10-19-2017

State v. Merrill Respondent's Brief Dckt. 44822

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 44822, 44823 & 44824**
Plaintiff-Respondent,	)	
	)	**Bingham County Case Nos.**
v.	)	**CR-2013-457, CR-2015-2848 &**
	)	**CR-2016-6753**
COLTON MERRILL,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Colton Merrill appeals from his judgments of conviction and sentences in case numbers CR-2013-457, CR-2015-2848, and CR-2016-6753. For the first time on appeal, Merrill asserts that the prosecutor violated his plea agreement in his sentencing recommendation.

Statement Of The Facts And Course Of The Proceedings

This consolidated appeal arises from three separate criminal cases. In CR-2013-457, the district court offered the following background:

> [In 2013, Merrill] pleaded guilty to one count of Burglary, a felony violation of Idaho Code §§ 18-401 and 18-403. Judgment upon Merrill was withheld and he was placed on probation for a period of five years.
>
> Merrill later admitted to violating the terms and conditions of his probation by failing to report to the probation office as directed, consuming alcohol, smoking methamphetamine, and failing to attend treatment at Road to Recovery as directed. Merrill's withheld judgment was revoked and he was sentenced to a fixed and determinate period of two years together with an indeterminate period of three years. He was continued on probation with modified terms and conditions.
>
> Merrill again violated the terms and conditions of his probation by committing the misdemeanor crime of Unlawful Removal of a Theft Detection Device, failing to attend D7 Treatment as directed, failing to notify his probation officer that his employment was terminated, using marijuana, and failing to produce a urine sample for substance abuse testing. Merrill's probation was revoked, and his sentence was imposed. Jurisdiction over Merrill was retained for a period of three-hundred and sixty-five days.
>
> After successfully completing his retained jurisdiction, Merrill was again placed on probation for a period of five years.
>
> Merrill again violated the terms and conditions of his probation by injecting an oxy pill that was not prescribed to him, committing a new crime of Driving Without Privileges (which was amended to Driving with an Expired

License), failing to pay costs of supervision, and committing a new crime of Burglary. Merrill was continued on probation with modifications to the terms and conditions of his probation.

Merrill again violated the terms and conditions of his probation by causing his suspension from the Wood Court program for repeatedly driving without privileges, curfew violations, failing to report a misdemeanor citation, and for blatant dishonesty with the Wood Court team and judge about those violations. He was continued on probation with modified terms and conditions.

Merrill again violated the terms and conditions of his probation by using intravenous heroin and oxycodone, driving without a license, and committing a misdemeanor Driving Without Privileges charge. Merrill's probation was revoked and his sentence was re-imposed….

(R., pp.346-49.) In case number CR-2015-2848, the district court set forth the factual background as follows:

[In 2015, Merrill again] pleaded guilty to one count of Burglary, a felony violation of Idaho Code §§ 18-401 and 18-403. He was sentenced to a unified term of ten years, of which four years are fixed and determinate and six years are indeterminate. His sentence was suspended and he was placed on probation for a period of six years.

Merrill violated the terms and conditions of his probation by causing his suspension from the Wood Court program for repeatedly driving without privileges, curfew violations, failing to report a misdemeanor citation, and for blatant dishonesty with the Wood Court team and judge about those violations. He was continued on probation with modified terms and conditions.

Merrill again violated the terms and conditions of his probation by using intravenous heroin and oxycodone, driving without a license, and committing a misdemeanor Driving Without Privileges charge. Merrill's probation was revoked and his sentence was re-imposed. The sentence imposed against Merrill in Bingham County case no. CR-2013-457 was ordered to run consecutively to the sentence imposed in this case.

(R., pp.519-20.) Finally, in case number CR-2016-6753, Merrill pleaded guilty to felony attempting to elude, and was sentenced to a unified term of five years with two years fixed, to run concurrently with the sentences in his other cases. (R., pp.591-93.)

Merrill filed Rule 35 motions requesting sentence reductions in each case (R., pp.330, 503, 595), which the district court denied (R., pp.346-52, 519-24, 613-17). Merrill also filed timely notices of appeal from each judgment. (R., pp.332-34, 505-07, 597-99.)

ISSUE

Merrill states the issue on appeal as:

> 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?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Merrill failed to show that the prosecutor's unobjected-to comments at sentencing constituted a breach of the plea agreement, much less that the alleged breach constitutes fundamental error?

ARGUMENT

Merrill Has Failed To Show That The Prosecutor Breached The Plea Agreement, Much Less That The Alleged Breach Constitutes Fundamental Error

A. Introduction

Pursuant to a plea agreement, the prosecutor agreed to limit his sentencing recommendations to those of the PSI. (See Tr., p.7, Ls.7-12; p.29, Ls.17-18.) The prosecutor fulfilled his obligations under the plea agreement by following the recommendation of the PSI, and made a strong case for that recommendation. (See Tr., p.30, L.11 – p.32, L.25.) Notwithstanding this recommendation, the district court sentenced Merrill to a unified term of five years with two years fixed and did not retain jurisdiction. (Tr., p.39, L.4 – p.41, L.12; R., pp.591-93.) Now Merrill blames the prosecutor for the district court's sentencing decision and, for the first time on appeal, asserts that the prosecutor breached his obligations under the plea agreement. (Appellant's brief, pp.6-19.) Review of the record and application of the correct legal standards, however, shows no breach, much less fundamental error entitling Merrill to review of this unpreserved issue.

B. Standard Of Review

When raised for the first time on appeal, a claim that the state breached a plea agreement will only be reviewed for fundamental error. State v. Gomez, 153 Idaho 253, 281 P.3d 90 (2012). "Whether a plea agreement has been breached is a question of law to be reviewed by this Court *de novo*, in accordance with contract law standards." State v. Schultz, 150 Idaho 97, 244 P.3d 241 (Ct. App. 2010) (citing State v. Jafek, 141 Idaho 71, 73, 106 P.3d 397, 399 (2005); Puckett v. United States, 556 U.S. 129, 137 (2009)).

C. The Prosecutor Did Not Breach The Plea Agreement

The issue Merrill seeks to present on appeal, an alleged violation of his plea agreement, was never presented to nor decided by the district court. The issue is therefore unpreserved and can only be addressed under the fundamental error standard articulated by the Court in State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010). To show fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (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) was not harmless.

Id. at 228, 245 P.3d at 980. Application of this legal standard to the facts of this case demonstrates that Merrill has failed to show error, much less fundamental error entitling him to review of this unpreserved issue.

1. The Prosecutor Followed The Sentencing Recommendation Contained In The PSI, And So Did Not Violate Merrill's Constitutional Rights

When the state breaches its obligation under a plea agreement to recommend a specific sentence, it violates the defendant's due process rights. Puckett, 556 U.S. at 136 (citing Santobello v. New York, 404 U.S. 257 (1971)); see also Gomez, 153 Idaho at 256, 281 P.3d at 93. As noted above, under the plea agreement, the state was required to follow the sentencing recommendation of the PSI. And that is what the prosecutor did: After expressing some surprise at the PSI's recommendation for a period of retained jurisdiction (Tr., p.30, Ls.2-10), the prosecutor stated:

> Quite frankly, though, the last paragraph on page 19 is almost spot on with how I feel, and so I'm going to read it on the record.
>
> "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 IDOC.
>
> "However, the fact that 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.30, Ls.11-24.) After reading the PSI sentencing recommendation into the record, the prosecutor went on to explain (responding to defense counsel's arguments) the reasons why probation was "out of the question" in Merrill's case, including his prior failures on probation and his lack of support from family in the community. (Tr., p.31, L.3 – p.32, L.10.) The prosecutor then concluded by recommending an underlying sentence of five years fixed, and then made a compelling case for the period of retained jurisdiction:

> I'll recommend that the Court order a retained jurisdiction and give him that one chance at the new program. That might—and the benefit of—that I'm getting to with the two benefits, the CAPP Rider doesn't address his criminal thinking, which I think is there.
>
> It may address it in some form or another, but I think, from what I know about the new retained jurisdiction, that might hit it out of the park for him and get him on the right track. At least let him take a swing at that is my recommendation.

(Tr., p.32, Ls.15-25.) The prosecutor did not violate the plea agreement; he fulfilled his obligations to follow the PSI, and made a strong case for that recommendation. Merrill's constitutional rights, therefore, were not violated and he cannot show fundamental error entitling him to review of this unpreserved issue.

2. None Of The Statements Of Which Merrill Complains On Appeal Clearly Violated The Plea Agreement

Merrill takes several isolated statements from the prosecutor out of the context of the prosecutor's argument as a whole, and then claims that they violated his plea agreement. (Appellant's brief, pp.10-15.) None of the statements shows a clear violation of the agreement.

Merrill first claims that the prosecutor's expression of surprise at the PSI's recommendation for a period of retained jurisdiction violated the plea agreement. (Appellant's brief, pp.10-11.) It does not. Review of the record shows that everyone was surprised by the recommendation for a period of retained jurisdiction. (See, e.g., Tr., p.28, L.24 – p.29, L.4 (district court asking defense counsel "why [it should] even entertain a request for a retained jurisdiction rather than simply imposing the sentence"); Tr., p.29, Ls.9-13 (defense counsel acknowledging that he, "likewise, expected a recommendation of imposing the sentence").) Nothing in the plea agreement required the prosecutor to ignore the obvious—it *was* surprising, given Merrill's history and current crimes, that he would receive a recommendation for a period of retained jurisdiction—and ignoring the obvious would not have strengthened the recommendation. Instead, as highlighted above, the prosecutor used that common surprise among all of the parties to make a strong case for the recommendation of retained jurisdiction. Merrill has failed to show that, in context, the prosecutor's comments acknowledging surprise at the recommendation breached the plea agreement, much less constitute fundamental error entitling him to review of this unpreserved claim of error.

As noted above, the plea agreement required the prosecutor to limit his sentencing recommendation to that of the PSI, which, as shown above, he did. While the PSI writer recommended retained jurisdiction, Merrill's counsel, in part, argued for probation. (Tr., p.27, L.8 – p.28, L.23.) The prosecutor strenuously opposed the recommendation for probation.

Merrill raises several claims, each asserting that the comments the prosecutor made in this context violated his obligations under the plea agreement. (Appellant's brief, pp.11-14.) But the prosecutor was not bound to recommend *probation* under the plea agreement, and was free to vigorously argue all of the reasons that Merrill, at least at present, was not amenable to probation. See State v. Halbesleben, 147 Idaho 161, 168, 206 P.3d 867, 874 (Ct. App. 2009) (buttressing recommendation against argument from defense counsel that a defendant merits a less severe sentence did not impliedly disavow sentencing recommendation). The prosecutor did not breach the plea agreement when he argued against probation.

Merrill specifically claims that the prosecutor violated the plea agreement when he stated, "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." (Appellant's brief, p.13.) These comments, referencing Merrill's prior failures on probation, are not improper and certainly do not violate the prosecutor's obligation to recommend a period of retained jurisdiction. Moreover, they should be read in the context of the prosecutor's recognition that Merrill's prior CAPP rider lacked the programs necessary to address his criminal thinking, and that the "new retained jurisdiction" could address those issues and might allow Merrill to "hit it out of the park" and "get him on the right track." (Tr., p.32, Ls.19-25.) Again, the prosecutor fulfilled his obligation under the plea agreement to recommend, consistent with the PSI, a period of retained jurisdiction. Merrill has failed to show any breach of the plea agreement, much less fundamental error entitling him to review of this unpreserved claim of error.

In his argument against probation, the prosecutor also referenced Merrill's mother and brother, and their respective challenges with the law. (Tr., p.31, L.13 – p.32, L.7.) In their context, these comments also appear proper. Courts normally rely upon close family to serve as

a defendant's support network while on probation and, as the prosecutor explained, in this particular case the mother and brother could not be relied upon to provide that support. (Tr., p.31, L.21 – p.32, L.7.) Moreover, in that context, the prosecutor's statement that Merrill was on the same path as his mother, doing "really great for a period of time, and then he's back in the system" (Tr., p.31, Ls.13-20), further reflects the challenges created by Merrill's specific home environment in Bingham County.

Merrill, giving the prosecutor's statements their worst possible reading, claims that by explaining these family challenges, 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." (Appellant's brief, p.12.) This meaning adduced by Merrill from the prosecutor's comment requires interpretation—the key is in the word "effectively"—and is certainly not clear on the record. See State v. Stocks, 153 Idaho 171, 174, 280 P.3d 198, 201 (Ct. App. 2012) ("the requirement that a violation be 'clear' all but definitively defeats a claim of an implied violation"). That defense counsel's failure to object to such comments was not a tactical decision is also unclear, and reinforces the state's less-inflammatory interpretation: Though with some reservation, even Merrill acknowledged that his local support network was not good, but noted that he had an older brother in Caldwell who was "not in the system" and that his parents were moving toward divorce. (See Tr., p.33, L.13 – p.35, L.10.)

Finally, it is clear that, whatever may have been intended by the prosecutor's comments, the district court gave them a proper interpretation:

> Just so that we're clear, whatever Mr. Rogers said about your mother, I don't know what's going on there, because those aren't my cases. And I don't punish you because your mom is involved in any other things. The only point that I take from that is he's saying that, whatever support system you have here, she's not it. I can't disagree with that aspect of it.

(Tr., p.40, Ls.4-10.) Thus, even had the prosecutor's comments been clearly improper, Merrill was not prejudiced. Merrill has failed to show that these comments constitute fundamental error entitling him to review of this unpreserved claim of error.

Merrill last argues that the prosecutor's statement, "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), breached the plea agreement. (Appellant's brief, p.14.) Merrill characterizes this statement as "[t]he most blatant of all of the violations" and asserts that the prosecutor's "expression of a personal preference for prison cannot possibly be reconciled with a recommendation for retained jurisdiction." (Id.) In fact, a recommendation for a period of retained jurisdiction is a recommendation for incarceration, and not probation, so the prosecutor's expressed preference would at least seem reconcilable with the recommendation. It is also worth noting that the prosecutor's statement was not conditional—he did not argue that a "prison recommendation *would have been* just fantastic" but that the "prison recommendation *is* just fantastic." Where the statement is unconditional, Merrill cannot show that his reading of the statement is the only possibly correct reading. Merrill has therefore failed to show that this statement, even in isolation, clearly violated the plea agreement. And in the context of the prosecutor's argument as a whole, it is clear (as shown above) that the prosecutor fulfilled his obligation under the plea agreement to recommend retained jurisdiction. Having failed to show fundamental error, Merrill is not entitled to review of this unpreserved claim of error.

3. The District Court Focused On Merrill's Ongoing Criminality, Not The Prosecutor's Statements At Sentencing, When It Rejected The Prosecutor's Recommendation For Retained Jurisdiction

Finally, Merrill's claim also fails on the third prong of fundamental error because, contrary to his assertions, there is no basis for concluding the prosecutor's comments affected the

sentence. Under the prejudice prong of the fundamental error test, "the defendant must further persuade the reviewing court that the error was not harmless; i.e., that there is a reasonable possibility that the error affected the outcome of the trial." State v. Jackson, 151 Idaho 376, 378, 256 P.3d 784, 786 (Ct. App. 2011). When the error relates to sentencing, "the 'outcome' he must show to have been affected is his sentence." Puckett, 556 U.S. at 142 n. 4. "The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event …." Id. at 141-42.

Review of the record shows that, even had the prosecutor breached the plea agreement (which he did not), such breach would be harmless because Merrill likely would not have received a period of retained jurisdiction in any event. First, before the prosecutor ever made his recommendation, it appears the district court already intended to reject the PSI recommendation for a period of retained jurisdiction. It stated:

> [G]iven [Merrill's] history and where we've gone and where we've been, why should I even entertain a request for a retained jurisdiction rather than simply imposing the sentence, specifically given the nature of the charge that he's pled guilty to in this newer case.

(Tr., p.28, L.24 – p.29, L.4.) Second, after the prosecutor made his argument at sentencing, the district court explained that its decision to not retain jurisdiction was based on Merrill's need for Level 3.5 residential treatment, his lack of awareness of his needs for treatment for rehabilitation to succeed, and his ongoing criminality. (Tr., p.40, L.2 – p.41, L.12.) The court's decision was not based on the prosecutor's statements. Finally, in its orders denying Merrill's subsequent Rule 35 motions, the district court further explained its sentencing rationale. (See R., pp.350-51, 522-23, 615-16.) Again, it was Merrill's criminal history and several prior failures on probation

that led the district court to execute his sentences without retaining jurisdiction, not any argument from the prosecutor.

Merrill has failed to show that the prosecutor failed to fulfill his obligation under the plea agreement to follow the sentencing recommendation, when he in fact read that recommendation into the record and then made a compelling argument in favor of that recommendation. He has failed to show that any of the prosecutor's isolated comments which he has highlighted clearly breached the plea agreement, especially when those comments are considered in context. Finally, he has failed to show that, regardless of the prosecutor's arguments, he was likely to receive a period of retained jurisdiction in any event, especially given his criminal history and the nature of his most recent crimes. Merrill has failed to show that the prosecutor breached his plea agreement, much less committed fundamental error entitling him to review of this unpreserved issue. Merrill's conviction and sentence should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Merrill's conviction and sentence.

DATED this 19th day of October, 2017.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of October, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

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/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd