

COURT OF APPEALS
DIVISION II

NO. 35943-0

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

STATE OF WASHINGTON, RESPONDENT

v.

LARON TERRILL MCGEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 05-1-05080-4
06-1-00094-5

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Has defendant failed to show that his minimal due process rights were violated? 1

2. Has the State met its burden of establishing defendant's breach of the plea agreement by a preponderance of the evidence? 1

3. Did the State honor the plea agreement?..... 1

4. Has defendant failed to show that he is entitled to relief under the defense of discharge by supervening frustration? 1

5. Did the trial court properly deny defendant's request to withdraw his guilty plea? 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 4

1. DEFENDANT HAS FAILED TO SHOW THAT HIS MINIMAL DUE PROCESS RIGHTS WERE VIOLATED..... 4

2. THE STATE MET ITS BURDEN OF ESTABLISHING DEFENDANT'S BREACH OF THE PLEA AGREEMENT BY A PREPONDERANCE OF THE EVIDENCE. 8

3. THE STATE DID NOT BREACH THE PLEA AGREEMENT. 12

4. DEFENDANT'S ASSERTION THAT THE DEFENSE OF DISCHARGE BY SUPERVENING FRUSTRATION IS WITHOUT MERIT..... 14

5. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN DENYING DEFENDANT'S REQUEST
TO WITHDRAW HIS GUILTY PLEA.....18

D. CONCLUSION.22

Table of Authorities

Federal Cases

<u>Henderson v. Morgan</u> , 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976).....	18
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).....	5
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	2

State Cases

<u>Felt v. McCarthy</u> , 78 Wn. App. 362, 366, 898 P.2d 315 (1995)	15
<u>In re Hews</u> , 108 Wn.2d 579, 590, 741 P.2d 983 (1987).....	18
<u>In re James</u> , 96 Wn.2d 847, 849, 640 P.2d 18 (1982)	4
<u>In re Montoya</u> , 109 Wn.2d 270, 277, 744 P.2d 340 (1987).....	18
<u>In re Personal Restraint of Boone</u> , 103 Wn.2d 224, 230, 691 P.2d 964 (1984)	4
<u>In re PRP of Lord</u> , 152 Wn.2d 182, 189, 94 P.3d 952 (2004).....	12
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)	20
<u>State v. Armstrong</u> , 109 Wn. App. 458, 462, 35 P. 3d 397 (2001)	9
<u>State v. Branch</u> , 129 Wn.2d 635, 641, 919 P.2d 1228 (1996).....	19
<u>State v. Dahl</u> , 139 Wn.2d 678, 683, 990 P.2d 396 (1999).....	4, 5
<u>State v. Harris</u> , 102 Wn. App. 275, 280, 6 P.3d 1218 (2000).....	8
<u>State v. Hunsicker</u> , 129 Wn.2d 554, 559, 919 P.2d 79 (1996)	12
<u>State v. Jamison</u> , 105 Wn. App. 572, 589-90, 20 P.3d 1010 (2001)	20

<u>State v. Jerde</u> , 93 Wn. App. 774, 780, 970 P.2d 781 (1999)	12
<u>State v. Kessler</u> , 75 Wn. App. 634, 639, 879 P.2d 333 (1994).....	4, 8, 9
<u>State v. Marino</u> , 100 Wn.2d 719, 725, 674 P.2d 171 (1984).....	8
<u>State v. McRae</u> , 96 Wn. App. 298, 305, 979 P.2d 911 (1999)	12
<u>State v. Miller</u> , 110 Wn.2d 528, 531, 756 P.2d 122 (1988).....	13
<u>State v. Nelson</u> , 103 Wn. 2d 760, 763, 697 P.2d 579 (1985)	4
<u>State v. Olmsted</u> , 70 Wn.2d 116, 118, 422 P.2d 312 (1966).....	20
<u>State v. Perez</u> , 33 Wn. App. 258, 261, 654 P.2d 708 (1982).....	18
<u>State v. Ridgley</u> , 28 Wn. App. 351, 623 P.2d 717 (1981)	18
<u>State v. Saas</u> , 118 Wn.2d 37, 42, 820 P.2d 505 (1991)	19, 20
<u>State v. Sledge</u> , 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1998)	8, 12
<u>State v. Smith</u> , 134 Wn.2d 849, 852, 953 P.2d 810 (1998).....	18
<u>State v. Stowe</u> , 71 Wn. App. 182, 186, 858 P.2d 267 (1993).....	18
<u>State v. Talley</u> , 134 Wn.2d 176, 183, 949 P.2d 358 (1998)	12
<u>State v. Taylor</u> , 83 Wn.2d 594, 596, 521 P.2d 699 (1974).....	19, 20
<u>State v. Wakefield</u> , 130 Wn.2d 464, 472, 925 P.2d 183 (1996).....	20
<u>State v. Williams</u> , 103 Wn. App. 231, 235, 11 P.3d 878 (2000).....	4
<u>Vacova Co. v. Farrell</u> , 62 Wn. App. 386, 403, 814 P.2d 255 (1991).....	9
<u>Wash. State Hop Producers Liquidation Trust v. Goschie Farms, Inc.</u> , 112 Wn.2d 694, 699, 773 P.2d 70 (1989).....	14, 15

Statutes

RCW 9.94A.090	19
RCW 9.94A.430-.460.....	19

Rules and Regulations

CrR 4.2(f).....19
CrR 4.2(g).....18
CrR 7.8.....19

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

1. Has defendant failed to show that his minimal due process rights were violated?
2. Has the State met its burden of establishing defendant's breach of the plea agreement by a preponderance of the evidence?
3. Did the State honor the plea agreement?
4. Has defendant failed to show that he is entitled to relief under the defense of discharge by supervening frustration?
5. Did the trial court properly deny defendant's request to withdraw his guilty plea?

B. STATEMENT OF THE CASE.

On October 17, 2005, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, LARON T. MCGEE, hereinafter "defendant," with one count of robbery in the first degree and one count of unlawful possession of a controlled substance with intent to deliver. CP 66-68. The case was assigned cause number 05-1-05080-4. CP 66-68.

On January 6, 2006, the Pierce County Prosecuting Attorney's Office filed an information charging defendant with one count of unlawful

possession of a firearm in the second degree, one count of possession of a stolen firearm, and one count of reckless driving. CP 1-3. The cause was assigned cause number 06-1-00094-5. CP 1-3.

On June 8, 2006 pursuant to a plea agreement, defendant entered Alford¹ pleas to all of the original charges. 1RP² 10-13. The conditions of the plea agreement were outlined in a plea agreement and contract and submitted to the court. 1RP 3-4, CP 107-113, 114-120, See Appendix "A." The plea agreement and contract required defendant to provide information, act under the supervision of the Pierce County Sheriff's Department, and actively participate as directed by the Pierce County Sheriff's Department in any controlled substances investigation and prosecution as a result of information provided by the defendant. CP 107-113, 114-120.

The court accepted defendant's pleas and found defendant guilty as charged. 1RP 13. Sentencing was set over to June 1, 2007, to allow defendant to fulfill the conditions of his plea agreement. 1RP 13.

On February 6, 2007, a sentencing hearing was held following defendant's violations of the plea agreement and contract. 2RP 3, 5. Defendant requested an evidentiary hearing to establish his

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² CP refers to the Clerk's Papers.

1RP refers to the verbatim report of proceedings that occurred on June 8, 2006.

2RP refers to the verbatim report of proceedings that occurred on February 6, 2007.

noncompliance. 2RP 5. The evidentiary hearing was immediately held at the sentencing hearing. 2RP 5.

At the hearing, Pierce County Sheriff's Deputy Roger Leach testified that he was the officer assigned to oversee defendant's compliance with the plea agreement and contract in which defendant agreed to serve as a confidential informant. 2RP 7. Deputy Leach also testified regarding defendant's noncompliance with the plea agreement and contract. 2RP 6-16. Deputy Leach testified that defendant failed to comply with the terms and conditions of the contract by failing to: (1) maintain contact with Deputy Leach, (2) provide a current address, (3) refrain from criminal activity, and (4) assist in any investigations. 2RP 8.

At the conclusion of the evidentiary hearing, the court issued an oral ruling and found that defendant breached his plea agreement. 2RP 21. The court denied defendant's request to withdraw his guilty plea. 2RP 21. On cause number 05-1-05080-4, defendant was sentenced to 57 months concurrently on each count I and II. On cause number 06-1-00094-5, defendant was sentenced to 16 months on count I (unlawful possession of a firearm) and 22 months on count II (possession of a stolen firearm).

Defendant filed a timely notice of appeal on February 7, 2007. CP 52, 95. The cause numbers were consolidated.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT HIS MINIMAL DUE PROCESS RIGHTS WERE VIOLATED.

A plea agreement is a contract. State v. Williams, 103 Wn. App. 231, 235, 11 P.3d 878 (2000). Revocation of a plea agreement “calls for the application of legal principles of due process as guided by analogy to such contract principles as may be appropriate and helpful.” State v. Kessler, 75 Wn. App. 634, 639, 879 P.2d 333 (1994). In the present case, the plea agreement and contract entered on June 8, 2006, does not set out contractual terms for a revocation procedure. CP 107-113, See Appendix “A.” Therefore, the revocation of the plea agreement must proceed under minimal due process.

Prosecutorial negation of a plea agreement presents an issue of constitutional magnitude. In re James, 96 Wn.2d 847, 849, 640 P.2d 18 (1982). However, the due process rights afforded to an offender at a revocation hearing are not the same as those afforded at the time of trial. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999), citing In re Personal Restraint of Boone, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). An offender facing revocation has only minimal due process rights. Dahl, at 683, citing State v. Nelson, 103 Wn. 2d 760, 763, 697 P.2d 579 (1985). The Washington State Supreme Court has ruled that the minimal due process rights afforded to an offender facing a revocation are as follows:

[M]inimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

Dahl, at 683, citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

While written findings of the court are encouraged, they are not required and an oral ruling may be issued so long as the oral ruling is sufficiently detailed to be amenable to judicial review. Dahl, 139 Wn.2d at 689.

Defendant was not denied his minimal due process right to notice. In the amended order establishing conditions pending sentencing, defendant was ordered to comply with all conditions of the plea agreement entered on June 8, 2006. CP 123-24, 125-26. On September 6, 2006, an order for a bench warrant was entered citing violations by defendant of his amended order establishing conditions pending sentencing. CP 121, 122. Defendant was arrested on the warrant on October 20, 2006. CP 127, 128. The issuance of a warrant based upon violations of the plea agreement provided initial notice to defendant of his violations.

At a hearing on October 23, 2006, defendant signed a scheduling order for his sentencing hearing on November 7, 2006, at which the State sought revocation of his plea agreement. CP 129, 130. By acknowledging

the upcoming sentencing hearing, defendant was further put on notice that the State sought to revoke his plea agreement. While this sentencing hearing was rescheduled four separate times, defendant signed every scheduling order (with the exception of the January 4, 2007, order during which defendant was in custody, but which his attorney signed). CP 129, 130, 131, 132, 133, 134, 135, 136, 137, 138.

Defendant was not denied his minimal due process right to: hear the evidence against him, have the opportunity to be heard, confront and cross-examine witnesses, or have a neutral and detached hearing body. On February 6, 2007, defendant received an evidentiary hearing regarding the State's allegations he had violated the terms of his plea agreement and contract. 2RP 5, 7. The evidentiary hearing was presided over by Judge Stolz, a neutral and detached hearing body. 1RP 3. Defendant was present with counsel. 2RP 3.

Defendant had the opportunity to hear the evidence against him when the prosecutor called Pierce County Sheriff's Deputy Roger Leach to testify that defendant breached the confidential informant contract he entered into with the sheriff's department on June 8, 2006. 2RP 7. Defendant was given the opportunity to cross examine Deputy Leach, as well as to call his own witnesses. 2RP 13-16. However, defense counsel stated that it "ha[d] no witnesses." 2RP 16.

Defendant also was not denied his right to a statement by the court as to the evidence relied upon and the reasons for the revocation. At the

conclusion of the hearing the trial court issued an oral ruling on the record granting the State's request to revoke defendant's plea agreement. The court stated:

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 contract, 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 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.

2RP 21-22. The trial court clearly articulated that based upon defendant's failure to maintain contact with Deputy Leach, his apparent involvement in criminal activity, and his refusal to perform the three required buys for the sheriff's department, a revocation of the plea agreement was required.

Defendant has failed to show that his minimal due process rights were violated as he received notice of his violations as well as an evidentiary hearing prior to the revocation of his plea agreement at which he was allowed to confront and cross-examine witnesses, hear the evidence against him, have the opportunity to be heard, and have a neutral and detached hearing body preside. Additionally, the court issued an oral ruling that identified both the factual basis it relied upon as well as its findings. As defendant has not demonstrated that his minimal due process rights were violated, he is not entitled to reversal.

2. THE STATE MET ITS BURDEN OF ESTABLISHING DEFENDANT'S BREACH OF THE PLEA AGREEMENT BY A PREPONDERANCE OF THE EVIDENCE.

It is well-settled that a plea agreement is a contractual agreement between the State and defendant. State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1998). Plea agreements are analyzed under basic contract law. State v. Harris, 102 Wn. App. 275, 280, 6 P.3d 1218 (2000). The decision whether or not to terminate a plea agreement is analogous to the determination of materiality of a breach in a contract case. State v. Kessler, 75 Wn. App. 634, 640, 879 P. 2d 333 (1994).

The burden is on the State to prove noncompliance with the agreement by a preponderance of the evidence. State v. Marino, 100 Wn.2d 719, 725, 674 P.2d 171 (1984). The determination of materiality

of breach or termination of a plea agreement is dependant upon the circumstances of each case. Kessler, 75 Wn. App. at 641, citing Vacova Co. v. Farrell, 62 Wn. App. 386, 403, 814 P.2d 255 (1991). After a defendant breaches a plea agreement, the State may either rescind or specifically enforce the agreement. State v. Armstrong, 109 Wn. App. 458, 462, 35 P. 3d 397 (2001).

In the present case, the circumstances clearly demonstrate that defendant breached his plea agreement. Therefore, the State retained the authority to either rescind or demand specific performance of the plea agreement. Defendant's plea agreement provided in part:

The agreement is as follows:

- (1) The defendant must contact Pierce County Deputy Roger Leach or his designee upon release from custody and call Dep. Leach or his designee a minimum of once a day between the hours of 0900 and 1300 while under the terms of this contract;
- (2) The defendant must immediately advise Dep. Leach or his designee of any address and/or telephone numbers where he can be found and he must inform Dep. Leach or his designee of any change to either his address or telephone number while under the terms of this contract;...
- (4) The defendant must not violate any municipal, county, state or federal law;...
- (7) The defendant must perform two reliability drug purchases as directed by Dep. Leach or his designee. The term "reliability drug purchase" meaning controlled substance purchases made for the purpose of establishing reliability of the defendant as an informant. Such reliability purchases are to be made in addition to any other purchases required to be made under the terms of this contract;
- (8) The defendant must, under the direction of Dep. Leach or his designee, 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; such purchase of one ounce of numerous ecstasy pills from each individual; and/or group may be divided up into multiple buys of smaller quantities as directed by Dep. Leach or his designee. The purchases described in this subparagraph are in addition to the purchases described in subparagraph 7...

CP 107-113, 114-120.

The essential components of the plea agreement and contract were: defendant's cooperation with the Pierce County Sheriff's Department; defendant's ability to provide information to the Pierce County Sheriff's Department; defendant's submission to the supervision of the sheriff's department; and defendant's active participation in any controlled substances investigation and prosecution as directed by the Pierce County Sheriff's Department. CP 107-113, 114-120. Defendant was to demonstrate his reliability in aiding the sheriff's department in resolving criminal cases, and to remain accessible to the sheriff's department by providing it with his contact information and maintaining contact as required. 2RP 12.

However, while under the plea agreement and contract defendant consistently failed to maintain contact with Deputy Leach, provide the sheriff's department with his current address and contact information, or to demonstrate his reliability as an informant by completing his required

buys. 2RP 9-12. Defendant failed to conduct any of the three controlled buys for the sheriff's department as agreed to in the plea agreement and contract. While one of the individuals identified in the contract, Anthony Williams, was later arrested defendant was not precluded from completing the remaining two required buys nor from seeking assistance from the sheriff's department in obtaining a different assigned contact for the third. 2RP 12, 15.

Defendant further breached the plea agreement and contract by participating in criminal activity. Deputy Leach was contacted by a sheriff's department Detective who advised Deputy Leach that defendant had been named as a suspect in three motor vehicle thefts and a case involving the theft of a saddle. 2RP 10.

Defendant claims that the only breach that can be inferred from the trial court's ruling was defendant's failure to avoid participation in criminal activity. However, the court very clearly considered not only defendant's criminal involvement in the thefts, but also defendant's failure to maintain contact with and provide an address to the sheriff's department, or conduct any of the required controlled buys (see above excerpt from trial court's oral ruling). Defendant's failure to fulfill nearly every pertinent term of his plea agreement constitutes a material breach of his plea agreement contract.

The State showed by a preponderance of the evidence that defendant breached the plea agreement and contract. As such, defendant is not entitled to relief on this issue.

3. THE STATE DID NOT BREACH THE PLEA AGREEMENT.

Once a trial court accepts a plea agreement, it is a binding contract between the State and the defendant, and the State has a duty to fulfill the promises made in the agreement. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998); State v. Hunsicker, 129 Wn.2d 554, 559, 919 P.2d 79 (1996). The State breaches its duty if it fails to make or undercuts a promised recommendation. Talley, 134 Wn.2d at 183; State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

To determine whether there was a breach of the plea agreement, we look at whether the State's words and conduct, viewed objectively, contradict a promise. See Talley, 134 Wn.2d at 187; State v. Sledge, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). The reviewing court looks at the sentencing record to determine the objective manifestations of intent. In re PRP of Lord, 152 Wn.2d 182, 189, 94 P.3d 952 (2004). "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). When the State breaches a plea agreement, the typical

remedy is remand for the defendant to choose between withdrawing the plea or demanding specific performance of the agreement. State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

In the present case, it is clear from the record that the State agreed to move to allow defendant to withdraw his guilty pleas to all charges under both cause numbers, and amend the information to reduced charges, as well as make low end sentencing recommendations, *on condition* that defendant satisfy all of the conditions set forth in the plea agreement and contract. CP 107-113, 114-120, See Appendix “A.”

Appendix “A” clearly states:

Upon the condition that the defendant performs the *promises enumerated above in their entirety* the Pierce County Prosecutor’s Office agrees to...

The defendant further understands that *any failure to perform any of his promises or obligations truthfully or honestly under this agreement relieves the Pierce County Prosecutor’s Office from being required to perform any obligation pursuant to this agreement and contract.*

The defendant further understands that in the event he fails to perform any of his promises or obligations truthfully or honestly under this agreement, his plea to the original information under the above cited cause numbers will be accepted and the court will proceed to sentence him for all counts.

CP 107-113, 114-120 (emphasis added).

As stated unambiguously in the contract, the State retained power in the plea negotiations. The State retained the right to revoke the plea agreement should defendant fail to adhere to the agreed upon terms, or

perform his promises and obligations. The plea agreement and contract specified that any deviation from the agreed conditions was unacceptable. Defendant knew that the State's concession to allow defendant to withdraw his plea was conditioned upon his fulfillment of the promises and conditions of the plea agreement and contract. When defendant failed to adhere to these terms he violated the plea agreement, thus releasing the State from its obligations as outlined in the agreement.

Defendant fails to show that the prosecutor breached the plea agreement in this case. As such, defendant is not entitled to relief on this issue.

4. DEFENDANT'S ASSERTION THAT THE DEFENSE OF DISCHARGE BY SUPERVENING FRUSTRATION IS WITHOUT MERIT.

On appeal, defendant asserts that based upon the doctrine of "discharge by supervening frustration," he should have been permitted to withdraw his plea. See Appellant's Brief at 24. However, defendant is not entitled to relief under this doctrine.

Frustration of purpose is a defense to a claim of breach. Wash. State Hop Producers Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 699, 773 P.2d 70 (1989). The Restatement (Second) of Contracts describes the doctrine of discharge by supervening frustration:

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 contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts §265 (1979).

Comment (a) to the restatement requires: (1) the purpose frustrated must have been a principal purpose of that party in making a contract, and (2) the frustration must be substantial. Rest. (2d) of Contracts §265(a) (1979).

“The frustration must be so severe that it is not fairly to be regarded as within the risks that [the affected party] assumed under the contract.” Felt v. McCarthy, 78 Wn. App. 362, 366, 898 P.2d 315 (1995), citing Wash. State Hop, 112 Wn.2d at 700. The issue of frustration must be “so completely the basis of the contract that, as *both parties* understand, without it the transaction would make little sense.” Felt, 78 Wn. App. at 367, citing, Wash. State Hop, 112 Wn.2d at 700.

In the present case, because discharge by frustration of purpose is a defense to breach, defendant is necessarily admitting that he breached the plea agreement by raising the defense. Further, defendant's claim of frustration of purpose fails as a defense because defendant's controlled buy from Anthony Williams was neither a principal purpose in making the plea agreement and contract, nor was it a substantial frustration.

First, the required buy from Anthony Williams was not a principal purpose in making the plea agreement and contract. Defendant's chief objective in acting as an informant was to provide information that would lead to the execution of a controlled substance search warrant or prosecution of three separate individuals and/or groups. The introductory paragraph of defendant's plea agreement provides:

This agreement and contract outlines an understanding wherein the defendant agrees to provide information, act under the supervision of the Pierce County Sheriff's Department, and actively participate as directed by the Pierce County Sheriff's Department in any controlled substances investigation and prosecution as a result of information provided by the defendant.

CP 107-113, 114-120.

Defendant's plea agreement was entered into for the principal purpose of providing aid to the Pierce County Sheriff's Department in investigating and prosecuting controlled substances offenses. The plea agreement and contract provided that defendant must conduct a controlled buy from *each of three separate individuals*, including Anthony Williams. CP 107-113, 114-120. The emphasis of this requirement was on the performance of three separate transactions, not on defendant's ability to purchase from Anthony Williams. As the principal purpose of defendant's plea agreement contract was his ability to aid the sheriff's department in investigating criminal acts involving controlled substances, defendant

cannot claim frustration of purpose as a defense for his failure to perform a task that was not the principal purpose of the agreement.

Secondly, the arrest of Anthony Williams did not constitute a substantial frustration of the plea agreement and contract. Even if defendant's buy from Anthony Williams failed, he was still obligated, at minimum, to perform two more buys. The arrest of Anthony Williams did not prevent defendant from performing the two remaining controlled buys (not involving Anthony Williams), or from seeking direction from Deputy Leach as to how to complete the third buy after Anthony Williams' arrest. Defendant failed to perform *any* of the three required buys. As the purpose of defendant's plea agreement was to require his cooperation and assistance in sheriff's department investigations generally, rather than against Anthony Williams solely, his inability to purchase from Anthony Williams did not result in a substantial frustration.

Defendant has failed to show that his inability to conduct a controlled buy with Anthony Williams was a frustrated purpose that was a principal purpose in making the plea agreement and contract; nor has he shown that his inability to conduct the buy resulted in a substantial frustration. Defendant has not successfully raised the defense of discharge by supervening frustration and is therefore not entitled to relief.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S REQUEST TO WITHDRAW HIS GUILTY PLEA.

A guilty plea must be “knowing, intelligent, and voluntary in order to satisfy due process requirements.” State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993)(citing Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); In re Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). When a defendant fills out a written plea statement under CrR 4.2(g) and acknowledges that he has read and understands it and that its contents are true, a reviewing court will presume that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998)(citing State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)). In addition, “[w]hen the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” Perez, 33 Wn. App. at 262 (citing State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981)).

In this case, the presumption that defendant voluntarily pleaded guilty is “well nigh refutable.” Defendant signed statements on plea of guilty for each charge. CP 69-76. Moreover, the trial court reviewed with defendant his rights and confirmed that he understood the consequences of

his pleas on all three counts. 1RP 4-13. The court also explicitly stated that it was satisfied that defendant was making his pleas knowingly, voluntarily, and intelligently. 1RP 13.

Nevertheless, CrR 4.2(f) allows the defendant to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a “manifest injustice.” The rule states:

Withdrawal of plea. The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f).

A manifest injustice is “an injustice that is obvious, directly observable, overt, not obscure.” State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996)(quoting State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)(quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). Four nonexclusive criteria exist for determining whether a manifest injustice has occurred: “(1) denial of effective counsel, (2) plea not ratified by the defendant or one authorized [by him] to do so, (3) plea was involuntary, (4) plea agreement was not kept by the prosecution.”

State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996)(quoting Saas, 118 Wn.2d at 42)(quoting Taylor, 83 Wn.2d 594 at 597, 521 P.2d 699).

A trial court's denial of a motion to withdraw a guilty plea is reviewed under an abuse of discretion standard. State v. Olmsted, 70 Wn.2d 116, 118, 422 P.2d 312 (1966); State v. Jamison, 105 Wn. App. 572, 589-90, 20 P.3d 1010 (2001). A court abuses its discretion if its decision is based on clearly untenable or manifestly unreasonable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); Jamison, 105 Wn. App. at 589-90.

Defendant claims that he should be permitted to withdraw his plea of guilt because the State failed to honor his plea agreement, therefore resulting in manifest injustice. See Appellant's Brief at 23. However, defendant has failed to demonstrate that the trial court abused its discretion in denying defendant's request to withdraw his guilty plea.

The trial court did not base its decision to deny defendant's request on untenable or manifestly unreasonable grounds. The record shows that the trial court's denial was based upon the substantial evidence. The State presented evidence that defendant failed to: maintain contact with Deputy Leach, provide the Pierce County Sheriff's Department with an address of

residence, avoid criminal activity, or perform *any* of the three required buys for the sheriff's department.

When ruling on the State's request to revoke defendant's plea agreement, the trial court articulated the facts upon which it relied. The court found that defendant's participation in the plea agreement and contract was not limited to conducting buys from Anthony Williams alone, and that he failed to conduct any of the other two buys. 2RP 21. Additionally, the court found that defendant failed to stay in close contact with Deputy Leach and that defendant was having difficulty maintaining law abiding behavior as required. 2RP 21-22.

Defendant has failed to demonstrate that the trial court abused its discretion in by denying his request to withdraw his guilty plea. Therefore, defendant is not entitled to relief on this issue.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: DECEMBER 10, 2007

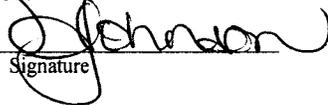
GERALD A. HORNE
Pierce County
Prosecuting Attorney



JESSICA GINER
Deputy Prosecuting Attorney
WSB # 39220

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.

12/10/07 
Date Signature

APPENDIX "A"

Plea Agreement and Contract



FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB - 8 2007 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-00094-5
05-1-05080-4

Vs.

LARON TERRILL MCGEE,

Defendant.

PLEA AGREEMENT AND CONTRACT

COMES NOW the Plaintiff, State of Washington, by and through its attorney, Gregory L. Greer, Deputy Prosecuting Attorney for Pierce County, and the defendant, LARON TERRILL MCGEE (hereafter referred to as the defendant), by and through his attorney, William Ferrell, and enter the following agreement and contract.

This agreement and contract outlines an understanding wherein the defendant agrees to provide information, act under the supervision of the Pierce County Sheriff's Department, and actively participate as directed by the Pierce Count Sheriff's Department in any controlled substances investigation and prosecution as a result of information provided by the defendant.

The agreement is as follows:

- (1) The defendant must contact Pierce County Deputy Roger Leach or his designee upon release from custody and call Dep. Leach or his designee a minimum of once a day between the hours of 0900 and 1300 while under the terms of this contract;

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- (2) The defendant must immediately advise Dep. Leach or his designee of any address and/or telephone numbers where he can be found and he must inform Dep. Leach or his designee of any change to either his address or telephone number while under the terms of this contract;
 - (3) The defendant must appear in person at any location chosen by Dep. Leach or his designee within two hours of the deputy's request to appear;
 - (4) The defendant must not violate any municipal, county, state or federal law;
 - (5) The defendant must appear for all scheduled court dates, whether directed to appear as a witness or as a defendant;
 - (6) The defendant must provide a complete and truthful statement to officers concerning any and all knowledge of person(s) involved in the distribution of controlled substances in the Western United States;
 - (7) The defendant must perform two reliability drug purchases as directed by Dep. Leach or his designee. The term "reliability drug purchase" meaning controlled substances purchases made for the purpose of establishing reliability of the defendant as an informant. Such reliability purchases are to be made in addition to any other purchases required to be made under the terms of this contract;
 - (8) The defendant must, under the direction of Dep. Leach or his designee, 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; such purchase of one ounce of numerous ecstasy pills

1 from each individual and/or group may be divided up into multiple buys of
2 smaller quantities as directed by Dep. Leach or his designee. The purchases
3 described in this subparagraph are in addition to the purchases described in
4 subparagraph 7;

- 5 (9) The defendant must submit to and pass a polygraph examination concerning his
6 initial statement of subsequent information if requested by Dep. Leach or his
7 designee;
- 8 (10) The defendant must contact Dep. Leach or his designee in person or
9 telephonically as directed until the conclusion of the criminal and/or civil
10 proceedings against all subjects arrested and charged as a result of information
11 provided by the defendant;
- 12 (11) The defendant must remain in Pierce County at all times during the investigation
13 and court proceedings unless prior notification is given and permission to leave
14 obtained from Dep. Leach or his designee;
- 15 (12) The defendant must continue to provide complete and truthful information
16 throughout all investigations concerning all participants involved in the
17 distribution of controlled substances;
- 18 (13) The defendant must perform such tasks pertaining to the investigations as directed
19 by Dep. Leach or his designee, including but not limited to: wearing a wire
20 device, introduction of an undercover officer, and granting permission to record
21 phone conversations;
- 22 (14) The defendant must plead guilty as charged by the original information under the
23 above captioned cause numbers (06-1-00094-5 and 05-1-05080-4);
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- (15) The defendant must provide complete and truthful information at all times to the State, to the federal government's attorneys, to detectives from the Pierce County Sheriff's Department, to any federal police agency and to defense attorneys and/or investigators, regarding knowledge of the participants and circumstances surrounding the above mentioned purchases. This information, to be considered truthful by the Pierce County Prosecutor's Office, must include specific and complete details about the incidents of purchase and each participant's role, including her own, and any other information he has about the surrounding circumstances of the purchases. The defendant must not hold back any information in an attempt to protect himself or other people. A reasonable belief on the part of the deputy prosecuting attorney assigned to the case that the defendant is not being completely truthful will result in a violation of this agreement;
- (16) The defendant must appear when requested for interviews or trial preparation by a deputy prosecuting attorney, a federal government attorney, a federal agency police officer or a Sheriff's Department detective, at a location and time designated by them. The defendant's attorney shall be notified and have the right to be present for all interviews of the defendant conducted by any persons involved in these cases;
- (17) The defendant must agree to set over sentencing until the completion of his responsibilities and requirements under this contract as outlined above. The defendant must sign an agreement to waive speedy sentencing until after these requirements are complete and/or for a time period not to exceed 365 days, which

1 is the time the defendant agrees that he must assist in the completion of the active
 2 investigations and arrests or charging of the individuals and/or groups mentioned
 3 in subparagraph 8, and for whatever time is needed to prosecute such individuals
 4 and/or groups;

5 Upon the condition that the defendant performs the promises enumerated above in their
 6 entirety the Pierce County Prosecutor's Office agrees to:

- 7 (a) Move to allow the defendant to withdraw his guilty pleas to all charges
 8 under the two cause numbers described and amend the information to
 9 charge the defendant under cause number 05-05080-4 with one count of
 10 robbery in the second degree and further, the State will dismiss all counts
 11 under cause number 06-1-00094-5;
- 12 (b) At sentencing, the State will recommend ^{12 months + 1 day} ~~the high end of the sentencing~~
 13 ^{range} ~~range~~ (calculated at ^{12 + 14} ~~18~~ months based on an offender score of 2 points);
 14 \$500 CVPA; \$200 Court costs; \$100 DNA fee; restitution; \$500 DAC
 15 recoupment; no contact with the victim and/or the victim store; and, 18-36
 16 months community custody.
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18 The defendant understands that the State will not tolerate deception from him at any point
 19 during the performance of this contract, regardless of whether the untruthfulness helps or hurts
 20 the investigation and prosecution of any purchase and/or person charged.

21 The defendant further understands that any failure to perform any of his promises or
 22 obligations truthfully or honestly under this agreement relieves the Pierce County Prosecutor's
 23 Office from being required to perform any obligation pursuant to this agreement and contract.
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1 The defendant further understands that in the event he fails to perform any of his
2 promises or obligations truthfully or honestly under this agreement, his plea to the original
3 information under the above cited cause numbers will be accepted and the court will proceed to
4 sentence him for all counts. The prosecution's recommendation in this instance will be open
5 (meaning that the State will be free to seek a high end recommended sentence).

6 The defendant further understands and acknowledges as follows:

- 7 1. Should Dep. Leach be unavailable for an extended period of time, the
8 defendant will report to a designee of Dep. Leach;
- 9 2. This contract does not bind the Immigration and Naturalization Service in any
10 way or affect the ability of such service to deport the defendant as a result of his
11 conviction;
- 12 3. If there is authority to deport the defendant, he may be deported from the
13 United States as a result of his conviction(s);
- 14 4. The defendant fully understands each and every term of this document, the
15 entire document having been written in his primary language of English, and that
16 the defendant has no further questions;
- 17 5. The defendant's attorney, William Ferrell, has fully informed the defendant of
18 the contents of this contract, its obligations, and all alternatives to entering into
19 this contract, including exercising his right to a trial and all other constitutional
20 rights he gives up;
- 21 6. The defendant's attorney has fully reviewed the police reports pertaining to the
22 above captioned cases and has fully discussed with the defendant the merits of the
23 State's cases and chances of successful prosecution;
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7. The defendant, understanding the entire contents of this contract, now enters into this contract and accepts its obligations. The defendant enters into this contract of his own free will, voluntarily, intelligently and knowingly.

DATED this 8 day of June, 2006.



DEFENDANT, LARON TERRILL MCGEE



WILLIAM FERRELL
Attorney for Defendant
WSB# 27022



GREGORY L. GREER
Deputy Prosecuting Attorney
WSB# 22936

glg