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Division II
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NO. 53801-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MANUEL ALVAREZ CALO,
Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by failing to consider whether William Manuel Alvarez Calo should be resentenced on remand.
2. Defense counsel provided ineffective assistance by failing to argue in support of his client's request for resentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by refusing to exercise its discretion to consider Mr. Calo's request that the remaining two counts—first degree burglary and first degree murder—be merged? Assignment of Error 1.
2. Defense counsel provides ineffective assistance when the client is prejudiced by the attorney's deficient performance. Was Mr. Calo deprived of his right to the effective assistance of counsel at sentencing? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. **Procedural facts:**

William Manuel Alvarez Calo was convicted of first degree felony murder, first degree burglary, and attempted first degree robbery in November, 2016. The offenses involved several other participants, including Michael Rowland. *State v. Calo*, No. 49794-8-II, (December 27, 2018), 6 Wn.App.2d 1046, 2018 WL 6819566, at *1 (cited for facts). On November 12, 2012, Michael Rowland, and five other people went

to Juan Hidalgo-Mendoza's apartment in Lakewood, Washington, intending to steal drugs and money. *Calo*, 2018 WL 6819566, at *1. After entering the apartment, one of the men shot and killed a man named Jaime Diaz-Solis. In the course of the murder investigation of Diaz-Solis, officers found items Hidalgo-Mendoza had hidden and later discovered large amounts of heroin and methamphetamine hidden inside the walls of Hidalgo-Mendoza's apartment. *Calo*, 2018 WL 6819566, at *1, 2. Hidalgo-Mendoza and his cousin were subsequently charged with drug trafficking related to the drugs found in the apartment, but months passed without a lead in the murder investigation. *Calo*, 2018 WL 6819566, at *2.

In February 2013, Mr. Calo was charged in Lakewood with a misdemeanor driving offense and in Pierce County with second degree identity theft and third degree driving with a suspended license. Mr. Calo met with police several times and eventually became a paid informant. During a third interview with police, Mr. Calo “made incriminating statements including that he had a part in arranging the hit to happen.” *Calo*, 2018 WL 6819566, at *2, 3. During a fourth meeting with police, officers arrested Mr. Calo and he was subsequently charged with first degree felony murder (Count I), conspiracy to commit first degree murder (Count II), first degree burglary (Count III), attempted first degree robbery (Count IV), and tampering with a witness (Count V). He was acquitted

of witness tampering. *Calo*, 2018 WL 6819566, at *6.

A. December 16, 2016 sentencing hearing:

At sentencing on December 16, 2016, the Honorable Frank E. Cuthbertson found that the attempted first degree robbery merged with the first degree murder conviction. Report of Proceedings¹ (RP) (12/16/16) at 11. *Calo*, 2018 WL 6819566, at *6. In the judgment and sentence, the trial court crossed out the attempted first degree robbery entry in the “current offenses” section of the judgment and sentence and handwrote the word “merges” next to the crossed-out entry. *Calo*, 2018 WL 6819566 at *6. Clerk’s Papers (CP) 34.

At sentencing, the State opposed Mr. Calo’s request to merge the burglary and murder charges. RP (12/16/16) at 3, 6. Defense counsel argued that in Michael Rowland’s case, Judge Cuthbertson found that the burglary merged with the robbery and the felony murder charge, and Mr. Calo requested that the court make the same finding in his case. RP (12/16/16) at 7. The court found that the burglary constituted the same criminal conduct as the first degree murder charge but did not order that the offenses be merged. RP (12/16/16) at 11; CP 35.

Michael Rowland was convicted first degree felony murder, first degree burglary, and first degree attempted robbery. *State v. Rowland*, No.

¹The record of proceedings consists of the following transcribed hearings: December 16, 2016 (sentencing) and June 21, 2019 (sentencing following appeal).

49444-2-II, (September 25, 2018), 5 Wash.App.2d 1023, 2018 WL 4603130, at *6.² At Mr. Calo's sentencing on December 16, 2016, the State noted that the court declined to apply the burglary antimerger statute at Michael Rowland's sentencing and merged the burglary and murder charges because Mr. Rowland "was one of the more minimal players" and that Mr. Calo "is one of the main players and that's why I'm asking the Court to apply that anti-merger statute." RP (12/16/16) at 3.

On appeal, Mr. Calo argued that (1) the trial court erred in admitting the audio and video recordings of the four police interviews, that the evidence is insufficient to support the attempted first degree robbery conviction. Mr. Calo also argued that because his attempted first degree robbery conviction merged with the first degree felony murder charge, all references to the attempted first degree robbery conviction, including reference to the special verdict on that count, must be deleted from the judgment and sentence. He also raised 14 issues in his Statement of Additional Grounds. *Calo*, 2018 WL 6819566, at *1, 2. The Court affirmed the convictions but remanded to the trial court with directions to amend the judgment and sentence to reflect only the first degree murder and first degree burglary convictions and special verdicts related only to the convictions. *Calo*, 2018 WL 6819566, at *11.

² Pursuant to GR 14.1, unpublished opinions filed after March 1, 2013 may be cited but are not binding authorities. They may be given such persuasive value as this Court deems appropriate. *Rowland* is cited to

The court also vacated legal financial obligations including \$100.00 DNA fee and \$200 criminal filing fee and interest accrual for non-restitution amounts. *Calo*, 2018 WL 6819566, at *31.

b. June 21, 2019 sentencing hearing:

The case came back before Judge Cuthbertson on June 21, 2019, RP (6/21/19) at 1-8. On remand, the court amended the judgment and sentence to remove references to the merged attempted robbery charge. RP (6/21/19) at 3. The court entered a Motion and Order Vacating Conviction for Attempted Robbery in the First Degree Count IV Only on June 21, 2019. CP 129-130.

Regarding legal financial obligations, the court found that Mr. Calo is indigent and struck the \$100 DNA fee and \$200 criminal filing fee. RP (6/21/19) at 3. The court entered a Motion and Order Correcting Judgment and Sentence striking the LFOs on June 21, 2019. CP 123-28.

Defense counsel agreed that the orders proposed by the State complied with the directions from the Court of Appeals. RP (6/21/19) at 2. After his attorney spoke, Mr. Calo addressed the court directly and asked the court to merge the burglary and the murder charges. RP (6/21/19) at 4. Judge Cuthbertson stated that the issue was not before the court. RP (6/21/19) at 4. Mr. Calo told the court that the issue of merging the burglary charge with the murder charge was not raised in his Statement of

solely to show the facts of his sentencing hearing.

Additional Grounds. RP (6/21/19) at 5. Defense counsel stated that the court had found during the first sentencing in 2016 that the burglary and murder charges were the same criminal conduct and the 60 month firearm enhancement was to be served consecutively to the 60 month enhancement imposed in the murder conviction. RP (6/21/19) at 5.

Mr. Calo argued that burglary merges with the murder charge, and noted that the court found that burglary merged with murder when it sentenced Michael Rowland.³ RP (6/21/19) at 6-7. The court declined to consider Mr. Calo's argument for merger of the remaining two offenses. RP (6/21/19) at 4-5, 6.

Mr. Calo appealed. CP 52. The trial court entered an Order of Indigency, granting Mr. Calo a right to review at public expense. CP 136-37.

C. ARGUMENT

- 1. WHETHER THE TRIAL COURT ERRED BY REFUSING TO EXERCISE ITS DISCRETION TO CONSIDER MR. CALO'S REQUEST FOR THE COURT TO MERGE FIRST DEGREE BURGLARY WITH FIRST DEGREE MURDER.**

³The sentencing court ordered Rowland to a low-end standard range sentence of 240 months for the murder, plus a 60-month firearm enhancement for a total of 300 months. Rowland was sentenced for only the first degree murder because the sentencing court concluded that the burglary and robbery convictions should merge into the murder conviction and vacated the attempted robbery and burglary convictions. The sentencing court declined to apply the burglary antimerger statute to prevent merger of the murder and burglary convictions. *State v. Rowland*, No. 49444-2-II, 2018 WL 4603130, at *6.

In its unpublished opinion, this Court remanded and directed the trial court to delete from the judgment and sentence all references to attempted first degree robbery conviction, including reference to the special verdict in that count. *Calo*, 2018 WL 6819566 at *11. The opinion “remand[s] to the trial court with directions to amend the judgment and sentence to reflect only the first degree murder and first degree burglary convictions and special verdicts related only to those convictions.” *Calo*, 2018 WL 6819566 at *11.

This Court also found that following the 2018 statutory amendments regarding legal financial obligations, the interest accrual provision must be struck, and that the sentencing court must inquire into Mr. Calo’s current or likely future ability to pay LFOs. The opinion states that although Mr. Calo was found to be indigent for purposes of appeal, the record does not show if he was found indigent under RCW 10.101.010(3)(a) through (c), and orders “remand to determine whether the criminal filing fee can be imposed[,]” and to determine if a DNA collection fee has been previously collected. *Calo*, 2018 WL 6819566 at *31. The mandate issued April 9, 2019. CP 60-61.

At the resentencing hearing held following remand to amend the judgment and sentence and address the indigency issue, Mr. Calo requested the court merge the convictions for first degree burglary and first degree murder. RP (6/21/19) at 4, 5. The trial court declined to consider his arguments for an exceptional sentence. RP (6/21/19) at 6-7.

An issue becomes an appealable question “[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again” on the issue. *State v. Wheeler*, 183 Wn.2d 71, 78, 349 P.3d 820 (2015) (citing *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993); *State v. Kilgore*, 167 Wn.2d 28, 39-41, 216 P.3d 393 (2009)).

Where a resentencing court exercises its independent judgment on remand, a defendant is entitled to raise new challenges to his sentence on remand. See *State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007) (stating “[a]t the resentencing hearing, the trial court had the discretion to consider issues [the defendant] did not raise at his initial sentencing or in his first appeal.”); *State v. Rowland*, 160 Wn. App. 316, 331-32, 249 P.3d 635 (2011) (where the resentencing court was required to correct the offender score and the standard range, the trial court exercised independent discretion, and the defendant was entitled to raise new challenges to his offender score on remand).

A trial court's discretion to resentence on remand is constrained by the scope of the court's mandate. *Kilgore*, 167 Wn.2d at 42. When an appellate court's opinion orders remand for resentencing, the resentencing court has broad discretion to resentence the defendant on all remaining counts. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). However, the resentencing court does not retain the same discretion when the court remands to the trial court with direction that leaves no room for

exercise of independent judgment. *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), aff'd, 163 Wn.2d 664, 185 P.3d 1151 (2008).

A court differentiates between a full resentencing hearing and a hearing that is merely ministerial in nature to correct a sentence. *Kilgore*, 167 Wn.2d at 41. If the Court of Appeals order requires a resentencing of the defendant, the lower court may conduct a full evidentiary hearing at which issues not addressed on appeal can be raised. *Toney*, 149 Wn.App. at 792. However, where a lower court merely corrects a technical error and uses no discretion in doing so, the case is final and not subject to further challenge. *Kilgore*, 167 Wn.2d at 41. In *Toney*, this Court ruled that:

[T]he defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence.

149 Wn. App. at 792.

Here, this Court held in its unpublished opinion;

We . . . remand to the trial court with directions to amend the judgment and sentence to reflect only the first degree murder and first degree burglary convictions and special verdicts related only to those convictions.

Calo, 2018 WL6819566 at *11.

However, the Court permitted the court to exercise its discretion regarding the LFO issue. *Calo*, 2018 WL 6819566 at *31. Here, the court made a discretionary ruling regarding imposition of LFOs by finding that

Mr. Calo was indigent. RP (6/21/19) at 3. A trial court’s ultimate decision of whether to impose LFOs is reviewed for abuse of discretion and therefore is a matter in which the court exercises its discretion. *State v. Ramirez*, 191 Wn.2d 732, 741-42, 426 P.3d 714 (2018); *State v. Smith*, 9 Wn.App.2d 122, 126, 442 P.3d 265 (2019).

Mr. Calo also requested the court to merge the burglary conviction with the murder conviction as it did in Michael Rowland’s case. RP (6/21/19) at 4. The burglary antimerger statute⁴ allows the “sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

The burglary antimerger statute gives the sentencing court discretion to punish or to decline to punish for two crimes when a burglary and an additional crime encompass the same criminal conduct. See *State v. Bradford*, 95 Wn.App. 935, 950, 978 P.2d 534 (1999); *State v. Davis*, 90 Wn.App. 776, 783–84, 954 P.2d 325 (1998). As the trial court did in Rowland’s sentencing, the permissive language in the antimerger statute provides the trial court with the discretion to treat burglary and the other offense as one crime if the offenses in fact constitute the same criminal conduct.

⁴RCW 9A.52.050 provides: Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime

The action taken by the trial court on resentencing was necessarily discretionary and not purely a ministerial correction. The trial court held a sentencing hearing on remand, and exercised its independent judgment regarding imposition of LFOs and the finding of indigency. RP (6/21/19) at 11. Mr. Calo requested the trial court to merge the remaining convictions as it had done in Rowland's case, RP (6/21/19). The trial court declined to consider the argument, failing to exercise its discretion. RP (6/21/19) at 3, 4-5, 6.

Because the trial court exercised its independent judgment on remand—at least insofar as the LFO issue is concerned—rather than merely making a purely ministerial correction to the sentence, Mr. Calo was entitled to raise new challenges to his sentence. See *Toney*, 149 Wn. App. at 792; *Rowland*, 160 Wn. App. at 331-32. The trial court failed to recognize its ability to exercise its discretion in granting or denying Mr. Calo's sentencing request. The trial court abused its discretion when it failed to consider Mr. Calo's argument. The sentence should be reversed and remanded to the trial court for another resentencing hearing, at which the trial court should consider Mr. Calo's request to merge the convictions.

2. MR. CALO'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

The right to counsel includes the right to the effective assistance of

separately.

counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kylo*, 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 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). To prevail on an ineffective assistance claim, the appellant must show deficient performance and prejudice. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013).

Here, defense counsel erroneously believed he lacked authority to request that the charges be merged and that the original finding of same criminal conduct did not preclude merger of the offenses. RP (6/21/19) at 5. As argued above, the discretionary ruling involved in the LFO permitted the court to readdress the merger issue raised by Mr. Calo. *See Kilgore*, 167 Wn.2d at 42.

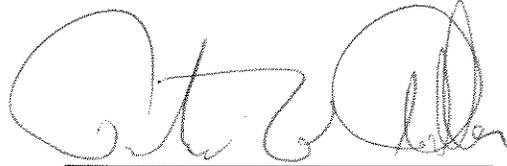
Because the sentencing court could conclude that resentencing was appropriate, counsel's deficient performance prejudiced Mr. Calo. He was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Phuong*, 174 Wn. App. at 547-548. The case must be remanded to allow the judge to consider resentencing Mr. Calo.

E. CONCLUSION

For the foregoing reasons, the case must be remanded for a new sentencing hearing. The trial judge must consider resentencing Mr. Calo.

DATED: March 3, 2020.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

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Of Attorneys for William Manuel Alvarez
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CERTIFICATE OF SERVICE

The undersigned certifies that on March 3, 2020, that this Appellant's Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed Kristie Barham Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 3, 2020.



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