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No. 51207-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JERRY D. WIATT, JR.  
Appellant.

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

The Honorable Mary Sue Wilson  
Cause No. 01-1-01136-1

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BRIEF OF RESPONDENT

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#### A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court correctly found that Wiatt's agreement to the entry of nine civil anti-harassment protection orders was an indivisible portion of the plea agreement he entered into in 2011, such that his attempts to vacate those orders in 2017 violated the terms of the plea agreement.
2. Whether matters outside of the criminal sentence in a particular case can be included in a valid plea agreement.
3. Whether the Wiatt's agreement to enter into nine civil anti-harassment protection orders was a valid portion of the plea agreement, and whether the trial court acted within its authority granted by RCW 10.14 in entering the orders that Wiatt agreed to.
4. Whether the trial court correctly found that specific performance precluded Wiatt from attacking the validity of the anti-harassment orders where Wiatt had breached a material term of the 2011 plea agreement.

#### B. STATEMENT OF THE CASE.

On January 31, 2011, Jerry D. Wiatt, Jr., appeared for a change of plea and sentencing in Thurston County cause number 01-1-01136-1. Wiatt had been serving a prison sentence for convictions for two counts of rape in the second degree, two counts of rape in the third degree, one count of attempted rape in the third degree, six counts of furnishing liquor to a minor, one count of voyeurism, and one count of communication with a minor for immoral purposes. All of the convictions were vacated by a

decision of this court and the charges had been remanded to Thurston County for a retrial. CP 145-146. The State had filed a Petition in the Washington Supreme Court seeking review of this Court's decision. CP 146.

Wiatt entered into an agreed resolution, in which the State committed to reduce the charges to seven counts of assault in the fourth degree and two counts of furnishing liquor to a minor. CP 41, 146. The plea agreement was summarized in the Statement of Defendant on Plea of Guilty submitted by the defendant to the court that day:

. . . 365 days on each count with 60 day suspended for a period of two years, with time on all counts running concurrently; that the defendant receive credit for 305 days served as to all counts and that he be released from the custody of the Department of Corrections at the time of sentencing; that supervision of probation by the Department of Corrections be in King County where the defendant will be residing; that the conditions of probation be as follows: no criminal law violations, defendant engage in treatment as recommended in the December 4, 2010 evaluation by Michael Comte, and that the defendant not maintain a principal residence, or have a principal place of employment or principal place of schooling in Thurston County. Pursuant 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. The State recommends legal financial obligations in the

amount of \$500 for the victim penalty assessment and \$200 for court costs.

CP 6, 41.

At the change of plea hearing, the defendant acknowledged he fully understood what was stated in the statement of defendant on plea of guilty. CP 55. The State noted the following in regard to its recommendations following the court's acceptance of the defendant's guilty pleas:

. . . Your Honor, I'm asking the court to impose a permanent antiharassment order for each victim, and for the purposes of the record I'm going to read their names into the -- on the record. Magen Blevins, Jennifer Bowles, Alvina Cruz, Erin Gundlach, Zoe Hawkins, Krystal Hoskins, Heather Kamilkov, Raminta Rankis, and Sherri Waltermeyer.

CP 57. The court accepted the defendant's guilty pleas to all nine counts, finding that the defendant had made those pleas freely, voluntarily, intelligently, and competently, and that he understood the consequences of his guilty pleas. CP 64.

The prosecutor then provided to the court the following information concerning the victims of the defendant's crimes:

. . . The only additional information at this point that I would like to add to the Court is that information regarding the contact with the victims. The victims are all aware, all the victims have been sent letters by certified mail. Ms. Carroll has been the victim advocate, had contact with all the victims in this case.

Some of them have had more contact, more than majority of them have had more contact than others with Ms. Carroll, they have all chosen not to be present here today. They still are all requesting the permanent lifetime no contact or, excuse me, antiharassment orders that are before the court. They did not want to see the defendant. They're all young woman (sic) who – incidents as the Court can see from the dates in the information were affected by crimes 11 and 12 years ago. Many of them have gotten married, some of them have children, some of them live in Thurston County, many of them still have contacts like relatives, parents that live in Thurston County even if they live elsewhere. But the one unifying comment from all the victims is they never want to see the defendant ever again. . . .

I can also indicate to the Court that as we've been sitting here and as the Court's been proceeding on this very hearing, Ms. Carroll has been in contact and has actually received some e-mail contact back from the victims that are very anxious to hear what's going to be happening so they are very much present, very much concerned about what the Court's proceeding on today. I don't want the fact that their presence is not actual in court today for the Court to think that there is any less import to the victim's feelings regarding this case.

CP 65-67.

The prosecutor went on to discuss the entry of the proposed anti-harassment orders within the context of the criminal change of plea and sentencing hearing that was taking place.

. . . In this case, Your Honor, because of the unique circumstances, the State in effect is acting as the petitioner for this hearing on behalf of the victims, and so I believe that it would be appropriate for the State to sign but I have not done so until the Court

approves. I believe that's Mr. Zuckerman and defense counsel's opinion as well and I'll hand those forward to the Court if the Court wants to review those as well. . .

CP 67-68 (emphasis added). After the court reviewed the proposed anti-harassment protection orders, the court asked for a response from defense counsel. That response was as follows:

Yes, Your Honor. Thank you, Your Honor, I do want to confirm that all of these conditions are fully agreed upon by the defense. As I think Your Honor knows, this was the result of considerable negotiations between the defense and the prosecutor's office and I know that the prosecutor also took the time to correspond with all the victims in the case and make sure that the settlement was acceptable to them as well. So we agree to all the terms recommended. . .

CP 68-69 (emphasis added). The defendant was asked if he had any comment to make. He declined, saying that he was deferring to his attorney. CP 69.

The court then noted that several published Washington appellate opinions had been presented in support of the proposal for entry of the anti-harassment orders, and that the court had reviewed those. Those cases were State v. Alphonse, 147 Wn. App. 891, 197 P.3d 1211 (2008) and State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005). The judge stated that she had studied those cases and noted that the cases set forth six

nonexclusive factors that the court should consider when determining whether to impose a lifetime order such as was being requested. The court indicated the belief that the most important consideration was whether there was no less restrictive means available to accomplish the purpose of the order, and that the orders must be narrowly tailored to serve the interests involved. CP 70-71. The court stated that the court was accepting the joint recommendation of the parties as proposed. CP 72. The court then specifically found that it was appropriate under both the statute and the cases referred to above that there be lifetime anti-harassment orders imposed. CP 72. The State, in return, confirmed that a withdrawal of the State's Petition for Review would be submitted to the Washington Supreme Court. CP 76.

Along with the filing of each of the nine anti-harassment protection orders approved by the court on January 31, 2011, the court also entered an Order Waiving Fees. In each such Order, the court summarized what had taken place regarding these anti-harassment orders in the following manner:

In the above-named causes, the State of Washington, through Christen Anton Peters and James C. Powers, Deputy Prosecuting Attorneys for Thurston County, sought Permanent Anti-Harassment Orders for the protection of victims of offenses regarding which

findings of guilt were entered against Jerry Dale Wiatt, Jr., respondent herein, and defendant in Thurston County Superior Court Cause 01-1-01136-1. This was done pursuant to a plea agreement reached with Jerry Dale Wiatt, Jr., in that criminal cause. Consequently, the respondent/defendant, Jerry Dale Wiatt, Jr., stipulated to the entry of those Permanent Anti-Harassment Orders in the above causes on January 31, 2011, at a hearing at which a Judgment and Sentence was also entered against defendant Wiatt in the criminal cause, Cause No. 01-1-01136-1. Because of the circumstances in which Permanent Anti-Harassment Orders were entered in the above-identified cases, the Court hereby finds it appropriate that all court and service fees be waived with regard to the entry and service of these Anti-Harassment Orders.

CP 116. The Honorable Judge Lisa Sutton also sentenced Wiatt as requested in the plea agreement. CP 40-44, 79-81.

On April 7, 2017, Wiatt filed in each of the nine civil causes a motion to vacate the permanent anti-harassment order that had been entered by the Court on January 31, 2011, arguing that the Court had committed legal error in issuing each of those orders.

CP 147. The State intervened and argued that the motions to vacate breached the terms of the plea agreement that had been reached in 2011. CP 118. The trial court agreed that Wiatt had breached the terms of the plea agreement by attacking the validity of the permanent civil protection orders and found that the remedy

of specific performance precluded Wiatt from proceeding in his motions to vacate. CP 144-150. Wiatt appeals that finding.

### C. ARGUMENT.

1. The trial court correctly concluded that Wiatt's Motions to Vacate the civil anti-harassment orders, the formation of which were indivisible parts of the plea agreement entered in 2011, constituted a breach of the plea agreement that Wiatt accepted the benefits of.

Issues regarding the interpretation of a plea agreement are questions of law that are reviewed de novo. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). Plea agreements are considered to be analogous to contracts and are enforceable on that basis. State v. Armstrong, 109 Wn. App. 458, 461, 35 P.3d 397 (2001); In re Personal Restraint of Breedlove, 138 Wn.2d 298, 309, 979 P.2d 427 (1999). Both the State and the defendant can seek to enforce the agreement against any breach by the other party, as in the case of any contract. State v. Thomas, 79 Wn. App. 32, 35-36, 899 P.2d 1312 (1995). Under the defendant's theory, a party to the agreement is free to breach the agreement with impunity, as the defendant has tried to do in this case, once the court's jurisdiction over the sentence imposed has come to an end, even if the agreement encompasses a separate matter in which the court's jurisdiction to act continues, such as with regard to the anti-harassment orders at issue here.

An indivisible contract is essentially a package deal and can only be challenged as a whole. As is generally the case with contracts, whether the terms of the contract are to be considered separable or indivisible depends upon the intent of the parties. In determining the intent of the parties in the context of a plea agreement, a court must consider only objective manifestations of that intent, not claims of subjective intent. State v. Turley, 149 Wn.2d 395, 400, 60 P.3d 338 (2003). In Turley, the steps taken by the parties in resolving the pending charges occurred at the same time and in a single proceeding, and were expressed as a single plea agreement in a single document. The Washington Supreme Court held that these objective manifestations of the parties' intent established that the plea agreement was indivisible, and therefore could only be challenged or enforced as a whole. Turley, 149 Wn.2d at 402.

In the present case, every aspect of the record supports the indivisibility of the plea agreement in this case. The defendant's own Statement on Plea of Guilty specifically referred to his agreement to the entry of the anti-harassment orders as part of the plea agreement in which he would plead guilty to the nine counts in the amended information and the State would recommend a credit

for time served sentence on all counts running concurrently. CP 41. The prosecutor stressed that all the conditions being recommended were agreed and were the result of negotiations with defense counsel for the ultimate resolution being presented to the court that day. CP 56. The request for the anti-harassment orders was an integral part of the State's recommendations to the court which composed that "ultimate resolution". CP57. Indeed, in arguing for the State's recommendations, the State placed almost all its focus on those anti-harassment orders, showing that for the State the principal benefit of the bargain in this plea agreement was the defendant's agreement to the issuance of those anti-harassment orders. RP at 65-66.

Since the entry of those anti-harassment orders was a primary aspect of the consideration obtained by the State in return for the concessions granted to the defendant, it was an essential part of the quid pro quo at the heart of this agreement. Defense counsel responded that all of the conditions requested by the State were agreed upon by the defense, noting that they were the result of considerable negotiation between the parties that had also involved correspondence with all the victims in the case. Defense counsel then stated, "So we agree to all the terms recommended".

CP 69. He then noted a caution with regard to enforcement of the anti-harassment orders, further confirming that the issuance of those orders was part of what the defense had just agreed to. CP 69. The defendant's only comment to all of this was to defer to the remarks of his attorney. CP 69.

The trial court correctly concluded that the objective intent of the parties was that the agreement to enter into the anti-harassment protection orders was indivisible from the plea agreement. CP 148. Wiatt gained important benefits from that indivisible agreement. The State fully complied with its obligations under the contract. The trial court correctly concluded that Wiatt should not reap the benefits of the agreement and then be able to challenge part of the agreement with no risk of losing the benefit he received. Under State v. Turley, *supra*, that is not permissible. Indeed, the Washington Supreme Court recently referred to it as an "unreasonable windfall" when a defendant negotiates a plea agreement with the State that provides him with important benefits, and then tries to repudiate that agreement to his further benefit. In re Personal Restraint of Swagerty, 186 Wn.2d 801, 812, 383 P.3d 454 (2016).

Several cases support the ability of the State to enforce a plea agreement. In State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006), Ermels pled guilty to second-degree manslaughter, and as part of the plea agreement, he stipulated to facts supporting an exceptional sentence, stipulated there was a legal basis for an exceptional sentence, and waived his right to appeal the basis for and propriety of an exceptional sentence imposed against him.. Nevertheless, Ermels sought on appeal to challenge the exceptional sentence imposed and sought a resentencing within the standard range, without challenging the plea agreement as a whole. Ermels, 156 Wn.2d at 531. The State Supreme Court found that the plea agreement in that case was indivisible, and Ermels had received benefits from that agreement. Since Ermels had not chosen to challenge the entire plea agreement, he could not be permitted to challenge separately that portion of the agreement concerning the exceptional sentence. Ermels, 156 Wn.2d at 540-542.

In State v. Steele, 134 Wn. App. 844, 142 P.3d 649 (2006), Steele entered into a plea agreement with the State concerning two felony sex offenses. As part of that agreement, Steele stipulated to the imposition of an exceptional sentence. However, on appeal he

challenged the exceptional sentence that was imposed on him. Steele, 134 Wn. App. at 845-846. Steele sought a sentence within the standard range but did not otherwise challenge the plea agreement he had reached with the State. The appellate court found that the plea agreement was indivisible in this case. Since Steele had not challenged the validity of the plea agreement as a whole, and had received the benefits of that agreement, his attempt to challenge the exceptional sentence alone was a “fatal” choice that must be denied. Steele, 134 Wn. App. at 852-853.

In State v. Dillon, 142 Wn. App. 269, 174 P.3d 1201 (2007), Dillon joined the State in recommending an exceptional sentence of 500 months in prison pursuant to a plea agreement from which he received substantial benefits. He then sought to challenge the imposition of that sentence on appeal. However, he did not seek to withdraw from the plea agreement which had provided him those important benefits. Dillon, 142 Wn. App. at 273 and 276. The Court of Appeals ruled that since Dillon had joined the State in requesting the exceptional sentence and had received the benefit of the bargain from his plea agreement, he would not be permitted to challenge the exceptional sentence he received while at the

same time refraining from challenging the plea agreement. Dillon, 142 Wn. App. at 276-277.

Since Wiatt, chose not to challenge the entire plea agreement, the trial court was correct in enforcing the agreement and not allowing him to challenge something that he agreed to and supported as part of the agreement.

2. Plea Agreements may encompass matters outside of the criminal sentence.

Courts are limited in their powers to only those powers granted explicitly by statute, and the parties to a plea agreement cannot empower a court to exceed those powers. State v. Eilts, 94 Wn.2d 489, 495 (1980). Wiatt mistakenly argues that the anti-harassment orders exceeded the trial court's jurisdiction. Wiatt contends that because the requirements of the sentence have been completed and the time period for enforcement of criminal sentence has passed, the court lacks any authority to enforce the terms of the plea agreement, even if an aspect of that agreement goes beyond court's jurisdiction to enforce the sentence imposed. The plea agreement does not derive from the sentence in this cause, nor is the plea agreement part of the sentence. The plea

agreement is the agreement of the parties independent of the court's determination of a sentence.

It is not unusual for plea agreements to encompass within them other cases, whether civil or criminal, outside of the case in which the agreement has been formed. Under Wiatt's theory, a party to the agreement is free to breach the agreement with impunity, as Wiatt attempted to do in this case, once the court's jurisdiction over the sentence imposed has come to an end, even if the agreement encompasses a separate matter in which the court's jurisdiction to act continues, such as with regard to the anti-harassment orders at issue here.

The flaw in Wiatt's analysis can best be seen by viewing the implications of Wiatt's theory in a case where a criminal defendant seeks to enforce the plea agreement. For example, it is not uncommon for the prosecution to agree to not charge against the defendant other criminal matters under investigation in return for a defendant's guilty plea in a pending case. According to Wiatt's theory, the State could enter into such an agreement, wait for the sentence to be fully served and the court's jurisdiction over the sentence to end, and then with the same disregard of the agreement shown by the defendant in this instance, file additional

charges on matters which the State pledged not to do so. Since the jurisdiction of the court over the sentence would have ended, Wiatt's argument here would hold that the defendant in that instance could not then enforce the plea agreement and hold the State to its bargain.

However, certainly that would not be the outcome. The State having chosen to enter into the plea agreement would be bound to it as long as any matter pertaining to the agreement remained actionable by the court. Here, Wiatt chose to include within the plea agreement a commitment as to the anti-harassment orders in the civil cases at issue here. By making that choice, the plea agreement in the criminal case remains enforceable as long as the court retains jurisdiction to act in any matter encompassed by that agreement.

The plea agreement reached in this case encompassed more than just a criminal sentence. Wiatt stipulated to the entry of nine civil no contact orders, which the trial court had authority to enter under RCW 10.14, in exchange for the amended charges, sentencing recommendation, and agreement of the State to abandon a Motion for Discretionary Review to the State Supreme Court regarding Wiatt's more serious charges. CP 51-53. A review

of case law confirms that plea agreements which encompass matters outside of the criminal case are generally enforceable as long as the court had authority to act.

In Newton v. Rumery, 480 U.S. 386, 398, 107 S.Ct. 1187 (1987), the United States Supreme Court upheld the validity of an agreement to dismiss a criminal case in exchange for a release of any potential civil claims that the defendant had. The Court noted, “we conclude that this agreement was voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interest.” Id.

In State v. Lee, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997), the Washington State Supreme Court acknowledged that “agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of a valid plea agreement. “The circumstances of a valid plea will vary.” State v. Johnson, 23 Wn.App.490, 496, 596 P.2d 308 (1979)(Holding that the State violated a plea agreement by failing to give defendant the benefit of a bargain after he agreed to testify truthfully against others and did so).

In State v. Chambers, 163 Wn.App. 54, 62, 256 P.3d 1283 (2011), this Court acknowledged that a single agreement involving three criminal cases constituted a single indivisible plea agreement, therefore, the pleas on all nine counts contained in the three cause numbers were allowed to be withdrawn. On review, the State Supreme Court confirmed, “the objective intent of the parties was an indivisible, global plea agreement encompassing the February, May, and November charges.” State v. Chambers, 176 Wn.2d 573, 583, 293 P.3d 1185 (2013).

The cases above demonstrate that matters beyond the criminal sentence in any one case can be negotiated as part of a valid plea agreement. Here, in exchange for lenient charges and a lenient recommendation, Wiatt stipulated to the entry of civil protection orders. The trial court had authority to enter those orders under RCW 10.14, and the trial court properly considered factors for making those orders permanent. CP 70-71. The agreement to enter the protection orders was a valid part of the plea agreement.

3. The permanent anti-harassment orders imposed upon Wiatt on January 31, 2011 were issued by the court pursuant to the authority to issue such orders set forth in Chapter 10.14 RCW. Any technical procedural requirements or exercise of the court’s discretion in

making findings to support such orders that Wiatt complained did not occur were waived by Wiatt's stipulation to the entry of these orders pursuant to the plea agreement in this case and were a legal and validly negotiated condition of his plea agreement.

Wiatt contends that the anti-harassment orders imposed on January 31, 2011 were issued without authority of law because they were issued as a condition of the defendant's criminal sentence. However, a review of the defendant's Judgment and Sentence and the language of the anti-harassment orders themselves, shows that this claim is not accurate. CP 40-45, 79-81; CP 97-114.

Each order states that the court finds that, based upon the stipulation of Jerry Dale Wiatt, Jr. and the case record, respondent Wiatt has committed unlawful harassment, as defined in RCW 10.14.080. That statute authorizes a court to issue a civil anti-harassment protection order. RCW 10.14.080(3). Each order also states that the order is permanent based upon a finding of the court that Wiatt is likely to resume unlawful harassment of the petitioner when the order expires. RCW 10.14.080(4) authorizes the issuance of a permanent protection order on the basis of such a

finding. Thus, these orders were issued under existing authority of law.

A review of the Judgment and Sentence in this cause shows that the anti-harassment orders were not entered as conditions of the sentence. Nowhere in the Judgment and Sentence was the entry of those orders addressed. The defendant was ordered as a condition of his suspended sentence to comply with the requirements of those civil orders, but that had nothing to do with the entry of those orders. Given that each of the anti-harassment orders was issued for the protection of a victim of a crime for which the defendant had just pled guilty, such a requirement for compliance was reasonably crime-related and so appropriately a condition of suspended sentence.

At the trial court level, Wiatt argued that the trial court had not followed correct procedures for entry of the civil protection orders. CP 83-94. He does not specifically raise the issues on appeal; however, the validity of the civil protection orders falls under the general argument that the trial court erred in finding that he breached the plea agreement.

The arguments Wiatt raised fell into one of two categories: either technical procedural requirements of Chapter 10.14 RCW

which were not satisfied, such as the filing of a petition, or a lack of factual findings by the court to support the issuance of the order. As regards the latter complaint, it has been noted above that specific findings were included in each order entered. CP 97-114. Wiatt argued at the trial court that these were just part of the printed language of the order. However, the court signed each order to express the court's approval of the language used therein. In fact, nowhere is there a requirement for more detailed findings of fact in Chapter 10.14 RCW. Rather, RCW 10.14.080(6) simply states that in deciding whether to issue a civil anti-harassment protection order, the court shall have broad discretion to grant such relief as the court deems proper.

In any event, as regards any complaint as to technical, procedural requirements or the court's failure to exercise its discretion to make more detailed factual findings, such failures must be deemed as having been waived when a defendant stipulates to the entry of an order pursuant to a plea agreement whereby the defendant receives the benefit of his bargain. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-875, 50 P.3d 618 (2002).

An example of this rule can be found in State v. Majors, 94 Wn.2d 354, 616 P.2d1237 (1980). As part of a plea agreement, Majors stipulated to being a habitual offender. Then on appeal, Majors argued that the allegation he was an habitual offender, which he had stipulated to, was defective because a prior conviction must precede the commission of a subsequent offense under the habitual offender statute, and that had not occurred in Majors' case. The Washington Supreme Court rejected this claim of error, even though it was factually correct, because Majors had stipulated to being an habitual offender as part of the plea agreement, and he needed to be held to his bargain under these circumstances. Majors, 94 Wn.2d at 356-357. The court noted as follows:

. . . When a technical defect is not jurisdictional, plea agreements have been upheld where the plea was entered into voluntarily and knowingly, and the defendant was fully apprised of the consequences.

Majors, 94 Wn.2d at 358. Thus, Majors' stipulation pursuant to the plea agreement overruled any technical error involved in the court entering the order that had been the subject of the stipulation.

Another example can be found in State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013). In that case, Chambers

stipulated to an exceptional sentence pursuant to a plea agreement with the State. The sentencing court then imposed an exceptional sentence based upon the stipulation of the parties. However, the court erred in not checking a box indicating that an exceptional sentence was being imposed and in failing to enter findings of fact and conclusions of law justifying the exceptional sentence. Nevertheless, the State Supreme Court ruled that since Chambers received the exceptional sentence he stipulated to in the plea agreement, the technical defects involved in the imposition of the exceptional sentence did not justify vacating that sentence. Chambers, 176 Wn.2d at 587-588.

A third example can be found in State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000). In that case, Nitsch entered into a plea agreement whereby he pled guilty to 2 criminal charges and agreed with the State's calculation of the standard range, and then joined the State in recommending a sentence at the high end of the standard range for both counts running concurrently. However, on appeal Nitsch complained that his standard range had been erroneously calculated because two of his priors constituted the same criminal conduct. Thus, Nitsch claimed both an erroneous factual determination and a failure of the court to exercise its

discretion to make a determination regarding whether prior offenses were the same criminal conduct. Nitsch, 100 Wn. App. at 518-520. The Court of Appeals ruled that by choosing to stipulate to a certain standard range and by joining the State in making a recommendation for the sentence imposed pursuant to a plea agreement, the defendant waived any ability to make a claim of same criminal conduct on appeal. Nitsch, 100 Wn. App. at 521-523.

In the case of In re Personal Restraint of Goodwin, supra, the State Supreme Court clarified the law regarding the effect of a defendant's stipulation in a plea agreement when the defendant later challenges the outcome he stipulated to. The court held that a defendant's stipulation could not justify action by the court that was not authorized under existing law. However, if there was legal authority for the court's order, a defendant's stipulation to that order could constitute a waiver of errors involved in the process of issuing the order, such as when there is an error as to facts or an error involving the exercise of the trial court's discretion, or a failure of the court to exercise its discretion. In noting this distinction, the State Supreme Court relied upon cases such as Majors, supra, and

Nitsch, supra, which have been discussed above. Goodwin, 146 Wn.2d at 873-875.

In the present case, as noted above, the court's imposition of permanent civil anti-harassment orders was authorized by law, specifically RCW 10.14.080. Wiatt cannot show otherwise. The errors claimed by Wiatt all concerned the failure of the court to require certain procedural steps or to make certain factual findings in the exercise of the court's broad discretion in deciding on whether to issue such an anti-harassment order. However, the record is very clear that all of those failures claimed by the defendant derived from the defendant's stipulation to the entry of the orders. The State asserted that all of the defendant's victims were seeking these anti-harassment orders and the defense fully agreed. CP 66-68. The State asked that the court impose the orders without the presence of the victims based upon the agreement of the parties and the defense joined in that recommendation. CP 67-68 and 69. There was no reason for the court to make any further factual findings since the defendant was in agreement that the orders should be entered. Here, as in the cases cited above, the defendant received precisely what he asked

for, and consequently as in those cases he waived any of the claims of technical error in the entry of those orders.

The terms of the plea agreement did not exceed the statutory authority of the trial court. In exchange for his favorable recommendation, Wiatt agreed to the lawful entry of permanent anti-harassment orders. The agreement was valid, and the trial court correctly found that Wiatt is precluded from reaping the benefits of the agreement and then attacking important portions that agreed to as consideration exchange for the benefits that he received. The trial court has authority under RCW 10.14 to enter permanent anti-harassment orders.

4. The trial court correctly found that specific performance is an appropriate response to the breach of a plea agreement.

The trial court found that Wiatt's motions to vacate the anti-harassment protection orders constituted a material breach of the 2011 plea agreement and that the remedy of specific performance was an appropriate response to the material breach. CP 149.

Plea agreements are favored by the courts. State v. Armstrong, 109 Wn. App. 458, 461, 35 P.3d 397 (2001). The State of Washington recognizes a strong public interest in enforcing the

terms of plea agreements which are voluntarily and intelligently made. In re Personal Restraint of Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). A plea bargain is analogous to a contract and its terms are read as a contract. Armstrong, 109 Wn. App. at 461. As a party to a plea agreement, if a defendant fails to honor a commitment made as part of that agreement, he can be held to have breached the agreement. State v. Thomas, 79 Wn. App. 32, 35-36, 899 P.2d 1312 (1995).

If the court determines that a defendant has breached the plea agreement, the State has the option to either enforce or rescind the agreement. Thomas, 79 Wn. App. at 37. Specific performance is an appropriate remedy for breach of a plea agreement. State v. Tourtellotte, 88 Wn.2d 579, 585, 564 P.2d 799 (1977). In Tourtellotte, the Court found that the State was the breaching party to a plea agreement and noted, "If we do not enforce the agreement, the state would be permitted to play fast and loose with an accused constitutional rights to its advantage and his detriment." Id.; *citing*, Courtney v. State, 341 P.2d 610, 612 (Okla.Crim. 1959).

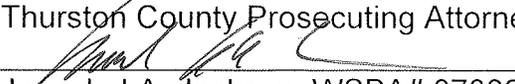
Like the State in Tourtellotte, Wiatt would have been permitted to play fast and loose with the terms of the agreement

that he voluntarily entered if the trial court had not enforced it. The State negotiated for and Wiatt agreed to important protections for his nine victims in exchange for the benefits that Wiatt received. The trial court correctly found that his attempts breached the plea agreement that he entered.

D. CONCLUSION.

Wiatt negotiated for and received a significant reduction in charges and a lawful sentence to misdemeanor charges in exchange for his agreement that the trial court enter nine permanent civil protection orders under RCW 10.14. The trial court correctly found that his attempts to vacate the protections orders was a material breach of the plea agreement that he entered into, and held that specific performance precluded him from attacking the validity of those agreements. Wiatt received the benefits and consequences that he negotiated for. This Court should affirm the trial court's ruling that Wiatt materially breached the 2011 plea agreement by attempting to vacate the civil orders.

Respectfully submitted this 10 day of May, 2018.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10<sup>th</sup> day of May, 2018, at Olympia, Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**May 10, 2018 - 11:53 AM**

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