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Division III  
State of Washington  
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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID JOSEPH QUIROZ, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. FAILURE TO OBJECT OR MOVE FOR MODIFICATION DID NOT WAIVE THE RIGHT TO APPEAL FROM THE STATE'S RESCISSION OF THE PLEA AGREEMENT.

Mr. Quiroz did not waive his right to appeal his conviction; his claim of error is based on the State's breach of the plea agreement: "[U]nder RAP 2.5(a)(3) a breach of a plea agreement is an issue of constitutional magnitude, and [the reviewing court] will address the issue despite the defendant's failure to object or move to set aside the plea below." *State v. Williams*, 103 Wn. App. 231, 234-35, 11 P.3d 878 (2000) (citing *State v. Van Buren*, 101 Wn. App. 206, 211-12, 2 P.3d 991 (2000)); see *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

2. THE STATE'S RESCISSION IS NOT SUPPORTED BY THE TERMS OF THE PLEA AGREEMENT.

The State does not argue that the original plea agreement was modified at any time. Rather, the State argues that the plea agreement required Mr. Quiroz to comply with the terms of release pending sentencing.<sup>1</sup> (Resp. Br. at 3-5) Mr. Quiroz's plea agreement expressly

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<sup>1</sup> The State's argument rests on the prosecutor's oral representations to the court that, since sentencing was being set for a future date, the plea bargain would be rescinded if he "violates the terms or commits any new crimes . . ." (Resp. Br. at 5, citing RP 11) The statement was made to the court moments before the court accepted Mr. Quiroz's guilty plea; there is nothing in the record to show this provision was bargained for.

stated: “If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.” (CP 6, Statement Sec. 6(d) and (g))

The State’s argument requires this court to construe the terms of the plea agreement. A plea agreement reasonably susceptible to different interpretations is ambiguous. *State v. Bisson*, 156 Wn.2d 507, 523, 130 P.3d 820 (2006).

Words and provisions in a plea agreement are not ambiguous simply because a party suggests an opposing meaning. See *Mayer v. Pierce County Medical Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (contract terms are not ambiguous simply because one party suggests a different interpretation). Review of plea agreements is *de novo*. *Bisson*, 156 Wn.2d at 517.

Here, the agreement makes no reference to the terms of Mr. Quiroz’s release prior to sentencing. The only relevant language in the plea agreement refers to convictions of additional crimes. The provision is not susceptible to different interpretations

At best, the State is arguing that the express written language of the plea agreement should somehow be construed to incorporate the concept of failure to comply with the conditions of his release pending sentencing.

Ambiguous plea agreements must be “strictly construed in favor of the accused.” *State v. Bisson*, 156 Wn.2d 507, 523, 130 P.3d 820 (2006). The plea agreement in this case cannot be construed to include violations of the terms of the defendant’s release pending sentencing as a basis for rescission. Even if ambiguous, the express terms of the plea agreement are susceptible to interpretation as providing for intervening conviction as the sole grounds for rescission or modification of the agreement. This court should strictly construe the plea agreement in favor of Mr. Quiroz, find that the State rescinded the agreement in error and remand to permit Mr. Quiroz to elect whether to enforce the agreement as it was written or to withdraw his plea.

3. DUE PROCESS REQUIRES AN EVIDENTIARY HEARING TO RESOLVE ANY REMAINING FACTUAL ISSUE.

Even if this court were to conclude that the plea agreement was ambiguous, the State may not rescind a plea agreement based on the defendant’s breach absent an evidentiary hearing. *State v. Townsend*, 409 P.3d 1094, 1097-98 (Wash. Ct. App. 2018). The State has included in the record on appeal documents in support of its claim that compliance with the terms of his release was an essential component of Mr. Quiroz’s agreement. If these documents, or the State’s argument, give rise to an

issue of fact as to the parties' intention respecting the terms of the plea agreement, Mr. Quiroz is entitled to an evidentiary hearing on that issue.

The evidence that Mr. Quiroz may have violated the terms of his release consists of hearsay and ambiguous remarks at the time of sentencing. In the event the lower court were to construe the agreement as the State has suggested, due process would further require an evidentiary hearing as to whether Mr. Quiroz's conduct breached the agreement. *Townsend*, 409 P.3d at 1097.

B. CONCLUSION

The conviction should be reversed based on the unjustified rescission of the plea agreement and the matter should be remanded to permit Mr. Quiroz to elect his remedy. Alternatively, the matter should be remanded for an evidentiary hearing as to the terms of the plea agreement and the issue of whether the defendant's conduct violated those terms.

Dated this 12th day of April, 2018.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 35315-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DAVID JOSEPH QUIROZ,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this day, I served a copy of the Appellant's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

David Trefry  
David.Trefry@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on this day, I mailed a copy of the Appellant's Reply Brief in this matter to:

David Joseph Quiroz  
#967158  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen, WA 98520

Signed at Spokane, Washington on April 12, 2018.

  
Janet G. Gemberling  
Attorney at Law

**JANET GEMBERLING PS**

**April 12, 2018 - 11:14 AM**

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