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No. 51880-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ACKERMAN
Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 16-1-01859-34

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 6

 1. The prosecutor’s sentencing argument justified the State’s recommendation regarding a domestic violence evaluation and distinguished Ackerman from his co-defendant Garlock. Taken as a whole, the recommendation did not undercut the arranged plea agreement..... 6

 2. The State does not oppose an order correcting the clerical error regarding joint and several liability on restitution; however, there is no need to amend the judgment and sentence regarding personal property..... 15

D. CONCLUSION..... 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Sledge,
133 Wn.2d 828, 839-840, 946 P.2d 1199 (1997) 7, 8, 12

State v. Suleiman,
158 Wn.2d 280, 291-292, 143 P.3d 795 (2006) 9

Decisions Of The Court Of Appeals

State v. Carreno-Maldono,
135 Wn.App. 77, 85, 143 P.3d 343 (2006)..... 14

State v. Gutierrez,
58 Wn.App. 70, 76, 791 P.2d 275 (1990)..... 7

State v. Henderson,
99 Wn.App. 369, 374, 993 P.2d 928 (2000)..... 15

State v. Jerde,
93 Wn.App. 774, 780, 970 P.2d 781 (1999)..... 7, 8, 13, 14

In re Pers. Restraint of Mayer,
128 Wn.App. 694, 708, 117 P.3d 353 (2005)..... 15, 16

State v. Roberts,
185 Wn.App. 94, 95, 339 P.3d 995 (2014)..... 16

State v. Van Buren,
101 Wn.App. 206, 215-216, 2 P.3d 991 (2000)..... 13

State v. Williams,
103 Wn.App. 231, 236, 11 P.3d 878 (2000)..... 8, 12

State v. Xaviar,
117 Wn.App. 196, 199, 69 P.3d 901 (2003)..... 7, 13

United States v. Whitney,
673 F.3d 965, 971 (9th Cir. 2012) 11

U.S. Supreme Court Decisions

Santobello v. New York,
404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) 7

Statutes and Rules

RCW 7.68.310..... 16

RCW 9.41.098..... 16

RCW 9A.32.050(1)(a) 8

RCW 9.94A.431(2) 15

RCW 9.94A.535(3)(b) 9

RCW 9.94A.535(3)(h) 12

RCW 9.94A.535(3)(q) 10

Other Authorities

U.S. Const.amend XIV; Const. Art. 1 §3 7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a prosecutor breaches a plea agreement by arguing for the recommended sentence and distinguishing the defendant from his co-defendant without requesting or arguing for a greater sentence.

2. Whether remand for the purpose of correcting a clerical error is appropriate to reflect that the ordered restitution is joint and several with the co-defendant and to reflect an agreement to forfeit property.

B. STATEMENT OF THE CASE.

The body of Dakota Walker was found near the Margaret McKenny campground with multiple gunshot wounds. CP 1. The Thurston County Sheriff's Office investigated and ultimately questioned the appellant, Jonathan Ackerman, and Vincent Garlock regarding the crime. CP 2-3. Ackerman indicated that Garlock had been the shooter and Garlock indicated that Ackerman had been the shooter. CP 3. Ackerman and Garlock were charged as co-defendants with murder in the first degree. CP 5.

Ackerman eventually accepted a plea offer to an amended charge of murder in the second degree/domestic violence. CP 8. In addition to the amendment from first degree murder to second degree murder, the State agreed to recommend 240 months incarceration, with 36 months of community custody, with conditions to include restitution joint and severable with his co-

defendant, that he forfeit all property collected as evidence except family and other personal photographs belonging to him that were found in a van, have no contact with certain individuals and that he complete a domestic violence evaluation and follow all recommended treatment. CP 11-12. As part of the recommendation, the State further agreed to recommend that the sentence run concurrent to cause his other pending cases and any federal time that may be imposed arising out of his felony conviction. CP 12.

In support of his plea, Ackerman stated, "Between October 15, 2016, through October 20, 2016, I, Jonathan Ackerman, did intentionally cause the death of Dakota Walker with a firearm. The act occurred in Thurston County, Washington." CP 17. When the trial court asked, "as to Count 1 in the First Amended Information, murder in the second degree domestic violence, how do you plead today," Ackerman responded, "Murder – or guilty." 1 RP 16.¹ On the same day that as he plea of guilty in this case, Ackerman pled guilty to identity theft in the first degree, attempted theft of a motor

¹ For purposes of this brief, the Change of Plea hearing on January 9, 2018, will be referred to as 1 RP, the continuance hearing on March 1, 2018, will be referred to as 2 RP, and the Sentencing Hearing on April 13, 2018, will be referenced as 3 RP

vehicle and identity theft in the second degree in Thurston County cause number 16-1-01403-34. 1 RP 14-15.

Prior to sentencing, Ackerman's attorney was allowed to withdraw and he was appointed new counsel. CP 26-27, 2 RP 5. His new attorney, Renee Alsept, requested a continuance of the sentencing hearing to review whether to pursue a motion to withdraw the guilty pleas. 2 RP 5.

At the sentencing hearing, the trial court indicated, "this was charged as a DV. And paragraph 11 in the change of plea doesn't reference the relationship, so that's something we will want to address when we get to that matter." 3 RP 5. The trial court first considered the recommendations on cause number 16-1-01403-34. 3 RP 5-15. When the trial court reached this case, the parties first addressed the domestic violence designation. The trial court indicated that the statement in the plea of guilty could be amended or the parties could agree to remove the domestic violence designation and consent to the domestic violence conditions as requested. 3 RP 17.

After the prosecutor and defense attorney consulted, the State agreed to move forward to sentencing "as murder in the second degree without the domestic violence tag," and Ackerman

acknowledged that he had intended to plead guilty to murder in the second degree. 3 RP 21-22. The trial court then heard sentencing recommendations.

The prosecutor began by stating, "This is an agreed recommendation," and stated, "the agreed recommendation is for 240 months in prison with 36 months of community custody." 3 RP 24. The prosecutor then provided some background regarding the case indicating, "Dakota said that he had met Mr. Ackerman via an online dating app for men." 2 RP 26. In describing the victim, the prosecutor stated, "he seemed to be a vulnerable young man," later clarifying,

"I mean, nobody knew that he was missing during the time that his body lay in Capital Forest. So he was vulnerable, in that he wanted to get out. He maybe didn't have as much connection with all of his family members as you might hope for a 17 year-old young man."

3 RP 26.

The prosecutor discussed the fact that Ackerman and Garlock had engaged in mail thefts and took Dakota with them. 3 RP 27. She pointed out that when Dakota was found, "nobody seemed to notice that [he] was missing. He was living this transient lifestyle with Mr. Ackerman." 3 RP 27.

The prosecutor noted “when it became apparent that the suspects in this case were Mr. Ackerman and Mr. Garlock, both individuals gave a statement to law enforcement,” and “they both gave nearly identical statements with the only difference being pointing the finger at the other guy.” 3 RP 28. The prosecutor then noted, “it’s clear that Ackerman had the motive to kill Dakota. Ackerman was Dakota’s boyfriend. He was the one who was controlling Dakota.” 3 RP 29. She then indicated,

“One of the people who was closest to Dakota said that Mr. Ackerman threatened her and said he would put a bullet between her eyes and shoot her when she was least expecting it. And the State believes that is what happened to Dakota, that he was shot when he was least expecting it.”

3 RP 29.

The prosecutor continued to explain how the State arrived at the timeline and the State’s reasons for believing that Ackerman was the shooter. 3 RP 29-30. The prosecutor indicated, “I tell you all that Your Honor because I know the Court is going to be sentencing Mr. Garlock later. Ultimately this was a difficult case.,” before continuing to distinguish between Ackerman and Garlock. 3 RP 30-31. Near the conclusion of her argument, the prosecutor stated,

“We’ve not been able to get information about why was Dakota shot at that particular moment. The only thing I can deduce is that Mr. Ackerman shot Dakota when he was least expecting it, just like he threatened to do to others.”

3 RP 31.

The trial court then heard from the victim’s mother, who indicated that she “already knew that true justice would not be served,” and asked that the trial court impose the maximum sentence allowed. 3 RP 34, 36. The trial court indicated that he agreed with many of the things that the victim’s mother had said, and imposed the high end of the standard range, 295 months. 3 RP 42, 43. The trial court adopted all of the conditions recommended in the plea agreement. 3 RP 41. However, the judgment and sentence specifically noted that “defendant is not ordered to complete a domestic violence perpetrators treatment program.” CP 38. This appeal follows.

C. ARGUMENT.

1. The prosecutor’s sentencing argument justified the State’s recommendation regarding a domestic violence evaluation and distinguished Ackerman from his co-defendant Garlock. Taken as a whole, the recommendation did not undercut the arranged plea agreement.

The Fourteenth Amendment’s due process clause requires

the plea bargaining process to comport with principles of fairness. U.S. Const. amend XIV; Const. Art. 1 §3; Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Sledge, 133 Wn.2d 828, 839-840, 946 P.2d 1199 (1997). Whether a breach of a plea agreement has occurred is a question of law that is reviewed de novo. State v. Xaviar, 117 Wn.App. 196, 199, 69 P.3d 901 (2003).

Plea agreements are contracts and are analyzed under basic contract principles. Sledge, 133 Wn.2d at 838. Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the defendant's contract rights implicate due process considerations. Id. at 839. A prosecutor is entitled to present relevant facts that might not fully support the recommended sentence. State v. Gutierrez, 58 Wn.App. 70, 76, 791 P.2d 275 (1990). However, a prosecutor may not undercut the plea agreement explicitly or by conduct evidencing an intent to circumvent the terms of the agreement. State v. Jerde, 93 Wn.App. 774, 780, 970 P.2d 781 (1999).

When determining whether a prosecutor violated the duty to adhere to the plea agreement, 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 focus of the decision is on the effect of the State's actions, not the intent behind them." Sledge, 133 Wn.2d at 843 n.7. An objective standard should be applied to determine whether the State has breached the agreement. Jerde, 93 Wn.App. at 780.

Ackerman argues that the prosecutor breached the plea agreement in this case by making unsolicited remarks at sentencing about motive and premeditation, arguing the particular vulnerability of the victim, opining about lack of remorse, detailing the defendant's criminal past, and making argument regarding the domestic relationship between Ackerman and the victim. The prosecutor did not argue aggravating factors in this case. The recommendation, when objectively viewed in the context of the entire sentencing record demonstrates that the prosecutor merely explained the basis for the State's mid-range recommendation and took efforts to distinguish Ackerman from his co-defendant.

Murder in the second degree requires that the defendant act with intent to cause the death of the victim. RCW 9A.32.050(1)(a). Here the prosecutor explicitly stated that the investigation was not able to get information about why the victim was shot at the specific

time of the event. 3 RP 31. That statement explains the basis for the reduction to murder in the second degree. It did not amount to an argument that Ackerman was somehow more culpable than the average murder defendant.

The prosecutor's arguments described the context in which the victim was living at the time of his death, and she did describe him as "vulnerable," however, that comment did not rise to the level of arguing that an aggravating factor existed for a particularly vulnerable victim. 3 RP 26. The vulnerable victim aggravator is codified in RCW 9.94A.535(3)(b) and reads, "the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of consent."

In order for a victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime. State v. Suleiman, 158 Wn.2d 280, 291-292, 143 P.3d 795 (2006). While the prosecutor stated that the victim in this case "seemed to be a vulnerable young man," that statement was in the context of explaining that nobody knew he was missing and articulating difficulties in the investigation. 3 RP

26. The statement did not rise to the level of undercutting the plea agreement by arguing aggravating factors.

Ackerman further alleges that the prosecutor's statements regarding Ackerman attempting to deceive people after the victim's death constitutes an argument that Ackerman had a lack of remorse. 3 RP 30-31. Specifically, the prosecutor stated,

"he was sending test messages or someone was sending text messages to one of Dakota's friends, pretending to be Dakota, and saying things like, well, I've been shot; it's some gang members; I need help. Nobody knew that Dakota had been shot, except Mr. Garlock and Mr. Ackerman. And we know that Mr. Ackerman was at the scene of where Dakota's body was laying in the woods."

3 RP 30. Immediately, thereafter, the prosecutor explained,

"I tell all of that to Your Honor because I know the court is going to be sentencing Mr. Garlock later." 3 RP 30. Nowhere did the prosecutor argue that the facts demonstrated a lack of remorse or mention the aggravating factor in RCW 9.94A.535(3)(q). She merely explained the State's reasons for believing that Ackerman committed the crime. There was no argument whatsoever that the Ackerman's actions displayed an egregious lack of remorse.

Ackerman's criminal history was before the Court in both cases and part of the plea agreement involved a recommendation

that the sentence run concurrent to his other current case and any federal time imposed. Ackerman cites to United States v. Whitney, 673 F.3d 965, 971 (9th Cir. 2012), for the proposition that the State cannot recite criminal history that is already before the Court when making a recommendation. In Whitney, the Court stated “when the government obligates itself to make a recommendation at the low end of the guidelines range, it may not introduce information that serves no purpose but to influence the court to give a higher sentence.” Id. at 971. Here, the State agreed to recommend a mid-range sentence, and it is clear that the prosecutor’s purpose in discussing Ackerman’s history was to distinguish him from his co-defendant. The discussion was not part of an attempt to influence the Court to give a higher sentence.

The prosecutor’s comments in regard to the domestic relationship between the victim and Ackerman were part of the agreed recommendation. CP 11-12. While there was agreement at sentencing that the facts to support the plea were insufficient to support the domestic violence designation, there was no agreement in the record indicating that the State agreed not to ask for the domestic violence evaluation and follow up treatment that was part

of the joint recommendation that Ackerman agreed to. 3 RP 21-22; CP 11-12.

Despite the removal of the domestic violence designation, the prosecutor was within her rights pursuant to the plea agreement to present facts to justify domestic violence treatment during community custody. Nothing in the prosecutor's comments rose to the level of mentioning or arguing for a higher sentence based on the domestic violence aggravator pursuant to RCW 9.94A.535(3)(h). Moreover, the option of removing the domestic violence designation with the notion that the State could still recommend domestic violence treatment was specifically suggested by the trial judge. 3 RP 17. The specific reason that domestic violence treatment was excluded in the judgment and sentence does not appear in the record.

The cases that Ackerman relies on are distinguishable from the facts of this case. In State v. Sledge, the prosecutor agreed to a juvenile disposition and then "called and vigorously examined a probation officer on aggravating factors supporting an exceptional disposition based on manifest injustice." 133 Wn.2d at 830. In State v. Williams, the prosecutor agreed to recommend a standard range sentence, but then filed a sentencing memorandum that set

forth “aggravating circumstances,” stated the court’s authority to impose an exceptional sentence, and emphasized that public safety required “at least” the high end of the standard range. 103 Wn.App. at 233.

In State v. Xavier, the prosecutor agreed to a 240 month sentence, but at sentencing the prosecutor emphasized the graveness of the situation, reiterated charges that the State did not bring, noted that the State had forgone the opportunity to ask for a 60 year exceptional sentence and highlighted aggravating circumstances that would support an exceptional sentence. 117 Wn.App. at 198. The statements included a comment that the defendant was “one of the most prolific child molesters that [the] office had ever seen,” and specific comments that he exhibited no remorse and his conduct constituted a “monumental violation of trust.” Id. at 200.

In State v. Van Buren, the prosecutor referenced the agreed recommendation “as listed in the plea form,” and then stated, “if the Court is considering an exceptional sentence” before highlighting aggravating factors that were contained in a presentence investigation report. 101 Wn.App. 206, 215-216, 2 P.3d 991 (2000). In State v. Jerde, the prosecutors commented on a written

presentence report, and two separate prosecutors outlined aggravating factors for grounds upon which the court could rely in imposing an exceptional sentence, despite the agreement for a mid-range sentence. 93 Wn.App. at 777-779.

None of the comments made by the prosecutor in this case rose to the level of the conduct in those cases. Here, the prosecutor provided the reasons for the mid-range sentence, distinguished Ackerman from his co-defendant and provided reasons for the conditions that were agreed upon. The prosecutor did not cross the impermissible line where cases have found that a prosecutor implicitly undercut a plea agreement. The prosecutor cited no specific aggravating factors, did not mention or argue in any way that the Court could impose an exceptional sentence, and made no argument that protection of the community requires a higher sentence than agreed upon.

The prosecutor did not breach the plea agreement in this case. Her comments did not go beyond what was necessary to support the mid-range sentencing recommendation and did not attempt to show that the offense was more egregious than a typical crime of the same class. See, State v. Carreno-Maldono, 135 Wn.App. 77, 85, 143 P.3d 343 (2006). The facts supporting a

conviction for murder in the second degree will always be serious due to the nature of the offense.

While the trial court did impose the high end of the standard range against the agreed recommendation, it was very clear that he was swayed to do so by the heartbreaking statement of the victim's mother. 3 RP 41-42. A trial court is not required to follow the agreed recommendation. RCW 9.94A.431(2); State v. Henderson, 99 Wn.App. 369, 374, 993 P.2d 928 (2000). The fact that the trial court declined to follow the agreed recommendation in this case does not mean that the State breached the plea agreement. The sentencing record, taken in its entirety, demonstrates that the State did not, and that the trial court's sentence was influenced primarily by the statements of the victim's mother.

2. The State does not oppose an order correcting the clerical error regarding joint and several liability on restitution; however, there is no need to amend the judgment and sentence regarding personal property.

The agreed recommendation included joint and several restitution. CP 11-12. The trial court appears to have adopted that recommendation in his verbal ruling at sentencing. 3 RP 41. The proper remedy for clerical errors in the judgment and sentence is to remand for the sole purpose of correcting them. In re Pers.

Restraint of Mayer, 128 Wn.App. 694, 708, 117 P.3d 353 (2005).

As such the State does not oppose an order remanding for entry of an order reflecting that the restitution amount should be joint and several with the co-defendant.

The plea agreement also contained a specific notation that Ackerman agreed to forfeit all property collected as evidence, except for family and other personal photographs belonging to him that were found in the van. CP 11-12. “The authority to order forfeiture or property as part of a judgment and sentence is purely statutory.” State v. Roberts, 185 Wn.App. 94, 95, 339 P.3d 995 (2014). Several statutes authorize civil forfeiture of certain property used in or from the proceeds of a crime. *See generally*, RCW 9.41.098 (forfeiture of firearm used in felony); RCW 7.68.310 (forfeiture of property the acquisition of which is the direct or indirect result of commission of a crime). Items seized as evidence may be returned to the rightful owner when no longer needed as evidence. Therefore, the family and other photographs that were not agreed to be forfeited should be obtained from the seizing law enforcement agency and there should be no need for this Court to order the Superior Court to include language to that affect in the judgment and sentence.

D. CONCLUSION.

The prosecutor did not breach the plea agreement during the sentencing hearing because she did not ask for or imply that a greater sentence was required than that which was recommended. The State does not oppose an order clarifying that the restitution order is joint and several with the co-defendant. There is no specific authority cited or need for inclusion of the portion of the agreement regarding forfeiture in the judgment and sentence. The State respectfully requests that this Court affirm Ackerman's conviction and sentence.

Respectfully submitted this 30th day of January, 2019.

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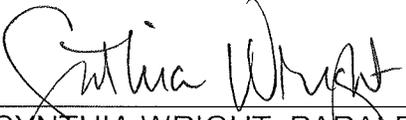
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of January, 2019, at Olympia, Washington.



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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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