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SEP 02 2011

DIVISION III
STATE OF WASHINGTON
By _____

No. 29801-9-III

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

STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY TOMASZEWSKI,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
BENTON COUNTY

The Honorable Robert G. Swisher, and
the Honorable Vic L. Vanderschoor, Judges

APPELLANT'S OPENING BRIEF

TIMOTHY TOMASZEWSKI
DOC #341609, PRO SE

WASHINGTON STATE PENITENTIARY
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A. ASSIGNMENT OF ERROR

Reversal of the conviction should be granted -- and Tomazewski should be allowed to choose his remedy because the prosecutor implicitly breached the terms of the plea agreement by failing to inform -- the Court that Tomaszewski was entitled to credit -- for time served, and concurrent sentences of all charges filed against him, to include his District -- Court matters!

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

After careful consideration, the Prosecutor offered Tomaszewski a deal. The term was simple, Tomaszewski to plea guilty to all charges filed, with the understanding that the prosecution would recommend a 33 month sentence to run concurrent with all charges filed, to include District Court matters. Did the prosecutor implicitly breach the -- plea where at a motion hearing the prosecutor knew Tomaszewski was seeking his credit for time served and concurrent sentences, but failed to inform the Court, where the ability to request that sentence was clearly the basis for Tomaszewski's decision to enter the plea in the first place? (Assignment of Error 1.)

C. STATEMENT OF THE CASE

1. Procedural Facts:

Appellant, Timothy Tomaszewski was charged by information with Felony Driving Under The Influence Driving While License Suspended; Hit And Run; and Ignition Interlock Violation. RCW 46.20.342 (1),(a) RCW 46.20.720, RCW 46.20.740, RCW 46.52.020 (5), -- RCW 46.61.502 (1),(6); 1RP3; 1RP7; CP 1-3.

On May 13, 2010, Tomaszewski entered a regular plea of guilty to all the charges filed, to include Felony Driving Under The Influence; Driving While License Suspended; Hit And Run, and Ignition Interlock Violation. 1RP6; CP 6-15.

¹ Sentencing was held before the Honorable Vic. L. Vanderschoor on May 27, 2010, after which Judge Vanderschoor imposed a standard range sentence of 33 months with credit for time served and concurrent sentences to all charges filed, community placement or custody up to 12 months. 2RP6; CP 6-15.

¹ The verbatim report of proceedings consist of three volumes which will be referred to as follows:

May 13, 2010, as "1RP"
May 27, 2010, as "2RP"
February 24, 2011, as "3RP"

2. Facts relevant to issue on appeal:

When Mr. Tomaszewski arrived at Washington -- State Penitentiary in October 2010, after Judgment and Sentence in the Benton County Superior Court CP 18-27.

Mr. Tomaszewski reviewed his plea agreement - and Judgment And Sentence and it was pointed out - the State's recommendation were not incorporated in to the documents in details, and the prosecutor's recommendation to run all charges with Tomaszewski's District Court matter under J383092; J2Y6154; J-681457; and J2Y6124, were not incorporated neither. CP 6-15; CP 18-27.

¹ Mr. Tomaszewski obtained a copy of the Benton County Sheriff's, Jail Time Certificate. See (Appendix-A), attached to Tomaszewski's Motion And Declaration To Amend And Modify Judgment And Sentence. filed January 26, 2011, requesting credit for time served of 40 days based a division of time dealing with the District Court matter. CP 32-60.

¹This motion went unanswered by the Court and the State, as it was noted, for February 3, 2011, at 9 am.

On March 14, 2011, Mr. Tomaszewski, placed in a second Motion To Amend And Modify The Judgment -- And Sentence, for credit of 40 days, as his total time served in the Benton County Jail was 75 days, but Mr. Tomaszewski only received 35 days of that total time. Thus, Mr. Tomaszewski asked the Court credit him 40 days in his motion filed with the Court March 18, 2011. CP 73-101.

¹The State responded by motion, at a hearing held February 24, 2011, before the Honorable Robert G. Swisher, asked the Court to deny Mr. Tomaszewski's motion because he was asking for an extra 40 days credit. CP 68-71.

The court's response to the pleadings, was: "I have read the briefs". Mr. Tomaszewski is still at Airway Heights" Ms. Bredeweg responded, he is. The Court:"I will not appoint counsel for him. He can seek that through the Court of Appeals through a -- Personal Restraint Petition." 3RP2, CP 73-101; CP 68-71.

¹ A review of the record demonstrated that the State did not mail a copy of the State's Motion in Response Mr. Tomaszewski's Motion To Amend And Modify, as to allow him to make a reply motion to such response.

After Mr. Tomaszewski received the "Clerks Papers" he realized his Motion To Amend was improperly filed before Judge Swisher, and should be filed before Judge Vic L. Vanderschoor, who was aware concurrent sentences in the Superior and District Court charges, that Judge Vanderschoor forgot to do, May 27, 2010, during sentencing. See 2RP3; 2RP6.

After denying Mr. Tomaszewski Motion To Amend And Modify the Judgment And Sentence, at the Motion hearing held February 24, 2011. Judge Swisher signed an "Order Denying Defendant's Motion". 3RP2; CP-72; CP 73-101; CP-29-31.

As a result of the trial Court's denial. Mr. Tomaszewski, placed in the institutional mail system, at the Washington State Penitentiary, Minimum Security Unit, his "Notice of Appeal", which included the appeal of the denial of the appointment of defense counsel for the February 24, 2011, motion hearing to defend Mr. Tomaszewski's Motion To Amend And Modify. 3RP2; CP 103-105; CP 29-31.

D. ARGUMENT

THE STATE VIOLATED TOMASZEWSKI'S DUE PROCESS RIGHTS BY BREACHING THE PLEA AGREEMENT WHEN FAILED TO INFORM THE COURT THAT TOMASZEWSKI WAS ENTITLED TO CREDIT FOR TIME SERVED AND CONCURRENT SENTENCES WITH HIS DISTRICT COURT MATTERS, WHEN TOMASZEWSKI FILED A MOTION TO AMEND AND MODIFY JUDGMENT AND SENTENCE AND A HEARING WAS HELD. THUS, TOMASZEWSKI SHOULD BE ALLOWED HIS CHOICE OF REMEDY!

Plea agreements are contracts between the prosecution and the accused. See State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). As part of a plea agreement, the defendant gives up many important rights. See e.g. State v. Jerde, 93 Wn.App. -

774, 780, 970 P.2d 781, review denied 138 Wn.2d 10-02 (1999). As a result, a prosecutor has a due process duty to act in "good faith" and with fairness in upholding a plea agreement in to which the prosecutor's office has entered. See Sledge, 133 Wn.2d Wn.2d at 839-40; State v. Shineman, 94 An.App. 57, 60-61, 971 P.2d 94 (1999). The terms of the agreement becomes binding on the State once the trial court accepts the plea. See State v. Miller, 110 Wn.-2d 528, 536, 756 P.2d 122 (1988).

When a prosecutor breaches a plea agreement, - due process mandates that the conviction must be -- reversed and the defendant is entitled to his choice of remedies, i.e. either to withdraw the plea -- and go to trial, or to specifically enforce the -- terms of the agreement. See Sledge, 133 Wn.2d at 8-46. If the defendant chooses specific enforcement, he is entitled to a new sentencing hearing in front of a different Judge. State v. Van Buren, 101 Wn. - App. 206, 2P.3d 991, review denied, 142 Wn.2d 1015 (2000).

In this case, it is Tomaszewski's position that at the prosecutor breached the plea agreement by -- failing to inform the sentencing judge Vanderschoor on May 27, 2010, that Mr. Tomaszewski's superior -- court was to run concurrent with his District court, as to the first breach of the plea agreement, and the second breach of the plea agreement, was on February 24, 2011, when the prosecutor had a second chance to inform the court that Mr. Tomaszewski was not entitled to 40 days credit for time served, but instead entitled to his Superior and District Court cases ran concurrent with credit for time served, -- she knew the parties agreed upon, for which he sought at the motion hearing. See 2RP3; CP 73-101; CP-68-71.

On May 27, 2010, Judge Vanderschoor imposed a sentence of 33 months, concurrent sentences except for the District Court matter in error. See 2RP6.

Defense counsel, and the State failed to incorporate the plea agreement in details, in to the -- Statement of Defendant, and the Judgment and Sentence. See CP 6-15; CP 18-27.

As a threshold matter, this issue is properly before this court. Even if a defendant fails to object or move to set aside the plea below, the breach of a plea agreement is an issue of Constitutional magnitude which may be raised for the first time on appeal, as a manifest error under RAP 2.5(a)(3). See Van Buren, 101 Wn.App. at 211. Thus, this court may address Tomaszewski's argument in this case.

On review, this court should reverse. While a prosecutor need not enthusiastically advocate for a specific recommendation based on a plea, the prosecutor must not violate the integrity of the plea -- bargaining process by engaging in conduct which either explicitly or implicitly circumvents the agreement. See State v. Xaviar, 117 Wn.App. 196, 199, - 69 P.2d 901 (2005).

Here, while the plea agreement indicated that prosecutor would ask for a standard range sentence at the low end of 33 months. CP 6-15. However, there is nothing in the Statement of Defendant that -- concurrent sentences with Mr. Tomaszewski's misdemeanors traffic violations, neither does it mention anything about the concurrent sentence. CP 6-15.

In the prosecutor's letter pre-trial plea offer dictates the terms of the plea deal, but doesn't mention the plea deal to include the District Court matter raised before Judge Vanderschoor May 27, 2010. 2RP3; CP-15.

During the May 27, 2010, sentencing, the State did not argue against defense counsel presentation to Judge Vic L. Vanderschoor, about Tomaszewski losing his credit for time he's been incarcerated in the Benton County Jail, because of the District Court matter. 2RP3. Here Judge Vanderschoor failed to include the last minute plea deal with the State to include concurrent sentences with the District Court matter. 2RP6.

However, at the motion hearing on February 24, 2011, the prosecutor argued by motion to deny Mr. Tomaszewski asked for credit for time served of 40 days, "instead of a concurrent sentence with the District Court matter" for which Mr. Tomaszewski should have been seeking before Judge Vanderschoor who had personal subject matter jurisdiction over the issue that presented to Judge Swisher. 2RP3; 2RP6; 3RP2; CP 73-101.

Notably, this was not an "Alford" guilty pleas case. Instead Mr. Tomaszewski entered a "straight" plea. Unlike an "Alford" plea, an inherently equivocal plea, the very nature of which require greater scrutiny than the average guilty plea. See Personal Restraint of Mayer, 128 Wn.App. 694, 701, 117 P.3d - 353 (2005). Such pleas do not involve admission of guilt, and are instead the result of a "cost-benefit" analysis of what is best for him based upon his understanding of his options. See State v. D.T.M., 78 WN.APP. 216, 220, 896 P.2d 108 (1995). With respect to all pleas, it is especially important to -- ensure that the defendant's understanding of what -- he is exchanging his important rights for is not -- "undercut" by the actions of the prosecutor.

Because the prosecutor, "undercut" Mr. Tomaszewski's last minute plea agreement, by failing to -- inform the court that Mr. Tomaszewski was entitled to concurrent sentences of his Superior and District court cases, with credit for time served, instead of credit for 40 days, as his total time served was 75 days that was divided between both cases, -- because Judge Vanderschoor forgotten May 27, 2010

to run these two cases concurrent with credit for --
time served when defense counsel presented the mat-
ter during sentencing. 2RP3;2RP6!

Mr. Tomaszewski argues, that his plea deal was
based on two benefits. The low end of the standard
sentence range of "33" months, and "concurrent" se-
ntences on all charges, to include his "District"
"Court Matters" on May 27, 2010. 2RP3.

Prosecutor Megan Bredeweg handled the initial pl-
ea deal May 13, 2010 before the Honorable Swisher,
and had personal subject knowledge over the cases.
1RP5-8. CP-6-15.

Prosecutor Megan Bredeweg represented the State
in Mr. Tomaszewski's Motion To Amend And Modify his
Judgment And Sentence, in his attempt to obtain his
40 days credit for time served, was divided from --
his total time served of 75 days between the Super-
ior case and his District court case by motion. 3R-
P2. CP 73-101; CP 68-71. Where the prosecutor argu-
ed by motion, asking the court to deny the 40 days.
CP 68-71. And, orally remaining silent to the facts
and error of Judge Vanderschoor failure to run Mr.

Tomaszewski's Superior Court case and his District Court case concurrent May 27, 2010. 3RP2. See Letter of defendant. CP-67.

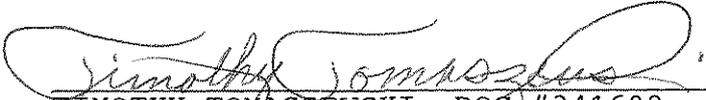
This case should be reversed, and remanded for a disposition hearing before the Honorable Vic L. Vanderschoor, Judge, as to Mr. Tomaszewski's choice of remedies, as this court has personal subject matter jurisdiction over the facts of the case. 2R-R3; 2RP6; CP 6-15; CP 18-27; CP-28.

E. CONCLUSION

For the reasons stated here, the only solution is reversal, and remand for a hearing before the correction judge for disposition of the case, and Mr. Tomaszewski choice of remedies.

Dated: this, 29th day of August, 2011.

Respectfully Submitted By:

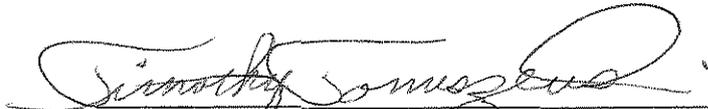

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PROOF OF SERVICE BY U.S MAIL

I, TIMOTHY TOMASZEWSKI, STATE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I PLACED IN THE INSTITUTIONAL MAIL SYSTEM HERE AT THE WASHINGTON STATE PENITENTIARY, MINIMUM SECURITY, THIS ORIGINAL DOCUMENT, AND ONE COPY ADDRESSED TO THE INDIVIDUALS LISTED BELOW, POSTAGE PAID & and Subject to the State and Federal Mail Box Rules See State vs. Hurt, 107 Wn.App. 816, 27 P.3d 1276 - (2001).

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