

NO. 39001-9-II

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

STATE OF WASHINGTON, Respondent

v.

KEATON CARTER FOX EGIZI, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA D. JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01116-0

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. RESPONSE

The Court of Appeals, by order entered February 16, 2010, requested that the State respond to the fact that, as part of the guilty plea of this defendant, ~~that~~ he stipulated to a five-year protection order.

When the State initially responded to this, it took the position that the statutory authority dealt with a two-year period and thus this matter should have been remanded for readjustment of this to a two-year time limit, consistent with the clear language of the statute.

The Commissioner in Division II requested that the issue of the stipulation to a five-year protection order be considered.

It is the State's position that this becomes in effect, then, an exceptional sentence as part of a plea agreement.

A defendant who has explicitly stipulated to or made an agreed recommendation of an exceptional sentence as part of the plea agreement has effectively waived the right to appeal such a sentence. State v. Poston, 138 Wn. App. 898, 158 P.3d 1286 (2007); State v. Cooper, 63 Wn. App. 8, 816 P.2d 734 (1991). In State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006) the Supreme Court discusses a waiver that was expressly made as

part of the defendant's plea agreement. It was held that such a recommendation was, at a minimum, invited error if the waiver is later challenged by the defendant on appeal. The exceptional sentence is indivisible from the plea agreement and could not be appealed without challenging the validity of the entire plea agreement.

When we review the Appellant's Supplemental Brief it is noted on Page 3 that the defendant does not want any contact with the victim and has no objection to the formal five-year protective order if it can be entered as a lawful order. The State is not approaching this as a breach of plea agreement by the defendant, but merely a question of clarification as to the length of the no contact order.

Thus, we are on the horns of a dilemma. The statute is plain on its face, limiting it to a two-year order. Yet, the defendant clearly stipulated as part of his plea agreement that the order be extended to five years.

Although the State conceded during the earlier portion, it withdraws the concession at this point and submits that the agreed recommendation of an exceptional sentence as part of a plea agreement has effectively waived the right to appeal such a sentence. The State submits that the defendant is not in a position to oppose this.

DATED this 25 day of March, 2010.

Respectfully submitted:

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