NO. 43819-4-II

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

STATE OF WASHINGTON, Respondent

v.

SAMUEL PATRICK FARLAND, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01224-7

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERRORS

I. THE TRIAL COURT HAD AUTHORITY TO SET THE RESTITUTION IN THE AMOUNT OF $22,264.05 BECAUSE FARLAND AGREED TO PAY FULL RESTITUTION ON UNCHARGED CRIMES IN EXCHANGE FOR THE STATE'S AGREEMENT NOT TO FILE ADDITIONAL CHARGES

II. THE TRIAL COURT'S CONTINGENT ORDER ON RESTITUTION IS NOT YET RIPE FOR REVIEW, AND FARLAND'S RIGHT TO APPEAL HAS NOT BEEN VIOLATED.

B. STATEMENT OF THE CASE

On January 12, 2012, Samuel Farland entered a guilty plea to one count of Burglary in the Second Degree as charged by information. CP 1; CP 3-20; 1 RP at 1-19. Attached to his statement on plea of guilty was an offer of settlement from the State. CP 17-19. The terms of the offer included a mid-range recommendation to 45 days confinement, and the following statement regarding restitution:

> "...To accept this offer, defendant agrees to pay restitution (in an amount presently understood to be determined) which could be established or modified by the court at a later date based on additional information. The defendant agrees to pay restitution to victims of uncharged crimes contained in the discovery, and/or dismissed counts."

CP 17. The offer of settlement also stated, "OTHER State agrees not to file any additional charges based on police report V11-12481." CP 18.

Farland's statement upon plea of guilty also included a summary of the prosecutor's recommendation as follows:

> "(g) The prosecuting attorney will make the following recommendation to the judge:
>
> 1. Recommend 45 days in jail with credit for time served.
> 2. No contact with Mary Jane's House of Glass.
> 3. State agrees not to file any additional charges based on police report V11-12481.
> 4. The state is aware the defendant admits to going to Mary Jane's House of Glass only once and taking only one item of less than $100.00 in value.
> 5. Payment of $200 court costs, $500 crime victim compensation fund fee, $800 court appointed attorney fees, $100 DNA fee, $500 fine and a restitution hearing to be set to determine defendant's restitution liability."

CP 7.

At the sentencing hearing, the court sentenced Farland to 45 days, as per the agreed recommendation. 2 RP at 80; CP 23. At no time did defense argue for less than the 45 days agreed by the State and defense, even though the standard sentencing range was 1 to 3 months. 2 RP at 78-84. The court set a restitution hearing for a later date. 2 RP at 82.

The restitution hearing was held on August 2, 2012. At that hearing, defense counsel contested for the first time the agreement to pay restitution for both incidents the State alleged the defendant participated in per the police reports. 1 RP at 57, 59, 63, 66. The trial court found that

there was a plea agreement on this case, and the terms required the defendant pay full restitution for uncharged crimes. 1 RP at 67.

The court took testimony from David Saberi, a partner at Mary Jane's House of Glass, the victim of the burglary Farland pled guilty to, and Adrian Beech, a representative from Farmer's Insurance. 1 RP at 26-45, 46-53. Farland also testified. 1 RP 54-61. On cross-examination, Farland admitted to going to Mary Jane's House of Glass more than one time. 1 RP at 57. Farland admitted that on a second occasion he provided transportation to other people to Mary Jane's House of Glass knowing that they were going to break in to Mary Jane's House of Glass. 1 RP at 58. Farland admitted that those people then did break in to Mary Jane's House of Glass and brought the items stolen back to the vehicle and that Farland assisted by driving. 1 RP at 58.

The trial court set restitution at $22,264.05, the amount owed to Mr. Saberi and to Farmer's Insurance for the two incidents of burglary to Mary Jane's House of Glass. 1 RP at 68-69. The court further indicated that if Farland successfully appealed the restitution amount, he would order double the amount of restitution from the single burglary in a total amount of $20,215.60. 1 RP at 69. The court cited to RCW 9.94A.753 for authority to order double the amount of the victim's loss. 1 RP at 71.

At no time did Farland move to withdraw his guilty plea due to a misunderstanding of the terms of the agreement with the State.

C. ARGUMENT

I. THE COURT HAD AUTHORITY TO SET RESTITUTION IN THE AMOUNT OF $22,264.05 BECAUSE FARLAND AGREED PURSUANT TO A PLEA AGREEMENT TO PAY RESTITUTION FOR THE UNCHARGED ACCOUNT

Farland argues on appeal that there was no plea agreement entered into with the State and therefore the court's authority in setting restitution is limited to the amount for the single count of Burglary to which he pled guilty. RCW 9.94A.753 allows for restitution to be paid for losses incurred by the victim as a result of the defendant's crime, and also to victims of uncharged or dismissed counts if agreed to by the defendant. RCW 9.94A.753(3), (5). Farland and the State entered into a plea agreement, as evidenced by the plea agreement attached to his statement upon plea of guilty, and the statements in his statement itself. CP 7, 17-19.

The general rule in criminal cases is that restitution may be ordered only for losses incurred as a result of crimes charged. *State v. Raleigh*, 50 Wn. App. 248, 252, 748 P.2d 267 (1988). A defendant cannot be ordered to pay restitution for loss beyond the scope of the crime charged absent an express agreement to the contrary. *Id.* (citing *State v. Eilts*, 94 Wn.2d 489,

617 P.2d 993 (1980); *State v. Hartwell*, 38 Wn. App. 135, 684 P.2d 778 (1984); *State v. Mark*, 36 Wn. App. 428, 675 P.2d 1250 (1984)). An agreement to pay restitution on uncharged crimes is a permissible component of a valid plea agreement. *State v. Lee*, 132 Wn.2d 498, 939 P.2d 1223 (1997). The ability to bargain for fewer convictions in exchange for paying more restitution is specifically allowed by statute. RCW 9.94A.753(5). It is clear from the terms of the plea agreement that Farland agreed to pay restitution to victims of uncharged crimes in exchange for the prosecution not filing additional counts and for its recommendation as to sentence.

A plea agreement is a binding agreement between the defendant and the State once a plea is accepted by the trial court. *State v. Miller*, 110 Wn.2d at 536 (citing *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977)). The State and a defendant may bargain for the amount of restitution to be paid, and for the payment of restitution on uncharged crimes involving the same or different victims. *See State v. Hunsicker*, 129 Wn.2d 554, 559, 919 P.2d 79 (1996). In *Hunsicker*, the defendant agreed to pay restitution for the full amount in exchange for the State not filing additional charges. *Id.* The court found that the agreement was binding and the court had the authority to impose an order for restitution in the full amount. *Id.*

Farland argues the plea agreement attached to his statement upon plea of guilty was not agreed to, and that further, the language contained therein is nothing but boilerplate to which this court should give no meaning. Plea agreements are contracts. *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003). A plea agreement is a contract and therefore issues concerning the interpretation of a plea agreement are questions of law reviewed de novo. *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003); *Tyrrell v. Farmers Ins. Co. of Wash.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000). The court must give words and provisions in a contract their ordinary meaning. *Oliver v. Flow Int'l Corp.*, 137 Wn. App. 655, 659, 155 P.3d 140 (2006). A plea agreement reasonably susceptible to different interpretations is ambiguous. *State v. Bisson*, 156 Wn.2d 507, 523, 130 P.3d 820 (2006). However, words and provisions in a plea agreement are not ambiguous simply because a party suggests an opposing meaning. *See Mayer v. Pierce County Medical Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (holding that contract terms are not ambiguous simply because one party suggests a different interpretation).

Farland does not actually contend that the plea agreement he entered into with the State is ambiguous; he simply declares the language is "boilerplate" and therefore it should be given no meaning by this court.

This argument is wholly without merit. As the words and provisions in a contract should be giving their ordinary meaning, the provision stating "The defendant agrees to pay restitution to victims of uncharged crimes contained in the discovery, and/or dismissed counts" CP 17, must be given its ordinary meaning. This is an express statement indicating that part of the agreement includes the defendant's agreement to pay restitution to victims of uncharged crimes in the discovery. This statement is abundantly clear. There is no ambiguity to resolve.

The issue becomes whether the plea offer was accepted and if not, then what is the appropriate remedy in this instance. Farland appears to argue there was no acceptance of the State's written plea agreement offer. However, this argument is disingenuous now as he attempts to take the benefit of the State's offer-escaping liability for a second confessed Burglary and a mid-range sentence recommendation- without living up to his end of the bargain. Also, from Farland's statement on plea of guilty and the circumstances of the plea and sentencing, it is clear there was a plea agreement. CP 7, 17-19. Not only was the plea agreement attached to Farland's statement upon plea of guilty, but there was never any argument regarding the amount of time sentenced. Farland never requested a low end sentence. Farland's guilty plea statement which his attorney prepared, shows there were terms of an agreement. That agreement was in writing

and the terms were clear: The State would recommend mid-range and not file the additional counts it had probable cause for and to which the defendant confessed, and in exchange the defendant would not argue for a lesser sentence, and would agree to pay restitution for all uncharged counts. Farland attempts to argue that he did not agree to this offer, however some of the terms are contained in his statement upon plea of guilty which he and his attorney prepared, and which he signed. CP 7. Had Farland pled guilty as charged without the benefit of the plea agreement, then the portion of his statement which indicated the prosecutor's recommendation would have stated, "unknown" or something to that effect, as Farland would not have known the State's recommendation. From the surrounding circumstances it is clear that Farland had accepted the State's offer of settlement.

"The integrity of the plea bargaining process requires that once the court accepted the plea, it cannot ignore the terms of the bargain, unless the defendant...chooses to withdraw the plea." *State v. Miller,* 110 Wn.2d 528, 536, 756 P.2d 122 (1988); *See also State v. Harrison*, 148 Wn.2d 550, 556-57, 61 P.3d 1104 (2003) (stating that plea agreements are contracts that require a prosecutor to adhere to the terms of the agreement). Farland cannot ignore the terms of the agreement which he later decides he does not like. The offer was for an agreement as a whole-

not the terms Farland decided to pick and choose. If there truly was no meeting of the minds on the entire agreement, then the choice of remedies is withdrawal of a guilty plea or specific performance of the agreement. However Farland is requesting a third remedy, wherein he gets to pick and choose the terms of the agreement which suit him.

Farland appears to argue that the appropriate remedy to this situation, wherein he either agreed to consequences that he now wishes he hadn't, or there wasn't a mutual understanding of the agreed upon terms, is a certain, reduced, amount of restitution. However, that is not the appropriate remedy here. When the terms of a plea agreement conflict with the law, or when the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea. *Miller*, 110 Wn.2d at 536; *Turley*, 149 Wn.2d at 399. *Miller*, 110 Wn.2d at 536; *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003). A plea agreement is indivisible when the plea is made to multiple counts at the same time, or described in one document, and accepted in one single proceeding. *Turley*, 149 Wn.2d at 400. A defendant who shows involuntariness as to one sentencing element in an indivisible plea agreement may move to withdraw the plea agreement or have specific performance of the agreement. *Id.*

As in *Turley, supra*, and *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006), Farland's plea agreement is indivisible from the restitution agreement, and Farland cannot seek rescission of one term, or one consequence of his plea. The Court in *Bisson, supra* addressed whether a defendant could withdraw his guilty plea only as to weapons enhancements only and not the underlying charges when terms of the plea agreement were illegal and rendered the defendant's plea involuntary. The Court held that the defendant could elect to withdraw his plea in its entirety, but could not withdraw his plea to the weapon enhancements alone. *Bisson*, 156 Wn.2d at 520. Farland cannot get the benefit of the bargain he made-the agreement not to charge additional crimes and standard range sentence recommendation- without also getting the consequence he agreed to. As in *State v. Moon*, 130 Wn. App. 256, 122 P.3d 192 (2005), and *State v. Hilyard*, 63 Wn. App. 413, 819 P.2d 809 (1991), Farland

> "agreed to accept a sentence which avoided a potentially more severe sentence as part of his negotiated plea agreement, as did the petitioner in *State v. Majors*, [94 Wn.2d 354, 616 P.2d 1237 (1980). He must be held to this bargain, just as the State is bound by the plea agreement. *See State v. Schaupp*, 111 Wn.2d 34, 38, 757 P.2d 970 (1988).

Hilyard, 63 Wn. App. at 420.

Farland must be held the plea agreement he entered into, or, if upon remand, he can show a basis for withdrawal of the plea based on mutual mistake as to the terms of the agreement he entered into, then he could withdraw his plea and the State would file additional charges upon which he could be tried or re-enter into plea negotiations. The appropriate remedy is not for Farland to choose which terms of the agreement suit him: the State's agreement not to file additional charges, a mid-range sentence recommendation, and ignore the terms of the agreement which he finds ill-fitting: payment of restitution in full on uncharged acts. This court should remand to the trial court for further proceedings on a potential motion to withdraw guilty plea, or for Farland to elect the remedy from those available to him: motion to withdraw a guilty plea or specific performance of the entire agreement.

II. FARLAND'S RIGHT TO APPEAL HAS NOT BEEN VIOLATED.

Farland argues that the trial court violated his right to appeal the restitution hearing decision by setting a contingent amount based on the outcome of his appeal. Farland's right to appeal was clearly not violated as he has filed an appeal, was appointed appellate counsel, and has an appellate court considering his claims. This evidences fulfillment of his right to appeal. The trial court in no way interfered with his present right

to appeal. Farland also argues that he would be unable to appeal a new order setting restitution in the contingent amount the trial court previously indicated. However, that would require a new order being entered at the trial court level which would be a final decision under RAP 2.2(a)(1) from which Farland could again appeal.

Further, the contingent order of the trial court cannot be reviewed until it is ripe. A possible, future order is not a final action which can be appealed. A claim is only ripe for review on direct appeal "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996). These three factors must be present before an issue is ripe for review. Farland seeks review of the trial court's conditional order setting restitution. This is not yet ripe for review as it is not a final judgment. The court must take further action before that becomes a final order. If this case is remanded for a new restitution hearing, or for reversal of the total restitution amount, it would be after the trial court re-enters a restitution order that it becomes final and appealable under RAP 2.2.

D. CONCLUSION

Farland entered into a plea agreement with the State whereby he agreed to pay restitution on uncharged counts and the State agreed not to file those additional counts. Farland cannot now claim this plea agreement did not exist, or claim only certain terms of the agreement should be enforced and not others. Farland cannot receive the benefit of the bargain without also suffering the consequences he bargained for. The court appropriately awarded restitution given the facts and circumstances of this case and the presence of an accepted offer of settlement. If Farland can establish facts to support a motion to withdraw a guilty plea, that may be an available remedy upon remand to the trial court. This case should be remanded to the trial court for proceedings consistent with determining whether Farland has a valid basis to withdraw his guilty plea, or if he wishes to proceed, knowing the State could then file additional charges. Otherwise, the restitution amount was properly determined by the trial court upon statutory authority to so order. Farland's claims the trial court exceeded its authority are without merit.

DATED this _____ day of June, 2013.

Respectfully submitted:

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