

No. 35943-0-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**LARON TERRILL MCGEE,**

**Appellant/Defendant.**

FILED  
COURT OF APPEALS  
DIVISION II  
07 SEP 11 AM 9:00  
STATE OF WASHINGTON  
BY    
DEPUTY

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**PIERCE COUNTY SUPERIOR COURT**

**CAUSE NOs. 05-1-05080-4 and 06-1-00094-5**

**THE HONORABLE KATHERINE M. STOLZ,**

**Presiding at the Trial Court.**

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**APPELLANT'S OPENING BRIEF**

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**A. ASSIGNMENTS OF ERROR**

1. Mr. McGee's due process rights were violated because the State failed to provide any notice of non-compliance with the plea agreement, and the court failed to find any specific violations.

2. The State failed to prove by a preponderance of evidence that Mr. McGee violated his plea agreement.

3. The State breached the plea agreement by failing to fulfill its promises under the agreement.

4. Under the doctrine of "Discharge by Supervening Frustration" Mr. McGee should have been permitted to rescind the plea agreement and withdraw his guilty pleas.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Under federal and state due process requirements must the State specifically identify a defendant's alleged act(s) of non-compliance with a plea agreement and must the trial court find the specific violations and supply reasons for such finding? (Assignment of Error Number One)

2. Did the State prove that Mr. McGee violated any laws

where he was merely a “suspect” in new crimes for which he was never charged? (Assignment of Error Number Two)

3. Did the State breach the plea agreement where it failed to fulfill its obligations under the agreement in the absence of a lawful finding that Mr. McGee had breached the agreement? (Assignment of Error Number Three)

4. Where Mr. McGee was unable to perform an essential obligation under the plea agreement due to the occurrence of an event beyond his control should the trial court have allowed him to rescind the agreement and withdraw his guilty plea? (Assignment of Error Number Four)

## **C. STATEMENT OF THE CASE**

### **1. Procedural History**

On October 17, 2005, the defendant/appellant, Laron T. McGee, was charged by Information with one count of Robbery in the First Degree <sup>1</sup> and one count of Unlawful Possession of a Controlled

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RCW 9A.56.190, 9A.56.200(1)(a)(iii).

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Substance with Intent to Deliver <sup>2</sup> in Pierce County Superior Court Cause No. **05-1-05080-4**. CP 66-68.

On January 6, 2006, Mr. McGee was charged by Information with one count of Unlawful Possession of a Firearm in the Second Degree, <sup>3</sup> one count of Possession of a Stolen Firearm, <sup>4</sup> and one count of Reckless Driving <sup>5</sup> in Pierce County Superior Court No. **06-1-00094-5**. CP 1-3.

On June 8, 2006, Mr. McGee entered *Alford/Newton* <sup>6</sup> pleas to the original charges in both Cause Number **05-1-05080-4**, and Cause Number **06-1-00094-5**. CP 69-76, 4-11. The guilty pleas were

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RCW 69.50.401(1)(2)(c)

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RCW 9.41.010(12)

4

RCW 9A.56.140(1)

5

RCW 46.61.500

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*North Carolina v. Alford*, 400 U.S. 25,91 S. Ct. 160,27 L.Ed 2d 162 (1970),  
*State v. Newton*, 87 Wn.2d 362,552 P.2d 682 (1976).

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entered pursuant to a Plea Agreement and Contract which was subsequently filed with the Court. CP 56-62.

On September 6, 2006, the State filed an Affidavit alleging that Mr. McGee had violated his *conditions of release* by failing to “keep in contact with representatives of Lakewood Police Department at all times” “according to Det. Roger Leach, of that agency.” CP 102-104,

On February 6, 2007, an evidentiary hearing was held to determine whether Mr. McGee had breached the terms of his Plea Agreement and Contract. RP 2 6-22.<sup>7</sup> The Court apparently determined that Mr. McGee had failed to comply with the terms of his Plea Agreement and Contract. RP 2 22. No written findings or conclusions, however, were filed.

On the same date, the Court denied Mr. McGee’s motion to withdraw his guilty pleas. The Court then imposed a standard range

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The transcripts are unnumbered. For purposes of Appellant’s Brief the VRPs will be referred to as follows: June 8, 2006 = RP1, February 6, 2007 = RP2.

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felony sentence as follows: fifty-seven (57) months each on the first degree robbery and unlawful possession of a controlled substance with intent to deliver convictions, to run concurrent; sixteen (16) months for the second degree unlawful possession of a firearm conviction, and twenty-two (22) months for the possession of a stolen firearm conviction, to run consecutive to each other. CP 79-91, 29-40. Mr. McGee also received a suspended sentence of three hundred and sixty-five (365) days for the reckless driving conviction. CP 43-47.

A timely Notice of Appeal was filed on February 7, 2007. CP 95, 52. Pierce County Cause Numbers 05-1-05080-4 and 06-1-00094-5 were auto-consolidated by this Court.

**1. Plea Agreement and Contract**

The “Plea Agreement and Contract” provided that Mr. McGee would enter guilty pleas to the original charges in each of the aforementioned cause numbers. CP 56-62. Additionally, Mr. McGee agreed to serve as a confidential informant for Pierce County Sheriff’s Department. CP 56-62.

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Specifically, Mr. McGee's agreement to work with Pierce County Sheriff's Department required him to first complete two "reliability drug purchases," and then to "arrange for the purchase of one ounce of cocaine and/or multiple pills of ecstasy from EACH of three separate individuals and/or groups, including ANTHONY WILLIAMS..." Plea Agreement and Contract at p. 2; CP 56-62.

Other provisions included in the Plea Agreement and Contract were that Mr. McGee must keep Deputy Leach or his designee advised of his address and telephone number, and that he "must not violate any municipal, county, state or federal law..." *Id.*

The State in turn agreed to move to allow Mr. McGee to withdraw his guilty pleas under cause number 05-1-05080-4, and to amend the Information in that cause number to one count of second degree robbery at the conclusion of Mr. McGee's service to the Pierce County Sheriff's Department. Additionally, the State promised to dismiss all counts under cause number 06-1-00094-5. Finally, the State agreed to recommend a sentence of twelve (12) months and one

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(1) day for the amended second degree robbery charge. *Id.* at p. 5.

**3. Motion to Withdraw Pleas and Compliance Hearing**

On February 6, 2007, Mr. McGee moved to withdraw his guilty pleas on the grounds that the contract could not be performed due to impossibility. The primary focus of the contract was that Mr. McGee assist in the arrest and conviction of three persons which must include Anthony Williams. Mr. Williams, however, was subsequently arrested and incarcerated thus rendering any controlled buy impossible. RP 2 18-19. The motion was denied. RP 2 21.

On the same date a hearing was held to determine whether Mr. McGee was in compliance with the Plea Agreement and Contract. The State represented the following to the trial court: “The State’s ready to proceed with an evidentiary hearing regarding the State’s allegations that the defendant violated the terms of the contract....” RP 2 5. At no time, however, did the State specifically allege, either in writing or orally, which term(s) of the contract Mr. McGee had supposedly violated. The State called Deputy Roger Leach to testify at the hearing.

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**Deputy Roger Leach**, with the Pierce County Sheriff's Department, testified that he was Mr. McGee's supervisor for the CI contract entered into as part of the plea agreement. RP 2 6-7. Deputy Leach stated that he did not know exactly where Mr. McGee was living and that Mr. McGee had not contacted him from the second week of August until shortly before Mr. McGee was arrested.<sup>8</sup> RP 2 9-11. Additionally, Deputy Leach testified that Mr. McGee was "a suspect" in three motor vehicle thefts and a case "involving a horse saddle." RP 2 10-11. No charges, however, were filed against Mr. McGee. RP 2 16.

Deputy Leach testified that Mr. McGee had performed both of his reliability buys. RP 2 12-13. He further testified that Mr. McGee's contract was for a six-month period, and that ANTHONY WILLIAMS was, in fact, incarcerated in August, subsequent to the entering of the agreement. RP 2 14.

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Mr. McGee was arrested pursuant to bench warrant following the filing of the Affidavit of Deputy Prosecuting Attorney Gregory Greer on September 6, 2006, in which Mr. Greer stated that Mr. McGee had violated the condition of release that he maintain contact with representatives of Lakewood Police Department at all time. CP102-104.

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Following Deputy Leach's testimony and argument by the parties the trial court made the following verbal ruling in its entirety.

**THE COURT'S RULING**

**THE COURT:** Well, I mean, contract law requires that we read the contract in its totality; and the contract in its totality is not at all limiting the cooperation of Mr. McGee to simply Anthony Williams. It says each of three separate individuals and/or groups, including Anthony Williams; and since they did not name the other separate individuals and/or groups, obviously, that would be something that the officers would be working with Mr. McGee on an ongoing basis; and he was to stay in close contact with him; and given what he is charged with and the consequences of a finding of guilty on the charges that he is charged with, and what they would recommend if he was following through with the contact, I mean, there was a substantial benefit to Mr. Leach to follow through, and I don't think simply because Mr. Williams was arrested that that terminated Mr. McGee's obligations to the State, so I find that he did abrogate his agreement. I'm not going

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to allow him to withdraw his plea; and whatever the merits on the missing saddle - - and that's sort of inconclusive. I mean, somebody had it listed for sale, but, apparently, never much tracked down Mr. McGee and another individual as suspects. I mean, he was seen driving stolen cars. Those cars were recovered from the parking lot of his apartment; *so certainly, he was having some difficulty in maintaining law-abiding behavior* which might not have been unanticipated since he got the '06 charge while he was out on release on the '05; so we'll proceed to sentencing at this time. RP 2 21-22.

**D. ARGUMENT**

**I. MR. MCGEE WAS DENIED HIS DUE PROCESS RIGHTS WHERE THE STATE FAILED TO SPECIFICALLY ALLEGE AND THE TRIAL COURT FAILED TO SPECIFICALLY FIND HIS NON-COMPLIANCE WITH THE PLEA AGREEMENT AND CONTRACT.**

Based on the above ruling of the Court, it is simply impossible to precisely determine what willful and material non-compliance the trial court found or the reasons or evidence relied upon to support such

a finding. While it is arguable that the trial court intended to find that Mr. McGee breached the condition of the plea agreement that precludes Mr. McGee from violating “any municipal, county, state or federal law,” the Court’s ruling that Mr. McGee “was having some difficulty in maintaining the law behavior” is insufficient as a matter of law. Exacerbating the problematic record is the fact that the State failed to specifically allege the act(s) of non-compliance in writing or even verbally.

Due process requires that non-compliance with a plea agreement be specifically alleged and proved by a preponderance of the evidence. *In re James*, 96 Wash.2d 847,640 P.2d 18 (1982). Because important constitutional rights are waived in entering into a plea agreement the accused is entitled to judicial enforcement of the terms of the agreement. *State v. Marino*, 100 Wash.2d 719,725,674 P.2d 171 (1984). Judicial enforcement includes post-hearing factual findings that include a statement of the specific non-compliance found and a clear statement of the evidence relied upon to reach such findings. *Id.*

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at 727; State v. Cassill-Skilton, 94 P.3d 407,122 Wash. App.652 (2004); State v. Varnell, 137 Wash.App. 925,155 P.3d 971 (2007).

In State v. 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 also “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

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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*, therefore, due process requirements are the same for drug court agreements as for plea agreements. Due process requires notice of the specific allegation(s) of non-compliance and a judicial finding with a statement of the evidence relied upon. “The statement facilitates appellate review and assures that the exercise of discretion...is based on accurate knowledge.” *State v. Cassill-Skilton, Supra.* at 410.

In Mr. McGee’s case due process requirements were not satisfied. Mr. McGee was given no notice by the prosecutor of the

specific allegations against him prior to or even at the evidentiary hearing. Post-hearing, the trial court failed to specifically find any willful material breach, or to state evidence relied upon to support such findings.

**II. THE STATE FAILED TO PROVE THAT MR. MCGEE WILFULLY, MATERIALLY, AND SUBSTANTIALLY BREACHED THE PLEA AGREEMENT AND CONTRACT.**

The breach of a nonmaterial term of a contract does not excuse performance by the other party. McEachern v. Sherwood & Roberts, 36 Wn. App. 576, 675 P.2d 1266, rev. denied 101 Wn.2d 1010 (1984). Review of a plea agreement breach in a criminal case is analogous to the determination of materiality in a breach of contract case. State v. Kessler, 75 Wn.App. 634, 879 P.2d 333 (1994). The existence of a breach and the materiality of that breach are questions of fact. Bailie Communications v. Tend, 53 Wn.App. 77, 765 P.2d 339 (1988). Materiality depends on the circumstances of each particular case. Vacova Company v. Farrell, 62 Wn.App. 386, 814 P.2d 255 (1991). A party is only excused from performing under a contract where the

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other party's breach is material and substantial. McEachern v. Sherwood and Roberts, Supra.

In Mr. McGee's case, the record does not clearly state the specific breach committed by Mr. McGee. The only breach that can arguably be inferred to have been found by the trial court was that Mr. McGee failed to comply with the term that he "must not violate any municipal, county, state or federal law..." Plea Agreement and Contract at p.2; CP 56-62.

Concerning this matter, the trial court stated that Mr. McGee "was having some difficulty in maintaining law abiding behavior..." RP 2 22. Setting aside the fact that such language is insufficient is a matter of law to establish a finding of a willful, material, and substantial breach, a finding that Mr. McGee violated the law was not proved by the State or supported by the evidence. Deputy Leach testified only that Mr. McGee was a "suspect" in some crimes. RP 2 10. Mr. McGee was never convicted or even charged with the alleged crimes. "[M]erely accusing the defendant of misconduct does not

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relieve the State of its bargained for duty.” *In re James*, 96 Wash.2d 847,640 P.2d 18 (1982).

With respect to Deputy Leach’s contention that Mr. McGee had not properly kept in contact with him, the trial court quite simply made no such finding of non-compliance. In its Ruling, the trial court merely reiterated that the plea agreement provided that “the officers would be working with Mr. McGee on an ongoing basis; and [Mr. McGee] was to stay in close contact with [Deputy Leach].” RP 2 21.

Notably, even if the trial court had found a specific violation, the State failed to prove that any suspected non-compliance was willful, material, and substantial. The essence of the Plea Agreement and Contact was that Mr. McGee was required to perform specific tasks including, first, engaging in two “reliability” buys, and then, performing three controlled buys, one of which must be from ANTHONY WILLIAMS. Mr. McGee did complete the reliability buys. Unfortunately, the named subject of the controlled buy(s) was taken into custody before Mr. McGee was able to complete the

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controlled buy(s) portion of his agreement. Other aspects of the plea agreement were not material and substantial terms, and in any event, no willful breach of any other terms was proved by the State.

**III. THE STATE BREACHED THE PLEA AGREEMENT BY FAILING TO PERFORM ITS PROMISES WHERE MR. MCGEE'S NON-COMPLIANCE WITH THE AGREEMENT WAS NEVER PROPERLY ALLEGED, PROVED, OR FOUND.**

Constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3), *State v. Williams*, 103 Wn.App. 231,234-35, 11 P.3d 878 (2000). Under RAP 2.5(a)(3) a breach of a plea agreement is an issue of constitutional magnitude. Appellate courts will address the issue even where a defendant fails to object or move to withdraw his/her plea at the lower court. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991(2002).

Plea agreements are contracts, and analysis of a plea agreement begins with basic principles of contract law. *State v. Sledge*, 133 Wn.2d 828,839,947 P.2d 1199 (1997). The analysis does not stop

there, however, since plea agreements “are more than simple common law contracts. Because they concern fundamental rights of the accused, constitutional due process considerations come into play.” *Sledge*, at 839. Because the defendant’s underlying contract right is constitutionally based, it involves concerns that differ fundamentally from and run wider than those of commercial contract law. Fairness is mandated to ensure public confidence in the administration of our justice system. *Sledge*, at 839, citations omitted. The State’s obligations are reinforced by an implied duty of good faith and fair dealing. *State v. Harris*, 102 Wn.App. 275, 6 P.3d 1218 (2000).

Washington courts recognize that a plea agreement is a binding contract once accepted by a trial court. *See, e.g. State v. Hunsicker*, 129 Wn.2d 554, 559, 919 P.2d 79 (1996); *State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988); *State v. Hall*, 104 Wn.2d 486, 490, 706, P.2d 1074 (1985). Contract law requires a duty of good faith and fair dealing. RESTATEMENT, SECOND, CONTRACTS § 205.<sup>9</sup>

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205. Duty of Good Faith and Fair Dealing

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Moreover, a maxim of contract interpretation is that provisions of a contract are to be interpreted against the drafter.<sup>10</sup>

Because a plea agreement is a binding contract, the State is obligated to fully and wholeheartedly comply with the terms of a plea agreement. *Santobello v. New York*, U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495(1971); *State v. Tourtellotte*, 88 Wash.2d 579,584,564 P.2d 799 (1977). 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 (2002).

Additionally, due process is violated when the State breaches the terms of a plea agreement. See, *In re Palodichuk*, 22 Wash.App. 107,589 P.2d 269 (1978) (due process requires that the prosecutor

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Every Contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. RESTATEMENT, SECOND, CONTRACTS §' 205.

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#### 206. Interpretation Against the Draftsman

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds. RESTATEMENT, SECOND, CONTRACTS § 206.

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adhere to the terms of the plea bargain agreement reached with a criminal defendant.). In the context of a criminal charge, principles of substantive due process are implicated by, and inherent in, the process of enforcing a plea agreement. State v. Scott, 230 Wis. 2d 643,651,602 N.W.296 (Ct.App. 1999). The Washington Supreme Court has ruled that “[b]ecause they [plea agreements] concern fundamental right of the accused, constitutional due process considerations come into play.” State v. Sledge, 133 Wn.2d 828,839,947 P.2d 1199 (1997).

Where a prosecutor violates a plea agreement it does not matter that the violation was the result of bad faith or was an inadvertent mistake. State v. Collins, 46 Wn.App. 636,731 P.2d 1157 (1987) (citing Santobello, supra). A defendant is entitled to relief regardless of whether the prosecution breached the agreement deliberately or otherwise. The test to be applied is “an objective one - whether the plea agreement has been breached or not - - irrespective of prosecutorial motivations or justifications for the failure in performance.” In re Palodichuk, 22 Wn.App.at 110.

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Two options are available to a defendant who has entered a guilty plea where the prosecutor refused to abide by the terms of the agreement. “The court can permit the accused to withdraw his plea and be tried anew on the original charges, or grant specific performance of the agreement.” State v. Miller, 110 Wn.2d, 528,531,756 P.2d 122 (1988), (quoting State v. Tourtellotte, 88 Wash.2d 579,585,564 P.2d 799 (1977)).

The Miller court also held “the defendant’s choice of remedy controls, unless there are compelling reasons not to allow that remedy.” Miller, 110 Wn.2d at 536. Miller noted some circumstances in which compelling reasons might exist to override the defendant’s choice of remedy - - for example, if a plea agreement violation was caused by misinformation provided by the defendant, or if the prosecutor detrimentally relied on the bargain and lost witnesses or evidence. Miller, 110 at 535.

In Tourtellotte, the court held: “a court ought to accord a defendant’s preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor’s breach of

a plea bargain are those of the defendant, not of the State.” *Tourtellotte*, 88 Wn.2d at 585 (quoting *Santobello v. New York*, 404 U.S. 257,267, 30 L.Ed.2d 427, 92 S.Ct. 495(1971) (Douglas J. concurring)).

In Mr. McGee’s case, the State made charging and sentencing promises as outlined above. The State failed to fulfill its obligations notwithstanding the absence of judicial findings that Mr. McGee had not complied with any specific term of his agreement. Moreover, the State failed to allege, either in writing or verbally, any specific breach of the terms of the Plea Agreement and Contact. Finally, no violations were proved. The State was, therefore, bound to its promises set forth in the plea agreement. Mr. McGee’s remedy is a remand to the trial court for him to elect withdrawal of his guilty pleas or specific performance.

**IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW MR. MCGEE TO RESCIND THE PLEA AGREEMENT AND WITHDRAW HIS GUILTY PLEAS WHERE AN EVENT BEYOND MR. MCGEE’S CONTROL RENDERED PERFORMANCE OF A SPECIFIC OBLIGATION UNDER THE**

### **AGREEMENT IMPOSSIBLE.**

Mr. McGee should now be permitted to withdraw his guilty plea because the plea agreement was not honored by the State in the absence of a lawful finding of his breach of the plea agreement. Additionally, Mr. McGee should have been allowed to withdraw his guilty plea when he so moved the trial court because withdrawal was necessary to correct a manifest injustice. Specifically, under the doctrine of "Discharge by Supervening Frustration" Mr. McGee's duties under the plea agreement should have been judicially rescinded and accompanied by withdrawal of his guilty pleas.

A defendant shall be allowed to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. *State v. Taylor*, 83 Wn.2d 594,598,521 P.2d 699 (1974).

In *Taylor*, the Court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, 2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement was not honored

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by the prosecution. Any of the four indicia listed above would independently establish “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. *State v. Taylor*, 83 Wn.2d at 597; see also *State v. Wakefield*, 130 Wn.2d 464,472,925 P.2d 183 (1996).

Application of the contacts doctrine of frustration is a question of law. *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn.2d 694,794,773 P.2d 70 (1989). The Washington Courts apply the doctrine as it is stated in Restatement (Second) of Contracts § 265 (1979). *Hop Producers*, 112 Wn.2d ta 700. This section, entitled “Discharge by Supervening Frustration,” states:

Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contact was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contract.

Rest. (2d) of Contracts § 265 (1979). Comment (a) to this section gives an explanation of how the rule should be applied. It states, in part:

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The rule stated in this Section sets out the requirements for the discharge of that party's duty. First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completed the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed the contact. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contact was made[.]

(Emphasis added.) Rest. (2d) of Contracts § 265 (1979). Comment (a) (as cited in *Felt v. McCarthy*, 130 Wn.2d 203, 208,922 P.2d 90(1996)).

Here, the plea agreement specifically required Mr. McGee to “arrange for the purchase of one ounce of cocaine and/or multiple pills of ecstasy from EACH of three separate individuals and/or groups, including ANTHONY WILLIAMS, and provide information which will lead to the execution of a Superior Court controlled substance search warrant on each of these separate individuals and/or groups...” ANTHONY WILLIAMS was a named subject of the contract. Acquiring a conviction against Mr. Williams based on Mr. McGee's

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ability to assist in a controlled substance buy from Mr. Williams was “a principle purpose” of both parties. Had Mr. McGee failed to proceed against Mr. Williams he would have been in material breach of the plea agreement. It cannot be assumed that the State would have renegotiated the contact where Mr. Williams was such in integral part of it.

Additionally, Mr. McGee’s frustration of purpose was substantial. The controlled buy could not have occurred during Mr. Williams’ incarceration. While the record is silent as to the length of Mr. Williams’ incarceration, Deputy Leach did not testify that Mr. Williams was ever released. The length of the plea agreement was six (6) months so time was of the essence.

Finally, Mr. Williams’ incarceration was not foreseeable by Mr. McGee. Had he known that he could not proceed against Mr. Williams, Mr. McGee would not have agreed, where he necessarily would have failed, and provided the basis for his own breach of the agreement.

The trial court should have permitted Mr. McGee to rescind his

agreement under the supervening frustration doctrine. Failure to do so constitutes reversible error.

**E. CONCLUSION**

For all of the foregoing reasons and conclusions Mr. McGee respectfully requests that this Court reverse his conviction, and remand to the Superior Court to allow Mr, McGee the option of withdrawing his guilty pleas or specific performance.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of September,  
2007.

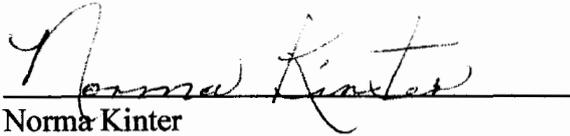


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Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 10, 2007, she delivered in person a copy of this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and delivered by U.S. mail to appellant, Laron Terrill McGee, DOC # 303074, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, Washington 98326, true and correct copies of this 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 September 10, 2007.

  
Norma Kinter

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