, describing the defendant’s “extreme violent

behavior” and that he had “preyed on what would be considered a vulnerable segment” of the community. *Id.* The court imposed high end sentences on all counts. *Id.* at 81. On appeal, the appellate court held that the State breached the plea agreement. *Id.* at 84. As the Court explained, because the State agreed to recommend a low end sentence, “there was no need for the State to recite potentially aggravating facts.” *Id.* at 84. And while the Court acknowledged that the State had more leeway on the mid-range recommendation to do so, the prosecutor’s remarks “went beyond what was necessary” to support the mid-range recommendation. *Id.* at 84-85. The Court further noted that the prosecutor’s remarks “were not a response to argument by defense counsel or an attempt to provide information which the court solicited.” *Id.* at 85.

c. *The prosecutor’s argument undercut the agreement.*

Here, in the last sentence of his presentence report, Mr. Erker noted that part of the delay in agreeing to the plea agreement was the difficulty he had “coming to terms with and grasping the felony murder rule.” CP 70. Instead of simply making the agreed recommendation, the prosecutor felt the need

to provide information to the court which “went beyond what was necessary.” *Carreno-Maldonado*, 135 Wn.App. at 84-85. With this single sentence on the last page of a five page document, the prosecutor launched into an unnecessary argument which ultimately concluded by arguing that Mr. Erker was more culpable than what he was willing to admit. RP 18-19 (“And in some ways, that disregard for another’s life – it’s no different than the sentiment behind an intentional murder”). Whether Mr. Erker understood the felony murder rule was not germane to the recommended sentence or the sentencing hearing generally, and was only provided to the court to paint Mr. Erker in as bad of light as possible to encourage the court to do what it ultimately did and reject the agreed recommendation and impose a greater sentence. *See Carreno-Maldonado*, 135 Wn.App. at 84 (because it was an agreed recommendation, “there was no need for the State to recite potentially aggravating facts”). Finally, the prosecutor’s comments were not solicited by the court and were gratuitously presented.

The prosecutor’s comments undercut and constituted a breached the plea agreement.

- d. *Mr. Erker is entitled to remand to elect specific performance or withdrawal of the plea agreement.*

A harmless error review does not apply where the State breaches a plea agreement. *Santobello*, 404 U.S. at 262-63. Thus, the remedy for a breach of the plea agreement is to permit the defendant to elect to withdraw the guilty plea or to seek specific performance. *State v. MacDonald*, 183 Wn.2d 1, 21, 346 P.3d 748 (2015); *State v. Barber*, 170 Wn.2d 854, 873, 248 P.3d 494 (2011). Therefore, this Court should remand to the trial court and permit Mr. Erker to elect whether to withdraw the guilty plea or to seek specific performance of the plea agreement.

**2. The Court should exercise its discretion and deny any request for costs on appeal.**

Should this Court reject Mr. Erker's argument on appeal, he asks this Court to issue a ruling denying any request for costs on appeal due to his continued indigency. Such a request is authorized under *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612, *review denied*, \_\_\_ Wn.2d \_\_\_ (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may “direct otherwise.” RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, quoting *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to “compelling circumstances.” *Sinclair*, 192 Wn.App. at 388, quoting *Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent “throughout the review” unless there is a finding that the defendant is no longer indigent. RAP 15.2(f). Mr. Erker had previously been found indigent prior to trial, and there has been no showing that Mr. Erker’s circumstances have so changed that he is no longer indigent. In fact, the opposite is true; he has been incarcerated since his arrest.

In addition, Mr. Erker is a thirty-six who has had significant learning disabilities as well as memory issues throughout his life. CP 67-69. In addition, he has no income or assets. CP 75-76. Further, he is serving a 233 month sentence of

which 60 months is without the ability to earn good-time credit. CP 61; RP 41. As a consequence, Mr. Erker will be released from prison in his late 40's, early 50's with a felony conviction for a serious offense and still possessing learning disabilities and memory problems which will significantly limit his employment opportunities.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an “individualized inquiry” regarding the defendant’s ability to pay. *Id.* at 391, citing *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Because of his current and presumed continuing indigency, Mr. Erker asks this Court to order that no costs on appeal be awarded. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. Erker asks this Court to reverse his sentence and remand for resentencing or for Mr. Erker to withdraw his plea.

DATED this 10<sup>th</sup> day of October 2016.

Respectfully submitted,

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	)	
RYAN ERKER,	)	
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING 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 10<sup>TH</sup> DAY OF OCTOBER, 2016.



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