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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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Related to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	9
1. THE STATE’S FAILURE TO RECOMMEND CONCURRENT SENTENCES REQUIRES VACATION OF THE JUDGMENT AND REMAND.....	9
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Lord

152 Wn.2d 182, 94 P.3d 952, 955 (2004);.....9, 10, 11, 12, 13

State v. Barber

170 Wn.2d 854, 248 P.3d 494 (2011)..... 9, 10

State v. Neisler

191 Wash. App. 259, 361 P.3d 278 (2015)..... 12

State v. Sledge

133 Wn.2d 828, 947 P.2d 1199 (1997)..... 6, 9, 12, 13

State v. Tourtellotte

88 Wn.2d 579, 564 P.2d 799 (1977)..... 10

State v. Van Buren

101 Wn. App. 206, 2 P.3d 991 (2000) 6, 12

FEDERAL CASES

Santobello v. New York

404 U.S. 257, 92 S.Ct. 495, 30 L Ed.2d 427 (1971) 10

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.5 12

RCW 9.94A.589 7

A. ASSIGNMENTS OF ERROR

1. The prosecutor's failure to recommend concurrent sentences as required by the plea agreement denied appellant due process. RP 29-32, 41.

2. The trial court erred in denying appellant's motion to withdraw the plea and to vacate the judgment and sentence. CP 60-61.

Issues Related to Assignments of Error

1. The parties entered a plea agreement in which appellant waived numerous constitutional rights and plead guilty to two of three charged counts. In return, the state agreed to recommend concurrent sentences on those two counts. Where the state failed to recommend concurrent sentences, and where the court imposed consecutive sentences, was appellant denied his right to due process?

2. Did the sentencing court err in denying appellant's motion to withdraw the plea and vacate the judgment and sentence?

3. Does settled law require remand to the trial court for a determination whether appellant wishes to seek specific performance of the plea agreement or to withdraw his plea?

B. STATEMENT OF THE CASE

On January 11, 2018, the Pend Oreille County prosecutor charged appellant Wyatt Walker with three counts: 1 – second degree assault; 2 – third degree malicious mischief, and 3 – fourth degree assault. CP 1-3. The events leading to the charges occurred several months earlier on October 28, 2017, when Daniel Millage visited Walker's girlfriend at Walker's home over Walker's expressed opposition. Walker came home and punched Millage, then followed Millage to his car and broke the windshield. Millage ended up with a fractured orbital socket requiring surgery. At some point, Walker allegedly also shoved his girlfriend. CP 4-8, 40.¹

Walker had no prior criminal history. RP 39. The standard range for count 1 was 3-9 months. Count 2, a gross misdemeanor, had a range of 0-364 days in jail. CP 29, 43. On April 25, 2018, the state offered Walker a plea deal where the state would dismiss count 3 if Walker plead guilty to counts 1 and 2. CP 9-18. The state's initial proposal offered to recommend a high-end nine-month sentence on count 1 but expressed no recommendation for count 2. CP 12.

¹ This brief summary of the incident comes from allegations in the statement of probable cause. CP 4-8. Walker did not adopt those facts as part of his statement on plea of guilty, and they were never proven to be true. CP 40.

On May 24, 2018, Walker and the state entered an agreement whereby Walker would plead to counts 1 and 2 in consideration for the state's expressed agreement to recommend concurrent nine-month sentences on counts 1 and 2. The state also agreed Walker could recommend a lower sentence. Count 3 would be dismissed. CP 24, 34; RP 14-15, 22-23.

At the hearing on May 24 the court conducted a colloquy with Walker explaining the plea's consequences. After the colloquy, the court accepted Walker's guilty pleas to counts 1 and 2 as knowing, intelligent, and voluntary. CP 41; RP 21-26.

Sentencing occurred June 14, 2018. RP 28. The prosecutor emphasized facts relating to the Millage assault that the state believed justified a high-end sentence on count 1. The prosecutor focused on Millage's injuries, loss of work, and inability to participate in National Guard training. RP 29-32. In summing up, the prosecutor said "[i]f there was a way, Your Honor, I could have argued extenuating circumstances to get it above nine months I would have, but that's hard to do when the charging language we're using is substantial bodily injury." RP 32. The prosecutor continued, "nine months is

even under where we should be given the facts and given what happened that night, Your Honor.” RP 32.²

The prosecutor briefly mentioned the broken windshield that formed the basis for count 2. RP 30 (lines 8-9). The prosecutor failed to ask the court to impose concurrent sentences. RP 29-32.

Defense counsel asked the court to impose a low-end sentence of three months for count 1. Walker had no criminal history, but this offense was a strike with numerous collateral consequences. Counsel noted Walker’s consistent efforts to do the right thing, which included accepting the guilty plea despite the state’s high-end recommendation. RP 34-36, 39. Walker’s employer also spoke on Walker’s behalf, praising Walker’s character and ability at work. RP 36-38

In its oral remarks, the sentencing court mentioned the state’s assertion that nine months was “the max . . . and if we could ask for more we would, if we could find a basis we would, because nine months is not sufficient here, in the State’s opinion.” RP 40. The court then said there was “every reason to impose the maximum

² Millage did not appear for sentencing. Millage’s mother briefly spoke about impacts of the offense on Millage. RP 33-34.

possible sentence” on count 1, based on Millage’s injuries. For that reason, the court imposed a nine-month sentence on count 1. RP 41.

The court then moved to count 2.

THE COURT: . . . And, then on count two, which is the gross misdemeanor, malicious mischief, and the State was requesting – or this – bound to recommend nine months, and that would run consecutive to that?

MR. HICKS [prosecutor]: Yes, Your Honor. Thank you.

THE COURT: And, I – or, they – actually, the State was recommending concurrent to that, the nine months both, and that’s a 364 day maximum sentence on that – I apologize, I’m trying to find the right page, and what I am going to do with the gross misdemeanor is that I am going to impose the 364 days in jail on count two, but I am going to suspend 300 days of that, and I am going to run the 64 days that are being imposed consecutive to the nine months of confinement.

RP 41-42.

Defense counsel objected to the court’s imposition of sentence and argued the state “essentially argued an exceptional sentence by saying ‘if he could have, he would have done more[.]’” RP 43. Counsel argued the court had imposed an unlawful exceptional sentence and notified the court of an appeal. RP 43. Counsel felt the state’s recommendation was “a sandbag” and led to an unlawful exceptional sentence. RP 44.

The court stated Walker had been informed the court was not bound by either party's recommendation. The court also asserted there was no statutory obligation to run the sentences concurrently. RP 44. The court reiterated its opinion that a low end sentence was not appropriate "given the amount of physical damage that was caused and the consequences that were suffered by the victim in this case, and the nature of the violence, unprovoked[.]" RP 44-45.

The written judgment and sentence imposed nine months on count 1, with 64 days consecutive on count 2. CP 45.³

Several days after sentencing defense counsel filed a motion to vacate the judgment and sentence and to withdraw the plea. Counsel argued the prosecutor had failed to make the sentence recommendation required by the plea agreement, resulting in what counsel referred to as an unlawful exceptional sentence. The motion cited settled case law for the proposition that the state's failure denied Walker his due process rights. CP 52-53 (citing State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997); State v. Van Buren, 101 Wn. App. 206, 213, 2 P.3d 991 (2000)). Counsel also mistakenly argued a

³ The court also imposed 12 months of community custody, various legal financial obligations, and no contact provisions. CP 45-48.

concurrent sentence was statutorily required by RCW 9.94A.589(1)(a).

The state responded with four main points. First the state conceded the plea agreement required the state to recommend concurrent sentences. Second, the state erroneously claimed the prosecutor had in fact made that recommendation. Supp. CP (sub no. 51, State's Response at 2, ¶¶ 5, 10).

Third, the state pointed out that RCW 9.94A.589's presumption of concurrent felony sentences did not apply to the count 2 gross misdemeanor sentence. The state also argued it had not requested an exceptional sentence, and that the court was not bound by either party's recommendation. Finally, the state asserted Walker could file an appeal on this issue. Supp. CP (sub no 51, at 3-4).

Defense counsel's reply cited several more cases supporting the settled proposition that a prosecutor violates due process by failing to make a sentence recommendation as required by a plea agreement. CP 54-55.

At the hearing on August 2, 2018, defense counsel essentially repeated and emphasized Walker's written arguments. Counsel believed the state violated the plea agreement by telling the court "If I could ask for more, I would." RP 54-57, 61-65.

The prosecutor pointed out he only argued for the high end of the count 1 range and did not request an exceptional sentence. RP 57-58. Counsel carefully noted “the State never argued for consecutive sentences.” RP 58 (emphasis added). But counsel did not repeat the erroneous written claim that the state had actually recommended concurrent sentences.⁴ The state again noted Walker could appeal if he believed the process was unfair. RP 61.

The court orally recognized it did not have “a vast degree of experience in sentencing,” but it was aware that misdemeanor sentences could run consecutive to felonies. RP 65. The court decided to take the matter under further advisement. RP 66-67.

Several weeks later the court entered its ruling. The court reasoned the count 3 gross misdemeanor was a separate incident from the count 1 assault and that no statutory law precluded a consecutive sentence. The court entered no finding that the state had recommended concurrent sentences as the plea agreement required. RP 70-71.

⁴ Cf. Supp. CP (sub no. 51, at 2 ¶ 10 “The state recommended 09 months of jail on the Assault in the Second Degree charge and 09 months on the Malicious Mischief in the Third Degree charge, to run concurrent.” Emphasis added.)

Two written orders denied the motion to withdraw the plea and vacate the sentence. CP 60-61. As the state suggested, Walker now appeals. CP 62.

C. ARGUMENT

1. THE STATE'S FAILURE TO RECOMMEND CONCURRENT SENTENCES REQUIRES VACATION OF THE JUDGMENT AND REMAND.

This is a simple case arising from a fundamental error. To procure Walker's waiver of his constitutional trial rights, the state agreed to recommend concurrent sentences. The prosecutor failed to make that recommendation.

As Walker's short motion and reply showed, the controlling law is well settled. CP 53-55. Plea agreements are contracts that bind the state and require the state to act in good faith. Because plea agreements also involve the waiver of constitutional rights, good faith is not enough; due process requires the state to actually make the bargained-for recommendation. The state's failure to do so is a breach that entitles the accused to choose the remedy of specific performance or withdrawal of the plea. State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011); In re Lord, 152 Wn.2d 182, 189, 94 P.3d 952, 955 (2004); State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997) (citing, inter alia, Santobello v. New York, 404 U.S. 257,

92 S.Ct. 495, 30 L Ed.2d 427 (1971)); State v. Tourtellotte, 88 Wn.2d 579, 585, 564 P.2d 799 (1977).

“A breach occurs when the State promises, for example, to recommend or not recommend a particular sentence or to file or drop certain charges, and then fails to keep its promise.” State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011) (emphasis added). In Lord, for example, the state agreed to recommend a suspended sentence⁵ if Lord was found amenable to treatment. The state’s initial evaluator and Lord’s initial evaluator concluded Lord was not amenable. Lord sought another evaluation, which concluded he was amenable to treatment. At sentencing, the prosecutor revoked the state’s recommendation for a SSOSA. The sentencing court reasoned it was not bound by the state’s promised recommendation and declined to impose a SSOSA. Lord, 152 Wn.2d at 185-88.

Lord filed a personal restraint petition rather than an appeal. The Washington Supreme Court reviewed the terms of the plea agreement and concluded the state breached its agreed duty to recommend a SSOSA. This violation of due process required

⁵ Lord sought a SSOSA, or Special Sex Offender Sentencing Alternative, with much of the prison time suspended.

vacation of the judgment and remand to allow Lord his choice of remedy. Lord, at 188-93.

These rules apply quickly to Walker's case. The unambiguous plea agreement bound the state to recommend concurrent sentences. CP 24, 34. When the state failed to make that recommendation it breached the agreement. This failure denied Walker his due process rights. Remand is required for a determination whether Walker seeks specific performance or to withdraw his pleas.

In response, the state may seek to avoid these settled rules through several potential arguments. Each lacks merit.

First, the state may note the court's sua sponte effort to search the court file to find what the state had promised to recommend. See RP 41. This would be a factual stretch at best, because the prosecutor instead agreed with the court's initial error that the state was recommending "consecutive" sentences and did not correct the court. But as a matter of law, the court's file foray "to find the right page" and discover the state's agreement changes nothing. Every court file in every plea case contains the state's written agreement. This has never excused the state from the actual duty to make agreed recommendations at sentencing. See e.g., Lord, 152 Wn.2d at 185-87, 192-94 (although sentencing court was well aware of the state's

agreement to recommend a SSOSA, the state's failure to make that recommendation still required vacation of the judgment); State v. Van Buren, 101 Wn. App. 206, 218, 2 P.3d 991 (2000) (the state must present its recommendation "without equivocation.") A contrary rule would render the state's plea and sentencing obligations a hollow charade.

The state may next suggest this error cannot be raised on appeal, but the state argued the contrary in the trial court. RP 61; Supp. CP (sub no 51, at 3-4).⁶ In addition, the state's failure to comply with its plea agreements denies due process and is manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Neisler, 191 Wash. App. 259, 265, 361 P.3d 278 (2015); State v. Van Buren, 101 Wn. App. 206, 218, 2 P.3d 991 (2000).⁷

⁶ The doctrine of judicial estoppel discourages litigants from making contrary claims in successive litigation. See e.g., Haslett v. Planck, 140 Wash. App. 660, 665, 166 P.3d 866, 869 (2007) ("In short, judicial estoppel prevents a litigant from playing fast and loose with the courts") (internal quotations and citations omitted).

⁷ See also Sledge, 133 Wn.2d at 842 (reaching the issue and reversing even though Sledge did not raise the precise objection in the trial court); Lord, 152 Wn.2d at 187-88 (claim could be raised for the first time in a personal restraint petition).

Last, the state may reassert the careful (and subtle) claim it raised during the motion hearing – that the prosecutor “never argued for consecutive sentences.” RP 58. But Walker bargained for the state’s affirmative concurrent recommendation, not the state’s silence as to a consecutive recommendation. The agreement’s plain terms required the state to affirmatively recommend concurrent sentences. While courts may decline to gauge a prosecutor’s degree of “enthusiasm” when making required recommendations, courts do not entirely excuse prosecutors from clear obligations. Sledge, 133 Wn.2d at 840.⁸

The remedy is to vacate the judgment and remand this case to the trial court where Walker can choose between withdrawing his plea or seeking specific performance of the state’s agreement before a different sentencing judge. Lord, 152 Wn.2d at 193; Sledge, 133 Wn.2d at 846.

⁸ The prosecutor’s error was compounded – and certainly not mitigated – by the assertion that the state would have recommended more than nine months if it could have, and that “nine months is even under where we should be[.]” RP 32 (emphasis added).

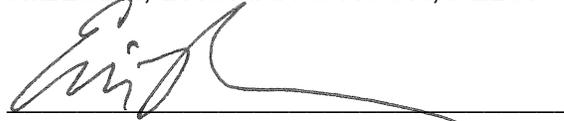
D. CONCLUSION

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 23rd day of September, 2019.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "Eric Broman", written over a horizontal line.

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