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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34984-5-III

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STATE OF WASHINGTON, Respondent,

v.

CALEB TOWNSEND, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

Caleb Townsend pleaded guilty to two felonies pursuant to a plea agreement with the State. As part of that agreement, he agreed to commit no new criminal law violations. He was then arrested and charged with new offenses, and the State changed its sentencing recommendation. Without holding an evidentiary hearing, the trial court found that Townsend breached his plea agreement, even though he had not been convicted of the new charges. Townsend now appeals from his high end standard range sentence.

## **II. ASSIGNMENTS OF ERROR**

ASSIGNMENT OF ERROR 1: The trial court erred in finding Townsend breached his plea agreement when Townsend was not convicted of any new crimes, and no evidentiary hearing was held at which he would have an opportunity to rebut the State's allegations.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE 1: What is the standard of proof in determining whether a defendant has violated a plea agreement term by committing a new crime?

ISSUE 2: Does the defendant have a due process right to a hearing with an opportunity to present evidence that he did not commit the alleged

crime, when the State seeks to revoke a plea agreement based upon new criminal charges?

#### **IV. STATEMENT OF THE CASE**

Pursuant to a plea agreement with the State, Caleb Townsend pled guilty to first degree robbery and first degree burglary. CP 8, 23, RP 3-4. Under the agreement, Townsend agreed to testify in another matter and waive his right to speedy sentencing until after that matter was resolved; thereafter, the State would recommend an exceptional sentence of time served. CP 24-25, RP 10. In addition, a condition of the plea agreement was that Townsend abide by all release conditions set at the time of entering his plea. CP 24. Those conditions included a requirement that he commit no law violations. CP 29.

Subsequently, the State charged Townsend with new offenses arising after his release. CP 31-34; RP 19-20. Consequently, the State alleged that Townsend breached the plea agreement and sought to impose the high end sentence called for in the agreement. CP 21. Opposing the State's request, Townsend argued that (1) the new charges were still pending and therefore unproven, and (2) the term "commit no new law violations" was ambiguous, and should be construed to require a new conviction before a violation could be found. CP 36-37.

At the sentencing hearing, the parties disputed the burden of proof applicable to establishing a breach of a plea agreement. The State alleged that under contract principles, it needed only establish a breach by a preponderance of the evidence, which it contended was established in the affidavit of facts and by the court's prior decision to enter a failure to comply warrant. RP 21. However, the State acknowledged Townsend's presumption of innocence on the new charges and suggested the court could wait for the outcome of the new matter before proceeding with sentencing. RP 22. Townsend argued that because there is no criminal law violation until the charge has been proven beyond a reasonable doubt, a conviction is required to establish the breach by a preponderance of the evidence. RP 22-23. Because the State drafted the plea agreement, Townsend argued that ambiguity in whether committing no criminal law violations requires a conviction or a lesser showing should be construed against the State and in Townsend's favor under traditional contract principles. RP 24.

The trial court agreed with the State that the breach needed only be established by a preponderance of the evidence. RP 26. Relying upon the probable cause statement supporting the new charge, it found a breach of the plea agreement. CP 64-65, RP 26. After proceeding to sentencing, when allowed to allocate, Townsend maintained his innocence of the new

crimes, denying that he was present. RP 27-28. At no point in the hearing did the trial court offer Townsend any opportunity to present evidence on his own behalf or challenge the information contained in the State's affidavits to show that he did not commit the new crime, and therefore did not violate the plea agreement. In response to his statement, the trial court simply said,

Thank you, sir. Well, I have to say the court is impressed with Mr. Townsend's manner and demeanor. He's certainly entitled to his opinion on whether or not there's sufficient proof here. Nonetheless, the court has made the ruling on the plea agreement, and in fact there has been a breach of that.

RP 28.

The trial court imposed the high end sentence of 61 months followed by 18 months' community custody based on the violation finding. CP 54-55, RP 28-29. Townsend timely appeals, and has been found indigent for that purpose. CP 47, 66.

#### **V. ARGUMENT**

The issue presented is whether the trial court erred in finding that Townsend breached the plea agreement. The State must prove the breach only by a preponderance of the evidence. However, due process requires an evidentiary hearing at which the defendant has the opportunity to

contest the State's allegations before breach of a plea agreement can be found. Because the trial court found a breach without conducting the required evidentiary hearing, the finding does not comport with due process requirements and must be reversed.

Plea agreements are contracts, and contract principles govern their analysis. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003); *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). But unlike ordinary common law contracts, plea agreements concern fundamental rights of the accused, such that due process considerations come into play. *Sledge*, 133 Wn.2d at 839. Accordingly, principles of fundamental fairness require the State to comply with the terms of a plea agreement. *Id.* at 839.

The State may, consistent with these principles, rescind a plea agreement when a defendant has breached it. *State v. Thomas*, 79 Wn. App. 32, 37, 899 P.2d 1312 (1995). But the State's accusation alone does not establish a breach; the court must determine whether the defendant has committed the violation as a question of fact. *In re Matter of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). Because the defendant has an expectation that the State will comply with its obligations, due process requires a hearing before that expectation can be taken away. *Id.* at 851.

The requirement of an evidentiary hearing prevents arbitrary deprivations of rights and minimizes the risk that “a defendant merely accused of post-plea crimes, but innocent and later acquitted of them, could nonetheless lose the benefit of his or her bargain.” *Id.*

*James*, just like the present case, concerned a plea agreement and subsequent criminal activity for which the defendant denied guilt. 96

Wn.2d at 848. In that case, the Supreme Court acknowledged the constitutional requirement

before relieving the State of its promises, that an evidentiary hearing be held and that the defendant be given an opportunity to call witnesses and have other due process rights, including the requirement that the State prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement.

*Id.* at 850.

In an unpublished opinion, Division One of the Court of Appeals applied *James* to reach a similar result.<sup>1</sup> *State v. Galeazzi*, 181 Wn. App. 1023, 2014 WL 2574034 (2014). There, the defendant entered into a plea agreement that required he commit no new law violations. *Id.* at 1. Three days later, he was arrested on new charges, and the State changed its

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<sup>1</sup> Pursuant to GR 14.1, unpublished opinions filed after March 1, 2013 may be cited but are not binding authorities. They may be given such persuasive value as this court deems appropriate.

sentencing recommendation. *Id.* The *Galeazzi* Court reversed the sentence, citing *James*'s requirement of an evidentiary hearing with the opportunity to call witnesses. *Id.* at 3. It noted that the court held no evidentiary hearing before permitting the State to deviate from the agreed recommendation and only considered the probable cause affidavit submitted in support of the new charges. *Id.* at 4. And while it agreed that the condition triggering the State's obligation required only commission of new crimes, not conviction, it noted that whether the defendant committed the new crimes "is subject to *James*'s due process requirement that an evidentiary hearing be held and that the State prove by a preponderance of the evidence that Galeazzi failed to perform his part of the agreement." *Id.*

In this case, both the plea agreement language and the procedural posture are nearly identical to *Galeazzi*. While the trial court correctly held that the State needed to prove a violation by a preponderance of the evidence and proof of conviction was not required, it failed to recognize Townsend's right to contest the State's accusation. The error may have been harmless had Townsend admitted the violation, but he plainly did not. RP 27-28. Having denied the fact of the violation, he was entitled to an evidentiary hearing to dispute the State's charges.

*Galeazzi* relied upon *State v. Morley*, 35 Wn. App. 45, 665 P.2d 419 (1983) and *State v. Roberson*, 118 Wn. App. 151, 74 P.3d 1208 (2003), *overruled in part on other grounds in State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) in reaching its conclusion. Both cases likewise support reversal and remand here. In *Morley*, the defendant entered into a plea agreement but subsequently consumed alcohol and was arrested on new charges. 35 Wn. App. at 46. The *Morley* court held that under *James*, the sentence must be set aside due to the lack of an evidentiary hearing to establish the violation. *Id.* at 48. In *Roberson*, the State alleged that the juvenile defendant failed to comply with the plea agreement when he failed an initial polygraph examination and disclosed a history of sexually deviant behavior including voyeuristic activities. 118 Wn. App. at 156, 158. Again, the court cited *James* for the proposition that an evidentiary hearing was required to find a breach of the plea agreement and remanded the case for that purpose. *Id.* at 158-59.

Applying these authorities in the present case, Townsend's sentence must be reversed and the case remanded. Under *James*, the trial court may not find a breach of a plea agreement without providing the defendant with an opportunity to present evidence contesting the violation. Failing to do so deprived Townsend of due process of law. Under *James*

and its progeny, reversal of the sentence and remand for Townsend to have an opportunity to contest the State's allegations is required.

## VI. CONCLUSION

For the foregoing reasons, Townsend respectfully requests that the court REVERSE his sentence and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 5 day of May, 2017.

  
\_\_\_\_\_  
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**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on the 5<sup>th</sup> day of May, 2017,  
I served a copy of the foregoing Appellant's Brief by e-mail, pursuant to  
prior agreement of the parties, to the following:

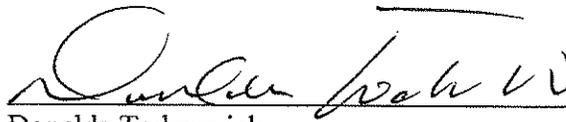
Brian O'Brien, Deputy Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

And by depositing a copy in the U.S. Mail, first-class, postage pre-  
paid, addressed as follows:

Caleb Townsend  
c/o Spokane County Corrections  
1100 W. Mallon Ave.  
Spokane, WA 99260

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

Signed this 5<sup>th</sup> day of May, 2017 in Walla Walla, Washington.

  
Donelda Todorovich

**BURKHART & BURKHART, PLLC**  
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