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Court of Appeals
Division III
State of Washington

No. 32017-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

FRANK L. J. UHYREK,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....5

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....6

D. ARGUMENT.....7

 1. The conviction for unlawfully displaying a weapon merges with the convictions for first-degree robbery.....7

 2. The convictions for first-degree robbery encompass the same criminal conduct.....9

 3. The sentencing court did not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701..... 11

 4. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required.....13

E. CONCLUSION.....14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	12
<i>In re Pers. Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	12
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).....	12
<i>State v. Anderson</i> , 92 Wn. App. 54, 960 P.2d 975 (1998).....	9
<i>State v. Bryan</i> , 93 Wn.2d 177, 606 P.2d 1228 (1980).....	11
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....	10
<i>State v. Franklin</i> , 172 Wn.2d 831, 836, 263 P.3d 585 (2011).....	13
<i>State v. Grantham</i> , 84 Wn. App. 854, 932 P.2d 657 (1997).....	10
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	10
<i>State v. Maxfield</i> , 125 Wn.2d 378, 886 P.2d 123 (1994).....	10
<i>State v. Michielli</i> , 132 Wn.2d 229, 238, 937 P.2d 587 (1997).....	7
<i>State v. Monday</i> , 85 Wn.2d 906, 540 P.2d 416 (1975).....	11
<i>State v. Mulcare</i> , 189 Wn. 625, 66 P.2d 360 (1937).....	11
<i>State v. Prater</i> , 30 Wn. App. 512, 635 P.2d 1104 (1981).....	8
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	9
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	7, 8

Statutes

RCW 9A.56.200(1)(a).....9

RCW 9A.56.200(2).....12

RCW 9.94A.030(54)(a)(i).....12

RCW 9.94A.589(1)(a).....9

RCW 9.94A.701.....12, 13

RCW 9.94A.701(2).....12

RCW 43.43.754.....13, 14

RCW 43.43.754(1) and (2).....14

A. ASSIGNMENTS OF ERROR

1. The crime of unlawfully displaying a weapon merges with the robbery convictions.
2. The four robbery convictions encompass the same criminal conduct.
3. The trial court erred in finding counts 1-4 involved separate and distinct courses of conduct. Finding of fact No. 4, CP 483.
4. The trial court erred in finding an offender score of 16. Finding of fact No. 5, Conclusion of Law No. 2, CP 483.
5. The trial court erred in imposing consecutive sentences on counts 1-4 for an exceptional sentence of 628 months. Conclusions of Law Nos. 1-6, CP 483-84.
6. The trial court erred by imposing a variable term of community custody.
7. The trial court erred by imposing a DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the conviction for unlawfully displaying a weapon merge with the convictions for first-degree robbery?
3. Do the four convictions for first-degree robbery encompass the same criminal conduct?

3. Did the sentencing court not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701?

4. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, is a subsequent submission required?

C. STATEMENT OF THE CASE

Frank Uhyrek was charged and convicted of two counts of attempted first degree robbery, two counts of first degree robbery, and one count of unlawfully displaying a weapon with deadly weapon enhancements on the first four counts. CP 169-77. The State presented evidence that a man wearing a ski mask, allegedly Mr. Uhyrek, entered a Safeway store, displayed a knife, and robbed or attempted to rob the individual check-stands by ordering four checkers to open the cash drawer and then grabbing the money. RP 149-237.

At sentencing, the Court ordered an exceptional sentence of 628 months based on multiple current offenses and a high offender score pursuant to RCW 9.94A.535(2)(c). CP 482-84. The Court found counts 1-4 involved separate and distinct courses of conduct and imposed consecutive sentences on those counts. *Id.*

The Court imposed the following sentence of community custody:

The defendant shall be on community custody for the longer of the period of early release, RCW 9.94A.728(1)(2); or the period imposed by the court, as follows . . . 18 months . . .

CP 492, ¶4.2.

The Court also imposed a \$100 DNA collection fee as part of the mandatory legal financial obligation (LFO) in this case. CP 494.

This appeal followed. CP 505.

D. ARGUMENT

1. The conviction for unlawfully displaying a weapon merges with the convictions for first-degree robbery.

"The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions." *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587, reconsideration denied (1997). Merger is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). The doctrine only applies "where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not

only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping)." *Vladovic*, 99 Wn.2d at 421, 662 P.2d 853.

Crimes merge when proof of one crime is necessary to prove an element or the degree of another crime. *Vladovic*, 99 Wn.2d at 419-21, 662 P.2d 853. If one of the crimes involves an injury that is separate and distinct from that of the other crime, the crimes do not merge. *Vladovic*, 99 Wn.2d at 421, 662 P.2d 853.

In *State v. Prater*, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981), the court held that where striking the victim was part of the force used to induce her to find money, the object of the robbery, and the purpose and effect was to intimidate the victim, the assault inflicted was not separate and distinct from the force required for robbery, and thus the assault merged into the defendants' robbery convictions.

Here, as in *Prater*, the crime of unlawfully displaying a weapon merges with the robbery convictions, since the act of unlawfully displaying a weapon was the means used to accomplish the robbery. One of the elements of first degree robbery as charged herein is that the perpetrator is "armed with a deadly weapon or displays what appears to be a firearm or

other deadly weapon. RCW 9A.56.200(1)(a). The unlawfully displaying a weapon was thus incidental to and intricately tied to the robbery. The evidence clearly shows that that the primary purpose of the criminal act was robbery. The unlawfully displaying a weapon was not separate and distinct from the means used to commit the robbery. Therefore, the unlawfully displaying a weapon merges with the first-degree robbery convictions. Mr. Uhyrek's offender score and sentence should be reduced accordingly.

2. The four convictions for first-degree robbery encompass the same criminal conduct.¹

A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a); *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). "Same criminal conduct" is indicated when 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 absence of any of these elements precludes a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

¹ Encompasses Assignments of Error Nos. 2-5.

The Legislature intended that courts construe the phrase, "same criminal conduct," narrowly. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). To determine if two crimes share a criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts should also consider whether one crime furthered the other. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Standard of Review. Appellate courts review a trial court's finding that the offenses did not constitute the same criminal conduct for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Here, it is undisputed that the crimes at issue were committed at the same time and place and involved the same intent. The only remaining issue then is whether the crimes involved the same victim. The charging document names the individual checkers as victims. CP 1-3. On this basis it would appear the four robberies involve different victims. However, in reality the true victim of all four robberies is Safeway, not the individual checkers. The perpetrator's intent and accomplished purpose was to rob Safeway not the individual checkers personally. The money that was stolen or attempted to be stolen came from the cash registers, not from the

individual checkers themselves. Thus, since all four first-degree robbery convictions involve the same victim, Safeway, they constitute the same criminal conduct.

Since the four robberies constitute the same criminal conduct, there is ostensibly only one robbery conviction. Therefore, the basis for imposing an exceptional sentence-- multiple current offenses and a high offender score--is not present. See CP 482-84. The defendant's offender score and sentence should be reduced accordingly to a sentence within the standard range.

3. The sentencing court did not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.²

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85

Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

RCW 9.94A.701(2). First degree robbery is a violent offense. RCW 9.94A.030(54)(a)(i); RCW 9A.56.200(2).

“Under [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length

² Assignments of Error No. 6.

of community custody at the time of sentencing.” *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the trial court imposed the following sentence of community custody:

The defendant shall be on community custody for the longer of the period of early release, RCW 9.94A.728(1)(2); or the period imposed by the court, as follows . . . 18 months . . .

CP 492, ¶4.2.

The trial court did not have the statutory authority to sentence Mr. Uhyrek to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of 18 months. Therefore, the variable term of community custody imposed by the trial court was improper.

4. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required.³

RCW 43.43.754 provides in pertinent part:

(1) A biological sample must be collected for purposes of DNA identification analysis from:

(a) Every adult or juvenile individual convicted of a felony. . .

³ Assignments of Error No. 7.

(2) If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.

RCW 43.43.754(1) and (2). The effective date of this statute was June 12, 2008. RCW 43.43.754.

Here, Mr. Uhyrek's criminal history included a prior felony conviction for third degree assault, on which he was sentenced after June 12, 2008. CP 489. This convictions required collection of a biological sample for purposes of DNA identification analysis pursuant to the statute. Accordingly, under paragraph two of the statute a subsequent DNA sample was not required. Therefore, the sentencing court should not have imposed a \$100 DNA collection fee as part of the mandatory legal financial obligation (LFO).

D. CONCLUSION

For the reasons stated the case should be remanded for resentencing within the standard range on only one count of first degree robbery with a finite term of community custody. In addition, the \$100 DNA collection fee should be stricken from the judgment and sentence.

Respectfully submitted October 12, 2014,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on October 12, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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