6.55.14-4 65574-4

NO. 65574-4-I

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

REC'D
JAN 18 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

GREGORY RYAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard Eadie, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206)623-2373

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A. ARGUMENT IN REPLY

RYAN DID NOT AGREE TO PAY RESTITUTION FOR ALL OF GREGORY'S LOSSES.

The State argues Ryan was properly ordered to pay restitution for all of Gregory's losses because he expressly agreed to do so as part of his plea. Specifically, the State relies on language found in the "Felony Plea Agreement" document, which sets out the terms of the plea agreement. See Brief of Respondent, at 1, 5-6.

The fatal flaw in the State's argument is that the "Felony Plea Agreement" says no such thing. In its brief, the State summarizes the document's pertinent language as follows:

> **RESTITUTION**: Pursuant to RCWA 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts *and* for incident #09-029014 & 09-073668

Brief of Respondent, at 1-2 (emphasis added).

The document actually reads as follows:

> **RESTITUTION**: Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts for incident # 09-029014 & 09-073668

CP 32 (emphasis added). The key word "and" – rather than pertaining to the underlined language (as the State interprets the document) – pertains to the two options immediately below it:

> □ agrees to pay restitution in the specific amount of $ _____
>
> □ agrees to pay restitution _____

CP 32. Notably, neither of these boxes, which address a defendant's express agreement to pay restitution, is marked. Nor are the lines that follow them filled in.

The actual Felony Plea Agreement form from this case is attached to this brief as appendix A. For comparison purposes, undersigned counsel has attached as appendix B a redrafted version of that form demonstrating *what it should have looked like* had the State wanted an express agreement from Ryan to pay restitution for offenses not charged in the Gregory case. Compare appendices A and B.

It is worth noting once again that any agreement to pay restitution for crimes not prosecuted must be express. State v. Woods, 90 Wn. App. 904, 908-909, 953 P.2d 834, review denied, 136 Wn.2d 1021 (1998). Moreover, to the extent there is any ambiguity, the agreement is generally defined according to the

defendant's understanding. State v. Oliva, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003), review denied, 151 Wn.2d 1007 (2004).

Ryan's understanding of the plea agreement, as articulated by his attorney at the restitution hearing, is that he is only obligated to pay restitution for lost silverware and cleaning costs in Gregory's case. He is not responsible for other costs associated with the uncharged burglary. See 3RP 6-11. This is fully consistent with the Felony Plea Agreement form.

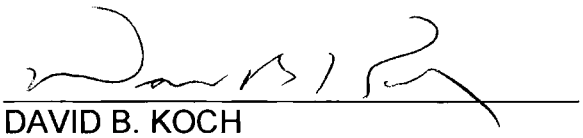
B. CONCLUSION

For the reasons discussed in Ryan's opening brief and above, this Court should vacate the restitution order and remand for a new restitution hearing to determine the losses associated with the missing silverware and cleaning costs.

DATED this 18th day of January, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

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FELONY PLEA AGREEMENT

Date of Crime: 2/5/09 & 3/29/09 Date: 10/30/09

Defendant: Gregory P. Ryan Cause No: 09-1-04834-3 SEA ~~SEA/KNT~~

The State of Washington and the defendant enter into this PLEA AGREEMENT which is accepted only by a guilty plea. This agreement **may be withdrawn at any time prior to entry of the guilty plea.** The PLEA AGREEMENT is as follows:

On Plea To: As charged in Count(s) I, II of the ☐ original ☒ 1st amended information.
☐ **With Special Finding(s):** ☐ deadly weapon - firearm, RCW 9.94A.510(3); ☐ deadly weapon other than firearm, RCW 9.94A.510(4); ☐ sexual motivation, RCW 9.94A.835; ☐ protected zone, RCW 69.50.435; ☐ domestic violence, RCW 10.99.020; ☐ other _____; for count(s): _____

☐ This is part of an indivisible agreement that includes cause number(s): _____.

☐ **DISMISS:** Upon disposition of Count(s) _____, the State moves to dismiss: _____.

☒ **REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES:** In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing:
☒ The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary.
☐ The facts set forth in ☐ Appendix C; ☐ _____.
The defendant acknowledges and waives any right to have a jury determine these facts by proof beyond a reasonable doubt.

☒ **RESTITUTION:** Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and for incident # 09-029014 & 09-073668
☐ agrees to pay restitution in the specific amount of $ _____.
☐ agrees to pay restitution _____

☐ **OTHER:** Agreed recommendation

CRIMINAL HISTORY AND OFFENDER SCORE:
a. ☒ The defendant **agrees** to this Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A), offender score, and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). The State makes the sentencing recommendation set forth in the State's sentence recommendation. An essential term of this agreement is the parties' understanding of the standard sentencing range(s); if the parties are mistaken as to the offender score on any count, neither party is bound by any term of this agreement.

b. ☐ The defendant **disputes** the Prosecutor's Statement of the Defendant's Criminal History, as follows:
(1) Conviction: _____ Basis: _____
(2) Conviction: _____ Basis: _____

c. The parties agree that neither party will seek an exceptional sentence.

Maximum on Count(s) I, II is not more than 5 years each and $ 10,000 fine each.

Maximum on Count(s) _____ is not more than _____ years each and $ _____ fine each.

☐ Mandatory Minimum Term(s) pursuant to RCW 9.94A.540 only: _____

☐ Mandatory weapon sentence enhancement for Count(s) _____ is _____ months each; for Count(s) _____ is _____ months each. This/these additional term(s) must be served consecutively to each other and to any other term and without any earned early release.

The State's recommendation will increase in severity if additional criminal convictions are found or if the defendant commits any new charged or uncharged crimes, fails to appear for sentencing or violates the conditions of release.

Defendant

Deputy Prosecuting Attorney 31057

35317
Attorney for Defendant

Judge, King County Superior Court

KING COUNTY PROSECUTING ATTORNEY
Revised 7/2008

APPENDIX B

FELONY PLEA AGREEMENT

Date of Crime: 2/5/09 & 3/29/09 Date: 10/30/09

Defendant: Gregory P. Ryan Cause No: 09-1-04834-3 SEA ~~SEAKNT~~

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☒ The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary.
☐ The facts set forth in ☐ Appendix C; ☐ _____.
The defendant acknowledges and waives any right to have a jury determine these facts by proof beyond a reasonable doubt.

☒ **RESTITUTION:** Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and for incident # 09-029014 & 09-073668
☐ agrees to pay restitution in the specific amount of $ _____.
☒ agrees to pay restitution on all uncharged counts for these incidents

☐ **OTHER:** Agreed recommendation

CRIMINAL HISTORY AND OFFENDER SCORE:

a. ☒ The defendant **agrees** to this Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A), offender score, and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). The State makes the sentencing recommendation set forth in the State's sentence recommendation. An essential term of this agreement is the parties' understanding of the standard sentencing range(s); if the parties are mistaken as to the offender score on any count, neither party is bound by any term of this agreement.

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Maximum on Count(s) _____ is not more than _____ years each and $ _____ fine each.

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The State's recommendation will increase in severity if additional criminal convictions are found or if the defendant commits any new charged or uncharged crimes, fails to appear for sentencing or violates the conditions of release.

Defendant

Deputy Prosecuting Attorney 31057

35317
Attorney for Defendant

Judge, King County Superior Court

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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65574-4-I
	)	
GREGORY RYAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF JANUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GREGORY RYAN
6005 KENWOOD DRIVE
APT. B
EVERETT, WA 98203

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF JANUARY 2011.

x Patrick Mayovsky

2011 JAN 18 PM 4:19