

FILED
Court of Appeals
Division III
State of Washington
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NO. 37013-5-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

State of Washington,

Respondent / Plaintiff,

v.

ASHLEY MYERS,

Appellant / Defendant.

Appeal From The Superior Court
Of Whitman County
Case No. 18-1-00238-38

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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I. DEFENDANT / APPELLANT'S ASSIGNMENT OF ERROR

The defendant argues

1. that the prosecutor breached the plea agreement; and
2. that the sentencing judge violated the 'real facts' doctrine by considering facts not admitted by defendant.

The State believes there was no breach of the plea agreement, and the facts upon which the sentence was based were properly before the court.

II. STATEMENT OF THE CASE

The defendant shot the victim (Kenneth Allen) twice in the head with a .40 caliber pistol, after consuming a substantial amount of methamphetamine. This happened in a car, at the side of the road in rural Whitman County. (CP 4-6: the probable cause certificate). The defendant confessed to the deed, saying the defendant herself was Satan and the guy she shot was awful and had murdered the defendant's daughter the day before. (Id.) In fact, the defendant's daughter was fine, and living elsewhere.

The defendant was charged with Murder First Degree and Possession of Meth. (CP 1-3) Pursuant to a plea agreement, defendant pled guilty to a single amended charge of Murder Second Degree. (CP

31-32) The standard range for the crime was 123 to 220 months. (CP 9 – Statement on Plea; CP 22 – Judgment and Sentence; and RP 18) The prosecutor agreed to recommend a sentence of 130 months - neither at the bottom nor at the top of the range. (CP 19; and RP 15)

At her plea hearing, and in her statement of defendant on plea of guilty, the defendant noted that the court could review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. (CP 17 and RP 17) The prosecutor summarized from the Sheriff's office reports. (RP 13-14, 17)

The probable cause statement from a Sheriff's deputy notes, in relevant part: "Myers told me she was Satan. I asked Myers what happened today she said that guy was awful and murdered her daughter yesterday. Myers said she shot the male in the head. Myers admitted to smoking methamphetamine today." (CP 5) The prosecutor, in summarizing the reports, stated: "And she quickly admitted to the crime, explaining that needed to kill Mr. Allen because he had killed her child and she felt that that just needed to be done. And in – apparently in retaliation for him killing her child. As I say, he hadn't killed her child, but – and so that's the factual basis, Your Honor, of the charge of Murder in the Second Degree." (RP 14) The prosecutor went on to say, "Ms. Meyers, after having used apparently quite a bit of methamphetamine, was

very high at the time and she was convinced at the time that Mr. Allen had killed her child the day before. So this was some – apparently some act of revenge for that. But – and – and she told the deputy that she was the devil.” (RP 17)

The prosecutor then recognized the mental evaluation that had been done in preparation for sentencing, recognized that it was a ‘terrible act,’ that the defendant needed drug treatment, that defendant was taking responsibility for her actions, and didn’t have a criminal history, and all those things played into the recommendation by the prosecutor of 130 months. (RP 17-18)

Then the prosecutor noted that the prosecutor, at least, should not forget that someone was murdered, and then introduced the victim’s surviving sister to the court, who was present to make a statement. She was there because she wanted to talk about the victim, to tell the judge about the fellow that was murdered and to give the judge her recommendation. (RP 18-19)

The victim’s sister told the judge about her beloved brother, in a fairly touching way. (RP 19-24) In the course of her lengthy statement, there was no objection from defense counsel. She stated at one point: “I hope the court accepts the plea of guilty. I’d like to see a little longer sentence than what’s being offered just because of, you know, the nature

of the crime.” (RP 22) Then, after noting this was a deliberate act, “I ask this court to accept her plea of guilty and I ask this court to sentence her to the full extent of the law.” (RP 23)

The defendant’s attorney spoke primarily of the role that the meth played in the crime. (RP 24-26) He also disputed that the killing was done in revenge for the supposed-killing of defendant’s daughter. Instead, he argued that defendant shot the victim because the defendant thought the victim was going to take her to where he had supposedly killed the daughter and then kill the defendant there; more an argument of perceived self defense – albeit a twisted horror of fantasy self defense, built on drug intoxication. (Id.)

The defendant was given a chance to speak and declined. (RP 26)

The court then imposed a sentence above what the prosecutor had recommended, but below the maximum: 180 months. The court noted: “The 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. I tend to go along with the recommendations of the State but my one concern is I think there needs to be more jail time. There needs to be more time to think about that, and as a result I’m going to impose 180 months in the State

institution. I want you to think about what –what happened that day, what led you to do that that day. I – I want you to also hopefully get treatment while you’re in there. ... And nothing’s going to replace the loss of this gentleman that was murdered. He will not have a chance to see his family grow up. You’ll have a chance to see your family grow up and it’s – it’s just a sad state of affairs when we find these kind of things happen, particularly when they’re drug induced. And I think that this is really what is a foundation of exactly what’s going on here.” (RP 26-27)

III. ARGUMENT

1. There was no breach of the plea agreement.

Contrary to the defense’s argument, the prosecutor did nothing to undercut or violate the plea agreement – not in the slightest. This court will note that the prosecutor agreed to recommend, and did recommend, an amount of prison of 130 months – not the low end, not the high end, but something else. This court will also note that the defense was free to recommend the low end of the range, if they chose to, or for that matter, they could recommend an exceptional sentence below the standard range. The prosecutor did not know what the defense was going to recommend.

It was incumbent on the prosecutor to support the State's recommendation with reasons. That is what the prosecutor gave the court.

The defendant on appeal suggests, despite not raising the issue below, that the prosecutor somehow undercut the State's recommendation by noting that there had been a flesh-and-blood victim who had been murdered. That suggestion has no merit.

The defendant on appeal grossly misperceives the prosecutor's statement. At page 11 of her brief, appellant first suggests the prosecutor emphasized how terrible the crime was. The transcript shows the prosecutor only stated baldly that it was an "awful, terrible act" and that the defendant would be going to prison for a long time. (RP 17) The prosecutor did not emphasize the act any further.

Next, defendant states at page 11 of her brief, "the prosecutor breached the plea agreement by arguing it ignored the victim"... As shown by the quote that follows her argument, the prosecutor did NOT argue that the plea agreement ignored the victim. The prosecutor was noting that there was an actual victim, and it was important to remember that in the course of a cold courtroom proceeding. That was a natural lead in to introducing the victim's representative.

The defendant suggests on appeal that the prosecutor somehow undercut the State's recommendation by introducing the victim's

surviving sister and informing the court she had her own recommendation. That is the prosecutor's solemn duty. See RCW 7.69.030 (13) and (14); Washington Constitution, Art 1, Sec 35. It would be outrageous injustice indeed if a prosecutor were to try to silence a survivor out of fear that the survivor might disagree with the prosecutor's recommendation. The prosecutor in a criminal case must tolerate no unfairness towards a criminal defendant, and must also see that the rights of victims' survivors are protected. In this matter, the prosecutor did his duty to both.

Defendant argues that the decision in State v. MacDonald, 183 Wn.2d 1 (2015), ought to persuade this court that it was improper for the victim's survivor to be introduced, or allowed to speak, or allowed to give her own recommendation to the sentencing court. That is simply wrong. In MacDonald, the prosecutor had asked that a police investigator be allowed to make a recommendation, which was for much more than the prosecutor had recommended. The court in MacDonald upheld its earlier rulings that investigating officers are agents of the State and cannot undercut plea offers. This case is a far cry from that case.

The defendant on appeal advances the novel idea that a victim, or victim survivor, may object to a plea bargain overall, and ask a court to not accept a defendant's guilty plea to a reduced charge as part of that, but may not be heard to voice any other recommendations or requests to the

sentencing court. This court should not adopt that idea. (See eg State v. Lindahl, 114 Wn.App. 1, rev denied 149 Wn.2d 1013 (2002), where attorney for murder victim's family entitled to address court at sentencing and to file a sentencing memorandum, arguing for a sentence much higher than recommended by prosecutor.)

The prosecutor did not undercut the plea bargain. There was no underhanded conduct, no talking out of both sides of the mouth, no bringing in through the back door what the prosecutor didn't want to bring in through the front. The victim disagreed with the amount of time being recommended and they were entitled to say so.

2. The trial court based its sentence on facts taken from police reports, as agreed to by the defendant.

The defendant agreed the court could consider the facts contained in the police reports. Those are the facts given to the court by the prosecutor. Those are the facts upon which the court based its sentence.

As noted above, the trial court focused its reasoning on the role that meth intoxication played in this murder. That was undisputed, and indeed specifically argued, by defendant. The idea that the victim's survivor's comments about the defendant's prostitution (which were not objected to) somehow influenced the court are not supported by the record.

The defendant has not shown that the sentence was based on some impermissible factors.

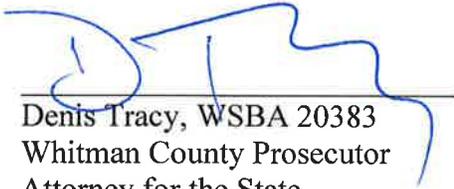
IV. CONCLUSION

The defendant has not shown that the prosecutor undercut the plea bargain – indeed the opposite is true.

The defendant has not shown the sentencing court based its sentence on facts outside the record.

The State respectfully requests the court deny the appeal and affirm the sentence.

Respectfully submitted this 18 day of June, 2020.



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WHITMAN COUNTY PROSECUTOR'S OFFICE

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