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WASHINGTON STATE
SUPREME COURT

Supreme Court No.: 93709.5
Court of Appeals No.: 73803-8-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA REDDING,

Petitioner.

FILED
October 10, 2016
Court of Appeals
Division I
State of Washington



PETITION FOR REVIEW

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

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Joshua Redding, petitioner here and appellant below, requests this Court grant review pursuant to RAP 13.4(b)(3) and (4) of the decision of the Court of Appeals, Division One, in *State v. Redding*, No. 73803-8-I, filed October 3, 2016. A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review as a matter of substantial public interest because the prosecutor's abuse of discretion in filing charges against Mr. Redding after law enforcement assured him charges would not be forwarded if he came into compliance with his registration requirement? RAP 13.4(b)(4).

2. Whether the Court should grant review where the filing of charges against Mr. Redding violates due process notions of fair play and decency, harming the delicate relationship between law enforcement and the citizens of this State? RAP 13.4(b)(3) & (4).

3. Whether the Court should grant review and hold that law enforcement breaches a unilateral contract if it forwards charges to the prosecutor after assuring charges will not be forwarded if an individual

reports to authorities within a given deadline and the individual responds by reporting within the deadline? RAP 13.4(b)(4).

C. 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).

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

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

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.

Mr. Redding appealed, seeking reversal on three independent grounds but the Court of Appeals affirmed. *See* Slip Op. at Appendix.

D. ARGUMENT

- 1. The Court should grant review of the novel issue of substantial public interest that the filing of charges after assuring no charges would be forwarded constitutes an abuse of 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 unvoidable 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. Detective Berg provided explicit assurances to Mr. Redding. 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 circumstances here militated against wielding the full impact of criminal laws against Mr. Redding, who had just reported as requested. The Snohomish County prosecutor failed to act justly in filing the instant charge against Mr. Redding.

Mr. Redding answered Detective Berg’s calls and complied with his request to report. 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.² This Court should grant review and hold that a county abuses its authority when it files charges in these circumstances.

² It is also notable that Mr. Redding’s duty to register stems from a juvenile adjudication. CP 112.

2. **This Court should grant review and hold that 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 his 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.

3. The Court should grant review and hold that the detective breached a unilateral contract with Mr. Redding by forwarding charges to the prosecutor after Mr. Redding reported to the jail.

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 Court should grant review and hold that the State's conduct 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

³ The facts are not disputed; accordingly whether the State breached a contract is a legal question reviewed de novo. *Graoch*

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

The Court of Appeals held a contract was not formed because there was no consideration. Slip Op. at 7. Mr. Redding did provide consideration. He provided Detective Berg compliance with Redding's registration duties. Compliance with registration was Detective Berg's primary concern and served the purported purpose of the registration requirements. 4/17/15 RP 10. Mr. Redding provided Detective Berg with fulfillment of Berg's job responsibilities, which included ensuring individuals came into compliance with their reporting duties.

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.

Assocs. No. 5 Ltd. P'ship v. Titan Const. Corp., 126 Wn. App. 856, 861, 109 P.3d 830 (2005).

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 Court of Appeals held that Detective Berg had no authority to promise Mr. Redding that charges would not be filed. Slip Op. at 6. But Detective Berg did have discretion to decide whether to forward charges to the prosecutor. 4/17/15 RP 9-10 (testimony of Berg that he generally acts discretionally in determining whether to forward charges out of courtesy and in the interest of securing compliance). Mr. Redding only claims that law enforcement breached the contract when it forwarded the charges to the prosecuting attorney's office. This was within law enforcement's authority. Moreover, law enforcement's limited role in the criminal justice system counsels against it making promises it cannot fulfill. This at least supports Mr. Redding's due process arguments.

E. 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. The Court should grant review and reverse Mr. Redding's conviction for failure to register because it

violates due process, the charge was an abuse of prosecutorial discretion and law enforcement breached a unilateral contract by forwarding the charge.

DATED this 10th day of October, 2016.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 73803-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
JOSHUA LEE REDDING,)	
)	
Appellant.)	FILED: October 3, 2016

APPELWICK, J. — Redding appeals his conviction for failure to register as a sex offender while on community custody. Redding was in violation of required in person reporting to the sheriff's office when a detective told him that he had to report by the next scheduled date, February 13, 2015, or charges would be forwarded to the prosecutor. Redding turned himself in to the county jail on February 12th on an outstanding warrant. He argues that the sheriff's office breached a unilateral contract when it forwarded the charges to the prosecutor. He also argues the prosecuting attorney's office abused its discretion and violated his due process rights. We affirm.

FACTS

Joshua Redding was convicted as a juvenile in 1997 for first degree child molestation. Since then he has been required to register as a sex offender under RCW 9A.44.130. On January 13, 2015, Redding registered in Snohomish County and reported his status as homeless/transient. Because of his status, Redding was required to report to the Snohomish County Sheriff's Office every Tuesday during normal business hours. When a person misses any given week, the Sheriff's office may file a failure to register. According to Detective Scott Berg, "typically" it would be "about two weeks before we filed a Fail[ure] to Register on a homeless individual."

After reporting on January 13, 2015, Redding had not reported for four subsequent Tuesdays. Detective Berg called and spoke with Redding on February 10, 2015, informing him that he was out of compliance. Redding had been unable to report because he "was up towards the mountains" and "wasn't on a bus line anywhere."

During this time Redding was under Department of Corrections (DOC) supervision as a result of a prior failure to register conviction from 2013. He had been released from custody on January 10, 2015 and had a duty to report to his Community Corrections Officer (CCO) on January 20th. He did not report as required and DOC issued an escape arrest warrant. Redding knew he was on a warrant and did not want to report to the sheriff's office, because he did not want to be arrested.

Redding called Detective Berg back on February 11th and mentioned that he had tried to contact his CCO, but had not been able to reach him. Detective Berg tried to call Redding's CCO and discovered that he was out of the office. Detective Berg then called Redding back that same day to give him the name of another CCO to contact. Detective Berg informed Redding that he was still out of compliance and that he needed to report by February 13 or failure to register charges would be filed.

Redding turned himself in to the Snohomish County Jail on the evening of February 12th. He did not report directly to Detective Berg because he "didn't want to chance it. It was about 6:00 at night on a Thursday, and I wanted to just get straight down there." Redding's CCO notified Detective Berg that Redding had been arrested and booked into the county jail.

On February 24, 2015, the sheriff's office requested that charges be filed against Redding for failure to register as a sex offender. At that time Redding was still being held in the Snohomish County jail. On February 26, 2015, Redding was charged with felony failure to register as a sex offender while on community custody.

Redding moved to dismiss the charges based on Detective Berg's statement that he had to report by the 13th or charges would be filed. The court denied the motion, finding that "[n]o contract and no promises [were] made to the defendant by the Detective Berg," nor was there an "implied or expressed agreement as to not forwarding charges," nor any "contractual agreement or offer

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of immunity.” The trial court also found that Redding could not “graft contract theory to (‘use or derivative use’) Immunity [sic] case law and then apply it to the facts of this case.”

The case proceeded to a bench trial on stipulated facts. Redding was convicted of felony failure to register while on community custody on July 13, 2015. He had been previously been convicted three times for failing to register in 2011, 2012, and 2013.

Based on Redding’s offender score, the standard range sentence for this offence was 43-57 months. The sentencing court imposed an exceptional downward sentence of 36 months and 48 months community custody, because Redding’s “capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law w[as] significantly impaired by [his] diagnosed mental illness.”¹ Redding appeals.

DISCUSSION

CrR 8.3(b) provides that a trial court may dismiss an action when, “due to arbitrary action or governmental misconduct, there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.”² We review

¹ Redding had been diagnosed with unspecified schizophrenia spectrum and trauma and stress related disorders.

² While Redding did not cite CrR 8.3(b) as the basis for his motion to dismiss, his contract law arguments and claims for violation of the 5th and 14th Amendments raise issues of arbitrary action and governmental misconduct that are covered by the rule. We therefore apply the manifest abuse of discretion standard when reviewing his motion to dismiss. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003).

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a trial court's denial of a motion to dismiss under CrR 8.3(b) for a manifest abuse of discretion. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). Dismissal under this rule is an extraordinary remedy and is improper absent material prejudice to the rights of the accused. State v. Blackwell, 120 Wn.2d 822, 830-31, 845 P.2d 1017 (1993).

Redding first argues that the charges should have been dismissed, because he and Berg had an agreement that no charges would be filed if he reported before February 13, 2015. He contends that the parties formed a unilateral contract when he accepted Berg's offer by turning himself into the Snohomish County jail on February 12, 2015. According to Redding, the sheriff's office breached the contract and violated the duty of good faith and fair dealing by filing charges after he had complied with the terms of the agreement.

RCW 9A.44.130 provides the general registration and reporting guidelines for specified sex offenders. The statute sets forth the procedures and reporting requirements that offenders must follow, once they have registered, including processes for moving or becoming homeless. State v. Durrett, 150 Wn. App. 402, 406-07, 208 P.3d 1174 (2009). Under RCW 9A.44.130(6)(b), a person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. Id. A person commits the crime of failing to register as a sex offender under RCW 9A.44.132(1)

if he or she knowingly fails to comply with any of the requirements of RCW 9A.44.130, including failing to report on a weekly basis.

The State argues that Detective Berg has no power to offer immunity from prosecution; only the prosecuting attorney can enter into such agreement and it must be approved by the court. We agree. This court has expressly held that principles of contract law have little application to criminal law matters outside of plea agreements. State v. Reed, 75 Wn. App. 742, 744, 879 P.2d 1000 (1994). In Reed, we held that a promise by police to “drop charges” exceeded their authority, and that such an agreement could not be enforced as a contract without the prosecutor’s involvement. Id. at 745.

Here, as in Reed, Berg had no authority to promise Redding that charges would not be filed. The county prosecutor is the only one with the discretion to decide whether to file criminal charges. Id. at 744. A police officer cannot extend immunity from prosecution. State v. Unga, 165 Wn.2d 95, 104, 196 P.3d 645 (2008); State v. Hull, 78 Wn.2d 984, 989, 481 P.2d 902 (1971). Therefore, any such agreement to refrain from charging Redding would not be enforceable as a contract.³

Even if Berg had the authority, and contract principles applied in this case, there was unilateral contract. In any breach of contract action, a court must first

³ Redding argues that his breach of contract claim does not rely upon the ultimate charging decision, but that Berg “breached the contract when [he] forwarded the charges to the prosecuting attorney’s office.” This is of no distinction. Regardless of whether it involves the actual charging decision or the forwarding of charges, under Reed and Hull, the sheriff’s office does not have authority to extend immunity to individuals who are not in compliance.

determine whether an enforceable contract has been created. Storti v. Univ. of Wash., 181 Wn.2d 28, 35, 330 P.3d 159 (2014). For a unilateral contract, one party must make a promise that the second party may accept and establish a contract only through performing his or her end of the bargain. Id. at 35-36. Unilateral contracts are defined by traditional contract concepts of offer, acceptance, and consideration. Id. at 35. The party asserting the existence of a unilateral contract has the burden of proving each essential element of a unilateral contract. Multicare Med. Ctr. v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 584 n.19, 790 P.2d 124 (1990), overruled in part on other grounds Neah Bay Chamber of Commerce v. Dep't of Fisheries, 119 Wn.2d 464, 832 P.2d 1310 (1992).

The State argues there was no contract because there was no consideration on Redding's part. We agree. All Redding had to do to fulfill the "contract" was to report to the Sheriff's office as required. The performance of a preexisting legal obligation is not valid consideration. Id. at 584-85. Redding was required to report weekly under RCW 9A.44.130(6)(b). Merely fulfilling this requirement is not sufficient consideration for a contract.⁴

Redding next argues that the Snohomish County prosecutor abused its discretion by filing charges against him without taking mitigating circumstances into account. Even assuming that Redding's subjective belief in a promise of

⁴ Redding argues that his consideration for the contract was "coming into compliance with his registration duties," which was "Detective Berg's primary concern." This only affirms the fact that Redding had a preexisting legal duty, and his compliance with that duty would not provide consideration for a contract.

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immunity was a mitigating circumstance, his argument has no merit. First, Redding did not raise this issue before the trial court. Under RAP 2.5(a), an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. The appellant must show the alleged error is "manifest" by demonstrating actual prejudice. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. Id.

Here, there is no evidence in the record that the prosecutor failed to account for mitigating circumstances in the charging decision. Even if it had, Redding cites no authority to support his position that failure to consider a mitigating condition is an abuse of discretion.

Prosecutors are vested with wide discretion in determining how and when to file criminal charges. State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). But, that discretion is not 'unfettered'; the prosecutor's discretionary authority may not be exercised in a manner that violates the accused's due process rights. Moen, 150 Wn.2d at 227. An exercise of prosecutorial discretion is generally proper when it is based on a consideration of the elements that can be proved or the penalties on conviction. State v. Ward, 108 Wn. App. 621, 629, 32 P.3d 1007 (2001), aff'd, 148 Wn.2d 803, 64 P.3d 640 (2003).

Exercise of this discretion involves consideration of numerous factors, including the public interest as well as the strength of the State's case. Moen, 150

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Wn.2d at 227. A prosecutor can assess any mitigating or aggravating factors before filing charges. State v. Rice, 159 Wn. App. 545, 566, 246 P.3d 234 (2011), aff'd on other grounds, 174 Wn.2d 884, 279 P.3d 849 (2012). But, there is no statute requiring the prosecutor to consider mitigation evidence in a noncapital case. Koenig v. Thurston County, 175 Wn.2d 837, 846, 287 P.3d 523 (2012). Here, Redding cannot show that the prosecutor abused its discretion by filing charges in spite of his belief that Berg promised he would not be charged.

Finally, Redding argues that the charging decision violated his due process rights. According to him, the filing of charges, after he had been told otherwise, infringed those " 'fundamental conceptions of justice which lie at the base of our civil and political institutions.' " (Quoting United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).) Unfortunately, Redding has not shown that he has any right to not be charged under RCW 9A.44.132 when he declined to report for four weeks, let alone that such a right is a fundamental principle of justice deeply rooted in our State's law. We find no error in the trial court's denial of Redding's motion to dismiss.

Citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) and State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d.733 (2016), Redding asks that appellate costs be presumptively denied.. The State did not respond to this assertion.

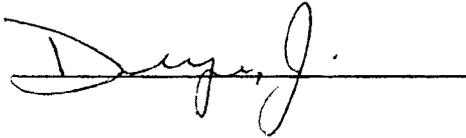
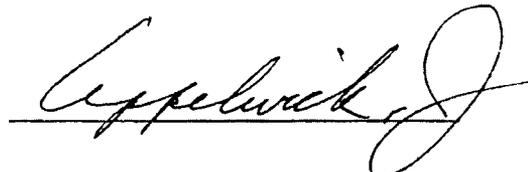
In Sinclair, we determined that RAP 15.2(f) created a presumption of continued indigency throughout review. 192 Wn. App. at 393. Here, Redding was

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found to be indigent prior to trial. He was represented by an appointed attorney at trial and his appeal was authorized *in forma pauperis*. The State has provided no factual basis to overcome the continuing presumption of indigency. Therefore, we conclude that appellate costs should not be awarded to the State.

Affirmed.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dyer, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Appelwick, J.", written over a horizontal line.
A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73803-8-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Andrew Alsdorf
[aalsdorf@snoco.org]
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 10, 2016