FILED
Court of Appeals
Division III
State of Washington
11/18/2019 8:00 AM

NO. 36960-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO SALAZAR,
Appellant.

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

Walla Walla County Cause No. 15-1-00306-0

The Honorable M. Scott Wolfram, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court exceeded its authority by amending Mr. Salazar's Judgment and Sentence absent any statutory justification.
2. The trial court exceeded its authority by imposing a sanction upon revocation of Mr. Salazar's DOSA sentence other than the one specified in the Judgment and Sentence.

> **ISSUE 1:** The circumstances under which a court may amend a Judgment and Sentence are limited to those delineated by statute. Did the court exceed its statutory authority by amending Mr. Salazar's sentence upon revocation of his DOSA sentence?

3. The state violated Mr. Salazar's Fourteenth Amendment right to due process by failing to adhere to the plea agreement.
4. The state violated Mr. Salazar's Wash. Const. art. I, § 3 right to due process by failing to adhere to the plea agreement.
5. The prosecutor violated the terms of the plea agreement by recommending a sentence higher than that agreed upon.

> **ISSUE 2:** A prosecutor violates an accused person's right to Due Process by failing to recommend the sentence agreed upon as part of a plea agreement. Did the prosecutor violate Mr. Salazar's right to Due Process by recommending a high-end sentence (upon revocation of the DOSA sentence) when the plea agreement specified that he would recommend the mid-point of the standard range absent circumstances which had not come to pass?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eduardo Salazar pleaded guilty in 2015 to third degree assault, pursuant to a negotiated agreement with the state. CP 7-15.

As part of that agreement, the state pledged to recommend that Mr. Salazar be sentenced under the Drug Offender Sentencing Alternative (DOSA) statute. CP 10. The agreement clarified that the state would recommend that he be sentenced to serve 12.75 months in prison, followed, by 12.75 months of community custody. CP 10. The total of twenty-five months represented the mid-point of the standard range for the offense. CP 10.

Mr. Salazar's signed Statement on Plea of Guilty informed him that the state would increase its sentencing recommendation only if it was discovered that he had additional criminal history before his sentencing hearing. CP 9.

At Mr. Salazar's 2015 sentencing hearing, the prosecutor made the agreed-upon recommendation and the court imposed the recommended mid-range, prison-based DOSA sentence. *See* RP 8-16; CP 18-29.

The sentencing court signed the Judgment and Sentence, which delineated the maximum period of confinement that would be imposed upon Mr. Salazar if he failed to comply with the terms of his DOSA sentence as 12.75 months (the other half of his mid-range sentence):

> IF THE DEFENDANT VIOLATES THE SENTENCE CONDITIONS HEREIN…. THE COURT SHALL HOLD A VIOLATION HEARING AND MAY IMPOSE SANCTIONS. IN ADDITION, FOR ANY WILLFUL VIOLATION, CONFINEMENT CONSISTING OF UP TO **[ ] THE HIGH END OF THE STNADARD RANGE, <u>OR</u> [X] THE REMAINING ONE HALF OF THE MIDPOINT OF THE STANDARD RANGE** FOR THE OFFENSE HEREIN MAY BE IMPOSED.
> CP 25 (emphasis in original).

In 2018, the state alleged that Mr. Salazar had violated the terms of his DOSA sentence by absconding from Community Custody. *See* CP 39-41.

A hearing was held in July 2019 and Mr. Salazar admitted to the alleged sentencing violations. RP 19-20 The court ordered that his DOSA sentence would be revoked. RP 22.

But the court did not order Mr. Salazar to serve the remaining 12.75 months of his original mid-range sentence. Instead, at the state's recommendation, the court imposed a *new*, *high-end* sentence of twenty-nine months (with credit for time served). RP 24, 29; CP 42-44.

Mr. Salazar vigorously objected, noting that his sentence was already final and that the state was, essentially, making an oral motion to modify his Judgment and Sentence, without any basis. RP 27-28.

Nonetheless, the court sided with the state. CP 29-30. The revocation court did not clarify any source for the authority it was

exercising by resentencing Mr. Salazar, rather than imposing the sanction included in the Judgment and Sentence. RP 29-30; CP 42-44.

This timely appeal follows. CP 46.

ARGUMENT

I. THE DOSA-REVOCATION COURT DID NOT HAVE THE AUTHORITY TO AMEND MR. SALAZAR'S JUDGMENT AND SENTENCE ALMOST FOUR YEARS AFTER IT BECAME FINAL, WITHOUT ANY STATUTORY BASIS.

Mr. Salazar's Judgment and Sentence, which became final in 2015 specified the sanction that would be imposed if he violated the terms of his community custody. CP 25. Specifically, the sentencing court ordered that, in the event of a willful violation, Mr. Salazar would be confined for up to "the remaining one half of the midpoint of the standard range." CP 25.

But, upon finding that Mr. Salazar had violated the terms of his sentence, that is not the sanction that the DOSA-revocation court imposed. CP 42-44. Instead, the court, in effect, amended the Judgment and Sentence by imposing the high end of the standard range instead. CP 42-44.

The court did not have the authority to amend the Judgment and Sentence in this manner because it was a final order and none of the statutory criteria for amendment had been met.

A court's sentencing authority is limited to that granted by statute. *State v. Bergen*, 186 Wn. App. 21, 28, 344 P.3d 1251 (2015) (*citing State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986)); *See also State v. Yancey*, 193 Wn.2d 26, 30, 434 P.3d 518 (2019); *In re West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005).[1]

The circumstances under which a court may amend a final Judgment and Sentence are also clearly delineated by statute and court rule. *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (*citing State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)) ("The SRA allows modification only in certain specific and carefully delineated circumstances).

A sentencing court retains no inherent authority to modify a Judgment and Sentence when the statutory criteria for amendment are not met. *State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003).

Here, the DOSA-revocation court acted outside its statutory authority by attempting to amend Mr. Salazar's Judgment and Sentence, which had become final almost four years earlier, when none of the statutory criteria for modification had been met. *Id.* The court was

[1] Whether a sentencing court has exceeded its authority is a question of law, reviewed *de novo*. *Bergen*, 186 Wn. App. at 28.

required to impose the sanction ordered in the Judgment and Sentence: the remaining half of the mid-point of the standard range. CP 25.

The court exceeded its statutory authority by attempting to modify Mr. Salazar's Judgment and Sentence upon revocation of his DOSA. *Id.* Mr. Salazar's case must be remanded for entry of the sanction ordered by his Judgment and Sentence. *Id.*

II. THE PROSECUTOR VIOLATED MR. SALAZAR'S RIGHT TO DUE PROCESS BY FAILING TO ADHERE TO THE TERMS OF THE PLEA AGREEMENT.

The plea agreement between Mr. Salazar and the state specified the terms under which the state could increase its sentencing recommendation to the court. CP 9. Those circumstances were limited to situations in which Mr. Salazar was (a) convicted of new crimes before sentencing, or (b) discovered to have additional criminal history that was not previously known. CP 9.

Neither of those criteria were met here. *See* RP *generally*. Still, four years later, when Mr. Salazar's DOSA was revoked, the state did not recommend the sentence agreed upon in the plea agreement. RP 24. Instead, the state asked the court to impose the high end of the standard range. RP 24.

The prosecutor violated Mr. Salazar's right to Due Process by failing to adhere to the terms of the plea agreement.

A plea agreement constitutes a contract between an accused person and the state. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015), *as corrected* (Apr. 13, 2015). The agreement imposes a duty upon the state to act in good faith and not to "undercut the terms of the agreement." *Id.*

Constitutional Due Process also "requires a prosecutor to adhere to the terms of the agreement by recommending the agreed upon sentence." *Id.* at 8; U.S. Const. Amend. XIV; art. I, § 3. This is because the accused waives significant constitutional rights by pleading guilty, in exchange for the "benefits of the bargain." *Id.* When the state breaches the agreement, "it undercuts the basis for the waiver of constitutional rights implicit in the plea." *Id.* at 9 (*quoting State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977)).[2]

Mr. Salazar waived his constitutional rights to a jury trial, etc. in exchange for the state's promise to recommend a mid-range sentence. CP 10. As part of the plea agreement, the state further promised to increase its sentencing recommendation only if Mr. Salazar was convicted of new crimes or if it was discovered that he had previously unknown criminal history. CP 9.

[2] Whether the state has violated Due Process by breaching the terms of a plea agreement may be raised for the first time on appeal. *Van Buren*, 101 Wn. App. at 212; RAP 2.5(b)(3).

The state violated the terms of its agreement with Mr. Salazar by recommending a high-end sentence even though none of the agreed-upon criteria for doing so had been met. RP 24; CP 9-10. That failure to comply with the plea agreement violated Mr. Salazar's right to Due Process. *MacDonald*, 183 Wn.2d at 8. The proper remedy is remand for Mr. Salazar to choose either to withdraw his guilty plea or to specifically enforce the agreement against the state. *State v. Van Buren*, 101 Wn. App. 206, 217, 2 P.3d 991 (2000).

The prosecution violated Mr. Salazar's right to Due Process by breaching the terms of the plea agreement. *MacDonald*, 183 Wn.2d at 8. The court's order must be vacated and the case must be remanded. *Van Buren*, 101 Wn. App. at 217.

CONCLUSION

For the reasons set forth above, this Court should vacate the order increasing Mr. Salazar's sentence and remand this case with instructions limiting the DOSA-revocation court to the sanction imposed by the Judgment and Sentence.

Respectfully submitted on November 15, 2019,

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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Walla Walla County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on November 15, 2019.

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Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

November 15, 2019 - 6:44 PM

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Superior Court Case Number:	15-1-00306-0

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