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Court of Appeals
Division III
State of Washington
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363902-III

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

STATE OF WASHINGTON,

Respondent

v.

WYATT WADE WALKER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
COUNTY OF PEND OREILLE
The Honorable Judge Jessica Reeves

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR, STATE'S RESPONSE

1. The Appellant was not denied due process because the State honored the plea agreement and the trial judge did not follow the agreement.
2. The trial court did not err in denying Appellant's motion to withdraw the plea and to vacate the judgment and sentence.

II. STATEMENT OF THE CASE

The Pend Oreille County Prosecutor's Office filed an Information on or about January 11, 2018, charging WYATT WADE WALKER (herein after "Appellant") with one count of Assault in the Second Degree, Assault in the Fourth Degree, and Malicious Mischief in the Third Degree. The charges stem from an incident which occurred on October 28, 2017 in Pend Oreille County, Washington.

Courtney Hill was visiting with Daniel Millage on that date in her living room in an apartment she shared with Appellant. Appellant entered the apartment and immediately began an unprovoked attack upon Millage, striking him multiple times about the face and head. Courtney attempted to intervene, but she was struck and thrown to the floor. RP 29.30

Millage immediately fled the second story apartment to his car, with Appellant in hot pursuit. Millage, a member of the Army National Guard

pointed his service pistol at Appellant in an attempt to stop the assault. The assault continued as Appellant smashed the windshield of Millage's car in an attempt to further the assault. Appellant discontinued the assault upon seeing the pistol and returning to the apartment.

Millage went to the hospital that night. Shortly thereafter, a metal plate secured by five metal screws was implanted into his face as a result of the assault. A second surgery was later performed to remove the plate and screws. Millage needed additional surgery to repair a fractured orbital socket caused by the Appellant. Millage would miss approximately two weeks of employment in the National Guard as a result of the assault caused by Appellant. RP 29-30

The maximum penalty for Second Degree Assault is ten years in prison and a \$20,000 fine RCW 9A.20.021(1)(b). The standard range for Appellant is 03-09 months because he had no prior history. Assault in the Fourth Degree and Malicious Mischief in the Third Degree are both Gross Misdemeanors which carry a sentencing range of 0 – 364 days in jail and a maximum fine of \$5,000. RCW 9A.20.021(2).

The parties entered into plea negotiations and prepared, signed, and presented a "Notice of Settlement" to the Court on or about May 03, 2018. CP 39. The document was signed by Superior Court Judge Patrick Monasmith who explained it to Appellant. The document provided that

upon a plea to Assault in the Second Degree, the State would recommend nine months of jail and the defense was free to make his own recommendation as to jail time. Further, upon a plea to the Malicious Mischief in the Third Degree charge, the State would recommend 365 days in jail and a \$5,000 fine, with 365 days and the \$5,000 fine to be suspended. The State would also agree to dismiss the charge of Assault in the Fourth Degree. Judge Monasmith informed Appellant at the hearing: “A judge is free to reject any plea bargain. A judge is free to impose the maximum sentence authorized by law regardless of what the parties recommend. You understand that?” Appellant indicated he did. RP 15.

Appellant pled guilty to Assault in the Second Degree and Malicious Mischief in the Third Degree on May 24, 2018 in front of Judge Monasmith. The judge made a finding that: “The plea he makes today is made knowingly, intelligently, and voluntarily with an understanding of the charge and of the consequences of pleading guilty to this charge.” RP 26. Sentencing was continued to June 14, 2018 before Judge Jessica Reeves.

Several pleadings were prepared and presented to the Court on May 24, 2018. One pleading which was presented and signed by all parties, including Judge Monasmith, was the “Plea Agreement”. The State’s sentence recommendations is contained in paragraph 2.1, which provides:

“Total confinement for Count I: Nine months; total confinement for Count II: Nine Months. Terms on each count to run concurrently.” CP 41.

The second pleading prepared for the Court was the Statement on Plea of Guilty. This document was also signed by all parties, including the Appellant. The Appellant acknowledges in paragraph 6 he is aware the crime of Malicious Mischief in the Third Degree that he is pleading guilty to carries a jail term from 0 days to 364 days. Further, paragraph 6(k) of this document provides that: “The judge does not have to follow anyone’s recommendation as to sentence.” CP 41.

Appellant was sentenced by Judge Reeves on June 14, 2018. The State gave rendition of the facts to Judge Reeves which would have been presented if the case had gone to trial. These undisputed facts included the damage inflicted upon the victim by the Appellant which resulted in a metal plate being inserted into the victim’s face, the fact that the victim pulled a gun to defend himself, and the fact the Appellant assaulted a female as the tried to assault Daniel Millage. The State then told the Court: “The maximum we can ask for is 9 months and that is what the State is requesting.” RP 31. The State did not make any argument for aggravating or extenuating circumstances, and in fact told the court that there were none present.

Judge Reeves imposed a nine month sentence on the felony and held: “I can consider the nature of the crime. I consider the amount of violence, the damage that was caused. This in is not just a first crime, this is a heinous crime for which we have no tolerance.” RP 41.

The Court then sentenced as the second count, the Malicious Mischief. Judge Reeves inquired if the penalty for the gross misdemeanor was to run consecutive to the felony penalty? The State incorrectly answered ‘yes’, but the Court, upon examining the Notice of Settlement, immediately corrected the State. The judge indicated: “Actually, the State was recommending concurrent to that, the nine months both, a 364 day maximum.” RP 41. The court then imposed a 64 day sentence on the second count, to run consecutive to the felony.

When the Appellant objected to the imposition of the 64 days, the Court stated: “At the time he (Appellant) pled he was aware that the Court is not bound by the recommendation,...and that the Court can sentence to the maximum. He knew the State was going to be requesting the maximum and there is no obligation on the part of the Court to run those sentences concurrent to one another.” RP 44. Appellant was taken into custody at this time.

Appellant brought a motion on August 02, 2018 to vacate the judgement and withdraw his plea. The Court in considering the motion,

read the portion of the Notice of Settlement into the record regarding the sentences running concurrently: “Appellant will plead to Count II: Malicious Mischief and the State will recommend 365 with 365 suspended.” The Court held as to the felony sentence: “...nine months was the maximum, there was no argument for aggravating factors or exceptional sentencing.” RP 66. The Court set August 30, 2018 as the date to give its’ ruling.

Judge Reeves denied the defense request to vacate and withdraw the plea on August 30, 2018. She concluded that the “Malicious Mischief, although it was the same day as the Assault, was separate incident in that it was subsequent to the assault”, and the penalty from this charge could therefore run concurrent with the penalty on the felony charge. RP 70.

The judge also disagreed with the defense contention that the State exceeded the recommendation for nine months of jail on the felony; and further held that the State did not persuade the Court to impose a sentence which exceeded the maximum sentence. Judge Reeves noted that: “I think that the statement that the prosecutor made that he would have requested more time if he could, it’s clear that he couldn’t. He was bound by his recommendation to the Court, and it is also clear that defense was informed by the Court, as was the Appellant, that the Court was not bound by that recommendation and could sentence him up to the maximum penalty

allowed under the law, and the Court is not unaware that the prosecution is bound by their recommendation and that the Court is not, and so I don't think it was misconduct. He didn't deviate from his recommendation, and that the Court did not fine – or, did not follow the recommendation was not based on that statement made by the prosecuting attorney. I think I put my basis for that on the record.” RP 71.

Appellant then filed this appeal after his motion to vacate was denied.

III. ARGUMENT

1. Prosecutor did not violate the plea agreement with the Appellant.

There was no fundamental error committed in this case. The plea agreement which was consistently offered to the Appellant was that upon pleading guilty to Assault in the Second Degree and Malicious Mischief in the Third Degree, the State would recommend the maximum penalty of nine months to run concurrently, and the defense could argue for the minimum range of three months. This agreement was expressly stated in the Notice of Settlement signed by the Court on May 03, 2018 and in the Plea Agreement signed by the Court on May 24, 2018. The Appellant was sentenced June 14, 2018 and the Court inquired if the sentences were to run

consecutive? The State misspoke, and indicated they were to run consecutive. The court immediately corrected the State after reviewing the Notice of Settlement, and indicated: "...Actually, the State was recommending concurrent to that, the nine months both". RP 41- 42. The State never mentioned that the sentences should be consecutive from this point forward after being corrected by the Court. The defense at no time objected or took issue with the fact that the State was not clear on the recommendation for a concurrent sentence prior to the court imposing the jail time on June 14th, 2018.

2. State never advocated for a sentence greater than the standard range.

There is absolutely nothing in the record, either in the pleadings or in oral representations to the Court, where the State asked the Court to impose more than nine months of jail. The State did argue that they believed a nine month sentence for a felony strike offense appeared insufficient given both the seriousness of the assault, the fact the victim pulled a gun to defend himself, and the maximum sentence on the Malicious Mischief, a Gross Misdemeanor was three months longer. The language used by the State however, was conditional ("...if we could ask for more...if we could find a basis...") and it was noted this was only an opinion. RP 40. The State could have argued for a sentence outside the standard range and asked the court

to find aggravating factors and impose a larger jail term pursuant to RCW 9.94A.535(2). The State did not do so, and a sentence above the standard range was never asked for. RP 58.

The State is allowed to advocate aggressively for the maximum penalty, particularly where the Appellant has no prior criminal history. The aggressive argument was necessary because the court could sentence the Appellant anywhere from three months to nine months. The Court did not find the State's conditional language to be inappropriate or asking for an exceptional sentence, and held that... "the statement that the prosecutor made that he could have requested more time if he could, it's clear that he couldn't. He was bound by his recommendation to the court...and the court is not unaware that the prosecution is bound by their recommendation and that the Court is not, and so I do not think it was misconduct. He didn't deviate from his recommendation, and that the Court did not find-or, did not follow the recommendation was not based on that statement made by the prosecuting attorney." RP 71.

3. Court applies an objective standard to Determine if there is a breach of the Plea Agreement

The State would argue the standard to determine if there has been a breach of a plea bargain was established in *State v. Van Burien*, 101 Wash.App 206, 2 P.3d 991 (2000), where the Court of Appeals held:" 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.” Jerde, 93 Wash.App. at 780, 970 P.2d 781 (quoting Palodichuk, 22 Wash.App at 110, 589 P.2d 269); *see also* Sledge, 133 Wash.2d at 843 n. 7, 947 P.2d *996 1199 (“The focus of this decision is on the effect of the State’s actions, not the intent behind them.”). “The test is whether the prosecutor contradicts, by word or conduct, the State’s recommendation for a standard range sentence.” Jerde, 93 Wash.App. at 780, 970 P.2d 781 (citing Talley, 134 Wash.2d at 187, 949 P.2d 358). In making this determination, we view the entire sentencing record. Jerde, 93 Wash.App. at 782, 970 P.2d 781. Van Burién at 996. The State would argue that when the entire sentencing record is considered, there was no breach of the plea agreement. The entire record consists of the Notice of Settlement and the Plea Agreement, both of which contain the State’s recommendation of concurrent jail time, the discussion between Judge Reeves and the State on June 14, 2018, of a concurrent or consecutive sentence, and the record from June 14, 2018 indicating Judge Reeve’s is aware of the concurrent recommendation, all of which lead the State to conclude that there was no breach of the plea agreement.

4. This case can be distinguished from cases cited by Appellant.

Appellant cites several cases as authority for this Court to consider. The State argues these cases all have significantly different facts than the present case and thus should not be relied on for authority.

Appellant relies on State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011), as an example of a breach of a plea agreement. This case involves the recommendation of adding a term of community custody when the original agreement did not include this term. This case is distinguished because the State in our case never sought to add a condition which was not present from the beginning. The defense claims that more days were imposed, but the State never requested additional sanctions.

Likewise, the case of In re Lord, 152 Wn. 2d 182, 189, 94 P.3d 952, 955 (2004), is also used by the defense to show breach of a plea agreement. This case involves a prosecutor agreeing to impose jail time under the SSODA sentencing alternative which was not part of the original plea negotiation. The State would argue this case is distinguished similar to Barber, in that under no circumstances did the State add additional conditions which were not in the original offer. The defense also relies upon State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). This case involved the State holding a disposition hearing in a juvenile case to argue aggravating factors after a plea had been offered. Clearly no such action occurred in the present case, and the State could only ask for a sentence

outside the standard range if aggravating factors were found under RCW 9.94A.535(2). This motion was never filed by the State or considered by the Court. This case should not be considered as authority by the Court because the State never argued that aggravating factors existed, unlike the State prosecutor in *Sledge*.

5. Judge does not have to follow recommendations made by the parties.

It is a well settled principle in both case law and statute that a court is not bound to follow a recommendation of the parties.

Washington law provides that a judge does not have to follow a recommendation made by the parties. RCW 9.94A.431(2) states: “The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the Appellant shall be so informed in the time of the plea.”

Washington case law also makes clear that a judge does not have to follow any recommendation contained in a plea agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003), *State v. Henderson*, 99 Wn.App 369, 276, 993 P.2d 928 (2000), *In re Breedlove*, 138 Wn.2d 298 (1999).

This is exactly the rationale Judge Reeves made when she disregarded the sentencing recommendation of the parties. She explained

on August 30, 2018, during the Motion to Withdraw Plea that: “The Court was not bound by that recommendation and could sentence him up to the maximum penalty allowed under the law.” RP 71.

The State would argue that the plea agreement which was reached between the parties was not adopted by the Court, nor did it have to be. Also, regardless of how aggressively the State argued for a concurrent sentence, clearly the Court did not have to accept the agreement. Technically, if anyone breached the plea agreement, it was the Court, not the State.

Appellant was made aware that the Court did not have to accept the sentence recommendation from the parties at every hearing he attended and most pleadings he signed. Appellant was told by Judge Monasmith on May 03, 2018, and then again on May 24, 2018 that the Court was not bound by the plea agreement of the parties and by Judge Reeves on June 14, 2018 and again on August 30, 2018. There was also a provision in the Statement on Plea of Guilty, entered May 24, 2018 which also expressly provided that the Court did not have to follow the plea agreement. Appellant was fully aware of the consequences of pleading guilty and he knew the risk he took by entering the plea, yet he decided to proceed non-the-less. The Appellant should not be rewarded, nor the State punished, for the Appellant assuming the risk and entering his plea of guilty.

6. The decision of the trial court cannot be set aside unless there is abuse of discretion.

The decision of Judge Reeves to not accept the plea agreement can be set aside only if the Court were to find an abuse of discretion. Our Supreme Court holds: “The Sentencing of criminals is subject to the exercise of sound judicial discretion which will not be set aside absent an abuse. An abuse of discretion only occurs when the decision or order of the Court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *St. v. Cunningham*, 96 Wn.2d 31, 633 P.2d 886 (1981); quoting *State v. Blight*, 89 Wn.2d 38, 569 2d 1129 (1977), *State v. Curry*, 191 Wn.2d 475, 423 P.3d 179 (2018). Judge Reeves at the sentencing on June 14, 2018 partially explained her reason for the sentence when she held: “I considered the amount of violence, the damage that was caused, the lives that were disrupted.” Judge Reeves further stated: “I think there is every reason to impose the maximum possible that I can impose give the nature of the crime, the degree of the violence, the degree of harm that you caused with broken bones and the disruption that followed the pain and suffering. I think the high end of the range is appropriate.” RP 41. Based on the factors enumerated by Judge Reeves in making her decision to sentence to the high end of the range, the State would argue there was no abuse of discretion and the sentence should not be overturned.

7. Appellant should not be allowed to withdraw his plea if the State did not breach the plea agreement.

Appellant argues that he has the right pursuant to *Sledge* and *Lord* to withdraw his plea or seek specific performance if the State breached the plea agreement. While these cases certainly stand for that fact situation, they do not apply to a situation where the sentencing judge does not follow the agreed plea agreement and sentences independent of the plea agreement. The State argues again that a judge is not bound by any recommendations, contained in a plea agreement (*Harrison, Henderson* IBID), and that is exactly what happened in this case. Appellant has failed to show what remedy, if any, is available when the judge does not follow a sentence recommendation.

8. Withdrawal of plea not allowed when judge does not follow the recommendation of the State.

Washington Appellate Courts have previously held that state trial judges need not permit withdrawal of an otherwise voluntary guilty plea merely because they elect not to follow the plea-bargaining recommendations of the prosecuting attorney. *In re Hughes*, 19 Wn.App 155, 575 P.2d 250 (1978). When a guilty plea has been entered and accepted in compliance with constitutional requirements and CrR 4.2(f), the imposition of a more severe penalty than was bargained for does not constitute a “manifest injustice”. *State v. Bolton*, 23 Wn.App 708, 711, 598

P.2d 734 (79); of *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974). The Appellant knew when he entered his plea the judge did not have to follow the recommendation, and he should not be allowed to withdraw it now.

9. Appellant should not be allowed to withdraw his plea if he was sentenced with the standard range of the crime.

Appellant was sentenced within the standard range of both crimes he pled guilty to. Assault in the Second Degree is a Class “B” Felony with a standard range of 03 – 09 months and a maximum term of five years. RCW 9A.20.021(1)(b). Malicious Mischief in the Third Degree is a Gross Misdemeanor with a jail range of 0 days to 364 days. RCW 9A.20.021(2). Pursuant to Washington law, a sentence within the standard range shall not be appealed. RCW 9.94A.585(1). Appellant should not be allowed to withdraw his plea because he was sentenced within the standard range.

CONCLUSION

Based on the above the State respectfully requests that the sentence should not be vacated and/or remanded to the trial court because the State did not breach the plea agreement and the sentence which was imposed by the trial court judge was beyond the control of the State.

Respectfully submitted the 22 day of November, 2019.

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