FILED
October 30, 2012
Court of Appeals
Division III
State of Washington

No. 30699-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD ELTON CHEW,

Appellant.

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

The Honorable John Lohrmann

APPELLANT'S REPLY BRIEF

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A. REPLY ARGUMENT

The State of Washington enticed Mr. Chew to plead guilty by promising to recommend an 84-month sentence at sentencing. This promise in the plea agreement, which bound the prosecutor and his agents, was breached when the prosecutor invited the investigating detective to speak at sentencing and Detective Buttice then made a litany of denigrating statements about the defendant and his offenses, which directly resulted in the trial court exceeding the State's putative recommendation, and doing so for the identical factual reasons cited by the Detective. See Appellant's Opening Brief.

1. There was no breach of the plea by the defendant, but there was a breach by the State, an entity that is held to *exacting* standards when it comes to the question whether it has performed, or breached, its promises in a plea agreement. The Respondent now contends that Detective Buttice's extended denunciation of Mr. Chew was somehow warranted under the justification that it was an *ad hoc*, spur-of-the-moment rebuttal to what the Respondent characterizes as Mr. Chew's shocking conduct at sentencing following the plea, when he allegedly requested an alternative DOSA sentence.

But first, the defendant, Mr. Chew, was not bound by any promise to "recommend" a particular sentence. It was only the prosecutor who

was bound by a promise to "recommend" a certain sentence – indeed, this was the State's enticement that was used to obtain a guilty plea *from* Mr. Chew. As the plea agreement stated: "**The prosecuting attorney will make the following recommendation to the judge**: asking 84 months agreed all sides." (Emphasis added.) CP 133. This pre-printed and filled-in language from the plea statement (and the trial court's recitation of the same language) was fully set forth in the Opening Brief, and its clear, sole meaning was noted – i.e., that the parties agreed that the prosecutor would recommend a certain sentence at sentencing, if Mr. Chew would plead guilty. Appellant's Opening Brief, at pp. 3-4; see CP 133; see 2/27/12RP at 205. Nothing in the plea indicated that Mr. Chew was promising to refrain from seeking a DOSA sentence, and indeed the plea left fully open the possibility of an exceptional sentence downward. CP 133.

The Respondent, in its brief, has made no effort to counter Mr. Chew's argument regarding this language, and instead the Respondent simply states, summarily (and inaccurately), that *Mr. Chew* ("Both parties") agreed to "recommend" an 84-month sentence. BOR, at 2. This is simply not correct.

Furthermore, even if Mr. Chew had been obligated by some promise in the plea agreement that he, the defendant, would "recommend" an 84-month sentence, there was no breach arising from the fact that his

counsel, at sentencing, did nothing more than very briefly, and in a most highly qualified manner, indicate to the court the defendant's personal wish for drug treatment, perhaps by means of a DOSA. Defense counsel *immediately* noted that the idea of a DOSA sentence was essentially moot given the defendant's range, and instead asked the court to consider somehow ordering drug treatment *as part of* Mr. Chew's 84-month term of incarceration. 3/5/12RP at 212-13.[1]

Importantly, the State is held to an exacting standard when the question is whether it has fulfilled, or breached, its plea promises to a defendant who pleads guilty. The State is "held to 'meticulous standards on both promise and performance.'" (Emphasis added.) Palmero v. Warden, 545 F.2d 286, 296 (2d Cir. 1973); see also United States v. Transfiguracion, 442 F.3d 1222, 1227-28 (9th Cir. 2006) (for similar reasons, any ambiguities in the plea agreement are construed against the drafter). Plea agreements are contracts, and the law also imposes upon the State an implied promise to act in good faith. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Furthermore, however,

> [b]ecause plea agreements concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to the terms of the

[1] It should also be noted that a DOSA would indeed be an "84-month" sentence, albeit with a portion of the sentence of incarceration suspended but at risk of being summarily imposed upon a failure to adhere to conditions of treatment. See RCW 9.94A.660(3), (6), (7).

> agreement. [Sledge, at 839] (citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)); United States v. Harvey, 791 F.2d 294, 300 (4th Cir.1986) (the defendant's underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law).

State v. Harrison, 148 Wn.2d 550, 556-57, 61 P.3d 1104 (2003). It is inconsistent with these authorities and the principles for which they stand for the Respondent to now contend that Detective Buttice's lengthy diatribe on Mr. Chew's criminal character and dangerousness was somehow proper under the justification that it was a response to a similar breach of the plea agreement by Mr. Chew. Assuming solely for the purposes of argument that there was a breach by the defendant, the Detective's statement was dramatically out of proportion to any *de minimis* default by Mr. Chew.

The State, to fulfill its obligations, must act in good faith and "not contravene the defendant's reasonable expectations that arise from the agreement." State v. McInally, 125 Wn. App. 854, 861-62, 106 P.3d 794, review denied, 155 Wn.2d 1022 (2005). Here, the fact that the Detective mentioned, briefly, somewhere during his litany of attacks, that a DOSA was not appropriate, does not *ex post facto* transform that extended denunciation of Mr. Chew into a proper response to any request for a DOSA. If this Court concludes that a DOSA was actually sought by the

defense in breach of some provision of the plea, the prosecutor had already adequately stated his opposition to any DOSA request, when he stated a DOSA was unwarranted, before inviting the Detective to give his sentencing statement. 3/5/12RP at 214.

Even if this Court construes the paragraph in the plea agreement regarding the "prosecuting attorney" and his promise to recommend a certain sentence, as applying to the defendant, and thus rendering Mr. Chew in default by briefly mentioning a DOSA before making clear that a DOSA was not being sought, the Court should reject any contention that Detective Buttice's significant, material, and consequential breach of the plea agreement was warranted by any default by Mr. Chew. Importantly, the controversial but proper resolution of criminal cases by plea agreement would be substantially chilled if Defendants come to believe that a prosecutor's plea promises can be wholly undermined by the State's agent, leading to sentences in excess of the State's plea enticement, and the resulting general unreliability of any prosecution plea offers.

2. The case of *State v. Sanchez* holds that investigating officers such as Detective Buttice are agents of the State whose conduct can breach the prosecutor's plea agreement promises. In a final chapter to this saga, the Respondent on appeal further contends that Detective Buttice's tirade is of no legal moment anyway, because the Detective

investigating the case is not an agent of the prosecutor and thus Detective Buttice was not bound by the plea agreement for purposes of breaching it, under State v. Sanchez, 146 Wn.2d 339, 46 P.3d 774 (2002).

The Respondent misreads Sanchez. The opinion of the Supreme Court is the opinion of the majority of the Justices as to a holding or outcome. Spain v. Employment Sec. Dept., 164 Wn.2d 252, 260 n. 8, 185 P.3d 1188 (2008) (stating that "the holding of this court is the holding joined by a majority of the justices on a case"); see also State v. Brooks, 157 Wn. App. 258, 265, 236 P.3d 250 (2010) ("A majority opinion is settled law").

In Sanchez, Justice Madsen, joined in her opinion by three other members of the Washington Supreme Court, stated that both investigating officers *and* community corrections officers, for purposes of alleged State's breach of a plea by those actors, are bound by a prosecutor's plea agreement under "[b]asic agency principles and simple fairness." Sanchez, 146 Wn.2d at 359 (Madsen, J.). Justice Bridge, also joined by three other Justices, disagreed entirely, and wrote that *neither* category of officers are bound in this manner. Sanchez, 146 Wn.2d at 342, 356.

Ultimately, the majority opinions in both the Sanchez case and the companion case of Harris came down to the opinion of Justice *Chambers*, who provided the fifth and determinative vote in both Mr. Sanchez's and

Mr. Harris's cases. In Sanchez, Justice Chambers agreed with Justice Madsen, in both reasoning and result, with regard to investigating officers. Echoing Justice Madsen's rationale, Justice Chambers similarly determined that the investigating officer in Mr. Sanchez's case was bound by the prosecutor's plea agreement promises, under "principles of fairness and agency[.]" Sanchez, 146 Wn.2d at 356. As Mr. Chew stated in his Appellant's Opening Brief, this rule regarding investigating officers – like Detective Buttice here – is the rule for which Sanchez stands. Appellant's Opening Brief, at pp. 4, 9, 13, 14. The majority opinion in Harris was also set forth by the fifth vote of Justice Chambers, and in that case Justice Chambers applied the opposite rule when it comes to community corrections officers, but those are not the circumstances here. Detective Buttice, as set forth in the Opening Brief, was unquestionably the investigating police officer on the prosecution case, having enlisted and employed the informant, having applied for and executed the search warrant, and the information having been filed by the deputy prosecutor in reliance on Buttice's report for purposes of the affidavit of probable cause. CP 37, CP 4, CP 1; 9/20/11RP at 19, 31.

Indeed, Detective Buttice was not only the investigating officer, it was in fact he who negotiated with the defense regarding the various plea offers discussed during the course of pre-trial proceedings and ongoing

disputed motions to suppress. When the defendant ultimately signaled his wish to plead guilty in the courtroom just prior to the start of trial, the deputy prosecutor responded by consulting with Detective Buttice to determine what specific plea offer was on the table as most recently offered to the defendant. 2/27/12RP at 199. The prosecutor in the same hearing again consulted with Detective Buttice regarding the specifics of the plea offer, and then expressly stated that the State, "after meeting with our detective," would agree to amend the information to reflect the negotiated charges. 2/27/12RP at 201-02.

Detective Buttice as the investigating officer in Mr. Chew's case was an "agent" of the prosecutor, and his extended denigration of Mr. Chew before sentencing was a breach of the State's plea agreement, just as much as if it had emanated from the trial prosecutor who invited the Detective to speak. Mr. Chew's appellate briefing properly states the holding in Sanchez.[2]

The State breached its plea agreement promise to recommend a low-end sentence by reciting aggravating facts at the sentencing hearing, including through the investigating police officer, resulting in the trial

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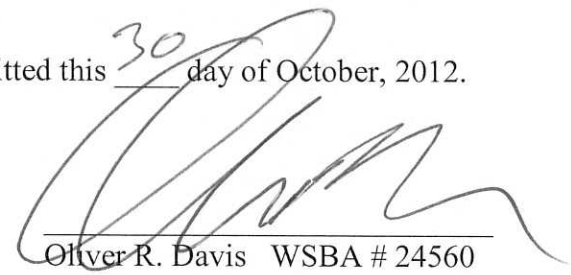
[2] The unofficial Westlaw summary of the Sanchez decision unfortunately and incorrectly states that the Court's decision holds that *neither* the community corrections officer in Harris (the companion case) or the investigating officer in Sanchez were bound by the prosecutor's plea promises. State v. Sanchez, supra. Notably, a number of unpublished Washington decisions have also misstated the holding of Sanchez in the same manner as the Respondent.

court departing significantly upward from the recommendation on the basis of those very same aggravating facts. Remand is required as argued in the Appellant's Opening Brief.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Chew respectfully requests that this Court reverse the judgment and sentence of the trial court and remand his case for his choice of remedies upon breach by the State.

Respectfully submitted this 30 day of October, 2012.



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 30699-2-III
v.	)	
	)	
CLIFFORD CHEW,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES NAGLE, DPA WALLA WALLA COUNTY PROSECUTOR'S OFFICE 240 W ALDER ST, STE 201 WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] TERESA CHEN ATTORNEY AT LAW PO BOX 5889 PASCO, WA 99302-5801	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF OCTOBER, 2012.

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