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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB SCHMITT,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 13-1-04668-9

BRIEF OF RESPONDENT

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I. INTRODUCTION

After being charged with his third strike offense in 2013, appellant, Jacob Schmitt, was facing the possibility of life in prison as a persistent offender. The State, however, agreed to amend the charges and drop the potential third strike felony in exchange for Schmitt pleading guilty to the reduced felony charges and agreeing to a stipulated prison term of 360 months. The only outstanding issue was whether Schmitt's 2001 federal conviction for bank robbery should count toward his offender score. As the resolution of this issue would have no bearing on Schmitt's decision to plead guilty or on the stipulated sentence, the parties agreed to let the trial court decide the offender score issue.

At the change of plea and sentencing hearing, the trial court decided that it would not include Schmitt's 2001 federal felony conviction in his offender scores. The court then accepted Schmitt's guilty pleas to the reduced felony charges. Both parties then advocated for the stipulated recommended sentence, which the trial court accepted.

On both direct and collateral review, Schmitt raised a sentencing issue unrelated to the issue decided by the trial court – Schmitt argued that his 2001 federal bank robbery conviction did not interrupt the “washout” period for his 1996 strike conviction and thus he should have only been facing sentence as a “second striker” in this case. The State has argued

against this claim and both this Court and the Washington State Supreme Court have repeatedly rejected Schmitt's argument.

In the instant appeal, Schmitt claims that the State breached its obligations under the plea agreement in its response to his latest Personal Restraint Petition. Not so. In its response to that petition, the State did not ask that the trial court's decision on the offender score issue be reversed or revisited. Rather, the State focused on responding to Schmitt's specific claim regarding the "washout period," an issue separate from the one determined by the trial court.

The State fulfilled its obligations under the plea agreement by allowing the trial court to determine the offender score issue and advocating for the jointly recommended sentence. As the plea agreement did not include any implicit agreement that the State would be forever precluded from addressing the impact of Schmitt's 2001 federal conviction during direct or collateral review for any purpose whatsoever, the State did not circumvent the terms of the plea agreement in its response to Schmitt's latest petition.

Schmitt's claim should be denied and the trial court's order denying Schmitt's motion for a breach of the plea agreement should be affirmed.

II. RESTATEMENT OF THE ISSUE

Whether the State breached its obligations under the plea agreement in its response to Schmitt's most recent Personal Restraint Petition

after it fulfilled its explicit obligations under the plea agreement and focused its response on Schmitt's specific sentencing argument that has been repeatedly rejected by this Court.

III. STATEMENT OF THE CASE

On December 4, 2013, the Pierce County Prosecuting Attorney's Office filed an Information charging Schmitt with robbery in the first degree and attempting to elude a pursuing police vehicle. CP 35-36. Based on a review of the mitigation packet provided by Schmitt, the State agreed to amend the Information, so Schmitt would not be subject to a mandatory life sentence as a persistent offender, in exchange for guilty pleas to the charges in the Amended Information and a stipulated exceptional sentence above the standard range. CP 59-60.

On September 12, 2014, the prosecution filed an Amended Information charging Schmitt with three non-strike Class B felonies: two counts of theft in the first degree and one count of burglary in the second degree. CP 53-54. On that same day, Schmitt signed a Statement of Defendant on Plea of Guilty to the charges set forth in the Amended Information. CP 18-27.

On the Statement of Defendant on Plea of Guilty, the defense and the State agreed to a stipulated exceptional sentence of 360 months imprisonment, which consisted of the maximum term of 120 months on each of the three Class B felonies running consecutively. CP 21. However,

there remained a disagreement as to whether Schmitt's prior conviction in 2001 for federal bank robbery would count towards his offender score. The prosecution calculated Schmitt's offender score as "7" for his theft offenses and "8" for his burglary offense, while Schmitt calculated his offender score as "6" for his theft offenses and "7" for his burglary offense. CP 19, 39-40. Therefore, the following language was added to the Statement of Defendant on Plea of Guilty:

. . . If the prosecutor and I disagree about the computation of the offender score, I understand that this dispute will be resolved by the court at sentencing. I waive any right to challenge the acceptance of my guilty plea on the grounds that my offender score or standard range is lower than what is listed in paragraph 6(a). . .

CP 19-20.

As Schmitt's particular offender scores for his current convictions would not impact the stipulated sentencing agreement, Schmitt was unambiguously clear that he wanted to plead guilty in exchange for the joint recommended sentence regardless of how the trial court determined his offender scores. Specifically, in the parties' Stipulation on Prior Record and Offender Score, the following handwritten language was added:

In computing the defendant's offender score and standard range, the State relies on RCW 9.94A.525(3) to count defendant's federal bank robbery conviction as 1 point toward offender score (Class C felony equivalent since not comparable). Defendant contends his offender score should not include the federal bank robbery conviction and he should be a '6' for counts I and II (standard range of 17-22

months), and a '7' for Count III (standard range 33-43 months) based on *State v. Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005) and *State v. Thomas*, 135 Wn. App. 474, 480-81, 144 P.3d 1178 (Div. I 2006) (citing *Lavery*).

Although the defendant does not agree with the State's calculation of offender score, the defendant voluntarily, knowingly and intelligently enters into this plea, including the recommendation for an exceptional sentence.

CP 40.

At the change of plea and sentencing hearing, Schmitt's counsel argued that Schmitt's conviction for federal bank robbery in 2001 should not be included in his offender scores for his current offenses and cited in support of his argument *State v. Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005) (for the proposition that federal bank robbery is not comparable to any Washington felony) and *State v. Thomas*, 135 Wn. App. 474, 144 P.3d 1178 (2006) (interpreting *Lavery* to mean that a federal bank robbery conviction should not be included in a defendant's offender score because it is not comparable to a Washington crime). CP 61-63, 70-72. Defense counsel acknowledged that this case law conflicted somewhat with RCW 9.94A.525(3),¹ but nevertheless contended that because federal bank

¹ "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. *If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.*" RCW 9.94A.525 (emphasis added).

robbery is not comparable to a Washington crime, it should not be counted in Schmitt's offender scores:

. . . The State is basing its position on the statute that says when it's not clearly comparable -- and I don't mean to argue for the State, but I'll explain it anyhow. When it's not clearly comparable, it drops down to a Class C felony, which it doesn't sound like it is a benefit to the defendant, but there are certain circumstances where if it drops down to a C, then wash-out provisions could then perhaps come into play.

In Mr. Schmitt's case, it wouldn't, but it is Mr. Schmitt's position and my position that if it's not comparable, it is not comparable for any purposes, as far as the felony is concerned. . .

CP 62. Defense counsel also acknowledged that "in the great scheme of things when we're dealing with a sentence in a matter like this and an agreed exceptional sentence upward, it may not make a difference," but nevertheless urged the trial court to make a finding regarding Schmitt's offender scores. CP 63.

The prosecutor countered that the court did not need to make such a determination as there was a joint stipulated sentence above the standard range:

If the Court is going to impose the agreed exceptional upward, then the Court, it's the State's position, does not need to make a determination, as to what his score is, just the fact that he's entering the plea freely and voluntarily knowing that his score could be either a six or seven, and this will be his standard range if he received a standard range sentence.

CP 64. The prosecutor added that the State's position was conveyed to the defense by her office – the federal bank robbery should be scored as a Class C felony, but reiterated:

. . . But just for the record -- and I know it's in the written documentation -- regardless of what the Court determines the defendant's offender score is, he wants to go forward with this plea and this recommendation and receive that benefit of this not being his third strike, life without parole, regardless of what the standard range is and his offender score.

CP 65. The prosecutor also noted that this issue “came up when I was out of the office, and this is the first morning I've been back.” CP 65, 71.

The trial court went through the plea colloquy with Schmitt and confirmed that Schmitt wanted to plead guilty and accept the jointly stipulated exceptional sentence:

THE COURT: There is a dispute as to the offender score, and it all centers around your conviction in a federal jurisdiction for robbery as to whether that would count or not count towards your offender score and, thus, it would affect your standard range

Is it your intent to enter this plea no matter what the decision the Court makes in regards to the offender score?

MR. SCHMITT: Yes, sir, it is.

CP 66-67.

Based on *Lavery* and *Thomas*, the trial court found that Schmitt's conviction in 2001 for federal bank robbery would not count in his offender scores:

I think the language of *Thomas* couldn't be any clearer in terms of it specifically finding that it was not comparable to a Washington crime. They obviously had under their consideration RCW [9.]94A.525(3) since it does talk about comparable offenses, and they made an analysis and found that it wasn't comparable. So I'm not going to go against that ruling, and *I will exclude the federal offense as an offender score* based on the ruling in *Thomas*.

CP 72 (emphasis added).

Schmitt proceeded to plead guilty as charged in the Amended Information. CP 73-75. The trial court followed the stipulated recommendation to an exceptional sentence upward and sentenced Schmitt to a total of 360 months in prison – the maximum term of 120 months on each of his three felony convictions to be served consecutively. CP 81-82. Specifically, on the Judgment and Sentence, the following handwritten language was added:

Although D does not agree with the State's calculation of the offender score and asserts he is a 6 on Ct[s] I & II, 7 on Count III changing his standard range to Ct[s] I & II 17-22 and Ct III 33-43[.] D stipulates to exceptional sentence upward of 120 months on each count to be serve[d] consecutive to each other for 360 months i/c. Ct rules D has offender score of 6 Ct I & II, and 7 Cnt III.²

CP 12.

² Under "Criminal History" in the Judgment and Sentence, "Armed Bank Rob" is crossed out and the following handwritten language was added: "Ct determines not comparable or included in prior conviction offender score." CP 6.

Schmitt subsequently sought both direct and collateral review of his conviction and sentence.³ In his opening brief on appeal and in his first personal restraint petition, which this Court consolidated, Schmitt argued, among other things, that because his federal bank robbery was not comparable to any Washington crime, and because the trial court excluded this conviction from his offender scores, his federal crime did not interrupt the 10-year “washout” period for his 1996 “strike” conviction for robbery in the second degree. Appellant’s Opening Brief (“AOB”) in No. 46773-9-II at 6-8; Petitioner’s Personal Restraint Petition (“PRP”) in No. 47706-8-II at 3-9. In other words, Schmitt claimed that the 12 years he spent in a federal penitentiary as a result of his conviction for bank robbery should be treated as crime-free “time in the community” for “washout” purposes. Accordingly, Schmitt contended that because he only actually faced a standard range sentence of 57-75 months for the crimes charged in the original Information (as that robbery in the second degree, Schmitt reasoned, would only be his second “strike”), his guilty pleas were based on erroneous information and therefore he did not understand the direct

³ Respondent asks this Court to take judicial notice of the pleadings filed by the parties during direct and collateral review of Schmitt’s judgment and sentence in this case. ER 201; *Eugster v. Washington State Bar Association*, 198 Wn. App. 758, 795, 397 P.3d 131 (2017) (“Judicial Notice may be taken on appeal if the following standard is met: ‘We may take judicial notice of the record in the case presently before us or “in proceedings engrafted, ancillary, or supplementary to it. . .”’) (internal citations omitted).

consequences of his pleas. AOB in No. 46773-9-II at 8-11. He further argued that defense counsel rendered ineffective assistance during plea negotiations for not informing him of this “washout.” AOB in No. 46773-9-II at 11-13; PRP in No. 47706-8-II at 9-10. Schmitt asked this Court to remand the matter to the trial court so he could withdraw his plea of guilty. AOB in No. 46773-9-II at 13-14.

In its consolidated response, the State noted that the issues Schmitt was raising in his briefing and petition were different than the issue before the trial court; the trial court was tasked only with determining whether Schmitt’s federal bank robbery conviction counted in his *offender score*. Respondent’s Brief (“RB”) in No. 46773-9-II at 4-6. The State argued that a federal bank robbery is a crime, even if such a conviction is not included in a defendant’s offender score, and would therefore interrupt a “washout” period. RB in No. 46773-9-II at 8-18. The State pointed out that counting time served in a federal penitentiary as time spent crime-free in the community defies logic and would lead to absurd results. RB in No. 46773-9-II at 16.

In his replies to the State’s response, Schmitt reiterated his contention that because federal bank robbery is not equivalent to a Washington crime, such a conviction does not interrupt a “washout” period. Appellant’s Reply Brief in No. 46773-9-II at 3-4; Petitioner’s Reply Brief

in Support of PRP in No. 46773-9-II at 3-5. Although Schmitt acknowledged that federal bank robbery may be a crime, the time spent in prison for such a crime was *not* time spent in confinement “pursuant to a felony” conviction. Appellant’s Reply Brief in No. 46773-9-II at 1-5; Petitioner’s Reply Brief in Support of PRP in No. 46773-9-II at 4.

This Court affirmed Schmitt’s conviction and sentence⁴ and denied his personal restraint petition. In the published portion of its opinion, this Court held that Schmitt’s 1996 conviction for robbery in the second degree did not “washout” because Schmitt committed an intervening felony for which he spent over ten years incarcerated. CP 89-91. Specifically, although agreeing that there is no comparable Washington offense to federal bank robbery, this Court found that federal bank robbery is nevertheless a crime that interrupts a washout period. CP 89-90. This Court went on to hold that under RCW 9.94A.525(3), federal felonies that are not comparable any Washington offense are Class C felonies and recognized as such under the offender score statute. CP 90.

In the unpublished portion of this Court’s opinion, this Court held that Schmitt’s guilty pleas were knowing, intelligent, and voluntary, as he

⁴ This Court also found that an award of appellate costs to the State was not appropriate and remanded the matter for the limited purpose of ordering the trial court to conduct an individualized inquiry into Schmitt’s current and future ability to pay discretionary legal financial obligations. CP 98-99.

was properly apprised that his first-degree robbery (as charged in the original Information) would constitute his third strike offense. CP 93-95. This Court also denied Schmitt's claim of ineffective assistance of counsel because defense counsel properly advised him and effectively negotiated a favorable plea agreement. CP 95-96.

Schmitt subsequently filed a Petition for Review with the Washington State Supreme Court. The Washington Supreme Court denied this petition. *State v. Schmitt*, 188 Wn.2d 1002, 393 P.3d 353 (2017).

In March 2018, Schmitt filed a motion to vacate his Judgment and Sentence in the Superior Court. Supplemental CP 1-13. This motion largely reiterated the claims Schmitt had previously made in his direct appeal and first personal restraint petition. This motion was transferred to this Court as a personal restraint petition and this Court subsequently transferred the petition to the Washington State Supreme Court as a successive petition. Supp. CP 14-15.

On August 1, 2018, the Washington State Supreme Court denied Schmitt's successive petition because the arguments made in that petition were substantially the same as those Schmitt made on direct appeal and in his first personal restraint petition. CP 102-105. The Washington State Supreme Court noted that this Court had rejected Schmitt's claims and that

he “neither shows good cause for raising this issue again nor demonstrates that the interests of justice require it to be reexamined.” CP 104-105.

Meanwhile, Schmitt filed a third personal restraint petition. That petition, again, raised the same arguments that were previously rejected by this Court and the Washington State Supreme Court – that Schmitt’s 1996 conviction “washed out” while he was in federal custody for his 2001 federal bank robbery conviction. Petitioner’s PRP in No. 52511-9-II.

In its December 19, 2018, response to this third petition, the State argued that this successive petition should be dismissed as an abuse of writ because Schmitt again raised issues previously rejected by this Court on both direct and collateral review and has again failed to demonstrate prejudicial error. CP 107-134. Once again, the State focused its response on Schmitt’s claims that his 1996 conviction for robbery “washed out” (because his 2001 federal conviction for bank robbery was not a “conviction”), that his counsel rendered ineffective assistance, and that he should be entitled to withdraw his guilty plea. CP 111-133. In responding to Schmitt’s specific claims, the State set forth the law of the case, i.e., the findings and holdings of both this Court and the Washington State Supreme Court regarding this case, including that federal offenses not comparable to Washington law are categorized as Class C felonies. CP 114-127; RCW

9.94A.525. This Court has stayed this petition pending the resolution of the present appeal.

On February 13, 2019, Schmitt filed in the trial court a Motion for Breach of Plea Hearing. CP 1-3. In this motion, Schmitt argued that the State breached its plea agreement “that if the parties dispute the existence of prior convictions or the offender score, [the trial] [c]ourt would make the determination of fact on these issues at the time of sentencing.”⁵ CP 2. As set forth above, the trial court found that Schmitt’s 2001 federal conviction for bank robbery did not count in the calculation of Schmitt’s offender scores. Schmitt claims that the State breached its agreement in its response to his latest personal restraint petition by taking a position “adverse” to the trial court’s findings:

In this [latest] PRP, Schmitt presented grounds challenging the Court of Appeals application of state and federal law, with no challenge to the facts determined by this Court at the time of plea and sentencing. On December 19, 2018, the State filed a response. Instead of arguing that the Court of Appeals had correctly applied state and federal law, the State opted to repeatedly argue that the facts determined by this

⁵ The actual language of this “agreement” from Schmitt’s Statement of Defendant on Plea of Guilty is as follows:

The prosecuting attorney’s statement of my criminal history is attached to this statement. Unless I have attached a different statement, I agree that the prosecuting attorney’s statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If the prosecutor and I disagree about the computation of the offender score, I understand that this dispute will be resolved by the court at sentencing.

CP 19.

Court at plea and sentencing were incorrect. In doing so, the State has breached its plea agreement with Schmitt.

CP 2.

In its March 6, 2019, response to Schmitt's motion, the State pointed out that the parties agreed that at the change of plea/sentencing hearing, Schmitt would be able to challenge his 2001 federal felony conviction for bank robbery being included as part of his offender scores as a non-comparable offense. CP 30. During its colloquy with the trial court, Schmitt made it clear that he would be pleading guilty regardless of how the court ruled on this offender score issue. CP 30. The trial court ultimately "excluded the federal offense as an *offender score . . .*" CP 30 (emphasis added).

In the substantive part of its response, the State argued that Schmitt had failed to demonstrate that the State has breached its plea agreement by responding to the issues raised in Schmitt's personal restraint petition and asking this Court to uphold its prior rulings or that Schmitt has suffered some type of manifest injustice by its response. CP 31-33. The State further asserted that it did not argue that the facts determined by the trial court at plea and sentencing were incorrect; rather, it argued that this Court correctly applied the law that Schmitt's 2001 federal conviction is treated as a Class C felony for *washout purposes*, not in regard to Schmitt's *offender score*. CP 32-33.

On March 22, 2019, the trial court held a hearing on Schmitt's motion. In this hearing, Schmitt's counsel argued that in its response to Schmitt's pending personal restraint petition, the State argued that the trial court was incorrect in its ruling that Schmitt's 2001 federal conviction did not count towards his offender score. RP 6-11. In doing so, counsel argued, the State breached its agreement that it would let the trial court resolve that issue. RP 8-11, 14-15.

The prosecutor responded that in its response to Schmitt's latest personal restraint petition, the State never once said that the trial court erred or that the matter should be remanded for a change in the offender score. RP 11-12. Instead, the State fulfilled its obligation to fully disclose relevant law and set forth how this Court had previously ruled in this case. RP 12-13. The prosecutor also explained that the State's response was not regarding the offender score, but in response to Schmitt's argument that the trial court and this Court erred because his 1996 conviction "washed out" as the time he spent incarcerated for his 2001 federal conviction should be considered "time spent in the community." RP 11-13.

The trial court found that "there was no agreement that the State was bound by any decision I made as to whether or not the robbery charge would be used as part of the offender score." RP 15. The trial court further noted that the deputy prosecutor at that change of plea and sentencing hearing did

not know that this issue was going to be argued until the day of the hearing but agreed to go forward as the resolution of the issue of Schmitt's offender scores would not in any way affect the agreed sentence. RP 15-16. The trial court concluded that the State did not breach its agreement. RP 16.

In its Order on Breach of Plea, the trial court that the State did not breach its plea agreement for the following reasons:

- a) 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
- b) The consequences of the Court's ruling on offender score would not affect the agreed upon exceptional sentence of 260 months.
- c) The offender score was a collateral issue to the agreed upon exceptional sentence.

CP 135-137.

IV. ARGUMENT

THE STATE FULFILLED ITS OBLIGATIONS UNDER THE PLEA AGREEMENT AND DID NOT CIRCUMVENT THE TERMS OF THE PLEA AGREEMENT IN ITS RESPONSE TO SCHMITT'S CLAIM IN HIS LATEST PERSONAL RESTRAINT PETITION REGARDING AN UNRELATED SENTENCING ISSUE REPEATEDLY REJECTED BY THIS COURT

Once entered by the court, a plea agreement creates a right analogous to a contract right. *State v. Hall*, 104 Wn.2d 486, 706 P.2d 1074 (1985). When a plea rests to such a degree on a promise or agreement of the prosecutor that it is part of the inducement or consideration, that promise

must be fulfilled. *Id.* at 490 (citing *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). Due process requires that the prosecutor adhere to the terms by recommending the agreed upon sentence. *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

On appeal, the reviewing court applies an objective standard to determine whether the State breached the plea agreement. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). 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 purpose of a remedy when the State breaches a plea agreement is to restore the defendant to the position he held before the breach. *State v. Harrison*, 148 Wn.2d 550, 558-59, 61 P.3d 1104 (2003).

Schmitt complains in this appeal that the State breached its plea agreement with him in order to gain some type of advantage in Schmitt's latest attempt to seek collateral relief from his sentence. Brief of Appellant at 5-6. Schmitt therefore asks this Court to reverse the trial court's order denying his motion for breach of the plea agreement and remand this matter to allow him to "choose his remedy." Brief of Appellant at 1. As the State did not breach its plea agreement with Schmitt, this Court should deny his claims and affirm the trial court's order.

As set forth above, the area of disagreement between the prosecution and the defense during the change of plea and sentencing hearing was very narrow. The sole disputed issue was whether Schmitt's 2001 federal conviction for bank robbery should count as a point in his offender scores – the State believed it should while the defense believed it should not. Schmitt made it clear on his Statement of Defendant on Plea of Guilty that he wanted to plead guilty and accept the jointly recommended stipulated sentence of 360 months in prison regardless of how the trial court resolved the offender score issue. The parties agreed to let the trial court decide this offender score issue:

If the prosecutor and I disagree about the computation of the offender score, I understand that this dispute will be resolved by the court at sentencing. I waive any right to challenge the acceptance of my guilty plea on the grounds that my offender score or standard range is lower than what is listed in paragraph 6(a).

CP 19.

After hearing arguments from the parties at the change of plea and sentencing hearing, the trial court ultimately decided that Schmitt's 2001 federal bank robbery was not comparable to a Washington felony and that it would not include this conviction when calculating Schmitt's offender scores:

I think the language of *Thomas* couldn't be any clearer in terms of it specifically finding that it was not comparable to a Washington crime. They obviously had under their

consideration RCW [9.]94A.525(3) since it does talk about comparable offenses, and they made an analysis and found that it wasn't comparable. So I'm not going to go against that ruling, and *I will exclude the federal offense as an offender score* based on the ruling in *Thomas*.

CP 72 (emphasis added). The trial court did not make any other decisions or rulings regarding Schmitt's 2001 federal conviction or its consequences.

As the State allowed the trial court to determine Schmitt's offender score, and otherwise advocated for the agreed upon stipulated sentence, the State has fulfilled its obligations under this plea agreement and was not obligated to do more. *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997); *State v. Arko*, 52 Wn. App. 130, 133-134, 758 P.2d 522 (1988). In fact, the State has never taken issue with the calculation of Schmitt's offender scores – the State has never argued that the trial court's decision should be reversed or reconsidered, and it has never argued that Schmitt's offender scores should be recalculated.

Schmitt, however, appears to argue that there are additional implied terms in the specifically agreed upon plea bargain. Schmitt seems to ask this Court to imply that the plea bargain to allow the trial court to determine Schmitt's offender scores *necessarily means* that the State can never argue that his 2001 federal bank robbery conviction is the equivalent of a Class C felony and that the State is forever precluded from addressing the impact of Schmitt's 2001 federal conviction during direct or collateral review for any

purpose whatsoever. Brief of Appellant at 5-8. These terms, however, are not implicit parts of the plea agreement and Schmitt cites to no authority for his contention. *Cf. State v. Mixon*, 27 Ariz. App. 306, 554 P.2d 902, 903-04 (1976).

Once a plea bargain has been entered into, the defendant has a right analogous to a contract right to have the terms of the agreement fulfilled. *State v. Arko*, 52 Wn. App. at 134. In order for a court to *imply* a covenant in a contract, the following requirements must be satisfied:

(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract.

Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 371, 617 P.2d 704 (1980)
(internal citations omitted).

Based on these criteria, this Court should decline to find that the terms Schmitt is relying on to argue that the State breached its obligations under the plea agreement are implied in that agreement. The “terms” that the State could never argue that Schmitt’s 2001 federal conviction is equivalent to a Class C felony or that the State is forever barred from addressing the trial court’s decision regarding Schmitt’s offender scores in

an entirely different sentencing context did not “arise from the language used or [was] indispensable to effectuate the intention of the parties” because the plea agreement only obligated the State to let the trial court determine Schmitt’s offender scores and recommend that the trial court follow the joint sentencing recommendation – the State fulfilled these obligations. For the same reasons, such “terms” were not “clearly within the contemplation of the parties,” legally necessary, or of a nature that such a term would have been added if it had come to the attention of the parties. Finally, the subject matter, i.e., allowing the trial court to determine whether Schmitt’s 2001 federal offense counted in his offender scores, was completely covered by the plea agreement. There were no other implied terms, much less the terms Schmitt urges this Court to find.

In Schmitt’s latest Personal Restraint Petition, currently pending before this Court, Schmitt’s claims for at least the third time before this Court that his 2001 federal bank robbery conviction did not interrupt his “washout” period for a previous strike offense and therefore he faced a potentially much lower standard range sentence as a “two-striker” and should be allowed to withdraw his guilty plea or be resentenced. Both this Court and the Washington State Supreme have repeatedly denied this claim.

In the State’s response to this Personal Restraint Petition, the State, in arguing that Schmitt’s claim has been repeatedly adjudicated, cites to the

“law of the case.” The “law of the case” doctrine generally “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand’” or to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice, Judgments* § 380, at 55 (4th ed.1986) (footnote omitted)). This doctrine serves to “promote[] the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues.’” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (quoting 1B J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 118 (1984)). Courts apply this doctrine in order “to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.” 5 Am.Jur.2d *Appellate Review* § 605 (2d ed.1995) (footnote omitted); *See State v. Harrison*, 148 Wn. 2d at 562.

In this Court’s previous decision rejecting Schmitt’s contention on direct appeal, this Court specifically found that a federal conviction that is not comparable to a Washington felony is considered the equivalent of a

Class C offense. CP 90. This Court has also rejected Schmitt's claim that his federal conviction did not interrupt the "washout" period for his 1996 conviction. CP 90-92. The State refers to and uses this "law of the case" in its response to Schmitt's latest petition. As part of its obligation under RPC 3.3(a)(3)⁶ to inform this Court as to relevant law, the State also set forth in its response pertinent case law and statutory law, including RCW 9.94A.525 (" . . . Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.").

All of Schmitt's citations to the State's response to his Personal Restraint Petition (Brief of Appellant at 6-7) refer to proper assertions or arguments relating to the "law of the case" or other relevant and pertinent legal authority. In no way do these assertions and arguments constitute a breach of the plea agreement. The State never claimed that the trial court should not have decided Schmitt's offender score, nor did it ever ask that the issue of Schmitt's offender score be reconsidered. As the State fulfilled

⁶ "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party." RPC 3.3(a)(3).

its obligations under the plea agreement by allowing the trial court to calculate Schmitt's offender scores and advocating for the jointly recommended sentence, the State has fulfilled its obligations. As there are no other "implied terms" to this plea bargain, the State did not breach the plea agreement by arguing against Schmitt's position regarding the "washout" period and noting the law of the case and other relevant legal authority to this Court. Schmitt's claim that the State breached its plea agreement should be rejected.

Schmitt also argues that the trial court's findings in its order denying his motion for a breach of plea are either "unsupported or irrelevant." Brief of Appellant at 8-10. As argued above, the trial court properly denied Schmitt's motion that the State breached its obligations under the plea agreement in its responses to Schmitt's latest Personal Restraint Petition. Therefore, even if the trial court gave different or even incorrect *reasons* for its denial of Schmitt's motion, this Court is not prevented from affirming an otherwise correct ruling. *State v. Hansen*, 107 Wn.2d 331, 334-35, 728 P.2d 593 (1986); *Ertman v. City of Olympia*, 95 Wn.2d 105, 107-08, 621 P.2d 724 (1980).

In any event, all of the trial court's findings were both supported by sufficient evidence and were relevant. In its Order on Breach of Plea, the

trial court found that the State did not breach its plea agreement for the following reasons:

- a) 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
- b) The consequences of the Court's ruling on offender score would not affect the agreed upon exceptional sentence of 360 months.
- c) The offender score was a collateral issue to the agreed upon exceptional sentence.

CP 135-136.

Schmitt claims that reason (a) above is unsupported by the record. Brief of Appellant at 8-9. However, a fair reading of the record indicates that the assigned prosecutor only learned of the issue regarding Schmitt's offender score on the day of the change of plea and sentencing hearing. The prosecutor stated that she had been out of the office the previous week and had only returned that morning. CP 65, 71. Although the defense may have had contact with the prosecutor's office earlier, that does not preclude the finding that this particular prosecutor just learned of that contact and her office's position that morning. Thus, sufficient evidence supports this finding.

Schmitt challenges reasons (b) and (c) as irrelevant to his claim that the prosecutor breached the plea agreement. Brief of Appellant at 9-10. However, both of these reasons are relevant as they demonstrate that the

terms that Schmitt seeks to have this Court imply from the plea agreement are not implicit parts of this agreement.

As stated above, the agreement called for the trial court to calculate Schmitt's offender scores by determining whether his 2001 federal offense counted as a point in the calculation of these scores. The trial court's reasons for denying Schmitt's breach of plea motion because "The consequences of the Court's ruling on offender score would not affect the agreed upon exceptional sentence of 360 months" and "The offender score was a collateral issue to the agreed upon exceptional sentence" demonstrate that the implied terms that Schmitt argues are included in this plea agreement are, in fact, not included. In other words, these findings show that there was no implicit agreement that the State would be forever barred from addressing the trial court's decision regarding Schmitt's offender scores in an entirely different sentencing context because such an implicit term did not "arise from the language used or [was] indispensable to effectuate the intention of the parties." These findings also indicate that such a "term" was not "clearly within the contemplation of the parties," legally necessary, or of a nature that such a term would have been added if it had come to the attention of the parties." *See Brown v. Safeway Stores, Inc.*, 94 Wn.2d at 371.

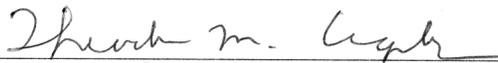
Because the trial court properly denied Schmitt's motion, the reasons for its denial are not relevant. In any event, the reasons set forth by the trial court in denying Schmitt's motion are both supported by the record and are relevant to its finding that the State did not breach its plea in its response to Schmitt's latest Personal Restraint Petition. Schmitt's claim to the contrary should be rejected.

V. CONCLUSION

For the foregoing reasons, this Court should deny Schmitt's claims and affirm the trial court's order denying Schmitt's motion for breach of the plea bargain.

RESPECTFULLY SUBMITTED this 20th day of September,
2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



THEODORE M. CROPLEY WSB# 27453
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

9/20/19
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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