

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

FILED
MAY 14 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JARED MARSHALL GOLLEHON,

Defendant/Appellant.

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

BRIEF OF APPELLANT
(Amended)

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	4
	The state violated the plea agreement by offering reservations that under-cut its recommendation of an exceptional sentence downward.....	4
D.	CONCLUSION.....	11

AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Mabry v. Johnson</u> , 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).....	11
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	2
<u>Santobello v. New York</u> , 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).....	5, 9, 10

<u>In re Lord</u> , 152 Wn.2d 182, 94 P.3d 352 (2004).....	8
<u>State v. Carreno-Maldonado</u> , 135 Wn. App. 77, 143 P.3d 343 (2006).....	9
<u>State v. Coppin</u> , 57 Wn. App. 866, 791 P.2d 228, <i>rev. denied</i> , 115 Wn.2d 1011 (1990).....	6
<u>State v. Harris</u> , 102 Wn. App. 275, 6 P.3d 1218 (2000).....	11
<u>State v. Jerde</u> , 93 Wn. App. 774, 970 P.2d 781, <i>rev. denied</i> , 138 Wn.2d 1002 (1999).....	6, 7
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006).....	7
<u>State v. Sanchez</u> , 146 Wn.2d 339, 46 P.3d 774 (2002).....	6
<u>State v. Sledge</u> , 133 Wn.2d 828, 947 P.2d 1199 (1997).....	5, 10
<u>State v. Talley</u> , 134 Wn.2d 176, 949 P.2d 358 (1998).....	6
<u>State v. Tourtellotte</u> , 88 Wn.2d 579, 564 P.2d 799 (1977).....	4, 5, 10

Statutes

U.S. Const. amend 14.....	5
Wash. Const. art. I, § 35.....	6
RCW 7.69.030.....	6

Court Rules

CrR 4.2(f).....	7
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant’s motion to withdraw his guilty plea.

2. The state violated appellant’s due process rights when it breached the plea agreement by undercutting its agreed sentence recommendation.

Issue pertaining to assignments of error.

An express condition of acceptance of the plea agreement was that all parties, including the policeman 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?

B. STATEMENT OF THE CASE

The state charged appellant Jared Gollehon with first degree assault with a firearm enhancement, first degree unlawful possession of a firearm, and possession of a short-barreled shotgun or rifle. CP 69–70. The state filed an affidavit of probable cause alleging that after being detained by Officer¹ Cobb in a high crime area, Gollehon ran away and

¹ 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”.

subsequently fired gun shots at the pursuing officer. Gollehon was thereafter arrested. CP 72.

In a negotiated settlement, the state amended the charges to first degree assault without the firearm enhancement, and moved to dismiss the remaining two counts. CP 35 at ¶ 1.3; 67.

Gollehon entered an *Alford*² plea of guilty. CP 50; RP 6. He stipulated the court could consider the affidavit of probable cause and/or police reports to determine whether there was factual basis for the plea. CP 50. Based on Gollehon's offender score of nine, the standard range was 240 to 318 months. CP 36; RP 7. As part of the plea agreement, the state agreed to recommend an exceptional sentence downward of 185 months³. CP 47; RP 8. The settlement called for all parties and particularly Officer Cobb to be fully "on board" and in agreement with the terms of the joint recommendation. The state understood that 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.

The court accepted Gollehon's plea. RP 7. The state recommended the exceptional sentence downward of 185 months as

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

³ Based on certain evidentiary problems. RP 8–10.

agreed and explained its reasons for the negotiated settlement. RP 7–10.

In part, the following colloquy took place:

[PROSECUTOR]: ... So, as we continued working on this case, I found that there were some gaps in the evidence that I had not anticipated and that were – didn't seem to be there when we began the case. And so I talked to Officer Cobb about this and I said, you know, there's a chance if we go to trial that a jury might not find him guilty because we don't have any physical evidence and the two supporting witnesses on whose testimony I was counting [aren't] going to be there for us at trial, and it would be wise to accept the offer extended by the Defense of 185 months, a downward departure.

And Officer Cobb agreed with me that this would be a wise decision and a decision that he approved of. And so I would urge the Court to adopt the recommendation. It is a recommendation to which we have arrived by virtue of an arm's length transaction based on what we really believe will be the state of the evidence when we proceed to trial, if we had proceeded to trial.

And that's why we arrived at this conclusion, why we think that the Court should adopt this recommendation. We believe it is just and fair under the circumstances based on what appears to be lack of the evidence.

Officer Cobb is here in court today. I don't believe that he wishes to make a statement, but perhaps the Court should inquire.

[THE COURT]: Either you guys want to say anything about this matter before I impose sentence, Chief (inaudible), [Officer Cobb?

[OFFICER COBB]: Your Honor, I defer to the prosecutor's judgment. Anything I have to say would be counter-productive at this time.

[THE COURT]: Okay. Chief, anything you want to say?

[CHIEF ???]: NO, that's fine, sir, thank you.

[THE COURT]: Okay. All Right. Anything further, Mr.

[PROSECUTOR]?

[PROSECUTOR]: No, Your Honor.

[THE COURT]: Okay. ...

RP 10–11. The defense attorney concurred in the agreed recommendation.

RP 11–12.

The court declined to accept the recommendation of 185 months, saying that due to Gollehon’s criminal history and his plea of guilty to shooting at a police officer, a sentence below the standard range would be inconsistent with the purposes of the Sentencing Reform Act. RP 12–13.

The court imposed a sentence at the low end of the standard range, 240 months. RP 13.

Gollehon later moved for resentencing and/or to withdraw his guilty plea because the state had breached the plea agreement through Officer Cobb’s statements. CP 12–14, 33–34. After hearing, the court denied the motion. CP 3; RP 16–25; 26–27. This appeal followed. CP 2.

C. ARGUMENT

The trial court erred in denying Gollehon’s motion to withdraw his guilty plea because the state violated the plea agreement by offering reservations that under-cut its recommendation of an exceptional sentence downward.

A plea bargain is a binding agreement between the defendant and the state which is subject to the approval of the court. State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). Because such

agreements are contractual in nature, the law imposes an implied promise by the state to act in good faith. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Because plea agreements concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to the terms of the agreement. *Id.* (citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)); U.S. Const. amend 14.

“When a plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled. Santobello, 404 U.S. at 262. When a prosecutor breaks the agreement, “he undercuts the basis for the waiver of constitutional rights implicit in the plea.” Santobello, 404 U.S. at 268 (Marshall, J., concurring in part, dissenting in part); Tourtellotte, 88 Wn.2d at 584. No matter how ill-considered the agreement may appear, neither exigencies of the moment nor public pressure justify breach. Tourtellotte, 88 Wn.2d at 854.

In return for the defendant’s guilty plea, the state must make the promised recommendation. Sledge, 133 Wn.2d at 840. While prosecutors are not required to argue enthusiastically on behalf of the agreement, the state undercuts a plea bargain, and violates its duty of good faith and fair dealing, when the prosecutor’s words and conduct at the hearing contradict

its sentencing recommendation. State v. Talley, 134 Wn.2d 176, 187, 949 P.2d 358 (1998) (discussing the limits of prosecutorial conduct at a court-ordered evidentiary hearing on an exceptional sentence); State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, *rev. denied*, 138 Wn.2d 1002 (1999). The state breaches the agreement when any reservations are expressed with regard to the recommended sentence. State v. Coppin, 57 Wn. App. 866, 875, 791 P.2d 228, *rev. denied*, 115 Wn.2d 1011 (1990).

The state may not engage in conduct “which suggests terms contrary to those agreed upon under the plea agreement.” Coppin, 57 Wn. App. at 574. Thus, a prosecutor who has agreed to make a standard range recommendation undercuts that agreement by emphasizing evidence that supports a finding that aggravating factors are present. Talley, 134 Wn.2d at 186. While victims have the right to speak on their own behalf at sentencing,⁴ 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

⁴ Wash. Const. article I, § 35; RCW 7.69.030.

(Madsen, J., dissenting).⁵

Appellate courts apply an objective standard to determine whether the state has breached a plea agreement irrespective of the prosecutors' motivations or justifications for the failure to perform. Jerde, 93 Wn. App. at 780 (citations omitted).

A trial court "shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). Our courts "have recognized the following circumstances as amounting to manifest injustice: the denial of effective assistance of counsel, the defendant's failure to ratify the plea, an involuntary plea, and the prosecution's breach of the plea agreement." State v. Mendoza, 157 Wn.2d 582, 586 141 P.3d 49 (2006) (citation omitted). If an accused can show that the prosecutor has breached the plea agreement, he has demonstrated actual and substantial prejudice from the prosecutor's violation of his constitutional due process rights. If an

⁵ 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.

accused can show that the prosecutor has breached the plea agreement, he has demonstrated actual and substantial prejudice from the prosecutor's violation of his constitutional due process rights. In re Lord, 152 Wn.2d 182, 189, 94 P.3d 352 (2004).

In this case, the state breached the plea agreement. It is undisputed that the negotiated settlement called for Officer Cobb to be fully "on board" and in agreement with the joint recommendation. Both sides understood that Gollehon would not have agreed to plead guilty in the absence of Officer Cobb's approval. RP 18–21. Prior to the plea, the state affirmatively represented that the officer was in agreement. CP 4; RP 10. However, at sentencing Officer Cobb did not say that he agreed with the recommendation. Instead, 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."

This is a clear breach of the plea agreement. Obviously Officer Cobb's feelings about the joint recommendation differed from the prosecutor's judgment, and hence he "deferred" to that judgment. The officer refrained from stating his disagreement outright because he knew the plea would fall through. No other meaning could be attributed to the words he chose—that he indeed had something to say but telling it to the

court would be “counter-productive”, i.e. it would defeat the intended goal of securing a conviction carrying a significant period of confinement despite evidentiary deficiencies that could otherwise result in acquittal. 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.

Furthermore, the actual effect of the prosecutor’s arguments on the court is irrelevant. State v. Carreno-Maldonado, 135 Wn. App. 77, 88, 143 P.3d 343 (2006). The prosecutor is required to act in good faith and advocate for the agreed sentence regardless of whether the court imposes that sentence. Id.; *see also*, Santobello, 404 U.S. at 262–263 (remand is necessary even if the court did not base its exceptional sentence on those complaints or allegations). No harmless error test applies. Carreno-Maldonado, 135 Wn. App. at 88. Thus, it is irrelevant that the trial court indicated it would have imposed the same sentence regardless of the state’s breach of the plea agreement. CP 3; RP 27.

Fundamental fairness requires that, in a prosecution initiated in a state court, the terms of a plea agreement be enforced against the state.

Santobello, 404 U.S. at 262, 30 L.Ed. 427, 92 S.Ct. 495 (fact that second prosecutor who made a specific recommendation was unaware of first prosecutor's agreement to stand silent on sentencing, did not excuse the breach).

The remedy for a breach is either a new sentencing hearing before a different judge, where the prosecutor provides specific performance on the agreement, or an opportunity for the accused to withdraw his plea. Santobello, 404 U.S. at 263; *see also* Sledge, 133 Wn.2d at 846 n.8 (sentencing before a different judge is appropriate when the sentencing judge has already-expressed views on the sentence). Because the fundamental rights waived by entering a guilty plea belong to the accused, the defendant's preference controls unless the State can show compelling reasons not to allow that remedy. Tourtellotte, 88 Wn.2d at 585; Jerde, 93 Wn. App. at 780; Santobello, 404 U.S. at 267 (Douglas, J., concurring). Remand is required regardless whether the breach is inadvertent or whether the breach has no influence on the sentencing judge. Santobello, 404 U.S. at 262–263.

Herein, the trial court erred in denying Gollehon's motion to withdraw his guilty plea because the record substantiates that the state

breached the plea agreement in violation of his constitutional right to due process.

D. CONCLUSION

“When 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.” State v. Harris, 102 Wn. App. 275, 280, 6 P.3d 1218 (2000) (quoting Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)). For the reasons stated, 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 May 12, 2010.


Susan Marie Gasch 5/13/10
Attorney for Appellant

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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 May 13, 2010, 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 brief of appellant (**amended**):

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