

FILED
Court of Appeals
Division II
State of Washington
1/30/2020 4:34 PM

No. 53495-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LABOUNTY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .. 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 5

1. The prosecution breached its obligation under the plea agreement by recommending a far higher sentence than it promised to recommend 5

a. The prosecutor must adhere to the terms of a plea agreement 5

b. The prosecution breached the plea agreement when it explicitly asked for a maximum sentence and never made the lower recommendation it promised in the plea agreement 8

c. The remedy is to order a new sentencing hearing before a different judge for all concurrently sentenced offenses 11

2. The court entered an impermissible term of community custody..... 13

3. The judgment and sentence does not expressly state the terms of the sentence, which creates an improper ambiguity. Remand for written clarification should be ordered..... 16

F. CONCLUSION..... 18

TABLE OF AUTHORITIES

Washington Supreme Court

In re Pers. Restraint of James, 96 Wn.2d 847, 640 P.3d 18 (1982)
..... 9

State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012) 14, 15

State v. Bruch, 182 Wn.2d 854, 346 P.3d 724 (2015)..... 14

State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011) 15

State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003) 11

State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997) 6, 10

Washington Court of Appeals

City of Seattle v. Clewis, 159 Wn. App. 842, 247 P.3d 449 (2011)
..... 12

State v. Carreno-Maldonado, 135 Wn. App. 77, 143 P.3d 343
(2006)..... 5, 6, 7, 10, 11

State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995)..... 12

State v. E.A.J., 116 Wn. App. 777, 67 P.3d 518 (2003) 6

State v. Gleim, 200 Wn. App. 40, 401 P.3d 316 (2017), *rev.*
denied, 189 Wn.2d 1032 (2018) 6

State v. Johnson, 180 Wn. App. 318, 327 P.3d 704 (2014) 17

State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002)..... 17

State v. Xavier, 117 Wn. App. 196, 69 P.3d 901 (2003) 6

Federal Decisions

Correale v. United States, 479 F.2d 944 (1st Cir.1973) 6

Palermo v. Warden, 545 F.2d 286, (2d Cir.1976) 6

United States v. Alcalá-Sánchez, 666 F.3d 571 (9th Cir. 2012).....
..... 5, 12

United States Constitution

Fourteenth Amendment..... 5

Washington Constitution

Article I, § 3 5

Statutes

RCW 69.50.401 14

RCW 9.94A.505 14

RCW 9.94A.535 16

RCW 9.94A.589 16

RCW 9.94A.701 14, 15

RCW 9.94A.729 15

A. INTRODUCTION.

Matthew LaBounty entered into a plea agreement with the prosecution. As part of the agreement, the prosecution promised to recommend sentences of 108 months, less than the top of the standard range, for counts 1 and 2. But at the sentencing hearing, the prosecution asked the court to impose the statutory maximum of 120 months and never mentioned the plea agreement.

The prosecution's failure to adhere to the terms of the plea agreement undermines the plea and entitles Mr. LaBounty to the opportunity to withdraw his plea or have a new sentencing hearing where the prosecution abides by the terms of the agreement. On remand, the court should also strike the unauthorized term of community custody and clarify the concurrent sentencing terms ordered.

B. ASSIGNMENTS OF ERROR.

1. The prosecution breached the plea agreement in violation of its contractual obligation and Mr. LaBounty's right to due process of law under the Fourteenth Amendment and article I, section 3.

2. The court imposed a period of community custody that is not authorized by statute.

3. The court improperly neglected to explain the terms of the sentence on the written judgment and sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the prosecution induces a guilty plea by promising to make a certain sentencing recommendation but does not honor this promise, it undermines the validity of the guilty plea. The prosecution offered Mr. LaBounty a plea bargain that promised it would recommend 108 months as the sentence for counts 1 and 2 but it did not mention this promise at the sentencing hearing and asked the court to impose the statutory maximum of 120 months. Did the prosecution's sentencing advocacy breach its promise to recommend a lower standard range sentence, entitling Mr. LaBounty to receive a new sentencing hearing or the opportunity to withdraw his plea?

2. By statute, the trial court must impose a fixed term of community custody and it may not delegate its imposition of a term of community custody to the Department of Corrections. Here, the court ordered Mr. LaBounty to serve the statutory

maximum of 120 months in prison, which precludes the imposition of community custody. But it also ordered DOC to place Mr. LaBounty on community custody for an undefined term based on earned early release. Is the court's sentence unlawful?

D. STATEMENT OF THE CASE.

Matthew LaBounty entered into a plea agreement with the prosecution. CP 56-61. The terms of this agreement were that Mr. LaBounty would waive his right to have the prosecution prove three charged offenses, agree to his criminal history, and also waive his right to appeal in two other cases where he had been convicted following jury trials. CP 56-58; RP 113-14.

In exchange for this plea and waiver of appeal in two other cases, the prosecution promised to recommend sentences of 108 months for counts 1 and 2, involving the possession of a controlled substance with the intent to deliver, and 102 months for a third count of unlawful possession of a firearm. CP 59; RP 117. The prosecution also agreed to dismiss two firearm enhancements and agreed the charges constituted the same

criminal conduct. RP 113-14. The court accepted Mr. LaBounty's guilty plea premised on this plea agreement. RP 116-19.

At the sentencing hearing, the prosecution asked the court to impose 120 month sentences in counts 1 and 2, the high end of the standard range and the statutory maximum for these two offenses. RP 128. It did not mention a specific sentence for count 3, but asked the court to impose "the top of the range on everything." *Id.*

Mr. LaBounty asked the court to impose 108 months on counts 1 and 2, and 102 months on count 3. RP 128-30. Defense counsel explained that if the court imposed its recommendation, rather than the statutory maximum on counts 1 and 2, it could also order a 12-month term of community custody. *Id.*

The court followed the prosecutor's recommendation and ordered Mr. LaBounty to serve 120 months on counts 1 and 2, and 102 months on count 3. CP 82; RP 135-36. Rather than imposing a term of community custody, the court ordered Mr. LaBounty to serve "any" earned early release time as community custody. CP 83.

The court pronounced the sentences as concurrent to the other terms imposed in other cases, but the judgment and sentence does not direct the various sentences imposed at the same sentencing hearing to be treated as concurrent. CP 79-90; RP 134.

E. ARGUMENT.

1. The prosecution breached its obligation under the plea agreement by recommending a far higher sentence than it promised to recommend.

a. The prosecutor must adhere to the terms of a plea agreement.

“A plea agreement is a contract, and the government is held to its literal terms.” *United States v. Alcala-Sanchez*, 666 F.3d 571, 575 (9th Cir. 2012). By accepting a plea agreement, a defendant gives up important constitutional rights based on the expectation that the prosecution will honor the terms of the agreement. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006); U.S. Const. amend. XIV; Const. art. I, § 3.

Both contract law and due process protections require prosecutors to abide by the terms of their plea agreements in good faith. *State v. Gleim*, 200 Wn. App. 40, 44, 401 P.3d 316

(2017), *rev. denied*, 189 Wn.2d 1032 (2018). Because plea agreements implicate the accused’s fundamental rights, the State is held to “meticulous standards of both promise and performance.” *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973)).

The State’s “duty of good faith” when plea bargaining prohibits it from “explicitly or implicitly” engaging in conduct that may “circumvent the terms of the plea agreement.” *Carreno-Maldonado*, 135 Wn. App. at 83. To determine whether the prosecution has breached its agreement to recommend a particular sentence, the court looks objectively to the “effect of the State’s actions, not the intent behind them.” *State v. Sledge*, 133 Wn.2d 828, 843, 947 P.2d 1199 (1997). “Neither good motivations nor a reasonable justification will excuse a breach.” *State v. Xavier*, 117 Wn. App. 196, 200, 69 P.3d 901 (2003).

The prosecution’s breach of a plea is a structural error that is not subject to harmless error review. *Carreno-Maldonado*, 135 Wn. App. at 87-88; *State v. E.A.J.*, 116 Wn. App. 777, 785, 67 P.3d 518 (2003) .

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

Even when a prosecutor’s reason for discussing the facts of the case is to guard against a lower sentence, “a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class.” *Id.* at 84-85.

b. The prosecution breached the plea agreement when it explicitly asked for a maximum sentence and never made the lower recommendation it promised in the plea agreement.

Mr. LaBounty faced a standard range of 60+ to 120 months on counts 1 and 2, both involving possession of a controlled substance with intent to deliver, and 77 to 102 months on count 3, for the separate offense of unlawful possession of a firearm. CP 59, 63. In the plea agreement, the prosecution promised to recommend Mr. LaBounty receive a sentence of 108 months for counts 1 and 2 and 102 months for count 3. CP 59. It agreed counts one and two would be treated as the same criminal conduct. CP 59. The prosecutor agreed these sentences would be concurrent under operation of the law. RP 112-13.

Mr. LaBounty pled guilty based on this promised recommendation. CP 59, 61, 65. In addition to waiving his right to trial, he agreed not to appeal from two other cases in which he had recently been convicted following jury trials. CP 57. His attorney recommended the same sentence as the prosecutor promised to recommend. CP 77.

But at the sentencing hearing, the prosecutor said, “I am asking the Court to impose the top of the range on everything.” RP 125. The prosecutor did not give any reason for not making its promised recommendation and did not contend there was a legal basis to void the plea agreement. RP 125-26. If the prosecution believed there was a legal grounds for nullifying the plea agreement, due process requirements trigger an obligation of notice and hearing on the alleged violation. *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.3d 18 (1982) (holding prosecution may not “unilaterally nullify” a plea agreement). Here the prosecution simply did not mention the promised plea recommendation during the sentencing hearing and gave no reason for disregarding its promise.

The prosecutor told the court, “I think it’s appropriate” to impose the statutory maximum sentence because Mr. LaBounty “ran up against the top of the range pretty early on.” RP 125. The prosecutor told the court that the State agreed to dismiss the firearm enhancement attached to counts one and two as part of the plea bargain because it would only have resulted in losing some earned release time given that Mr. LaBounty would

receive the statutory maximum. *Id.* The prosecutor further explained, “on the cases where he is facing up to 120 months, I am going to ask the Court to impose all 120” months. RP 126.

In response the defense’s request for sentence below the statutory maximum to enable Mr. LaBounty to receive a term of community custody, the prosecutor argued that any community custody should be only earned early release time. RP 126.

Summing up, the prosecutor said to the court, “And again, I am just asking that you impose the top of the range on everything.” RP 128.

A breach of the plea agreement is based on the prosecution’s failure to fulfill its promised sentencing recommendation, without regard to whether it had any influence on the sentencing judge. *Carreno-Maldonado*, 135 Wn. App. at 88.

The prosecution may not explicitly or implicitly undercut its promised sentencing recommendation. *See Sledge*, 133 Wn.2d at 840 (prosecution has duty “not to undercut terms of the [plea] agreement” even though it is not necessary to make the recommendation “enthusiastically”). The prosecution directly

undercut its promised sentencing recommendation at the sentencing hearing. It voiced no support for the promised sentencing recommendation. The plea agreement mandates the prosecutor's "good faith recommendation" of a specific sentence. *Carreno-Maldonado*, 135 Wn. App. at 88. "[F]ailing to make the bargained-for recommendation eliminates the basis for the bargain struck." *Id.*

By expressly arguing why the court should give a far higher sentence than its agreed recommendation, and never endorsing the plea agreement, the prosecution breached its duty under the plea agreement.

c. The remedy is to order a new sentencing hearing before a different judge for all concurrently sentenced offenses.

Where the State breaches a plea agreement, the defendant has the choice to either withdraw his plea or receive specific performance of the agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003). "[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.*

When a judge makes a sentencing decision without factoring in all necessary information, the judge’s continued involvement creates an appearance of unfairness and the remedy is remand before a different judge. *City of Seattle v. Clewis*, 159 Wn. App. 842, 851, 247 P.3d 449 (2011); *see Sledge*, 133 Wn.2d at 846 n.9 (we “provide for a new judge at the disposition hearing in light of the trial court’s already-expressed views on the disposition”); *Alcala-Sanchez*, 666 F.3d at 577 (remanding for resentencing before a different judge – regardless of the prior judge’s impartiality – because it is necessary “to eliminate the impact of the government’s prior mistake and breach”).

As this Court held in *State v. Crider*, 78 Wn. App. 849, 861, 899 P.2d 24 (1995),

Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant’s perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

Here, the court imposed sentences for several offenses as part of a joint resolution of several cases. The prosecutor pursued the maximum possible sentence on all of these cases, despite its promise to recommend lower sentences.

It is appropriate to reassign this case to a different judge who did not already announced a sentence. This ensures Mr. LaBounty is not disadvantaged in his request for a sentence under the plea bargain while the State confines itself to its promised sentencing recommendation.

2. The court entered an impermissible term of community custody.

The court imposed the statutory maximum sentence of 120 months on counts 1 and 2. CP 82. But it also ordered that Mr. LaBounty serve an undefined amount of community custody on these counts for “any earned release time.” CP 83. This ambiguous term of community custody is unlawful and must be stricken.

A court lacks authority to sentence someone to a combination of prison and community custody that exceeds the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321

(2012). Any time the term of confinement plus community custody exceeds the statutory maximum, the court must reduce the term of community custody. RCW 9.94A.701(9).

The court's authority to impose community custody stems from RCW 9.94A.701; *see* RCW 9.94A.505(2)(a)(ii) (directing that "the court shall impose" community custody pursuant to "RCW 9.94A.701" in a case with a sentence over one year). RCW 9.94A.701(9) requires the trial court, not the Department of Corrections, to reduce the community custody term to avoid exceeding the statutory maximum. *Boyd*, 174 Wn.2d at 473.

The trial court may not transfer the decision of the length of community custody to the Department of Corrections. *Id.* The legislature removed a statute that allowed DOC to determine the duration of community custody. *State v. Bruch*, 182 Wn.2d 854, 862, 346 P.3d 724 (2015).

Mr. LaBounty was sentenced to several class B felonies with a statutory maximum of 120 months. CP 1-2, 81; RCW 69.50.401(1) & (2)(b). The court imposed this statutory maximum for counts 1 and 2. CP 82. Count 3 is ineligible for community custody. *See* RCW 9.94A.701.

The court also directed the Department of Corrections to require Mr. LaBounty to serve additional time as community custody. CP 83. It did not order a specific term of community custody. *Id.*

As the court explained in *Boyd*, the judgment and sentence must specify a fixed term of community custody. 174 Wn.2d at 472; RCW 9.94A.701(9). The “plain meaning” of RCW 9.94A.701 is that the trial court must impose the term of community custody at the time of sentencing, not as a matter earned early release under RCW 9.94A.729. *State v. Franklin*, 172 Wn.2d 831, 837 n.8, 263 P.3d 585 (2011). The court, not the Department of Corrections, is required to reduce the term of community custody to ensure it does not exceed the statutory maximum.

The improper term of community custody should be stricken from the judgment and sentence. Unless the court imposes a sentence below the statutory maximum on remand, no community custody may be ordered.

3. The judgment and sentence does not expressly state the terms of the sentence, which creates an improper ambiguity. Remand for written clarification should be ordered.

When the court sentences a person for two or more “current offenses,” the sentences imposed “shall be served concurrently.” RCW 9.94A.589(1)(a). Terms may be consecutive only if the exceptional sentence provisions of RCW 9.94A.535 apply. *Id.*; see also RCW 9.94A.589(3).

Here, the court pronounced sentences on four different cause numbers at the same hearing. RP 134-36. It ordered these sentences run concurrently. RP 134. But the judgment and sentence makes no mention of this order. CP 79-90.

The judgment and sentence does not refer to the other concurrently imposed sentences. CP 81-83. It does not direct the Department of Corrections to treat this sentence as concurrent to these other sentences or mention that the term of confinement imposed will exceed the statutory maximum when viewed in light of the 120 months of incarceration Mr. LaBounty must serve. *Id.*

The court did not notify the Department of Corrections that the sentences are concurrent. There is no guarantee the Department will understand the mandatory concurrent nature of these various terms.

The judgment and sentence should be modified on remand to expressly state that this sentence is imposed concurrently with the other current offenses in other cause numbers sentenced in the same hearing. *See State v. Johnson*, 180 Wn. App. 318, 331, 327 P.3d 704 (2014) (granting trial court “the necessary permission” to correct clerical errors in the judgment and sentence on remand); *see also State v. Trujillo*, 112 Wn. App. 390, 412 n.15, 49 P.3d 935 (2002) (remanding to clarify terms of judgment and sentence). This correction is necessary to accurately convey the terms of the sentence imposed and ensure it is properly executed.

F. CONCLUSION.

Mr. LaBounty's case should be remanded so he is afforded the opportunity to withdraw his plea. Alternatively, the court should be directed to strike the unauthorized term of community custody or reduce the term of confinement so the sentence does not exceed the statutory maximum.

DATED this 30th day of January 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy Collins", written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant
nancy@washapp.org
wapofficemail@washapp.org

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 53495-9-II
)	
MATTHEW LABOUNTY,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2020, I CAUSED THE ORIGINAL OPENING BRIEF OF APPELLANT TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|----------------------------|---|
| <p>[X] JASON WALKER, DPA
[jwalker@co.grays-harbor.wa.us]
[appeals@co.grays-harbor.wa.us]
GRAYS HARBOR CO PROSECUTOR'S OFFICE
102 W. BROADWAY AVENUE, ROOM 102
MONTESANO, WA 98563-3621</p> | <p>()
()
(X)</p> | <p>U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL</p> |
| <p>[X] MATTHEW LABOUNTY
(ADDRESS OF RECORD)
ON FILE WITH OUR OFFICE)</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JANUARY, 2020.

X _____ 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

January 30, 2020 - 4:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53495-9
Appellate Court Case Title: State of Washington, Respondent v. Matthew Benjamin Labounty, Appellant
Superior Court Case Number: 18-1-00570-4

The following documents have been uploaded:

- 534959_Briefs_20200130163221D2964057_1524.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.013020-08.pdf
- 534959_Motion_20200130163221D2964057_5822.pdf
This File Contains:
Motion 1 - Consolidate
The Original File Name was washapp.013020-09.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- greg@washapp.org
- jwalker@co.grays-harbor.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200130163221D2964057