9-8-2017

State v. Merrill Appellant's Brief Dckt. 44822

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NOS. 44822, 44823 & 44824**
	)	
v.	)	**BINGHAM COUNTY**
	)	**NOS. CR 2013-457, CR-2015-2848 &**
	)	**CR 2016-6753**
COLTON MERRILL,	)	
	)	
Defendant-Appellant.	)	**APPELLANT'S BRIEF**
	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

HONORABLE DARREN B. SIMPSON
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

KIMBERLY A. COSTER
Deputy State Appellate Public Defender
I.S.B. #4115
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Colton Merrill entered a plea agreement with the State whereby he pled guilty to a charge of attempting to elude a police officer and admitted to violating his probation in two prior cases. In exchange, the State promised to concur with the sentencing recommendations in the presentence investigation report; the presentence investigator recommended retained jurisdiction and a rider.

At sentencing, the prosecutor acknowledged the State's obligation to follow the presentence investigator's recommendation, and he ultimately made the recommendation for retained jurisdiction and a rider. However, the prosecutor made additional, negative statements regarding that recommendation, including "I think a straight prison recommendation is just fantastic." (Tr., p.32, Ls.2-10) (Emphasis added).

The district court did not retain jurisdiction and sentenced Mr. Merrill to "straight prison" in all three cases. On appeal, Mr. Merrill challenges the dispositions in his three cases, which have been consolidated for appeal, contending that the prosecutor's negative statements at sentencing constituted a breach of the plea agreement, and he asks for a new sentencing hearing before a different judge.

Statement of the Facts and Course of Proceedings

Mr. Merrill has struggled with heroin addiction for years. (PSI, p.191.) He had been progressing in the Wood Drug Court program, as part of his probation in two previous cases, and he had been sober for more than 15 months when, after a bad break up with his girlfriend, he relapsed with a single heroin use. (PSI, p.171.) He became delusional and led police on a high-speed car chase that ended when his vehicle left the road and landed in a canal. (PSI, p.171;

R., pp.305, 538.) The State charged Mr. Merrill with attempting to elude a police officer and driving without privileges, along with a persistent violator enhancement. (R., pp.560, 562.) The State also filed probation violation reports alleging Mr. Merrill had violated probation in his two previous cases. (R., pp.301, 475.)

Pursuant to the terms of a plea agreement, Mr. Merrill pled guilty to the eluding charge and admitted violating his probation. (R., p.573; Tr., p.16, L.5; Tr., p.19, L.21 – p.20, L.1.) In exchange, the State promised to dismiss the misdemeanor charge and to not pursue the enhancement; the State also promised to concur with the recommendations of the presentence investigation ("PSI") writer. (Tr., p.7, Ls.6-11, p.29, Ls.17-18.) The PSI writer recommended retained jurisdiction and a rider. (PSI, p.177.)

At the combined sentencing and disposition hearing, Mr. Merrill asked the court to continue his probation and allow him to participate in a new intensive residential treatment program in the community; in the alternative, if the court were not to grant probation, he asked for retained jurisdiction and a rider, as recommended in the PSI. (Tr., p.28, Ls.17-23.)

The prosecutor then presented the State's sentencing argument. (Tr., p.29, L.16 – p.33, L.4.) The prosecutor acknowledged he was bound by the plea agreement to follow the PSI's recommendation (Tr., p.29, Ls.16-18), and he ultimately made the required recommendation for retained jurisdiction and a rider (Tr., p.32, Ls.15-16). But the prosecutor also made additional statements. Referring to PSI writer's recommendation, the prosecutor stated:

> I don't know if I have too much extra stuff in my eggnog[1] or the presentence investigator writer does, but what the conclusion of [the PSI] is – I think I was expecting to have an IDOC recommendation in this case.

(Tr., p.30, Ls.6-10.)

The prosecutor went on to read from the presentence writer's comments including:

> Mr. Merrill has an extensive criminal history. The instant offense is his third felony. He has completed a rider and had a chance to participate in a specialty court. He has had previous chances at probation and treatment and that, along with the nature of the instant offense, could merit a recommendation of incarceration with the IDOC.
>
> However, the fact the retained jurisdiction program has changed since he was last sent on one is another option; therefore, I respectfully recommend a retained jurisdiction.

(Tr., p.20, Ls.14-24.)

The prosecutor told the court he knew of "only two things" in favor of the recommendation for retained jurisdiction:

> Two things are this: He "only" – and I say that with quotations. He "only" did the CAPP Rider, and he's young. That's it.
>
> I know we dealt with his mother in another court. *She got another chance at retained jurisdiction. … I think she got a third rider.*
>
> *And he's on the same path.* Mr. Merrill to me is on the same path of he comes to court and says "This is what I'm doing." He does really great for a period of time *and then he's back in the system.*

(Tr., p.31, Ls.1-20.) (Emphasis added.)

The prosecutor went on to make additional remarks about Mr. Merrill's mother and siblings and their frequent appearances on his criminal court calendar, stating:

> I think a weak point is his mother and his siblings. Maybe he just has the one brother. I don't know if there's more.
>
> But since I've been here, it's been that that group of people. I've have a Merrill on my calendar for four years at least once a month.

(Tr., p.32, Ls.5-7.) Next, the prosecutor stated:

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[1] An apparent reference to the popular holiday drink that includes Bourbon; the sentencing hearing took place on December 19th.

> So that's how irritated I am by this, *and that's why I think a straight prison recommendation is just fantastic*.
>
> But giving him the benefit of the doubt, I'll turn my anger into a recommendation of an underlying sentence of five years fixed [the maximum sentence]. I think he's earned it at this point.
>
> And now the ball is on his court, and I'll recommend that the Court order a retained jurisdiction and give him that one chance at the new program….

(Tr., p.32, Ls.2-12) (Emphasis added.)

Mr. Merrill did not object to the prosecutor's comments. (*See generally* Tr., p.32, L.11 – p.44, L.6.) The district court sentenced Mr. Merrill, in the 2016 eluding case, to a term of five years, with two fixed, and revoked his probation in the 2013 and 2015 cases (Tr., p.39, Ls.5-24); the court specifically declined to retain jurisdiction (Tr., p.41, Ls.10-12.). Mr. Merrill timely filed notices of appeal from the orders revoking his probation in his previous cases (R., pp.332, 505), and from the judgment imposing sentence in eluding case (R., p.597).[2] Supreme Court consolidated the appeals. (*See* Order To Consolidate Appeals, dated February 21, 2017).

[2] Mr. Merrill also filed a Rule 35 motion seeking a reduction of his sentence, and the district court summarily denied it. (R., pp.503, 595, 613.) Mr. Merrill's appeal does not challenge the denial of that motion.

ISSUE

Did the State breach the plea agreement by making statements that were fundamentally at odds with the sentencing dispositions that it was obligated to recommend?

ARGUMENT

The State Breached The Plea Agreement By Making Statements That Were Fundamentally At Odds With The Disposition That The State Was Obligated To Recommend

A. Introduction

When the State enters a plea agreement with a defendant promising to recommend a particular disposition at sentencing, the prosecutor is not permitted to make statements fundamentally at odds with that recommendation. But that is exactly what happened here.

As part of the plea bargain, the State specifically promised to concur with the recommendation of the presentence investigation ("PSI"), which was for retained jurisdiction. (Tr., p.7, Ls.6-11; PSI, p.177). Although the prosecutor uttered the requisite words, he also made a number of statements that were wholly incompatible with that recommendation: he criticized the recommendation and mocked the presentence investigator for making it; he listed reasons that merited a counter recommendation for incarceration; he drew comparisons to another family member's failures after a second chance at rider, and remarked that "Mr. Merrill is on the same path"; he pronounced his unqualified opposition to probation - which is the ultimate goal of retained jurisdiction; and finally, but most blatantly, he told the court, "that's why I think a straight prison recommendation is just fantastic." (Tr., p.30, Ls.6-10, p.32, Ls.8-10.)

These statements were completely at odds with the recommendation for retained jurisdiction, depriving Mr. Merrill of the benefit of his plea bargain, and constituted a breach of the plea agreement as a matter of law.

B. Standard Of Review

Mr. Merrill's claim that the prosecutor's additional statements breached the plea agreement as a matter of law is reviewed by this Court *de novo*, in accordance with contract law standards. *State v. Gomez*, 153 Idaho 253, 256 (2012).

Although Mr. Merrill did not object to the prosecutor's statements in the district court, his claim that the State breached the plea agreement is reviewable by this Court under the *Perry* fundamental error doctrine. *State v. Gomez*, 153 Idaho 253, 255 (2012) (citing *State v. Perry*, 150 Idaho 209, 225 (2010). *Perry* sets forth the applicable standard:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Perry, 150 Idaho at 226.

C. The State Breached Its Plea Agreement By Making Statements That Were Fundamentally At Odds With The Disposition That It Was Obligated To Recommend

The law is well-settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *State v. Gomez*, 153 Idaho 253, 255 (2012) (quoting *Santobello v. New York*, U.S. 257, 262, 92 S. Ct. 495, 499 (1971)). The State breaches its agreement with a defendant when the prosecutor's argument at sentencing is "so fundamentally at odds with the position that the state was obligated to recommend that it amount[s] to a violation of the agreement." *State v. Lankford*, 127 Idaho 608, 617 (1995); *see also State v.*

Jones, 139 Idaho 299, 302 (Ct. App. 2003); *State v. Wills*, 140 Idaho 773 (2004); and *State v. Daubs*, 140 Idaho 299 (Ct. App. 2004).

In *Lankford*, the State promised to recommend a lenient sentence in exchange for a plea to murder. 127 Idaho at 617. Although the prosecutor made that recommendation at sentencing, he also presented aggravating evidence showing the defendant to be more culpable than he had admitted, that he had been a disruptive inmate, and that he was a poor candidate for rehabilitation. *Id*. Additionally, the prosecutor argued that the defendant was highly culpable, manipulative and dangerous. *Id.* On appeal, this Court held that the State had violated the plea agreement by making a presentation at sentencing that was inconsistent with its promise to recommend leniency:

> Allowing the state to make the arguments and introduce the evidence in aggravation to the extent that was done was reversible error, *because it was so fundamentally at odds* with the position the State was obligated to recommend that it amounted to a violation of the agreement.

Id. (Emphasis added.)

In *State v. Jones*, the prosecutor agreed to recommend retained jurisdiction in exchange for the defendant's guilty plea. 139 Idaho at 300. However, while the prosecutor made the requisite recommendation, she also argued to the district court that the presentence investigator advised against supervised probation, in part, out of concern for the safety of the victims and defendant's poor prospects for rehabilitation. *Id*. The prosecutor added that, while she was bound to her recommendation, she did not have all of the aggravating information at the time of the plea agreement and, thus, left it up to the court's discretion. *Id*., at 300-01. Applying *Lankford*, the Court of Appeals vacated the sentence, holding that the additional statements made by the prosecutor were "fundamentally at odds" with recommendation that the State had promised; although the prosecutor uttered the requisite wording make the recommendation called

for in the plea agreement, her additional statements "effectively disavowed the recommendation for retained jurisdiction," and thereby deprived the defendant of the benefit of his bargain, constituting a breach of the agreement. *Id.* at 303.

Similarly, in *State v. Wills*, the prosecutor had agreed to recommend specific sentences, but later argued that those sentences were "the very minimum" the court should impose, and that the State was showing "great restraint" by only recommending those sentences. 140 Idaho at 774. The Court of Appeals held that the prosecutor's argument breached the plea agreement:

> By presenting the recommended sentences as the minimum to be imposed and indicating that this minimum recommendation was made with "great restraint," the prosecutor failed to endorse the recommended terms as the ones the district court should accept. Instead, the prosecutor conveyed a reservation regarding the advisability of imposing those sentences and implied that longer terms would be more appropriate. This conduct was fundamentally at odds with what the state agreed to do under the plea agreement.

Id., at 776.

And in *Daubs*, the Court of Appeals held that the prosecutor's argument was "fundamentally at odds" with the terms of the plea agreement, where the prosecutor's over-emphasis of the harsher sentence recommended in the presentence investigation report acted as a "constructive disavowal" of the State's required recommendation. 140 Idaho at 301.

Federal appellate courts applying these same contract principles to plea agreements likewise hold that the prosecutor "may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one." *United State v. Whitney*, 673 F.3d 965, 971 (9th Cir. 2012). In *Whitney* the Ninth Circuit Court of Appeals explained:

> Although the sentencing recommendation need not be made enthusiastically, when the government obligates itself to make a recommendation at the low of the guidelines range, it may not introduce information that serves no purpose but to influence the court to give a higher sentence. This prohibition precludes referring to information that the court already has before it, including statements relating to

> the seriousness of the defendant's prior record, statements indicating a preference for a harsher sentence, or the introduction of evidence that is irrelevant to any matter that the government is permitted to argue. Such statements are recognized as introduced solely for the purpose of influencing the district court to sentence the defendant more harshly.

673 F.3d at 971. *See also United States v. Heredia*, 768 F.3d 1220, 1233 (9th Cir. 2014) (the prosecutor "breaches its bargain with the defendant if it purports to make the promised recommendation while " winking' at the district court' to impliedly request a different outcome.")

Like the prosecutors in these cases, the prosecutor in Mr. Merrill's case uttered the requisite words to recommend the disposition it was obligated to recommend. (Tr., p.32, Ls.15-17.) However, and as in those cases, the prosecutor made additional comments throughout his presentation that did not support the bargained-for recommendation; the prosecutor's arguments here argued *against* retained jurisdiction and in favor of a "straight prison." As discussed more fully below, these additional statements were fundamentally at odds with the recommendation the State was obliged to make, and violated the plea agreement.

1. <u>The Prosecutor's Statement Mocking The Recommendation Of The Presentence Investigation, Coupled With His Statement That He Had Expected A Prison Recommendation, Violated The Plea Agreement</u>

After pointing out to the court that the plea agreement "bound us to follow the recommendation of the PSI," the prosecutor mocked that recommendation – and the presentence investigator for making it – by stating "I don't know if I have too much extra stuff in my eggnog or the presentence investigator writer does," and then, "I was expecting to have an IDOC [i.e., prison] recommendation in this case." (Tr., p.29, L.17 – p.30, L.10.) By making these statements, the prosecutor effectively told the court the recommendation made no sense to him and that he thought it silly, and that the recommendation he had expected - IDOC incarceration -

was the more sober disposition for this case. These remarks served no practical purpose other than to undermine value of the recommendation Mr. Merrill had bargained for, and violated the plea agreement.

2. The Prosecutor's Statements Minimized The Reasons For Retaining Jurisdiction, And Emphasized The Reasons Against It, Violated The Plea Agreement

The prosecutor also told the district court he had personal, conflicting feelings about the recommendation and decided to read aloud, from the presentence investigation, a list of reasons supporting a prison sentence for Mr. Merrill: his extensive criminal history, that the instant offense is his third felony; that he had completed a rider and had a chance to participate in specialty court; that he'd been given previous chances at probation and treatment; the serious nature of the instant offense; and a conclusion that these reasons "could merit a recommendation of incarceration with the IDOC." (Tr., p.30, Ls.11-20.)

This information was already before the district court in the PSI, and underscoring those reasons could serve no practical purpose other than to influence the district court to consider them in support of a straight prison sentence, and as such violated the plea agreement. *See Whitney*, 673 F.3d at 971; *Jones*, 139 Idaho at 300.

Although the prosecutor also read the reason given by the presentence investigator for recommending retained jurisdiction, i.e., there is a new retained jurisdiction program, (Tr., p.30, Ls.14-24), the prosecutor went to great lengths to minimize the recommendation, stating there were "only two things" that favored retained jurisdiction: "[Mr. Merrill] 'only' – and I say that with quotations, "only" did the CAPP Rider, and he's young. *That's it.*" (Tr., p.31, Ls.10-12.) (Emphasis added.) The prosecutor also made extensive, detailed comments regarding Mr. Merrill's record of failure, i.e., "he does really great for a period of time, and then he's back

in the system." (Tr., p.31, Ls.3-20), clearly expressing his lack of confidence in Mr. Merrill's ability to succeed. (*See generally*, Tr., p.31, L.3 – p.32, L.10.)

And, while the prosecutor did ultimately consent to recommend retained jurisdiction, "giving him the benefit of the doubt," and "give him that one chance" at a rider (Tr., p.32, Ls.17), his additional comments showed that the prosecutor had strong reservations about the recommendation, and were akin to the statement of "great restraint" that was held to violate the State's plea promise in *State v. Wills*. *See* 140 Idaho at 776. Moreover, there is no exception to the reasoning or holdings of *Lankford*, *Jones*, *Wills*, or *Daubs* that permits a prosecutor to present a counter-argument to the recommendation the State is required to make under the plea agreement. Thus, although the prosecutor provided reasons that supported the recommendation, he was not, consistent with the plea agreement, permitted to highlight reasons that were contrary to that recommendation.

3. By Underscoring The Fact The Mr. Merrill's Mother Was Given A Second Chance On Retained Jurisdiction And Failed, And Then Telling The Court That Mr. Merrill "Was On The Same Path," The Prosecutor Breached The Plea Agreement

The prosecutor additionally violated the plea agreement by pointing out that Mr. Merrill's mother had been given a second chance on retained jurisdiction and failed, and that he believed Mr. Merrill was "on the same path"; the prosecutor emphasized his expectation of failure, explaining that Mr. Merrill "does really great for a period of time, *and then he's back in the system*." (Tr., p.31, Ls.3-20.) (Emphasis added.) The prosecutor effectively argued the futility of granting Mr. Merrill a second chance at retained jurisdiction, predicting that like his mother, Mr. Merrill would fail. This argument is incompatible with the State's promise to recommend retained jurisdiction, and violated the plea agreement.

4. The Prosecutor's Unqualified Statements Against The Possibility Of Probation Are Incompatible With A Recommendation For Retained Jurisdiction

The central theme of the prosecutor's argument was that Mr. Merrill was a poor candidate for rehabilitation and underserving of the "second chance" that was being recommended. (Tr., p.31, Ls.3-20.) The prosecutor told the court that, "probation, for me, is out of the question" and "there's nothing in the last four years that I've seen here that tells me he's going to be okay on probation." (Tr., p.31, Ls.3-7.) As noted above, the prosecutor bolstered his portrayal of Mr. Merrill by telling the judge that Mr. Merrill was "on the same path" as his mother, who was now on her "*third* rider," explaining to the court that like her, "he does really great for a period of time, and then he's back in the system." (Tr., p.31, Ls.3-20.) (Emphasis added.) These unqualified statements against even the possibility of probation are incompatible with a recommendation for retained jurisdiction. As recognized by Idaho's courts, the primary purpose of retaining jurisdiction is to afford the trial court additional time to evaluate a defendant's rehabilitation potential and suitability for probation. *State v. Jones*, 141 Idaho 673, 677 (Ct. App. 2005). "Probation is the ultimate objective sought by a defendant who asks a court to retain jurisdiction." *State v. Chapel*, 687 P.2d 583 (Idaho Ct. App. 1984). Thus, a sentencing recommendation for retained jurisdiction necessarily contemplates the possibility of probation. *Jones*, at 677.

Here, the prosecutor's statements constituted a forceful argument that Mr. Merrill would never succeed on probation, regardless of any short-term success he may achieve. (Tr., p.31, Ls.3-20.) Such statements are fundamentally at odds with a recommendation for retained jurisdiction, since the ultimate goal *is* probation. As such, these statements, too, violated the plea agreement.

5. The Prosecutor's Statement, "That's Why I Think A Straight Prison Recommendation Is Just Fantastic" Violated The Plea Agreement

The most blatant of all of the violations, however, was the prosecutor's statement, made after describing his experience with Mr. Merrill: "So that's just how irritated I am by this, and that's why *I think a straight prison recommendation is just fantastic*." (Tr., p.32, Ls.8-10.) (Emphasis added.) This expression of a personal preference for prison cannot possibly be reconciled with a recommendation for retained jurisdiction, and plainly violates the plea agreement.

Moreover, and as discussed below, the fact that the prosecutor made this statement negates any potential argument that his other adverse remarks were in response to the defense's request for reinstatement on probation. *See State v. Halbesleben*, 147 Idaho 161 (Ct. App. 2009) (prosecutor's argument detailing troubling facts and urging that a lesser sentence would depreciate gravity of offense did not violate State's plea promise to recommend relatively lenient sentence, but was permissible as a buttress against defense's argument for an even more lenient sentence).

6. The Prosecutor's Additional Statements Cannot Be Justified As A Response To The Defense's Argument For Probation

Even if the prosecutor were permitted to present some argument in response to defense counsel's request for immediate reinstatement on probation, *see Halbesleben*, 147 Idaho at 163, the statements that the prosecutor made here cannot be justified. The plea agreement restricted the State's sentencing argument, but not Mr. Merrill's. (*See* Tr., p.7, Ls.6-11, p.29, Ls.17-18.) The fact that Mr. Merrill requested a disposition that differed from the one recommended in the PSI did not relieve the State of its obligation to contour its sentencing arguments so as to be consistent with that recommendation.

Consistent with its obligation to recommend retained jurisdiction, the prosecutor could, for example, have stated that Mr. Merrill is not a suitable candidate for probation "at this time" and then argued for retained jurisdiction and a rider. Instead, the prosecutor chose to ridicule the presentence investigator for his recommendation of retained jurisdiction; to portray Mr. Merrill as unworthy of the "second chance" that was supposedly being recommended; and, finally, to tell the court, explicitly, that he personally believes "a straight prison sentence is just fantastic."

Although the prosecutor purported to justify some of his comments under the guise of showing that Mr. Merrill lacked community support group (Tr., p.31, Ls.21-23), that explanation cannot justify the statements that Mr. Merrill challenges in this appeal. Those statements constituted an argument favoring "straight prison" and against retained jurisdiction, and were entirely at odds with the recommendation that the State had promised to make, constituting a breach of the plea agreement as a matter of law.

D. Fundamental Error Under *Perry* Demonstrated

Mr. Merrill's breach of plea agreement claim satisfies Perry's fundamental error requirements.

1. Violation Of Constitutional Rights

The Supreme Court has held, post-*Perry*, that a claim that the State breached a plea agreement "goes to the foundation or basis of a defendant's rights." *State v. Gomez*, 153 Idaho 253, 256 (2012) (internal citations omitted). Applying *Gomez* here, Mr. Merrill's claim of breach, as established above, satisfies the first prong of the *Perry* standard. *See Gomez*, 153 Idaho at 256.

2. Clear And Obvious Breach

Mr. Merrill's claim of error likewise satisfies the second prong of the *Perry* test, which requires that the error be "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision." 150 Idaho at 226.

a. Terms Of The Plea Agreement Clear From The Record

The terms of the parties' plea agreement, and the prosecutor's conduct that breached that agreement, are plain and obvious from the appellate record. (*See generally* Transcripts of plea hearing held 10/17/2016 and sentencing hearing held 12/19/2016; PSI, p.177); *see also State v. Jones*, 139 Idaho at 301 (holding transcript of plea and sentencing proceedings adequate to review claim that State breached its plea promise to recommend retained jurisdiction).

b. Failure To Object Not A Tactical Decision

There is nothing in the record to indicate that Mr. Merrill's failure to object to the prosecutor's improper statements was a tactical decision. *See State v. Sutton*, 151 Idaho 161, 167 (Ct. App. 2011) (applying objective "reasonable trial strategist" standard to conclude that information outside the record was not necessary to determine that the defendant's failure to object was not a strategic decision.) Mr. Merrill had nothing to gain by allowing the prosecutor to make disparaging remarks undermining the presentence investigator's recommendation, or to portray Mr. Merrill as an incorrigible criminal incapable of rehabilitation, or to express a personal preference for a "straight prison." On the contrary, had he objected to these statements in the district court, and prevented the prosecutor from making such a forceful argument for incarceration, the court might have decided to follow the presentence investigator's

recommendation for retained jurisdiction. Moreover, because Mr. Merrill's alternative recommendation was for immediate probation, an objection to the prosecutor's advocacy for straight prison would have been entirely consistent with Mr. Merrill's strategic interests. Applying an objective standard, there was no cognizable strategic advantage to Mr. Merrill for failing to object to the prosecutor's improper statements.

3. Substantial Rights Affected

Mr. Merrill's claim also satisfies the third part of the fundamental error standard, which is to demonstrate that the State's breach of the plea agreement affected his substantial rights. *Perry*, 150 Idaho at 226. Under this standard, Mr. Merrill must demonstrate "a reasonable possibility" that the State's breach affected the outcome of his sentencing. *Id.*; *see also Puckett v, United States*, 556 U.S. 129 (2009), note 4 ("When the rights acquired by the defendant relate to sentencing, the 'outcome' he must show to have been affected is his sentence.")

The presentence investigator's recommendation for retained jurisdiction was a reasonable disposition in this case. Mr. Merrill had been battling a heroin addiction for years; he successfully completed a previous rider and had made substantial progress in the Wood Court program, nearly completing it; and he'd remained sober for fifteen months, until his recent, single-use relapse triggered by a relationship breakup. (PSI, pp.171, 191; Tr., p.33, Ls.17-18). Mr. Merrill's history of drug addiction, and his potential for overcoming that addiction, are strong mitigating factors recognized by this Court. *See State v. Coffin*, 146 Idaho 166, 171 (Ct. App. 2008).

Not only was retained jurisdiction a viable disposition, it was *the* disposition being recommended to the court by the presentence investigator, who was an expert in such matters,

and who was aligned with neither party. (PSI, p.177.) Pursuant to the plea agreement, Mr. Merrill was entitled to the State's *unequivocal* concurrence in that recommendation. While not binding on the court, it is reasonably possible that the presentation of a "united front"[3] would have influenced the district court's weighing process in favor retaining jurisdiction.

It is reasonably possible that the district court would have given some weight to the State's *unequivocal* recommendation for retained jurisdiction, had one been made; and it is reasonably possible that the prosecutor's breach, and the manner in which that breach occurred, influenced the district court's decision to not retain jurisdiction. *See Whitney*, 673 F.3d at 973-74 (applying plain error review to conclude there was a reasonable *probability* that government's breach in implicitly arguing for a higher sentence than the one it was obligated to recommend, affected defendant's substantial rights.)

After listening to the parties' respective sentencing presentations, and after determining the length of Mr. Merrill's underlying sentences and deciding to not place him on probation, the district court squarely faced this issue: "So the question is whether I retain jurisdiction or impose the sentence." (Tr., p.40, Ls.2-3.) On *this* question, it is reasonably possible that the court would have followed the presentence investigator's recommendation for retained jurisdiction, had the State not mocked and disavowed that recommendation, not portrayed Mr. Merrill as an

[3]As described by the Ninth Circuit Court of Appeals, one of the benefits to a defendant of prosecutor's promise to recommend a sentence is the presentation of a "united front" before the sentencing court. *See United States v. Whitney*, 673 F.3d 965, 973-74 (9th Cir. 2012) (recognizing "the persuasive force behind a sentencing recommendation when it is urged by the government in addition to the defense"); see also *United States v. Camarillo–Tello*, 236 F.3d 1024, 1028 (9th Cir.2001) ("[W]hen the sentencing court hears that both sides believe a certain sentence is appropriate and reasonable in the circumstances, this is more persuasive than only the defendant arguing for that sentence"); *see also United States v. Alcala-Sanchez*, 666 F.3d 571, 575 (9th Cir. 2012) (citing *Camarillo–Tello*).

incorrigible criminal unworthy of a second rider, not argued against the very goal of retained jurisdiction, and not expressed his personal preference for "straight prison."

Given the extent of the prosecutor's adverse commentary, the negative impact on the court's decision-making process is incalculable. What is clear and obvious from this record, however, is that the district court *could* have retained jurisdiction, but did not. And, given the existence of factors that weighed in favor of retaining jurisdiction, it was reasonably possible that the presentation of a "united front" would have persuaded the court to retain jurisdiction, instead of declining it. The State's breach deprived Mr. Merrill of that bargained-for united front, affecting his substantial rights at sentencing.

E. Remand Before A Different Sentencing Judge

The prosecutor's breach of the plea agreement entitles Mr. Merrill to have his sentence vacated and his case remanded to the district court, where he may obtain specific performance of the plea agreement at a new sentencing hearing. *McAmis v. State*, 155 Idaho 796, 798 (Ct. App. 2013); *Puckett*, 129 S.Ct. at 133. Although the breach was not the fault of the district court, the case should be remanded to a different judge. *See Jones*, 139 Idaho at 303; *McAmis*, 155 Idaho at 798.

CONCLUSION

For the foregoing reasons, Mr. Merrill respectfully requests that this Court vacate the orders revoking probation and executing sentence in his 2013 and 2015 cases, vacate his sentence in the 2016 eluding case, and remand his cases to the district court for resentencing before a different judge.

DATED this 8th day of September, 2017.

_____/s/_____
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of September, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

COLTON MERRILL
INMATE #107758
C/O JEFFERSON COUNTY
SHERIFF'S OFFICE
200 COURTHOUSE WAY
RIGBY ID 83442

DARREN B SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

R JAMES ARCHIBALD
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

KAC/eas