

No. 42995-1-II

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

STATE OF WASHINGTON

Respondent

vs.

TIMOTHY ASHE

Appellant

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 23 PM 1:17
STATE OF WASHINGTON
BY 
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY
The Honorable Brian Altman
Superior Court No. 10-1-00084-2

APPELLANT'S REPLY BRIEF

MARK W. MUENSTER, WSBA #11228
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

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I. ISSUES RAISED BY RESPONDENT'S BRIEF

When the parties jointly recommended conversion of a portion of the sentence to work release, and the sheriff rejected appellant for work crew, was there a mutual mistake of the parties justifying withdrawal of the plea?

II. ARGUMENT IN REPLY

The prosecutor acknowledges, as he must, Washington cases which hold that a mutual mistake in the plea agreement allows the defendant to withdraw the plea. *State v. Barber*, 170 Wn. 2d 854, 859, 248 P.3d 494 (2011); *State v. Moore*, 75 Wn. App. 166, 173, 876 P.2d 959 (1994); *State v. Skiggn*, 58 Wn. App. 831, 835, 795 P.2d 169 (1990); *State v. Wilson*, 102 Wn. App. 161, 6 P.3d 637 (2000). The plea in this case was premised on Mr. Ashe's eligibility to serve the sentence on work crew. This was a decision which was not in his hands, but that of the sheriff of Skamania County who ran the work crew.

The prosecutor suggests that the mistake here was not mutual, but was somehow attributable to Mr. Ashe alone:

The mistake was predicated upon a misunderstanding of his personal medical condition about which the appellant himself would have the best knowledge and about which there is no reasonable expectation the prosecutor should have been aware. Resp. Br. at 12-13.

While Mr. Ashe did have superior knowledge of his "medical condition" in a general sense, the prosecutor was aware of his age¹ at the time of

¹ "He's basically---other than , I think, a very old DUI conviction from the 70s...He's been actually crime free for his whole life and he is, I think 65 years old and has been an upstanding member of the community."

sentencing, RP 11. and presumably was aware of the sheriff's criteria for determining eligibility for work crew. It was the sheriff who determined Mr. Ashe would not be eligible to do work crew. RP 25, 27. It had been Mr. Ashe's expectation, based on his long work history, that he would be able to do work crew. RP 15. The court acknowledged that both parties expected Mr. Ashe would be able to qualify for and complete work crew. RP 48-49.

Even in *State v. Skiggn, supra*, where the court noted that defense counsel was *primarily* responsible for an error regarding the offender score, the court allowed withdrawal of the plea. *Skiggn*, 58 Wn. App. at 839. Thus even if Mr. Ashe had *primary* responsibility for the *sheriff's* decision not to allow him to serve on work crew, relief should be granted because the prosecutor "as a legal professional is expected to have some expertise in the criminal law," Resp Br. at 12, and could reasonably be expected to have some familiarity with the sheriff's criteria for accepting candidates for work crew.²

III. CONCLUSION

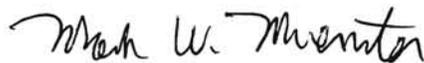
A plea agreement is a contract, under which the defendant gives up significant rights in exchange for promises made by the government, usually about the sentencing consequences that will flow from the

² The court noted during the hearing:
...[T]he prosecutor doesn't come to this with spotless hands. In this case it was partly the prosecutor's promise to the previous lawyer that he would get community service [work crew] that causes us to be here today. And the prosecutor has conceded that point on the record a couple of times. RP 47.

conviction. Here the parties made a joint recommendation for work crew, and Mr. Ashe would not have entered into the plea without that recommendation. The court characterized the plea agreement as “well thought out”, and followed it in sentencing. It was an executive decision by the sheriff who had to carry out the sentence which frustrated the expectations of the parties and the court. This was not because of any deception on the part of Mr. Ashe in any aspect leading up to the entry of the plea. The parties were simply mutually mistaken about whether the sheriff would allow the sentence to be served as originally handed down by the court. Since the sheriff, and not Mr. Ashe, made that executive decision, and the prosecutor did not oppose the withdrawal of the plea, the court erred in denying the motion to withdraw the plea on the grounds of mutual mistake.

Dated this 18 day of July, 2012

LAW OFFICE OF MARK W. MUENSTER

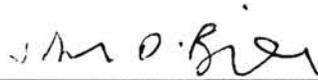


Mark W. Muenster, WSBA 11228
Attorney for Appellant Tim Ashe
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 20th day of July, 2012 with postage fully prepaid.

DATED this 20th day of July, 2012



John O'Brien

Yarden Weidenfeld
Deputy Prosecuting Attorney
PO Box 790
Stevenson, WA 98648

Tim Ashe
PO Box 100
Stevenson, WA 98648

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