

NO. 37543-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY MITUNIEWICZ,

Appellant.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY *cm*
DEPUTY

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

The Honorable John F. Nichols, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state violated appellant's right to due process by failing to make the agreed-upon sentencing recommendation after appellant entered his guilty plea.

2. The sentencing court refused to consider appellant's request for an exceptional community custody term.

Issues pertaining to assignments of error

1. Appellant pleaded guilty to one count of possession of a controlled substance in exchange for the state's agreement to recommend a low-end standard range sentence with no community custody. At sentencing, however, the court recommended a standard community custody term in addition to confinement. Where the state's breach of the plea agreement violated appellant's right to due process, must he be given the option of either withdrawing his plea or specifically enforcing the agreement?

2. The court below failed to recognize its authority to impose an exceptional term of community custody, stating it had no discretion to impose anything but the standard community custody range. Does the court's refusal to consider appellant's request for an exceptional community custody sentence require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

On September 28, 2007, the Clark County Prosecuting Attorney charged appellant Rodney Mituniewicz with one count of possession of a controlled substance, heroin. CP 1; RCW 69.50.4013(1). Mituniewicz pleaded guilty, and the Honorable John F. Nichols imposed a standard range sentence. CP 20, 25. Mituniewicz filed this timely appeal. CP 38.

2. Substantive Facts

Mituniewicz pleaded guilty to one count of possession of a controlled substance in exchange for the state's agreement to recommend a sentence of 366 days confinement. CP 11, 16. In Mituniewicz's statement on plea of guilty, he acknowledged that the standard range sentence for this offense is 12+ to 24 months confinement, with a community custody range of nine to 12 months, and a maximum penalty of five years and \$10,000. CP 9. The statement also acknowledged that the court would sentence him to the established community custody range "unless the judge finds substantial and compelling reasons not to do so." CP 10.

The guilty plea statement further indicates that the prosecutor would recommend a sentence of 366 days as stated in the plea agreement. CP 10-11. In the plea agreement, "366 days" is entered in the section

labeled "RECOMMENDATION AS TO CONFINEMENT." CP 16. The section labeled "SUPERVISION" includes a check box for community custody with spaces to fill in the range of months. That section is left blank. CP 16. On the next page, several boxes in the section labeled "OTHER CONDITIONS OF SUPERVISION" are checked. CP 17.

When Mituniewicz entered his guilty plea, the court explained the standard range sentence, community custody term, and maximum penalty, and Mituniewicz said he understood those consequences of his plea. RP¹ 39-40. He told the court he understood the prosecution would recommend a sentence of 366 days. CP 40.

After the court accepted the plea however, the prosecutor recommended not only 366 days confinement but also nine to 12 months community custody. RP 41-42. Defense counsel pointed out that the state's plea offer did not include a recommendation of community custody. RP 43. He argued that community custody has always been problematic for Mituniewicz and urged the court not to impose any community supervision. RP 43. Counsel explained that he believed Mituniewicz was a good candidate for drug court, but he had been unsuccessful in obtaining that resolution. He felt there were problems

¹ The Verbatim Report of Proceeding for 10/11/07, 11/1/07, 11/7/07, 2/13/08, 2/19/08, and 2/29/08, are contained in a single volume designated RP.

with the system which excluded the "hard" cases from consideration. RP 43-44.

The judge acknowledged that counsel made a good point regarding the drug court system. He responded, however, that even if he ordered no community supervision, DOC would send the case back saying it had to be included. RP 44.

When Mituniewicz was asked if he had anything to add, the following exchange took place:

MR. MITUNIEWICZ: Yeah. We (inaudible) prosecutor's arguing (inaudible). I'm a lousy (inaudible) testing. And you also have Your Honor (inaudible) what do you call that, exceptional sentence (inaudible). But, in the last few years I've been locked up and everything else, (inaudible) no longer (inaudible) custody with, uh, (inaudible) exceptional cases any more.

THE COURT: You know, I don't understand (inaudible) how he could do that. Under a felony.

MR. MITUNIEWICZ: Yeah. Uh –

THE COURT: A misdemeanor, maybe.

MR. MITUNIEWICZ: So I'm asking the Court to go ahead and, uh, give (inaudible), you know, or (inaudible) let the Court see, you know, if DOC wants to (inaudible) back in, then that's my fight with DOC then.

THE COURT: Yeah, you know –

MR. MITUNIEWICZ: (Inaudible) –

THE COURT: -- I'm not going to do that.

MR. MITUNIEWICZ: (Inaudible).

THE COURT: I can't do that, because all it does is (inaudible) paper back to me and (inaudible) have to go through it. I'm required to put that in –

(BACKGROUND TALKING AND NOISE OVERRIDES SPEAKERS)

THE COURT: -- required to. I wish I had some discretion on (inaudible), they've taken that away from us. We don't have that. And, frankly, your criminal history, it's – you're going to be back with us anyway, it'd be something new.... But, I will give you the bare minimum that I can. That's 366 days, and the community custody is something that has to be in there.

RP 45-47.

C. ARGUMENT

1. THE PROSECUTOR VIOLATED MITUNIEWICZ'S RIGHT TO DUE PROCESS BY FAILING TO MAKE THE AGREED SENTENCING RECOMMENDATION.

A plea agreement is a binding contract between the state and the defendant, which includes an implied duty of good faith and fair dealing. State v. Talley, 134 Wn.2d 176, 182, 949 P.2d 358 (1998); State v. Sledge, 133 Wn.2d 828, 838, 842, 947 P.2d 1199 (1997). The contract in this case required the state to recommend a sentence of 366 days, with no community custody. CP 11, 16. Mituniewicz kept his end of the bargain, giving up fundamental rights by entering a guilty plea to the charged offense. Due process therefore requires that the state adhere to the terms of the plea agreement as well, by making the agree-upon sentencing

recommendation. See Santobello v. New York, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971); Sledge, 133 Wn.2d at 839 (citing cases).

In Santobello, the defendant pleaded guilty in exchange for the prosecutor's agreement to make no sentencing recommendation. 404 U.S. at 258. At the sentencing hearing, however, a different prosecutor replaced the prosecutor who had negotiated the plea, and the new prosecutor recommended the maximum sentence. Defense counsel immediately objected that the recommendation violated the terms of the plea agreement. Id. at 259. The court ruled it was unnecessary for defense counsel to prove the terms of the agreement, stating it was not influenced by the prosecutor's recommendation. Instead, the court determined that the maximum sentence was warranted based on a probation report detailing the defendant's criminal history and amenability to community supervision. Id. at 259-60.

In reviewing the case, the United States Supreme Court noted the importance of plea negotiations to the orderly administration of justice. Id. at 260-61. It noted, moreover, that fairness is of the utmost importance in that process. Thus, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262. In that case, the defendant agreed to plead guilty on the condition

that no sentence recommendation would be made by the prosecutor. Although the breach of that agreement appeared to have been inadvertent, it nonetheless denied the defendant due process, and remand was required. Id. at 262-63.

Here, as in Santobello, Mituniewicz bargained for a particular sentencing recommendation, which the state then failed to make. Instead of recommending a sentence of 366 days as the plea agreement required, the prosecutor recommended 366 days of confinement and nine to 12 months of community custody. The state's failure to make the agreed-upon recommendation denied Mituniewicz due process.

Defense counsel brought the state's breach to the court's attention, explaining that the state's plea offer did not include a recommendation of community custody. RP 43. There was no apparent need for counsel to pursue the issue further. The agreed recommendation was already of record, and counsel properly brought it to the court's attention. In any event, trial counsel did not need to pursue the issue in order to preserve it for review. The state's breach of the plea agreement constitutes a denial of due process which can be raised for the first time on appeal. See Sledge, 133 Wn.2d at 839; State v. Van Buren, 101 Wn. App. 206, 211-12, 2 P.3d 991, review denied, 142 Wn.2d 1015 (2000).

Neither the prosecutor nor the court seemed to find the state's breach of any significance, stating that even if the court did not order community custody, DOC would require the court to correct the judgment and sentence. RP 44. The error of this reasoning is addressed in § C.2, *infra*. Regardless of whether the bargained for recommendation would have affected the court's decision, the breach itself is significant. Prosecutorial conduct is very important to the integrity of the plea process. Talley, 134 Wn.2d at 183-84. As the Washington Supreme Court has noted:

If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep the bargain and not subvert the judicial process through external pressure whenever the occasion arises.

State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). A prosecutor may not even suggest terms that deviate from the agreement. State v. Coppin, 57 Wn. App. 866, 874, 791 P.2d 228, review denied, 115 Wn.2d 1011 (1990). When the state breaches its obligation under an executed plea agreement, the defendant pleads guilty on a false premise, and his conviction cannot stand. Sledge, 133 Wn.2d at 839-40 (quoting Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984)).

The prosecutor's breach of the plea agreement denied Mituniewicz due process and rendered his guilty plea invalid. Consequently, Mituniewicz is entitled to either withdraw his guilty plea or specifically enforce the plea agreement, with resentencing before a different judge. See Sledge, 133 Wn.2d at 846 (defendant entitled to his choice of remedy where state undercut plea agreement by advocating exceptional sentence, different judge necessary in light of trial court's already-expressed views as to sentence).

2. THE COURT'S REFUSAL TO CONSIDER AN EXCEPTIONAL TERM OF COMMUNITY CUSTODY REQUIRES REVERSAL.

This Court has recognized that "when a statute authorizes community custody, trial courts may impose community custody terms longer or shorter than the amount set by statute as long as the overall sentence does not exceed the statutory maximum." State v. Hudnall, 116 Wn. App. 190, 197, 64 P.3d 687 (2003). A trial court's authority to impose an exceptional sentence includes an exceptional term of community custody. In re Postsentence Review of Smith, 139 Wn. App. 600, 603-05, 161 P.3d 483 (2007) (citing Hudnall). The established community custody ranges for offenses "are not intended to affect or limit the authority to impose exceptional community custody ranges, either above or below the standard community custody range." WAC 437-20-

010; Hudnall, 116 Wn. App. at 196; Smith, 139 Wn. App. at 604. Thus, the sentencing court may order an exceptional term of community custody below the standard range when it finds substantial and compelling reasons to do so. RCW 9.94A.535; Hudnall, 116 Wn. App. at 197.²

The court below failed to recognize its authority to impose an exceptional term of community custody. When Mituniewicz urged the court not to impose the community custody term recommended by the state, the court responded that it had no discretion in the matter. The court stated that even if it said no community custody was ordered, DOC would send the case back for correction of the judgment and sentence. RP 44. The court felt the bare minimum it could impose was 366 days plus the standard community custody term of nine to 12 months. RP 47.

Although a standard range sentence is generally not reviewable, an offender can always challenge the procedure by which a sentence is imposed. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989)); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Thus, it is well established that appellate review is available for correcting legal errors or

² The statement on plea of guilty acknowledges the court's authority, stating that the judge would impose a standard term of community custody "unless the judge finds substantial and compelling reasons not to do so." CP 10.

abuses of discretion in sentencing decisions. State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

Every offender is entitled to ask the sentencing court to consider an exceptional sentence below the standard range and to have the sentencing alternative actually considered. Grayson, 154 Wn.2d at 342 (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). When a sentencing court fails to meaningfully consider whether a sentencing alternative was appropriate, reversal is required. Grayson, 154 Wn.2d at 343.

In Grayson, the defendant was eligible for a DOSA, although the state had valid arguments why the sentencing alternative was not appropriate in that case. 154 Wn.2d at 336. The sentencing court categorically refused to consider a DOSA, regardless of the arguments for or against such a sentence, because it believed the DOSA program was under-funded. Id. at 337. The Supreme Court held that the court's failure to meaningfully consider the sentencing alternative was an abuse of discretion, and it reversed the defendant's sentence. Id. at 343.

In this case, as in Grayson, the court categorically refused to consider a valid sentencing alternative. The defense argued that the circumstances of this case justified a departure from the standard community custody requirement, pointing to the inadequacy of the drug

court system and Mituniewicz's past history on community custody. And, while the record of Mituniewicz's colloquy with the court is incomplete due to problems with the recording, it is nonetheless clear that Mituniewicz referred to an exceptional sentence when asking the court not to impose community custody. RP 45-46.

The court acknowledged the issues raised by the defense but refused to consider an exceptional sentence on the erroneous belief that it had no discretion in the matter and that it would be bound by a DOC determination that a standard term of community custody was required. RP 45-47. The court was clearly wrong, since the Legislature has authorized trial courts to impose exceptional terms of community custody. See Smith, 139 Wn. App. at 605 (denying DOC's postsentence petition to modify exceptional term of community custody). The court's refusal to consider Mituniewicz's request for an exceptional community custody sentence is an abuse of discretion, and this Court should reverse the sentence. See Grayson, 154 Wn.2d at 343.

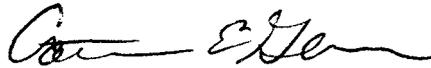
D. CONCLUSION

The prosecutor breached the plea agreement by failing to make the agreed sentencing recommendation, and the case must be remanded to allow Mituniewicz to elect his remedy. Moreover, the court abused its

discretion in failing to consider an exceptional term of community custody, and the sentence must be reversed.

DATED this 6th day of August, 2008.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Rodney Mituniewicz*, Cause No. 37543-5-II directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
August 6, 2008

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