FILED
Court of Appeals
Division III
State of Washington
12/18/2017 12:09 PM

35315-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID JOSEPH QUIROZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 8754
Spokane, WA 99203
(509) 838-8585

INDEX

A. ASSIGNMENT OF ERROR 1

B. ISSUE 1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT 3

1. THE PROSECUTOR'S BREACH OF THE PLEA AGREEMENT REQUIRES REVERSAL.....3

a. Breach Of The Plea Agreement Violates Due Process 3

b. The Agreement Modification Alleged By The State Appears To Be Ambiguous.....4

2. THE DEFENDANT IS ENTITLED TO ELECT WHETHER TO WITHDRAW HIS PLEA OR ENFORCE THE AGREEMENT.....7

E. CONCLUSION.....8

TABLE OF AUTHORITIES

WASHINGTON CASES

DICE V. CITY OF MONTESANO, 131 Wn. App. 675,
128 P.3d 1253 (2006)..... 6

IN RE MARRIAGE OF LITOWITZ, 146 Wn.2d 514,
48 P.3d 261, 53 P.3d 516 (2002) 5

IN RE PALODICHUK, 22 Wn. App. 107,
589 P.2d 269 (1978)..... 3

QUEEN CITY SAV. & LOAN ASS'N V. MANNHALT,
111 Wn.2d 503, 760 P.2d 350 (1988)..... 6

SPRATT V. CRUSADER INS. CO., 109 Wn. App. 944,
37 P.3d 1269 (2002)..... 6

STATE V. HALL, 104 Wn.2d 486,
706 P.2d 1074 (1985)..... 3, 4

STATE V. HARRISON, 148 Wn.2d 550,
61 P.3d 1104 (2003)..... 7

STATE V. MILLER, 110 Wn.2d 528,
756 P.2d 122 (1988)..... 7

STATE V. OLIVA, 117 Wn. App. 773,
73 P.3d 1016 (2003)..... 5

STATE V. PETERSEN, 97 Wn.2d 864,
651 P.2d 211 (1982)..... 3

STATE V. SANCHEZ, 146 Wn.2d 339,
346 P.2d 774 (2002)..... 7

STATE V. SLEDGE, 133 Wn.2d 828,
947 P.2d 1199 (1997)..... 3

STATE V. TOURTELLOTTE, 88 Wn.2d 579,
564 P.2d 799 (1977)..... 3, 4

STATE V. VAN BUREN, 103 Wn. App. 206,
2 P.3d 991 (2000)..... 4, 7

SYROVY V. ALPINE RES., INC., 68 Wn. App. 35,
841 P.2d 1279 (1992), *aff'd*,
122 Wn.2d 544, 859 P.2d 51 (1993)..... 5

SUPREME COURT CASES

MABRY V. JOHNSON, 467 U.S. 504,
81 L. Ed. 2d 437, 104 S. Ct. 2543 (1984)..... 3

SANTOBELLO V. NEW YORK, 404 U.S. 257,
30 L. Ed. 2d 427, 92 S. Ct. 495 (1971)..... 3

FEDERAL CASES

U.S. V. HARVEY, 791 F.2d 294 (4th Cir. 1986)..... 5

COURT RULES

RAP 2.5(a)(3)..... 7

A. ASSIGNMENT OF ERROR

The State's failure to make the sentence recommendation required by the parties' plea agreement violated Mr. Quiroz's right to due process.

B. ISSUE

At sentencing the State failed to make the sentence recommendation required by the parties' plea agreement. The State alleged the agreement had been orally modified at the time of the plea hearing to permit the State to retract its recommendation if the defendant used drugs or failed to appear for a hearing prior to sentencing. Absent persuasive evidence the defendant agreed to the terms of the alleged modification, did the State violate the defendant's right to due process?

C. STATEMENT OF THE CASE

The State charged David Quiroz with failing to register as a sex offender. (CP 1) He filed a guilty plea statement stating the prosecuting attorney would recommend a sentence of "32 months in prison and a 24-month supervision." (Plea RP 8; Sentencing RP 3-4; CP 9) The Agreement provided: "If l 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)

Sentencing was set for several months in the future and the prosecutor told the court Mr. Quiroz had agreed that if he "violates the terms or commits any new crimes, that offer's off the table." (Plea RP 10-11) The court accepted Mr. Quiroz's guilty plea. (Plea RP 12)

At sentencing defense counsel advised the court that while sentencing was pending, Mr. Quiroz had admitted to a probation officer that he had used methamphetamine. (Sentencing RP 2) The prosecutor elaborated:

> During that time period it was made very clear on that January date that if he violated the terms of his release conditions, which included drug use, and if he failed to appear on that March date, that the terms of his plea bargain would be off the table and the State could ask for whatever they wanted. He violated both those terms by, by his continued drug use, and then failing to appear for . . . sentencing.

(Sentencing RP 4) Defense counsel pointed out to the court that Mr. Quiroz's oral admission to having used methamphetamine had not resulted in a conviction of any crime, and asked the court to enforce the plea agreement. (Sentencing RP 5) Mr. Quiroz explained to the court that he had understood the plea agreement would be withdrawn only if he were charged with a crime prior to sentencing. (Sentencing RP 6)

The court ruled that as a result of violating the terms of his release Mr. Quiroz would be sentenced to 48 months' incarceration. (Sentencing RP 8; CP 18) He appealed. (CP 34)

D. ARGUMENT

1. THE PROSECUTOR'S BREACH OF THE PLEA AGREEMENT REQUIRES REVERSAL.

a. Breach Of The Plea Agreement Violates Due Process.

The State must fully comply with the terms of a plea agreement. *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971); *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). To fulfill this obligation, the prosecutor cannot undermine the recommendation with equivocation. *State v. Petersen*, 97 Wn.2d 864, 866, 651 P.2d 211 (1982). The defendant's right to have the terms of a plea agreement scrupulously honored is analogous to a contract right. *State v. Hall*, 104 Wn.2d 486, 706 P.2d 1074 (1985); *In re Palodichuk*, 22 Wn. App. 107, 110, 589 P.2d 269 (1978).

Due process requires that the prosecutor adhere to the terms of the plea bargain. *Mabry v. Johnson*, 467 U.S. 504, 81 L. Ed. 2d 437, 104 S. Ct. 2543 (1984); *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). In entering a guilty plea, a defendant waives significant

constitutional rights, including the rights to a jury trial, to confront one's accusers, to present witnesses, to remain silent, and to be convicted only upon proof beyond a reasonable doubt. *Tourtellotte*, 88 Wn.2d at 579. When a plea rests to such a degree on a promise by the prosecutor that it is part of the inducement or consideration, the promise must be fulfilled. *State v. Hall*, 104 Wn.2d at 490.

> If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep its bargain.

State v. Tourtellotte, 88 Wn.2d at 584.

Accordingly, a plea agreement obligates the State to recommend to the court the sentence contained in the agreement. *State v. Van Buren*, 103 Wn. App. 206, 213, 2 P.3d 991 (2000).

b. The Agreement Modification Alleged By The State Appears To Be Ambiguous.

The State gave two different versions of the alleged oral modification of the plea agreement. At the time of the plea hearing, the prosecutor told the court the State would withdraw its offer if Mr. Quiroz "violate[d] the terms or commit[ed] any new crimes." (Plea RP 11) There is no clarification of the intended meaning of "the terms."

At sentencing the prosecutor elaborated, stating:

> [O]riginally the offer was for 32 months in prison and a 24-month supervision. During that time period it was made very clear on that January date that if he violated the terms of his release conditions, which included drug use, and if he failed to appear on that March date, that the terms of his plea bargain would be off the table and the State could ask for whatever they wanted.

(Sentencing RP 3-4)

But defense counsel told the court that Mr. Quiroz had not been charged with or convicted of methamphetamine possession and asked the court to impose the sentence that was set forth in the plea statement. (Sentencing RP 5) Mr. Quiroz told the court he had understood the agreement merely precluded his being charged with or convicted of any new offenses. His statement is consistent with language contained in the plea statement. (Sentencing RP 6)

"[T]he object of contract interpretation is to ascertain and give effect to the intent of the parties." *State v. Oliva*, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003) (citing *In re Marriage of Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261, 53 P.3d 516 (2002)).

Whether an agreement is ambiguous is a question of law to be decided by the court and reviewed *de novo*. *Syrovy v. Alpine Res*., *Inc*., 68 Wn. App. 35, 39, 841 P.2d 1279 (1992), *aff'd*, 122 Wn.2d 544, 859 P.2d 51 (1993); *U.S. v. Harvey*, 791 F.2d 294 (4th Cir. 1986). A contract

provision is ambiguous when, reading the contract as a whole, its terms are uncertain or capable of conveying more than one meaning. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006); *Spratt v. Crusader Ins. Co*., 109 Wn. App. 944, 37 P.3d 1269 (2002).

The party that drafted the contract generally bears responsibility for any imprecision or ambiguity. *Queen City Sav. & Loan Ass'n v. Mannhalt*, 111 Wn.2d 503, 513, 760 P.2d 350 (1988).

The record does not show when or how the alleged modification was made, whether it was made by the attorneys and Mr. Quiroz was merely told of its provisions, or whether he discussed the meaning of the terms and expressly agreed to them. The prosecutor first referenced the "terms of his release" at sentencing and the only evidence as to what those terms were is the prosecutor's recitation that they included drug use and failure to appear.

The record does not support the State's assertion that the parties agreed to modify the plea agreement to permit the State to withdraw its offer after Mr. Quiroz had accepted it by entering his guilty plea if, prior to sentencing, he used drugs or failed to appear for a scheduled hearing. Absent such a modification, the prosecutor's failure to make the agreed recommendation violated Mr. Quiroz's right to due process.

2. THE DEFENDANT IS ENTITLED TO ELECT WHETHER TO WITHDRAW HIS PLEA OR ENFORCE THE AGREEMENT.

A manifest error affecting a constitutional right may be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. Van Buren*, 103 Wn. App. at 211. The error is manifest if the necessary facts are in the record and the defendant is actually prejudiced. *State v. Sanchez*, 146 Wn.2d 339, 346 P.2d 774 (2002). Because the breach of the plea agreement implicates due process, and because the record demonstrates the agreement was breached and Mr. Quiroz was not sentenced in accordance with the plea agreement, the issue is properly raised here.

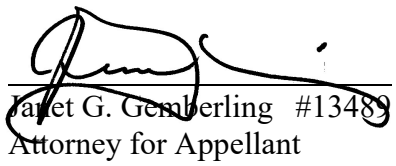
Where the State fails to comply with a plea agreement, in the absence of compelling reasons to the contrary, the defendant has a choice of remedies: withdrawal of his plea or a de novo sentencing hearing, before a different judge, in which the State will abide by its plea agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003); *State v. Miller*, 110 Wn.2d 528, 535, 756 P.2d 122 (1988).

E. CONCLUSION

Mr. Quiroz's conviction should be reversed and the matter remanded to enable him to elect whether to withdraw his plea or to be resentenced in accordance with the plea agreement.

Dated this 18th day of December, 2017.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
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
RICHARD F. KLEPACKI,	)	OF MAILING
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on December 18, 2017, I served a copy of the Appellant's 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

Signed at Brussels, Belgium on December 18, 2017.

Janet G. Gemberling
Attorney at Law

JANET GEMBERLING PS

December 18, 2017 - 12:09 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35315-0
Appellate Court Case Title:	State of Washington v. David Joseph Quiroz
Superior Court Case Number:	16-1-01080-1

The following documents have been uploaded:

- 353150_Briefs_20171218120838D3344911_3824.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was QuirozOpeningBr.pdf

A copy of the uploaded files will be sent to:

- David.Trefry@co.yakima.wa.us
- joseph.brusic@co.yakima.wa.us

Comments:

Sender Name: Janet Gemberling - Email: jan@gemberlaw.com
Address:
PO BOX 8754
SPOKANE, WA, 99203-0754
Phone: 509-838-8585

Note: The Filing Id is 20171218120838D3344911