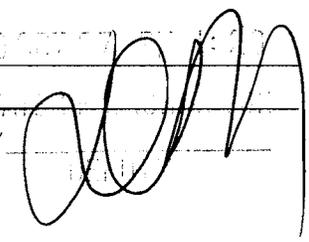


NO. 40899-6

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

COURT OF APPEALS
10 OCT 27 1999
BY: 

STATE OF WASHINGTON, APPELLANT

v.

JAMES JOHN CHAMBERS, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Judge Thomas Felnagle

No. 99-1-00817-2

OPENING BRIEF OF APPELLANT

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3. The trial court erred when it failed to find that the pleas and sentences on all three cause numbers were part of a single agreement. *See* CP129-30; RP 02-02-10, p. 5-22 as well as the absence from the record of any determination of this issue.
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B. STATEMENT OF THE CASE.

1. Procedure

On July 7, 1999 the defendant pleaded guilty to four counts, Count I, unlawful possession of a controlled substance with intent to deliver; Count II, unlawful manufacture of a controlled substance; Count III, unlawful possession of a firearm in the first degree; and Count IV, unlawful possession of a firearm in the first degree. CP 150-61. Counts I and II both included firearm sentence enhancements. CP 150-61.

The State's recommendation was open. CP 156. Sentencing was scheduled for a later date and the defendant was released. CP 149, 156. While sentencing was pending, the defendant was involved in the incidents on November 14, 1999 to November 19, 1999 that form the basis of the charges in this case. CP 30. As a result, the State charged the defendant under CA# 99-1-05307-1 with Count I, failure to remain at an injury accident; Count II, possessing stolen property in the first degree; Count III, possessing stole property in the first degree; Count IV, unlawful possession of a firearm; Count V, unlawful manufacturing of a controlled substance, methamphetamine. CP 90-92.

As a result of the new charges, the State extended to the defendant a plea offer that encompassed the first case to which he pleaded, this cause number, as well as a third case. CP 44-45. The defendant's statement of defendant on plea of guilty specifies as to Count I that "On 11-14-99 I possessed a vehicle which I knew to be stolen, I caused the vehicle to come into contact with a pedestrian and she was injured and died and then I drove away." CP 95. The prosecutor's recommendation on the 99-1-05307-1 cause number was for a total sentence of 240 months, all counts concurrent to each other, but that sentence consecutive to cause numbers 99-1-00817-2, and 99-1-02235-3. CP 93. As specified in the prosecutor's recommendation, the State agreed not to amend charges to include murder in the second degree, and not to seek firearm sentence enhancements. CP 44-45; 93.

Pursuant to the agreement, on March 17, 2000 the defendant also pleaded guilty on cause number 99-1-05307-1, and sentencing was set over to a later date. CP 93; RP 03-17-2000, p. 4-14. On March 17, 2000 the defendant was also sentenced on Cause Numbers 99-1-00817-2 and 99-1-02235-3. CP 81-88, 156-66; RP 03-17-2000, p. 14-23. On cause number 99-1-05307-1 the court imposed a sentence of 60 months on Count I; 57 months on Count II; 57 months on Count III; 116 months on Count IV; and 240 months on Count V for a total sentence of 240 months. CP 97-104. This sentence was imposed consecutive to the sentences on cause numbers cause numbers 99-1-00817-2 and 99-1-02253-3. CP 103.

On October 12, 2006 the defendant filed a Personal Restraint Petition on cause number 99-1-00817-2 directly in the court of appeals. *In re Chambers*, No. 35454-3. In that petition he claimed he was unaware of the effect of a doubling statute on the statutory maximum and sought a reduction in his sentence. *In re Chambers*, No. 35454-3. On June 21, 2007 the court filed an order dismissing the defendant's petition because it was filed more than a year after the Judgment and Sentence was entered and he failed to show that any exception applied to the one-year time bar. *In re Chambers*, No. 35454-3 (see Order Dismissing Petition of 06-21-10).

The defendant filed a motion for discretionary review to the Washington Supreme Court on 07-06-07 under No. 80331-5 and it was denied on November 29, 2007. *In re Chambers*, No. 80331-5.

On July 7, 2008 the defendant filed another personal restraint petition in the court of appeals. *In re Chambers*, No. 38074-9. The court granted him partial relief, holding that his convictions for Counts III and IV were not lawful because he had not previously been convicted of a serious offense as was required to elevate them to the first degree. *In re Chambers*, No. 38074-9 (see 01-14-09 Order Granting Petition in Part). The court denied his request to reduce his sentences as to Counts I and II based on his claim that the statutory maximum was only ten years, not twenty. *Chambers*, No. 38074-9 (see 01-14-09 Order Granting Petition in Part). The court denied the motion on the basis that the prior drug doubler doubled the statutory maximum. *Chambers*, No. 38074-9 (04-14-09 Order Granting Petition in Part). Both parties filed motions for reconsideration that were denied.

The defendant petitioned for review in the Supreme Court, which petition was granted. *In re Chambers*, No. 82681-1. The court granted the motion for discretionary review and remanded the matter back to the trial court so that the defendant's motion to withdraw his plea could be considered as to Counts I and II together with the court of appeals remand as to Counts III and IV. *In re Chambers*, No. 82681-1 (Order of 09-30-09).

In the trial court on remand, the defendant filed a motion to vacate judgment, motion to withdraw guilty plea, and motion for specific performance. CP 1, 2-8. The State responded. CP 37-109. On May 28,

2010 the court entered an order granting the defendant's motion to withdraw his pleas as to counts I, II, III, and IV, and then dismissed the case because the State's evidence had been destroyed. CP 129-30.

The State timely filed a Notice of Appeal on Monday June 28, 2010. CP 139-40.

As to CA# 99-1-05307-1, the court of appeals considered a personal restraint petition of the defendant's. *In re Chambers*, No. 32135-1-II (*see* 0-07-05 Order Calling for Supplemental Response) [It had originally been filed in the trial court as a motion under CrR 7.8.] However, on October 6, 2006 the court granted a stipulated motion for voluntary withdrawal of petition and dismissing petition. *In re Chambers*, No. 32135-1-II (*see* Order Granting Stipulated Motion for Voluntary Withdrawal of Petition and Dismissing Petition).

Subsequently, the trial court transferred another motion to the Court of Appeals to be considered as a personal restraint petition. *In re Chambers*, No. 38205-9-II. On its own initiative the court issued a stay while the Washington Supreme Court considered personal restraint petition No. 82681-1 on cause number 99-1-00817-2. *Chambers*, No. 38205-9-II. On March 25, 2010 the court lifted the stay and remanded the matter back to the trial court to be considered in conjunction with cause number 99-1-00817-2. *Chambers*, No. 38074-9-II (*see* Order Lifting Stay and Granting State's Motion to Remand Petition to the Trial Court).

A hearing was held on August 6, 2010 in which Exhibits were entered into evidence. The court denied the defendant's motion. *See* Appendix A.

The defendant timely filed a notice of Appeal on August 12, 2010. *In re Chambers*, No. 41082-6-II.

On cause number 99-1-02235-3, the defendant received a total sentence of 29 months that ran concurrent to cause number 99-1-00817-2. CP 81-88. The defendant has not brought any subsequent attack on the validity of that judgment. Because it was imposed as a concurrent sentence and is shorter than standard range sentence imposed on cause number 99-1-00817-2, the only practical effect of 99-1-02235-3 has been to add a point to the defendant's offender scores on 99-1-00817-2 and on 99-1-05307-1. However, if the court's dismissal of cause number 99-1-00817-2 remains effective, then the defendant's sentence on 99-1-02235-3 would be of consequence because it was imposed consecutive to the sentence in 99-1-05307-1.

2. Facts

The following facts are taken from the Declaration for Determination of Probable Cause, CP 147-48.

On February 23, 1999 Tacoma police served a search warrant at a house in Tacoma, with the defendant as the named suspect. Officers stopped Chambers as he drove away from the residence. After being

advised of his rights, Chambers admitted selling narcotics from the residence listed in the warrant and told officers he had been manufacturing methamphetamine at the residence on other days, but not today. He later told officers he had cooked methamphetamine at other locations but had just extracted pseudoephedrine in the garage of the target residence.

A search of Chambers revealed two knives, a smoking device, a wallet with \$949. A search of the front seat located a fanny pack containing a loaded .22 caliber pistol, an eyeglass case with two bags of white substances and three more bags of white substance, all total which totaled 60 grams and field tested positive as methamphetamine. On the front floor of the vehicle was a black backpack with four baggies containing 15.1 grams of what field-tested positive as marijuana, a 9mm handgun, scale, cell phone, baggies with white residue, and a knife.

A search of the garages to the residence yielded items associated with the manufacture of methamphetamine, including coffee filters covered in a white residue, 150 gallon cylinder labeled anhydrous ammonia, an empty can of acetone, a full can of toluene, a full gallon can of denatured alcohol, packaging for a case of lithium batteries, unused coffee filters, rock salt, 9 bottles of pseudoephedrine, a hot plate, 72 feet of plastic tubing and a full case of lithium batteries, and a handgun, and numerous other coffee filters containing a powder that field-tested positive as ephedrine.

A loaded shotgun was found in the bed of a truck parked in the center of the garage.

Chambers was convicted of manufacture of a controlled substance in 1995.

C. ARGUMENT.

1. THE TRIAL COURT ERRED WHERE IT RULED ON THE AVAILABLE REMEDIES WITHOUT FIRST DETERMINING WHETHER THE TWO CASES WERE PART OF A SINGLE PLEA AGREEMENT.

To satisfy due process, a guilty plea must be knowing, voluntary, and intelligent. *In re Hudgens*, 156 Wn. App. 411, 416, 233 P.3d 566 (2010)(citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)). If a guilty plea is based on misinformation of sentencing consequences it is not knowing or voluntary. *Hudgens*, 156 Wn. App. at 416 (citing *Isadore*, 151 Wn.2d at 298; *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988)). A guilty plea is considered involuntary if the State fails to inform a defendant of a direct consequence of his plea. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (interpreting CrR 4.2(d)).

If a plea is involuntary, it is a manifest injustice. *Hudgens*, 156 Wn. App. at 416 (citing *Isadore*, 151 Wn.2d at 298). CrR 4.2(f) permits a defendant to withdraw a plea where doing so is necessary to correct a

manifest injustice. *Hudgens*, 156 Wn. App. at 416 (citing *Isadore*, 151 Wn.2d at 298).

The court in *Hudgens* uses the following language from *State v. Bission*, “[b]ecause a plea agreement is a contract, interpretation of the plea’s terms is a question of law, reviewed de novo.” *Hudgens*, 156 Wn. App. at 416 (citing without quoting *State v. Bission*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006)). For that proposition, the court in *Bission* relied upon *Tyrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000). However, in *Tyrell*, what the court said was, “*Roller* noted that where facts are not in dispute, “coverage depends solely on the language of the insurance policy”- and the interpretation of that language is a question of law reviewed *de novo*. *Tyrell*, 140 Wn.2d at 133 (emphasis added)(citing *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990)).

Thus, as used in *Bission*, *Tyrell* and similar cases, “interpretation” refers to the determination of the legal effect of the contract and that is properly a question of law. However, this use of “interpretation” differs from other cases where “interpretation” is used to refer to the ascertainment of the meaning one or both parties ascribe to the contract or agreement. See *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

Under contract law, determinations of the parties’ intentions are questions of fact, while the legal consequences of such intentions are

questions of law. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). This is why, in *Berg*, the court held that "...extrinsic evidence is admissible as to the entire circumstances under which the contract was made as an aid in ascertaining the parties intent." The taking or admitting of evidence (as well as the weighing of such) is a question of fact. Thus, where there is a dispute as to the intent of the parties with regard to what they contracted or agreed to, a factual determination of what was agreed to is the necessary pre-requisite to the ultimate determination of the legal consequences of any such agreement.

Here, there was clearly a question as to whether the agreement in this case was part and parcel of a larger plea agreement. In its memorandum in opposition to specific performance motion, the State discussed the agreement as a single agreement involving three cause numbers. CP 29f. The State also made a record of the original plea offer, plea agreements and sentences. CP 37-109.

The State further notified the court that it had brought a motion in the personal restraint petition action, COA# 38205-9-II (re: CA# 99-1-05307-1) to have that matter remanded back to the trial court so that the validity of all the guilty pleas that were involved in the plea agreement may be considered together. CP 31. The court of appeals did indeed lift its stay in that case and remanded the petition to the trial court for joint consideration of CA#s 99-1-008172 and 99-1-05307-1. See *In re Chambers*, No. 38205-9-II (Order Lifting Stay filed 03-25-2010).

Additionally, at the hearing before the trial court on remand the defense acknowledged at the hearing on this matter that State was making an argument that there was a global plea deal on all the cases, and then the defense proceeded to argue against that position. RP 04-02-10, p. 7, ln. 6 to p. 8, ln. 3.

Notwithstanding the court of appeals order, the trial court did not consider the two cases together. *See* RP 04-02-10, p. 23, ln. 1-5; RP 05-28-10, p. 21, ln. 8-11. Indeed the court left for another day the question of whether the defendant's withdrawal of his plea on CA# 99-1-00817-2 was a breach of the global plea agreement that entitled the State to re-file the felony murder charge(s) on CA# 99-1-05307-1. RP 04-02-10, p. 20, ln. 15 to p. 21, ln. 7.

The court erred insofar as it put the cart before the horse. In doing so it violated the court of appeal's order. Here the court granted a remedy without first determining what the scope of the plea agreement was. A determination of the scope of the agreement was necessary the setting of the proper remedy to which the defendant was entitled.

An evidentiary hearing and factual determinations as to the scope of the plea agreement was necessary as a preliminary step to the determination of any remedies to which the defendant was entitled. Where the court failed to conduct such a hearing, it erred.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE PLEAS AND SENTENCES ON ALL THREE CAUSE NUMBERS WERE PART OF SINGLE AGREEMENT.

The modification of a bilateral contract requires a meeting of the minds, as well as separate consideration from the original contract.

Duncan v. Alaska U.S.A Federal Credit Union, Inc., 148 Wn. App. 52, 74, 199 P.3d 991 (2008). “Without a mutual change of obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract.” *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005).

Here, the defendant originally entered into an agreement on this case whereby he pleaded guilty to four counts with the agreement that sentencing would be set over and that the State’s recommendation would be open. CP 47-50, 53. [There are a number of reasons why a defendant would plead guilty with an open recommendation from the State, which generally include giving the defendant the opportunity to satisfy some condition or conditions over a period of time, while obtaining the security of a plea for the State. Such reasons can include drug treatment, payment of restitution, or a number of other conditions. In this case the defendant was working as a confidential informant for the Tacoma Police Department.]

Prior to sentencing the defendant killed an elderly woman when he hit her while driving a stolen car. CP 30. As a result, the parties modified

their original agreement. Instead of an open recommendation, the defendant agreed to a specific recommendation for the low end of his range and that it run concurrent to CA# 99-1-02235-3 but consecutive to CA# 99-1-05307-1. The parties also agreed to a recommendation of 240 months on CA# 99-1-05307-1 and in exchange for the defendant agreeing to that sentence, the State agreed to forego charging the defendant with felony murder or adding a firearm enhancement to the manufacturing charge. CP 44-45.

This agreement constituted mutual consideration that was an effective modification of the original agreement, thereby making the modified agreement a single plea agreement. The language of the offer specifically contemplated it as a single offer as is evidenced by the language, “[t]he second part of the offer is...” Not only was this offer memorialized in the written letter, it was also reflected in the plea agreements on 99-1-05307-1, and on the record at the time of the plea on that case and the sentence on this case. *See* CP 93; RP 03-17-2000, p. 4-24.¹

It is clear from the record in this case that there were not two separate agreements, but rather an original agreement that was properly

¹ The State has filed a Supplemental Statement of Arrangements with regard to this transcript. A copy has been produced and the court should already have it.

modified. Accordingly, the court erred to the extent that it failed to treat the three cases as a single plea agreement.

3. THE TRIAL COURT ERRED WHEN IT ALLOWED THE DEFENDANT TO WITHDRAW HIS PLEA OF GUILTY AS TO THE COUNTS ON THIS CASE ONLY.

...[W]here the terms of a plea agreement conflict with the law or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea. The prosecutor bears the burden of demonstrating that the defendant's choice of remedy is unjust.

Hudgens, 156 Wn. App. at 417 (quoting *Miller*, 110 Wn.2d at 536).

Thus, once the defendant elects a remedy, the State then has the burden to show that compelling reasons exist not to allow that choice. *Hudgens*, 156 Wn. App. at 417 (citing *Bisson*, 156 Wn.2d at 518).

First, here the court did not apply the test because it failed to make a determination as to whether the State had shown compelling reasons not to allow the choice the defendant elected. Instead of applying the test properly, the court effectively only considered the effect of the remedy on the defendant. *See* RP 05-28-10, p. 10, ln. 16-25; p. 15, ln. 21 to p. 16, ln. 19.

Because the pleas and recommendations on the three cases constituted a single plea agreement, the court erred when it allowed the defendant to withdraw his plea as to this case only. The defendant's

choice should have been between specific performance of the entire plea agreement or withdrawal of the entire plea agreement. The defendant should not have been entitled to withdraw his plea as to this case only.

As the State argued at the time of the court's ruling, permitting the defendant to withdraw his plea as to this case was unjust where the defendant by waiting to seek his relief was able to deprive the State of its consideration of 221 months of total confinement, without the ability to re-prosecute him on this case because the passage of time has led to the destruction of all the State's evidence. Moreover, to the extent that the court treated the sentences on this case and CA# 99-1-05307-1 as separate agreements, the State may also have given up the opportunity to prosecute the defendant for felony murder, in exchange for consideration that it has been deprived of after the fact.

Accordingly, the trial court erred when it allowed the defendant to withdraw his plea as to this case only.

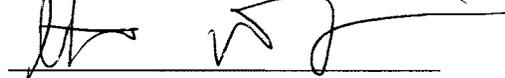
D. CONCLUSION.

The trial court erred when it ruled on the available remedies without first determining whether the two cases were part of a single plea agreement. The trial court also erred because it did not make a preliminary finding that the three cases were part of a single plea agreement. The trial court erred when it allowed the defendant to withdraw his plea of guilty as to this case only.

The action of the court should be reversed and the matter remanded with more specific instructions to the trial court to make a finding regarding whether the cases were part of a single plea agreement or multiple separate agreements and to then take the appropriate action as to what if any remedies are available to the defendant, and include in that a consideration of whether the State can show compelling reasons exist not to allow the defendant's election of remedies.

DATED: OCTOBER 27, 2010

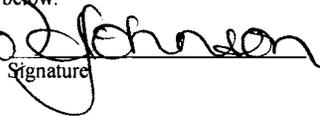
MARK LINDQUIST
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WSB # 30925

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.

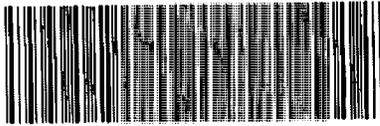
10/27/10 
Date Signature



Vertical stamp: COURT REPORTERS

APPENDIX “A”

Order Denying Specific Performance



99-1-05307-1 34808093 ORDY 08-10-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 99-1-05307-1

vs.

JAMES CHAMBERS,

ORDER Denying
MOTION FOR SPECIFIC
PERFORMANCE

Defendant.

THIS MATTER came before the court on the defendant's motion for partial specific performance. The court has considered the parties' pleadings and the authorities cited. Now, therefore

It is hereby ORDERED that the defendant's motion is

denied.

Furthermore, it is ORDERED that

The defendant is not entitled to the relief he requested in his motion.

The defendant shall be returned to DOC immediately.

DONE IN OPEN COURT this 6th day of August, 2010.

Thomas Felnagle

JUDGE
JUDGE THOMAS FELNAGLE
DEPT. 15

Presented by:

James S. Schacht
James S. Schacht
Deputy Prosecuting Attorney
WSB# 17298

Approved as to Form:

Stephen Johnson
Stephen Johnson
Attorney for Defendant
WSB# 24214

FILED
DEPT. 15
IN OPEN COURT
AUG 06 2010
BY *mm*
DEPUTY

A