

FILED

JAN 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28589-8-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JARED MARSHALL GOLLEHON,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
HONORABLE MICHAEL G. MCCARTHY

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF APPELLANT'S ISSUE

An express condition of acceptance of the plea agreement was that all parties, including the police officer victim, agree to the terms of the joint recommendation. By offering reservations about the recommendation to the sentencing court, did the state undercut its recommendation for an exceptional sentence downward and breach the plea agreement?¹

B. RESPONDENT'S ANSWER TO APPELLANT'S ISSUE

The State did not violate the plea agreement.²

C. RESTATEMENT OF FACTS PERTINENT TO ISSUE

When Officer³ Greg Cobb attempted to detain Mr. Gollehon, who was walking in a high crime area, Mr. Gollehon ran and also fired shots at the pursuing officer. CP 72. As part of the negotiated settlement, Mr. Gollehon required the victim, Officer Cobb, to be fully on board and in agreement with the terms of the joint recommendation. RP 17, 19–21.⁴

¹ Brief of Appellant (Amended), p. 1.

² Brief of Respondent, p. 1.

³ The Declaration of Probable Cause refers to Greg Cobb as a police officer. CP 72. In the transcript, he is referred to sometimes as “Officer Cobb” and elsewhere as “Sergeant Cobb”. In this brief, he will be referred to as “Officer Cobb”.

⁴ “... [M]y client had told me specifically that, you know, he wasn't comfortable going along with the plea agreement unless everybody was on board, particularly Sergeant Cobb ... [M]y client has specifically said that he wasn't going to go forward with it unless everybody was on board.” RP 17.

The state acknowledged Mr. Gollehon would not have agreed to plead guilty in the absence of that representation by the state. RP 18-21. Prior to the plea, the state affirmatively represented that Officer Cobb was in agreement. CP 4; RP 10.

Mr. Gollehon entered an *Alford*⁵ plea to first degree assault. CP 50; RP 6. As agreed, the prosecutor recommended an exceptional sentence downward of 185 months. RP 8. The court asked Officer Cobb if he wanted to say anything. RP 11. Officer Cobb responded, “Your Honor, I defer to the prosecutor’s judgment. Anything I have to say would be counter-productive at this time.” RP 11. The court declined to follow the joint recommendation and imposed a low end standard range sentence of 240 months. RP 12-13.

Mr. Gollehon later moved for resentencing and/or to withdraw his guilty plea identifying Officer Cobb’s statements as a material breach of

“... My client would not have signed the plea agreement, based on my discussions with my client, had not the State made representations that Sergeant Cobb was going to be fully in agreement with the recommendations.” RP 19-20.

“... Sergeant Cobb's agreement to follow the joint recommendations, based on my client's representations to me, was key to my client taking the deal.” RP20.

“... [M]y client took the deal specifically and precisely because of the fact that Sergeant Cobb was going to be on board and was going to be in agreement with the joint recommendations” RP 21.

⁵ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

the plea agreement. CP 12–14, 33–34.⁶ After hearing, the court denied the motion. CP 3; RP 16–25; 26–27. This appeal followed. CP 2.

D. ARGUMENT IN REPLY TO STATE’S RESPONSE

Where the evidence established a key condition of the plea was not met, the trial court abused its discretion in denying the motion to withdraw the guilty plea

A trial court's denial of a motion to withdraw a guilty plea for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998); State v. Robinson, 150 Wn. App. 934, 937, 210 P.3d 1045 (2009).

The conditions for a valid plea “presuppose fairness in securing agreement between an accused and a prosecutor.... The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.” Santobello

⁶ The Commissioner’s Ruling in this case dated November 2, 2010, refers to a prior motion to withdraw guilty plea, which was apparently filed by Mr. Gollehon acting *pro se* and transferred by the superior court to this court for consideration as a personal restraint petition. The PRP was dismissed in February 2009 on the court’s motion for failure to file the statement of finance form. Commissioner’s Ruling, No. 285898-III, at p. 2–3.

v. New York, 404 U.S. 257, 261–62, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

“[W]hen the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand: ‘[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.’ ”

Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547(1984) (citing Santobello, 404 U.S. at 262, 92 S.Ct., at 499).

Here, it is undisputed that the plea agreement required the victim Officer Cobb to be fully on board and in agreement with the negotiated charge of first degree assault and sentencing recommendations. The fulfillment of the requirement was part of the inducement causing Mr. Gollehon to enter into the agreement. Relying on the State’s affirmative representation that the officer was in full agreement, Mr. Gollehon pled guilty.

At sentencing, the prosecutor explained at great length the various reasons for negotiating a settlement, including lack of physical evidence and loss of previously supportive witnesses. RP 7–11. The court then asked Officer Cobb if he wanted to say anything about the matter. Officer Cobb expressed his reservations about the negotiated settlement, saying “I

defer to the prosecutor's judgment" and "anything I have to say would be counter-productive at this time." Officer Cobb's spoken reservations clearly undercut a fundamental part of the plea agreement that the officer be fully on board.

Officer Cobb's status in this case is two-fold—he is both the victim of the crime and a police officer in the county where the crime is being prosecuted. As a police officer, he would surely have an interest in participating in the investigation of the crime committed against him. An investigating officer is part of the prosecution team and, by agency principles, is bound by the prosecutor's agreement. State v. Sanchez, 146 Wn.2d 339, 356–359, 46 P.3d 774 (2002) (Chambers, J., concurring in part, dissenting in part); Sanchez, 146 Wn.2d at 359–370 (Madsen, J., dissenting).⁷

As a victim of a crime, Officer Cobb would otherwise have the right to speak on his own behalf at sentencing. Wash. Const. article I, §35;

⁷ Five justices – the numerical majority – held this way. Although what has been denominated as the opinion of the Court held that the investigating officer was not bound by the plea agreement, only four justices joined that opinion. An equal number joined the dissenting opinion of Justice Madsen and would have bound the investigating officer to the plea agreement. Justice Chambers joined the dissenters as far as the investigating officer being bound by the plea agreement. Thus, a majority of the Court has held that the investigating officer is bound by the prosecutor's agreement.

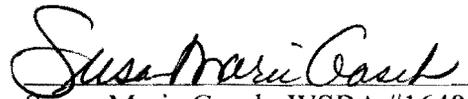
RCW 7.69.030. Under the facts of this case, however, the State made the victim officer's full approval an integral part of the plea agreement. Due process requires that the prosecutor adhere to the terms of the plea bargain agreement. Santobello, *supra*.

A plea agreement is a contract and *this* plea agreement required Officer Cobb's unqualified acceptance of its terms, whether in his role as victim or as member of the prosecuting team or a combination of both. The reservations expressed by the officer violated the terms of the plea agreement.

E. CONCLUSION

For the reasons stated here and in the initial brief of appellant, this Court should reverse the conviction and sentence, and remand this matter to the trial court before a different judge, allowing Mr. Gollehon the choice between specific performance of the original plea agreement or withdrawal of his plea.

Respectfully submitted this 24th day of January, 2011.


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Attorney for Appellant

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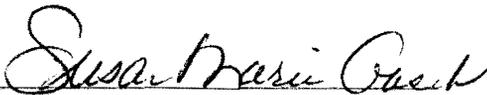
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| JARED MARSHALL GOLLEHON, |) | PROOF OF SERVICE (RAP 18.5(b)) |
| Defendant/Appellant |) | |

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 24, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or personally served, as appropriate, a true and correct copy of reply brief of appellant:

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