

NO. 41719-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL LEWIS O'BRIEN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
11 AUG 11 PM 12:00
STATE OF WASHINGTON
BY _____
DEPUTY CLERK

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

The Honorable Vicki L. Hogan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. O'Brien's Motion to Correct Judgment and Sentence.

2. The trial court erred in finding that the prosecutor's agreed recommendation of concurrent terms was illegal.

3. The trial court erred in not conducting an evidentiary hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should Mr. O'Brien's Judgment and Sentence be corrected to reflect the understanding of the parties at the time he entered his plea bargain that the state was recommending that his sentence run concurrently with his revoked DOSA sentence and his understanding that the court had adopted this recommendation?

2. If Mr. O'Brien's Judgment and Sentence is not corrected, should he be permitted to withdraw his plea because he was not accurately informed of the consequences of his plea and, therefore, his plea was not knowing, intelligent and voluntary?

3. If Mr. O'Brien chooses not to withdraw his plea, should he be permitted to specifically enforce his bargain at a new sentencing hearing in which the

prosecutor makes the recommendation he agreed to make?

4. If there is any doubt about the terms of the plea bargain or the intent of the parties or the court, should Mr. O'Brien be given an evidentiary hearing to clarify these facts?

C. STATEMENT OF THE CASE

In June 2006, appellant Russell O'Brien pled guilty to charges in Pierce County Cause numbers 05-1-06126-1, 05-1-05591-9 and 05-1-05727-2 and was sentenced under the Drug Offender Sentencing Alternative (DOSA). CP 49-50. His DOSA was subsequently and he was charged under 07-05394-0. CP 1-2, 49-50.

Mr. O'Brien entered a guilty plea under the 07-5394-0 cause on December 17, 2007. CP 5, 6-14. As set out in his Statement of Defendant on Plea of Guilty, he entered the plea in exchange for the state's agreement to recommend a 60-month sentence to run concurrently with the revoked DOSA:

The prosecuting attorney will make the following recommendation to the judge:
60 months in custody, credit for 60 days served \$200 costs, \$500 CVPA, \$100 DNA [unreadable], \$600 DA recoupment,

restitution--concurrent with 05-1-06126-1,
01-1-05727-2.¹

CP 6-14.

When the court entered Judgment and Sentence on December 17, 2007, the court included the words "Concurrent with 05-1-06126-1, 05-1-05591-9 and 05-1-05727-2" written beside the printed word "Restitution" at the beginning of the restitution provisions of the printed form. CP 15-26. There is no indication, in the relevant portion of the Judgment and Sentence, that the sentence would begin consecutively to any other sentences. CP 15-26.

When Mr. O'Brien later learned that the Department of Corrections was interpreting the Judgment and Sentence to mean that only the restitution provisions would run concurrently, he attempted -- on February 11, 2008, November 13,

¹ The prosecutor's recommendation is handwritten by defense counsel, RP 7-8, and not the model of legibility. There may be no "--" between the word "restitution: and "concurrent," although it appears to appellate counsel that there is. IN any event, there is no comma after "restitution," as there is after the other items which precede it and a space. CP 6-14.

2009, and February 8, 2010 to correct the error.² CP 29-32, 33-34, 35-37, 38, 39-41, 42-46, 47-48, 81. Finally on November 3, 2010, his trial counsel filed a Motion to Correct the Judgment and Sentence, arguing that Mr. O'Brien had the right to specifically enforce his plea agreement or withdraw his guilty plea. CP 49-102.

At the hearing on the Motion to Correct the Judgment and Sentence, trial counsel informed the trial court that "The discussions that I had with my client were that the State would recommend that the sentence in this case would run concurrently with the sentences on three other cause numbers." RP 3. After noting that the Judgment and Sentence appeared to reflect that the restitution was to run concurrently, trial counsel stated unambiguously that the "intent of the parties at the time was that the sentence, the 60 months would run concurrently with the three other cause numbers that ended up being part of a revoked DOSA." RP 4. Counsel noted that it would "not be logical that we

² The state did not object in the trial court that Mr. O'Brien's Motion to Correct Judgment and Sentence was untimely, nor did the trial court find the motion to be untimely. RP 5-10.

would recommend only restitution to run concurrent, especially with different cause numbers several years apart," and that "nowhere does it [the judgment and sentence] mention that the sentences would run concurrently." RP 8.

Counsel stated that after several years, Mr. O'Brien was notified by the Department of Corrections that the "sentences could not run concurrently by operation of law." RP 4. Counsel further noted that the sentencing had taken place on the fifth floor where "[t]hings were going very quickly, and I think that this was in error." RP 5.

The prosecutor present at the hearing was not the trial prosecutor and argued only that no one mentioned at the sentencing hearing that the sentence would run concurrent with the revoked DOSA. RP 6. The prosecutor conceded, however, that the understanding of the parties at the time could well have been that the terms would run concurrently:

Mr. Felleisen [defense counsel] may have told him, you know, we are going to ask that this run concurrent, **and the prosecutor at the time may have told Mr. Felleisen we are going to run this concurrent,** but it's Your Honor who ultimately ordered the sentence that you did. . . .

RP 7.

Defense counsel noted that the state's reading of the Statement of Defendant on Plea of Guilty as only the restitution being concurrent was not logical. RP 8. Defense counsel reiterated "So I can testify or swear to you as an officer of the court what my understanding was and what I advised Mr. O'Brien and what the meeting of the minds were for the parties at the times, that the sentences were going to be concurrently." RP 8.

The court conceded that "I am not certain what the bargain was," (RP 8), that what could be gleaned from the transcript of the plea hearing was not helpful,³ (RP 8) but concluded:

³ The court's analysis of the transcript is somewhat ambiguous, noting that the court did go through the prosecutor's recommendation, that the court knew that the DOSA had been revoked, and that the LFO'd as well as the restitution was to be concurrent, and that there was no clarification in the transcript of whether the sentence was to be concurrent or consecutive to the other cause numbers. RP 9.

At the plea hearing (transcript attached to Motion to Correct) the court stated: "At sentencing the prosecutor is going to be recommending 60 months in custody, as well as the legal financial obligations concurrent with three other cause numbers, you understand that?" CP 74.

The prosecutor said: "Your Honor, we are going to ask the Court to impose 60 months in prison. Credit for time serviced is 60 days, Legal financial obligations of \$500 . . . Restitution to all victims, and I believe that there was a DOSSA
(continued...)

if by operation of law the sentence could not be run concurrent with a revoked DOSA, and it was clear at the time of the sentencing he had a revoked DOSA, then this was the proper sentence, and it was not concurrent with the revoked DOSA. It was consecutive.

So the motion is denied.

RP 9.

Trial counsel clarified that Mr. O'Brien should have the option of withdrawing his plea. RP 10.

Although Mr. O'Brien's appeal of the denial of his Motion to Correct Judgment and Sentence was initially dismissed by this Court as untimely, it was subsequently, on July 1, 2011, reinstated. CP 103, 104-105.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. O'BRIEN'S MOTION TO CORRECT JUDGMENT AND SENTENCE.

At the hearing on the Motion to Correct Judgment and Sentence, Mr. O'Brien's attorney stated on the record, as an officer of the court, that the

³(...continued)

that was revoked, You Honor, so the restitution would be concurrent with the restitution that was ordered in the DOSSA revocation." CP 75-76.

The court indicated, "What I am going to do is impose 60 months in the Department of Corrections, credit for 60 days that you have served here," CP 78.

agreed recommendation was for Mr. O'Brien's current sentence to be imposed to run concurrently with, not consecutive to, the sentence imposed as a result of the revocation of Mr. O'Brien's DOSA. RP 8. The prosecutor who represented the Pierce County Prosecutor's Office at the hearing on the motion conceded that the trial deputy prosecutor may well have told defense counsel that the state agreed to recommend concurrent terms. RP 7. Certainly the judgment and sentence imposed by the trial court did not reflect that the current sentence was consecutive to any prior sentences and did reflect "Concurrent with 05-1-06126-1, 05-1-05591-2 05-1-05757-1" next to the restitution section of the printed form. CP 15-26.

The trial court did not recall what the court intended and the denial of a correction of the judgment and sentence was based entirely on the state's representation that concurrent terms would not have been proper as a matter of law. RP 9.

Since, however, the trial court had the discretion to impose the terms concurrently and apparently intended to follow the prosecutor's

recommendation of concurrent terms, the Motion to Correct should have been granted.

A plea agreement to recommend what would be an exceptional sentence, either above or below the standard range, can be a "substantial and compelling" reason justifying such a sentence under the Sentencing Reform Act. State v. Breedlove, 138 Wn.2d 298, 306-309, 979 P.2d 417 (1999); State v. Hilyard, 63 Wn. App. 413, 819 P.2d 809 (1991). The SRA authorizes such plea bargains. State v. Lee, 132 Wn.2d 498, 506, 939 P.2d 1223 (1977).

Thus, this is not an instance of Mr. O'Brien trying to specifically enforce an illegal sentence imposed based on a mutual mistake. See State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (20barber11). This is an instance in which the parties bargained for a sentence which the court could have imposed and likely intended to impose, but did not clearly do so in the judgment and sentence. The trial court erred in denying Mr. O'Brien's Motion to Correct the Judgment and Sentence to reflect the intent of the parties and the court.

2. IF THE COURT HAD ANY DOUBTS ABOUT THE FACTS ON WHICH THE MOTION WAS BASED, THE COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING.

If there is any doubt that the parties and court intended to impose a sentence to run concurrently with the sentence for the revoked DOSA, the trial court should have conducted a fact-finding hearing.

Criminal Rule 7.8, which governs motions for relief from judgments, provides that the trial court "shall" transfer motions to the Court of Appeals for consideration as Personal Restraint Petitions unless the trial court determines that the motion is timely and that a substantial showing for relief has been made or "the resolution of the motion will require a factual hearing."

While defense counsel's representation that the parties agreed to a recommendation for a sentence to be served concurrently with a prior revoked DOSA was unchallenged, the court should have inquired further rather than simply conclude that the facts were irrelevant. The trial court did have discretion to impose concurrent terms and likely intended to adopt the agreed-upon recommendation. Further factual development could also have clarified whether the

prosecutor was remiss in not making a clearer recommendation on the significant agreement on which the plea was based.⁴

3. **MR. O'BRIEN SHOULD, IN THE ALTERNATE, BE ENTITLED TO WITHDRAW HIS PLEA OR SPECIFICALLY ENFORCE HIS RIGHT TO THE PROSECUTOR'S AGREED-UPON RECOMMENDATION AT A NEW SENTENCING HEARING.**

Since neither the state nor the court disputed Mr. O'Brien's attorney's representation that Mr. O'Brien had understood that the state agreed to recommend concurrent terms, if he is not entitled to a correction of his Judgment and Sentence, two things are clear: (1) he was misinformed about the bargain he had entered; and (2) the prosecutor failed to make the recommendation he agreed to make. As a result, Mr. O'Brien should be entitled to withdraw his plea because it was involuntary or to specifically enforce his bargain at a new sentencing hearing in which the prosecutor makes the agreed-upon recommendation.

⁴ Based on anecdotal evidence, Mr. O'Brien believes that he could establish at a fact-finding hearing that plea-bargains for a sentence concurrent with a revoked DOSA are routine.

A person should be permitted to withdraw his plea to avoid a manifest injustice. Criminal Rule 4.2(f) provides that:

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

Both an involuntary plea and the prosecutor's failure to keep the state's part of the bargain meet the "manifest injustice" standard. State v. Wakefield, 130 Wn.2d 464, 925 P.2d 183 (1996); State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

A plea is involuntary if the defendant is incorrectly advised about the consequences of his plea. State v. King, ____ Wn.App. ____, 253 P.3d 120 (2011).

If the prosecutor fails to make the agreed recommendation, the defendant can either withdraw the plea or specifically enforce it. Specific performance requires the prosecutor to make the bargained-for recommendation at a new sentencing hearing. Barber, supra; State v. Harrison, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003).

Here is is clear that Mr. O'Brien did not receive the benefit of his bargain and that his plea was therefore involuntary. If his Judgment and

Sentence is not corrected to have his sentences run concurrently, he should be given the option of withdrawing his involuntary plea or specifically enforcing his bargain at a new sentencing hearing.

E. CONCLUSION

Mr. O'Brien respectfully submits that his case should be remanded for entry of an order clarifying that his current sentence should be run concurrently with his sentence for his revoked DOSA. If his case is not remanded for entry of such an order, it should be remanded for a new sentencing hearing in which the prosecutor makes a clear recommendation for concurrent terms or a hearing in which Mr. O'Brien is permitted to withdraw his plea. If there is any doubt about the facts in the case, an evidentiary hearing should be conducted to determine them.

DATED this 4th day of August, 2011

Respectfully submitted,



Rita J. Griffith, WSBA #14360
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DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I certify that on the 4th day of August, 2011, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via prepaid first class mail:

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