

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

G.E.H.,

Appellant.

No. 41757-0-II

UNPUBLISHED OPINION

Worswick, J. — G.E.H.<sup>1</sup> pleaded guilty to use of an explosive device without a license. The juvenile court imposed a manifest injustice disposition.<sup>2</sup> He appeals the disposition, arguing that the deputy prosecutor breached the plea agreement by failing to recommend a chemical

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<sup>1</sup> Because this is a juvenile case, we use the appellant's initials to protect his interests in privacy.

<sup>2</sup> RCW 13.40.160(b)(2).

dependency disposition alternative (CDDA)<sup>3</sup> during his disposition hearing. We reverse and remand.<sup>4</sup>

### FACTS

On September 3, 2010, G.E.H. helped a friend make and use an explosive device by putting the gunpowder from a firecracker into a soda bottle and igniting the powder. The State charged him with use of an explosive device without a license. G.E.H. agreed to plead guilty in exchange for the State's recommendation that he receive a CDDA. The juvenile court accepted his plea and set a disposition hearing.

At that hearing, the court heard from a person, whom the record only identifies as either Mr. or Ms. Torres, who stated that the entity tasked with administering the CDDA did not feel that G.E.H. would be a good match for their program because he had been unsuccessful before in both inpatient and outpatient treatment programs. Torres asked for a manifest injustice disposition because he or she felt that 36 weeks, which would have been the maximum range for the standard disposition, was not enough time to allow G.E.H. to get his graduation equivalency diploma as well as drug and alcohol treatment and vocational training.

The court then sought input from the deputy prosecutor and the following exchange took place:

[STATE]: Well, quite frankly I'm not sure what my limitations are here because when I looked at that plea form, it said the State would recommend CDDA. I don't recall that that was my recommendation. My

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<sup>3</sup> RCW 13.40.165.

<sup>4</sup> A commissioner of this court initially considered G.E.H.'s appeal on accelerated review under RAP 18.13 and then transferred it to a panel of judges.

recommendation—my written recommendation to Counsel indicated a predisposition report for standard range with thirty days for a PV. So—

Offender: I never had a PV, though.

[STATE]: I understand. I'm just saying what my written recommendation said.

Offender: Oh, okay.

[DEFENSE ATTORNEY]: But, this—this was with Jesse—

[STATE]: Um—so—so, the bottom line in regards to it, I am not going to make any recommendation.

[DEFENSE ATTORNEY]: Then, he is in violation of the agreement and we would ask for a trial and withdrawal of the plea.

Report of Proceedings (RP) at 13.

G.E.H.'s counsel continued to argue in favor of a CDDA, but the court instead imposed the manifest injustice disposition of 39 to 52 weeks to protect the public.

#### ANALYSIS

A plea agreement is a contract between the defendant and the State; the trial court is not bound. *State v. Sledge*, 133 Wn.2d 828, 839 n.6, 947 P.2d 1199 (1997). “Because a plea agreement is a contract, issues concerning the interpretation of a plea agreement are questions of law reviewed de novo.” *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). To determine whether a prosecutor has breached the terms of a plea agreement, we review the sentencing record as a whole using an objective standard. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006).

Due process requires a prosecutor to adhere to the terms of the agreement and recommend the agreed upon sentence. *Sledge*, 133 Wn.2d at 839-40. Although the State need not enthusiastically make the sentencing recommendation, it must act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with the duty of

candor towards the tribunal, and consistent with RCW 9.94A.460, not hold back relevant information regarding the plea agreement. *Carreno-Maldonado*, 135 Wn. App. at 83 (quoting *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998)). “Neither good motivations nor a reasonable justification will excuse a breach.” *State v. Xaviar*, 117 Wn. App. 196, 200, 69 P.3d 901 (2003).

In this case, the statement on plea of guilty contains the statement, “I understand that the prosecuting attorney will make the following recommendation to the Judge: CDDA.” Clerk’s Papers at 9. And G.E.H. entered his plea relying on that promise. Moreover, the trial court found, “[B]est evidence is the plea form that says the prosecuting attorney . . . would recommend CDDA.” RP at 14. But at the disposition hearing, the deputy prosecutor refused to make any recommendation at all. The deputy prosecutor clearly breached the plea agreement by not making a recommendation for CDDA.

There are two possible remedies where the State breaches a plea agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003). The defendant may choose to withdraw his plea or to receive specific performance of the agreement. *Harrison*, 148 Wn.2d at 557. The defendant’s choice of remedy controls, unless there are compelling reasons not to allow the chosen remedy. *Harrison*, 148 Wn.2d at 557 (quoting *State v. Miller*, 110 Wn.2d 528, 535, 756 P.2d 122 (1988), *overruled on other grounds by State v. Barber*, 170 Wn.2d 854, 872-73, 248 P.3d 494 (2011) (holding that specific performance is not available where a plea agreement calls for the enforcement of an illegal sentence)). Because the State violated G.E.H.’s due process rights by breaching the plea agreement, we reverse G.E.H.’s disposition order and remand to

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allow him the choice between a withdrawal of his plea or specific performance by the State at a new sentencing hearing before a different judge. *See Sledge*, 133 Wn.2d at 846.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Worswick, J.

We concur:

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Van Deren, J.

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Penoyar, C.J.