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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 Reply Brief

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ARGUMENT

I. THE STATE SHOULD NOT BE PERMITTED TO GAIN AN ADVANTAGE IN MR. SCHMITT'S PERSONAL RESTRAINT PROCEEDING BY BREACHING THE PLEA AGREEMENT.

A prosecutor may not undercut the terms of a plea agreement. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). In this case, the State undercut the terms of the agreement it entered into with Mr. Schmitt.

The prosecution agreed that the dispute regarding Mr. Schmitt's bank robbery conviction would be "resolved by the court at sentencing." CP 19. The agreement was not time-limited; nor were there any exceptions allowing the prosecution to take a different position when it suited the prosecution to do so.

The sentencing court "resolved" the issue by excluding the prior conviction from Mr. Schmitt's offender score. CP 6, 69, 72. In its judgment and sentence, the court "[d]etermined [that the prior conviction was] not comparable or included in prior conviction offender score." CP 6. This written finding memorialized Judge Hickman's oral conclusion that the "conviction would not be in the offender score" and that he would "exclude the federal offense as an offender score [sic]." CP 69, 72.

Now, seeking to gain an advantage in the PRP proceeding, the State repeatedly argues that the conviction should score as a Class C

felony. CP 114-123. Specifically, the prosecution argues that the offense is a Class C felony, and that Mr. Schmitt “has not met his burden to show otherwise.” CP 114.

The State’s arguments, viewed objectively, “evidenc[e] an intent to circumvent the terms of the plea agreement.” *Id.* The prosecution is not standing by its agreement to let the sentencing court resolve the issue. Thus, the State has not “fulfilled its obligations.” Brief of Respondent, p. 20.

Respondent falsely asserts that “the State has never taken issue with the calculation of Schmitt’s offender scores.” Brief of Respondent, p. 20. In fact, the State has argued that the offense “is a Class C felony and must be scored as such.” CP 115. According to Respondent, the statute “clearly requires the federal bank robbery to be treated as a Class C felony.” CP 119. To support its argument, it cites the same statute that was at issue in the sentencing proceeding. CP 119, 123 (citing RCW 9.94A.525(3)).

Mr. Schmitt is not asking this court to imply any terms not specifically enumerated in the plea agreement. *See* Brief of Respondent, pp. 20-21. Under the agreement, both parties agreed that the dispute would be “resolved by the court at sentencing.” CP 19. Nothing in the plea

agreement permitted the State to later attack the court’s resolution of the issue in a PRP or other proceeding.

The word “resolve” means (in relevant part) “to come to a definite or earnest decision about.” Dictionary.com, based on the *Random House Unabridged Dictionary* (2019).¹ Its synonyms include words such as “determine” and “settle.” Thesaurus.Com, based on *Roget’s 21st Century Thesaurus*, Third Edition (2013).²

Under the plain meaning of the term “resolve,” the court came “to a definite or earnest decision;” it “determine[d]” and “settle[d]” the issue. The State agreed to be bound by this determination.

Respondent also suggests that its PRP response merely cited the “law of the case.” Brief of Respondent, pp. 22-23. This is only partially true.³ In its PRP filing, Respondent did not merely cite the “law of the case” doctrine; instead, the State made substantive arguments disputing the trial court’s resolution of the issue. CP 114-115, 118, 119, 121, 123. In doing so, the State breached the plea agreement.

The error cannot be considered harmless. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015), *as corrected* (Apr. 13, 2015). The case

¹ Available at <https://www.dictionary.com/browse/resolve?s=t> (accessed 10/3/19).

² Available at <https://www.thesaurus.com/browse/resolve?s=t> (accessed 10/3/19).

³ In addition, Respondent fails to cite to the record.

must be remanded to the trial court. Mr. Schmitt must be allowed to choose his remedy. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003).

II. THE TRIAL COURT’S FINDINGS ENTERED FOLLOWING THE BREACH OF PLEA HEARING ARE NOT SUPPORTED BY THE RECORD.

The State breached its plea agreement by attacking the sentencing court’s resolution of the disputed issue regarding Mr. Schmitt’s prior bank robbery conviction. *See* Appellant’s Opening Brief, pp. 5-8. The lower court in this case found that the State did not breach the agreement. CP 135. This finding is not supported by substantial evidence, and thus must be vacated. *See City of Richland v. Wakefield*, 186 Wn.2d 596, 605, 380 P.3d 459 (2016).

Similarly unsupported is the court’s finding 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.

Respondent argues that this finding is supported because “the assigned prosecutor only learned of the issue... on the day of the change of plea and sentencing hearing.” Brief of Respondent, p. 26.

But the record is clear that “the State”⁴ was aware of Mr. Schmitt’s argument prior to the day of the plea hearing, even if the individual

⁴ CP 135.

prosecutor only learned of it that morning. CP 65, 71. Furthermore, there is no reason the State should be excused from the agreement, even if “this particular prosecutor just learned of [the defense position]”⁵ on the morning of the plea hearing.

The finding is unsupported. It must be stricken. *Id.*

Respondent suggests that the court’s additional findings “are relevant [to] demonstrate that the terms that Schmitt seeks to have this Court imply from the plea agreement are not implicit parts of this agreement.” Brief of Respondent, p. 27. But Mr. Schmitt is not asking this Court to imply any terms omitted from the plea agreement.

As part of the agreement, the State agreed that the comparability and offender score dispute would be “resolved by the court at sentencing.” CP 19. The State breached that explicit agreement by asserting a position contrary to the sentencing court’s resolution of the issue. CP 114-123. The breach did not arise in a wholly unrelated matter (such as a sentencing proceeding on a new crime); instead, the State’s breach relates directly to the conviction and sentence stemming from the plea agreement itself.

⁵ Brief of Respondent, p. 26.

Respondent also repeatedly implies that the offender score issue was unimportant and did not impact Mr. Schmitt's decision to plead guilty. Brief of Respondent, pp. 4, 6-8, 15, 19, 27-28. This is incorrect.

Even though Mr. Schmitt agreed to an exceptional sentence, he did not waive the offender score issue. As Respondent notes, "there remained a disagreement," and thus "language was added to the Statement of Defendant on Plea of Guilty..." Brief of Respondent, pp. 3-4. The disagreement was further memorialized in "handwritten language... added" to the parties' Stipulation on Prior Record and Offender Score. Brief of Respondent, pp. 4-5.

Mr. Schmitt insisted that the dispute be spelled out in both the plea statement and the stipulation on prior record. The added language included the term at issue here: "this dispute will be resolved by the court at sentencing." CP 19. The inclusion of this language shows the importance of the offender score issue. The trial court's finding that the offender score dispute was a collateral issue must be stricken. *Id.*

CONCLUSION

The State agreed that issues pertaining to Mr. Schmitt's criminal history and offender score would be "resolved" by the sentencing court. It

now violates that agreement by asserting a position contrary to the sentencing court's findings.

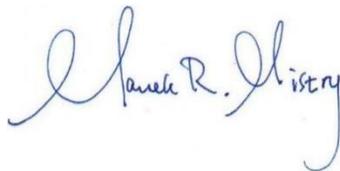
The State should not be permitted to breach its agreement. Mr. Schmitt's case must be remanded to the trial court to allow him to elect his remedy.

Respectfully submitted on October 4, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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I filed the Appellant's Reply 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 October 4, 2019.



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