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NO. 69501-1-I

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

STATE OF WASHINGTON

Respondent

v.

B.H. (DOB: 4/7/1996),

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the prosecutor's remarks at the sentencing hearing undercut the plea agreement?

2. Was the victim advocate bound by the plea agreement so that her comments on behalf of the victim constituted a breach of the plea agreement?

II. STATEMENT OF THE CASE

The appellant, B.H., was born on April 7, 1996. On April 18, 2012 H.R.B., went to B.H.'s home without her parent's permission. While there B.H. tried to get H.R.B. to have sex with him. When H.R.B resisted B.H.'s advances he threatened to rape her if she did not consent to have sex with him. B.H. used his upper body weight to hold H.R.B. down while he put on a condom. B.H then forced H.R.B. to have sexual intercourse with him. After he ejaculated he removed the condom and threw it at H.R.B., spreading his ejaculate all over her. Even after he raped her, B.H. prevented H.R.B. from leaving his room. H.R.B was not able to leave until the next morning when B.H. got in the shower. Police later interviewed B.H. about the incident. He admitted that he threatened to hit H.R.B if she did not agree to have sex with him. B.H. admitted that H.R.B. did not seem to want to have sex with him, but that she ultimately

agreed to do so after he threatened her. He also admitted to throwing the used condom at her, explaining that it was a joke. 2 CP 72-74.

On May 9, 2012 B.H. was going to class with A.S. at Lynnwood High School. On the way to class B.H. grabbed A.S. around her waist and dragged her into the boy's bathroom. B.H. tried to push A.S. into one of the stalls but she managed to get away. A.S. told B.H. to stop, and to let her go. B.H. later admitted to pushing A.S. into the boy's bathroom, stating he did it "just to be funny." A.S. said she thought she was being assaulted, and did not think it was a joke. 1 CP 68-69.

B.H. was originally charged with one count of second degree rape. 1 CP 75. The charges were amended to third degree rape for the sexual assault on H.R.B, and unlawful imprisonment for the unlawful restraint of A.S. 1 CP 70-71. B.H. pled guilty to the amended information. 1 RP 6-12¹; 1 CP 56-65. In exchange for his plea of guilty the State agreed to recommend that B.H. serve 30 days in detention on the unlawful imprisonment count and a SSODA disposition on the third degree rape count. 1 CP 61.

¹ The State adopts the appellant's number reference to the report of proceedings.

The probation department provided a disposition report to the court. Appended to the report was a sexual behavior evaluation prepared by Sara Strauss, MA, a certified sex offender treatment provider. 2 CP 77-105. Ms. Strauss met with B.H. on two occasions for a total of 4.5 hours and she reviewed the test result administered to B.H. She also spoke with B.H.'s father, and the high school resource officer, Deputy Barker. Ms. Strauss also reviewed the police reports from each charged incident. 2 CP 79.

Ms. Strauss reported that B.H. expressed to her his belief that the incidents had been blown out of proportion. He expressed anger when asked to provide details about each incident. He said H.R.B. lied, and that she willingly had sex with him. He did not want to be evaluated, and he did not think that he needed treatment. Specifically B.H. stated that he did not want to participate in a SSODA program if the court ordered it. Ms. Strauss noted B.H. expressed no remorse for his actions. 2 CP 88-90.

Ms Strauss listed 14 risk factors B.H. presented to community based treatment, and only 3 factors that would mitigate that risk. 2 CP 96-97. Ms. Strauss concluded that B.H. needed sex offender treatment, but he was not "amenable to treatment in the SSODA program at this time" as a result of his unwillingness to

participate in treatment. She predicted that if he were sentenced to the SSODA alternative he would frequently violate the conditions of his disposition. 2 CP 98. The probation counselor recommended B.H. serve 52 weeks of confinement. 2 CP 77.

At sentencing the prosecutor recommended a SSODA with 30 days confinement. The prosecutor acknowledged that the probation counsel did not join in that recommendation based on the evaluation results. The prosecutor explained that B.H. had earlier taken more responsibility for his action, and reiterated B.H. needed treatment. She suggested that perhaps the defense attorney could illuminate for the court B.H.'s statements to the evaluator. She admitted that it was uncertain if treatment would be effective without B.H. altering his attitude from that expressed in the evaluation. 2 RP 3.

After the prosecutor's presentation, defense counsel and B.H. addressed the court. Each explained to the court that B.H.'s attitude during the evaluation process stemmed from Ms. Strauss's misunderstanding regarding what B.H. had been found guilty of. When Ms. Strauss informed B.H. he had been convicted of second degree rape, rather than third degree rape, B.H. was shocked and believed his lawyer had lied to him. B2 RP 5, 10 .

H.R.B. and her parents attended the disposition hearing. 2 RP 2. H.R.B.'s father spoke on behalf of his daughter, telling the court that B.H.'s actions were still affecting H.R.B. 2 RP 3-4. After the defense attorney, B.H., and B.H.'s father spoke the victim advocate, Ms. Wallace spoke on behalf of H.R.B. and her father. Ms. Wallace told the court that H.R.B. and her family were in favor of the recommendation for 52 weeks confinement. She stated the family was "disheartened" to hear about what B.H. said in the evaluation and at court, diminishing his own culpability. 2 RP 11-12.

The trial court rejected the recommendation for a SSODA and imposed a manifest injustice disposition on the rape third degree count, sentencing B.H. to 42-52 weeks in JRA. The court imposed 22 days, with credit for 22 days served on the unlawful imprisonment count. 2 RP 16, 1 CP 40, 48.

III. ARGUMENT

A. THE PROSECUTOR'S COMMENTS AT SENTENCING DID NOT BREACH THE PLEA AGREEMENT.

B.H. argues the prosecutor breached the plea agreement by referring to the evaluation as "concerning." He also argues that the prosecutor breached the plea agreement by stating "I don't know

how effective [treatment] will be unless he changes his attitude.”
BOA at 7-8, 2 RP 3.

The State has the duty under the terms of the plea agreement to make the promised sentencing recommendation. State v. Sledge, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). That duty does not require the prosecutor to make a recommendation enthusiastically. State v. Van Buren, 101 Wn. App. 206, 212, 2 P.3d 991, review denied, 114 Wn.2d 1015 (2000). The prosecutor must act in good faith, participate in the sentencing proceeding, and not hold back relevant information regarding the plea agreement. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998).

At the same time the prosecutor may not undercut the terms of the agreement. Van Buren, 101 Wn. App. at 212. “The State can undercut a plea agreement either explicitly or implicitly through conduct indicating an intent to circumvent the agreement.” Id. The test is whether the prosecutor contradicts, by words or conduct, the State’s recommendation. State v. Julian, 102 Wn. App. 296, 303, 9 P.3d (2000), review denied, 143 Wn.2d 1003 (2001). Whether the State undercut the plea agreement is judged by an objective

standard. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999).

In Sledge the prosecutor agree to make a standard range disposition recommendation in exchange for the juvenile respondent's guilty plea to Taking a Motor Vehicle Without Permission. Sledge, 133 Wn.2d at 831. At the disposition hearing the respondent stipulated the court could consider the manifest injustice report. Despite that the prosecutor called the report writer and examined her in detail regarding the respondent's criminal history and her reasons for recommending a manifest injustice. The prosecutor also called one of the respondent's parole officers from an earlier disposition to talk about his about his problems while on parole. The prosecutor asked the parole officer to offer a disposition recommendation, specifically asking about aggravating factors that would support a manifest injustice. After presenting that testimony the prosecutor argued at length the facts that would support the aggravating factors justifying a manifest injustice. Id. at 833-38.

The Court found the prosecutor's conduct undercut the recommendation for a standard range disposition, and therefore breached the plea agreement. Id. at 842-43. That conclusion was

based on the unnecessary examination of the probation counselor and parole officer and the summation which was an obvious attempt to advocate for the aggravating factors supporting the manifest injustice disposition. Id.

In contrast, the prosecutor's reference to grounds for an exceptional sentence advocated by the presentence investigation report, while unnecessary, did not cross the line into advocacy in Van Buren, 101 Wn. App. at 216. Standing alone that conduct did not undermine the plea agreement for a standard range sentence. Id. However, the prosecutor's remarks regarding the impact of the defendant's conduct on the victim's family effectively advocated for an exceptional sentence and therefore undermined the plea agreement. That conclusion was further supported by the prosecutor's reference to the defendant's lack of remorse, when the defense had not suggested her remorse was a basis for a sentence at the low end of the standard range. Id. at 216-17.

The prosecutor's comments did not undercut the plea agreement in State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995). There the prosecutor agreed to recommend a SSOSA if the presentence report supported such a recommendation. The PSI did recommend a SSOSA; accordingly at sentencing the prosecutor

recommended a SSOSA. The prosecutor also called a witness to clarify the defendant's juvenile criminal history as reported in the PSI. Because the testimony focused on a fact that could have been discerned from the PSI report the prosecutor did not breach the plea agreement by calling the witness to testify to what in effect was cumulative information. Id. at 854.

Here the prosecutor did recommend a SSODA sentence. Her remarks regarding the evaluation as "concerning" was no different than the remarks that did not constitute a breach of the plea agreement in Van Buren. Like those comments, the prosecutor's comment here did no more than state what was obvious from the materials before the court. Her remarks did not by inference suggest to the court that it should reject the State's recommendation. Rather the remarks acknowledged that B.H.'s behavior during the evaluation could possibly be explained so that a SSODA would still be a viable option.

Likewise, the prosecutor's comment regarding B.H.'s prognosis for success in treatment was apparent from the probation report and attached evaluation. B.H.'s behavior during the evaluation stood in stark contrast to his attitude as demonstrated during the police investigation and the plea hearing. B.H. admitted

to police that he committed a forcible rape on H.R.B. and then humiliated her by throwing a used condom at her. 1 CP 73. B.H. also admitted conduct amounting to an unlawful imprisonment of A.S. 1 CP 69. At the plea hearing B.H. again admitted to forcing H.R.B. to have sex with him. 1 RP 10-12. In contrast during the evaluation B.H. claimed he had consensual sexual intercourse with H.R.B. 2 CP 89. He denied that he needed treatment and indicated that he would not participate in treatment if ordered. 2 CP 90. Because it was apparent from the report that B.H.'s success in treatment was in jeopardy given his new attitude, the prosecutor's comments were at best cumulative. Like the witnesses' testimony in Crider, the comment here does not support the conclusion that a breach occurred.

Finally, although the prosecutor's comments acknowledged B.H.'s attitude change she did not suggest his attitude would never change again, or that he was a poor risk to at least try treatment. Here comments did not amount to advocacy for a disposition other than the SSODA recommendation B.H. bargained for. Rather, her comments sought to encourage the defense to explain to the court why, in the face of a troubling report that showed B.H. was a

completely unsuitable candidate for a SSODA, the court should nevertheless order it.

B. THE VICTIM ADVOCATE WAS AUTHORIZED TO MAKE REMARKS ON BEHALF OF THE VICTIM. HER COMMENTS DID NOT BREACH THE PLEA AGREEMENT.

B.H. argues the Court should consider the prosecutor's remarks in conjunction with the victim advocate's remarks to find a breach of the plea agreement. He provides no authority for the proposition that the remarks of the victim advocate should be imputed to the prosecutor when considering whether there has been a breach of the plea agreement. Because the victim advocate had a constitutional and statutory role in the sentencing proceeding independent of the prosecutor's role, and because prior case authority does not support B.H.'s argument, it should be rejected.

Crime victims in Washington have constitutional rights as outlined in Art. 1, §35 of the Washington Constitution. In part that provision gives crime victims the right "to make a statement at sentencing..." Id. In the case of a minor "the prosecuting attorney may identify a representative to appear to exercise the victim's rights." Id. Crime victims have the statutory right to submit a victim impact statement to "present a statement personally or by representation, at the sentencing hearing." RCW 7.69.030(14).

RCW 9.94A.500(1) requires the court to “allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.” The list is inclusive; it mandates who must be permitted to speak at a sentencing hearing, but does not limit the court’s discretion in hearing from others. State v. Hixson, 94 Wn. App. 862, 866, 973 P.2d 496 (1999).

Although employed by the prosecutor’s office, the victim advocate’s duty is to the victim. “The role of the crime victim advocate is to provide emotional support to the child victim and to promote the child’s feelings of security and safety.” RCW 7.69.030(2). Thus, at court hearings she stands as the victim’s representative, not as a representative of the prosecutor’s office.

The record is clear that Ms. Wallace, the victim advocate, was speaking on behalf of H.R.B. and her family. After the defense gave its presentation the court asked the prosecutor if she had anything to add. The prosecutor indicated that H.R.B.’s father had left something out of his statement that Ms. Wallace would present to the court. Ms. Wallace stated she was speaking “on behalf of the victim’s dad as well as express some of her thoughts and

feelings that she felt unable to convey to you this morning herself.”
2 RP 11. The remainder of her remarks conveyed the victim and
her family’s position. 2 RP 12. The victim advocate was not
expressing her own opinion, nor was she speaking on behalf of the
prosecutor.

The victim advocate was not a party to the plea agreement.
“The prosecutor and the defendant are the only parties to a plea
agreement.” State v. Wakefield, 130 Wn.2d 464, 474, 925 P.2d
183 (1996). The Court reaffirmed this statement in Sledge, 133
Wn.2d at 839, n. 6. “[W]hether a government employee other than
the prosecutor is bound by the agreement depends not on the
employee’s role vis-à-vis the prosecutor, but on the employees’ role
vis-a-vis the sentencing court. State v. Sanchez, 146 Wn.2d 339,
349, 46 P.3d 774 (2002).

Because only the prosecutor is a party to the plea
agreement, it was the prosecutor’s conduct in Sledge that violated
the plea agreement. It was not the probation or parole officer’s
recommendations that constituted a violation of the plea
agreement, even though the probation officer had filed a report with
the court advocating for some disposition other than that which the
prosecutor agreed to recommend. Sledge, 133 Wn.2d at 843.

Similarly the Court found no breach of the plea agreement when a lawyer acting on behalf of the victim's family argued for an exceptional sentence where the prosecutor agreed to recommend a standard range sentence. State v. Lindahl, 114 Wn. App. 1, 12, 56 P.3d 589 (2002), review denied, 149 Wn.2d 1013 (2003). More recently the Court found comments by the investigating officer (IO) in one case and the community corrections officer (CCO) in another case did not constitute a breach of the plea agreement. The Court reasoned that both the IO and the CCO had a statutory role at sentencing. Further the prosecutor did not control the IO's actions. Sanchez, 146 Wn.2d at 349-52.

Like the IO and CCO, the victim advocate has a statutory role at sentencing. She also has a duty to the victim. At times that duty may conflict with the prosecutor's goals. The possibility that the advocate and the prosecutor positions may conflict shows that the prosecutor does not control the victim advocate. Here the advocate was not acting as an agent of the prosecutor when she addressed the court. Her comments should not be considered as breach of the plea agreement between the deputy prosecutor and B.H.

IV. CONCLUSION

For the foregoing reasons the State did not breach the plea agreement. The State asks the Court to affirm the sentence imposed by the trial court.

Respectfully submitted on March 21, 2013.

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