

NO. 34844-6

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW K. ROMERO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

Nos. 04-1-01423-1
04-1-05350-3
05-1-00347-6

RESPONDENT'S BRIEF

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

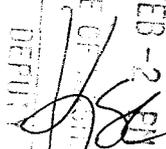
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  LUNA-GREEN
DEPUTY

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. May the defendant challenge for the first time on appeal whether the State breached a plea agreement where defendant stipulated below that he breached the agreement and joined in the State's sentencing recommendation? (Appellant's Assignment of Error Nos. 1-4).

B. STATEMENT OF THE CASE.

1. Procedure

This matter is a consolidated appeal from the plea and sentence in three separate cause numbers: 04-1-01423-1, 05-1-00347-4, and 04-1-05350-3.

a. Original Charges:

04-1-01423-1

On March 23, 2004, the State charged MATTHEW KAYNE ROMERO, hereinafter referred to as defendant, in Pierce County Superior Court with one count of unlawful possession of a controlled substance, to wit: methamphetamine, in violation of RCW 69.50.401 (d), one count of driving under the influence of intoxicants, contrary to RCW 46.61.502 (1)(b)(c), one count of unlawful use of drug paraphernalia, pursuant to RCW 69.50.102 and RCW 69.40.412, and one count of driving while in

suspended or revoked status in the third degree, contrary to RCW 46.20.342(1)(b). CP 1-4.

04-1-05350-3

On November 16, 2004, the State charged defendant with three counts of possessing stolen property in the first degree, pursuant to RCW 9A.56.140(1), and RCW 9A.56.150(1). CP 91-94.

05-1-00347-4

On January 21, 2005, the State charged defendant with one count of theft in the first degree, in violation of RCW 9A.56.020(1)(a), and RCW 9A.56.030(1)(a). CP 53-56.

b. Guilty Plea/Agreement

On March 15, 2005, defendant entered a guilty plea to amended charges under all three cause numbers referenced above. CP 57-59. As part of the guilty plea, the parties entered into a written contractual agreement that required defendant to fulfill certain obligations in order to obtain specific sentencing recommendations and dismissal of charges. CP 57-59 (Appendix A).

Defendant's Obligations

Under the terms of the agreement, the defendant agreed to plead guilty to (1) theft in the first degree under cause number 05-1-00347-4, (2) possession of stolen property in the first degree under cause number 04-1-05350-3, and (3) unlawful possession of a controlled substance with intent

to deliver under cause number 04-1-01423-1. In addition, defendant also agreed to recover a Chevrolet Corvette in tact, appear at all future court proceedings, and refrain from committing any new crimes. Failure to comply with any of these conditions would result in a breach of the agreement. CP 57-59.

State's Obligations

Upon the defendant's fulfillment of his obligations, the State agreed to make the following sentencing recommendations: (1) 05-1-00347-4 and 04-1-05350-3 – 57 months for both, concurrent with 04-1-01423-1, (2) 04-1-01423-1 – 90 months DOSA sentence, concurrent with 05-1-00347-4 and 04-1-05350-3, (3) dismissal with prejudice under 04-1-02670-1 and 03-1-0572, (4) and agreement that the sentences run concurrent with cases in Thurston and Snohomish counties. CP 57-58.

Breach Clause

In the event of a breach of the agreement, an agreed recommendation for an exception sentence of 114 months under cause 05-1-00347-4 and 04-1-05350-3, restitution in the amount of \$17,131.39 to victim Donald Hanson, a sentence of 120 months under cause number 04-1-01423-1 without DOSA, which would run consecutive to 05-1-00347-4 and 04-1-05350-3, and that the state may refile charges under cause numbers 04-1-01423-1 and 03-1-05792-1. CP 58-59.

c. Sentencing

On May 12, 2005, the defendant failed to appear for sentencing and a bench warrant was issued. CP 139.

On April 14, 2006, the matter came before the Honorable Judge Arend on a motion to withdraw the guilty plea. Before the court were allegations that the defendant failed to comply with any of the terms of the agreement, including that the vehicle was returned, but not intact, defendant failed to appear for sentencing on May 12, 2005, and defendant was arrested in Oregon and convicted of several crimes. RP 6, 4/14/06.

The prosecutor explained to the court that after negotiating with counsel the parties had come to a resolution and (1) defendant was withdrawing his motion to withdraw his plea, (2) defendant was agreeing that there was a violation of the original agreement, and (3) that counsel had met with defendant, advised him of his options, and that it was an agreed recommendation. RP 5, 8, 4/14/06. Defense counsel Quillen, who had substituted in for original counsel Bernberg, and who had filed the motion to withdraw the plea, agreed with the State's recitation. RP 8-9, 4/14/06. Defense counsel explained that originally he was going to have Bernberg appear and testify on the motion to withdraw but the defendant reconsidered this motion. RP 9, 4/14/06. Counsel further explained to the court that he spoke with the defendant about this in some detail and:

Given the agreement that was reached and the –
similar to a situation of you need to be careful what
you ask for, it may have been ill advised with regard

to the attempt to withdraw the pleas and put it back at Square 1 facing the charges. And so he has indicated to me that he does not wish to pursue that plea withdrawal anymore, and I think that is a sound decision on his part.

We also looked into whether there was any agreement that he could get specific performance of the agreement that he had entered into. There was certainly a dispute about the state of the car when it was returned, but obviously, other aspects or other provisions of that agreement were that he appear for all future hearings and that he not commit any crimes while released. Obviously, he was arrested in Oregon and convicted down there, so that was a clear violation of that agreement and gave us no basis to try to argue for specific performance of that. Therefore, we did reach the agreement we reached with Mr. Hurney. That's been explained by both myself and Ms. Gais Ford to Mr. Romero and I'm confident that he understands and I'm confident that he agrees it's in his best interest to adopt the agreed recommendation as set forth by Mr. Hurney which involves high-end sentences for each of the three cases were dealing with here.

RP 9, 4/14/06.

Per the recommendation of the parties, defendant received a standard range sentence under all three cause numbers of: 120 months under 04-1-01423-1, concurrent to the 57 months ordered in 05-1-00347-4, and the 57 months in 04-1-05350-3, but consecutive to Thurston County cause number 05-1-01162-2. CP 28-40, 70-81, 118-129.

This timely appeal follows. CP 42-43, 83, 131.

C. ARGUMENT.

1. THE DEFENDANT MAY NOT CHALLENGE FOR THE FIRST TIME ON APPEAL WHETHER THE STATE BREACHED THE PLEA AGREEMENT WHERE DEFENDANT STIPULATED BELOW THAT HE FAILED TO FULFILL HIS OBLIGATIONS UNDER THE AGREEMENT AND FURTHER STIPULATED TO AN AGREED SENTENCE.

Defendant assigns numerous errors to the proceedings below regarding whether the State breached a plea agreement, but raises these assignments while ignoring that the defendant stipulated to the proceedings below. Thus the issue before the court is simple: did the defendant waive his right to appeal his breach of a plea agreement where defendant stipulated below that he breached the agreement and joined in the State's sentencing recommendation.

Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal. In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). A standard range sentence may not be appealed. See former RCW 9.94A.210(1) (1989) (recodified as RCW 9.94A.585); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993).

A plea agreement is a contract between the State and the defendant. State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). Basic contract principles of good faith and fair dealing impose on

the State an implied promise to act in good faith in plea agreements. Sledge, 133 Wn.2d at 838-39. Due process establishes the State's duty to comply with plea agreements. Sledge, 133 Wn.2d at 839-40.

Compliance is a question of fact. In re Personal Restraint of James, 96 Wn.2d 847, 850, 640 P.2d 18 (1982) (defendant charged -- but not convicted -- of additional misdemeanors between plea and sentencing). To decide the compliance issue, the trial court must hold an evidentiary hearing at which the State bears the burden of proving by a preponderance of the evidence that the defendant has failed to perform his part of the agreement. James, 96 Wn.2d at 850.

In the instant case defendant chose to forgo an evidentiary hearing, as outlined in In re James, and instead entered a stipulation to the violations. Defendant entirely glosses over the fact that the proceeding below was an agreed one, and that he expressly stipulated to the violation. Because defendant was represented by counsel and counsel presented the agreement to the court, this court should accept the stipulation as valid. There is no need to inquire into the level of due process afforded at the revocation hearing, where defendant waived the due process of an evidentiary hearing and entered into a stipulation. The only possible issue on appeal is the voluntariness of that stipulation, an issue that defendant did not raise in his opening brief, and should be precluded from raising in his reply brief. RAP 10.3(c) (reply brief should be limited to a response to the issues in the brief).

Assuming *arguendo* that this court may consider the voluntariness of defendant's stipulation, that post-plea waiver is easily met. While there is no State law addressing the standards for a non-guilty plea stipulation, the federal courts that have considered it in the probation violation context hold that the standard for guilty pleas does not apply. See United States v. Pelensky, 129 F.3d 63, 66-69 (2nd Cir. 1997) (endorsing position of four other circuits finding no statutory or constitutional requirement of a voluntariness colloquy in revocation hearings); United States v. Rapert, 813 F.2d 182, 185 (8th Cir. 1987) ("Admitting to probation violations at a revocation hearing is not the equivalent of pleading guilty to a crime. The admissions are 'not made in the course of a criminal trial and do not give rise to a different statutory offense or to an increase in punishment on the underlying conviction.'" (quoting United States v. Segal, 549 F.2d 1293, 1300 (9th Cir. 1977) (guilty plea advisements not required in probation revocation hearings)). See also South Dakota v. Janis, 529 N.W.2d 211 (S.D. 1995) (right to withdraw guilty plea does not include right to withdraw an admission to a probation violation).

Here, a valid waiver is clear from the record below. The record shows that the defendant was aware of the nature of the alleged violations and his right to contest those allegations as evidenced in his original motion to withdraw his guilty plea. CP 14-24. However, defendant chose to forgo that motion to withdraw, and instead agreed with the state that he had violated the conditions of the agreement by failing to appear at all

future hearings and abstaining from further criminal conduct when he was arrested and convicted of new crimes in Oregon. RP 9, 4/14/06.

Based on defendant's agreement that he violated the contract and his offer to withdraw his motion to withdraw his plea, the doctrine of invited error prevents defendant from challenging the issue of breach of a plea on appeal. See, In re Pers. Restraint of Tortorelli, supra at 149 Wn.2d 94.

Nor may defendant challenge the validity of the agreement based on an allegation that the State filed new charges, or changed "the agreement," in violation of the agreement. Again, this issue was never litigated below, and was withdrawn when the defendant withdrew his motion to withdraw his guilty plea which was based in part of the allegation that the State had filed additional charges in violation of the plea. CP 60-66. See, State v. McInally, 125 Wn. App. 854, 867, 868, 106 P.3d 794, (2005) ("When a defendant breaches a plea agreement, he has no right to specifically enforce an agreement," and failure to comply with a condition precedent excuses performance under a contract). Even if this court were to consider the merit of the breach argument, there is nothing in the agreement that prevents the State from filing additional charges. CP 57-59. Instead, defendant argues that the "plea agreement between Mr. Romero and the State *seemingly* covered all possible charges Mr. Romero was facing, including those in Snohomish and Thurston Counties as well as Pierce County." (Opening Brief of Appellant at 20, emphasis added).

This argument asks the court to read language into a contract that is plain on its face; there simply never was an agreement to forgo additional charges. Moreover, given that it was the defendant who breached the agreement, even assuming the State had 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 additional charges. The State also asks this court to disregard Appendix B, attached to the opening brief of appellant, as such appendix is not part of the record below. RAP 9.1(c), 9.6(a); See State v. Jackson, 36 Wn. App. 510, 516, 676 P.2d 517, aff'd, 102 Wn.2d 689, 689 P.2d 76 (1984) (A party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue).

Given the frivolity of the issues presented, it is questionable whether traditional appellate review and briefing is even appropriate under the circumstances. Even in the criminal context, defense counsel has the option of reviewing a case, and where counsel finds the appeal to be wholly frivolous, counsel "should so advise the court and request permission to withdraw." Anders v. California, 386 U.S. 738,744, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967). Under RAP 18.9(a), "[a]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." State v. Chapman, 140 Wn.2d 436, 998 P.2d 282

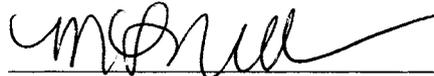
(2000), writ of cert. den, 531 U.S. 984, 121 S. Ct. 438, 148 L.Ed.2d 444, 69 U.S.L.W. 3317 (2000), (*quoting, State ex rel Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998)), *other citations omitted*. RAP 18.9 (a) permits the court on its own motion to impose sanctions for filing a frivolous appeal. Given the assignment of error in this case, and counsel's avoidance of the fact that this was a stipulated agreement, counsel has for whatever reason tried to file a brief on the merits when the facts did not dictate.

D. CONCLUSION.

Given the frivolous nature of this appeal, the State asks this court to affirm defendant's plea and sentence.

DATED: February 2, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

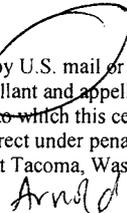


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

2207 
Date Signature

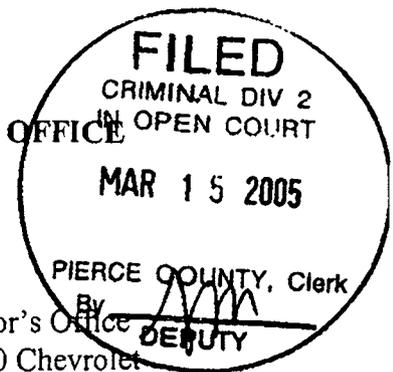


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STATE OF WASHINGTON
DEPUTY
COURT OF APPEALS
DIVISION II

APPENDIX "A"

Agreement

**AGREEMENT BETWEEN PIERCE COUNTY PROSECUTOR'S OFFICE
AND MATTHEW ROMERO**



This document is an agreement between the Pierce County Prosecutor's Office and Matthew Romero, by which Matthew Romero will recover intact a 1990 Chevrolet Corvette VIN 1G1YY3389L5105781, owned by Donald Hanson, or provide information to law enforcement which shall result in the recovery of said vehicle.

The Pierce County Prosecutor's Office and Matthew Romero agree that this agreement is the sole agreement between the parties to the agreement; this agreement shall not be modified by either party without the signed written agreement of both parties; and neither The Pierce County Sheriff's Department nor Det. Jensen possess the authority to modify this agreement.

Matthew Romero agrees to: recover the aforementioned Chevrolet Corvette in intact condition or provide information to law enforcement which leads to the recovery of said vehicle in an intact condition.

- a. Plead guilty to the following felony under Pierce county Superior Court Cause 05-1-00347-4 accompanied by its respective standard-range:
 - Theft in the First Degree
 - Offender score 12
 - Standard range: 43-57 months
- b. Plead guilty to the following felony under Pierce County Court Cause 04-1-05350-3 accompanied by its respective standard-range
 - Possession of Stolen Property First Degree
 - Offender score 12
 - Standard range: 43-57 months
- c. Plead guilty to the following felony under Pierce County Court Cause 04-1-01423-1
 - Unlawful Possession of a Controlled Substance with the Intent to Deliver
 - Offender score 12
 - Standard range: 60-120 months
- d. The State agrees to dismiss without prejudice causes 04-1-02670-1 and 03-1-05728-4.

UPON THE CONDITION THAT **MATTHEW ROMERO** HAS PERFORMED THE PROMISES ENUMERATED ABOVE, THE PIERCE COUNTY PROSECUTOR'S OFFICE AGREES TO MAKE THE FOLLOWING SENTENCING RECOMMENDATION FOR THE CASE(S) LISTED ABOVE, THE DEFENDANT UNDERSTANDING THAT THE SENTENCING JUDGE NEED NOT FOLLOW SUCH RECOMMENDATION: under 05-1-00347-4 and 04-1-05350-3, the State will recommend 57 months for both causes concurrent with 04-1-01423-1, along with standard fines and costs and restitution. Under 04-1-01423-1, the State will recommend a

90 month DOSA sentence, concurrent with 05-1-00347-4 and 04-1-05350-3, along with standard fines and costs and a term of community custody.

IN ADDITION, the State will move to dismiss with prejudice causes 04-1-02670-1 and 03-1-05728-4.

FURTHER, the State will have no objection if these sentences are run concurrently with property crime cases in Thurston and Snohomish counties.

FURTHER, the State agrees to set over sentencing and recommend to the Court that **MATTHEW ROMERO** be released pending sentencing on his own recognizance

Defendant's initials

M.R.

UPON THE CONDITION THAT **MATTHEW ROMERO** FAILS TO PERFORM ANY OF THE ABOVE PROMISES, FAILS TO APPEAR FOR ANY SUBSEQUENT COURT PROCEEDINGS OR COMMITS ANY CRIMES WHILE RELEASED THIS DOCUMENT WILL NO LONGER CONSTITUTE THE PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE'S RECOMMENDATION AND SUCH OFFICE WILL NO LONGER BE BOUND BY ANY AGREEMENT CONTAINED WITHIN THIS DOCUMENT.

MATTHEW ROMERO FURTHER ACKNOWLEDGES AND UNDERSTANDS THAT:

I, **MATTHEW KAYNE ROMERO**, do acknowledge that under Blakely v. Washington, 124 S.Ct 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573. I have a right to a jury determination of aggravating circumstances in this matter and I waive this right. I waive any right to appeal under the Blakely decision.

Matthew Romero
MATTHEW KAYNE ROMERO

FURTHERMORE,

In the event that I, **MATTHEW KAYNE ROMERO**, 1. do not perform my promise of returning the aforementioned Chevrolet Corvette intact or 2. providing information to law enforcement information which results in the recovery of said vehicle or 3. fails to appear for any subsequent court proceedings or 4. commits any new crimes while released, the exceptional sentence of 114 months under cause 05-1-00347-4 and 04-1-05350-3 months will be recommended and agreed upon by my attorney and the

State per State v. Hilyard, 63 Wn.App. 413 (1991). This recommendation will include a Restitution Order in the amount of \$17,131.39 payable to the victim Donald Hanson. Under cause 04-1-01423-1, the MATTHEW ROMERO agrees to a standard range sentence of 120 months without any recommendation for a DOSA sentence, consecutive to 05-1-00347-4 and 04-1-05350-3. FURTHER, that the State may re-file causes 04-1-01423-1 and 03-1-05792-1.

MATTHEW ROMERO fully understands each and every term of this document, the entire document having been written in his primary language of English, and that **MATTHEW ROMERO** does not have any further questions;

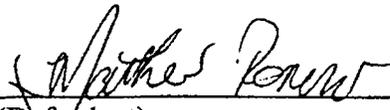
Defendant's Initials MR

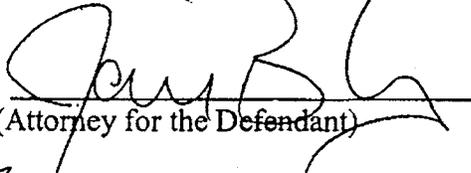
MATTHEW ROMERO'S attorney, Jay Berneburg has fully informed **MATTHEW ROMERO** of the contents of this contract, its obligations, and all alternatives to entering this contract, including exercising right to a trial;

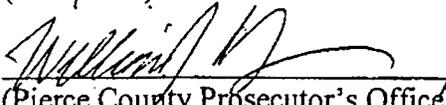
MATTHEW ROMERO'S attorney, Jay Berneburg, has fully reviewed the police reports in this case and has fully discussed with **MATTHEW ROMERO** the merits of the State's case and chance of successful prosecution;

Understanding the entire contents of this agreement, **MATTHEW ROMERO** wishes to enter into this agreement and accepts its obligations, doing so of **MATTHEW ROMERO'S** own free will, voluntarily, intelligently, and knowingly.

DATED THIS 15 day of March, 2005


(Defendant)


(Attorney for the Defendant)

 12902
(Pierce County Prosecutor's Office)