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NO. 51207-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON, Respondent

v.

JERRY D. WIATT, JR., Appellant

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

In 2011, Jerry D. Wiatt, Jr. plead guilty to nine gross misdemeanors pursuant to a plea agreement with the State. As part of that plea agreement, Mr. Wiatt agreed to entry of nine permanent civil anti-harassment orders issued under RCW 10.14, et. seq. Mr. Wiatt plead guilty and was sentenced on the same day. During the sentencing hearing, the Trial Court imposed the nine civil orders.

In 2017, Mr. Wiatt moved to vacate the nine civil orders as being issued outside of the statutory limitations of RCW 10.14, et. seq. The State intervened, moved to consolidate the nine civil cause numbers with the criminal cause and for the Trial Court to find that Mr. Wiatt breached the plea agreement by initiating the motions to vacate under the civil causes. The Trial Court agreed with the State and found that Mr. Wiatt breached the plea agreement. Mr. Wiatt appeals the finding that he breached the plea agreement, arguing that the plea agreement was a fully executed contract.

II. ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in finding that Mr. Wiatt breached his plea agreement after serving his sentence in entirety and jurisdiction under the criminal sentence had expired.

III. ISSUES RELATING TO ASSIGNMENT OF ERROR

ISSUE 1: When has a plea agreement been fully executed?

ISSUE 2: Does the trial court have authority to hold a criminal defendant to a contract in perpetuity, even when the court's jurisdiction has expired?

IV. STATEMENT OF THE CASE

On January 31, 2011, Mr. Wiatt plead guilty to nine gross misdemeanors charges, to include seven counts of assault in the fourth degree (RCW 9A.36.041) and two counts of furnishing liquor to a minor (RCW 66.44.270(1)) for incidents occurring from dates ranging from 1999 to 2001. The trial court accepted his guilty pleas and subsequently sentenced him the same day. The sentence included a twenty-four-month suspended sentence with a condition

that Mr. Wiatt "comply with the requirements of permanent civil anti-harassment orders imposed by the Court upon the defendant on January 31, 2011." (Judgment and Sentence Following Appeal (Non-Felony), page 3). No separate written plea agreement was filed. The only reference to a plea agreement was in paragraph 6 (b) of the Statement of Defendant on Plea of Guilty (Non-Felony); where "[t]he prosecuting authority will make the following recommendation to the judge: ... [p]ursuant to the plea agreement of the parties, the defendant would agree to the entry by this court at the time of sentencing of a permanent civil anti-harassment order for each of the victims named in the nine counts against the defendant." (Statement of Defendant on Plea of Guilty (Non-Felony), page 2).

The trial court signed the nine civil orders at the sentencing hearing and the prosecutor filed the civil orders with the clerk's office after the hearing concluded. Additionally, it is important to note, there were no petitions filed pursuant to RCW 10.14, et. seq. and the orders were not signed by any of the petitioners; prosecuting attorney Christen Peters signed the orders on behalf of each petitioner. None of the petitioners appeared at the plea and sentencing hearing.

In 2017, Mr. Wiatt moved the court, under each of the civil cause numbers, to vacate the orders as not having been issued in compliance with the statutory requirements of RCW 10.14, et. seq. The petitioners were properly served. The State intervened to consolidate the civil motions with the criminal cause, even though it is not a party to the civil orders, and argued that Mr. Wiatt was in breach of the plea agreement by having initiated the motion to vacate the civil orders. The trial court agreed with the State and found Mr. Wiatt in breach of the plea agreement and ordered specific performance forbidding Mr. Wiatt from challenging the validity of the civil orders or to move for modification of the civil orders in the future; even though the Court's jurisdiction over the criminal gross misdemeanor offenses expired many years prior.

V. ARGUMENT

The issue presented is whether the Trial Court erred in finding Mr. Wiatt breached the plea agreement. It is settled law that the State merely needs to prove a breach of a plea agreement by a preponderance of the evidence. However, "[a] plea bargain, standing alone, is without constitutional significance; in itself, it is a

mere executory agreement ... until embodied in the judgment of a court ...." Mabry v. Johnson 467 U.S. 504, 507 (1984). Taking this in context, it means that a plea agreement is a contract with constitutional implications. State v. Townsend, No. 34984-5 (Div. III, 02/06/2018), citing In re Pers. Restraint of Lord, 152 Wn.2d 182, 188-189 (2004). A criminal "defendant's underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law." United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986). "A plea bargain is not a commercial exchange. It is an instrument for the enforcement of the criminal law." United States v. Baron, 172 F.3d 1153, 1158 (9th Cir. 1999). Once a defendant pleads guilty, is sentenced, serves the sentence in entirety, and jurisdiction expires, the trial court can no longer hold the defendant in violation of that criminal cause. Therefore, the findings by the Trial Court that Mr. Wiatt breached the plea agreement must be reversed.

Although not mandatory, the State and defendant "may reach an agreement regarding sentence recommendations." RCW 9.94A.460. Plea agreements, by their very nature are sentencing recommendations. RCW 9.94A.421. Under the statutory framework

and guidance of RCW 9.94A.421, it is expected that plea agreements would contain sentence recommendations or other promises to be fulfilled by the prosecutor. Id. While contract principles are important, they are not absolute due to the Due Process considerations and the Constitutional restraints on criminal defendants. Plea bargains are executory contracts created upon the defendant's promise to plead guilty. Pleading guilty is the only bargaining chip the defendant holds. Once a defendant pleads guilty, he has nothing left to bargain. After the Trial Court sentences the defendant, the sentence is served, and jurisdiction expires; the contract has been fully executed.

"[P]lea agreement[s] function as a contract in which the defendant exchanges his [promised] guilty plea for the bargained-for concession from the state." State v. Barber, 170 Wn.2d 854, 859 (2011), citing State v. Sledge, 133 Wn.2d 828, 838-840 (1997); State v. Hunsicker, 129 Wn.2d 554, 559 (1996). Furthermore, "ambiguities in the [plea] agreement must be construed against the State." State v. Howington, 907 S.W. 2d 403, 410 (Tenn. 1995). Mere acquiescence in an improper plea agreement cannot render it valid. Likewise, uncertainty in length will render the agreement invalid. The

invited error doctrine does not apply to illegally imposed sentences, even if a defendant agreed to the sentence. State v. Wallin, 125 Wn.App. 648, 661 (2005). An illegal bargain occurs when the parties engage in an agreement that is outside the penalty permitted by law. A plea bargain is a contract whereby the prosecutor and the defense attorney bargain over charges and sentences. The Court is limited in its powers to only those powers granted explicitly by statute, and the parties to a plea agreement cannot empower a court, through that agreement, to exceed those powers. State v. Eilts, 94 Wn.2d 489, 495 (1980), superseded by statute RCW 9.95.210. "The actual sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the Legislature has allowed for. State v. Barber, 170 Wn.2d 854, 869 (2001), quoting State v. Moore, 116 Wn.2d 30, 38 (1991).

Plea agreements contain a promise to plead guilty by a defendant and the promise to recommend a specific sentence by the prosecutor. Therefore, because plea agreements contain an exchange of promises, plea agreements, by definition are bilateral contracts. Therefore, a plea bargain is executed when the defendant pleads guilty, the prosecutor makes the promised sentence

recommendation, and the court accepts the plea and sentences the defendant. Once executed, the contract is complete; and the sentencing court retains jurisdiction on the criminal cause over the defendant for only as long as authorized by statutorily granted limits. A defendant is no longer subject to the sentencing court on a criminal cause once probation is terminated or expires on that particular criminal case.

Contracts in perpetuity are strongly disfavored. To be valid, a perpetual contract must be in writing. No separate written plea agreement exists in this case. "In plea bargaining terms, there must be a promissory exchange and the promise of certain benefits, including the exact penal promises, in return for a defendant's promise to enter a guilty or no contest plea." State v. Bembenek, 724 N.W. 2d 685, 689 (Wis. Ct. App. 2006), quoting, State v. Bowers, 696 N.W. 2d 255, 264 (Wis. Ct. App. 2005) (Brown, J., dissenting). The State's discretion in plea bargaining is not unfettered. State v. Moen, 150 Wn.2d 221, 227 (2003). Plea agreements cannot exceed the statutory authority of the trial court, even if a defendant agrees. In re Thompson, 141 Wn.2d 712, 723 (2000). "The government gets what it bargains for but nothing more." United States v. Pruitt, 32

F.3d 431, 433 (9th Cir. 1994). Because "the court's sentencing authority is limited to that expressly provided for by statute," holding a criminal defendant subject to a plea agreement for life on misdemeanor convictions, would be expressly forbidden. State. Phelps, 113 Wn.App. 347, 356 (2002).

In this case, the State, acting as loco parentis for the nine named petitioners on the civil anti-harassment orders, was usurping the Court's power and doing what the Court was not allowed to do. The State did an end-run around the jurisdiction limitations of the Sentencing Court's jurisdiction. Because Mr. Wiatt was convicted of gross misdemeanors, the jurisdiction for the Court was limited to two years. The Court did not have any inherent authority to impose lifetime orders for such an offense. Mr. Wiatt sought to address the issue through the proper mechanism by filing motions to vacate the orders under the civil causes. The criminal court no longer has jurisdiction under the criminal case and the State is not a party to the civil causes. In finding that Mr. Wiatt breached the plea agreement, the Trial Court has found that criminal defendants are subject to contracts in perpetuity; even long after the Court has lost jurisdiction to find a probation violation.

VI. CONCLUSION

For the foregoing reasons, Mr. Wiatt respectfully requests that the Court REVERSE the ruling of the Trial Court and find that there was no breach of the plea agreement and further find the State has no standing to intervene in the civil causes.

Dated this 19th day of March 2018

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I served a copy of the foregoing documents on all parties, or their counsel of record, on this 19th day of March 2018, via the following:

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