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No. 54016-9

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

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State of Washington,

Respondent,

vs.

Steven Rancour,

Appellant.

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REPLY BRIEF OF APPELLANT

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## **I. ARGUMENT IN REPLY TO STATE’S BRIEF ON APPEAL**

### **A. The State Breached the Plea Bargain.**

In the trial court, 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 State repeatedly urged the court, either explicitly or implicitly, to sentence Mr. Rancour to the maximum top of the standard range. The State even argued that there were factors that supported an exceptional sentence beyond the standard range, and 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) (Whether State breached plea agreement is of constitutional magnitude, Id. at 212;

State fleetingly mentioned its plea offer but twice volunteered aggravating factors cited by the presentence report writer, Id. at 216).

Here, 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.) Also, the State volunteered aggravating factors at least twice in the case at bar, as discussed below.

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 without any evidence that the absent victims had requested the State's assistance. (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, as they appear to be here.

The prosecutor's recitation of aggravating factors also breached the plea bargain. There was no need for such recitation in the case at bar; without such need, a breach of the plea agreement occurred. State v. Carreno-Maldonado, 135 Wn. App. 77, 86-87, 143 P.3d 343 (2006).

Here, the prosecutor told the court that it should highly regard the recommendation of the one victim who was present, a recommendation that the

victim made personally. There was no reason for the prosecutor to advocate for that recommendation and it was improper to do so. The State's statement is advocacy; the prosecutor does not represent that victim nor did that victim request the prosecutor's assistance. Moreover, it is advocacy for a high-end sentence; not a mid-range sentence.

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). 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).

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).

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 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. Mr. Rancour was denied Access to the Courts**

The State argues that the record is not well-developed in regard to Mr. Rancour's motion to schedule his motion to allow choice of remedies. That is true; yet the record is sufficient by the Narrative Report of Proceedings, none of which the State rebuts with any evidence or its own version of the facts. The record is what it is due to the rules of the Thurston County Superior Court. The party is directed to appear on a regularly scheduled calendar or on an ex-parte calendar and request permission to note up a hearing before a specific judge at a later date. Mr. Rancour appeared before Commissioner Zinn on a regularly scheduled ex-parte calendar, as directed. The Commissioner denied the request for a hearing before Judge Dixon, the sentencing judge. The Commissioner did not state why she denied the motion. (Narrative Report of Proceedings).

Despite the State's argument that Mr. Rancour could have subsequently had his motion heard before a judge on a recorded calendar, Mr. Rancour had no authority to do so. The only method to challenge a commissioner's decision is a

motion to revise. RCW 2.24.050. A party cannot simply note up a hearing before a judge and make the same motion that the commissioner denied. Superior court judges and commissioners are on the same level; a party cannot obtain an unfavorable decision from one judicial officer and then ask another on the same level in the same court to make a different decision on the same motion.

Access to the courts was denied.

## **II. 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 10<sup>th</sup> day of June, 2020.

*Bruce Finlay*

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