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Court of Appeals
Division II
State of Washington
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No. 54016-9

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

State of Washington,

Respondent,

vs.

Steven Rancour,

Appellant.

APPELLANT'S OPENING BRIEF ON APPEAL, AMENDED

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to breach the plea agreement and in not providing Mr. Rancour with a remedy for the State's breach.

2. The trial court erred in refusing to allow Mr. Rancour to note up a hearing before the sentencing judge, Judge Dixon, for his post-trial motion to vacate the sentence due to the prosecutor's breach of the plea bargain.

B. STATEMENT OF THE CASE

Steven Rancour pled guilty in Thurston County Superior Court to two counts of indecent liberties, RCW 9A.01.020(1)(B), and to assault third degree, RCW 9A.01.020(1)(f) after negotiations with the State. The State agreed to recommend a sentence of 102 months (Sentencing transcript, 10-21-19, p. 5, ln. 4); hereafter, (TR); (CP 3-14; 52-68).

102 months is fifteen days above the mid-point of the standard range of 87-116 months (the exact mid-point is 101.5 months).

The State told the court that the plea agreement was for a "high – towards the high end of 102 months on each of the indecent liberties." (TR p. 5, lines 3-5). The high end of the range is 116 months; not 102 months. (CR 3-14; 52-68). The mid-point is 101.5 months, placing the

agreement at just fifteen days over the mid-point, but it was 14 full months below the high end.

Mr. Rancour filed a motion to vacate the sentences (CP 15-45) due to the State's breach; however, Thurston County Superior Court does not allow a lawyer to note anything up before a specific judge. The lawyer must appear on an established criminal ex-parte or miscellaneous motions docket and ask that judge for permission to special set a motion before a specific judge at a later date. Mr. Rancour did that by appearing before a commissioner on an established ex-parte docket, albeit not realizing that the hearing was neither recorded nor was a court reporter present. But the commissioner denied the motion, giving no reason for the denial. (Narrative Report of Proceedings). Mr. Rancour then filed his notice of appeal.

C. ARGUMENT

A. Breach of the Plea Agreement by the State

At the sentencing hearing, the State strongly and repeatedly advocated for a high end sentence, even to the extent of citing aggravating factors that would support an exceptional sentence above and beyond the standard range; thereby undercutting the plea bargain and violating Mr. Rancour's right to due process of law.

Starting with the United States Supreme Court and federal cases, there is little question that the State undercut the plea agreement.

[W]hen a plea agreement rests in significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Mondragon, 228 F.3d 978, 980 (9th Cir. 2000); United States v. Camarillo-Tello, 236 F.3d 1024, 1027 (9th Cir. 2001).

That promise is not fulfilled if, while making the recommendation, the prosecutor contradicts that recommendation by indicating a preference for a harsher sentence.

Id. at 1027; United States v. Johnson, 187 F.3d 1129, 1135 (9th Cir. 1999), citing United States v. Brown, 500 F.2d 375, 377 (4th Cir. 1974).

In Johnson, the Government promised to recommend a sentence at the low end of the guidelines range. At the sentencing hearing, the prosecutor fulfilled that promise when he said: "I am bound under the plea agreement not to recommend more than the low end of the sentencing range, and I will abide by that plea agreement." Johnson, 187 F.3d at 1135. The Ninth Circuit nevertheless found the prosecutor breached the plea agreement because he undercut his recommendation by presenting a previous victim's statement describing the defendant as a "monster."

We see no way to view the introduction of [the victim's] statement other than as an attempt by the

prosecution to influence the court to give a higher sentence than the prosecutor's recommendation.

Johnson, 187 F.3d at 1135. The Court vacated the defendant's sentence and remanded for resentencing. Id. at 1136.

In Mondragon, the Court found a breach of a plea agreement not to make any sentencing recommendation. The prosecutor never recommended a particular sentence. Nonetheless, the Court found he made a disguised sentencing recommendation and so breached his promise not to make one, by volunteering the following information to the Court after the defense described the defendant's prior convictions as "petty":

Your Honor. Just to point out that there's no misconstruction of the [defendant's criminal] history, we just point out to the Court the serious nature of some of the listed offenses in there and also point out that, just under my looking at this criminal history that we have in front of us, that approximately 25 percent of the time the defendant's been arrested he has run or resisted and that 45 percent of the time he has failed to appear or warrants have been issued or he's had a probation violation.

We would just like to bring that to the Court's attention.

Mondragon, 228 F.2d at 979.

Published opinions from our state concur. In State v. Tourtellotte, 88 Wn.2d 579, 564 P.2d 799 (1977), the defendant pled guilty to second-degree arson. The loss was in excess of \$160,000. The plea bargain included that the State would not to pursue any larceny charges and make no sentencing recommendation. But, at the sentencing hearing, the victims of the arson appeared and strongly objected to the plea bargain, whereupon

the prosecutor moved to have the plea to second-degree arson withdrawn. The judge granted the State's motion, and directed the matter to proceed to trial. Id., at 581-82.

When the case came on for trial, the defendant moved to dismiss on double jeopardy grounds and that motion was granted. The prosecutor then filed an information charging the defendant with three counts of larceny. The defendant moved to dismiss those charges based on the plea agreement; his motion was denied and appeal followed. Id., at 582. In reversing, our state high court cited the United States high court's decision in Santobello v. New York, 404 U.S. 257, 260 (1971), as follows:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See Brady v. United States, 397 U.S. 742, 751-752 (1970).

Tourtellotte, 88 Wn.2d 579, 582-83.

The judge's role is to ensure that the plea process is characterized by fairness and candor. The judge must ensure the propriety of the final disposition of the case. Id., at 583. "A plea bargain is a binding agreement between the defendant and the State which is subject to the approval of the court. When the prosecutor breaks the plea bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. In Santobello v. New York, *supra* at 263, the United States Supreme Court noted that there are two alternative forms of relief available to the defendant under these circumstances. The court can permit the accused to withdraw his plea and be tried anew on the original charges, or grant specific performance of the agreement." Tourtellotte, at 584-85.

In State v. Van Buren, 101 Wn. App. 206, 2 P.3d 991 (2000), a Division II case, the defendant pled guilty to murder first-degree pursuant to a plea bargain in which the State agreed to recommend a standard range sentence of 292 months. But at sentencing, the State told the court that there was evidence to support an exceptional sentence, and that is what the court gave Ms. Van Buren as well as an exceptional sentence above the standard range. Van Buren did not object at the trial court; nonetheless, the issue was heard and decided on appeal because it was a manifest error affecting a constitutional right. Id., at 208. A breach of a plea agreement is a violation of due process. Id., at 211.

Since a plea agreement is a contract between the parties, basic contract principles of good faith and fair dealing impose upon the State an implied promise to act in good faith. Due process concerns reinforce the State's duty to comply with plea agreements. While the obligation to recommend the agreed sentence does not require the State to recommend it enthusiastically, the State may not undercut the terms of the agreement either explicitly or implicitly through conduct indicating an intent to circumvent the bargain. Van Buren, 101 Wn. App. at 213.

In Van Buren, the State did tell the court that its plea recommendation was contained in the plea form, but then, without prompting from the court, said that if the court was considering an exceptional sentence as indicated in the PSI report, there were grounds to support that including deliberate cruelty and lack of remorse, and the impact to the victim's family. The appellate court held that the State's reference to the grounds for a higher sentence unnecessarily highlighted two aggravating factors proposed in the presentence report (PSI). Id., at 216-17. The court held that the State helped the court justify an exceptional sentence; consequently, the State undermined and breached the plea bargain. The conviction was reversed and remanded to the trial court for the defendant to choose whether to withdraw the guilty plea or specifically enforce the plea bargain. Id., at 218.

In State v. Carreno-Maldonado, 135 Wn. App. 77, 143 P.3d 343 (2006), another Division II case, the defendant appealed the trial court's denial of his motion to withdraw his plea for the State's breach of the plea bargain. The appellate court held that the State's comments at sentencing breached the plea bargain; that this error is not subject to harmless error analysis, and reversed and remanded. Id., at 79. The defendant was charged with many counts of first and second degree rape, first-degree robbery, first-degree kidnapping, and second-degree assault. The State agreed to recommend concurrent sentences of (1) a low-end standard range sentence of 240 months for the first degree rape count, (2) a midpoint standard range sentence of 240 months for the five second degree rape counts, and (3) a high-end standard range sentence of 84 months for the second degree assault count. Id., at 79-80. At sentencing, the State told the court the following:

Your Honor, I just wanted to speak on behalf of the victims. I would note that there are three victims in the courtroom today. There are a total of seven victims in this case. Two of them we were never able to connect with, solidly anyway. . . . But, we do have three women here today. *It's my understanding they are just here to observe. They don't want to speak to the court.* And, I just wanted to make a brief statement on their behalf. As Your Honor probably noticed in reading the declaration of probable cause and in taking the plea and reading the PSI, this is a case of a defendant who engaged in very extreme violent behavior for the purpose of obtaining what he calls or is quoted as saying "free sex." It's the [S]tate's position that he preyed on what would normally be considered a vulnerable segment of our community

and these women are vulnerable insofar as they are exposed to the kind of people that [Carreno-Maldonado] is. They're the type of victims that probably make the best victims and maybe [Carreno-Maldonado] recognized that; that they were less likely to report the crimes to the police. If they even do get to that point they're less likely to come to court and testify or be involved whatsoever in the prosecution process. That was the case for a couple of the victims that were charged in this case. However, not necessarily for all of them. It took sometimes more effort to get some of these victims to come in and make statements but they eventually did. I'm not sure what else I can say because these crimes are so heinous and so violent it showed a complete disregard and disrespect for these women.

Carreno-Maldonado, 135 Wn. App. at 80-81. The defendant objected; the State replied that she was not going beyond the agreed recommendation and stated what it was, and her comments were simply on behalf of the victims. Id., at 81. The trial court stated that the State's comments did not affect the sentence that it ordered. Id., at 82.

But the appellate court was not impressed. The State does not represent the victims of a crime, and witnesses to a criminal case do not "belong" to either party. Thus, it is improper for a prosecutor to advise or represent a victim/witness. State v. Hofstetter, 75 Wn. App. 390, 395-96, 878 P.2d 474 (1994).

A breach of a plea agreement occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State's obligations under the plea agreement. The prosecutor went beyond what was necessary to support the plea agreement, and

normally, the State does not have the right to speak on behalf of crime victims, particularly where the prosecutor's comments are unsolicited advocacy and contrary to her sentencing recommendation. Carreno-Maldonado, 135 Wn. App. at 86-87.

Finally, from the Supreme Court's opinion in State v. MacDonald, 183 Wn.2d 1, 346 P.3d 748 (2015):

Ronald Wayne MacDonald entered into a plea agreement for second degree manslaughter with the prosecutor in exchange for recommending a 5-year suspended sentence with 16 months' confinement in King County jail, with credit for time served. At sentencing, the investigating police officer, purportedly speaking on behalf of the victim, advocated for a sentence contrary to the agreement. The trial court gave MacDonald the maximum sentence, and the Court of Appeals affirmed.

We hold that the investigating officer was functioning as a substantial arm of the prosecution and should not have been permitted to advocate against the plea bargain. Therefore, the State breached the plea agreement by undercutting the agreed sentencing recommendation. We reverse the Court of Appeals and remand with instructions to permit MacDonald to either withdraw his guilty plea or seek specific performance of the plea agreement.

State v. MacDonald, 183 Wn.2d 1, 4-5, 346 P.3d 748, 750-51 (2015).

In the case at bar, the State agreed to recommend a sentence of 102 months on the charges with the highest range. (TR p. 4)(CP 3-15; 52-68). Yet, at sentencing, the deputy prosecutor repeatedly urged the court, either explicitly or implicitly, to sentence Mr. Rancour to the maximum top of the standard range. She even argued that there were factors that supported

an exceptional sentence beyond the standard range, and she spoke on behalf of the victims, stating that they recommended the maximum range. All of this undercut the plea agreement.

First, the State said that the agreement was for a “high – towards the high end of 102 months on each of the indecent liberties.” (TR p. 5, lines 3-5). But, the high end of the range is 116 months; not 102 months. The mid-point is 101.5 months, placing the agreement at just fifteen days over the mid-point, but it was 14 full months below the high end. The prosecutor purposely mischaracterized her own recommendation, thereby undercutting the plea agreement.

Then she unnecessarily pointed out the “separate and distinct” recommendation in the PSI, which also recommended the high end. (TR, pg. 5, lines 7-9); State v. Van Buren, 101 Wn. App. 206, 216-17, 2 P.3d 991 (2000). The PSI writer had told Mr. Rancour that he always recommends the high end in this kind of case, (TR pg. 13, lines 5-7). This is an abuse of the PSI writer’s discretion. State v. Stearman, 187 Wn. App. 257, 264-65, 348 P.3d 394 (2015) (Refusal to exercise discretion is an abuse of discretion.)

The prosecutor then advocated on behalf of the absent victims, stating that they were asking the court to impose the high end of the standard range. (TR p. 5). But the prosecutor normally has no authority

to speak on behalf of the victims, particularly where the prosecutor's comments are unsolicited advocacy and contrary to her sentencing recommendation of a mid-range sentence. State v. Carreno-Maldonado, 135 Wn. App. 77, 86-87, 143 P.3d 343 (2006).

The prosecutor explicitly argued at least twice that aggravating factors were present in this case. The prosecutor said, "because as the court can see, these are victims that are very – that were extremely vulnerable. They were all either addicted . . . one . . . had just given birth." (TR 6, ln. 15-17).

Aggravating circumstances that would support a sentence above the standard range are defined in RCW 9.94A.535. Section (3)(b) of that statute states that such an aggravator exists when "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." The prosecutor here argued that the facts of the case are very graphic and very concerning to the court and the public, and the bravery of the victim who appeared was "extremely amazing", indicating that the victim who appeared was terrified of the defendant, seriously undercutting the State's agreement for a sentence just fifteen days above the midpoint of the standard range. (TR pg. 7, lines 3-7).

Again the prosecutor argued aggravating factors, asking the court to “recognize that the defendant has an exceptionally lengthy criminal history”. (TR pg. 7. Lines 14-16). RCW 9.94A.535(2)(d).

As in State v. Carreno-Maldonado, 135 Wn. App. 77, 86-87, the prosecutor here advocated not only for the victims who were not present, but specifically asked the sentencing court that it should highly regard the recommendation of the victim who appeared and spoke to the court, as follows:

The facts of that case are very graphic and very -- I think should be very concerning to the court and to the public. I think that the bravery of Ms. Courtney to be here today to address the court is extremely amazing. As I've told her throughout this case, this is a situation where years ago, someone in her situation, may have been taken advantage of in this type of circumstance, and she's been very strong and brave throughout. So I commend her. ***I think that whatever her recommendation is to the Court should be highly regarded.***

(TR 7, ln. 3-14). In the quote above, the State also told the court that Mr. Rancour may have done it before – “. . . years ago, someone in her situation, may have been taken advantage of in this type of situation . . .” (TR 7, ln. 8-10).

Finally, the prosecutor concluded by continuing her advocacy for an exceptional sentence, as follows: “Your Honor, for all of these reasons, the fact that the victims were taken advantage of, they were clearly

unconscious at the time of all of these offenses, . . .”). (TR, pg. 8, lines 1-4).

The statement that the victims were clearly unconscious violated both the real facts doctrine, (TR pg. 13, lines 2-3) (objection by defense); and constitutes grounds for an exceptional sentence. RCW 9.94A.535(3)(b). The defendant also objected to the statements that undercut the plea agreement. (TR 13, ln. 11-13).

The State clearly and unambiguously undercut the plea agreement. The remedy is to remand the case to the trial court with instructions to vacate the sentences and give Mr. Rancour the option of either specifically enforcing the plea agreement, or withdrawing his pleas of guilty and scheduling a new trial. Either remedy requires a new judge.

B. Access to the Courts

The right to petition for postconviction relief is of fundamental constitutional importance. It enables those unlawfully incarcerated to obtain their freedom. Access of prisoners to the courts for the purpose of presenting their complaints should not be denied or obstructed.” Wolff v. McDonnell, 418 U.S. 539, 578, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

State v. Hurt, 107 Wn. App. 816, 826, 27 P.3d 1276 (2001).

In Washington, the right of access to the courts entails a fundamental right. Carter v. Univ. of Wash., 85 Wn.2d 391, 398, 536 P.2d 618, 623 (1975); Putman v. Wenatchee Valley Med. Ctr., PS, 166 Wn.2d

974, 216 P.3d 374 (2009) (statute to burdened discovery violated right to access to courts). This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. “[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-897, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984); see also *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 2494, 180 L.Ed.2d 408, 420-21 (2011).

Here, the Thurston County Superior Court does not allow any party to petition for post-conviction relief to the sentencing judge. The party must appear before a different judge, on a regularly scheduled calendar regardless whether that is even possible for the party, and then and there request permission. If permission is granted, the matter is then scheduled for a later hearing before the sentencing judge. Here, permission was denied by the commissioner. (Narrative Report of

Proceedings). Mr. Rancour could not then make the same motion before a judge, as that would be judge-shopping. The only method to challenge a commissioner's decision is a motion to revise. RCW 2.24.050. Access to the courts was denied.

D. CONCLUSION

For the foregoing reasons, the Court should remand the case to the trial court with order to vacate the sentences and give Mr. Rancour his choice of either specifically enforcing the plea agreement or withdrawing his pleas of guilty and proceeding to trial in the normal course of business. Either option requires a different judge.

Respectfully submitted this 24th day of February, 2020.

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STATE OF WASHINGTON

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| PLAINTIFF, |) | No. 54016-9-II |
| |) | |
| vs. |) | Proof of Service of Amended Brief of |
| |) | Appellant on Steven Rancour |
| STEVEN LEE RANCOUR, |) | |
| DEFENDANT |) | |
| |) | |
| |) | |

I served Steven Rancour with a copy of the Amended Brief of Appellant by U.S. mail on February 25, 2020 to the address he requested be used, 1028 NE Marion St., Olympia, WA 98506.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct: dated February 26, 2020, at Shelton, Washington.

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