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Sep 04, 2012
Court of Appeals
Division III
State of Washington

30302-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

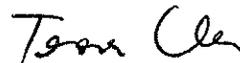
PHILIP S. INGRAM,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUE

When the parties agreed that the prosecutor shall recommend SSOSA if the Defendant is found amenable to treatment, and the DOC found the Defendant was NOT amenable to treatment, did the prosecutor undercut the plea agreement in stating that the Defendant did not appear to be amenable to treatment?

IV. STATEMENT OF THE CASE

On January 10, 2011, the Defendant Phillip Sherman Ingram was charged with rape of a child in the second degree, child molestation in the third degree, and furnishing liquor to minors. CP 9-11.

On June 27, 2011, the Defendant pled guilty to the first two counts. CP 12-22. In exchange for the guilty plea, the prosecutor agreed to dismiss

count three and to “recommend SSOSA if defendant is found to be amenable to treatment.” CP 16.

The judge explained the agreement to the Defendant, referencing the Department of Corrections’ part in the recommendation process:

THE COURT: I see the State’s going to recommend SSOSA, Special Sex Offender Sentencing Alternative if you are found to be amenable to treatment. There will have to be a report prepared by DOC and then they’ll make a recommendation.

IRP¹ at 5, ll. 14-18. And again at the end of the hearing, the judge referenced the DOC evaluation, i.e. the PSI or post-sentencing investigation required under RCW 9.94A.500:

THE COURT: Sentencing in two weeks? Well, we have to have the report done. Okay. So Mr. Golden will just note that when you have the report in hand?

MR. GOLDEN: Yes, Your Honor.

THE COURT: All right. That’s all for today.

IRP at 9.

On August 8, 2011, the sentencing hearing was continued. Defense counsel explained, the parties were still “[w]aiting for the PSI.” IRP at 10.

The Defendant was sentenced on September 8, 2011. CP 54-67. The judge had reviewed “entire file” including a psychological report by Dr.

¹ IRP refers to the Verbatim Report of Proceedings for June 27, 2011 & August 8, 2011.

Page, the presentence investigation from the Department of Corrections, and the victims' letters. 2RP² at 3.

Defense counsel emphasized Dr. Page's report. 2RP 4-7. Acknowledging the DOC's conclusion was different, defense counsel argued that "DOC's recommendation is colored by victim impact." 2RP at 7.

The prosecutor began with the parties' agreement that the prosecutor would recommend SSOSA if the Defendant was amenable to treatment. 2RP at 8. "[B]ut this is a tough one. Even though Dr. Page seems to say he is amenable to treatment everything else indicates that isn't so." *Id.* The prosecutor went on to emphasize the amenability assessment made by the DOC.

THE PROSECUTOR: ...

DOC's report is based on or colored by the impact statement. It's also colored by what [the Defendant] 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

² 2RP refers to the Verbatim Report of Proceedings for September 8, 2011.

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 [thinks], 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.

THE COURT: Well, I'm accepting your recommendation as being for SSOSA.

MR. GOLDEN: Thank you.

2RP at 8-9 (emphasis added).

The court then heard from the parent of one of the victims, who described the Defendant's long-term predatory behavior and the effect of the crimes on the minor victims. 2RP at 10-11.

The court also heard from Alison Smith, a DOC representative, who pointed out that the Defendant was not legally eligible for SSOSA. 2RP at 12. A SSOSA is not available in the case of stranger rape, but only when the offender has "an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime." RCW 9.94A.670(2)(e). Ms. Smith also noted that the victims opposed SSOSA and the court was required to give great weight to their opinions. 2RP at 12. *See* RCW 9.94A.670(4) ("The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section.").

In the end, the sentencing court found that regardless of any party's recommendation, "Mr. Ingram doesn't qualify for a SSOSA sentence under the statute there is no established relationship with the victim under Section 2 E." 2RP at 14. The court did not grant a SSOSA. *Id.*

The Defendant appeals from the sentence, arguing that the prosecutor breached the terms of the plea agreement.

V. ARGUMENT

THE PROSECUTOR DID NOT BREACH THE PLEA AGREEMENT BY NOTING THAT THERE WAS MORE THAN ONE AMENABILITY DETERMINATION.

Regardless of whether an objection can be interpreted in this record, this appeal is proper. A defendant may raise the issue of a prosecutor's breach of the plea agreement for the first time on appeal. *State v. Xaviar*, 117 Wn. App. 196, 199, 69 P.3d 901 (2003). The prosecutor agrees with the Defendant that if a breach is found, the Defendant may request either specific performance of the plea agreement or withdrawal of his guilty plea. The defendant's preferred remedy is entitled to considerable weight. *State v. Morley*, 35 Wn. App. 45, 665 P.2d 419 (1983). If the Defendant chooses specific performance, only the prosecutor's recommendation is mandated. The sentencing court is still free to disagree with and depart from any

recommendation. *State v. Henderson*, 99 Wn. App. 369, 379, 993 P.2d 928 (2000).

As the Defendant notes, the State may not undercut its plea bargain. Appellant's Brief at 4-5, *citing State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). And expressing reservations can undercut the plea bargain. Appellant's Brief at 5, *citing State v. Lake*, 107 Wn. App. 227, 233-34, 27 P.3d 232 (2001).

However, the prosecutor's recommendation need not be made enthusiastically. *State v. Sledge*, 133 Wn.2d at 840. The prosecutor fulfills his duty by simply making the promised recommendation. *State v. Coppin*, 57 Wn. App. 866, 791 P.2d 228, *review denied* 115 Wn.2d 1011, 797 P.2d 512 (1990).

The first question to this Court is how to interpret "amenability" within the plea agreement. Two evaluations were made, one by Dr. Page and one by the DOC. The Defendant argues that *Dr. Page's opinion* is the sole determination of SSOSA amenability. Appellant's Brief at 6. That definition is nowhere to be found in the agreement. The agreement is simply that the prosecutor would "recommend SSOSA if defendant is found to be amenable to treatment." CP 16. The court's frequent reference to and reliance on the PSI suggest that *DOC's opinion* on amenability was the preferred source for

the determination on amenability. There was no mention in the plea hearing about Dr. Page, only the PSI. And it was the DOC's conclusion that an offender is not amenable if he does not "take full responsibility for all elements of the crime." 2RP at 12.

The prosecutor explained the plea bargain to the judge and argued "I don't know if I strictly have to go by what Dr. Page [writes], or [if] I can look at everything." 2RP at 9. Because the language of the agreement does not limit the amenability question to Dr. Page's opinion, the prosecutor was within his rights to interpret the agreement as he did. This is a reasonable understanding of the agreement.

In fact, both attorneys argued about the relative merit of those two different evaluations. Defense counsel suggested that the DOC amenability assessment was too dependent on the victims' opinions. And the prosecutor argued that the reason for the different conclusions was that the Defendant had given different information to the different evaluators. To Ms. Smith, the Defendant had asserted that he was innocent. 2RP at 8-9. A person who does not acknowledge responsibility for a sexual offense is not amenable to treatment.

Because Dr. Page's assessment was not the final word on amenability, it cannot be said that the prosecutor breached the agreement.

The second question is: if, however, this Court determines that Dr. Page's conclusion was the final determination of amenability, did the prosecutor breach the agreement? The prosecutor made one recommendation: SSOSA, dependent upon amenability to treatment. The preliminary question in the prosecutor's mind was whether, in fact, the Defendant was amenable to treatment.

The Defendant argues that this preliminary query of the court (the clarification of the terms of the agreement) undercut the agreement. The prosecutor, however, relied upon the ability of the sentencing court to act logically and to compartmentalize. The court appears to have done so. The sentencing court chose to interpret the prosecutor's recommendation as being for SSOSA. 2RP at 9.

It is common for courts to determine preliminary matters before making rulings. For example, in a bench trial, a judge may hear unduly prejudicial information, rule it inadmissible under ER 403, and then divorce oneself from that information when determining culpability. Because, judges can be relied upon to make these decisions, often multiple times a day, it is reasonable and common for attorneys to address preliminary matters as the prosecutor did here. The judge's response demonstrated that the court accepted nothing from the prosecutor except the recommendation for

SSOSA.

The prosecutor did not breach the plea agreement by inquiring into whether the terms of the agreement had been met. The prosecutor made a firm, if unenthusiastic, recommendation dependent on the court's interpretation of the terms of the plea agreement. And the court accepted this recommendation quite clearly. There was no breach.

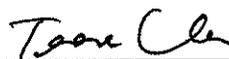
The State notes that if this Court were to reverse, the most likely outcome would be a withdrawal of the guilty plea. This is because the Defendant is not statutorily eligible for SSOSA, so that specific performance would not change the outcome. In other words, *based solely on the prosecutor's request for clarification from the sentencing court as to the interpretation of the plea agreement*, the Defendant is seeking to withdraw his plea and begin anew. The record demonstrates the victims' trauma throughout this process. Their wounds would be reopened. This would be an unjust outcome.

VI. CONCLUSION

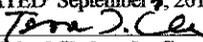
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: September 4, 2012.

Respectfully submitted:



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<p>Janet Gemberling <jan@gemberlaw.com></p> <p>Phillip S. Ingram, DOC# 350577 P.O. Box 2049 Airway Heights, WA 99001</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 4, 2012, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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