

FILED
DECEMBER 19, 2012
Court of Appeals
Division III
State of Washington

NO. 306771-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CURTIS GENE GANSKE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-01264-1

AMENDED BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

JULIE E. LONG, Deputy
Prosecuting Attorney
BAR NO.28276
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. STATEMENT OF ISSUES

- A. Did the State comply with the terms of the plea agreement with the defendant?**

- B. Is the defendant entitled to specific performance of the Cooperation and Plea Agreement, in light of his breach of the terms?**

II. STATEMENT OF THE CASE

On December 14, 2010, Curtis Gene Ganske, the defendant, was charged by Information with Burglary in the Second Degree in Benton County Superior Court Cause No. 10-1-01264-1. (CP 1-2). On September 28, 2011, the defendant entered into a separate Cooperation and Plea Agreement with the Benton County Prosecuting Attorney's Office. (CP 26-30). Pursuant to the Cooperation and Plea Agreement, the defendant would plead guilty to the Burglary in the Second Degree charge in Benton County Superior Court Cause No. 10-1-01264-1, and in exchange for his compliance with the terms of the Cooperation and Plea Agreement, the State would recommend an exceptional sentence downward. (CP 28-29). Under the Cooperation and Plea Agreement, the defendant was to work as a Confidential Informant (CI) and perform drug purchase transactions from known targets for the METRO Drug Task

Force. (CP 26-30). The Cooperation and Plea Agreement lists the defendant's duties as a CI, which include:

Assisting investigating officers in gathering evidence as deemed necessary including cooperation which results in prosecutable cases as determined by the office of the prosecuting attorney against the following person: **five individual targets to be determined and approved by the investigating officers and/or the prosecuting attorney.**

(CP 26).

Numerous requirement and/or conditions were also set forth in the Cooperation and Plea Agreement which included:

"It is understood by the contractor that contractor will contact the supervising detective at least once weekly, or the contractor will be deemed to have failed to cooperate. (CP 27).

.....

Should the contractor be involved in any further violation of the law amounting to a misdemeanor, gross misdemeanor, or felony this contract may be revoked at the option of the state. This paragraph shall apply irrespective of whether the contractor is charged, or convicted of the offense. (CP 29).

If the defendant completed all terms of the Cooperation and Plea Agreement, the State would recommend 24 months in prison on an exceptional sentence downward on a standard sentence range of 51 to 68 months in prison. (CP 28-29). If the defendant did not comply with the terms of the Cooperation and Plea Agreement, the State would

recommend 65 months in prison. (CP 6). The defendant entered into this Cooperation and Plea Agreement while being advised by his attorney. (CP 30).

The defendant pled guilty to Burglary in the Second Degree in Benton County Superior Court Cause No. 10-1-01264-1 on September 28, 2011, and sentencing was set on December 14, 2011. (CP 3-12, 31). The defendant failed to appear at sentencing and had been out of contact with law enforcement, so a bench warrant was issued for his arrest. (CP 31-32). On December 22, 2011, Mr. Ganske committed a new criminal offense, for which he was arrested and held in the Franklin County Jail. (RP 02/08/2012, 3). Benton County Jail Officials located him there and he was subsequently brought before the Honorable Judge Craig Matheson on February 8, 2012, for sentencing on the Burglary in the Second Degree charge. (RP 02/08/12, 2-8).

Due to his violation of the provisions of the Cooperation and Plea Agreement referenced above, the State sought a sentence of 65 months in prison pursuant to the Cooperation and Plea Agreement and the Statement of Defendant on Plea of Guilty. (CP 3-12, 26-30). The defendant provided no evidence he had completed all of the terms required of him in the Cooperation and Plea Agreement, nor did he argue he was not in

breach of the agreement. (RP 02/08/12, Page 2-8) In fact, no mention was made of the agreement during his sentencing, as the State and the defendant were both aware that the agreement was being enforced according to the terms covering the possibility of a breach. (RP 02/08/12, Page 2-8) The Honorable Judge Craig Matheson elected to sentence the defendant to 60 months in prison, a sentence within the range generated by the Burglary in the Second Degree offense, and the defendant's offender score. (CP 18; RP 02/08/2012, 7).

The defendant now appeals, seeking enforcement of the agreement.

III. ARGUMENT

- A. **The State did not breach the Cooperation and Plea Agreement with the defendant when it sought a 65 month prison sentence due to the defendant's breach of the Cooperation and Plea Agreement and failure to satisfy the conditions set forth therein to receive the benefit of an exceptional sentence downward.**

“Just as a defendant has the option to specifically enforce or rescind a plea agreement after a breach by the State, *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 1988), *State v. Tourtellotte*, 88 Wash.2d 579, 585, 564 P.2d 799 (1977), the State has the option to specifically enforce or rescind a plea agreement after a breach by the defendant.” *State v. Thomas*, 79 Wn. App. 32, 36-37, 899 P.2d 1312 (1995). The

defendant's belief that he is entitled to either withdraw his plea, or force the State to grant him the 24 month sentence promised in the Cooperation and Plea Agreement and Statement of Defendant on Plea of Guilty would only be valid if he had completed and complied with the terms of the Cooperation and Plea Agreement set forth therein. The defendant did not. He violated two provisions of the Cooperation and Plea Agreement and failed to provide proof he completed the required elements. The provisions of the Cooperation and Plea Agreement state that failing to fulfill the requirements of the contract constitutes a breach of the agreement, and is grounds for the State to recommend a 65 month prison sentence. (CP 27, 29)

The defendant did not comply with law enforcement instructions by vanishing and breaking contact with them, despite the fact that Section 5 of the Cooperation and Plea Agreement clearly stated that he must be in contact with the supervising detective. (CP 26-30). As the Honorable Judge Craig Matheson stated at the defendant's sentencing hearing, "And finally, I'm struck by the time that we did the plea in this back in September, and here we are in February and you've been on the lamb not coming to court. We had to issue a bench warrant to drag you down here today," (RP 02/08/2012, 6). Furthermore, the defendant's

commission of a new criminal offense constituted an additional breach of the Cooperation and Plea Agreement. (RP 02/08/2012, 4).

The Cooperation and Plea Agreement and the Statement of Defendant on Plea of Guilty made very clear that if the defendant did not comply with all the conditions of the agreement, he was not entitled to the 24 month sentence. (CP 3-12, 26-30). The Statement of Defendant on Plea of Guilty that the defendant signed states, "The Prosecuting Attorney will make the following recommendation to the judge: 24 months prison, standard fees, fines, costs, 0 restitution. If [defendant] fully completes separate agreement, 65 months prison if he does not." (CP 6). Furthermore, the State took the additional step of placing their recommendation on the record during the defendant's plea hearing. "[Y]our Honor, I want to put on the record that the 24 months is the exceptional sentence, but we're recommending 65 if the elements of the exceptional sentence aren't satisfied. I think he understands that." (RP 09/28/2011, 6). The response from both counsel of record for the defendant and the defendant himself were in the affirmative asserting that their understanding accorded with the State's. (RP 09/28/2011, 6).

The defendant makes no arguments that the prosecution was not fully within their rights to follow the terms of the Cooperation and Plea Agreement he made with them. He does not argue that there are any

circumstances which make the State's actions unfair. The defendant's arguments are made from the position of one who complied with the terms of the Cooperation and Plea Agreement. However, that is simply not the case. The only breach of the Cooperation and Plea Agreement lies with the defendant. The defendant failed to comply with Sections 5 and 11 of the Cooperation and Plea Agreement, and as a result, the State followed through with the terms of the agreement covering the eventuality of a breach. (CP 27, 29). In such an event, it was clearly indicated that the State's recommendation would increase to 65 months.

The defendant received exactly what he bargained for. The State elected to seek specific performance as to the terms of the contract, as *State v. Thomas* explicitly allows them. *State v. Thomas*, 79 Wn. App. at 37. The only fact that the defendant cites to in support of his position that the plea agreement is enforceable is the fact that the State, at the February 8, 2012, hearing did not set forth on the record that the Cooperation and Plea Agreement was revoked, nor did it give reasons as to why it was revoked. (App. Brief, 7). No case law supports that a revocation must be made on the record. Public policy demonstrates why this should be the case. If the State was forced to reveal all its dealings with CIs in open court on the record, the word 'Confidential' would lose meaning. Furthermore, given the realistic consequences of it being known that an

individual is a CI, such reticence on the part of the State works for the benefit of the informants.

The Cooperation and Plea Agreement was a contract, which the defendant knowingly breached. *State v. Mollich*, 132 Wn.2d 80, 91, 936 P.2d 408 (1997). The Cooperation and Plea Agreement covered such breaches, making it clear what the consequences of such would be. (CP 6). The actions of the State have simply consisted of following through with said provisions.

B. The defendant is not entitled to seek specific performance of the Cooperation and Plea Agreement.

The breaching party of a contract has no right to demand specific performance of the contract by the non-breaching party, if that breach is of a material nature. *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951) (citing 2 Restatement, Contracts, 750, § 397). This is a fundamental notion of contract law. A party which breaches a contract does not maintain the right to demand satisfaction of that contract. Plea agreements are contracts, and are governed by the provisions of contract law. *State v. Mollich*, 132 Wn.2d at 91. Following from these, the Court has stated, “[W]hen a defendant breaches a plea agreement, he has no right to specifically enforce an agreement.” *State v. McNally*, 125 Wn. App. 854, 867, 106 P.3d 794 (2005).

The defendant unquestionably breached the agreement with the State. He left the jurisdiction, and was out of contact with law enforcement for an extended period of time. (CP 32; RP 02/08/11, 6). The defendant elected to not fulfill the very basic terms of the agreement. Furthermore, while he was out of contact, he was arrested for another criminal offense, again breaching the terms of the agreement. (RP 02/08/11, 4). The Cooperation and Plea Agreement specifically indicated that the involvement of the defendant in any other criminal activity would be grounds for revoking the agreement. (CP 29). At no point has the State acted capriciously, or with malice. At no point has the State surprised the defendant with anything. The State has simply complied with the terms of the Cooperation and Plea Agreement it made, and exercised its rights under said contract.

IV. CONCLUSION

The State has complied with all of the obligations under the Cooperation and Plea Agreement. As such, the defendant is not entitled to a resentencing hearing, and his appeal should be denied.

RESPECTFULLY SUBMITTED this 17th day of December 2012.

ANDY MILLER

Prosecutor

JULIE E. LONG, Deputy

Prosecuting Attorney

Bar No. 3379

OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

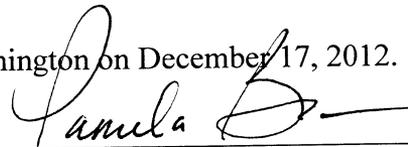
David N. Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

E-mail service by agreement
was made to the following
parties: gaschlaw@msn.com

Curtis Gene Ganske
#842081
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on December 17, 2012.



Pamela Bradshaw
Legal Assistant

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

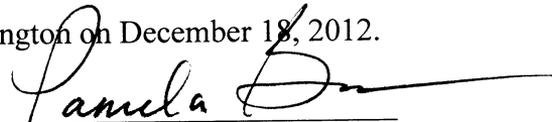
David N. Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

E-mail service by agreement
was made to the following
parties: gaschlaw@msn.com

Curtis Gene Ganske
#842081
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on December 18, 2012.



Pamela Bradshaw
Legal Assistant