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Court of Appeals
Division III
State of Washington

31430-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN J. SHOLLENBERGER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The prosecuting attorney breached the plea agreement.

B. ISSUE

1. Mr. Shollenberger entered into a plea agreement, part of which was that the State would allow for a prison-based drug offender sentencing alternative (DOSA). At sentencing, the deputy prosecutor asked the trial court to impose a sentence of 22 months in prison. In making this recommendation, the prosecutor made no mention of a prison-based DOSA. Did the deputy prosecutor breach the plea agreement?

C. STATEMENT OF THE CASE

Bryan J. Shollenberger and Melissa Wheeler had been in a dating relationship. (RP (Jan. 14, 2013) 35-36). A protection order was in place prohibiting Mr. Shollenberger from contacting Ms. Wheeler. (CP 3). On June 4, 2012, Mr. Shollenberger had contact with Ms. Wheeler. (CP 3).

The State charged Mr. Shollenberger with one count of felony violation of a protection order, with a domestic violence allegation.

(CP 1-2). Mr. Shollenberger agreed to plead guilty as charged.

(CP 55-64; RP (Jan. 14, 2013) 28-36). The plea agreement provided:

The prosecuting attorney will make the following recommendation to the judge: Not charge bail jump, Recommend 22 credit for concurrent time for time served on 11-1-01019-1 total 3 months, Allow sentence to prison DOSA. Allow aray [sic] exceptional sentence for Residential DOSA, although State is not agreeing to it.

(CP 58).

During the plea colloquy, the trial court discussed the State's sentencing recommendation with Mr. Shollenberger. (RP (Jan. 14, 2013)

32-34). The discussion proceeded as follows:

[The Court:] I see, and that the State is concurring with your request for a prison based DOSA?

[Defense counsel:] A DOSA sentence. Yes, your honor.

[Deputy prosecutor:] I don't have any objection to the prison based DOSA. It is my understanding the defense will be asking for a residential DOSA, and we'll be arguing about that.

[The Court:] Why don't we do this. With the way this has been written, and I can't read [defense counsel's] handwriting sometimes, and then there's been additions and changes, I'm having a hard time articulating exactly what the State's recommendation is.

So will you do that please?

[Defense counsel:] Yes, your honor.

The State's recommendation is that he has spent three months in custody on the original violations of no contact order. That he can have concurrent time for those three months, which were served while he was preparing to go to trial on this new violation. That the State does not object to this court giving him a DOSA sentence on a standard range of 22 to 29 months.

That would be a prison based DOSA. That he is going to argue or I am going to argue for him for an exceptional sentence where the court would have to reduce him to a sentence of – an actual sentence of 22 months in order for him to qualify for a residential DOSA because the residential DOSA cuts off at a mid range of 24 months, and the mid range of his sentence would be 24 and a half months, which makes him not qualify for the residential DOSA unless the court were to grant an exceptional sentence to a standard range below 22 months.

[The Court:] All right. Mr. Shollenberger, is that your understanding of the State's recommendation and the plea bargain that's been reached here today?

[Mr. Shollenberger:] Yes.

(RP (Jan. 14, 2013) 33-34).

A pre-sentence investigation was ordered to determine Mr. Shollenberger's eligibility for both a prison-based DOSA and a residential DOSA. (CP 65, 70; RP (Jan. 14, 2013) 36-40). The investigation indicated chemical dependency. (CP 70-72).

At sentencing, defense counsel asked the trial court to impose an exceptional sentence downward, to allow for the imposition of a residential DOSA sentence. (RP (Feb. 6, 2013) 3-6). The deputy prosecutor asked the trial court to impose a sentence of 22 months in prison. (RP (Feb. 6, 2013) 2). The prosecutor argued:

As [defense counsel] said, residential DOSA has a very low success rate. I spoke to one community corrections officer who said he had only about one person ever even successfully complete it. The prison-based DOSA has a much higher success rate. And I appreciate that drugs or alcohol is the basis for probably 95% of the people that

come through this court, but that doesn't mean that everybody is entitled to DOSA. I think it's completely inappropriate case [sic] for an exceptional sentence down. Should, you know, again the state's recommending 22 months, but should the Court find it appropriate to sentence him to DOSA, we'd be asking the Court not to sentence the residential DOSA.

(RP (Feb. 6, 2013) 11).

The court declined to sentence Mr. Shollenberger to a prison-based DOSA, and imposed a sentence of 22 months confinement. (CP 73-84; RP (Feb. 6, 2013) 11).

Mr. Shollenberger appealed. (CP 88).

D. ARGUMENT

1. BECAUSE THE DEPUTY PROSECUTOR BREACHED THE PLEA AGREEMENT, MR. SHOLLENBERGER IS ENTITLED TO RESCISSION OR ENFORCEMENT OF THE PLEA AGREEMENT.

A plea agreement is a contract between the defendant and the State, under which the defendant pleads guilty in exchange for some State concession, such as a sentencing recommendation. *State v. Barber*, 170 Wn.2d 854, 859, 248 P.3d 494 (2011). “[P]lea agreements are more than simple common law contracts.” *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Plea agreements concern fundamental rights of the accused, and therefore, constitutional due process principles apply.

Id. Due process requires 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)). Interpretation of a plea agreement involves questions of law, subject to *de novo* review. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006).

“A prosecutor is obliged to fulfill the State’s duty under the plea agreement by making the promised sentencing recommendation.” *Sledge*, 133 Wn.2d. at 840. In making the sentencing recommendation here, the prosecutor made no mention of a prison-based DOSA. (RP (Feb. 6, 2013) 2, 10-11). The State did not tell the court that it would not oppose a prison-based DOSA. (RP (Feb. 6, 2013) 2, 10-11). The prosecutor failed to fulfill the State’s duty under the plea agreement to allow for a prison-based DOSA.

“[T]he State has a concomitant duty not to undercut the terms of the plea agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.” *Sledge*, 133 Wn.2d. at 840. The test for determining if this duty is fulfilled is whether the prosecutor objectively contradicted the sentencing recommendation by use of words or conduct. *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999). The conduct is evaluated by an objective standard, regardless of the prosecutor’s motivations or justifications for the failure to perform. *Id.*

(quoting *In re Pers. Restraint of Palodichuk*, 22 Wn. App. 107, 110, 589 P.2d 269 (1978)).

Here, the prosecutor contradicted the State's sentencing recommendation by arguing for a standard range sentence, without a prison-based DOSA option. (RP (Feb. 6, 2013) 2, 10-11). The prosecutor breached the plea agreement by failing to tell the court she had agreed to prison-based DOSA.

Mr. Shollenberger is entitled to a choice of remedies: remand for withdrawal of the guilty plea or specific performance by means of a new sentencing hearing before a different judge with the benefit of the agreed-upon recommendation of the State. *See State v. Van Buren*, 101 Wn. App. 206, 217, 2 P.3d 991 (2000) (setting forth this remedy for a prosecutor's breach of a plea agreement). Regardless of whether the prosecutor's breach actually influenced the court, Mr. Shollenberger is entitled to relief. *See In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982) (the right to withdraw a plea or have the plea bargain specifically enforced "exists even though the sentencing judge was not bound, nor even influenced, by the prosecutor's recommendation.").

E. CONCLUSION

The case should be remanded to permit Mr. Shollenberger to decide whether to withdraw his guilty plea or elect specific performance of the plea agreement before a different judge.

Dated this 5th day of July, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31430-8-III
)	
vs.)	CERTIFICATE
)	OF MAILING
BRYAN J. SHOLLENBERGER,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on July 5, 2013, 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:

Andrew Kelvin Miller
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I certify under penalty of perjury under the laws of the State of Washington that on July 5, 2013, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 5, 2013.


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