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COURT OF APPEALS
DIVISION II

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No. 36472-7-II

STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Douglas Baker,

Appellant.

Jefferson County Superior Court

Cause No. 02-1-00116-1

The Honorable Judge Theodore Spearman

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Baker's motion to withdraw his guilty plea.
2. The trial court erred by ruling that Mr. Baker's motion was time-barred under RCW 10.73.090.
3. Mr. Baker was denied due process of law when the state breached the Comprehensive Plea Agreement.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Doug Baker entered into a Comprehensive Plea Agreement in January of 2004, covering a Jefferson County charge and forfeiture proceedings associated with that charge. Under the agreement, Mr. Baker was to plead guilty to a felony. In return, the state promised to sell the Baker family's property at fair market value, to allow 30 days from the date of sale for Mrs. Baker to vacate and remove possessions from the property, to remit 15% of the proceeds to Mrs. Baker, and to return certain property being held as evidence.

On June 18, 2004, the state sold the property, without allowing Mrs. Baker 30 days to remove her possessions. When the Bakers learned of the sale price, they concluded that the property was sold at less than fair market value. As of August 2006, the state had still failed to remit \$8000 owed to Mrs. Baker, and had failed to return an item of property.

In August of 2006, Mr. Baker filed a motion to withdraw his plea, alleging that the state failed to fulfill its obligations. A hearing was held, but instead of hearing evidence, the trial judge denied the motion as time-barred under RCW 10.73.090.

1. Did the trial court err by denying as time-barred Mr. Baker's motion to withdraw his guilty plea? Assignment of Error Nos. 1-3.

2. Should the trial judge have applied the doctrine of equitable tolling and considered Mr. Baker's motion since it was brought within one year of the state's alleged breach of the Comprehensive Plea Agreement? Assignment of Error Nos. 1-3.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Douglas Baker was charged in Jefferson County with Manufacture or Possession with Intent to Deliver Marijuana, Conspiracy to Manufacture Marijuana, and Defrauding a Public Utility in the First Degree. CP 1-2. At the same time, he was charged in Clallam County with 14 counts of Delivery of Cocaine, 14 counts of Money Laundering, Defrauding a Public Utility in the First Degree, and Manufacture of Marijuana. CP 4. The cases were connected, in that property owned by his family in each county had been searched pursuant to one investigation, and his charges stemmed from those linked searches. CP 1-4; Supp. CP, Affidavit of Probable Cause, Supp. Motion for Probable Cause; RP (1/16/04) 18-19; RP (4/9/07) 2. The prosecutor assigned to the case in Clallam County, John Prentiss, was appointed as a special prosecutor for the charge in Jefferson County. Supp. CP; RP (4/9/07) 21.

Mr. Baker took his Clallam County cases to trial. RP (1/16/04) 18-19). He was convicted as charged and sentenced. CP 4.

On January 16, 2004, Mr. Baker entered into a "Comprehensive Plea Agreement," combining his Jefferson County case with forfeiture proceedings initiated by Clallam County regarding the Baker family's

property. Supp. CP, Appendix A. According to that agreement, the state was to take certain actions:

- dismiss the marijuana charges in Jefferson County,
- recommend no jail time and no fines on the defrauding charge,
- dismiss the charges against Mr. Baker's wife in Clallam county,
- sell all three properties at fair market value or as close thereto as practicable,
- distribute 15% of the net profit from the sale to Mr. Baker's wife,
- allow Mr. Baker's wife 30 days after the closing of the sale of her home to remove her possessions and vacate,
- return certain items to Mr. and Mrs. Baker, including an Olympus digital camera.

Supp. CP.

In exchange for this, Mr. Baker was to:

- plead guilty to Defrauding a Public Utility in Jefferson County,
- convey and quitclaim his interest in the three properties (one in Clallam county, one in Jefferson county and one in Grays Harbor county) to Clallam county,
- agree to Forfeiture Orders on all three properties.

Supp. CP.

The court accepted this agreement and entered a Judgment and Sentence.

CP 3-13; RP (1/16/04) 19-23.

Mr. Baker appealed his Clallam County convictions, challenging the search warrant, and his convictions were overturned. The Clallam

County charges were dismissed with prejudice. See Court of Appeals cause number 30994-2-II and 31134-8-II. Supp. CP.

Mr. Baker filed a motion to withdraw his Jefferson County guilty plea in January of 2005. At that time, he did not argue that the state had failed to perform obligations under the Comprehensive Plea Agreement. The motion was denied on March 18, 2005. RP (3/18/05) 27-28; Supp. CP, Minute Order.

As of August of 2006, the state's performance of its obligations under the agreement was in dispute. The disputed provisions included the state's duty to:

- sell the property at fair market value,
- give 15% of the proceeds to Mrs. Baker,
- allow Mrs. Baker 30 days in which to vacate the property and remove the family's possessions;
- return all of the items listed in the agreement, including the digital camera.

Supp. CP.

Mr. Baker filed a second motion to withdraw his plea on August 2, 2006, arguing that the state had not followed through with its part of the agreement, despite Mr. Baker's performance of his obligations. Supp. CP. First, Mr. Baker alleged that the state had not sold the property in Clallam County at its fair market value. The home in Clallam County had burned to the ground prior to entry of the Comprehensive Plea Agreement, but was covered by insurance and could have been rebuilt at no expense to the

county or to the Bakers. Supp. CP. The insurance policy also provided money for cleanup and debris removal, which would have restored the some of the value of the property. Mr. Baker filed a claim under the policy. RP (5/21/07) 35. On June 18, 2004, the county sold the property without clean-up or rebuilding. Supp. CP; RP (5/21/07) 35-38, 45. The terms of the sale did not allow Mrs. Baker 30 days as specified in the contract to retrieve her possessions, and she was denied entry when she arrived at the property. RP (5/21/07) 45. The state responded to this argument by asserting that the property was sold at fair market value. Supp. CP, Response to Motion to Withdraw Guilty Plea, page 3.

Second, Mr. Baker alleged that his camera had not been returned to him. The state acknowledged that it could easily have performed that obligation earlier. Supp. CP, Response to Motion to Withdraw Guilty Plea, page 2. Third, Mr. Baker alleged that the state had not provided Mrs. Baker with \$8000 owed to her under the terms of the agreement. The state admitted that Clallam County still held money owed, and that there had been no obstacle to its return earlier. Supp. CP, Response to Motion to Withdraw Guilty Plea, page 2. The prosecution characterized its failure to perform these two obligations as “oversights,” and informed the court that the state “stands ready to remedy these oversights and finish performance,” arguing that performance under the contract was delayed

but that the delay did not constitute a breach. Supp. CP, Response to Motion to Withdraw Guilty Plea, pp. 3, 7.

At a hearing on the motion to withdraw his plea, Mr. Baker argued that the court could rule on his motion, despite the fact that it was brought more than one year after entry of the Jefferson County Judgment and Sentence, because the state's breach created a manifest injustice. RP (4/9/07) 7. Additionally, Mr. Baker urged the court to view the agreement as a contract that could be enforced within its statute of limitations, especially since there was no specific deadline for the state's performance. RP (5/21/07) 41-45.

The court denied Mr. Baker's motion, holding that the issue was time-barred. Supp. CP, Minute Order. This timely appeal followed. CP 14-15.

ARGUMENT

MR. BAKER'S MOTION TO WITHDRAW HIS GUILTY PLEA WAS NOT TIME-BARRED BECAUSE THE LIMITATIONS PERIOD WAS EQUITABLY TOLLED PENDING PERFORMANCE BY THE STATE OF ITS PART OF THE PLEA AGREEMENT.

Under RCW 10.73.090, a collateral attack on a criminal conviction (including a motion to withdraw a guilty plea) must be brought within "one year after the judgment becomes final," subject to certain limitations listed in RCW 10.73.100. In proper cases, RCW 10.73.090 can be subject

to equitable tolling. *State v. Littlefair*, 112 Wn. App. 749 at 759, 51 P.3d 116 (2002). Equitable tolling permits an action when justice requires it, even though a statutory time period has elapsed. *State v. McLean (In re Carlstad)*, 150 Wn.2d 583 at 593, 80 P.3d 587 (2003).

For example, where a defendant pleads guilty without being advised about the deportation consequences of his plea, he may bring a collateral attack after deportation proceedings commence, even if more than a year has passed after entry of the judgment and sentence. *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002). *See also State v. Schwab*, 141 Wn. App. 85, 167 P.3d 1225 (2007); *In re Personal Restraint of Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000).

In this case, justice requires application of the doctrine of equitable tolling. According to Mr. Baker, the state failed to comply with the Comprehensive Plea Agreement (1) by selling the Baker family's property at less than fair market value, (2) by failing to permit Mrs. Baker 30 days after the sale to enter the property and retrieve her possessions, (3) by failing to return a digital camera, and (4) by withholding money owed to the Bakers from the sale. The Agreement was entered in January of 2004, and the state's breach was ongoing in August of 2006. The state acknowledged its failure to perform the latter two obligations, and disputed Mr. Baker's claim regarding the first, creating an issue of fact (as

to whether or not the property was sold at fair market value under the terms of the agreement).

If the doctrine of equitable tolling is not applied to this case, then the state would receive the benefit of the Comprehensive Plea Agreement without performing its obligations, and Mr. Baker would have no remedy. This is exactly the kind of injustice that the doctrine of equitable tolling is designed to address. *See Littlefair, supra*.

Accordingly, the trial court's order denying Mr. Baker's motion as time-barred must be reversed, and the case must be remanded to the trial court (1) for an evidentiary hearing on the issue of whether or not the state sold the Baker family property at less than fair market value, and (2) for a determination of whether or not the state's breaches were material. Upon a finding of material breach, Mr. Baker should be permitted to demand specific enforcement or to withdraw his guilty plea.

CONCLUSION

The state should not be permitted to enter a plea agreement, accept a defendant's performance (in this case, a guilty plea to a felony), enforce punishment against him, and then refuse with impunity to perform its obligations under the agreement. Where the state breaches a plea agreement after entry of the judgment and sentence, RCW 10.73.090 should not bar a collateral attack brought within one year of the breach.

The doctrine of equitable tolling should apply, so that an accused can elect whether to specifically enforce the agreement or withdraw his plea.

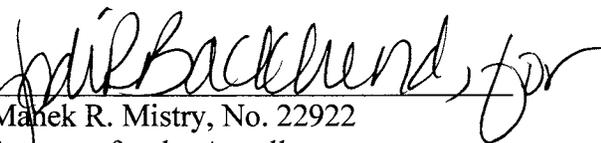
For all these reasons, the court's order denying Mr. Baker's motion as time-barred must be reversed, and the case should be remanded to the trial court. On remand, the trial court should determine whether or not the state's failure to return the camera and money constituted a material breach. The trial court should also hold an evidentiary hearing to determine whether or not the state sold the property at less than fair market value, and if so, whether this failure constituted a material breach.

Respectfully submitted on January 12, 2008.

BACKLUND AND MISTRY



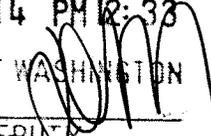
Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

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COURT OF APPEALS
DIVISION II

08 JAN 14 PM 12:33

CERTIFICATE OF MAILING STATE OF WASHINGTON
BY 

I certify that I mailed a copy of Appellant's Opening Brief to:

Douglas Baker
1142 East Craig Ave.
Port Angeles, WA 98362

and to:

John Joseph Jay
Special Deputy Prosecuting Attorney
PO Box 1220
Port Angeles, WA 98368-0920

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 12, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 12, 2008.


Jodi R. Backlund, No. 22917
Attorney for the Appellant

Appendix A

This form is required on a case that involves...

COMPREHENSIVE PLEA AGREEMENT

FILED
CLALLAM COUNTY
JUN 15 2005
MOLLY LINGVALL, Clerk

THE FOLLOWING constitutes the complete, comprehensive, integrated agreement between CLALLAM COUNTY, JEFFERSON COUNTY, DOUGLAS BAKER, FRANCINE BAKER and HARD ROCK TRUCKING, and is meant to resolve:

Not Guilty

02-1-125-3

02-2-288-1

SCANNED - 4 Not Guilty

- (a) The two remaining criminal cases against DOUGLAS BAKER (Clallam County cause No. 02-1-00125-3 and Jefferson County cause No. 02-1-00116-1), and one criminal case against FRANCINE BAKER (Clallam County Cause No. 02-1-00126-1); and
- (b) The three real property drug forfeiture actions pending against the Bakers' real property in Clallam, Jefferson and Grays Harbor Counties (Clallam County cause No. 02-2-00288-1, Jefferson County cause No. 02-1-00097-4 and Grays Harbor County cause No. 02-2-00395-4); and
- (c) The personal property forfeiture case No. CTF98-00003.

1. In Jefferson County cause No. 02-1-00116-1, DOUGLAS BAKER agrees to enter a plea of Guilty to Count III of the Amended Information (DEFRAUDING A PUBLIC UTILITY IN THE FIRST DEGREE). Mr. BAKER also agrees to join the State in recommending that Mr. BAKER be ordered to pay Eight Hundred Fifty Dollars (\$850.00) restitution to the Mason County Public Utility District. The State will, in exchange, move to dismiss Counts I and II and recommend (a) no jail time under Jefferson County Cause No. 02-1-00116-3, (b) no fine, and (c) only whatever minimum court costs and crime victims fees which the Court sees fit to impose.

2. With regard to Clallam County's three (3) real property forfeiture actions under Clallam County cause No. 02-2-00288-1, Jefferson County cause No. 02-1-00097-4, and Grays Harbor County cause No. 02-2-00395-4, DOUGLAS BAKER, FRANCINE BAKER, and HARD ROCK TRUCKING INC. agree to do the following:

Not Guilty of any crime

- (a) Under Jefferson County Cause No. 02-1-00097-4, DOUGLAS BAKER agrees to convey and quitclaim his interest in the real property known as 772 Forrest Drive, Brinnon, by assigning his interest in his Real Estate Contract with William and Helen Aker, to Clallam County. FRANCINE BAKER also agrees to quitclaim all of her interest, if any, in the property.
- (b) Under Clallam County Cause No. 02-2-00288-1, DOUGLAS BAKER, FRANCINE BAKER and HARD ROCK TRUCKING agree to quitclaim all their interest in the real property known as 166 Old Dads Road, to Clallam County.

(c) Under Grays Harbor County cause No. 02-2-00395-4, DOUGLAS BAKER and FRANCINE BAKER agree to quitclaim all their interest in the real property known as 638 Island Circle SE, Ocean Shores.

3. DOUGLAS BAKER, FRANCINE BAKER and HARD ROCK TRUCKING also agree to the entry of court Forfeiture Orders for the three above-described real properties under the following terms and conditions:

- (a) The Sheriff of Clallam County shall sell all three (3) real properties at fair market value, or as close thereto as practicable. The Sheriff shall retain sole control over the choice of real estate agent, the manner, timing, and details of the sales.
- (b) The Sheriff shall reimburse himself for any reasonable costs of sale and expenses (including preparation, if any, and other reasonable expenses).
- (c) The net profit of the sales, after sales costs, closing costs, and broker's fees are deducted, shall be deposited in an interest-bearing account controlled by the Clallam County Superior Court.
- (d) As soon as practicable following each of the three (3) court-ordered real estate sales, the Court shall distribute the net profits as follows:
 - (i) eighty-five percent (85%) of the net profit to CLALLAM COUNTY; and
 - (ii) fifteen percent (15%) of the net profit to ~~FRANCINE BAKER~~ FRANCINE BAKER. *J.P. W*

4. The net profit from the recent sale of timber from 166 Old Dads Road, Sequim, already on deposit in an account controlled by the Superior Court, shall be distributed by the same 85% / 15% formula described above.

5. FRANCINE BAKER shall be allowed thirty (30) days from the date of closing of the sale of the 166 Old Dads Road real property to remove her possessions and vacate the property.

6. With regard to the civil forfeiture actions, the parties agree to bear the cost of their own litigation and attorney's fees. CLALLAM COUNTY specifically disclaims any responsibility for payment of liens placed on defendant properties by attorney Allen M. Ressler subsequent to the County's filings.

7. Under personal property forfeiture case No. CTF 98-00003, the Sheriff of Clallam County agrees to return the following items to DOUGLAS BAKER and FRANCINE BAKER:

- (a) 2001 Honda power bike
- (b) Olympus digital camera

<u>Tag No.</u>
69059
69014

Did Not

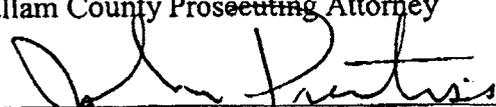
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- (c) Power chainsaw 64890
- (d) Three-legged tripod 64892
- (e) Quasar video camera with bag and accessories 64893
- (f) Videotapes 64894
- (g) Zenith night vision 69047
- (h) Napa battery charger 64880
- (i) Assorted tools 64881 through 64886
- (j) All of Francine Baker's wedding rings and jewelry 64708
- (k) Gateway computer 69001
- (l) All of the Bakers' personal papers
- (m) Maroon coat 64705
- (n) Honda generator 64710
- (o) Painted picture 64700
- (p) Fourteen silver dollars 69081

All the remaining seized items shall be forfeited to the Clallam County Sheriff's Department, subject only to outstanding claims of others not parties to this Agreement.

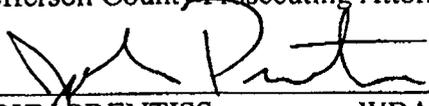
8. With regard to Clallam County cause No. 02-1-00126-1, the State agrees: (a) to dismiss the charge of POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE) against FRANCINE BAKER, with prejudice, and (b) to file no other criminal charges against FRANCINE BAKER arising out of this investigation.

DEBORAH S. KELLY
Clallam County Prosecuting Attorney


JOHN PRENTISS WBA #28218
Deputy Prosecuting Attorney

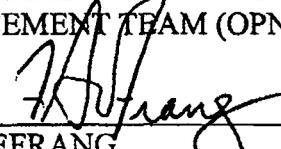
Date: January 13, 2004

JUELANNE DALZELL
Jefferson County Prosecuting Attorney


JOHN PRENTISS WBA #28218
Deputy Prosecuting Attorney

Date: January 13, 2004

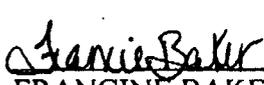
OLYMPIC PENINSULA NARCOTICS
ENFORCEMENT TEAM (OPNET)


FRED DEFRANG

Date: January 13, 2004


DOUGLAS E. BAKER, individually and
as agent for HARD ROCK TRUCKING

Date: 1-16-04, 2004


FRANCINE BAKER

Date: 1-15-04, 2004