

30517-1-III  
COURT OF APPEALS  
DIVISION III

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Court of Appeals  
Division III  
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES W. FOLEY, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in concluding that Mr. Foley breached the plea agreement.

B. ISSUE

1. When the State enters into a plea agreement with a defendant who subsequently absconds and commits additional offenses prior to sentencing, in the absence of any provision of the agreement requiring the defendant to refrain from doing so, does the court err in concluding the defendant has breached the plea agreement?

C. STATEMENT OF THE CASE

Mr. Foley agreed to plead guilty to two charges of first degree theft, and to pay an amount of restitution detailed in an attachment to his written guilty plea statement. (CP 6-13, 15-16) In exchange, the State agreed to dismiss a third theft charge, to file no additional charges in relating to three specified reports, numbered 01-328229, 01-352853, and 01-229572, and to recommend a 14-month sentence. (CP 9)

The guilty plea statement included a statement of Mr. Foley's offender score, which was 5 points, yielding a standard range sentence of 14 to 18 months. (CP 7) The plea statement provided:

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.

(CP 7)

The court accepted Mr. Foley's guilty plea on June 6, 2002. (6/6/2002 RP 1-12) Sentencing was scheduled for July 8<sup>th</sup>. (6/6/2002 RP 11) Mr. Foley was released pending sentencing. (CP 53)

Mr. Foley appeared with counsel on September 30, 2011, and sentencing was scheduled for November 8, 2011. (CP 18-19) Shortly before the sentencing hearing, defense moved to enforce the 2002 plea agreement, alleging that following Mr. Foley's guilty plea, the State had breached the plea agreement by filing charges against Mr. Foley in an unrelated case, Spokane County Cause no. 02-02948-8. (CP 20-21) The following day, Mr. Foley filed an affidavit alleging that his understanding of the plea bargain had included an agreement that the State would not file

any charges against him relating to the banks to which he had agreed to make restitution. (CP 22-24) He stated that the written provision in the plea agreement did not represent the agreement between the parties as he had understood it. (CP 23)

The State filed a memorandum contending that under the terms of the plea agreement, the State was not bound by the original calculation of Mr. Foley's offender score and standard range because in the interim between his guilty plea and the forthcoming sentencing hearing he had committed a substantial number of felonies in other jurisdictions. (CP 27) The State submitted a list of 13 offenses of which Mr. Foley was allegedly convicted following entry of his guilty plea in 2002. (CP 88) In support of this list, the State submitted six packets of documents purporting to substantiate the alleged convictions. (CP 96-202)

At sentencing, defense counsel argued that the plea agreement should be enforced and Mr. Foley's offender score and standard range should be recalculated based on the intervening convictions presented by the prosecutor. (Sentencing RP 5) The court ruled the State's filing of additional charges was not a breach of the plea agreement but that Mr. Foley's flight was a breach of the plea agreement:

The second aspect here is whether Mr. Foley can be viewed as being in breach of his agreement, his part of the plea bargain, so to speak, that was entered back in 2002.

There are a few things that the State argues herein, namely, the commission of additional crimes and the act of absconding.

I don't think I need to go beyond the fact that Mr. Foley absented himself, did not come back for sentencing in this matter. That alone I think is grounds to violate his end of the plea agreement, freeing the State to argue any legal sentence which is before the Court at sentencing.

(CP 222-23)

The court declined Mr. Foley's request for a DOSA sentence and imposed a 43-month term of incarceration. (CP 213)

#### D. ARGUMENT

1. MR. FOLEY'S ABSENCE FROM THE STATE DID NOT VIOLATE THE TERMS OF THE PLEA AGREEMENT.

A plea agreement is a contract between the defendant and the prosecutor. *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). Accordingly, plea agreements are construed according to contract principles. *State v. Harris*, 102 Wn. App. 275, 280, 6 P.3d 1218 (2000); *State v. Wheeler*, 95 Wn.2d 799, 803-04, 631 P.2d 376 (1981).

The terms of the agreement are construed based on the defendant's reasonable understanding. *State v. Wakefield*, 130 Wn.2d 464, 481, 925 P.2d 183 (1996) (Sanders, J., concurring in part, dissenting in part). "[T]he terms of . . . [a plea] agreement are generally defined by what the

defendant understood them to be when he or she entered into the plea agreement.” *State v. Oliva*, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003).

The party that drafted the contract generally bears responsibility for any imprecision or ambiguity. *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 513, 760 P.2d 350 (1988). The plea agreement is construed against the government, which bears primary responsibility for the promise and performance of the agreement. *See United States v. Harvey*, 791 F.2d 294, 300-301 (4th Cir.1986).

When the defendant fails to perform the agreed terms, the trial court must conduct an evidentiary hearing, at which the State must prove that the defendant failed to perform his part of the agreement. *In re James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982), *review denied*, 100 Wn.2d 1023 (1983).

Here, the terms of the plea agreement did not include any provision requiring Mr. Foley to remain within the State of Washington, or to appear for sentencing at any particular time, nor did the agreement preclude his engaging in further criminal activities. Indeed, the contract expressly provided for the possibility that Mr. Foley might remain at large and might commit additional offenses.

The court’s determination that Mr. Foley had violated the terms of his plea agreement is not supported by the record or the law.

E. CONCLUSION

The sentence should be vacated and the matter remanded for sentencing before a different judge.

Dated this 1st day of October, 2012.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30517-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JAMES W. FOLEY,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on October 1, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey  
kowens@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on October 1, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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#986911  
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Signed at Spokane, Washington on October 1, 2012.

  
\_\_\_\_\_  
Jill S. Reuter #38374

