

No. 46458-6-II

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

STATE OF WASHINGTON, Respondent

v.

QUALAGINE A. HUDSON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JUDGE FRANK E. CUTHBERTSON

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. Mr. Hudson's Constitutional Right To Due Process Was Violated When The Court Imposed Sentence Without An Evidentiary Hearing.

B. The Nature Of And Reasons For The Plea Contract Agreement With Mr. Hudson At The Time He Entered An Alford Plea Were Not Made Part of the Court Record in Violation of CrR 4.2(e) and RCW 9.94A.431.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Where the State and defendant have entered into a plea agreement contract, is the constitutional right to due process violated where, on the accusation of the prosecutor, the plea contract is unilaterally withdrawn and without an evidentiary hearing, the court imposes a criminal sentence?

B. Where CrR 4.2(e) and RCW 9.94A.431, are not strictly complied with, is the defendant entitled to withdraw a plea of guilty?

II. STATEMENT OF FACTS

Mr. Hudson incorporates by reference the facts as presented in his opening brief and adds the following, which include corrections to the State's statement of facts.

In Respondent's brief, page 2, the State described why it sought a bench warrant: On November 6, 2012, that the defendant had new charges in King County Superior Court, which violated his conditions of release. The State did not, however, in either the bench warrant or a later hearing, produce any cause number or information to substantiate the claim that there were new charges filed against Mr. Hudson.

In Respondent's brief, page 9, the State argues that at the sentencing hearing Mr. Hudson "admitted" that he was arrested in a stolen vehicle. (Resp. Brief at 9). However, the record is clear that Mr. Hudson said, "And I was **not** arrested in a stolen vehicle." (6/6/14 RP 10)(emphasis added). Mr. Hudson explained to the court that he was *questioned* about a car about which officers thought he had some information. (Id.). He was not arrested in a stolen vehicle. (6/6/14 RP 10,12).

On page 20 of Respondent's brief, the State continues the wrongful assumption, "As he was arrested in a stolen car, it is a

logical inference that he violated the law.” (Resp. Brief. at 10). Mr. Hudson never agreed that he was arrested in a stolen vehicle, and told the court he believed he had met the terms of the agreement. (6/6/14 RP 3). The State did not produce any evidence that would indicate otherwise.

III. ARGUMENT

Mr. Hudson Is Entitled To Withdraw His Plea Of Guilty.

Mr. Hudson incorporates by reference the arguments set forth in appellant’s opening brief and adds the following.

The State has taken the position that because the trial court never ruled on Mr. Hudson’s motion to withdraw the guilty plea (filed after his notice of appeal) that Mr. Hudson’s appeal is premature. (Resp. Brief at 3). However, the State misunderstands Mr. Hudson’s appeal. On appeal, Mr. Hudson’s argument is two fold and the remedy for each is withdrawal of a guilty plea or specific performance of the plea contract.

A. The Trial Court Erred, Violating Mr. Hudson’s Right To Due Process, When It Refused To Hold An Evidentiary Hearing.

Mr. Hudson argues that the trial court should have held an evidentiary hearing to determine whether the State’s assertion that he had violated his plea contract was backed up by provable fact

prior to imposing sentence. By denying the hearing, under Washington law, Mr. Hudson's right to due process was violated.

Under Washington law, prosecutorial negation of a plea agreement presents an issue of constitutional magnitude. *State v. Tourtellote*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). A plea bargain warrants the same judicial solicitude given a guilty plea, and a breach of the plea agreement violates the Due Process Clause of the Fourteenth Amendment. *In re Personal Restraint of James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982); *State v. Sledge*, 133 Wn.2d 828, 839, 946 P.2d 1199 (1997).

Here, there are two issues: first, the nature and reason for the agreement were not made part of the oral record at the time the plea was entered (see argument below); and second, under Washington law, due process requires that before the State may be relieved of its promises, there must be an evidentiary hearing. *In re James*, 96 Wn.2d at 850.

Here, the State and defense counsel both intimated to the court that an evidentiary hearing could be held. (6/6/14 RP 4-5). They were both correct and incorrect: it is not an optional hearing, the court is *required* to hold an evidentiary hearing.

Similar to the defendant in *James*, Mr. Hudson denied the validity of the State's accusations that he had violated his plea agreement contract. And, exactly as occurred in *James*, the trial court did not hold a hearing and instead, commenced with imposing sentence. *Id.* at 848-49.

The Washington Supreme Court reversed, holding that a hearing ensures that the right or expectation of the defendant to the benefits of the agreement are not arbitrarily denied. The Court reasoned that if there were no evidentiary hearings, at which the State must prove by a preponderance of the evidence the defendant in fact committed misconduct that breached an agreement, a defendant *merely accused of post-plea crimes, but innocent and later acquitted*, could nevertheless lose the benefit of his bargain. *James*, 96 Wn.2d at 851. Washington courts have held that an issue of noncompliance by a defendant is a question of fact to be decided by the court. *State v. Morley*, 35 Wn.App. 45, 48, 665 P.2d 419 (1983). Simply put, the State cannot unilaterally decide Mr. Hudson violated the terms of the contract and relieve itself of its promises; due process requires there *must* be an evidentiary hearing. *In re James*, 96 Wn.2d at 850.

The appropriate remedy here, as in *James*, is for remand to the trial court to determine, with Mr. Hudson's preference to be accorded considerable weight, whether to permit him to withdraw his plea or grant specific performance of the bargain. *In re James*, 96 Wn.2d at 851-52; *In re Palodichuk*, 22 Wn.App. 107, 109, 589 P.2d 269 (1978)(abrogated on other grounds, *State v. Henderson*, 99 Wn.App. 369, 375, 993 P.2d 928 (2000).

B. The Failure of the Court To Place The Nature Of And Reason For The Agreement On The Record At The Time The Plea Was Entered Was Error, and Standing Alone, Is Grounds For Withdrawal Of A Plea.

In its response brief, the State has taken the position that despite no oral record being made regarding the nature of the agreement and the reasons for the agreement at the time the plea was entered, there was compliance with the court rule and state statute. (Resp. Brief at 6-7). This is error. Both CrR 4.2(e) and RCW 9.94A.431 make very clear that at the time of the defendant's plea, it must be stated on the record, the nature of and reasons for the agreement. RCW 9.94A.431. (Emphasis added). There is no gray area.

In this case, after the appellant's brief was filed in this Court, the State filed a copy of the plea agreement and contract in the trial court, approximately 1,053 days (2 years, 10 months, 19 days) after the initial entry of the plea agreement. (Supp. CP 128-133). Despite the State's assertions that because the trial court *viewed* the contract document, there was compliance, "[t]he language of CrR 4.2(e) is clear: *any plea bargain must be spread on the record at the plea hearing*. The criminal rules were not made to be broken or ignored." *State v. Perez*, 33 Wn.App. 258, 262, 654 P.2d 708 (1982).

The State has attempted to differentiate this case from *Perez*, noting that in *Perez*, there was an agreement of which the court was unaware. (Resp. Brief at 7). However, in *Jones*, the Division 3 Court of Appeals found that the provisions of both the statute and the court rule were met *because the report of proceedings indicated the court was informed on the record as to the nature of the agreement and the reason Jones entered into it*. (Id.).

In this case, it is evident that the rules were ignored: there is nothing in the report of proceedings on the date of plea entry that provides any information about the nature of and reasons for the

agreement. Further, the *Perez* Court made very clear that failure to comply with CrR 4.2(e), *standing alone* was grounds for withdrawal of a plea. *Perez*, 33 Wn.App. at 263. Because both the SRA and CrR 4.2(e) strictly require the nature of and reasons for the agreement to be stated on the record, and that did not occur in this case, Mr. Hudson is entitled to withdraw his plea.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hudson respectfully asks this Court to remand this matter to the Superior Court with instructions to allow Mr. Hudson to withdraw his guilty plea or in the alternative, to grant him specific performance of the bargain.

Respectfully submitted this 12th day of June 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the state of Washington, that on June 15, 2015, I mailed by USPS, first class, postage prepaid, a true and correct copy of the brief of appellant to:

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