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No. 35315-0-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

DAVID JOSEPH QUIROZ,

APPELLANT.

AMENDED BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENT OF ERROR.

1. The State breached the plea agreement with the defendant.
2. The defendant is entitled to elect which whether to withdraw his plea or enforce specific performance of the plea offer.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no breach of the plea agreement.
2. Because there was no breach the defendant does not have a choice of remedies. Further, if this court does follow James, *infra*, the remedy will be a hearing to allow the State to prove the defendant, not the State was in breach.

II. STATEMENT OF THE CASE

The facts which pertain to this appeal total less than forty pages.

The State shall refer to specific sections of the record in this brief therefore, pursuant to RAP 10.3(b); the State shall not set forth a separate fact section.

III. ARGUMENT

1. There is no legal basis to allow the Appellant to withdraw his guilty plea.

This matter was a guilty plea, with a standard range sentence. State v. Wiley, 26 Wn. App. 422, 425, 613 P.2d 549 (1980), “A guilty plea generally waives the right to appeal. State v. Saylor, 70 Wn.2d 7, 422

P.2d 477 (1966). A guilty plea has been said to be "itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969).”

Appellant was advised that if he agreed to this plea bargain he waived certain rights;

THE COURT: So you're charged with failure to register as a sex offender. ... Sir, by pleading guilty you're going to be giving up a number of important rights, so I'm going to take a minute and go through those with you just to make sure you know that you're going to be waiving them. ... If you did go to trial, sir, and were found guilty, you could appeal that finding of guilt to a higher Court. Sir, do you understand those important rights?

DEFENDANT: Yes, sir.

THE COURT: And, sir, do you know that by pleading guilty this afternoon you're going to be giving up those important rights?

DEFENDANT: Yes, sir.

The Washington State Supreme Court has determined “...that a claim of error based upon a breach of a plea agreement involves an issue of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). Similarly, given the fundamental constitutional rights of an accused which are implicated when a defendant pleads guilty, a claim that a guilty plea pursuant to a plea agreement was involuntary due to a misunderstanding about the standard range sentence is the kind of constitutional error that RAP 2.5(a)(3) encompasses.” State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)

This court should address this claim as required by RAP 2.5(a)(3) which provides that "**manifest** error affecting a constitutional right" may be raised for the first time on appeal. (Emphasis added.) Walsh goes on to state, "'Manifest" in RAP 2.5(a)(3) means that a showing of actual prejudice is made. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)."

The alleged error raised by Quiroz is not manifest and is not likely to succeed. Clearly the parties bargained for a specific set of acts to take place prior to sentencing and it is equally clear that the defendant knew the requirements of the bargained for exchange. He understood he was being given a significant downward departure in return for continued good behavior and the State not having to conduct a trial. In order for this contractual arrangement to be complete one of his requirements was that he maintain his law abiding behavior.

MS. HOLBROOK: Just I believe it was also explained to him, and we should clarify this point, that if he -- since we're setting sentencing out two months, that if he--

THE COURT: There's no violation between --

MS. HOLBROOK: -- violates the terms or commits any new crimes, that offer's off the table. There's no Hilliard

down at the point and the State will be asking for the maximum, and I know that Mr. Cotterell's gone over that, but if we could just make that part of this record.

THE COURT: That seems to make some sense.

DEFENDANT: I ain't doing no crimes (unintelligible)

THE COURT: Okay.

RP 11-12.

The Appellant failed to maintain his part of this bargain. Not only did he have a positive urinalysis (UA) as stated by his attorney and admitted by the defendant, the trial court also had to issue a warrant for Quiroz's arrest because he failed to appear for his original sentencing. This failure to appear alone was sufficient to allow the State to withdraw its plea offer.

There are two documents that have been submitted to this court by way of a supplemental designation of clerks papers that show what the State's attorney was discussing at the time of the plea. As this court can see from the Order on Arraignment/Order Setting Case Schedule found at CP 58-60 the conditions of the defendant's release include "6. Defendant shall appear in Court as ordered."

Synonyms and Antonyms of condition

....

2 something upon which the carrying out of an agreement or offer depends ·You'll get a bonus with the condition that we meet our sales forecast.

Synonyms of condition

contingency, if, provision, proviso, qualification, reservation, stipulation

Words Related to condition

strings, terms, precondition, prerequisite, requirement, requisite, limitation, modification, restriction, exception, exemption
demand, essential, must, necessity, need
<https://www.merriam-webster.com/thesaurus/condition>

Quiroz's own statements to the court at sentencing attempt to explain why he did not appear at his court ordered sentencing. He states that he did not appear because he was told by his attorney that due to the bad UA the prosecutor was going to pull out of the plea bargain and Quiroz was now looking at being sentenced to the full term standard range sentence. There was no confusion as to the terms used by the State at the time Quiroz plead guilty.

State v. Sledge, 133 Wn.2d 828, 839-41, 947 P.2d 1199 (1997):

In analyzing this plea agreement...we resort to basic principles of contract. "Plea agreements are contracts." Just as there is an implied duty of good faith and fair dealing in every contract, the law imposes an implied promise by the State to act in good faith in plea agreements.

But plea agreements are more than simple common law contracts. Because they 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.

A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. The recommendation need not be made "enthusiastically." The prosecutor, as an officer of the court, is obliged to participate in the

sentencing proceedings, candidly answering the court's questions in accordance with RPC 3.3, and holding back no relevant information regarding the plea agreement. See, e.g., RCW 9.94A.460 (State may not agree to withhold relevant information from court regarding plea agreement). (Citations omitted.)

The prosecutor stood by the State's offer, there was no violation of the agreement between the parties. The simple fact is the defendant breached and admitted that on the record.

This is further evidenced by the fact that Appellant did not try to withdraw his plea in the trial court at the time of his sentencing. The standard a party must adhere to in the trial court when moving to withdraw a plea is set forth in State v. Hurt, 107 Wn. App. 816, 822, 828-29, 27 P.3d 1276 (2001) and it applicable here:

A motion to withdraw a guilty plea is governed by CrR 7.8(b). We review the decision for abuse of discretion.

...

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion. The court abuses its discretion if it bases its decision on clearly untenable or manifestly unreasonable grounds. A motion to withdraw a guilty plea may be granted to correct a manifest injustice. CrR 4.2(f); The defendant has the burden of proving manifest injustice. Manifest injustice is proved by a showing that the plea is involuntary. Unless it is apparent from the record of the plea hearing that the plea was voluntary and intelligent, the State has the burden of proving the validity of the plea. (Citations omitted.)

Even if Quiroz had moved to withdraw his guilty plea in the trial court he would not have met the standards set forth above. As this court stated in State v. Van Buren, 101 Wn.App. 206, 213, 2 P.3d 991 (2000), "We apply an objective standard in determining whether the State breached a plea agreement " 'irrespective of prosecutorial motivations or justifications for the failure in performance.' " ... "The test is whether the prosecutor contradicts, by word or conduct, the State's recommendation for a standard range sentence." In making this determination, we view the entire sentencing record. (Citations omitted.) State v. Wilson, 102 Wn. App. 161, 168, 6 P.3d 637 (2000), "Plea agreements are contracts. "Words in a contract should be given their ordinary meaning." The court will not give effect to interpretations that would render contract obligations illusory.

Just as the State is required to abide by the terms of this contractual agreement so too is the defendant; In re James, 96 Wn.2d 847, 850, 640 P.2d 18 (1982), a defendant's right to specifically enforce "exists provided the defendant has complied with the agreement", review denied, 100 Wn.2d 1023 (1983); State v. Hall, 32 Wn. App. 108, 110, 645 P.2d 1143, review denied, 97 Wn.2d 1037 (1982) "The State is expected to keep its bargains unless the defendant has failed to keep his or hers."; State v. Gilcrest, 25 Wn. App. 427, 428, 607 P.2d 1243 (1980) plea agreement

required defendant to successfully complete treatment program; defendant not entitled to enforce agreement after failing to complete program.

The State is well aware that cases such as In re James, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982) and very recently decided State v. Townsend – COA #34984-5-III (COA Division III February 6, 2018) indicate that if there was a question as to the defendant's compliance with the agreement, then the defendant is entitled to an evidentiary hearing at which the State must prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement. James, supra.

It is the State's position that James and Townsend are distinguishable from the present case. In this appeal Quiroz does not deny that he admitted to the trial court that he had a dirty UA and that admission resulted in sanctions by the DOC, nor does he or can he deny that an arrest warrant (CP 60-61) had to be issued to get him to finally appear before the trial court. The court must remember there is no method in this state to legally possess an illegal substance. He and his attorney's statements supports the State's reasoning that Quiroz violated his terms and conditions of release which then resulted in his failing to appear for his initial sentencing and a bench warrant having to be issued for his arrest.

Townsend vigorously protested his innocence and James “openly denied the validity of the...accusations.” James, 96 Wn.2d at 848. The court in James also stressed that James “was then, mentally handicapped and cannot read or write.” Id.

Here Quiroz understood that he could not violate the law and stated “I ain’t doing no crimes...” RP 12. And his counsel admitted at the time of his sentencing that he had “picked up a drug use admission through the Department of Corrections (Sentencing RP 2) that he had admitted to the UA and to the failure to appear at this same hearing;

DEFENDANT: Yeah, the reason why I didn’t show up is because my lawyer had -- he had told me that, that because I got the dirty UA, well, I admitted (unintelligible) that, that the Prosecutor was going to give me 48 -- was asking for 48 months because I didn’t get that because I got the dirty UA, that’s part of the reason why I didn’t show up because I was scared, you know, I was scared of getting more, more time for that.

And, yeah, I do have, I do have a drug problem and, and, and, and I didn’t get dirty but I admitted, I admitted to being dirty to that, but I didn’t know that -- I wasn’t aware of (unintelligible) my thought thinking was that if I got a new charge, it was if I got a new charge or if I got arrested on a new charge or anything like that the deal would be taken, the deal would be taken off, I wasn’t aware -- because I was -- last time I was coming to Court I was on drugs, I was high on drugs when I was coming to Court --

THE COURT: Uh-huh (affirmative).

DEFENDANT: -- and I wasn’t aware of, of, of everything, you know, of... Of, of, of the rules or whatever that I had to abide by, I wasn’t completely in my right state of mind is what I’m trying to say.

Based on the record in the trial court there is no need nor requirement for this case to be remanded for a hearing regarding Quiroz's violation of this plea agreement.

If no question exists as to the defendant's breach, this court need not order an evidentiary hearing. State v. Hall, 32 Wn.App. 108, 110, 645 P.2d 1143 (1982). This case is far closer factually to State v. Hall than it is to either Townsend or James.

2. Remedy if breach.

The State stands by its argument above; there was no breach by the State. And in fact the breach that occurred was by the defendant. The process after a breach is the same no matter who breached. State v. Thomas, 79 Wn.App. 32, 36-7, 899 P.2d 1312 (1995):

Just as a defendant has the option to specifically enforce or rescind a plea agreement after a breach by the *State*, State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), State v. Tourtellotte, 88 Wn.2d 579, 585, 564 P.2d 799 (1977), the State has the option to specifically enforce or rescind a plea agreement after a breach by the defendant. It is now well settled that, when the government breaches a plea agreement, a defendant's remedy is either specific performance of the plea agreement or an opportunity to withdraw his guilty plea. Santobello v. New York, 404 U.S. 257, 263-63, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971); United States v. Brody, 808 F.2d 944, 947 (2d Cir.1986); see also United States v. Abbamonte, 759 F.2d at 1071-72 [2d Cir.1985]. The question presented for review today is whether, when the situation is reversed and it is the defendant who has breached the agreement, specific

performance is a possible remedy for the government. We hold that it is. (Emphasis in the original.)

This court followed Thomas in its very recent decision, State v. Townsend, supra. In this case the State determined that it would rescind the offer and ask for a standard range sentence.

IV. CONCLUSION

There is no basis for this court to allow this Appellant to withdraw his guilty plea. If any breach occurred, it was on the part of the defendant and the State properly and legally elected to rescind the offer of a downward departure and ask the trial court to impose a standard range sentence.

Further, based on the record before the trial court there is no need to remand this case for a fact hearing regarding this breach. It is clear from the record that the defendant did breach and he and his counsel acknowledge that breach and did not ask for specific performance because of that material breach of this plea agreement.

Respectfully submitted this 14th day of March, 2018,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on March 14, 2018, 2018, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Janet Gemberling at admin@gemberlaw.com

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

DATED this 14th day of March, 2018 at Spokane, Washington.

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