

FILED
August 15, 2012
Court of Appeals
Division III
State of Washington

COA No. 30699-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD ELTON CHEW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

The Honorable John W. Lohrmann

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The State breached its plea agreement obligation to recommend a low-end sentence by reciting aggravating facts at the sentencing hearing, including through the investigating police officer, resulting in the trial court departing significantly upward from the recommendation, and requiring remand.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In exchange for Mr. Chew's plea of guilty to one count of possession with intent to manufacture methamphetamine, the State agreed to recommend a sentence at the low end of the standard sentencing range. However, at sentencing, although the prosecutor stated the promised recommendation, the State and in particular the investigating police detective undercut the recommendation by commenting on the societal harm of the type of crime committed, the dangerous nature of the defendant's specific crime, and denigrating the defendant for his repetitive offending. The trial court then cited those same reasons for imposing the maximum possible terms of incarceration and community custody for the offense. The State's extensive remarks were not justified as an impromptu rebuttal to any actual request by the defense for a DOSA sentence, and in any event, the plea agreement signed by the parties did not preclude, but rather allowed, the defendant to seek a lesser sentence based on mitigating

facts. Did the State breach the plea agreement, requiring remand for the defendant to exercise his choice of remedies?

C. STATEMENT OF THE CASE

Clifford Chew was charged by an amended information with three counts Violation of the Uniform Controlled Substances Act, including count 3 – Possession with Intent to Manufacture Methamphetamine, per RCW 69.50.401(1)(2)(b). CP 115-18. Shortly prior to trial, Mr. Chew indicated his willingness to accept the State’s plea offer on count 3, with the prosecutor to agree to recommend a low-end sentence of 84 months, based on 60 months from a standard range of 60 to 120 months plus a 24-month school zone enhancement, with a statutory maximum of 120 months. 2/27/12RP at 199, 205. The deputy prosecutor affirmed the plea offer in open court and specifically noted the State’s agreement to recommend 84 months at sentencing. 2/27/12RP at 200-02.

In an oral colloquy, the trial court confirmed that Mr. Chew understood that “the prosecuting attorney is going to recommend asking for the low side, as agreed to by all sides.” 2/27/12RP at 205. Mr. Chew expressed the importance he placed on the prosecutor’s promised recommendation, stating that he “was hoping to get the 84-month” sentence the prosecutor had agreed to advocate for. 2/27/12RP at 208. The court noted that in his plea statement, Mr. Chew indicated he was

entering an Alford plea, "in order to take advantage of the plea bargain offered," and confirmed with Mr. Chew that this was a correct statement of why he was induced into entering the plea bargain. 2/27/12RP at 208-09.

The State's promise to Mr. Chew was reduced to writing in the Statement of Defendant on Plea of Guilty, which stated that all parties agreed the prosecutor would recommend a low-end sentence. 2/27/12RP at 200-02; CP 133 (Statement of Defendant on Plea of Guilty). The Statement, executed during the court's oral colloquy with Mr. Chew, reads as follows:

The prosecuting attorney will make the following recommendation to the judge: asking 84 months agreed all sides.

CP 133. The plea statement informed Mr. Chew that "the prosecuting attorney's recommendation" at sentencing could properly be increased if further criminal history was located, a circumstance which did not arise.

CP 132. The Statement also advised the defendant that the trial court could impose a sentence below the standard range, if the court found mitigating circumstances.¹ CP 133.

¹ Other provisions in the written plea statement permitted an exceptional sentence above the standard range, but only if the State and the defendant stipulated to such sentence, which was not a circumstance of the plea below. CP 133.

At sentencing, the prosecutor personally stated he was recommending a low-end sentence. However, the court ultimately imposed 108 months and 12 months community custody, citing facts averred by the State at the hearing, including by the investigating detective, Sergeant Chris Buttice of the Walla Walla Police Department, who the prosecutor presented to the court at the hearing. 3/5/12RP at 220; CP 144-56; see CP 1 (affidavit of probable cause prepared by Detective Buttice as arresting and investigating officer).

Mr. Chew appeals, seeking his choice of remedies. CP 157.

D. ARGUMENT

THE STATE BREACHED THE PLEA AGREEMENT, VIOLATING MR. CHEW'S DUE PROCESS RIGHTS.

1. The trial court imposed a sentence of 108 months based on the statements made by Detective Buttice, who was bound by the prosecutor's plea agreement. At sentencing, the State was bound by its agreement to recommend the low-end sentence, an obligation shared by the investigating police officer. CP 133; State v. Sanchez, 146 Wn.2d 339, 356, 359-60, 46 P.3d 774 (2002).

At sentencing, addressing the court first, Mr. Chew's counsel noted that Mr. Chew was wishing for drug treatment and perhaps a DOSA sentence. 3/5/12RP at 212-13. Defense counsel stated, however, that he did not know if a DOSA was applicable, noted treatment would be

available to Mr. Chew in prison, and asked the court to allow Mr. Chew access to drug treatment of some "sort or another." 3/5/12RP at 213.

The prosecutor indicated to the court that he was fulfilling the State's agreed plea obligation to recommend a low-end sentence. 3/5/12RP at 213. The prosecutor then stated that he did not believe a DOSA should be given, and recounted Mr. Chew's criminal history, along with reciting his more serious convictions and noting that with regard to drug convictions, Mr. Chew had now been found "back at it" by constructing two methamphetamine laboratories. 3/5/12/RP at 214-15.

The State then introduced the police detective who investigated Mr. Chew's activity. 3/5/12RP at 214-16; see CP 1. Sergeant Buttice urged the trial court as follows:

Your Honor, I don't have to educate the Court on the destruction of Methamphetamine or Methamphetamine laboratories. As we know, it is affecting our community, our society, and actually globally.

What I want the Court to understand is we as law enforcement officers take an inherent risk to investigate these types of crimes in order to give a better quality of life to everybody here, and the citizens within the community.

The people at that hotel that day, the people in the future to come to that hotel that day, didn't anticipate or probably would never know the inherent danger or risk associated with what was going on in room 106; the contamination, the exposure levels of the chemicals within the room.

Again, we as law enforcement take that risk so that people have a safe place to live. I don't feel it's right that we give any sort of leniency towards people who take

advantage of our community in this way and bring their dirt here, if you will.

Our position is that we would hope that Mr. Chew takes advantage of some sort of treatment program within the Institutions. We would not agree or be in favor of granting DOSA in any way. If there was a one time scenario I might be more open to that, but this is not the first time. This is not his first encounter with Methamphetamine and it's certainly not the last time we're going to see it in the community, but I just ask that you recognize the dangers and inherent danger that this posed not only to him, to us and the community, which is just about everybody as a whole. Thank you.

3/5/12RP at 215-17.

The court then sentenced Mr. Chew, announcing that the court "was not sentencing toward the low end. It will be quite the opposite."

3/5/12RP at 217-18. Instead, the court imposed a sentence at the maximum term of 108 months incarceration and 12 months community custody, for three reasons:

1. because of "the nature of the substance, Methamphetamine [being] a horrendous drug . . . that's having a tremendous impact on our community right now;"
2. because of "exactly the point made by Detective Buttice" that innocent people at the motel or in motel room 106 where Mr. Chew was manufacturing Methamphetamine were at risk of being exposed to the hazardous materials, including the people living and staying there, and those who have "go in there and clean it up;" and
3. because Mr. Chew had numerous repeat offenses involving controlled substances and a high offender score of "9 plus."

3/5/12RP at 218-19. The State's presentation to the sentencing court was in breach of the promise the prosecutor employed to induce Mr. Chew to waive his right to a trial.

2. Due process principles and rules of contract apply to the plea bargaining process. The Fourteenth Amendment's due process guarantee requires that the plea bargaining process comport with principles of fairness and due process. U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3; Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Sledge, 133 Wn.2d 828, 839-40, 946 P.2d 1199 (1997). "As a general rule, fundamental fairness means courts will enforce promises made during the plea bargaining process that induce a criminal defendant to waive his constitutional rights." Staten v. Neal, 880 F.2d 962, 963 (7th Cir.1989). Doing so is essential to ensure "the honor of the government [and] public confidence in fair administration of justice." State v. Bryant, 146 Wn.2d 90, 104, 42 P.3d 1278 (2002) (citing United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972), cert. denied, 417 U.S. 933 (1974)); accord, Sledge, 133 Wn.2d at 839. A State's breach of the plea agreement therefore violates the Due Process Clause of the Fourteenth Amendment, requiring remand for such enforcement. Sledge, 133 Wn.2d at 839-40.

Further, a plea agreement is a contract, and must be analyzed – along with the question of whether there has been a breach thereof -- in accord with contract principles, but in recognition of the fact that the defendant is waiving significant rights. State v. Harrison, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003) (due process considerations mandate especially rigorous compliance with rules on behalf of the prosecution); Sledge, 133 Wn.2d at 839-40. Thus the rule is that "fundamental fairness and public confidence in government officials require that [the government] be held to meticulous standards on both promise and performance." (Emphasis added.) Palmero v. Warden, 545 F.2d 286, 296 (2d Cir. 1973) (quoting Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973)). For similar reasons, any ambiguities in the plea agreement are construed against the drafter. United States v. Transfiguracion, 442 F.3d 1222, 1227-28 (9th Cir. 2006); Sledge, 133 Wn.2d at 838; see generally State v. Coyle, 95 Wn.2d 1, 621 P.2d 1256 (1980) (noting that waiver of constitutional rights will never be presumed).

Under these rules, the State can take no action which undermines the promises made in the plea agreement. Sledge, 133 Wn.2d at 840. The State need not make the recommendation enthusiastically, but must refrain from any actions which undercut it. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). Thus in State v. Xaviar, 117 Wn. App. 196, 200-02,

69 P.3d 901 (2003), the prosecutor breached the plea agreement requiring him to make a low-end recommendation, when he discussed aggravating factors and other charges not pursued, and denigrated the defendant as "prolific child molester," and the trial court imposed an exceptional sentence. State v. Xaviar, 117 Wn. App. at 198, 200-02.

3. The State breached the plea agreement.² Mr. Chew's Statement on Plea of Guilty plainly stated his understanding that the State, at sentencing, would recommend a sentence of 60 months – the low end of the standard range – plus the mandatory 24 month enhancement. CP 133. Under the plea, the State's obligation was to make the recommendation promised, and not undercut it. Talley, 134 Wn.2d at 183. Detective Sergeant Buttice, as an agent of the State, shared that obligation. State v. Sanchez, 146 Wn.2d at 356, 359-60 (principles of agency and fundamental fairness bind the investigating police officer to the prosecutor's plea obligations).³

² A breach of a plea agreement is a constitutional issue that may be raised for the first time on appeal. State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003), review denied, 150 Wn.2d 1028 (2004); RAP 2.5(a)(3). A defendant asserting a breach of plea agreement makes out the actual prejudice required for "manifest" constitutional error under RAP 2.5(a)(3) if the trial court, as here, did not sentence the defendant in accordance with the plea agreement. Sanchez, 146 Wn.2d at 346.

³ A different majority of the Sanchez Court held in the companion case of Harris that a Community Corrections Officer, preparing a presentence recommendation as an agent of the sentencing court, was not bound by the prosecutor's plea obligations regarding recommendation of sentence. Sanchez, 146 Wn.2d at 353, 356.

The State's sentencing presentation breached the plea agreement, because it so significantly departed from that obligation, by reciting a litany of facts regarding the societal harmfulness of methamphetamine crimes generally, the danger posed to law enforcement and innocent persons by the crime of manufacture specifically, and the particular egregiousness of both the defendant's conduct and his past history.

It does not affect the breach that defense counsel very briefly noted the defendant's personal wish for some sort of treatment, such as by means of a "DOSAs." First, as party to the plea agreement, the State agreed with the provisions of the plea which permitted the trial court to give Mr. Chew a sentence below the standard range if it found mitigating facts at the hearing, a provision necessarily permitting Mr. Chew to ask for such a sentence. CP 132-33. To this provision the prosecuting attorney also agreed, when he signed the Plea Statement promising to recommend a low-end sentence. CP 138.

Further, defense counsel essentially demurred on the question of a DOSA. The State of Washington's extensive remarks decrying the crimes as aggravated, and reciting Mr. Chew's recidivism, cannot be justified as rebuttal to some actual request for a DOSA which never was made, and for which Mr. Chew was likely ineligible anyway. This was a recitation

of aggravating factors that effectively advocated for a sentence above the low-end of the range, and which had precisely that effect.

For example, in State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006), the court found that where the prosecution agreed to recommend a low-end sentence, it breached the plea agreement by reciting "potentially aggravating facts." Carreno-Maldonado, 135 Wn. App. at 85. The Carreno-Maldonado Court first noted that "[a] breach occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State's obligations under the plea agreement." Carreno-Maldonado, at 83. An objective standard applies to determining whether the prosecution has breached the plea agreement, "irrespective of prosecutorial motivations or justifications for the failure in performance." Carreno-Maldonado, 135 Wn. App. at 83; State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999) (same).

In Carreno-Maldonado, the prosecutor had agreed to recommend a low-end sentence on one of the counts, and mid-range sentences on two other counts. Carreno-Maldonado, at 82. Yet at sentencing, the prosecutor described the defendant as very violent, described his criminal conduct as heinous, and also stated that the defendant had "preyed on what

would normally be considered a vulnerable segment of our community." Carreno-Maldonado, at 80-81.

The Court of Appeals correctly concluded that these remarks, in their severity, tended to describe "the crime [as] more egregious than a typical crime of the same class" and therefore simply "went beyond what was necessary to support the mid-point sentencing recommendations." Carreno-Maldonado, at 84-85. The Court emphasized that even though the prosecutor might deem it necessary to recount some facts in order to justify the mid-range recommendations on the latter counts, reciting aggravating facts that painted an egregious picture of the defendant violated the promise to recommend a low-end sentence on the former.

The Court stated:

Applying these principles to the record before us, we hold that the State's conduct breached the plea bargain with Carreno-Maldonado. In coming to this conclusion, we focus on the rape counts, which carried the highest sentences and were the focus of the deputy prosecutor's statements at sentencing. Because the State agreed to recommend a low-end sentence of 240 months for the first degree rape, there was no need for the State to recite potentially aggravating facts. As to the mid-point sentencing recommendations for each of the second degree rapes, we recognize that it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence. But a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class. Here, we conclude that the deputy prosecutor's

remarks went beyond what was necessary to support the mid-point sentencing recommendations.

Carreno-Maldonado, at 84-85. Here, the State agreed to recommend a low-end sentence, thus any negative recitation of the facts was improper, because it could only have the purpose of promoting a longer sentence. Importantly, the fact that the prosecutor below repeated that the plea obliged it to hew to its low-end recommendation does not erase the objective breach caused by the State's presentation of aggravating facts about Mr. Chew and his offense. State v. Van Buren, 101 Wn. App. 206, 217, 2 P.3d 991, review denied, 142 Wn.2d 1015 (2000) (breach where prosecutor mentioned recommended sentence, but discussed probation report's exceptional sentence request in detail).

In sum, Mr. Chew gave up important constitutional rights by pleading guilty, and provided the State with a conviction without necessity of holding a trial. This relinquishment of rights was based on his expectation that the State would adhere to the terms of the agreement and make a good faith recommendation at sentencing as promised. Carreno-Maldonado, 135 Wn. App. at 88. This promise bound the State because of Mr. Chew's reasonable understanding that it was made by the prosecutor and applied to all 'those' on that side of the case against him, including, by Supreme Court case law, on the State and its agent Detective Buttice. It could not be breached either by that prosecutor, or "by proxy." State v.

Sanchez, 146 Wn.2d at 359 (“Prosecutors may not do indirectly through their investigating officers what they are prohibited from doing directly”). Allowing state agents such as the responsible police officer to undercut the prosecutor’s agreement, as occurred here,

renders the prosecution’s agreement meaningless, disintegrates the fabric of our criminal justice system, and will deter future plea agreements.

Sanchez, 146 Wn.2d at 370. The plea agreement was breached, irregardless of whether the prosecutor purposefully solicited the detective’s testimony. Carreno-Maldonado, 135 Wn. App. at 83; State v. Jerde, 93 Wn. App. at 780.

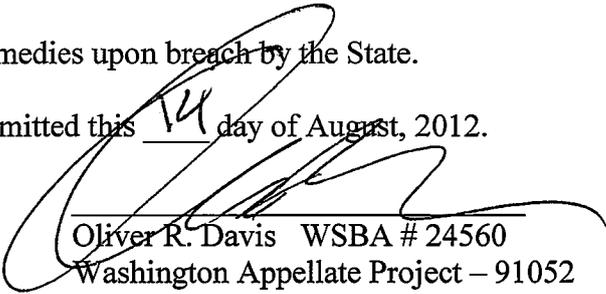
4. This court should remand Mr. Chew’s case to a new trial judge for Mr. Chew’s choice of remedies. The appropriate ruling following a breach of a plea agreement is to remand the matter to permit the defendant his choice of remedy -- withdrawal of the plea, or specific performance of the agreement. State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122 (1988); Sledge, 133 Wn.2d at 846; Talley, 134 Wn.2d at 188. Where a case is reversed on appeal for a breach, the matter is remanded to be heard by a new trial judge. Sledge, 133 Wn.2d at 846; Talley, 134 Wn.2d at 188. Remand before a new judge is not dictated by any misconduct on the part of the original trial judge, but rather by a general rule recognizing the need to return the defendant as close as possible to the

place he held prior to the breach, including to the court of a judge who has been unaffected by the State's conduct in breach. See e.g., Sledge, 133 Wn.2d at 846, n.9.

E. CONCLUSION

Based on the foregoing, 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 14 day of August, 2012.



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DIVISION THREE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING 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:

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