

FILED

OCT 04, 2012

Court of Appeals
Division III
State of Washington

NO. 30475-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

TONY BARCLAY,

Appellant.

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

The Honorable Donald Schacht, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE PROSECUTOR UNDERCUT THE PLEA AGREEMENT BY PORTRAYING BARCLAY AS A CAREER CRIMINAL THEREBY ENCOURAGING THE COURT TO IMPOSE A LONGER SENTENCE.

Under the plea agreement, the prosecutor agreed to recommend the low end of the standard range for the burglary charge. 1CP 12. No additional facts whatsoever were necessary to justify that recommendation. On the contrary, the judge would have had to find additional facts to go any lower. RCW 9.94A.535. No one on the defense side asked the court to consider any additional facts. No request was made for a mitigated lower sentence of any sort. 2RP 2. Barclay himself expressly disavowed the idea that his problems with medication should mitigate his culpability. 2RP 2. Thus, the prosecutor was not justified in bringing any additional incriminating facts before the court.

Yet the prosecutor brought up facts outside the record that made Barclay look like a career criminal. A sentence may be premised only upon those facts proven to a jury beyond a reasonable doubt or admitted to by the defendant in the plea agreement. RCW 9.94A.530(2). She argued he was “pretty well outfitted to be doing exactly what they were doing; stealing wire from places that were either not watched very well or sort of agricultural areas.” 2RP 3-4. She continued saying it was not to be blamed on his

medication because there was “a lot of planning” and they had “burglar tools in the car.” 2RP 3-4. None of these facts were properly before the court. CP 15.

Even assuming the argument was a response to Barclay’s remarks about his medications, no case has absolved a prosecutor’s undercutting the plea agreement based solely on the defendant’s allocution, as opposed to his attorney’s legal argument. See State v. Carreno-Maldonado, 135 Wn. App. 77, 85, 143 P.3d 343 (2006). In Carreno-Maldonado, the court acknowledged additional facts may have been necessary to guard against a lower sentence because the State agreed to recommend a mid-range sentence. Id. at 84-85. But the court concluded the prosecutor’s factual recitations went beyond what was necessary and “were not a response to argument by defense counsel.” Id. at 85.

The State cites State v. Monroe, 126 Wn. App. 435, 109 P.3d 449 (2005), for the proposition that a prosecutor may recite facts supporting the prosecutor’s recommendation. Respondent’s Brief at 5. But Monroe is inapposite. In that case, the State agreed to seek a sentence at the top of the standard range. Monroe, 126 Wn. App. at 440. As the court noted in Carreno-Maldonado, additional facts may have been necessary to prevent the court imposing a lower sentence within the standard range. Monroe, 126 Wn. App. at 440; accord Carreno-Maldonado, 135 Wn. App. at 85. To

avoid breaching the plea agreement, the prosecutor had only to avoid mentioning facts that would appear to support an exceptional sentence above the standard range. Monroe, 126 Wn. App. at 440.

But that is not the case here. Because the agreement was for a low-end recommendation, the prosecutor's recitation of additional incriminating facts breached the plea agreement, regardless of whether those facts would support an exceptional sentence. The State breached the plea agreement by bringing up unnecessary facts that implicitly argued for a longer sentence than the low end of the standard range. State v. Van Buren, 101 Wn. App. 206, 216-17, 2 P.3d 991 (2000).

This breach of the plea agreement is structural error that is never harmless. Carreno-Maldonado, 135 Wn. App. at 88 (citing Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Nevertheless, the State also argues the sentence was based on Barclay's criminal history, not the prosecutor's argument. Respondent's Brief at 8. But the prosecutor's argument tied in directly with the court's reason for imposing a longer sentence based on Barclay's criminal history because she made it appear that such offenses were routine for Barclay. 2RP 3-4. Barclay's convictions must be reversed and the case remanded so he can choose between specific performance and withdrawing his plea. State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988).

2. BARCLAY'S CONSECUTIVE SENTENCES MUST BE REVERSED.

It appears the State concedes Barclay's sentences must be concurrent, rather than consecutive. Respondent's Brief at 8-9. In fact, the State believes they already are. Id. Unfortunately, the judgment and sentence for cause number 11-1-00335-1 states, "This sentence shall be (X) consecutively [sic] to the sentence in Walla Walla Cause 11-1-00326-1. 2CP 24. Even if Barclay is not permitted to withdraw his guilty pleas, this case should be remanded for resentencing to concurrent sentences as required by the Sentencing Reform Act.

3. A STATEMENT BY THE ALLEGED VICTIM THAT SHE HAD TWO BEERS DOES NOT WARRANT PROHIBITING BARCLAY FROM POSSESSING ALCOHOL AND REQUIRING HIM TO PARTICIPATE IN TREATMENT.

As a preliminary matter, the State appears to conflate a prohibition on consuming alcohol with a prohibition on possessing it. A ban on consuming alcohol is a permissible community custody condition. RCW 9.94A.703. But Barclay has been prohibited from even possessing alcohol and is required to obtain treatment. Those conditions may not be imposed without evidence that substance abuse contributed to the offense. State v. Jones, 118 Wn. App. 199, 204, 207-08, 76 P.3d 258 (2003). There is none.

Nothing in the facts admitted in the plea agreements points to substance abuse. 1CP 15; 2CP 13. Nevertheless, the State points to the

probable cause certification to argue these conditions are not improper. Respondent's Brief at 12-13. This argument should be rejected for two reasons. First, Barclay did not stipulate that the probable cause certification could be considered at sentencing. 2CP 13. Moreover, even if it is permissible to base community custody conditions on bare allegations in the probable cause certification, that document does not support the State's argument. It mentions alcohol use by the alleged victim, not Barclay.

The State's brief declares, "In the assault case the victim admitted that alcohol had been consumed before the mid-afternoon assault." Respondent's Brief at 12 (citing 2CP 3). But the probable cause certification makes no reference to alcohol use by Barclay. It states, "Deputy Greco asked Mary if there were any drugs or alcohol involved, and she stated that she only drank two beers that day." 2CP 3.

Glossing over the fact that there is no mention of Barclay using any substance, the State attempts to rely on the deputy's observation that Barclay was "very animated... his tone was very loud and he was speaking very rapidly." 2CP 4. The deputy also states Barclay told him he "knew he was going to jail." 2CP 4. This would presumably provide a reason why a person would be animated, loud, and speaking rapidly. The deputy does not say Barclay appeared intoxicated or had bloodshot eyes or slurred speech or any typical sign of intoxication.

Finally, the State argues the prohibition on possessing alcohol and the treatment requirement are permissible as a requirement to participate in rehabilitative programs or perform affirmative conduct reasonably related to the risk of re-offense. Respondent's Brief at 12; RCW 9.94A.703(3)(d). Because there is no evidence of substance abuse, these requirements are not reasonably related to the risk of re-offense. The chemical dependency finding, the treatment requirement, and the ban on possessing alcohol should be stricken as unsupported by the record. Jones, 118 Wn. App. at 204, 212.

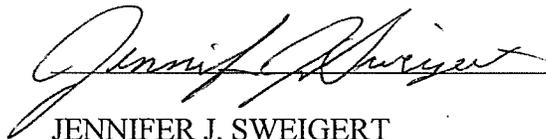
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Barclay asks this Court to vacate the judgment and sentences in these cases and remand for a remedy for breach of the plea agreement, or alternatively, to remand for imposition of concurrent sentences and to strike the unsubstantiated findings and conditions.

DATED this 3rd day of October, 2012.

Respectfully submitted,

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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 4th day of October, 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) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 4th day of October, 2012.

X Patrick Mayovsky