

No. 49627-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Appellant.

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

The Honorable
Cause No. 14-1-01551-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court's discussion of potential mitigating factors show that it had meaningfully considered the issue, or did it abuse its discretion by choosing not to impose a sentence below the standard range?
2. Did the trial court abuse its discretion by failing to consider either the merger doctrine or treating Southmayd's offenses as the same criminal conduct, even though counsel did not raise the issues at trial?
3. Did trial counsel provide ineffective assistance of counsel by failing to argue that Southmayd's offenses should be treated as the same criminal conduct?
4. The State does not contest Southmayd's request that appellate costs not be imposed.

B. STATEMENT OF THE CASE

As a result of a prior domestic violence conviction, the appellant, Lynn Southmayd Jr., was barred from contacting his mother, Henrietta Southmayd (hereinafter "Henrietta"), by a no-contact order, but on October 13, 2014, he violated that order by visiting her apartment. CP 6, 32. Despite the protective order and their checkered history, his mother allowed him inside without incident. CP 6. Southmayd was subsequently arrested, and sentenced to 73 months in prison for burglary and violation of a no-contact order. CP 7.

On appeal, this court reversed the sentence, holding that the trial court failed to meaningfully consider Henrietta's willing role in violating the no-contact order as a potentially mitigating factor. CP 5. On remand, the trial court noted that while Henrietta may have been a willing

participant, Southmayd's repeated disregard for court orders merited a standard range sentence. RP 26-27. Accordingly, the court again imposed a sentence of 73 months. CP 36. Again, Southmayd appealed.

C. ARGUMENT

1. The Record Indicates That the Trial Court Adequately Considered Potentially Mitigating Factors, Therefore Imposing a Standard Range Sentence Was Not an Abuse of Discretion.

In his first point of error, Southmayd argues that the trial court failed to meaningfully consider potentially mitigating factors at sentencing, specifically his mother's willingness to violate the no-contact order. App. Brief at 5. However, contrary to Southmayd's claims, on remand the trial court explicitly addressed the mitigating factors, and found that despite Henrietta's willing participation, a standard range sentence was appropriate. RP 26-28. Because appellate review of a standard range sentence is limited to circumstances where the sentencing court wholly refuses to exercise its discretion, or relies on an impermissible basis for refusing to impose an exceptional sentence;¹ in

¹ Southmayd cites *O'Dell* as support for his argument. App. Brief at 4, citing *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). In *O'Dell*, the trial court failed to consider age as a mitigating factor, believing it was prohibited from doing so. The Supreme Court held that the trial court was free to consider age and remanded. In light of these facts, *O'Dell* has no bearing on the present case where the trial court expressly considered the mitigating factor.

light of the trial court's explicit consideration of mitigating factors, appellate review of Southmayd's current sentence is not appropriate. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); *State v. Southmayd*, 2016 Wash. App. LEXIS 1279, *6-7 (Wash. Ct. App. June 1, 2016).

If there was any doubt as to whether the trial court meaningfully considered the potential mitigating factors, the court expressly stated it was exercising its discretion to impose a 73 month sentence in spite of Henrietta's willingness, and provided a reasoned basis for its ruling, noting that Southmayd has multiple violations of court order in his past; he has shown a continuing disregard for court orders; and that protective orders exist to safeguard the community, even for people who don't want that protection. RP 26-27.

Thus, with no an indication that the trial court wholly failed to exercise its discretion, the sentence is not otherwise subject to appeal. RCW 9.94A.585(1); *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994); *Garcia-Martinez*, 88 Wn. App. at 330. Accordingly, Southmayd's first point of error must be denied.

2. Because the Trial Court Had No Duty to Raise the Issue Sua Sponte, It Did Not Abuse Its Discretion By Failing to Consider the Burglary and Violation of No-Contact Order as the Same Criminal Conduct.

In his second point of error, Southmayd claims that it was within the trial court's discretion to treat the burglary and violation of the no-contact order convictions as the same criminal conduct, which would have resulted in a lower offender score and sentence range.² App. Brief at 5. Therefore, Southmayd contends that the trial court's failure to consider punishing the two offenses as a single act was an abuse of discretion, regardless of the fact that this issue was not raised at trial, but this argument does not comport with existing law. App. Brief at 5.

Under *Aldana Graciano*, it is Southmayd who bears the burden of establishing that the burglary and violation of a protective order should be treated as the same criminal conduct, and because he failed to raise the issue, there is no error in the court's failure to consider it. *State v. Aldana Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013) (“[E]ach of a defendant's convictions counts toward his offender score unless he convinces the court that they involved the same criminal intent, time, place, and victim. The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in

² In his second point of error, Southmayd's brief seems to use merger and same criminal conduct interchangeably to refer to RCW 9.94A.589 and 9A.52.050, though there are slight differences between the two doctrines. Nevertheless, because neither issue was raised at court, the State's argument is the same for either issue. Thus for the purposes of this brief, the State is similarly treating the terminology as interchangeable.

which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.”); *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991) (“The burden is on the moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor.”).

Furthermore, Southmayd offers no legal support for his claim that a trial court must raise the issue of same criminal conduct sua sponte. Merger is a matter of judicial discretion,³ not a constitutional right, and although there are limited instances where a trial court is obligated or permitted to raise an issue without input from counsel, merger is not one of them. *See State v. Evans*, 100 Wn.App. 757, 775, 998 P.2d 373 (2000) (holding that courts have discretion to raise Batson issues sua sponte); *State v. Russell*, 171 Wn.2d 118, 120, 249 P.3d 604 (2011) (holding that courts have duty to issue sua sponte limiting instructions); *State v. Davis*, 141 Wn.2d 798, 886, 10 P.3d 977 (2000) (holding that courts have discretion to question jurors about racial bias sua sponte).

³ Under RCW 9A.52.050, merger is discretionary when it concerns burglary, whereas RCW 9.94A.589 gives courts discretion to determine whether offenses constitute the same criminal conduct. Thus both are discretionary functions of the court, though 9A.52.050 provides more discretion, and should be considered the controlling statute here as it is specific to the crime of burglary. *State v. Knight*, 176 Wn. App. 936, 962, 309 P.3d 776 (2013).

Considering the lack of support for requiring sua sponte merger, and the fact that Southmayd failed to raise the issue at trial, his second point of error must be denied.

3. Defense Counsel’s Failure to Request That Southmayd’s Crimes Be Treated as the Same Criminal Conduct Did Not Constitute Ineffective Assistance of Counsel, As There Are Potential Tactical Reasons For His Actions, and Counsel Zealously Pursued a Reduced Sentence Through Other Means.

Alternatively, in his third claim Southmayd argues that his defense counsel provided ineffective assistance when he failed to request that the burglary and violation of no-contact order charges be treated as the same criminal conduct, but this would hold counsel to a standard that goes above and beyond what is required by law, and ignores possible legitimate tactical reasons why defense counsel may have focused on other means of obtaining a reduced sentence, rather than arguing for a lower offender score. App. Brief at 7.

To prevail on an ineffective assistance of counsel claim, Southmayd must prove (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The question is whether defense counsel’s performance fell “below an objective standard of reasonableness,” viewed at the time of the sentencing hearing. *Strickland*, 466 U.S. at 688-89 (“A fair assessment of attorney performance requires

that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The presumption is that Southmayd’s defense counsel provided effective assistance, unless there is no possible tactical explanation for his actions. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Notable cases where courts have found ineffective assistance of counsel for the failure to argue same criminal conduct may be distinguished from the present case by the simple fact that they did not deal with burglary. *See State v. Phuong*, 174 Wn. App. 494, 547-48, 299 P.3d 37 (2013) (appealing sentencing for rape and unlawful imprisonment); *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (appealing sentencing for murder, rape, robbery and kidnapping). Burglary is unique among Washington’s criminal offenses in that it has a dedicated anti-merger statute, explicitly giving courts discretion to punish burglary separately from other crimes. RCW 9A.52.050; *State v. Knight*, 176 Wn. App. 936, 962, 309 P.3d 776 (2013) (“The trial court here had authority under RCW 9A.52.050 to impose a separate sentence for [the defendant’s] burglary conviction, regardless of whether the burglary

constituted the same criminal conduct as any of her other convictions.”). This differs from the rule regarding other offenses which provides courts considerably less discretion, and requires that crimes be treated as one offense if they encompass the same criminal conduct. RCW 9.94A.589. Thus, while in some cases, the failure to argue for same criminal conduct may constitute ineffective assistance of counsel, that reasoning does not hold true when the crime is burglary.

Moreover, defense counsel’s failure to seek a lowered offender score does not mean that he neglected to seek a reduced sentence for Southmayd. To the contrary, defense counsel zealously argued that mitigating factors called for an exceptional sentence below the standard range. RP 12-17. Considering that this court had just remanded the case with specific instructions to meaningfully consider mitigating factors, this argument had a reasonable chance of obtaining a reduced sentence for Southmayd. CP 5. Critically, because claims of ineffective assistance of counsel must be viewed in the full context of the case, defense counsel’s actions must be judged not only for what issues he failed to raise, but also for the arguments he did make. *Strickland*, 466 U.S. at 688-89; *State v. Rhoads*, 35 Wn. App. 339, 342, 666 P.2d 400 (1983). Consequently, the question is not whether defense counsel rendered ineffective assistance by failing to argue same criminal conduct, but instead, the proper question is

whether defense counsel was required to argue *both* same criminal conduct and mitigating factors. *Id.*

Therefore, while the record does not indicate what reason, if any, defense counsel had for not arguing same criminal conduct, it is a reasonable possibility that defense counsel simply made a strategic decision to focus on what he believed was the strongest argument for obtaining a reduced sentence, and he feared that arguing same criminal conduct would accomplish little beyond potentially distracting or antagonizing the trial court.⁴ *McFarland*, 126 Wn.2d at 336 (“Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.”).

Deciding which arguments to pursue and which arguments to disregard is ultimately a question of judgment. *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015) (noting that there is a strong presumption that counsel exercises reasonable professional judgment). While in hindsight, it is easy to argue that it was a mistake to put all of his legal eggs into one basket so to speak, if this court were to hold that defense

⁴ It is also critical to note that defense counsel may have reasonably believed that if the trial court was willing to disregard mitigating factors a second time despite this court’s reversal, then it was unlikely to be moved by a same criminal conduct argument.

counsel rendered ineffective assistance by focusing on mitigating factors over offender score, it would in essence mandate that attorneys disregard their judgment, and throw every argument they can against the wall to see what sticks. Such a result would disregard the strong presumption of effective assistance, and certainly cannot be the intent of the effective assistance doctrine. *Id.*

Finally, it is highly unlikely that defense counsel's failure to argue for same criminal conduct caused Southmayd to suffer prejudice, because there is no indication that the trial court would have lowered the offender score. *Strickland*, 466 U.S. at 687; *State v. Turner*, 167 Wn. App. 871, 878, 275 P.3d 356 (2012) (holding that failure to argue an issue was not ineffective assistance of counsel, if he would not have prevailed). Even in instances where crimes might otherwise be considered the same criminal conduct, RCW 9A.52.050 gives the trial court discretion to punish burglary offenses separately. *Knight*, 176 Wn. App. at 962. Of the two possible means for Southmayd to obtain a reduced sentence, the mitigating factors argument was the more persuasive, considering that this court had just remanded the initial sentence with instructions to consider Henrietta's willing participation, CP 5, but if the trial court was unwilling to reduce the Southmayd's sentence on those grounds, then it is reasonable to

believe that the court would not have exercised its discretion to reduce Southmayd's offender score.

Thus, because defense counsel did zealously seek a reduced sentence, and there are potential legitimate strategic explanations for defense counsel's failure to argue same criminal conduct, as a matter of law, the facts are insufficient to overcome the strong presumption that Southmayd received effective assistance of counsel. *Strickland*, 466 U.S. at 687.

4. The State Does Not Contest Southmayd's Request That Appellate Costs Not Be Imposed.

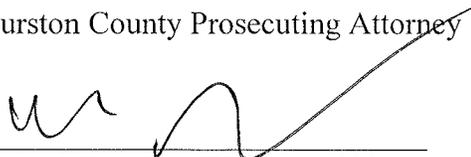
For his final issue, Southmayd has requested that the court decline to impose appellate costs. The State does not object.

D. CONCLUSION

For these reasons, the State asks the court to affirm Southmayd's sentence.

Respectfully submitted this 24th day of February, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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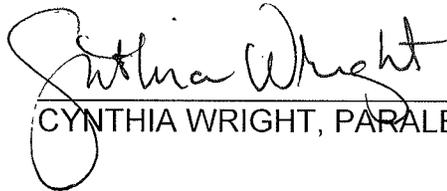
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