FILED

No. 298019

DEC 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

FILED

DEC 16 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY TOMASZEWSKI

Appellant / Petitioner

ON APPEAL FROM THE SUPERIOR
COURT OF THE STATE OF WASH
FOR THE COUNTY OF BENTON

REPLY BRIEF OF
Appellant / Petitioner

Timonthy Tomaszewski
Washington State Pen.
1313 North 13th Ave
Walla Walla, Wa 99362

ORIGINAL

TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY

1. The State Breached An Oral Contract For Concurrent Court Sentences of The Superior And District Matters, And The State Has Failed To Address This Claim Made By Mr. Tomaszewski In His PRP! 1

2. Counsel Was Ineffective And Failed To Inform The Court Of All The Facts To The Oral Contract, Appealed! ... 4

B. CONCLUSION 5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State V. Coppin, 57 Wn. App. 866, 874, 791 P.2d 228 (1990) - - - - - - - - - - - - 4

State V. Hall, 104 Wn.2d 486, 490, 706 P.2d 1074 (1985) - - - - - - - - - - - - - - - - 2

State V. Marler, 32 Wn. App. 503, 508, 648 P.2d 903 (1982) - - - - - - - - - - - - - - - - - 1

State V. McDonald, 143 Wn.2d 506, 22 P.3d 791 (May 10, 2001) - - - - - - - 4

State V. Mollichi, 132 Wn.2d 80, 90, 936 P.2d 408 (1997) - - - - - - - - - 1

State V. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (12/11/1997) - - - - - - - 1

State V. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977) - - - 2

State V. Petterson, 97 Wn.2d 864, 866, 651 P.2d 211 (1982) - - - - - - - - - - - - - 3

WASHINGTON CASES (Continued)

Page

Badgett V. Security State Bank
116 Wn. 2d 563, 568, 807 P.2d 356
(1991) - - - - - - - - - - - - - - 1

In re Pers. Restraint of Brett, 142
Wn. 2d 868, 16 P.3d 601 (2001). - - - - 4

CONSTITUTION

Sixth Amendment U.S. Const. - - 4

RULES AND STATUTES

Fed. R. Crim. P. 11(e) - - - - - - - 3

RCW 9.94A.460 - - - - - - - - - - 4

RPC 3.3 - - - - - - - - - - - - - 4

FEDERAL CASES

Page

Carreale V. United States, 479 F.2d 944, 947 (10th. Cir 1973) - - - - - - 1

Mabry V. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L.Ed.2d 437 (1984) - - 2

Santobello V. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) - - - - - - - - - - - - - - 2

United States V. Ailsworth, 927 F. Supp. 1438, 1445 (D. Kan. 1996) - - - - - - - 1

United States V. Benchimol, 471 U.S. 453, 456, 105 S. Ct. 2103, 85 L.Ed.2d 462 (1985) - - - - - - - - - - - - - 3

United States V. Bowler, 585 F.2d 851, 854 (7th Cir. 1973) - - - - - - - - - - - 1

United States V. Carter, 454 F.2d 426, 428 (4th Cir. 1972), Cert. denied, 417 U.S. 933, 94 S. Ct. 2643, 41 L.Ed.2d 237 (1974) - - - - - - - - - - 2

FEDERAL CASES (Continued)

Page

United States V. Harvey, 791 F.2d 294, 300 (4th Cir. 1971) - - - - - - - - - 2

United States V. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995). - - - - - - - - 2

United States V. Rexach, 896 F.2d 710, 714 (2d. Cir.) cert. denied, 498 U.S. 969 111 S. Ct. 433, 112 L.Ed.2d 417 (1990). - - - - - - - - - - - - - - 1

A. ARGUMENT IN REPLY

1. THE STATE BREACHED MR. TOMASZEWSKI'S ORAL CONTRACT FOR CONCURRENT SENTENCES OF HIS DISTRICT COURT AND SUPERIOR COURT MATTERS, AND THE STATE HAS FAILED TO ADDRESS THIS CLAIM MADE BY MR. TOMASZEWSKI IN HIS PRP!

In State Vs. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (12/11/1997).

[1-3]... "Plea agreements are contracts." State V. Mollici, 132 Wn.2d 80, 90 936 P.2d 408 (1997). Just as there is an implied duty of good faith and fair dealing in every contract, Badgett V. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991), the law imposes an implied promise by the State to act in good faith in plea agreements. State V. Marler, 32 Wn.App. 503, 508, 648 P.2d 903 (1982). See also Correale V. United States, 479 F.2d 944, 947 (1st. Cir. 1973); United States V. Bowler, 585 F.2d 851, 854 (7th Cir. 1978); United States V. Ailsworth 927 F. Supp. 1438, 1445 (D. Kan. 1996); United States, V. Rexach, 896 F.2d 710, 714 (2d. Cir); Cert.

denied, 498 U.S. 969 111 S. Ct. 433, 112 L.Ed.2d 417 (1990); United States V. Jones, 58 F.3d 688, 692, (D.C. Cir. 1995).

But plea agreements are more than simple common-law contracts. Because they concern fundamental rights of the accused, constitutional due process requires a prosecutor to adhere to the terms of the agreement. Santobello V. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971); United States, V. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (the defendant's underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law). Fairness is mandated to ensure public confidence in the administration of our justice system. United States V. Carter, 454 F.2d 426, 428 (4th Cir. 1972), Cert. denied, 417 U.S. 933, 94 S. Ct. 2646, 41 L.Ed.2d 237 (1974). See State V. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). The State must comply with the terms of a plea bargain agreement. State V. Hall, 104 Wn.2d 486, 490, 706 P.2d 1074 (1985). Accord Mabry V. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L.Ed. 2d 437 (1984). ("When the prosecution

breaches it's promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand.").

Washington case law has discussed the parameters of the State's good faith obligation to effectuate the plea agreement. In some of our earlier cases subsequent to Santobello, we suggested a more aggressive duty on the part of a prosecutor to advocate for the sentence set forth in the plea agreement. In State v. Peterson, 97 Wn.2d 864, 866, 651 P.2d 211 (1982), for example, we stated: "the consideration which induces a defendant to plead guilty is not the prospect of a formal recitation by the prosecutor of the sentencing recommendation, but the prospect that the recommendation will be made with some degree of advocacy." This statement is inconsistent with our present understanding of the prosecutor's duty with regard to a plea agreement. See, e.g., United States v. Benchimol, 471 U.S. 453, 456, 105 S.Ct. 2103, 85 L.Ed.2d 462 (1985) (under FED. R. CRIM. P. 11(e), there is no requirement for a prosecutor to support a sentencing recommendation with enthusiasm).

A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. The recommendation need not be made "enthusiastically." State v. Coppin, 57 Wn.App. 866, 874, 791 P.2d 228 (1990). The prosecutor, as an officer of the Court, is obliged to participate in the sentencing proceedings, candidly answering the Court's questions in accordance with RPC 3.3, and holding back no relevant information regarding the plea agreement. See, e.g., RCW 9.94A.460 (State may not agree to withhold relevant information from Court regarding plea agreement).

2. Counsel Was Ineffective And Failed To Inform The Court of All The Facts To The Oral Contract, Appealed!

[1,2] In State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (May 10, 2001)

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to effective asistance of Counsel. In re Pers. Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Tomaszewski's convictions and remand for a hearing on his claims, and specific performance of his plea agreement and oral contract.

Dated: November 21, 2011

Respectfully Submitted T. T.

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I, TIMOTHY TOMASZEWSKI, STATE UNDER THE PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT I I PLACED ONE COPY OF THIS DOCUMENT AND THE ORIGINAL IN THE INSTITUTIONAL MAIL SYSTEM, POSTAGE PAID ADDRESSED TO THE INDIVIDUALS LISTED ABOVE.

DATED: November 21, 2011

Timothy Tomaszewski
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