

NO. 50129-5

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WILLIAMS, II,

Appellant.

---

Appeal from Pierce County Superior Court  
Honorable Bryan Chushcoff  
No. 14-1-05086-2

---

OPENING BRIEF OF APPELLANT

---

Edward Penoyar, WSBA #42919  
Joel Penoyar, WSBA #6407  
Attorneys for Defendant/Appellant

Post Office Box 425  
South Bend, Washington 98586  
(360) 875-5321

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR .....	1
	A. The Prosecution breached the plea agreement by implicitly advocating for an exceptional sentence and objecting to the defense’s argument for a downward deviation.....	1
	B. The Real Facts Doctrine was violated because the sentencing court was presented and considered non-“acknowledged” information outside the record without an evidentiary hearing.....	2
III.	STATEMENT OF CASE .....	2
IV.	ARGUMENT .....	3
	A. The Prosecution breached the plea agreement by implicitly advocating for an exceptional sentence and objecting to the defense’s argument for a downward deviation.....	3
	1. LAW .....	4
	a) Standard of Review .....	4
	b) Plea Agreements .....	4
	c) Mitigating Factors for Downward Deviations. ....	5
	2. ANALYSIS.....	6
	B. The Real Facts Doctrine was violated because the sentencing court was presented and considered non-“acknowledged” information outside the record without an evidentiary hearing.....	9
	1. LAW .....	9
	2. ANALYSIS.....	10
	a) The prosecution alleged an uncharged and unproven crime of Rape III, in direct violation of State v Wakefield: .....	10
	b) The prosecution presented evidence	

	outside the record in direct violation of RCW 9.94A.530(2).....	11
c)	Despite the defense counsel’s dispute of material facts, the court failed to “grant an evidentiary hearing on the point” in direct violation of RCW 9.94A.530(2).....	13
V.	CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Cases

<i>Badgett v. Security State Bank</i> , 116 Wash.2d 563, 569, 807 P.2d 356 (1991).....	4
<i>State v. Barnes</i> , 117 Wash.2d 701, 708, 818 P.2d 1088 (1991) .....	10
<i>State v. Calvert</i> , 79 Wash.App. 569, 581, 903 P.2d 1003 (1995).....	6
<i>State v. Ford</i> , 137 Wash.2d 472, 479, 973 P.2d 452 (1999).....	4
<i>State v. Grayson</i> , 154 Wash.2d 333, 340 111 P.3d 1183, 1187 (2005).....	10
<i>State v. Herzog</i> , 112 Wash.2d 419, 431–32, 771 P.2d 739 (1989).....	9
<i>State v. Mail</i> , 121 Wash.2d 707, 712, 854 P.2d 1042 (1993) .....	4
<i>State v. Marler</i> , 32 Wash.App. 503, 508, 648 P.2d 903 (1982).....	4
<i>State v. Mollichi</i> , 132 Wash.2d 80, 90, 936 P.2d 408 (1997) .....	4
<i>State v. Negrete</i> , 72 Wash.App. 62, 67, 863 P.2d 137 (1993) .....	7
<i>State v. Rice</i> , 159 Wash.App. 545, 574, 246 P.3d 234, 248 (2011).....	6
<i>State v. Sledge</i> , 133 Wash.2d 828, 947 P.2d 1199 (1997) .....	5
<i>State v. Thorgerson</i> , 172 Wash.2d 438258 P.3d 43 AT 451 and 50 (2011).....	7
<i>State v. Wakefield</i> , 130 Wash.2d 464, 475–76, 925 P.2d 183 (1996). 10, 11	
<i>State v. Warren</i> , 165 Wash.2d 17, 29–30, 195 P.3d 940 (2008) .....	7

### Federal Cases

<i>Santobello v. New York</i> , 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).....	5
<i>United States v. Harvey</i> , 791 F.2d 294, 300 (4th Cir.1986) .....	5

### Statutes

RCW 9.94.535(1)(a) .....	3, 5
RCW 9.94A.010.....	5, 6
RCW 9.94A.530(2).....	9, 11, 13, 14

**Other Authorities**

Wash. Const. art. I, § 3..... 9

**Rules**

CR 6(d)..... 13  
CrR 8..... 13  
RAP 2.2(b)(6) ..... 4

## I. INTRODUCTION

Appellant Michael Williams, II, appeals from a tumultuous sentencing hearing where numerous procedural and evidentiary errors occurred. The prosecution breached the plea agreement by implicitly advocating for aggravating factors, improperly alleging an uncharged, unproven crime, and presenting evidence that was not “acknowledged” in the record. Defense counsel erred in seeking a finding of a mitigating factor only the afternoon before the hearing. And the trial court erred in allowing the sentencing to proceed without an evidentiary hearing, despite defense’s dispute of material facts.

## II. ASSIGNMENTS OF ERROR

- A. The Prosecution breached the plea agreement by implicitly advocating for an exceptional sentence and objecting to the defense’s argument for a downward deviation.**

### ISSUES PERTAINING TO ASSIGNMENT OF ERROR:

1. Whether the prosecution breached the plea agreement that the State would recommend a “standard range sentence” when it advocated for, and the judge considered, aggravating factors for an exceptional *upward* sentence and uncharged higher crimes.

2. Whether the prosecution breached the plea agreement that stated the defense “may argue for exception sentence downward” by objecting to the defense’s argument for mitigating factors and commensurate punishment.

**B. The Real Facts Doctrine was violated because the sentencing court was presented and considered non-“acknowledged” information outside the record without an evidentiary hearing.**

ISSUES PERTAINING TO ASSIGNMENT OF ERROR:

1. Whether the State improperly presented evidence that the defendant was an accomplice to Rape III, an uncharged crime.

2. Whether the State improperly presented evidence that even the State *admitted* was outside the record; specifically claims that the victims were fearful to testify that day, suicidal, beaten by defendants, kidnapped, etc.

3. Whether the trial court erred in considering non-“acknowledged”, disputed information outside the record without an evidentiary hearing.

**III. STATEMENT OF CASE**

Appellant Williams pled guilty to one count of human trafficking in the second degree on February 8, 2017. The standard range was 129 – 171 months incarceration. Paragraph (g) stated in relevant part (emphasis added):

The prosecuting attorney will make the following recommendation to the judge: Standard range sentence, **defense may argue for exceptional sentence downward.**

See, Statement of Defendant on Plea of Guilty, CP 239.

Co-defendant Escalante pled guilty to two counts of the same on February 19, 2017 and a combined sentencing hearing was set for both on March 10, 2017.

On March 9, 2017, counsel for Appellant Williams filed a brief in support of an exceptional sentence downward the afternoon before the hearing, citing to requisite mitigating factors, namely, “to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94.535(1)(a). See (CP 252-271) On March 10, 2017, the State filed a sentencing memorandum and response the morning of the joint sentencing hearing. See CP 295-301

Understandably, the sentencing hearing was tumultuous. This included multiple violations of the Real Facts Doctrine, statute, and caselaw, as well as an apparently surprise expert witness, and breach of the plea agreement. See *infra*. The hearing concluded with a sentence of 150 months (12.5 years) for Appellant Williams, the middle of the standard range. (CP 285).

#### IV. ARGUMENT

**A. The Prosecution breached the plea agreement by implicitly advocating for an exceptional sentence and objecting to the defense’s argument for a downward deviation.**

Instead of abiding by the agreement, the prosecution not only objected to the right of defense counsel to argue for the necessary mitigating factors for a downward deviation, but went so far as to advocate for an aggravating factor that would result in an upward sentence and insinuated uncharged higher-level crimes.

1. LAW

a) *Standard of Review*

As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within, as here, the correct standard sentencing range. See, e.g., RAP 2.2(b)(6). However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. See *State v. Mail*, 121 Wash.2d 707, 712, 854 P.2d 1042 (1993). It is well established then that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies. See, *State v. Ford*, 137 Wash.2d 472, 479, 973 P.2d 452 (1999).

b) *Plea Agreements*

"Plea agreements are contracts." *State v. Mollichi*, 132 Wash.2d 80, 90, 936 P.2d 408 (1997) . Just as there is an implied duty of good faith and fair dealing in every contract, *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991), the law imposes an implied promise by the State to act in good faith in plea agreements. *State v. Marler*, 32 Wash.App. 503, 508, 648 P.2d 903 (1982).

But plea agreements are more than simple common law contracts. Because they concern fundamental rights of the accused, constitutional due process considerations come into play. Due process requires a prosecutor to adhere to the terms of the agreement. *Santobello v. New York*, 404 U.S.

257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986).

In fact, remarkably similar to the ones here, the Supreme Court stated in *State v. Sledge*, 133 Wash.2d 828, 947 P.2d 1199 (1997) that a plea agreement was broken when the prosecution implicitly advocated for an exceptional upward sentence despite *outwardly* telling the sentencing court it was asking for a standard range sentence:

The State breached its plea agreement with Sledge when it undercut the plea agreement by effectively advocating for an exceptional sentence. [...] [*Id* at 846, 1208]

Finally, the State's summation of the aggravating factors was a transparent attempt to sustain an exceptional sentence. A fair reading of the State's direct examination of probation counselor Curtis and parole officer Garner and negative summation reveals the State's unmistakable advocacy for an exceptional sentence. Even though the State told the trial court it was recommending a standard range sentence, it violated its duty of good faith and fair dealing by undercutting the recommendation, and thereby breached the plea agreement. [*Id* at 843, 1206]

If a plea agreement has been violated, the sentence is vacated and the defendant may either be re-sentenced or withdraw his guilty plea. *Id.*

*c) Mitigating Factors for Downward Deviations.*

A sentencing court may grant a downward deviation from the Standard Range if it finds, by a preponderance of the evidence, that “to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94.535(1)(a).

RCW 9.94A.010 sets forth the purposes of the Sentencing Reform Act, including that sentences:

(3) Be commensurate with the punishment imposed on others committing similar offenses ...

The purposes enumerated in RCW 9.94A.010 are not in and of themselves mitigating factors in sentencing, but may provide support for exceptional sentences downward once the trial court identifies a mitigating circumstance. *State v. Calvert*, 79 Wash.App. 569, 581, 903 P.2d 1003 (1995), review denied, 129 Wash.2d 1005, 914 P.2d 65 (1996). Defense counsel may present an account of other local cases to a sentencing court to argue for such commensurate punishment. See, *State v. Rice*, 159 Wash.App. 545, 574, 246 P.3d 234, 248 (2011).

## 2. ANALYSIS

Here, the plea agreement stated in Paragraph (g) in relevant part:

The prosecuting attorney will make the following recommendation to the judge: Standard range sentence, **defense may argue for exceptional sentence downward**. [emphasis added.]

CP 239.

Instead of abiding by the agreement, the prosecution not only objected to the right of defense counsel to argue for the necessary mitigating factors for a downward deviation, but went so far as to advocate for an aggravating factor that would result in an upward sentence and insinuated uncharged higher-level crimes.

First, the prosecution violated its duty of good faith to the contract by characterizing, without legal authority, defense counsel's request for mitigating factors as "beyond appalling" (VRP 74), "ridiculous" (VRP 96), and "preposterous" (VRP 98). Defense counsel was simply citing, with *statutory authority*, to a mitigating factor that the victim was a willing

participant. It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *State v. Warren*, 165 Wash.2d 17, 29–30, 195 P.3d 940 (2008); *State v. Negrete*, 72 Wash.App. 62, 67, 863 P.2d 137 (1993).<sup>1</sup> The prosecutor even outright objected to defense counsel's proper analysis of other Pierce County cases, just as the appellate court had done in *State v. Rice*, *supra*, in her request for commensurate punishment for Appellant Williams:

Judge, I'm objecting to this. I mean, I have stayed quiet on all of these facts that have never been presented.

See, VRP 121.

Second, in a pattern almost identical to *Sledge* set forth *supra*, the prosecution stated that the facts of the case mandated an aggravating factor, in other words, an exceptional upward deviation contrary to the plea agreement:

It is a statutory aggravating factor. How in the world, if that is a statutory aggravating factor, can they then say another part of the statute, which, of course, doesn't apply here.

See, VRP 136.

See also the State's Sentencing Memorandum (emphasis added by prosecution):

In fact, however, RCW 9.94A.535(3)(1), indicates a person convicted of "human trafficking in the second degree an any victim was a minor at the time of the offense" is an **aggravating factor**.

See, CP 298.

---

<sup>1</sup> See *State v. Thorgerson*, 172 Wash.2d 438258 P.3d 43 AT 451 and 50 (2011): prosecutor's characterization of presentation of defense's case as "bogus" and involving "sleight of hand" was "ill-intentioned misconduct."

The harm from these improper statements completely changed the analysis of the sentencing court, as the court went on to effectively presume that it was in a position of deciding if the facts here were aggravating or mitigating:

THE COURT: Sure. That's an aggravating circumstance under the same statute potentially.

See, VRP 136.

THE COURT: Well, I think I can reconcile at least the legal part of this in terms of whether something is mitigating circumstance or an aggravating circumstance.

See, VRP 154

THE COURT: Of course, the things that aggravate it have to do with the conduct [...]

See, VRP 155

The prosecution further undermined the plea agreement by arguing, without any notice or briefing, that the Appellant Williams committed other higher crimes that were not charged:

Certainly, Rubie, by legal definition, is being raped every single day, and these guys are the accomplices to the rape.

Every single count of these guys, they are an accomplice to Rape Child III.

See, VRP 132.

As is evident, the prosecution clearly breached the plea agreement by not only improperly objecting to what the State agreed the defense counsel could request at sentencing, but also by implicitly advocating for aggravating circumstances and improperly pointing out uncharged crimes.

This is exactly the “transparent attempt to sustain an exceptional sentence” as seen in *Sledge*. The sentence should be vacated.

**B. The Real Facts Doctrine was violated because the sentencing court was presented and considered non-“acknowledged” information outside the record without an evidentiary hearing.**

The Real Facts Doctrine was violated for three primary reasons: a) The prosecution alleged an uncharged and unproven crime of Rape III, in direct violation of *State v Wakefield (infra)*, b) The prosecution presented evidence outside the record in direct violation of RCW 9.94A.530(2), and c) despite the defendant’s dispute of material facts, the court failed to “grant an evidentiary hearing on the point” in direct violation of RCW 9.94A.530(2).

1. LAW

RCW 9.94A.530(2) sets forth the “Real Facts Doctrine,” that a sentencing court

may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. **Where the defendant disputes material facts**, the court must either not consider the fact or **grant an evidentiary hearing on the point.** [emphasis added.]

The purpose of this limitation is “to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information.” *State v. Herzog*, 112 Wash.2d 419, 431–32, 771 P.2d 739 (1989); Wash. Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of

law.”) and to prevent *ex parte* contact with the judge, *sua sponte* investigation and research of a judge, and sentencing based on speculative facts. *State v. Grayson*, 154 Wash.2d 333, 340 111 P.3d 1183, 1187 (2005).

Specifically, a trial court must not impose a harsher sentence on a defendant based on presentations that the facts could constitute a more serious crime: [u]nder the real facts doctrine, a trial court may not impose a sentence based on the elements of a more serious crime that the State did not charge or prove. See *State v. Wakefield*, 130 Wash.2d 464, 475–76, 925 P.2d 183 (1996) citing RCW 9.94A.370(2); *State v. Barnes*, 117 Wash.2d 701, 708, 818 P.2d 1088 (1991).

## 2. ANALYSIS

Here, the Real Facts Doctrine was violated for three primary reasons:

- a) *The prosecution alleged an uncharged and unproven crime of Rape III, in direct violation of State v Wakefield:*

The impropriety of the prosecution’s statements on this point are clear:

Certainly, Rubie, by legal definition, is being raped every single day, and these guys are the accomplices to the rape.

Every single count of these guys, they are an accomplice to Rape Child III.

See, VRP 132.

There is no alternative interpretation of these statements. This unproven, uncharged crime was not in the presentence reports or the trial record, and never acknowledged by the defense. This is a flagrant violation

of the defendant's due process rights and *Wakefield* requires vacation of the sentence on this point. The extent to which the sentencing court relied on this improper representation is an onerous inquiry the defendant should not be subjected to.

b) *The prosecution presented evidence outside the record in direct violation of RCW 9.94A.530(2).*

Throughout this sentencing hearing, the prosecution repeatedly alleged information outside the case record without Appellant Williams' acknowledgment, even at points admitting as such, as here when the prosecution cited to information the court could not see:

The initial charge was based on the kidnapping theory, and there was a kidnapping count. In fact, the facts were pretty close. They don't give you the e-mails that Rubie sent out talking about not being able to leave, needing somebody to get her, and she can't, they won't let her. They don't talk about the fact that their phones were taken from them, so they are not communicating. The defendants are. They don't talk about the fact that it is Mr. Escalante pretending to be the girl, in fact, while he is communicating with Mr. Williams about getting money. They don't talk about the Gucci belt that was used to beat them with. They don't talk about any of those things. [...]

They don't show you the text messages where Rubie says, I'm going to kill myself. Don't show you those.

They took them to the mall to cash out, which means they allowed them to buy something with the money that they made having sex with these men. How nice of them to allow them to have a little bit. They will hold the money and pay for it, but they allowed them to go to the mall one day and actually buy something for themselves, and I'm sure that it was lingerie.

See, VRP 128-130.

The prosecution further cited to extraneous information about his personal, emotional connection to the victims:

Two, I want to emphasize to Lexi and Rubie...Sorry. I have known them both for now two to three years. This is going to take me a second, but it is going to be quick when I finally get around to saying it. They are not broken. Nothing is wrong with them. They are both beautiful. They are both smart.

See, VRP 98.

The prosecution also presented unsupported information about the acts the victims undertook:

[...] it is a culture now. There are acronyms. The BBBJ, bareback blow job. The COF, cum on face. The Greek, the anal. This is what these guys are requesting over and over again. What do the girls have to do? They have to turn to these guys and say, this is what he wants. Okay, but extra, meaning, you are going to do it, but charge extra than the \$200, \$300 they charge for a half an hour for these strange men to do these things to them.

See, VRP 97.

Furthermore, the prosecution attempted to improperly persuade the court with his unsupported, personal beliefs as to why the victims were not testifying, and his hearsay statements of what the victims "wanted" for the defendants:

I do want to emphasize that I think she is afraid. Why wouldn't she be, you know, of these two men right here, of who they represent, of their attitude here today, of not taking responsibility, of not being contrite and remorseful about what they did. Her fears, I'm confident, come from a long, long time ago when she was very, very young, and the court and defense understand what I'm talking about, and they continue. Why wouldn't they continue? The court knows what's happened throughout the pendency of this case, but she is here. That says a lot, too, I think. I want the court to acknowledge - - I know that the court has -- her presence here today. She does support the State's recommendation, which is going to be high end. I briefed that as well.

See, VRP 96.

Not only was the majority of this non-acknowledged information outside the record, but the defense had already made it abundantly clear that

it was *disputing* these material facts. This invited the “judge's reliance on false information” “*sua sponte* investigation and research of a judge, and sentencing based on speculative facts” precisely as forbidden by the caselaw.

c) *Despite the defense counsel's dispute of material facts, the court failed to “grant an evidentiary hearing on the point” in direct violation of RCW 9.94A.530(2).*

Defense counsel's dispute of the material facts at this sentencing hearing was made abundantly clear. Not only had both defense counsel filed briefs arguing that the victims were willing participants, and disputing the nature of the arrangement between the defendants and victims, but they argued as such on the record throughout their statements at sentencing. VRP 111-124. Defense counsel also disputed the expertise of the apparently surprise witness Maurice Washington, which the State presented as an “expert” in child trafficking. VRP 76.

Defense counsel improperly filed their brief at 2:43 pm the day before this hearing. See CrR 8, referencing CR 6(d). This was the first-time notice had been given that the defense intended to move the court for a finding of a mitigating factor that the victims were willing participants. The prosecution was unable to file a response until the morning of the sentencing hearing. VRP 71. The defendants were subjected to a sentencing hearing that would determine the fate of the rest of their lives with last-minute briefing and little to no opportunity to present evidence or

witnesses in a proper evidentiary hearing as required by RCW 9.94A.530(2).

The trial court erred in allowing this hearing to commence without evidentiary process, allowing *ad hoc*, unsupported argument on a host of factual disputes.

#### V. CONCLUSION

The sentence should be vacated and remanded for re-sentencing.

Respectfully submitted this 17th day of July, 2017.

/s/ Edward Penoyar  
EDWARD PENOYAR, WSBA #42919  
edwardpenoyar@gmail.com  
Counsel for Appellant Sandoval  
P.O Box 425  
South Bend, WA 98586  
(360) 875-5321

**Certificate of Service**

I declare under penalty of perjury under the laws of the State of Washington that on the date below I personally caused the foregoing document to be e-filed with the Clerk of the Court of Appeals as follows:

Derek Bryne, Court Clerk  
Court of Appeals, Division II

and served via the Court of Appeals e-filing portal as follows:

Michelle Hyer  
Pierce County Prosecutor's Office  
[pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us)

and mailed postage prepared to Appellant on July 18, 2017:

Michael Williams, II, DOC #359677  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

DATED July 17, 2017, South Bend, Washington.

  
TAMRON CLEVINGER

# PENYOYAR LAW OFFICES

July 17, 2017 - 4:51 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50129-5  
**Appellate Court Case Title:** State of Washington, Respondent v Michael Williams, II, Appellant  
**Superior Court Case Number:** 14-1-05086-2

### The following documents have been uploaded:

- 5-501295\_Briefs\_20170717165031D2259090\_3711.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Appellants Brief.pdf*

### A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- penoyarlawyer@gmail.com

### Comments:

---

Sender Name: Tamron Clevenger - Email: tamron\_penoyarlaw@comcast.net

**Filing on Behalf of:** Edward Harry Penoyar - Email: edwardpenoyar@gmail.com (Alternate Email: )

Address:  
PO Box 425  
South Bend, WA, 98586  
Phone: (360) 875-5321

**Note: The Filing Id is 20170717165031D2259090**