

No. 49627-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lynn Southmayd,

Appellant.

Thurston County Superior Court Cause No. 14-1-01551-1

The Honorable Judge Carol A. Murphy

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 4

I. The sentencing judge did not “meaningfully consider” the willing participation of Mr. Southmayd’s mother in his two offenses..... 4

II. Mr. Southmayd’s attorney provided ineffective assistance by failing to ask the court to exercise its discretion to score the burglary and no contact order violation together. 5

A. Mr. Southmayd’s two offenses comprised the same criminal conduct, and the court had discretion to score them together under the burglary anti-merger statute..... 5

B. Defense counsel deprived Mr. Southmayd of the effective assistance of counsel at sentencing by failing to argue same criminal conduct. 7

III. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested. 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) 8

WASHINGTON STATE CASES

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 10

State v. Davis, 90 Wn. App. 776, 954 P.2d 325 (1998)..... 7, 8

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 8

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 4, 5, 7

State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013)..... 6, 8, 9

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997)..... 6

State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016)..... 9, 10

State v. Wright, 97 Wn. App. 382, 985 P.2d 411 (1999)..... 4

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 1

U.S. Const. XIV 1

WASHINGTON STATE STATUTES

RCW 9.94A.525..... 5

RCW 9.94A.589..... 6, 9

RCW 9A.52.050..... 7

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court failed to meaningfully consider Mr. Southmayd's request for an exceptional sentence below the standard range.

ISSUE 1: Did the sentencing court fail to meaningfully consider Mr. Southmayd's request for an exceptional sentence based on the mitigating factor that his mother was a willing participant in the burglary and no contact order violation because she encouraged him to unlawfully enter or remain in her house in violation of a protection order?

2. The trial court abused its discretion by failing to consider whether the two crimes comprised the same criminal conduct.
3. The trial court erred by sentencing Mr. Southmayd with offender scores of nine (Count I) and eight (Count II).
4. Mr. Southmayd was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
5. Defense counsel provided ineffective assistance by failing to argue same criminal conduct at sentencing.
6. Defense counsel provided ineffective assistance by failing to ask the sentencing court to exercise its discretion under the burglary anti-merger statute.

ISSUE 2: Multiple offenses score as the same criminal conduct if they occurred at the same time and place, against the same victim, and with the same criminal intent. Did the sentencing court improperly fail to exercise its discretion by scoring Mr. Southmayd's two offenses separately?

ISSUE 3: Defense counsel provides ineffective assistance by failing to argue same criminal conduct when warranted by the facts. Did Mr. Southmayd's attorney provide ineffective assistance by failing to argue same criminal conduct at sentencing?

7. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Lynn Southmayd is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Because her son was homeless, Lynn Southmayd's mother allowed him to stay with her in her house. CP 6. She had previously obtained an order prohibiting him from having contact with her. CP 6. Police found him at her house. He was charged with and convicted of residential burglary and felony violation of a no contact order. CP 6.

His convictions were affirmed on appeal, but the Court of Appeals remanded for resentencing because the sentencing judge had "failed to *meaningfully* consider that Southmayd had provided a valid mitigating factor." CP 10 (emphasis added). Specifically, the court held that the court "fail[ed] to *actually* consider the mitigating factor that Southmayd's mother was a willing participant in the offense at all," and that this "was an abuse of discretion." CP 10 (emphasis added).

Prior to the resentencing hearing, Mr. Southmayd again asked the court to impose a mitigated sentence. CP 12-16. Defense counsel did not ask the court to exercise its discretion to score his two felonies as the same criminal conduct. CP 12-16; RP 13-17.

At the resentencing hearing, the sentencing judge announced that she

did fully consider that exceptional sentence request when the Court issued the Judgment and Sentence in 2015. I heard from Ms. Southmayd at that time as I did today.

I recall this trial. I recall the facts that came out at the trial, as well as Ms. Southmayd's participation, and the Court did fully consider that as I am fully considering that today. It is true that the Court may consider that a protected person was a willing participant in this contact, and the Court did consider that and is considering that today, as well.
RP 26.

The sentencing court made no mention of the burglary anti-merger statute or the same criminal conduct determination. RP 26-32. The judgment and sentence reflects a boilerplate finding allowing the two offenses to score separately. CP 44.

The court imposed the same sentence previously ordered: a total of 73 months in prison. CP 47. Mr. Southmayd timely appealed. CP 31.

ARGUMENT

I. THE SENTENCING JUDGE DID NOT “MEANINGFULLY CONSIDER” THE WILLING PARTICIPATION OF MR. SOUTHMAYD’S MOTHER IN HIS TWO OFFENSES.

A sentencing court must “meaningfully consider” any mitigating factor; failure to do so requires reversal. *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). Furthermore, the superior court “is required to follow a mandate of [the Court of Appeals].” *State v. Wright*, 97 Wn. App. 382, 383, 985 P.2d 411 (1999).

Here, the sentencing court again failed to “meaningfully consider” Mr. Southmayd’s request for an exceptional sentence below the standard range. Instead, the judge did no more than mention the mitigating factor

and state that she had considered it as she had on the prior occasion. RP 26.

This was inadequate under *O'Dell* and violated the Court of Appeals' remand order. *Id.*; *O'Dell*, 183 Wn.2d at 689. Mr. Southmayd's sentence must be vacated and the case remanded once more for a new sentencing hearing. *O'Dell*, 183 Wn.2d at 689.

II. MR. SOUTHMAYD'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO ASK THE COURT TO EXERCISE ITS DISCRETION TO SCORE THE BURGLARY AND NO CONTACT ORDER VIOLATION TOGETHER.

Mr. Southmayd's two crimes comprised the same criminal conduct. The burglary anti-merger statute gave the sentencing judge discretion to score them together. This would have resulted in a lower offender score and standard range. Despite this, defense counsel failed to ask the sentencing judge to exercise her discretion to score the two offenses together. This deprived Mr. Southmayd of the effective assistance of counsel at sentencing.

A. Mr. Southmayd's two offenses comprised the same criminal conduct, and the court had discretion to score them together under the burglary anti-merger statute.

A sentencing court must determine the defendant's offender score. RCW 9.94A.525. The sentencing judge must determine how multiple current offenses are to be scored. Offenses that comprise the "same

criminal conduct” are “counted as one crime.” RCW 9.94A.589(1)(a). “Same criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

The phrase “same criminal intent” does not refer to a crime’s *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall criminal objective, and whether one crime furthered the other. *Id.* When objectively viewed, the intent for a “continuing, uninterrupted sequence of conduct” likely remains the same from one crime to the next. *See State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974 (1997).

Here, the two offenses comprised the same criminal conduct. They involved a single act—the contact order violation was essential to the residential burglary conviction. By violating the no contact order, Mr. Southmayd entered or remained “unlawfully” in his mother’s residence. Information filed 10/16/14, Supp. CP. Furthermore his “intent to commit a crime therein” was established by his violation of the no contact order. CP 6; Information filed 10/16/14, Supp. CP.

The two crimes occurred at the same time and place. They involved the same victim. The two offenses were intimately related, and

his overall objective for each—to obtain shelter despite violating the no contact order—did not differ.

Because the two crimes comprised the same criminal conduct, the sentencing court had discretion under the burglary anti-merger statute to score them as one. RCW 9A.52.050. That statute provides that “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary...” RCW 9A.52.050. A sentencing court “may, in its discretion, refuse to apply the burglary antimerger statute based on the facts of the case before it.” *State v. Davis*, 90 Wn. App. 776, 783–84, 954 P.2d 325 (1998).

Here, the trial court failed to exercise its discretion. It did not determine whether or not the two offenses comprised the same criminal conduct, and did not determine whether or not the facts warranted application of the anti-merger statute. RP 26-32, CP 44.

This failure to exercise discretion was itself an abuse of discretion. *See O'Dell*, 183 Wn.2d at 697. Mr. Southmayd’s sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

B. Defense counsel deprived Mr. Southmayd of the effective assistance of counsel at sentencing by failing to argue same criminal conduct.

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51

L.Ed.2d 393 (1977). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.* An attorney has “the duty to research the relevant law.” *Kyylo*, 166 Wn.2d at 862. An unreasonable failure to do so constitutes deficient performance. *Id.*, at 868.

Defense counsel provides ineffective assistance by failing to argue same criminal conduct when warranted. *Phuong*, 174 Wn. App. at 548.

Mr. Southmayd’s two offenses comprised the same criminal conduct: they occurred at the same time, place, victim, and overall intent. The trial judge had discretion under the burglary anti-merger statute to score them together. *Davis*, 90 Wn. App. 783–84.

Defense counsel did not ask the sentencing judge to exercise her discretion and score the two offenses together.¹ This deprived Mr. Southmayd of his right to the effective assistance of counsel. *Phuong*, 174 Wn. App. at 548.

Mr. Southmayd was prejudiced by his attorney’s deficient performance. *Kyylo*, 166 Wn.2d at 862. The facts of this case fit squarely

¹ In fact, defense counsel’s calculation of Mr. Southmayd’s standard ranges appears to have been based on the state’s calculation of the offender score. CP 13, 34.

into the standard for same criminal conduct. RCW 9.94A.589(1)(a). If defense counsel had raised the issue at sentencing, there is a reasonable probability that the sentencing court would have reduced Mr. Southmayd's offender scores by counting the two current offenses together. This would have reduced his standard ranges, and resulted in a lower sentence. There is a reasonable probability that counsel's deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn. App. at 548.

His sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).²

² Division II's commissioner has indicated that Division II will follow *Sinclair*.

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace this court's obligation to exercise discretion when properly requested to do so.” *Sinclair*, 192 Wn. App. at 388.

The trial court found Lynn Southmayd indigent for purposes of this appeal. CP 26. That status is unlikely to change, especially with the addition of two additional felony violations and the imposition of 73 months in prison. CP 43, 47. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

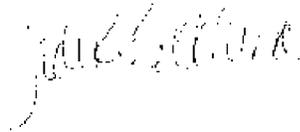
CONCLUSION

For the foregoing reasons, Mr. Southmayd’s sentence must be vacated and the case remanded for a new sentencing hearing. If

Respondent substantially prevails, the court should decline to impose appellate costs.

Respectfully submitted on December 28, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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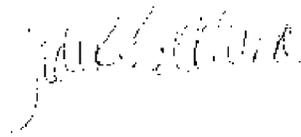
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 28, 2016.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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