69836-2

69836-2

NO. 69836-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

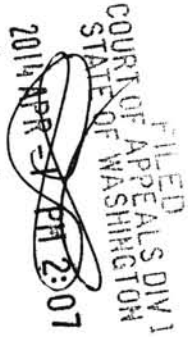
v.

BRODERICK YOUNG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S OPENING BRIEF



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A. ASSIGNMENTS OF ERROR.

1. The court abused its discretion by applying the wrong legal standard to decide whether a burglary conviction should be separately punished from another offense that occurred at the same time and place and as part of the same incident.

2. The court imposed conditions of community custody that are overbroad, unduly vague, and not crime-related.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The burglary anti-merger statute gives a sentencing court discretion to separately punish burglary from another offense that is the same in fact and law. Here, the prosecution told the court that the Legislature required separate punishments even though the statute gives the court discretion. Did the court misunderstand its sentencing authority and impose separate punishments for burglary and a second offense based on the State's misrepresentation of its sentencing authority?

2. The trial court erred by prohibiting Mr. Young from frequenting establishments whose primary business pertains to sexually explicit or erotic material as a condition of community custody.

3. The court's prohibition on Mr. Young's ability to "form relationships" without prior approval from a community corrections officer is void for vagueness and subject to arbitrary enforcement.

4. The trial court erred by ordering Mr. Young to not possess drug paraphernalia as a condition of community custody.

5. The trial court erred by ordering Mr. Young to participate in polygraph examinations without limitation.

C. STATEMENT OF THE CASE.

Broderick Young entered a stranger's home while naked and lunged toward her, grabbing for her pants. 8/1/12RP 16; CP 28. She grabbed his hair, pushed him into a cabinet, and he ran outside. *Id.* She locked the door behind him and called the police; he was arrested shortly thereafter. *Id.*

Once at the jail, he was acting bizarrely, including keeping his cell full of feces and urine. 8/1/12RP 24. He suffered from hallucinations, delusions, and paranoia. *Id.* at 25-26. He was sent to Western State hospital two times during pretrial proceedings for competency evaluations based on his lawyer's concern about his mental health. 7/28/11RP 2-3; 9/22/11RP 5; 4/26/12RP 3; 8/1/12RP 25-26.

Once found competent, he pled guilty as charged to attempted rape in the first degree and burglary in the first degree. 5/24/12RP 4-5. He had no criminal history that counted in his offender score other than the current offenses. *Id.* at 6.

At sentencing, the prosecution told the court that the "clear intent of the Legislature" is to impose separate punishments on any burglary and "any offenses that might be committed in the course of the burglary." 8/1/12RP 11. Mr. Young asked the court to treat the offenses as a single crime, noting that each offense was already elevated to a higher degree because of the other offense. *Id.* at 21-22. Mr. Young also asked for an exceptional sentence below the standard range based on his mental health issues. *Id.* at 24-28; CP 32-34.

The court refused to impose a sentence below the standard range because Mr. Young was dangerous and the incident was very scary. 8/1/12RP 33, 35. Without explaining its reasons, the court also imposed separate punishment for the offenses, finding that the anti-merger statute "does apply." *Id.* at 36-37. The court ordered Mr. Young to serve a minimum term of 110 months to life for the attempted rape and 34 months for the burglary. *Id.* at 37. The court imposed a number of community custody conditions. CP 63-65.

D. ARGUMENT.

1. **For untenable reasons, the court refused to treat two offenses, each elevated in degree based on the other, as merged for sentencing purposes.**

a. *The court's sentencing discretion must be exercised based on an accurate understanding of the law.*

The court's sentencing authority is limited by statute, the constitutional requirement of due process, and the bar against cruel and unusual punishment. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Hunley,* 175 Wn.2d 901, 908-09, 287 P.3d 584 (2012); *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980); U.S. Const. amends. 8, 14; Wash. Const. art. I, §§ 3, 14.

By statute and as a matter of due process, the court must hold a sentencing hearing before imposing a sentence and must place "on the record" the information used to determine the person's sentencing range. RCW 9.94A.500(1); *Hunley,* 175 Wn.2d at 908. The State bears the burden of proof at a sentencing hearing. *Hunley*, 175 Wn.2d at 910. This burden "lies with the State because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'"

Id. (quoting *In re Pers. Restraint of Williams,* 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

When two or more current offenses constitute the "same criminal conduct," they shall "count as one crime" for purposes of sentencing. *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 1218 (2002); RCW 9.94A.589 (1)(a). Two offenses constitute the "same criminal conduct" when they involve the same victim, occur at the same time and place, and are based on the same overarching intent. *State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2005).

Additionally, under the merger doctrine, when one offense is "elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code," the offenses will be sentenced as a single offense based on the punishment set forth for the greater offense. *State v. Parmelee,* 108 Wn.App. 702, 710, 32 P.3d 1029 (2001). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Merger applies when one crime was used to effectuate the other, without a separate purpose or effect. For example, in *State v. Williams*,

156 Wn.App. 482, 494, 123 P.3d 1174 (2010), the defendant was charged with second degree assault with sexual motivation and rape in the first degree. In holding that the offenses merged, the Court explained, "[t]he only assault here was the attack and strangulation of KW before and during the act of rape. The assault was used to effectuate the rape. The assault had no purpose or effect independent of the rape." *Id.* at 495; *see also State v. Leming*, 133 Wn.App. 875, 888-89, 138 P.3d 1095 (2006) (double jeopardy violated by separate punishments for second degree assault based on intent to commit felony harassment and felony harassment). Merger reflects the double jeopardy principle that when two separate offenses require proof of the same facts, the Legislature intended a single punishment. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004).

An exception to these established rules exists when a person is convicted of burglary. Under the burglary anti-merger statute, the court is accorded discretion to deviate from the requirement of merging the duplicative offenses. RCW 9A.52.050. The statute gives the court authority to treat a burglary offense either separately from or as merged with another offense committed at the same time and place. *Id.*

RCW 9A.52.050 is not mandatory or even presumptive. *State v. Davis*, 90 Wn.App. 776, 783-84, 954 P.2d 325 (1998). It simply grants the court discretion to deviate from otherwise mandatory requirements of merger, double jeopardy, and same criminal conduct. *Id.*

Despite the plainly discretionary language of RCW 9A.52.050, the prosecution informed the court at Mr. Young's sentencing hearing that it must presume Mr. Young's conviction for burglary in the first degree did not merge with his other conviction for attempted rape in the first degree. 8/1/12RP 11-12. The State claimed the Legislature's intent was to treat all burglaries as separate offenses from any crime that occurred at the same time. *Id.* at 11. It said Mr. Young carried the "obligation" of proving the reason for not treating the burglary as a separate offense. *Id.* at 12. This argument was patently incorrect and yet the court followed the State's sentencing recommendation without indicating it understood that Mr. Young carried no burden of proof and there was no presumption mandating separate treatment for burglary and another offense that occurred as part of the burglary.

b. *The court necessarily abuses its discretion when it applies the wrong legal standard.*

It is "fundamentally flawed" to treat the anti-merger statute as mandatory. *Davis*, 90 Wn.App. at 784 n.17. The court abuses its discretion if it applies the wrong legal standard or if it believes a blanket policy should apply to an individualized question at sentencing. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A judge is required to "actually consider" a legitimate sentencing request. *Id.* at 342. Appellate review of sentencing decisions exists to correct legal errors and abuses of discretion in determining which sentence applies. *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005).

In the case at bar, the prosecution misrepresented the legal standard controlling whether the court may impose a sentence that punishes a burglary conviction as separate from another offense committed at the same time and place. The prosecution claimed Mr. Young bore the burden of disproving the application of the anti-merger statute, but the defendant does not bear such a burden. 8/1/12RP 12. On the contrary, the State bears the burden at sentencing. See *Hunley,* 175 Wn.2d at 908-09.

The State also claimed that the "anti-merger" statute was always presumed to apply and the court must apply it unless the defense sufficiently proves that it should not apply. 8/1/12RP 11-12. Yet there is no mandatory presumption favoring the application of the anti-merger statute. *See Davis*, 90 Wn.App. at 784 n.17.

Mr. Young offered legitimate reasons for the court to treat the two offenses singularly, rather than imposing separate punishment. 8/1/12RP 21-22. Both offenses of conviction were elevated to a higher degree based on the other, which is a benchmark of the application of the merger doctrine for other offenses. *Williams*, 156 Wn.App. at 495; *see also State v. Martin*, 149 Wn.App. 689, 701, 205 P.3d 931 (2009) (second degree assault based on the intent to commit rape and attempted rape in the third degree based on same facts and require single punishment under double jeopardy clause). The attempted rape was elevated from second to first degree because it occurred in a home; the burglary was elevated to a first degree offense because an assault occurred during the burglary. 8/1/12RP 21-22. The only assault that occurred was that which constituted the attempted rape. *Id.* at 22.

The two offenses occurred at the same time and place and involved the same victim. *See* RCW 9.94A.589(1)(a). No one else was

present. They both involved the same objective intent, as shown by the fact that Mr. Young entered the home naked and immediately tried to sexually assault the complainant. 8/1/12RP 16, 22. The incident lasted no longer than the failed attempt at rape, because the complainant quickly reacted, struck Mr. Young and caused him to flee. 8/1/12RP 16-17, 22. But for the existence of the anti-merger statute, these two simultaneous offenses would require singular punishment under the doctrine of merger and principles of double jeopardy, as well as the law governing same criminal conduct.

Moreover, Mr. Young faced an indeterminate life sentence no matter what minimum term the court imposed for attempted rape in the first degree. 8/1/12RP 27. After he served the minimum sentence imposed by the court based on the standard range, he would be released only at the direction of the authorities at the Department of Corrections. *Id.*

Despite the reasons Mr. Young offered for the court to treat the offenses singularly at sentencing, which would have reduced Mr. Young's minimum standard range, the court did not do so.

The court ruled only, "I would find that the antimerger statute does apply, and that the sentencing range score therefore would be a

two." 8/1/12RP 36-37. It did not put its reasons on the record or state it understood the prosecution was incorrect when it explained the legal standard.

The court's ruling indicates it misunderstood the nature of its discretion. The question was not whether the anti-merger statute "does apply," because it applies any time a person is convicted of burglary and another offense. The question the court needed to decide was whether, after considering the reasons for treating the offenses singularly or separately for purposes of punishment, the burglary should be separately punished.

Even though the prosecution had misrepresented the legal threshold, the court did not indicate it was aware the prosecution's statement of the law was incorrect. In ruling that the statute would "apply," the court appeared to treat separate punishment as mandatory rather than a matter of its discretion.

While the court is not obligated to list its reasons for electing a certain sentence, it is required to employ the correct legal standard or it necessarily abuses its discretion. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *Cf. State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). Additionally, the court should place "on the record" the

information used to determine the person's sentence. RCW 9.94A.500(1); *Hunley,* 175 Wn.2d at 908.

In other areas where a court has discretion, it must state its reasons so that appellate courts can examine the trial court's use of its discretion. For example, trial courts must specifically state the reasons for admitting certain kinds of evidence. *See, e.g., State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) (explaining court must "determine on the record" its basis for admitting the evidence under ER 404(b)); *State v. Alexis,* 95 Wn.2d 15, 18-19, 621 P.2d 1269 (1980) (remanding whether trial court appeared to balance probative value versus prejudice under ER 609 without properly weighing proper considerations).

To the extent it is not possible to determine the precise basis of the court's sentencing decision, the court's summary decision issued after the State misrepresented the governing legal standard does not insulate its ruling from appellate review. *See Grayson*, 154 Wn.2d at 342. It undermines the constitutional right to appeal to simply defer to an unexplained sentencing decision when the court has not explained that it understood the law. A court's exercise of discretion is untenable when it is not premised on an accurate understanding of the law. *See*

Rohrich, 149 Wn.2d at 654. Here, the court did not exercise its discretion based on an accurate understanding of the law. It never corrected the prosecution's misstatement and indicated it believed its decision was simply whether the anti-merger statute applied, without considering the reasons to punish the offenses singularly under these circumstances.

c. *Remand for resentencing is required.*

The court's procedural failure to exercise its discretion based on an accurate understanding of the law requires a new sentencing hearing. *Grayson*, 154 Wn.2d at 342. On remand, the court must consider whether Mr. Young is a suitable candidate for imposing singular punishment for the two simultaneously occurring offenses, each elevated in degree based on the other.

2. **Unduly vague or impermissible community custody conditions not related to the offenses must be stricken**

a. *Community custody conditions must be both constitutionally legitimate and authorized by statute.*

Limitations on fundamental constitutional rights during community custody must be "reasonably necessary to accomplish the essential needs of the state and the public order." *State v. Riles,* 135

Wn.2d 326, 350, 957 P.2d 655 (1998). A condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. U.S. Const. amend. 14; Const. art. I, § 3; *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Offenders on community custody retain their rights to free expression and association, even though some limitations are permitted. *See Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail).

Mr. Young was ordered to comply with several unauthorized and unlawful conditions of community custody. Community custody conditions must be authorized by statute or crime-related. RCW 9.94A.505(8); RCW 9.94A.703; *see In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The burden is on the State to demonstrate the condition of community supervision is statutorily authorized. *Hunley*, 175 Wn.2d at 910; *see United States v. Weber*, 451

F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

b. *The court imposed unauthorized conditions of community custody.*

i. *Condition 5*

Mr. Young was ordered not to "frequent establishments whose primary business pertains to sexually explicit or erotic material." CP 63. Yet Mr. Young was not accused of accessing sexually explicit materials or entering a business involved in selling such materials. The offenses for which he was convicted do not involve such activity. The court made no finding that this is a crime-related prohibition, and it lacks authority to order non-crime-related prohibitions. RCW 9.94A.703(3)(f).

A crime-related prohibition must directly relate to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There must be substantial evidence providing factual support for the prohibition. *State v. Motter*, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007), *rev. denied*, 163 Wn.2d 1025 (2008); *State v. O'Cain*, 144 Wn.App. 772, 184 P.3d 1262 (2008) (striking

prohibition on internet access in rape case because it was not crime related). In Mr. Young's case, there was no allegation of any pornographic materials. Adult bookstores or X-rated movies were not involved in the allegations against Mr. Young, but the court ordered that he may not enter any such establishments. CP 19. The sentencing court erred when it imposed this condition and it should be stricken.

ii. *Condition 7*

In condition 7, Mr. Young was ordered to never "date women or form relationships unless receiving prior approval from a Community Corrections Officer." CP 64.

A court may not sweepingly or confusingly prohibit a person from navigating through life without just cause and subject to arbitrary enforcement. *See State v. Valencia*, 169 Wn.2d 782, 795, 239 P.3d 1059 (2010) ("A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague"); *see also State v. Johnson*, _ Wn.App. _, _P.3d _, 2014 WL 1226456, *5 (March 25, 2014) (finding condition barring contact with "vulnerable" individuals "fails to provide the safeguards against arbitrary enforcement required by due process").

The court's prohibition restricts Mr. Young's ability to "form" any type of "relationship," not simply romantic relationships or those involving sexual activity. CP 64. It requires pre-approval by a community custody officer without standards, permitting an "inventive" community custody officer to bar Mr. Young from establishing friendships at a church or coffee shop. *Valencia*, 169 Wn.2d at 794; *Johnson*, 2014 WL 1226456 at *5.

Mr. Young was accused of assaulting a stranger, not someone with whom he had a relationship. 8/1/12RP 12, 16. There is no evidence he had ever entered into relationships for nefarious purposes and his convictions were not the result of any such relationship. This condition serves no legitimate crime-related purpose, it limits Mr. Young's ability to associate with others in permissible circumstances, and is subject to arbitrary enforcement. The condition should be stricken as overbroad, vague, and not related to the facts underlying the offenses of conviction.

iii. *Condition 10*

The trial court also entered a community custody condition forbidding Mr. Young from possessing "drug paraphernalia." CP 64. In *State v. Land*, 172 Wn.App. 593, 605, 295 P.3d 782, *rev. denied*, 177

Wn.2d 1016 (2013), a person convicted of several sex offenses received this same community custody condition. Because there was no evidence that drug use or drug paraphernalia was related to the offenses, this court struck the condition. *Id.*

In *Valencia*, the Supreme Court struck a condition barring a person who was convicted of a drug offense from possessing "paraphernalia" that was not limited to items involved in consuming or possessing controlled substances. 169 Wn.2d at 785, 795. A broadly stated condition prohibiting the possession of paraphernalia associated with drug use is unconstitutionally vague. *Id.* at 793. The term "drug paraphernalia" is so broad that it may be construed to include tools used innocuously in everyday life, and the restriction imposed is not limited to possession of such materials with the "intent" to use drugs. *Id.* at 794. As the *Valencia* Court instructed,

> "an inventive probation officer could envision any common place item as possible for use as drug paraphernalia," such as sandwich bags or paper. Supp'l Br. of Appellant at 10. Another probation officer might not arrest for the same "violation," i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. Accordingly, we hold that the condition at issue is void for vagueness.

Id. at 794-95.

Moreover, in Mr. Young's case, the prosecution agreed that there was no evidence Mr. Young had used drugs before or during the incident. 8/1/12RP 29. Accordingly, this condition is not crime-related, in addition to being too ambiguous to provide a valid, authorized condition of community custody. It should be stricken.

iv. *Condition 19*

Condition 19 ordered Mr. Young to submit to polygraph examinations "as directed by your Community Corrections Officer." CP 65. Polygraph tests are disfavored in the law and courts have consistently recognized their unreliability. *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). "[P]olygraph examinations are also invasive, both physically and of one's private affairs." *Id.* Compulsory polygraph examinations "implicate privacy concerns," and even if they are permitted, the authority to demand a person submit to such an examination must be narrowly circumscribed. *Id.*

One circumstance in which polygraph examinations may be ordered by a court is in the context of community custody, but only in limited circumstances. *Riles*, 135 Wn.2d at 342-43. Courts may not bestow unbridled discretion upon the State to require offenders submit to polygraph examinations. *See State v. Combs*, 102 Wn.App. 949, 952-

53, 10 P.3d 1101 (2000). Polygraphs may not be used as a fishing expedition to probe the defendant's mind and ascertain whether he has any incriminating information to offer. *Id.* Instead, polygraph examinations must be used only to monitor conditions of community custody. *Id.*

In *Combs*, the court faulted the sentencing judge for using a preprinted form that did not explicitly limit the State's authority to require a polygraph examination to the circumstance of monitoring compliance with conditions of community custody. 102 Wn.App. at 953. The court "strongly encourage[d]" courts to explicitly limit the requirements of a polygraph to state the permissible purposes, in order to "better inform offenders of their rights, insure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard." *Id.* at 953. Condition 19 does not contain the limiting language that *Combs* required of future sentencing orders to insure fair application of such a requirement.

Mr. Young was ordered to "participate" in polygraph examinations whenever "directed" to do so by his CCO. CP 65 (Condition 19). The court did not limit the State's use of polygraph

examinations to the permissible purpose of monitoring compliance with community custody conditions. This condition allots unjustifiable discretion to the CCO to demand Mr. Young submit to a polygraph for reasons unconnected to monitoring his compliance with court-ordered restrictions. The impermissibly broad condition of community custody must be stricken.

c. *This Court should strike the unauthorized conditions of community custody.*

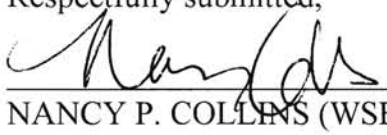
The conditions of community custody 5, 7, 10, and 19 are either not reasonably related to Mr. Young's offenses of conviction, overbroad, or unduly vague. This Court should vacate the portions of the Judgment and Sentence requiring him to comply with these unauthorized or improper conditions of community custody. *Valencia*, 169 Wn.2d at 795 (striking condition of community custody void for vaguenss); *Johnson*, 2014 WL 1226456 at *5-*6 (striking conditions of community placement not reasonably related to offense and overbroad).

E. CONCLUSION.

Mr. Young's sentence should be vacated and his case remanded for a new sentencing hearing. On remand, the court should strike all community custody conditions that are not unrelated to the facts of the crime or are stated in overbroad and vague terms.

DATED this 31st day of March 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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