

NO. 73803-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA REDDING,

Appellant.

FILED
Feb 11, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Law enforcement told Joshua Redding that he needed to report by February 13 or failure to register charges would be forwarded to the Snohomish County Prosecuting Attorney. Understanding this conversation to mean if he reported by February 13, charges would not be filed, Mr. Redding reported to the Snohomish County jail on February 12. He was still charged with, and ultimately convicted of, felony failure to register. He is serving a three-year prison sentence.

The charge should be dismissed on three independent grounds. Law enforcement's forwarding of charges breached the unilateral contract formed between the police and Mr. Redding. Second, by failing to consider the mitigating circumstances presented here, Snohomish County abused its prosecutorial discretion. Third, the charges in this case violate the notions of fair play and decency embedded in the due process clause of our state and federal constitutions.

B. ASSIGNMENTS OF ERROR

1. The filing of a felony failure to register as a sex offender charge constituted a breach of contract.

2. The prosecutor's office abused its discretion by filing felony failure to register charges after Mr. Redding reported as directed by law enforcement and after he reasonably understood he could avoid charges by reporting.

3. The conviction violates due process.

4. The trial court erred in denying Mr. Redding's motion to dismiss, including conclusions of law A through F. CP 147-49.

5. The court's conclusion that Mr. Redding is guilty of failure to register beyond a reasonable doubt is erroneous. CP 64.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A unilateral contract is formed where one party makes a promise and the other party accepts that promise through performance. Did law enforcement form a contract with Mr. Redding that was subsequently breached, when Detective Berg told Mr. Redding to report by February 13 or charges would be filed, and Mr. Redding turned himself in on February 12?

2. Prosecutors have discretion to determine when to file criminal charges, including the responsibility not to file charges in some circumstances. A prosecutor's decision should take into account the public interest and mitigating factors. Is it an abuse of prosecutorial

discretion to file criminal charges against an individual who had entered a surrender agreement with law enforcement, and who had maintained his part of the agreement?

3. Due process requires citizens be treated in a manner that is fundamentally fair. Fair play and decency are enshrined in this constitutional provision. Were Mr. Redding's due process rights violated when Snohomish County filed felony charges against Mr. Redding despite law enforcement's assurances that reporting by February 13 would not result in criminal charges?

D. STATEMENT OF THE CASE

Prior to his incarceration on this charge, Joshua Redding was homeless and trying to secure stable housing.¹ 4/17/15 RP 12-13; CP 147; *see* 7/13/15 RP 9-10. He suffers from diagnosed mental illnesses, including "unspecified schizophrenia spectrum and other psychotic disorder." CP 41-42, 46, 48-56. Due to a juvenile conviction, he was under a duty to register as a sex offender. CP 112. He registered as homeless on January 13, 2015. 4/17/15 RP 12. Generally offenders are only required to register within three days of a change of address, but homeless offenders have to report weekly. RCW 9A.44.130(5), (6).

¹ The volumes of the verbatim report of proceedings are referred to herein by the first date transcribed, e.g. 4/17/15 RP.

Detective Scott Berg's duties at the Snohomish County Sheriff's Office include sex offender registration. 4/17/15 RP 3-5. Individuals who register as homeless are required to report to the Sheriff's Office every Tuesday between 9a.m. and 5p.m., when they must account for where they have been for the last week. 4/17/15 RP 6. Despite these requirements, Detective Berg cannot think of a week when everyone has reported as required. 4/17/15 RP 8-9. Although he can forward charges to the prosecutor when a homeless person misses any given week, he generally does not file charges if a homeless offender comes into compliance within a reasonable amount of time. 4/17/15 RP 9-11. He acts discretionally out of courtesy and in the interest of securing compliance. 4/17/15 RP 9-10.

Detective Berg was aware Mr. Redding had registered as homeless on January 13 but had not returned. 4/17/15 RP 12-13. In hopes of gaining compliance, on February 10, Detective Berg called Mr. Redding's cell phone and Mr. Redding answered. 4/17/15 RP 14-15, 28-29. Mr. Redding informed Detective Berg that he had been trying without success to contact the officer supervising his community custody (on a prior charge) and did not want to report until he had that sorted out, because he knew there was a warrant out for him. 4/17/15

RP 14-15. Meanwhile, Mr. Redding was trying to find stable housing.

4/17/15 RP 15.

Detective Berg contacted Mr. Redding's community custody officer, learned the officer was out of the office, and called Mr. Redding back on February 11 to provide him with the name of another officer to contact. 4/17/15 RP 16-17. Mr. Redding repeated that he did not want to come in to register while he was at risk of being arrested. 4/17/15 RP 17, 30. Detective Berg told Mr. Redding "to report with his [homeless reporting] form by 2-13 or FTR charges will be forwarded." 4/17/15 RP 19-20; Exhibit 2. Based on this conversation, Mr. Redding "was under the impression I would come in and we would square up and everything would be -- that they wouldn't file charges." 4/17/15 RP 26-27; *accord* 4/17/15 RP 27, 32-33 (Detective Berg "said he would not forward charges to the prosecutor if I came in by the 13th"). Detective Berg denied that he made any such promise. 4/17/15 RP 20-21.

Detective Berg testified that if Mr. Redding reported by February 13 there was "a good chance," "a likelihood" he would not forward failure to register charges. 4/17/15 RP 21. But even though Mr. Redding turned himself in on February 12, Detective Berg still

forwarded charges to the prosecutor. 4/17/15 RP 21, 27. Snohomish County then charged Mr. Redding with felony failure to register. CP 145-46, 183-84.

Mr. Redding moved to dismiss the charges based on the promise made to him by Detective Berg. CP 174-78. At a hearing on the motion, Detective Berg, admitted he “advised Mr. Redding that he needed to report by 2/13/2015 or Failure to Register charges would be reported to the prosecutor’s office for charging.” CP 148. The court nonetheless denied the motion, concluding Detective Berg did not enter into a contract with or offer immunity to Mr. Redding. CP 148-49; 4/17/15 RP 39.

After a stipulated facts bench trial, Mr. Redding was convicted of felony failure to register. CP 19-34, 61-144; 7/13/15 RP 2-5. Although the presumptive standard range was 43 to 57 months incarceration and the prosecutor recommended 43 months, the court imposed an exceptional downward sentence of 36 months incarceration and 48 months community custody because Mr. Redding’s “capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law were significantly impaired by the [his] diagnosed mental illness.” CP 22, 23, 33. The court also waived all

“non-mandatory” costs and found Mr. Redding indigent for purposes of appeal. CP 25; CP __ (motion and order of indigency (sub # 40, 41)).²

E. ARGUMENT

1. The filing of felony failure to register charges was a breach of contract.

A unilateral contract is formed where one party makes a promise and the other party can accept that promise through performance. *Storti v. University of Washington*, 181 Wn.2d 28, 35-36, 330 P.3d 159 (2014). “The offeror is the master of the offer” and “may propose acceptance by conduct, and the buyer may accept by performing those acts proposed by the offeror.” *Discover Bank v. Ray*, 139 Wn. App. 723, 727, 162 P.3d 1131 (2007).³

Detective Berg extended Mr. Redding an offer to not file a failure to register charge if Mr. Redding reported by February 13, 2015. 4/17/15 RP 19-20; Exhibit 2; *see* CP 148. Relying on that offer, Mr. Redding turned himself into the Snohomish County jail on February 12, thereby accepting law enforcement’s offer. *Id.*; 4/17/15 RP 26-27,

² A supplemental designation of clerk’s papers was filed on February 1, 2016, requesting these documents be forwarded to the Court of Appeals.

³ The facts are not disputed; accordingly whether the State breached a contract is a legal question reviewed de novo. *Graoch Assocs. No. 5 Ltd. P’ship v. Titan Const. Corp.*, 126 Wn. App. 856, 861, 109 P.3d 830 (2005).

32-33; *see* CP 148. The parties thereby formed a unilateral contract. *Storti*, 181 Wn.2d at 35-36.

Every contract carries an implied duty of good faith and fair dealing. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). The State breached the unilateral contract and violated the duty of good faith and fair dealing by filing a failure to register charge against Mr. Redding, even though he accepted the contract by turning himself into the county jail before the offer expired. *See Storti*, 181 Wn.2d at 39 (courts interpret contract terms according to their ordinary meaning). The trial court erred in denying Mr. Redding's motion to dismiss the charge. *See* CP 148-49.

2. The felony conviction for failure to register works an injustice regardless of whether it is also a breach of contract.

- a. By filing the information after assuring Mr. Redding charges would not be filed, Snohomish County abused its prosecutorial discretion.

“[A] prosecutor has wide discretion to charge or not to charge a suspect.” *State v. Pettitt*, 93 Wn.2d 288, 294, 609 P.2d 1364 (1980); *accord Deal v. United States*, 508 U.S. 129, 134 n. 2, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) (recognizing prosecutors have “universally available and unavoidable power to charge or not to charge an

offense.”); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). In granting this discretion, courts and the public presume “that public officials will act fairly, reasonably and impartially in the exercise of their discretionary authority.” *State v. Jefferson*, 79 Wn.2d 345, 350-51, 485 P.2d 77, 80 (1971). This presumption is overcome, however, upon a “convincing showing of proof.” *Id.* at 351.

“The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government’s case, in order to determine whether prosecution would be in the public interest.” *Pettitt*, 93 Wn.2d at 295 (quoting *United States v. Lovasco*, 431 U.S. 783, 794, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) (noting circumstances where, despite evidence of guilt, prosecuting attorney would act appropriately by exercising discretion not to file charges)). When electing whether to file criminal charges, therefore, “[p]rosecutors should consider mitigating circumstances.” *Id.* at 296.

Here, Snohomish County failed to take into account mitigating circumstances. Even if this Court finds Detective Berg did not make an explicit or enforceable promise to Mr. Redding not to file charges if he registered (which Mr. Redding does not concede), Detective Berg

provided explicit assurances. Mr. Redding reasonably believed Detective Berg promised not to file charges so long as Mr. Redding reported by February 13. Mr. Redding, moreover, did report by turning himself into the jail immediately and before the deadline. *See State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997) (where law enforcement makes promises, the relationship between promise and confession is relevant to voluntariness); *People v. Perez*, 243 Cal. App. 4th 863, 876, 196 Cal. Rptr. 3d 871 (Jan. 8, 2016) (express promise of leniency in prosecution renders confession involuntary, requiring suppression; collecting cases). Detective Berg's statements and Mr. Redding's conforming actions are mitigating circumstances that should have caused Snohomish County not to file a charge against Mr. Redding, particularly a charge which would result in substantial prison time.

As explained in *Pettitt*, "the exercise of prosecutorial discretion is an important and delicate component of the office" in that the prosecutor is both an administrator of justice and an advocate who "must exercise sound discretion in the performance of his functions" and whose "broad discretion ... in deciding whether to bring charges and in choosing the particular charges to be made requires that the

greatest effort be made to see that this power is used fairly and uniformly.” 93 Wn.2d at 295 (citations and internal quotation marks omitted). The Snohomish County prosecutor failed to act justly in filing the instant charge against Mr. Redding.

- b. The due process guarantees of fair play, decency and fundamental fairness were infringed where Mr. Redding was convicted of felony failure to register and sentenced to three years imprisonment after he reasonably understood reporting would not result in the filing of charges.

“Due process requires the government to treat its citizens in a fundamentally fair manner.” *In re Detention of Ross*, 114 Wn. App. 113, 121, 56 P.3d 602 (2002); accord U.S. Const. amend. XIV; Const. art. 1, § 3. Due process requires fair play. *E.g.*, *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 64, 7 P.3d 818 (2000); *cf. Sledge*, 133 Wn.2d at 839 (contracts between government and accused implicate constitutional due process considerations). Due process is violated if a prosecutor’s actions infringe those “‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ . . . and which define ‘the community’s sense of fair play and decency.’” *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935) and *Rochin v. California*, 342

U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183 (1952)). “Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend ‘a sense of justice.’” *Rochin*, 342 U.S. at 173 (quoting *Brown v. Mississippi*, 297 U.S. 278, 285-86, 56 S. Ct. 461, 80 L. Ed. 682 (1936)).

Due process requires fair play, but that was denied Mr. Redding. He had been contacting his community custody officer to work out a way to come into compliance without facing a warrant for arrest. Meanwhile, Mr. Redding was trying to secure stable housing. He was waiting to report until something had been worked out with his community custody officer. But he was induced to report to the county jail by Detective Berg’s advisement that he could report by February 13 without fear of failure to register charges being filed. Mr. Redding reasonably understood Detective Berg’s statement to mean that *as long as he reported by February 13, criminal charges would not be filed*. He reported the very next day, on February 12. Snohomish County prosecuted, and even with the exceptional sentence below the range, he

is sentence to three years in prison followed by four years of community custody.

The fair treatment and decency embodied in our due process protections was not achieved here.

c. On either ground, the conviction should be reversed.

Mr. Redding reasonably understood that he would not be charged with failure to register if he reported to Snohomish County by February 13. He accordingly turned himself into jail. Charges were nonetheless forwarded to the prosecuting attorney and filed against him. He is serving 36 months in prison for conforming with conduct that he understood would absolve him of liability. The circumstances do not merit a felony conviction or a lengthy sentence. The conviction should be reversed because it violates due process and constitutes an abuse of prosecutorial discretion.

F. CONCLUSION

A lack of trust between police officers and the public harms us all. The conviction here erodes Mr. Redding's trust in the fair meaning of law enforcement's apparent promise. Contract law principles, decency, fair treatment and reasonableness each counsel that his failure to register conviction should be reversed.

Alternatively, if the State is the substantially prevailing party on appeal, this Court should exercise its discretion and decline to award costs because Mr. Redding is indigent and does not and likely will not have the ability to pay. CP ___ (motion and order of indigency (sub # 40, 41)); 7/13/15 RP 7-8, 10; RAP 1.2(a), (c); RAP 14; RAP 15.2(f); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *State v. Sinclair*, ___ Wn. App. ___, 2016 WL 393719, *2-7 (Jan. 27, 2016); *see* RCW 10.01.160(3); GR 34(a).

DATED this 10th day of February, 2016.

Respectfully submitted,

s/ Marla L. Zink
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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 73803-8-I
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JOSHUA REDDING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 11TH DAY OF FEBRUARY, 2016.



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