

FILED
Court of Appeals
Division III
State of Washington
12/5/2019 12:53 PM

NO. 36390-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

WYATT WALKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PEND ORIELLE COUNTY

The Honorable Patrick A. Monasmith, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Did Walker's opening brief predict and refute all pertinent claims in the state's response?

2. Are the rest of the state's responses non sequiturs?

B. SUPPLEMENTAL ARGUMENT

THE RECORD AND CONTROLLING LAW SHOW THE STATE BREACHED THE PLEA AGREEMENT. REVERSAL IS REQUIRED.

Walker's opening brief raised a simple claim: the state breached the plea agreement when it failed to recommend concurrent sentences as required by the plea agreement. BOA at 8-10. Walker's brief also predicted three potential state responses and showed why each lacked merit. BOA at 10-12.

In response, the state concedes the sentencing prosecutor failed to recommend concurrent sentences at the sentencing hearing. BOR at 5 (conceding the prosecutor "incorrectly" answered "yes" when the court asked if the sentences should be consecutive); BOR at 8 (conceding the prosecutor "misspoke"). Not only did the prosecutor err in answering the court's question, the prosecutor failed to make the agreed recommendation at any time. RP 29-32. As Walker's opening brief shows, this concession ends this Court's

inquiry. BOA at 8-11. The state's remaining efforts to salvage its conceded breach are meritless.

The state repeatedly points to the written plea agreement. BOR at 3-4, 7-8, 9-10. Without fleshing out this claim, the state appears to assert that the presence of a written recommendation in the court file can excuse the state from its agreed obligation to make the agreed recommendation at sentencing. BOR at 7-10. Not surprisingly, the state cites no authority for this meritless position. As Walker showed in his opening brief, the fact that a court file contains the correct written plea agreement cannot relieve a prosecutor from making the agreed recommendation at sentencing. BOA at 10-11 (citing and discussing authority).

The state's brief also references the "notice of settlement" provided to the court on May 3, 2018, but the state has not designated that document for the appellate record. See BOR at 2, ¶ 2 (citing "CP 39 [sic]"); BOR at 5, ¶ 2; BOR at 7, ¶ 3; BOR at 8 (going so far as to claim the court reviewed the notice of settlement to find the concurrent recommendation); BOR at 10.¹ The state is simply

¹ It is possible counsel for the state either: (1) is unfamiliar with the rules for designating and citing clerk's papers, or (2) overlooked the index to clerk's papers. The state's brief is starkly bereft of citations to the clerk's papers (see e.g., BOR at 1-7), and all three extant

wrong about this. The notice of settlement did not include the concurrent sentence recommendation, which is instead contained in the plea agreement. Cf. Appendix A with CP 24.

In the interest of professional courtesy and to assist this Court, appellant's counsel has designated the "notice of settlement" and attached a copy to this brief as an appendix. However, it adds nothing to the state's position because the terms of the plea agreement instead are fully stated in the plea agreement. Furthermore, as discussed in Walker's opening brief, the state initially proposed an agreement that did not require the state to recommend concurrent sentences, CP 12, but Walker bargained for a different final agreement which expressly required the state to recommend concurrent sentences. CP 24, 34. Curiously, the state's brief neglects to mention these important facts that are fully supported by the record.

The state next claims it did not recommend an exceptional sentence. BOR at 8-9. But Walker argues the state failed to recommend concurrent sentences, which the state properly

citations are incorrect. BOR at 2 (citing "CP 39 [sic]" as the not-yet-designated Notice of Settlement; BOR at 4 (citing "CP 41 [sic]" for quotations found on CP 24 and 34).

concedes. The absence of a second breach of the plea agreement does not cure the state's first breach. The state cites no contrary authority and counsel for appellant is aware of none.

The state briefly points out minor factual distinctions between a few cases discussed in Walker's brief and the present case. BOR at 11. This effort fails to recognize that the settled rule applied in those cases applies equally here. Simply stated, the state's failure to make an agreed recommendation is a breach of the plea agreement. Appellate courts remedy such breaches by reversing the conviction and remanding to allow the appellant to choose withdrawal or specific performance. BOA at 8-11 (citing settled and controlling authority).

The state next notes that reviewing courts apply an "objective standard" to determine whether the state breached a plea agreement. BOR at 9. While this is likely accurate, the state's breach is plain under any standard. As the state properly concedes, the prosecutor did not recommend concurrent sentences at the sentencing hearing. BOR at 5, 8; RP 29-32, 41.

Under various argument headings the state repeats its claim that a sentencing court need not follow an agreed sentencing

recommendation. BOR at 12-16.² This also is true, but irrelevant. As shown in Walker's opening brief, a court's decision not to follow an agreed recommendation does not excuse the state's failure to make the agreed recommendation. BOA at 10-11.

The state's remaining claims are non sequiturs as they have nothing to do with the argument Walker has raised on appeal. BOR at 14-16.

C. CONCLUSION

For the reasons stated here and in the opening brief, this Court should vacate the judgment and sentence and remand the case to the trial court to allow Walker his choice of remedy.

DATED this 5th day of December, 2019.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

² The state goes so far as to suggest “[t]echnically, if anyone breached the plea agreement, it was the Court, not the State.” BOR at 13. Again, not surprisingly, the state cites no authority for this bold theory.

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Appendix

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TAMMIE A. LAMBIE
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PEND OREILLE

STATE OF WASHINGTON,

Plaintiff,

vs.
WYATT WADE WALKER
Defendant.

NO. 18-1-00005-2

NOTICE OF SETTLEMENT WAIVER
OF SPEEDY TRIAL AND ORDER
STRIKING TRIAL DATE

Clerk's Action Required

The State of Washington and the defendant have reached a settlement of the above case. The matter should be set for entry of a plea as follows:

DATE: 5/24, 2018, TIME: 9:00 a.m./p.m.

Superior Court [] District Court

The attorneys and defendant agree and stipulate as follows:

- (1) The trial setting, if any, in the above case is stricken;
- (2) If a plea of guilty is not entered as scheduled herein, a new trial date will be scheduled within sixty (60) days or ninety (90) days of the next court hearing, which shall be treated as a new arraignment for purposes of computing the trial for trial under CrR 3.3;
- (3) By signing this Notice, the defendant waives his or her right to trial within the time limits previously set and agrees to the provisions contained herein.
- (4) Settlement Agreement is as follows: _____

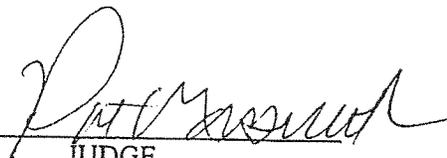
- DEF WILL PLEAD GUILTY TO COUNT I, ASST 2ND;
- STATE WILL RECOMMEND 9 (NINE) MONTHS OF JAIL;
- DEFENSE IS FREE TO MAKE HIS OWN RECOMMENDATION
AS TO JAIL TIME;

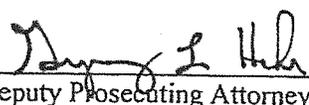
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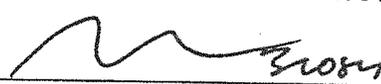
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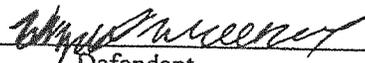
- STATE WILL DISMISS COUNT III; ASSAULT 4TH, DV;
- DEF WILL PLEAD TO COUNT II, MALICIOUS MISCHIEF AND
STATE WILL RECOMMEND 365 / 365 SUSP, \$5000 / 5000 SUSP;
- RESTITUTION FOR MEDICAL AND CAR;
- FINES AND COSTS.
- ANGER MANAGEMENT PROGRAM;
- 12 MONTHS DOC COMMUNITY CUSTODY;
- NO CONTACT WITH VICTIM DANIEL MILLAGE;
- DEF CAN ARGUE FOR A DELAYED REPORT DATE

5-3-18
DATE


JUDGE PATRICK A. MONASMITH


Deputy Prosecuting Attorney
WSBA 17458


Attorney for Defendant


Defendant

NIELSEN, BROMAN & KOCH P.L.L.C.

December 05, 2019 - 12:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: State of Washington v. Wyatt Wade Walker
Superior Court Case Number: 18-1-00005-2

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- ghicks@wapa-sep.wa.gov
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