

**FILED**  
Jun 22, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30677-1-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CURTIS G. GANSKE,

Defendant/Appellant.

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Appellant's Brief

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**A. ASSIGNMENTS OF ERROR**

The prosecutor breached the plea agreement at the sentencing hearing when she deviated from her original recommendation made at the guilty plea hearing.

*Issue Pertaining to Assignments of Error*

Did the prosecutor breach the plea agreement at the sentencing hearing when she deviated from her original recommendation made at the guilty plea hearing?

**B. STATEMENT OF THE CASE**

Mr. Ganske pled guilty to one count of second degree burglary. CP 3-12. As part of the plea agreement the State recommended a 24 month exceptional sentence downward if the elements of the exceptional sentence were satisfied. Otherwise, the recommendation would be for 65 months. 9/28/11 RP 5-6. At the sentencing hearing a little over four months later, the State recommended 65 months without further explanation regarding the previous 24-month recommendation. 2/8/12 RP 2-3. The Court sentenced Mr. Ganske to 60 months incarceration. CP 13-23. This appeal followed. CP 24-25.

**C. ARGUMENT**

The prosecutor breached the plea agreement at the sentencing hearing when she deviated from her original recommendation made at the guilty plea hearing.

RCW 9.94A.421, regarding plea agreements and their contents, provides in pertinent part as follows:

The prosecutor and the attorney for the defendant ... may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

- (1) Move for dismissal of other charges or counts;
- (2) Recommend a particular sentence within the sentence range applicable to the offense or offenses to which the offender pled guilty;
- (3) Recommend a particular sentence outside of the sentence range;
- (4) Agree to file a particular charge or count;
- (5) Agree not to file other charges or counts; or
- (6) Make any other promise to the defendant, except that in no instance may the prosecutor agree not to allege prior convictions.

Plea agreements are contracts, and the law imposes upon the State an implied promise to act in good faith. State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011); State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Because plea agreements concern fundamental rights of the accused, they also implicate due process considerations that require a

prosecutor to adhere to the terms of the agreement. *Id.* (citing 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).

Herein, as part of the plea agreement at the guilty plea hearing the State recommended a 24 month exceptional sentence downward if the elements of the exceptional sentence were satisfied. Otherwise, the recommendation would be for 65 months. 9/28/11 RP 5-6. At the sentencing hearing a little over four months later, the State recommended 65 months without further explanation regarding the previous 24-month recommendation. 2/8/12 RP 2-3.

Fundamental fairness requires that, in a prosecution initiated in a state court, the terms of a plea agreement be enforced against the state. Santobello, 404 U.S. at 262, 30 L.Ed. 427 (fact that second prosecutor who made a specific recommendation was unaware of first prosecutor's agreement to stand silent on sentencing, did not excuse the breach).

The Washington State Supreme Court has recognized two possible remedies where the State breaches a plea agreement. State v. Miller, 110

Wn.2d 528, 531, 536, 756 P.2d 122 (1988). The defendant has the choice to either withdraw his plea and be tried anew on the original charges or receive specific performance of the agreement. Id. Because a plea agreement is analogous to a contract, the defendant is entitled to a remedy that restores him to the position he occupied before the State breached. State v. James, 35 Wn.App. 351, 355, 666 P.2d 943 (1983). Furthermore, "the defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy." Miller, 110 Wn.2d at 535, 756 P.2d 122.

Herein, as set forth above, the State breached the plea agreement by not adhering to the originally recommended 24-month sentence. The prosecutor provided no reason on the record as to why she had changed her original recommendation. She also did not say whether or not the elements of the 24-month exceptional sentence were satisfied, which was the basis of the 24-month recommendation. Therefore, Mr. Ganske is entitled to his choice of either specific performance of the original agreement or withdrawal of his plea.

**D. CONCLUSION**

For the reasons stated, this Court should remand this matter for resentencing, allowing Mr. Ganske the choice between specific performance of the original plea agreement or withdrawal of his plea.

Respectfully submitted June 22, 2012,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on May 2, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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