

No. 34844-6-II
(Consolidated with COA NOs. 34850-1-II and 34854-3-II)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW KAYNE ROMERO,

Appellant/Defendant.

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STATE OF WASHINGTON
BY _____ DEPUTY
COURT CLERK

PIERCE COUNTY SUPERIOR COURT

CAUSE NOS. 04-1-01423-1, 05-1-00347-4, 04-1-05350-3

THE HONORABLE STEPHANIE A. AREND,

Presiding at the Trial Court.

APPELLANT'S REPLY BRIEF

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I. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The State has failed to provide any citation to the record that Mr. Romero was given notice of any specific allegations of non-compliance with the plea agreement, or that he waived his right to an evidentiary hearing on the question of non-compliance, or that he voluntarily stipulated to any specific non-compliance, or that the trial court found orally or in writing any specific violation of any provision contained in his plea agreement.

2. The State's concession that, without a judicial finding, it unilaterally determined that Mr. Romero breached the plea agreement and was therefore free to disregard the agreement, coupled with the State's failure to reply to any of Mr. Romero's assignments or error concerning the State's breach demonstrates acquiescence that it breached the plea agreement.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

2. Whether Mr. Romero's due process rights were violated by the State's unilateral revocation of the plea agreement? (Assignment

of Error Number One.)

2. Whether the State's concession that it unilaterally revoked its plea agreement without a judicial finding that Mr. Romero had breached, combined with the State's failure to reply to any of Mr. Romero's assignments of error claiming the State breached, constitutes acquiescence to the breach? (Assignment of Error Number Two.)

III. ARGUMENT IN REPLY

A. BASED ON THE RECORD BELOW THE STATE IS UNABLE TO ESTABLISH A VALID STIPULATION OF A BREACH OF THE PLEA AGREEMENT BY MR. ROMERO.

In its Responsive Brief the State's sole argument is that a defendant may not challenge the State's breach of a plea agreement where the defendant has stipulated to his own breach. The State has failed, however, to cite any portion of the record that demonstrates either a written or verbal stipulation by Mr. Romero, or a finding by the trial court of any specific breach. The State argues that once the State determines a defendant has breached a plea agreement the State can unilaterally nullify the agreement:

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Moreover, given that it was the defendant who breached the agreement, even assuming the State has promised to not file additional charges, that promise was revoked when the defendant breached his end of the agreement, and the State was no longer bound to any alleged agreement regarding the filing of any additional charges. Respondent's Brief at p. 10.

The State provides no legal support for this proposition. Our Supreme Court, however, has specifically ruled to the contrary.

[T]he issue of non-compliance is a question of fact to be determined by the court....to permit the State to unilaterally nullify an agreement would constitute 'manifest impropriety,' and an abdication of the court's duty to ensure "fairness and candor." *In re James*, Wash.2d 847,849,640 P.2d 18 (1982).

The State claims that Mr. Romero waived his right to the due process protections outlined in *James*, but fails to support such claim with any portion of the lower court record. This waiver argument was rejected in *James* where the Court explained:

[T]he State carries a heavy burden of demonstrating a voluntary, knowing, and intelligent waiver of any constitutional right. *State v. Coyle*, 95 Wash. 2d 1,621 P.2d 1256 (1980); *State v. Sweet*, 90 Wash.2d 282,581 P.2d (1978). Such waivers will not be presumed. *In re James, Supra* at 850.

As the State correctly points out, no Washington law establishes a specific procedure for ensuring that a stipulation to a

breach of a plea bargain is voluntary. Any procedure utilized, however, must meet due process requirements. See State v. Cassill-Skilton, 122 Wn.App.652,94 P.3d 407 (2004). The State suggests that a plea bargain breach stipulation is analogous to a probation violation stipulation. The State fails to realize that in a probation violation allegation context the State cannot unilaterally find a probation violation and then penalize the defendant.

The State also ignores the obvious fact that probation violation allegations and stipulations are done in writing which protects due process concerns and allows for Appellate Court review. The State erroneously concludes, under its analogy, that because no colloquy which establishes the voluntariness of the stipulation is required in probation violation stipulations that the same is true in the plea bargain stipulation context. The State fails to cite legal authority that supports this theory.

Additionally the State fails to cite any legal authority which provides that due process notice and judicial finding requirements are inapplicable in the plea agreement violation context. In State v.

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Cassill-Skilton, this Court compared Pierce County Drug Court non-compliance procedures to probation revocation, pretrial diversion, and plea bargain non-compliance procedures. This Court held that the appellant was denied due process in the drug court termination procedure, because among other things, she had not received proper notice of the alleged violation, and no oral or written findings were made which provided the basis for the termination and the reasons relied on by the Court to determine non-compliance. State v. Cassill-Skilton, Id. This Court held that to comport with due process protections the fact finder must “make a statement of the evidence relied on and reasons for revoking” *Id* at 657, citing State v. Marino, 100 Wn.2d 719,723-34,674 P.2d 171 (1984).

This Court further noted that pretrial diversion agreements, which were at issue in Marino, are distinguishable from drug court agreements because the prosecutor has statutory discretion to establish the conditions of and supervise the drug court program. The same distinction exists here. “[S]imilar rights [are] at stake in probation revocation, plea bargain agreements, and pretrial diversions....” *Id* at

655 . The State has not been given statutory discretion to unilaterally establish the conditions of, supervise, or revoke plea bargain agreements. The conditions of plea bargain agreements are negotiated by the parties and enforced by the court. Non-compliance is judicially determined.

Under this Court's reasoning in Cassill-Skilton, whether a violation is established via an evidentiary hearing or by a stipulation between the parties, the due process requirements for notice of the specific allegations of non-compliance and a judicial finding remain the same.

The essence of the problem here is that the Pierce County Prosecutor's Office and/or the Pierce County Superior Court either has no procedure in place for protecting the due process rights of defendants and ensuring voluntariness in the context of plea agreement stipulations, or such procedures are in place but were not followed in Mr. Romero's case. In Mr. Romero's case there was no written notice of the alleged non-compliance. Nor was there any written or oral waiver of the right to an evidentiary hearing. Nor was

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there any written or oral stipulation by Mr. Romero, or any judicial finding of the specific violation(s). The prosecuting attorney and defense counsel discussed and reached an agreement without creating any written documents or even an oral record that would show that Mr. Romero's due process rights were protected or waived.

Finally, the State attempts to interject the invited error doctrine under *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82,94,66 P.3d 606 (2003), but fails to explain its application of *Tortorelli* to the case at hand except to state in the sentence that follows that "A standard range sentence may not be appealed." Respondent's Brief at p.6.

B. THE STATE'S BREACH OF THE PLEA AGREEMENT, TO WHICH THE STATE HAS NOW ACQUIESCED, CONSTITUTES ERROR OF CONSTITUTIONAL MAGNITUDE THAT IS REVIEWABLE FOR THE FIRST TIME ON APPEAL.

The law in Washington is well settled that a breach of a plea agreement is an issue of constitutional magnitude that can be raised for the first time on appeal. RAP 2.5 (a)(3); *State v. Van Buren*, 101 Wn. App. 206 2, P.3d 991(2002). The State concedes in its reply brief that

once it had unilaterally determined that Mr. Romero had breached the plea agreement “the State was no longer bound to any alleged agreement regarding the filing of additional charges.” Respondent’s Brief at p. 10. The State’s decision to unilaterally revoke and refuse to comply with the plea agreement was, therefore, reached prior to any alleged stipulation and in the absence of a judicial finding of non-compliance.

The State’s failure to respond to Mr. Romero’s assignments of error concerning its breach of the plea agreement coupled with its assertions that it was not bound by the plea agreement after unilaterally deciding Mr. Romero breached plainly demonstrates acquiesce to appellant’s claims of breach by the State. Furthermore, it shows the breach was intentional. The State’s dismissive approach to the idea of safeguarding Mr. Romero’s constitutional rights even now is indeed disturbing.

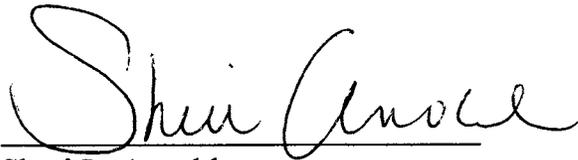
Finally, with respect to the State’s suggestions concerning sanctioning appellate counsel, etc., counsel respectfully declines to engage in this improper manner of argument as it derogates the

briefing process and undermines the dignity of this Court and the parties. (Respondent's Brief at p. 10-11)

IV. CONCLUSION

Mr. Romero continues to respectfully request that this Court reverse and remand for his election of specific performance or withdrawal of his guilty plea.

RESPECTFULLY SUBMITTED this 10th day of February,
2007.

A handwritten signature in cursive script that reads "Sheri Arnold". The signature is written in black ink and is positioned above a horizontal line.

Sheri L. Arnold
WSBA # 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on February 12, 2007, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by the U.S. Post Office to appellant, Matthew K. Romero, DOC # 7496184, McNeil Island Corrections Center, Post Office Box 881000, Steilacoom, WA. 98388, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on February 12, 2007.


Norma Kinter

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