

NO. 67175-8-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ARISTOTLE MARR,

Appellant.

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

The Honorable J. Wesley Saint Clair, Judge

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BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The Superior Court erred when it denied appellant's motion to vacate his pleas.

Issue Pertaining to Assignment of Error

The law of the case doctrine generally bars the relitigation of claims previously considered and decided. Appellant pleaded guilty to multiple criminal offenses in exchange for, among other things, the State's promise to seek standard range sentences. At sentencing, however, the State sought – and the court imposed – exceptional sentences. Appellant moved to withdraw his guilty pleas based on the State's breach of the plea agreement. Although that claim has never been decided, the Superior Court relied on the law of the case doctrine to deny the motion. Was this error?

B. STATEMENT OF THE CASE

1. Marr Pleads Guilty

On March 1, 2002, Aristotle Marr and the King County Prosecutor's Office consummated a negotiated plea agreement. Marr pleaded guilty to six crimes, all of which occurred on June 22, 2000:

Count 1: Robbery in the First Degree

Count 2: Assault in the First Degree

Count 3: Attempted Robbery in the Second Degree

Count 4: Burglary in the First Degree

Count 5: Unlawful Imprisonment

Count 6: Unlawful Imprisonment

CP 15-17, 253-275, 371.

In exchange for the guilty pleas, the State agreed to abide by certain conditions. One condition was the State's promise to recommend sentences within the standard ranges. CP 264-265, 389, 433. At the plea hearing, the court made it clear the State was legally bound to make the recommendation to which it had agreed and that a breach would return the parties to their respective positions prior to the pleas. CP 273-274.

Sentencing occurred on April 19, 2002. CP 277. In violation of the plea agreement, the State recommended exceptional sentences above the standard ranges in two respects. First, although the standard range for count 3 (Attempted Robbery in the Second Degree) was 39.75 to 52.5 months, the State recommended a sentence of 70 months. CP 19, 263, 284, 399, 403. Not only does this sentence exceed the standard range, it exceeds the statutory maximum sentence of 60 months. CP 19.

Second, the sentencing court was under the misimpression that certain community custody ranges applied to Marr's offenses. CP 313. The prosecutor properly pointed out that Marr's crimes predated the effective date for those ranges: "Your Honor, the only point of clarification I would offer is that I think because the crime occurred before the community custody statute came into play on July 1st, 2000 he should be eligible for community placement for a period of 24 months." CP 315; former RCW 9.94A.120(11)(a). In fact, however, the 24-month term only applied to count 2 (Assault in the First Degree), which is considered a serious violent offense. The proper term for every other crime was merely 12 months. See Former RCW 9.94A.120(9)(a)-(b).

Consistent with the State's recommendation on count 3, the court imposed what amounted to an exceptional 70-month sentence for Attempted Robbery in the Second Degree. CP 21. With one exception, the court imposed concurrent high-end standard range sentences on each of the remaining counts,<sup>1</sup> resulting in a total sentence of 277 months, as follows:

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<sup>1</sup> The one exception is count 1 (Robbery in the First Degree). Although the high end of the standard range was 144 months, the court mistakenly imposed 44 months. CP 19, 21.

Ct 1: Robbery in the First Degree	44 months
Ct 2: Assault in the First Degree	277 months
Ct 3: Att. Robbery in the Second Degree	70 months
Ct 4: Burglary in the First Degree	102 months
Ct 5: Unlawful Imprisonment	22 months
Ct 6: Unlawful Imprisonment	22 months

CP 19, 21, 25.

The judgment and sentence also indicates a community placement term of 24 months, without distinguishing among Marr's five convictions. CP 21.

## 2. Marr Appeals

On appeal, Marr challenged the factual basis for his plea to Assault in the First Degree in count 2. He argued the conviction should be vacated and that his plea on this count was divisible from his pleas on the other counts, leaving the balance of the plea deal intact. In January 2004, this Court rejected both arguments. CP 63-73. On the latter point, this Court specifically found the plea agreement indivisible. CP 70-72.

3. CrR 7.8 Motion

In November 2005, Marr filed a CrR 7.8, once again seeking to withdraw his plea on count 2. CP 30-35, 404-407. At the State's request, Marr's motion was transferred to the Court of Appeals as a Personal Restraint Petition. CP 36-38, 191-192. This Court concluded that Marr's claim was virtually identical to his claim in his direct appeal and dismissed the petition on that ground. CP 193-195.

4. Marr's Personal Restraint Petition in the Washington Supreme Court

Marr subsequently discovered the errors at his sentencing and in his judgment and sentence. On June 2, 2010, Marr filed a PRP in the Supreme Court pointing out that he had received an exceptional sentence up of 70 months on count 3, an exceptional sentence down of 44 months on count 1, and exceptional community placement terms. CP 416-419. He argued his guilty pleas were involuntary because he was never informed he would be receiving exceptional sentences of any kind. CP 419-424.

Moreover, Marr alleged that the State had breached the plea agreement by requesting an exceptional sentence on count 3 and asking for 24 months' community placement for all his offenses

where, in fact, 12 months was the appropriate term for every crime except the assault in count 2. CP 421 (“[t]he Prosecutor misled Petitioner by stating that the State would not seek an exceptional sentence” but then requested exceptional sentences).

The State agreed that Marr’s sentences on counts 1 and 3 were outside the standard ranges and the 70-month sentence on count 3 exceeded the statutory maximum for Attempted Robbery in the Second Degree. The State conceded these sentences were facially invalid and should be corrected. CP 432-433.

As to Marr’s argument that he was misadvised he would not face an exceptional sentence, the State argued this claim was time-barred because it had not been raised within the one-year time limit for collateral attacks and/or barred as a successive attempt to relitigate his claims in his direct appeal and CrR 7.8 motion. CP 434-437.

The State also argued the claim failed on its merits because Marr had been advised that the State would ask for a 70-month sentence (albeit an unlawful sentence) on count 3 and advised that it would ask for *some* term of community placement on the various counts. CP 438-439. The State did not address Marr’s allegation that the State’s conduct breached the provision of the plea

agreement prohibiting it from asking for an exceptional sentence.

In reply, Marr disputed that his claims had previously been raised or were otherwise time barred. CP 444-446, 448, 451-452. He again focused not only on the failure to advise him that he would receive exceptional sentences, but also the State's breach of the plea agreement by asking for those exceptional sentences. See CP 447 (State did not "keep its bargain" when it asked for exceptional sentence on attempted robbery after promising to recommend standard range sentence); CP 448 (request for exceptional on "count III was a fundamental breach of the plea agreement" even if unintentional); CP 454 ("Petitioner's plea agreement was breached by the State prosecutor's recommendation of an exceptional sentence, after the State agreed to recommend a standard range sentence."); CP 456 ("a breach has occurred" based on State's recommendation).

Commissioner Goff agreed that Marr's judgment was facially invalid and his sentences on counts 1 and 3 had to be amended to fall within the standard ranges. CP 459-460. Citing In re Personal Restraint of McKiernan, 165 Wn.2d 777, 781, 203 P.3d 375 (2009), Commissioner Goff found Marr's challenge to his pleas timely, but rejected his argument that he was misinformed of the sentencing

consequences of his pleas because he was informed the State would be seeking 70 months on count 3 and informed that he was subject to community placement. CP 461-462.

Commissioner Goff summarized his decision as follows: “In sum, Mr. Marr does not show he was misinformed of direct sentencing consequences so as to render his plea involuntary.” CP 462. He did not directly address Marr’s breach argument. Instead, he dismissed the PRP on condition that within 60 days the State obtain and file an amended judgment correcting Marr’s sentences on counts 1 and 3. CP 462-463.

Marr filed a Motion to Modify. CP 465. He reiterated his argument – rejected by Commissioner Goff – that he had been misinformed of the sentencing consequences of his pleas. CP 470-476. He also reiterated that the State had breached the plea agreement by seeking an exceptional sentence on count 3 and exceptional 24-month terms of community placement. CP 467-469. Marr noted that whether his plea was invalid due to misinformation or the breach, it was indivisible and he was entitled to withdrawal on all counts. CP 476-478. The motion was denied without additional discussion or analysis of the issues. CP 487.

5. Continued Efforts To Have His Claim Addressed

On remand to correct the judgment and sentence, Marr once again moved to withdraw his pleas based on the State's breach of the plea agreement. CP 219-232. Marr noted that no appellate court, including the Supreme Court, had ever resolved this claim. CP 223-224.

In response, the State argued Commissioner Goff had already denied the claim in the Supreme Court and, therefore, it was barred as "law of the case." CP 408-412. The sentencing court agreed the breach claim had already been decided, resentenced Marr, and denied the motion to withdraw his pleas. 1RP<sup>2</sup> 25-27; 2RP 29-30; CP 344-353, 369. Marr timely filed his Notice of Appeal. CP 370.

C. ARGUMENT

THE SUPERIOR COURT ERRED WHEN IT DENIED MARR'S MOTION TO WITHDRAW HIS PLEAS.

In denying Marr's motion, the Superior Court's reliance on the law of the case doctrine was misplaced. As the Supreme Court of Washington has explained:

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<sup>2</sup> "1RP" refers to the verbatim report of proceedings for March 3, 2011. "2RP" refers to the verbatim report of proceedings for May 20, 2011.

The “law of the case” doctrine generally “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand’” or to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.”

State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003)

(quoting Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992)); see also RAP 2.5 (c) (limiting doctrine).

The doctrine is discretionary, not mandatory. Folsom v. County of Spokane, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).

Generally, where an appellate court has considered and ruled on the merits of a claim, that determination will not be litigated again in a subsequent forum. Where, however, a claim has never been decided on its merits, the doctrine does not prevent its consideration. See Columbia Steel Co. v. State, 34 Wn.2d 700, 705-706, 209 P.2d 482 (1949) (distinguishing between claims “considered and decided,” and therefore subject to law of the case doctrine, and those not previously decided and therefore properly addressed), cert. denied, 339 U.S. 903 (1950). Moreover, the doctrine will not be applied where the prior ruling is clearly erroneous and to do so would result in a manifest injustice. Id. (citing Greene v. Rothschild, 68 Wn.2d 1, 402 P.2d 356, 414 P.2d 1013 (1965)).

The State's argument below – that Commissioner Goff considered and rejected Marr's claimed breach of the plea agreement – is incorrect. As discussed above, in his PRP Marr argued both that he was misinformed of the consequences of his pleas and that the State had breached the plea agreement by requesting what amounted to an exceptional and illegal sentence on count 3 and community placement terms of two years on all counts (instead of merely on count 2). CP 416-421, 447-448, 454, 456.

But as Commissioner Goff's summarizing statement confirms, he only addressed Marr's claim that he had been misinformed of the sentencing consequences of his pleas. CP 462. Commissioner Goff did not determine whether – despite the fact Marr was informed he could receive 70 months on count 3 and informed he would receive some term of community placement term – by asking for an exceptional 70-month term on count 3 and exceptional 24-month supervision terms on all counts, the State violated its express promise not to seek exceptional sentences.

Nor was the issue addressed in the ruling denying Marr's Motion to Modify. Without analysis, comment, or modification of any kind, a Department of the Supreme Court merely denied the Motion to Modify, leaving intact Commissioner Goff's incomplete

decision conditionally dismissing Marr's PRP. CP 487. No court has ever addressed the merits of Marr's claimed breach or explained why he is not entitled to the relief he seeks.

In order to prevail on a personal restraint petition, petitioners must demonstrate they were actually and substantially prejudiced by constitutional error or, for nonconstitutional error, demonstrate a fundamental defect resulting in a complete miscarriage of justice. *In re Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007). Marr has made the requisite showing.

Plea agreements are contracts, and due process requires a prosecutor to adhere to the terms of the agreement. *State v. Sledge*, 133 Wn.2d 828, 838-840, 947 P.2d 1199 (1997). "If a personal restraint petitioner can show that the prosecutor has failed to adhere to the terms of the plea agreement, the petitioner establishes that he or she was actually and substantially prejudiced by the prosecutor's violation of his or her constitutional rights and is entitled to relief." *In re Lord*, 152 Wn.2d 182, 189, 94 P.3d 952 (2004).

Moreover, whether the breach was intentional is irrelevant. "That the breach of agreement was inadvertent does not limit its impact." *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

A defendant is entitled to relief regardless of whether the prosecutor breached the agreement deliberately or otherwise. The test to be applied is “an objective one – whether the plea bargain agreement has been breached or not – irrespective of prosecutorial motivations or justifications for the failure in performance.”

State v. Collins, 46 Wn. App. 636, 639-640, 731 P.2d 1157 (quoting In re Palodichuk, 22 Wn. App. 107, 110, 589 P.2d 269 (1978)), review denied, 108 Wn.2d 1026 (1987).

Marr waived fundamental constitutional trial rights in exchange for the State’s promise not to seek exceptional sentences. Yet, the State inadvertently sought exceptional sentences when it requested 70 months on count 3 and 24-month community placement terms on all counts. Even Commissioner Goff’s ruling seems to acknowledge a breach of the plea agreement. See CP 461 (noting the State’s recommendation of 70 months for Attempted Second Degree Robbery was “contrary to the undisputed true agreement of the parties that the State would not recommend any exceptional sentence.”). But the issue was never squarely addressed or decided.

Where the State has breached the plea agreement, the defendant is entitled to his choice of remedies: specific performance or withdrawal of the plea. Lord, 152 Wn.2d at 190. Marr seeks

withdrawal. CP 219. And where a plea agreement involves multiple counts, it is considered indivisible (i.e., only subject to withdrawal as a whole) if “pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding.” State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). This Court already found Marr’s pleas indivisible in his direct appeal. CP 70-72. Therefore, his pleas must be withdrawn on all counts.

In response, the State may seek to rely on the Supreme Court’s recent opinion in In re Coats, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 5593063 (filed 11/17/11). The Coats decision does not dictate the outcome here, however.

Coats pleaded guilty to several crimes, including Conspiracy to Commit First-Degree Robbery, and received concurrent standard range sentences. His judgment and sentence mistakenly indicated that the maximum sentence for Conspiracy to Commit Robbery is life in prison. The statement on plea of guilty mistakenly indicated the maximum sentence is 20 years. The correct maximum sentence is 10 years. Coats was sentenced to 51 months for this offense, the lowest sentence he received for any of his crimes. Id. at \*1.

Fourteen years after his pleas, Coats filed a personal restraint petition contending his judgment and sentence was not valid on its face and therefore not subject to the one-year time bar in RCW 10.73.090. Coats argued that this error on the judgment also opened the door for him to withdraw his guilty plea based on misinformation concerning a direct consequence of his plea, thereby rendering it involuntary. *Id.* at \*2. In other words, the error on the judgment permitted Coats to bring his otherwise untimely challenge to his guilty plea. *Id.* at \*4.

The Court of Appeals denied the petition, concluding the mistake regarding the maximum term was merely “a technical misstatement that had no actual effect on the rights of the petitioner.” *Id.* The Supreme Court granted review “only on the issue of whether Petitioner’s judgment and sentence is facially invalid, and if so, whether he is entitled to withdraw his guilty plea.” *Id.* (emphasis added).

The Supreme Court resolved the petition on the first question, finding that the judgment in Coats’ case was not invalid on its face simply because it contained an error. *Id.* at \*5-\*6. Rather, to be invalid on its face, a judgment must indicate that the sentencing court exceeded its statutory authority in some manner:

While the judgment and sentence misstated the maximum possible sentence for one count, Coats was in fact sentenced within the standard range of possible sentences for that offense. The court did not exceed its authority and the judgment and sentence is not facially invalid. Therefore, Coats's petition is time barred.

*Id.* at \*9.

The majority opinion also appears to reject the notion that an error in the judgment automatically permits an otherwise untimely challenge to a plea. *Id.* at \*4 ("it is Coats's view that an error in the judgment and sentence permits him to circumvent other carefully crafted time limits on collateral review. We disagree, but his confusion is understandable."). The Coats majority rejected the notion that it had ever adopted such a rule. *Id.* at \*6 (discussing In re Personal Restraint of Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009)).

Given the majority's conclusion that Coats' challenge to the mistake on the judgment was time barred, these additional, brief statements concerning the impact on any plea challenge are dicta and therefore not binding precedent. See Plankel v. Plankel, 68 Wn. App. 89, 92, 841 P.2d 1309 (1992) (rationale not necessary for decision is non-binding dicta); Black's Law Dictionary 1100 (7th ed. 1999) (defining "obiter dictum" as "[a] judicial comment made during

the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential”).

Indeed, in a concurring opinion, Chief Justice Madsen chastises the majority for its failure to thoroughly address the interplay between a facially invalid judgment and other claims:

as Justice Stephens’ concurrence explains, the majority fails to provide any meaningful discussion of petitioner’s main contention – that once the one-year time bar of RCW 10.73.090(1) is avoided as to one claim, it is automatically avoided as to all claims asserted by the petitioner. Fortunately, the concurrence explains why this is an improper interpretation of the statute.

Id. at \*11 (Madsen, C.J., concurring); see also id. at \*23-\*25 (Stephens, J., concurring) (arguing why facial invalidity on a judgment and sentence should not open door to other time-barred claims, such as invalidity of the plea).

Citing In re the Personal Restraint of McKiernan, Commissioner Goff concluded that the facial invalidity of Marr’s judgment and sentence permitted him to challenge the validity of his plea. CP 461; McKiernan, 165 Wn.2d at 781 (“In order to consider whether the plea agreement was invalid we must first find that the judgment and sentence itself is facially invalid. Otherwise, review of

the plea agreement is barred by RCW 10.73.090.”).

Because Coats involved a *valid* judgment and sentence, McKiernan still states the applicable rule where, as here, the judgment is *invalid* on its face, the dicta in Coats notwithstanding. Because Marr’s judgment and sentence was invalid on its face, and that invalidity was directly related to Marr’s claimed breach of the plea agreement, Commissioner Goff’s conclusion that Marr’s plea challenges were timely was, and remains, correct. Unfortunately, however, Marr’s breach claim has never been considered on its merits.

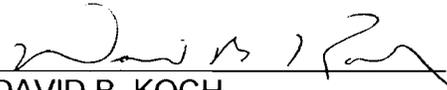
D. CONCLUSION

This Court should reverse and order the Superior Court to consider, on the merits, Marr’s motion to vacate his pleas based on the State’s breach of the plea agreement.

DATED this 28<sup>th</sup> day of November, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 67175-8-1
	)	
ARISTOTLE MARR,	)	
	)	
Appellant.	)	

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**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 28<sup>TH</sup> DAY OF NOVEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ARISTOTLE MARR  
DOC NO. 837827  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2011.

x Patrick Mayovsky

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COURT OF APPEALS  
STATE OF WASHINGTON  
FILED  
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