

COURT OF APPEALS  
DIVISION II

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No. 37314-9-II

STATE OF WASHINGTON

BY *[Signature]*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT JOHN PRESTON,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Katherine Stolz and  
the Honorable Bryan Chushcoff, Judges

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A. ASSIGNMENT OF ERROR

Reversal of the conviction should be granted and Preston should be allowed to choose his remedy because the prosecutor implicitly breached the terms of the plea agreement by arguing against a Drug Offender Sentencing Alternative (DOSA) sentence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

After a trial in which the jury was unable to unanimously agree to convict Preston on any charges, the prosecutor offered Preston a deal. The terms were that the prosecutor would drop several charges and Preston would enter an Alford plea to a single charge, with the understanding that the prosecution would request a sentence of 60 months while Preston would argue for a DOSA sentence. Did the prosecutor implicitly breach the plea where, at sentencing, he did not simply argue in favor of the 60 month sentence but also argued at length against the DOSA sentence where the ability to request that sentence was clearly the basis for Preston's decision to enter the plea?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant, Robert J. Preston, was charged by amended information with attempting to elude a pursuing police vehicle and failure to remain at an injury accident. CP 6-7. RCW 46.52.020; RCW 46.61.024. After a trial, the jury was unable to reach an unanimous decision. Supp. CP \_\_\_\_ (notice from jury, filed 02/07/07). Pretrial proceedings began again and the prosecution then added a charge of tampering with a witness. CP 12-13; RCW 9A.72.120(1)(a).

On October 18, 2007, Preston entered an Alford<sup>1</sup> plea to a third amended information alleging only the failure to remain at an injury accident charge. CP 25-28; RCW 46.52.020. That same day, the Honorable Judge Katherine Stolz accepted that plea. 3RP 9.<sup>2</sup>

Sentencing was held before the Honorable Judge Bryan Chushcoff on January 16, 2008, after which the judge imposed a standard range sentence. 4RP 1-11; CP 33-45. Preston appealed, and this pleading follows. See CP 46-48, 58-71.

2. Facts relevant to issue on appeal

On October 18, 2007, Preston agreed to enter an Alford plea to a single count of failing to remain at the scene of an injury accident. See 3RP 3-4. At the plea hearing, the court informed Preston that the standard range was set at 60-60 months because of Preston's offender score and the statutory maximum, and that the prosecution would be recommending such a sentence. 3RP 5. The court also ensured that Preston understood that, under the agreement, he would be permitted to argue, *inter alia*, for a Drug Offender Sentencing Alternative (DOSA) sentence. 3RP 5-6. Indeed, the court said, the plea agreement specifically focused on the DOSA option, declaring that "the defendant understands that the crime charged does not disqualify him for a DOSA." 3RP 6. As part of the

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

<sup>2</sup>The verbatim report of proceedings consists of four volumes, which will be referred to as follows:

May 8, 2007, as "1RP;"  
May 15, 2007, as "2RP;"  
October 18, 2007, as "3RP;"  
January 16, 2008, as "4RP."

colloquy, the court said to Preston:

And assuming you were to be sentenced to a DOSA, you would be sentenced to a total confinement in a state facility for one-half of the mid-point range. Half would be served in custody. Half would be served on the DOSA out of custody. If you were to violate, you would be returned to prison to serve out the balance of the DOSA sentence. Is that your understanding?

3RP 7. Preston acknowledged that he understood. 3RP 7.

After the court accepted the plea, the prosecutor told the court the defense was “requesting a continuance of the sentencing, so Mr. Preston can be screened for a DOSA.” 3RP 9. The prosecutor said nothing indicating that he would be objecting to a DOSA. 3RP 9.

At sentencing in front of a different judge, the same prosecutor who was present at the plea hearing argued fervently not just for the 60 month sentence but against the DOSA. 4RP 4-23. The prosecutor declared that Preston did not deserve “any kind of a break at this point,” that he had likely previously had opportunities for treatment which he obviously had not taken advantage of, and that Preston had tried “multiple ways to manipulate his way out of taking responsibility for this offense.” 4RP 5. The prosecutor declared what he believed were the facts of the case, although those facts had not been found by the jury based upon the evidence the prosecutor had presented at trial, because the jury had failed to convict. 4RP 4-7; see Supp. CP \_\_\_\_\_. The prosecutor also argued that Preston had put pressure on his girlfriend and others to say that Preston’s father was driving the car, not Preston, although that conduct dealt with one of the dismissed charges. 4RP 7-8; see CP 12-13.

The prosecutor was also unhappy with Preston for having filed a

bar complaint against him saying he was pursuing unfounded charges, which the prosecutor deemed not to be a legitimate complaint but rather Preston “trying every which way. . . to not have to face up to the responsibility” of what he had done. 4RP 9. The prosecutor said that Preston had been appointed several different attorneys, which the prosecutor also said was a way for Preston to try to avoid responsibility. 4RP 9-10. According to the prosecutor, the request for a DOSA was just “another manipulation” by Preston to try to serve the least amount of time possible, because the prosecutor did not believe that Preston had become really serious about wanting treatment and still wanted to evade responsibility for the offense. 4RP 10.

In response, counsel argued for a DOSA sentence, noting that Preston did not have any felonies from 1999 on and that DOSA was not, as the prosecutor seemed to think, a “free ride.” 4RP 11-12. He noted that Preston had not previously attempted treatment and that he had a significant problem with drugs which had contributed not only to the current incident but to many of his prior offenses contained in his criminal history. 4RP 13-14. Counsel said that it was best for the community and for Preston to give him the opportunity to do treatment in order to take care of his issues and prevent him from committing crimes in the future. 4RP 14. Counsel also stated he “did anticipate” that the state would “object to a DOSA sentence,” although he did not say he had conveyed that information to Preston. 4RP 11.

Preston told the court that drugs had been his entire downfall and he had been “emotionally hit” by his 15-year old daughter’s recently

begging him to quit doing drugs and to get out of jail. 4RP 17. Preston had decided that he had to deal with his problems, which is why he had entered a plea in the case. 4RP 17. He admitted his past mistakes and said he could not take them back but he could stop from being back in court in the future if he was given the tools to do so. 4RP 18. He said he needed a support group and assistance, that he recognized now where he was “is stupid,” and that he needed help.. 4RP 18-19.

The court noted that none of Preston’s criminal history was for possession or dealing but was instead such things as property crimes or eluding or escape. 4RP 19. Preston then told the court that he had been “positive for cocaine” in his violations for his federal offenses, had a conviction for possessing drug paraphernalia at some point and was “doing good and all that stuff” for awhile but when he got involved with his girlfriend he started doing cocaine again and not going to report for his federal probation, which was why a warrant had been issued and police had apprehended him at the time of the incident in this case. 4RP 20.

The court stated it thought it was “probable” that Preston had a drug problem but also that Preston appeared to have developed a lifestyle “in which he doesn’t much care about anybody other than himself.” 4RP 21-22. The court said it thought if it just treated the drug problem, that would not “solve the problem of his basic criminality of the thing.” 4RP 22. The court acknowledged that it “might make it easier” for Preston to give him treatment but the court was not sure that a DOSA would solve the problems of Preston’s mental situation. 4RP 22. Meanwhile, the court stated, Preston was a “danger to everybody” with his driving and his not

staying at the accident. 4RP 22-23. Indeed, the court thought, Preston was “a thoroughly irresponsible and immoral person” and drugs were “merely, a byproduct of that.” 4RP 22-23. The court then denied the request for the DOSA and imposed a sentence of 60 months in custody. 4RP 22-23.

D. ARGUMENT

THE STATE VIOLATED PRESTON’S DUE PROCESS RIGHTS  
BY BREACHING THE PLEA AGREEMENT AND PRESTON  
SHOULD BE ALLOWED HIS CHOICE OF REMEDY

Plea agreements are contracts between the prosecution and the accused. See State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). As part of a plea agreement, the defendant gives up many important constitutional rights. See, e.g., State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999). As a result, a prosecutor has a due process duty to act in good faith and with fairness in upholding a plea agreement into which the prosecutor’s office has entered. See Sledge, 133 Wn.2d at 839-40; State v. Shineman, 94 Wn. App. 57, 60-61, 971 P.2d 94 (1999). The terms of the agreement become binding on the state once the trial court accepts the plea. See State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988).

When a prosecutor breaches a plea agreement, due process mandates that the conviction must be reversed and the defendant is entitled to his choice of remedies, i.e., either to withdraw the plea and go to trial, or to specifically enforce the terms of the agreement. See Sledge, 133 Wn.2d at 846. If the defendant chooses specific enforcement, he is entitled to a new sentencing hearing in front of a different judge. State v. Van Buren, 101 Wn. App. 206, 218, 2 P.3d 991, review denied, 142

Wn.2d 1015 (2000).

In this case, it is Preston's position that the prosecutor breached the plea agreement by not simply just arguing for the 60-month sentence the prosecutor said he would recommend but indeed arguing *against* the sentence he knew Preston would seek. As a threshold matter, this issue is properly before the Court. Even if a defendant fails to object or move to set aside the plea below, the breach of a plea agreement is an issue of constitutional magnitude which may be raised for the first time on appeal as a manifest error under RAP 2.5(a)(3). See VanBuren, 101 Wn. App. at 211. Further, here, Preston has specifically moved to withdraw his plea. See CP 52-57. Thus, this Court may address Preston's arguments in this case.

On review, this Court should reverse. While a prosecutor need not enthusiastically advocate for a specific recommendation based on a plea, the prosecutor must not violate the integrity of the plea bargaining process by engaging in conduct which either explicitly or implicitly circumvents the agreement. See State v. Xaviar, 117 Wn. App. 196, 199, 69 P.2d 901 (2003).

Here, while the agreement indicated that the prosecutor would ask for a sentence of 60 months, it also indicated that the prosecutor understood and agreed that Preston would be seeking a DOSA sentence. CP 25-28. Nothing in the agreement indicated that the prosecutor would actively advocate *against* Preston's request for a DOSA. CP 25-28. Yet the opportunity to seek a DOSA was clearly the only reason that Preston agreed to enter the plea in the first place. See CP 25-28. Obviously, had

Preston known that the prosecutor was going to argue against the DOSA request, instead of just saying it preferred the 60-month sentence, Preston would not have entered the plea. See CP 52-57. Indeed, Preston’s motion to withdraw the plea so indicates. CP 52-57.

Notably, this was not a “straight” guilty plea case. Instead, Preston entered an Alford plea, an inherently equivocal plea the very nature of which requires greater scrutiny than the average guilty plea. See Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). Such pleas do not involve admissions of guilt and are instead the result of a defendant’s “cost-benefit” analysis of what is best for him, based upon his understanding of his options. See State v. D.T.M., 78 Wn. App. 216, 220, 896 P.2d 108 (1995). It is thus especially important to ensure that the defendant’s understanding of what he is exchanging his important rights for is not undercut by the actions of the prosecutor.

Because the prosecutor undercut the plea agreement by specifically arguing against the sentence the prosecutor knew Preston was seeking in entering the plea, this Court should reverse and remand to allow Preston his choice of remedy.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 5th day of November, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Robert Preston, DOC 935915, Monroe Corr. Complex, P.O. Box 777, Monroe, WA. 98272-0777.

DATED this 5<sup>th</sup> day of November, 2008.

  
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