

FILED

NO. 328988-III

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

MAR 9 2015
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. NEISLER

Appellant.

**AMENDED BRIEF OF APPELLANT, MICHAEL
D. NEISLER**

Submitted by:

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I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. ASSIGNMENTS OF ERROR

1. The prosecutor violated the terms of the plea agreement.
2. The sentencing court erred by classifying a conviction for vehicular assault as a serious violent felony.
3. The sentencing court erred by imposing 36 months of community custody.

B. ISSUES PRESENTED

1. Did the prosecuting attorney violate the terms of the plea agreement when the prosecutor agreed not to make a sentencing recommendation and, ultimately, argued that the injuries sustained by the victim amounted to a fate worse than death?
2. Did the sentencing court err by classifying Vehicular Assault as a serious violent felony?
3. Did the sentencing court err by imposing 36 months community custody?

II. STATEMENT OF THE CASE

A. Factual History.

Pursuant to an Information filed on December 9th, 2013, Michael Dee Neisler (hereinafter "Mr. Neisler") was charged with one count of Vehicular Assault¹ and one count of Vehicular Assault with Aggravating Circumstances². CP at 1-3.

Negotiations were pursued between the State and Mr. Neisler, where a resolution was met and a Defendant's Statement of Plea of Guilty was filed and presented to the court on October 21, 2014. RP at 2; CP at 16-26.

As such, a sentencing hearing was conducted on October 21st, 2014 in Stevens County Superior Court with the Honorable Judge Allen C. Nielson presiding. RP at 1. Per the resolution, it was agreed that Mr. Neisler would be pleading guilty to count one and two of the Information. RP at 2. Additionally, it was agreed that during the sentencing hearing the State would not be making a recommendation as to a term of imprisonment. CP at 43; RP at 2. Consequently, Mr. Neisler plead guilty to counts

¹ RCW 46.61.522

² *Id.*; RCW 9.94A.535

one and two of the Information³ on October 21st, 2014. RP at 7-8.

Subsequently, at sentencing, the Court then addressed, among other issues, the classification of Vehicular Assault, for purposes of community custody. RP at 18. Ultimately, the court found that Vehicular Assault was a serious violent felony and imposed 36 months of community custody. *Id.*; CP at 32. However, the Court did acknowledge that this determination was in disagreement. RP at 18.

The Felony Judgment and Sentencing was completed and filed by the Court on October 21, 2014 and Mr. Neisler was taken into custody. CP at 27-39; RP at 19. Finally, Notice of Appeal was filed on November 13th, 2014 addressing five issues that pertained to sentencing. CP at 40.

B. Procedural History.

An Information was filed on December 9th, 2013 in the Stevens County Superior Court, where Mr. Neisler was charged with one count of Vehicular Assault⁴ and one count of Vehicular Assault with Aggravating

³ CP at 1-3.

⁴ RCW 46.61.522

Circumstances⁵. CP at 1-3. Pursuant to a negotiated resolution, a Notice of Settlement was filed on September 16, 2014. CP at 42-43. Additionally, Defendant's Statement on Plea of Guilty was filed on October 21st, 2014. CP at 16-26. Subsequently, a sentencing hearing was conducted on October 21, 2014 where a Felony Judgment and Sentence was, ultimately, filed by the court. RP at 1-21; CP at 27-39. Finally, Mr. Neisler submitted a Notice of Appeal on November 13th, 2014.

III. DISCUSSION

A. The prosecutor implicitly violated the terms of the plea agreement.

The prosecutor implicitly violated the terms of the plea agreement when it was agreed that the State would not opine as to a sentencing recommendation and the prosecutor inferred that no amount of time was enough and that the victims injuries amounted to a fate worse than death. Ultimately, the appellant would ask this court to reverse Mr. Neisler's conviction and remand this matter back to the sentencing court where Mr. Neisler may be given the opportunity to withdrawal his plea or have a new disposition hearing before a different judge.

⁵ RCW 46.61.522; RCW 9.94A.535

"Plea agreements are contracts." *State v. Sledge*, 133 Wash. 2d 828, 838, 947 P. 2d 1199, 1204 (1997)(quoting *State v. Mollichi*, 132 Wash. 2d 80, 90, 936 P. 2d 408 (1997)). Consequently, plea agreements "concern fundamental rights of the accused, constitutional due process considerations come into play. Due process requires a prosecutor to adhere to the terms of the agreement." *Id.* at 839. Additionally, "the State has a concomitant duty not to undercut the terms of the agreement explicitly or by *conduct evidencing an intent to circumvent* the terms of the plea agreement." *Id.* at 840 (emphasis added)(*citation* omitted).

Here, the State agreed, pursuant to plea negotiations, to refrain from making a "recommendation as far as a specific amount of imprisonment." RP at 2. This agreement was reinforced within the contents of the Notice of Settlement which specifically stated that the State would not make a recommendation as to sentencing. CP at 43. However, at the time of sentencing, the State made several statements that implicitly argued in support of an exceptional sentence which undercut the understood terms of the plea agreement; to wit, that

the State would not opine as to a sentencing recommendation.

CP at 43; RP at 12-13.

Specifically, the State conveyed to the court:

Your Honor, so often, I think, when we deal with these kinds of cases in our roles as prosecutor's, defenses, and judges, we kind of get a little cold and callous and I can't even imagine what these two women have been going through for the past year. And I can recall one specific conversation that I had with Caroline Enns at one point over the summer. And after I asked the question, I realized how silly it sounded and I ask, *how much time is enough?* . . . Judge, I hope during my career that I never have a case like this again. And this, again, and I apologize if it sounds callous, but in a lot of ways this is *more severe than a vehicular homicide* in that these women have to continue to live with this.

Id. (Emphasis added). Consequently, the State's remarks likely influenced the judge to impose an exceptional sentence as can be seen by the fact that the judge did impose a sentence of 72 months for count 2; specifically, Vehicular Assault with Aggravating Circumstances. CP at 27-31.

Now, while, the prosecutor's "[r]ecommendation need not be made 'enthusiastically'", there is duty on behalf of the State not "to *undercut* the terms of the agreement." *See Sledge*, 133 Wash. 2d 828, 840, 947 P. 2d 1199, 1205 (1997)(*citation omitted*).

In *Sledge*, there was a plea agreement conveying that the State would ask for a standard range disposition of 21 to 28 weeks on the charge of taking a motor vehicle without permission. *Id.* at 830. Ultimately, the court imposed an exceptional disposition of 103 weeks of confinement. *Id.* While the prosecutor overtly adhered to the terms of the plea agreement, at sentencing the prosecutor pursued a disposition hearing where the probation counselor and parole officer were "vigorously examined" on the aggravating factors supporting the exceptional sentence. *Id.* at 831. On appeal, where it was contested that the prosecutor violated the terms of the plea agreement by pursuing a line of questioning that undercut the plea agreement, the court reversed the exceptional sentence and remanded to the trial court so that Sledge would be given an opportunity to withdraw the plea or undergo sentencing in front of a new judge. *Id.* at 843. Specifically, the court found:

Finally, the State's summation of the aggravating factors was a transparent attempt to sustain an exceptional sentence. A fair reading of the State's direct examination of probation counselor Curtis and parole officer Garner and negative summation reveals the State's unmistakable advocacy for an exceptional sentence. Even though the State *told* the trial court it was recommending a standard range sentence, it violated its duty of good faith and fair dealing by undercutting the recommendation, and thereby breached the plea agreement.

Id. (Emphasis added).

The court here is faced with a similar case. Here, the State agreed that it would not make a recommendation as to sentencing. CP at 43. Consequently, the State conveyed this to the court. RP at 12. However, the State proceeded to implicitly describe to the court that the facts of this case were so severe that no amount of time would be sufficient. *Id.* Additionally, the State proceeded to describe that the injuries sustained in this case as exceeding those of a vehicular homicide case; namely, death. *Id.* at 13. Such communication conveys to the court one thing; Mr. Neisler should have been sentenced to an exceptional sentence to which the court did. *See Id.* at 18.

While the State, in this case, expressly conveyed to the court it would not be making a sentencing recommendation, the actions of the State implicitly conveyed the opposite. The summation provided by the State undercut the plea agreement when it suggested that no amount of prison time would be sufficient and when it analogized this case as being worse than a vehicular homicide. As such, we would ask this court to reverse Mr. Neisler's conviction and remand to the sentencing court where Mr. Neisler would be given the opportunity to revoke his

plea of guilty or pursue a new sentencing hearing in front of a different judge.

B. The sentencing court erred by classifying Vehicular Assault as a serious violent felony.

The court erred when it classified Vehicular Assault as a serious violent felony as opposed to a violent felony due to the fact that such a finding is in direct conflict with the language of RCW 9.94A.030(54)(a)(xiii). Should the court uphold Mr. Neisler's plea of guilty⁶, this matter should be remanded back to the sentencing court so that the conviction for vehicular assault can be properly classified as a violent offense.

RCW 9.94A.030 clearly states:

(54) "Violent offense" means:

(a) Any of the following felonies:

(xiii) *Vehicular assault*, when caused by the operation or driving of a vehicle by a person under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; . . .

(Emphasis added). Additionally, "[t]he meaning of a plain and unambiguous statute must be derived from the wording of the statute itself." *State v. Tili*, 139 Wash. 2d 107, 115, 985 P. 2d 365, 370 (1999) (citation omitted).

⁶ *See Supra*.

In this case, Mr. Neisler plead guilty to one count of Vehicular Assault and one count of Vehicular Assault with Aggravating Circumstances. CP at 27-29. Consequently, the court found that Mr. Neisler would be subject to 2-36 months community custody because the court found that Vehicular assault was a *serious violent offense*. CP at 32. Such a finding is clearly erroneous and contrary to the unambiguous language of RCW 9.94A.030(54)(a)(xiii). "Without a threshold showing of ambiguity, the court derives a statute's meaning from the *wording* of the statute itself . . ." *Tili*, 139 Wash. 2d 107, 115, 985 P. 2d 365, 370 (1999) (citation omitted).

Ultimately, this matter should be remanded back to the sentencing court so that the proper finding can be made; specifically, that Vehicular assault is a violent offense. *See* RCW 9.94A.030(54)(a)(xiii).

C. The sentencing court erred by imposing 36 months of community custody.

The sentencing court erred by imposing 36 months community custody contrary to the imposition required by RCW 9.94A.701(2) and this matter should be remanded back to the sentencing court for a proper determination of the community

custody requirement, should the court uphold Mr. Neisler's guilty plea.

Specifically, RCW 9.94A.701(2) states:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for *eighteen months* when the court sentences the person to the custody of the department for a *violent* offense that is not considered a *serious* violent offense.

(Emphasis added).

Here, Mr. Neisler plead guilty to Vehicular Assault and Vehicular Assault with Aggravating Circumstances. CP at 27-39; RP at 8. At sentencing, the sentencing court acknowledged there was disagreement as to whether Mr. Neisler should be subject to 18 or 36 months community custody; however, the court, ultimately, imposed 36 months of community custody. RP at 18; CP at 32. This imposition is contrary to RCW 9.94A.701(2), which unambiguously states that defendants convicted of a *violent offense* are subject to 18 months community custody. Whereas, RCW 9.94.701(1)⁷ designates

⁷ RCW 9.94A.701(1) states: If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years: . . . (b) A *serious* violent offense. (Emphasis added).

that individuals convicted of a *serious* violent offense are subject to three years community custody.

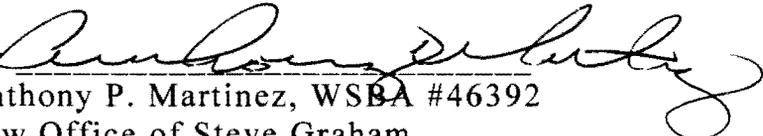
The court erred by imposing the serious violent offense community custody requirement; namely, the court's finding is in direct opposition to the language in RCW 9.94A.701(2). Therefore, this matter should be remanded back to the sentencing court so that the appropriate community custody disposition can be determined.

IV. Conclusion.

In conclusion, the State implicitly undercut the terms of the plea agreement by making statements that supported the imposition of an exceptional sentence when, originally, it was understood that the State would not opine as to the length of imprisonment that should be imposed. Based on this implicit, breach of the plea agreement, this court should reverse Mr. Neisler's conviction and remand for another hearing where Mr. Neisler be given the opportunity to revoke his plea or pursue sentencing in front of a different judge. Additionally, the court found that a conviction for Vehicular Assault was a serious violent felony and, consequently, imposed 36 months community custody. Both the finding and imposition were in error as Vehicular Assault, pursuant to statute, is only a violent felony subject to 18 months community custody. Regarding these two issues, we

respectfully ask this court to remand back to the sentencing court for a new hearing so the proper finding and imposition can be made.

DATED this 20th day of March, 2015.

By 
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