

State v. Tracer (Richard Charles)

No. 84452-6

MADSEN, C.J. (concurring)—I agree with the majority that Richard Tracer’s guilty plea must be vacated and that Noah Harrison was not an appropriate person to appoint as a special deputy prosecutor. However, I also believe the trial court exceeded its authority under RCW 36.27.030. I write separately to express these concerns.

Discussion

Under separation of powers principles, prosecutors are entitled to exercise discretion in determining what charges to file, when to file them, and, generally speaking, whether to amend them.¹ *State v. Korum*, 157 Wn.2d 614, 625, 655, 658, 141 P.3d 13 (2006); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). Trial courts may not substitute their judgment for the prosecutors’. *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975). In the context of a plea agreement, the prosecutor and the defendant are the only “parties.” *State v.*

¹ A trial court’s authority to approve or deny a plea bargain includes the authority to refuse amendment of the charges pursuant to a plea bargain agreement. *State v. Haner*, 95 Wn.2d 858, 631 P.2d 381 (1981). This principle does not apply under the facts of this case, where the court itself directed amendment.

Sanchez, 146 Wn.2d 339, 348-49, 46 P.3d 774 (2002). Thus, the court may act to assure fairness in the plea process, but it may not plea bargain and it may never communicate to a defendant that a plea agreement should be reached or a plea entered. *State v. Tourtellotte*, 88 Wn.2d 579, 583-84, 564 P.2d 799 (1977); *State v. Pouncey*, 29 Wn. App. 629, 634-37, 630 P.2d 932 (1981). As the Court of Appeals concluded, the trial court here exceeded its authority because it effectively directed Mr. Harrison to amend the information and accept Mr. Tracer's plea and advised Tracer to accept the plea offer. Thus, as the Court of Appeals determined, the amendment was a nullity. *Cf. In re Costello*, 22 Wn.2d 697, 705-06, 157 P.2d 713 (1945) (an order of board of prison terms and parole purporting to release and discharge an individual who had been conditionally paroled by the governor interfered with the governor's authority and was a nullity). It follows that Tracer's plea was a nullity as well.

While the repeated failures of the special prosecutor may have been aggravating, the trial court had other tools available to address his conduct, including but not limited to imposing a monetary sanction, making a complaint to the elected prosecutor or the Washington State Bar Association, or dismissing the charges without prejudice. Instead, the court exceeded its authority by inserting itself into the case in an improper manner when it gave Mr. Harrison directions in concluding a plea agreement and endorsed that plea agreement to Mr. Tracer.

I agree with the majority that the amendment was invalid, the guilty plea is

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void, and the State is entitled to prosecute Tracer on the original charges.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:
