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COURT OF APPEALS
STATE OF WASHINGTON
16
2012 JUL 18 PM 4:45

NO. 68474-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

AMANDA TUCKER,

Appellant.

REC'D

JUL 18 2012

King County Prosecutor
Appellate Unit

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

The Honorable Michael Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State's conduct at sentencing breached the plea agreement.

Issue Pertaining to Assignment of Error

Under the terms of a plea agreement, the appellant pled guilty to 23 felony crimes and stipulated to the existence of two aggravating factors. In exchange, the prosecutor agreed to recommend a standard sentence. Despite the agreement, the State presented statements by two detectives that emphasized the aggravating factors, noted appellant was not remorseful, and requested the trial court impose "substantial jail time." RP¹ 28. The court imposed an exceptional sentence. Did the prosecutor breach the plea agreement by presenting unsolicited information that emphasized the aggravating factors despite its obligation to make a standard range sentencing recommendation?

B. STATEMENT OF THE CASE

The King County prosecutor charged Amanda Tucker with six counts of residential burglary, two counts of possession of a stolen vehicle, two counts of second degree possession of stolen property, and one count each of first degree trafficking in stolen property, second degree identity theft, and possession of cocaine. CP 28-32. In a separate case, the State charged Tucker with five counts of residential burglary, three

¹ "RP" refers to the verbatim report of proceedings for February 17, 2012.

counts of second degree possession of stolen property, and one count each of theft of a motor vehicle and possession of cocaine.² RP 2-5; CP 132-36. In total, Tucker was charged with 23 felony offenses. RP 11; CP 132-36.

Tucker pled guilty as charged and stipulated on several counts to the aggravating factors of vulnerable victims and victims present during the burglary. In exchange, the State agreed to recommend a high end standard range sentence of 84 months in prison followed by 12 months of community custody. CP 35-68; RP 2-5, 10-11; CP 102-31.

At sentencing, the prosecutor initially recommended the agreed-upon standard range sentence. RP 4-5, 10-11; CP 132-36. The trial court asked why the plea agreement included a stipulation to two aggravating factors. RP 6. The prosecutor said the State wanted Tucker to acknowledge that she took advantage of very vulnerable victims. RP 6-7, 10. The trial court explained it wanted to ensure itself there was a basis for an exceptional sentence. RP 9-10

Tucker requested a drug offender sentencing alternative (DOSA). RP 31-36. The prosecutor argued against the alternative sentence, stating

² A separate notice of appeal was not filed for this second cause number; however, the exceptional sentence at issue in this case was imposed on the first cause number which is the basis of this appeal. RP 40; CP 69-81.

Tucker victimized many people, caused much damage, and committed many of the crimes after being released on bail. RP 11.

Following statements from six complaining witnesses, the prosecutor invited Detective Jones to give a statement to the court. RP 11-24. Jones remarked that even if Tucker had a poor childhood, the choices she made were “beyond the pale.” RP 25. Continuing, Jones said Tucker:

[D]idn't break into stores and steal from cash registers. She didn't break into cars to steal money or CDs to get dollar bills in exchange for cash to supply a drug habit. She targeted the most vulnerable of society. That's a calculated, methodical plan that's not the action of a drug addict[ed] person.

RP 25-26.

Jones emphasized that burglary, unlike other crimes, causes the victim to feel violated and strikes at the “very safety of a person in their home.” RP 25. Stating, “[o]ur system of justice is set up to protect the rights of the accused,” Jones implored the court to consider the “rights and interests of the victims to get a sense of justice.” RP 26-27.

The prosecutor concluded his presentation by reading a statement prepared by Detective Steve Owings. Owings characterized Tucker as a remorseless “predator” who targeted elderly individuals, some of whom suffered from serious medical problems. RP 28. He said Tucker was “very hateful, disrespectful, and belligerent towards officers and myself,

and she would not cooperate at any time.” RP 27-28. Owings noted Tucker committed many of the crimes while on bail. RP 28. Concluding, Owings wrote:

I have to tell you that I’ve been in law enforcement for almost 17 years, and this case is the most important one I worked on in terms of who she victimizes and what she took from the victims. Please make sure she gets what she deserves, which is a *[sic]* substantial jail time.

RP 28.

Defense counsel responded that it was “particularly offensive for the detective to paint all defendants with such a brush[.]” RP 30. The trial court acknowledged it was “unusual for a detective to speak that long at sentencing,” but asked counsel to focus on Tucker. RP 30-31. Defense counsel requested that Tucker receive a prison-based DOSA. RP 31-36.

The trial court rejected Tucker’s request, as well as the prosecutor’s standard-range recommendation. RP 38-39. The court instead imposed concurrent statutory maximum sentences for each residential burglary committed with aggravating factors for a prison term of 120 months followed by 12 months of community custody. RP 38-40, 44; CP 69-81. The trial court concluded Tucker’s stipulation to aggravating factors justified the sentence.³ CP 98-101.

³ The trial court’s “Findings of Fact and Conclusions of Law for Exceptional Sentence” are attached as an appendix.

Tucker timely appeals. CP 82.

C. ARGUMENT

THE STATE'S ACTIONS UNDERCUT THE AGREED SENTENCING RECOMMENDATION AND BREACHED THE PLEA AGREEMENT.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Accordingly, due process requires the prosecutor to adhere to the terms of the agreement. Sledge, 133 Wn.2d at 839. "A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation." Sledge, 133 Wn.2d at 840. Although the recommendation need not be enthusiastically made, the State has a duty not to undercut the terms explicitly or by conduct evidencing intent to circumvent the plea agreement. Sledge, 133 Wn.2d at 840-41.

"A breach occurs when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State's obligations under the plea agreement." State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). In determining whether a prosecutor breaches a plea agreement, this Court reviews the prosecutor's comments and actions objectively from the sentencing record as a whole. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, rev. denied, 138 Wn.2d 1002 (1999). Harmless error does not apply when the State

breaches a plea agreement. Carreno-Maldonado, 135 Wn. App. at 87. The breach of a plea agreement is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

The prosecutor undermined the sentence he was purportedly recommending in Tucker's case by inviting the detectives to give emotional, unsolicited statements to the court. Both statements emphasized the aggravating factors, highlighted Tucker's lack of remorse – a potential aggravator Tucker had not stipulated to – and suggested the incidents were calculated, “predatory” crimes rather than the actions of a drug addict. RP 24-28.

Especially telling was Detective Owings dramatic description of Tucker's case as “the most important one I have worked on” in his 17 years as a police officer. RP 28. There could have been no reason to present such an unsolicited statement other than to undermine a recommended sentence the prosecutor plainly believed was too lenient.

Although the statements were the detectives' rather than the prosecutor's, the two are functional equivalents. See State v. Sanchez, 146 Wn.2d 339, 356-59, 46 P.3d 774 (2002) (In a plurality opinion, five justices agreed that an investigating officer is part of the prosecution team and is bound by the prosecutor's agreement); cf. State v. Lindahl, 114 Wn.

App. 1, 11-12, 56 P.3d 589 (2002) (finding the State does not breach the plea bargain when State agents argue for an exceptional sentence without the prosecutor's encouragement), rev. denied, 149 Wn.2d 1013 (2003).⁴ By not only inviting the detectives to highlight aggravating facts, but also speaking for Detective Owings, the prosecutor engaged in a "transparent attempt to sustain an exceptional sentence." Sledge, 133 Wn.2d at 843; See also State v. Talley, 134 Wn.2d 176, 186, 949 P.2d 358 (1998) (although State could engage in real facts hearing without undercutting plea agreement, prosecutor could nevertheless "easily undercut the plea

⁴ Lindahl concluded, "In Sanchez, the court found no breach of a plea agreement in cases where a community corrections officer and an investigating officer argued at sentencing for a longer sentence than that agreed to in the plea agreement." 114 Wn. App. at 11-12 (citing Sanchez, 146 Wn.2d at 352-54). But, in Sanchez, a majority of the Supreme Court did hold that investigating officers are bound by a prosecutor's plea agreement. Justice Madsen's dissent concluded, "We have previously held prosecutors are agents of the state, whose agreement binds the state as well as it [*sic*] other agents. To allow CCOs [community correction officers] and IOs [investigative officers] to present arguments to the sentencing judge, in any form, which contradict another state agency's contract not only appears unfair, but is unfair. It renders the prosecution's agreement meaningless, disintegrates the fabric of our criminal justice system, and will deter future plea agreements." Sanchez, 146 Wn.2d at 359-70. (Madsen, J., dissenting, joined by Alexander, C.J., Sanders, and Johnson, JJ.). Justice Chambers authored an opinion concurring in part with the majority but also concurring with Justice Madsen's conclusion that "principles of fairness and agency require use to bind the investigating officer to the prosecutor's bargain." Sanchez, 146 Wn.2d at 356.

agreement by placing emphasis on the evidence the supports findings that aggravating factors are present.”).

The prosecutor’s conduct in this case is similar to conduct constituting a breach of the plea agreement in several other cases. In Sledge, the Court found a prosecutor undercut the State’s standard range sentence recommendation by: calling a probation counselor to testify about a stipulated “manifest injustice report”; questioning the counselor about the factors that caused her to recommend an exceptional sentence; calling Sledge’s parole officer; and presenting a lengthy summary of the aggravating factors. Sledge, 133 Wn.2d at 842-43. The Court noted that while a probation counselor has a statutory role in juvenile sentencing, a parole officer does not. The only purpose for calling the unsolicited parole officer was to contradict the State’s recommendation. The Court concluded the prosecutor’s conduct was a “transparent attempt to sustain an exceptional sentence.” Sledge, 133 Wn.2d at 843.

Similarly, in Jerde, two prosecutors announced the State’s agreed-upon standard range recommendation, but then without prompting repeatedly emphasized factors that would support an exceptional sentence, including an aggravating factor not found in the presentence report. 93 Wn. App. at 777-83. Noting factual similarities between Sledge and Jerde’s case, the Court of Appeals concluded the State effectively

undercut the plea agreement in a transparent attempt to sustain an exceptional sentence. Jerde, 93 Wn. App. at 782.

In State v. Van Buren, the Court of Appeals concluded the State's actions at sentencing undermined and thereby breached the plea agreement for a standard range sentence. 101 Wn. App. 206, 217, 2 P.3d 991, rev. denied, 142 Wn.2d 1015 (2000). The Court focused on several actions by the prosecutor that "helped the court justify an exceptional sentence." Van Buren, 101 Wn. App. at 217. The State (1) downplayed its standard range recommendation; (2) specifically focused the court's attention on the aggravating factors contained in a presentence report; (3) proposed an aggravating factor that was not part of the presentence report; and (4) argued the validity of the additional aggravating factor. Van Buren, 101 Wn. App. at 215-17.

The Court concluded that although the prosecutor's conduct was not as flagrant as it was in Sledge and Jerde, the State nonetheless crossed the line into advocacy and breached the plea agreement when it sensed the court was considering an exceptional sentence. Van Buren, 101 Wn. App. at 217.

Finally, in State v. Xavier, the State agreed to recommend a standard range sentence in exchange for a guilty plea to several child sexual offenses. 117 Wn. App. 196, 198-99, 69 P.3d 901 (2003). At

sentencing, the prosecutor made the agreed-upon recommendation, but also highlighted aggravating factors and un-filed charges, noted Xavier's lack of remorse, and called Xavier "one of the most prolific child molesters that this office has ever seen." Xavier, 117 Wn. App. at 200-02. The trial court imposed an exceptional sentence following the prosecutor's presentation. Xavier, 117 Wn. App. at 199.

The Court of Appeals reversed Xavier's convictions and found the prosecutor undercut the sentencing recommendation. The Court noted that by highlighting unsolicited aggravating facts, "the prosecutor clearly signaled to the court her lack of support for a standard range sentence and thereby 'effectively undercut the plea agreement in a transparent attempt to sustain an exceptional sentence.'" Xavier, 117 Wn. App. at 201 (quoting Jerde, 93 Wn. App. at 782).

Like Sledge, Jerde, Van Buren, and Xavier, here the only reason for the detectives' unsolicited statements was to contradict the State's purported recommendation and to put before the trial court reasons to reject the standard range sentence. The trial court was already aware of Tucker's stipulation to two aggravating factors. It was therefore unnecessary for the State to highlight those facts, argue the validity of lack of remorse as a third aggravating factor, and emphasize the seriousness of

Tucker's "predatory" crimes in comparison to other criminal investigations over a 17-year period.

The prosecutor violated the terms of the State's contract with Tucker. Tucker kept her end of the bargain by pleading guilty to 23 felony offenses and stipulating to two aggravating factors. In doing so, she gave up important constitutional rights. In contrast, the State received significant benefits as a result of Tucker's plea: the certainty of conviction, conservation of judicial and State resources, and the lifting of the burden to call witnesses to testify at trial. Thus, while the State received the full benefit of the bargain, Tucker effectively received nothing.

Where, as here, the prosecutor undercuts the plea agreement in an attempt to sustain an exceptional sentence, the defendant has her choice of remedies. She may vacate the agreement and demand a trial or she may elect a new sentencing hearing in front of a different judge. Sledge, 133 Wn.2d at 846; Xavier, 117 Wn. App. at 202; Jerde, 93 Wn. App. at 782-83. Tucker was denied the benefit of her plea bargain and should be offered these options.

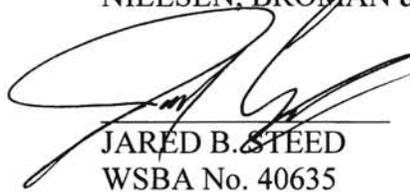
D. CONCLUSION

The State breached its plea agreement with Tucker. This Court should vacate Tucker's sentence and allow her to elect her remedy.

DATED this 18th day of July, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is stylized and cursive.

JARED B. STEED
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APPENDIX

FILED
KING COUNTY, WASHINGTON
MAR 22 2012
SUPERIOR COURT CLERK
BY JOSEPH MASON
REPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

AMANDA TUCKER,

Defendant.

No. 11-1-07587-3 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

Pursuant to RCW 9.94A.120(2),(3), and having reviewed all the evidence, records and other information in this matter, to wit: the defendant's statement on plea of guilty, the certification for determination of probable cause attached to the felony plea agreement where the defendant stipulated to real facts, and having considered the arguments of counsel, the Court hereby imposes an exceptional sentence of 120 months. This sentence is based on the following facts and law:

A. FINDINGS OF FACT

1. The defendant was first arrested by the Seattle Police Department on August 29, 2011, in a stolen car that belonged to a resident of the Mirabella Retirement Community;
2. The Mirabella Retirement Community is a facility of independent and assisted living for seniors;

- 1 3. On September 2, 2011, Tucker was charged with possession of stolen vehicle and
2 held on \$10,000 bail;
- 3 4. On September 15, 2011, the State filed an amended information charging Tucker
4 with five counts of Residential Burglary, one count of VUCSA, one count of
5 Possession of Stolen Property in the Second Degree, and one count of Identity
6 Theft in the Second Degree;
- 7 5. The residential burglary charges stemmed out of Tucker breaking into the
8 apartments of senior citizens living at the Mirabella Retirement Community;
- 9 6. Tucker burglarized four of the residences while they were occupied by the senior
10 residents;
- 11 7. On September 28, 2011, Tucker posted bond and was released from jail;
- 12 8. On November 18, 2011, Tucker was arrested by the Federal Way Police
13 Department for possession of cocaine and residential burglary at the Emeritus
14 Senior Facility. At that time the State filed six additional counts of residential
15 burglary and several other related charges under cause number 11-1-108309-4
16 SEA;
- 17 9. On January 23, 2012, the State filed a second amended information adding the
18 following aggravators: committing a burglary while the victim was present in the
19 residence pursuant to RCW 9.94A.535(3)(u) for counts III, IV, VI and VIII, and
20 committing the crime knowing the victim was particularly vulnerable pursuant to
21 RCW 9.94A.535(3)(b) for counts III, IV, VI, VII and VIII;

- 1 10. On January 23, 2012, the defendant pled guilty as charged to the second amended
- 2 information under this cause number as well as guilty as charged under cause
- 3 number 11-1-08309-4;
- 4 11. The defendant pled guilty to a total of 23 felonies;
- 5 12. The defendant stipulated to real facts in the felony plea agreement;
- 6 13. In the defendant's statement on plea of guilty, the defendant indicated she
- 7 committed four residential burglaries while the victims were present in their
- 8 respective residences;
- 9 14. In the defendant's statement on plea of guilty, the defendant indicated she
- 10 committed five burglaries of elderly victims;
- 11 15. The defendant's offender score for the charges of residential burglary is 32;
- 12 16. The defendant's standard range is 63 to 84 months in prison;
- 13 17. The statutory maximum for residential burglary is 10 years in prison.

14

15 B. CONCLUSIONS OF LAW – SUBSTANTIAL AND COMPELLING REASONS FOR
 16 IMPOSING EXCEPTIONAL SENTENCE

- 17 1. An offense that is a burglary and the victim of burglary was present in the
- 18 building or residence when the burglary was committed is an aggravating
- 19 circumstance to depart from the standard range pursuant to RCW
- 20 9.94A.535(3)(u).
- 21 2. An offense committed when the defendant knew or should have known that the
- 22 victim of the current offense was particularly vulnerable or incapable of resistance
- 23 is an aggravating circumstance to depart from the standard range pursuant to
- 24 RCW 9.94A.535(3)(b).

- 3. Facts establishing sentencing aggravating factors must be proved beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.
- 4. The defendant's stipulation to an aggravating factor is sufficient to constitute a substantial and compelling reason.
- 5. In this case, the defendant's stipulation to four victims being present in their residences when the burglaries were committed is an aggravating factor and constitutes a substantial and compelling reason.
- 6. Similarly, the defendant's stipulation to burglarizing five residences knowing that the victims were particularly vulnerable given that they were elderly is an aggravating factor and constitutes a substantial and compelling reason.

C. The court finds that each one of these substantial and compelling reasons, standing alone, is sufficient justification for the length of the exceptional sentence hereby imposed. The Court imposes the 120 months for each of the five counts of residential burglary, for a total confinement of 120 months.

In the event that an appellate court affirms at least one of the substantial and compelling reasons, the length of the sentence should remain the same so there is no need for a remand.

Date: 3/22/12


 Judge Michael Hayden, King County Superior Court

Agreed as to form:


 Mafé Rajul, WSBA #37877
 Deputy Prosecuting Attorney


 Hong Tran, WSBA #25198
 Attorney for the Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 68474-4-I
)	
AMANDA TUCKER,)	
)	
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 JULY 2012, 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] AMANDA TUCKER
 DOC NO. 356110
 WASHINGTON STATE CORRECTIONS CENTER FOR WOMEN
 9601 BUJACICH ROAD NW
 GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF JULY 2012.

x *Patrick Mayovsky*