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No. 66729-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAHENDRA SAMI CHETTY,

Appellant.

OPENING BRIEF OF APPELLANT

On Appeal From King County Superior Court
The Hon. Helen Halpert, Presiding
The Hon. Paris Kallas, Presiding
The Hon. Cheryl Carey, Presiding

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http://tdn.com/news/local/death-of-an-informant-part/article_366fadb4-4650-11e2-980a-0019bb2963f4.html (Part 1); http://tdn.com/news/local/death-of-an-informant-part/article_a181988c-4660-11e2-9be7-0019bb2963f4.html (Part 2); http://tdn.com/news/local/death-of-an-informant-part/article_f71ec346-53ad-11e2-838e-0019bb2963f4.html (Part 3); http://tdn.com/news/local/death-of-an-informant-part/article_5bae4b74-53ae-11e2-a79a-0019bb2963f4.html (Part 4)..... 24

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A. ASSIGNMENTS OF ERROR

1. Appellant Mahendra Chetty assigns error to the entry of judgment and sentence. CP 79-86.

2. The trial court erred when it determined that Mr. Chetty was in breach of a cooperation agreement and that the State was entitled to proceed by way of a stipulated facts trial. CP 70, *Findings of Fact and Conclusions of Law: Breach of Cooperation Agreement* (App. A).

3. Mr. Chetty assigns error to the following sentence of Finding of Fact 6 of the *Findings of Fact and Conclusions of Law: Breach of Cooperation Agreement*: “The defendant testified that it was his understanding that he was responsible for finding the dealers.” CP 68 (App. A).

4. Mr. Chetty assigns error to Conclusions of Law 2 of the *Findings of Fact and Conclusions of Law: Breach of Cooperation Agreement*. CP 69 (App. A).

5. Mr. Chetty assigns error to Conclusion of Law 3 of the *Findings of Fact and Conclusions of Law: Breach of Cooperation Agreement*. CP 69 (App. A).

6. The *Cooperation Agreement*, CP 71-76, App A, as construed by the trial court, was an illusory contract and violated public policy, and thus could not be enforced.

7. The *Cooperation Agreement* was never filed in open court, and was never publicly approved by the trial court, thereby violating the First, Sixth and Fourteenth Amendments and article I, sections 10 and 22 or violating the separation of powers set out in the Washington Constitution.

8. Mr. Chetty's jury trial rights were violated, and it was error for the trial court to try Mr. Chetty based upon the police reports.

9. The trial court erred by finding that it "approved the defendant's submittal of this action to the court for a stipulated facts trial" and erred by referring to "the defendant's Stipulation to Facts and Waiver of Jury Trial." CP 41 (App. B).

10. The trial court erred by entering all of the findings and conclusions in the *Order on Stipulated Facts – Findings and Conclusions of Law*. CP 41-44, attached in App. B

11. Mr. Chetty received ineffective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Mr. Chetty fulfill his end of the *Cooperation Agreement*, and thus did the trial court err when terminating the agreement and trying him based upon police reports?

2. As construed by the trial court, was the *Cooperation Agreement* illusory and void as being against public policy?

3. Does enforcement of a secret *Cooperation Agreement* violate requirements that courts be involved in plea agreements and dismissals of cases, and violate the open courts provisions of the state and federal constitutions?

4. Did Mr. Chetty validly waive the right to a jury trial?

5. Was trial counsel ineffective?

C. STATEMENT OF THE CASE

1. *Procedural History*

By information filed on June 10, 2003, in King County Superior Court, the State of Washington charged Mahendra Chetty with one count of possession of cocaine with intent to deliver. CP 1. Prior to trial, on April 29, 2004, the parties entered into an agreement by which the trial would be continued and Mr. Chetty would assist the Seattle Police

Department in drug cases. If Mr. Chetty complied, the State agreed to dismiss the charges. If there was a breach, Mr. Chetty agreed he would waive his trial rights and have a stipulated facts trial. CP 71-76.

The substance of the agreement will be discussed in the next section of this brief. However, the format of the *Cooperation Agreement* is that of a court pleading. It is printed on pleading paper, under the heading of “the Superior Court for the State of Washington in and for King County.” The case is listed as “State of Washington, Plaintiff v. Mahendra Chetty, Defendant,” with the following cause number: No. 03-1-06783-7 Sea. CP 71-76. The agreement was signed by Mr. Chetty and his attorney (Peter Connick), with Mr. Connick’s signature being dated April 29, 2004. Neither of the two deputy prosecutors (Karissa Taylor and Mary Barbosa) signed the agreement. CP 76.

The day after Mr. Connick and Mr. Chetty signed the agreement, on April 30, 2004, the deputy prosecutor (Ms. Taylor) appeared before the Hon. Paris Kallas for the omnibus hearing.¹ Neither Mr. Chetty nor Mr. Connick were present. The prosecutor informed the court that she was not asking for a warrant because she had been in close communication with

¹ On April 16, 2004, the trial date was continued until May 10, 2004, and an omnibus hearing date of April 30, 2004, had been set. Supp. CP __ (Sub. No. 40).

Mr. Connick and there must have been some confusion. RP (4/30/04) 2. There was no discussion on the record of the *Cooperation Agreement*, but the omnibus hearing was continued until May 7, 2004. Supp. CP ____ (Sub. No. 41).

On May 7, 2004, the prosecutor appeared in court again, before the Hon. Cheryl Carey. Again, neither Mr. Chetty nor Mr. Connick were present, although attorney Ann Mahoney appeared for Mr. Connick. Again without discussion on the record of the *Cooperation Agreement*, the court continued the trial until August 31, 2004. RP (5/7/04) 2-3; Supp. CP ____ (Sub No. 43). Ms. Mahoney filed a speedy trial waiver, signed by Mr. Chetty, waiving speedy trial through September 30, 2004. Supp. CP ____ (Sub. No. 44). Neither party filed the *Cooperation Agreement* with the court at that point.²

The State later alleged that Mr. Chetty did not fulfill his part of the *Cooperation Agreement* and sought “enforcement” of the agreement by holding a stipulated trial. CP 36-40. The defense also argued for

² The *Cooperation Agreement* was later introduced as an exhibit at the evidentiary hearing held on October 5, 2004, Ex. 2 (10/5/04), and was attached to the trial court’s findings and conclusions regarding the enforcement of the agreement. CP 71-76.

“enforcement” of the agreement, arguing that Mr. Chetty complied with its terms and that it was the police who breached the agreement. CP 24-34.

An evidentiary hearing took place before the Hon. Helen Halpert on October 5, 2004. RP (10/5/04) 10-66. On October 15, 2004, Judge Halpert ruled that the State had shown by a preponderance of the evidence that the agreement had been breached by Mr. Chetty. RP (10/15/04) 67; CP 66-70. Pursuant to the agreement, Judge Halpert reviewed certain police reports and found Mr. Chetty guilty. RP (10/15/04) 70-71; CP 41-65.

On November 3, 2004, the trial court sentenced Mr. Chetty to serve 15 months in the Department of Corrections. CP 79-86. Mr. Chetty appealed the conviction on February 23, 2011. CP 87-106. This Court later extended the time for filing the notice of appeal. *State v. Chetty*, 167 Wn. App. 432, 272 P.3d 918 (2012), *after remand* 184 Wn. App. 607, 338 P.3d 298 (2014).

2. *Substantive Facts*

i. The Agreement

On May 23, 2003, Seattle Police Department officers arrested Mr. Chetty after a drug operation, and the State charged him with VUCSA a

few weeks later. CP 1-3. Almost a year later, according to King County Deputy Prosecuting Attorney Karissa Taylor, who testified as a witness at the evidentiary hearing, Mr. Chetty's attorney (Mr. Connick) raised the issue of Mr. Chetty becoming a cooperating witness to "work off" the pending charge. RP (10/5/04) 41-42. Ms. Taylor worked out the *Cooperation Agreement* with the input of other prosecutors in her office. She sent the agreement to Mr. Connick, who faxed it back with the signature page signed. She then forwarded it to Seattle Police Department ("SPD") Detective Rudy Gonzales. RP (10/5/04) 42-43.³

The *Cooperation Agreement* involved Mr. Chetty assisting SPD officers in drug cases. In exchange, the State promised to dismiss the charges against him. CP 71-76. Mr. Chetty agreed to stay in regular touch with his handlers, and not to disclose his cooperation to any other person or to "any other law enforcement agency, local, state or federal." CP 72, ¶¶1(B)(5) - (6); CP 74, ¶1(M). Mr. Chetty also assumed all risks "which may arise from his involvement in the undercover operations" and to hold the SPD and the King County Prosecuting Attorney harmless "*for any*

³ The trial court's findings spell the detective's name as "Gonzalez," but he testified the name was spelled "Gonzales." RP (10/5/04) 13.

injury or death that may result from his participation in this cooperation agreement.” CP 75 (emphasis added).

The agreement set out Mr. Chetty’s obligations and “tasks” which included the following:

- * “Chetty will assist in the investigation and prosecution of three drug dealers in the greater Seattle area.”
- * “Chetty will make controlled purchases of controlled substances as directed by SPD officers.”
- * “Chetty will assist in the arrest and prosecution of three drug dealers who are arrested with more than 9 ounces of cocaine (one quarter kilo).”
- * “Chetty will provide any other assistance required by SPD in order to further their investigations of these three individuals.”
- * “Mahendra Chetty agrees to comply with all lawful and reasonable requests by the SPD as it relates to being an informant.”
- * “Mahendra Chetty acknowledges and agrees that the above conditions may be changed if the need arises. In so acknowledging and agreeing, Chetty is aware that the SPD will ultimately be the decision making authority regarding the investigations that Chetty will assist in.”
- * “Mahendra Chetty agrees and acknowledges that SPD will ultimately determine whether he has fulfilled the terms of this agreement.”

CP 71-73, ¶¶ 1(B)(1) - (4); ¶¶ (1)(J) - (L).

Mr. Chetty also agreed that he will waive his trial rights:

Mahendra Chetty will stipulate to the admissibility and veracity of the police reports including the results of the narcotics field test. He will waive his right to a jury trial; his right to a speedy trial; and his right to present or object to any evidence. He acknowledges that the only trial he will receive will be a stipulated bench trial.

CP 72, ¶ 1(C).

ii. Mr. Chetty's Attempts to Comply

Mr. Chetty stayed in regular contact with his handler, SPD Det. Gonzales. CP 68, FF 7-8. Mr. Chetty thought that Detective Gonzales would call him when there was something for him to do, and that SPD would find the possible sellers of cocaine from whom he would then purchase drugs. CP 32; RP (10/5/04) 55. Det. Gonzales soon told Mr. Chetty that it was *Chetty's* responsibility to find the sellers. RP (10/5/04) 55-56. Gonzales would later admit that the condition that it was Mr. Chetty's job to find the potential dealers was not in the agreement. RP (10/5/04) 32.

Mr. Chetty's regular supplier the year before had been arrested when Mr. Chetty initially cooperated with the arresting officers. Mr. Chetty did not have a lot of other sources and, while he tried the best he

could, he could not locate other people who could sell the quantity desired by the SPD. CP 33.

Chetty located someone to buy marijuana from, but it was not in sufficient quantities such that Det. Gonzales was interested. RP (10/5/04) 27. Mr. Chetty then found an individual that he believed might be able to provide a large quantity of cocaine. Chetty told Gonzales that he had purchased or could purchase an “8 ball” from this individual, and thought he could purchase 9 ounces. Det. Gonzales wanted to go more gradually and order up only 3.5 grams from the individual and not arrest him. Under SPD’s supervision, Chetty purchased ½ ounce of cocaine, but then the relationship with this dealer “fizzled,” and Chetty was no longer able to meet with him to buy cocaine. RP (10/5/04) 22, 35. Gonzales, though, concluded “that’s just the drug business. I mean . . . he did what he was told to do.” RP (10/5/04) 35. By this time, the deadline for the agreement was expiring and Det. Gonzales informed the State that he believed Mr. Chetty was in breach of the agreement. RP (10/5/04) 23.

iii. The Trial Court’s Findings

Judge Halpert concluded, as agreed by both parties, that the *Cooperation Agreement* gave the court the role to determine whether

either party breached the agreement. CP 68-69, CL 1. Judge Halpert concluded also that it was Mr. Chetty's job, not SPD's, under the agreement, to locate the three large drug dealers:

The court concludes that defendant, per the agreement, was required to locate three drug dealers each capable of selling nine ounces of cocaine in one transaction and was not simply required to assist the police in doing controlled buy[s] from individuals whom the police had previously identified. Even assuming that Section [1]B-2 is not entirely clear in this regard, Sections [1]J and [1]K give the police the authority to modify and clarify these conditions. Defendant acknowledges that after his first conversation with the Detective, the detective specifically clarified this condition. . . .

CP 69, CL 2. Judge Halpert concluded that because it was Mr. Chetty's role to find the dealers, and he did not, he was in breach, and the State could proceed to the stipulated facts trial. CP 69-70; RP (10/15/04) 67.

Having found a breach, Judge Halpert asked Mr. Chetty to sign a written stipulation form and a jury trial waiver. RP (10/15/04) 68. Mr. Chetty's attorney, however, declined to sign a jury trial waiver. Judge Halpert noted that the agreement stated that Mr. Chetty "will waive" his right to a jury trial, as opposed to having signed a waiver already.

However, she concluded that the intent of the parties was to have waived the jury trial right, and thus proceeded to try Mr. Chetty based upon the

police reports without a further waiver. RP (10/15/04) 68-70. In her written findings and conclusions, Judge Halpert stated that she had “approved the defendant’s submittal of this action to the court for a stipulated facts trial,” referencing a purported “defendant’s Stipulation to Facts and Waiver of Jury Trial.” CP 41. Clearly, Judge Halpert only “approved” of the decision after finding that Mr. Chetty had breached the *Cooperation Agreement*, and there actually was no new “Stipulation to Facts and Waiver of Jury Trial” form executed by Mr. Chetty.

D. ARGUMENT

1. *Mr. Chetty Did Not Breach the Agreement*

Mr. Chetty agreed to “assist” the Seattle Police Department investigate, arrest and prosecute three drug dealers. He agreed to make purchases of controlled substances “as directed by SPD officers.” CP 71-72. He did not agree to go out on his own, unsupervised, and locate high level dealers to present to SPD officers.⁴ While the trial court construed the agreement to place the onus on Mr. Chetty to find three large drug

⁴ Judge Halpert found that “[t]he defendant testified that it was his understanding that he was responsible for finding the dealers.” CP 68, FF 6. This finding is not supported by the evidence and is clearly erroneous because Mr. Chetty testified that he believed initially that it was SPD’s job to find the potential dealers. RP (10/5/04) 55-56.

dealers, such a construction would either violate public policy or would make the agreement “illusory.”

i. **The Court is the Final Arbiter Regarding Enforcement of a Cooperation Agreement**

An elected prosecuting attorney in a county retains great discretion to file criminal charges, and there is no role for judicial involvement in the initial decision to file charges or to decide what charges are to be filed. *See State v. Haner*, 95 Wn.2d 858, 863, 631 P.2d 381 (1981). On the other hand, once a criminal charge is actually filed, it is the court which retains the ultimate authority to determine whether a charge should be amended or dismissed. *State v. Haner*, 95 Wn.2d at 863-64 (citing CrR 2.1(d)).⁵ Ultimately, the power to approve or deny a proposed disposition

⁵ In *Haner*, the Supreme Court held:

The amendment of an information is *not* an initial decision to prosecute, however. . . . By the time the State has determined to move to amend the information, the plain terms of CrR 2.1(d) have implicated the court in any possible alterations. . . .

...

Thus, the reducing or dismissal of charges is an integral and major element of the bargain. To characterize it solely as a charging function of the prosecutor and not as part of the plea bargain is unrealistic and as a practical matter strips the judge of his authority to approve or disapprove the plea bargain, a role all parties agree he has

...

(continued...)

of a filed case is part of the power vested in the judicial branch of our government under article IV, section 1, of the Washington Constitution. *See State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 775-76, 621 P.2d 115 (1980) (power to refer charged person for deferred prosecution is a judicial power, not subject to prosecution veto). *See also State v. Haner*, 95 Wn.2d at 863 (citing *Schillberg*).

While the prosecuting attorney has the initial authority to enter into a “cooperation agreement” with someone facing criminal charges, *see State v. Reed*, 75 Wn. App. 742, 745, 879 P.2d 1000 (1994),⁶ the

⁵(...continued)

Thus, to have any meaning beyond its ordinary sentencing powers, the court's authority to approve or deny a plea bargain must include the right to refuse or allow the dismissal or amendment of the charges.

Haner, 95 Wn.2d at 863-64 (emphasis in original). *See also State v. Ford*, 125 Wn.2d 919, 924-25, 891 P.2d 712 (1995) (with regard to acceptance of guilty plea, “[t]he court is part of the proceeding and is not a potted-palm functionary, with only the attorneys having a defined purpose.”).

⁶ In *Reed*, the issue was whether the police, without prosecutorial involvement, could enter into a binding cooperation agreement with a defendant not to file charges in exchange for information. This Court held:

However, the prosecuting attorney was not a party to the agreement in this case. We hold that the promise by police to ‘drop charges’ exceeded their authority and that, without the involvement of the county prosecutor, such an agreement cannot be enforced as a contract. . . . The prosecutor may make enforceable agreements to reduce or dismiss charges, . . . but because the police did not first obtain the approval or consent of the prosecutor, they had no authority to enter into an enforceable agreement not to prosecute Reed.

(continued...)

Washington Supreme Court has held that the enforcement of such an agreement is a judicial function. *State v. Sonneland*, 80 Wn.2d 343, 494 P.2d 469 (1972).

In *Sonneland*, the defendant, charged with possession of marijuana, agreed to become an informant and provide information leading to the arrest of three dealers of marijuana or heroin. If successful, the charge would be dismissed; if he failed to do so, he agreed to plead guilty to a gross misdemeanor:

As a “cover”, defense counsel obtained a continuance and the defendant was released.

In August, the defendant informed on one dealer. During the raid which followed, the named dealer and two other dealers were arrested. Afterward defendant furnished no further information.

State v. Sonneland, 80 Wn.2d at 345.

The defense successfully sought dismissal based upon compliance with the agreement, but the prosecutor took the position that Mr. Sonneland only “carried out only one-third of his bargain” – only having provided one “tip” and not three separate tips. *State v. Sonneland*, 80 Wn.2d at 348-49. Further, the State argued that the court was powerless to

⁶(...continued)
State v. Reed, 75 Wn. App. at 745.

dismiss a case over its objection, and that “the court’s inquiry should have been limited to a determination of whether the *prosecutor*, not the court, felt the agreement had been honored.” *Id.* at 349 (emphasis in original).

The Supreme Court rejected the State’s arguments, holding that former RCW 10.46.090⁷ modified the common law to abrogate the prosecutor’s sole discretion under common-law to dismiss a charge: “Clearly this evidences a legislative intent that the trial court *alone* is authorized to dismiss criminal charges.” *State v. Sonneland*, 80 Wn.2d at 346 (emphasis in original). This power extended to review the prosecutor’s belief that the defendant had not complied, and to find substantial compliance because in fact three dealers were arrested based upon the defendant’s one tip. *Id.* at 349.

⁷ Former RCW 10.46.090 provided:

Nolle prosequi. The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section.

Laws of 1909, ch. 249 § 62; Code of 1881 § 775; RRS § 2314, repealed by Laws of 1984, ch. 76 § 29.

ii. **The Agreement Here Required Mr. Chetty to Work under the Supervision of the Police and Did Not Require Him to Find Three Dealers on his Own**

The principles of contract law may apply “at least by analogy” to cooperation agreements entered into between a criminal defendant and the prosecutor. *State v. Reed*, 75 Wn. App. at 744. Interpretation of contracts is generally a question of law, reviewed *de novo*. See *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

Washington follows the “objective manifestation” theory of contracts. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The court must “determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Id.* The court imputes to the parties an intention that corresponds with the reasonable meaning of the words used in their contract, giving undefined words their ordinary, usual, and popular meaning unless the entirety of the contract clearly demonstrates a contrary intent. *Id.* at 503-04. “[T]he subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. . . . We do not interpret what was intended to be written but what was written.” *Id.* at 504.

Applying these principles to the *Cooperation Agreement*, it is apparent that Mr. Chetty's understanding was correct. As both Det. Gonzales and Ms. Taylor admitted, the agreement did not contain any provision that required Mr. Chetty to seek out and find major drug dealers on his own. RP (10/5/04) 32, 46. On the other hand, the agreement required Mr. Chetty to "assist" in the investigation, prosecution, and arrest of drug dealers, a term used consistently throughout the agreement and a term that connotes working with another person, under his or her guidance. CP 71-72, ¶¶ 1(B)(1), (1)(B)(3) & (1)(B)(4).⁸

This meaning is supported by ¶ 1(B)(2), which required Mr. Chetty to "make controlled purchases of controlled substances *as directed by SPD officers.*" CP 72 (emphasis added). The paragraph did not require Mr. Chetty to make purchases of controlled substances under any other circumstance but "as directed by SPD officers."

⁸ "Assist" is defined as:

1. to give support or aid to; help:
Please assist him in moving the furniture.
2. to be associated with as an assistant or helper.

Dictionary.com.

If there is any ambiguity, “[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” *Restatement of the Law, Second, Contracts*, § 206 (1981). Here, the State was the party that drafted the agreement. RP (10/5/04) 42-43. Thus, any ambiguity should be resolved in Mr. Chetty’s, not the State’s, favor. *See, e.g., State v. Sonneland*, 80 Wn.2d at 348-49 (construing agreement in defendant’s favor). Such a construction is in accord with the general principle that it is the State’s burden to prove a violation. *See generally United States v. Mark*, ___ F.3d ___, 13-10579 (9th Cir. 7/31/15), Slip Op. at 7 (government has burden of proving a breach of an immunity agreement by a preponderance of the evidence).

Accordingly, this Court should hold that Mr. Chetty complied with the agreement, and that he did not breach the agreement. He is entitled to reversal of the conviction and dismissal of the information. *State v. Sonneland, supra*.

iii. **The Trial Court's Construction Would Render the Contract Illusory and Violate Public Policy**

Judge Halpert concluded that the agreement required Mr. Chetty to locate the dealers. CL 2, CP 69. This conclusion was erroneous.

Judge Halpert did not point to any particular language in the agreement to support this conclusion, but rather ruled:

Even assuming that Section B-2 is not entirely clear in this regard, Sections [1]J and [1]K give the police the authority to modify and clarify these conditions. Defendant acknowledges that after his first conversation with the Detective, the detective specifically clarified this condition. Further, this interpretation is completely consistent with the parties' course of dealing: That is, on May 23, 2003, the date of defendant's arrest and before the signing of the agreement, the detective agreed not to immediately book defendant into custody if he would disclose his source and participate in an "order up".

CL 2, CP 69.

It is not clear what the prior cooperation between Mr. Chetty and the detective has to do with the construction of the later agreement. If anything, the testimony was that Mr. Chetty took direction from Det. Gonzales and contacted his supplier the day he was arrested because Gonzales directed him to do so. RP (10/5/04) 15-17, 28-30.

As for ¶ 1(J)⁹ and ¶1(K),¹⁰ apart from the fact that ¶1(K) still is worded in a way that makes it clear that Mr. Chetty is to “assist” the SPD in its investigations, it is not clear that these sections really did give the SPD the complete authority to change the terms of the agreement at will. ¶ 1(J) still requires the SPD’s requests to be “reasonable” and it is not “reasonable” to send someone out, on his or her own, to locate large-scale drug dealers. Additionally, giving unfettered discretion *to the police* to change unilaterally the agreement is unenforceable since, as noted above, a cooperation agreement can only be enforceable if signed off by the prosecuting attorney. *State v. Reed, supra.*

On the other hand, these two clauses, if construed in the way the trial court construed them, essentially set up an “illusory contract,” giving

⁹ ¶ 1(J) provides:

Mahendra Chetty agrees to comply with all lawful and reasonable requests by the SPD as it relates to being an informant.

CP 73.

¹⁰ ¶ 1(K) provides:

Mahendra Chetty acknowledges and agrees that the above conditions may be changed if the need arises. In so acknowledging and agreeing, Chetty is aware that the SPD will ultimately be the decision making authority regarding the investigations that Chetty will assist in.

CP 73.

sole discretion to the police to decide whether to carry out the terms of the contract. As the leading case on the subject states:

An “illusory promise” is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. When a “promise” is illusory, there is no actual requirement upon the “promisor” that anything be done because the “promisor” has an alternative which, if taken, will render the “promisee” nothing. When the provisions of the supposed promise leave the promisor’s performance optional or entirely within the discretion, pleasure, and control of the promisor, the “promise” is illusory. . . . An “illusory promise” is neither enforceable nor sufficient consideration to support enforcement of a return promise.

Interchange Assoc. v. Interchange, Inc., 16 Wn. App. 359, 360-61, 557 P.2d 357 (1976).

If ¶ 1(J) and ¶ 1(K) of the agreement allowed the police at will to change the terms of the *Cooperation Agreement*, there would be nothing in the agreement preventing the police from simply refusing to allow Mr. Chetty to do anything to complete his obligations. Such an agreement, which gives one party complete power, is no real agreement at all. *See, e.g., Carey v. 24 Hour Fitness*, 669 F.3d 202 (5th Cir. 2012) (arbitration clause not enforceable because employee handbook gave employer “the right to revise, delete, and add to the employee handbook”).

Finally, the trial court's construction of the agreement is one that would not be conducive to public order and safety, not to speak of Mr. Chetty's personal safety. The way Det. Gonzales envisioned Mr. Chetty's work was for Chetty to go off, unsupervised and subject to an oath of secrecy, and make contact with drug dealers, possibly purchasing small amounts of drugs, in an effort to locate dealers who might have more drugs down the road. This appears to be what Mr. Chetty did in August when he purchased, on his own an "8-ball" of cocaine and then worked with Gonzales to buy a larger quantity. RP (10/5/04) 35 ("He had indicated to me that he had himself purchased no more than an eight ball, 3.5 grams from this individual, but thought he might be an individual who would be worthy of the nine-ounce.").

Because of the secrecy provisions of the agreement, ¶ 1(M), Mr. Chetty could not disclose his work even with another law enforcement agency, such as the DEA or FBI. Thus, without close supervision by an SPD officer, Mr. Chetty was expected to move in the shadowy world of drug dealers, undercover, while he committed drug offenses – buying various amounts of drugs from potential targets. Apart from the fact that such conduct violates the law (and could have subjected Mr. Chetty to

federal prosecution, for instance),¹¹ such a scheme opened Mr. Chetty up to the risk of extreme violence. *See, e.g.*, T. Lystra, “Death of an Informant,” Parts 1, 2, 3 & 4, *The Daily News* (Longview), December 29, 30, 2012, & Jan. 1, 2013 (discussing murder of informant in Cowlitz County who was working off drug charge).¹² Yet, the agreement required Mr. Chetty to hold SPD and the King County Prosecuting Attorney harmless for any injury or death that may result from his participation in the *Cooperation Agreement*.

¹¹ If Mr. Chetty was busted for trying to buy cocaine from a large-scale dealer, who was him or herself working for the DEA, Mr. Chetty could have been prosecuted federally for conspiracy to distribute cocaine, and could not have raised in his own defense the fact that he was working for SPD, as that disclosure would violate the agreement. He would hardly have been the first informant left out in the cold by his handlers.

¹² The article quoted (former) Sen. Adam Kline:

“They’re conscripts,” Kline said of the young informants. “These are untrained people conscripted because they can be, and they’re put in harm’s way. ... These are — how do I say it? — collateral damage in the war on drugs.”

http://tdn.com/news/local/death-of-an-informant-part/article_366fadb4-4650-11e2-980a-0019bb2963f4.html (Part 1); http://tdn.com/news/local/death-of-an-informant-part/article_a181988c-4660-11e2-9be7-0019bb2963f4.html (Part 2); http://tdn.com/news/local/death-of-an-informant-part/article_f71ec346-53ad-11e2-838e-0019bb2963f4.html (Part 3); http://tdn.com/news/local/death-of-an-informant-part/article_5bae4b74-53ae-11e2-a79a-0019bb2963f4.html (Part 4).

Such an agreement that exposed Mr. Chetty to death would probably not survive scrutiny if the State included such terms in other contexts:

This court has analyzed express releases seeking to immunize a defendant for negligent breach of a duty imposed by law and found that these violate public policy. See *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968 (1988) (invalidating on public policy grounds preinjury releases required of students as a condition for participating in interscholastic athletics); *Vodopest v. MacGregor*, 128 Wn.2d 840, 913 P.2d 779 (1996) (invalidating on public policy grounds preinjury releases to the extent they exculpate medical research facilities for negligence in performance of research). In *Wagenblast* we recognized “are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract.” 110 Wn.2d at 849. It flows logically that this court is even more reluctant to allow jailers charged with a public duty to shed it through a prisoner’s purported implied consent to assume a risk, especially in a context where jailers exert complete control over inmates.

Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 637-38, 244 P.3d 924 (2010). If jailers cannot rid themselves of the obligation to care for those under their care, the State should not be allowed to send someone into harm’s way without supervision and liability.

The Supreme Court has on at least one occasion disapproved of undercover informants, going out on their own “trolling for targets.” *State*

v. Lively, 130 Wn.2d 1, 23, 921 P.2d 1035 (1996). In *Lively*, the informant met the defendant at an AA/NA meeting, and arranged for sales of cocaine after entering into a physical relationship with her. *Id.* at 4-8. The Supreme Court found such conduct to be “so outrageous that it shocks the universal sense of justice . . . To condone the police conduct in this case is contrary to public policy and to basic principles of human decency.” *Id.* at 26-27. While here, Mr. Chetty did not infiltrate an AA/NA meeting to find a target, the agreement, as construed by the trial court, would have condoned such a result – essentially an agreement that Mr. Chetty use any means necessary to find the dealers sought by Det. Gonzales.

Contracts can certainly contain terms that are unenforceable because they violate public policy. See *LK Operating v. Collection Group*, 181 Wn.2d 48, 331 P.3d 1147 (2014) (contract violated public policy and was unenforceable because it violated RPCs). A contractual agreement that sent Mr. Chetty out on his own, unsupervised and in secret, to commit felony drug offenses in an effort to bring in a large dealer clearly “has a tendency to be against the public good, or to be injurious to the public.” *Lk Operating v. Collection Group*, 181 Wn.2d at 87 (internal quotes omitted).

This Court, however, need not resolve the issue of whether all informant agreements that send people out on their own to commit crimes and then to report back to a handler violate public policy. Rather, this Court avoid the issue here and hold the agreement at issue in this case did not require Mr. Chetty to be unsupervised. Rather, the agreement required him to “assist” SPD officers and to make purchases of controlled substances only “as directed by SPD officers.”

Accordingly, the trial court’s conclusions to the contrary (CL 2) were entered in error. Mr. Chetty did not breach the agreement. He complied with his end of the bargain. Rather, it was Det. Gonzales who made it impossible for Mr. Chetty to comply. CL 3 (CP 69) was therefore entered in error. Because of Mr. Chetty’s compliance, the case should have been dismissed. The conviction should be vacated. *State v. Sonneland, supra.*

2. A Secret Agreement to Resolve a Case Is Invalid

After the State filed charges against Mr. Chetty, on the eve of trial, on May 7, 2004, the case was continued for three months so that Mr. Chetty could assist SPD officers arrest large drug dealers. In exchange, the parties agreed that the case would be dismissed. There was no mention of this agreement on the record, however, when the case was continued for

such a lengthy time. Either the secret agreement was never disclosed to the court, or there was some off-the-record communication with the judge that was not placed on the record. In either case, such secrecy was illegal and is grounds to invalidate the agreement.¹³

As noted above, while the prosecuting attorney has discretion to enter into a cooperation agreement with a defendant, once a charge has been filed, the ultimate decision to dismiss the case is a judicial function. *State v. Sonneland, supra*; CrR 8.3(a); Const. art. IV, § 1. This is in line with the general judicial role of overseeing plea agreements. *See State v. Haner, supra*.¹⁴

To be sure, an agreement to dismiss a case based upon cooperation with law enforcement is not the same as a guilty plea. But, such an agreement is still part of the plea bargaining process, which this Court has recognized is governed by the same principles. *See State v. Reed*, 75 Wn. App. at 744 (citing *In re Palodichuk*, 22 Wn. App. 107, 110-11, 589 P.2d 269 (1978)). Plea negotiations can result in any number of outcomes,

¹³ This issue was not raised below, but is constitutional and can be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Wise*, 176 Wn.2d 1, 15-16, 288 P.3d 1113 (2012).

¹⁴ *See also* RCW 9.94A.431 (court can reject plea bargain if it “is not consistent with the interests of justice”).

ranging from guilty pleas to the charged or amended offense with a particular sentence recommendation to pretrial diversion to “stipulated orders of continuance” or “stays of proceedings” to outright dismissal. *See* RCW 9.94A.421.¹⁵ Such negotiations are not “some adjunct to the criminal justice system; it *is* the criminal justice system.” *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012) (quoting Robert E. Scott & William J. Stuntz, “Plea Bargaining as Contract,” 101 YALE L.J. 1909, 1912 (1992) (emphasis in article)).

¹⁵ RCW 9.94A.421 provides in part:

The prosecutor and the attorney for the defendant, or the defendant when acting pro se, 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.

Typically, agreements between the prosecutor and the defendant regarding the disposition of a case need to be placed on the record. *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982) (“[A]ny plea bargain must be spread on the record at the plea hearing.”) (emphasis in original). “The parties are required to state the nature of the agreement and the reasons for the agreement. . . . Those reasons, of course, must be truthful and must be sufficient to satisfy the court that the plea agreement is in the interest of justice.” *State v. Schaupp*, 111 Wn.2d 34, 41, 757 P.2d 970 (1988).

“America has a long history of distrust for secret proceedings. [Citation omitted] Pursuant to the First Amendment, there is a presumed public right of access to court proceedings. [Citation omitted] Secret proceedings are the exception rather than the rule in our courts.” *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014).

Accordingly, the presumption is that an agreement between the prosecutor and a defendant that addresses resolution of a criminal case should be filed in open court, and available for all to see. *See Oregonian Publ’g Co. v. U.S. Dist. Court*, 920 F.2d 1462 (9th Cir. 1990). This is required not only under the First, Sixth and Fourteenth Amendments of the United States Constitution, *id.*, but also under article I, sections 10 and 22

of the Washington Constitution. *See Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 71, 256 P.3d 1179 (2011) (public right to access where “a court’s approval of a settlement or acceptance of a plea agreement is part of the court’s decision making process.”).¹⁶

Of course, if a defendant is still cooperating in active investigations, there may be a valid basis to seal court records which detail such investigations or to close the courtroom when such agreements are discussed. However, sealing or courtroom closure need to conform to the requirements of *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). While the public has a qualified right to access court documents describing a defendant’s cooperation, portions of documents that would put others in danger can be sealed. *See United States v. Higuera-Guerrero (In re Copley Press, Inc.)*, 518 F.3d 1022, 1026-30 (9th Cir. 2008).

These principles were violated in this case because the *Cooperation Agreement*, drawn up in the style of a court pleading, was never filed with the court and either was withheld from the judge or

¹⁶ Judicial oversight of plea bargaining does not mean that a judge should become involved in the actual process of hammering out a deal. *See* RCW 9.94A.421 (“The court shall not participate in any discussions under this section.”); *State v. Wakefield*, 130 Wn.2d 464, 472-73, 925 P.2d 183 (1996) (cautioning against judicial involvement in plea negotiation process). However, as noted, once an agreement is reached, it is still up to the court to approve the agreement. RCW 9.94A.431; *State v. Haner, supra*.

disclosed in some off-the-record proceeding without there being a proper analysis under *Bone-Club*. There was never any on-the-record analysis (or even analysis in a non-public *ex parte* proceeding) regarding whether the deal reached by Mr. Chetty and the State – a lengthy continuance, cooperation and ultimate dismissal – should be public or not. This secrecy violated the First, Sixth and Fourteenth Amendments and article I, section 10 and 22, and requires invalidation of the *Cooperation Agreement* because the error is structural and prejudice is presumed. *State v. Paumier*, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

3. *There Was Not a Valid Jury Trial Waiver*

The secrecy of the proceedings also impacts the issue of whether Mr. Chetty truly made a knowing and voluntary waiver of the right to a jury trial. Such a right was protected under the Sixth and Fourteenth Amendments and article I, sections 21 & 22. *See Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982).¹⁷ A “waiver of that right must be voluntary, knowing, and intelligent. . . . Additionally, a court must indulge every reasonable presumption against waiver of fundamental rights.” *Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). “The State

¹⁷ Mr. Chetty also gave up other trial rights, including the right to confront witnesses, the right to present evidence, and the right to object to evidence.

bears the burden of proving a valid waiver.” *State v. Stegall*, 124 Wn.2d 719, 730, 881 P.2d 979 (1994).¹⁸

CrR 6.1(a) requires that cases be tried by a jury “unless the defendant files a written waiver of a jury trial, *and has consent of the court.*” Emphasis added. RCW 10.01.060 provides:

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his or her plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, *with the assent of the court*, waive trial by jury and submit to trial by the court.”

Emphasis added.

Ultimately, whether or not a court accepts a jury waiver depends on the court’s assessment not only of the voluntariness of the waiver, but also of other issues such as the seriousness of the charges, whether credibility is an issue, the burden on the court, and public perceptions of fairness. *See State v. Thompson*, 88 Wn.2d 13, 14-15, 558 P.2d 202

¹⁸ Because this issue is constitutional, it may be raised for the first time on appeal under RAP 2.5(a)(3). *See Bellevue v. Acrey*, 103 Wn.2d at 207 (jury trial waiver issue raised for first time on motion for discretionary review); *State v. Wicke*, 91 Wn.2d 638, 644-45, 591 P.2d 452 (1979) (waiver of constitutional jury trial right addressed for first time on appeal).

(1977); *State v. Turner*, 16 Wn. App. 292, 294-95, 555 P.2d 1382 (1976);
State v. Newsome, 10 Wn. App. 505, 506-08, 518 P.2d 741 (1974).

In *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979), the defendant was silent in court when his attorney waived the jury trial right in open court. The record also failed to reflect that defense counsel had consulted with Wicke or that the trial court questioned Wicke's waiver. Thus, the waiver was not knowing, intelligent, and voluntary. *Wicke*, 91 Wn.2d at 641, 645.

An oral colloquy between the defendant and the court is not necessary for there to be a valid waiver of the jury trial right. *State v. Stegall*, 124 Wn.2d at 725. Yet, the existence of a written waiver is not determinative, but is only strong evidence of the waiver's validity. *State v. Downs*, 36 Wn. App. 143, 145, 672 P.2d 416 (1983).

In this case, there was neither a standard jury waiver, filed with the court, nor a colloquy in court, on the record, accepting the jury waiver. There was an agreement that Mr. Chetty "will waive his right to a jury trial," and "will stipulate" to the admissibility of the police reports. CP 72. But, as Judge Halpert recognized (RP (10/15/04) 69) agreeing that Mr. Chetty *will* waive his right to a jury trial in the future is different than actually waiving it.

Moreover, there was, at the time of the purported waiver, no record that the court ever approved of the waiver. RP (4/30/04) 2; RP 5/7/04) 2-3. Either this lack of judicial involvement violated CrR 6.1(a) and RCW 10.01.060, or if there was secret judicial approval, that secrecy violated the right to open justice under the First, Sixth and Fourteenth Amendments and article I, sections 10 and 22. *See supra* § D(2).

The failure to have an on-the-record hearing related to the purported jury trial waiver ties into the confusion by Mr. Chetty as to exactly what his obligations were under the agreement. Mr. Chetty believed that he was to assist Det. Gonzales investigate and apprehend large drug dealers, and that it was not his responsibility to go off on his own. A colloquy, on the record, in court before the judge who was charged with consenting to a jury trial waiver, would have allowed there to that additional layer of protection – to insure that Mr. Chetty truly understood the ramifications of what he was getting himself into.

Accordingly, Mr. Chetty never actually knowingly and voluntarily waived the constitutional right to a jury trial, under the Sixth and Fourteenth Amendments or article I, sections 21 & 22, and the trial court never assented to this waiver, on the record, prior to accepting the waiver,

as required.¹⁹ It was error therefore to conduct a stipulated facts trial. This Court should reverse Mr. Chetty's conviction.

4. *Mr. Chetty Received Ineffective Assistance of Counsel*

All of the issues raised above were either fully preserved, having been raised below, or are constitutional and can be raised for the first time on appeal. Nonetheless, if there is any question about whether the issues raised in this case can be considered at this juncture, the Court should consider them under the rubric of ineffective assistance of counsel.

An accused person has the right under the Sixth and Fourteenth Amendments and article I, section 22 to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-90, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). While counsel is not expected to perform flawlessly, counsel is required to meet an objectively reasonable minimum standard of performance. *Id.* If counsel's performance falls beneath this minimum standard, reversal is required if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The defendant "need not show that

¹⁹ Judge Halpert's statement that the court "approved the defendant's submittal of this action to the court for a stipulated facts trial" which referenced "the defendant's Stipulation to Facts and Waiver of Jury Trial," CP 41, is erroneous. There was no actual waiver, and no court approval at the time of the purported waiver.

counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693.

The failure to make appropriate objections and motions certainly qualifies as falling below an objective standards of effectiveness. *See, e.g. State v. Reichenbach*, 153 W.2d 126, 130-31, 101 P.3d 80 (2004) (no possible legitimate tactic to fail to move to suppress evidence); *In re Maxfield*, 133 Wn.2d 332, 334, 945 P.2d 196 (1997) (ineffective to fail to argue state constitutional grounds for suppression motion). Accordingly, if Mr. Connick did not properly make all meritorious arguments on behalf of Mr. Chetty, Mr. Chetty should not be penalized and this Court should still reach the issues and reverse the conviction.

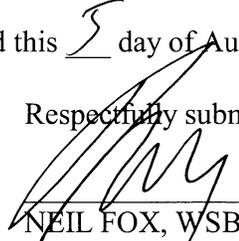
E. CONCLUSION

Mr. Chetty complied with the *Cooperation Agreement*. The trial court's construction of that agreement would make the agreement illusory or a violation of public policy. Moreover, the secrecy of the proceedings below, the lack of judicial involvement and the lack of a valid jury waiver which approved by the court should lead to the conclusion that it was error to try Mr. Chetty based on the police reports. The trial court erred when conducting such a trial and entering all the findings and conclusions in CP

41-43. Accordingly, this Court should reverse the conviction, and either remand for dismissal or for a jury trial.

Dated this 5 day of August 2015.

Respectfully submitted,



NEIL FOX, WSBA NO. 15277
Attorney for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

OCT 19 2004

SUPERIOR COURT CLERK
TONJA S. HOGAN
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

No. 03-1-06783-7 SEA

STATE OF WASHINGTON,
Plaintiff.

Findings of Fact and Conclusions of Law:
Breach of Cooperation Agreement

vs.

MAHENDRA CHETTY,
Defendant

This matter came for a hearing before the undersigned judge on October 5. The State offered the testimony of Detective Rudy Gonzalez. Defendant Mahendra Chetty testified on his own behalf. From this testimony and from the exhibits admitted during the hearing, the court makes the following findings of fact and conclusions of law. *A copy of the Cooperation Agreement (Defendant's exhibit 2) is attached hereto as Exhibit A.*

I. Findings of Fact

1. Defendant was arrested for possession of cocaine with intent to deliver on May 23, 2003. A large amount of cocaine was located in his vehicle at the date of his arrest. On that date, in return for an agreement not to be booked into custody, defendant agreed to arrange a buy from his supplier and to further cooperate with prosecution if necessary. Defendant complied and was not booked into jail. Defendant was to contact Detective

Helen L. Halpert, Judge
King County Superior Court
516 Third Avenue
Seattle WA 98104
(206) 296-9235

ORIGINAL
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1 Gonzalez by June 2, 2003 if he wished to enter into any other agreement concerning his
2 charges.

3 2. Because defendant did not contact the detective by June 2, the case was referred to the
4 King County Prosecuting Attorney's Office for the filing of charges.

5 3. After charges were filed, defendant, with the assistance of counsel, entered into a
6 cooperation agreement with the Seattle Police Department (Detective Rudy Gonzalez)
7 and the King County Prosecuting Attorney. If defendant fulfilled the conditions set forth
8 in the agreement, his case would be dismissed. If not, the defendant agreed to waive
9 his right to trial by jury and to have the matter proceed on a stipulated trial to the bench.
10 This agreement was signed by the defense on April 29, 2004.

11 4. Defendant's obligations are set forth in Section 1 of the agreement: Among other
12 things, the defendant agreed "to assist in the investigation and prosecution of 3 drug
13 dealers in the Greater Seattle area" (B-1). Each dealer was to be arrested with at least 9
14 ounces of cocaine in his possession (B-3). The cooperation would include making
15 "controlled purchases of controlled substances as directed by SPD officers." (B-2).
16 Defendant further agreed to "comply with all lawful and reasonable requests by the SPD
17 as it relates to being an informant" (J) and agreed that "the above conditions may be
18 changed if the need arises." (K). Defendant was required to maintain frequent phone
19 contact with Detective Gonzalez.

20 5. Defendant had until August 31, 2004 to complete his obligations under the contract.

21 6. The defendant called Detective Gonzalez shortly after the April 29th agreement was
22 signed. During this call, he asked the detective to set up the controlled buys so that he
23 could begin his cooperation. Detective Gonzalez clarified that it was the responsibility

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1 of the defendant to locate three drug dealers so that SPD could begin its investigation of
2 these individuals. Defendant agreed to do so. The defendant testified that it was his
3 understanding that he was responsible for finding the dealers.

4 7. Defendant maintained appropriate phone contact with Detective Gonzalez.

5 8. Although in his declaration, defendant asserts that the Detective often did not return his
6 phone calls, his testimony at the hearing did not support this assertion. Further the
7 detective testified that although the two occasionally played "phone tag", frequent and
8 appropriate contact was maintained. The court finds this to be true and finds that the
9 detective had not made himself unavailable or difficult to contact.

10 9. On August 10, 2004, the defendant did purchase 1/2 ounce of cocaine from a dealer he
11 identified. Shortly thereafter he informed Detective Gonzalez that this source had
12 "fizzled" and would be unavailable for future buys.

13 10. The defendant also approached Detective Gonzalez about the possibility of generating
14 a lead on a person selling marijuana; the amounts in question were not enough to
15 interest the detective.

16 11. The defendant did not locate three individuals capable of selling him nine ounces of
17 cocaine.

18 **II. Conclusions of Law**

19 1. Although Section L of the contract provides that "Mahendra Chetty agrees and
20 acknowledges that SPD will ultimately determine whether he has fulfilled the terms of
21 this agreement", both parties agree that the court shall be the decision-maker in the
22 case of a factual dispute as to whether either party has breached the agreement.

23 Section L must be read in conjunction with Section D which gives the prosecution the

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authority to immediately request that a bench warrant be issued and a hearing set if defendant violates his conditions. (Section D). That is, the State could seek a bench warrant if SPD reported that defendant was in breach of his conditions but the ultimate determination of breach is to be determined by the court. The court has the authority to determine whether either party has breached this agreement.

2. The court concludes that defendant, per the agreement, was required to locate three drug dealers each capable of selling nine ounces of cocaine in one transaction and was not simply required to assist the police in doing controlled buy from individuals whom the police had previously identified. Even assuming that Section B-2 is not entirely clear in this regard, Sections J and K give the police the authority to modify and clarify these conditions. Defendant acknowledges that after his first conversation with the Detective, the detective specifically clarified this condition. Further, this interpretation is completely consistent with the parties' course of dealing: That is, on May 23, 2003, the date of defendant's arrest and before the signing of the agreement, the detective agreed not to immediately book defendant into custody if he would disclose his source and participate in an "order up". Significantly, in oral argument, defense counsel specifically indicated that the remedy being sought was not rescission of the agreement, but implementation of a provision giving defendant an additional sixty days to locate the three drug dealers required under the agreement.

3. The State, through the person of Detective Gonzalez, did not make it impossible or difficult for defendant to complete his obligations by failing to return defendant's phone calls: there was no anticipatory breach.

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4. Defendant did not agree to enter into an Alford plea, but rather agreed to waive his right to a trial by jury and to agree to a stipulated facts trial. The State is still required to prove, beyond a reasonable doubt, based on the police reports, that on May 23, 2003, in the State of Washington, defendant possessed a controlled substance, cocaine, with the intent to deliver. See *State Johnson*, v. 104 Wn. 2d 338 (1985).

THEREFORE, the court concludes that defendant is in breach of the agreement of April 29, 2004 and the State is entitled to proceed by way of a stipulated facts trial before the bench

Dated this 15 day of October, 2004

Helen L. Halpert
Helen L. Halpert, Judge

Copy Received by:
SM *31371*
Shelby Smith

Copy Received:
Pete Connick
PETE CONNICK - #12560
Attorney for Defendant

Exhibit A

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

MAHENDRA CHETTY

Defendant.

NO. 03-1-06783-7 SEA

COOPERATION AGREEMENT

Mahendra Chetty is currently charged with a Violation of the Uniform Controlled Substances Act, Possession of Cocaine with Intent to Deliver. Mahendra Chetty is represented in this above mentioned cause number by Pete Connick.

This agreement was reached as a result of negotiations between Mahendra Chetty, through his attorney, Pete Connick, the King County Prosecutor's Office, being represented by Karissa Taylor and Mary Barbosa, Deputy Prosecuting Attorneys, and Detective Gonzales of the Seattle Police Department.

1. Defendant's Obligations:

A. Mahendra Chetty will cooperate totally with the agents of the Seattle Police Department (hereinafter SPD), and the King County Prosecutor's Office as discussed in Paragraph B of this agreement.

B. Mahendra Chetty will complete the following tasks for SPD:

1. Chetty will assist in the investigation and prosecution of three drug dealers in the greater Seattle area.

- 1 Mahendra Chetty agrees that the following standard sentencing range is
2 accurate: VUCSA- Possession of Cocaine with Intent to Deliver: 15 to 20
3 months.
4
- 5 G. Mahendra Chetty agrees to make the following joint sentencing
6 recommendation if he has not successfully completed his obligations under
7 this contract: 15 months; 9-12 months of Community Custody; \$500.00
8 Victim Penalty Assessment.
9
- 10 H. Mahendra Chetty agrees to waive speedy trial to September 6, 2004 to
11 accomplish the requirements of this agreement.
- 12 I. Mahendra Chetty agrees to testify in any and all hearings, motions, trials,
13 sentencing hearings, or any other court hearing as required by the King
14 County Prosecutor's Office as they relate to the investigations contemplated
15 in this cooperation agreement.
16
- 17 J. Mahendra Chetty agrees to comply with all lawful and reasonable requests
18 by the SPD as it relates to being an informant.
- 19 K. Mahendra Chetty acknowledges and agrees that the above conditions may
20 be changed if the need arises. In so acknowledging and agreeing, Chetty is
21 aware that the SPD will ultimately be the decision making authority
22 regarding the investigations that Chetty will assist in.
23
- 24 L. Mahendra Chetty agrees and acknowledges that SPD will ultimately
25 determine whether he has fulfilled the terms of this agreement.
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1 M. Mahendra Chetty agrees not to disclose the existence of his cooperation or
2 the existence of the investigations conducted by the SPD to any person or to
3 any other law enforcement agency, local, state or federal.
4

5 2. State's Obligation:

- 6 A. The King County Prosecutor's Office (hereinafter KCPO) will agree to
7 continue the trial date to ^{August 31, 2004 PM MSC} ~~July 26, 2004~~ to afford the defendant the
8 opportunity to fulfill his obligations under this agreement.
9
10 B. Upon satisfactory fulfillment of Chetty's obligation stated in Section 1,
11 paragraph B of this agreement, the state will dismiss the charges in cause
12 number 03-1-06783-7 SEA.
13
14 C. The King County Prosecutor's Office will not use any statements made by
15 Mahendra Chetty pursuant to this agreement against him in any subsequent
16 prosecutions, with the exception of any crimes of violence or crimes
17 involving a firearm committed by Mahendra Chetty.
18
19 D. If Mahendra Chetty does not complete his requirements under this
20 agreement, the state will immediately set a stipulated trial date, and if the
21 defendant is found guilty will make the following agreed sentencing
22 recommendation: 15 months, \$500 Victim Penalty Assessment, and 9-12
23 months of community custody.

24 3. Seattle Police Department's Obligations

- 25 A. SPD agrees to actively document Mahendra Chetty's cooperation and record
26 his compliance with the agreement.
27
28

- 1 B. SPD further agrees to make every effort to maintain sufficient contact with
2 Mahendra Chetty to assure his compliance with this agreement.
3
4 C. SPD agrees to notify the King County Prosecutor's Office immediately if they
5 have been unable to reach Mahendra Chetty for 72 hours.
6

7 All of the parties signing this agreement, acknowledge and concur that compliance
8 for the purpose of this agreement is defined as completing ALL of the above referenced
9 conditions and requirements. Substantial compliance will only be achieved when all the
10 conditions have been fully met. If for any reason, Mahendra Chetty fails to meet any of
11 his obligations outlined in the above agreement, the King County Prosecutor's Office is
12 under no obligation to fulfill their agreement and will actively prosecute this case.
13 Mahendra Chetty waives his right to argue that substantial compliance has occurred
14 unless all provisions have been complied with.
15
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18 Mahendra Chetty is aware of and assumes all risks, which may arise from his
19 involvement in the undercover operations. Mahendra Chetty agrees to hold SPD and the
20 King County Prosecuting Attorney, and all of their agents and employees harmless for any
21 injury or death that may result from his participation in this cooperation agreement.
22
23

24 This cooperation agreement refers only to non-violent drug related crimes
25 committed prior to the date of this agreement. Any and all criminal activity Mahendra
26 Chetty is involved in must cease at the signing of this agreement.
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By signing below, Mahendra Chetty agrees to all the terms of this agreement and acknowledges that this constitutes the entire agreement existing between SPD, the King County Prosecuting Attorney and himself and that no other promises other than those contained herein, exist between the parties.

Mahendra Chetty acknowledges that he has entered into this agreement knowingly, intelligently, and voluntarily.

Dated this ___ day of _____, 2004.

Karissa Taylor
Mary Barbosa
Deputy Prosecuting Attorneys

X Mahendra P. Chetty
Mahendra Chetty

Pete Connick (04/29/04)
Pete Connick
Atty for Mahendra Chetty

APPENDIX B

FILED
KING COUNTY, WASHINGTON

Judge Halpert
The Honorable

OCT 19 2004

SUPERIOR COURT CLERK
TONJA S. HOGAN
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 03-1-06783-7 SEA
)	
vs.)	
)	
MAHENDRA CHETTY,)	ORDER ON STIPULATED FACTS -
)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
)	
)	
)	

The court, having approved the defendant's submittal of this action to the court for a stipulated facts trial, having read the police reports and all other materials submitted, which have been filed with the court as Appendix A to the defendant's Stipulation to Facts and Waiver of Jury Trial, and having heard the argument of counsel for the State, Shelby R. Smith, and for the defendant, Peter T. Connick, now makes the following:

I. FINDINGS OF FACT

The following events took place within King County, Washington:

ORDER ON STIPULATED FACTS - FINDINGS OF
FACT AND CONCLUSIONS OF LAW - 1

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 A. On May, 23, 2003, Mahendra Chetty agreed to deliver four ounces of flake
2 cocaine to a Cooperating Witness.

3 B. Mahendra Chetty agreed to meet the Cooperating Witness in the parking lot of the
4 Bank of America located at Northgate Mall in order to make the delivery.

5 C. Mahendra Chetty told the Cooperating Witness that he would arrive in a large
6 blue suburban.

7 D. The Cooperating Witness contacted Mahendra Chetty over the phone at (206)
8 909-1588. Detective Gonzales from the Seattle Police Department listened in on and tape
9 recorded this phone conversation between the Cooperating Witness and Mahendra Chetty.

10 E. Mahendra Chetty arrived at the Bank of America parking lot at Northgate Mall at
11 approximately 1605 hours. This was the approximate time that the Cooperating Witness and
12 Mahendra Chetty had previously agreed to meet.

13 F. Mahendra Chetty was driving a blue 1993 GMC suburban, Washington license
14 437PPL. This vehicle is registered to Mahendra Chetty.

15 G. The Cooperating Witness recognized Mahendra Chetty as the person who was to
16 deliver the flake cocaine to him.

17 H. Mahendra Chetty was contacted as he was seated inside his vehicle and arrested.

18 I. Mahendra Chetty had his young daughter with him in the vehicle (toddler).

19 J. Officers searched the vehicle incident to the arrest of Mahendra Chetty. A large
20 amount of flake cocaine was discovered inside the vehicle under the driver's seat. The cocaine
21 was packaged for sale in two separate packages. ^{HIT} The substance ^{felt} ~~weighed~~ ^{was} ~~26.9 grams and 27.8~~ ^{positive for cocaine. #11}
22 grams. ~~The powder from each package was analyzed separately by the Washington State Patrol~~

23

ORDER ON STIPULATED FACTS - FINDINGS OF
FACT AND CONCLUSIONS OF LAW - 2

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 ~~Crime Lab and found to contain cocaine. The street value of the recovered narcotics is~~
2 ~~approximately \$32,500.00.~~

3 K. Mahendra Chetty had two active cellular phones beside him in the vehicle's
4 center console. One of these phones was identified as having (206) 909-1588 as its phone
5 number.

6 And having made those Findings of Fact, the Court also now enters the following:

7 II. CONCLUSIONS OF LAW

8 A. The above-entitled court has jurisdiction of the subject matter and of the defendant
9 Mahendra Chetty in the above-entitled cause.

10 B. The following elements of the crime charged have been proven by the State beyond a
11 reasonable doubt:

- 12 1. On May 23, 2003, the defendant possessed cocaine, a controlled substance;
- 13 2. That the defendant possessed the substance with the intent to deliver a controlled
14 substance; and
- 15 3. These acts occurred in the State of Washington.

17 C. The defendant is guilty of the crime of Possession of Cocaine with the Intent to
18 Deliver as charged in the Information.

19 D. Judgment should be entered in accordance with Conclusion of Law C.

21 DONE IN OPEN COURT this 15 day of ~~September~~ ^{Oct.}, 2004.

23 Helen L. Halpert
JUDGE

HELEN HALPERT
Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

ORDER ON STIPULATED FACTS - FINDINGS OF
FACT AND CONCLUSIONS OF LAW - 3

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Presented by:

SM

Deputy Prosecuting Attorney *Shelby Smith*

Copy received only:
Peter P. Connick

Defendant's Attorney - *PETE CONNICK*

Copy received only: #12560
** melenchia R. Chetta*

Attorney for Defendant

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

CrR 2.1 provides in part:

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

CrR 6.1 provides in part:

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

CrR 8.3 provides in part:

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

RAP 2.5 provides in part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed. to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the

trial court if another party on the same side of the case has raised the claim of error in the trial court.

RCW 9.94A.421 provides in part:

The prosecutor and the attorney for the defendant, or the defendant when acting pro se, 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.

RCW 9.94A.431 provides:

(1) If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. The prosecutor shall inform the court on the record whether the victim or victims of all crimes against persons, as defined in RCW 9.94A.411,

covered by the plea agreement have expressed any objections to or comments on the nature of and reasons for the plea agreement. The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.

(2) The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea.

RCW 10.01.060 provides:

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his or her plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

Former RCW 10.46.090 provided:

Nolle prosequi. The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section.

Restatement of the Law, Second, Contracts (1981) provides in part:

§ 206 Interpretation Against the Draftsman.

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 10 provides:

Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage

may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. IV, § 1 provides:

JUDICIAL POWER, WHERE VESTED. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

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

STATE OF WASHINGTON,

Respondent,

v.

MAHENDRA SAMI CHETTY,

Appellant.

) NO. 66729-7-I

) CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare that on the 5th day of August 2015, I deposited copies of the attached OPENING BRIEF OF APPELLANT into the United States Mail with proper first-class postage attached, in envelopes addressed to:

Dennis McCurdy
King County Prosecuting Attorney's Office
W554 King County Courthouse
516 3rd Ave.
Seattle WA 98104

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

8-5-2015 - SEATTLE, WA
DATE AND PLACE


ALEX FAST

2015 AUG -5 PM 2:43
COURT OF APPEALS
STATE OF WASHINGTON