

NO. 43818-6-II

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

STATE OF WASHINGTON, Respondent

v.

CLARK ALLEN TELLVIK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00696-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. THE STATE DID NOT VIOLATE THE PLEA AGREEMENT AS THE AGREEMENT SPECIFIED CREDIT FOR TIME SERVED FOR TIME THE DEFENDANT SPENT IN CUSTODY *SOLELY* ON THIS CASE..... 1

 II. THE DEFENDANT IS NOT ENTITLED TO CREDIT FOR TIME SERVED AS HE ALLEGES 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 2

 I. THE STATE DID NOT VIOLATE THE PLEA AGREEMENT AS THE AGREEMENT SPECIFIED CREDIT FOR TIME SERVED FOR THE TIME THE DEFENDANT SPENT IN CUSTODY *SOLELY* ON THIS CASE..... 2

 II. The CREDIT FOR time SERVED Tellvik received is all he is entitled to as a matter of law 4

D. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

<i>In re Pers. Restraint of Phelan</i> , 97 Wn.2d 590, 647 P.2d 1026 (1982) ..6, 7	
<i>In re Pers. Restraint of Schillereff</i> , 159 Wn.2d 649, 152 P.3d 345 (2007) .7	
<i>Santobello v. New York</i> , 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).....	3
<i>State v. Bisson</i> , 156 Wn.2d 507, 517, 130 P.3d 820 (2006)	4
<i>State v. Davis</i> 69 Wn. App. 634, 641, 849 P.2d 1283(1993).....	5
<i>State v. Marler</i> , 32 Wn. App. 503, 508, 648 P.2d 903 (1982).....	3
<i>State v. Mollich</i> , 132 Wn.2d 80, 90, 936 P.2d 408 (1997)	3
<i>State v. Nelson</i> , 108 Wn.2d 491, 499, 740 P.2d 835 (1987).....	3
<i>State v. Sledge</i> , 133 Wn.2d 828, 839, 947 P.2d 1199 (1997)	3
<i>State v. Talley</i> , 134 Wash. 2d. 176, 183, 949 P.2d 358 (1998)	3
<i>State v. Wakefield</i> , 130 Wn.2d 646, 474, 925 P.2d 183 (1996).....	3
<i>State v. Watson</i> , 63 Wn. App. 854, 859, 822 P.2d 327 (1992)	5, 6
<i>State v. Williams</i> , 59 Wn. App. 379, 796 P.2d 1301 (1990).....	5, 6
<i>United State v. Harvey</i> , 791 F.2d 294, 300 (4th Cir. 1986).....	3

Statutes

RCW 9.94A.090(2).....	3
RCW 9.94A.120(13).....	6
RCW 9.94A.505(6).....	5, 6

A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE STATE DID NOT VIOLATE THE PLEA AGREEMENT AS THE AGREEMENT SPECIFIED CREDIT FOR TIME SERVED FOR TIME THE DEFENDANT SPENT IN CUSTODY SOLELY ON THIS CASE
- II. THE DEFENDANT IS NOT ENTITLED TO CREDIT FOR TIME SERVED AS HE ALLEGES

B. STATEMENT OF THE CASE

Clark Tellvik (hereafter 'Tellvik') was charged with five various felony counts out of Clark County in case number 10-1-00696-6. CP 6-8. Pursuant to a plea agreement, Tellvik plead guilty to one felony count of Trafficking in Stolen Property in the First Degree. CP 9, 17. The plea agreement states in pertinent part:

“RECOMMENDATION AS TO CONFINEMENT

State agrees to recommend concurrent sentences with Yakima County Superior Court No. 10-1-00888-3 and King County Superior Court No. 11-C-06778-1; the State agrees to recommend Prison-Based DOSA if defendant is eligible – this would involve a term of 36.75 months prison and 36.75 months Community Custody. If the defendant is ineligible for DOSA, the defendant chooses not to pursue a DOSA sentence, or the Court declines to impose a DOSA sentence, the State's recommendation will be for 84 Months in Total Confinement.

TERMS APPLICABLE TO ALL RECOMMENDATIONS

This offer includes credit for time served in custody solely on this case, up to the date of sentencing....”

CP 17.

At sentencing, the defense and the State disagreed about the amount of credit for time served Tellvik was entitled to. RP 23-35. The State argued Tellvik should receive credit for 49 days served. RP 22-23. The defense argued Tellvik should receive credit for 370 days, which included time Tellvik spent in custody in King County while pending another felony charge out of King County, but after Clark County had issued its warrant for Tellvik’s failure to appear in Clark County. RP 370. The Court awarded Tellvik 137 days credit for time served. RP 37. Tellvik argued at sentencing that failing to give the full amount of time served violated the concurrent nature of the plea agreement. RP 33-34.

C. ARGUMENT

I. THE STATE DID NOT VIOLATE THE PLEA AGREEMENT AS THE AGREEMENT SPECIFIED CREDIT FOR TIME SERVED FOR THE TIME THE DEFENDANT SPENT IN CUSTODY SOLELY ON THIS CASE

Tellvik alleges the State violated the plea agreement and improperly induced him to plead guilty. The plea agreement at issue was attached to Tellvik’s statement upon plea of guilty. CP 17-18.

The plea agreement specifically states, “This offer includes credit for time served in custody solely on this case, up to the date of sentencing.” CP 17. As the sentencing prosecutor did not argue against this, or any other term of the offer, the State did not violate the plea agreement and Tellvik’s claim fails.

“Plea agreements are contracts.” *State v. Mollichi*, 132 Wn.2d 80, 90, 936 P.2d 408 (1997). The contract imposes an implied promise by the State to act in good faith in plea agreements. *State v. Marler*, 32 Wn. App. 503, 508, 648 P.2d 903 (1982). A plea agreement is a contract between the State and the defendant. The court is not bound by the agreement. RCW 9.94A.090(2); *State v. Wakefield*, 130 Wn.2d 646, 474, 925 P.2d 183 (1996); *State v. Nelson*, 108 Wn.2d 491, 499, 740 P.2d 835 (1987). Due process requires a prosecutor adhere to the terms of the agreement. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997) (citing *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) and *United State v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). The State is obligated to follow the terms of a plea agreement by recommending the agreed upon sentence. *State v. Talley*, 134 Wash. 2d. 176, 183, 949 P.2d 358 (1998).

The issues concerning the interpretation of a plea agreement are questions of law that shall be reviewed de novo.

State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). It is clear, from the wording of the plea agreement and the citation of the State to the law that supports the terms of the plea agreement, that the State did not argue against any provision of the plea agreement. The State did not breach the plea agreement.

The relevant term of the plea agreement states “This offer includes credit for time served in custody solely on this case, up to the date of sentencing.” CP 17. From that statement, contained in the plea agreement that was attached to Tellvik’s statement on plea of guilty, it is clear the terms of the agreement contemplated only recommending that Tellvik receive credit for time served for any time he served in custody solely on his Clark County case. That is exactly what the prosecuting attorney argued for at sentencing. In no way did the State violate the terms of the plea agreement. As no terms were violated, Tellvik has no grounds for relief on this claim.

II. THE CREDIT FOR TIME SERVED TELLVIK RECEIVED IS ALL HE IS ENTITLED TO AS A MATTER OF LAW

Tellvik alleges that he is entitled to more credit for time served than the sentencing court awarded. The sentencing court awarded Tellvik 137 days credit. CP 25. Per the terms of the plea agreement, the State

recommended Tellvik receive credit for time served for the amount of time he served while in custody on solely the Clark County case. RCW 9.94A.505(6) states “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.” RCW 9.94A.505(6).

A defendant who receives two sentences to run concurrent to each other is not entitled to credit for time served on all the sentences. *State v. Davis*, 69 Wn. App. 634, 641, 849 P.2d 1283(1993) (citing *State v. Watson*, 63 Wn. App. 854, 859, 822 P.2d 327 (1992)). In *State v. Watson*, the court stated that “The SRA does not authorize giving credit for time being served on other sentences.” *Watson*, 63 Wn. App. at 859 (citing *State v. Williams*, 59 Wn. App. 379, 796 P.2d 1301 (1990)). The court in *Watson* further held that a sentencing court may consider an offender’s time served on another sentence in so far as it may be a reason to exercise discretion in sentencing within the standard range or in an extraordinary case, a reason for an exceptional sentence. *Id.* at 859-60.

“‘Credit for time served’ in a standard plea bargain has a fixed legal meaning which is time served ‘solely in regard to the offense for which the offender is being sentenced.’”

Id. at 860 (citing former RCW 9.94A.120(13)).¹ Despite Tellvik's interpretation of RCW 9.94A.505(6) to be permissive, the interpretation of the same language by the Court in *Watson, supra*, clearly shows the terms of this statute are obligatory on the trial courts. Credit for time served means only the time which an offender served 'solely in regard to the offense for which the offender is being sentenced.'

On July 13, 2012, when Tellvik was being sentenced in Clark County, he was only being sentenced on Clark County cause number 10-1-00696-6. The prosecutor argued for the court to follow the law as it is provided in RCW 9.94A.505(6) and supporting case law. This argument was further in accordance with the plea agreement between the State and Tellvik which stated "This offer includes credit for time served in custody solely on this case, up to the date of sentencing." CP 17.

In *State v. Williams*, 59 Wn. App. 379, 796 P.2d 1301 (1990), the Court found a defendant was not entitled to credit for time served for the time he served prior to sentencing on a Robbery charge as he was also being held in custody on a parole violation. *Williams*, 59 Wn. App. at 382-83. In *In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1982), the Supreme Court stated, "...we believe petitioner is entitled to credit only if the jail time served was exclusively on the principal

¹ Former RCW 9.94A.120 was transferred to RCW 9.94A.505.

underlying charge of second degree rape.” *Phelan*, 97 Wn.2d at 597. The Court found that the petitioner was serving time on a Clark County charge and not on the principal underlying charge and he was therefore not entitled to credit for any of that time. *Id.*

Tellvik’s case is similar to those above and to that of *In re Pers. Restraint of Schillereff*, 159 Wn.2d 649, 152 P.3d 345 (2007). In *Schillereff*, the defendant failed to appear after being released on bail while the case was still pending. *Schillereff*, 159 Wn.2d 650. The defendant then was charged with another crime in another jurisdiction. *Id.* While in custody in the foreign jurisdiction, Clark County issued a warrant for his arrest and extradited Schillereff to face the still pending charges in Clark County. *Id.* Schillereff plead guilty pursuant to a plea agreement that recommended his Clark County sentence run concurrent to his foreign jurisdiction sentence. *Id.* Schillereff argued he should have been given credit for the time he served while in the foreign jurisdiction. *Id.* The Supreme Court held that Schillereff was not entitled to credit for the time he served while he was in custody on other matters and not solely the Clark County matter. *Id.* at 651. Like Schillereff, Tellvik failed to appear after having been released pending trial. He was then arrested in another jurisdiction and held in custody there until the conclusion of that case. As

in *Schillereff*, Tellvik is not entitled to credit for time he served in another jurisdiction during the pendency of a separate case.

The above cases all show that a criminal defendant is only entitled to credit for time that he serves in custody while he is in custody solely on the case he is currently being sentenced on. Tellvik is asking this Court to award him credit for time he served in another jurisdiction while pending a felony trial and subsequent resolution by guilty plea on another jurisdiction's case. The law does not support Tellvik's request.

Tellvik's also appears to argue that failure to give him credit for all time served on all his cases violates the State's recommendation for a concurrent sentence. However, that is incorrect. The State recommended the Clark County sentence run concurrent to any other sentences. The court followed this recommendation and sentenced Tellvik to concurrent time. CP 25. The plea agreement also contemplated that Tellvik would receive credit for time served that he served solely on this case. CP 17. Whether a sentence is to run concurrent or consecutive to another sentence, and the amount of credit for time served a defendant is entitled to are two separate issues. Both issues are addressed separate in the plea agreement. The State argued at sentencing for the court to follow the law as it applied to the terms of the plea agreement. The State recommended the case run concurrent with Tellvik's other sentences and that the Court

award credit for time served “solely on this case.” This mirrors the language of the plea agreement. The State did not violate the agreement, and the law supports the amount of credit for time served that the sentencing court awarded. Tellvik’s claim fails.

D. CONCLUSION

The State followed the terms of the plea agreement which provided that Tellvik would receive credit for time served in custody “solely on this case.” The law provides that a defendant is entitled to credit for time served in this fashion, and case law supports the sentencing court’s calculation of credit for time served. The State respectfully asks this Court to uphold the sentencing court in all respects.

DATED this 13 day of April, 2013.

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