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69415-4

NO. 69415-4-1

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

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MAR 26 2013  
King County Prosecutor  
Appellate Unit

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STATE OF WASHINGTON,

Respondent,

v.

RONALD WAYNE MACDONALD

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Harry McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State violated the appellant's due process rights when the investigating officer breached the plea agreement by deviating from an agreed-upon sentencing recommendation.

Issue Pertaining to Assignment of Error

Did the investigating detective breach the plea agreement reached by the appellant and the State by arguing for imposition of the statutory maximum term of imprisonment?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged Ronald Wayne MacDonald with first degree felony murder of Arlene Roberts, who was killed during an apparent burglary of her trailer home in 1978. CP 1-10, 76-78. Police suspected MacDonald, who was leading a quiet life in Reno, Nevada, based on their belief that his fingerprints matched prints found on traveler's checks and bank documents found in Roberts's trailer. CP 52, 102-03.

Following plea negotiations, the State amended the charge to second degree manslaughter. CP 78. MacDonald entered an Alford<sup>2</sup> plea.

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<sup>1</sup> The brief refers to the verbatim reports as follows: 1RP – 6/11/12 (CrR 3.5 hearing and motions in limine); 2RP – 6/12/12 (CrR 3.5 hearing and motions in limine); 3RP – 6/13/12 (motions in limine and jury selection); 4RP – 6/14/12 (discussion of possible resolution); and 5RP – 6/18/12 (Alford plea). The transcript of the August 8, 2012 sentencing hearing appears at CP 188-211.

CP 79-84; 5RP 8-13. The parties' agreed-upon recommendation was five years of incarceration<sup>3</sup> suspended on the condition that MacDonald serve 16 months in the King County jail.<sup>4</sup> CP 98, 101-10, 191-92; RCW 9.92.060 (authorizing such a sentence). The primary detective, Scott Tompkins, was party to the plea negotiations and would have sat with the prosecutor at trial as permitted by ER 615. CP 112, 147-48; 1RP 9-10.

At the sentencing hearing, the prosecutor made the agreed-upon 16-month recommendation but alerted the court that Detective Tompkins also wished to address the court. The prosecutor informed the court she believed such argument was permissible because case law "tend[ed] to support"<sup>5</sup> permitting a separate recommendation. Tompkins explained he was speaking on behalf of the deceased Roberts. Over defense objection, Tompkins presented pictures of the crime scene and Roberts, suggested that the DNA evidence (which excluded MacDonald) was contaminated, opined that the crime was one a 17-year-old (MacDonald's age in 1978)

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<sup>2</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>3</sup> MacDonald argued the sentence should be suspended for one year whereas the State argued it should be suspended for five years. CP 98, 198.

<sup>4</sup> This would have resulted in MacDonald's immediate release, as he had 323 days credit for time served as well as good-time credits. CP 202.

<sup>5</sup> CP 193-94.

could have easily committed, and made other arguments in favor of the statutory maximum sentence. CP 192-97 (attached to this brief as an Appendix).

The court imposed a minimum sentence of 55 months incarceration, with a maximum term of 60 months, the statutory maximum for the offense. CP 99-100, 203-08; Supp. CP \_\_\_\_ (sub no. 58, Order Fixing Minimum Term).

MacDonald moved to withdraw his plea, arguing Tompkins breached the plea agreement. CP 111-78. The superior court denied the motion and ordered the case transferred to this Court. CP 212-14. MacDonald also filed a notice of appeal of the judgment and sentence. CP 215-19.

C. ARGUMENT

THE INVESTIGATING OFFICER'S ARGUMENT IN FAVOR OF THE MAXIMUM SENTENCE BREACHED THE PLEA AGREEMENT AND VIOLATED MACDONALD'S RIGHT TO DUE PROCESS.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). In addition, "[d]ue process requires a prosecutor to adhere to the terms of the agreement." Id. at 839 (citing, inter alia, Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81

L. Ed. 2d 437 (1984)). When the State breaches a plea agreement, it “undercuts the basis for the waiver of constitutional rights implicit in the plea.” State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977).

A plea agreement is a contract between the State and the accused; because the accused gives up important constitutional rights by pleading guilty, the State must adhere to the terms of the agreement by recommending the agreed-upon sentence. Sledge, 133 Wn.2d at 839. The State's duty of good faith requires it not undercut the terms of the agreement either (1) explicitly or (2) implicitly, by conduct indicating intent to circumvent its terms. Sledge, 133 Wn.2d at 840; State v. Talley, 134 Wn.2d 176, 183-84, 949 P.2d 358 (1998); State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999).

Because a police officer is an investigating arm of the prosecutor's office, “principles of fairness and agency” require that the investigating officer be bound to the prosecutor's bargain. State v. Sanchez, 146 Wn.2d 339, 356, 46 P.3d 774 (2002) (Chambers, J., concurring and dissenting) (joining four-judge “dissent” and thus constituting de facto majority on this issue). Sanchez consolidated two appeals: one involved an alleged plea breach by a Community Corrections Officer's argument at sentencing; the other involved an alleged breach by an investigating

officer. Id. at 342-44. The lead opinion holds that neither officer breached the plea agreement. Id. at 355-56.

The “dissenting” opinion on this point – joined by Justice Chambers -- holds that an investigative officer’s recommendation differing from the prosecutor’s recommendation constitutes a breach of the plea agreement. Id. at 362-63. This is so despite the language of former RCW 9.94A.110<sup>6</sup> which permits an investigative officer to *address* the court at sentencing. Sanchez, 146 Wn.2d at 363. That statute also allows the prosecutor to address the sentencing court, for example, but obviously does not permit the prosecutor to undercut a plea agreement. Id.

With Justice Chambers’ “dissenting” vote on this point, this portion of the “dissent” constitutes the opinion of the majority of justices, and is thus the holding of the case. While the State may, as it has in the past, argue Tompkins was merely acting as the victim’s representative, this argument does not withstand the holding of the majority of justices in Sanchez that an investigating officer, an arm of the prosecution, is not permitted to make such a recommendation. Id. at 358-59, 364.

Under the holding of a majority of justices in Sanchez, therefore, Tompkins’s recommendation breached the plea agreement. Such an error

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<sup>6</sup> This provision has been recodified as RCW 9.94A.500.

cannot be harmless. In In re Personal Restraint of James, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982), the Court stated:

When a prosecutor breaches an agreement by failing to recommend probation, a defendant is entitled to withdraw any entered plea or to have the bargain specifically enforced. This right exists even though the sentencing judge was not bound, nor even influenced, by the prosecutor's recommendation.

(Citations omitted.) James relied in part on Santobello v. New York, 404 U.S. 257. In that case, the state agreed not to make a sentencing recommendation as part of the plea agreement. Id. at 258. At sentencing, however, the state made a recommendation. In response to the defendant's objection, the trial court stated its decision was not influenced by the recommendation. Id. at 259. The Supreme Court, without doubting the sentencing court's statements that it was not influenced by the breach, held the interests of justice required that the defendant receive specific performance of the agreement or withdrawal of the plea. Id. at 262-63.

Under James and Santobello, therefore, the breach of a plea agreement is never harmless error. The plea bargaining process requires that both the State and the accused adhere to their promises. When this process is frustrated, the fairness of the sentencing hearing is in question. Such an error infects the entire proceeding and, as such, cannot be

harmless. State v. Carreno-Maldonado, 135 Wn. App. 77, 88, 143 P.3d 343 (2006).<sup>7</sup>

The State cannot seriously dispute that Tompkins undermined the plea agreement. This was a breach; this Court should reverse the trial court's order denying MacDonald's motion to withdraw his guilty plea.

And because the recommended sentence was permitted by statute, the proper remedy for the breach is to allow MacDonald to elect whether to withdraw the guilty plea or seek specific performance of the plea agreement. State v. Barber, 170 Wn.2d 854, 873-74, 248 P.3d 494 (2011).

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<sup>7</sup> Carreno-Maldonado appears to misstate the holding of the de facto Sanchez majority as to investigating officers. Carreno-Maldonado, 135 Wn. App. at 84. This statement is not only inaccurate, it is also dicta, as Carreno-Maldonado did not involve a sentencing recommendation by an investigating officer. Id. at 79.

D. CONCLUSION

The State violated MacDonald's due process rights when it breached the plea agreement by undercutting the bargained-for sentence recommendation. This Court should remand so that MacDonald may elect whether to withdraw his plea or seek specific performance of the plea agreement.

DATED this 26<sup>TH</sup> day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
\_\_\_\_\_  
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# APPENDIX

1 has no family. Detective Tompkins has -- I've made  
2 clear to him that I don't want to know what he's going  
3 to say. I have no idea what it will be. It doesn't do  
4 anything to affect my recommendation. My  
5 recommendation is still solidly for 16 months because  
6 that's what the agreement was. So with the court's  
7 permission, Detective Tompkins would like to speak.

8 COURT: Yes. Detective Tompkins.

9 DET. TOMPKINS: Thank you, Your Honor. As  
10 Kristin mentioned, I understand the need for a plea  
11 agreement in this case, and I was on board for that,  
12 but I feel obligated to ask for the maximum sentence in  
13 this case.

14 This woman was born in 1898, and she has no  
15 living family. No one to speak on her behalf. And so  
16 I know that you heard a lot in the 3.5 hearing about  
17 what happened in Reno in our interview of the  
18 defendant, but I also would like to introduce what  
19 happened to the victim. And I don't think you saw  
20 those, and I'd like to present those to you.

21 COURT: Yes. Okay. Perhaps we could mark  
22 those as an exhibit to the sentencing hearing. Exhibit  
23 No. 1.

24 DET. TOMPKINS: Thank you, sir.

25 CLERK: Call it Exhibit 1, Your Honor?

1 COURT: Yeah.

2 MR. DUBOW: Your Honor, I'm going to, we're  
3 going to object to the marking the exhibit and object  
4 to Detective Tompkins asking the court for the maximum.  
5 I think he is an agent of the State. I think that does  
6 breach the plea agreement. I know the State has  
7 indicated they're standing by their 16 month  
8 recommendation, however, I believe the detective as an  
9 agent of the State is bound by that recommendation and  
10 so --

11 MS. RICHARDSON: Your Honor, I --

12 MR. DUBOW: Also --

13 MS. RICHARDSON: I'm sorry, go ahead.

14 MR. DUBOW: I also, the, part of the plea  
15 agreement was that the probable cause statement would  
16 be included at sentencing. There was no discussion of  
17 whether the pictures would be included as well.

18 COURT: Yes. Thank you, Mr. Dubrow.

19 MS. RICHARDSON: Your Honor, I did a little  
20 research on this in anticipation that this might be  
21 what Detective Tompkins wanted to talk about, and I  
22 think that as long as it's at the behest of the court  
23 as opposed to the State -- I don't need Detective  
24 Tompkins to help me with my recommendation, but if the  
25 court wants to hear him, there's case law that tends to

1 support that if the sentencing court thinks that it's  
2 helpful.

3 COURT: Yes. I'm going to overrule the  
4 objection. The State is making its recommendation and  
5 adhering to that recommendation. As I understand it,  
6 Detective Tompkins is here speaking with respect to the  
7 victim.

8 In many cases, if not all criminal cases,  
9 particularly serious ones such as this, a victim  
10 advocate very frequently speaks to the court on behalf  
11 of the victim. There is no victim advocate speaking  
12 here today, and I think Detective Tompkins may take  
13 that role.

14 DET. TOMPKINS: Thank you, sir.

15 COURT: Thank you.

16 DET. TOMPKINS: The photos I've provided you  
17 are how the King County Sheriff's Office found Arlene  
18 Roberts in her, in her trailer that morning. The  
19 medical examiner's office went on to document 18  
20 paragraphs of injuries to that woman. She died a  
21 horrific death.

22 I also want to address a couple things that  
23 defense counsel brought up at the time the agreement  
24 was made, one of those being the lack of DNA on the  
25 ligatures that were used to bind the victim. I think

1 we have, I know we have photos in the case file showing  
2 medical examiner personnel holding the ligatures with  
3 bare hands. DNA wasn't even known of in 1978. They had  
4 no reason not to touch those ligatures to examine the  
5 knots with their bare hands. The fact that there is  
6 DNA, foreign DNA, at that crime scene is not surprising  
7 in 1978 considering where it was found.

8           Secondly, it was brought up that his  
9 admissions were not recorded. And if you recall, we  
10 did give him the opportunity to have a recorded  
11 statement. And I also know that Your Honor has a  
12 federal background, and I'm wondering how many FBI  
13 recorded statements you saw and how many of those  
14 summary statements lost their validity because they  
15 weren't recorded. We documented what he said to us to  
16 the best of our ability.

17           We met with the defendant several times in  
18 Reno. And in fact, I spent half a day flying him back  
19 from Reno in the extradition. Not once did he say to  
20 us "I didn't do this." Not once did he say, "You have  
21 the wrong guy." Instead, he made the admissions that  
22 you heard in the 3.5 hearing, which include "I was 17  
23 years old, young and stupid," that he didn't know the  
24 victim, that he never thought of turning himself in,  
25 and that he always worried this day would come back to

1     haunt him.

2             I've read the defense presentence report  
3 talking about how the defendant has a good job back in  
4 Reno at Mill Street Tire and how his friends and family  
5 love him, and I have no doubt that that's true. But  
6 all the more reason when we're trying to pluck him out  
7 of that life on a murder charge to say "I didn't do  
8 this, you have the wrong guy." And he never said that.  
9 He only said that once he met defense counsel.

10            Another thing in the presentence report was  
11 how this was a sophisticated crime and that how a 17-  
12 year-old couldn't have committed this crime. I've  
13 worked robbery/homicide for 14 years, I've worked at  
14 sheriff's offices in three states, and I can tell you  
15 that is not a sophisticated crime scene. It's anything  
16 but. And it goes to show that people like him in that  
17 age group are the people that kill elderly women. It's  
18 very consistent with the crime scene and the defendant.

19            Lastly, I'd just like to say as a cold case  
20 detective, there's a standard to be met here. This  
21 woman was a part of our community. And whether it  
22 happened 34 years ago or last week, it needs to be held  
23 to the same standard. This happened to somebody, and  
24 somebody needs to be held accountable for it. No more  
25 and no less. And 16 months is not being held

1 accountable. I think you'll agree once you take a look  
2 at the crime scene photos.

3 Thank you.

4 COURT: Thank you.

5 MS. RICHARDSON: Your Honor, just one last  
6 thing, mostly for the record but for the court's  
7 information as well. The decision to reduce this case  
8 was very difficult. Ultimately we decided together  
9 that there needed to be something out there that says  
10 that somebody killed her. And this says that.

11 COURT: Thank you. Just to be clear for the  
12 record also, I want to make clear that I allowed  
13 Detective Tompkins to speak insofar as he is speaking  
14 on behalf of the victim since there's not a victim  
15 advocate here today and not so much as a comment on the  
16 nature of the plea negotiations or the evidence as  
17 such. That's been, that's already been discussed  
18 between the State and the defense. So I'll take his  
19 comments as they pertain to his advocacy on behalf of  
20 the victim. Okay.

21 MS. RICHARDSON: Thank you.

22 COURT: Yeah. Okay. Ms. Pickering or Mr.  
23 Dubow, on behalf of the defense. I should say at the  
24 outset, I have read all of the presentence memoranda,  
25 both by the State and by the defense. I've read the

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	)	
RONALD MACDONALD,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26<sup>TH</sup> DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD MACDONALD  
DOC NO. 902835  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF MARCH 2013.

x *Patrick Mayovsky*