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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONY ALLEN BARCLAY,

Appellant.

APPEAL AFTER RESENTENCING
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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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 resentencing of the Appellant.

III. ISSUE

Did the prosecutor's inquiry into the grant or scope of authority on remand breach the plea agreement?

IV. STATEMENT OF THE CASE

The Honorable Judge Schacht presided over the original sentencing. RP 12. The Honorable Judge Wolfram presided over the resentencing. RP 27. On remand, the parties disagreed on the intention of the Court of Appeals' opinion.

Defense counsel Gail Siemers advised that the parties were in agreement on the sentencing recommendation. RP 23. She advised that the previous judge had imposed consecutive sentences without finding the

special circumstances necessary for such a sentence. RP 23. Counsel asked for “specific performance of the contract,” in other words 51 months for the burglary and 69 months for the assault, to be served concurrently. RP 24-25. The court clarified the parties’ recommendation under the terms of the plea agreement. RP 29.

The prosecutor explained that because the court of appeals had found no breach of the plea agreement, the actual term of each sentence imposed by the previous judge had been affirmed and the only issue on remand was whether there was a basis for the exceptional consecutive term. RP 26, 30-31. The prosecutor requested the court only to correct the judgment and sentence to reflect that the terms should be served concurrently, rather than consecutively. RP 31.

The prosecutor explained her interpretation of the opinion:

[T]his 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.

....

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 31-32.

The judge disagreed with the prosecutor, "No. It is a resentencing." RP 30.

Without having the briefing in front of me, I tend to agree with Ms. Siemers 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 standard range sentences to be served concurrently. RP 33.

On appeal, the Defendant argues that the prosecutor's discussion of the intent of the court of appeals discussion was improper and breached the plea agreement.

V. ARGUMENT

THE PARTIES' DISCUSSION OF HOW TO INTERPRET THE COURT OF APPEALS' INTENT ON REMAND WAS NOT A BREACH OF THE PLEA AGREEMENT.

On appeal from the resentencing, the Defendant argues that the prosecutor's opinion on what the court of appeals' decision authorized

undercut the plea agreement. Brief of Appellant at 11, *quoting State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). The parties' plea agreement was for concurrent sentences of 51 and 69 months. CP 11. The prosecutor did not ask for a different term. It is apparent from the transcript that the prosecutor did not contradict defense counsel about the terms of the plea agreement. RP 23-32. The prosecutor made no further recommendation other than for concurrent sentences. RP 31. This is not a breach of the plea agreement.

Different judges presided over the two different sentencing hearings. RP 12, 27. On remand, the parties disagreed on the intention of the Court of Appeals' opinion. The meaning of the unpublished opinion and the scope or grant of authority on remand is a proper topic of discussion.

Defense counsel Gail Siemers was of the opinion that the superior court had the authority to engage in a completely new sentencing hearing. RP 23-25. The prosecutor disagreed, believing that the only issue on remand was whether there was a basis for the exceptional sentence. RP 26, 30-32.

The judge agreed with the defense and disagreed with the prosecutor, "No. It is a resentencing." RP 30.

The Court of Appeals' unpublished opinion noted that an exceptional sentence could be ordered under RCW 9.94A.535(2)(b) and (c), based on the offender score in excess of nine points and a significant misdemeanor history. However, in order to do so, the sentencing judge must declare an exceptional sentence.

If the prosecutor had pointed this out on remand, that the Defendant's criminal history supported an exceptional sentence, there could be a cognizable claim that the prosecutor undercut the plea agreement. *State v. Xaviar*, 117 Wn. App. 196, 69 P.3d 901 (2003) (the prosecutor breached the plea agreement by highlighting aggravating factors which would support an exceptional sentence). *See also State v. Carreno-Maldonado*, 135 Wn. App. 77, 82, 143 P.3d 343 (2006) and *State v. Van Buren*, 101 Wn. App. 206, 209, 2 P.3d 991 (2000). But the prosecutor made no reference to aggravating factors, asking instead only for concurrent terms.

The prosecutor made no argument for why the sentence should be greater than parties' recommendation. The prosecutor only questioned the grant of authority to the trial court on remand. Such an inquiry is proper. And a superior court judge is capable of compartmentalizing the distinct questions of what the court of appeals has authorized on remand versus

what the prosecutor recommends as a term. The judge was able to quickly assess the grant of authority and move on. The judge ruled he had authority to impose different terms of confinement. He chose to impose standard range sentences to be served concurrently. RP 33. RCW 9.94A.585 (standard range terms cannot be appealed).

The Appellant argues that the prosecutor failed to adhere to her promise. Brief of Appellant at 12, citing *State v. Carreno-Maldonado*, 135 Wn. App. at 88. It is apparent from the transcript that the prosecutor made no explicit recommendation other than for concurrent sentences. RP 25-26. The Defendant provided the court with the prosecutor's recommendation at plea, which the prosecutor implicitly acknowledged. RP 23-24. On this record, there is no breach.

The Defendant argues that the prosecutor should not be allowed to discuss with the court her interpretation of the opinion which directed the resentencing. *Carreno-Maldonado* does not demonstrate that discussion of the scope of remand somehow is a failure to adhere to a plea bargain. In fact, no authority cited by the Appellant supports his argument. No authority would, because there is no justice purpose by preventing the parties from discussing the scope of the hearing. A reasonable discussion regarding the scope on the court's authority on remand is not a breach of

the plea agreement.

VI. CONCLUSION

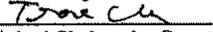
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's sentence.

DATED: August 5, 2014.

Respectfully submitted:



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<p>Elizabeth Halls Burkhart & Burkhart, PLLC 6 ½ N 2nd Avenue, Suite 200 P.O. Box 946 Walla Walla, WA 99362</p> <p>Tony Barclay, #926034 Coyote Ridge Corrections Center 1301 N. Ephrata Ave P.O. Box 769 Connell, WA 99326</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 August 5, 2014, Pasco, WA</p>  <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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