

NO. 285898

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JARED MARSHALL GOLLEHON,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
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128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Did the State violate the plea agreement?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State did not violate the plea agreement.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific areas of the record.

III. ARGUMENT.

The outcome of this appeal will turn on the “meaning” given, by this court, to one phrase spoken by the victim of this crime, Sgt. Cobb, the person Gollehon shot at.

Gollehon would have this court “interpret” this short statement as a total and complete abrogation of the plea agreement. He would have this court believe that as a result of this statement the trial court did not follow the plea agreement and sentenced the defendant not to an exceptional sentence downward but instead to a legally mandated standard range sentence.

The following is the basis for this appeal:

THE COURT: Either of you guys want to say anything about this matter before I impose sentence, Chief (inaudible), Sergeant Cobb?

SERGEANT COBB: **Your Honor, I defer to the Prosecutor's judgment. Anything I have to say would be counter-productive at this time.** (Emphasis mine.)

This benign phrase has been steeped with great malice by Gollehon. He says that this and this alone is an egregious breach of the plea agreement. An agreement which mandated that all parties “be on board.” Gollehon now demands that he should be allowed to either withdraw his plea or be given the specific performance of the downward departure.

Gollehon has *interpreted* the statement of this officer as meaning he, the officer, was not fully onboard. Gollehon further says this court should not look outside the initial record of this statement for the meaning of these words.

The absurdity of that is later when the matter was before the court again the deputy prosecutor handling the case states on the record that he, an officer of the court, inquired of the officer as to what he meant. Which resulted in the following statement made by trial counsel for Gollehon:

In fact, Mr. Knittle sent me a memo indicating that what he just iterated to the Court right now that he had talked to Sergeant Cobb about what his -- whether he was in fact in agreement with the recommendations or not.

And, in fact, the statement from Sergeant Cobb was that he was thinking about saying -- what he was thinking about saying that would have been counter productive was something along the lines of telling the Defendant that he's lucky that he doesn't jump over this wall and strangle him. While I don't think the subjective intent of the officer, though, is relevant at this point in purposes of this motion.

Even at the trial court level Gollehon tries to couch this interview of the victim as "subjective intent", this statement is not the subjective intent of the officer. Subjective means based on someone's opinions or feelings rather than on facts or evidence. At the time of the statement it may be that this would have been a subjective statement. Historically looking back at the incident this is a fact, evidence no different than the statements made by this defendant at the time he was arrested for shooting at this officer. This is the actual "content" of what the officer would have stated.

It would probably have been best if this statement had been placed on the record, it could not have been "interpreted" by either attorney for Gollehon as meaning the officer did not agree with the plea bargain. It would have simply and completely shown that the victim meant he had personal animosity, as most victims would, towards the man who apparently tried to kill him.

This court has the ability to look to all of the record and in the interests of justice should do so in this instance. As was stated in State v. Finch, 137 Wn.2d 792, 884, 975 P.2d 967 (1999) “Turning to the question of whether there was any error at all in this case, we ordered the unusual procedure of a reference hearing in a direct appeal.”

RAP 1.2 would be clearly applicable in this situation. This court should look to the entire record. If this court looks to the entire record it is obvious that the victim was “on board” with the actions of the prosecutor and in agreement with the plea agreement. He simply had the very human desire to strike back at the person who tried to kill him. This is clear from a reading of the entire record. This review would negate the windfall the defendant would get if this court were to strike down the original agreement. It would also negate the need for a reference hearing, a hearing that would result in a record being made which in the end would result in the victim stating that he meant he wanted to jump over the railing and strangle the defendant and the sentencing judge indicate that he was not in any shape or fashion affected by the statement in the manner indicated to this court, the very same record which is now before this court.

This is much to do about nothing. The sentencing court did not care, the officer did not mean what is being claimed and the defendant

received the lesser sentence, just not the exceptional sentence downward. What he received was the sentence which is mandated by our legislature. There was equal bargaining, there was a meeting of the minds, there was no rescission by the State. The parties went forward and the final arbiter, the trial court judge just said NO.

It must also be noted that this matter was a guilty plea, with a standard range sentence. State v. Wiley, 26 Wn. App. 422, 425, 613 P.2d 549 (1980), "A guilty plea generally waives the right to appeal. State v. Saylors, 70 Wn.2d 7, 422 P.2d 477 (1966). A guilty plea has been said to be "itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)."

Gollehon was advised that if he agreed to this plea he waived certain rights;

THE COURT: Okay. You understand that by pleading guilty, you're giving up a number of rights. The right to a trial, the right to a jury trial, the right at the trial to confront the witnesses against you and to call witnesses to testify for you, giving up your own right to testify at the time of trial or to remain silent.

You're relieving the State of its burden of proving that you're guilty beyond a reasonable doubt at a trial, and **you're giving up the right to appeal.** Do you understand that?

MR. GOLLEHON: Correct.

(Emphasis mine.) (RP 3)

This appellant had no “right” to appeal this decision initially and has now filed and had dismissed a PRP and now has filed this appeal based on this single allegation. Trial counsel for Gollehon did not indicate to the court that Gollehon had filed a previous motion to withdraw his plea which had been terminated and mandated five months previous to filing his motion to withdraw guilty plea.

State v. Gaut, 111 Wn. App. 875, 46 P.3d 832 (2002) a case very similar to this stands for the proposition that Gollehon may not raise the issue of whether there was a violation of the plea agreement. It would appear from Gaut that the court would allow this type of untimely appeal however the issue would be restricted to whether the court violated its discretion when it denied the motion to withdraw. It would be the position of the State that the allegations as set forth in the amended opening brief do not comply with the edicts of Gaut and therefore this matter should be dismissed.

Even if Gollehon had limited his argument to the question of whether the court had exceeded its discretion it is clear that this court should dismiss the appeal as baseless. The very brief record makes it clear that the assertion of the officer/victim that he would “defer” to the prosecutor was not a violation of the plea agreement.

The facts are simple in this case, Gollehon states “However, at sentencing Officer Cobb did not say that he agreed with the recommendation. Instead, Officer Cobb expressed his reservation about the negotiated settlement, saying “I defer to the prosecutor’s judgment” and “anything I have to say would be counter-productive at this time.” (Appellant’s brief at 8.)

The State is at a complete loss to understand how one phrase, six words which indicate without any equivocation that Sgt. Cobb, while not putting on pom-poms and a cheer leaders uniform, had agreed with the actions of the parties. The very definition of the word “defer” would negate this argument.

Merriam-Webster’s Online Dictionary:

Main Entry: ²**defer**

Function: *verb*

Inflected Form(s): **deferred; deferring**

Etymology: Middle English *deferren*, *differren*, from Middle French *deferer*, *defferer*, from Late Latin *deferre*, from Latin, to bring down, bring, from *de-* + *ferre* to carry — more at **BEAR**

Date: 15th century

transitive verb : **to delegate to another <he could defer his job to no one — J. A. Michener>**
intransitive verb : **to submit to another's wishes, opinion, or governance**

usually through deference or respect

<deferred to her father's wishes>

synonyms see YIELD

The second portion of the officer's statement further supports the fact that he "deferred" to the prosecutor. He is indicating that this plea agreement is productive and anything that would be stated would not be "productive."

Once again Merriam- Webster's Online Dictionary:

Definition of *COUNTER*

1 : marked by or tending toward or in an opposite direction or effect

2 : given to or marked by opposition, hostility, or antipathy

3 : situated or lying opposite <the *counter* side>

4 : recalling or ordering back by a superseding contrary order : countermanding <*counter* orders from the colonel

Definition of *PRODUCTIVE*

1: having the quality or power of producing especially in abundance <*productive* fishing waters>

2: effective in bringing about <investigating committees have been *productive* of much good — R. K. Carr>

3a : yielding results, benefits, or profits b : yielding or devoted to the satisfaction of wants or the creation of utilities

4: continuing to be used in the formation of new words or constructions <*un-* is a *productive* prefix>

The fact still remains that this has nothing to do with the action of the trial court. The court in the verbatim report of proceedings as well as the written order indicates that the State did not violate any agreement. The simple fact is the judge, in his discretion, did not like

the recommendation of an exceptional sentence downward. He states on the record and confirms in the written order that he was concerned with the fact that his was an instance where the Gollehon had an extensive criminal record and he had shot at a police officer.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d

775 (1971):

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

The court informs Gollehon that the court does not have to go

along with the agreement of the parties and Gollehon still took the offer;

THE COURT: And you understand that I don't have to follow anybody's recommendation in regard to sentencing, and that I can impose any sentence that I think is appropriate in this matter, up to and including the maximum authorized by law. Do you understand that?

MR. GOLLEHON: Yeah. (RP 4)

The two lawyers then spend a considerable period of time attempting to convince the court that the recommendation of an exceptional sentence downward is a good idea. (RP 7-11) The fact is that this entire proceeding only covers fourteen pages of transcript, of that almost four full pages are the two attorneys laying out in great detail why they came to this agreement and why the court should follow what they have agree to.

Once again as indicated above the court informed Gollehon and he stated understood that "I don't have to follow anybody's recommendation in regard to sentencing, and that I can impose any sentence that I think appropriate in this matter, up to and including the maximum authorized by law." (RP 4)

The oral ruling was well reasoned based on the facts presented to the court and was well within the discretion of the court:

THE COURT: Okay. Well, I'll be honest with

everybody. I'm struggling with this. Before me is a young man with a criminal history that is terrible and he has just pled guilty to shooting at a police officer. And I'm having real difficulty saying that a sentence

below the standard range is appropriate. I'm having --

I'm struggling, Mr. Knittle and Mr. Hernandez, I'll be honest with you. Normally, and I think to this point, invariably I have in these Hilyard recommendations, have followed the negotiated recommendation. Noting, you know, that there are always going to be problems at the time of trial and there can, you know, sometimes the range is just -- doesn't fit the crime and sometimes there needs to be an adjustment and sometimes that there are evidentiary issues or other issues of a similar nature that cause the State to believe that they need to cut a deal.

I guess there's no other way to put it. But the bottom line is, sitting where I am today is that I look at a criminal history and I look at the crime that he's pled guilty to. And I can't say that a sentence below the standard range is consistent with the interest of justice or the purposes of the Sentencing 1 Reform Act. I can't say that, despite the fact that both parties want me to say that. I can't do it, and I'm not willing to.

I will find the exceptional sentence and I will impose a sentence within the range of 240 months, at the lower end of the range. Credit for time served will be calculated by the jail and certified to the Department of Corrections. You'll also serve a period of community custody from 24 to 48 months upon your release from custody.

This discretionary ruling has not been shown by Gollehon to be in violation of State v. Downing, 151 Wn.2d 265, 272-3 (2004), "We will not disturb the trial court's decision unless the appellant or

petitioner makes "a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." (Citations omitted.)

State v. Hurt, 107 Wn. App. 816, 822, 828-29, 27 P.3d

1276 (2001):

A motion to withdraw a guilty plea is governed by CrR 7.8(b). We review the decision for abuse of discretion.

...

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion. The court abuses its discretion if it bases its decision on clearly untenable or manifestly unreasonable grounds. A motion to withdraw a guilty plea may be granted to correct a manifest injustice. CrR 4.2(f); The defendant has the burden of proving manifest injustice. Manifest injustice is proved by a showing that the plea is involuntary. Unless it is apparent from the record of the plea hearing that the plea was voluntary and intelligent, the State has the burden of proving the validity of the plea. (Citations omitted.)

There has been and can not be a challenge that this plea was involuntary. Gollehon was advised by the court of the circumstances of the plea and the ramifications of that plea. The court sentenced him to a standard range sentence with certain conditions none of the conditions are or where challenged.

This court has the inherent power to remand a matter for a reference hearing if there is a basis to believe there is need to clarify

the record. The facts are in the record; however appellant would have this court ignore them as having been placed on the record after the actual plea hearing. How else may the truth be found than by asking the parties involved how and why they took the action they took or made the statements they made without asking them at some future point just those questions.

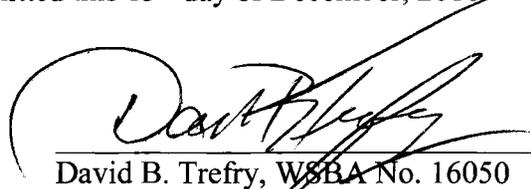
Obviously the officer at a later date stated that he agreed to the plea the only thing he wanted to say or do was to strangle the defendant for having taken a shot at him a very real an human reaction. The appellant would now bend the statement the victim made such that he may now try to get out of his portion of the plea agreement.

It would be the belief of the State that this in and of itself would also be a violation of the plea agreement and the State would therefore be entitled to specific performance of the very contract Gollehon now tries to rid himself of. If this court so desires it may send this down to the trial court, directing that court to place the officer under oath at which time he can swear under penalty of perjury that he did support the agreement and that as indicated on the record the meaning of his statement was that he wished he had occasion to meet out some personal justice on Gollehon for risking the life of this officer.

VI. CONCLUSION

Based upon the foregoing argument, this Court should affirm the conviction. In the alternative if this court may remand this matter for a reference hearing and thereby forever place on the record by the oath and affirmation of the officer the real meaning of his words, not as interpreted by the appellant or any other party.

Respectfully submitted this 13th day of December, 2010.

A handwritten signature in black ink, appearing to read "David B. Trefry", written over a horizontal line.

David B. Trefry, WSBA No. 16050
Special Deputy Prosecuting Attorney
Attorney for Yakima County

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

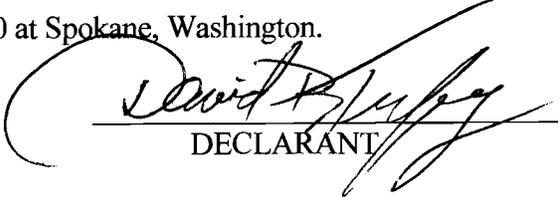
STATE OF WASHINGTON
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Vs.
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Appellant

NO. 28589-8-III

DECLARATION OF MAILING

I, David B. Trefry state that on December 20, 2010, I deposited in the United States mails by first class mail, proper postage affixed a copy of the Respondent's Brief to: Mrs. Susan Gasch, Gasch Law Office, P.O. Box 30339, Spokane, WA 99223 and too Jared Marshall Gollehon DOC #825685, 1830 Eagle Crest Way, Clallam Bay, WA 98326-9723
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of December, 2010 at Spokane, Washington.


DECLARANT