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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW STEVEN MCNEIL, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Matthew McNeil's guilty plea was involuntary where he plead to an offense different from the offense on which the court entered judgment.

2. The court imposed consecutive sentences for current offenses in violation of its statutory authority under the Sentencing Reform Act (SRA).

II. ISSUES PRESENTED

1. Because statutes must be interpreted to avoid absurd results, would Mr. McNeil's contention that RCW 9.94A.589(1)(a) applies to his situation create an absurd result contrary to the purpose of the SRA?

2. When the trial court explicitly rejected the parties' joint recommended sentence, imposed an exceptional sentence upward based on the "free crimes" aggravator, and sentenced Mr. McNeil to consecutive maximum sentences for his current offenses, but the judgment and sentence does not contain written findings, is remand required?

3. Was Mr. McNeil's plea involuntary where the stock plea document contains scrivener's errors, but the record and amended information clearly lay out the actual agreement, charge, and elements of the charge?

III. STATEMENT OF THE CASE¹

Matthew McNeil appeals from his three convictions, by guilty plea, for two counts of attempting to elude a police vehicle, and one count of conspiracy to commit delivery of a controlled substance.

On June 12, 2017, Mr. McNeil fled from a traffic stop, after a law enforcement officer witnessed him committing a traffic infraction and discovered he had a felony arrest warrant. 2CP 2-3. Mr. McNeil fled at over 100 miles per hour on a motorcycle, passed several marked patrol vehicles and other traffic going 35 miles per hour on a residential arterial, and ran several stop signs. 2CP 2. Mr. McNeil crashed, and law enforcement arrested him; they also discovered a dangerous weapon. 2CP 2-3.

Six months later, Mr. McNeil again fled a traffic stop. 3CP 1-4. Law enforcement discovered Mr. McNeil had a Department of Corrections community custody warrant, as well as an outstanding arrest warrant for his previous, but still pending, eluding charge. 3CP 3. On the same residential

¹ The State anticipates this case will be consolidated with Mr. McNeil's other cause numbers on appeal, as they share a common consecutive sentence issue and substantially the same record. The citations to the record will refer to all three cause numbers as follows: "CP" and "RP" will refer to the record in this case number; "2CP" will refer to Case No. 36945-5 clerk's papers; "3CP" will refer to Case No. 36946-3 clerk's papers; "2RP" will refer to the report of proceedings in either Case No. 36944-7 or 36945-5, which are identical. The arguments in this brief address the count of conspiracy only.

street, Mr. McNeil fled, almost struck a sheriff's deputy, and then pulled into a yard. 3CP 2-3. Law enforcement took him into custody again. 3CP 2-3.

The parties reached an agreement for Mr. McNeil to plead guilty to two counts of attempting to elude a police vehicle. 3CP 10-14. The State agreed to recommend a prison-based DOSA sentence: serving 12.75 months in custody and 12.75 months on community custody on each charge, with both sentences to run concurrently. 3CP 14. The State also agreed to dismiss all other charges, and to refrain from filing any other charges associated with the operative police reports. 3CP 14.

On September 5, 2018, the court accepted Mr. McNeil's guilty plea for both counts. 2RP 4-8. Mr. McNeil requested the court to continue his sentencing hearing for at least 12 weeks, so that he could have an opportunity to participate in a parenting skills class, relationship skills class, and drug and alcohol treatment offered at a local county facility. 2RP 9. Mr. McNeil represented to the court that, "he knows he'll be getting treatment while at prison, but he'd also like to take advantage of every opportunity to change his ways." 2RP 9. The court granted his request, scheduling the sentencing hearing on January 2, 2019. 2RP 10. For reasons unclear in the record, the court continued the hearing past that date to February 27, 2019. *See CP at passim.*

On February 26, 2019, Spokane County Detention Services discovered that Mr. McNeil and Emily Hammond, a cohort who he had encountered in custody a month prior, had conspired to create a scheme to smuggle controlled substances into a correctional facility. CP 2-5. Communications indicated Mr. McNeil asked his coconspirator to mail him controlled substances, after which the property custodian discovered Suboxone, a controlled substance, in his mail. CP 3-4. Additional communications indicated Mr. McNeil was asking for additional controlled substances, and after he received and distributed those substances, Mr. McNeil anticipated mailing the proceeds to Ms. Hammond. CP 4.

Yet another communication revealed a scheme where Mr. McNeil instructed Ms. Hammond to arrive early to court the next day, February 27, 2019, to attend Mr. McNeil's sentencing hearing from his previous pleas. CP 4 ("McNeil advise[d] Hammond to bring contraband into court with her prior to his sentencing hearing on 02/27/2019"). He directed her to hide controlled substances in the bench cushion on which he would be seated, and to mark the area with a ketchup packet, so that he could locate the substances, conceal them within his body, and then smuggle them into the correctional facility. CP 4. After law enforcement discovered the plot, the sentencing hearing was again continued, and the State charged Mr. McNeil

with possession of a controlled substance with intent to deliver, and delivery of a controlled substance. CP 1.

The court set a hearing to sentence Mr. McNeil for the original two pleas on May 30, 2019. 2RP 13. At that hearing, the State indicated that although these two matters had been continued a number of times, the parties were attempting to reach a global resolution for all three cause numbers and the State was simply waiting on confirmation that one of the controlled substances tested positive as Suboxone. 2RP 14-15. The court continued the hearing to July 3, 2019, but indicated that if the parties could not reach a global resolution it would impose a sentence on the two counts of eluding on that date. 2RP 19-20. At some point, the parties reached an agreement. RP 2; CP 11.

The global resolution included Mr. McNeil pleading guilty to one count of “conspiracy to deliver a controlled substance” to resolve the new charges. RP 2. The parties agreed on the sentencing recommendation: for the two eluding charges, the parties would jointly recommend the original agreement: a prison-based DOSA sentence, resulting in 12.75 months of incarceration followed by 12.75 months of community custody. RP 7. For conspiracy to deliver a controlled substance, the parties would recommend six months of confinement, consecutive to the DOSA sentence, and the

State would agree not to file any other charges associated with that police report. RP 7; CP 11.

Pertaining to the new criminal conduct, the court: (1) permitted the State to amend the information to charge one count of conspiracy to commit delivery of a controlled substance, (2) verified orally that Mr. McNeil received a copy of the information, and (3) verified orally that Mr. McNeil waived a formal reading of the information. RP 2-3. The amended information alleged Mr. McNeil committed:

CONSPIRACY TO COMMIT DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, MATTHEW S. MCNEIL, in the State of Washington, on or about February 26, 2019, with intent that conduct constituting the crime of DELIVERY OF A CONTROLLED SUBSTANCE, as set out in RCW 69.50.401, be performed, did agree with one or more persons to engage in and cause the performance of such conduct, and one of the parties so agreeing did take a substantial step in the pursuance of such agreement.

CP 6.

The court reviewed the plea agreement with Mr. McNeil, including that his standard range was 0-to-12 months confinement. RP 4. The physical “statement of defendant on plea of guilty” document contains scrivener’s errors; it states Mr. McNeil is charged with conspiracy to possess a controlled substance; and states that he is pleading guilty to “conspiracy PCS.” CP 7, 16. The court also verified that Mr. McNeil knew the court did

not have to follow the recommendation. RP 4. The court accepted

Mr. McNeil's plea:

THE COURT: *To the charge of conspiracy to commit delivery of a controlled substance on the case number ending in 8532, what is your plea?*

THE DEFENDANT: Guilty.

THE COURT: It indicates in the statement that the Court can rely on the Affidavit of Facts for a factual basis. I've had a chance to review the Affidavit of Facts, and based on that the affidavit find that there is a factual basis for your plea. I find that your plea was made knowingly, voluntarily, intelligently, and with the advice of counsel and, therefore, *find you guilty of the charge of conspiracy to commit delivery of a controlled substance.*

RP 6 (emphasis added).

The parties both advocated for the jointly recommended sentences. RP 7-8. The court asked Mr. McNeil after allocution whether he had done DOSA before, and if he had successfully completed it. RP 9. Mr. McNeil equivocated, and appeared to blame the counselor and the facility. RP 9.

The court weighed the joint recommendation, Mr. McNeil's criminal history, the purposes of rehabilitation, and the facts of Mr. McNeil's convictions on the record in a detail ruling. RP 10-12. The court did not follow the joint recommendation. RP 12. The court sentenced Mr. McNeil to 29 months for each count of eluding and 12 months for the conspiracy charge. CP 25; 2CP 24; 3CP 28. It ordered that Mr. McNeil would serve each sentence consecutive to the others for a total of 70 months

confinement. CP 25; 2CP 24; 3CP 28. The court rejected Mr. McNeil's request for a DOSA after reasoning it did not believe that Mr. McNeil could be treated or would be rehabilitated by the program as demonstrated by his lengthy criminal history. RP 10-12. It also noted the conspiracy charge was not eligible for a DOSA sentence. RP 5.

The court reasoned that it had the authority to impose an exceptional sentence: "based upon your offender score, the Court can also go above that and impose an exceptional sentence because your offender score is so far beyond the maximum of nine and a crime would be unpunished if the Court were to run these concurrent." RP 11-12. When imposing the sentence, the court expressly stated the aggravating factor applied: "as much as I respect the recommendation here it seems that, first, one charge will go unpunished, at least one if the Court follows the recommendation." RP 12.

The judgment and sentence documents for each cause number reflect the court's oral ruling in its entirety, but the box on these preprinted forms indicating the court imposed an exceptional sentence is not checked. CP 24; 2CP 22; 3CP 26. That same section also indicates the court will attach "Appendix 2.4" with the findings of fact and conclusions of law in support of the exceptional sentence. CP 24; 2CP 23; 3CP 27. The court did not do so for any of Mr. McNeil's convictions. *See CP at passim.*

Mr. McNeil did not move to withdraw his conspiracy plea pursuant to CrR 4.2. *See* 3CP *at passim*. Mr. McNeil timely appeals. CP 35.

IV. ARGUMENT

A. CONCURRENT SENTENCES IN THIS CIRCUMSTANCE WOULD LEAD TO AN ABSURD RESULT

Mr. McNeil first requests this Court vacate his sentence and remand for a resentencing hearing because the trial court did not enter written findings of fact and conclusions of law in support of its exceptional sentence as required by statute. Common law provides for an exception to RCW 9.94A.589(1)(a) when the unique circumstances or facts of a case demonstrate that the offenses are not truly current offenses within the meaning of RCW 9.94A.525(1). Mr. McNeil's case fits that exception.

1. Rules of law.

Ordinarily, convictions entered or sentenced on the same day as the convictions currently before the court are considered "other current offenses." RCW 9.94A.525(1). The order of sentences under the Sentencing Reform Act of 1981 (SRA) is controlled by RCW 9.94A.589. Subsection (1) of that statute directs that sentences imposed on the same day be served concurrently.

RCW 9.94A.589(1)(a) authorizes the trial court to order the consecutive sentencing, but only under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.535 provides that in imposing an

exceptional sentence, “the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” The state high court has held the entry of written findings to be “essential.” *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

2. *RCW 9.94A.589(1)(a) does not apply to these facts.*

State v. Moore, 63 Wn. App. 466, 470-71, 820 P.2d 59 (1991) (discussing former statutes RCW 9.94A.400(1)(a) and (3)²), noted an exception to the concurrent current sentences provision of now RCW 9.94A.589(1)(a) under what it termed “unique facts.” In that case, the trial court convicted the defendant of two burglary charges in 1987, but because he failed to appear for the scheduled sentencing hearing the court did not sentence him. *Id.* at 467. Three years later, the trial court convicted him for an unrelated assault charge. *Id.* The court sentenced the defendant on all three matters at the same hearing, ordering concurrent sentences for the first two convictions, but expressly ran them consecutive to the assault conviction. *Id.* at 467-68. The defendant appealed, arguing former RCW 9.94A.400 required concurrent sentences absent written findings that supported an exceptional sentence. *Id.* at 469-70. The reviewing court

² Re-codified as RCW 9.94A.589.

agreed that RCW 9.94A.400(1) applied under normal circumstances. *Id.* at 470-71.

However, the court held that this presented an absurd or strained circumstance, and cited *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987), for the proposition that “[s]tatutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided.” *Moore*, 63 Wn. App. at 470. The court reasoned that the defendant absconded to avoid sentencing on the earlier convictions, and that the situation differed “from one in which multiple independent charges in a single jurisdiction are pending against a defendant due to *routine delays in sentencing.*” *Id.* at 470 (emphasis added). The court declined to find the current offenses provision of former RCW 9.94A.400 applied in this circumstance because doing so would “in effect reward [the defendant] for evading the punishment.” *Id.* at 471. The court determined the trial court correctly applied former RCW 9.94A.400(3) which, as it does today, authorizes a court to run sentences consecutively without findings. *Id.* at 470-71; RCW 9.94A.589(3).

There is nothing routine about the delay in Mr. McNeil’s case, as it was geared toward the benefit of Mr. McNeil; the result Mr. McNeil is advocating for would be absurd and contrary to the SRA. Mr. McNeil pleaded guilty to two eluding charges at the beginning of September, six

months prior to committing his third charged crime at the end of February. The State is not arguing that this Court should consider the two eluding charges as anything other than routine current offenses.

However, Mr. McNeil accrued his third charge while in custody after entering his prior two pleas, but before the court entered judgments of conviction and imposed a sentence. This occurred during an extended continuance that Mr. McNeil had requested in order to take classes at the county jail and attempt to demonstrate to the court that he would be amenable to a lenient, treatment-focused sentence. While in custody during this extended delay, Mr. McNeil conspired to profit from distributing controlled substances to other inmates. He also specifically manipulated his sentencing date to February 27. The day prior to his sentencing hearing, he directed his coconspirator to arrive at the court early in order to hide contraband for him to secrete and bring back to custody. The sentencing range for his third charge was lower than the proposed joint recommended sentence for the charges to which he had already entered a plea. Mr. McNeil's requested application of this specific provision of the SRA would essentially reward him for pleading guilty, remaining at a specific facility with the consent from the court, and then seeking to profit from drug distribution, while "attempting" to demonstrate to the court that he was seeking to better himself prior to sentencing.

3. *Equitable considerations and the invited error doctrine.*

Principles of equity and the invited error also favor the application of *Moore*. First, equity demands that one must come to court with clean hands and must not be permitted to take advantage of his or her own wrong. *Income Inv'rs v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). The unique facts of this case fall squarely within this principle. Mr. McNeil conspired to use his greatly delayed sentencing date to smuggle contraband into custody, in order to distribute narcotics for profit. He was only in this position because he represented to the court repeatedly that he was seeking rehabilitation. A sentence of six months run concurrently to the joint recommendation of 12.75 months—rather than consecutive as the parties specifically bargained for—would be rewarding Mr. McNeil’s wrongful conduct.

Second, the global resolution required Mr. McNeil to specifically agree to and recommend serving his sentence on the delivery count consecutive to the sentence imposed for the eluding charges. A defendant may agree to the prosecutor recommending a sentence outside the standard range. RCW 9.94A.421(3). A party who sets up an error at trial cannot claim that action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider “whether the defendant affirmatively assented

to the error, materially contributed to it, or benefited from it.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires affirmative actions by the defendant. *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000). Courts apply the doctrine when a defendant took knowing and voluntary actions to set up the error. *Id.* If the defendant agrees to an exceptional sentence, that fact alone provides a substantial and compelling reason for an exceptional sentence. *In re Breedlove*, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

Mr. McNeil invited the imposition of an exceptional consecutive sentence for this conviction because he explicitly agreed to the joint recommendation of a consecutive sentence for what would otherwise be a current offense. A joint stipulation to an exceptional sentence is a valid basis for the court to impose such a sentence. *Id.*; RCW 9.94A.535(2)(a). Not only did Mr. McNeil affirmatively agree to an exceptional consecutive sentence, but he agreed to do so because he was gaining the benefit of significantly reduced charges and time in custody, as well as a joint recommendation for a DOSA sentence. Mr. McNeil is essentially breaching

the plea agreement³ because he agreed to serve the sentence consecutively as an exceptional sentence and now is demanding this Court vacate the sentence and remand for resentencing. Between the facts of Mr. McNeil's case and the arguable applicability of equity and the invited error doctrine, these are certainly a unique set of circumstances as contemplated by *Moore*.⁴

In sum, this Court is free to determine the facts here are unique, as in *Moore*, meaning the concurrent current offenses provision of RCW 9.94A.589(1)(a) would not apply. His sentence would be subject to RCW 9.94A.589(3).

³ When the defendant breaches a plea agreement, the State may rescind the agreement or specifically enforce the agreement. *State v. Thomas*, 79 Wn. App. 32, 37, 899 P.2d 1312 (1995). As argued further below, Mr. McNeil would not benefit from the State choosing to rescind this agreement.

⁴ Although Mr. McNeil's facts are certainly unique, in the interest of candor to the tribunal, *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001), clarified that Division Two believes the exception may not apply where the defendant obtains repeat continuances with the trial court's approval. The *Rasmussen* decision is entitled to "respectful consideration" but is not binding, and it did not rely on Washington Supreme Court precedent to distinguish *Moore*. See *Matter of Arnold*, 190 Wn.2d 136, 147-56, 410 P.3d 1133 (2018). The circumstances are different; Mr. McNeil was attempting to demonstrate compliance with treatment classes, picked up a new charge contrary to his representations, manipulated his sentencing date so he could coordinate with his coconspirator, stipulated to a consecutive sentence, and had a significant offender score.

As in *Moore*, concurrent sentences would reward Mr. McNeil for committing crimes while knowing he was subject to sentencing for crimes he pleaded guilty and admitted culpability for. The circumstances here are that he was in custody post-plea but pre-conviction, but he was only in this position because he represented to the court that, if given an opportunity, he could demonstrate his ability to better himself through treatment. 63 Wn. App. at 471 (concurrent sentences would in effect “reward Evans for evading the punishment for the burglary convictions”). This is the reason the court continued his sentence for such a lengthy amount of time. It would be absurd to apply the SRA in such a manner that would allow Mr. McNeil to plead guilty to two crimes, ask for an opportunity to prove his commitment to treatment while in custody prior to recommending a DOSA sentence, but then seek to distribute drugs while in custody, and using his sentencing hearing as the time and place to retrieve contraband and face no additional sanction.

4. *Caselaw requires remand for the entry of written findings.*

If this Court declines to apply the exception identified in *Moore*, Mr. McNeil’s convictions are current offenses. There are two bases in the record supporting the court’s exceptional sentence. First, Mr. McNeil agreed to serve a consecutive sentence on this current offense, which is a valid basis for an exceptional sentence. RCW 9.94A.535(2)(a). Second, the

free crimes aggravator applies when the defendant’s high offender score combines with multiple current offenses to leave “some of the current offenses going unpunished.” RCW 9.94A.535(2)(c). Mr. McNeil entered the sentencing hearing with an offender score of 20+ points, and the court orally ruled it had the authority to—and was in fact going to—impose exceptional consecutive sentences under the “free crimes” aggravator provided by RCW 9.94A.535(2)(c). It did not merely recognize that it could do so, but when imposing the actual sentence stated: “as much as I respect the recommendation here, it seems that, first, *one charge will go unpunished.*” RP 12 (emphasis added). This is plainly the free crimes aggravator. The CrR 4.2-approved stock plea documents advised Mr. McNeil that this was a possibility. CP 11.

Although an adequate oral ruling usually permits appellate review, the Supreme Court was quite clear that its holding requiring written findings derived from the plain language of the SRA. *Friedlund*, 182 Wn.2d at 388-89. If this Court determines RCW 9.94A.589(1)(a) applies, it must remand for the entry of written findings. *Id.* at 397.⁵ “The remedy for a trial court’s

⁵ Mr. McNeil relies on *Rasmussen*, 109 Wn. App. at 286, a 2001 Division Two opinion, to request this Court vacate his sentence and remand for resentencing. Mr. McNeil is not entitled to a full resentencing. Mr. McNeil’s proposed remedy is contrary to the remedy outlined in *Friedlund*.

failure to enter written findings of fact and conclusions of law is to remand the case for entry of those findings and conclusions.” *Id.* at 395 (citing *In re Breedlove*, 138 Wn.2d at 311). This Court should remand for the entry of written findings of fact and conclusions of law in support of Mr. McNeil’s exceptional sentence under either basis supported by the record.

B. MR. MCNEIL KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY PLEADED GUILTY TO CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, NOTWITHSTANDING THE CLERICAL ERROR ON HIS PLEA PAPERWORK

The record here demonstrates a scrivener’s error on the plea document that Mr. McNeil’s counsel prepared. Review of the record reveals that both parties and the trial court knew the substance of the actual agreement. Mr. McNeil knowingly, intelligently, and voluntarily pleaded guilty to conspiracy to deliver a controlled substance.

In entering a plea of guilty, a defendant necessarily waives important constitutional rights, including the right to a jury trial, the right of confrontation, and the privilege against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). To be valid, a guilty plea must be intelligently and voluntarily made with the knowledge that certain rights will be waived. *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). Whether a plea is knowingly, intelligently and voluntarily made is determined from the totality of the

circumstances. *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601, *review denied*, 385 U.S. 905 (1966).

Plea agreements are contracts and issues concerning their interpretation are reviewed de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997), *as amended* (Jan. 28, 1998). An appellate court's primary objective in interpreting a plea agreement is to give effect to the intent of the parties. *State v. Lathrop*, 125 Wn. App. 353, 362, 104 P.3d 737 (2005). This Court reviews the plea agreement as a whole, considering the objective of the agreement, all the circumstances surrounding the agreement, and the reasonableness of respective interpretations advocated by the parties. *Id.* Any ambiguities are resolved against the drafter. *Id.*

“In contract law, a scrivener's error, like a mutual mistake, occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error.” *In re Estate of Harford*, 86 Wn. App. 259, 263, 936 P.2d 48 (1997). Courts may in equity reform a contract to correct a scrivener's error. *Id.*; *Geoghegan v. Dever*, 30 Wn.2d 877, 888-89, 194 P.2d 397 (1948).

If all this Court had to review was the statement on plea of guilty, Mr. McNeil's argument likely would succeed. But this Court must consider the totality of the circumstances and give effect to the intent of the parties.

The report of proceedings clearly demonstrates that the paperwork contains scrivener's errors. The document, prepared by Mr. McNeil's counsel, first erroneously states that Mr. McNeil is charged with conspiracy to possess a controlled substance, and that the unidentified elements are "On [date], the defendant conspired to possession [a controlled substance] in Spokane County, WA." CP 7 (brackets in original). That simple misstatement does not contain the date or identity of the controlled substance, demonstrating the haste with which counsel prepared the document. This is likely due to the hard deadline that the trial court imposed, when it indicated it would be proceeding with sentencing Mr. McNeil on his eluding charges if the parties could not reach an accord on the new charge. It is also wrong; neither the original nor amended information ever charged Mr. McNeil with conspiracy to possess a controlled substance. CP 1-2, 6. The document also says Mr. McNeil is pleading guilty to "Conspiracy PCS" and that the court may rely on the affidavit of probable cause. CP 16. Again, that was not the original or the amended charge.

The report of proceedings demonstrates the actual agreement of the parties, and that there was a mutual agreement in fact. The State stated Mr. McNeil is prepared "to enter a plea to a conspiracy to deliver a controlled substance." RP 2. Mr. McNeil agreed he was ready to proceed. RP 2. The State gave Mr. McNeil a copy of the amended information

charging him with the reduced charge of conspiracy to commit delivery of a controlled substance. RP 2-3. The trial court verified with Mr. McNeil that he had received “a copy of the Amended Information in the case number ending in 8532 charging [him] with one count of conspiracy to commit delivery of a controlled substance.” RP 2-3. Mr. McNeil himself agreed that he did. RP 3. The amended information contained the proper elements. CP 6.

The court reviewed the standard waivers and agreements with Mr. McNeil. RP 3-4. The court reviewed the joint sentencing recommendation. RP 4. After verifying that Mr. McNeil knew the court was not bound by the agreement, the court asked Mr. McNeil. “To the charge of conspiracy to commit delivery of a controlled substance on the case number ending in 8532, what is your plea?” RP 6. The court was aware of the actual agreement between the parties, despite the paperwork error. RP 6. Mr. McNeil answered that direct inquiry by pleading “guilty.” RP 6. The court agreed that the affidavit of facts provided a factual basis for the charge. RP 6. The court accepted Mr. McNeil’s plea made in court. RP 6. Counsel agreed the State’s summary of the agreement was “accurate.” RP 8. Mr. McNeil spoke on his own behalf, strongly urging the court to accept the parties’ joint recommendation. RP 8-9. Mr. McNeil desperately wanted that agreement as the bargain was excellent; there was no difference in the

sentencing consequences between the error and actual agreement; the State honored the old agreement on the earlier cases; the State significantly reduced the amount of charges Mr. McNeil faced for his new criminal conduct; and the State only asked for an additional consecutive sentence of six months. Under the totality of the circumstances, Mr. McNeil intended to plead guilty to conspiracy to commit delivery of a controlled substance. The error was a scrivener's error under contract law, and the remedy is to correct the error.

Mr. McNeil may also wish to consider whether he truly desires to receive the relief he requests. If this Court were to vacate his guilty plea for the conspiracy charge and remand for further proceedings, the State would no longer be bound by the terms of that agreement. He is already serving two 29-month consecutive sentences on his earlier plea, despite a joint recommendation for concurrent sentences of 12.75 months confinement and 12.75 months on community custody. Mr. McNeil would be vulnerable to *all* criminal liability arising from the relevant police report, and the State would be free to ask for whatever sentence it wished on whichever charges it could prove, were Mr. McNeil convicted. The original information charged Mr. McNeil with two crimes, but Mr. McNeil may have faced additional charges. Of the two original charges, the State outright dismissed one charge, reduced another to conspiracy to deliver a controlled substance,

and agreed not to file further charges. The trial court believed the free crimes aggravator was appropriate, and nothing in the record indicates that position would change if the State were to try Mr. McNeil on multiple charges arising from his conduct prior to his February 27, 2019, sentencing hearing or offer another plea agreement. This may explain why Mr. McNeil's motion for review at public expense only alleged a consecutive sentence error⁶, and why he did not move to withdraw his guilty plea pursuant to CrR 4.2(f).

The parties had the same intention at the sentencing hearing. Mr. McNeil understood the agreement, and the trial court satisfied itself of the voluntariness of the plea. His counsel prepared the written document but it contains scrivener's errors. To the extent that the defendant claims that his plea was involuntary because the paperwork contains scrivener's errors, that claim is belied by the record. The totality of the circumstances supports the voluntariness of Mr. McNeil's plea.

V. CONCLUSION

Mr. McNeil's case fits squarely within the common law exception to RCW 9.94A.589(1)'s current offense sentencing scheme. Failing that, the remedy is remand for the court to enter written findings in support of its

⁶ CP 52.

oral ruling imposing the free crimes aggravator. Mr. McNeil's plea paperwork contains scrivener's errors, but the record and totality of the circumstances demonstrate that he intended to plead guilty to conspiracy to commit delivery of a controlled substance. This Court should affirm.

Dated this 6 day of February, 2020.

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Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW MCNEIL,

Appellant.

NO. 36946-3-III

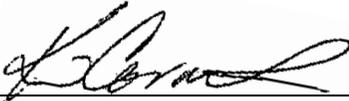
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on February 6, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
wapofficemail@washapp.org

2/6/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

February 06, 2020 - 11:59 AM

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