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NO. 67175-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ARISTOTLE MARR,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 15 PM 3:15

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A decade ago, the defendant pled guilty and was sentenced for a series of crimes that included an armed robbery and assault in which Seattle Police Officer Wesley Buxton was shot. In March of 2011, due to certain sentencing errors, the defendant was resentenced. At that time, the trial court refused to hear the defendant's motion to withdraw his plea. The sole issue before this Court is whether the trial court correctly declined to address the defendant's motion because the issue had already been ruled upon by the Supreme Court in the defendant's restraint petition under cause number 84616-2.

B. STATEMENT OF THE CASE

The defendant was charged as follows:

- Count I: First-Degree Robbery with a Firearm Enhancement
- Count II: First-Degree Assault with a Firearm Enhancement
- Count III: Attempted Second-Degree Robbery
- Count IV: First-Degree Burglary with a Deadly Weapon Enhancement
- Count V: First-Degree Kidnapping with a Deadly Weapon Enhancement
- Count VI: First-Degree Kidnapping with a Deadly Weapon Enhancement

CP 5-14. As charged, the defendant faced a mandatory 16 years on the firearm and deadly weapon sentence enhancements alone.

See former RCW 9.94A.125 and former RCW 9.94A.310.

On March 1, 2002, the defendant entered a negotiated plea of guilty in which the State agreed to drop all the firearm and deadly weapon enhancements with the defendant pleading guilty to the following charges:

Count I:	First-Degree Robbery
Count II:	First-Degree Assault
Count III:	Attempted Second-Degree Robbery
Count IV:	First-Degree Burglary
Count V:	Unlawful Imprisonment (a reduced charge)
Count VI:	Unlawful Imprisonment (a reduced charge) ¹

See CP 371-403.

As part of the written plea agreement, the defendant was aware that the State would make the following sentence recommendation:

Count I:	144 months
Count II:	277 months
Count III:	70 months
Count IV:	102 months

¹ Convictions on two counts of first-degree kidnapping, being "serious violent offenses," would have added 12 plus to 17 years of time, **consecutive** to his sentence on the first-degree assault charge. See former RCW 9.94A.400 and former RCW 9.94A.525.

Count V: 22 months
Count VI: 22 months

CP 376, 403. This is exactly the recommendation made by the State at sentencing. CP 279-87.²

As part of the plea, the State and the defendant agreed that the sentencing range for the greatest charge--the first-degree assault charge (count II), was 209-277 months and that "[t]he agreed-upon range of 209-277 months has been negotiated by both sides and is the basis for the plea agreement." CP 389. Both the State and the defendant "agree[d] not to seek or argue for an exceptional sentence ***outside the agreed-upon sentencing range of 209-277 months.***" CP 389 (emphasis added).³ The defendant sought a sentence at the bottom of the standard range--209 months, while the State sought a sentence at the top of the standard range, 277 months. CP 279-87; CP ____, sub # 96, pages 3-4.

² The defendant was also informed that he would be placed on community placement. CP 376. While part of the plea, this was not part of the State's recommendation as it was a mandatory condition. See CP 376 (section (f)). The defendant was informed that he would be required to serve a term of 24 months on community placement. CP 398.

³ A transcript of the plea hearing is attached to CP 74-190 at pages 145 to 168.

Below is the sentence imposed by the court followed by the correct standard range for each offense.

Count I:	44 months	(108-144)
Count II:	277 months	(209-277)
Count III:	70 months	(39.75-52.5)
Count IV:	102 months	(77-102)
Count V:	22 months	(17-22)
Count VI:	22 months	(17-22)

CP 19, 21, 25, 312-13. All terms of confinement were to be served concurrently. CP 21.⁴

The sentences imposed on counts I and III were outside the standard range. The court did not check the box on the judgment and sentence indicating that it was imposing an exceptional sentence. CP 19. To the contrary, the court noted that both the defendant and the State were in agreement that there was no basis in law or in fact to impose an exceptional sentence. CP 302.

Upset with the fact he received a high-end sentence, the defendant filed a "motion for resentencing." CP ____, sub # 108A. The State responded that the defendant had no right to challenge

⁴ The court also imposed 24 months of community placement on count III. CP 21, 315. The defendant continues to assert that the court imposed 24 months of community placement on each count, but the judgment and sentence does not support this claim. Twenty-four months was imposed for "qualifying crimes" with a list of the crimes receiving 24 months to include any "serious violent offense." As is standard practice, only the greatest term of community custody is imposed and the only "serious violent offense" was the first-degree assault conviction.

his sentence because it was a standard range sentence. CP ____, sub # 109. The court denied the defendant's motion, stating that the court's imposition of a "**standard range**" sentence was appropriate based on the facts presented. CP ____, sub # 112 (emphasis added). It is readily apparent that no one yet realized that the sentences imposed on counts I and III were outside the standard range.

The defendant appealed his conviction to this Court under cause number 50395-2-I. He argued that he should be allowed to withdraw his plea of guilty as to count II, the first-degree assault charge, because there was no factual basis to support the charge and thus his plea was involuntary. CP ____, sub # 118. This Court rejected the defendant's argument. Id. After his petition to the Supreme Court was denied, a mandate was issued on November 3, 2004. Id.⁵

On June 2, 2010, the defendant filed a restraint petition with the Supreme Court under cause number 84616-2. In his petition, among other things, the defendant argued that he should be

⁵ The defendant also filed a motion collaterally attacking his plea under cause number 58905-9-I. See CP 30-35; CP 193-95. The petition was dismissed and a certificate of finality was issued on March 28, 2007. CP 193-95. This motion is not relevant to this appeal.

allowed to withdraw his plea because the State had breached the plea agreement by asking for, and the court had imposed, an exceptional sentence of 70 months on count III, when the standard range was 39.75 to 52.5 months. CP 414, 416-18. In his reply brief, the defendant specifically argued that the State "did not keep its bargain," in relation to the attempted robbery conviction and that it was a "breach" of the plea agreement to seek an exceptional sentence of 70 months. CP 447-48.

On October 1, 2010, the Supreme Court Commissioner dismissed the petition on condition that the trial court correct two errors in the judgment and sentence--two sentences that were outside the standard range for the offenses. CP 459-63.

As to count I, the Commissioner found that the 44 month sentence imposed on a standard range of 108 to 144 "probably reflects a scrivener's error...given that the maximum standard range was 144 months, and the superior court imposed maximum standard range sentences on all of the other convictions." CP 460.

As to count III, the Commissioner stated that:

[t]he error appears to have resulted from mistakenly overlooking the fact that Mr. Marr pleaded guilty to attempted second degree robbery, not the completed crime. For the completed crime, the standard range was 53 to 70 months. As indicated, it is evident from

the other sentences that the superior court intended to impose maximum standard range terms, so it probably meant to impose a sentence of 52.5 months, though it did orally state 70 months.

CP 460.

The Commissioner further found that "Mr. Marr does not demonstrate the existence of any defects in the plea," and that he "was not misinformed of possible sentencing consequences."

CP 461. Finally, the Commissioner did not find that the State asked for, or that the court imposed, an exceptional sentence.⁶

CP 461.⁷

On October 28, 2010, the defendant filed a motion to modify the commissioner's ruling. CP 465. He again claimed that the prosecutor "breached the plea agreement" by seeking an exceptional sentence. CP 467. On January 5, 2011, the Supreme Court denied the defendant's motion to modify the commissioner's ruling. CP 487.

⁶ At the time of the defendant's conviction, an exceptional sentence could be imposed only upon the court making the specific finding that there were "substantial and compelling" reasons to justify a departure from the standard range. See former RCW 9.94A.535; State v. Cardenas, 129 Wn.2d 1, 5, 914 P.2d 57 (1996). There is no dispute that the trial court did not make, or attempt to make, any such findings.

⁷ The Commissioner also found that the trial court properly imposed a 24 month term of community placement. CP 460-61.

On March 3, 2011, the defendant was resentenced. CP 344-53. The exact same sentence was imposed except as to count I and count III, as directed by the Supreme Court. As to count I, the court imposed a sentence of 144 months on a standard range of 108 to 144 months. CP 345, 347. As to count III, the court imposed a sentence of 52.5 months on a standard range of 39.75 to 52.50 months. Id.

When the defendant's case was returned to the trial court to correct the two errors in his judgment and sentence, the defendant asked that he be allowed to withdraw his plea of guilty because the State breached the plea agreement by recommending an exceptional sentence on count III and by asking for community placement of 24 months on every count. CP 219. The State argued that these issues had been raised and decided previously in the Supreme Court and thus the defendant was barred from raising the issue yet again. CP 408-87. The defendant argued the Supreme Court had not actually ruled on his claims and thus the trial court was required to do so. CP 360-68. The court challenged defense counsel to explain how the issue had not already been decided, no matter how "you dress it up," or what you "call it."

2RP⁸ 23. Ultimately, the court ruled against the defendant, finding that the issue had been previously litigated and finding that the court was thus prevented from addressing the issues anew. 2RP 29-30; CP 369.

C. **ARGUMENT**

THE TRIAL COURT CORRECTLY RULED THAT THE "LAW OF THE CASE" DOCTRINE PREVENTED THE COURT FROM RELITIGATING AN ISSUE PREVIOUSLY REJECTED BY THE SUPREME COURT.

The defendant seeks to have this Court "order the Superior Court to consider on the merits [his] motion to vacate his plea based on the State's breach of the plea agreement." Def. br. at 18. The trial court refused to do so based on the "law of the case" doctrine, finding that the Supreme Court had rejected the same argument in the defendant's prior restraint petition. The defendant claims that his argument that the prosecutor breached the plea agreement has never been litigated before. He is incorrect. The defendant directly raised this issue in the Supreme Court in a restraint petition and the Supreme Court rejected his argument.

⁸ The verbatim report of proceedings is cited as follows: 1RP--3/3/11, 2RP--5/20/11.

Thus, the trial court correctly found that it was prevented from relitigating the issue.

The "law of the case" doctrine refers to the "binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). Courts apply the doctrine to "avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." Id. (citing 5 Am.Jur.2d Appellate Review § 605 (2d ed. 1995)).

Once an appellate court has ruled on an issue, the court's decision becomes the "law of the case." State v. Strauss, 119 Wn.2d 401, 412, 832 P.2d 78 (1992). Once the mandate is issued, the trial court is bound by the appellate court's determination. Strauss, 119 Wn.2d at 413. "If a trial court were free to ignore such orders, total chaos would result in the court system." Id.

Plea agreements are contracts and a violation of a plea agreement by the State may permit a defendant to invoke certain remedies; withdrawal of the plea or specific performance of the agreement. Harrison, 148 Wn.2d at 556-57. This is the doctrine the defendant seeks to invoke.

In no uncertain terms, in his restraint petition before the Supreme Court, the defendant sought withdrawal of his plea based on the same claims he raised in the trial court here--that the State violated the plea agreement by seeking an exceptional sentence on count III and in regards to community placement. See CP 416-18, 420-21, 467-69. Section IV A of the defendant's motion to modify the Supreme Court Commissioner's ruling is titled "[t]he prosecutor breached the plea agreement." CP 467. In this section, the defendant makes the exact same arguments he subsequently made to the trial court. See CP 222-32. The defendant does not argue otherwise.

Instead, the defendant argues that the Supreme Court did not address the issues that he raised. The defendant's reliance

upon semantics to reach this conclusion is unavailing. It is true that the Supreme Court did not specifically state that "we find the defendant's argument that the prosecutor breached the plea agreement to be without merit." Instead, the Court stated that it "considered" the defendant's motion and ruled that "the Petitioner's Motion to Modify the Commissioner's Ruling is denied." CP 487.

The issue was squarely presented to the Supreme Court. To argue that the Supreme Court ruled on his motion but declined to rule on the actual issue is nonsensical. The defendant specifically argued in his motion to modify that the State breached the plea agreement and the commissioner's ruling should be modified. If the Supreme Court had found the defendant's claim had merit, it would have granted his motion. Instead, the Court rejected his motion. The defendant may have wanted a more extensive ruling from the Court, but the fact that the Court did not do so is of no moment. The Court ruled on his motion and the trial court was correct, it was precluded from ruling on the same motion again.

D. **CONCLUSION**

For the reasons cited above, this Court should reject the defendant's claim that the trial court was required to rule on the defendant's motion to withdraw his plea of guilty.

DATED this 15 day of February, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MARR, Cause No. 67175-8-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Done in Seattle, Washington



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