IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CODY L. BERKEY, Appellant.	No. 38525-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After the Grays Harbor County Superior Court rejected the plea agreement, a jury found Cody Berkey guilty of first degree robbery. He appeals, arguing that the trial court erred when it allowed the State to withdraw the plea offer, and he asks this court to reverse the conviction and order specific performance of the agreement. We affirm.[1]

FACTS

Berkey was involved in two separate incidents for which the State filed separate charges. The first incident involved a disagreement in a parking lot between Berkey and another man, whom Berkey knocked to the ground. The victim lost consciousness and was treated in the hospital for "fairly severe" injuries. Report of Proceedings (RP) (Apr. 14, 2008) at 2. This

[1] A commissioner of this court considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

incident resulted in a charge of second degree assault. In the second incident, Berkey and two other men, each armed with a baseball bat, confronted the victim outside his home and took his wallet. This was the basis of the first degree robbery charge.

In proceedings before the superior court on April 14, 2008, the State presented a plea agreement, under which Berkey would plead guilty to the second degree assault charge and an amended charge of second degree robbery.

The judge expressed his concern about the agreement, stating, "To me this is a sweet deal for the kind of conduct that's alleged in these two cases. I'm very reluctant to approve a deal that's only going to give him 20 months in prison." RP (Apr. 14, 2008) at 8. The judge said that he wanted to talk to the victim of the assault before he made a decision about whether to accept the plea. He ordered the plea hearing continued for a week and returned the plea agreement to the parties.

Trial was scheduled to begin on April 22, 2008, and Berkey waived his speedy trial rights. The parties did not appear before the court again until Monday, June 9, 2008. The State advised the court that the victim did not want any leniency for Berkey and that it was going to proceed with trial, noting that the court had rejected the plea agreement. Defense counsel asserted that there had been no rejection. He told the court that he and Berkey had believed until the Friday before the hearing that the agreement was still pending and that, because of this belief, the defense was not prepared for trial. The judge noted that he would not be inclined to allow the "reduction" proposed unless the victim agreed with it.

Berkey again waived his speedy trial rights and the trial date was reset. The first degree robbery case went to trial on October 22, 2008, with the jury convicting Berkey as charged. The

second degree assault charge was tried separately and it resulted in a conviction of fourth degree assault. Berkey challenges only his first degree robbery conviction.

ANALYSIS

Berkey asserts that the trial court did not reject the plea agreement on April 14, but rather postponed a decision on it. He argues that the agreement was still pending on June 9, and the court should not have allowed the State to withdraw from the agreement because he had detrimentally relied on it when he waived his speedy trial right. This argument is not persuasive.

The trial court has the clear discretionary authority to refuse to accept a plea bargain under CrR 4.2(e) and (f). *See State v. Haner*, 95 Wn.2d 858, 861-62, 631 P.2d 381 (1981). The court likewise has discretion to refuse to allow an amendment of the information. *Haner*, 95 Wn.2d at 864-65; *State v. Rapozo*, 114 Wn. App. 321, 324, 58 P.3d 290 (2002).

From the record before us, it appears that the court did not categorically reject the plea agreement on April 14. However, it indicated at the June 9 hearing that it would not allow amendment of the information to a lesser charge without the assault victim's consent. As the victim had refused to consent, the agreement was no longer viable, whether or not withdrawn by the State.

In any case, Berkey has not established the kind of detrimental reliance that would require the remedy of specific performance. First, it is questionable whether reliance was reasonable after the court's April 14 comments. The trial court clearly indicated substantial doubts about the propriety of the agreement. Berkey was on notice at that point that the trial court's acceptance was by no means certain.

Second, the right to specific performance of a plea proposal is not a right of constitutional

magnitude. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981). The defendant must show that he relied on the bargain in a manner that makes a fair trial impossible. *State v. Budge*, 125 Wn. App. 341, 345, 104 P.3d 714 (2005). Berkey points to his waiver of speedy trial, but he does not explain how the postponement had any effect on the fairness of the trial.[2] There is no basis for specific performance here.

Affirmed.

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.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

VAN DEREN, C.J.

[2] Notably, he had given the police a confession the day after the robbery, before the State ever discussed a bargain.