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Court of Appeals
Division II
State of Washington
7/24/2020 4:16 PM

NO. 53495-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LABOUNTY,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
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A. ARGUMENT.

1. The prosecution admits its breach of the plea agreement but misunderstands the prohibition on unilaterally breaching a plea agreement.

a. A plea agreement binds the prosecution.

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)).

Before the prosecution is excused from performing its end of a plea agreement, it must show the defendant has not complied with the agreement. *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.3d 18 (1982). This requires an evidentiary hearing, where the defendant has “an opportunity to call witnesses and have other due process rights, including the requirement that the State prove, by a preponderance of the

evidence, that the defendant has failed to perform his or her part of the agreement.”*Id.* at 850. This “procedure is constitutionally required.” *Id.*

Even when a defendant does not ask for an evidentiary hearing, the right is not waived. *Id.* at 851; *State v. Morley*, 35 Wn. App. 45, 47-48, 665 P.2d 419 (1983). In *James* and *Morley*, the reviewing court reversed because the defendants had not been afforded an evidentiary hearing on the issue of breach of the plea bargain. *James*, 96 Wn.2d at 852; *Morley*, 35 Wn. App. at 47-49; *see also State v. Roberson*, 118 Wn. App. 151, 158–59, 74 P.3d 1208 (2003) (remanding for evidentiary hearing on whether defendant’s behavior allowed prosecutor to breach the plea agreement)

The prosecution admits it entered a plea agreement with Mr. LaBounty that required the prosecution to recommend 108 months as the sentence on counts 1 and 2, with 102 months for count 3. CP 59. It concedes it did not make this promised recommendation at the March 22, 2019 sentencing hearing, and instead sought the statutory maximum of 120 months for counts 1 and 2. RP 159.

For the first time on appeal, the prosecution claims it was no longer bound by the plea agreement because, on the day of sentencing, it filed a new criminal charge against Mr. LaBounty.

However, if the prosecution believes there is legal grounds for nullifying a plea agreement, due process requirements trigger an obligation of notice and hearing on the alleged breach. *James*, 96 Wn.2d at 850. The prosecution is prohibited from “unilaterally nullify[ing]” a plea agreement, as occurred here. *Id.*

b. The prosecution breached the plea agreement without notifying Mr. LaBounty and while pressing him to hastily admit to a new crime by promising this would benefit him.

The prosecution disregarded its promised recommendation at the sentencing hearing and pressed only for the longest possible sentence at the March 22, 2019 sentencing hearing. This is a breach of the plea agreement.

The prosecution now claims it was allowed to unilaterally breach the plea because Mr. LaBounty committed a new offense. But it pressed Mr. LaBounty to enter a plea to this new offense before it was even charged, by promising this plea would benefit

him and without indicating that with this plea, the prosecution would now press for a harsher sentence.

At the sentencing hearing, the prosecution stated it was filing a new criminal charge that same day and offered to wrap up that charge with the other cases in the plea agreement, claiming only that this would benefit Mr. LaBounty. This new charge had not even been formally filed before the March 22, 2019 hearing. RP 122. The prosecutor only told the defense attorney that a new charge would be filed the day before this sentencing hearing. *Id.*

The prosecutor presented this new charge as a trivial matter, something Mr. LaBounty could just “take care of today” and since the sentence would be concurrent, it would be “some advantage to him” if he just pled guilty and agreed to be sentenced immediately on all cases. RP 122.

The prosecution did not even “have lab results yet” for the new case, but encouraged Mr. LaBounty to waive those results, since they are “usually a foregone conclusion.” RP 122. It insisted that it would benefit Mr. LaBounty to plead guilty now

and “to proceed to sentencing on that matter and everything else today as well,” the prosecution insisted. *Id.*

The new charge was possession of a controlled substance, suboxone,¹ in the jail. RP 122; COA 53551-3, CP 1 (information and probable cause certification attached as Appendix A).² This suboxone was discovered in a jail cell shared by five people. *Id.* (CP 4). Another person in the cell, Brett Warness, appeared to have used this substance. *Id.* A jail guard said Mr. LaBounty told the other inmates, “I will take the blame for it,” although this was not in response to any discussion about drugs. *Id.* A jail sergeant watched video footage that he believed showed Mr. LaBounty put a glue stick behind him on a bench and this glue stick contained what appeared to be suboxone strips. *Id.*

The transcript from the sentencing hearing shows the prosecution pressed Mr. LaBounty to quickly plead guilty to this new charge, without waiting for the result of a lab test indicating the jail found a controlled substance, without

¹ Suboxone is a schedule III controlled substance prescribed to overcome opioid dependence.

² COA 53551-3 is a currently pending appeal in this Court, which rests on the same sentencing record as this case, with different clerks papers.

watching the video surveillance footage, or without otherwise contesting whether the State could prove he was in possession of a controlled substance found in a jail cell that he shared with at least four other people, one of whom appeared to be under the influence of drugs.

The prosecution sua sponte relieved itself of the promise that it would recommend sentences not more than 108 months, which it used to induce Mr. LaBounty's guilty pleas. Instead of the promised recommendation, it asked the court to impose the high end of the standard range. RP 128. It breached the plea agreement without alerting Mr. LaBounty that if he pled guilty to the charge it filed that day, it would no longer make its promised plea recommendation. It further encouraged Mr. LaBounty to enter this additional plea, telling him it would be to his advantage without also ensuring he understood the disadvantage of pleading guilty to this new charge. RP 122.

The prosecution's unilateral nullification of the plea agreement should be reversed and this Court should order further proceedings that comply with due process.

2. The judgment and sentence incorrectly imposes a discretionary range of community custody.

The trial court must impose a fixed term of community custody. *State v. Bruch*, 182 Wn.2d 854, 862, 346 P.3d 724 (2015). RCW 9.94A.701 sets forth the determinate terms authorized for different offenses. Community custody may not be imposed as a range of time. *Id.*; *Bruch*, 182 Wn.2d 861.

In addition, the Court may not authorize the Department of Corrections to decide the length of community custody. *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012). The legislature removed a statute that allowed DOC to determine the duration of community custody. *Id.*

Finally, if the court imposes sentence that would exceed the statutory maximum by combining community custody and prison, the trial court must reduce the term of community custody at the time of sentencing. *Id.* at 473.

The prosecution relies exclusively on *Bruch* to assert the court may impose the required fixed term community custody by simply telling the Department of Corrections to use any earned early release time as community custody. This assertion

misrepresents *Bruch* and other related Supreme Court decisions.

In *Bruch*, the Supreme Court reiterated that a sentencing court is “required to reduce a term of community custody that, in combination with the term of confinement, may exceed the statutory maximum.” 182 Wn.2d at 858; RCW 9.94A.701(9). The court did this in *Bruch* by sentencing Mr. Bruch “to only four months of community custody.” *Id.*

In addition to imposing a flat 116-month prison sentence and fixed four-month term of community custody, the sentencing court in *Bruch* also stated that “all accrued earned early release time at the time of release” should be included in community custody. *Id.* at 859. The *Bruch* Court reasoned this added increment of community custody did not violate the statutory maximum or invest new authority in DOC because the term was fixed and the added time would not exceed the statutory maximum. Its reasoning hinged on the fact that the court imposed a lawful *fixed* term of community custody and this term was not undermined by the court also “referencing in the

judgment and sentence” DOC’s authority to release a person early under RCW 9.94A.729(5).

Here the court ordered Mr. LaBounty serve the statutory maximum. It did not impose a fixed term of community custody as required. CP 83. Instead, it directed DOC to set its own term of community custody. *Id.*

As the Supreme 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.

Also distinguishing this case from *Bruch*, Mr. LaBounty was sentenced to the statutory maximum for this case and two others. RP 135-36. At the same time, the court sentenced him to 12 months of community custody for a concurrent case, COA

53551-3. RP 136, 139. If that community custody survives the challenge raised on appeal,³ it creates a situation where Mr. LaBounty is serving an ambiguous term of community custody for this case, that may not exceed the statutory maximum, as well as a 12-month term in another case. There is an unmistakable risk he would end up improperly serving more than the statutory maximum on this case.

The trial court overstepped its authority by ordering an ambiguous, unfixed term of community custody at the discretion of the Department of Corrections while also imposing the statutory maximum. This language serves no valid purpose and should be stricken from the judgment and sentence.

3. The judgment and sentence should be modified to clearly convey the sentence ordered by the court.

The prosecution agrees, as it must, the judge imposed concurrent sentences on four different cause numbers but the judgment and sentence does not explain the concurrent nature of the sentences. Resp. Brief at 7-8. It brushes aside any concern

³ In COA 53551-3, Mr. LaBounty contests the court's authority to order 12 months of community custody that he must serve after spending 10 years in prison, which extends his confinement far

that this may result in an erroneous interpretation of this sentence and complains that Mr. LaBounty has not proven his sentence is actually being improperly treated as concurrent by DOC.

However, the reason this issue came to light was because DOC construed these sentences to be partially concurrent and partially consecutive when Mr. LaBounty was sent to prison.⁴ While this individual determination of a records custodian is not final, and another DOC employee may interpret the sentences differently, it is certainly not guaranteed that the court's intent to impose concurrent sentences will be understood by DOC.

The court alone has the authority to order sentences run concurrently or consecutively. RCW 9.94A.589. The court must impose a sentence authorized by statute and may not delegate the terms of a sentence to DOC. *See In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). It may not leave its sentencing decisions ambiguous, or allow DOC to construe the terms of imprisonment.

beyond the five year statutory maximum.

⁴ The undersigned counsel has confirmed that DOC has construed Mr. LaBounty's sentence to include consecutive terms.

The court should ensure the sentences it imposes are properly understood by clarifying the judgment and sentence to specify the concurrent nature of the sentences imposed under different cause numbers. *See, e.g., State v. Trujillo*, 112 Wn. App. 390, 412 n.15, 49 P.3d 935 (2002) (remanding to clarify terms of judgment and sentence).

B. CONCLUSION.

As explained above and in Mr. LaBounty's opening brief, the prosecution's breach of the plea agreement requires remand for further proceedings before a new judge. If resentenced, Mr. LaBounty may receive only a lawful, fixed term of community custody and the concurrent nature of his sentences should be clarified.

DATED this 24th day of July 2020.

Respectfully submitted,



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APPENDIX A

FILED

2019 MAR 22 PM 1:03

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19-1-00157-14
INFO 1
Information
6171908



SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

No.: 19-1-157-14

v.

INFORMATION

MATTHEW BENJAMIN LABOUNTY
AKA NICHOLAS RYAN GEORGE,
DOB: 04/08/1985

GHSO No.: 19-3329
P. A. No.: 027-0095638

Defendant.

I, Katherine L. Svoboda, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the Defendant of the crime of VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT - POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows:

That the said Defendant, Matthew Benjamin LaBounty, in Grays Harbor County, Washington, on or about February 23, 2019, did unlawfully possess a controlled substance, to-wit: Buprenorphine;

CONTRARY TO RCW 69.50.4013(1) and against the peace and dignity of the State of Washington.

DATED: this 22 day of March, 2019

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY:
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

JFW/lh

INFORMATION

NAME:	MATTHEW BENJAMIN LABOUNTY
DOB:	04/08/1985
KNOWN ALIASES:	NICHOLAS RYAN GEORGE
SSN:	539-96-6594
FBI No.:	487298WB0
PCN:	
WASIS:	20849877
NAME CODE:	IN J06 J3762
JUVIS:	515323
DOC No.:	840615
D.L.:	WA LABOUMB151JH
HAIR/ EYES:	BRO / HAZ
HT/WT:	6'01 / 270
RACE/SEX:	W / M
LAST KNOWN ADDRESS:	1762 STATE ROUTE 105 ABERDEEN, WA 98520
POLICE AGENCY/ OFFICER:	GRAYS HARBOR COUNTY SHERIFF'S DEPARTMENT / DEPUTY DAVID IVERSON
BOOKING No.:	

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2019-MAR-22 PM 1:03

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KYM FOSTER
COUNTY CLERK

19-1-00157-14
ADPC 2
Affidavit of Probable Cause
6171911



SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

No.: 19-1-157-14

v.

DECLARATION FOR
DETERMINATION OF
PROBABLE CAUSE

MATTHEW BENJAMIN LABOUNTY
AKA NICHOLAS RYAN GEORGE,
DOB: 04/08/1985,

Defendant.

Booking No.

DECLARATION

I, Jason F. Walker, declare that I am a Chief Criminal Deputy for Grays Harbor County, and I am familiar with the police reports and/or investigation of the Grays Harbor County Sheriff's Department in case number 19-3329.

From that information, I believe that there is probable cause to believe that Matthew Benjamin LaBounty, who is known to be in custody, has committed the crime of Violation of the Uniform Controlled Substances Act - Possession of a Controlled Substance, as follows:

On February 23, 2019, the Defendant was an inmate in the Grays Harbor County Jail awaiting sentencing on Grays Harbor Superior Court cause numbers 18-1-116-14, 18-1-438-14, and 18-1-570-14.

DECLARATION FOR
DETERMINATION OF
PROBABLE CAUSE

1 On February 23, 2019, Corrections Deputy Dane Bonnell arrived at the Defendant's
2 cellblock and made contact with the Defendant's cellmate, Brett Warness. Warness avoided eye
3 contact, look confused, was very red, could not complete a sentence, and kept repeating himself.
4 Corrections Deputy Bonnell believed that Warness was under the influence of some kind of
5 intoxicating substance.
6

7 Corrections Deputies decided to search the cellblock. They removed the inmates, who
8 included the Defendant, Brett Warness, Billy Ray Karr, Chris Dewey Jones, and Sean Goings,
9 and escorted them to the basement. All five inmates were searched and placed into a holding
10 cell.
11

12 After the inmates were placed into a holding cell, Deputy Bogar observed a white and red
13 piece of a glue stick tube. The corrections deputies examined the tube and found that it
14 contained what appeared to be Suboxone strips folded up into bandaids.
15

16 While the Defendant was in the holding cell, Corrections Deputies overheard him say, "I
17 will take the blame for it." At that time, the inmates had not been told what the correction
18 deputies had found.
19

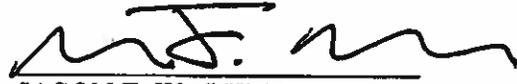
20 Sergeant Buchanan reviewed video footage of the area where the inmates had been
21 seated. On the video surveillance footage, the Defendant could be seen pulling the glue stick
22 tube that contained the Suboxone from his waistband, and placing it behind him on the bench.
23

24 Deputy Iverson responded to the jail and attempted to interview the Defendant. The
25 Defendant denied having any Suboxone strips. Deputy Iverson then showed the Defendant
26 printout of the video, showing him taking the strips out of his pants. Deputy Iverson then asked
27 the Defendant what he could say, and the Defendant responded that he was a "retard."

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: this 22 day of March, 2019 at Montesano, Washington.



JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

JFW/lh

**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 24TH DAY OF JULY, 2020, I CAUSED THE ORIGINAL **REPLY 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:

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| 102 W. BROADWAY AVENUE, ROOM 102 | | |
| MONTESANO, WA 98563-3621 | | |
| | | |
| <input checked="" type="checkbox"/> MATTHEW LABOUNTY | (X) | U.S. MAIL |
| 840615 | () | HAND DELIVERY |
| WASHINGTON STATE PENITENTIARY | () | _____ |
| 1313 N. 13 TH AVE | | |
| WALLA WALLA, WA 99362 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF JULY, 2020.



X _____

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WASHINGTON APPELLATE PROJECT

July 24, 2020 - 4:16 PM

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