

TRANSCRIPT (9)

MR. HAEG: I was a little upset yesterday so I didn't write down when you told - when you testified about when you told me that the Rule 11 Agreement was going to be broke. Can you refresh my memory?

MR. COLE: **Dave there was no Rule 11 Agreement**, David. There was an offer made by the State, there were discussions modifying the offer made by the State, there was an inquiry about whether there was a possibility for another offer - a wr - a - initially the district attorney said 'yes', he called me back about a week later and said 'no'. I called you and told you...

MR. HAEG: **Ok what was that date? Can you give me that date?**

MR. COLE: It was somewhere before - between (long pause)... I believe it happened sometime (pause) I think it happened sometime in September. **But I can't be sure**. My recollection is you got your offer around the 19th and then I have a notation on the 27th 'telephone conference with opposing counsel regarding plea agreement and an opportunity for open sentencing'. **And I think that's the initial conversation that I had with him where he said 'yes'**. My recollection is that about a week later and that maybe was on September 8th - I have 'telephone conference with client regarding deal investigation' - maybe it was the 14th 'telephone conference with client regarding sentencing'.

MR. HAEG: Ok but...

MR. COLE: I believe my...

MR. HAEG: Can you...

MR. COLE: ...just please - **my recollection is approximately one week after I spoke with him he came back and changed the deal and I think it happened sometime in that period.**

MR. HAEG: Ok can you give me an approximate date of when Mr. Leaders said 'yes' and an approximate when he said 'no'?

MR. COLE: I just did.

MR. HAEG: I'm confused - I've got September 8th the 14th the 19th.

MR. COLE: Well -uh- like I said...

MR. HAEG: Ok somewhere in there.

MR. COLE: ...I spoke to him about this...

MR. HAEG: Ok so...

MR. COLE: ...on - this possibility on Au - August 27th. That's - **that's the best of my recollection. I do not have a specific recollection.** I'm looking at the entries in my time slips. And this particular one is this opportunity for open sentencing. My recollection is when I initially talked to him about it he said 'yes'. My recollection is approximately one week later it may have been two weeks he then called me back and said that was not goanna be an option and then I talked to you on numerous occasions after that and **I think during that time we specifically discussed that.**

MR. HAEG: Ok. Do you remember testimony, sworn testimony, of people before this panel that you told them, I believe my wife Jackie was one of the people, so she'll be right here listening that it was on November 8th that...

MR. COLE: That's when I received...

MR. HAEG: ...a couple hours before we were supposed to go out there when you told all of us, is that correct?

MR. COLE: That's - I told you that I had recently received the amended information with the new charges - the Friday before.

MR. HAEG: Ok. And you're - you're saying that I flew people in, from around the United States, for this Rule 11

Agreement hearing that apparently I mis - forgot was cancelled and everybody forgot it was cancelled too, that flew in?

MR. COLE: No David. When you - you (exhales) again you were ok with the deal that we were goanna do - the arraignment and sentencing. That was everything was ok. **And then we got to the date and you were not happy with the deal.** You talked about our options - **I believe we talked about it before that.** We talked about your options. We could have gone out to McGrath, we could have done the sentencing, there were options on the table to do it the very next day, everybody could have done that. I thought we were goanna go out and do the sentencing in accordance with the deal that I had struck. Apparently I was wrong.

MR. HAEG: And what - and what - can you explain very clearly to me what deal that was?

MR. COLE: That deal was for you to be charged under AS 08.54.720(A)(8) which would have been a minimum 1 year.

MR. HAEG: Ok.

MR. COLE: It is essentially the deal that was in place by Mr. Leaders but there were modification to the probation and the hunting privileges. You weren't goanna use your hunting privileges and we were basically - the only thing we were goanna argue about was whether you should get a s - between one and three license suspension. The State wanted the option to argue for 2 or 3 years, I had the option of arguing for 1 year. We were calling the people because the State's evidence in support of why you should get the higher stan - the higher suspension was because of the moose hunt and we were goanna have our witnesses were goanna go out to be there, in support of you, to show why the events could not have occurred according to the moose hunt. In fact we sent out in preparation for that we sent

the transcripts that your wife did to the judge so that she would have it in - ahead of time, be able to read it and be familiar with it so that we wouldn't be educating her when we got out there on the 9th. That was my philosophy and we talked about that.

MR. HAEG: Ok was there ever - did I ever ask about open sentencing?

MR. COLE: Well go over this again?

MS. SHAW: Do you mean ever or do you mean on the 8th?

MR. HAEG: Ever because he's - Mr. Cole is saying that I would - I apparently I was going out for some sentence that I'd never heard about - or maybe had heard about but never accepted. And I did a lot of things, apparently...

MS. SHAW: Well yes he's testifying...

MR. HAEG: Ok.

MS. SHAW: ...about his recollection in this...

MR. HAEG: Ok.

MS. SHAW: ... it may be different from yours.

MR. HAEG: -Um- did I ever ask you - ok why don't you just think about this. When did Mr. Leaders send you, and you inform me of the first offer?

MR. COLE: Right around August 19th.

MR. HAEG: **Right - I agree with that. Did I ever - did I accept that offer?**

MR. COLE: **No.**

MR. HAEG: What - what did I say about that offer?

MR. COLE: **You were unhappy with it** - you - although when we talked about it I - I thought it was not to bad.

MR. HAEG: Yep.

MR. COLE: And - and - and...

MR. HAEG: And that's...

MR. COLE: But you were a little bit unhappy because of the length of time of the - the probation, some of the forfeiture issues, the restrictions on some of the other things, but the best part about it - it was no jail time, it was a limited fine, and they - they weren't asking for 5 years loss of license, it wasn't a mandatory 3 years, it wasn't any felonies. There were a lot of good things about it and you had an opportunity to get it down to 1 year, which I thought we had a good chance to do.

MR. HAEG: Ok. But you said I didn't accept that sentence. What ever happened - did I make - did - a day or two after that did -uh- or did I...

MR. COLE: **Over the next 6 weeks, David, 6 to 8 weeks we discussed options constantly over the phone.** Ultimately we reached what I understood was a resolution - an agreement by you. Because we put it on for an arraignment slash sentencing. I thought, from my conversations with you, that you were in agreement that this scenario that we talked about would be acceptable. You never told me 'I will not go forward with this deal. I will only go forward with open sentencing'.¹

MR. HAEG: Do you ever remember Mr. Leaders saying that he was going to change the charges - file amended charges so that I could not go open sentencing unless I had a mandatory 3 years?

MR. COLE: Yes I've already testified to that.

MR. HAEG: Ok. And when did he tell you that?

MR. COLE: I - I - I've told you like - like 3 times now my best recollection is it happened about a week after I inquired about the possibility. And my notes show that I inquired about the possibility around August 8th or August 27th or 28th. **I will tell you my own recollection is that it happened longer - further along in events but for some reason...**

¹ Tr. Fee Arbitration p. 326-330.

MS. SHAW: Further you mean Septemberish more than August?

MR. COLE: Yeah but well actually it seemed it was in October but - **but when I look at my notes it says I inquired about open sentencing in late August.** Which would have been you know 2 weeks after you know we had been we'd gotten the original offer, I had been making a number of conversations, we're talking about terms, where whittling things down, and then David says 'hey well what about doing open sentencing' I'm like 'David why would you ever do that?' 'Well you know it's my plane' and I go 'ok if you want me to ask him I will.' My recollection is approximately a week later is when I got this call back.

MS. SHAW: **And I take it that it is not your recollection that you told Mr. Haeg for the first time about the amended information on the night before the scheduled change of plea?**

MR. COLE: I - I - I told him they had filed the amended information because they didn't file it until...

MS. SHAW: But it - but it's - it's not your recollection you told him for the first time about this open sentencing amended information on the eve of that change of plea?

MR. COLE: No I - I recall telling David prior to that event. It was not - in - in my recollection it was not an issue.

MS. SHAW: I understand. I understand - I'm just trying to get the timing straight.

MR. COLE: When we - when we would - when we had scheduled the change of plea...

MS. SHAW: It was for a different deal.

MR. COLE: ...it was - it was for the different deal. I - I you know David and I just have a different recollection about that - I - I apologize.

MR. HAEG: Ok. When was the first information filed?

MR. COLE: **The first information was filed in November.**

MR. HAEG: Ok.

MR. COLE: But the charges were given to us in August. They told us specifically what the charges were goanna be. August 19th that was in the memo. That was in the memo that Kevin had received.

MR. METZGER: Is that exhibit 7?

MR. HAEG: **So there's no way that they could have filed that information with the deal that I had thought I had?**

MR. COLE: I don't know. No.

MR. HAEG: Because...

MR. COLE: I don't think so.

MR. HAEG: Because do you remember me asking you if I could - **I'd be willing to plea to all the charges that Mr. Leaders had I just wanted a judge to listen me?**

MR. COLE: **I remember you telling me that.**

MR. HAEG: Did Mr. Leaders ever say yes to that?

MR. COLE: Yeah he said if you wanted to have A15 a minimum 3 years.

MR. HAEG: **Oh right off the bat so I never had that agreement?**

MR. COLE: **No later on he told me that. Originally he said...**

MR. HAEG: **Ok later on he told you that - ok.**

MR. COLE: ...he said he'd - no David I've said this time. The first time I asked him it was an off the cuff comment. I mean I knew David was interested in doing this open sentencing. Which I could not fathom why - I understood but I was willing you know I'm negotiating, I'm negotiation, here this- this - this I go 'hey you know by the way what if my guy wanted to just go in and plead open sentencing you got any problems with that?' 'no' is the answer I get. I'm like - he goes 'well why would he

do that?' I go 'listen you know this plane means a lot to him he may do that, ok.' A week later - like - like I said a week later we're talking - we're still talking he goes 'hey I'm not going to allow him to do open sentencing with the charges that - that we've sent over. Its goanna be A15.' That's exactly what happened. I said 'Scot why would you do that?' I mean I can't control the charges he does. I go 'don't do that' he said 'well look if we're goanna have an argument over the plane then he's goanna get 3 years' and I'm like (taps the table). So I told David that.

MR. HAEG: Ok so he filed the - the original charges on I believe November 4th. When did he file the amended information? This is in November...

MR. COLE: He - he filed it the - like the Friday before. He handed it to me on the Friday before. I told you that - we were going out to Dillingham, we were both doing 2 guiding cases before me, he had not done it up to that point because we - I thought had a deal. Obviously David didn't think so but he gave that to me...

MR. HAEG: What and I go...

MR. COLE: ...and I go 'why do you do - why are you doing this?' And he goes 'well...'

MR. HAEG: Can you explain to me...

MR. COLE: ...'I just don't want to get ambushed out there'.

MR. HAEG: Can you explain to me...

MR. COLE: Have David plead open sentencing and then him not be able to amend the charges.

MS. SHAW: Ok.

MR. HAEG: Can you explain to me that I didn't - what you meant by that last comment that apparently I didn't think there was a deal?

MR. COLE: I - I - I guess you didn't think there was a - I - uh- thought we had a deal - we were goanna go out, it was 1 to 3 years, we were goanna argue that, every other term as in place and we were goanna argue whether you got 1 to 3 years and that was the issue and that was the only issue. And that turned out not to be the case. Then we re- and then we said 'here are your options - you can go out and do open sentencing, you can do it a couple different ways, or you can have the structured settlements in a couple different ways' and then we made a 5th deal and that was that you got your license back with a small period of incarceration, which you said you didn't care about, in return for getting your license back by July 1st 2005. Which is what we were putting in place and that's what we did.

MR. HAEG: Ok now why would Mr. Leaders file the original information on November 4th...

MR. COLE: You need to ask him - I have no idea.

MR. HAEG: ...if he knew I wanted something else?

MR. COLE: I - you have to ask him - I have no idea. I - I don't know...

MR. HAEG: Do you understand what I'm saying there?

MR. COLE: I - I - I see what your inference is David but I don't think it's as big of deal as you think.

MR. HAEG: Ok.

MR. COLE: They file those things time and time again.

MR. HAEG: So what you're saying is he filed by mistake?

MR. COLE: I'm not saying that at all. I think he filed it (laughs) the way he did. But he changed his mind.

MR. HAEG: Ok so he changed his mind before or after November 4th?

MR. COLE: You need to talk to him. I have no idea. I had no control over what pleadings he files.

MR. HAEG: Now...

MR. COLE: What charges he makes...

MR. HAEG: Ok. Ok -um- is it likely for him to have filed the wrong information when he was going to file the amended one...

MR. COLE: I have no.

MR. HAEG: ...before filing the original information?

MR. COLE: You need to talk to Scot Leaders. I cannot explain to you why he did that. I was not happy with it cause I thought we had a deal. You can hear it in my statement to the judge on the 9th.

MR. HAEG: Ok. Can you look at I think it's exhibit number 1?

MR. METZGER: It's the December 23rd 04 letter?

MR. HAEG: Yes.

MR. COLE: Could you show me a copy of it?

MR. METZGER: Ok.

MR. COLE: Ok.

MR. HAEG: Can you -uh- do you agree that this is your letter?

MR. COLE: Yep.

MR. HAEG: Ok. Do you see where it says on number 2...

MS. JOHNSON: (starts to talk but cuts off)

MR. HAEG: -Um- on number 2 do you -uh-

MR. COLE: Number 2?

MR. HAEG: You got number 1 number 2 number 3 number 4 on my copy.

MR. METZGER: I don't know what...

MS. SHAW: I think we're looking at different -um- letters. What's the date on yours Mr. Haeg?

MR. HAEG: Oh July 6, 2005 it might be the wrong.

MR. COLE: That's a different letter.

MR. METZGER: That's a different letter.

MR. HAEG: Oh I'm sorry. That aint exhibit number 1?

MR. METZGER: That's exhibit number 7.

MR. HAEG: (laughs) sorry. -Um- I make a very poor attorney. Ok now this letter being in July 6th 2005 would it be a clearer version of your recollection or a less clear version?

MR. COLE: Now I see what you're saying. It was done closer to time, I told you that I thought it was later in the middle of October or later in September. The reason I said August 29th is because my specific recollection is that - my notes from the time slips that I keep says that I inquired about it on August 29th and I felt that it was about 7 days later. My recollection is that it actually happened later on but I - I don't have - I wasn't specific enough in my time slips. This says that 'sometime after the middle of October you inquired about pleading open sentence to the filed charges so that you could argue. I indicted I would make that inquiry, which I did, he initially did not have a problem with this. About a week a later however I received a call from him indicated he was amendable to allowing you to plea open sentencing but he was going to change the information to require a minimum 3 year license revocation'.

MR. HAEG: Ok. What's...

MR. COLE: I believe this happened on or about this happened on or about November 5th.

MR. HAEG: Ok.

MR. COLE: I apologize...

MR. HAEG: Ok.

MR. COLE: ...maybe it did happen later to that time.

MR. HAEG: Ok. Ok.

MR. COLE: Hmm.

MR. HAEG: And did - do you think that before you talked to Mr. Leaders on November 5th that in my mind and in all the witnesses mind, that I called at your request, that we thought we had a deal on November 5th when you talked to Mr. Leaders?

MR. COLE: No I don't think so David. Maybe you know I can't speak for you. I didn't think that that was ever going to be the deal. I never had it in my mind that you wanted open sentencing. I apologize about you know when this actually occurred.

MR. HAEG: Why would you make the statement that you just did that you never thought it was going to be the deal?

MR. COLE: Cause I never thought you would plead - in your own mind - I never - I told you time and time again 'it was goanna be over my dead body, I thought, that you would plead open sentencing'. I could never imagine a scenario where you would do that. Why would you put yourself in a worse position then you had?

MR. HAEG: So - so what you're telling me is you - you inquired of Mr. Leaders on November 5th if I could have open sentencing - is that it?

MR. COLE: I don't think so. Uhh-uhh.

MR. HAEG: Is that it?

MR. COLE: No. No.

MR. HAEG: I think - I think things are becoming a little clearer for me. I think - I think Mr. Cole here mislead me.

MR. COLE: Are you goanna testify or...

MR. HAEG: I think we may need to subpoena - we need to maybe subpoena Mr. Leaders, please. Mr. Shaw.

MS. SHAW: No you - you need to have done that...

MR. HAEG: Or Mrs. Shaw...

MS. SHAW: ...you need to have done that before.

MR. HAEG: I never - you know...

MS. SHAW: This is the - this is the time (...)

MR. HAEG: Ok I didn't know what's going on here but think I do know now.

MS. SHAW: Ok.

MR. HAEG: -Um- on number 4 can you read number 4 out loud, please, slowly and clearly?

MR. METZGER: Are - are you talking about exhibit number 7 again?

MR. HAEG: Yes.

MR. COLE: 'On Monday, November 4th you and your family came to our office to meet in preparation for the arraignment and change of plea scheduled to occur in McGrath. It was at that time I informed you of Mr. Leaders' decision and outlined your legal options. Later that night, I spoke with Mr. Leaders and we further negotiated the terms of the plea including limits on the nature and extent of the 16 month license suspension that would allow you to begin guiding in July 1st, 2005. Both parties agreed that in light of the new agreement, it was not necessary to fly any of the parties out to McGrath. We simply intended to get the Division of Occupational Licensing to agree to the deal and then set up a change of plea. It was during the next month that you decided that you were not agreeable to this arrangement and hired Mr. Robinson.'

MR. HAEG: Ok do you agree that on November 8th indeed myself and more then several witnesses - I believe there were - well I don't know - I think there was 8 in our entire party. Some of them flying in from -uh- Illinois. Do you agree that we all came there as you say in preparation for arrangement -

arraignment and change of plea scheduled to occur McGrath the next day? Do you agree that that's what happened?

MR. COLE: I - I don't know what your intention was. I know what my intention was. I know what this says.

MR. HAEG: Ok explain to me again what your intention was.

MR. COLE: My intention was that we were goanna fly to McGrath to do the deal for 1 to 3 years.

MR. HAEG: Ok yep. I...

MR. COLE: And all the other terms were fixed.

MR. HAEG: Oh ok. Ok.

MR. COLE: It was not that you were going to go open sentence.

MR. HAEG: Ok. Ok. -Um- do you also agree that the next line it says 'It was at that time'...

MR. COLE: Yep.

MR. HAEG: 'I informed you of Mr. Leaders' decision and outlined your legal options'?

MR. COLE: I informed you of Mr. Leaders' decision to file the amended complaint.

MR. HAEG: Now I'm interested in the word 'that'. It was at 'that' time.

MR. COLE: Yep.

MR. HAEG: Ok. So you waited until I had spent \$6000.00 dollars gathering witnesses. You waited until literally hours before we were supposed to do it to let me know that it wasn't goanna happen?

MR. COLE: I didn't find out about the amended information until Friday morning when I was going to Dillingham. I didn't get back from Dillingham until Friday night. I didn't call you the next 2 days and I talked to you when you got to my office.

MR. HAEG: Yesterday you were so adamant that you called me weeks before...

MR. COLE: I - I think I did.

MR. HAEG: Now that's on the record.

MR. COLE: I do think that's right.

MR. HAEG: How can he state two things?

MS. SHAW: Well the purpose of your cross-examination...

MR. HAEG: -Um- ok.

MS. SHAW: ...is to show that his testimony is contradictory...

MR. HAEG: Its - it...

MS. SHAW: (...) [very quietly says something]

MR. HAEG: ...Ok I appreciate that and I guess I would like you people to maybe listen to what happened yesterday and listen to what happened today -um- I think we may be looked at that one hard enough. -Um- this is goanna be something I need to do and we're - we actually. ²

² Tr. Fee Arbitration p.336-343.