

68474-4

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NO. 68474-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AMANDA TUCKER,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

In a case where the State and the defendant are not in agreement with the sentencing recommendation, both parties can persuasively argue their position within the plea agreement. As part of the State's presentation, the court shall allow law enforcement officers to speak at a sentencing hearing. In a sentencing hearing where the defendant was asking for a Drug Offender Sentencing Alternative (DOSA) and the State was asking for the high end of the standard range of 84 months, did the prosecutor comply with the plea agreement by persuasively asking the court to impose 84 months in custody and reject the defendant's DOSA request, and when two members of law enforcement asked the sentencing judge to reject the defendant's argument that her addiction led her to the crimes she committed and to impose a substantial jail time?

B. STATEMENT OF FACTS

On January 23, 2012, Tucker pled guilty to a total 23 felonies and two aggravating factors. CP 35-68, 102-31. Under King County cause number 11-1-07587-3 SEA, Tucker pled guilty to two counts of possession of a stolen vehicle, one count of possession

of cocaine, six counts of residential burglary, two counts of possession of stolen property in the second degree, one count of trafficking in stolen property in the first degree, and one count of identity theft in the second degree. 1RP 4-7.¹ Tucker also pled to the vulnerable victim aggravator on counts III, IV, VI, VII, and VIII, and victim present at the time of the burglary aggravator on counts III, IV, VI and VIII. 1RP 4-8.

In a separate case, King County cause number 11-1-08309-4 SEA, Tucker pled guilty to five counts of residential burglary, three counts of possession of stolen property in the second degree, one count of theft of a motor vehicle and one count of possession of cocaine. 1RP 4-8. Tucker's standard range, based on an offender score of 32, on the residential burglary charges was 63-84 months. CP 35-68; 1RP 9-10; 2RP 2-4.

The parties reached an agreement where the State would recommend the high end of the standard range on the residential burglary counts for total confinement of 84 months, followed by the required community custody period of 12 months for the possession of cocaine convictions. CP 35-68; 1RP 13-15; 2RP 2-5,

¹ 1RP refers to the verbatim report of the plea hearing on January 23, 2012; 2RP refers to the verbatim report of the sentencing hearing on February 17, 2012

10-11; CP 102-31. Tucker was free to ask for a Drug Offender Sentencing Alternative (DOSA). CP 35-68.

On February 17, 2012, Tucker appeared before the Honorable Michael Hayden for sentencing. The State began its sentencing presentation by outlining for the court the several charges Tucker had pled to, her offender score on each charge, and the respective standard range. 2RP 3-4. Pursuant to the plea agreement, the prosecutor then asked the court to impose the high end of the range of 84 months followed by 12 months of community custody. 2RP 5. The prosecutor started to argue the basis for the high end and was interrupted by the court who inquired as to Tucker's plea to the aggravators. 2RP 5-7. The State indicated that although the State was not asking for an exceptional sentence, the State required a plea to the aggravators because the State felt the need for Tucker to take full responsibility for her actions and recognize she had taken advantage of vulnerable victims. 2RP 6-7. The court continued to inquire as to the plea to the aggravators, at which time defense counsel interjected and stated "since the State is not asking for an exceptional sentence, I think ultimately it doesn't really affect the sentence." 2RP 9. The court reminded defense counsel that the State does not have to ask for an

exceptional sentence for the court to impose it. 2RP 9. The court went on to say “I saw in here that there were aggravating factors. I wanted to make sure it was covered in the plea agreement sufficiently that if it is my inclination to impose an exceptional sentence up, there’s a basis for it.” 2RP 9-10.

After the court finished with its inquiry as to the aggravating factors, the State briefly continued with its sentencing presentation by pointing out Tucker had caused a lot of damage, for which she needed to be held accountable. 2RP 10-11. The prosecutor objected to a DOSA sentence, and reminded the court that if the court were to follow the State’s recommendation of the high end of the range followed by community custody, Tucker would ultimately have the benefit of substance abuse treatment. 2RP 10-11. Other than to answer the court’s questions, the prosecutor did not underscore the aggravating factors that Tucker acknowledged in her guilty plea, nor did the prosecutor argue other aggravating factors not included in Tucker’s plea of guilty.

After the prosecutor made her presentation, several victims addressed the court. 2RP 11-24. Seattle Police Department Detective Jones, one of the investigating officers, also addressed the Court and expressed his view in opposition to a DOSA

sentence by pointing out that Tucker's actions were methodical, calculated and not the actions of an addict. 2RP 25-26. Detective Jones finished his address to the court by saying that "although our system of justice is set up to protect the rights of the accused, upon conviction the court must also be concerned with the rights and interests of the victims in order to get a sense of justice." 2RP 26-27. Detective Jones never spoke as to how much time he believed would be appropriate or what type of sentence Tucker should receive.

Lastly, the prosecutor read a letter from one other member of law enforcement who investigated Tucker's crimes, Detective Stephen Owings. 2RP 27-28. Detective Owings was unable to be at the hearing. 2RP 27. In the letter, Detective Owings objected to the imposition of a DOSA sentence and urged the court to impose substantial jail time. 2RP 28. Detective Owings in his letter to the court did not ask the court to impose a sentence above 84 months.

Tucker addressed the court and stated she had a drug problem. 2RP 29, 36-37. Tucker's counsel argued for a DOSA relying on, among other things, a report prepared by a social worker that outlined Tucker's horrific childhood. 2RP 30-36. The court imposed an exceptional sentence on the basis that Tucker

pled to statutory grounds that provide for an exceptional sentence, and in doing so also stated: "The State's not asking for an exceptional sentence, but I'm imposing one. The statutory maximum for these offenses is 120 months. And it will be the court's sentence on those burglaries that were committed with the aggravating factors. That is where people were home or the victims were vulnerable." 2RP 38-39.

C. ARGUMENT

THE PROSECUTOR COMPLIED WITH THE PLEA AGREEMENT AND LAW ENFORCEMENT'S REMARKS TO THE COURT WERE CONSISTENT WITH THE STATE'S RECOMMENDATION.

A defendant gives up important constitutional rights by agreeing to a plea bargain. The State must therefore adhere to the terms of a plea agreement by recommending the agreed-upon sentence to the court. *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999) (citing *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998), *review denied*, 138 Wn.2d 1002 (1999)). Although the recommendation need not be made enthusiastically, the prosecutor is obliged to act in good faith. *Jerde*, 93 Wn. App at 780. The State must not undercut the terms of the agreement.

Talley, 134 Wn.2d at 183; *Jerde*, 93 Wn. App. at 780. The State can undercut a plea agreement either explicitly or implicitly through words or conduct indicating an intent to circumvent the agreement. *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997); *State v. Van Buren*, 101 Wn. App 206, 213, 2 P.3d 991, *review denied*, 143 Wn.2d 1011 (2001).

The courts apply an objective standard in determining whether the State breached a plea agreement. *Van Buren*, 101 Wn. App. at 213. The test is whether the prosecutor contradicts, by word or conduct, the State's recommendation for a standard range sentence. *Jerde*, 93 Wn. App. at 780. In making this determination, the Court views the entire sentencing record. *Van Buren*, 101 Wn. App. at 214.

The law allows law enforcement to address the trial court at a sentencing hearing. In relevant part, RCW 9.94A.500 states:

"At a sentencing hearing, the court shall consider the risk assessment report and presentence reports... and allow arguments from the prosecutor, the defense counsel, the offender, the victim... and an investigative law enforcement officer as to the sentence to be imposed."

RCW 9.94A.500(1).

In this case, the State acted in good faith and did not breach the plea agreement. The prosecutor asked for an imposition of the high end of the range of 84 months. Similarly, Detective Jones' oral statement and Detective Owings' letter to the court were well within the realm of sources the court was to consider when determining what sentence to impose. To say the prosecutor invited the detectives to give unsolicited statements is to imply the law precludes law enforcement from speaking independently at a sentencing hearing. Significantly, neither detective asked the court to disregard the prosecutor's recommendation and impose an exceptional sentence. The detectives did nothing more than to express their opinion as to why Tucker was not acting simply to feed her drug habit, and to ask the court to impose jail time rather than grant a DOSA. The detectives' statements were consistent with the prosecutor's strong opposition to a DOSA and her request for a high-end sentence of 84 months.

Erroneously, Tucker argues that this case is similar to *Sledge, Jerde, Van Buren* and *Xaviar*. App Br. 10. However, all of those cases are distinguishable from the case at bar. In *Sledge*, the probation department had recommended a manifest injustice disposition for the juvenile defendant and the prosecutor, while

superficially recommending a standard range disposition, called the probation officer as a witness, inquiring at great length as to the basis for the manifest injustice recommendation. 133 Wn.2d at 833-35. The prosecutor also gave a summation of the various factors supporting an exceptional disposition, including an aggravating factor not included in the probation report. *Id.* at 837-38. In this case, although Detectives Jones and Owings addressed the court, no one recommended an exceptional sentence. Detective Jones did not speak as to how much time would be appropriate and Detective Owings simply stated “[p]lease make sure she gets what she deserves, which is a substantial jail time.” 2RP 28. The State’s recommendation of 84 months of incarceration is substantial jail time.

This case is also distinguishable from *Jerde*. In that case, the prosecutor referred at great length to the aggravating factors that would support an exceptional sentence. 93 Wn. App. at 777-79. The court took issue with the fact that the prosecutor had agreed to recommend a mid-range sentence and was highlighting the factors that supported an exceptional sentence. *Id.* In contrast, here, the prosecutor argued for a high-end sentence, and did no more than forcefully argue for 84 months and oppose a DOSA. In

its presentation, the prosecutor did not underscore the aggravating factors. Rather, the record is clear that the only time the prosecutor addressed the aggravating factors was in response to the court's questions as to Tucker's plea.

This case is also distinguishable from *Van Buren*. In *Van Buren*, the prosecutor made a very tangential reference to its sentencing recommendation and then continued by telling the court there were several aggravating factors the court could consider if its inclination was to impose an exceptional sentence. 101 Wn. App. at 209. The *Van Buren* court found the prosecutor had downplayed its recommendation, specifically focused the court's attention on two aggravating factors contained in the presentence report, proposed an aggravating factor not cited within the presentence report, and argued the validity of one of the aggravating factors. *Id.* at 215-16. In this case, although Tucker pled guilty to two aggravating factors, the prosecutor did not invite the court to consider an exceptional sentence, nor did the prosecutor focus her argument on the aggravating factors. Instead, the prosecutor asked the court to impose the high end of 84 months followed by 12 months of supervision so that Tucker could receive the treatment she was seeking to receive a DOSA sentence.

Xaviar is also distinguishable from this case. The *Xaviar* court opined that when the prosecutor highlighted various statutory aggravating circumstances, the prosecutor clearly signaled to the court her lack of support for a standard range sentence. *State v. Xaviar*, 117 Wn. App. 196, 200-01, 69 P.3d 901 (2003). Here, by the terms of the plea agreement, the prosecutor was to recommend a high-end standard range sentence and Tucker was free to request a DOSA. In its objection to the DOSA, it was reasonable for the prosecutor to emphasize the number of victims involved in her crime spree and the damage she caused. It was also reasonable for the State to point out that Tucker's actions were not the actions of someone who is desperate to get money in order to support her drug habit. Rather, her actions were of someone who chose her victims carefully in order to get away with her crimes. The State did not emphasize the aggravating factors and an argument in opposition to a DOSA would have been negligible without the prosecutor pointing out Tucker's conscious decision to target specific victims.

Viewed in the context of the entire argument, the prosecutor was not advocating the imposition of an exceptional sentence, but was arguing persuasively for a high-end sentence. More importantly, viewed in the context of the entire sentencing hearing, it is clear from the initial inquiry made by the court that the court had already considered an exceptional sentence even before the prosecutor and the detectives made their comments in support for a high-end standard range sentence. While a prosecutor is prohibited from contradicting, by words or conduct, the State's recommendation for a standard range sentence, he or she is not prohibited from presenting relevant facts to the sentencing court, especially when the sentencing recommendation to the court is not an agreed recommendation. The facts presented by the prosecutor here were relevant to the State's recommendation for a high-end sentence, and the arguments made by the prosecutor did not undercut the State's recommendation. The State did not breach the plea agreement.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm

Tucker's exceptional sentence of 120 months.

DATED this 6th day of September, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

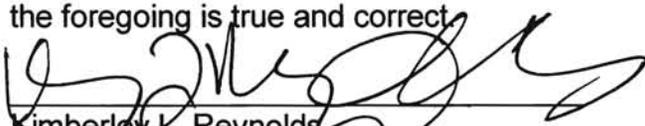
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, 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. AMANDA TUCKER, Cause No. 68474-4-I, 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.



Kimberley L. Reynolds
Done in Seattle, Washington

9/6/12
Date