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Court of Appeals
Division III
State of Washington
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No. 37013-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

ASHLEY MYERS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR THE COUNTY OF WHITMAN

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The prosecutor informed the court that the victim's perspective was not accounted for in the agreed-upon plea recommendation with Ms. Myers before introducing the surviving victim's request for a higher sentence. This constitutes breach of the plea agreement, requiring reversal and remand for Ms. Myers to either withdraw her plea or seek specific performance. Alternatively remand for resentencing is required based on the court's violation of the "real facts" doctrine under RCW 9.94A.530(2).

B. ARGUMENT IN REPLY

- 1. The prosecutor breached the plea agreement by informing the court it failed to account for the wishes of the victim, who subsequently requested a higher sentence than agreed to by the parties, which the court imposed.**

The State misconstrues Ms. Myers's argument in claiming that she advances a "novel idea" that a victim or surviving victim may not be heard to voice any other recommendations to the sentencing court. Br. of Resp. at 8-9. This is not Ms. Myers's argument. Ms. Myers argues that it is breach for the prosecutor to inform the court that he failed to account for the victim in the

plea agreement, and then introduce the victim's statement as an alternative to the agreed upon recommendation.

In *State v. Lindahl*, cited by the State for the uncontested proposition that the victim's family may address the court and request a higher sentence, the prosecutor made clear to the court that the State was advocating for a lower sentence than the victim's family's representative was requesting. *State v. Lindahl*, 114 Wn. App. 1, 6, 56 P.3d 589 (2002) (the court summarized, "what I am hearing is that the State is not advocating for the recommendation posed by the victim's representative"). The prosecutor there did not breach the plea agreement by failing to oppose the family's ability to request a different sentence.¹ *Id.* at 12.

No such clarity about the prosecution's position was made to the court here, where the prosecutor informed the court that the plea agreement may not have fully taken into account the victim, Mr. Allen, and that his sister was here to give her perspective about what the sentence should be. RP 18-19.

¹ In *Lindahl*, the defendant claimed the "prosecutor deliberately set up the scenario whereby a third party would recommend an exceptional sentence." *Id.* at 12. However, this claim was not supported by the record. *Id.*

The State now argues that the prosecutor's statement cited in full in Ms. Myers's brief does not mean what it says, insisting, "the prosecutor did NOT argue that the plea agreement ignored the victim." Br. of Resp. at 7. The State notably does not include the contested statement, in which the prosecutor informed the court about the particular "risk for me of ignoring the other part of this and that's Mr. Allen, the fellow who got murdered, the fellow who's not here today to explain how this crime has impacted him or what he thinks the sentence out [sic] to be and how his life was going when it got stolen by Ms. Myers in her murdering him." RP 18-19 (emphasis added); cited at Br. of App. at 11.

The State argues this was a "natural lead" to introducing the victim's statement. Br. of Resp. at 7. This is wrong. Such a statement goes well beyond the prosecutor's statutory obligations to inform the surviving victim about the resolution, and submit her statement to the court if requested as provided for under RCW 7.69.030(2) and (13). It also exceeds the prosecutor's ability to inform the court whether the victims agree or disagree with the plea offer as contemplated by RCW

9.94A.431(1). These statutes require the prosecutor to communicate with the victims and consider their wishes. They do not permit the prosecutor to enter into a binding, contractual agreement with the defendant, and then inform the court this agreement failed to account for the victim as occurred here. These statutes cannot be construed to allow the prosecutor to breach the plea agreement the prosecutor entered into with Ms. Myers in exchange for her agreement to waive her constitutional rights. *State v. MacDonald*, 183 Wn.2d 1, 17, 346 P.3d 748 (2015).

The State's effort to distinguish *MacDonald* on the facts does not resolve the due process problem here. The State points out that in *MacDonald*, the Court held that the investigating officer was an arm of the State, and thus contravened the State's agreement with the defendant by asking for a different recommendation. Br. of Resp. at 8 (citing *MacDonald*, 183 Wn.2d 1). This distinction is of no matter here, where the issue is that the prosecutor breached by the plea agreement by his "own words or conduct." *State v. Sanchez*, 146 Wn.2d 339, 347, 46 P.3d 774 (2002).

MacDonald emphasized that whether the officer was speaking as a victim representative, or as a representative for the State, “the statutory right to speak at a sentencing hearing does not supersede constitutional precedent from this court and the United States Supreme Court limiting arguments that undermine plea agreements.” *MacDonald*, 183 Wn.2d at 17. *MacDonald* is clear: “The crime victims’ rights statutes must be read in conjunction with precedent protecting a defendant’s due process rights in a plea bargain.” *Id.*

This Court should reject the State’s claim that the prosecutor’s words did not mean what they said. The prosecutor’s statement that the plea agreement he made with Ms. Myers failed to account for the victim’s perspective when introducing the victim’s higher sentencing recommendation breached their agreement, which requires reversal and remand for Ms. Myers to withdraw her plea or seek specific performance. *MacDonald*, 183 Wn.2d at 21.

- 2. The disputed factual allegations made by the deceased’s sister at sentencing violated RCW 9.94A.530(2).**

The deceased's sister's statements about the crime submitted at sentencing went far beyond what the State addresses in its response brief. Br. of Resp. at 9. The State claims that Mr. Allen's sister's comments were limited to the unsupported accusation Ms. Myers was engaged in prostitution. Br. of Resp. at 9. As detailed in the Appellant's Opening Brief, Ms. Allen's sister made numerous claims about the offense that were not acknowledged or admitted to by Ms. Myers, including unsupported claims about Ms. Myers's motive, and that Ms. Myers had an ongoing, extensive drug lifestyle. Br. of App. at 19-21. In rejecting the plea agreement in favor of the higher sentence requested by the decedent's sister, the court pronounced a concern for the "toll" that drug abuse takes and that Ms. Myers required a more lengthy sentence to remain "clean and sober." RP 26-27.

The deceased's sister's portrait of ongoing, depraved drug use was neither admitted to by Ms. Myers nor was an accurate recounting of the "circumstances surrounding the crime." *State v. Randoll*, 111 Wn. App. 578, 582, 45 P.3d 1137 (2002). Reversal and remand for a new sentencing hearing is required.

C. CONCLUSION

Ms. Myers gave up her constitutional rights in exchange for the prosecution's recommendation for a sentence that he later undercut by informing the court that this agreement did not account for the victim. This was a breach requiring reversal and remand for Ms. Myers to enforce this agreement or withdraw her plea. Alternatively, reversal and remand for a new sentencing hearing is required for the court's violation of the "real facts" doctrine.

DATED this 20th day of July, 2020.

Respectfully submitted,

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RESPONDENT,)	
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v.)	NO. 37013-5-III
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