11-13-2017

State v. Merrill Appellant's Reply 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,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY 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

_____

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STATEMENT OF THE CASE

Nature of the Case

Colton Merrill entered an agreement with the State whereby the State promised to concur with the PSI's recommendation for retained jurisdiction. At sentencing, the prosecutor eventually recommended retained jurisdiction, but he also made statements that were fundamentally at odds with that recommendation, such as "I think a *straight prison* recommendation is just fantastic." (Tr., p.32, Ls.2-10) (emphasis added).

The district court declined to follow the PSI's recommendation and sentenced Mr. Merrill to straight prison. On appeal, Mr. Merrill contends that the prosecutor's additional, incompatible statements breached the plea agreement, and he asks for a new sentencing hearing before a different judge.

This Reply Brief is necessary to address several of the State's attempts at justifying and excusing the prosecutor's comments, and to demonstrate the correct application of the *Perry*[1] fundamental error standard to case.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Merrill's Appellant's Brief, pp.1-4, and are incorporated herein by reference.

[1] *State v. Perry*, 150 Idaho 209, 245 P.3d 961, 982 (2010).

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 Prosecutor Breached The Plea Agreement By Making Statements That Were Fundamentally At Odds With The Sentencing Dispositions The State Was Obligated To Recommend, Affecting Mr. Merrill's Substantial Rights

A. Introduction

As argued in the Appellant's Brief, pp.6-9, the prosecutor breached the plea agreement by making statements at sentencing that were fundamentally at odds with the State's obligation to concur in the PSI's recommendation for retained jurisdiction. Although the prosecutor ultimately made the requisite recommendation, he did so only after mocking that recommendation and the PSI writer for making it; after minimizing the reasons that support the recommendation and highlighting the reasons against it; after bringing in the fact that Mr. Merrill's mother's had been given a second chance at retained jurisdiction and failed and then telling the court Mr. Merrill "was on the same path"; and after expressing his clear personal preference for a "straight prison" sentence.

Contrary to the State's arguments, the prosecutor's statements clearly breached the plea agreement and affected Mr. Merrill's substantial rights, entitling Mr. Merrill to a new sentencing hearing.

B. The Prosecutor Made Statements That Clearly Violated The Plea Agreement

The prosecutor made multiple statements that, read together or in isolation, were fundamentally at odds with the disposition the State was obliged to make, in violation of the plea agreement.

1. The Prosecutor's Remarks Mocking The PSI's Recommendation, And The PSI Writer For Making It, Cannot Be Justified As "Expressions Of Surprise"

Contrary to the State's arguments (Respondent's Brief, p.8), the prosecutor's preliminary statement mocking the PSI writer for recommending retained jurisdiction cannot be justified as a mere "expression of surprise." The prosecutor's comment, "I don't know if I have too much extra stuff in my eggnog or the presentence investigator writer does" (Tr., p.29, L.17 – p.30, L.10), questioned the lucidity and credibility of the PSI writer, and expressed skepticism and distrust for the recommendation he made. The comment made it clear to the court that the prosecutor did not take the PSI's recommendation seriously, and in so doing, undermined the value of the recommendation Mr. Merrill had bargained for, in violation of the plea agreement.

2. The Prosecutor's Comments Cannot Be Justified As A Buttress Against Mr. Merrill's Request For Probation

Contrary to the State's argument (Respondent's Brief, p.9), the prosecutor did not have unlimited freedom to argue that Mr. Merrill was unamenable to probation. While the prosecutor could permissibly argue against Mr. Merrill's request for immediate reinstatement on probation, *see State v. Halbesleben*, 147 Idaho 161, 168 (Ct. App. 2009) (prosecutor's adverse statements were permissible to buttress against defendant's request for greater leniency), the prosecutor was prohibited by the plea agreement from making statements that were incompatible with the opportunity for probation following a period of retained jurisdiction. Yet, the prosecutor's arguments against probation were *un*qualified and *un*conditional, and thus incompatible with the State's recommendation.

Additionally, there was no *permissible* reason for the prosecutor to specify that Mr. Merrill's mother "got another chance at retained jurisdiction," is now on her "third rider,"

and that Mr. Merrill is "on the same path." (Tr., p.31, Ls.14-18.) Rather, as argued in Appellant's Brief, pp.6-7, the only practical purpose for drawing a comparison that included these details was to express the prosecutor's personal opinion and belief that Mr. Merrill, like his mother, will fail if given another chance at retained jurisdiction. Such comments were fundamentally at odds with a recommendation for retaining jurisdiction, and violated the plea agreement.

Contrary to the State's argument (Respondent's Brief, p.10), the comments were *not* offered to show lack of a support network on probation; rather, as the prosecutor expressly told that court, Mr. Merrill's family was a key reason behind his personal preference for "straight prison":

> I've had a Merrill on my calendar for four years at least once a month.
>
> So that's how irritated I am by this, and *that's why* I think a straight prison recommendation is just fantastic.

(Tr., p.32, Ls.5-10) (emphasis added).

3. Expressing A Preference For A "Straight Prison Recommendation" Is Not Reconcilable With A Recommendation For Retained Jurisdiction

Contrary to the State's argument (Respondent's Brief, p.11), the prosecutor did not express a preference for "a prison recommendation"; he expressed a preference for "a *straight* prison recommendation" – which means prison without retained jurisdiction. And, contrary to the State's argument, expressing a preference for "straight prison" cannot be reconciled with the prosecutor's obligation to recommend retained jurisdiction. Additionally, that his preferred recommendation for "straight prison" was an *alternative* to the one the State had promised, is plain from the comments that followed, which began with "But." In context:

> 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. …

(Tr., p.32, Ls.5-10) (emphasis added).

Whether read in isolation or in the context of his overall sentencing argument, the prosecutor's expression of a personal preference for "straight prison" is incompatible with the recommendation the State was obligated to make. This statement, and the other statements identified in Appellant's Brief, demonstrate a clear breach of the plea agreement.

C. The Failure To Object Was Not A Tactical Decision

To the extent the State suggests that Mr. Merrill has not demonstrated the failure to object was not a tactical decision, Mr. Merrill respectfully refers this Court to his argument in Appellant's Brief, pp.16-17.

D. The Breach Affected Mr. Merrill's Substantial Rights

Mr. Merrill's claim satisfies the third prong of the *Perry* fundamental error test: he has demonstrated that there is a reasonable possibility that the district court would have followed the PSI's recommendation to impose a sentence with retained jurisdiction, instead of straight prison, had the prosecutor not breached the plea agreement. The State's arguments to the contrary (Respondent's Brief, pp.11-12), are flawed.

First, the State incorrectly relies on the federal harmless error standard used in *Puckett* to argue that the State's breach, in this case, is "harmless because Mr. Merrill *likely* would not have received a period of retained jurisdiction in any event." (Respondent's Brief, p.12) (*citing Puckett v. United States*, 556 U.S. 129, 141-142 (2009)) (emphasis added.)[2] The federal plain

[2] In *Puckett* the United States Supreme Court decided that an unpreserved claim that the government breached a plea agreement was subject to plain-error review as set forth in Rule 52(b) of the Federal Rules of Criminal Procedure, and the standard of review established in *United States v. Olano,* 507 U.S. 725, 734 (1993). 556 U.S. at 141.

error standard is different from the Idaho *Perry* fundamental error standard. Under the federal standard, for a defendant to demonstrate his substantial rights were affected, "there must be a reasonable *probability* that the error affected the outcome of the sentencing." *United States v. Whitney*, 673 F.3d 965, 972 (2012) (internal citations omitted) (emphasis added). Under the federal standard, a defendant must show a "likelihood" of a different outcome but-for the government's breach. *Id.*

Idaho's *Perry* standard requires a lesser burden; a defendant bears the burden to show there is a "reasonable *possibility*" the error affected the sentencing outcome. 150 Idaho at 236 (emphasis added). Under the *Perry* standard, a defendant is not required to demonstrate that a different outcome was "probable" or "likely," only that it was "reasonably *possible*." *Id*. Thus, Mr. Merrill is not required to demonstrate that the district court would "likely," or "probably," have followed the PSI's recommendation for retained jurisdiction. Rather, under the correct legal standard, Mr. Merrill is required to show that receiving a sentence with retained jurisdiction was reasonably *possible*. As argued in his Appellant's Brief pp.19-19, Mr. Merrill has met that burden.

Second, the State's arguments seek to downplay the importance of its recommendation on the district court's sentencing decision. (Respondent's Brief, p.12.) However, our courts have long recognized the importance of the government's recommendation on the sentence imposed. *See, e.g. Santobello v. New York*, 404 U.S. 257 (1971) (vacating defendant's sentence because the prosecutor breached a promise to refrain from recommending a specific term of imprisonment). Additionally, as argued in Appellant's Brief, pp.8-19, presenting the court a "united front" with all three recommenders – the PSI writer, Mr. Merrill, and the State –

concurring in the recommendation, as Mr. Merrill had bargained for, was especially valuable in this case.

Third, contrary to the State's argument (Respondent's Brief, p.12), the district court's question to defense counsel, "why should I even entertain a request for retained jurisdiction rather than simply imposing the sentence … ?" does *not* demonstrate that the prosecutor's breach was harmless. To the contrary, the question reveals that the court had questions about the PSI's recommendation for retained jurisdiction, underscoring the importance of an *unequivocal* concurrence by the State in that recommendation. However, the prosecutor's hostile, derogatory comments regarding that recommendation answered the court's question in a manner that clearly violated the State's agreement.

Finally, and contrary to the State's argument (Respondent's Brief, p.12), the district court's explanation of its sentence does not demonstrate that the prosecutor's comments had no impact on it. On the contrary, the court's sentencing decision appears to follow prosecutor's improper commentary[3] lockstep. (*See* Tr., p.40, L.24 – p.41, L.8.) Given the sentencing court's multi-faceted decision-making process, and the extent and tone of the prosecutor's improper comments in this case, "one really cannot calculate how the [prosecutor's breach] may have affected the perceptions of the sentencing judge." *Whitney*, 673 F.3d at 973.

[3]As argued in Appellant's brief, at page 11, the prosecutor also told the court he had personal, conflicting feelings about the PSI's 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." (citing Tr., p.30, Ls.11-20.)

As argued in the Appellant's Brief, pp.17-18, retained jurisdiction not only was a viable disposition, it was *the* disposition recommended by the PSI investigator, who was the expert in such matters and the advisor to the court, and who was aligned with neither party. Thus, retained jurisdiction was a reasonable disposition for this case. It is reasonably possible that the court would have followed the PSI's recommendation, instead of rejecting it, had the prosecutor concurred in that recommendation, presenting the court with a "united front," instead of arguing against it.

Mr. Merrill was entitled to the State's unequivocal concurrence in the PSI's recommendation for retained jurisdiction. By making statements that were fundamentally at odds with the PSI's recommendation, the prosecutor deprived Mr. Merrill of the benefit of his bargain, in violation of the plea agreement. The PSI's recommendation for retained jurisdiction was a reasonable disposition for this case, and there is a reasonable possibility the district court would have followed that recommendation, had the prosecutor not argued against it. Mr. Merrill is entitled to a new sentencing hearing, before a different judge. *See McAmis v. State*, 155 Idaho 796, 798 (Ct. App. 2013).

CONCLUSION

For the foregoing reasons, and the reasons set forth in his Appellant's Brief, 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 case, and remand his cases to the district court for resentencing before a different judge.

DATED this 13th day of November, 2017.

_____/s/_____
KIMBERLY A. COSTER

Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of November, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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