

FILED

DEC 14, 2011
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

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THE PROSECUTOR BREACHED THE PLEA AGREEMENT AND THEREFORE DALLUGE'S JUDGMENT AND SENTENCE MUST BE REVERSED AND THE MATTER REMANDED FOR DALLUGE TO CHOOSE BETWEEN WITHDRAWAL OF HIS GUILTY PLEA OR SPECIFIC PERFORMANCE.....	2
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Isadore</u> 151 Wn.2d 294, 88 P.3d 390 (2004)	4
<u>In re Palodichuk</u> 22 Wn. App. 107, 589 P.2d 269 (1978).....	3, 4
<u>State v. Barber</u> 170 Wn..2d 854, 248 P.3d 494 (2011).....	3
<u>State v. Codiga</u> 162 Wn.2d 912, 175 P.3d 1082 (2008).....	3
<u>State v. Grayson</u> 130 Wn. App. 782, 125 P.3d 169 (2005).....	4
<u>State v. Jerde</u> 93 Wn. App. 774, 970 P.2d 781 review denied, 138 Wash.2d 1002, 984 P.2d 1033 (1999).....	3, 4, 5
<u>State v. Sledge</u> 133 Wn.2d 828, 947 P.2d 1199 (1997).....	3, 4, 5
<u>State v. Smith</u> 142 Wn. App. 122, 173 P.3d 973 (2007).....	4
<u>State v. Talley</u> 134 Wn.2d 176, 949 P.2d 358 (1998).....	3, 4
<u>FEDERAL CASES</u>	
<u>Mabry v. Johnson</u> 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)	3, 5
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94A.589	4

A. ASSIGNMENT OF ERROR

The prosecuting violated Appellant's due process rights by failing to make the sentencing recommendation required by the plea agreement.

Issue Pertaining to Assignment of Error

Appellant pled guilty to misdemeanor bail jumping in exchange for the prosecutor recommending the sentence for that offense and two misdemeanor harassment convictions be served concurrently. At sentencing for all three offenses, however, the prosecutor recommended a 90-day sentence for the bail jump, suspended for two years, and concurrent 365-day sentences for the harassment conviction, with only 180 days suspended. Did the prosecutor breach the plea agreement by failing to recommend that the incarceration time for the bail jump be served concurrently with the jail time for the harassment offenses, and therefore is Appellant entitled to reversal of his judgment and sentence and remand to the trial court so he can choose between specific performance of the plea agreement or withdrawal of his guilty plea?

B. STATEMENT OF THE CASE

Following jury trial convictions for two counts of misdemeanor harassment, appellant Christopher Dalluge entered an Alford plea to one

count of misdemeanor bail jumping. CP 40-42, 50-54; 1RP¹ 71-74; 2RP 300-04. In exchange for Dalluge's guilty plea, the prosecutor agreed to "make the following recommendation to the judge: concurrent w/ sentence on convictions for counts 3 & 4." CP 51. Counts "3 & 4" are the two jury trial harassment conviction. CP 47-48.

At sentencing, however, the prosecutor recommended a 90-day incarceration term for the bail jumping be suspended for a two-year period, but that Dalluge immediately begin serving all but 180 days for concurrent 365-day terms of incarceration for the harassment convictions. 1RP 75. The court followed the prosecutor's recommendation to impose a two-year suspended 90-day sentence for the bail jumping, and imposed concurrent 180-day sentences for the harassment conviction with 90 days suspended. CP 55-61; 1RP 86. Dalluge appeals. CP 62.

C. ARGUMENT

THE PROSECUTOR BREACHED THE PLEA AGREEMENT AND THEREFORE DALLUGE'S JUDGMENT AND SENTENCE MUST BE REVERSED AND THE MATTER REMANDED FOR DALLUGE TO CHOOSE BETWEEN WITHDRAWAL OF HIS GUILTY PLEA OR SPECIFIC PERFORMANCE.

"A plea agreement functions as a contract in which the defendant exchanges his guilty plea for some bargained-for concession from the State:

¹ There are four volumes of verbatim report referenced as follows: 1RP - single volume consecutively for the dates of 2/2/11, 2/22/11, 3/8/11, 3/15/11 & 3/22/11; and 2RP - three-volume consecutively paginated set for the dates of 3/9/11, 3/10/11 & 3/11/11.

dropping of charges, a sentencing recommendation, etc.” State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011). “Between the parties, plea agreements are regarded and interpreted as contracts, and the parties are bound by the terms of a valid plea agreement.” State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). “[A] defendant gives up important constitutional rights by agreeing to a plea bargain[.]” State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (citing State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998); In re Palodichuk, 22 Wn. App. 107, 109-110, 589 P.2d 269 (1978)), review denied, 138 Wn.2d 1002, 984 P.2d 1033 (1999). “Because [plea agreements] concern fundamental rights of the accused, constitutional due process considerations come into play.” State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). A breach of a plea agreement is a violation of due process. See Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) (“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”).

A plea agreement obligates the State to recommend to the sentencing court the sentence contained in the agreement. Talley, 134 Wn.2d at 183; Sledge, 133 Wn.2d at 840. The State can violate a plea agreement either explicitly or implicitly. Sledge, 133 Wn.2d at 840; Jerde, 93 Wn. App. at 780; Palodichuk, 22 Wn. App. at 110.

This Court applies an objective standard in determining whether the State breached a plea agreement “irrespective of prosecutorial motivations or justifications for the failure in performance.” Jerde, 93 Wn. App. at 780 (quoting Palodichuk, 22 Wn. App. at 110); see also Sledge, 133 Wn.2d at 843 n. 7 (“The focus of this decision is on the effect of the State's actions, not the intent behind them.”). “The test is whether the prosecutor contradicts, by word or conduct,” the bargained-for recommendation. Jerde, 93 Wn. App. at 780 (citing Talley, 134 Wn.2d at 187). “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.” Jerde, 93 Wn. App. at 782-83; accord In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004).

Here, the prosecutor breached the plea agreement by failing to make the bargained-for recommendation set forth in Dalluge's guilty plea statement. Instead of making the agreed-upon sentence recommendation of concurrent sentences for all three offenses, the prosecutor's recommended something akin to a hybrid sentence,² whereby Dalluge would immediately serve a majority of the recommended incarceration time for the harassment

² A "hybrid sentence" results where a sentence for one conviction is partially concurrent and partially consecutive to the sentence for another conviction. At least in the context of felony sentences, this is unlawful because it violates RCW 9.94A.589(3), which requires sentences imposed at the same time to be served concurrently, absent imposition of an exceptional sentence. State v. Smith, 142 Wn. App. 122, 173 P.3d 973 (2007); State v. Grayson, 130 Wn. App. 782, 125 P.3d 169 (2005).

convictions (185 days), with the entire recommended incarceration term for the bail jumping conviction held in reserve for up to two years. 1RP 75. As proposed by the prosecutor, Dalluge could end up serving the incarceration terms for the bail jumping conviction independently from the incarceration terms for harassment convictions.

It is axiomatic that this scheme does not constitute "concurrent" sentences, and therefore is not the agreed upon recommendation set forth in Dalluge's plea statement. CP 51. The prosecutor should have instead simply recommended that whatever term of incarceration it recommended for the bail jumping be served concurrently with whatever term of incarceration imposed for the harassment convictions. The prosecutor's failure to do so violated Dalluge's right to due process by making a sentence recommendation more onerous than contemplated when Dalluge entered his guilty plea. Mabry v. Johnson, 467 U.S. at 509; Sledge, 133 Wn.2d at 839.

The appropriate remedy is to vacate the judgment and sentence and remand so Dalluge can choose between withdrawing his guilty plea to bail jumping or obtaining specific performance from the prosecutor. Jerde, 93 Wn. App. at 782-83. This Court should so order.

D. CONCLUSION

Dalluge was denied his right to due process because the prosecutor breached the plea agreement. Therefore, 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 4th day of December 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorney for Appellant

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

OFFICE MANAGER
JOHN SLOANE

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

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 14th day of December, 2011, I caused a true and correct copy of the **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 14th day of December 2011

x *Patrick Mayovsky*

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

STATE OF WASHINGTON

Respondent,

v,

CHRISTOPHER DALLUGE,

Appellant.

)
)
)
)
)
)
)
)
)
)
)

COA NO. 29791-8-III

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 14TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **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 14TH DAY OF DECEMBER 2011.

x *Patrick Mayovsky*