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COURT OF APPEALS
DIVISION II

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No. 38317-9-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JESSE GONZALES,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II, Judge
Cause No. 02 1 00415 6

RESPONSE BRIEF (2009)

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PM 3-27-09

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A. PETITIONER'S ASSIGNMENT OF ERROR

- 1.) Gonzales did not knowingly, intelligently, and voluntarily plead guilty because he misunderstood the sentencing range and was never informed of the condition prohibiting contact with the decedent's family for life.
- 2.) The no-contact order violates due process by barring contact with unspecified individuals who were not the victim of the offense.
- 3.) The court lacked the statutory authority to issue the no-contact order.
- 4.) The prosecution breached its agreement under the plea bargain by undercutting its promised sentencing recommendation.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 1.) Whether Gonzales waived his opportunity to seek withdrawal of his plea under *Mendoza*. [Assignment of Error 1].
- 2.) Whether the no-contact provision is a direct or collateral consequence of sentencing. [Assignment of Error 1].
- 3.) Whether the no-contact order is overly broad. [Assignment of Error 2].
- 4.) Whether the court had authority to include the no-contact provision in the sentence. [Assignment of Error 3]
- 5.) Whether the prosecutor breached its plea agreement [Assignment of Error 4].

C. STATEMENT OF THE CASE

Michael Gonzales was charged in Mason County Superior Court with Murder in the First Degree with a firearm enhancement. The information was amended prior to trial with the charges at the time of trial

being: Count I, Murder in the First Degree with a firearm enhancement with Count II being the alternative of Murder in the Second Degree also with a firearm enhancement; Count III, Robbery in the First Degree with a firearm enhancement; Count IV, Unlawful Possession of Controlled Substance; and Count V, Conspiracy to commit Robbery in the First Degree. These events occurred on June 14, 2002.

Pursuant to plea negotiations, Gonzales entered a plea of guilty to one count of Murder in the Second Degree during trial. The remaining charges and enhancements were dismissed. Sentence was imposed on June 13, 2003 and received a sentence of 265 months which was top end of the standard range.

Gonzales appealed, asserting that the State violated the plea agreement and that his offender score had been miscalculated. In a Statement of Additional Grounds, Gonzales also asserted ineffective assistance of counsel.

The Court of Appeals remanded for recalculation of offender score based on the State's concession that two adult offenses had washed, resulting in an offender score of 2 rather than 4. The Court of Appeals declined to address Gonzales's arguments about same criminal conduct and the plea agreement violation. The Court of Appeals did address the

assertion of ineffective assistance of counsel, finding that Gonzales had not met his burden in proving the assertion.

Gonzales was resentenced on January 15, 2005 with an offender score of 2 and received a standard range sentence of 242 months.

Gonzales was present and was represented by Adrian Pimentel at the hearing. The Court considered argument of counsel as well as the written transcript, including the victim impact statements, from the original hearing.

(The State previously filed a response to Gonzales's pro se PRP prior to the Court of Appeals consolidating the PRP with this appeal. The State incorporates that response by reference.)

D. ARGUMENT

1. GONZALES WAIVED HIS OPPORTUNITY TO WITHDRAW HIS PLEA BASED ON AN INCORRECT OFFENDER SCORE.

Gonzales asserts that he has a right under *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d 49 (2006) to withdraw his guilty plea because of the miscalculated offender score.

Mendoza requires either an objection to the new sentencing range or a motion to withdraw the plea at sentencing. Gonzales argues that he did ask to withdraw his plea at the resentencing hearing in 2005 (Appellant's Brief at 9). In fact, Gonzales made no such motion. Gonzales, through counsel, advised the Court that he "believes that there

is a new case that recently came out that would give him the right to withdraw his plea.” [RP 2005 at 2-3]. Gonzales’s attorney indicated that he was not aware of that case. The Court agreed saying, “Nor am I, given that this is a reduction, rather than an increase in sentence.” [RP 2005 at 3].

At the time of the resentencing in January 2005, both the Court and defense counsel were correct in their assessment of the law in Division II. Division I and Division III had ruled on the issue subsequently raised in *Mendoza* prior to Gonzalez’s plea of guilty in May 2003. See *State v. Murphy*, 119 Wn.App. 805, 81 P.3d 122 (2002), *review denied*, 152 Wn.2d 1005 (2004) and *State v. Moon*, 108 Wn.App. 59, 29 P.3d 734 (2001).¹

It does not appear that Division II had ruled on the issue as of January 2005 but did flatly reject this argument a mere six months later in its unpublished case *State v. Mendoza*, 128 Wn.App. 1052, (July 2005) saying “a defendant enters an invalid plea only when he enters it believing that his sentencing range will be lower than in fact.” While this ruling was subsequently reversed by the Supreme Court, it is clear that in 2005, both the trial court and defense counsel were of the same mind as Division

¹ Interestingly, Division I subsequently changed its position and agreed with Division II. See *State v. Calhoun*, 134 Wn.App 184 (2006). This case was eventually remanded by the Supreme Court for reconsideration in light of *Mendoza*.

II of the Court of Appeals. There simply was no “new case” as asserted by Gonzales. Nor is there a clear request or motion to withdraw his plea made at the time of sentencing.

Further, Gonzales’s own words suggest that he believed at the time of his original sentencing that the prior juvenile offense had washed yet he did not move to withdraw his plea at that time. See RP 2005 at 13.

Gonzales uses these same words to support his claim he made a motion to withdraw the plea at the January 2005 hearing. Yet a complete reading of the transcript shows that statement refers back to the original sentencing.

Nor does Gonzales object to the new offender range, the second alternative discussed in *Mendoza*. Gonzales through counsel agreed with the calculation of the sentencing range [RP 2005 at 6-7] and did not object.

2. A NO-CONTACT ORDER IS NOT A DIRECT
CONSEQUENCE OF SENTENCING AND THEREFORE
HAS NO EFFECT ON WHETHER GONZALES’S PLEA
WAS VOLUNTARY, KNOWING AND INTELLIGENT.

Gonzales is correct when he states that a defendant must be apprised of the direct consequences of a sentence:

A defendant need not be informed of all possible consequences of a plea but rather only direct consequences. The court has distinguished direct from collateral consequences by “ ‘whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment’ .”

State v. Ross 129 Wn.2d 279, 284, 916 P.2d 405 (1996), *internal citations omitted*. However, his reliance on *State v. Wilson*, 117 Wn.App 1, 75 P.3d 573 (2003) for the proposition that a no-contact order imposed in a criminal sentence constitutes a direct consequence of sentencing is misplaced. The Court in *Wilson* simply states that Wilson was advised of the no-contact provision and nothing beyond that. *Wilson* does not state anywhere that a no-contact order is a direct consequence of sentencing.

Ross at 285 provides an instructive list of the types of conditions or consequences that are direct.

In contrast are sentencing conditions where any effect on punishment flows not from the guilty plea itself but from additional proceedings and thus cannot qualify as immediate. *State v. Olivas*, 122 Wn.2d 73, 96, 856 P.2d 1076 (1993) (mandatory DNA testing); *Barton*, 93 Wn.2d at 305, 609 P.2d 1353 (discretionary habitual criminal proceedings); *In Re Ness* 70 Wn.App. 817, 823, 855 P.2d 1191 (1993) (federal sentence restricting possession of firearms), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994); *In Re Peters*, 50 Wn.App. 702, 704-05, 750 P.2d 643 (1988) (deportation); *State v. Malik*, 37 Wn.App. 414, 415-16, 680 P.2d 770, *review denied*, 102 Wn.2d 1023 (1984) (deportation).

A no-contact order does not have an immediate effect on the sentence itself but, like the list of non-direct consequences above, the “punishment flows not from the guilty plea itself but from additional proceedings(.)” Gonzales urges this court to find that a loss of freedom is imposed by the no-contact order (presumably the freedom to contact family members of

the victim) and thus the effect is immediate. The list in *Ross* is again instructive since deportation (clearly having an impact on freedom) and loss of right to bear arms (a specifically enumerated constitutional right in both the State and Federal Constitutions) are collateral consequences because their effect is not immediate.

Any additional punishment that would flow from a violation of the no-contact provision of the 2005 sentence would come from a subsequent hearing and not be automatic. Applying the *Barton* analysis to this case, there was no constitutional requirement to advise Gonzales of the potential for an order precluding him from contact with the victim's family. Although the no-contact provision flows from Gonzales's conviction for murder, it does not enhance Gonzales's sentence or punishment. "A defendant must understand the *sentencing* consequences for a guilty plea to be valid." (Italics added) *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

Gonzales cannot show that the no-contact order is a direct consequence and therefore his argument must fail.²

3. THE COURT HAS SPECIFIC STATUTORY AUTHORITY TO INCLUDE A CRIME-RELATED NO-CONTACT ORDER IN A SENTENCE AND THE INCLUSION OF FAMILY IS NOT OVERBROAD.

² Counsel for Gonzales points out that the State argued in its PRP brief that the no-contact order was included in the first sentence. Counsel is correct and the final paragraph, page 11 of the State's Response to the PRP should be stricken.

Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wash.2d 106, 112, 120, 156 P.3d 201 (2007). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(13). This court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wash.2d 22, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonably crime related. *Id.* at 36-37, 846 P.2d 1365.

State v. Warren 165 Wn.2d 17, 32, 195 P.3d 940, 947 (Wash.,2008)

It is without question that the family members of the victim Mr. Abundiz are victims themselves or at minimum are survivors of the victim as defined by statute. “Victim” means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged. RCWA 9.94A.030(53).

Alternatively, the Victim Rights statutes contain the following definitions:

(2) “Survivor” or “survivors” of a victim of crime means a spouse or domestic partner, child, parent, legal guardian, sibling, or grandparent.

...

(3) “Victim” means a person against whom a crime has been committed or the representative of a person against whom a crime has been committed.

RCWA 7.69.020

Since the no-contact provision is part of the sentence, any alleged violation would be brought before the court where the full panoply of due

process rights would attach and the State would bear the burden of proof.

See RCW 9.94A.631 and .634.

The no-contact provision in the sentence has both statutory authority and a reasonable breadth under existing statutes.

Even if this Court finds that the no-contact provision is overbroad, the proper remedy would be remand for clarification of the provision, not withdrawal of the plea since the trial court has statutory authority to impose the condition and it is not a direct consequence of the plea as argued above.

4. THE STATE ADHERED TO ITS PLEA BARGAIN AND DID NOT UNDERCUT ITS RECOMMENDATION

This Court has provided a succinct discussion of the law applicable to plea bargains (and this appeal) in *State v. Van Buren*, 101 Wn.App 206, 213, 2 P.3d 991 (2000):

...a plea agreement obligates the State to recommend to the court the sentence contained in the agreement. This obligation does not, however, require the State to make the sentencing recommendation enthusiastically. But, at the same time, the State must not undercut the terms of the agreement. The State can undercut a plea agreement either explicitly or implicitly through conduct indicating an intent to circumvent the agreement.

We apply an objective standard in determining whether the State breached a plea agreement “irrespective of prosecutorial motivations or justifications for the failure in performance.” The test is whether the prosecutor contradicts, by word or conduct, the

State's recommendation for a standard range sentence. In making this determination, we view the entire sentencing record.

(internal citations omitted).

Gonzales attributes 14 statements made by friends and family of the victim prior to the first sentencing to the State, and makes the same assertion since the State provided a transcript (with consent of defense counsel, RP 2005 at 5) of the first sentencing hearing to the court for the 2005 re-sentencing. However there is nothing in the record to suggest that any or all of these individuals were asked to speak or prompted to speak by the prosecutor at the first sentencing. At the first sentencing, the prosecutor advised the Court that there were people who wished to address the court and introduced the victim's mother [RP 1465]. Members of Abundiz's family were also at the second sentencing but did not speak. See RP 2005 at 5.

This is consistent with the prosecutor's role as envisioned by RCW 7.69. "In most circumstances, a prosecutor acting as an officer of the court who merely helps a victim exercise her constitutional and statutory right to communicate information to the sentencing court does not breach a plea agreement by that conduct alone." *State v. Carreno-Maldonado* 135 Wn.App. 77, 86, 143 P.3d 343 (2006).

After a number of people spoke at the first sentencing, the prosecutor inquired whether anyone else wanted to talk to the court [RP 1484] and two more persons identified themselves and addressed the court. The presentation of these statements is entirely in comport with RCW 7.69.030(14) which requires a reasonable effort made to ensure that victims and survivors of victims be able to personally make statements at felony sentencing hearings. As Division III noted in *State v. Hixson*, 94 Wn.App 862, 866, 973 P.2d 496 (1999):

Additionally, a prosecutor does not breach a plea agreement merely advising the court of witnesses who wish to testify at a sentencing hearing. Consequently, he cannot show a due process violation. While constitutional guarantees must be observed at sentencing just like during the investigative and trial phases of a criminal proceeding, merely considering the witnesses testimony is not evidence that procedural guarantees were not observed here.

(Internal citations omitted).

At the first sentencing the prosecutor, in closing, does remind the trial court of the co-defendant's sentence but also immediately differentiates the two men and their respective roles, specifically identifying co-defendant Barbee as the killer. [RP 1490]. The prosecutor went on to express that he believed that the various participants never planned on killing the victim [RP 1491] and that many of the participants were legitimately sorry and remorseful. [RP 1492]. The prosecutor made the agreed recommendation of 180 months and described the

recommendation as appropriate for Gonzales' involvement. [RP 1493].

The prosecutor repeats his belief that he did not believe Gonzales planned or wanted the victim's death and he directs that comment specifically to the families of the victim, of Gonzales and to Gonzales and his attorney.

[RP 1494]. And the prosecutor again differentiates between Gonzales and Barbee stating that Barbee deserved a more serious punishment. [RP 1494].³

Defense counsel in closing also discussed many of the disturbing facts of the underlying case and pointed out many of the same differences between the co-defendant's that the prosecutor pointed out in his closing. Similarly, the trial judge recognized that the prosecutor had good reason to offer the reduced charge and to distinguish between Barbee and Gonzales [RP 1501]. The same trial judge also noted that he had sentenced Barbee the day before [RP 1500].

³ In differentiating Gonzalez and Barbee as to culpability and sentencing recommendation, the prosecutor was (perhaps unknowingly) following the equal protection arguments laid out in *State v. Handley*, 115 Wn.2d 275, 292, 796 P.2d 1266 (1990) which stated in part "Because we hold that the defendant did not establish that he and his codefendants were members of a particular class, we need not reach the question of whether there was a rational basis for the trial court's differentiation between the defendant and his codefendants. Although we do not reach that question, we note there were many sustainable reasons for the trial court's different treatment of these codefendants. Relevant distinctions need not pertain only to the codefendants' relative culpability or to the pleas to which they agreed, but may pertain to anything which provides a rational basis for the disparate sentences. In addition to relative culpability, courts compare factors such as criminal record, rehabilitation potential, cooperation with law enforcement, and differences in pleas. (citations omitted).

The State adhered to its plea bargain during the first sentencing and did not undercut its recommendation. There is certainly no question that the facts of this case are heinous and, taken alone, may have been construed as undercutting the plea agreement. However in the context of the prosecutor's additional and repeated comments separating Gonzales from his more culpable co-defendants, the prosecutor did abide by the plea agreement including making the agreed-upon sentencing recommendation.

Likewise in the second hearing, the prosecutor specifically followed the plea agreement recommendation. The prosecutor here recited salient facts (many of which were the same facts discussed by defense counsel—at both sentencings) and unequivocally made the agreed upon recommendation. Gonzales's assertion that the prosecutor harped on Gonzales participating in a robbery is clearly not borne out by the transcript of the 2005 sentencing.

The trial court was asked and specifically found that the state had not breached its plea agreement. Gonzales's urges this Court to disregard the trial court's finding of compliance as irrelevant but it is relevant in that the question of prosecutor breach had been raised by Gonzales in his first appeal and had been left open by the Court of Appeals decision remanding for resentencing.

E. CONCLUSION

Based on the foregoing, the State asks that the Court find that Gonzales waived his opportunity to seek withdrawal of his plea under *Mendoza*, that the no-contact provision is a properly imposed collateral consequence and that the prosecutor complied with the plea agreement.

DATED this 26th day of March 2009.

Respectfully submitted,



Monty Cobb, W&BA # 23575
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Attorney for Respondent

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
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 MICHAEL JESSE GONZALES,)
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 Appellant,)
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No. 38317-9-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

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DIVISION II
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STATE OF WASHINGTON
DEPUTY

I, MARGIE OLINGER, declare and state as follows:

On March 27, 2009, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Nancy P. Collins
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I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 27th day of March, 2009, at Shelton, Washington.


Margie Olinger

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