

No. 46458-6-II

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

STATE OF WASHINGTON, Respondent

v.

QUALAGINE A. HUDSON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JUDGE FRANK E. CUTHBERTSON

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR	1
II.	STATEMENT OF FACTS.....	2
III.	ARGUMENT.....	6
	A. Mr. Hudson Is Entitled To Withdraw His Plea.....	6
	B. Mr. Hudson’s Constitutional Rights Were Violated When The Prosecutor Unilaterally Stated Mr. Hudson Violated The Terms Of the Plea Agreement And He Was Denied An Evidentiary Hearing.	8
	C. The Trial Court Exceeded Its Statutory Authority When It Imposed A Variable Term Of Community Custody.....	12
D.	CONCLUSION	13

TABLE OF AUTHORITIES

Washington Cases

<i>In re Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980) _____	13
<i>In re Palodichuk</i> , 22 Wn.App. 107, 589 P.2d 269 (1978) (<i>abrogated on other grounds, State v. Henderson</i> , 99 Wn.App. 369, 375, 993 P.2d 928 (2000)) _____	12
<i>In re Personal Restraint of James</i> , 96 Wn.2d 847, 640 P.2d 18 (1982) _____	9
<i>State v. Franklin</i> , 173 Wn.2d 831, 263 P.3d 585 (2011) _____	13
<i>State v. Harris</i> , 102 Wn.App. 275, 6 P.3d 1218 (2000) _____	10
<i>State v. Jones</i> , 46 Wn.App. 67, 729 P.2d 642 (1986) _____	8
<i>State v. Olivia</i> , 177 Wn.App. 773, 73 P.3d 1016 (2003) _____	10
<i>State v. Paine</i> , 69 Wn.App. 873, 850 P.2d 1369, <i>rev. denied</i> , 122 Wn.2d 1024, 866 P.2d 39 (1993) _____	13
<i>State v. Perez</i> , 33 Wn.App. 258, 654 P.2d 708 (1982) _____	7
<i>State v. Sledge</i> , 133 Wn.2d 828, 946 P.2d 1199 (1997) _____	9
<i>State v. Tourtellotte</i> , 88 Wn.2d 579, 564 P.2d 799 (1977) _____	9
<i>State v. Winborne</i> , 167 Wn.App. 320, 273 P.3d 454 (2012) _____	13
<i>Wood v. Morris</i> , 87 Wn.2d 501, 554 P.2d 1032 (1976) _____	7
 <i>U.S. Supreme Court Cases</i>	
<i>McCarthy v. United States</i> , 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); _____	7
 <i>Statutes</i>	
RCW 9.94A.431 _____	6

RCW 9.94A.701 _____ 13

Rules

CrR 4.2(e) _____ 6

I. ASSIGNMENT OF ERROR

- A. The Nature Of And Reasons For The Plea Contract Agreement With Mr. Hudson At The Time He Entered An Alford Plea Were Not Made Part of the Court Record in Violation of CrR 4.2(e).
- B. Mr. Hudson's Constitutional Right To Due Process Was Violated When The Court Imposed Sentence Without An Evidentiary Hearing.
- C. The Trial Court Exceeded Its Authority When It Imposed A Variable Term Of Community Custody.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Where CrR 4.2(e) and RCW 9.94A.431, are not strictly complied with, is the defendant entitled to withdraw a plea of guilty?
- B. Where the State and defendant have entered into a plea agreement contract, is the constitutional right to due process violated where, on the accusation of the prosecutor, the plea contract is unilaterally withdrawn and without an evidentiary hearing, the court imposes a criminal sentence?

C. Did the trial court exceed its authority when it imposed a variable term of community custody?

II. STATEMENT OF FACTS

On January 17, 2012, Pierce County prosecutors charged Qualagine Hudson with two counts: first degree trafficking in stolen property and unlawful possession of a stolen vehicle for events that occurred on January 14, 2012 and January 3, 2012, respectively.

CP 1-2. On February 2, 2012, the charging information was amended to include a total of four counts of trafficking in stolen property, first degree; two counts of theft of a motor vehicle; two counts of attempted theft of a motor vehicle; one count of conspiracy to commit theft of a motor vehicle; and one count of leading organized crime. CP 7-18.

On July 12, 2012, Mr. Hudson entered an *Alford* Plea on all counts. CP 33-46. At that hearing, as the prosecutor stated, "I have passed to the Court the Statement of Defendant on Plea of Guilty, and most significantly, a plea agreement, and I would ask the Court to review that for a full understanding of what is anticipated." 7/12/12 RP 2; CP 33-46. Judge McCarthy acknowledged there was the Statement of Defendant on Plea of Guilty, a plea agreement, and a waiver of jury trial on aggravating

factors on one count. 7/12/12 RP 4. The court went through each of the charges to determine if Mr. Hudson understood the charge and standard range sentence for each. 7/12/12 RP 76-7.

In its questioning, the court also asked “Has anyone threatened any harm to you of any kind or made any promise to you *other than is set forth in the contract?*” 7/12/12 RP 7.

(Emphasis added). Mr. Hudson replied in the negative. *Id.* The court again asked, “Even though your plea is in the form that you’ve submitted it, in the form of a *Newton* or *Alford* plea, to take advantage of the contract and offer, if I accept the plea in that form and if I find that there is a factual basis to find you guilty of these crimes, I will sentence you as if you admitted and acknowledged these crimes. Do you understand that?” 7/12/12 RP 8. Mr. Hudson answered in the affirmative. The court accepted the plea of guilty to all counts. 7/12/12 RP 10. The nature and reason for the plea agreement contract were *not* made part of the oral record.

The prosecutor requested that Mr. Hudson be released on personal recognizance and stated:

“Most all conditions, of course, of the order are significant, but one very significant condition that I have written in, “Comply with all conditions imposed under this order on the record on 7/12/12” which I would state, the State’s position is

that the plea agreement is what we are referring to in that paragraph; the defendant must comply with every aspect of the plea agreement.” 7/12/12 RP 11.

Before adjourning, the prosecutor stated, “Your Honor, I’d prefer to keep the contract in my custody.” 7/12/12 RP 11. The court assented. Id. Only the *Alford* plea was filed. CP 33-46. A sentencing hearing was set for March 2013. Id.

On November 6, 2012, the State filed a motion and declaration and order for a bench warrant for failure to comply with the conditions of release. CP 50-52. Mr. Hudson was taken into custody to the Pierce County Jail and held without bond through June 2014. 6/6/14 RP; CP 53-54.

Approximately 18 months later after his arrest, Judge Cuthbertson held a sentencing hearing. 6/6/14 RP 2. Defense counsel explained to this court that there had been a longstanding cooperation agreement between the State and Mr. Hudson. Mr. Hudson believed that he met the terms of the agreement. 6/6/14 RP 3. Counsel then sought to withdraw from representation because he felt he could not file the motion Mr. Hudson wanted him to, presumably to withdraw the plea of guilty; counsel was very afraid of the potential consequences to Mr. Hudson. 6/6/14 RP 3.

The court denied the motion for substitution of counsel. 6/6/14 RP 5.

The State's position was that after his release on his own recognizance in November 2012, Mr. Hudson did not stay in contact and was apprehended driving a stolen vehicle in another county. 6/6/14 RP 4.

The State recommended that an evidentiary hearing be set to determine whether, in fact, Mr. Hudson had violated the terms of the agreement. 6/6/14 RP 5. Defense counsel asked, "Will the Court permit, as opposing counsel suggests, that there be a determination of a future hearing to determine if he's met the terms of the agreement?" Without further discussion, the court stated, "We're going forward today." 6/6/14 RP 5.

Mr. Hudson disputed the prosecutor's accusations. He reported that he had maintained full time employment, as well as made contact with his "handler" on a daily basis, either through text messages or in person meetings. 6/6/14 RP 9-10. He presented the court with a list of cases in which he had assisted law enforcement and spoke of several cases where he had tried to be of assistance. He also disputed that he was arrested in a stolen vehicle. 6/6/14 RP 10, 12.

The Sentence included the following terms under Section 4.6 (A): The defendant shall be on community custody for the longer of (1) the period of early release. RCW 9.94A.728(1)(2): or (2) the period imposed by the court, as follows: Count X- 18 months for Violent Offenses. CP 86. Mr. Hudson filed a motion to withdraw his plea of guilty. CP 97-115. There is no ruling on that motion in the record. Mr. Hudson makes this timely appeal. CP 117-118.

III. ARGUMENT

A. Mr. Hudson Is Entitled To Withdraw His Plea Of Guilty.

With respect to pleas, the language of CrR 4.2(e) requires:

The nature of the agreement and the reasons for the agreement *shall* be made part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.431 may be determined at the same hearing at which the plea is accepted. CrR 4.2(e).

RCW 9.94A.431 similarly provides:

If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they *shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement.*

(Emphasis added).

“The language of CrR 4.2(e) is clear: *any* plea bargain must be spread on the record at the plea hearing. The criminal rules were not made to be broken or ignored.” *State v. Perez*, 33 Wn.App. 258, 262, 654 P.2d 708 (1982). The *Perez* court traced the strict compliance requirement, citing that such compliance would help reduce the “great waste” of judicial resources required to process frivolous attacks on guilty plea convictions and noted the difficulty of disposing of such cases “when the original record is inadequate.” *Id.* at 263 (citing *McCarthy v. United States*, 394 U.S. 459, 465, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); *Wood v. Morris*, 87 Wn.2d 501, 554 P.2d 1032 (1976)).

In *Perez*, during the colloquy to determine whether the plea was voluntarily made, the defendant answered “No” when asked if there were any other agreements or arrangements. *Perez*, 33 Wn.App. at 262. Later, when the defendant moved to withdraw the guilty plea, it became apparent there was an undisclosed agreement. *Id.* The Court went on to hold:

Therefore, we now hold that, with regard to pleas taken after publication of this opinion, failure to comply with CrR 4.2(e), *standing alone*, will be grounds

for withdrawal of a plea. Compliance with the rule is, of course, the responsibility of the attorneys and particularly of the prosecutor, who has an interest in obtaining a secure plea. No judge can make an agreement part of the record if it is not disclosed.

Perez, 33 Wn.App. at 263.

Here, the trial court was aware there was a written contract between the prosecutor and Mr. Hudson. The written agreement was not entered into the record. In fact, the record reflected the prosecutor wanted to keep the copy of the plea agreement. Neither the SRA or CrR 4.2 requires a plea agreement to be in writing. However, the problem arises because both the SRA and CrR 4.2 do require the nature and reasons for the agreement to be stated on the record at the time the plea is made. *State v. Jones*, 46 Wn.App. 67, 70, 729 P.2d 642 (1986). That did not occur in this case. The record here is inadequate and under Washington law, failure to comply with CrR 4.2 entitles Mr. Hudson to withdraw his plea of guilty. Mr. Hudson respectfully asks this Court to remand to the superior court with instructions that he may withdraw his plea of guilty.

B. Mr. Hudson's Constitutional Rights Were Violated When The Prosecutor Unilaterally Stated Mr. Hudson Violated The

Terms Of the Plea Agreement And He Was Denied An Evidentiary Hearing.

Prosecutorial negation of a plea agreement presents an issue of constitutional magnitude. *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977); *In re Personal Restraint of James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982). A plea bargain involves the waiver of constitutional rights: the right to a jury trial, to confront one's accusers, present witnesses in one's own defense, and to be convicted by proof beyond a reasonable doubt. *Tourtellotte*, 86 Wn.2d at 583. "For this reason, a plea bargain warrants the same judicial solicitude given a guilty plea...and has constitutional significance." *In re James*, 86 Wn.2d at 849. A breach of the plea agreement violates the Due Process Clause of the Fourteenth Amendment. *State v. Sledge*, 133 Wn.2d 828, 839, 946 P.2d 1199 (1997).

A defendant is entitled to rely upon an agreement made and accepted in open court. *Tourtellotte*, 88 Wn.2d at 584. ("If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question.") A plea agreement is a contract and must be construed under contract principles. *State v. Harris*, 102

Wn.App. 275, 280, 6 P.3d 1218 (2000). Further, the terms of such an agreement “are generally defined by what the defendant understood them to be when he entered into the agreement.” *State v. Olivia*, 177 Wn.App. 773, 779, 73 P.3d 1016 (2003).

In this case, the terms of the agreement were never made a part of the public record. This is particularly problematic as Mr. Hudson believed he had fulfilled the requirements and the State later accused Mr. Hudson of noncompliance with the requirements. Where a defendant has entered into a contractual agreement with the State, and is later accused of misconduct or noncompliance, “due process requires that before the State may be relieved of its promises, there *must* be an evidentiary hearing.” *In re James*, 96 Wn.2d at 850.

In *James*, the defendant pleaded guilty pursuant to a plea bargain with the State. He pleaded guilty to second-degree robbery and the prosecutor was obliged to recommend probation. *James*, 96 Wn.2d at 848. James was released on his own recognizance, but was soon arrested for two misdemeanors. The alleged misdemeanors occurred after both the plea agreement and plea were entered into the record. At sentencing, the State accused him of committing the additional misdemeanors and claimed those

misdemeanors excused its performance of recommending probation. James denied the validity of the accusations. Without holding an evidentiary hearing, the court sentenced him to ten years in prison. *Id.* at 848-49.

The *James* court held, “A hearing ensures that the right or expectation is not arbitrarily denied. With plea bargains, if there were no evidentiary hearings, a defendant *merely accused of post-plea crimes* but innocent and later acquitted of them, could nonetheless lose the benefit of his or her bargain.” *James*, 96 Wn.2d at 851.

At an evidentiary hearing, the State must prove by a preponderance of the evidence that the defendant committed the misconduct and that misconduct breached the agreement. *State v. Morley*, 35 Wn.App. 45, 665 P.2d 419 (1983). An issue of noncompliance by a defendant is a question of fact to be determined by the court. *Id.* at 48. “[t]o permit the State to unilaterally nullify an agreement would constitute “manifest impropriety” and an abdication of the Court’s duty to ensure “fairness and candor.” *Torutellotte*, 88 Wn.2d at 583.

Similar to *James*, Mr. Hudson clearly disputed the State’s accusations of crimes that allegedly occurred after the guilty plea

had been entered. And, like *James*, asked his attorney to withdraw his guilty plea. *James*, 96 Wn.2d at 851. Here, both counsel for the state and the defendant requested an evidentiary hearing: Mr. Hudson did not voluntarily waive his right to an evidentiary hearing. The trial court apparently disagreed a hearing was necessary and on the basis of the State's accusations, sentenced Mr. Hudson.

Mr. Hudson does not concede that the court complied with CrR 4.2 and RCW 9.94A.431, and maintains that he is entitled to withdraw his guilty plea. As an alternative argument, he contends that his constitutional right to an evidentiary hearing was violated. The appropriate remedy, as in *James*, is for the trial court to decide, with the defendant's preference to be accorded considerable weight, whether to permit Mr. Hudson to withdraw his plea or to grant specific performance of the bargain. *In re James*, 96 Wn.2d at 851-52; *In re Palodichuk*, 22 Wn.App. 107, 109, 589 P.2d 269 (1978) (*abrogated on other grounds, State v. Henderson*, 99 Wn.App. 369, 375, 993 P.2d 928 (2000)).

C. The Trial Court Exceeded Its Statutory Authority When It Imposed A Variable Term Of Community Custody.

The right to challenge sentencing conditions is not waived by a failure to object at the trial court. *State v. Paine*, 69 Wn.App. 873,

850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024, 866 P.2d 39 (1993).

A sentence imposed without statutory authority can be addressed for the first time on appeal, and a reviewing court has the power and duty to grant relief when necessary. *Id.* at 883-84.

A trial court may only impose a sentence that is authorized by statute. *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.701 and .702 delineate the specific number of months for community custody, depending on the crime. However, a court is not authorized to impose a term of community custody that is equal to a variable and speculative period of earned early release time. *State v. Winborne*, 167 Wn.App. 320, 328-29, 273 P.3d 454 (2012). Rather, the court must instead determine the precise length of community custody at the time of sentencing. *State v. Franklin*, 173 Wn.2d 831, 836, 263 P.3d 585 (2011).

Mr. Hudson's contingent sentence, the longer of the period of early release or 18 months, violates RCW 9.94A.701. This case should be remanded to the trial court with instruction to strike unauthorized portion of the sentence.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hudson respectfully asks this Court to remand this matter to the Superior

Court with instructions to allow Mr. Hudson to withdraw his guilty plea or in the alternative, to grant him specific performance of the bargain.

Respectfully submitted this 22nd day of January, 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the state of Washington, that on January 22, 2015, I mailed by USPS, first class, postage prepaid, a true and correct copy of the brief of appellant to:

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