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Court of Appeals
Division II
State of Washington
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NO. 53495-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

MATTHEW BENJAMIN LABOUNTY,
Appellant.

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

THE HONORABLE STEPHEN BROWN, JUDGE

BRIEF OF RESPONDENT

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T A B L E S

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE..... 1

ARGUMENT..... 1

1. The Defendant committed a new criminal act while awaiting sentencing, which, by the terms of the plea agreement, allowed the State to recommend a more severe sentence..... 1

2. The trial court properly ordered any earned early release time be converted to community custody..... 5

3. The Defendant points to no law requiring the judgment & sentence to refer to other court cases sentenced on the same day, nor does he establish prejudice..... 7

Standard of Review..... 7

Application..... 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

State v. Bruch, 182 Wn.2d 854, 346 P.3d 724 (2015) 5, 6
State v. Sanchez, 146 Wn.2d 339, 46 P.3d 774 (2002). 2
State v. Van Buren, 101 Wn. App. 206, 2 P.3d 991, 995 (2000) 2
State v. Williams, 149 Wn.2d 143, 65 P.3d 143 (2003). 7

Statutes

RCW 9.94A.510..... 4
RCW 9.94A.589..... 7
RCW 9.94A.729..... 5

RESPONSE TO ASSIGNMENTS OF ERROR

1. **The State did not breach the plea agreement because the agreement allowed the State to recommend a more severe sentence if the Defendant committed a new criminal act before sentencing, which he did.**
2. **The Court did not impose an unlawful term of community custody.**
3. **There is no requirement that judgment & sentences reference other cases sentenced on the same day. The Defendant's prejudice is speculative.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the Defendant's recitation of the facts, with the exception of the passages cited to in the argument.

ARGUMENT

1. **The Defendant committed a new criminal act while awaiting sentencing, which, by the terms of the plea agreement, allowed the State to recommend a more severe sentence.**

In his first assignment of error, the Defendant claims the State breached the plea agreement because the State recommended 120 months at sentencing, whereas the plea agreement promised a recommendation of 108 months. However, the plea agreement specifically allowed for a more severe sentence recommendation if the Defendant committed a new

criminal act. When the Defendant was caught with drugs in the jail before sentencing, he opened the door for the State to make the recommendation it did.

Argument.

Appellate courts use an objective standard in determining whether the State breached a plea agreement. *State v. Van Buren*, 101 Wn. App. 206, 213, 2 P.3d 991, 995 (2000) (citing *State v. Jerde*, 93 Wn.App. 774, 780, 970 P.2d 781 (1999).) The entire sentencing record is reviewed when determining if there was a breach. *Id.* (citing *Jerde* at 782.) Plea agreements are analyzed according to contract principles. *State v. Sanchez*, 146 Wn.2d 339, 347, 46 P.3d 774, 778 (2002), *as amended* (May 13, 2002).

The Defendant entered into a plea agreement with the State, which was filed with the trial court at the time of the plea, February 13, 2019. CP at 56. The Agreement contained the State's sentence recommendation: 108 months on counts 1 and 2, and 102 months, the top of the range, on Count 3. CP at 59. This was based upon the Defendant's offender score of 8. *Id.* Counts 1 and 2 would also carry 12 months of community custody. *Id.*

In addition to the sentencing provisions, the Agreement specifically allowed that, “If the Defendant... commits a new offense... prior to sentencing... the Prosecuting Attorney may recommend a more severe sentence....” CP at 60. Sentencing was scheduled for March 22, 2019. VRP 2/13/2019 at 10.

At the record here shows, the Defendant “...was caught with suboxone [*sic*] in the jail about a month ago while he was awaiting sentencing.”¹ VRP 3/22/2020 at 122. As a result, on March 22, 2019, the date set for sentencing on this matter, the State filed a new criminal charge for violating the Uniform Controlled Substance Act.² VRP 3/22/2020 at 122-25. The Defendant then promptly pled guilty to the new charge, and the Defendant was then sentenced on all four of his pending matters. VRP 3/22/2020 at 125. As the plea agreement allowed, the State then recommended a more severe sentence, 120 months on Counts 1 and 2. *Id.*

Because the Defendant’s plea agreement specifically allowed for the prosecutor to recommend a more severe sentence if the Defendant committed a new criminal act while awaiting sentencing, and the Defendant did so, the State did not breach the plea agreement.

¹ Suboxone is a trade name for a medication containing the controlled substance buprenorphine.

² That case is currently on appeal, but stayed pending the outcome of the instant appeal. *See* Washington State Court of Appeals case #53551-3-II.

The State anticipates that the Defendant may argue that operation of this provision renders the plea agreement void. This is not the case. Nowhere in the Agreement does it say that the Defendant agrees not to commit new crimes before sentencing. Allowing the prosecutor to argue for a higher sentence is a provision of the plea agreement that was activated when the Defendant committed his new offense.

The provision allowing the State to deviate from a sentencing recommendation is a necessary part of a plea agreement under the Sentencing Reform Act. The sentencing ranges allowed by the SRA are narrow, and do not always overlap. *See* RCW 9.94A.510. Therefore, if a criminal defendant were to commit a new crime after entering into a plea agreement, but before sentencing, the State might be put in the untenable position of having to recommend a sentence that the court cannot legally impose, one below the Defendant's standard range. Allowing the State to recommend a more severe sentence for crimes committed while pending sentencing not only provides an incentive for convicted, but not sentenced, defendants to behave, but avoids putting a prosecutor in such a dichotomy due to the misconduct of another.

Because the Defendant committed a new criminal act after entering in the plea agreement with the State, the State was entitled to ask for a more severe sentence. The Defendant has no one to blame but himself.

2. The trial court properly ordered any earned early release time be converted to community custody.

The Defendant next claims that the trial court erred by ordering the Defendant serve earned early release time on community custody.

However, pursuant to RCW 9.94A.729(5)(a) earned early release time must be converted to community custody when a defendant's offense qualifies for community custody. This does not amount to a prohibited indeterminate sentence or an improper delegation of authority to the Department of Corrections, as our Supreme Court recognized in *State v. Bruch*.

In *Bruch*, the Defendant was convicted, in relevant part, of two Class B sex offenses. *Bruch*, 182 Wn.2d 854, 857, 346 P.3d 724 (2015). Those crimes carried a community custody term of 36 months. *Id.*

The trial court imposed a sentence of 116 months. *Id.* However, Class B felonies carry a maximum punishment of 120 months. *See* RCW 9A.20.021 (1)(b). Therefore, pursuant to RCW 9.94A.701(9), the court reduced the community custody to "at least 4 months, *plus all accrued earned early release time at the time of release.*" *Id.* (emphasis added.)

On appeal, the defendant argued that the court erred because the community custody ordered was tantamount to an indeterminate sentence. *Id.* at 860. But the Supreme Court rejected that argument, pointing out that there was “no indication that the legislature intended for offenders... to serve only the fixed, court-imposed community custody term” or that “community custody in lieu of early release renders an offender's sentence indeterminate.” *Id.* at 855.

The same situation exists here. The Defendant’s standard range did not allow for a fixed term of community custody on top of total confinement. However, the provision requiring earned early release time be converted to community custody does not stop operating just because the Defendant received the maximum sentence.

The only difference between *Bruch* and the instant case is that the defendant in *Bruch* was sentenced to four months plus any earned early release time on community custody, whereas the Defendant here was sentenced only to the converted earned early release time. This difference is not relevant. The Defendant does not explain why *Bruch* is distinguishable.

Because the community custody ordered is consistent with *Bruch* this Court should uphold the Defendant’s sentence.

3. The Defendant points to no law requiring the judgment & sentence to refer to other court cases sentenced on the same day, nor does he establish prejudice.

Finally, the Defendant complains that his judgment & sentence documents do not reference one another, and alleges this creates ambiguity. However, the Defendant's prejudice is not only highly speculative, but unlikely.

Standard of Review.

A standard range sentence is generally not subject to appellate review. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 143 (2003).

Application.

As the Defendant correctly points out, under the sentencing provisions of the Sentencing Reform Act, all sentences for current offenses are presumed to be concurrent, unless an exception applies. *See* RCW 9.94A.589(1)(a). No party here alleges that any exception might apply.

The Defendant simply alleges that “[t]here is no guarantee the Department [of Corrections] will understand the mandatory concurrent nature” of the Defendant's sentence. Brief of Appellant at 17. The Defendant offers no further explanation as to why he suspects this. There is no indication in the record to suggest this misunderstanding will occur.

It seems exceedingly unlikely that the department responsible for the execution of criminal sentences would make such a mistake. This is especially true given that running the Defendant's sentences consecutively would increase the cost to the Department dramatically.

And at this point, if such a mistake were to be made, the Defendant would know. The Defendant was sentenced over a year ago. His prospective release date must have been calculated by now. Yet he does not allege that his sentences are running consecutively or that he is not receiving credit towards all of his sentences. Instead, he invites this Court to imagine that an ambiguity exists, and then imagine that he might be prejudiced.

Because the Defendant's alleged prejudice is only speculative, this Court should take no action and affirm his sentence.

CONCLUSION

The Defendant chose to engage in criminal activity while awaiting sentencing. Pursuant to the terms of the plea agreement, this allowed the State to recommend the top of the range, rather than the 108 months that had been negotiated. Because the Defendant was sentenced to the maximum sentence allowed, the sentencing court could not impose a term

of community custody, except any earned release time the Defendant accrues while in prison. That order is consistent with *Bruch* and is lawful. Nor are his sentences ambiguous or vague. There is no legal requirement that the multiple judgment & sentence documents entered on that day reference each other. This Court should not presume that the Department of Corrections is going to make an expensive mistake to both their and the Defendant's detriment. This Court should affirm the Defendant's sentence.

DATED this 8th day of May, 2020.

Respectfully Submitted,

BY. 

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JFW /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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