70060-0

REC'D
SEP 25 2013
King County Prosecutor
Appellate Unit

70060-0

NO. 70060-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAOLO GALEAZZI,

Appellant.

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

The Honorable Andrea Darvas, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issue Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 6

THE PROSECUTOR BREACHED THE PLEA AGREEMENT BY RECOMMENDING A 90-MONTH SENTENCE. 6

a. The Commission of Additional Crimes Was a Condition Subsequent that Must Be Proved by a Preponderance of the Evidence. 7

b. The Prosecutor's Duty to Recommend a 65-Month Sentence Was Excused Only If New Crimes Were "Committed," and Was Not Excused Based on the Mere Existence of Charges. 9

c. The State Breached the Plea Agreement, and Galeazzi Should Be Permitted to Withdraw His Plea 11

D. CONCLUSION 14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Allstate Ins. Co. v. Huston
123 Wn. App. 530, 94 P.3d 358 (2004) 8, 9, 12

Colorado Structures, Inc. v. Ins. Co. of the West
161 Wn.2d 577, 167 P.3d 1125 (2007) 7, 8, 12

Fluke Corp. v. Hartford
102 Wn. App. 237, 7 P.3d 825 (2000)
aff'd, 145 Wn.2d 137, 34 P.3d 809 (2001) 10

Guy Stickney, Inc. v. Underwood
67 Wn.2d 824, 410 P.2d 7 (1966) 10

In re Pers. Restraint of Bradley
165 Wn.2d 934, 205 P.3d 123 (2009) 13

In re Pers. Restraint of James
96 Wn.2d 847, 640 P.2d 18 (1982) 8, 9

In re Pers. Restraint of Shale
160 Wn.2d 489, 158 P.3d 588 (2007) 13

Lynott v. Nat'l Union Fire Ins. Co.
123 Wn.2d 678, 871 P.2d 146 (1994) 10

Mendez v. Palm Harbor Homes
111 Wn. App. 446, 45 P.3d 594 (2002) 10

Northwest Airlines v. Hughes Air Corp.
104 Wn.2d 152, 702 P.2d 1192 (1985) 11

St. Paul Mercury Ins. Co. v. Salovich
41 Wn. App. 652, 705 P.2d 812 (1985) 8

State v. Adamy
151 Wn. App. 583, 213 P.3d 627 (2009) 12

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Carreno-Maldonado
135 Wn. App. 77, 143 P.3d 343 (2006) 12

State v. Chavez
162 Wn. App. 431, 257 P.3d 1114 (2011) 11

State v. Jerde
93 Wn. App. 774, 970 P.2d 781 (1999) 7

State v. Marshall
144 Wn.2d 266, 27 P.3d 192 (2001) 11

State v. Morley
35 Wn. App. 45, 665 P.2d 419 (1983). 8

State v. Roberson
118 Wn. App. 151, 74 P.3d 1208 (2003) 8, 14

State v. Sanchez
146 Wn.2d 339, 46 P.3d 774 (2002) 13

State v. Sledge
133 Wn.2d 828, 947 P.2d 1199 (1997) 7, 13

State v. Van Buren
101 Wn. App. 206, 2 P.3d 991 (2000) 13

Syrovy v. Alpine Resources, Inc.
122 Wn.2d 544, 859 P.2d 51 (1993) 10

Wagner v. Wagner
95 Wn.2d 94, 621 P.2d 1279 (1980). 11

Wlasiuk v. Whirlpool Corp.
81 Wn. App. 163, 914 P.2d 102, 113 (1996) 7

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Mabry v. Johnson
467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984)..... 7, 12

Neder v. United States
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 12

Santobello v. New York
404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)..... 7

RULES, STATUTES AND OTHER AUTHORITIES

CrR 4.2..... 11

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to withdraw his guilty plea.

2. The court erred in finding the prosecutor did not breach the plea agreement by failing to make the agreed-upon sentencing recommendation.

3. The court erred in entering judgment and sentence against appellant.

Issue Pertaining to Assignments of Error

Appellant pled guilty in exchange for an agreed recommendation of a 65-month sentence. The agreement allowed the State to increase its recommendation if appellant "commits any new charged or uncharged crimes." Before sentencing the State charged appellant with two new offenses. The only evidence of the new offenses was the certification of probable cause. Nonetheless, the State increased its recommendation to 90 months. Did the court err in finding the State did not violate the plea agreement and in denying appellant's motion to withdraw his plea?

B. STATEMENT OF THE CASE

On June 23, 2011, the King County prosecutor charged appellant Paolo Galeazzi with possession of methamphetamine. 1CP[1] 1. The charge was later amended to possession with intent to manufacture or distribute. 1CP 9. Trial was delayed for various reasons until January 15, 2013. 1RP[2] 3. In the intervening time, on May 8, 2012, the prosecutor charged Galeazzi with theft of a motor vehicle. 2CP 1.

On January 15 and 16, 2013, the court heard CrR 3.5 and 3.6 motions in the drug charge, and ruled that Galeazzi's statements to law enforcement and the evidence obtained in the search incident to arrest were admissible. 2RP 170-73, 179-81.

The next day, January 17, 2013, Galeazzi pled guilty to possession of methamphetamine with intent to deliver. 1CP 39-51. The day after that, the State amended the theft of a motor vehicle charge to taking a motor vehicle without permission in the second degree, and Galeazzi pled guilty in that cause number as well. 2CP 15.

The plea agreements in each case state that the agreement is an indivisible one encompassing both cause numbers. 1CP 33; 2CP 34. In each

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[1] 1CP refers to the clerk's papers in case number 70060-0-I, and 2CP refers to the clerk's papers in 69963-6-I. These cases are linked for consideration.

[2] The Verbatim Report of Proceedings in case 70060-0-I is referenced as follows: 1RP – Jan. 15, 2013; 2RP – Jan. 16, 2013; 3RP – Jan. 17, 2013. The Verbatim Report of Proceedings in case no. 69963-6-I is referenced as follows: 4RP – Feb. 8, 2013.

case, Galeazzi stipulated to the facts in the probable cause certification and agreed his criminal history was correct as listed in Appendix B. 1CP 33; 2CP 34.

In exchange for Galeazzi's guilty plea, the State agreed not to file bail jumping charges in either cause number. 1CP 33; 2CP 34. The State agreed not to seek an exceptional sentence and Galeazzi agreed not to seek any sentencing alternatives. 2CP 34.

On the motor vehicle charge, the State agreed to recommend 25 months, assuming an offender score of 17 and standard range of 22 to 29 months. 2CP 35, 39. On the methamphetamine charge, the State agreed to recommend 65 months plus the required community custody, based on an offender score of 15 and a standard range of 60 to 120 months. 1CP 37-38. Both agreements stated, "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." 1CP 33; 2CP 34. Sentencing was set for February 8, 2013. 3RP 12.

At the sentencing hearing, Galeazzi moved to continue because the State had announced it would change its recommendation based on new charges filed against Galeazzi since the pleas were entered. 4RP 17-18. Defense counsel wanted time to investigate the new charges, to attempt to

negotiate a global resolution, and to research whether the mere fact of an allegation was sufficient to relieve the State of its duty to abide by the recommendations in the plea agreement. 4RP 17-18.

The court denied the motion to continue, finding no prejudice in going forward with sentencing as scheduled. 4RP 25. The prosecutor turned first to the 2012 taking a motor vehicle case. In that case, the State did not change its recommendation from the plea agreement, and counsel agreed there was no dispute regarding Galeazzi's criminal history or offender score. 4RP 26.

Next, the State turned to the methamphetamine charge. Galeazzi, represented by different counsel on this case, argued that any increase in the State's recommendation would constitute a breach of the plea agreement. 4RP 27. The State argued it was recommending 90 months, rather than the 65 months previously agreed to, because Galeazzi's new offenses released it from its duty. 4RP 28. Defense counsel argued there must be some standard of proof higher than mere probable cause in order to release the State from its contractual duty. 4RP 32-33. He then requested a continuance to research the issue and present briefing. 4RP 32-33.

The court noted that the only evidence before it (of the new allegations) was the probable cause certification. 4RP 35. The court explained there was no breach because under the terms of the plea

agreement, the State's recommendation could change if it had probable cause to believe Galeazzi had committed new offenses. 4RP 36-37.

Galeazzi argued the State breached by changing its recommendation and moved to withdraw the plea. 4RP 37. The court told Galeazzi he could do that after sentencing. 4RP 37. The court then declared, "This is a mess. I'm going to go ahead with the sentencing hearing at this point. [The prosecutor] can make whatever presentation he wants to make." 4RP 37. The court ruled there were grounds under the plea agreement for the State to change its recommendation. 4RP 38. The State then recommended 90 months. 4RP 38-40.

On the motor vehicle charge, Galeazzi joined the State's recommendation for 25 months as per the plea agreement. 4RP 43. However, as to the methamphetamine charge, counsel reiterated his argument that the State was in breach and renewed the motion to withdraw the plea. 4RP 43.

Galeazzi argued he was also no longer bound by his stipulation to the offender score because of the prosecutor's breach. 4RP 43. He therefore recommended a low-end standard range sentence of 12 months based on an offender score of zero. 4RP 44. Alternatively, he recommended 60 months if the State produced certified copies of judgments showing Galeazzi's criminal history. 4RP 44.

The court imposed the agreed 25 months on the motor vehicle charge to run concurrently with 80 months on the methamphetamine charge. 4RP 49-50. The State then argued Galeazzi could not withdraw his stipulation to his offender score in the methamphetamine case and even if he could, the court could still rely on the stipulation he made in the other case. 4RP 51. At this point, Galeazzi's attorney on the motor vehicle case suggested she had been ineffective in going first and agreeing in that case. 4RP 51. The court declared the Court of Appeals could sort that out and ruled that the criminal history in Appendix B was presumptively correct, and no one had presented any facts showing it was not. 4RP 52-53. The court declared the State had not breached the plea agreement, but had merely changed its recommendation as per the terms of that agreement. 4RP 53. Notice of appeal was timely filed in both cause numbers. 1CP 62; 2CP 49. Galeazzi has moved to consolidate the two appeals.

C. ARGUMENT

THE PROSECUTOR BREACHED THE PLEA AGREEMENT BY RECOMMENDING A 90-MONTH SENTENCE.

The plea agreement states the prosecutor can increase the recommended sentence if the defendant commits any new charged or uncharged crimes. 1CP 33; 2CP 34. Because this condition was not

established by a preponderance of the evidence, the prosecutor's increased recommendation constituted a breach of the plea agreement. The court, therefore, erred in denying Galeazzi's motion to withdraw his plea.

a. The Commission of Additional Crimes Was a Condition Subsequent that Must Be Proved by a Preponderance of the Evidence.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838- 39, 947 P.2d 1199 (1997). "[D]ue process requires a prosecutor to adhere to the terms of the agreement." Id. at 839 (citing, inter alia, Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984)). Because a defendant gives up important constitutional rights by pleading guilty, the State must adhere to the terms by recommending the agreed-upon sentence. Sledge, 133 Wn.2d at 839; State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

A condition subsequent is a condition that relieves a party to a contract of its duty to perform. Colorado Structures, Inc. v. Ins. Co. of the West, 161 Wn.2d 577, 588, 167 P.3d 1125, 1131 (2007). The party seeking to avoid performance bears the burden to prove the existence of a condition subsequent. Wlasiuk v. Whirlpool Corp., 81 Wn. App. 163, 179, 914 P.2d 102, 113 (1996) ("The burden of proof is upon defendant to prove an affirmative defense based upon plaintiff's nonperformance under the

contract. The burden would have been on Wlasiuk to prove his performance under the contract only if his performance were a condition precedent.") (citations omitted). A condition that relieves a party of its duty to perform must be proved by a preponderance of the evidence. Allstate Ins. Co. v. Huston, 123 Wn. App. 530, 543, 94 P.3d 358 (2004) (citing St. Paul Mercury Ins. Co. v. Salovich, 41 Wn. App. 652, 705 P.2d 812 (1985)).

When the State seeks to be relieved of its duty to perform as provided in a plea agreement, an evidentiary hearing is required. In re Pers. Restraint of James, 96 Wn.2d 847, 850, 640 P.2d 18 (1982); State v. Roberson, 118 Wn. App. 151, 158-59, 74 P.3d 1208 (2003); State v. Morley, 35 Wn. App. 45, 665 P.2d 419 (1983).

> A hearing ensures that the right or the expectation is not arbitrarily denied. With plea bargains, if there were no evidentiary hearings, a defendant merely accused of post plea crimes, but innocent and later acquitted of them, could nevertheless lose the benefit of his or her bargain.

James, 96 Wn.2d at 851.

The State argued it was relieved of the duty it would otherwise have because of the occurrence of other crimes. That is the definition of a condition subsequent. Colorado Structures, 161 Wn.2d at 588. For that condition to be effective, the State must prove the existence of the condition by a preponderance of the evidence. Allstate Ins., 123 Wn. App. at 543. It

did not do so, and the failure to make its agreed-upon recommendation was a breach of the plea agreement.

b. The Prosecutor's Duty to Recommend a 65-Month Sentence Was Excused Only If New Crimes Were "Committed," and Was Not Excused Based on the Mere Existence of Charges.

The State argued below, and the court concluded, that there was no breach because the contract terms permitted the increased recommendation. 4RP 28, 53. That is not correct under the plain language of the plea.

Contracts are interpreted by the contract's actual written language, not by language that was not included. The plea form unambiguously provided the State must recommend 65 months unless, among other things, Galeazzi "commits any new charged or uncharged crimes." 1CP 33; 2CP 34. (emphasis added). The form did not provide the State the option to make more severe recommendation if Galeazzi was merely charged with new crimes. In fact, the form's language renders the existence of a charge irrelevant. The key is whether any new crimes were committed. This question should have been settled by an evidentiary hearing, at which the State would have the burden to prove a new offense was committed by a preponderance of the evidence. James, 96 Wn.2d at 850; Allstate Ins., 123 Wn. App. at 543.

If the State had meant to reserve for itself the option to terminate its contractual obligation simply by filing charges, it should have included the term expressly in its agreement. See, e.g., Lynott v. Nat'l Union Fire Ins. Co., 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (where missing contract language is easily available, contract will be interpreted not to include such language); Syrovy v. Alpine Resources, Inc., 122 Wn.2d 544, 550-51, 859 P.2d 51 (1993) (timber buyer's failure to use term "option" in contract was fatal to buyer's claim that contract was for option rather than purchase).

Another important rule of contract interpretation construes written contract terms against the drafter. Guy Stickney, Inc. v. Underwood, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); Mendez v. Palm Harbor Homes, 111 Wn. App. 446, 459-60, 45 P.3d 594 (2002); Fluke Corp. v. Hartford, 102 Wn. App. 237, 244, 7 P.3d 825 (2000), aff'd, 145 Wn.2d 137, 34 P.3d 809 (2001). The State unquestionably drafted the language in the Plea Agreement form, as it indicates in the bottom left hand corner of the form:

> KING COUNTY PROSECUTING ATTORNEY
>
> Revised 6/2010

1CP 33; 2CP 34. The State was fully aware of the unambiguous language in its own form, so it cannot claim surprise, or even a unilateral mistake.

A third settled rule of contract interpretation provides that courts will not rewrite contracts to include language that one party believes is missing.

Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Thus, to the extent the State claims it thought the agreement would allow it to increase its sentence recommendation if Galeazzi were merely charged with any new offenses, the Court would have to rewrite the contract terms to include such a provision. This is something courts will not do. Northwest Airlines v. Hughes Air Corp., 104 Wn.2d 152, 159, 702 P.2d 1192 (1985); Wagner, 95 Wn.2d at 104.

Based on the contract language and these settled rules of interpretation, the State agreed to make a 65-month sentence recommendation. By recommending a 90-month sentence, the prosecution breached the agreement because it was never established that Galeazzi committed any new crimes, only that he was charged. 4RP 35. Galeazzi's motion to withdraw his plea should have been granted.

c. The State Breached the Plea Agreement, and Galeazzi Should Be Permitted to Withdraw His Plea.

Withdrawal of a plea is permitted whenever necessary to correct a manifest injustice. CrR 4.2. The State's breach of the plea agreement constitutes a manifest injustice. State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Chavez, 162 Wn. App. 431, 440, 257 P.3d 1114, 1118 (2011). A trial court abuses its discretion if its

decision is manifestly unreasonable or rests on untenable grounds. State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627, 629 (2009).

The court abused its discretion in denying Galeazzi's motion to withdraw his plea because that ruling was based an error of law. The court apparently believed that no hearing or evidence was necessary and that the certification of probable cause, showing reason to believe Galeazzi had committed new offenses, was sufficient to relieve the State of its duty to abide by the agreed sentence recommendation. 4RP 58. This is in direct contradiction of the law discussed above requiring proof of a condition subsequent by a preponderance of the evidence. Colorado Structures, 161 Wn.2d at 588; Allstate Ins., 123 Wn. App. at 543. It is also manifestly unreasonable in light of the express language of the plea agreement. 1CP 33; 2CP 34.

When the State breaches its agreement, the defendant pleads guilty on a false premise. Mabry, 467 U.S. at 509. Such an error infects the entire sentencing proceeding and is structural error that cannot be harmless. State v. Carreno-Maldonado, 135 Wn. App. 77, 88, 143 P.3d 343 (2006) (citing Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). This structural error is not limited to one charge because the pleas were, by the terms of the agreements, part of an "indivisible" package deal. 1CP 33; 2CP 34; see, e.g.; In re Pers. Restraint of Bradley, 165 Wn.2d 934,

942-43, 205 P.3d 123 (2009); In re Pers. Restraint of Shale, 160 Wn.2d 489, 158 P.3d 588 (2007).

Breach of a plea agreement is manifest constitutional error that may be raised for the first time on appeal. State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002); [3] State v. Van Buren, 101 Wn. App. 206, 212, 2 P.3d 991 (2000). Constitutional error is manifest when the necessary facts are in the record and the error causes actual prejudice. Id. The facts necessary to Galeazzi's challenge are contained in the clerk's papers and transcripts discussed below. He has shown actual prejudice because, as in Sanchez, the court actually imposed a longer sentence than the prosecutor's recommendation. 4RP 38, 40; see Sanchez, 146 Wn.2d at 346 (breach of plea agreement causes actual prejudice where defendant not sentenced according to the plea agreement).

When, as here, the prosecutor breaches the plea agreement, a defendant may choose either to vacate the agreement and demand a trial or elect a new sentencing hearing in front of a different judge. Sledge, 133 Wn.2d at 846. Galeazzi was denied the benefit of his bargain and moved to withdraw his plea. 4RP 37, 43. That motion should have been granted. Alternatively, this Court could remand for an evidentiary hearing. See

[3] Sanchez is a plurality opinion, but neither the concurrence/dissent by Justice Chambers nor the dissent by Justice Madsen disagreed with the lead opinion that the issue was properly raised for the first time on appeal as manifest constitutional error.

Roberson, 118 Wn. App. at 158-59 (remanding for evidentiary hearing at which State would bear burden of proving other incidents by a preponderance of the evidence).

D. CONCLUSION

For the foregoing reasons, Galeazzi requests this Court reverse his convictions and the order denying his motion to withdraw his guilty plea.

DATED this 25th day of September, 2013.

Respectfully submitted,

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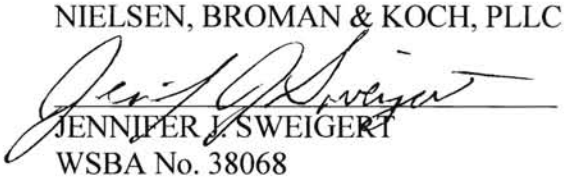

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