FILED
Court of Appeals
Division II
State of Washington
7/8/2019 8:00 AM

No. 53431-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Schmitt,

Appellant.

Pierce County Superior Court Cause No. 13-1-04668-9

The Honorable Judge John R. Hickman

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE AND ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 2

ARGUMENT 5

I. The State breached Mr. Schmitt's plea agreement in an effort to gain an advantage in the personal restraint proceeding 5

II. The trial court's order includes findings that are not supported by substantial evidence 8

CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016)..... 8

In re Pers. Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005)..... 2

State v. Carreno-Maldonado, 135 Wn. App. 77, 143 P.3d 343 (2006).. 5, 7

State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003) 6, 8

State v. MacDonald, 183 Wn.2d 1, 346 P.3d 748 (2015), *as corrected* (Apr. 13, 2015) 5, 7

State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006), *as amended* (Oct. 13, 2006)..... 2

WASHINGTON STATE STATUTES

RCW 9.94A.525..... 3, 6, 7

ISSUE AND ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that the State did not breach the plea agreement.
2. The trial court erred by adopting Finding of Fact No. 2(a).
3. The trial court erred by adopting Finding of Fact No. 2(b).
4. The trial court erred by adopting Finding of Fact No. 2(c).

> **ISSUE:** The State may not engage in conduct evidencing an intent to circumvent the terms of a plea agreement. Did the prosecution breach its plea agreement with Mr. Schmitt in order to gain an advantage in his pending personal restraint petition proceeding?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2014, Jacob Schmitt pled guilty to three felonies. CP 18-27. He stipulated to an exceptional sentence totaling 360 months in prison. CP 21.

The parties disputed how the court should treat a 2001 federal bank robbery conviction and how it should be scored. CP 19, 37-40. However, they agreed that "this dispute will be resolved by the court at sentencing." CP 19.

At sentencing, the assigned prosecutor made clear that she was aware of the dispute prior to the hearing. She noted that defense counsel had "consulted with Kit Proctor, the head of our appellate unit," about the disputed issue. CP 65. She told the court that Proctor "maintains the position that the State's asserted, that [the federal conviction] should be counted as a Class C felony, one point." CP 65.

The court resolved the dispute in Mr. Schmitt's favor, concluding that the federal conviction was not comparable to a Washington felony.[1] CP 6, 69, 72. In his direct appeal and contemporaneous personal restraint petitions, Mr. Schmitt unsuccessfully sought to have the Court of Appeals and the Supreme Court set aside his convictions. CP 85, 100.

---

[1] The court relied on *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005) and *State v. Thomas*, 135 Wn. App. 474, 144 P.3d 1178 (2006), *as amended* (Oct. 13, 2006). CP 69, 72.

A more recent personal restraint petition is pending in the Court of Appeals. *See* Court of Appeals Cause No. 52511-9-II. The State filed a response, urging the Court of Appeals to deny the petition. CP 106.

In its response to the PRP, the State repeatedly took positions adverse to the trial court's decision regarding the federal bank robbery conviction, even though it had agreed to be bound by the lower court's decision. CP 106-134. Specifically, the State argued as follows:

> Federal felony convictions which are not comparable to Washington offenses are categorized as Class C felonies and petitioner has not met his burden to show otherwise. CP 114.
>
> [A] non-comparable federal felony offense is a Class C felony and must be scored as such. CP 115.
>
> [T]he sentencing court's ruling [regarding the federal conviction] is a conclusion of law, not a finding of fact and cannot be a verity on appeal… Conclusions of law are reviewed *de novo.* CP 118.
>
> RCW 9.94A.525(3) clearly requires the federal bank robbery to be treated as a class C felony… CP 119.
>
> It also does not matter if the sentencing court erred in finding the federal bank robbery conviction does not apply to petitioner's offender score. CP 119.
>
> [J]ust because [federal bank robbery] is not a comparable offense does not mean it cannot be included for offender score and wash out purposes. CP 121.
>
> The plain language [of RCW 9.94A.525(3)] clearly indicates that felony offenses which are not comparable are to be treated as the equivalent of a class C felony. CP 123.

Mr. Schmitt filed a motion asking the trial court to find a breach of the plea agreement, based on the positions taken by the State in its response to his pending PRP. CP 1. The trial court heard argument and denied the motion, finding that the State "did not breach the plea agreement." CP 135; RP 4-19.

The court gave three reasons for its ruling. First, the court found that "[t]he State was not bound by the Court's ruling as to offender score as it only learned of argument from defense on day of plea and sentencing." CP 135. The court did not make any reference to the prosecutor's statements acknowledging that the State knew of the dispute prior to the hearing. CP 65, 135.

The court's other two reasons did not address Mr. Schmitt's claim that the State had breached the plea agreement. CP 135. Instead of examining the State's arguments in the PRP proceeding, the court made two observations regarding the significance of the offender score dispute at the sentencing hearing. CP 135-136. The court did not make any findings directly addressing the State's arguments in its response to the PRP. CP 135-136.

Mr. Schmitt appealed from this order.[2] CP 138.

[2] His pending PRP has been stayed until this appeal is resolved.

ARGUMENT

When Mr. Schmitt entered his plea, the parties agreed to be bound by the sentencing court's determination regarding his federal bank robbery conviction. The court found that the conviction was not comparable to any Washington felony, and excluded it from the offender score.

Now, seeking to gain an advantage in Mr. Schmitt's personal restraint case, the State argues that the federal conviction should be considered a class C felony. In making these arguments, the State has breached the plea agreement. The trial court's Order on Breach of Plea must be reversed, and the case remanded to allow Mr. Schmitt to elect his remedy.

I. THE STATE BREACHED MR. SCHMITT'S PLEA AGREEMENT IN AN EFFORT TO GAIN AN ADVANTAGE IN THE PERSONAL RESTRAINT PROCEEDING.

A plea agreement is a contract between the prosecuting authority and the accused person. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). The State may not undercut the terms of a plea agreement, either explicitly or implicitly. *Id.*

Harmless error review does not apply when the State breaches a plea agreement. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015), *as corrected* (Apr. 13, 2015). Furthermore, where the State

breaches a plea agreement, the defendant's choice of remedy controls. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003).

In this case, the State agreed that the dispute regarding Mr. Schmitt's federal bank robbery conviction would be "resolved by the court at sentencing." CP 19. The dispute was resolved in Mr. Schmitt's favor: the sentencing court determined that the federal conviction was not equivalent to a Washington felony and should not be included in the offender score. CP 6, 69, 72.

Now, the State seeks to gain an advantage in the personal restraint proceeding by suggesting that the federal bank robbery conviction qualifies as a class C felony. CP 114-115, 118-119, 121. Citing RCW 9.94A.525(3)—the statute at issue in the sentencing proceeding— the State repeatedly presents arguments contrary to the sentencing court's decision. CP 114-115, 118-119, 121, 123.

In its response to the PRP, the State asserts that Mr. Schmitt's federal bank robbery conviction qualifies as a class C felony. CP 114-115, 118-119, 121, 123. The prosecutor argues that "[f]ederal felony convictions which are not comparable to Washington offenses are categorized as class C felonies and petitioner has not met his burden to show otherwise." CP 114.

According to the State, "RCW 9.94A.525(3) clearly requires the federal bank robbery to be treated as a class C felony."[3] CP 119. The State reiterates that "a non-comparable federal felony offense is a class C felony and must be scored as such."[4] CP 115. It suggests that the sentencing court's ruling in Mr. Schmitt's favor "cannot be a verity on appeal," but rather is subject to *de novo* review.[5] CP 118.

The State's arguments, viewed objectively, "evidenc[e] an intent to circumvent the terms of the plea agreement." *Carreno-Maldonado*, 135 Wn. App. at 83. The State agreed to let the sentencing court resolve the issue regarding Mr. Schmitt's federal bank robbery conviction.

It now argues that the federal conviction should be considered a class C felony. CP 114-115, 118-119, 121, 123. It has taken this position in an effort to defeat Mr. Schmitt's personal restraint petition.

The State has breached the plea agreement. The error cannot be considered harmless. *MacDonald*, 183 Wn.2d at 8. Accordingly, Mr.

---

[3] Later in its response, the State argues that "[t]he plain language [of RCW 9.94A.525(3)] clearly indicates that felony offenses which are not comparable are to be treated as the equivalent of a class C felony." CP 123.

[4] Alternatively, the State argues that even if the federal bank robbery "is not a comparable offense does not mean it cannot be included for offender score and wash out purposes." CP 121.

[5] It also implies that "the sentencing court erred in finding the federal bank robbery conviction does not apply to petitioner's offender score." CP 119.

Schmitt's case must be remanded to the trial court to allow him to choose his remedy. *Harrison*, 148 Wn.2d at 557.

II. THE TRIAL COURT'S ORDER INCLUDES FINDINGS THAT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellate courts review a trial court's findings for substantial evidence. *City of Richland v. Wakefield*, 186 Wn.2d 596, 605, 380 P.3d 459 (2016). Here, the trial court made several findings that are unsupported or irrelevant.

In its order on breach of plea, the trial court found that the State "did not breach the plea agreement." CP 135. This finding is unsupported for the reasons outlined above. The State agreed to be bound by the sentencing court's ruling, but repeatedly made arguments conflicting with the sentencing court's resolution of the disputed issue. The court's finding is unsupported and must be stricken. *Id.*

The court also provided three "reasons for this Court's rulings." CP 135. These "reasons" must also be stricken.

First, the court found that the State "was not bound by the Court's ruling as to offender score as it only learned of argument from defense on day of plea and sentencing." CP 135. This is incorrect.

The record of the plea hearing clearly reflects that the State knew of Mr. Schmitt's position prior to the hearing date. CP 65. Although the

assigned prosecutor had been out of town during the preceding week, she noted that "defense consulted with Kit Proctor, the head of our appellate unit." CP 65. She relayed to the court that Proctor "maintains the position that the State's asserted, that [the federal conviction] should be counted as a Class C felony, one point." CP 65.

The record shows that the State knew of the dispute prior to the day Mr. Schmitt entered his guilty plea. CP 65. The court's finding is unsupported and should be stricken. *Id.*

The Court of Appeals should also strike the court's determination that "[t]he consequences of the Court's ruling on offender score would not affect the agreed upon exceptional sentence upward of 360 months." CP 135-136. The issue here is not how the ruling would have affected the agreed exceptional sentence.

Rather, the issue is whether the State should be allowed to breach the plea agreement in order to achieve an advantage in the PRP proceeding. The court's finding regarding the effect of the offender score ruling is irrelevant to the issue of the State's breach and should be stricken.

Finally, the court's third "reason" for its ruling should be stricken. The court found that "[t]he offender score was a collateral issue to the agreed upon exceptional sentence." CP 136. As noted, the issue here

involves the State's breach of the plea agreement in order to gain advantage in the pending PRP matter. It does not relate to the agreed exceptional sentence.

Furthermore, the offender score issue was clearly important to Mr. Schmitt. He wished to have the issue resolved by the trial court, even though he agreed to the exceptional prison term. The issue was not merely "collateral;" he wished to have it resolved, and both parties agreed to be bound by the sentencing court's determination. CP 19. The trial court's finding that the offender score dispute was a collateral issue must be stricken. *Id.*

CONCLUSION

Under the terms of Jacob Schmitt's plea agreement, both parties agreed to be bound by the sentencing court's determination regarding a prior federal bank robbery conviction. The sentencing court found that the prior federal conviction was not comparable to a Washington felony, and excluded it from the offender score calculation.

Now, despite its agreement to be bound by the sentencing court's ruling, the State asserts that the prior federal conviction is equivalent to a class C felony. The State should not be permitted to gain advantage in the

PRP proceeding by breaching its agreement to be bound by the sentencing court's decision.

The trial court's order on breach of plea must be reversed. The State has breached the plea agreement by making arguments in the PRP proceeding that are inconsistent with the agreement.

Because the State has breached the plea agreement, the case must be remanded to the trial court to allow Mr. Schmitt to elect his remedy.

Respectfully submitted on July 8, 2019,

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jacob Schmitt, DOC #711473
Monroe Corrections Center
PO Box 888
Monroe, WA 98272

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
kristie.barham@piercecountywa.gov
PCpatcecf@piercecountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on July 8, 2019.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

July 08, 2019 - 4:30 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53431-2
Appellate Court Case Title:	State of Washington, Respondent v. Jacob Ivan Schmitt, Appellant
Superior Court Case Number:	13-1-04668-9

The following documents have been uploaded:

- 534312_Briefs_20190708042802D2268192_7197.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was 534312 State v Jacob Schmitt Opening Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20190708042802D2268192