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Court of Appeals
Division II
State of Washington
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No. 49322-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

QUALAGINE HUDSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State failed to satisfy its burden at the evidentiary hearing and this Court should reverse.

Qualagine Hudson entered into a plea agreement and contract in which he agreed to cooperate with Pierce County detectives and, in exchange, the State agreed to vacate the majority of the convictions against him and recommend a standard range sentence on the remaining conviction. CP 84-85. Several months after entering into the agreement, the State claimed Mr. Hudson breached the agreement by committing a crime in King County. CP 140. The trial court denied Mr. Hudson's request for an evidentiary hearing on the alleged breach but this Court reversed, remanding Mr. Hudson's case for a hearing and resentencing. 6/6/14 RP 5; *State v. Hudson*, 192 Wn. App. 1003, 2015 WL 9462105 (Wash. Ct. App. Dec. 28, 2015) (unpublished opinion cited for procedural history).

At the subsequent evidentiary hearing, the burden was on the State to prove Mr. Hudson violated the agreement. *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). Because the State relied only on hearsay evidence and did not submit evidence of the conditions of the plea agreement, it did not satisfy this burden. In

addition, the doctrine of laches precluded the State from relying on Mr. Hudson's conviction in King County to meet its burden.

a. The State's evidence was insufficient to meet its burden.

At the evidentiary hearing the State only moved to admit Mr. Hudson's judgment and sentence from the King County proceeding and the police report. Exs. 1&2, 7/22/16 RP 6. This was not sufficient to satisfy its burden, particularly given that the live witnesses were available. *State v. Dahl*, 139 Wn.2d 678, 686, 990 P.2d 396 (1999); CP 135 (trial court finding detectives present at the hearing). As the supreme court explained in *Dahl*, "hearsay evidence should be considered only if there is good cause to forgo live testimony." 138 Wn.2d at 686.

The State relies on a case involving *sentencing* for its claim the hearsay evidence was sufficient because a prior conviction may be proved by a certified copy of the judgment and sentence. Resp. Br. at 12; *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540, 545 (2010). As this Court determined, Mr. Hudson was entitled to a full evidentiary hearing, separate from a sentencing hearing. The State confuses the two when it relies on *Adolph*.

The State makes the same mistake when it relies on evidence in the record, but not admitted at Mr. Hudson's evidentiary hearing, in support of its claim that Mr. Hudson violated one of the conditions of the agreement. Resp. Br. at 8. The State argues it "follows" Mr. Hudson breached the agreement when he was subsequently convicted of a crime in King County and that it does not require "a sophisticated analysis" to reach this conclusion. Resp. Br. at 8. These arguments do not address the deficiency in the State's evidence.

The State chose to present only a police report and the judgment and sentence from the King County proceeding. The State was not entitled to rely on this hearsay evidence. *See* Op. Br. at 9-10. However, even if the State were permitted to rely upon hearsay evidence to satisfy its burden, the evidence it presented was insufficient to meet its burden to prove breach because it did not admit evidence of the conditions of the agreement. It was therefore not possible to determine, based on the evidence admitted at the hearing, whether Mr. Hudson had in fact breached the agreement.

b. <u>Mr. Hudson addressed the court only after he believed it had ruled against him and he did not admit to the breach.</u>

The State claims Mr. Hudson admitted to the breach, but this argument is meritless. Resp. Br. at 9. As Mr. Hudson explained in his

opening brief, Mr. Hudson did not admit to violating the agreement when he addressed the court. 7/22/16 RP 9-10. Instead, he discussed the fact he had made good-faith efforts to work with the officers and even attempted to assist officers after he was incarcerated. 7/22/16 RP 10.

The record also shows that at the time Mr. Hudson addressed the court he believed it had already ruled against him. 7/22/16 RP 11. Mr. Hudson approached his opportunity to speak to the court with the assumption the court had moved on to the sentencing phase. 7/22/16 RP 9-10. Because the trial court gave Mr. Hudson the impression the evidentiary hearing had concluded, the court was not entitled to use its interpretation of Mr. Hudson's statements against him.

In addition, the State improperly argues there is no evidence in the record as to how Mr. Hudson would have successfully challenged the State's allegation that he had breached the agreement, but this claim ignores the fact the burden remained on the State at the hearing. *See* Resp. Br. at 11; *James*, 96 Wn.2d at 850. Mr. Hudson was under no obligation to present evidence.

c. The doctrine of laches prevented the State from relying on Mr. Hudson's conviction in King County to prove he violated the agreement.

Finally, equitable consideration prevented the State from relying on the King County conviction to prove Mr. Hudson violated the conditions of the agreement. In order to analyze a plea agreement, our courts rely on basic principles of contract law. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Equitable principles, such as the doctrine of laches, are regularly applied in contract law. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 787, 197 P.3d 710 (2008).

The doctrine of laches bars actions that are inexcusably delayed and result in prejudice to the charged party. *Clark County Pub. Util. Distr. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000). Here, the State acknowledges, as it must, that despite the fact Pierce County learned about the King County offense in 2012, no charges were brought against Mr. Hudson in King County until 2015. CP 141; Resp. Br. at 15. The State claims the doctrine of laches does not apply because "the record is silent" as to why King County chose to prosecute the charge after a three year delay. Resp. Br. at 17.

The State's silence is revealing. It remains unable to point to a valid reason as to why it waited three years to charge Mr. Hudson in

King County. However, both the timing of the charge and the prosecutor's statements at the hearing suggest it was solely for the purpose of presenting evidence of the breach. 7/22/16 RP 3. At the hearing after remand, the prosecutor stated:

> State's prepared now to show the Court through testimony, which, I don't believe, is actually necessary, this issue with the stolen vintage car in King County. He actually was charged there.

7/22/16 RP 3. The prosecutor's statements implied that any deficiency in the State's evidence had now been fixed because Mr. Hudson had now "actually" been charged – three years after the fact and only when the State risked the possibility of having to present evidence at a hearing.

To constitute laches, there must only have been a delay in the claim and some change in condition that would be make it inequitable to enforce the claim. *McKnight v. Basilides*, 19 Wn.2d 391, 400, 143 P.2d 307 (1943). Here, the delay of three years is undisputed. The change in condition is also apparent, as the State made the decision to charge Mr. Hudson shortly before this Court ruled Mr. Hudson had been wrongly denied an evidentiary hearing.

Thus, only after the State became concerned Mr. Hudson might prevail in the Court of Appeals and be granted a full evidentiary

hearing did the State file charges against him in King County. It then relied on that conviction to argue no additional evidence at the evidentiary hearing was necessary. 7/22/16 RP 3. Because the State filed charges against Mr. Hudson only after it was faced the possibility of having to demonstrate a breach of contract, it was inequitable to permit the State to rely on the King County conviction to prove breach at the hearing.

The doctrine of laches barred the State's use of this evidence. *See McKnight*, 19 Wn.2d at 400. For all of these reasons, and the reasons expressed in his opening brief, this Court should reverse.

2. If this Court finds the trial court properly concluded the State satisfied its burden at the evidentiary hearing, reversal is required because Mr. Hudson was denied the effective assistance of counsel.

Mr. Hudson was entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Here, Mr. Hudson's counsel did not object to the hearsay testimony, failed to explain the State waited to prosecute Mr. Hudson in King County until it faced the risk of needing this evidence for an evidentiary hearing, and permitted Mr. Hudson to address the court before contesting the violation. *See* Op. Br. at 17-22. For all of the reasons stated in Mr. Hudson's opening brief, reversal is required

because defense counsel wholly failed to contest the State's allegation that Mr. Hudson had breached the contract.

The State argues defense counsel engaged in a reasonable tactic because had Mr. Hudson not discussed the mitigating circumstances, the trial court might have imposed the high end of the standard range. Resp. Br. at 20-21. This claim is misguided and once again conflates the evidentiary hearing with a sentencing hearing. At the only sentencing hearing, back in 2014, the State requested a mid-range sentence but the trial court imposed the low end of the standard range instead. 6/6/14 RP 7, 12. CP 47, 50. In 2016, the trial court declined to resentence Mr. Hudson and a new judgment and sentence, with the same sentence, was entered after this case was pending on appeal. 12/22/16 RP 4; CP 125.

Mr. Hudson was entitled to speak to mitigating factors at a subsequent sentencing hearing regardless of whether he contested the alleged breach at the evidentiary hearing. Particularly given that Mr. Hudson had already been sentenced to the low end of the standard range, it would not have been reasonable for defense counsel to address mitigating circumstances for purposes of a resentencing when Mr.

Hudson's concern remained the State's failure to uphold its part of the plea agreement and contract.

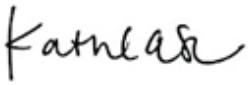
Defense counsel's performance was deficient and prejudiced Mr. Hudson. This Court should reverse.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse because the State failed to prove Mr. Hudson violated his plea agreement and contract with the State. Reversal is also required because Mr. Hudson was denied the effective assistance of counsel.

DATED this 12th day of March, 2018.

Respectfully submitted,



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	)	
Appellant.	)	

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