

NO. 29909-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN WILKINS,

Appellant.

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

The Honorable Cameron Mitchell, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE PROSECUTOR BREACHED THE PLEA AGREEMENT BY FAILING TO RECOMMEND A SSOSA.

The prosecutor in this case agreed to recommend a Special Sex Offender Sentencing Alternative (SSOSA) if Wilkins received a “favorable recommendation.” CP 10. At issue are two questions: first, who must make the recommendation and second, what is meant by favorable. The State also suggests its duty to recommend a SSOSA hinges on the timing of the recommendation. Brief of Respondent at 10-11. This Court should reject the State’s arguments and hold that Dr. Henry’s evaluation triggered the State’s duty to recommend a SSOSA because Dr. Henry found Wilkins was a candidate for treatment.

a. Nothing in the Plea Agreement Indicates the Favorable Recommendation Must Come from the Pre-Sentence Investigation (PSI).

The State claims the recommendation referred to in the plea agreement must be the PSI because only the PSI involves an assessment of risk. Brief of Respondent at 13. This is false. The SSOSA statute describes the requirements for an evaluation to determine whether the offender is amenable to treatment. RCW 9.94A.670. The examiner must “assess and report regarding the offender’s amenability to treatment and relative risk to the community.” RCW 9.94A.670(3)(b) (emphasis added). Indeed, as the

State notes in its brief, Dr. Henry's evaluation specifically included considerations of risk to the community. CP 63; Brief of Respondent at 7-8.

The State also argues the agreement shows no intent to be bound by Dr. Henry's evaluation. Brief of Respondent at 11-12. But it also shows no intent to restrict the source of the "favorable recommendation" to the PSI. If the State intended its recommendation to hinge on the PSI, it could have said so in the plea agreement, which it drafted. See In re Detention of Lord, 152 Wn.2d 182, 192 n.10, 94 P.3d 952 (2004) ("The State could have easily clarified in Lord's plea agreement that its SSOSA recommendation depended on whether *its* evaluator found that Lord was amenable for a SSOSA.").

Instead, the plea agreement contains no provision regarding the source of the recommendation. The generic language of "favorable recommendation" indicates the recommendation may come from more than one possible source. Since the SSOSA statute specifically provides for a treatment provider's report as part of the statutory process, it is logical that a treatment provider's report, such as Dr. Henry's evaluation, would be at least one possible source for the recommendation.

b. Dr. Henry's Evaluation Is Favorable Because It Found Wilkins Amenable To Treatment.

The SSOSA statute was designed for less serious offenders who are amenable to treatment. State v. Goss, 56 Wn. App. 541, 544, 784 P.2d 194 (1990). The crux of the analysis is whether the offender can be rehabilitated via treatment without undue risk to the community. Id. at 544. Given this purpose, it is reasonable for the prosecutor's recommendation to hinge on whether Wilkins was eligible under these criteria, rather than a subjective determination of whether an evaluator's assessment was "favorable."

The State's argument is similar to the argument the court rejected in Lord. In that case, the plea agreement, which the court described as "not the picture of clarity," called for the prosecutor to recommend a SSOSA "on the condition petitioner successfully obtained treatment under SSOSA." Lord, 152 Wn.2d at 190. Despite the language requiring Lord to "successfully obtain" treatment, the court held the prosecutor's recommendation actually hinged on Lord's eligibility for a SSOSA. Id. The court held the prosecutor breached the plea agreement, and remanded the case to permit Lord to withdraw his guilty plea or demand specific performance of the plea. Id. at 193. The same result should arise here. Dr. Henry's evaluation was favorable because it found Wilkins was a candidate, even if a marginal one,

for treatment, thereby implying he was at least sufficiently amenable to treatment.

c. Dr. Henry's Evaluation Satisfies the Condition Even Though It Was Written Before the Plea Agreement Was Made.

The State argues Dr. Henry's evaluation is not a favorable recommendation because it had already been prepared prior to the plea agreement. Brief of Respondent at 11. This is a red herring. A condition precedent may involve events that occurred in the past but which are discovered after the agreement. See State v. McNally, 125 Wn. App. 854, 858-59, 106 P.3d 794 (2005). In McNally, the prosecutor's duty to recommend a SSOSA was contingent on McNally's criminal history. The court explained, "McNally's agreement that the criminal history in Appendix A was complete and accurate was a condition precedent to the State's agreement to recommend a SSOSA." Id. at 867. This condition precedent did not involve an event occurring after the agreement was made. On the contrary, it involved McNally's contemporaneous agreement regarding events that had occurred in the past, *i.e.*, his criminal history. The court held the prosecutor's performance was excused due to the failure of the condition precedent. Id. at 867-68. By contrast, in this case, the prosecutor's performance was not excused because the condition precedent of a "favorable recommendation" was satisfied by Dr. Henry's evaluation.

Finally, there is no indication Wilkins or his attorney were not acting in good faith. Wilkins' first attorney, who withdrew after the plea agreement, solicited Dr. Henry's evaluation. 2RP 3. Neither Wilkins nor his new attorney knew why the report was not initially disclosed to the State. 2RP 3. Because the Henry report was a favorable recommendation, the State breached the plea agreement by failing to recommend a SSOSA. Wilkins asks this Court to reverse the conviction and permit him to withdraw his plea or demand specific performance. Lord, 152 Wn.2d at 193.

D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Wilkins requests this Court reverse his conviction and permit him to withdraw his plea or demand specific performance.

DATED this 11th day of April, 2012.

Respectfully submitted,

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State v. Steven Wilkins

No. 29909-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 11th day of April, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

Signed in Seattle, Washington this 11th day of April, 2012.

X 

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Respondent,)	
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STEVEN WILKINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF APRIL 2012.

x *Patrick Mayovsky*