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State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT BRIAN REHMUS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-01264-3

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BRIEF OF RESPONDENT

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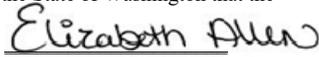
CHAD M. ENRIGHT  
Prosecuting Attorney

JOHN L. CROSS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 328-1577

**SERVICE**

Lisa Elizabeth Tabbut  
Po Box 1319  
Winthrop, Wa 98862-3004  
Email: ltabbutlaw@gmail.com

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DATED November 26, 2019, Port Orchard, WA   
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Office ID #91103 kcpa@co.kitsap.wa.us

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the prosecutor undercut the plea agreement by providing the trial court with the information the statutes require him to provide and where the trial court rejected the agreement based on a fact that was not advanced by the prosecutor?

2. Whether the trial court erred in imposing conditions of sentence that addressed the circumstances of the crime and were understandable to an ordinary person and not likely to allow arbitrary enforcement?

3. Whether certain legal financial obligations and an interest provision should be stricken from the judgment and sentence?

CONCESSION OF ERROR.

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Scott Brian Rehmus was charged by information filed in Kitsap County Superior Court with vehicular homicide alleged to have been proximately caused by intoxication. CP 1-2.

Rehmus pled guilty as charged. CP 21-29 (statement of defendant on plea of guilty). In so pleading, Rehmus admitted he had driven with an

illegal level of THC in his system and that was the proximate cause of the victim's death. CP 29. The plea agreement recited a standard range of 78-102 months. CP 15. That agreement included that the state would recommend a downward departure from the standard range of 65 months. CP 16.

The defense advanced that Rehmus had signed the statement of defendant "voluntarily, intelligently, and knowingly." RP, 9/25/18, 2. Rehmus agreed that he had gone over the plea agreement with his attorney, had no questions about the document, and had freely and voluntarily signed it. RP, 9/25/18, 2-3. When the trial court said of the plea agreement that it is not bound to follow the recommendations therein, Rehmus acknowledged that he understood. Id. Rehmus similarly agreed that he had reviewed and voluntarily signed the statement of defendant. RP, 9/25/18, 3-4.

At sentencing, the prosecutor advised the trial court that there was "an agreed exceptional to 65 months" on a standard range of 78 to 202 (sic) months. RP, 10/5/18, 2-3. The prosecutor justified the downward departure to the court by noting that the defense had raised a dispositive motion that the state may lose. RP, 10/5/18, 3. Queried by the trial court, the prosecutor confirmed that Rehmus' driver's license was suspended at the time of the accident. RP, 10/5/18, 3-4. The prosecutor again told the

trial court that the recommendation was a “compromise with the defense.” RP, 10/5/18, 4. The probable cause materials submitted by law enforcement establish that in fact Rehmus’ driver’s license was suspended at the time of the incident. CP 13.

The question of driving with a suspended license came up as the trial court rejected the recommendation of the parties and imposed a standard range sentence of 84 months. CP 32; RP, 10/5/18, 19 (“He was not even supposed to be driving”). The judgment and sentence was entered on October 5, 2018. CP 31. Rehmus did not file a notice of appeal until January 10, 2019, 97 days after entry of the judgment and sentence. CP 65.

After sentencing, Rehmus sought relief from judgment alleging that the prosecutor had undercut the plea agreement and that the trial court had violated the real facts doctrine by referring to the fact of the suspended license in imposing sentence. CP 42. Hearing on the motions resulted in the trial court setting an evidentiary hearing on the issue of the suspended license. At the evidentiary hearing, the state presented a certified copy of Rehmus’ driving record indicating the suspended status on the date of the incident. RP, 12/10/18, 4. Rehmus testified that he did not think he was suspended at the time. RP, 12/10/18, 6-7. The trial court admitted the driving record and denied the real facts motion. RP,

12/10/18, 14-15.

On January 25, 2019, this court responded to the notice of appeal by questioning the appealability of the superior court's judgment and sentence pursuant to RAP 2.2(a). This court ordered a written response on the appealability issue. Rehmus provided a response asserting the substantive issue for which he sought review. On February 13, 2019, this court found that this appeal is as a matter of right and directed the Clerk to perfect the appeal. This court neither addressed nor ruled on the question of the 97 days between the judgment and sentence and the notice of appeal.<sup>1</sup>

## **B. FACTS**

As indicated, Rehmus admitted the elemental facts of the offense in paragraph 11 of the statement of defendant on plea of guilty. The police reports by which probable cause was established are in the record. CP 4-13. In the plea agreement, Rehmus stipulated that the trial court could consider the certification of probable cause as "material facts" at sentencing. CP 16.<sup>2</sup>

The certificate of probable cause indicates that Rehmus was

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The present notice of appeal says that review of the judgment and sentence is sought. CP 65.

<sup>2</sup> The trial court read the probable cause statement before the sentencing hearing. RP,

driving when he struck a jogger who was in a marked crosswalk. CP 4. The jogger died of her injuries. Id. Rehmus admitted to law enforcement that he was speeding at the time of the accident. Id. He said he briefly looked down to place a soda pop in the cup holder, looked up and saw the jogger in the cross walk. Id. He braked too late and hit the jogger. Id. The Washington State Patrol Laboratory found a THC level above the legal limit in Rehmus' blood. Id.

As noted above, the probable cause materials also established that Rehmus had a suspended driver's license at the time of the incident. CP 13.

### **III. MOTION TO DISMISS APPEAL**

As noted, the notice of appeal in this matter was filed 97 days after the entry of judgement. CP 31 (J&S filed October 5, 2018); CP 65 (Notice of appeal filed January 10, 2019). Pursuant to RAP 10.4(d), the state includes this motion, which, if granted, would preclude hearing on the merits.

RAP 5.2(a) provides that the notice of appeal in this matter "must" be filed "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed." Rehmus is 67 days too late under the plain language of the rule. The time limit may be extended by

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10/5/18, 2.

motion of the court or a party. RAP 18.8(a). But extension of the time to file a notice of appeal is warranted only in extraordinary circumstances in order to prevent a gross miscarriage of justice. RAP 18.8(b).

It is established that on the present record Rehmus could have appealed the circumstances of his plea by timely direct appeal and Rehmus could have independently and timely appealed the denial of his post-judgment motion. *See State v. Gaut*, 111Wn. App. 875, 46 P.3d 832 (2002). But Rehmus did not timely appeal the judgment and has not appealed the denial of his post-judgment motion. The “desirability of finality of decisions” (RAP 18.8(b)) should control and the matter should be dismissed.

#### **IV. ARGUMENT**

##### **A. IN PROVIDING THE TRIAL COURT WITH STATUTORILY REQUIRED SENTENCING INFORMATION, THE PROSECUTOR DID NOT BREACH THE PLEA AGREEMENT.**

Rehmus argues that the prosecutor undercut the agreed sentencing recommendation and thereby breached the plea agreement. This claim is without merit because the prosecutor did no more than provide the trial court with the reasons for the agreement and with statutorily required

sentencing information.

The prosecution breaches a plea agreement when she “undercut[s] the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement.” *State v. Ramos*, 187 Wn.2d 420, 433, 387 P.3d 650 (2017). The prosecutor’s actions and comments are viewed objectively, “focusing on the effect of the State’s actions, not the intent behind them.” *Ramos*, 187 Wn.2d at 433, *citing State v. Sledge*, 133 Wn.2d 828, 843 n.7, 947 P.2d 1199 (1997). Review is *de novo*, looking at the entire sentencing record. *Id.*

That record shows that the prosecutor here in fact recommended to that Rehmus receive the downward exceptional sentence agreed to in the plea agreement. Even if the prosecutor’s remarks in this case tended to show his dissatisfaction with the plea, he was in fact required by the SRA to provide sentencing information to the trial court.

Here, the parties pitched an exceptional sentence to the trial court. A sentencing court may impose a sentence that is outside the standard range if it finds, considering the purpose of the chapter, that substantial and compelling reasons justify the imposition of an exceptional sentence. RCW 9.94A.535; *State v. Mulligan*, 87 Wn.App. 261, 264, 941 P.2d 694 (1997), *review denied* 134 Wn.2d 1016 (1998). A trial court that departs from the standard range must enter findings of fact and conclusions of law

setting forth the reasons for the departure. RCW 9.94A.535.

RCW 9.94A.431(1) requires that when the parties reach a plea agreement, the prosecutor must advise the court of “the nature of the agreement and the reasons for the agreement.” That statute also obligates the prosecutor to “inform the court on the record whether the victim or victims of all crimes against persons. . .covered by the plea agreement have expressed any objections to or comments on the nature of and reasons for the plea agreement.” RCW 9.94A.431(1). Finally, “The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea.” RCW 9.94A.431(2).

Thus, the prosecutor here was obliged by statute to tell the trial court that the agreement was a compromise that resulted from negotiations that included the possibility of a potential dispositive defense motion. And the prosecutor was further statutorily tasked with advising the trial court that the victims of the homicide were not happy about the recommended disposition. In fact, the prosecutor was twice compelled since he had to both justify the exceptional sentence and advise the trial court of the nature of and reasons for the agreement.

Moreover, neither the dissatisfaction of the state nor the victims moved the trial court. The trial court did not follow the agreement

because it determined independently that Rehmus “should not even have been driving.” Rehmus’ suspended status was the fact that drove the trial court’s decision, not any misgivings by the state or the victims. Thus even if the prosecutor’s remarks may be characterized as arguing against the agreement, which is doubtful, objectively, that argument did not change the trial court’s mind—it was changed by something else that the prosecutor did not bring up.

The doubt that the prosecutor’s remarks herein resulted in undercutting the agreement can be seen in *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017). The case involves a home invasion type robbery that devolved into heinous murders of two parents and their two sons, one a six-year-old boy. These perpetrators were 14 years-old at the time. The case engages a long analysis of appropriate sentencing under *Miller v. Alabama* and its progeny.

Ramos claimed in the mix of issues that the prosecution had undercut the plea agreement. Ramos was before the trial court for a second sentencing and was asserting the mitigation of youth to justify a lighter sentence. *Ramos*, 187 Wn.2d at 456-57. The prosecutor responded to that circumstance by pointing out to the sentencing judge, who was new to the case and did not well-know the facts, that the record also included aggravating factors. *Id.* The prosecutor advanced that the

young child murdered was particularly vulnerable and incapable of resistance due to extreme youth. *Id.*

The Supreme Court found no breach by that conduct. *Ramos*, 187 Wn.2d at 458. It was noted that “[t]he State had an obligation to participate in Ramos' second resentencing and ensure the court made a fully informed decision.” *Id.* The same sentiment applies in the present case. Every prosecutor who makes an agreement has the same statutory obligations. A trial judge sentencing after a plea is similarly situated to a new judge for resentencing—neither has had an opportunity to hear all the facts developed at trial.

Crucial to the Supreme Court’s analysis was that “in reaching its decision, the court did not discuss Bryan Skelton's particular vulnerability” but, rather, focused on the heinous nature of the offense. *Ramos*, 187 Wn.2d at 458. In the present case, the trial court did not say that the chagrin of the prosecutor and the victims controlled its decision. The trial court was aghast that Rehmus’ driving had killed a person when he was not even allowed to drive. Nothing the prosecutor said, objectively viewed, swayed the trial court to this conclusion. Thus, viewed objectively, the prosecutor’s remarks did not have the effect of undercutting the plea agreement. This issue fails.

**B. THE TRIAL COURT'S IMPOSITION OF COMMUNITY COUSTODY CONDITIONS WAS NOT AN ABUSE OF DISCRETION.**

Rehmus next claims that the trial court was without authority to prohibit him from entering places where alcohol is the chief item of sale and for ordering the vague condition that he not contact persons who deliver controlled substances because that category includes pharmacists. This claim is without merit because both provisions are crime related and the second is not too vague on its face and Rehmus, who killed a pedestrian while impaired by a legal substance, should be monitored as to any and all drugs he ingests.

On this offense, Rehmus was properly ordered to abide 18 months of community custody. CP 34. Moreover, Rehmus was convicted on the driving while impaired prong of the vehicular homicide statute, admitting in his plea that he was over the legal limit of marijuana ingestion. The present complaints fall under the "Alcohol/Drugs" subdivision of supervision requirements. CP 36. Rehmus was ordered to "enter no bar or place where alcohol is the chief item of sale" and to "have no contact with any persons who are currently manufacturing or delivering controlled substances." CP 36.

The imposition of conditions of supervision is reviewed for abuse of discretion. *State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018).

Conditions will not be reversed unless manifestly unreasonable. Id.

A trial court may impose any crime-related prohibition. RCW 9.94A.703(3)(f). “‘Crime-related prohibition’ means 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). But given the abuse of discretion standard, “[s]uch conditions are usually upheld if reasonably crime related.” *Ngugen*, 191 Wn.2d at 683. Thus, “[a] court does not abuse its discretion if a “reasonable relationship” between the crime of conviction and the community custody condition exists.” *Nguyen*, 191 Wn.2d at 684. There need be only “some basis for the connection.” Id.

***1. Authority to order Rehmus not to enter places where alcohol is the chief item of sale.***

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. See RCW 9.94A.703; *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). RCW 9.94A.703(2) lists conditions that the court “shall order” unless specifically waived by the court. RCW 9.94A.703(2)(c) requires the court to order an offender to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” RCW 9.94A.703(3) sets forth discretionary conditions that

the court may impose. The conditions that may be imposed include the requirement that the offender “[r]efrain from possessing or consuming alcohol.” RCW 9.94A.703(3)(e). The sentencing court is authorized to order an offender to refrain from consuming alcohol, regardless of whether alcohol contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

Rehmus is correct that the prohibition on frequenting places where alcohol is sold must be crime-related. *State v. Garcia*, 199 Wn. App. 1031 (2017) (unpublished, see GR 14.1(a)), *citing Jones*, 118 Wn. App. at 206-07). Here, however, here the trial court was justified in imposing this condition.

Rehmus was charged with and pled guilty to driving with a THC concentration of 5.00 or higher and thereby proximately causing death. CP 1 (information); CP 29 (admission in paragraph 11 of plea form). This is the “under the influence” prong of vehicular homicide. RCW 46.61.520(1)(a). A vehicular homicide defendant will have her license to drive revoked and is eligible to receive a license only if the department of licensing finds satisfactory progress in an approved alcohol treatment program. RCW 46.61.524.

Rehmus killed a person by driving while impaired. As a result, the trial court imposed all the conditions aimed at substance abuse. CP 36. Moreover, Rehmus will not be able to reinstate his driving privilege unless

he shows satisfactory progress in a treatment program, which program is will include the very prohibition the trial court imposed.

As our Supreme Court has held, it is not an abuse of discretion to impose a “condition [that] has more to do with [the defendant’s] inability to control her urges and impulsivities than it does with the specific facts of her crimes.” *Nguyen*, 191 Wn.2d at 687 (alteration added). The trial court did no more in the present case than listen to the needs of the defendant and give credence to the Supreme Court’s holding. There was no abuse of discretion.

**2. *Persons who are currently manufacturing or delivering controlled substances.***

If this provision is to be precise, the word “unlawfully” should be included to modify the words “manufacturing or delivering.” But complete precision is not required and a person of ordinary intelligence can understand, as can enforcing officers, that the provision is directed at unlawful drug manufacturers and distributors.

The vagueness doctrine serves to give notice to a citizen of proscribed conduct and serves to protect against arbitrary enforcement. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). But the person upon whom the conditions are imposed need not be able to predict with absolute certainty what conduct is prohibited. *Id.* at 793. Impossible standards of specificity are not required. *See State v. Norris*, 1 Wn. App.2d

87, 94, 404 P.3d 83 (2017). There must be “ascertainable standards of guilt to protect against arbitrary enforcement.” *Valencia*, 169 Wn.2d at 794, quoting *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

If a person of ordinary intelligence can understand what is proscribed, the provision is sufficiently definite. *Nguyen*, 191 Wn.2d at 678. Moreover, “A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Nguyen*, 191 Wn.2d at 679, quoting *City of Seattle v. Eze*, 111 Wn.2d 22,27, 759 P.2d 366 (1988). Further, RCW 9.94A.703(3)(b) allows the trial court to order an offender to “Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals.”

As noted, an overly-precise approach to the present condition is not warranted. A person of ordinary intelligence will know that the provision does not apply to Pfizer or his pharmacist. Moreover, it is manifest that there will be no arbitrary enforcement. Neither the trial court nor the community corrections officer will violate Rehmus for filling a valid prescription.

Moreover, it is not clear that the potential broadness of this provision is unwarranted. Rehmus killed a pedestrian while impaired by a legal drug. This is the same as one who kills a pedestrian while impaired by legal alcohol. In either case, the sentencing court and society in

general should be allowed to know which drugs of any kind Rehmus is ingesting. Certainly, if he is hanging around with purveyors of street drugs, his rehabilitation will be in doubt. The trial court did not err in imposing this prohibition.

**C. THE FILING FEE, EXPERT WITNESS CONTRIBUTION, AND INTEREST ACCRUEL PORTIONS OF THE JUDGMENT AND SENTENCE SHOULD BE STRICKEN.**

Rehmus next claims that certain legal financial obligations and the interest provision of the judgment and sentence should be stricken. The state agrees.

At sentencing, the trial court did find Rehmus to be indigent. CP 14. The trial court directed that all nonmandatory legal financial obligations not be imposed. Moreover, the 12% interest provision (CP 37) is not in accordance with current law.

Limited remand should be ordered to correct these provisions.

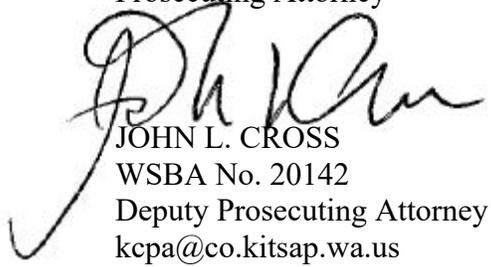
**V. CONCLUSION**

For the foregoing reasons, Rehmus' conviction and sentence should be affirmed with a limited remand to strike improper LFO and interest provisions.

DATED November 26, 2019.

Respectfully submitted,

CHAD M. ENRIGHT  
Prosecuting Attorney



JOHN L. CROSS  
WSBA No. 20142  
Deputy Prosecuting Attorney  
kcpa@co.kitsap.wa.us

**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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