

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Appellant,

v.

TREVIN MICHAEL KING,

Defendant-Respondent.

Linn County Circuit
Court No. 15CR22123

SC S063810

**EXPEDITED APPEAL UNDER
ORS 138.060(2)**

APPELLANT'S REPLY BRIEF

Appeal from the Order of Dismissal of the Circuit Court
for Linn County
Honorable DAVID E. DELSMAN, Judge

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APPELLANT’S REPLY BRIEF

INTRODUCTION

In dismissing this homicide case, the circuit court concluded that prosecutors, in plea negotiations in assault cases in which the death of the victim is a “reasonably foreseeable” possibility, have an obligation to expressly “reserve” the ability in order to bring later charges in the event of the victim’s death. As the state explained in its opening brief, that ruling is contrary to settled principles of contract law that govern plea bargains.

In his response brief, defendant argues that certain policy reasons support the “default” rule that the trial court imposed here. But neither of the policies identified by defendant justifies ignoring the text of an agreement or settled law about how to interpret silence in an agreement. He first invokes the constitutional guarantee that a guilty plea must be entered knowingly and intelligently. Second, he contends that this court should adopt a rule construing plea agreements against the prosecution—or placing a “burden of expression” on the prosecution—because of its “superior bargaining power.” But sufficient existing safeguards protect a criminal defendant’s constitutional rights in entering a plea. And defendant’s “bargaining power” argument is not a compelling reason to override the usual rule that parties’ silence in a contract on

a foreseeable contingency is an assumption of the risk that that contingency will arise and not be covered by the agreement.

Defendant also raises two new arguments for the first time in this appeal, but neither of those arguments provides a basis for affirmance. He first asserts that the circuit court's dismissal of the homicide charges can be justified by the doctrine of "necessary implication": that it was a necessary term that should be implied to effectuate the purposes of the contract. That argument depends on the factual premise that the parties' purpose—unstated but implicit in the agreement—was to terminate the prosecution not just for the assault charges but on any charges that might later arise. But that argument is not a basis for affirmance because the issue of the parties' subjective purpose was not developed below nor addressed by the circuit court—and, in any case, no evidence in the record could support such a finding.

Defendant also argues that the state should be judicially estopped from prosecuting the homicide due to remarks made by the prosecutor in the trial of defendant's co-defendant for the robbery and assault. But judicial estoppel—which protects the integrity of the judicial process by preventing a party from benefiting from taking contrary positions in different cases—applies only when the positions taken are clearly inconsistent. The prosecutor's statements that defendant had been sentenced on his plea and would not face "any more

trouble” as a result of his testimony were not fundamentally inconsistent with the state’s decision to charge defendant for the homicide after the victim died.

ARGUMENT

Although defendant does not dispute that ordinary contract-law principles do not justify the circuit court’s default rule, he argues that there are policy reasons to adopt that rule. As explained below, the policy reasons cited by defendant do not justify placing the burden on the prosecution to expressly reserve the ability to prosecute later homicide charges. Defendant’s other arguments—that the circuit court found that the prosecutor made an “implied in fact” promise not to prosecute and his argument based on judicial estoppel—also present no basis for reversal.¹

A. A default rule providing that a contract’s silence on a foreseeable contingency binds a party not to act on that contingency is inconsistent with Oregon contract law.

Defendant acknowledges that this court, in construing contracts, has recognized that, if a particular risk is “foreseeable,” then ““there should have been provision for it in the contract, and the absence of the provision gives rise to the inference that the risk was assumed.”” *Smith Tug v. Columbia-Pacific Towing*, 250 Or 612, 643, 443 P2d 205 (1968); *quoting Lloyd v. Murphy*, 25 Cal

¹ Defendant begins with his “implied in fact” assertion, and thus does not immediately address the default rule that the circuit court adopted. But the state begins with that issue because it was central to the circuit court’s ruling.

2d 48, 54, 153 P2d 47 (1944).² Nevertheless, he makes two policy arguments in support of his assertion that plea negotiations in criminal cases require a different approach. (Resp Br 34-35). First, he relies on the constitutional requirement that a defendant’s plea must be intelligently entered. (App Br 35). Second, he asserts that the state has “superior bargaining power and knowledge” during plea negotiations and that, for that reason, its silence on a subject must be construed in the defendant’s favor. (App Br 37). Neither of those policy arguments supports a departure from existing contract principles.

Defendant argues that a default rule construing silence against the prosecution in plea-bargaining when the victim’s death is foreseeable serves to effectuate the constitutional rights afforded to criminal defendants. However, existing statutory and constitutional safeguards already protect a defendant’s rights in both negotiated pleas and non-negotiated pleas. As explained in the state’s opening brief, Oregon statutes place specific responsibilities on both defense counsel and the trial court to ensure that the plea is knowingly and intelligently made. (App Br 31-32). In addition, both state and federal constitutional provisions ensure that a defendant knows the consequences of his

² That does not mean that the occurrence of a contingency that was *not* foreseeable is a basis for implying duties not in the contract. Rather, “frustration” of the purposes of the contract by such an unforeseen contingency simply may excuse nonperformance of a duty otherwise required by the contract. *Smith Tug*, 250 Or at 643-44.

plea.³ In light of those existing procedural protections, there is no need to impose an additional procedural responsibility on the prosecutor to effectuate the defendant's constitutional rights. Finally, the default rule—precluding the later homicide prosecution—would not vindicate any violation of the defendant's rights in obtaining the conviction pursuant to the plea: rather, it allows the conviction based on the plea to stand, and instead bars the otherwise lawful prosecution as a result of defendant's lack of knowledge in entering the plea.

Adoption of a default rule based solely on concerns about the rights of the defendant would ignore the significant countervailing public interests that the office of the prosecution represents in a criminal case. Unlike parties to most everyday contracts, prosecutors are not private actors seeking to further their own personal interests; rather, the law entrusts prosecutors with the duty to administer justice on behalf of the public. Art VII (Original), § 17; ORS 8.660(1) (the district attorney shall conduct, on behalf of the state, all prosecutions for public offenses within the county). The legislature's adoption of a comprehensive set of criminal prohibitions and sentences demonstrates its

³ Although a knowing plea requires, at a minimum, that the defendant understands the direct consequences of a plea, defense counsel must disclose even *collateral* consequences, if they are automatic and severe. *Padilla v. Kentucky*, 559 US 356, 366, 130 S Ct 1473, 176 L Ed 2d 284 (2010).

interest in the state's ability to pursue charges when appropriate. A general concern about the constitutional rights of a criminal defendant in entering a plea does not justify a default rule that works to the detriment of those other public interests simply because the parties do not address a future contingency as part of the plea agreement.

Defendant's second policy reason in favor of the circuit court's "default rule" is based on the premise that the prosecution has "superior bargaining power" in plea bargaining, and, for that reason, plea agreements should be construed against the state. But that policy argument is unpersuasive and does not provide a basis for overriding existing contract law as it applies to this particular factual scenario.

Although this court has recognized the maxim that, in some circumstances, contract terms can be applied against the drafter, it has applied that maxim only when a contract term is irremediably *ambiguous*—*i.e.*, where two or more competing plausible interpretations prove to be reasonable even after all methods for resolving the dispute have failed. *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon*, 313 Or 464, 470-471, 836 P2d 703 (1992). But, because a plea agreement's silence on a contingency is not an ambiguous term, that maxim does not justify construing silence against the

prosecution.⁴ Therefore, even assuming that the prosecutor can be said to be the “drafter” of the agreement negotiated by the parties in this case, the maxim does not apply because there is no ambiguity to construe.

Defendant argues that this court should adopt the circuit court’s default rule and conclude that the prosecution should have the “burden of expression” with respect to the contingency of a victim’s future death. He cites scholarly observations that *if* a default rule imposes a burden of expression, it should place the burden “on the party that can better cope with it because of bargaining power and drafting skill.” E. Allan Farnsworth, II *Farnsworth on Contracts* § 7.16, 352-53 (Third Ed 2004). (Resp Br 34). But, in a criminal case, because the defendant has a right to representation by effective counsel, neither party necessarily has superior drafting skills in documenting the terms of the parties’ agreement. Nor does the prosecution have “superior bargaining power” in any categorical sense. That is, although the initial charging decision is the responsibility of the prosecution, the leverage that the state has in plea negotiations always will depend on the individual facts of the case, the

⁴ Likewise, the out-of-state cases that defendant cites for his “burden of expression” argument apply that rule only to ambiguous terms in contracts drafted by the prosecution. *See State v. Rivers*, 283 Conn 713, 726, 931 A2d 185 (2007) (when government is drafter of agreement, “any ambiguities in the agreement must be resolved in favor of the defendant”) (internal quotations omitted); *State ex rel Thompson v. Pomponio*, 233 W Va 212, 219, 757 SE 2d 636 (2014) (applying rule to ambiguous term of plea agreement).

availability and credibility of witnesses, and any number of other factors that may strengthen or weaken a case. Those facts and circumstances can be outside the control of either party, and even can be within the exclusive control or knowledge of the defendant.

The fact that the prosecution often may have easier access to information about the victim's condition does not justify a default rule disfavoring prosecution in the event of the victim's death. If the question of foreseeability is, as phrased by the circuit court, merely whether the death "may occur," the victim's day-to-day status may or may not offer any particular illumination as to that possibility. Thus, the nature of the information that the prosecutor may more easily obtain does not provide such an advantage that warrants construing silence in the plea agreement against the prosecution.

In sum, this court should apply the general rule that, if a contingency is foreseeable, then a contract's silence on that contingency demonstrates an assumption of the risk that that contingency may occur. Defendant's policy arguments do not provide a compelling reason for deviating from the established law of contract interpretation. Because the plea agreement and the discussions leading to that agreement did not address the possibility of the victim's death, the state was not bound to forgo prosecution after the victim died.

B. Defendant’s argument that the trial court found an “implied in fact” promise not to prosecute a later homicide is belied by the record.

Defendant argues—for the first time to this court—that the circuit court’s ruling can be affirmed by interpreting it to have found, as fact, that the parties’ *purpose* in entering the plea agreement was to terminate defendant’s liability for all future consequences of the original criminal episode. Based on that argument, he asserts that this court may affirm on the ground that the circuit court, as a matter of “necessary implication,” implied a promise not to prosecute homicide charges to effectuate the parties’ purposes in entering the agreement. (Resp Br 25).

But defendant’s argument depends on a premise not supported by the record. Although the ultimate question of necessary implication is a legal question, the parties’ *purpose* in entering the contract is made is a question of fact. *Greenwood Products, Inc. v. Greenwood Forest Products, Inc.*, 351 Or 604, 616 n 10, 273 P3d 116 (2012) (to apply the doctrine, a court “must consider and interpret” the agreement and other admissible evidence to determine “the parties’ intent”). Here, the trial court did not make any factual finding about the parties’ *purpose* in entering the plea agreement. On the contrary, the circuit court expressly declined to address the particulars of the plea agreement in this case, and instead expressly rested its ruling on the “default” rule discussed in the previous section.

The circuit court stated that it was addressing an issue of “first impression” in Oregon. (Tr 161). It stated that it was persuaded by the decision in *State v. Carpenter*, 68 Ohio St 3d 59, 60, 623 NE 2d 66 (1993), and quoted that court’s description of the issue:

“The sole issue before this court is when the state accepts a negotiated plea and the victim later dies of injuries sustained in the crime[,] can the defendant later be indicted for murder where the state does not expressly reserve the right of the state to file additional charges should the victim later die.”

(Tr 161). The court then stated: “That is four square on the issue that is presented to this court with regard to defendant[.]” (Tr 161).

In response to the prosecutor’s suggestion that the court had found a breach of the plea agreement, the court stated:

“I didn’t find an actual violation of the plea agreement because that was not a factor that was explicitly addressed. I guess my finding is similar to the court in *Carpenter*, that if the state wishes to reserve the right to re prosecute for a greater offense when it’s negotiating resolution of the case through a plea to a lesser offense it has a duty to reserve that right explicitly in the negotiated plea agreement.”

(Tr 165). The prosecutor clarified: “So Your Honor is making a finding there was not a violation of any plea agreement, it’s just a different—essentially new Oregon application to these facts?” (Tr 166). The court replied: “And the ruling specifically is that if the state wishes to re prosecute they need – they need to [reserve] that right in any negotiated plea agreement.” (Tr 166).

Thus, the circuit court expressly declined to make any finding about the plea agreement itself. For that reason alone, this court should reject defendant's argument based on the "necessary implication" doctrine, which depends on his factual assertion that the parties shared the goal of eliminating the possibility of prosecution for later developments from the original criminal episode.

Defendant's failure to raise the issue below precluded the development of any record on that factual issue; thus, defendant's "necessary implication" argument provides no basis for affirmance on that ground. *Outdoor Media Dimensions, Inc. v. State of Oregon*, 331 Or 634, 659, 20 P3d 180 (2001). Even if it is inferable from this record that *defendant* believed that he was disposing of everything arising from the criminal incident, it cannot be said that the parties shared that purpose in entering the contract.

In sum, the circuit court did not find, and could not have found, that the parties shared a mutual goal of ending all prosecution for the original criminal episode. And, for that reason, this court should reject defendant's "implied in fact" argument.

C. The prosecutor's remarks in Jimenez's trial do not supply a basis for judicially estopping the State of Oregon from bringing murder charges.

This court should reject defendant's argument, made for the first time before this court, that the State of Oregon should be judicially estopped from prosecuting defendant for homicide because of comments made by the

prosecutor in closing arguments in his co-defendant's trial for assault and robbery.

Judicial estoppel is a common-law doctrine that allows a court, for equitable reasons, to preclude a party from benefiting from taking inconsistent factual positions in different court proceedings. *Day v. Advanced M & D Sales, Inc.*, 336 Or 511, 524, 86 P3d 678 (2004). The doctrine does not focus on rights of the *parties*, but instead seeks to protect the integrity of the judicial process. Whether the requirements for application of judicial estoppel have been established is a question of law. *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609, 892 P2d 683 (1995).⁵

Defendant's argument based on judicial estoppel fails, because the doctrine applies only to positions that are necessarily conflict or are "truly inconsistent." Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo Wash L Rev 409, 411 n 12 (1987). This court should

⁵ Because judicial estoppel is an equitable doctrine, the decision to apply the doctrine, even when its requirements are present, is a discretionary decision. *See New Hampshire v. Maine*, 532 US 742, 750, 121 S Ct 1808, 149 L Ed 2d 968, *reh'g denied*, 533 US 978 (2001) (describing doctrine as an equitable one "invoked by the court at its discretion."). Therefore, even if this court were to conclude that the doctrine can apply in this case, it should not affirm on that ground because defendant's failure to make his current argument below precluded development of the record on whether the circuit court should apply the equitable doctrine to these facts. *Outdoor Media Dimensions, Inc. v. State of Oregon*, 331 Or 634, 659, 20 P3d 180 (2001).

reject application of the doctrine in manner that would “irrevocably freeze[] the contentions of the [party] so that under no circumstances may he alter his view in that, or another, case, or assert an inconsistent position.” *See Parkinson v. California Co.*, 233 F2d 432, 438 (10th Cir 1956) (criticizing strict approach taken by some courts).

Here, defendant isolates a statement by the prosecutor—that, because defendant already had been convicted of the crimes, he would not face further “trouble” as a result of his testimony—and asserts that that statement reflected the state’s intent not to prosecute any new offenses. He contends that the prosecutor thus took a “position” in that case that is fundamentally inconsistent with the state’s decision to prosecute defendant in this homicide case. But, at the time the prosecutor made the statement, the victim was alive, so it strains credulity to say that her statement referred to defendant’s exposure for homicide charges. The more plausible interpretation is the one explained by the prosecutor at the hearing on defendant’s motion to dismiss: that defendant, as a result of his testimony on behalf of his co-defendant, would not get into “any more trouble” on the assault and robbery charges because he had already pleaded guilty. (Tr 78). At most, though, the statement was ambiguous with respect to what kind of “trouble” she was saying defendant no longer faced because of his pleas.

Ultimately, the doctrine of judicial estoppel should not apply in this situation because the prosecutor's argument is not "necessarily inconsistent" with the decision by the State of Oregon to later prosecute events that occurred after the prosecutor made her statement. The state, by initiating homicide charges after the victim's later death, has not taken a position that is inconsistent—let alone "truly inconsistent"—with the prosecutor's argument at trial.

CONCLUSION

This court should reverse the circuit court's order dismissing the indictment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 12, 2016, I directed the original Appellant's Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Ernest Lannet and Mary M. Reese, attorneys for respondent, by using the electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,255 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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