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Court of Appeals
Division III
State of Washington

30475-2-III
30477-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONY BARCLAY,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Did the prosecutor undercut the plea agreement by recounting salient facts which are not unduly inflammatory and which support the prosecutor's recommendation?
2. Do the judgment and sentences reflect consecutive sentences?
3. Does the record, which demonstrates the Defendant's fitness and ability to drive, support a finding of ability to pay legal financial obligations?
4. Did the court err in imposing a no contact order with the victim of the burglary/theft?
5. Did the court abuse its discretion in imposing substance abuse treatment based on a record, which suggests alcohol contributed to the assault?

IV. STATEMENT OF THE CASE

The State agrees with the Defendant's Statement of the Case. The sentencing judge's explanation for the term of confinement, namely criminal history, bears repeating.

> Based upon **your criminal history**, I do not believe it is appropriate to impose a sentence at the low end of the range.
>
> And so I'm going to impose a sentence of 60 months on [the burglary] count.

2RP[1] 5 (emphasis added).

> Again, the Court does not believe a sentence at the low end of the range is appropriate. And based upon your **prior criminal history** and the fact this was a **domestic violence crime**, the Court believes a sentence at the high end of the range is appropriate, so I'm going to impose 84 months on [the assault] count.

2RP 7 (emphasis added).

The Defendant's criminal history is significant. *See* 2CP[2] 20. And the facts of the assault are set out vividly in the Certificate of Probable Cause. 2CP 1-4. The Defendant punched his wife in the face several times and hit her in the face with a coat hanger. 2CP 3. She was unable to see out of her

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[1] The Appellant's citation format is adopted, with 2RP referring to the sentencing hearing on December 19, 2011.

[2] The Appellant's citation format is adopted, with 2CP referring to clerk's papers in the assault case (Walla Walla County No. 11-1-00335-1, COA No. 30477-9).

right eye due to a scratched cornea. 2CP 3. Her nose was fractured. 2CP 3. After the confrontation, the Defendant did not seek medical assistance for his wife. 2CP 1-2. Although he had more than one phone conversation with police, the Defendant refused to meet with police or turn himself in. 2CP 4.

During the sentencing hearing, the court inquired of the jail sergeant about credit for time served.

> THE COURT: ... Is there any credit on this?
>
> JAIL SERGEANT: If you are running them concurrent, 56 days, Your Honor.
>
> THE COURT: I'm not going to run them concurrent. I'm going to run them consecutively. So there's no credit, correct?
>
> JAIL SERGEANT: Correct.

2RP 7.

The judgment and sentence in each case does not indicate that the sentences run consecutive to each other and there is no finding of any aggravating factors which would permit an exceptional sentence.

V. ARGUMENT

A. THE PROSECUTOR DID NOT UNDERCUT THE PLEA AGREEMENT BY NOTING THE RELEVANCE OF THE DEFENDANT'S MEDICATION TO THE DIFFERENT OFFENSES.

A defendant may raise the issue of a prosecutor's breach of the plea agreement for the first time on appeal. *State v. Xaviar*, 117 Wn. App. 196, 199, 69 P.3d 901 (2003).

If a breach is found, the Defendant may request either specific performance of the plea agreement or withdrawal of his guilty plea. *In re James*, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982). The defendant's preferred remedy is entitled to considerable weight. *In re James*, 96 Wn.2d at 852. If the Defendant chooses specific performance, only the prosecutor's recommendation is mandated. The sentencing court is still free to disagree with and depart from any recommendation. *State v. Henderson*, 99 Wn. App. 369, 379, 993 P.2d 928 (2000).

As the Defendant notes, the State may not undercut its plea bargain. Brief of Appellant at 8, *citing State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). However, the prosecutor's recommendation need not be made enthusiastically. *State v. Sledge*, 133 Wn.2d at 840. The prosecutor fulfills his duty by simply making the promised recommendation. *State v. Coppin*,

57 Wn. App. 866, 791 P.2d 228, *review denied* 115 Wn.2d 1011, 797 P.2d 512 (1990). The prosecutor is obliged to act in good faith, to participate in the sentencing proceedings, to answer the court's questions candidly, and to provide relevant information regarding the plea agreement. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). It is a not a breach of the agreement for the prosecutor to recount salient facts which are not unduly inflammatory and which support the prosecutor's recommendation. *State v. Monroe*, 126 Wn. App. 435, 440, 109 P.3d 449 (2005).

In the instant case, the challenged remarks were relevant, were not unduly inflammatory, and supported the prosecutor's recommendation and nothing higher. The prosecutor did not ask for any different sentence. The prosecutors recommended the low end on the burglary charge (51 months) and near the low end on the assault charge (69 months) to run concurrently. 1CP 12; 2CP 10. That recommendation did not change.

The Defendant attempted to minimize his culpability by blaming his behavior on difficulty adjusting to his "mental meds." 2RP 2. Deputy prosecutor April King had charged the Defendant with the assault case. 2CP 5-6. This was the strike offense, which carried the greater sentencing range. 1RP 8. And deputy prosecutor Michelle Mulhern was assigned the burglary case. 2RP 3. Ms. Mulhern responded to the minimization, by agreeing that

the medication actually may have influenced the assault, but was unlikely to have affected the lesser charge, the burglary, which was a calculated or deliberate operation. 2RP 3-4.

The Defendant argues that the prosecutor's remarks were not responsive, because he had acknowledged that his medication was "no excuse." Brief of Appellant at 10-11. This is not logical. The remarks were clearly in response to the Defendant's statement. Perhaps the Defendant meant that the remarks were less necessary after the Defendant wavered in his excuse. Nevertheless, they were still responsive. It should be noted that the prosecutor's comment *credited* the meds as a possible explanation for the offense which carried the greater range of confinement.

The prosecutor's comment was not inflammatory. It did not suggest that the particular offense was deserving of a high-end sentence. Ms. Mulhern did not argue that aggravating factors were present. She merely noted in which instance the mental health medication may actually have had relevance.

The cases the Defendant relies upon are distinguishable. In *State v. Carreno-Maldonado*, 135 Wn. App. 77, 82, 143 P.3d 343 (2006), although the prosecutor was ostensibly recommending a low-end sentence, she used words which mirrored the statutory aggravating factors which could permit

an exceptional sentence. The prosecutor spoke about the special vulnerabilities of the victims (*Cf.* RCW 9.94A.535(3)(b)) and characterized the crimes as "so heinous and so violent it showed a complete disregard and disrespect for these women" (*Cf.* RCW 9.94A.535(3)(a) and (y)). *State v. Carreno-Maldonado*, 135 Wn. App. at 80-81.

Similarly, in *State v. Van Buren*, 101 Wn. App. 206, 209, 2 P.3d 991 (2000), the prosecutor recommended a standard range sentence, but then volunteered to the sentencing judge the evidence needed to impose an exceptional sentence for deliberate cruelty, lack of remorse, and foreseeable impact on others. RCW 9.94A.535(3)(a), (q), and (r).

The comments in those cases were unduly inflammatory and supported sentences far above those recommended. The same cannot be said of the innocuous comments in the instant case.

Ms. Mulhern did not use language comparable to that in the exceptional sentence statute RCW 9.94A.535(3). While unfortunate, minimization is common. And in particular, the Defendant's minimization was unremarkable. As the Defendant notes, it was not even maintained. (While on the one hand, he said his behavior was "certainly due to my mental meds," on the other hand, he admitted that had "no excuse" because he knew right from wrong. 2RP 2.) No one suggested that he displayed "an egregious

lack of remorse." RCW 9.94A.535(3)(q). In fact, the Defendant apologized twice when speaking for himself. 2RP 2. Ms. Mulhern did not suggest either explicitly or implicitly that the Defendant's small comment justified a sentence different from what was recommended.

The case law does not support the Defendant's representation of Ms. Mulhern's comments as an undercutting or breach of the agreement.

There is no requirement that a defendant demonstrate that an alleged breach of the agreement prejudiced his sentence. *State v. Carreno-Maldonado*, 135 Wn. App. at 87-88. However, the court's explanation for the sentence demonstrates how innocuous the prosecutor's remarks were. The court gave a greater than recommended sentence due to the Defendant's significant criminal history, not due to the Defendant's failure to take responsibility.

There was no breach of the agreement.

B. THE DEFENDANT DID NOT RECEIVE CONSECUTIVE SENTENCES.

The Defendant argues that the sentencing court exceeded its authority in imposing consecutive sentences. It is the State's position that the Defendant received concurrent sentences. That is the appearance from the judgment and sentence in each case. *See* J&S sections 2.4 and 4.2. There is

no written or oral record providing a basis for consecutive sentences. And there is no legal basis for a consecutive sentence. RCW 9.94A.589.

The court's comment at 2RP 7 appears to regard the crediting of time served when the Defendant was arrested at different times on different cases.

Because the J&S's do not demonstrate consecutive sentences, there is nothing to vacate. The Defendant received concurrent sentences.

C. THE RECORD SUPPORTS A FINDING OF ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

At the sentencing hearing, the court imposed legal financial obligations on the Defendant amounting to $3480.50 to be paid at $100/mo commencing 90 days after release from custody. 2RP 5, 7. The Defendant complains that the there is no evidence supporting the court's finding regarding his ability to pay. The State disagrees.

In *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165

Wn. App. at 405. The court affirmed the imposition of LFO's, struck the finding regarding ability to pay, and noted that the proper time to address the question is "when the government seeks to collect the obligation." *Id., citing State v. Baldwin*, 63 Wn. App. at 310.

The Defendant asks to strike finding 2.5, which is on page four of each J&S, consistent with the holding in *Bertrand.*

Unlike *Bertrand*, there is evidence on the record demonstrating the Defendant's ability to pay. The first page of the guilty plea statements provides the Defendant's relatively young age (43 at the time of plea). The Certificate of Probable Cause in the burglary matter states that the Defendant was stealing coils of wire from on top of a tractor trailer unit and throwing the stolen goods down to be loaded in the bed of a pickup. 1CP 1-4. The Certificate of Probable Cause in the assault matter states that the Defendant is able to drive and has the physical strength to cause significant injuries to his wife. 2CP 1-4. The long criminal history includes a vehicle prowling conviction from last year, about the time of these incidents. This information demonstrates that the Defendant is physically capable of finding employment.

There is no error in the imposing legal financial obligations.

D. THE COURT DID NOT ERR IN IMPOSING A NO CONTACT ORDER REGARDING THE VICTIM OF THE BURGLARY.

The Defendant challenges the no contact order in the burglary/theft case, arguing that "no facts in this case connect Mitch Sutton to this crime." Brief of Appellant at 20. The second page of the Amended Information lists Mr. Sutton as the victim of the theft. While the theft charge was dismissed pursuant to the plea agreement, the crimes of theft and burglary are interrelated. Although not convicted of theft, the plea agreement requires the Defendant to be responsible for any restitution owing in the dismissed offense. The Defendant is convicted of unlawfully entering or remaining on property with intent to commit that theft against Mitch Sutton. There is most certainly a reasonable relationship between Mr. Sutton and the burglary conviction. And there is no doubt that this provision is a crime-related prohibition under RCW 9.94A.030(13). *See also* RCW 9.94A.703(3)(b) and (f).

E. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING TREATMENT AND PROHIBITING ALCOHOL.

The Defendant challenges the community custody requirements of chemical dependency treatment and prohibition of alcohol. Brief of Appellant at 21.

As part of any term of community custody, the court has the

discretion to order an offender to participate in crime-related treatment or counseling, to participate in rehabilitative programs reasonably related to the offender's risk of reoffending or community safety, and to refrain from consuming alcohol. RCW 9.94A.703(3). The Defendant argues that there is no evidence on the record suggesting substance abuse. The argument fails for several reasons. First, the prohibition against alcohol does not require this record. *See* RCW 9.94A.703(3)(e). Second, a requirement to participate in rehabilitative programs or perform affirmative conduct (e.g. abstain from alcohol possession) reasonably related to the risk of re-offense and community safety does not require that there be a finding of crime-related substance abuse. And third, there is evidence in the record of crime-related substance abuse. The Defendant's suggestion that he "could be arrested based on legal use or possession of alcohol by a member of his household" is not consistent with the court's judgment. Brief of Appellant at 26.

In the assault case, the victim admitted that alcohol had been consumed before the mid-afternoon assault. 2CP 3. The intoxication of the parties would be consistent with the reluctance of witnesses to become involved even in transporting the badly beaten victim to the hospital and with the Defendant's strange behavior of driving around to find the victim before and after the assault and his strange conversation with police. 2CP 1-4 (The

Defendant called police and "was very animated throughout the conversation, his tone was very loud, and he was speaking very rapidly.").

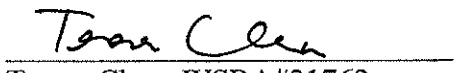
The community custody provisions are appropriate in this record.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: September 4, 2012.

Respectfully submitted:



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Jennifer Sweigert <SweigertJ@nwattorney.net> <MayovskyP@nwattorney.net> Tony Barclay DOC # 926034 Airway Heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 4, 2012, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**