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NO. 50769-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIZABETH GENE MCVEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

Nos. 15-1-00033-2, 15-1-00710-8, 16-1-02407-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether this Court should remand the matter for further proceedings where the record lacks sufficient evidence that defendant waived her right to an evidentiary hearing to determine whether she breached the plea agreement?

B. STATEMENT OF THE CASE.

1. RELEVANT FACTS AND PROCEDURE

On January 5, 2015, the Pierce County Prosecutor's Office charged ELIZABETH MCVEY (hereinafter "defendant") with two counts of Identity Theft in the Second Degree, two counts of Forgery, one count of Unlawful Possession of a Controlled Substance (Methamphetamine), and one count of Unlawful Use of Drug Paraphernalia in Pierce County Cause Number 15-1-00033-2. CP 73-75. On February 20, 2015, defendant was charged with one count of Forgery and one count of Attempted Theft in the Second Degree in Pierce County Cause Number 15-1-00710-8. CP 1-2. And, on June 14, 2016, defendant was charged with one count of Theft of Rental, Leased, or Lease-Purchased Property in Pierce County Cause Number 16-1-02407-8. CP 185. The State later filed an amended information in two of the three matters. *See* CP 7-8, 80-85, 94-99.

On October 12, 2016, all three matters were assigned to the Honorable Gretchen Leanderson for trial. 10/12/16 RP 1. The parties subsequently informed the court that they had reached a joint resolution for all three cases and asked to set the matters over to the following day for entry of guilty pleas. 10/12/16 RP 18-19.

On October 13, 2016, defendant entered guilty pleas on all three matters. 10/13/16 RP 20-52; CP 39-48, 143-52, 193-202. In Pierce County Cause Number 15-1-00033-2, defendant pleaded guilty to a second amended information which charged her with four counts of Identity Theft in the Second Degree and one count of Unlawful Possession of a Controlled Substance (Methamphetamine). CP 139-41, 143-52; 10/13/16 RP 37-47. In Pierce County Cause Number 15-1-00710-8, defendant pleaded guilty to a second amended information which charged her with one count of Forgery. CP 37, 39-48; 10/13/16 RP 30-37. In Pierce County Cause Number 16-1-02407-8, defendant pleaded guilty to one count of Theft of Rental, Leased, or Lease-Purchased Property as charge in the original information. CP 185, 193-202; 10/13/16 RP 20-30.

The State agreed to recommend a Residential Drug Offender Sentencing Alternative (DOSA) for all three matters in exchange for defendant's guilty pleas. 10/13/16 RP 21, 25-27, 31, 34, 40-41, 44-45; CP

42, 146, 196. However, defendant's Statements on Plea of Guilty also provided the following:

> 6. **In Considering the Consequences of My Guilty Plea, I Understand That:**
>
> . . .
>
> (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase[.]

CP 41, 145, 195. Defendant signed each plea form, and the court accepted defendant's guilty pleas to all three matters, finding her pleas to be knowingly, intelligently, and voluntarily made. CP 47-48, 151-52, 201-02; 10/13/16 RP 30, 37, 47.

The parties agreed to set over sentencing to December 9th to allow defendant to be screened for the DOSA program. 10/13/16 RP 47-49. The court entered conditions of release pending sentencing and ordered defendant to either obtain riders or report to jail within 24 hours. 10/13/16 RP 48-51; CP 227-28, 231-32, 235-36. Defendant was also ordered to maintain law abiding behavior and remain in contact with her attorney. *Id.* Defendant agreed to follow her conditions of release pending sentencing. *Id.*

The parties subsequently changed the date of sentencing from December 9, 2016, to December 8, 2016.[1] 12/8/16 RP 54. On December 8, 2016, defense counsel informed the court of the following: "Your Honor, this was set for tomorrow…and I could not get ahold of her. He[r] phone is disconnected. I sent a text. I don't think it went through. I sent a letter out, but I can't say that she's received that." 12/8/16 RP 53. Defendant did not appear to court on December 8, 2016. 12/8/16 RP 53. The State informed the court that defendant had failed to obtain a bail bond rider or report to jail as required in her conditions of release pending sentencing.[2] 12/8/16 RP 53-54. The court issued bench warrants for defendant's arrest. 12/8/16 RP 54; CP 229, 233, 237.

Sentencing was subsequently held on June 23, 2017, following defendant's arrest. 6/23/17 RP 56-57. The State argued the following to the court:

> [State:] [Defendant] pled guilty to…these three cause numbers back in October, October 13th of 2016. She was to have reported to jail the next day or provide a bail bond rider by October 14th of 2016 and did not do either one.
>
> There was a sentencing date that was set for December 8th as well that she failed to appear

[1] Defendant authorized her attorney to set court dates and agreed to appear for any court date set by her attorney. CP 228, 232, 236.

[2] Defendant arguably committed Escape in the Second Degree under RCW 9A.76.120 by failing to obtain a bail bond rider or report to jail within 24 hours as required by the court's conditions of release pending sentencing.

for, and there had been a warrant outstanding ever since.

She was arrested in May of this year on officers looking for her on this warrant, and they found her and arrested her. And she's been in custody since May pending sentencing.

...

The parties had an agreed recommendation at the time that the plea was entered into; however. When she failed to appear, both to jail and then to sentencing, State's no longer obligated to that recommendation and would ask the Court to, instead of imposing a DOSA sentence, to just impose the high end in custody.

...

[T]he 15 cause number ending in 710-8, that is one count of forgery...Her range on that is 12 to 14 months.

The State's asking for 14 months in custody on that[.]

...

I'll jump to the 2016 case...

Her range is 17 to 22 months. The state is requesting 22 months in prison.

...

The other 2015, cause number ending in 33-2, has five counts...

[T]he range on the each of the identity theft counts is 17 to 22 months. The State will be requesting 22 months on each of those to run concurrent with each other and concurrent with the other cause numbers.

The drug count is 12-plus to 24 months. The State is asking for 24 months also to run concurrent with the other counts.

> ...
> [J]ust given the fact that she has fled after pleaing and did not either report to jail, did not get a rider, did not respond to sentencing, and had to be arrested six months later, the State is asking for high end on each of these cases.

6/23/17 RP 56-60 (emphasis added).

Defense counsel responded by asking the court to impose the low end of the controlling standard range:

> [Defense:] Your Honor, the original plan was that Ms. McVey was going to have an evaluation through the Department of Corrections and that she was going to have a residential DOSA. That would have resulted in a minimum of 90 days in an inpatient facility, and that recommendation was based upon everybody's agreement that these cases were the direct result of using and continuing to use controlled substances.
>
> I have no doubt that Ms. McVey had every intention of showing back up for sentencing and completing this DOSA sentence and appearing on time and getting the bail bond. A couple of things, I think, prevented that from happening.
>
> ...
>
> **What she is asking, Your Honor, the Court to do at this point is to allow her to get her life back on track. And for her, that's going to mean going to prison now.** That's going to mean being on supervision. That's going to mean getting drug treatment. That's going to mean trying to find out what has happened to her home and her marriage and her family.

> **And, Your Honor, I think that 17 months in prison is punishment for her.** She's been in custody. She's been through a number of lawyers. But I think at this point, she's -- her mind is clear, and she knows what she needs to do.
>
> **So I'm going to ask the Court to impose the 17 months** and order that she come back at some point in the future so the Court can, you know, address possibly where she's at with her treatment.

6/23/17 RP 60-62 (emphasis added).

Defendant apologized to the court for "not making it back" and said she had "a hard time getting ahold of a couple of people for the rider." 6/23/17 RP 64. The following exchange then occurred:

> [Court:] I'll tell you, I was very surprised when you weren't here. When we were in court last, it seemed as though we had a good resolution.
>
> [Defendant:] Yeah.
>
> [Court:] And your responsibilities were, in my view, pretty --
>
> [Defendant:] Minimal.
>
> [Court:] -- pretty easy to satisfy.
>
> [Defendant:] I agree.
>
> [Court:] And so as a result of that, though, when you did not, it caused --

[Defendant:] Problems.

[Court:] -- a lot of problems for a lot of people.

[Defendant:] Yes, ma'am.

...

[Court:] All right. So you're going to have some time to be thinking about his, working with some counselors, hopefully, and get back to where you were before you --

[Defendant:] Messed up.

[Court:] Before you messed up.

6/23/17 RP 65-66.

The court followed the State's recommendation and imposed a total of 24 months confinement followed by a period of community custody, with all counts to run concurrent to one another. 6/23/17 RP 66-69; CP 55, 58-59, 159, 162-64, 209, 212-13. Defendant timely appealed. CP 65, 172, 219.

C. ARGUMENT.

1. THIS COURT SHOULD REMAND THE MATTER FOR THE TRIAL COURT TO EITHER CONDUCT AN EVIDENTIARY HEARING REGARDING DEFENDANT'S BREACH OF THE PLEA AGREEMENT OR OBTAIN A VALID WAIVER TO SUCH HEARING.

A plea agreement is a contract between the State and the defendant. ***State v. Sledge***, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997) (quoting ***State v. Mollichi***, 132 Wn.2d 80, 90, 936 P.2d 408 (1997)); ***State***

v. Armstrong, 109 Wn. App. 458, 461, 35 P.3d 397 (2001). Because a defendant gives up important constitutional rights by entering into a plea agreement, due process requires the State to adhere to the agreement by recommending the agreed-upon sentence. *Id.* at 839. "The State fulfills its obligations if it acts in good faith and does not contravene the defendant's reasonable expectations that arise from the agreement." ***State v. McInally***, 125 Wn. App. 854, 861-62, 106 P.3d 794 (2005) (citing ***State v. McRae***, 96 Wn. App. 298, 305, 979 P.2d 911 (1999)).

On appeal, the court applies an objective standard to determine whether the State breached the plea agreement. ***State v. MacDonald***, 183 Wn.2d 1, 8, 346 P.3d 748 (2015) (citing ***Sledge***, 133 Wn.2d at 843 n. 7). The reviewing court considers the entire sentencing record and asks whether the prosecutor contradicted the State's recommendation by either words or conduct. ***State v. Williams***, 103 Wn. App. 231, 236, 11 P.3d 878 (2000). The issue of whether the State breached the plea agreement is reviewed de novo, and the appropriate remedy for a breach "is to remand for the defendant to choose whether to withdraw the guilty plea or seek enforcement of the State's agreement." ***State v. Neisler***, 191 Wn. App. 259, 265-66, 361 P.3d 278 (2015).

Here, defendant claims the State breached the plea agreement by recommending a standard range sentence after she failed to abide by her

conditions of release pending sentencing. *See* Brief of Appellant at 1, 9-10. However, at sentencing, the State made its recommendation based on *defendant's* alleged breach of the plea agreement. *See* 6/23/17 RP 56-59. If a criminal defendant breaches a plea agreement, then the State may either rescind or specifically enforce it. ***Armstrong***, 109 Wn. App. at 462 (citing ***State v. Thomas***, 79 Wn. App. 32, 36-37, 899 P.2d 1312 (1995)); ***State v. Townsend***, 2 Wn. App.2d 434, 438, 409 P.3d 1094 (2018). "When the State opts to rescind a plea agreement, its subsequent rights are measured by law; but when it opts to specifically enforce, its subsequent rights are necessarily measured by the agreement itself." ***Thomas***, 79 Wn. App. at 37-38.

First, however, the State must prove breach of the plea agreement by a preponderance of the evidence. ***In re Pers. Restraint of James***, 96 Wn.2d 847, 850-51, 640 P.2d 18 (1982); ***Townsend***, 2 Wn. App.2d at 438. "Due process requires the State's proof be presented during an evidentiary hearing, at which the defendant must have the opportunity to call witnesses and contest the State's allegations." ***Townsend***, 2 Wn. App.2d at 439 (citing ***In re James***, 96 Wn.2d at 850-51). A defendant's right to an evidentiary hearing cannot be waived by silent acquiescence; rather, the State must prove a knowing, intelligent, and voluntary waiver. *Id.* at 436, 440.

In ***Townsend***, the defendant pleaded guilty to felony charges pursuant to a plea agreement with the State, wherein the State agreed to recommend a sentence below the standard range. 2 Wn. App.2d at 436. The defendant agreed to "abide by all release conditions, including a requirement that he '[c]ommit no law violations' while awaiting sentencing." *Id.* at 437. After the defendant pleaded guilty, he was arrested on new felony charges, and a warrant was issued based on his violation of his conditions of release. *Id.*

At sentencing, the prosecutor stated that the defendant had breached the terms of the plea agreement as evidenced by the warrant issued for his arrest and asked the court to impose the high end of the standard range pursuant to the plea agreement's penalty clause. *Id.* at 437. The court found that the defendant had breached the plea agreement and proceeded to sentencing. *Id.* at 437-38.

On appeal, the defendant claimed "the trial court improperly relieved the prosecution of its plea agreement obligations without either holding an evidentiary hearing or obtaining a valid waiver of his right to a hearing." ***Townsend***, 2 Wn. App.2d at 439. Division Three of the Court of Appeals agreed. *Id.* The court found that the trial court did not conduct an

evidentiary hearing[3] and noted that "an arrest warrant is not a substitute for the due process right to an evidentiary hearing." *Id.* at 439-40. The court also found that the State failed to prove a valid waiver to an evidentiary hearing, as "[s]ilent acquiescence is simply insufficient." *Id.* at 441. The ***Townsend*** court reversed and remanded the matter for the trial court to either conduct an evidentiary hearing or obtain a valid waiver. *Id.* at 443.

Here, as in ***Townsend***, the trial court did not conduct an evidentiary hearing to determine if defendant breached the plea agreement, and the record lacks sufficient evidence to establish that defendant knowingly, intelligently, and voluntarily waived her right to a hearing. There is no indication from the available record that defendant was provided notice and an opportunity to be heard regarding her alleged breach of the plea agreement. This Court should therefore remand the matter for further proceedings as in ***Townsend***. On remand, the trial court should either conduct an evidentiary hearing or obtain a valid waiver from defendant.

---

[3] "The trial court proceedings did not bear any of the hallmarks of an evidentiary hearing. No evidence was admitted. No testimony was taken…It is no accident that the trial court proceedings failed to resemble an evidentiary hearing. None was intended. The prosecution presented its case under the assumption that the court's arrest warrant determination conclusively established Mr. Townsend's release violation. This approach was mistaken." *Id.* at 439.

It should be noted, however, that the trial court sentenced defendant on June 23, 2017, to the high end of the standard range for a total of 24 months confinement in the Department of Corrections. 6/23/17 RP 66-69; CP 55, 58-59, 159, 162-64, 209, 212-13. At this point in time, with credit for time served and early release time calculated under RCW 9.94A.729, defendant has presumably served most of her sentence. The court's ability to grant defendant meaningful relief is therefore limited. Accordingly, the State respectfully requests this Court remand the matter in an expedited manner so that the parties may address the issue(s) raised and potentially negotiate an agreed recommendation for sentencing.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court remand the matter for further proceedings.

DATED: June 20, 2018.

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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.

6-20-18 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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