

30302-1-III
COURT OF APPEALS

FILED
June 26, 2012
Court of Appeals
Division III
State of Washington

DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PHILIP S. INGRAM, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The prosecuting attorney breached the plea agreement.

B. ISSUE

1. The accused entered into a plea agreement, part of which was that the State would recommend a special sex alterative sentence (SSOSA) if the accused was found amenable to treatment. At sentencing the deputy prosecutor acknowledged that the examining psychologist found the accused amenable to treatment. The prosecutor nevertheless argued that the accused was not, in his opinion, amenable to treatment and alleged facts supporting an argument that the accused was not eligible for SSOSA. Did the deputy prosecutor breach the plea agreement?

C. STATEMENT OF THE CASE

Around 10:30pm on New Year's Eve, 15-year-old SMC went to the home of her friend, 14-year-old BMB. (CP 2) They were joined by two young men, CDM and KLG. (CP 2) BMB telephoned John Glendaniel, who agreed to buy some liquor for her and her friends. (CP 2) The four young people went to Mr. Glendaniel's home, then drove him to a Safeway store where he bought them beer and hard lemonade. (CP 2) They then drove to Philip Ingram's apartment, where the whole group consumed the alcoholic beverages purchased at the grocery store and some vodka they found at the apartment. (CP 2)

After midnight, the young people went to bed, and in the course of the night, according to the others, Mr. Ingram had sexual contact with BMB and SMC. (CP 2) Based on the ensuing police investigation, Mr. Ingram was charged with one count each of first-degree rape of a child, second-degree child molestation, and furnishing liquor to a minor. (CP 2)

Mr. Ingram agreed to plead guilty to two of the charges. (CP 12, 16) The plea agreement provided: "The prosecuting attorney will make the following recommendation to the judges: The prosecutor will dismiss Count 3 and will recommend SSOSA if defendant is found to be amenable to treatment." (CP 16)

Dr. Ronald Page, a clinical psychologist, prepared an evaluation of

Mr. Ingram's suitability for SSOSA. (CP 30-36) He concluded:

Considering the above, Mr. Ingram may be a suitable candidate for SSOSA and an acceptable risk within the community. His treatment program should coincide with the period of community supervision in sessions of declining frequency, dependent largely upon his related progress in treatment. Fortunately, there is little in his known history to suggest that he is predatory to any significant degree, and his offense would seem to have been situationally provoked and opportunistic. Treatment emphases necessarily should work toward improving insight and an understanding of his social and legal responsibilities/vulnerabilities. Additional important emphases should include supportive feedback and guidance for psychological and vocational self-development at this critical period, especially in the shadow of potential stigmatization associated with the recent convictions. Mr. Ingram's prognosis may be positive. If his sentencing entails a period of penal confinement, the duration and circumstance should be for punitive purposes, as I do not believe confinement for community protection is justifiable on the basis of information available to me.

(CP 35-36)

At sentencing the prosecutor argued:

Well, Your Honor, the plea agreement is that he is amenable to treatment. If he was amenable to treatment the State would recommend SSOSA, but this is a tough one. Even though Dr. Page seems to say he is amenable to treatment everything else indicates that isn't so.

...

I want to point out a couple things to refute what Mr. Barrett said for the Court's edification. DOC's report is based on or colored by the impact statement. It's also colored by what he said to Ms. Smith when she interviewed him, and that cannot be overlooked. I don't know if he gave

a complete different version to Dr. Page than he did to Ms. Smith, but he's taken absolutely no responsibility for what's happened in this case. In fact he says, quote: "I'm innocent." Now it seems to me if you are going to try to go through SSOSA you have to take some responsibility, and he's done none of that at all. He has blamed it on the girls themselves and their parents because they didn't have them in that night. And as far as I'm concerned that's not taking responsibility. And I don't think that's breached the plea agreement. I just want to point that out. Dr. Page says, yes, he is amenable, so the State will follow that ruling, or his reasoning. But if you look at everything else, it's -- just almost flies in the face, and I don't know if I strictly have to go by what Dr. Page, or I can look at everything and say, yes, he is amenable, no, he is not. But I will stay with it because Dr. Page thinks he might be able to work with him. But everything else frightens me.

(RP 8-9)

The court declined to sentence Mr. Ingram under SSOSA, and imposed a minimum sentence of 120 months. (CP 60)

D. ARGUMENT

1. WHEN THE DEPUTY PROSECUTOR BREACHES THE PLEA AGREEMENT, THE OFFENDER IS ENTITLED TO RESCISSION OR ENFORCEMENT OF THE AGREEMENT.

The State must comply with the terms of a plea agreement, and if the State agrees to recommend a sentence, it must do so. *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). It may not undercut the agreement "explicitly or by conduct evidencing an intent to circumvent the

terms of the plea agreement.” *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). For example, the State breaches a plea agreement by recommending an agreed-upon sentence and then expressing its reservations about the terms of the plea agreement to the court. *See State v. Lake*, 107 Wn. App. 227, 233-34, 27 P.3d 232 (2001) (prosecutor’s statement at sentencing that she was no longer sure defendant was suitable for counseling was a breach of prosecutor’s plea bargain); *In re Palodichuk*, 22 Wn. App. 107, 108, 110, 589 P.2d 269 (1978)

A plea agreement is a contract between the defendant and the prosecutor. *State v. Talley*, 134 Wn.2d at 182. Implicit in every plea agreement is an implied promise by the prosecutor to act in good faith. *State v. Sledge*, 133 Wn.2d at 839; *State v. Marler*, 32 Wn. App. 503, 508, 648 P.2d 903 (1982). Because the defendant relinquishes important constitutional rights by complying with a plea bargain, “[d]ue process requires the prosecutor to adhere to the terms of the agreement.” *State v. Sledge*, 133 Wn.2d at 839. The prosecutor is entitled to present relevant facts that might not fully support the recommended sentence. *See State v. Gutierrez*, 58 Wn. App. 70, 76, 791 P.2d 275 (1990). The prosecutor may not, however, “undercut the plea bargain ‘explicitly or by conduct evidencing an intent to circumvent the terms of the plea

agreement.’ ” *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781, *review denied*, 138 Wn.2d 1002 (1999) (*quoting Sledge*, 133 Wn.2d at 840). The test is whether the prosecutor objectively contradicted the recommendation by use of words or conduct. *Jerde*, 93 Wn. App. at 780. The conduct is evaluated by an objective standard, regardless of either the prosecutor’s motivations or justifications for the failure to perform. *State v. Jerde*, 93 Wn. App. at 780 (*citing In re Personal Restraint of Palodichuk*, 22 Wn. App. at 110).

Mr. Ingram contends that the prosecutor breached and undercut the plea agreement by arguing that, even though the examining psychologist found Mr. Ingram “amenable” to treatment, the court could still find him not “eligible” for the SSOSA. The prosecutor has a duty “not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.” *Id.* at 840. The test for whether the State’s performance of a plea agreement meets constitutional muster is whether the prosecutor contradicts, by word or conduct, the State’s agreed-upon recommendation. *State v. Talley*, 134 Wn.2d at 187.

In the plea agreement, the State agreed to “recommend SSOSA if defendant is found amenable to treatment.” The prosecutor then argued that “amenable to treatment” is not the same as “SSOSA eligible.” Under RCW 9.94A.670(3) and (4), once it is found that a defendant is amenable

to treatment, it is the court that determines if SSOSA is appropriate. However, it could not have been the intent of this plea agreement to wait until the court found that SSOSA was appropriate before the State would not oppose it. That would render the plea agreement meaningless and leave Mr. Ingram with no recommendation from the State.

If the plea agreement is to have any meaning, the State should have recommended SSOSA when Mr. Ingram was found amenable to treatment. By arguing that Mr. Ingram might not be “eligible” for SSOSA, the State undercut and breached the plea agreement. The court did not ask the prosecutor to clarify the meanings of “amenable” and “eligible.” Regardless of whether the prosecutor’s breach actually influenced the court, Mr. Ingram is entitled to relief. *Palodichuk*, 22 Wn. App. at 110 (citing *Santobello v. New York*, 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)).

Mr. Ingram is entitled to a choice of remedies: remand for withdrawal of the guilty plea or specific performance by means of a new sentencing hearing before a different judge with the benefit of the agreed-upon recommendation of the State. *State v. Miller*, 110 Wn.2d 528, 535, 756 P.2d 122 (1988); *State v. James*, 35 Wn. App. 351, 355, 666 P.2d 943 (1983).

E. CONCLUSION

The case should be remanded to permit Mr. Ingram to decide whether to withdraw his guilty plea or elect specific performance of the plea agreement before a different judge.

Dated this 26th day of June, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30302-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
PHILIP S. INGRAM,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 26, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Teresa Chen
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I certify under penalty of perjury under the laws of the State of Washington that on June 26, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 26, 2012.


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