IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL E. M. KLEIN, Appellant.	No. 42058-9-II UNPUBLISHED OPINION

Hunt, J. – Daniel E. M. Klein appeals his sentence and guilty-plea convictions for two counts of communication with a minor for immoral purposes. His second appeal in this case arises from his resentencing on remand in *State v. Klein*, noted at 159 Wn. App. 1016 (2011), in which we held that the State had breached the plea agreement; we remanded for Klein to elect whether to withdraw his guilty pleas or to pursue specific performance of the plea agreement and be resentenced by a different judge. Klein now argues that (1) he was denied the opportunity to make a knowing, voluntary, and intelligent decision about whether to withdraw his guilty pleas or to demand specific performance because the resentencing court did not advise him that it was disinclined to follow the plea agreement's sentencing recommendation and he did not understand that the resentencing court was not required to follow the plea agreement's sentencing recommendation; (2) the superior court did not comply with our remand order because a judge

who had taken his guilty plea and participated in the original case up to the time of sentencing, but who had not sentenced Klein originally, resentenced him on remand; and (3) a community custody condition related to possession of pornographic material is unconstitutionally vague under the First Amendment.[1]

The State concedes that the community custody condition is unconstitutionally vague and agrees that we should remand to the superior court to strike or to revise this condition with greater specificity. We affirm Klein's guilty-plea convictions and his sentence to 60 months of confinement. Accepting the State's concession of error, we remand to the superior court for the limited purpose of striking community custody condition 17 or revising it with greater specificity to comply with constitutional requirements.

FACTS

I. 2010 Guilty Pleas, Sentence, and First Appeal

In March 2010, the State filed a second amended information charging Klein with five counts of communication with a minor for immoral purposes involving five different victims, one count of second degree child molestation, and one count of unlawful imprisonment. Following guilty-plea negotiations, the State filed a third amended information charging Klein with two counts of communication with a minor for immoral purposes involving two different victims. Klein agreed to plead guilty to these two charges in this third amended information. In exchange for his guilty pleas, the State agreed (1) to dismiss five other charges; (2) not to file any additional charges stemming from the related investigation; and (3) to recommend a 51-month sentence, the

[1] U.S. Const.,amend. I.

low end of the standard range of 51 to 60 months of confinement.[2]

Clallam County Superior Court Judge George Wood accepted Klein's guilty pleas. Klein's SDPG expressly stated that the sentencing court was not bound to follow the sentence recommended in the agreement. During the plea colloquy, Judge Wood advised Klein of the sentencing consequences, articulated the State's recommended sentence as described in the SDPG, and specifically advised Klein that the sentencing court did not have to follow the agreed sentencing recommendation in the SDPG. Klein acknowledged that he understood these admonitions. After accepting the pleas, Judge Wood ordered a presentencing investigation report (PSI).

At the sentencing hearing the next month, the State misstated the parties' plea agreement:

> Your Honor, this is a joint recommendation. We're asking the Court to impose a 51 *to 60 months* on Count 1 and 2. We're asking for 36 months community custody.
>
> We're asking that the Court follow the recommendations as set forth in the presentence investigation, appendix F, and that be incorporated in to the judgment and sentence.

Report of Proceedings (RP) (Apr. 29, 2010) at 3 (emphasis added).

Following the State's high end recommendation, Clallam County Superior Court Judge

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[2] More specifically, the statement of defendant on plea of guilty (SDPG) described the State's agreed recommendation as follows:

> Standard Range Sentence; 51 months incarceration, with credit for time served; with crime related prohibitions and affirmative obligations for purposes of assuring compliance with such prohibitions; court costs; restitution $TBD. The State agrees to dismiss counts 3 through 7 with prejudice. The State agrees not to file any charges against me arising from conditions of release on this case. This resolves all charges against me from this investigation.

Clerk's Papers (CP) at 52.

Ken Williams sentenced Klein to 60 months of incarceration. Klein unsuccessfully objected to community custody condition 17, arguing that it gave the therapist or community corrections officer (CCO) "pretty wide latitude" in defining the pornographic material that he was prohibited from possessing, purchasing, or perusing. RP (Apr. 29, 2010) at 9. Klein appealed.

On appeal, the State conceded that it had violated the plea agreement at Klein's sentencing when it failed to recommend the sentence to which it had agreed in its plea bargain with Klein. *Klein*, 2011 WL 101735, at *1. In an unpublished opinion, we accepted the State's concession of error and remanded to the superior court for further proceedings. On remand Klein was to have two options: (1) withdrawing his guilty pleas and "return[ing] to its pre-plea posture"; or (2) choosing specific performance of the plea bargain, in which case "he should be resentenced by a different judge." *Klein*, 2011 WL 101735, at *1.

II. Remand and Resentencing

In April 2011, Klein appeared for resentencing before Judge Wood, who had accepted his guilty pleas but had not sentenced him. Klein advised Judge Wood that he was electing not to withdraw his guilty pleas and, instead, demanding specific performance of the 2010 plea agreement. Nevertheless after reviewing the original sentencing minutes, Judge Wood advised Klein that he had the choice of (1) withdrawing his guilty pleas and going to trial, in which case the State was allowed to pursue all of the original charges; or (2) demanding "specific

performance" of the plea agreement, which Judge Wood explained in detail to Klein.[3] Klein acknowledged that he understood, confirmed that he had also discussed this with his counsel, and reiterated that he wanted to proceed to resentencing holding the State to its agreed recommendation.

Both the State and Klein asked Judge Wood to follow the agreed 51-month sentencing recommendation in the plea agreement. Judge Wood reiterated that he was not bound by this agreed sentencing recommendation. Noting that he had read the PSI and believed that Klein was "a danger," Judge Wood re-imposed the original 60-month sentence. RP (Apr. 26, 2011) at 12. Over Klein's renewed vagueness objection, Judge Wood also re-imposed community custody condition 17, which provided,

> Do not purchase, possess or peruse pornographic materials unless given prior approval by your sexual deviancy therapist and supervising CCO. Pornographic materials are to be defined by the therapist and/or CCO.

CP at 24.

Klein refused to sign the judgment and sentence, stating that (1) if Judge Wood imposed the "full sentence," he (Klein) was "taking it to trial"; (2) he was "tired"; (3) he "deserve[d]" only a 51-month sentence; (4) he wanted to be removed from the courtroom and to "get on with [his] life"; and (5) he was sorry for being so "fed up," especially after not having "been on [his] meds

[3] Specifically, Judge Wood told Klein,

> [B]y "specific performance" we mean that the State would have the requirement to argue to the Court that you should receive 51 months, and you need to understand the Court is not bound by that agreement. The Court can sentence you anywhere within the standard range, which the maximum here would be 60 months. Do you understand that?

RP (Apr. 26, 2011) at 7.

for two weeks." RP (Apr. 26, 2011) at 15-18.

Klein again appeals.

ANALYSIS

I. Knowing, Intelligent, and Voluntary Election of Specific Performance

Citing RCW 9.94A.431, Klein argues that his specific performance election on remand was not knowing, intelligent, and voluntary because (1) Judge Wood did not warn him that he (Judge Wood) was "not inclined to go along with the" agreed-to sentencing recommendation; and (2) although Judge Wood advised him (Klein) that the court did not have to follow the State's sentence recommendation in the plea agreement, the record shows that he (Klein) had gone without his medications for two weeks and that he did not understand the court's warning. Br. of Appellant at 7. These arguments fail.

RCW 9.94A.431 provides,

> (1) If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. The prosecutor shall inform the court on the record whether the victim or victims of all crimes against persons, as defined in RCW 9.94A.411, covered by the plea agreement have expressed any objections to or comments on the nature of and reasons for the plea agreement. *The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.*
>
> (2) The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea.

(Emphasis added.) RCW 9.94A.431(1) requires the court to determine whether the agreement is consistent with the interests of justice and prosecutorial standards and to advise the parties if it is not; but it does not require the court to advise the parties about whether it believes the agreed sentence is appropriate. Thus, to the extent Klein argues that RCW 9.94A.431 required Judge Wood to advise him that the judge was not inclined to agree with the sentencing recommendation, his argument fails.[4]

Klein also appears to assert that (1) he would not have pleaded guilty had he understood that the court might resentence him to more than 51 months on remand, and (2) his being off his medications and having objected to his 51-month resentence demonstrate this lack of understanding. The record does not support these assertions. On the contrary, the record shows that (1) the plea agreement expressly stated and Judge Wood repeatedly advised Klein that the sentencing court did not have to follow the agreement's sentencing recommendation, and (2)

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[4] In his reply brief, Klein asserts that *State v. Conwell*, 141 Wn.2d 901, 10 P.3d 1056 (2000), supports his argument that the resentencing court had to advise him that it was not inclined to follow the sentencing recommendation. We disagree. *Conwell* is not helpful because there the trial court rejected Conwell's plea. Here, in contrast, the sentencing court rejected only the sentencing recommendation in Klein's plea bargain with the State; the sentencing court did not reject Klein's plea itself. Furthermore, Klein's SDPG and the plea court had expressly advised Klein that the sentencing court was not required to follow the plea bargain's agreed sentencing recommendation.

Klein has also filed a statement of additional authorities, citing *Wood v. Morris*, 87 Wn.2d 501, 554 P.2d 1032 (1976), and *State v. Robinson*, 172 Wn.2d 783, 263 P.3d 1233 (2011). These two cases stand for the proposition that a defendant does not knowingly plead guilty if he is misadvised of the sentencing consequences. Here, in contrast, the record does not show that Klein was misadvised or not fully advised of the sentencing consequences of his guilty pleas. Moreover, as we have already noted, both his SDPG and the resentencing court expressly informed Klein that the sentencing court was not required to follow the State's sentencing recommendation in the plea agreement, which Klein stated on the record that he understood, both when he entered his guilty pleas in 2010 and when he was resentenced in 2011.

Klein agreed on the record that he understood this lack of guarantee both before Judge Wood accepted his guilty pleas in 2010 and before Judge Wood resentenced him on remand in 2011. Furthermore, despite Klein's asserted lack of medication, the record does not show that this lack of medication affected his ability to understand that the resentencing court did not have to follow the sentence recommended in the plea agreement. Nor do Klein's comments after Judge Wood resentenced him on remand necessarily show anything more than frustration and agitation.

We hold that Klein does not show that he failed to understand that the resentencing court did not have to impose the sentence recommended in the plea agreement. Therefore, his argument fails and he is not entitled to another remand for vacation of his guilty pleas.

II. Resentencing Before a "Different Judge" on Remand

Klein also argues that the superior court did not follow our remand instructions when it allowed Judge Wood to resentence him on remand.[5] The record does not support this argument.

As a result of Klein's first appeal, in which we held that the State had breached the plea agreement to recommend a specific sentence, we remanded to the superior court for his election of remedies. Klein elected to demand specific performance of the plea bargain sentence recommendation, for which we ordered resentencing by a "different judge" than the original sentencing judge. *Klein*, 2011 WL 101735, at *1.

[5] More specifically, Klein contends that (1) although Judge Wood had not imposed the original sentence in 2010, "the 'difference' is illusory" because "Judge Wood and Judge Williams essentially constituted a single judicial entity, virtually alternating on the bench throughout Klein's prosecution; (2) Judge Wood's involvement before the 2010 sentencing hearing was sufficient to establish that he was involved in the previous sentencing and that he should not have presided over the resentencing proceeding in 2011; and (3) "[i]t cannot be claimed that Judge Williams was in any way independent from Judge Wood." Br. of Appellant at 4-5.

We reject Klein's specious argument that because Judges Wood and Williams are colleagues on the same county's superior court bench and they were both intimately involved with these proceedings to the extent they were not independent of one another, they did not constitute "different judges" for purposes of fulfilling our remand for resentencing by a "different judge." The record shows that (1) Judge Wood, who had accepted Klein's guilty pleas in 2010, had presided over numerous pre-plea proceedings and had ordered a PSI, did not participate in Klein's original 2010 sentencing; (2) instead, it was Judge Williams who sentenced Klein in 2010; and (3) on remand, a "different judge," Judge Wood (not the 2010 sentencing judge, Judge Williams) resentenced Klein in 2011.[6] Accordingly, we hold that Klein fails to show that Judge Wood was not a "different" judge for purposes of resentencing on remand.

III. Invalid Community Custody Condition

Finally, Klein argues that community custody condition 17, which prohibits him from purchasing, possessing, or perusing pornographic material without prior approval, is vague because it leaves the definition of "pornographic materials" up to his therapist and/or CCO. Citing *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), the State concedes that this community custody condition, number 17, is unconstitutionally vague. Agreeing, we accept the

[6] Klein cites no authority suggesting that a judge involved in preliminary pre-plea or change-of-plea proceedings, ordered a PSI after accepting a defendant's guilty plea, or had access to the PSI but was not involved in the original sentencing proceeding is not sufficiently independent or removed from the tainted proceeding to qualify as a "different judge" on remand.

Furthermore, nothing in the record suggests any collusion between Judge Wood and Judge Williams or that the State's earlier plea agreement breach in any way influenced Judge Wood's resentencing of Klein on remand in 2011. On the contrary, the record does show that Judge Wood was not present during Klein's first sentencing by Judge Williams in 2010, when the State's breach of the plea agreement (which Judge Wood had accepted) came to light.

State's concession on this point.

Accordingly, we affirm Klein's two guilty-plea convictions and his 60-month sentence. We also accept the State's concession that community custody condition 17 is unconstitutionally invalid and remand to the trial court for the limited purpose of striking or revising community custody condition 17 to meet constitutional requirements for specificity.

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.

HUNT, J.

We concur:

WORSWICK, C.J.

JOHANSON, J.