

71348-J

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NO. 71348-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CHAD ZACHARIASEN,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 APR 29 PM 4:52

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

The Honorable Joseph P. Wilson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State breached its plea agreement with appellant by undercutting its promised sentencing recommendation.

Issue Pertaining to Assignment of Error

Appellant waived his trial rights and agreed to plead guilty in exchange for the State's promise to recommend a mid-standard range sentence. However, in a sentencing memorandum and again at the sentencing hearing, the prosecutor argued that, while she was asking for a mid-range sentence, an exceptional sentence was warranted based on multiple aggravating circumstances. The sentencing court imposed a sentence at the top of the range. Did the prosecutor violate the terms of the plea agreement?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged Chad Zachariasen with one count of possession of a controlled substance (cocaine) with intent to manufacture or deliver. CP 51-52. Zachariasen waived his trial rights and pled guilty in exchange for the State's promise to recommend a 90-month sentence – in the middle of his 60 to 120-month standard range – consecutive to any sentence imposed in a separate cause number; 12 months' community custody; and certain legal financial obligations. CP 27,

36-37; 1RP<sup>1</sup> 3-7. The defense was free to argue for a lower sentence. CP 36.

Prior to sentencing, defense counsel filed a memorandum explaining that Zachariasen's recent conduct was a result of his efforts to alleviate the suffering of his parents, both of whom were stricken with cancer and other serious medical conditions, by trading illegal street drugs for prescription pain killers they could not otherwise afford. Counsel argued a low-end sentence of 60 months, plus 12 months' community custody, would be appropriate. Supp. CP \_\_\_\_ (sub no. 38, Defendant's Sentencing Memorandum).

In a responsive memorandum, which defense counsel did not receive until the sentencing hearing, the State indicated that, although it was recommending 90 months, "[f]or several reasons supported by RCW 9.94A.535, an exceptional sentence would be appropriate for this defendant[.]" Supp. CP \_\_\_\_ (sub no. 21, Summary of Plea Agreement AND Sentencing Memorandum, at 2).

The prosecutor then provided these reasons:

A low end or a concurrent sentence would result in these offenses going unpunished or obviously too leniently punished; the defendant's prior unscored history results in a presumptive sentence that is

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – December 4, 2013; 2RP – December 17, 2013.

clearly too lenient, and the quantity of drugs involved in each offense would lead a reasonable trier of fact to find that the Defendant is either moving quantities of drugs far larger than for personal use or that he occupies a high position in the drug distribution hierarchy.

Id.

Consistent with these justifications for an exceptional sentence, the prosecutor noted, “The Defendant’s offender score [of 16] takes him literally off the chart for calculating standard range sentences under the SRA” and relied on the large quantities of recovered cocaine to argue Zachariasen was relatively high up in the drug distribution hierarchy. Id. at 2-4. The State also noted it was foregoing the filing of several other felonies and argued the court should reject any notion Zachariasen was acting out of concern for his parents. Id.

At the sentencing hearing, the prosecutor used these same justifications for an exceptional sentence:

The State is asking for 90. Based on the facts of this case, we could be in a good position to argue for an exceptional sentence over the 120. The defendant’s score is, quite literally, off the charts for scoring. The quantity of drugs he has in this case is a rather large amount as well, over 200 grams. . . .

2RP 2-3 (emphasis added). The prosecutor continued:

The probable cause affidavit I provided to the Court make[s] it clear that the defendant is consistently engaging in delivery or carrying quantities of drugs that are consistent with an individual that's higher in the drug hierarchy than our typical street level dealer that comes before the Court. In one of the case's probable cause affidavits they mention that the chunk of cocaine appeared to be broken off of a kilo brick, which was very significant to the officers in that case.

Here his score alone and the quantity alone support 90 months or more. I would ask that you follow the State's recommendation.

2RP 3-4 (emphasis added).

Defense counsel objected, pointing out that the prosecutor was not advocating for 90 months and had breached the plea bargain. 2RP 4. The court indicated it was interpreting the recommendation as one for 90 months and that if defense counsel disagreed, "you can take that up on appeal." 2RP 4.

Consistent with the defense memorandum, defense counsel argued Zachariasen had stayed crime-free for a significant period of time and recently had been dealing in drugs to obtain pain medications his parents could not otherwise afford. 2RP 5-6. Counsel urged the court to impose 60 months. 2RP 6. In his remarks to the court, Zachariasen echoed this request. 2RP 6.

The Honorable Joseph Wilson indicated he was struck by Zachariasen's lengthy criminal history and rejected the notion his latest activities were motivated by a desire to help his parents. 2RP 7. Judge Wilson then imposed a high-end 120-month sentence. 2RP 7-8; CP 18. Zachariasen timely filed his Notice of Appeal. CP 1-13.

C. ARGUMENT

THE STATE VIOLATED THE TERMS OF THE PLEA AGREEMENT.

A plea agreement is a contract under which the defendant gives up fundamental constitutional rights. State v. Sledge, 133 Wn.2d 828, 838-839, 947 P.2d 1199 (1997); State v. Van Buren, 101 Wn. App. 206, 211, 2 P.3d 991, review denied, 142 Wn.2d 1015, 16 P.3d 1265 (2000). Not only do contract principles bind the State to the terms of the agreement, due process also requires adherence. Sledge, 133 Wn.2d at 839.

While an agreed recommendation need not be made enthusiastically, the prosecutor has a "duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement." Sledge, 133 Wn. App. at 840. This Court reviews the prosecutor's actions and

comments objectively – without regard to motivation or justification – to determine whether there has been a breach. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002, 984 P.2d 1033 (1999). Even an inadvertent breach warrants relief. State v. Collins, 46 Wn. App. 636, 639-640, 731 P.2d 1157, review denied, 108 Wn.2d 1026 (1987).

Notably, a breach occurs where the prosecutor offers unsolicited information or argument that undermines an agreed sentence recommendation. State v. Halsey, 140 Wn. App. 313, 320, 165 P.3d 409 (2007). Several cases demonstrate this point where, as in Zachariasen's case, the prosecutor agrees to make a particular recommendation within the standard range, makes that recommendation, but also focuses on aggravating factors warranting an exceptional sentence.

In State v. Carreno-Maldonado, 135 Wn. App. 77, 79, 143 P.3d 343 (2006), the State agreed to recommend a low-end standard range sentence for rape in the first degree, a midpoint standard range sentence on multiple counts of rape in the second degree, and a high-end standard range sentence for assault in exchange for guilty pleas to these offenses. At sentencing, the prosecutor made these recommendations but also focused on

aggravating factors concerning the rapes (victim vulnerability and extreme violence). Id. at 80-81. The court sentenced Carreno-Maldonado to high-end sentences on each count. Id. at 82. This Court found that, by offering unsolicited argument focusing on aggravating factors in the case, the prosecutor had breached the plea agreement. Id. at 84.

In State v. Xavier, 117 Wn. App. 196, 69 P.3d 901 (2003), the State agreed to recommend a 240-month standard range sentence in exchange for Xavier's guilty plea to multiple sex offenses. After making the recommendation, the prosecutor "proceeded to (1) emphasize the graveness of the situation; (2) reiterate the charges that the State did not bring; (3) note that the State had forgone the opportunity to ask for a 60-year exceptional sentence; and (4) highlight aggravating circumstances that would support an exceptional sentence." Id. at 198. This Court found that, by highlighting aggravating facts with unsolicited remarks, the prosecutor signaled lack of support for a standard range sentence and undercut the plea agreement. Id. at 200-201.

In State v. Van Buren, the defendant pled guilty to murder in exchange for the State's recommendation that she receive a mid-standard range sentence of 292 months. Van Buren, 101 Wn.

App. at 207-209. At sentencing, the defense asked for the mandatory minimum sentence of 240 months. The prosecutor acknowledged the agreed recommended sentence, but also noted that, if the court were considering an exceptional sentence, the grounds for doing so were contained in a presentence report. The prosecutor listed applicable aggravating factors, including one not contained in the report, and expressed agreement with one factor in particular. The sentencing court imposed an exceptional sentence. Id. at 209-210. This Court found a breach because the prosecutor had downplayed the agreed recommendation and, instead, focused on applicability of the aggravating factors. Id. at 215-217.

Similarly, in State v. Jerde, the defendant pled guilty to murder in the second degree in exchange for the State's recommendation that he receive a mid-standard range sentence of 346 months. Prior to sentencing, a presentence report writer filed a report recommending an exceptional sentence of 688 months. Jerde, 93 Wn. App. at 777. At sentencing, prosecutors indicated they were maintaining their request for standard range sentences for Jerde and one of his co-defendants, but emphasized the aggravating factors contained in the report and even added an

additional factor for the court's consideration. Id. at 777-778 n.2-3. The sentencing court imposed an exceptional 497-month sentence. Id. at 779. This Court again found a breach because prosecutors had unnecessarily highlighted aggravating factors. Id. at 782.

Carreno-Maldonado, Xavier, Van Buren, and Jerde dictate the outcome in Zachariasen's case. While the prosecutor maintained she was recommending a mid-range sentence of 90 months, in her own presentence report, she offered unsolicited argument that "an exceptional sentence would be appropriate for this defendant" and discussed aggravating circumstances that would support such a sentence under RCW 9.94A.535(2)(d) (prior unscored history results in a presumptive sentence that is clearly too lenient) and RCW 9.94A.535(3)(e) (major VUCSA violation shown by quantity involved and high position in drug hierarchy). Supp. CP \_\_\_\_ (sub no. 21, Summary of Plea Agreement AND Sentencing Memorandum, at 2).

The State may assert that the prosecutor focused on the applicability of an exceptional sentence to dissuade Judge Wilson from granting Zachariasen's request for a low-end standard range sentence. Regardless of her intent, however, her justifications for an exceptional sentence undermined the chance Zachariasen

would receive even a mid-range sentence, which the State had agreed to request. “Neither good motivations nor a reasonable justification will excuse a breach.” Halsey, 140 Wn. App. at 320 (citing Van Buren, 101 Wn. App. at 213).

In Carreno-Maldonado, this Court recognized that when the prosecutor has agreed to make a mid-range recommendation, “it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence.” Carreno-Maldonado, 135 Wn. App. at 84. However, the Court then warned, “But a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class.” Id. at 84-85 (emphasis added). The prosecutor’s sentencing memorandum in Zachariasen’s case clearly went too far.

At sentencing, the prosecutor made no attempt to couch her focus on an exceptional sentence in terms of rejecting a low-end sentence. Instead, she argued – once again unsolicited – “we could be in a good position to argue for an exceptional sentence over the 120[.]” 2RP 2-3. She then returned to the two aggravating circumstances from her memorandum, mentioning again that

Zachariasen's sentence was "quite literally, off the charts for scoring," and that the large quantity of drugs indicated Zachariasen was higher in the drug hierarchy than typical. 2RP 2-4. She then added, "his score alone and the quantity alone support 90 months or more" before asking the court to follow the State's recommendation. 2RP 4 (emphasis added).

When defense counsel indicated the prosecutor had breached the plea agreement, Judge Wilson responded that he was interpreting her comments as a request for 90 months. 2RP 4. While this might invite an argument the breach was harmless, breach of a plea agreement is not subject to harmless error analysis. Carreno-Maldonado, 135 Wn. App. at 87-88 (citing In re Personal Restraint of James, 96 Wn.2d 847, 640 P.2d 18 (1982)).

Where a breach has occurred, the defendant has his choice of remedies. He may either withdraw his plea or enforce the plea bargain agreement at a new sentencing hearing before a different judge. See Xavier, 117 Wn. App. at 202; Van Buren, 101 Wn. App. at 217-218.

#### D. CONCLUSION

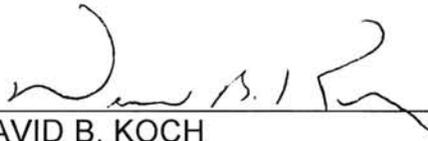
By repeatedly arguing that an exceptional sentence was warranted, the State undercut the plea agreement. Zachariasen's

sentence should be vacated and his case remanded for his choice of remedy.

DATED this 29<sup>th</sup> day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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	)	
CHAD ZACHARIASEN,	)	
	)	
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 29<sup>TH</sup> DAY OF APRIL 2014, 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.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF APRIL 2014.

X *Patrick Mayovsky*

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