

**FILED**

OCT 27 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 343626

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

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THE STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM MURRY PORTER,

Appellant.

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BRIEF OF APPELLANT

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Spokane County Cause No. 02-1-01224-9  
The Honorable Salvatore Cozza, Presiding

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WILLIAM MURRY PORTER  
DOC No. 847461, D-B-21-2U  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, Washington  
99326-0769

A. ASSIGNMENTS OF ERROR

1. The Trial Court Err'ed in Entering an Order Amending Appellant's Judgment and Sentence Nunc Pro Tunc.

2. The State's Motion to Amend the Judgment and Sentence Violated Promises in the Plea Agreement.

3. The Trial Court Err'ed in Dismissing Appellant's Motion for Relief From Judgment on Principles of Collateral Estoppel and Res Judicata.

B. Issues Pertaining to Assignments of Error.

1. Did the Trial Court's Order Amending Appellant's Judgment and Sentence Nunc Pro Tunc Violate Appellant's State and Federal Constitutional Rights to Due Process?

2. Did the State's Motion to Amend the Judgment and Sentence Breach the Terms of the Plea Agreement and thus Appellant's State and Federal Rights to Due Process?

3. Did the Trial Court err in Dismissing Appellant's Underlying Motion for Relief From Judgment on Principles of Res Judicata and Collateral Estoppel Where Appellant's Grounds for Relief had not Been Previously Heard and Determined on the Merits?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged William Murry Porter, the Appellant, with one count of rape in the second degree and one count of unlawful imprisonment by Information filed on May 13, 2002. See, Attachment A: Information. On October 15, 2002, the

trial court accepted Appellant's plea of guilty to one count of rape in the second degree. See, Attachment B: Plea Hearing Transcript. On October 16, 2002, the Statement of Defendant on Plea of Guilty was filed. See, Attachment C: Statement of the Defendant on Pleas of Guilty. In this Statement, the prosecuting attorney agreed to make the following recommendation to the judge with respect to sentencing:

SSOSA recommended upon evaluation (otherwise recommend low-end); no other charges from police report #002-02-0130768; no charges from (PCS 11/11/01), credit for time served since 5/7/02

Id, pg. 4.

2. On January 31, 2003, the trial court held a sentencing hearing. See. Attachment D: Sentencing Hearing Transcript. At this hearing the prosecuting attorney made the following sentencing recommendation:

MR. CIPPOLA: Your Honor, ... this is a determinate sentencing. The State would ask the Court to adopt Appendix H of the PSI as a condition of sentencing. The sentencing would include - - this is a determinate sentencing - eighteen to thirty six months to life of community custody , depending on the evaluator of the Department of Corrections.... Your Honor, I am asking the court for a low-end standard range sentence, which was the agreement....

See, Attachment C, pg. 3, ln. 12-22 & pg. 4, ln. 8-14.

3. In the judgment and sentence, which was filed on February 4, 2003, the trial court imposed a mid-range 90-month term of confinement, community placement for life, and a 36-48 month community custody term. Appendix

E: Judgment and Sentence. On March 29, 2003, the Department of Corrections Record Specialist wrote a letter to Judge Cozza, the judge that sentenced Appellant, stating that upon the Department of Corrections' review of Appellant's judgment and sentence, it appears that Appellant was eligible to be sentenced pursuant to RCW 9.94A.712. See, Attachment F: DOC Letter Dated 03/29/2003. A copy of that letter was provided to the ~~Spokane~~ County Prosecutor's Office. Id.

4. Due to the nature of DOC's letter and the date Appellant committed his crime, the State filed a motion, which Judge Cozza granted, amending Appellant's judgment and sentence to include more severe penalties in the form of a mandatory minimum term and a maximum term of confinement and a special finding that Appellant is subject to sentencing under RCW 9.94A.712(3). The court also, upon the State's request, amended §4.6 of the judgment and sentence from imposing a 36-48 month ~~community custody~~ term to imposing a community custody term from time of release from total confinement until the expiration of the maximum sentence, which in this case is life.

5. On April 30, 2003, Judge Cozza signed an "Order Amending Judgment and Sentence." Attachment G: Order Amending Judgment and Sentence. This order, which was filed on April

30, 2003, granted, nunc pro tunc, the State's motion to include a mandatory minimum and maximum term to §4.5(b) and to remove the 36-48 month community custody term from §4.6, of the judgment and sentence. Id.

6. Three times Appellant has tried, unsuccessfully, to raise claims that the June 30, 2003, order amending his judgment and sentence was illegal. See, In re Personal Restraint of Porter, COA No. 28490-5-III, COA No. 29117-1-III, and COA No. 32570-9-III. Each of these proceedings, where Appellant proceeded pro se, were dismissed on procedural grounds, none resulted in a decision on the merits. See, Attachment H: Order Dismissing COA No. 28490-5-II and 29117-1-III (consolidated), and; Attachment I: Order Dismissing COA No. 32570-9-III.

7. This matter stems from the trial court's denial of Appellant's motion for relief from judgment pursuant to CrR 7.8(b) on principles of res judicata and collateral estoppel. See, Attachment J: Order Denying Motion. The Appellant filed a timely Notice of Appeal from that order. ~~The~~ matter currently before the Court is whether the trial court err'ed in failing to transfer Appellant's motion to this Court for consideration as a personal restraint petition, as well as for considerations of the issues presented on page 1, ¶B(1)&(2) of this brief.

1. Substantive Facts

The substantive facts of the case are not necessary for resolution of this appeal, suffice it to say that on October 15, 2002, Appellant plead guilty to violating RCW 9A.44.050(1)(a). See, Attachment K: Affidavit of Facts.

C. ARGUMENT

APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ENTERED AN ORDER AMENDING JUDGMENT AND SENTENCE NUNC PRO TUNC.

RAP 2.2 affords a defendant the right to appeal the final judgment entered in any action or proceeding. Here, the trial court entered an order, nunc pro tunc, amending Appellant's judgment and sentence, filed on April 30, 2003, with[out] advising Appellant that he had the right to appeal the amendment.

In State v. Smissert, 103 Wash.2d 636, 639, 694 P.2d 654 (1985), the Supreme Court of Washington faced a similar situation as the one at bar. There, Smissert was convicted of first degree murder. Under the old indeterminate sentencing schema, the trial judge sentenced Smissert to a maximum of 20-years in prison. Smissert did not appeal, and some years later, the Board of Prison Terms and Paroles informed the court that it had erred and Smissert should have been given a life sentence. The trial court corrected the judgment nunc pro tunc, and Smissert promptly appealed. The Court of Appeals

held that Smissert had waived his right to appeal by not challenging the original judgment and sentence. Id. The Supreme Court of Washington reversed, holding that while the trial court had the "power and duty to correct an erroneous sentence," it should not have done so nunc pro tunc, effectively depriving Smissert of his constitutional right to appeal. Id., at 639, 643, 694 P.2d 654. This Court should reach that same conclusion based on the analogous facts of this case.

THE PROSECUTOR BREACHED THE PLEA AGREEMENT WHEN THE STATE MOVED THE TRIAL COURT TO AMEND THE JUDGMENT AND SENTENCE TO INCLUDE MORE SEVERE TERMS THAN THOSE AGREED TO IN THE PARTIES PLEA AGREEMENT.

An implicit part of the plea agreement here was the State's agreement to recommend determinate sentencing. Here, the State breached that agreement when it moved the trial judge to impose, nunc pro tunc, more severe penalties than those agreed to in the Statement of Defendant on Plea of Guilty, which turned Appellant's determinate sentence into an indeterminate sentence.

"[A] defendant gives up important constitutional rights by agreeing to a plea bargain[.]" State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (citing State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998); In re Personal Restraint of Palodichuk, 22 Wn. App. 107, 109-10, 589 P.2d 269 (1978)), review denied, 138 Wn.2d 1002, 984 P.2d 1033

(1999). "Because [plea agreements] concern fundamental constitutional rights of the accused, constitutional due process considerations come into play." State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). A breach of a plea agreement is a violation of due process. See, Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed. 2d 437 (1984) ("when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand"); see also State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (breach of plea agreement is criteria for determining whether "manifest injustice" mandates withdrawal of guilty plea under CrR 4.2(f)).

Here, as part of plea negotiations the State agreed to recommend determinate sentencing and indeed recommended determinate sentencing in the Statement of Defendant on Plea of Guilty and at the sentencing hearing. Approximately six-months after the plea agreement was accepted by the trial court and two-months after Appellant's sentencing hearing where the terms of the plea agreement were enforced, the State filed a motion, which the trial court subsequently granted, to amend the judgment and sentence from imposing a determinate sentence to imposing an indeterminate sentence.

This violated the terms of the plea agreement.

A plea agreement is a contract between the State and the defendant. Sledge, 133 Wn.2d at 838-39. Basic contract principles of good faith and fair dealing impose upon the State an implied promise to act in good faith in plea agreements. Sledge, 133 Wn.2d at 838-39. Due process concerns reinforce the State's duty to comply with plea agreements. Sledge, 133 Wn.2d at 839-40.

Accordingly, a plea agreement obligates the State to recommend to the court the sentence contained in the agreement. Talley, 134 Wn.2d at 183; Sledge, 133 Wn.2d at 840. This Court applies an objective standard in determining whether the State breached a plea agreement "'irrespective of prosecutorial motivations or justifications for the failure of performance.'" Jerde, 93 Wn. App. at 780 (quoting Palodichuk, 22 Wn. App. at 110); see also Sledge, 133 Wn.2d at 843 n.7 (the focus of this decision is on the effect of the State's actions, not the intent behind them). "The test is whether the prosecutor contradicts, by word or conduct, the State's sentencing recommendation." Jerde, 93 Wn. App. at 780 (citing Talley, 134 Wn.2d at 187). In making this determination, the Court views the entire sentencing record. State v. Vam Burien, 101 Wn. App. 206, 2 P.3d 991 (2000) (citing Jerde, 93 Wn. App. at 782).

The sentencing record in this case is clear. The State, represented by Deputy Pierce County Prosecutor G. Mark Cippola, made the following sentencing recommendation which was consistent with the plea agreement entered between the parties:

Mr. Cippola: Your Honor, ... the State would ask the court to adopt Appendix H of the PSI as a condition of sentencing. The sentence would include -- this is a determinative sentencing -- eighteen to thirty-six months to life of community custody, depending on the evaluation of the Department of Corrections....

See, Attachment D, pg. 3-4. Appendix H to the judgment and sentence made it clear:

Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9A.94A.150(1)&(2) whichever is longer....

See, Attachment E, Appendix H. The trial court adopted the State's sentencing recommendation, which was an agreed recommendation, and imposed, in relevant part, sentencing as follows:

THE COURT: .... I am going to impose a ninety-months in this matter .... I will also impose the following: Following such determination by the Department that he is to be released to community custody after the minimum of his term, he will be under conditions of community custody which will be as follows pursuant to the provisions that are set forth here in the standard Appendix H....

See, Attachment D, pg. 16, ln. 22-25 thru pg. 17, ln. 7-20.

Thus, the sentencing record in this case makes it clear that the grounds for amending the judgment and sentence set forth by the State in its motion to amend the judgment and sentence breached the terms of the plea agreement by moving the trial court to change Appellant's sentence from a determinate sentence to an indeterminate sentence in violation of Appellant's state and federal constitutional rights to due process.

Although the State's motion to amend the judgment and sentence from a determinate sentence to an indeterminate sentence was prompted by the Department of Corrections based on the viable grounds contained in the Department's letter dated March 29, 2003 (See, Attachment F), the reasoning behind the State's breach is not the focus, the focus is on the effect of the State's actions. Sledge, 133 Wn.2d at 843 n.7. The test is whether the State's actions contradict its sentencing recommendation. Jerde, 93 Wn. App. 780. In this case they clearly did.

"When the prosecutor breaches a plea agreement, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or specifically enforce the State's agreement." Jerd, 93 Wn. App. at 82-83; See also State v. Wakefield, 130 Wn.2d 464, 473-74, 925 P.2d 183 (1996). Whether Appellant is entitled to specific performance is questionable in light of the Supreme Court's

decision in State v. Barber, 170 Wash.2d 854 (2011). However, the Appellant is entitled to withdraw his plea.

THE TRIAL COURT ERR'ED IN DISMISSING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT ON PRINCIPLES OF COLLATERAL ESTOPPEL AND RES JUDICATA.

Because the grounds raised by Appellant in his prior personal restraint proceedings were no[t] adjudicated on their merits, and Appellant proceeded throughout those proceedings on a pro se basis, this Court should conclude that the trial court err'ed in dismissing Appellant's underlying Motion for Relief From Judgment on principles of collateral estoppel and res judicata. The Supreme Court may consider the merits of Appellant's motion under RAP 16.4(d), even if this Court's consideration is barred under RCW 10.73.140.

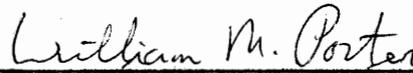
CONCLUSION

WHEREFORE, premises considered, the trial court's order denying Appellant's Motion for Relief From Judgment should be REVERSED and the relief Appellant seeks herein GRANTED.

It Should be so Ordered.

DATED this 25<sup>th</sup> day of October, 2016.

BY THE APPELLANT:

  
WILLIAM MURRY PORTER  
DOC No. 847461, D-B-21-2U  
P.O. Box 769  
Connell, WA 99326-0769

COURT OF APPEALS OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON, )  
                                  ) Respondent, ) No: 343626  
                                  ) )  
v. ) )  
                                  ) )  
WILLIAM MURRY PORTER, )  
                                  ) Appellant. )

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I, William Murry Porter, Appellant, in the above entitled cause, do hereby declare that I have served the following documents;

**BRIEF OF APPELLANT**

Upon:

Spokane County Prosecutor  
1100 West Mallon Avenue  
Spokane, Washington 99260-0270

I deposited with the \_\_\_-Unit Officer Station, by processing as *Legal Mail*, with first-class postage affixed thereto, at the ~~Airway Heights~~ <sup>Coyote Ridge</sup> Correction Center, P.O. Box 769, ~~Airway Heights~~ <sup>Cannell</sup> Airway Heights, WA 99260-0769

On this \_\_\_\_\_ day of October, 2016.

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted,

\_\_\_\_\_  
Petitioner  
WILLIAM MURRY PORTER