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Court of Appeals
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No. 54016-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LEE RANCOUR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon
Cause No. 17-1-01493-34; 18-1-02083-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a prosecutor breaches a plea agreement by making the agreed recommendation, relaying the opinion of the victims as requested, and discussing facts and criminal history that are already part of the record.

2. Whether the record supports a claim that access was denied to the trial court where defense counsel indicates that an ex-parte order to schedule a hearing was denied by a Court Commissioner, nothing in the record indicates that the Judge who the hearing was requested to be set in front of reviewed an order scheduling the hearing, and the matter was set for a hearing before a different judge of the Superior Court but stricken at defense request.

3. If this Court were to find that a breach of plea agreement occurred, whether the pleas in cause numbers 17-1-01493-34 and 18-1-02083-34 were indivisible such that an election for withdrawal of a plea would require withdrawal in both cases.

B. STATEMENT OF THE CASE.

The appellant, Steven Lee Rancour, was charged by way of information with three counts of rape in the second degree in Thurston County cause numbers 17-1-01493-34 and 18-1-02083-

34. CP 1, 47. Pursuant to a plea agreement with the State, Rancour entered pleas of guilty to two amended counts of indecent liberties in 17-1-01493-34 and an amended count of assault in the third degree in 18-1-02083-34. Statement of Defendant on Plea of Guilty, 17-1-01493-34, Supp CP __; Statement of Defendant on Plea of Guilty, 18-1-02083-34, Supp CP __.

At sentencing, the prosecutor began her recommendation by indicating that the parties had an agreed recommendation of 102 months on each of the indecent liberties counts and 60 months on the assault in the third degree. RP 5. The prosecutor noted that one of the victims was present and would speak to the court, but the other two victims were not able to be present but were requesting that the court impose the high end of the standard range on their respective counts. RP 5. The prosecutor then relayed some of the facts and commended the victim who was present for her bravery. RP 6-7. The prosecutor stated, "I think that whatever her recommendation is to the Court should be highly regarded." RP 7.

The prosecutor then discussed the defendant's criminal history and offender score before asking the trial court to listen to the present victim, S.C. RP 7-8. S.C. indicated a desire that Rancour be "removed from the community forever," or at least until

he grew old and had “no energy to commit any more sexual offenses.” RP 12.

Defense counsel spoke on behalf of Rancour and argued that “some of what the prosecutor said tends to undercut the plea bargain.” RP 13. Rancour did not ask the Court to strike the prosecutor’s arguments or request any action be taken at that time. RP 13. Defense counsel then noted that the defense believed there were significant questions as to whether any of the rapes occurred, but “there [was] enough evidence that the risk of going to trial [was] extreme.” RP 13. Defense counsel concluded his remarks by asking the trial court to “respect the plea bargain and to follow that 102 months.” RP 15. After Rancour exercised his right of allocution, stating, “That pretty much sums it up, Your Honor,” defense counsel raised issues with facts contained in the presentence investigation report (PSI). RP 15.

The trial court noted that the real facts doctrine applied and that “both counsels reminded the Court that this case is before the Court in the posture of what is commonly referred to as a plea bargain.” RP 16. The trial court then noted that both the prosecutor and defense counsel were well respected and known to the trial court. RP 16-17. The trial court expressed the understanding that

“both of the parties in the present case are jointly recommending to the Court that the Court impose 102 months. That’s not the low end; it’s not the high end.” RP 17.

The trial court then noted Rancour’s criminal history and high offender score. RP 17-18. Prior to indicating the sentence, the trial court discussed the purposes of the Sentencing Reform Act (SRA) as noted in RCW 9.94A.010. RP 18-19. The trial court stated:

There is a reason why taxpayers, why this community, builds prisons, and it is to protect the public. And when there is an individual who has been convicted, pled guilty, two sex offenses, has somewhere between 15 and 19 prior offenses on his or her record, has a prior sex offense, two prior convictions for escape, this Court believes it is just and proportionate and the proper sentence to impose the highest sentence allowed by law. That’s 116 months.

RP 19-20. The trial court continued:

The Court understands and appreciates that that’s above what the lawyers are recommending, but the Court has an obligation to protect the public, to ensure punishment that is proportionate to the seriousness of the offense and the offender’s criminal history.

RP 20. The trial court imposed the high-end sentence of 116 months on the indecent liberties counts and 60 months on the assault in the third degree. RP 20, CP 52-68, 3-14.

Nine days after the sentencing hearing, Rancour filed a Motion to Vacate Sentence in each cause number. CP 15-45, 69-100. Defense counsel indicates that he presented a motion to schedule the matter in front of the sentencing judge ex-parte that was denied by Superior Court Commissioner Rebekah Zinn. Amended Narrative, at 2. The State was not present and cannot confirm or deny exactly what occurred as ex-parte proceedings, by definition, involve only one side of the controversy.

The matter was, however, scheduled on the criminal miscellaneous motion's calendar after sentencing. Clerk's Minutes, November 21, 2019, Supp CP ___. The State responded to the motion and a deputy prosecutor was present on November 21, 2019, when the matter was stricken at defense request. Id., State's Response, Supp CP ___. The State was aware that this appeal had been initiated by the filing of a notice of appeal prior to the November 21, 2019 scheduled court date. After the November 21, 2019 scheduled court date, the hearing was stricken and no further action was taken in the trial court and this appeal was pursued.

C. ARGUMENT.

1. The prosecutor did not undercut the plea agreement by arguing for a midrange sentence.

The Fourteenth Amendment's due process clause requires the plea-bargaining process to comport with principles of fairness. U.S. Const. amend. XIV; U.S. Const. art. 1 § 3; Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Sledge, 133 Wn.2d 828, 839-840, 946 P.2d 1199 (1997). Whether a breach of a plea agreement has occurred is a question of law that is reviewed de novo. State v. Xaviar, 117 Wn. App. 196, 199, 69 P.3d 901 (2003).

Plea agreements are contracts and are analyzed under basic contract principles. Sledge, 133 Wn.2d at 838. Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the defendant's contract rights implicate due process considerations. Id. at 839. A prosecutor is entitled to present relevant facts that might not fully support the recommended sentence. State v. Gutierrez, 58 Wn. App. 70, 76, 791 P.2d 275 (1990). However, a prosecutor may not undercut the plea agreement explicitly or by conduct evidencing an intent to circumvent the terms of the agreement. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

When determining whether a prosecutor violated the duty to adhere to the plea agreement, the reviewing court considers the

entire sentencing record and asks whether the prosecutor contradicted the State's recommendation by either words or conduct. State v. Williams, 103 Wn. App. 231, 236, 11 P.3d 878 (2000). "The focus of the decision is on the effect of the State's actions, not the intent behind them." Sledge, 133 Wn.2d at 843 n.7. An objective standard should be applied to determine whether the State has breached the agreement. Jerde, 93 Wn. App. at 780.

When considering the sentencing record objectively as a whole, it is clear, that the statements made during the State's sentencing recommendation did not explicitly or implicitly undercut the plea agreement. The State's recommendation began with the agreed recommendation of 102 months on each of the indecent liberties counts and 60 months on the assault in the third-degree count. RP 5. The recommendation then indicated, "I do recognize that the Department of Corrections is making a separate and distinct recommendation." RP 5. This is an accurate statement and did not endorse any recommendation not included in the plea bargain. The Department of Corrections acts on behalf of the court when it provides information through a presentence report. State v. Sanchez, 146 Wn.2d 339, 354, 46 P.3d 774 (2002). The State did not endorse the independent recommendation or focus upon it.

The State's discussion of the presentence investigation report was in the context of conditions of community custody, not the duration of the sentence. RP 5-6.

While the State does not have the right to speak on behalf of a crime victim when they have decided not to speak and have not requested assistance in otherwise communicating with the court, Article 1, § 35 of the Washington Constitution and RCW 7.69.030 give victims the right to be have their opinion heard during a sentencing hearing. State v. Carreno-Maldonado, 135 Wn. App. 77, 85-86, 143 P.3d 343 (2006). The State acted in accordance with crime victim's rights by assisting the two victims in this case who were unable to be present to have their opinion relayed to the Court. RP 5. The conduct is distinguishable from that in Carreno-Maldonado, where the prosecutor made a lengthy statement purportedly on behalf of the victims, who were present in Court and indicated that they did not "want to speak to the Court." 135 Wn. App. at 80. Here, the State merely indicated the wishes of the non-present victims and moved on. The conduct did not constitute a breach of the plea agreement.

The State properly recited some facts in support of the midrange recommendation that was agreed upon. RP 6-7. "It may

be necessary to recount certain potentially aggravating circumstances in order to safeguard against the court imposing a lower sentence” and a prosecutor does not breach a plea agreement by doing so if they use care not to present the facts in a way that makes “the crime more egregious than a typical crime of the same class.” Carreno-Maldonado, 135 Wn. App. at 84-85. Here, the State’s comments did not make the crimes of indecent liberties without force more egregious than would otherwise be typical. As charged in the third amended information which Rancour pled guilty to, the crimes of indecent liberties required that the victims be mentally incapacitated or physically helpless. CP 51; RCW 9A.44.100(1)(b). These facts were included in Rancour’s plea statement. Statement of Defendant on Plea of Guilty, 17-1-01493-34, Supp CP ___. In his statement on plea of guilty, Rancour stated, “I am pleading guilty to take advantage of the plea offer. I acknowledge sufficient facts, that if believed by the jury, to convict. Two women claim that I touched them sexually while they were passed out.” Id. Supp CP ___.

The prosecutor’s discussion of Rancour’s criminal history also merely recounted facts that were already contained in the record and agreed to by Rancour. Statement on Criminal History,

17-1-01493-34, Supp CP ___. The prosecutor did not reference factors that were not part of the record or engage in advocacy for a higher than recommended sentence. The prosecutor did not engage in outright advocacy or advance aggravating circumstances that had no basis in the record by discussing facts that were already before the Court. State v. Van Buren, 101 Wn. App. 206, 215 2 P.3d 991 (2000); State v. Bartosek, 2020 Wash.App. LEXIS 168, 11 (Div. I, January 27, 2020).¹

The State's recommendation of 102 months was supported by the facts discussed by the State during its sentencing recommendation. The State did not breach the plea agreement that was reached. It is clear, that the words of the prosecutor supported the agreed recommendation. The trial court's statements regarding the recommendation clearly indicated that the words had conveyed the State's recommendation of 102 months. RP 20. Objectively viewed, the prosecutor's recommendation did not undercut the plea agreement explicitly or by conduct evidencing an intent to circumvent the terms of the agreement. The prosecutor never

¹ Unpublished decision offered for whatever persuasive value that the Court deems appropriate pursuant to GR 14.1.

argued for an exceptional sentence or made any recommendation other than the agreed upon 102-month sentence.

2. The trial court did not deny access to the Courts; the defense struck a hearing to elect to proceed with this appeal.

The record does not support Rancour's contention that he was denied access to the Courts. To the contrary, his motion was scheduled on a motion calendar on November 21, 2019. Notice of Hearing, 17-1-01493-34, Supp CP __; Notice of Hearing, 18-1-02083-34, Supp CP __; Clerk's Minutes, Supp CP __. After he filed his motion, but before the scheduled hearing, Rancour filed his notice of appeal to this Court. Notice of Appeal, 17-1-01493-34 Supp CP __; Notice of Appeal, 18-1-02083-34, Supp CP __. He then struck the hearing set for November 21, 2019. Clerk's Minutes, Supp CP __. The record is devoid of what was actually presented to Commissioner Zinn ex parte. When there was an opportunity to make a record of proceedings on November 21, 2019, that did not occur.

The Thurston County Superior Court has procedures for requesting a special set hearing.² While the Amended Narrative

² <https://www.thurstoncountywa.gov/sc/Pages/scheduling.aspx>

suggests that counsel ran into difficulty during his attempts to do so, that does not amount to a denial of access to the Court. The claim is unsupported by the record. Nothing in the record suggests that Judge Dixon refused to hear the issue or that the request for a special set hearing was ever put before Judge Dixon.

Additionally, once this Court rules on the primary issue raised in this appeal, the issue raised in the motion before the Superior Court will be moot. As a general rule, appellate courts do not consider questions that are moot. State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). A case is moot if the court can no longer provide effective relief. Id. There is no reason for this Court to consider the issue once it is moot. This is especially true given the undeveloped record which only indicates that an ex-parte motion was denied for an unspecified reason and that the case was on a docket before the trial court on November 21, 2019.

3. The plea agreement at issue was part of an indivisible plea agreement which included cause numbers 17-1-01493-34 and 18-1-02083-34.

Whether a plea agreement is divisible or indivisible is dependent upon the intent of the parties. State v. Chambers, 176 Wn.2d 573, 580, 293 P.3d 1185 (2013). A defendant cannot

withdraw a plea to only portions of an indivisible plea agreement. Id. at 581; State v. Turley, 149 Wn.2d 395, 398, 402, 400, 69 P.3d 338 (2003). In this case, the record makes clear that the Defendant pled guilty to a global plea agreement resolving each of the three charges of rape alleged in cause numbers 17-1-01493-34 and 18-1-02083-34.

Rancour correctly identifies that the remedy for a breach of a plea agreement is to permit the defendant to elect to withdraw the guilty plea or to seek specific performance. Brief of Appellant at 16; State v. MacDonald, 183 Wn.2d 1, 21, 346 P.3d 748 (2015); State v. Barber, 170 Wn.2d 854, 873, 248 P.3d 494 (2011). For the reasons stated above, there was no breach of the plea agreements in these cases. If, however, this Court disagrees, and if Rancour elected to withdraw his pleas, it should be made clear that his pleas to both cases would be withdrawn and the State could proceed on each of the three counts of rape that were originally alleged.³

The State notes that the record is not particularly well developed with regard to the plea in this case. The plea hearings have not been transcribed nor is there anything in the record

³ The Brief of Appellant does not appear to contest this point as it references the choice of specific performance or “withdrawing his *pleas* of guilty.” Brief of Appellant, at 16 (emphasis added).

regarding the communications between the parties for the pleas. At a minimum, if this Court were to rule in Rancour's favor, any withdrawal of plea following remand should allow for further development regarding the indivisible nature of the plea agreement in both cases.

D. CONCLUSION.

The prosecutor's comments at sentencing did not undercut the plea agreement. There was no explicit or implicit advocacy for the trial court to impose a sentence other than the agreed upon 102 months. The record does not support Rancour's claim that he was denied access to the trial court. Regardless, the decision of this Court will render that issue moot. The State respectfully requests that this Court affirm the convictions and sentences in both cause number 17-1-01493-34 and 18-1-02083-34. If this Court finds that a breach of the plea agreements occurred, the Court should clarify that any withdrawal of the pleas would require withdrawal in both cases, or at a minimum, allow for further factual development in the trial court on the issue of indivisibility.

Respectfully submitted this 27th day of April, 2020.



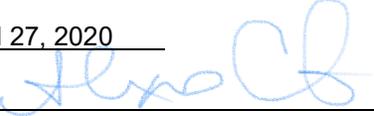
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