

FILED
February 18, 2014
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31970-9-III (consolidated with No. 31971-7-III)

STATE OF WASHINGTON, Respondent,

v.

TONY ALLEN BARCLAY, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Tony Allen Barclay pleaded guilty on the same day to second degree assault and second degree burglary, which had been charged in separate files. The court did not follow the sentence recommendations of the parties, and Barclay appealed to the Court of Appeals. The Court of Appeals affirmed the convictions, but remanded for resentencing because the trial court erred in sentencing Barclay consecutive sentences on both charges because the court did not declare an exceptional sentence and did not enter any findings in support of an exceptional sentence as required by law. The court reversed the sentences and remanded for a new sentencing proceeding.

At the new sentencing hearing, defense counsel asked for specific performance of the contract on the original plea agreement, and for the court to follow the agreed recommendation. However, the State argued that the court should simply keep the same amount of time originally imposed by the previous judge, but correct the judgment and sentence to reflect concurrent sentencings rather than consecutive sentencings. Because the State breached the plea agreement, Barclay asks the court to reverse the sentence at the second sentencing hearing and remand for a new sentencing proceeding, entitling Barclay the remedy of specific performance of the plea agreement.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The prosecution breached the plea agreement by arguing that the only issue on resentencing was to order the sentences concurrent instead of consecutive, thereby asking the sentencing judge to impose the previous judge's sentence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is a guilty plea rendered fundamentally unfair when the prosecution breaches the plea agreement?

ISSUE 2: Did the prosecutors breach the plea agreement at the second sentencing hearing?

ISSUE 3: Is Barclay entitled to the remedy of specific performance of the plea agreement?

ISSUE 4: Does the doctrine of Collateral Estoppel apply in this case?

IV. STATEMENT OF THE CASE

Barclay was charged under Walla Walla Superior Court No. 11-1-00326-1 with second degree burglary and third degree theft. He was charged with second degree assault, domestic violence in No. 11-1-00335-1. Barclay's criminal history showed that Barclay had nine prior adult

felony convictions, two juvenile felony convictions, and 14 prior adult misdemeanor convictions. CP 9-10. With an offender score of 9, Barclay's standard range for the second degree burglary charge was 51-68 months. CP (326-1), 14. His standard range on the second degree assault was 63-84 months. CP (335-1), 14. He entered into a universal plea agreement with the two prosecutors on his cases. CP 11. The plea agreement required him to plead guilty on the two felony counts, with the prosecution dismissing the third degree theft and another pending charge in district court. CP 11. The agreement in part states: "The State will recommend 51 months for the Burglary 2nd and 69 months for the Assault 2nd and will ask that these sentences run concurrently." CP 11.

On December 8, 2011, Barclay pleaded guilty on both cases. CP 1-11, RP 1-11. On December 19, 2011, at the sentencing hearing for both cases, Barclay told the Honorable Donald W. Schacht that he had been having problems with his medications. RP 12-13. Defense counsel presented the joint sentencing recommendations. RP 14. The prosecutor on the second degree assault charged noted that there was an 18 month period of community custody. RP 14. The other prosecutor then asked the court to impose 51 months on the second degree burglary charge, but discounted that Barclay's medication had been involved on that charge:

The State is recommending 51 months on that charge. It does appear that when both Mr. Barclay and his co-defendant were stopped, their car seemed to be pretty well outfitted to be doing exactly what they were doing; stealing wire from places that were either not watched very well or sort of agricultural areas that don't have anybody around during the day.

So for him to blame it on his meds, I can see perhaps for the assault, but not so much here. There was a lot of planning involved here and especially to rig out their car so they could run a porch light off of it and that type of thing, had burglar tools in the car.

RP 14-15.

The court imposed 60 months on the burglary count, explaining that based on the defendant's criminal history, the sentence was appropriate. RP 16. The court then turned to the assault charge and imposed a high end sentence of 84 months, stating that it was appropriate based on the defendant's criminal history and the fact that the crime involved domestic violence. RP 18. The court ordered the sentences be run consecutively, not concurrently. RP 18. Barclay timely appealed his sentence. CP (326-1) 32, CP (335-1) 34.

On June 5, 2013, on appeal, the court in Division III affirmed the convictions, but remanded for a new sentencing proceeding. *State v. Barclay*, 174 Wn.App 1042 (2013)(unpublished opinion); CP (326-1) 29-37; CP (335-1) 31-39. The court found that the prosecutor did not breach the plea agreement by commenting and discounting defendant's medication issues in the burglary charge. CP (326-1) 34; CP (335-1) 36.

However, the court found the trial court erred in sentencing Barclay consecutive sentences on both charges because the court did not declare an exceptional sentence and did not enter any findings in support of an exceptional sentence as required by RCW 9.94A.535. CP (326-1) 36; CP (335-1) 38. The court reversed the sentences and remanded for a new sentencing proceeding. *Id.*

On September 9, 2013, at the resentencing hearing before the Honorable M. Scott Wolfram, defense counsel asked for the court to follow the original plea agreement of 51 months on the second degree burglary and 69 months on the second degree assault, to run concurrently. RP 23. Defense counsel asked for specific performance of the contract on the original plea agreement, and for the court to follow the agreed recommendation. RP 24. Barclay apologized to the court and to his victims. RP 24. Since he has been in prison, Barclay told the court he has been taking vocational college classes and also volunteered for a year-long violence reduction program. RP 24. Barclay also asked the court to follow the original plea agreement. RP 24.

In response, the prosecutor on the second degree burglary charge argued that they were not re-litigating the terms of the sentence, that the only issue before the court was to correct the judgment and sentence by

running the sentences concurrently, not consecutively. RP 26. Then the prosecutor on the second degree assault charge argued the following:

The Court of Appeals did not find there was any breach of the plea agreement. That argument was made and it was specifically rejected in the Court's opinion. So we are not reopening this to request the low end of the range or a DOSA or anything of that nature.

We simply have to, according to the Division III opinion, mark concurrent sentencings rather than consecutive. And that should have already been marked on the judgment and sentences provided.

RP. 26-27. The court imposed 60 months, the same that the previous sentencing judge had imposed, to run concurrent with second degree assault case. RP 27.

The court then addressed the second degree assault charge. RP 29. Again defense counsel asked the court to follow the recommendations in the original plea agreement and sentence Barclay to 63 months, instead of the 84 months that the previous sentencing judge had imposed. RP 29-30. The prosecutor on the second degree assault charge argued the following:

The Court of Appeals' opinion remanded this for sentencing consistent with the Court of Appeals' opinion, which simply addressed an error the original trial court made in imposing consecutive sentences that were not in accordance with the provisions of the Sentencing Reform Act. In order to impose consecutive sentencings, the trial court could have done so but only by making special findings in support of an exceptional sentence, which the consecutive sentences were.

And the trial court did not do that. And because both matters were sentenced on the same day, and there were no exceptional sentence findings, they must be sentenced concurrently.

That was all the Court of Appeals addressed and that was the error that the trial court originally made.

And Division III remanded it specifically to address that issue. To correct that point of law that the trial court incorrectly made contrary to the SRA.

So we are not here – We didn't notify the victims to be here because this is not a de novo resentencing. It is simply to correct a point of law to bring the judgment and sentence in conformance with the Division III opinion.

So the State's position is that we simply keep the same amount of time originally imposed, but correct the judgment and sentence to reflect concurrent sentencings rather than consecutive sentencings.

The Court of Appeals did not refer this back for specific performance of the original plea offer. That argument was made to Division III, that a deputy prosecutor made comments during the original sentencing proceeding that breached the plea agreement and that the Defendant should have specific performance of the original plea offer, that argument was specifically rejected. However, the case was still remanded back simply to correct a point of law regarding consecutive sentences. So the State's position is that this is not a de novo sentencing. It's simply to correct a point of law.

RP 30-32.

Defense counsel then responded to prosecutor's arguments:

We would argue now that she is actually restating what her recommendations are to the Court, and therefore, violating the plea agreement, which is what the statements she is making now is doing because her recommendation was within the limits that we had expressed to the Court.

And so trying to hold on to something that was given by a judge and when resentencing put it before this Court and this Court makes that decision, there is nothing that I have found that says you cannot do that.

That it does send it back for the reasons that Judge Schacht did do them consecutive and not concurrent, but it does not state that you are precluded from making any decision with regards to the years or months that Mr. Barclay was in prison and to be in prison.

RP 32.

The court then stated: “Without having the briefing in front of me, I tend to agree with [defense counsel] that we are back for a resentencing and because that comes into play, it all comes into play. Theoretically, it could be an exceptional sentence as well. But having not sat through anything, that would be tough for me to do.” RP 32-33. The court then imposed 84 months, the same sentence that the previous sentencing judge had imposed, but made it concurrent with the second degree burglary charge. RP 33.

Barclay timely appeals his sentence.

V. ARGUMENT

THE PROSECUTION BREACHED THE PLEA AGREEMENT BY ARGUING THAT THE ONLY ISSUE ON RESENTENCING WAS TO ORDER THE SENTENCES CONCURRENT INSTEAD OF CONSECUTIVE, THEREBY ASKING THE SENTENCING JUDGE TO IMPOSE THE PREVIOUS JUDGE’S SENTENCE.

1. A guilty plea is rendered fundamentally unfair when the prosecution breaches the plea agreement.

Because a plea agreement is a contract, issues concerning the interpretation of a plea agreement are questions of law reviewed *de novo*. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820, 825 (2006); *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003). Plea agreements are contracts, and the law imposes upon the State an implied promise to act in good faith. *Harrison*, 148 Wn.2d at 556. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Because 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 agreement. *Id.* at 556-57 (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).

When a criminal defendant pleads guilty with the understanding that the prosecution will recommend a particular sentence, the defendant has given up important constitutional rights based on the expectation that the prosecution will adhere to the terms of the agreement. *State v. Carreno-Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). The defendant's purpose in entering into a plea agreement with the prosecution

is based on the expectation that the prosecution will make a good faith recommendation at sentencing as promised. *Id.* at 88. The prosecution's breach of a plea is a structural error that is not subject to harmless error review. *Id.* at 87-88.

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). If the State has breached the plea agreement, the disposition cannot stand. *Id.*

A plea agreement is a contract in which the ambiguities are construed against the drafter. *United States v. Transfiguration*, 442 F.3d 1222, 1227-28 (9th Cir. 2006); *Sledge*, 133 Wn.2d at 838. Unlike commercial contracts, plea agreements require a criminal defendant waive fundamental constitutional guarantees. *Harrison*, 148 Wn.2d at 556; U.S. Const. amends. 5, 6, 14; Wash. Const. Art 1, §§ 3, 22. Therefore, due process considerations mandate especially rigorous compliance with rules on behalf of the prosecution, and "require a prosecutor to adhere to the terms of the agreement." *Harrison*, 148 Wn.2d at 556. The prosecution is required to operate within the "literal terms of the plea it made." *Transfiguration*, 442 F.2d at 1228. Ambiguities are construed in favor of the defendant. *Id.*

The State's duty of good faith requires that it not undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement. *Carreno-Maldonado*, 135 Wn.App. at 83. A defendant has the right to have the prosecutor act in good faith even though the sentencing judge is not bound or even influenced by the prosecutor's recommendation. *Id.* at 88.

2. The prosecutors breached the plea agreement at the second sentencing hearing.

The prosecution is not required to make an agreed sentencing recommendation with particular enthusiasm, but it 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." *Sledge*, 133 Wn.2d at 840. 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, *review denied*, 138 Wn.2d 1002 (1999).

In *Jerde*, the prosecutor announced his or her recommendation but then emphasized and advocated factors supporting an exceptional sentence, thus breaching the plea agreement. *Jerde*, 93 Wn.App. at 780. In *Carreno-Maldonado*, the prosecutor described the offenses as heinous

and the defendant as violent but repeated several times that the State was not straying from the agreed recommendation. *Carreno-Maldonado*, 135 Wn.App. at 81-83. The trial court far exceeded the agreed recommendation, but it expressly ruled that it was not swayed by and did not impose sentence based on the prosecutor's arguments. *Id.* at 83.

Here, both of the prosecutors breached the plea agreement when they each argued that the only issue for the court to determine was to change the sentencing of the prior sentencing judge from consecutive to concurrent. Specifically, the State explicitly argued against following the plea agreement when they argued that court should "simply keep the same amount of time originally imposed, but correct the judgment and sentence to reflect concurrent sentencings rather than consecutive sentencings." RP 32.

The prosecutors had no right to undercut their promised sentencing recommendation of 51 months on the second degree burglary and 63 months on the second degree assault, concurrently. "The plea bargaining process requires that both the State and the defendant adhere to their promises." *Carreno-Maldonado*, 135 Wn.App. at 88. By arguing to the court that the only issue before the court is that the sentence should be concurrent instead of consecutive, and by arguing that the second sentencing hearing was not a de novo sentencing that the terms of the prior

sentence should stand, both prosecutors not only undermined the plea bargain, but explicitly argued against the plea bargain. The prosecutors arguments were now predicated on the false premise that the new sentencing judge was not allowed to revisit the prior terms of the sentence. Barclay was entitled to a good faith recommendation by the State as promised. Instead, the prosecutor clearly argued against Barclay's request to follow the agreed plea recommendation and repeatedly stated that the court should re-impose the time that the first sentencing judge had imposed, even though it exceeded the time the prosecutor had agreed to recommend.

3. Barclay is entitled to the remedy of specific performance.

Barclay contends that, with the trial court's acceptance of his plea on December 8, 2011, he was entitled to the remedy of specific performance. *Bisson*, 156 Wn.2d at 520. That remedy, requires the State to make its promised recommendation at a new sentencing hearing. *Harrison*, 148 Wn.2d at 557. While the State must uphold its end of the plea agreement on remand, the court retains the ultimate decision on sentencing. *Id.*

The integrity of the plea bargaining process requires that once the court has accepted the plea, it cannot ignore the terms of the bargain,

unless the defendant . . . chooses to withdraw the plea. *Bisson*, 156 Wn.2d at 520; *see also Harrison*, 148 Wn.2d at 556–57 (observing that, because plea agreements are contracts that “concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to the terms of the agreement”).

The purpose of a remedy when the State breaches a plea agreement is to restore the defendant to the position he held before the breach, and before the breach, Barclay had been convicted but not sentenced. *Harrison*, 148 Wn.2d at 559. Specific performance requires a reversal of the original sentence and remand for a new sentencing, preferably before a different judge, where the State will make its promised recommendation and the judge will exercise its sentencing discretion. *Id.*

In *Harrison*, the Court held that the State breached the plea agreement and therefore, the defendant was entitled to the remedy of specific performance. *Id.* at 554. The Court held that the remedy of specific performance entitled the defendant to a reversal of the original sentence and a de novo sentencing hearing in which the State will abide by its plea agreement. *Id.*

Like *Harrison*, because the State breached the plea agreement at the second sentencing hearing when it explicitly argued against the plea

agreement in this case, Barclay is entitled to the remedy of specific performance. As a result, the court must reverse the sentencing judge's ruling and remand for resentencing.

4. The doctrine of collateral estoppel does not apply in this case.

Collateral estoppel, or issue preclusion, does apply in criminal cases, and it precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment. *Harrison*, 148 Wn.2d at 561; *State v. Williams*, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997); *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). The policy behind collateral estoppel is to prevent relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case. *Harrison*, 148 Wn.2d at 561. Nonetheless, Washington courts follow federal precedent that in criminal cases, collateral estoppel is not to be applied with a "hypertechnical" approach but rather, "with realism and rationality." *Harrison*, 148 Wn.2d at 561; *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) (cited with approval in *State v. Harris*, 78 Wn.2d 894, 896-97, 480 P.2d 484 (1971)); see also *State v. Kassahun*, 78 Wn.App. 938, 948-49, 900 P.2d 1109 (1995).

Before collateral estoppel will apply to preclude the relitigation of an issue, all of the following requirements must be met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior adjudication must be a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. *Harrison*, 148 Wn.2d at 561.

In this case, collateral estoppel does not apply because the original sentence no longer existed as a final judgment on the merits. *Id.* The act of “an appeal does not suspend or negate ... collateral estoppel aspects of a judgment entered after trial in the superior courts,” but collateral estoppel can be defeated by later rulings on appeal. *Id.*

In *Harrison*, on his first appeal, the court reversed Harrison’s sentences and remanded for resentencing with the State’s recommendation of an offender score of 7. *Id.* at 562. His entire sentence was reversed, or vacated, since “reverse” and “vacate” have the same definition and effect in this context—the finality of the judgment is destroyed. *Id.* Accordingly, the Court held that Harrison’s prior sentence ceased to be a final judgment on the merits, and collateral estoppel did not apply. *Id.*

Similarly, in this case, the court of appeals reversed the sentences and remanded for a new sentencing hearing. That means Barclay's entire sentence was reversed or vacated, and as such, Barclay's prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply. Thus, the State's arguments at the second sentencing hearing that the terms of the first sentence should stand are without merit.

VI. CONCLUSION

Because the State violated the terms of the plea agreement, Barclay is entitled to the remedy of specific performance. Barclay respectfully asks this Court to reverse the sentences in both cases and remand for a new sentencing hearing.

RESPECTFULLY SUBMITTED this ~~18th~~ day of February
2014.


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