

NO. 46458-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

QUALAGINE APERO HUDSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 12-1-00220-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant can appeal the denial of his motion to withdraw his guilty plea when his motion has not been heard or decided.
2. Whether defendant's plea satisfies RCW 9.94A.431 and CrR 4.2.
3. Whether the trial court abused its discretion in not holding an evidentiary hearing prior to sentencing defendant.
4. Whether the trial court imposed a variable sentence regarding community custody on count X.

B. STATEMENT OF THE CASE.

1. Procedure

On January 17, 2012, the State charged Qualagine Hudson ("defendant") with one count of trafficking in stolen property in the first degree and one count of unlawful possession of a stolen vehicle. CP 1-2. On February 2, 2012, the State filed an amended information amending count II from unlawful possession of a stolen vehicle to theft of a motor vehicle, adding an additional three counts of trafficking in stolen property in the first degree, an additional two counts of theft of a motor vehicle, two counts of attempted theft of a motor vehicle, conspiracy to commit theft of a motor vehicle, and leading organized crime. CP 7-18. The

count of leading organized crime included that the aggravating circumstance that the crime constituted a major economic offense. CP 11.

On July 12, 2012, defendant pled guilty to the amended information. CP 33-46. As part of this agreement, defendant also entered into a plea agreement and contract. CP 127-132. Pursuant to the plea and the contract, defendant was released from custody on his own personal recognizance pending sentencing. CP 29-30. On November 6, 2012, the State requested a bench warrant for defendant's arrest after learning that defendant had new charges in King County Superior Court, which violated his conditions of release. CP 50-52. Defendant was arrested on November 20, 2012. CP 133.

On June 6, 2014, defendant was sentenced to 149 months in prison on count X; 84 months on counts I, IV, VIII, and IX; 57 months on counts II, II, and VI; 42.75 on counts V and VII. CP 78-94. The judgment and sentence was corrected to add 42.75 months on count XI. CP 122-123. Defendant was also sentenced to 18 months of community custody on count X. CP 86.

On June 27, 2014, defendant filed a motion to withdraw his guilty plea. CP 97-115. Defendant then filed this timely appeal. CP 17-118.

2. Facts

The facts of the case are not at issue. In brief, defendant was the leader of a scheme to steal and resell a number of vehicles. CP 12-18. The vehicles stolen by defendant totaled approximately \$170,000.00. CP 18.

C. ARGUMENT.

1. DEFENDANT'S APPEAL IS PREMATURE AS THE TRIAL COURT HAS NOT RULED ON HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

Pursuant to RAP 2.2(a)(10) and (11), an order granting or denying a motion for vacation or arrest of judgment is a decision of the superior court that may be appealed. In this case, defendant's appeal is based on a plea of guilt. Defendant has since moved to withdraw this plea. CP 97-115. Defendant also filed a letter with the trial court that should his motion be denied, he wished the trial court to transfer his motion to the Court as a personal restraint petition. CP 116. It does not appear from the record that the trial court has ruled on his motion or transferred it to the Court as a personal restraint petition. Defendant glosses over this fact in his brief before arguing that he is entitled to withdraw his guilty plea. BOA 6.

"[A] claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the

challenged action is final." *Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wn. App. 92, 106, 38 P.3d 1040, 1047 (2002)(quoting *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 366-67, 940 P.2d 286, 289 (1997)). In this case, defendant is essentially appealing the denial of his motion to withdraw his guilty plea, when it appears from the record that no ruling on this motion has been made. As he is attempting to appeal an action that is not final, his claim is not ripe. The Court should dismiss this appeal, or remand to the trial court for consideration of defendant's motion¹.

2. DEFENDANT'S PLEA SATISFIES THE REQUIREMENTS OF RCW 9.94A.431 AND CrR 4.2 AS THE TRIAL COURT ACKNOWLEDGED THE CONTRACT ON THE RECORD.

A plea bargain is no more than a proposal or an offer and the bargain is confirmed by the defendant entering a guilty plea on the record before the court. *State v. Julian*, 102 Wn. App. 296, 303, 9 P.3d 851 (2000). "A 'plea bargain is analogous to a contract right' and its terms are read as a contract. But plea agreements 'are more than simple common law contracts' because due process requires that the State adhere to the agreement's terms." *State v. Armstrong*, 109 Wn. App. 458, 461, 35 P.3d 397 (2001) (quoting *State v. James*, 35 Wn. App. 351, 355, 666 P.2d 943,

¹ Alternatively, defendant could move the trial court to transfer his motion to withdraw his plea as a contemporaneous PRP to this direct appeal.

review denied, 100 Wn.2d 1023 (1983), and *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997)). Plea agreements are favored by the courts. *Id.*

Neither RCW 9.94A.090 [recodified as RCW 9.94A.431] nor CrR4.2 requires the plea agreement to be in writing, but both require the agreement be stated on the record to the court. *Julian*, 102 Wn. App. at 296. The parties are required to state the nature of the agreement and the reasons for the agreement. RCW 9.94A.090(1). Those reasons, of course, must be truthful and must be sufficient to satisfy the court that the plea agreement is in the interest of justice. *State v. Schaupp*, 111 Wn.2d 34, 41, 757 P.2d 970, 973 (1988). The defendant and both counsel should provide any further information the court requests, and may not purposefully withhold information. *Id.* If the court is not satisfied with the information given, it may reject the plea agreement or defer its decision until further information is provided. *Id.*

"Court record includes, but is not limited to: (i)any document, information, exhibit or other thing that is maintained by a court in connection with a judicial proceeding..." GR31(c)(4). In addition, court records include "all records the court has considered in making any ruling, whether 'dispositive' or not." *State v. McEnroe*, 174 Wn.2d 795, 809, 279 P.3d 861 (2012)(quoting *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005)).

In this case, defendant plead guilty to an amended information based on a plea agreement. Part of this agreement was contingent on defendant assisting law enforcement. A separate plea agreement and contract enumerated what was required of defendant as part of this plea agreement ("contract"). CP 127-132. The State handed this contract up to the trial court at the time of the plea. 7/12/12 RP 2. The trial court acknowledged that there was a Statement of Defendant on Plea of Guilty, the contract, and a waiver of jury trial on aggravating factors. 7/12/12 RP 4. As defendant points out in his brief, during the plea colloquy, the court referenced that there was a separate contract. BOA 3; 7/12/12 RP 7. After inquiring of the defendant that the plea was made knowingly, intelligently, and voluntarily, the trial court accepted the plea of guilty to all counts. 7/12/12 RP 10. The contract is also referenced with regard to his conditions of release by both the State and the trial court. 7/12/12 RP 11. Defendant was explicitly told that he must comply with every aspect of the plea agreement. 7/12/12 RP 11. Had he complied with the contract, defendant's sentence would have been greatly reduced. CP 131. Once the plea was concluded, the State asked to keep the contract rather than have it filed. 7/12/12 RP 11. The plea in this case complies with RCW 9.94A.431 and CrR 4.2.

Defendant cites to *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982), for his argument that he should be allowed to withdraw his plea for a violation of CrR 4.2(e); however, *Perez* indicates that the

violation of CrR 4.2(e) turns on the fact that there was an undisclosed agreement that the trial court did not know about. *Perez*, 33 Wn. App. at 262 ("Now it turns out, there was an undisclosed agreement."). The parties must disclose the agreement in order to comply with CrR 4.2(e). *Id.* at 263. *Perez* is distinguishable from this case as the trial court was plainly aware of the contract in this case and acknowledged on the record that he had reviewed it. The fact that the contract was not filed at the time of the plea does not mean that the plea agreement was stated on the record. Defendant's plea agreement is valid and the parties and trial court complied with CrR 4.2.

3. AN EVIDENTIARY HEARING WAS NOT REQUIRED BECAUSE DEFENDANT ADMITTED HE DID NOT COMPLY WITH THE CONTRACT.

Whether the State is relieved of its obligations under a plea agreement by virtue of the defendant's nonperformance of his obligations is a question of fact to be determined after an evidentiary hearing at which the State has the burden of proving the defendant breached the agreement by a preponderance of the evidence. *State v. Morley*, 35 Wn. App 45, 47-48, 665 P.2d 419 (1983)(citing *In re Pers. Restraint of James*, 96 Wn.2d 847, 851-52, 640 P.2d 18 (1982)). However, the Court need not order an evidentiary hearing if defendant admitted breaching the agreement. *State v. Hall*, 32 Wn. App. 108, 110 645 P.2d 1143 (1982).

Noncompliance of the plea agreement is a question of fact to be determined by the court. *James*, 96 Wn.2d at 850.

Neither the prosecutor nor defendant explicitly asked for an evidentiary hearing, although the idea is floated to the trial court as a possibility. This is contrary to defendant's statement that "both counsel for the state and the defendant requested an evidentiary hearing." BOA 12. The record indicates that defendant's trial counsel initially asked to withdraw from the case. 6/6/14 RP 2. Defense counsel then told the trial court that defendant believed he had met the terms of his contract, but that defense counsel does not want to engage in the activities defendant has asked him to perform and asks to withdraw from the case. 6/6/14 RP 3.

The prosecutor responds that defendant has been in jail since November of 2012, and the defendant has resisted being sentenced and has been contacting various detectives to try to provide them with information. 6/6/14 RP 4. After sitting in jail for a year and a half, this was the first time that the prosecutor had heard that defendant claimed he fulfilled his contract. 6/6/14 RP 4. The prosecutor says, "If we want to set this for a hearing to determine whether he violated the contract, let's do that sooner rather than later..." 6/6/14 RP 4. The trial court then denies defense counsel's motion to withdraw. 6/6/14 RP 5. Trial defense counsel then asks, "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?" 6/6/14 RP 5. The trial court then says they are going forward that day. 6/6/14 RP 5.

Defendant does not object to proceeding, nor does he actually request a hearing to determine compliance with the contract. In addition, at this point of the hearing, neither the defendant nor his counsel argues that he has in fact complied with the contract.

During sentencing defendant admitted, "I was not completely, 100 percent forthright about it [a stolen vehicle he was arrested in], and that's kind of how things fell apart." 6/6/14 RP 10. Defendant then admitted that the detective he was working with said there was a problem, but that they could try to renegotiate [the contract]. 6/6/14 RP 10. Defendant also admitted that his attorney told him that they would try to get a partial deal. 6/6/14 RP 10. He went on to tell the court how he and his new attorney "tried to revive some type of agreement with the prosecutor." 6/6/14 RP 10.

These statements constituted proof that he violated the terms of the contract. The contract specifies, "A reasonable belief on the part of the deputy prosecuting attorney assigned to the case that the defendant is not being completely truthful will result in a violation of the agreement." CP 130. Defendant admits he was not completely truthful. This is a violation of the contract.

The contract also requires that the defendant not violate any laws. CP 128. As he was arrested in a stolen car, it is a logical inference that he violated the law. This is another violation of the contract.

Based on these admissions by defendant, it was harmless error not to hold an evidentiary hearing to determine whether defendant complied with the terms of the contract because it is clear from the record that he violated the contract.

4. THE COURT DID ERR IN IMPOSING COMMUNITY CUSTODY AS STATED IN THE JUDGMENT AND SENTENCE.

A sentence is not indeterminate merely because defendant may earn early release in lieu of community custody. *State v. Bruch*, No. 90021-3, --- P.3d ---, 2015 WL 1259722, at *6 (Mar. 19, 2015). The trial court is not prohibited from referencing in the judgment and sentence the procedures under RCW 9.94A.729(5). *Id.*

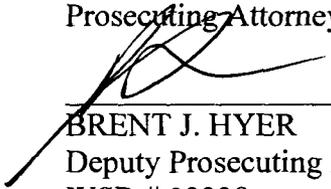
Here, the trial court properly imposed community custody for the longer of the period of early release or of 18 months for the violent offense. CP 86. As the Supreme Court recently held in *Bruch*, this does not violate RCW 9.94A.701. The Court should uphold defendant's sentence.

D. CONCLUSION.

Defendant voluntarily entered into a plea agreement and contract with the State in hopes of earning a reduced sentence. Unfortunately for the defendant, he then violated the contract and received a lengthy sentence. The Court should uphold defendant's sentence as there was no violation of CrR 4.2. There was no need for an evidentiary hearing as defendant admitted violating the contract, so if there was an error in not holding a hearing, it was harmless in light of defendant's admissions. The trial court also correctly imposed community custody pursuant to *Bruch*. Defendant's appeal should be dismissed and his plea and sentence upheld.

DATED: May 12, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

5.13.15 Heleen Kar
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PIERCE COUNTY PROSECUTOR

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