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Court of Appeals
Division II
State of Washington
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NO. 53077-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT REHMUS,

Appellant.

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

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor breached the negotiated plea agreement in violation of Mr. Rehmus' right to due process of law.

2. The trial court imposed a vague community custody condition prohibiting Mr. Rehmus from having contact with any persons currently manufacturing or delivering controlled substances.

3. The trial court erred in imposing an alcohol-related prohibition as a condition of community custody because the prohibition was not crime-related and therefore exceeded the trial court's authority.

4. Scrivener's errors on the judgment and sentence fail to strike all discretionary legal financial obligations (LFOs) contrary to the court's intent to strike all discretionary LFOs.

5. The judgment and sentence improperly authorizes interest to accrue on Rehmus' unpaid, non-restitution, legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State breached the plea agreement by arguing details suggesting the court should exceed the agreed sentence proposed by the State and Mr. Rehmus?

2. Whether the trial court erred in imposing a vague community custody condition prohibiting Mr. Rehmus from contact with persons who

deliver controlled substances. Must Mr. Rehmus' case be remanded to strike the vague condition?

3. The trial court erred in imposing an alcohol-related community custody condition prohibiting Mr. Rehmus from entering bars or places where alcohol is the chief sale as the prohibition was not crime-related. Must Mr. Rehmus' case be remanded to strike the condition?

4. A defendant is entitled to a judgment and sentence free of scrivener's errors. The court expressed its intent to strike all discretionary LFOs yet failed to do so. Must Mr. Rehmus' case be remanded to strike the remaining discretionary LFO scrivener's errors?

5. By statute, interest does not accrue on unpaid legal financial obligations other than restitution. Yet, Rehmus' judgment and sentence authorizes the accrual of interest on Rehmus' non-restitution legal financial obligations. Must Rehmus' case be remanded to strike the improper interest accrual provision?

C. STATEMENT OF THE CASE

Careful and thoughtful plea negotiations resulted in a joint agreement for Mr. Rehmus to plead guilty to vehicular homicide with an agreement for an exceptional sentence downward. CP 15-29; RP 9/25/18 at 2-3; RP 10/5/18 at 2. But at sentencing, the prosecutor implicitly

argued for a harsher standard range sentence. RP 10/5/18 at 3-4. The court imposed the harsher sentence. RP 10/5/18 at 19; CP 32.

The trial court heard Mr. Rehmus' post-sentencing motion to vacate the judgment and sentence because of the prosecutor's breach of the plea agreement. CP 42-64; RP 10/26/18 at 2-3. The court denied the motion. RP 10/26/18 at 14.

Because the prosecutor breached the plea agreement, Mr. Rehmus is entitled to a new sentencing hearing and the opportunity to withdraw his plea.

At the sentencing hearing, the court said it would not impose non-mandatory legal financial obligations (LFOs). RP 10/5/18 at 20. Yet, the court imposed two non-mandatory LFOs: a \$200 filing fee and a \$100 contribution to the Kitsap County Witness Fund. CP 37.

The court ordered that the interest on non-restitution LFOs bear interest from the date of entry of the judgment and sentence at the rate applicable to civil judgments. CP 37.

If Mr. Rehmus does not choose to withdraw his plea, on remand, the court should strike two community custody conditions. One condition is an alcohol condition that does not apply, and the other condition is

vague because it does not clarify what it meant to deliver a controlled substance. CP 36.

Mr. Rehmus appeals his judgment and sentence. CP 65.

D. ARGUMENT

Issue 1: The prosecution may not discourage the court from following the terms of a plea agreement, either directly or by implying a harsher sentence is appropriate. Here, the prosecutor discouraged the court from following the agreed recommendation by focusing its sentencing argument on dissatisfaction with the plea agreement because of potential suppression issues. Did the prosecution breach the plea agreement?

- a. The State is prohibited from inducing a guilty plea by promising to recommend a sentence as part of the plea agreement and then failing to make the promised recommendation.*

When a criminal defendant pleads guilty with the understanding that the prosecution will recommend a particular sentence, the defendant has given up important constitutional rights based on the expectation that the prosecution will adhere to the terms of the agreement. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). The defendant's purpose in entering into a plea agreement with the prosecution is based on the expectation that the prosecution will make a good faith recommendation at sentencing as promised. *Id* at 88. The

prosecution's breach of a plea is a structural error that is not subject to harmless error review. *Id.* at 87-88.

A breach of a plea agreement is a constitutional issue that may be raised for the first time on appeal. *State v. E.A.J.*, 116 Wn. App. 777, 785, 67 P.3d 518 (2003); RAP 2.5(a)(3). If the State has breached the plea agreement, the disposition cannot stand. *Id.*

A plea agreement is a contract in which ambiguities are construed against the drafter. *United States v. Transfiguracion*, 442 F.3d 1222, 1227-28 (9th Cir. 2006); *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Unlike commercial contracts, plea agreements require a criminal defendant to waive fundamental constitutional guarantees. *Transfiguracion*, 442 F.3d at 1227; *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003); U.S. Const. Amends. V, VI, XIV; Wash. Const. art. I, §§ 3, 22. Therefore, due process considerations mandate the prosecution's rigorous compliance and "require a prosecutor to adhere to the terms of the agreement." *Harrison*, 148 Wn.2d at 556 (citing *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986)); see also *Transfiguracion*, 442 F.2d at 1228.

The State is required to operate within “the literal terms of the plea it made.” *Transfiguracion*, 442 F.2d at 1228. Ambiguities are construed in favor of the defendant. *Id.*

“The State’s duty of good faith requires that it not undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement.” *Carreno-Maldonado*, 135 Wn. App. at 83. A defendant has a right to have the State act in good faith even though the sentencing judge is not bound or even influenced by the prosecutor’s recommendation. *Id.* at 88.

In *Carreno-Maldonado*, the prosecution agreed to recommend a low-end sentence for some counts, and clearly stated its sentencing recommendation on the record, but it breached the plea agreement by reciting “potentially aggravating facts.” 135 Wn. App. at 85. The judge insisted that he was not affected by the prosecutor’s remarks but the reviewing court reasoned that the judge’s belief did not matter, because “the fact that a breach occurred” is the only relevant consideration and harmless error review does not apply. *Id.* at 88.

b. The State breached the plea agreement.

The State induced Mr. Rehmus’ plea by a clear promise for an explicit sentencing recommendation. The “agreed” recommendation was

to ask the court to impose an exceptional sentence downward to 65 months on a standard range of 78-102 months. RP 10/5/18 at 2; CP 15-16. At sentencing, the prosecutor explained he was disappointed by the plea recommendation but that the threat of losing the case altogether made it something he could reluctantly accept. RP 10/5/18 at 2-3.

The prosecutor did not explain that careful or thoughtful negotiations had occurred. RP 10/5/18 at 2-4. Instead, the prosecutor meekly responded that he, “thought there was a very high risk that we could no succeed [in fighting a defense] motion.” RP 10/5/18 at 3. The only “support” he offered for the plea agreement was it was a compromise with the defense. RP 10/5/18 at 4.

After hearing the prosecution's timid assertion of agreement to the recommended exceptional sentence downward, the court imposed a harsher sentence than the agreed recommendation. RP 10/5/18 at 19. It ordered Mr. Rehmus to serve 84 months in prison, instead of the 65 months exceptional downward agreed to by the parties. RP 10/5/18 at 2, 19. CP 16, 32.

The Rehmus sentencing discussion is similar to the improper sentencing argument in *Carreno-Maldonado*, where the prosecutor agreed to recommend a low-end sentence for some counts, but “recited

potentially aggravating facts” on other counts. 135 Wn. App. at 80-81. Like *Carreno-Maldonado*, the prosecutor undermined the agreement by failing to sell the agreed recommendation and actually undermined it by implicitly expressing its unhappiness with the forced compromise with the defense. RP 10/5/18 at 2-4.

The prosecutor breached the plea with his timid support of the agreed exceptional sentence downward. The court imposed a sentence greater than the prosecution's promised recommendation under the plea bargain because the prosecutor breached the agreement by not assertively supporting it and, rather, implicitly undermining it.

c. The breach of the plea requires remand for further proceedings.

Where the State breaches a plea agreement, the defendant has the choice to either withdraw his plea or receive specific performance of the agreement. *Harrison*, 148 Wn.2d at 557. “[T]he defendant is entitled to a remedy which restores him to the position he occupied before the State breached.” *Id.* Specific performance of the plea agreement “requires the State to make its promised recommendation” at a new hearing, and a different judge should preside over the new hearing. *Id.*

Issue 2: The court exceeded its statutory authority by prohibiting Mr. Rehmus from entering any place where alcohol is the chief sale item because the condition is not crime related.

A court may impose only a sentence that is authorized by statute.

State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). “If the trial court exceeds its sentencing authority, its actions are void.” *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

The court's decision to impose crime-related community custody conditions is reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). *See also, State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Prohibitions are usually upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in

imposing others. RCW 9.94A.703. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Under RCW 9.94A.703(3)(e), a sentencing court may order an offender to refrain from consuming alcohol; therefore the court had discretion to order Mr. Rehmus “to comply with any crime-related prohibitions” including to bar consumption of alcohol, which is specifically delineated in the statute. Such a condition is authorized regardless of whether alcohol contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (examining former RCW 9.94A.700, which contained the same operative language as RCW 9.94A.703(3)(e)).

However, the court’s condition prohibiting Mr. Rehmus entry into locations where alcohol is the principal item of sale is valid only if it is a crime-related prohibition. RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Such a prohibition must be supported by evidence

showing the factual relationship between such prohibition and the crime being punished.

Substantial evidence must support a determination that a condition is crime-related. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007). Here, no evidence showed alcohol played any role in contributing to Mr. Rehmus' offense or that alcohol was in any way related to its circumstances. No affirmative evidence showed Mr. Rehmus had used alcohol or was under its influence at the time of the offenses. *See also, State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

Although the SRA permits a court to prohibit the consumption of alcohol, the imposition of the condition that Mr. Rehmus enter "no bar or place where alcohol is the chief item of sale" was erroneous because the condition was not "directly relate[d]" to the circumstances of the crimes of conviction. *Parramore*, 53 Wn. App. at 531.

In *State v. Jones*, the court struck community custody conditions requiring the defendant to participate in alcohol and mental health treatment and counseling. Jones pleaded guilty to first-degree burglary and "other crimes," and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. *Jones*, 118 Wn. App. at 202-03. Nothing suggested that alcohol

contributed to the defendant's offenses. *Id.* at 207- 08. On appeal, the Court found the trial court had authority to prohibit alcohol consumption but it could not order the defendant to participate in alcohol counseling because the counseling was not related to the crime. *Id.* at 206-08.

Similarly, the condition barring Mr. Rehmus from entry into places where alcohol is the chief item of sale was not crime-related. CP 4-13. There was no evidence in the record that the charges were augmented, precipitated, or influenced in any way by alcohol. CP 4-13. Because there was no evidence, and the court did not specifically find that alcohol contributed to the offenses, the prohibition was not a valid crime-related prohibition. RCW 9.94A.030(10).

Where the trial court exceeds its authority in imposing an invalid condition of sentence, the remedy is to remand to the trial court and direct the court to strike the offending condition or conditions. *See Jones*, 118 Wn. App. at 212 (“On remand, the trial court shall strike the condition pertaining to alcohol counseling.”). This Court must remand the matter to the court with the direction that the lower court strike the challenged condition as being unrelated to the crime for which Mr. Rehmus pled guilty.

Issue 3: The broad community custody condition prohibiting Mr. Rehmus from associating with people who deliver controlled substances, even if it is legal for them to do so, is vague, overbroad, and subjects Rehmus to arbitrary enforcement.

The prohibition against Mr. Rehmus having contact with any persons who are currently delivering controlled substances is too broad and too vague, thus, subjecting Rehmus to arbitrary enforcement. The condition must be stricken.

The due process vagueness doctrine requires that citizens have fair warning of proscribed behavior. U.S. Const. Amend. XIV; art. I, § 3; *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A community custody condition does not provide fair warning if (1) “it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition” or (2) “it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 679, 425 P.3d 847 (2018). It is not necessary that a condition provide “complete certainty the exact point at which his actions would be classified as prohibited conduct.” *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

Conditions of community custody may be challenged for vagueness for the first time on appeal. *Padilla*, 190 Wn. at 677. Courts review a

community custody condition for abuse of discretion and will reverse if the condition is manifestly unreasonable. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). A trial court necessarily abuses its discretion by imposing an unconstitutionally vague community custody condition. *Padilla*, 190 Wn.2d at 677.

The trial court abused its discretion in imposing an unconstitutionally vague condition. The vague condition prohibits Mr. Rehmus, while on community custody, from contact with any persons who are currently manufacturing or delivering controlled substances. CP 36. See list of controlled substances in RCWs 69.50.204, 69.50.206, 69.50.208, 69.50.210, and 69.50.212. Controlled substances find legitimate use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals. RCW 69.50.101(o).

The court condition prohibits Mr. Rehmus from associating with otherwise pro-social people merely because they, for example, are a pharmacist or a pharmacy technician whose job it is to dispense, or deliver, controlled substances to persons with legitimate prescriptions for controlled substances. Literally interpreted, Mr. Rehmus would violate the condition if, when visiting a friend at the hospital, the friend received a prescribed dose of a controlled substance from an attending nurse. Mr.

Rehmus would also violate the condition if he went to a Safeway pharmacy check out window to pay for Band-Aids and milk and a pharmacy technician who also handles controlled substances as part of her job rang up the transactions.

The vague condition does not provide Mr. Rehmus with “sufficiently ascertainable standards to protect against arbitrary enforcement.” *Padilla*, 190 Wn.2d at 677. With this broad, arbitrary community custody condition, Mr. Rehmus is an open book for arbitrary community custody violations. His case should be remanded to strike the condition.

Issue 4: Indigent Mr. Rehmus’ case should be remanded to the trial court to strike pre-printed discretionary legal financial obligations from the judgment and sentence.

At sentencing, the court indicated its intent to strike all discretionary legal financial obligations from the judgment and sentence. RP 10/5/18 at 20. Yet the court failed to strike two pre-printed discretionary LFOs from the pre-printed list on the judgment and sentence form. CP 37. The oversight is a scrivener’s error requiring remand for correction.

Scrivener’s errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record.

Clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. *State v. Coombes*, 191 Wn. App. 241, 255, 361 P.3d 270 (2015); *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

The trial court found Mr. Rehmus indigent both at trial and on appeal. CP 14, 82-83. The court recognized it should strike all discretionary LFOs. Mere oversight prevented the court from doing so. Remand is necessary to correct the trial court's oversight.

The legislature has mandated that a court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)). This imperative language prohibits a trial court from ordering discretionary LFOs absent an individualized inquiry into the person's ability to pay. *Id.* The *Blazina* court suggested that an indigent person likely could never pay LFOs. *Id.* (“[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs”).

The \$200 filing fee used to be statutorily mandated. Under former RCW 36.18.020(2)(h), upon conviction, an adult criminal defendant was liable for a filing fee of \$200. However, House Bill 1783 modified

Washington's system of legal financial obligations. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). It amended former RCW 10.01.160(3) to expressly prohibit a court from imposing discretionary costs on indigent defendants. LAWS OF 2018 ch. 269 §6 (3). The formerly mandatory criminal filing fee became a discretionary cost. LAWS of 2018 269 § 17 (2)(h). The \$200 criminal filing fee was a discretionary fee that should have been stricken given the court's articulated intent to strike all discretionary LFOs.

The contribution to the Kitsap County Expert Fund is also a discretionary fee. CP 37. No statute authorizes imposition of general costs for expert witnesses. The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). The court may not order an offender to pay legal financial obligations (LFOs) that are not authorized by statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011). Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160.

At sentencing, the state made no mention of incurred costs for expert witnesses. The language of the judgment and sentence, a

“contribution to the Kitsap County expert witness fund” suggests nothing more than a donation entirely at the court’s discretion. The court overlooked the donation when it failed to strike the discretionary fee. CP 37.

The remedy for a scrivener’s error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). This court should remand Mr. Rehmus’ case to strike the remaining discretionary LFOs.

Issue 5: The court must modify Mr. Rehmus’ judgment and sentence to eliminate interest accrual on the non-restitution legal financial obligations.

In 2018, the legislature amended former RCW 10.82.090 to prohibit interest accrual on non-restitution LFOs as of June 7, 2018. LAWS OF 2018 ch. 269, § 1.

The court sentenced Mr. Rehmus on October 5, 2018, well after the amended law went into effect. RP 10/5/18; CP 31. At sentencing, the court failed to strike the following paragraph:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.

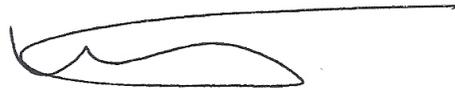
CP 37.

Because the court failed to strike the boilerplate interest language from the judgment and sentence, Mr. Rehmus is subject to improper interest accrual on his LFOs. Remand to strike any accrued and accruing interest is required. *Ramirez*, 191 Wn.2d at 746-47.

E. CONCLUSION

This court should remand Mr. Rehmus' case for a new sentencing hearing and give Rehmus the opportunity to withdraw his plea. If Mr. Rehmus does not withdraw his plea, the court should use its discretion to strike the remaining discretionary LFOs and to strike the two vague community custody conditions.

Respectfully submitted September 29, 2019.



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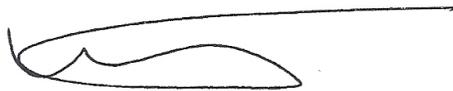
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Kitsap County Prosecutor's Office, at kcpa@co.kitsap.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Scott Rehmus, DOC#412776, Monroe Corrections Center, PO Box 777, Monroe, WA 98272.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 29, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Scott Rehmus, Appellant

LAW OFFICE OF LISA E TABBUT

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