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No. 37013-5-III

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 THE
STATE OF WASHINGTON FOR WHITMAN COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

The methamphetamine Kenneth Allen supplied to Ashley Myers caused her to have a “delusional stimulant-induced psychotic disorder.” She shot Mr. Allen, believing he was going to kill her. Even though heavily under the influence, she stayed at the scene and readily admitted shooting him.

Ms. Myers had no criminal history and faced a standard range sentence of 123-220 months for the charge of murder in the second degree. She agreed to plead guilty in exchange for the prosecutor recommending a 130 month sentence. However, at sentencing, the prosecutor breached their agreement by informing the court that it risked ignoring the victims’ wishes. He then introduced the testimony of Mr. Allen’s sister, who argued Ms. Myers should receive a higher sentence, which the court imposed.

The prosecutor and Mr. Allen’s sister also alleged various unproven, disputed facts about the crime in violation of the “real facts” doctrine.

Ms. Myers seeks remand for a new sentencing hearing.

B. ASSIGNMENTS OF ERROR

1. The prosecutor breached the plea agreement in violation of due process under the Fourteenth Amendment and article I, section 3.

2. The trial court violated the real facts doctrine by considering disputed facts not admitted in the plea agreement or acknowledged at sentencing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When Ms. Myers gave up her constitutional rights and agreed to plead guilty, due process required she receive the benefit of her bargain with the State. Her due process rights prevail over a victim's rights at sentencing. Did the prosecutor breach the plea deal by informing the court the agreement risked ignoring the victim's wishes and then introducing the victim's sister to request a higher sentence, which the court then imposed in excess of the jointly recommended sentence?

2. When a trial court imposes a standard range sentence, the Sentencing Reform Act (SRA) and due process limit the court's consideration to facts that are admitted in the plea or

admitted, acknowledged, or proved at sentencing. RCW 9.94A.530(2); Const. art. I, §3. Did the trial court's consideration of unacknowledged facts violate the "real facts" doctrine, requiring a new sentencing hearing?

D. STATEMENT OF THE CASE

1. Even though she was heavily under the influence when she shot Mr. Allen, Ms. Myers takes full responsibility for her conduct and enters a plea agreement with the State to a reduced murder charge.

Suffering delusions caused by the methamphetamine Kenneth Allen provided her, Ashley Myers developed the false belief that Mr. Allen killed her child, and that he would kill her too. RP 13-14, 17, 25. She shot Mr. Allen. RP 14, 24; CP 1-6. She stayed at the scene and readily admitted to shooting him. RP 14.

The medical doctor who evaluated her opined that Ms. Myers's conduct was consistent with a "delusional stimulant-induced psychotic disorder." RP 25. This is a form of insanity, but does not rise to a legal defense because it is voluntarily induced, rather than organic. RP 25.

The prosecutor amended the charge from murder in the first degree to murder in the second degree. RP 14-15; CP 31. Ms. Myers entered a guilty plea to the reduced charge. RP 15;

CP 8-14. The parties submitted the prosecutor's written plea offer with Ms. Myers's guilty plea to the court. RP 15; CP 19.

Ms. Myers had no prior criminal history and an offender score of "0." RP 15. She faced a standard sentencing range of 123-220 months. CP 22. As part of the bargained-for exchange, the prosecutor recommended a low-range, 130-month sentence. RP 15; CP 19. Ms. Myers also agreed to pay \$2800.98 in restitution to the State Crime Victim's Compensation Program for Mr. Allen's funeral costs, and to serve 36 months of community custody. *Id.*

2. Noting the plea agreement risks ignoring the victim, the prosecutor has Mr. Allen's sister request a higher sentence, which the court imposes.

When the court asked the prosecutor for his recommendation, the prosecutor emphasized this was an "awful, terrible act." RP 17. However, the defense's extensive mental health evaluation and Ms. Myers's admission of guilt and decision to take responsibility for her actions led the prosecutor to recommend a low-range sentence of 130 months. RP 18.

The prosecutor then went on to say that this recommendation runs the risk of "ignoring the other part of this

and that's Mr. Allen, the fellow who got murdered," including "what he thinks the sentence [ought¹] to be and how his life was going when it got stolen by Ms. Myers in her murdering him." RP 18. The prosecutor stated he would ask the decedent's sister "to come up and tell you about Mr. Allen and tell you what she thinks the sentence [ought] to be." RP 18-19.

Peggy Roberts told the court about her brother, Mr. Allen. Though he had "issues with the law of his own," RP 20, and was a methamphetamine addict, he was still "a good person." RP 21. Mr. Allen had fathered a child, and his death left "a 17-year-old boy out there who will never have the opportunity to know his father." RP 20.

Ms. Roberts also stated her belief about the "facts" of the case that were not admitted to or even alleged, including that Mr. Allen "picked [Ms. Myers] up off the street...[s]he was, my understanding, selling her body to infiltrate a sex trafficking ring to—to find her daughter who had been kidnapped." RP 21.

¹ The VRP uses the word "out" instead of "ought." RP 18, 19.

Ms. Roberts then offered her “understanding from some of the records” about the crime. RP 22. She declared this “wasn’t a psychotic episode. At that point in time she knew that what she had done was wrong.” RP 22. Based on these and additional unproven factual assertions about the offense and Ms. Myers’s history of drug use, Ms. Roberts asked the court to sentence Ms. Myers to “the full extent of the law.” RP 23.

Ms. Myers disputed the prosecutor’s claim about her motive, arguing that Ms. Myers shot out of “pure terror,” not revenge. RP 25. Ms. Myers also disputed Ms. Roberts’s assertions, arguing based on the medical evidence that Ms. Myers’s conduct resulted from a drug-induced psychosis, not a choice. RP 25.

When Ms. Myers is not using meth, she is “an amicable, intelligent, personable individual.” RP 26. Since the offense, she has gained important perspective on the impact drugs have had on her life, and she wants nothing more to do with them. RP 25. Her young daughter sent her cards with lengthy messages throughout her time in custody. RP 24. Ms. Myers asked the

court to impose the 130 month sentence agreed to by the parties.

RP 26.

Despite recognizing that Ms. Myers was now “clean and sober,” having been in jail for some time, the court stated “that needs to continue.” RP 27. The court echoed Ms. Roberts’s concerns, stating that Ms. Myers will have a chance to see her family grow up, but Mr. Allen will not, noting it’s a “sad state of affairs” when these kinds of things happen and are “drug induced.” RP 27.

The trial court declined to follow the parties’ agreed upon recommendation, imposing 180 months instead of the agreed to 130-month sentence. RP 27. The court also imposed the remaining terms in the plea agreement, including 36 months of community custody, and the \$2800 crime victim fund payment for Mr. Allen’s funeral expenses. RP 28; CP 19.

E. ARGUMENT

1. The prosecutor breached its plea agreement with Ms. Myers in violation of due process.

The prosecutor breached the plea agreement by informing the court that the plea agreement did not account for the victim,

and then introduced the victim's sister's testimony in support of a higher sentence.

- a. Ms. Myers's due process right to have the State uphold the plea agreement prevails over a victim's rights at sentencing.

The prosecutor was constitutionally obligated to uphold the plea bargain he made with Ms. Myers, regardless of a surviving victims' rights under state law.

When Ms. Myers agreed to the terms of the State's plea offer, she formed a contract with the State. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). This bargain imposed on the prosecutor a "contractual duty of good faith, requiring that it not undercut the terms of the agreement, either explicitly or implicitly, by conduct evidencing intent to circumvent the terms of the plea agreement." *Id.* at 8. This is a basic issue of fairness which is required to "ensure public confidence in the administration of our justice system." *Id.* (citing *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997)).

Due Process bound the prosecutor to the agreement because Ms. Myers relinquished significant constitutional rights in exchange for this plea agreement, including her jury trial

right, the right to confront and cross-examine witnesses, the right to present her own witnesses, her right to remain silent, and her right to have the State prove the charges against her beyond a reasonable doubt. *MacDonald*, 183 Wn.2d at 8-9; *see also Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

This Court reviews de novo whether the State breached its plea agreement. *MacDonald*, 183 Wn.2d at 8. “A breach occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State’s obligations under the plea agreement.” *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006).

Applying an “objective standard,” the appellate court looks at the sentencing record as a whole to determine whether the State breached the plea agreement: “[t]he test is whether the State’s words or conduct, without looking to the intent behind them, contradict the State’s recommendation.” *State v. Neisler*, 191 Wn. App. 259, 266, 361 P.3d 278 (2015). A breach cannot be harmless error, because the accused bargained for the

prosecutor's good faith recommendation, not for the particular sentence. *Carreno-Maldonado*, 135 Wn. App at 88-89.

Washington's crime victim laws do not permit a prosecutor to breach a plea agreement. *MacDonald*, 183 Wn.2d at 7. When a crime victims' rights impede the defendant's due process rights, the defendant's due process rights must prevail. *Id.* at 16.

In *MacDonald*, even though RCW 9.94A.500 granted statutory authority to an investigating officer to make a sentencing recommendation, that authority did not permit him to undercut the prosecutor's plea agreement by proxy. *MacDonald*, 183 Wn.2d at 15- 17 (citing *State v. Sanchez*, 146 Wn.2d 339, 363, 46 P.3d 774 (2002) (Madsen, J., dissenting) ("Because a prosecutor cannot make an argument contrary to the plea agreement, the statute cannot be intended to serve as authority for a law enforcement officer to make a recommendation contrary to the prosecutor's"). Likewise, a prosecutor may not make statements that undermine a plea agreement even if he informs the court he is making the

statements on behalf of the victims. *Carreno-Maldonado*, 135 Wn. App. at 86-87.

- b. The prosecutor breached the plea agreement by stating it did not reflect the victim's perspective.

A surviving victim has a statutory right to address the court and request a sentence. RCW 9.94A.500(1). But this statutory right must not impede Ms. Myers's due process rights to the plea agreement she entered into with the prosecution.

MacDonald, 183 Wn.2d at 15-16.

Here, after reviewing the guilty plea with Ms. Myers, the court asked the prosecutor for his recommendation. RP 17. After emphasizing how terrible the crime was, the prosecutor breached the plea agreement by arguing it ignored the victim:

[I]n these types of cases there's a risk -- a risk for me, I don't know about others -- but a 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.

But his sister, Peggy Roberts, is here to tell the Court about Mr. Allen; and I'll ask her to come up and tell you about Mr. Allen and tell you what she thinks the sentence out[sic] to be.

RP 18-19 (emphasis added).

Ms. Roberts first asked for “a little longer sentence than what’s being offered just because of, you know, the nature of the crime.” RP 22. Ms. Roberts had personal beliefs about the crime, including that it was Ms. Myers’s “choice” to shoot a second time, and that this was not a “psychotic episode,” RP 22, despite medical evidence to the contrary. RP 25. Ms. Roberts believed Ms. Myers “made choices that obviously she knew at the time...that what she had done was wrong. Whether it was amphetamine induced or not.” RP 23. Ms. Roberts then ended with a request for the court to “sentence her to the full extent of the law.” RP 23.

Acknowledging Ms. Roberts’s testimony, the trial court stated that Ms. Myers’s drug use “took a toll on the whole family of the victim of this crime.” RP 26. Though the court noted it typically followed the State’s recommendations, here the court was concerned “there needs to be more jail time.” RP 26-27. The trial court predictably imposed more jail time as requested by Mr. Allen’s sister, and imposed a 180-month sentence rather than the requested 130 months. RP 27; CP 23.

As in *MacDonald*, RCW 9.94A.500 allowed the investigating officer, like Mr. Allen's sister, to speak about the sentence; however, this right "must be read in conjunction with precedent protecting a defendant's due process rights in plea bargain." *MacDonald*, 183 Wn.2d at 17. In *MacDonald*, the investigating officer advocated for a sentence above the agreed upon plea recommendation. *Id.* at 6. The State argued the officer was not acting as an arm of the State but as an advocate for the deceased victim. *Id.* at 16. Our Supreme Court rejected this argument that sought to "elevate a victim's state's rights over an accused's due process rights as conferred by both state and federal constitutions" and was inconsistent with controlling case law. *Id.* at 17.

Ms. Roberts's sentence request should have been taken into account in the plea negotiations, not offered by the prosecutor as an alternative to the agreement he made with Ms. Myers. The prosecutor had a constitutional and statutory duty to inform Mr. Allen's sister about the final resolution of the case. RCW 7.69.030(2); Const. art I, § 35. And he had a duty to assist her with the "victim impact statement or report to the court...if

requested.” RCW 7.69.030(13). The prosecutor also has a duty to inform the court whether the victim of a crime against the person has any express objections. RCW 9.94A.431(1). If the court then determines the plea is inconsistent with the “interests of justice” and “prosecuting standards,” it shall inform the defendant and prosecutor they are not bound by the agreement, and allow the defendant to withdraw her plea. *Id.* Given these obligations to account for the victim’s wishes throughout plea negotiations, the prosecutor cannot simply claim at sentencing that the plea agreement he reached with the defendant failed to account for the victim’s perspective as occurred here.

In *MacDonald*, the Court noted the proper place for the investigating officer to voice his opinion about the length of the sentence was to the prosecutor, during plea negotiations, which the record established he was able to do. *Id.* at 18. The officer’s advocacy at sentencing undermined the plea agreement and was a breach, necessitating reversal. *Id.* at 20-21. The same is true here; the prosecutor had a statutory and constitutional duty to communicate with the victim’s survivors, and their opinions

about the sentence should have factored into plea negotiations—not introduced at sentencing in contravention of the plea agreement. Like in *MacDonald*, here the record reflects the prosecutor did in fact communicate with the surviving victims about their wishes, because the exact cost of Mr. Allen’s funeral expenses were part of the plea agreement. CP 19. And the prosecutor was aware Ms. Roberts would be telling the court “what she thinks the sentence [ought] to be” when he introduced her testimony to the court. RP 19.

Ms. Myers had a due process right to not have the prosecutor either explicitly or implicitly undermine the plea agreement. *Carreno-Maldonado*, 135 Wn. App. at 83. Even if the prosecutor is not required to make the recommendation with enthusiasm, his role as “a court officer” is to “answe[r] the court’s questions, assis[t] victims in the exercise of these rights,” but not to offer “unsolicited advocacy...contrary to the State’s sentencing recommendation.” *Id.* at 86-87. And the prosecutor may not undercut the agreement by proxy through another advocate. *MacDonald*, 183 Wn.2d at 15.

The prosecutor breached its agreement with Ms. Myers by alerting the court the victim's perspective was not accounted for in his plea offer, then introducing the victim's perspective on the sentence that should be imposed as an alternative to the plea agreement he entered into with Ms. Myers. *Carreno-Maldonado*, 135 Wn. App. at 83.

- c. Reversal is required for Ms. Myers to seek specific performance from the prosecutor and be sentenced by a different judge.

Because the prosecutor breached the plea agreement, Ms. Myers must be given the opportunity to withdraw her plea or seek specific performance. *MacDonald*, 183 Wn.2d at 21 (citing *State v. Barber*, 170 Wn.2d 854, 873, 248, P.3d 494 (2011)). Remand should be heard in front of a different judge, since the original judge has already expressed an opinion about the appropriate sentence. *Sledge*, 133 Wn.2d at 846.

2. The trial court impermissibly considered disputed facts contrary to RCW 9.94A.530(2).

The trial court considered factual allegations at sentencing that Ms. Myers did not acknowledge or admit to, including unproven and unadmitted claims that Ms. Myers possessed a large amount of drugs in the car, was involved in

prostitution, as well as disputed claims about her motive, in violation of RCW 9.94A.530(2).

Whenever a court imposes a standard range sentence, it may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). Under this statute, the court must not consider disputed, material facts or grant an evidentiary hearing. *Id.* The purpose of this limitation is “to protect against the possibility that a defendant’s due process rights will be infringed upon by the sentencing judge’s reliance on false information.” *State v. Herzog*, 112 Wn.2d 419, 431-32, 771 P.2d 739 (1989); Const. art. I, § 3.

To satisfy due process, “the facts relied upon by the trial court must have some basis in the trial record.” *State v. Ross*, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004). The “real facts” doctrine requires the sentence be based on the defendant’s current conviction, her criminal history, and the circumstances surrounding the crime. *State v. Randoll*, 111 Wn. App. 578, 582, 45 P.3d 1137 (2002).

A defendant's lack of an objection to asserted facts is not acknowledgement. *State v. Cate*, ___Wn.2d ___, 453 P.3d 990, 991 (2019) (citing *State v. Hunley*, 175 Wn.2d 901, 917, 287 P.3d 584 (2012)). A defendant may appeal a standard range sentence when the sentencing court failed to comply with procedural requirements. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Moreover, an unpreserved sentencing error may be raised for the first time on appeal if "the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record," because this implicates fundamental principles of due process. *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014) (citing *State v. Ford*, 137 Wn.2d, 472, 481, 973 P.2d 452 (1999)); RAP 2.5(a).

Here, the trial court considered facts that were neither admitted or acknowledged in violation of RCW 9.94A.530(2). Ms. Myers's guilty plea to murder in the second degree allowed the trial court to review the police reports and statement of probable cause to establish a factual basis for the plea. CP 17.

Pre-trial litigation involved "extensive mental health testing and reports" which informed the prosecutor's plea offer

to the reduced charge and a low-range sentencing recommendation. CP 19. Both parties agreed that Ms. Myers was heavily under the influence of methamphetamine, and this resulted in her mistaken belief that Mr. Allen killed her child. CP 17, 26. The prosecutor alleged that Ms. Myers acted out of a mistaken form of revenge. RP 17. Ms. Myers disputed this factual allegation, arguing that she “shot because she thought she was being taken to the same place to be buried with her daughter. And she shot out of fear, not out of revenge.” RP 25. The court held no evidentiary hearing on this disputed fact.

Mr. Allen’s sister also made a number of unsupported, disputed factual allegations, including that Mr. Allen picked Ms. Myers “up off the street...[s]he was, my understanding, selling her body to infiltrate a sex trafficking ring to ... find her daughter who had been kidnapped...[a]nd a friendship occurred of some sorts, and, you know, it ended in a fateful night.” RP 21. None of this was included in the probable cause statement. CP 5-6.

Ms. Roberts made additional factual claims about the offense that were neither established in the statement of

probable cause nor admitted to by Ms. Myers in regards to her use of methamphetamine, claiming, she “chose to use meth, she chose to live a lifestyle, to seek out people who also used meth.” RP 22. Ms. Roberts also alleged additional controlled substance offense violations, claiming, “[i]t appears, you know, from the police reports that there was large amounts of the drug in the vehicle.” RP 22. She claimed that Ms. Myers “found somebody who would supply her endless supply of meth, drive her around the country looking for her daughter, you know, when her daughter was safe.” RP 22.

Contrary to the medical evidence, Ms. Roberts also claimed, “so she chose to shoot him a second time. That was a choice. That wasn’t a psychotic episode.” RP 22. She then continued to assert more unproved allegations about the offense, including about Ms. Myers’s mental state, alleging: “I mean, she made choices that obviously she knew at the time that her -- that what she had done was wrong. Whether it was amphetamine induced or not.” RP 23. Ms. Myers disputed Ms. Roberts’s claims about her mental state, arguing that the doctor

who evaluated Ms. Myers found her actions were “consistent with a delusional stimulant-induced psychotic disorder.” RP 25.

Again, no evidentiary hearing was held about these disputed factual claims, which means the court impermissibly considered the prosecutor’s and Ms. Roberts’s allegations about prostitution, additional claims of drug possession, and claims about her ability to make choices in regards to the charged offense.

In sentencing Ms. Myers, the trial court echoed general concern about Ms. Myers’s drug problem: “[t]he use and abuse of drugs is just—it takes its toll on everyone. In this situation not only did it take its toll on you and cause you to do some things that you probably wouldn’t otherwise have done, but it also took a toll on the whole family of the victim of this crime.” RP 26.

Despite a lack of evidence about the specific nature of Ms. Myers’s addiction, and without resolving the factual disputes about the offense, the court imposed 180 months, rather than the agreed recommendation of 130 months, for Ms. Myers to continue her “clean and sober” time. RP 26-27.

The court's consideration of these unproven, unacknowledged factual claims violated the "real facts" doctrine, and requires a new sentencing hearing.

F. CONCLUSION

The prosecutor breached the plea agreement by introducing a surviving victim's request for a harsher sentence in contravention of the plea agreement. This requires a new sentencing hearing. The court's consideration of unacknowledged, unproven, disputed facts in violation of RCW 9.94A.530(2) provides a separate grounds for this Court to reverse and remand for a new sentencing hearing.

DATED this 6th day of March 2020.

Respectfully submitted,

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DIVISION THREE**

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v.)	NO. 37013-5-III
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ASHLEY MYERS,)	
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APPELLANT.)	

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WASHINGTON APPELLATE PROJECT

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