

NO. 43818-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CLARK TELLVIK,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Clark Tellvik worked with three different county's prosecuting agencies to negotiate a plea bargain. In global plea agreement, Tellvik agreed to plead guilty to certain offenses and the State agreed to recommend that he receive concurrent sentences for each case. Tellvik had been held in jail at the same time due to the pending charges in two of the cases that were part of the global plea agreement.

At Tellvik's Clark County sentencing hearing, a different prosecutor appeared for the State and argued that Tellvik should not receive the credit for time served that the negotiating prosecutor had thought appropriate for the case. The court followed the State's sentencing recommendation. It refused to credit Tellvik with the time he spent in custody on the two cases, despite imposing concurrent terms. Tellvik is entitled to relief on appeal because the State breached its promised plea recommendation and the court erroneously refused to give him credit for time served to which he was entitled.

B. ASSIGNMENTS OF ERROR.

1. The prosecution breached the plea agreement when it argued that Tellvik should not receive the concurrent credit for time served that was part of the plea bargain.

2. The court erroneously refused to give Tellvik credit for time he spent in jail.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. When the State agrees to make a certain sentencing recommendation as part of a negotiated plea, it breaches the agreement by asking for a different sentence. The prosecution agreed to recommend Tellvik receive concurrent sentences that included community-based drug treatment for three different cases, but at the sentencing hearing, a second prosecutor disavowed the credit for time served that the negotiating prosecutor thought was appropriate and argued that Tellvik was not entitled to time he spent in custody on the case at bar if he was also in custody on another case. Did the prosecution breach the plea agreement by making a different recommendation at the sentencing hearing that undermined the premise of the guilty plea?

2. By statute and as a matter of the constitutional protections of due process and double jeopardy, the court must credit a person with the time he has served in custody on the case for which he is being sentenced. Tellvik was in custody at the same time for two cases, and he received concurrent sentences for these cases. Did the court

erroneously deny Tellvik credit for the time he spent in jail on two cases when imposing concurrent sentences for those cases?

D. STATEMENT OF THE CASE.

Clark Tellvik was charged with various offenses, first in Clark and Yakima Counties, and later in King County.<sup>1</sup> CP 24. He reached a “global plea agreement” with the prosecution for all cases. RP 7. In exchange for his guilty plea to certain offenses in each case, the prosecution would recommend concurrent drug treatment, or “DOSA” sentences as long as Tellvik was found eligible for a DOSA. RP 7 -8 (the “global agreement between the three prosecutors’ offices and Mr. Tellvik is that he would be a candidate for DOSA in each of the cases and if granted DOSA, in each of the cases, they would all run concurrent to one another.”).

Tellvik was deemed DOSA eligible and the court agreed to impose the recommended DOSA sentences.<sup>2</sup> RP 35. Pursuant to his global plea agreement, he was first sentenced in King County. The

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<sup>1</sup> Clark Co. No. 10-1-00696-6; Yakima Co. No. 10-1-00888-3; King Co. No. 11-1-06778-1.

<sup>2</sup> At the time of Tellvik’s Clark County sentencing, he had been sentenced in King but not Yakima County. RP 7. Consequently, the instant appeal does not address the Yakima sentence, but counsel will provide information about the outcome of the Yakima County sentence at the Court’s request. RAP 9.11.

King County judge imposed the recommended sentence of a DOSA where Tellvik would serve 29.75 months in custody and 29.75 months under community supervision. RP 32.

Tellvik next appeared in Clark County to enter his negotiated guilty plea and receive his sentence, where the recommended DOSA sentence would provide for 37.5 months in prison and the same term on community custody. RP 33. The court agreed to impose this recommended sentence. RP 35.

However, at the sentencing hearing a different prosecutor appeared on behalf of the State.<sup>3</sup> This prosecutor argued Tellvik was not entitled to any credit for time he served in the King County jail, prior to his return to Clark County, even though the sentences were concurrent and he was held on both cases. RP 23, 27. Prosecutor James David told the court that negotiating prosecutor Michael Vaughn had been willing to “bend the rules” and allow additional credit for time spent in King County but Vaughn was incorrect. RP 27. The State

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<sup>3</sup> Michael Vaughn was the prosecutor who negotiated the plea; James David was the prosecutor who appeared at sentencing. RP 27. The transcript of the plea hearing only uses the name “docket prosecutor” but the negotiating prosecutor is mentioned by name at sentencing and in the prosecutor’s Offer of Settlement. RP 1; CP 18.

insisted Tellvik should only receive credit for the 49 days that he was personally in Clark County, even if he was held in King County under the authority of a Clark County “no bail” court order. RP 22-23. The court agreed with the prosecution’s claim in part, and credited Tellvik with 137 days of time he served, which included the time Tellvik remained in custody after he was sentenced on the King County case, before he was returned to Clark County. RP 37. Tellvik did not receive credit for the time he spent in the King County jail before he was sentenced on the King County case, even though he was held under the authority of a Clark County warrant issued due to the Clark County case. RP 35, 37.

Tellvik objected, explaining that the prosecution was violating the recommendation it agreed to make as part of the plea agreement by now claiming that his concurrent sentences would not include credit for time served when in jail for both cases. RP 20-21, 33-34. Tellvik had been held in King County on both the King and Clark county cases, based on a “no bail” warrant issued from Clark County. RP 20-21. The Clark County judge agreed it was unclear whether “interplay” of the statutes permitting the award of credit for time served and concurrent

sentences authorized Tellvik to get credit for time he served in both cases. RP 37.

Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

**Tellvik was entitled to credit for time served for the concurrently served sentences under his global plea agreement**

1. The State is prohibited from inducing a guilty plea by promising to recommend a sentence as part of the plea agreement and then requesting a sentence that undermines this plea agreement.

When a criminal defendant pleads guilty with the understanding that the prosecution will recommend a particular sentence, the defendant has given up important constitutional rights based on the expectation that the prosecution will adhere to the terms of the agreement. State v. Carreno-Maldonado, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). The defendant's purpose in entering into a plea agreement with the prosecution is based on the expectation that the prosecution will make a good faith recommendation at sentencing as promised. Id. at 88. The prosecution's breach of a plea is a structural error that is not subject to harmless error review. Id. at 87-88.

A breach of a plea agreement is a constitutional issue that may be raised for the first time on appeal. State v. E.A.J., 116 Wn.App. 777, 785, 67 P.3d 518 (2003), rev. denied, 150 Wn.2d 1028 (2004); RAP 2.5(a)(3). If the State has breached the plea agreement, the disposition cannot stand. Id.

A plea agreement is a contract in which ambiguities are construed against the drafter. United States v. Transfiguracion, 442 F.3d 1222, 1227-28 (9<sup>th</sup> Cir. 2006); State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Unlike commercial contracts, plea agreements require a criminal defendant waive fundamental constitutional guarantees. Transfiguracion, 442 F.3d at 1227; State v. Harrison, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003); U.S. Const. amends. 5, 6, 14; Wash. Const. Art. I, §§ 3, 22. Therefore, due process considerations mandate the prosecution's rigorous compliance and "require a prosecutor to adhere to the terms of the agreement." Harrison, 148 Wn.2d at 556 (citing United States v. Harvey, 791 F.2d 294 (4<sup>th</sup> Cir. 1986)); see also Transfiguracion, 442 F.2d at 1228.

Issues concerning the interpretation of a plea agreement are questions of law reviewed *de novo* on appeal. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). The prosecution is required to

operate within “the literal terms of the plea it made.” Transfiguracion, 442 F.2d at 1228. Ambiguities are construed in favor of the defendant. Id.

“The State's duty of good faith requires that it not undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement.” Carreno-Maldonado, 135 Wn.App. at 83. A defendant has a right to have the prosecutor act in good faith even though the sentencing judge is not bound or even influenced by the prosecutor’s recommendation. Id. at 88.

2. The prosecution breached the plea agreement.

As part of a “global plea agreement,” Tellvik agreed to waive his right to trial and plead guilty to certain offenses, based on an agreement that the prosecution would recommend concurrently imposed drug treatment “DOSAs” sentences on each case. RP 7. This basic understanding is memorialized in the plea agreement and judgment and sentence. CP 11-12, 17. The State breached this promise at the sentencing hearing when Prosecutor David insisted that Tellvik should not receive credit for time he served in custody before his guilty plea if he was also in custody on the other concurrently imposed

sentences, even when the negotiating prosecutor had been willing to recommend such credit. RP 27. This argument undermined the promise of concurrent DOSA sentences and the premise under which Tellvik waived his right to trial and entered the guilty plea.

Concurrent sentences are favored in Washington and are presumed when a person commits several offenses, unless those offenses occur when the person is already serving another sentence. RCW 9.94A.589(3). Because Tellvik's global plea agreement rested on charges from three counties, he was not sentenced on each at the same time. RP 7. However, the central premise of the plea agreement was that the State would recommend concurrent drug treatment sentences that involved serving one-half the sentence in prison and the remainder of the sentence in the community. RP 7; CP 17.

The prosecution undermined the purpose of the plea agreement by arguing at the sentencing hearing that Tellvik's sentences would be essentially consecutive, rather than concurrent, because he should not receive credit for the time he served jointly on the King and Clark County cases. The State claimed he could only receive credit for the time he served while physically held in the Clark County jail, 49 days, even though he had spent 370 days in jail on both the King and Clark

County cases. RP 32-34. The State's argument denied him credit for almost one year of time Tellvik spent in jail. The prison portion of his sentence was just over 3 years (37.5 months) in the Clark County DOSA, and just over two years for the King County DOSA (29.75 months). RP 33. When including good time, the prosecution's claim that Tellvik should not receive any credit for the 321 days he spent in custody, under a Clark County "no bail" warrant but not physically in Clark County undermined the concurrent nature of the DOSA sentences for which he had bargained. RP 21-22, 33.

This case is different in both fact and law from State v. Watson, 63 Wn.App. 854, 822 P.2d 327 (1992), where the defendant asked to withdraw his plea based on his misunderstanding that he would receive credit for time served on other cases. Watson had pled guilty in October 1989 and February 1990 to separate burglaries. Id. at 855-56. There was no global plea agreement that induced each plea, but the prosecution promised and the court imposed concurrent sentences. Id. at 856. In March 1990, after these sentences were imposed, the State filed new charges. Id. When Watson pled guilty to the March 1990 charges, with the promise of concurrent sentences, he believed he

should receive credit for the time he served on the other cases, even though he had not even been charged with the March 1990 case. Id.

The Watson Court affirmed the trial judge's denial of Watson's motion to withdraw his plea, reasoning that the State's promise of concurrent sentences did not include a promise of credit for time served before the charges were filed. Id. at 858. The court also found it was unreasonable for Watson to have expected to receive such credit when he had not been in custody on the later charges. Id. at 859. Unlike Watson, Tellvik was in custody on both cases at the time he pled guilty and was sentenced. RP 21-22. Moreover, Tellvik entered into a "global plea agreement" intended to resolve all pending cases with concurrently imposed DOSA sentences, which would be undermined if he was not released into community custody to serve the outpatient portion of the sentences. RP 7, 33-34.

Likewise, Tellvik's circumstances are dissimilar to State v. Stewart, 136 Wn.App. 162, 164, 149 P.3d 391 (2006), where the defendant was sequentially charged with various unrelated offenses after he was booked into jail. He separately pled guilty to various offenses. Id. After he pled guilty to the crimes that were charged at the latest point in time, he sought credit for the time he had been in jail

prior to having been charged with these crimes. The Stewart Court rejected this claim, and ruled that the defendant was not entitled to credit for jail time he served before he was charged on the offenses for which he was being sentenced because he had not been incarcerated for those crimes. Id. at 165. Tellvik does not seek credit for time he spent in the King County jail before the imposition of the Clark County “no bail” order. RP 21-22.

Tellvik was denied the benefit of the plea bargain he struck with the prosecution when the State unreasonably urged the court at the sentencing hearing to give Tellvik credit for only 49 days of time he spent in custody on the Clark County case, when he had in fact spent 370 days in custody on the Clark County case, even if not physically in Clark County, when he was held under a Clark County warrant. The prosecution breached the plea agreement. Furthermore, as explained below, the court should have credited him with the time he served concurrently on the King and Clark County cases under the plea agreement and based on an accurate and fair interpretation of the law.

3. Tellvik is entitled to concurrent sentences, including credit for time concurrently served.

A court must give credit for time served before trial in order to comply with the double jeopardy, due process, and equal protection clauses of the constitution:

Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence.

Ranier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974); U.S. Const. amends. 5, 14; Wash. Const. art. I. §§ 3, 9. In Tellvik's case, he should have received credit for the time he served concurrently with the sentences imposed on other cases. The court's failure to properly sentence him denied him due process and fundamental fairness, and the case should be remanded for an accurately imposed sentence.

The prosecution relied on RCW 9.94A.505(6), which provides:

The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

CP 23. The prosecution claimed that the word “solely” means the court lacks authority to grant credit for confinement served concurrently on cases for which there is a global plea agreement. *Id.* The State misreads this statute.

RCW 9.94A.505(6) requires the trial court to grant credit for all time served prior to sentencing if that confinement time was served solely in regard to the offense for which the person is being sentenced. The statute does not prohibit the court from granting credit for all time served prior to sentencing when the confinement was not served solely on the offense being sentenced, but was served on concurrent offenses. To read the statute as the prosecution suggests, the word “only” would have to be inserted before the word “shall” to read, “The sentencing court shall [only] give the offender credit for all confinement time served before sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.”

By failing to mandate that the court may only give credit for time served when it was served on a single offense, the statute gives the court authority to impose a concurrent sentence. RCW 9.94A.589(3).

RCW 9.94A.589(3) states in pertinent part:

whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

The Legislature plainly intended to authorize concurrent sentences, as those are presumed for offenses that occur when the person did not commit the offense at the same time he was serving a felony sentence on another matter. Id. Tellvik was not serving a felony sentence when the charges arose that are part of his plea agreement. RP 20-22. Concurrent sentencing authority would be meaningless if the court could not concurrently credit a person for time spent in custody before the imposition of sentence when the person was in custody for those offenses at the same time, both before and after the concurrent sentences were imposed.

“In construing statutes, our primary object is to effectuate legislative intent.” State v. Brasel, 28 Wn.App. 303, 308, 623 P.2d 696 (1981). Moreover, “[s]tatutory provisions are interpreted in a manner so as to avoid strained or absurd consequences which could result from

a literal reading.” Id. at 309. It undermines the Legislature’s plain intent to permit and encourage concurrent sentences, as the presumptive sentence, when refusing to award concurrent credit for time jointly spent in jail prior to sentencing.

Although there are some circumstances in which the court is not authorized to allot credit for time served to multiple offenses, those circumstances are not present here. Unlike the defendant in Stewart, Tellvik was not asking to receive credit for his Clark County case before he was charged with a crime in Clark County, but only “presentence time he has actually served on a charged offense.” 136 Wn.App. at 165.

Unlike the defendant in Schillereff, Tellvik had not absconded from the jurisdiction when he committed an unrelated crime for which he sought jail credit.<sup>4</sup> Additionally, in Schillereff, the defendant received consecutive sentences in the two cases at issue, further undermining the defendant’s claim he should receive credit for time spent in custody for a different crime. 159 Wn.2d at 651. Tellvik missed his Clark County court date because he was in custody in King County, not because he had fled the jurisdiction; he asked for credit dating from

the time the no-bail Clark County warrant was served based on the concurrent nature of the sentence, so that Tellvik was being held in jail on both cases at the same time. RP 20-22.

This circumstance is also unlike the defendant in Davis, who was held in custody in Montana on an unrelated charge, and received credit in Washington only after he was brought back to Washington and arraigned.<sup>5</sup> No one challenged Davis's right to credit for time served once arraigned on the Washington charge, even though he was also serving a 25-year Montana sentence at that time. Id. at 636, 641. Davis illustrates that Tellvik should receive credit for concurrently imposed sentences once he was held in custody on the multiple offenses.

Tellvik was initially charged in the case at bar on May 4, 2010. CP 1. On July 31, 2011, he was arrested in King County and held in that county's jail. RP 20-21. He was unable to appear for Clark County court date on August 18, 2011, and the court ordered the issuance of a bench warrant on August 29, 2011. Id.; Supp. CP \_\_, sub. no. 50. The court also ordered that Tellvik must be held without bail on the Clark County case. Id.

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<sup>4</sup> State v. Schillereff, 159 Wn.2d 649, 650, 152 P.3d 345 (2007).

<sup>5</sup> State v. Davis, 69 Wn.App. 634, 636-37, 849 P.2d 1283 (1993).

The Clark County prosecution did not arrange for Tellvik to be transported for any court appearances once they learned he was in the King County jail. Instead, they negotiated a global plea agreement that included the Clark and King County cases, as well as a pending Yakima County case, premised on concurrent sentences. RP 7. After Tellvik pled guilty and was sentenced in King County, Clark County prosecutors obtained an order transporting Tellvik to that county. RP 7, 32; Supp. CP \_, sub. no. 52.

Tellvik pled guilty on these three different cases, based on his understanding that the prosecution would recommend a DOSA sentence for each case and each case would be concurrent, enabling Tellvik to serve a portion of the sentences in out-of-custody drug treatment. For the first time at the sentencing hearing, the prosecution claimed Tellvik was not entitled to credit for time he spent in custody on both the Clark County case and the King County case. RP 26-27. The court agreed in part, and credited Tellvik with 137 days he spent in custody in Clark County, or while awaiting transport to Clark County after being sentenced on the King County matter. RP 37. It refused to credit him the additional 233 days he spent in King County on both cases. RP 33.

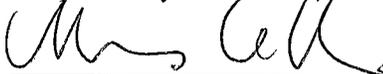
Tellvik pled guilty as part of a global agreement premised on the State's recommendation for concurrently imposed DOSA sentences on each case. The court agreed to impose the DOSA sentences that the parties jointly requested. RP 35. However, at the prosecution's request, the court undermined the concurrent nature of the sentences by refusing to give Tellvik credit for time he spent in custody, concurrently, on both the King and Clark County cases. RP 37. The court's sentencing error should be corrected and Tellvik credited with the time he spent in jail jointly on the two cases.

F. CONCLUSION.

For the reasons stated above, Mr. Tellvik respectfully asks this Court to order the correction of his sentence so that it includes all time he actually served concurrently. Alternatively, he asks this Court to order a new sentencing hearing at which the prosecution adheres to its promised recommendation.

DATED this <sup>21<sup>st</sup></sup> day of February 2013.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 43818-6-II
	)	
CLARK TELLVIK,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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