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Court of Appeals No. 37210-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

DANIEL GERALD SNAPP,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appeal form the Superior Court of Pierce County,
Cause No. 06-1-05153-1
The Honorable Katherine M. Stolz, Presiding Judge

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A. STATEMENT OF THE CASE IN REPLY

Prior to Mr. Snapp's entry of *Newton* pleas a CrR 3.6 hearing was held. The trial court denied Mr. Snapp's Motion to Suppress. CP 76-76. Six weeks later a negotiated plea agreement was finalized. CP 45-53. As inducement for his guilty pleas the state agreed, in writing, that Mr. Snapp retained his right to appeal the trial court's ruling denying his suppression motion. The state now dishonors its agreement by arguing that Mr. Snapp waived his right to appeal the CrR 3.6 ruling. The state's sole legal authority in support of its changed position is *State v. Smith*, 134 Wn.2d 849,953 P.3d 810 (1998).

In its responsive brief the state does not contest Mr. Snapp's argument that the trial court's CrR 3.6 ruling constitutes reversible error. Rather, the prosecutor argues that under *State v. Smith* this Court lacks the authority to hold the state to its agreement because the agreement was made contrary to the law. Brief of Respondent at page 5. The state further opines that as a consequence of entering into the plea agreement Mr. Snapp has waived his right to appeal the CrR 3.6

ruling.

Noteworthy is that the trial court orally advised Mr. Snapp only that he was giving up his right to appeal a guilty verdict following a trial, not that he was forfeiting his right to appeal the CrR 3.6 ruling. 10-16-07 6. Additionally, the trial court stated that it was adopting the agreed recommendations of the parties, which included the preservation of Mr. Snapp's right to appeal the CrR 3.6 ruling. 10-16-07 18.

B. ARGUMENT

THE STATE'S CONTENTION THAT IT IS NOT BOUND BY THE TERMS OF ITS PLEA AGREEMENT IS WITHOUT MERIT AND THE STATE HAS FAILED TO SHOW A VOLUNTARY WAIVER OF MR. SNAPP'S RIGHT TO APPEAL THE CrR 3.6 RULING.

The State is obligated to fully and wholeheartedly comply with the terms of a plea bargain agreement. *Santobello v. New York*, 40 U. 257,30 L.Ed.2d 427, 92 S.Ct. 495 (1971); *State v. Tourtellotte*, 88 Wash.2d 579,584,564 P.2d 799 (1977). A defendant has a right analogous to a contract right once a plea bargain is entered. *State v.*

Hall, 32 Wash.App. 104 Wn.2d 486,706 P.2d 1074 (1985).

Washington courts recognize that a plea agreement is a binding contract once accepted by a trial court. See, e.g. *State v. Hunsicker*, 129 Wn.2d 554,559,919 P.2d 70 (1996); *State v. Miller*, 110 Wn.2d 528,536,756 P.2d 122 (1988). Contract law requires a duty of good faith and fair dealing. RESTATEMENT, SECOND, CONTRACTS.' 205.

When a promise or agreement of the prosecutor is part of the inducement or consideration, that promise must be fulfilled. *State v. Hall*, *supra*, at 490 (citing *Santobello*, 404 U.S. at 262). Due process requires that the prosecutor adhere to the terms of the plea bargain agreement. (*In re Palodichuk*, 22 Wash.App. 107,589, P.22d 269 (1978)).

In Mr. Snapp's case, the state agreed that Mr. Snapp was preserving the CrR 3.6 ruling for appeal. The state has presented no legal authority that would relieve it of its obligation to adhere to that promise. On the contrary, under well established principles of contract law as well as due process requirements, the state may not be relieved

of its duties under the agreement. The state's argument that Mr. Snapp waived his right to appeal the CrR 3.6 ruling substantially undercuts the plea agreement, and should be considered a material breach of the agreement, and rejected by this court.

The state's reliance on *State v. Smith* is misplaced. In its responsive brief the state claims: "In pleading guilty, defendant waived his right to appeal his determination of guilt and any pretrial hearings, including the 3.6 Suppression Motion Hearing. *State v. Smith*, 134 Wn.2d 849,852,953 P.3d 810 (1998)." Brief of Respondent at page 5-6. The *Smith* Court actually held in opposite, e.g., that waiver had not been shown. Moreover, the *Smith* Court did not discuss the state's obligation to adhere to plea agreements because such facts were not presented.

In *State v. Smith*, the Washington Supreme Court reversed Division One's holding that defense counsel's unilateral mistaken statement to his client that the client could appeal a suppression ruling after entering a guilty plea did not overcome the evidence that the defendant's plea was voluntarily entered. In other words, the state

failed to meet its burden to show a valid waiver. The Supreme Court held that, although Mr. Smith had forefieted some rights, the State had not shown that he waived his right to appeal the suppression ruling. The *Smith* court acknowledged that the defendant admitted to reading and understanding his plea statement in court but explained:

> In this instance, however, defense counsel in open court expressed an erroneous legal interpretation of the plea statement which is at odds with a valid waiver. Counsel stated that, by pleading guilty, Smith was waiving certain rights on appeal, but was retaining the right to appeal the trial court's suppression ruling. Because this statement went uncorrected by opposing counsel or by the court itself, it seems apparent that Smith and everyone else in the courtroom had the same understanding, even if this understanding is inconsistent with the language in the plea statement saying Smith waived his right to appeal a determination of guilty after trial. Under the circumstances, it is clear that Smith voluntarily relinquished certain rights, but it is not clear that he knowingly, voluntarily, and intelligently relinquished the right to appeal the suppression ruling.

State v. Smith, 134 Wn.2d 849,851,953 P.3d 810 (1998).

In Mr. Snapp's case, the State provided even less evidence that a waiver of the right to appeal the suppression ruling was effectuated than did the *Smith* defendant, because here the state specifically agreed that Mr. Snapp's appeal right was preserved and the trial court

adopted the state's position.

Contrary to the state's newly formulated assertion that a plea agreement provision that permits an appeal of a CrR 3.6 ruling always contravenes the law, the appellate courts have looked to the written plea form and the in court colloquy to determine the intent of the parties and whether the right to appeal was waived, just as the *Smith* Court did. See also *State v. Olson*, 73 Wash. App. 348,869 P.2d 110 (1994).

While a stipulated facts trial may be a preferred procedural practice, the law does not prohibit enforcement of an agreement between the parties that a suppression ruling is appealable despite the entry of a guilty plea. The legal effect of a conviction is the same regardless of whether the conviction is obtained by jury verdict, by a judicial finding following a stipulated facts trial, or by guilty plea. In the event a trial court's denial of a suppression motion is reversed the improper evidence is suppressed and the parties then proceed accordingly with the remaining evidence.

This Court addressed the appealability issue under very similar

facts to those at bar in *State v. Olson*, 73 Wash. App. 348,869 P.2d 110 (1994). In *Olson*, the plea agreement provided that the defendant was "retaining his right to appeal the court's rulings on the *Knapstad* motion and the suppression (3.6) hearing." *Supra* at 350. The *Olson* Court conducted its review on the merits as if Mr. Olson had been found guilty on stipulated facts even though he entered a guilty plea and the record was "somewhat confusing." *Supra* at 351. The *Olson* Court declined to elevate form over substance and proceeded in this just and fair manner primarily because the record showed that the parties intended to preserve Mr. Olson's rights to appeal the pretrial rulings.

It stands to reason that a right which can be waived by stipulation can also be retained by agreement. "[T]here is nothing illegal per se abut a waiver of the right to appeal." *State v. Perkins*, 108 Wash. 2d 212,737 P.2d 250 (1987). Conversely, there is nothing illegal per se about preserving the right to appeal a suppression ruling, and the state has provided no legal authority to the contrary. Moreover, allowing the state to renege on its agreement would violate

strong public policy which favors plea agreements and holds parties accountable for their agreements.

C. CONCLUSION

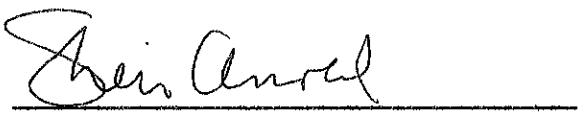
That the clear intention of the parties at the trial court was to preserve Mr. Snapp's right to appeal the suppression ruling is apparent and supported by the record. Ratifying the state's breach of its agreement would violate the law and public policy. The state has failed to show that Mr. Snapp waived his right to appeal the CrR 3.6 ruling under *State v. Smith, Supra.*

Furthermore, because the state has opted only in favor of dishonoring its plea agreement, and has entirely failed to respond to the merits of Mr. Snapp's arguments in its responsive brief, this Court should consider the suppression ruling issues on the basis of the appellant's unchallenged assignments of error and arguments as set forth in his opening brief.

In the event this Court determines that, as a matter of law, a suppression ruling can never be appealed following a guilty plea, notwithstanding the states stipulation to the contrary, and further, that

review of this case as a bench trial on stipulated facts pursuant to *State v. Olson* cannot occur, this Court must find that Mr. Snapp's plea was not voluntarily entered with an understanding of the effect the plea would have on his right to appeal the suppression ruling. Mr. Snapp's remedy would then be to withdraw his guilty plea in favor of a trial on stipulated facts under *State v. Smith, Supra,* from which he would again appeal the suppression ruling.

Respectfully Submitted this 13th day of October, 2008.



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 13 , 2008, I delivered bu U.S. mail to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and to Daniel Gerald Snapp, 3320 6th Avenue, Tacoma, Washington 98402, true and correct copies of this Reply Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on October 13, 2008.

Norma Kinter

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