

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)(b)**

APPELLANT'S OPENING 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 OPENING BRIEF

INTRODUCTION

Defendant brutally assaulted a man while stealing his bicycle, inflicting on the victim traumatic brain injuries. Pursuant to a negotiated agreement with the prosecution, defendant pleaded guilty to assault and other charges, and was convicted and sentenced on those offenses. Six months later, the victim died of complications from his injuries. At issue in this expedited appeal is whether the state may now prosecute defendant for murder and manslaughter or whether—as the circuit court concluded—the state is foreclosed from pursuing those new charges because it did not affirmatively reserve the right to do so during plea negotiations.

This court should reverse the circuit court and allow the state to prosecute defendant for causing the victim's death. The circuit court reasoned that because the state did not affirmatively reserve in the plea agreement the right to bring further charges, defendant "reasonably expected" that the state would refrain from bringing such charges, and that the state is bound to fulfill that expectation. Although the circuit court purported to find support for that rule in some out-of-state cases, the cases on which the court relied do not actually extend so far. In any event, the circuit court's reasoning finds no support in *this* court's case law, and in fact directly conflicts with the basic contract principles

that this court has long held to govern plea agreements. Under those settled principles, what matters is not one party's unstated expectations regarding the effect of an agreement, but, rather, what the plea agreement says. Here, nothing in the plea agreement suggested that state would be foreclosed from pursuing homicide charges if the victim were to die, and the law is clear that the state generally can bring such charges. In short, nothing now prevents the state from prosecuting defendant and holding him responsible for the victim's death.

STATEMENT OF THE CASE

Nature of the Proceeding

The state seeks reversal of the Linn County circuit court's pretrial order dismissing the accusatory instrument, which alleged charges of felony murder and first-degree manslaughter. (ER 1-2).

Nature of the Orders to be Reviewed

After a pretrial hearing, the circuit court issued an order, and later the amended order from which the state appeals, dismissing the case. (ER 24-27).

Statutory Basis of Appellate Jurisdiction

The state appeals pursuant to ORS 138.060(2)(b), which requires that an appeal by the state from an order dismissing a murder charge be filed directly in the Supreme Court.

Timeliness of Appeal

The order appealed from was entered on January 8, 2016. The state

timely served and filed its notice of appeal on January 13, 2016. ORS 138.071; ORAP 2.05.

Statement of Facts

A. Defendant is charged with assault and robbery of the victim, and later enters conditional pleas to those charges.

On August 5, 2013, defendant and another man, Jimenez, were highly intoxicated and caused a disturbance at Lebanon Hospital. A security guard who followed them out of the hospital heard defendant complain to Jimenez that his bicycle had been stolen, and that he wanted to “beat someone up.” (Ex 8 at 12).¹ Soon thereafter, defendant and Jimenez were seen walking a bicycle back toward the hospital; the victim ultimately was found badly beaten and almost unconscious in an industrial work area near the hospital. (Ex 8 at 12). The victim was severely injured: he was in a coma for a significant period of time, and the injuries to his brain resulted in his permanent inability to eat, drink, or speak, except to occasionally repeat words that are said to him. (Ex 8 at 14).

¹ Some, but not all, of the prior transcripts that were admitted as exhibits are marked with large handwritten numbers at the top of the page. Those numbers do not correspond to the page numbers of the respective transcript, or the page of the exhibit. Even though those numbers are the more prominent numbers on the page, the state uses the transcript page number in citing the relevant portions of the exhibits.

Both defendant and Jimenez were charged with second-degree assault and first-degree robbery. (*See* ER 28-29, Indictment); *see also* ORS 163.175(1)(a) (second-degree assault for “intentionally or knowingly caus[ing] serious physical injury” to victim); ORS 164.415(1)(c) (first-degree robbery based on infliction of serious physical injury to victim).

On February 27, 2014, defendant entered pleas pursuant to an offer extended by the prosecutor. The offer stated that, if defendant were to enter pleas of guilty to the assault and no-contest to the robbery, the prosecutor would recommend that the mandatory minimum sentences under Measure 11 (ORS 137.700) run partly concurrently and partly consecutively to one another, resulting in a “total prison time” of 120 months. (ER 30). The offer also proposed that defendant would agree to pay restitution, in an amount to be determined at a later date.² (ER 30). The offer contained no reference to crimes other than the two charged offenses.

At the plea hearing, defendant submitted a written plea petition stating that he would enter a guilty plea to the assault charge and a no-contest plea to the robbery. (ER 31-32). By agreement with the prosecutor, defendant

² Specifically, the prosecutor stated, “I do not know how the cost[] of medical care is being paid. The family, medical facility or health plan may submit information to our office about costs for restitution purposes. I have not seen anything yet but it certainly will not be a surprise if the request is staggering.” (ER 30).

reserved the ability to challenge on appeal a preliminary ruling by the trial court concluding that the two convictions would not merge into a single conviction. *See* ORS 135.335(3) (authorizing conditional plea which allows a defendant to reserve the right to appeal an adverse ruling).³ The plea petition also stated: “No threats have been made to me by anyone to induce me to enter this plea, and no promises have been made except as may have been stated in open court.” (ER 31).

The court accepted the pleas and imposed the recommended sentences. (Ex 8 at 17-18). At the hearing, the sole reference to the victim’s medical condition at that time was a statement by the prosecutor:

[Prosecutor]: [The victim] was in a coma for quite some time at the hospital. He was ultimately sent to rehab. He’s still in a rehab center. While he’s probably not in a coma he certainly is in no – he’s never going to be functioning in the manner that he was before. Who knows at this point. I mean it’s just a really long-term process as to where he’s going to be headed.

(Ex 8 at 48).

³ Defendant later filed a notice of appeal in that case, but, on January 7, 2016, after the ruling in this case, defendant moved to dismiss the appeal. *State v. King*, A156527 (appellate judgment issued January 14, 2016).

After defendant pleaded guilty, his co-defendant, Jimenez, was tried both charges. Defendant testified at that trial. (Ex 101 at 317).⁴ Jimenez was convicted on both charges.

B. The prosecution files homicide charges after the victim dies.

On August 17, 2014, six months after defendant was sentenced on his pleas, the victim died as a result of his injuries. A grand jury indicted defendant and Jimenez for felony murder and first-degree manslaughter. (ER 1-2).

C. The circuit court dismisses the homicide case because the prosecutor, in the plea agreement, did not expressly reserve the ability to bring those charges.

Both defendant and Jimenez moved to dismiss the homicide charges. Each raised challenges based on Oregon statutory and constitutional former-jeopardy principles, as well as the Fifth Amendment Double Jeopardy Clause. (ER 5-7). Defendant raised an additional argument not made by Jimenez, based on the fact that he was convicted pursuant to a negotiated plea agreement. Based on cases decided in other state appellate courts, he asserted that plea-contract principles require that, if the defendant is entering a plea to charges involving injuries to a victim that foreseeably may cause the victim's death, the state must affirmatively reserve the ability to bring future charges. (ER 8). The

⁴ His testimony in that case is not part of the record in this case; however, defendant offered as an exhibit a portion of the transcript of the prosecutor's closing argument referring to his testimony. (Ex 101).

courts in those jurisdictions have held that, unless the prosecution informs the defendant that his plea will not preclude a future prosecution for homicide, the prosecution loses the ability to prosecute such a charge in the event of the victim's death. (ER 8). The state opposed the motion, arguing that neither jeopardy principles nor the law on plea agreements justified dismissal of the charges. (ER 9-23).

At the hearing on the motions, the state offered a copy of the plea agreement, which referred only to the charged offenses. (ER 30). Former deputy district attorney Heidi Sternhagen, who had handled the plea negotiations in the first case, also testified. She testified that she was aware at the time of settlement conferences in that case that the victim was seriously injured, but that the parties never discussed the prospect that the victim might later die from his injuries or the prospect of future charges. (Tr 38, 40-41).⁵

In its oral statements at the hearing, the circuit court first rejected the defendants' arguments based on federal and state former-jeopardy principles, and, on that basis, denied Jimenez's motion to dismiss. (Tr 161). But, on the plea-agreement issue, which it described as one of "first impression" in Oregon,

⁵ Sternhagen also explained that the "big issue" that defendant raised throughout the negotiations was the merger issue that ultimately was reserved for appeal in his conditional plea, and that that legal issue was the subject of two settlement conferences. (Tr 37).

it was persuaded by defendant's argument that, where a death is reasonably foreseeable at the time of a negotiated plea based on the same criminal episode, the prosecutor must reserve the ability to prosecute a later homicide in order to be able to pursue a later prosecution in the event of the victim's death. (Tr 161, 165-66). In response to a question by the prosecutor, the court confirmed that it had not found a breach of the terms of the plea agreement:

[Prosecutor]: * * * 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?

THE COURT: 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).

In its written order, the court found that the prosecutor was aware at the time of the charges that the victim “could die as a result of his injuries,” and that the state did not expressly preserve the right to bring more serious charges in the event of that possible death. (ER 24-25). It concluded that, in exchange for his pleas to assault and robbery, defendant “gave up rights that may have resulted in his acquittal with the belief that he was terminating this incident.” (ER 26).

The court then noted the decisions of courts in four other states holding that, when “the death of the victim is a foreseeable event at the time of the plea negotiations with the defendant the state must affirmatively reserve the right to

bring future charges and inform the defendant that his plea agreement would not preclude future prosecutions.” (ER 26). It stated that it was persuaded by the reasoning articulated by the Ohio courts in *State v. Dye*, 127 Ohio St 3d 357, 939 NE 2d 1217 (2010), and *State v. Carpenter*, 68 Ohio St 3d 59, 623 NE 2d 66 (1993), and stated that, if the death of the victim is a foreseeable event at the time of the plea negotiations,

the application of contract law and criminal law in this particular factual setting requires the application of safeguards to insure the defendant what is reasonably due in the circumstances.

* * * This factual setting requires that the state in a negotiated plea must specifically preserve the right to re-prosecute.

(ER 5-6). The state has appealed to this court from the order dismissing the indictment.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

After the victim died, was the state precluded from prosecuting defendant on homicide charges because the prosecutor did not, at the time of the plea agreement, affirmatively reserve the state’s ability to bring those charges in the event of the victim’s death?

Proposed Rule of Law

Unless the prosecution has expressly agreed to forgo a future prosecution based on events that may occur after a defendant enters a plea agreement

resolving other crimes arising from the same criminal episode, no legal authority prohibits the state from proceeding with the later prosecution.

SUMMARY OF ARGUMENT

The circuit court erroneously dismissed the indictment in this case. Oregon law authorizes a homicide prosecution long after the initial incident that led to the victim's injuries. The fact that such a death occurs after a defendant has pleaded guilty to other charges stemming from the same incident is not an impediment to a later prosecution for homicide: neither state nor federal former-jeopardy principles preclude a prosecution where not all of the necessary facts had occurred at the time of the earlier prosecution.

Of course, the state may be precluded from bringing such charges if it expressly has agreed not to do so as part of an earlier plea agreement. But—as is undisputed—that did not happen here. The fact that the prosecutor is aware of the possibility of the victim's later death has no bearing on the terms of the plea agreement. The circuit court nonetheless concluded that the state was foreclosed from bringing these charges because it did not expressly reserve the right to bring a future murder prosecution, and concluded that—in the absence of any such reservation—defendant “reasonably expected” that the state would not bring any future charges. But that analysis is wrong, for two independent reasons.

First, this court long has held that plea agreements are subject to ordinary principles of contract law, and as a matter of contract law, a party's unspoken, unilateral expectations—reasonable or not—cannot bind the other party to the agreement. What does bind the parties is the words of the agreement. In this case, the agreement does not contain any promise by the state that it would not pursue further charges if the victim were to die.

Second, in any event, even if a defendant's unilateral but reasonable expectation can somehow bind the prosecutor to perform accordingly, an expectation is reasonable only if it is supported by some factual basis or binding legal principle. Defendant pointed to no factual basis for any such belief—and indeed offered no evidence of his subjective state of mind at all. Moreover, given that Oregon law plainly authorizes a murder prosecution after the initial incident that caused the victim's injuries, there is no legal or practical reason why a criminal defendant reasonably could or should expect that he would not face such a prosecution in the event that the victim should die.

ASSIGNMENT OF ERROR

The circuit court erroneously dismissed the homicide charges on the ground that, at the time of the plea agreement, the prosecution did not expressly inform the defendant that it could bring murder charges in the event of the victim's death.

A. Preservation of error

The state preserved its current arguments, both in its memorandum in opposition to defendant's motion to dismiss and at the hearing on that motion. Specifically, the state objected to dismissal, arguing that neither former-jeopardy principles nor the reasoning of the out-of-state courts with respect to plea agreements provided a basis for dismissing the murder charge. (Tr 116-34; ER 20-23). The state argued that contract law governs plea agreements in Oregon, and that the state had not promised not to prosecute defendant for homicide in the event of the victim's death. (Tr 133-34; ER 20-22).

B. Standard of review

Construction of the terms of a plea agreement, and whether the unstated expectations of one party to a plea agreement can bind the other party, is a question of law. *See State v. Heisser*, 350 Or 12, 27, 249 P3d 113 (2011) (parties mutually assented to unambiguous plea agreement; those terms bound the parties, despite differing subjective understandings of those terms). The reasonableness of a party's expectation is a question of law, informed by the facts.

ARGUMENT

As a general rule, the state lawfully may bring homicide charges against a defendant who previously has been prosecuted for a crime if the victim of the crime later dies of injuries inflicted by the defendant— there is no statutory or

constitutional impediment to doing so. While the state may, of course, agree not to bring such charges as part of a negotiated plea, that did not happen here. In the absence of such an agreement, the state is free to prosecute the defendant for homicide based on the victim's death.

A. In the absence of an agreement to refrain from doing so, the state lawfully may prosecute a defendant for a death that occurs after a completed prosecution based on the same criminal episode.

There is no legal bar in Oregon to a prosecution for a death that occurs long after the act that is the cause of that death. A person who, with a culpable mental state, causes the death of another person commits homicide.

ORS 163.005. Such a homicide is felony murder when it is committed in the course of and in furtherance of, or in the immediate flight from, any of certain enumerated felonies. ORS 163.115(1)(b). A person commits first-degree manslaughter by causing the death of another person “recklessly under circumstances manifesting extreme indifference to the value of human life.”

ORS 163.118. Moreover, it has been long established that, for homicide charges, the death need not occur within any particular timeframe. *See State v. Hudson*, 56 Or App 462, 642 P2d 331, *rev den*, 293 Or 146 (1982) (recognizing

abrogation by 1971 Criminal Code of common-law rule precluding prosecution for a death that occurred more than a year and a day after the causal event).⁶

A homicide prosecution after a conviction on lesser offenses based on the same underlying assault does not violate statutory or constitutional jeopardy protections. Oregon statutory former-jeopardy provisions prohibit certain types of successive prosecutions.⁷ ORS 131.515. But even if the circumstances in this case can be said to fall within those prohibitions, ORS 131.525 contains an exception that provides that a subsequent prosecution is not barred if the previous prosecution was “properly terminated under any of the following circumstances: * * * * When the subsequent prosecution was for an offense which was not consummated when the former prosecution began.”

⁶ Additionally, Oregon law has no statute of limitations for murder or manslaughter. ORS 131.125(1). The legislature’s policy choice not to limit the timeframe in which such charges must be brought is relevant context for what a defendant reasonably may expect with respect to the timing of a homicide prosecution.

⁷ ORS 131.515(1) and (2) contain prohibitions on successive prosecutions for the “same offense,” and separate prosecutions for “two or more offenses based upon the same criminal episode *if the several offenses are reasonably known to the appropriate prosecutor*” at the time of the first prosecution. *See also State v. Knowles*, 289 Or 813, 824, 618 P2d 1245 (1980) (prosecution for unlawful taking of elk was not barred because evidence of defendant’s involvement in the taking of the elk was not known to prosecutor at time of prior prosecution for unlawful possession of elk). In cases involving crimes of different degrees, a conviction or acquittal is a bar to a later prosecution for any lesser-included offense. ORS 131.515(3). None of those provisions precludes the prosecution in this case.

ORS 131.525(1)(d). The Commentary to the 1973 Criminal Procedure Code explains the intent underlying this provision, which was to deal with the precise situation here: “This recognizes the problem of when the harm occurs after a prosecution for the same criminal episode. When a defendant is prosecuted for reckless driving and later the victim of the accident dies, this subsection will allow the prosecution for negligent homicide.” Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Procedure Code, Final Draft and Report, § 28, 22 (Nov 1972).

Likewise, it is well-established that neither the state nor federal constitutional double-jeopardy principles prohibit a new prosecution for a crime that has not occurred when jeopardy attaches to the prior prosecution. Under Article I, section 12, of the Oregon Constitution, a second prosecution is for the “same offense” and “is prohibited if: (1) the charges arise out of the same act or transaction, and (2) the charges could have been tried in the same court, and (3) the prosecutor knew or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution.” *State v. Brown*, 262 Or 442, 457-458, 497 P2d 1191 (1972). Clearly, the prosecutor in this case could not have known about the facts relevant to the homicide until all of the material elements of that crime—notably, the death of the victim—had occurred. For purposes of the Fifth Amendment double-jeopardy protection, the United States Supreme Court has stated that the rule prohibiting multiple

prosecutions for greater offenses after conviction on a lesser-included offense is subject to exceptions previously recognized by the Court in several other cases:

“One commonly recognized exception is when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun.” *Jeffers v. United States*, 432 US 137, 151, 97 S Ct 2207, 53 L Ed 2d 168 (1977).

Consistent with those principles, Oregon statutes that govern plea agreements demonstrate that a prosecutor might bring later charges based on new facts, and that a plea agreement’s silence on that possibility is not a promise by the prosecutor not to do so. ORS 135.405 provides a nonexclusive list of promises that a prosecutor is authorized to make. One of those is to “seek or not oppose dismissal of other charges *or to refrain from bringing potential charges* in exchange for a plea.” ORS 135.405(3)(c). That statute specifically contemplates that a prosecutor may promise to refrain from bringing potential charges, but—conversely—in the absence of such a promise, nothing precludes a later prosecution based on new facts.

B. Here, the state did not agree to refrain from bringing homicide charges in the event of the victim’s death

As explained above, nothing in the law precludes the state from bringing homicide charges after a guilty plea. Therefore, the only way in which the prosecutor could be barred from doing so is if the state promised not to do so as

part of the plea agreement. The circuit court expressly acknowledged that it did not find that the prosecutor breached the plea agreement by pursuing homicide charges. It nevertheless concluded that, because the victim's death was reasonably foreseeable, "the application of contract law and criminal law in this factual setting" required that, in order to prosecute based on a later death, the prosecutor must expressly reserve the ability to bring future charges based on the original criminal episode. (ER 27). But, as explained below, plea-agreement principles do not support that conclusion.

1. Contract-law principles govern the interpretation of plea agreements.

Interpretation of a plea agreement generally is controlled by contract law. *Heisser*, 350 Or at 23. This court affirmatively has rejected theories of contract that would depend on the subjective state of mind of a party, and instead has concluded that an agreement "consists of mutual expressions; it does not consist of harmonious intentions or states of mind." *Heisser*, 350 Or at 25.

In considering a written contractual provision, such as a plea agreement, the "first inquiry" is what the words of the contract say, "not what the parties say about it." *Heisser*, 350 Or at 120, *quoting Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405, 900 P2d 475 (1995). If the terms of the contract are unambiguous, the analysis ends. *Heisser*, 350 Or at 25; *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). An ambiguity exists only if a term of

the agreement reasonably can be given more than one meaning. *Yogman*, 325 Or at 364. If an ambiguity exists in the contract’s terms, the court considers extrinsic evidence to determine what the parties intended in arriving at the agreement. *Card v. Stirnweis*, 232 Or 123, 129, 374 P2d 472 (1962). But that extrinsic evidence cannot supply terms that were not part of the parties’ agreement. *Ibid*.

2. Application of those principles to the plea agreement in this case shows that the state did not agree to refrain from prosecuting defendant for murder.

In this case, the plea agreement itself contains no promise by the prosecutor not to bring charges in the event of the victim’s death. As described above, the plea offer expressly recited the case number for the then-pending assault and robbery charges, and addressed *only* those charges. The offer included specific sentencing concessions by the state on those charges, and referred to the need for restitution for as-yet undetermined costs of the victim’s medical care. The offer did not refer to the possibility of the victim’s death—or to any prospective prosecutorial decision whether to file charges in the event of the victim’s death.

Thus, the express terms of the plea agreement provide no support for the circuit court’s conclusion that the prosecution was bound not to prosecute after the victim died. Nor is there any basis for this court to imply such a provision into the agreement. Although the doctrine of “necessary implication” allows a

court to imply a provision in a contract if it is necessary to carry out the purpose for which the contract was made, a court may declare only what is *implicit* in the contract, and cannot “create an entirely new obligation under the guise of ‘necessary implication.’” *Morrow v. Red Shield Ins. Co.*, 212 Or App 653, 661, 159 P3d 384 (2007).

And, as explained below, any expectation by defendant about the result of his plea is irrelevant to interpretation of the agreement. Here, the terms of the plea agreement were unambiguous, and the circuit court correctly declined to find a breach of the agreement. The plea offer, and the petition signed by defendant accepting the proposed terms, referred only to the then-existing charges. It contained no promises by the prosecution with respect to future charges based on decisions that might be made should the victim die. In the plea petition, defendant confirmed that no promises, other than those stated in open court, had been made by the prosecution to induce the plea. (Ex 10). Because the plea agreement contained no ambiguous terms, any extrinsic evidence would have been irrelevant to explain the meaning of those terms.⁸

⁸ To the extent that the trial court based its “contract law” conclusion on evidence elicited by defendant at the hearing on the motion to dismiss, that evidence did not explain any term in the agreement. Rather, he offered statements by the prosecutor at Jimenez’s trial, several months after the plea and sentencing in his case, suggesting that defendant had lied in his testimony, knowing he would not “get into any more trouble,” so “why not protect [Jimenez]?” (Ex 101 at 317; Tr 77-78). That evidence did not relate to

Footnote continued...

The only contract principle that is defined in language similar to the “reasonable expectation” language used by the circuit court in this case is the duty of good faith and fair dealing, which facilitates performance and enforcement of the contract by “effectuat[ing] the parties’ objectively reasonable expectations under the contract.” *Best v. US National Bank*, 303 Or 557, 563, 739 P2d 554 (1987). But, as defined, that duty does not apply to an expectation held by only one party. Moreover, it cannot be used to add to the terms of the contract; it exists only to effectuate those terms. Finally, a predicate to application of that principle is that the expectation be “reasonable.” For the reasons explained in the final section of this brief, any belief that the plea would preclude homicide charges in the event of a later death would not have been reasonable.

In sum, a party’s unstated expectations cannot dictate the terms of a contract. Therefore, the circuit court erred when it concluded based on “contract principles” that defendant’s expectations bound the prosecutor not to institute charges based on later events.

(...continued)

any contract term, but, rather, was offered in support of defendant’s “reasonable expectation” theory.

- C. The circuit court’s conclusion that the state had to expressly reserve the right to prosecute defendant for murder –and that without such a reservation defendant reasonably expected the state to refrain from doing so—is incorrect.**

Notwithstanding the fact that the prosecutor did not agree to refrain from pursuing homicide charges in this case, the circuit court still concluded that the state was foreclosed from doing so. In reaching that conclusion, the court expressly noted that the issue is one of “first impression” in Oregon, but that it was persuaded by decisions in other jurisdictions by courts presented with the issue. Purporting to adopt the reasoning in those cases, the circuit court concluded that that the state in this case had an obligation to affirmatively reserve the right to prosecute a homicide in the event of the victim’s future death and that, in the absence of an express reservation, defendant could reasonably expect that the state would refrain from bringing any future charges.

The state, in this appeal, does not challenge the circuit court’s finding that the prosecutor was aware that the victim could eventually die from his injuries. Therefore, to the extent that the existence of that future possibility makes the death “reasonably foreseeable,” the state does not challenge the court’s foreseeability conclusion. Even in cases involving a foreseeable death, however, this court should decline to adopt the circuit court’s rule, for two independent reasons.

1. **A defendant’s unspoken, unilateral expectation about the effect of a plea agreement cannot bind the state, particularly where there is no evidence that the state was aware of or shared in those expectations.**
 - a. **The cases on which the circuit court relied are distinguishable and do not support the circuit court’s conclusion in this case.**

As noted, the circuit court relied on the reasoning articulated in a small number of cases including—in addition to *Dye* and *Carpenter*, the two Ohio cases that it stated in its written order were persuasive—*State v. Nelson*, 23 Conn App 215, 219, 579 A2d 1104 (1990); *State v. Lordan*, 116 NH 479, 363 A2d 201(1976); and *New Jersey v. Thomas*, 61 NJ 314, 323, 294 A2d 57 (1972). As interpreted by the circuit court, those cases hold, as a categorical matter, that, if the victim’s eventual death is “foreseeable” to the prosecutor at the time of a negotiated plea, a defendant reasonably should be able to expect that a plea to charges involving the victim’s injuries will terminate the prosecution unless the state expressly reserves the ability to prosecute a homicide based on the death. But a closer examination of those cases suggests that they should not be interpreted so broadly.

The principle cited in each of the cases that the circuit court found persuasive stems from language contained in the United States Supreme Court’s decision in *Santobello v. New York*, 404 US 257, 92 S Ct 495, 30 L Ed 2d 427 (1971). In that case, the Court noted that the process for plea negotiations must

be attended by safeguards that give the defendant “what is reasonably due in the circumstances.” *Id.* at 262. The holding in the case is that “one fundamental safeguard” is that, when a plea is induced by a promise by the prosecutor, such promise “must be fulfilled.” *Ibid.*

Therefore, the holding in *Santobello* was limited to the uncontroversial conclusion that, if a plea is induced by a promise by the prosecutor, the defendant is entitled to expect that it will be fulfilled. However, state courts in Ohio, Connecticut, New Hampshire, and New Jersey, have cited *Santobello* in support of rules like the one adopted by the circuit court in this case: that, in cases in which an assault victim’s eventual death from the original crimes is foreseeable at the time of a plea bargain, the prosecutor has a special duty to “reserve” the right to bring later homicide charges.

But in those cases, unlike here, the prosecutor was at least subjectively aware of, and may have shared, the defendant’s understanding that the plea agreement would resolve the entire criminal incident. *See Dye*, 127 Ohio St 3d at 362-363 (acknowledging that the goal underlying the Ohio rule is to give effect “to the intention of the state and the defendant in their plea bargain,” and concluding, based on the circumstances, that “the state agreed to forgo further prosecution”); *Carpenter*, 68 Ohio St 3d at 62 (defendant had a reasonable expectation that he was terminating the criminal episode, and “prosecutor was aware of this expectation”); *Nelson*, 23 Conn App at 219 (prosecutor

affirmatively implied by conduct that state would not prosecute in event of victim's death); *Thomas*, 61 NJ at 323 (defendant had a reasonable expectation that he was terminating the incident and "we think it was shared by the prosecutor").⁹ In other words, those cases ultimately stand only for the proposition that, in the circumstances presented, the parties had mutually agreed to terminate the entire criminal episode with the plea. In this case, however, the circuit court found that the state had not violated the plea agreement, which necessarily defeats an inference that the parties had agreed that the state would not initiate a future prosecution, and distinguishes the facts in those cases from those in this case.

In addition to being factually distinguishable from this case, the cases relied on by the circuit court do not justify adoption of a similar rule in Oregon for another reason: although those cases are based on a conclusion about what a defendant who enters a plea agreement under the circumstances here would

⁹ Only one case cited by the circuit court is silent as to the prosecutor's understanding of the agreement. However, in that case, the prosecutor, at the time of the defendant's guilty pleas, was aware of all of the facts supporting the later prosecution and later initiated a new prosecution based on the same operative facts, only with new aggravating factors. *See State v. Lordan*, 116 NH 479, 363 A2d 201(1976) (after defendant's plea to attempted murder and robbery, state instituted charges for same offenses with additional allegation that he was armed with pistol). Because it is self-evident that the parties should expect a guilty plea to certain charges to resolve *those precise charges*, the *Lordan* decision necessarily was based on the idea that the prosecutor had to have known what the defendant expected from his pleas.

“reasonably believe,” the same conclusion does not follow when such a plea agreement is evaluated in the context of Oregon law. Those cases seem to be based on a categorical assumption that any defendant, in entering a plea agreement, reasonably should expect that he will face no further prosecution on the underlying incident. But that assumption—whatever its validity might be in those jurisdictions—is not true in Oregon.

The cases on which the circuit court relied are silent with respect to the role of the legal context in which the defendant decides to enter his plea. None of those cases refers to the existence, or nonexistence, of state law that expressly recognizes the possibility of a prosecution for a death long after the incident that is determined to be the cause of the death. Nor did the courts’ decisions in those cases address whether plea-bargaining statutes exist, like that in Oregon, that anticipate that the prosecutor may affirmatively agree to refrain from other charges. If a defendant’s unilateral but reasonable expectation about a plea agreement can bind the state to take or refrain from particular action, then consideration of the legal context in which the agreement is entered is necessary to determine whether that expectation is reasonable. *See People v. Carey*, 198 P3d 1223 (Colo App 2008) (rejecting the defendant’s claim of reasonable reliance on an implied promise not to prosecute, stating that he was “presumed to know” that applicable Colorado statutes expressly authorized the second prosecution). As explained above, it is well-settled that neither the Oregon

Criminal Code nor the applicable statutory and constitutional jeopardy protections prohibit a prosecutor from pursuing a homicide charge based on a death after a plea to charges arising from the same incident. For that reason, this court should conclude that a contrary belief is unreasonable, and should decline to adopt the circuit court's rule on that basis.

b. The circuit court's rule is directly contrary to Oregon contract principles; moreover, if followed, would have broad, unintended consequences.

This court should reject the circuit court's decision to extend the reasoning of the cases on which it relied to circumstances like this one, in which there is no shared expectation about future prosecution. As explained below, such a rule would conflict with the contract principles that govern plea agreements, and, if followed to its logical conclusion, would have a host of unintended consequences.

i. The circuit court's rule conflicts with contract law.

First and foremost, such a rule flies in the face of the fundamental contract principles that, as just explained, this court has long said govern the plea agreements. As a matter of contract law, one party's unilateral expectations about the meaning of an agreement do not bind the other party to the agreement.

A fundamental principle of contract law is that the formation of a contract requires a "bargain in which there is a manifestation of mutual assent

to the exchange and a consideration.” *Homestyle Direct, LLC v. Department of Human Services*, 354 Or 253, 262, 311 P3d 487 (2013), *quoting Restatement (Second) of Contracts* § 17(1) (1981). Oregon has adopted an objective theory of contracts, which requires that a contract be determined based on “manifested assent regardless of subjective intent.” *Kabil Developments Corp. v. Mignot*, 279 Or 151, 154-57, 566 P2d 505 (1977). Because manifested mutual assent is a necessary element of a contract, a defendant’s unexpressed unilateral hope or expectation about the effect of the agreement is irrelevant.

In very rare cases—the circumstances of which are not present here—Oregon courts have considered a unilateral mistake by a party as to the meaning of a contract in determining whether the mistake justifies rescission in equity. *Heisser*, 350 Or at 121, n 11. However, defendant did not seek—and the circuit court did not require—*rescission* of the plea agreement; rather, the circuit court agreed with defendant’s argument that the state should be required to *fulfill* defendant’s unilateral hope with respect to a later prosecution. For that reason, the law of rescission based on unilateral mistake cannot support the trial court’s ruling.¹⁰

¹⁰ It is possible, as this court noted in *Heisser*, that the requirement that a guilty plea be “voluntarily and intelligently made” could provide a basis, outside of contract law, for a defendant to challenge a conviction based on a guilty plea based on his subjective state of mind. *Heisser*, 350 Or at 24, n 8. However, even assuming that a subjective mistake by defendant about the effect

Footnote continued...

For those reasons, the rule adopted by the circuit court is contrary to contract-law principles, which, except in extraordinary circumstances not present here, allow consideration only of mutually-agreed terms that are expressed in the agreement. This court should reject the rule on that basis.

ii. If followed, the circuit court’s rule would have wide, unintended ramifications.

In addition to flouting basic contract principles, the trial court’s rule would, if followed to its logical conclusion, have impractical and absurd consequences.

First, the trial court, like the other state courts whose reasoning it adopted, concluded that the rule applies only if the victim’s death is *foreseeable* to the prosecutor. But if a criminal defendant is entitled to “reasonably expect” that a negotiated plea resolves the entire criminal episode, no logical reason supports limiting the rule to only those deaths that are foreseeable. In fact, it could be argued that the defendant has an even *more* reasonable expectation of finality in a case in which the parties *cannot* foresee victim’s death, because nothing would suggest to the defendant that a basis for

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of his plea could have had that effect, it would—at most—support a challenge to *those convictions*. See ORS 138.510, *et seq.* (Oregon Post-Conviction Relief Act), and 28 USCA § 2254 (federal *habeas corpus* relief). But even an involuntary plea in one case would not support relief in a separate case, such as the one here.

a future prosecution might arise. It appears that the decision to import a “foreseeability” limitation may have been based on an acknowledgement of the practical fact that a prosecutor cannot reasonably be expected to “reserve” ability to prosecute based on a fact that no one can be expected to foresee. Although that kind of policy-making based on a balancing of the parties’ interests may be within the purview of the legislative branch, the Oregon legislature has not imposed such a rule. And because the foreseeability limitation has no role in effectuating any “reasonable expectation” by defendant that he is resolving the entire criminal episode, it only emphasizes the frailty of the reasoning underlying the rule.

Second, the rule, at least thus far, has been applied only in the context of later charges for homicide, and not to other crimes with possible downstream consequences.¹¹ For example, a defendant may enter a plea to one crime that is later used as part of a prosecution for racketeering based in part on that predicate crime. *See* ORS 166.715, *et seq.* (defining racketeering). If a criminal defendant truly has a “reasonable expectation” that a plea pursuant to a

¹¹ Although the New Hampshire case, *State v. Lordan*, did not involve a homicide, it also is legally distinguishable from the other cases because it involved a second prosecution for *precisely the same charges* to which defendant had pleaded guilty—and, although the decision purports to rely on the New Jersey decision in *Nelson*, it just as easily could have been based on former-jeopardy principles. No other court has applied the “reasonable expectation” rule in a non-homicide case.

plea agreement will resolve the entire criminal episode, then no reason exists to limit the rule to cases that might result in homicide charges. And yet, although it may not, at first blush, seem impracticable for prosecutors to develop a practice of “reserving” the possibility of a later homicide charge in every case involving serious injury to a victim, such a practice would be far more unwieldy if prosecutors must, in every case, attempt to envision potential future prosecutions that might be in jeopardy if such a reservation is not made.

Third, although the rule has been applied by other courts only in the context of negotiated plea agreements, no logical reason exists for that limit, either. First, if a defendant, by entering a guilty plea, is entitled to expect that he will not be prosecuted for other crimes arising from the same criminal episode, there would be no reason to limit the rule to situations involving *negotiated* pleas; rather, if it is the guilty plea that gives rise to the expectation of finality, a defendant who pleads guilty without the benefit of a plea agreement is in precisely the same situation. And, for that matter, the rule’s distinction between pleas and *trials* is a questionable one. That is, in this case, just as defendant gave up the prospect of a possible acquittal at trial in exchange for a certain resolution of the charges, his codefendant, Jimenez, declined the prosecutor’s offer for a negotiated plea in exchange for a trial. In either context, the expectation of finality that stems from a conviction should be the same.

Finally, the rule places a procedural obligation on the *prosecutor* and binds the prosecution in a later case if the prosecutor fails to do so. No other legal principle places the obligation to advise a defendant of the consequences of his plea on the prosecutor. First, Oregon statutes contemplate that, although a prosecutor is authorized to enter plea agreements, the responsibility for advising the defendant and ensuring the validity of a plea falls on defense counsel and the trial court. ORS 135.425(2) (defense counsel must investigate and advise the defendant of factors considered to be important to defense counsel in reaching the decision to enter a plea); ORS 135.390(1)-(2) (trial court shall ensure that a plea is voluntarily and intelligently made and determine the nature of any plea agreement. Those statutes effectuate the defendant's constitutional rights in entering a plea. The defendant has constitutional rights to be represented by an attorney who can advocate for the defendant and advise the defendant about the choices he may have in the case.¹² The plea also must be voluntary, knowingly, and intelligently made. Although the prosecutor's intent to prosecute a later crime might be a factor in the defendant's decision to enter a plea, there is no basis in Oregon to require the prosecutor to "reserve"

¹² If, after being sentenced based on a plea agreement, the defendant believes that counsel's performance has failed to meet those minimum standards, the defendant has state and federal remedies for determining whether a violation has occurred. *See* ORS 138.510, *et seq.*; 28 USCA § 2254, *et seq.*

that ability in order to dispel any misunderstanding by the defendant about the possibility of a further prosecution for future events.

For those reasons, this court should reject the rule adopted by the circuit court as unpersuasive, and unsupported by existing law.

2. Even if a defendant's reasonable expectations can bind the state to fulfill those expectations, any expectation by defendant here was unreasonable.

The trial court's decision to dismiss this case was based on its conclusion that defendant had a "reasonable expectation" that he was resolving any prosecution that could arise based on the criminal incident, even if the facts supporting an essential element of a future prosecution had not yet occurred. The trial court's conclusion was erroneous, both because no evidence supports a conclusion that defendant subjectively believed that the plea was terminating his liability for future events, and because—even if he held such a belief—any such belief would be unreasonable.

As an initial matter, to the extent that the trial court's reasoning is based on a determination of defendant's *subjective* expectation about the plea agreement, that determination lacks factual support. Defendant offered no evidence about what he subjectively believed at the time of the plea, and no circumstantial evidence supports a conclusion that he believed he was resolving

anything other than the charges that were then pending.¹³ Therefore, the trial court's reasoning is based on a premise that is not supported by the record.

In any event, any belief of defendant that, by pleading guilty to assault and robbery, he was "terminating" any liability for any future consequences from the criminal episode, was unreasonable. A belief is reasonable only if it has legal or factual support. Here, neither existed.

As explained above, both Oregon statutory law and Oregon and federal constitutional law clearly recognize the possibility of a prosecution based on a death, or any other result, that occurs only after a prior prosecution arising out of the same criminal episode, any contrary understanding by defendant lacked legal support. Oregon statutes contemplate the possibility of a prosecution for

¹³ At the hearing on his motion to dismiss, defendant offered a portion of the prosecutor's closing arguments in Jimenez's trial, in which she challenged the credibility of defendant's testimony claiming sole responsibility for the victim's injuries on the ground that defendant could not be harmed by that testimony: "[Defendant] has already done his thing. He's not going to get into any more trouble. He knows that. So why not protect his brother[?]" (Tr 78; Ex 101 at 317). In her later testimony on the motion to dismiss, the prosecutor explained that she intended to say only that defendant had no reason not to lie for his brother because his testimony could not get him in more "trouble" on the assault and robbery charges, because he already had been convicted and sentenced on those charges. (Tr 78). The circuit court did not make any credibility finding with respect to the prosecutor's explanation, stating, in its written order, only that the prosecutor had "indicated that [defendant] was not at risk of further prosecution." (ER 25). But the prosecutor's statement, however construed, cannot have affected defendant's belief at the time of his plea, which occurred months prior to those statements.

homicide, whenever the death occurs. Moreover, the law is clear that neither statutory nor federal or state jeopardy principles preclude a later prosecution for an event that occurs after a conviction for other charges based on the same underlying incident. Finally, even the Oregon statutes that govern plea bargaining anticipate that, although a prosecutor may *agree* to refrain from bringing other charges, that agreement must be made expressly.

Moreover, the plea agreement itself provided no basis for a reasonable belief that no further prosecution could occur. The prosecutor's plea offer, like the plea petition signed by defendant, referred only to the case number of the existing case, and expressly described only the assault and robbery charges. Defendant expressly stated in the plea petition that no promises had been made to him that were not described in the petition.

Therefore, even if a prosecutor's ability to prosecute based on later-developing facts depends in any degree on a defendant's "reasonable belief" that no later prosecution can occur, any such belief by defendant in this case would not have been reasonable.

CONCLUSION

For all of the reasons explained above, the trial court erroneously dismissed the homicide case. Moreover, even if such an expectation could require that result, any belief by defendant that the prosecution would refrain from prosecuting a homicide in the event of the victim's death cannot be said to

have been a reasonable one. That is, the possibility of a prosecution for a homicide that occurs only after a conviction on other charges arising from the same criminal episode is well-established in Oregon and federal law. Likewise, applicable law governing plea agreements make clear that such an expectation would be reasonable only if the plea agreement so provided. The trial court's conclusion that a party can be bound to fulfill a "reasonable expectation" by another party about effects of a plea on a future case has no legal support in Oregon.

This court should reverse the circuit court's order of dismissal and should remand this case for trial.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 24, 2016, I directed the original Appellant's Opening Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Mary M. Reese, attorneys for respondent, by using the court's 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 8,519 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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