Received
Washington State Supreme Court

FEB 19 2016

Ronald R. Carpenter
Clerk

No. 92606-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Michael Dee Neisler, Petitioner,

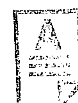
MOTION IN OPPOSITION OF PETITION FOR DISCRETIONARY REVIEW

(ANSWER TO PRV)

Tim Rasmussen, WSBA # 32105
Prosecuting Attorney
Attorney for Respondent

Lech Radzimski, WSBA # 39437
Deputy Prosecuting Attorney
Attorney for Respondent

Stevens County Prosecutors Office
215 S. Oak Street, Room # 114
Colville, WA 99114
509-684-7500



ORIGINAL

TABLE OF CONTENTS

A. IDENTITY OF RESPONDENT 1

B. DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

I. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT THE STATE DID NOT BREACH THE PLEA AGREEMENT IN THIS MATTER? 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 5

I. THE COURT OF APPEALS DID NOT ERR WHEN IT FOUND THAT THE STATE DID NOT BREACH THE PLEA AGREEMENT IN THIS MATTER 5

F. CONCLUSION 13

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

In re Palodichuk, 22 Wash.App. 107, 589 P.2d 269 (1978)......................6

State v. Carreno-Maldonado, 135 Wash. App. 77, 143 P.3d 343 (2006)..6, 8, 9, 10

State v. Jerde, 93 Wash.App. 774, 970 P.2d 781 (1999).......................5, 6

State v. Neisler No. 32898-8-III, 361 P.3d 278 (2015).......................1, 11

State v. Sledge, 133 Wash.2d 828, 947 P.2d 1199 (1997)................5, 6, 7

State v. Talley, 134 Wash.2d 176, 949 P.2d 358 (1998).......................5, 6

WASHINGTON STATE STATUTES

RCW 9.94A.535(3)(y) 2

A. IDENTITY OF RESPONDENT

The Respondent, State of Washington, asks this court to deny discretionary review of the decision designated in Part B of this motion.

B. DECISION

The Division III Court of Appeals issued a published opinion in this matter on November 10, 2015 affirming an exceptional sentence which was imposed by the trial court in this matter. *See State v. Neisler* No. 32898-8-III, 361 P.3d 278 (2015). The Petitioner seeks review of that decision.

C. ISSUE PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT THE STATE DID NOT BREACH THE PLEA AGREEMENT IN THIS MATTER?

D. STATEMENT OF THE CASE

On June 29, 2013 the Petitioner, Mr. Neisler was operating a motor vehicle in Stevens County while under the influence of alcohol. *See* CP 4 - 7. Mr. Neisler was driving a 2004 Toyota Tundra. *See id.* He crossed the centerline on State Route 25 and struck a 2006 Honda Civic with two occupants. *See id.* Both individuals sustained numerous fractures as a result of the impact. *Id.* Caroline Enns, the passenger, suffered permanent vision loss based upon this incident. *Id.*

Mr. Neisler was charged with two counts of vehicular assault. *See* CP 1 - 3. The second count, pursuant to RCW 9.94A.535(3)(y), alleged that the victim's injuries "...exceed the level of bodily harm necessary to satisfy the elements of the offense." *Id.*

On October 21, 2014, Mr. Neisler pled guilty to two counts of Vehicular Assault stemming from the incident which had occurred on June 29, 2013. *See* CP 16 - 26. Mr. Neisler also pled guilty to the aggravating factor. *Id.* At the beginning of the hearing the State informed the court,

> Given the history of the case, the nature of the injuries, judge, we have agreed not to make a recommendation as far as a specific amount of imprisonment and I'll get to some of the reasons for that later. But ultimately we are asking the Court to hear from the victims in the case. I'll supplement a little bit about the history of the case, how we got here today and ultimately we're deferring to Your Honor on what should be the appropriate sentence.

See 10/21/14 RP at 2

Mr. Neisler agreed that this was the resolution that had been reached. *See id* at 3. The parties engaged in a discussion at the time of sentencing about the range of confinement the court could impose. *See id* at 2, 4. After making Mr. Neisler fully aware of the sentencing possibilities the court inquired if he wanted to proceed and Mr. Neisler decided to move forward with his plea. *Id.*

At sentencing the trial court heard from the State. The trial court found that the State did not make a sentencing recommendation. *See* CP at 45. The trial court also heard from the victims and found that the victims recommended the court impose 120 months. *Id.* Mr. Neisler's trial counsel commented on the seriousness of the case and stated, "We would ask that the Court impose an exceptional sentence. We realize that 12 to 14 months isn't fitting in this case. We would ask the Court to go higher than that, to go 16 months or 18 months." *See* 10/21/14 RP at 15.

The trial court sentenced Mr. Neisler to 72 months. The court went into detail with respect to the reasons for imposing a 72 month sentence. *See* generally CP 44 - 48. The court reflected on past cases that had been prosecuted in Stevens County and conducted legal research into other cases from across the state in which exceptional sentences were imposed. *Id.* After taking into account everything the court had heard as

well as the legal research it conducted, a proper and lawful sentence was imposed.

The trial court stated what facts it was relying on when it decided to impose a 72 month sentence. *Id.* The court found,

> B. The harm suffered by Caroline H. Enns on June 19, 2013, as she described at the hearing was immediate and permanent loss of vision in both eyes; sheared off right elbow; broken left ankle; both shoulders crushed, the bones shattered; both arms with multiple breaks, and legs broken. This harm substantially exceeds the level of bodily harm necessary to comprise substantial bodily harm.
>
> C. In the aftermath she uses a walker, out of fear she might fall; she has had eight surgeries, taking five to eight hours each; she has incurred $650,000 in medical bills; she is unable to pursue her career as an artist; and she is totally dependent on the care of her daughter. She has suffered unremitting pain since June 29, 2013.
>
> *Id.* at 45.

The Petitioner appealed the imposition of the 72 month sentence arguing that the State made inappropriate statements during the sentencing hearing by commenting on the nature of Caroline Enns's injuries. The Division III Court of Appeals rejected this argument and affirmed the 72 months sentence.

E. ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR WHEN IT FOUND THAT THE STATE DID NOT BREACH THE PLEA AGREEMENT IN THIS MATTER.

This Court ought to deny the Petitioner's Motion for Discretionary Review as the Division III Court of Appeals did not err in its decision. Furthermore, the Court of Appeals decision in this matter is not in conflict with this Court's ruling in *State v. Sledge.*

A plea agreement is a contract between the State and the defendant. *State v. Sledge,* 133 Wash.2d 828, 838-39, 947 P.2d 1199 (1997). Basic contract principles of good faith and fair dealing impose upon the State an implied promise to act in good faith in plea agreements. *Id.* at 838-39. Due process concerns reinforce the State's duty to comply with plea agreements. *Id.* 839-40.

Accordingly, a plea agreement obligates the State to recommend to the court the sentence contained in the agreement. *State v. Talley,* 134 Wash.2d 176, 183, 949 P.2d 358 (1998); *Sledge,* 133 Wash.2d at 840, 947 P.2d 1199. This obligation does not, however, require the State to make the sentencing recommendation enthusiastically. *Talley,* 134 Wash.2d at 183; *Sledge,* 133 Wash.2d at 840. But, at the same time, the State must not undercut the terms of the agreement. *Talley,* 134 Wash.2d at 183; *Sledge,* 133 Wash.2d at 840; *State v. Jerde,* 93 Wash.App. 774, 780, 970

P.2d 781 (1999). The State can undercut a plea agreement either explicitly or implicitly through conduct indicating an intent to circumvent the agreement. *Sledge,* 133 Wash.2d at 840; *Jerde,* 93 Wash.App. at 780; *In re Palodichuk,* 22 Wash.App. 107, 110, 589 P.2d 269 (1978).

An objective standard is applied in determining whether the State breached a plea agreement "'irrespective of prosecutorial motivations or justifications for the failure in performance.'" *Jerde,* 93 Wash.App. at 780, (quoting *Palodichuk,* 22 Wash.App. at 110, 589 P.2d 269); *see also Sledge,* 133 Wash.2d at 843. ("The focus of this decision is on the effect of the State's actions, not the intent behind them."). "The test is whether the prosecutor contradicts, by word or conduct, the State's recommendation for a standard range sentence." *Jerde,* 93 Wash.App. at 780, citing *Talley,* 134 Wash.2d at 187. In making this determination, the entire sentencing record is reviewed. *Jerde,* 93 Wash.App. at 782.

It is also important to keep in mind that a defendant entering into a plea agreement bargains for a prosecutor's good faith recommendation, not a particular sentence. *See State v. Carreno-Maldonado*, 135 Wash. App. 77, 88, 143 P.3d 343 (2006). As with any plea agreement the court is not bound by the prosecutor's sentencing recommendation and is free to impose any lawful sentence it deems fit. *Id.*

Mr. Neisler relies exclusively on two cases to support his position

that the plea agreement was breached in this matter. Both cases are distinguishable from this case.

The Petitioner cites primarily to *State v. Sledge* to support his argument. In *Sledge* the State had agreed to make a standard range disposition recommendation to the court. *See Sledge* 133 Wash. 828 at 830. The State made the agreed upon recommendation but then insisted on a disposition hearing to present evidence. *Id.* An evidentiary hearing would have not been necessary for the court to impose a standard range disposition. At the disposition hearing the State presented evidence regarding aggravating factors that would support an exceptional sentence. *Id.* The court ultimately imposed an exceptional disposition in *Sledge*. *Id.*

In *Sledge*, the State engaged in extensive affirmative conduct that was not required to support the imposition of the bargained for disposition. Based upon a superfluous evidentiary hearing and the presenting of extensive unnecessary testimony the trial court in *Sledge* imposed an exceptional disposition. The Petitioner, in this case, equates a comment made by the State about the evidence that supports the existence of an aggravating factor to what transpired in *Sledge*. Commenting on the impact the Petitioner's actions had on the victims' is not the same as demanding a superfluous evidentiary hearing and presenting extensive testimony when it was not necessary.

Mr. Neisler's Petition for Discretionary Review also omits a key fact that distinguishes this case from *Sledge.* As stated above, the existence of an aggravating factor in *Sledge* was established solely through the conduct of the State. Unlike *Sledge*, Mr. Neisler pled guilty and acknowledged that the injuries he inflicted upon Caroline Enns exceeded the level of bodily harm necessary to satisfy the elements of the offense. In addition to pleading guilty to this aggravating factor Mr. Neisler urged the court to impose a sentence above the standard range. Mr. Neisler's trial counsel stated, "We realize that 12 to 14 months isn't fitting in this case. We would ask the Court to go higher..." *See* 10/21/14 RP at 15.

The Petitioner also cites to *State v. Carreno-Maldonado*. In *Carreno-Maldonado* the defendant pled guilty to seven felonies. *See State v. Carreno-Maldonado* 135 Wash.App. 77, 79, 143 P.3d 343 (2006). The State agreed to recommend concurrent sentences of (1) a low-end standard range sentence of 240 months for the first degree rape count; (2) a midpoint standard range sentence of 240 months for the five second degree rape counts; and (3) a high-end standard range sentence of 84 months for the second degree assault count. *Id.* at 80. At sentencing the prosecutor in *Carreno- Maldonado* addressed the court with the following:

> Your Honor, I just wanted to speak on behalf of the victims. I would note that there are three victims in the courtroom today. There are a total of seven victims in this

> case. Two of them we were never able to connect with, solidly anyway.... But, we do have three women here today. *It's my understanding they are just here to observe. They don't want to speak to the court.* And, I just wanted to make a brief statement on their behalf. As Your Honor probably noticed in reading the declaration of probable cause and in taking the plea and reading the PSI, this is a case of a defendant who engaged in very extreme violent behavior for the purpose of obtaining what he calls or is quoted as saying "free sex." It's the [S]tate's position that he preyed on what would normally be considered a vulnerable segment of our community and these women are vulnerable insofar as they are exposed to the kind of people that [Carreno–Maldonado] is. They're the type of victims that probably make the best victims and maybe [Carreno–Maldonado] recognized that; that they were less likely to report the crimes to the police. If they even do get to that point they're less likely to come to court and testify or be involved whatsoever in the prosecution process. That was this case. However, not necessarily for all of them. It took sometimes more effort to get some of these victims to come in and make statements but they eventually did. I'm not sure what else I can say because these crimes are so heinous and so violent it showed a complete disregard and disrespect for these women.
>
> *Id* at 80-81.

With respect to these comments the Division II Court of Appeals found that, "Article I, section 35 and RCW 7.69.030 give the victims the right to speak or not speak on their own behalf. But they do not provide the State with the right to speak for the victims when they have decided not to speak and have not requested assistance in otherwise communicating with the court such as by presenting a victim impact statement." *Id.* at 84. The court went on to find that the prosecutor's

statements were not intended to assist the victims' in exercising their rights. *Id.* Rather, the prosecutor's comments drew attention to aggravating factors that were not charged nor pled to. *Id.* The court in *Carreno-Maldonado* ultimately remanded the matter back to the trial court for further proceedings. *Id.*

The facts of *Carreno-Maldonado* are distinguishable from those of this case. In *Carreno-Maldonado* the prosecutor engaged in conduct which was not authorized by law when addressing the court on behalf of victims that were present in court. The prosecutor made comments that would have supported the existence of aggravating circumstances which were not charged or pled to.

In the present case the trial court heard from both victims. Both women described the impact the Petitioner's actions had on their lives. Both victims advocated for the imposition of 120 months. Unlike *Carreno-Maldonado* both parties, in this case, acknowledged the existence of an aggravating circumstance. In recognition of the aggravating circumstance the Petitioner himself advocated for the imposition of an exceptional sentence in this case.

In reaching its decision in this case the Division III Court of Appeals ruled,

> ...both parties agreed an exceptional sentence was appropriate given the nature of Caroline Enns's injuries. Therefore, the State was not prohibited from arguing and setting forth facts in support of an exceptional sentence. Although the plea agreement required the State to defer to the court with respect to sentencing, there was no agreement, expressed or implied, that the State would minimize Caroline Enns's true injuries to lead the court toward a "low end" aggravated sentence, such as that requested by defense counsel. We hold the State did not breach the plea agreement.
>
> *State v. Neisler*, No. 32898-8-III, 361 P.3d 278, 282-83 (2015)

When the entire sentencing record is reviewed it is clear that the Division III Court of Appeals ruling is proper. Mr. Neisler negotiated a resolution in which he pled guilty as charged to two counts of vehicular assault. One count alleged the existence of an aggravating circumstance. As part of this resolution the State agreed to defer to the court with respect to sentencing. The state upheld the bargain in this case and made no sentencing recommendation.

The record before this Court demonstrates that the motivation behind this appeal is the fact that the Petitioner is displeased that he was sentenced to 72 months. Given what transpired at sentencing it is all too convenient that he attempts to blame the State for the sentence that was imposed. Assigning blame to the State is the only way Mr. Neisler can obtain the relief that he seeks. The victims in this case urged the trial

court to impose the maximum punishment available. Mr. Neisler would be without remedy if he attempted to blame his sentence on the victims. The victims in this case exercised their statutory and constitutional right to address the court and cannot be faulted for this. Mr. Neisler could also take issue with the trial court for imposing the sentence that it did. This claim would likewise be without merit. In this case the trial court heard from all parties and detailed its rationale for imposing a sentence of 72 months in written findings. The rationale for the trial court's decision is supported both by the facts of this case and legal precedent. Lastly, Mr. Neisler could argue that there was no basis for the imposition of an exceptional sentence. This claim would likewise fail. To argue that an exceptional sentence is not appropriate would be invited error since the defense stipulated the existence of aggravating circumstances and requested a sentence above the standard range.

Mr. Neisler negotiated a resolution in which the State would defer to the court with respect to the sentence. The record from the sentencing hearing is clear that Mr. Neisler knew what range of punishment was available to the court. With this knowledge he chose to move forward and pled guilty. As with any case, the Petitioner assumed the risk that the court could impose any lawful sentence. In this case it included the possibility the Petitioner would be sentenced to 120 months.

As the Court of Appeals noted, Mr. Neisler did not negotiate that the State would minimize the victims' injuries or somehow argue that the facts of the case did not support an exceptional sentence. Mr. Neisler pled to an aggravated vehicular assault. All parties, including the State, were entitled to discuss why the facts of this case were aggravated. The trial court heard from both victims and the defense, all of whom advocated for the imposition of specific exceptional sentences. The one participant at the sentencing hearing that did not make a sentencing recommendation was the State.

F. CONCLUSION

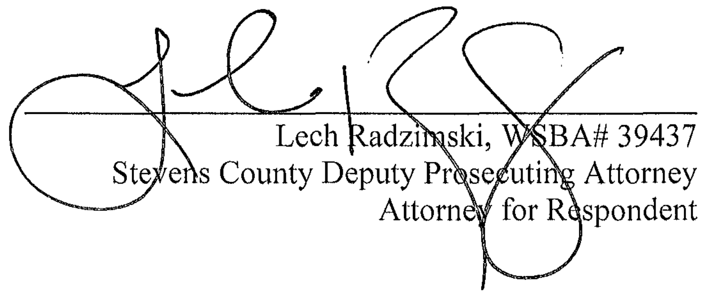
The State respectfully requests that this court deny review of this matter. The Petitioner cannot fault the victim for requesting an exceptional sentence. He cannot blame himself for his sentence given that the defense argued that the facts supported an exceptional sentence and requested on. He now seeks to blame the State for the sentence which was imposed.

The Court of Appeals did not err when it ruled that the comments of the State did not violate the terms of the plea agreement. The record

establishes that the State did not make a sentencing recommendation. The record also establishes that after hearing from all the parties and careful consideration the court exercised its discretion and entered a lawful sentence which is supported by the facts of this case and case law.

Respectfully submitted this 16th day of February, 2016

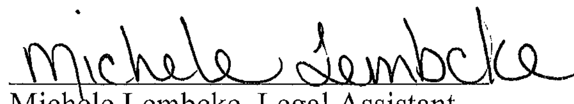
Tim Rasmussen, WSBA # 32105
Sevens County Prosecutor



Lech Radzimski, WSBA# 39437
Stevens County Deputy Prosecuting Attorney
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Motion in Opposition of Petition for Discretionary Review to the Supreme Court of the State of Washington; Law Office of Steve Graham, Attorney for Appellant, 1312 North Monroe, #140; and to Michael D. Neisler, Cedar Creek Corrections Center, P.O. Box 37, Littlerock, WA 98556-0037 on February 16, 2016.



Michele Lembcke, Legal Assistant
for Lech Radzimski