FILED

MAR 01, 2012

Court of Appeals
Division III
State of Washington

NO. 29791-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DALLUGE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Evan E. Sperline, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. THE RESPONDENT MISREPRESENTS THE RECORD.

The "Respondent's Brief " provides,

> In addition to the reduction from a potential felony charge of bail jumping to the misdemeanor charge of bail jumping, the parties also agreed that the maximum penalty of 90 days would be suspended concurrent with the two charges that Mr. Dalluge was being sentenced on from trial. CP 51.

Respondent's Brief at 3 (emphasis added).

A copy of "CP 51" is attached as an appendix. It includes sections 5 and 6 of the "Statement of Defendant on Plea of Guilty". Section 5 sets forth the rights Dalluge gave up by pleading guilty. Section 6 sets forth the maximum penalty, what the prosecutor will recommend in return for the guilty plea, and notifies Dalluge that the court does not have to follow the recommendation of either party, along with some other ancillary matters. Appendix.

Presumably the citation to "CP 51" in the Respondent's Brief refers to section 6. Notably absent from section 6, however, is any reference to the prosecutor recommending a "suspended" sentence. Rather, it states, "The prosecuting authority will make the following recommendation to the judge: concurrent w/ sentence on convictions for counts 3 & 4." (Emphasis added).

Given that Dalluge is arguing the prosecutor breached the plea agreement, the Respondent's erroneous factual assertion as to what the agreement was is troubling. Moreover, it does not constitute a "fair statement of the facts" as required under RAP 10.3(a)(5), (b). To the contrary, it is materially misleading in light of the issue on appeal.

This Court should disregard the misstatement of fact in the Respondent's Brief.

2. THIS COURT SHOULD ACCEPT THE RESPONDENT'S CONCESSION OF ERROR.

The respondent concedes the prosecutor never recommended that the sentence for the bail jump be served concurrently with the sentences for counts 3 and 4. Respondent's Brief at 4 ("although the word 'concurrent' was used by neither counsel"). This court should accept the concession.

A plea agreement obligates the State to recommend to the sentencing court the sentence recommendation contained in the agreement. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). "Although the prosecutor need not enthusiastically make the sentencing recommendation," it must still be made in order to comply with the agreement. State v. Halsey, 140 Wn. App. 313, 319, 165 P.3d 409 (2007). That was not done here, and therefore this Court should accept the State's concession.

3. REVERSAL IS REQUIRED.

The Respondent argues, "even if Mr. Dalluge can show breach, which the State disputes, Mr. Dalluge can show no harm." Respondent's Brief at 4. The Respondent misapprehends the applicable law, and the nature of the harm that results when the prosecution breaches a plea bargain.

Dalluge pled guilty to bail jumping in return for the prosecutor recommending a sentence concurrent with counts 3 and 4. CP 50-54. The plea bargaining process requires both the prosecution and defendant to adhere to their promises. State v. Carreno-Maldonado, 135 Wn. App. 77, 88, 143 P.3d 343 (2006). When the prosecution fails to adhere to its promise, the defendant pleads guilty on false premises. Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984).

Whether the prosecutor's breach had any affect on the sentencing court's sentencing decision does not excuse the breach;

> The prosecutor's conduct in failing to make the bargained-for recommendation eliminates the basis for the bargain struck. Thereafter, the State is no longer entitled to benefit from the plea bargain when the defendant has received none. Such an error infects the entire proceeding and, as such, it is a structural error that cannot be harmless. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); State v. Zimmerman, 130 Wn. App. 170, 176, 180, 121 P.3d 1216 (2005), remanded, 157 Wn.2d 1012, 138 P.3d 113 (2006).

Carreno-Maldonado, 135 Wn. App. at 88 (emphasis added).

Here, the prosecution was not entitled to Dalluge's guilty plea to bail jumping because it failed to uphold its end of the bargain. "When the prosecutor breaches a plea agreement, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or specifically enforce the State's agreement." State v. Jerde, 93 Wn. App. 774, 782, 970 P.2d 781, review denied, 138 Wn.2d 1002, 984 P.2d 1033 (1999).

B. CONCLUSION

For the reasons stated above and in Dalluge's opening brief, this Court should vacate the judgment and sentence and remand so Dalluge can choose to withdraw his guilty plea or obtain specific performance from the prosecutor.

DATED this 1st day of March 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorney for Appellant

APPENDIX

5. ***I Understand That I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:***

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to hear and question the witnesses who testify against me;

(d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;

(e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;

(f) The right to appeal a finding of guilt after a trial.

6. ***In Considering the Consequences of my Guilty Plea, I Understand That:***

(a) The crime with which I am charged carries a maximum sentence of 90 days in jail and a $ 1000 fine.

(b) The prosecuting authority will make the following recommendation to the judge: Concurrent w/ sentence on convictions for counts 3 & 4

(c) The judge does not have to follow anyone's recommendation as to sentence. The judge can give me any sentence up to the maximum authorized by law no matter what the prosecuting authority or anyone else recommends.

(d) The judge may place me on probation for up to five (5) years if I am sentenced for a domestic violence offense or under RCW 46.61.5055, or up to two (2) years for all other offenses and impose conditions of probation. If the court orders me to appear at a hearing regarding my compliance with probation and I fail to attend the hearing, the term of probation will be tolled until I appear before the court on the record.

(e) The judge may require me to pay costs, fees and assessments authorized by law. The judge may also order me to make restitution to any victims who lost money or property as a result of crimes I committed. The maximum amount of restitution is double the amount of the loss of all victims or double the amount of my gain.

(f) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Notification Relating to Specific Crimes: If any of the Following Paragraphs Apply, the Box Should Be Checked and the Paragraph Initialed by the Defendant.

[ ] (g) ~~The crime of _____ has a mandatory minimum sentence of _____ days in jail and $ _____ fine plus costs and assessments. The law does not allow any reduction of this sentence.~~

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Christopher Dalluge

No. 29791-8-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 1st day of March, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

D Angus Lee
Grant County Prosecuting Attorney
dlee@co.grant.wa.us
kburns@co.grant.wa.us

Signed in Seattle, Washington this 1st day of March, 2012.

x Patrick Mayovsky

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	)	
Respondent,	)	
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v.	)	COA NO. 29791-8-III
	)	
CHRISTOPHER DALLUGE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER DALLUGE
550 CASTLE DRIVE
MOSES LAKE, WA 98837

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF MARCH 2012.

x Patrick Mayovsky