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NO. 35627-2-III

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

STATE OF WASHINGTON,
Respondent,

v.

MARY FAUCETT,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove by a preponderance of the evidence that Faucett breached the Immunity Agreement and therefore, the State must specifically perform under its terms and Faucett's manslaughter charge must be dismissed.

2. The trial court erred when it denied Faucett's motion to dismiss the second amended information because The Doctrine of Fundamental Fairness required dismissal.

3. The State violated its duty of good faith and fair dealing when it failed to honor the Immunity Agreement it made with Faucett after Faucett fully performed.

B. ISSUES PRESENTED ON APPEAL

1. Whether the State failed to prove by a preponderance of the evidence that Faucett breached the Immunity Agreement when Faucett provided new truthful information about the homicide and cooperated with Detective Aceves during the January 5 interview?

2. Whether the Doctrine of Fundamental Fairness requires dismissal of Faucett's manslaughter charge when she fully performed her obligations under the agreement by

providing new information and the State's language in the Immunity Agreement included immunity from "any murder type charge"?

3. Whether the State violated its duty of good faith and fair dealing when it undercut the Immunity Agreement by arguing that it should be rescinded because Detective Aceves believed Faucett was untruthful about her motivations in asking Fernandez to meet her at the Stonegate Apartment when Faucett's motivations were not material to the Agreement?

C. STATEMENT OF THE CASE

1. Procedural History

Mary Faucett was charged by information with Rendering Criminal Assistance in the First Degree in the homicide of Lorenzo Fernandez under RCW 9A.76.050(1) and 9A.76.070(2)(a). CP 1. On January 5, 2015, the State verbally offered Faucett an immunity agreement in which the State agreed not to charge her with "any type of murder charge" if Faucett cooperated and spoke truthfully and with complete honesty regarding Fernandez's homicide CP 32; Exhibit 2 at 1:15. Faucett accepted the agreement. Exhibit 2 at 1:15.

After Faucett provided new truthful information about

Fernandez's homicide and details about her involvement, the State amended the charges against Faucett to charge manslaughter. Exhibit 2 at 1:08:30; CP 8. Faucett moved to dismiss the amended information and to enforce the immunity agreement. CP 11. The court denied her motion and allowed the State to move forward with the amended information. CP 48, 106.

Faucett pled guilty to Manslaughter in The First Degree (RCW 9A.32.060(1)(a)) as charged in the Fifth Amended Information. CP 118, 132. All other charges were dismissed. CP 118. Faucett timely appeals. CP 150.

2. Substantive Facts

DeShawn Anderson shot and killed Lorenzo Fernandez whom Anderson believed was a member of a gang he held responsible for shooting his friend. CP 43-44; RP 13 (5/26/17). Detectives Corey Smith and Anthony Aceves located Anderson approximately a week later. RP 13, 20 (5/26/17). When the police arrived, Anderson was with Faucett at her mother's residence in Kennewick. RP 13, 20 (5/26/17). Smith detained Faucett for questioning and she gave her first recorded statement at the Pasco Police Department. RP 13-14 (5/26/17). Faucett agreed to provide a second recorded statement on December 30. RP 25-26 (5/26/17).

After Faucett's second interview, Faucett and Aceves discussed the possibility of a deal with the prosecutor's office in exchange for her testimony. CP 32. However, the prosecutor wanted to assure Faucett had new information about the case that was significant, true, and accurate before he considered proposing an agreement. CP 32.

a. January 5 Interview with Faucett

On January 5, 2015 Faucett revealed new information the prosecutor found sufficient to offer an immunity agreement (the "Immunity Agreement"). CP 32. The actual agreement was not written or recorded, but Aceves reiterated the terms during Faucett's third recorded interview as follows: The Franklin County Prosecuting Attorney's Office agreed "not to charge [Faucett] with any type of murder charge" if Faucett "cooperate[d] to the fullest and talk[ed] with truth and complete honesty." Exhibit 2 at 1:15.

In arguing the Agreement should be rescinded, the State stated different terms for the agreement as follows: DPA [] (through Detective Aceves) offered that the Defendant would not be charged with any type of Murder if "she told of her complete involvement and spoke with absolute truth." CP 17. The State argued to the trial court

that the agreement provided that Faucett was obligated to “speak with absolute honesty.” CP 106. The trial court relied on the State’s rendition of the Immunity Agreement rather than the Agreement Aceves made with Faucett that Faucett was obligated to “speak with absolute honesty.” CP 106.

During her interviews, Faucett relayed to the following chain of events:

On the night of the homicide, Faucett’s husband, Kenyatta Bridges, drove a white Tahoe in which Faucett, Anderson, Raquel Acosta, and Louis Amaya were passengers. CP 32-33. On their way to Rite Aid, Anderson observed Fernandez’s vehicle parked at Albertsons. Exhibit 2 at 6:15. Bridges drove to Rite Aid where Acosta and Amaya went into the store. Exhibit 2 at 7:05. While the vehicle was parked in the parking lot, Anderson saw Fernandez’s vehicle leaving Albertsons and he directed Bridges to follow it. Exhibit 2 at 8:32; CP 33. Bridges left Amaya and Acosta at Rite Aid and followed Fernandez’s vehicle to a 7-Eleven store and Anderson was prepared to shoot Fernandez. Exhibit 2 at 11:28.

Faucett exited the Tahoe to prevent Anderson from shooting Fernandez. Exhibit 2 at 11:28. Faucett deliberately exited the store

at the same time Fernandez exited and Fernandez offered her a ride. Exhibit 2 at 13:30. Faucett accepted and during their brief car ride they discussed a recent shooting, in which Fernandez revealed that his cousin was one of the victims. Exhibit 2 at 16:20-22. Faucett thought that she could encourage a less volatile existence between Fernandez and Anderson if she could arrange for Fernandez and Anderson to talk. Facuett thought that Anderson would see that both he and Fernandez lost a loved one in the recent shooting and that Fernandez was not personally responsible for the death of Anderson's friend. Exhibit 2 at 16:40, 17:45.

Fernandez gave Faucett his phone number and took her to Memorial Park. CP 33. A few minutes later Bridges and Anderson arrived and the three of them went to reunite with Acosta and Amaya. CP 33. After a brief discussion with Amaya and Acosta alone, Amaya left with the Tahoe with Anderson, Bridges, and Faucett. Exhibit 2 at 19:20.

Faucett called Fernandez and told him to meet her at the Stonegate Apartments. Exhibit 2 at 31:00, 34:00. Fernandez believed he was meeting her for a sexual encounter, but she had no intention of having a sexual encounter with him. Exhibit 2 at 31:35.

Bridges drove the Tahoe to the Stonegate Apartments and parked some distance down the road. CP 34. Anderson and Bridges exited the Tahoe and walked to the Stonegate Apartments while Faucett and Amaya stayed in the vehicle. CP 34.

Sometime after Anderson and Bridges left the vehicle, Faucett heard several popping sounds that sounded like fireworks. Exhibit 2 at 52:16. Faucett called Fernandez several times to make sure he was not harmed. Exhibit 2 at 52:16. Moments later Bridges and Anderson returned to the Tahoe. Anderson was upset with Bridges because Bridges froze and failed to cover Anderson during the shooting. CP 34. Faucett did not know Bridges and Anderson were going to shoot Fernandez. CP 34.

Faucett's new information regarding the history of the ongoing gang feud involving Anderson, the events leading up to the homicide, the details about the homicide including where the vehicle was parked, which was previously unknown to the police, and how Anderson knew Fernandez's location. Exhibit 2. Faucett also detailed how she aided Anderson in evading the police on the night of the homicide. Exhibit 2 at 43:30.

During the interview, Faucett revealed at least two new

pieces of information: that Raquel Acosta was in the car with Faucett, Anderson, Bridges, and Amaya earlier in the evening and that the incident started when Anderson observed Fernandez's car in the Albertson's parking lot. Exhibit 2 at 5:34, 39:06, 1:08:30. Exhibit 2 at 39:06. Aceves indicated to Faucett her information showed her truthfulness and cooperation because it was previously unknown to the police. Exhibit 2 at 39:09.

b. Interview with Acosta

After Detective Aceves interviewed Faucett, he interviewed Acosta. The prosecuting attorney's office signed a written immunity agreement with Acosta. CP 35. Aceves also interviewed Amaya. CP 41. After these interviews, Aceves concluded that Faucett's statements and Acosta's statements "collided." CP 37. Aceves based his conclusion on Faucett's stated intention to unite Anderson and Fernandez to settle their differences and Acosta's statement that she heard Bridges, Anderson and Faucett talking about the sexual encounter setup. CP 37. Aceves also concluded that Faucett was untruthful because she omitted minor details such as assigning Fernandez a fictitious name, laughing about how she planned to lure Fernandez to the Stonegate Apartments, and failing to mention that

Anderson had bought the gun and a cell phone the day of the homicide. CP 37.

However, these “omissions” were based on testimony from Acosta, which Aceves could not verify.

c. Interview with Amaya

The State also signed a written immunity agreement with Amaya. CP 41. According to Aceves’ supplemental report, Amaya stated that when Faucett confirmed Fernandez had arrived at the Stonegate Apartments, Anderson brandished a .45 caliber firearm and exited the vehicle. CP 44. Bridges exited the vehicle with Anderson, they both put on hooded jackets and Bridges reached for his 9mm firearm and a second clip. CP 44. Moments after Anderson and Bridges exited the vehicle, Amaya heard several booming sounds followed by a loud bang sound and Amaya stated that he believed Faucett knew what was going to happen that night because she did not appear surprised or shocked by the sounds. CP 44-45.

Aceves believed that Faucett violated her obligation under the Cooperation Agreement because Aceves chose to believe Amaya instead of Facucett. The State amended the charges against Faucett to include conspiracy to commit murder. RP 3-5 (2/10/15);

CP 8, 38.

d. Hearing on Motion to Enforce Cooperation Agreement

Faucett moved to dismiss the conspiracy charge and to enforce the cooperation agreement. CP 11. The court denied the motion to dismiss and to enforce the agreement and entered the following findings:

5. After a telephone conversation a few days after the December 30th interview, Deputy Prosecuting Attorney Hultgrenn communicated, through Detective Aceves, a verbal agreement that the Defendant would not be charged with any type of Murder if she spoke of her complete involvement and spoke with absolute honesty.
6. The Defendant agreed to those terms.
7. The Defendant's statements given on January 5, 2015 are directly conflicted in significant ways by the statements of Raquel Acosta and Luis Amaya.

CP 106.

The court made the following conclusions of law:

1. Plea agreements between the State and Defendant should ordinarily be in writing.
2. The Defendant had two obligations under this agreement: to speak of her complete involvement, and to tell the absolute truth.
3. The Defendant did not speak to the detective with absolute truth regarding her full involvement in this case.
4. The State's agreement with the Defendant became null and void when she was dishonest.

5. The Defendant's Motion to Enforce the Plea Agreement and Dismiss the Amended Information is denied.

CP 106.

Faucett pled guilty to manslaughter as charged in the fifth amended information. CP 118, 132.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED FAUCETT'S MOTION TO ENFORCE HER NEGOTIATED INFORMAL IMMUNITY AGREEMENT WITH THE STATE.

The trial court erred when it denied Faucett's motion to enforce her negotiated informal immunity agreement with the State because Faucett did not materially breach the agreement; the State breached the agreement by amending the information. Whether the State breached the informal immunity agreement is a mixed question of law and fact. *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995). To resolve a mixed question of law and fact, the court must establish the relevant facts, determine the applicable law and then apply the law to the facts. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016) (citing *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993)).

Constitutional issues are reviewed de novo. *Samalia*, 186

Wn. 2d at 269.

Both the Fifth Amendment to the United States Constitution and art. I, § 9 of the Washington constitution permit a person to refuse to testify against him or herself in a criminal trial and to refuse to answer official questions where the answer may incriminate him or her in the future criminal proceedings. U.S. Const. Amend. V.; *State v. Powell*, 193 Wn. App. 112, 117, 370 P.3d 56 (2016); *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (The Fifth Amendment and art. I, § 9 are coextensive).

When a defendant has not claimed the Fifth Amendment privilege against self-incrimination, the State may grant the defendant varying degrees of immunity in an informal agreement. *Dudden*, 65 F.3d at 1467; *State v. Bryant*, 146 Wn.2d 90, 97, 42 P.3d 1278 (2002).

An informal immunity agreement falls into two categories: “transactional immunity” and “use/derivative use immunity.” *Bryant*, 146 Wn.2d at 97. “Transactional immunity precludes prosecution arising from any transaction about which a witness testifies, while use/derivative use immunity acts only to suppress a witness’ testimony and evidence derived directly or indirectly from that

testimony.” *Bryant*, 146 Wn.2d at 97. The general purpose of both types of informal immunity agreements is for an accused to trade information to enable the State to make a case against other defendants. *Bryant*, 146 Wn.2d at 98 (interpreting a use/derivative use immunity agreement). Here the State did not specify what type of immunity it granted.

To determine whether an informal immunity agreement has been breached, courts have “resorted to a patchwork of statutory, contract, equitable and fifth amendment due process analytical approaches.” *Bryant*, 146 Wn.2d at 96.

a. The State Did Not Prove by a Preponderance of the Evidence that Faucett breached the Immunity Agreement

Informal immunity agreements are subject to contract analysis, but the “panaoply of contract law doctrines” are not transported “in toto”. *Bryant*, 146 Wn.2d 90, 96, 99 (citing *State v. Reed*, 75 Wn. App. 742, 744, 879 P.2d 1000 (1994); *Dudden*, 65 F.3d at 1467). The State bears responsibility for any lack of clarity. *Thomas v. I.N.S.*, 35 F.3d 1332, 1337 (9th Cir. 1994), as amended on denial of reh'g (Nov. 23, 1994) (Thomas I) (citing *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir.1992)). A cooperation, or

immunity, agreement is analogous to a plea agreement. *Thomas I*, 35 F.3d at 1337 (citing *United States v. Carrillo*, 709 F.2d 35, 36 (9th Cir.1983)).

The State may rescind a plea agreement if it proves by a preponderance of the evidence the defendant breached that agreement. *State v. Townsend*, 2 Wn. App. 2d 434, 438, 409 P.3d 1094 (2018) (citing *State v. Thomas*, 79 Wn. App. 32, 36-37, 899 P.2d 1312 (1995) (Thomas II)). However, merely accusing the defendant of misconduct is insufficient and does not relieve the State of its bargained-for duty. *Matter of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982) (citations omitted).

A party is only justified in abandoning the contract if the other party's breach is material – that is, it defeats the contract's purpose. *Park Ave. Condo. Owners Ass'n v. Buchan Devs., L.L.C.*, 117 Wn. App. 369, 383, 71 P.3d 692 (2003).

In *U.S. v. Packwood*, 848 F.2d 1009, 1010-1011 (1988), the defendant signed a plea agreement in which he agreed to plead guilty to one count of bank robbery and to cooperate and testify in the investigation of other robberies and the murder of Janette Pimentel in return for freedom from prosecution for the other

robberies and the murder. *Packwood*, 848 F.2d at 1010. Packwood provided information about his movements on the day of the murder. *Packwood*, 848 F.2d at 1010.

The plea agreement specifically provided:

Should it be determined by the United States Attorney's Office that Mr. Packwood has willfully given materially incomplete or false testimony or false information, he shall be subject to prosecution for any appropriate federal criminal violation, including but not limited to perjury, and false statements. Furthermore, should Mr. Packwood willfully violate any part of this agreement, by giving materially incomplete or false testimony or false information, or by refusing to testify at any trial or trials or ancillary proceedings thereto, then Mr. Packwood can be prosecuted for each and every crime which he may have admitted to the Grand Jury or the United States Attorney's Office.

Packwood, 848 F.2d at 1012.

Five years later, a participant in the murder confessed that he and Packwood conspired to murder Pimentel. *Packwood*, 848 F.2d at 1010. Packwood was indicted for Pimentel's murder and he moved to dismiss the indictment based on his plea agreement. The Ninth Circuit held that Packwood did not breach the agreement by providing incomplete information because under the literal terms of the agreement information that was merely incomplete was not a breach. *Packwood*, 848 F.2d at 1012.

Similarly here, only false information constitutes a breach under the literal terms of the Immunity Agreement. In both cases, Packwood and Faucett were obligated to fully cooperate and speak with truth with complete honesty. Exhibit 2 at 1:15. Even if Faucett inadvertently omitted certain details it does not constitute a lie. Faucett like Packwood did not lie to Aceves, but rather failed to disclose details Aceves did not inquire about and details Faucett might not have considered important. Under the literal terms of the agreement failure to disclose her motivation for requesting Fernandez to meet her at the Stonegate Apartments is not a breach.

Additionally, Aceves' report was not conclusive evidence that Faucett was uncooperative or dishonest. Rather, the report reflected Aceves personal opinion that Faucett's version of the incident differed from Amayas. Under *Packwood*, and *Townsend*, Aceves personal opinion was insufficient to establish that Faucett breached the agreement. *Townsend*, 409 P.3d at 1096-97. Contrary to Aceves' report, and the State's assertion, Faucett fully performed under the Immunity Agreement by revealing new information about the incident, beginning with: Anderson seeing Fernandez's vehicle in the Albertson's parking lot, providing enough information to implicate

Anderson in premeditated murder; placing Bridges at the murder scene, and implicating him as an accomplice; in addition to revealing how Faucett convinced Fernandez to appear at the Stonegate Apartments and admitted to aiding Anderson and Bridges in evading the police after the murder. CP 32; Exhibit 2 at 1:08:30. This information satisfied Faucett's obligation to "cooperate to the fullest and talk with truth and complete honesty." Exhibit 2 at 1:15.

Under *Packwood* minor omissions in Faucett's January 5 interview were immaterial and did not constitute a breach under the literal terms of the Agreement. Faucett admitted she knew Anderson had a gun. It is immaterial when he purchased it. It is equally immaterial: when Anderson purchased his cell phone; whether Faucett had a fictitious name for Fernandez; or whether she laughed about getting him to go to the Stonegate Apartments. CP 37. Even if the State could prove Faucett intentionally omitted those facts, those omissions did not defeat the purpose of the agreement – to obtain truthful, honest, new information about the events leading up to the homicide. CP 32. Faucett testified that she did not believe Anderson would actually kill Fernandez and the State did not prove that Faucett intentionally made any material omissions. CP 34.

Under *Bryant*, the State was not authorized to rescind the Immunity Agreement. Therefore, this Court must reverse Faucett's conviction for manslaughter because it was based on immunized testimony. *Bryant*, 146 Wn.2d at 92.

b. The Doctrine of Fundamental Fairness Requires Dismissal of The Amended Information Against Faucett

The doctrine of fundamental fairness applies to informal immunity agreements because the accused waives the Fifth Amendment right against self-incrimination in exchange for a promise by the government. *Bryant*, 146 Wn.2d at 105. Fundamental Fairness requires that the government be "scrupulously fair" when honoring the terms of an informal immunity agreement. *Bryant*, 146 Wn.2d at 105. "There is more at stake than just the liberty of this defendant" such as "the honor of the government" and "public confidence in fair administration of justice." *Bryant*, 146 Wn.2d at 104 (*quoting United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)).

In *Bryant*, the Supreme Court applied the doctrine of fundamental fairness to interpret an immunity agreement based on the Defendant's understanding of the agreement when he waived

his right against self-incrimination. *Bryant*, 146 Wn.2d at 104. Bryant was arrested in King County and he offered to provide information about unsolved robberies that occurred along the I-5 corridor. *Bryant*, 146 Wn.2d at 92. The invasion of the Linari's home in Snohomish County was one of the unsolved robberies under investigation. *Bryant*, 146 Wn.2d at 106.

The King County prosecutor signed an informal immunity agreement which contained broad sweeping language that "nothing you reveal can ever be used against you in any prosecution" and "nothing you reveal can be utilized by law enforcement to find additional evidence to use against you." *Bryant*, 146 Wn.2d at 93. In exchange, Bryant was obligated to be completely candid and truthful. *Bryant*, 146 Wn.2d at 93.

Bryant implicated Dorman, but when negotiations broke down, King County prosecutors contacted Dorman and offered him the same terms. Dorman implicated Bryant in the Linari home invasion and as a result Snohomish County charged Bryant with robbery and kidnapping. *Bryant*, 146 Wn.2d at 94. Bryant moved to suppress Dorman's testimony and to dismiss all charges in King and Snohomish County. *Bryant*, 146 Wn.2d at 95.

Bryant understood the agreement to include all crimes under investigation regardless of the county of origin. *Bryant*, 146 Wn.2d 95. The Court applied the doctrine of fundamental fairness to hold that Bryant's understanding of the agreement to include all crimes required dismissal of all charges against Bryant related to the Linari case. *Bryant*, 146 Wn.2d at 106.

Similarly here, the terms of the State's verbal agreement used broad language to convey that the State would not charge Faucett with a murder type crime. Manslaughter is a murder type crime. "Manslaughter includes all homicides not falling within the definitions of murder in the first or second degree, or excusable or justifiable homicide." *State v. Utter*, 4 Wn. App. 137, 144, 950 P.2d 1 (1971) (quoting *State v. Hedges*, 8 Wn.2d 652, 656, 113 P.2d 530 (1941)). Faucett understood manslaughter to be a murder type crime. It makes no difference that Faucett pled guilty because "[w]hen 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." *Mabry v. Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). The

state violated the terms of the agreement charging Faucett with manslaughter.

Faucett was also required to “cooperate to the fullest and talk with truth and complete honesty.” Exhibit 2 at 1:15. The State did not specify that Faucett was required to remember and reveal details she might not have remembered or did not understand to be significant. Acevedes’ failure to ask questions about specific concerns does not negate Faucett’s full compliance with the agreement. Faucett cooperated and spoke the truth, she did not lie or refuse to answer questions and she provided the details she remembered. Under *Bryant*, the State’s failure to define the terms of the agreement with more detail did not relieve the state of its obligation to honor the agreement based on Faucett’s understanding. *Bryant*, 146 Wn.2d at 106 As in *Bryant*, the court was required to interpret the Immunity Agreement based on Faucett’s understanding of the agreement.

To allow the State to rescind the Immunity Agreement and bring a murder charge after Faucett detrimentally relied on the State’s promise not to bring any murder type charges undermines the public confidence in the fair administration of justice. *Bryant*, 146

Wn.2d at 104 (*citing Carter*, 454 F.2d at 428). Accordingly, this Court must enforce the State's immunity agreement and dismiss the manslaughter charge against Faucett. *Bryant*, 146 Wn.2d at 104.

c. The State breached the Immunity Agreement by violating its duty of good faith and fair dealing

The State "has a concomitant duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement." *State v. Sledge*, 133 Wn. 2d 828, 840, 947 P.2d 1199 (1997), *as amended* (Jan. 28, 1998) (*citing In re Palodichuk*, 22 Wn. App, 107, 589 P.2d 269 (1978)).

In *Sledge*, the State agreed to recommend a standard range juvenile confinement time of 21 to 28 weeks if Sledge plead guilty to Taking a Motor Vehicle Without Permission. *Sledge*, 133 Wn. 2d at 831. Sledge stipulated that a Manifest Injustice Report could be admitted at the disposition hearing. However, despite this agreement and the stipulation, the prosecutor insisted on a hearing with live witnesses to support establishing aggravating factors for an exceptional disposition. The prosecutor also gave a summation detailing the aggravating factors. *Sledge*, 133 Wn. 2d at 831. The

prosecutor's conduct in the disposition hearing violated the State's duty of good faith and fair dealing by undercutting its recommendation. *Sledge*, 133 Wn. 2d at 843.

The instant case is similar to *Sledge* where the State highlighted the aggravating factors that could form the basis of an exceptional disposition even though it agreed to a standard range sentence. Here, the State knew Faucett was involved with Fernandez's murder before it made the immunity Agreement. By offering Faucett immunity, the State received the benefit of the bargain – enough information to convict Anderson and Bridges. The State may have miscalculated the extent of Faucett's involvement, but the Immunity Agreement was not conditioned upon Faucett's level of involvement.

Under *Sledge*, here is no difference between highlighting aggravating factors to motivate the court to impose a greater sentence and highlighting Faucett's unknown participation or motivation - when those factors cannot be used to undermine the Immunity Agreement. The State simply did not want to uphold its agreement when it learned Faucett was the one who persuaded Fernandez to go to the Stonegate Apartments. RP 18 (3/10/15).

Even an investigating officer cannot undermine the prosecution's plea bargain. *State v. MacDonald*, 183 Wn.2d 1, 9, 346 P.3d 748 (2015), *as corrected* 346 P.3d 748 (2015). In *MacDonald*, the defendant entered into a plea agreement for second degree manslaughter in exchange for the State's recommendation of a 5-year suspended sentence with 16 months confinement and credit for time served. *MacDonald*, 183 Wn.2d at 4.

At sentencing, the trial court allowed investigating Officer Tompkins to testify as a victim's advocate and he immediately asked the court to impose the maximum sentence. In addition, he presented details about the victim's death, provided photographs of the victim's body, attacked each point in favor of the plea agreement and asked the court to hold MacDonald accountable for the crime. *MacDonald*, 183 Wn.2d at 20. The Supreme Court reversed MacDonald's conviction holding that Tompkins' advocacy undermined the State's plea agreement which constituted a breach. *MacDonald*, 183 Wn.2d at 21.

Aceves' conduct is similar to Officer Tompkins in *MacDonald*. Just as Officer Tompkins attacked each point in favor of the plea agreement, Aceves attacked minute variations between Faucett's

and Acosta's testimony, and interjected his personal opinion and commentary into his supplemental report in support of rescinding the Immunity Agreement. CP 32-44. Pointing to immaterial variations in the testimony and commenting that Faucett's motivation for her conduct does not make sense, and cannot support rescinding the Immunity Agreement because as in *MacDonald*, no state actor may undermine the state's agreement. *MacDonald*, 183 Wn.2d at 20. Here, Aceves' conduct like Tompkin's, undercut the State's agreement not to bring murder charges against Faucett.

(i). Remedy

Although the law regarding a plea agreement is analogous to an immunity agreement, the remedy differs. When the State violates "an agreement to induce an accused to waive the fifth amendment right against self-incrimination... [it] may require the crafting of a remedy consistent with the scope of the privilege against self-incrimination." *Bryant*, 146 Wn.2d at 69 (citing *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)).

In sum, the State violated its duty of good faith and fair dealing when it breached the Immunity Agreement. The State cannot breach its agreement to Faucett and also benefit from its

bargain. *MacDonald*, 183 Wn. 2d at 8. Here, consistent with *Bryant*, *Sledge*, and *MacDonnald*, the remedy requires reversal of Faucett's manslaughter charge because Faucett complied with the Immunity Agreement and the state agreed not to charge her with manslaughter, a crime related to murder.

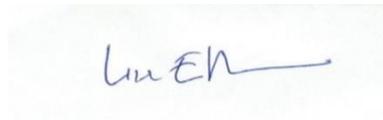
Rendering Criminal Assistance in the First Degree has a seriousness level of V. RCW 9.94A.515. Faucett's offender score was 1. CP 134. Had Faucett been charged with Rendering Criminal Assistance in the First Degree, under the parties' Immunity Agreement, the standard range sentence would have been twelve and a half to fourteen months. RCW 9.94A.510. As a result of the State's breach, Faucett pled guilty to Manslaughter and agreed to a sentence of 130 months. Therefore, the State's conduct in breaching the Cooperation Agreement increased her sentence from a maximum of 14 months to 130 months. CP 134. This court must remand this case to enforce the Immunity Agreement, vacate the Manslaughter charge and sentence Faucett for Rendering Criminal Assistance.

E. CONCLUSION

Faucett respectfully requests this Court remand this matter to the trial court to enforce the State's Immunity Agreement by vacating the Manslaughter charge, and vacating Faucett's guilty plea to Manslaughter, and reinstating the Rendering Criminal Assistance charge.

DATED this 7th day of June 2018.

Respectfully submitted,

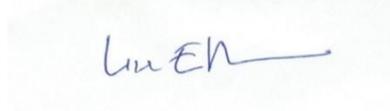


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I, Lise Ellner, a person over the age of 18 years of age, served the Franklin County Prosecutor's Office appeals@co.franklin.wa.us; Teresa Chen tchen@co.franklin.wa.us; and Mary Faucett 17J-13149, Yakima County Department of Corrections, 111 N Front Street, Yakima, WA 98901 a true copy of the document to which this certificate is affixed on June 7, 2018. Service was made by electronically to the prosecutor and Mary Faucett by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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