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NO. 37989-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANNY BARBER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01380-4

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BRIEF OF RESPONDENT

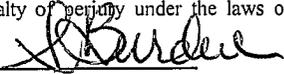
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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUE

Barber pled guilty to felony DUI, which carries a mandatory term of community custody. Barber was not informed of the community custody requirement, and the State's sentencing recommendation under the plea agreement did not include community custody, either. Barber was sentenced accordingly.

On learning that community custody was mandatory, the trial court sought to amend the judgment to comply with the statute. Barber objected, alleging that his plea was involuntary because he was not advised of the community custody requirement. The parties and the court below agreed that the plea was involuntary. Barber then elected specific performance of the plea agreement rather than withdrawal of his plea.

The State adhered to its original sentencing recommendation of no community custody. The trial court, however, declined to follow that recommendation, and imposed community custody.

The question presented is whether the remedy of specific performance requires the trial court to follow the State's sentencing recommendation.

II. STATEMENT OF THE CASE

Because the issue presented is purely one of law, the State accepts Barber's statement of the case for the purposes of this appeal.

III. ARGUMENT

THE TRIAL COURT WAS NOT BOUND TO FOLLOW THE STATE'S SENTENCING RECOMMENDATION AS PART OF THE REMEDY OF SPECIFIC PERFORMANCE UPON DETERMINATION THAT BARBER'S PLEA WAS INVOLUNTARY.

Barber argues that specific performance is a proper remedy for his involuntary plea. The State agrees, and it adhered to its original plea agreement recommendation of a sentence without community custody for Barber's felony DUI. Barber also claims, however, that he is entitled to have the trial judge follow that recommendation. His position is contrary to Washington precedent.

The Supreme Court has recognized two possible remedies where a defendant's plea was involuntary or the State breaches a plea agreement. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988); *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003). 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.* The defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy. *Miller*, 110 Wn.2d at 535.

The State and Barber are in agreement with the foregoing principles. The parties are also in agreement that Barber was not informed that he would be subject to a term of community custody for his felony DUI conviction.

Finally, the State also agrees that this failure rendered his plea involuntary, entitling Barber to withdraw his plea or to demand specific performance. *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Barber chose the latter. The question on appeal is what constitutes specific performance.

The trial court accepted the State's concession that specific performance meant that the State was bound by its plea agreement and therefore was required to recommend a sentence without a community custody component. CP 56. The court further concluded, however, that the court was not similarly bound. CP 57 (*citing State v. Henderson*, 99 Wn. App. 369, 993 P.2d 928 (2000)). It therefore concluded that it could, and did, impose community custody. CP 59.

The trial court's conclusion was correct. In *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003), the Supreme Court has endorsed the same reading of "specific performance" as this Court did in *Henderson*:

While the State must uphold its end of the plea agreement on remand, the court retains the ultimate decision on sentencing.

Harrison, 148 Wn.2d at 557 (*citing In re Powell*, 117 Wn.2d 175, 200, 814 P.2d 635 (1991)); *accord In re Lord*, 152 Wn.2d 182, 193 n.13, 94 P.3d 952 (2004) (although the defendant is entitled to specific performance by the State, "the sentencing court is still entitled to reject the State's recommendation.")). Because the trial court was correct, Barber's sentence

should be affirmed.

Barber's reliance on *Miller, Turley, and Isadore* for a contrary rule is misplaced. In none of those cases was the question of whether the trial court was bound by a plea agreement in issue. As noted in *Harrison* and like cases, the rule of law is emphatically that trial courts are not, and cannot, be bound by sentence recommendations in plea agreements. *See also* RCW 9.94A.431(2) ("The sentencing judge is not bound by any recommendations contained in an allowed plea agreement").

Barber's reliance on *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), is also inapposite. That case holds that failure to advise a defendant regarding community placement renders a plea involuntary. The State does not dispute this point. *Ross* sheds no light on the current issue, however, since the defendant therein sought to withdraw his plea. *Ross*, 129 Wn.2d at 288.

Nor does *State v. Schaupp*, 111 Wn.2d 34, 757 P.2d 970 (1988), assist Barber. The State generally agrees with his representations of the procedural history of that case. It disagrees with his apparent conclusion, however, that it mandates that the trial court is bound by a sentencing recommendation. To the contrary, although *Schaupp* was entitled to have his improperly vacated plea agreement reinstated, the Supreme Court remanded for resentencing.

Schaupp, 111 Wn.2d at 42. Nothing in the opinion suggests that that resentencing required the trial court to follow any sentencing recommendation. Indeed, it appears that the plea agreement only concerned a reduction in charges, not a sentence recommendation. *Schaupp*, 111 Wn.2d at 35-36. This case thus sheds no light on the question presented here. Moreover, even if it could be read in the manner Barber suggests, such a holding would be contrary to the Supreme Court's subsequent rulings in *Harrison* and *Lord*.

Nor is *State v. Banks*, 466 A.2d 69, 56 Md. App. 38 (1983), persuasive. That case's holding is based on a conception of the role of the court in the plea-bargaining process that is foreign to Washington law:

If the judge accepts the plea agreement, he shall accept the defendant's plea in open court *and embody in his judgment the agreed sentence*, disposition or other judicial action *encompassed in the agreement*, or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

Banks, 466 A.2d at 73 (emphasis supplied). This is directly contrary to the Washington rule that the judge is not bound by a recommendation contained in plea agreement.

Schaupp cited *Banks* without discussion, but, particularly given the context involved, any endorsement of *Banks* can only go so far as the proposition that once a plea is accepted, the trial court may not withdraw the

defendant's plea over the defendant's objection.¹ Nothing in *Schaupp* purports to alter the basic precept of the SRA that a trial judge is not bound by sentencing recommendations contained in plea agreements. And again, such a view has been subsequently and explicitly rejected by our Supreme Court.

United States v. Holman, 728 F.2d 809 (6th Cir. 1984), suffers from the same infirmity as *Banks*: it comes from a jurisdiction where the judiciary has a fundamentally different role in the plea negotiation process than in Washington. See Fed. R. Crim. P. 11(c)(1)(c) ("the plea agreement may specify that an attorney for the government will ... agree that a specific sentence or sentencing range is the appropriate ... *such a recommendation or request binds the court* once the court accepts the plea agreement." (emphasis supplied)).

Barber fails to show that the trial court erred. Its order amending his judgment and sentence should therefore be affirmed.

¹ This rule of course does not apply where the defendant breaches of the agreement. *State v. Armstrong*, 109 Wn. App. 458, 463, 35 P.3d 397 (2001), *review denied*, 146 Wn.2d 1013 (2002).

IV. CONCLUSION

For the foregoing reasons, Barber's conviction and sentence should be affirmed.

DATED February 6, 2009.

Respectfully submitted,

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