

NO. 37314-9

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT JOHN PRESTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz
The Honorable Bryan Chushcoff

No. 06-1-05249-0

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Has defendant failed to show the prosecutor breached the plea agreement by vigorously advocating for the sentence she agreed to recommend in the plea agreement?..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT.....3

 1. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR BREACHED THE PLEA AGREEMENT BY VIGOROUSLY ADVOCATING FOR THE SENTENCE SHE AGREED TO RECOMMEND IN THE PLEA AGREEMENT.3

D. CONCLUSION9

Table of Authorities

State Cases

| | |
|---|---------|
| <i>In re Palodichuk</i> , 22 Wn. App. 107, 110, 589 P.2d 269 (1978)..... | 5 |
| <i>State v. Arko</i> , 52 Wn. App. 130, 758 P.2d 522 (1988) | 4 |
| <i>State v. Coppin</i> , 57 Wn. App. 866, 874, 791 P.2d 228, <i>review denied</i> , 115 Wn.2d 1011, 797 P.2d 512 (1990)..... | 3 |
| <i>State v. Crider</i> , 78 Wn. App. 849, 853-54, 899 P.2d 24 (1995)..... | 3 |
| <i>State v. Davis</i> , 43 Wn. App. 832, 837, 720 P.2d 454, <i>review denied</i> , 106 Wn.2d 1017 (1986)..... | 4 |
| <i>State v. Gutierrez</i> , 58 Wn. App. 70, 76, 791 P.2d 275 (1990) | 4, 5 |
| <i>State v. Jerde</i> , 93 Wn. App. 774, 970 P.2d 781 (1999)..... | 5 |
| <i>State v. Sledge</i> , 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1998) | 3, 4, 5 |
| <i>State v. Talley</i> , 134 Wn.2d 176, 362, 949 P.2d 358 (1998) | 3, 5 |
| <i>State v. Talley</i> , 134 Wn.2d 176, 949 P.2d 358 (1998) | 4 |
| <i>State v. Van Buren</i> , 101 Wn. App. 206, 2 P.3d 991 (2000) | 5 |

Federal and Other Jurisdictions

| | |
|---|---|
| <i>United States v. Benchimol</i> , 471 U.S. 453, 456, 105 S. Ct. 2103, 85 L. Ed. 2d 462 (1985)..... | 3 |
|---|---|

Statutes

| | |
|---------------------|---|
| RCW 9.94A.460 | 4 |
|---------------------|---|

Rules and Regulations

| | |
|--------------|---|
| RPC 3.3..... | 4 |
|--------------|---|

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show the prosecutor breached the plea agreement by vigorously advocating for the sentence she agreed to recommend in the plea agreement?

B. STATEMENT OF THE CASE.

On November 6, 2006, Pierce County Prosecutor's Office charged defendant with the following crimes: one count attempting to elude a pursuing police vehicle, one count failure to remain at injury accident, one count driving while in suspended or revoked status in the third degree, and two counts reckless endangerment. CP 1-3; Cause No. 06-1-05249-0. On January 30, 2007, Pierce County Prosecutor's Office filed an amended information charging defendant with one count attempting to elude a pursuing police vehicle and one count failure to remain at injury accident. CP 6-7. On February 2, 2007, following a jury trial, the jury announced it was unable to reach a unanimous decision. CP 77-78. On June 4, 2007, Pierce County Prosecutor's Office filed a second amended information adding a charge of tampering with a witness. CP 12-13.

On October 18, 2007, pursuant to a third amended information charge of failure to remain at an injury accident, defendant entered an Alford plea. CP 23; CP 25-28. The prosecutor agreed to recommend a sentence of 60 months confinement, to run consecutive to a federal

sentence. CP 26. Under the terms in the plea agreement, it was noted that “defendant may argue for DOSA sentence and to have sentence run concurrent with his sentence in the federal court.” *Id.* The plea also stated “defendant understands that crime charged does not disqualify him for DOSA.” *Id.* The Honorable Katherine Stolz went over the plea with defendant and noted that “the State is recommending 60 months.” 3 RP 5¹. The court also noted that the State was recommending that the sentence run consecutive to defendant’s federal sentence. 3 RP 6. Defendant then acknowledged that he understood the State’s sentencing recommendations. *Id.* Upon reviewing the plea statement with defendant, the court accepted defendant’s plea. 3 RP 9.

On January 16, 2007, the Honorable Bryan Chushcoff sentenced defendant to the prosecutor’s recommended standard sentence of 60 months confinement. CP 33-45; 4 RP 1-11. The court noted that a DOSA sentence was not an appropriate as defendant is a “danger to everybody” because defendant went “110 miles an hour, blowing stoplights” while eluding the officers. 4 RP 22. Finally, the court noted that drugs are merely a “byproduct” of the crime, not a principle element of the crime.

¹ The verbatim report of proceedings consists of four volumes that will be referred to as follows:

May 8, 2007 (Motion for Withdrawal and Substitution of Attorney)= “1 RP”

May 15, 2007 (Continuance of Trial Date)= “2 RP”

October 18, 2007 (Change of Plea)= “3 RP”

January 16, 2007 (Sentencing)= “4 RP”

Id. On January 16, 2008, the court ordered restitution and disbursement in the amount of \$2,881.57. CP 81-82.

On February 5, 2008, defendant filed a timely notice of appeal. CP 46-49.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR BREACHED THE PLEA AGREEMENT BY VIGOROUSLY ADVOCATING FOR THE SENTENCE SHE AGREED TO RECOMMEND IN THE PLEA AGREEMENT.

It is well-settled that a plea agreement is a contractual agreement between the State and defendant. *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1998). A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. *State v. Talley*, 134 Wn.2d 176, 362, 949 P.2d 358 (1998); *State v. Coppin*, 57 Wn. App. 866, 874, 791 P.2d 228, rev. denied, 115 Wn.2d 1011, 797 P.2d 512 (1990). A prosecutor fulfills her duty with regard to a promise to make a recommendation with respect to sentence by making the promised recommendation. *United States v. Benchimol*, 471 U.S. 453, 456, 105 S. Ct. 2103, 85 L. Ed. 2d 462 (1985); *State v. Crider*, 78 Wn. App. 849, 853-54, 899 P.2d 24 (1995); *Coppin*, 57 Wn. App. at 873. The recommendation need not be made "enthusiastically." *Coppin*,

57 Wn. App. at 874. The prosecutor, as an officer of the court, is obliged to participate in the sentencing proceedings, candidly answering the court's questions in accordance with RPC 3.3, and holding back no relevant information regarding the plea agreement. *See* RCW 9.94A.460 (State may not agree to withhold relevant information from court regarding plea agreement). A prosecutor is entitled to present all relevant facts, whether or not they fully support his recommendation. *State v. Gutierrez*, 58 Wn. App. 70, 76, 791 P.2d 275 (1990); *State v. Davis*, 43 Wn. App. 832, 837, 720 P.2d 454, *review denied*, 106 Wn.2d 1017 (1986).

At the same time, however, the State has an equal duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement. *Sledge*, 133 Wn. 2d at 840.

Certain acts by the State have been found not to constitute a breach. *State v. Talley*, 134 Wn.2d 176, 949 P.2d 358 (1998) (prosecutor's participation in a court-ordered evidentiary hearing, by itself, does not undercut agreed recommendation); *State v. Davis*, 43 Wn. App. 832, 720 P.2d 454 (1986)(prosecutor did not breach agreement by advising court of two witnesses who wished to testify in favor of a prison term rather than probation); *State v. Arko*, 52 Wn. App. 130, 758 P.2d 522 (1988)(State's advocacy for exceptional sentence on appeal after standard

range recommendation in plea agreement was not a breach); *State v. Gutierrez*, 58 Wn. App. 70, 791 P.2d 275 (1990)(prosecutor did not breach agreement by presenting psychologist's report that did not fully support recommended sentence).

However, actions by the prosecutor which focus the court's attention on aggravating factors that justify an exceptional sentence when the State has agreed to recommend the standard range, will be found to constitute a breach. *Sledge, supra*; *State v. Jerde*, 93 Wn. App. 774, 970 P.2d 781 (1999); *State v. Van Buren*, 101 Wn. App. 206, 2 P.3d 991 (2000).

The test for determining whether a prosecutor breached terms of a plea agreement is assessed by determining whether the prosecutor objectively contradicted the recommendation by use of words or conduct. *Jerde*, 93 Wn. App. At 780. Courts have gone as far as to note that the State does not breach a plea agreement by advocating for a sentence beyond the bargained for recommendation as long as it does not to undercut a plan or bargain with the defendant. *Talley*, 134 Wn.2d at 183 (citing *In re Palodichuk*, 22 Wn. App. 107, 110, 589 P.2d 269 (1978)).

In the instant case, consistent with the terms of the plea agreement, the prosecutor recommended 60 months confinement to run consecutive with defendant's federal sentence. CP 25-28; 4 RP 11. This

recommendation fails to contradict the plea agreement as the recommendation reflects the precise terms noted in it. While appellant argues that the prosecutor breached the plea by arguing against the DOSA sentence (*See* Appellant's Brief pg. 7), the prosecutor merely advocated for her recommendation. The prosecutor did not recommend an exceptional sentence, nor did the prosecutor recommend anything not explicitly stated in the prosecutor's recommendation per the plea agreement.

Appellant has failed to establish a breach of the agreement as all parties understood the prosecutor would advocate for a 60 months consecutive sentence, which is inconsistent with a DOSA recommendation. While appellant notes that because this is an Alford plea, it is important to ensure that "defendant's understanding of what he is exchanging his important rights for is not undercut by the actions of the prosecutor," the record clearly indicates that defendant understood that the state was recommending 60 months confinement. (*See* Appellant's Brief pg. 8). First, defendant signed the plea agreement indicating he fully understood the terms of the plea and the prosecutor's recommendation in the plea agreement. CP 28. Second, defense counsel noted that he explained to defendant the rights defendant would be waiving and explained the "sentencing options available to the court." 3 RP 4. Third,

the court explained to defendant that the standard sentencing range for his offender score is 60 months and that the State was recommending 60 months to run consecutive with his federal sentence. 3 RP 5-6. Defendant responded by acknowledging that he understood what the State was recommending. 3 RP 6. Finally, at sentencing, defense counsel noted that he “did anticipate the State would object to a DOSA sentence.” Thus, there was no question as to what the State’s recommendation was and the defense fully understood the sentence the prosecution would be advocating for. 4 RP 11. This is further evidenced by defense counsel’s failure to object to the prosecution’s arguments at sentencing.

Along similar lines, while appellant asserts that defendant would not have entered the plea if defendant had known that the prosecutor was going to argue against the DOSA request (*See* Appellant’s Brief 7-8), the record does not support that assertion. Rather, the record supports that defendant took the plea agreement to take advantage of the State’s offer to reduce the charges. CP 12-13; CP 23. Pursuant to terms of the plea agreement, the State dropped one count attempting to elude a pursuing police vehicle and one count tampering with a witness. CP 6-7; CP 12-13; CP 23. Thus, defendant had the benefit of taking the plea charging only one count of failure to remain at injury accident. CP 23. Furthermore, defendant notes that he took the plea because he thought he would be found guilty at trial. Specifically, defendant states, “After reviewing the

evidence with my attorney, I believe there is a strong likelihood that I would be convicted if I proceeded to trial. I am entering a plea of guilty to take advantage of the State's offer." CP 28. Hence, there is no question that defendant entered the plea to take advantage of the State's offer. As noted above, defendant understood the State's offer and thus, chose to accept the State's offer of 60 months confinement. Defendant also acknowledged that he understood that the court could sentence defendant to whatever the court chooses within the standard range. 3 RP 6. Finally, defendant acknowledged that he understood that once his plea was accepted, he would not be able to withdraw his plea. 3 RP 8.

Although the State did argue additional factors to support its argument, the arguments were made as rebuttal to Preston's DOSA seeking sentence. 4 RP 4-10. At no time did the prosecutor veer from the sentencing recommendation in the plea. 4 RP 11.

In conclusion, the prosecutor vigorously advocated for the express terms of the recommended sentence as reflected in the plea. Therefore, the state performed its bargained for duty and there was no breach.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: JANUARY 8, 2009.

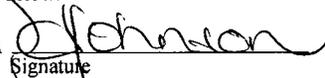
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/08/09 
Date Signature

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BY
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JAN 13 2009 5:04
NOTIFICATION
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COUNTY OF PIERCE
SUPERIOR COURT