69836-2

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NO. 69836-2-I

IN THE COURT OF APPEALS – 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

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

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I. SUMMARY OF ARGUMENT

Broderick Young challenges terms of his sentence after pleading guilty to Attempted Rape in the First Degree and Burglary in the First Degree. He contends the trial court improperly imposed the burglary anti-merger statute because the trial court was misinformed that application of the statute was discretionary. The State contends the trial court was informed and aware the statute is discretionary.

Young also contends community custody conditions regarding erotic material establishments, relationships with women, drug paraphernalia and polygraph testing were inappropriate. The State concedes the conditions pertaining to frequenting erotic material businesses and drug paraphernalia were not crime-related and should be stricken. As a sex offender, the condition regarding approval for relationships with women is appropriate for public safety and the condition for polygraph testing is an appropriate tool to monitor probation.

II. ISSUES

1. Was the trial court informed and aware that the burglary anti-merger statute is discretionary?

2. Under the facts of this case, are the community custody conditions regarding drug paraphernalia and frequenting erotic material establishments crime related?
3. Where the defendant expressed anger toward Caucasian women after committing a sexual offense, is a condition of approval of relationships with women by the community custody officer appropriate?
4. Is the condition of polygraph testing for a sexual offender an appropriate monitoring tool of probation?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On July 21, 2011, Broderick Young was charged with Attempted Rape in the First Degree and Burglary in the First Degree alleged to have occurred on July 19, 2011. CP 1-2.

Young was alleged to have entered the house of a sixty-three year-old woman while naked and attacked her in the kitchen, pulling her pants down. CP 8. The woman described that Young had charged at her in the kitchen and told her she would enjoy this while trying to pull her pants down. CP 8. The woman was able to grab his genitals and pushed him into a China cabinet, after which he fled. CP 8. Within minutes, Young was contacted by deputies on foot a short distance away. CP 8. The woman was

driven by Young and positively identified him. CP 9. Young was interviewed, first admitting to being in the house, but denying being naked. CP 9. Later, Young admitted to being naked but then said he was joking. CP 9.

On July 28, 2011, an order was entered to have Young evaluated as to competency. CP 3-4.

On September 22, 2011, an order was entered finding Young competent to stand trial based upon the report from Western State Hospital. CP 5-6.

On March 2, 2012, Young was ordered back to Western State Hospital for another competency evaluation. CP 10-11.

On April 26, 2012, Young appeared back before superior court and was found competent to stand trial based upon the reports from Western State Hospital. 4/26/12 RP 3-4, CP 12-13.

On May 24, 2012, Young pled guilty to Attempted Rape in the First Degree and Burglary in the First Degree, 5/24/12 RP 4-10, CP 15-26. The guilty plea statement indicated that the charges would be scored against each other resulting in an offender score of 2 and a range on the greatest charge of Attempted Rape in the First Degree of 83.25 months to 110.25 months. CP 16. The plea agreement indicated that the State was recommending 110.25 months and the following agreement was made between the parties:

> The parties agree that Mr. Young has a prior conviction for First-Degree Burglary from Oklahoma under Cherokee County District Court #CF-03-068 that is not comparable to a Washington State felony and that does not score.

On August 1, 2012, Young was sentenced by the trial court to 110.25 months on the Attempted Rape in the First Degree in count 1, concurrent to 34 months on the Burglary in the First Degree in count 2. CP 54. The trial court noted that the burglary anti-merger statute, RCW 9A.52.050, would be applied. CP 53. The result was to cause the burglary offense to be considered an other current offense resulting in Young's offender score to be a 2 as to the Attempted Rape in the First Degree. CP 53.

On January 22, 2013, Young filed an untimely Notice of Appeal in the trial court. CP 66.

The Court of Appeals noted that Young's notice of appeal was untimely and accepted briefing on the matter. The State contended Young's notice of appeal was untimely.

On October 15, 2013, the Court of Appeals commissioner found that the State had not contended that Young made a knowing intelligent and voluntary waiver of his right to appeal and granted Young's motion to enlarge the time to file the notice of appeal.

2. Statement of Facts Pertaining to Sentencing

i. Statements Regarding Burglary Anti-Merger Statute.

At sentencing, one of the issues addressed by the parties was whether the trial court should apply the burglary anti-merger statute, RCW 9A.52.050.

Both parties filed sentencing memoranda. CP 27-47 (Defense sentencing memorandum, CP __, (State's sentencing memorandum) (Sub. No. 53, Sentencing memorandum, filed July 31, 2012, Supplemental Designation of Clerk's Papers pending). The State's memorandum sought the application of the burglary anti-merger statute, RCW 9A.52.050. CP ___ (Sub. No. 53 at pages 1-2, 7-8, 10). The State's memorandum specifically informed the trial court the burglary anti-merger statute was discretionary. CP ___ (Sub. No. 53 at page 7, line 33).

Young's sentencing memorandum described that he sought a determination that both offenses constituted same criminal conduct and requested that the court not apply the burglary anti-merger statute. CP 28, 30-2, 34. The memorandum also specifically noted the trial court's decision to apply the burglary anti-merger statute was discretionary. CP 34 (lines 5-24). The title to the section of the brief is "Application of the burglary anti-merger statute is discretionary." RP 34 (line 5).

At the time of sentencing, the parties addressed the burglary anti-merger statute with the trial court. 8/1/12 RP 11-2, 21-3. [1] The prosecutor concluded: "And so I would ask the Court to apply the antimerger statute and adhere to the intent of the legislature, and treat each offense separately from the other, given the offender score of two." 8/1/12 RP 12 (lines 15-18).

Young's attorney noted application of the statute was discretionary.

> The statute says that the Court may punish for both crimes. It doesn't say the Court should, or that except for an exceptional circumstances the Court should. It just simply says that the Court may punish for both.

8/1/12 RP 21 (lines 14-17).

At a point, the trial court questioned Young's counsel about the impact of making the discretionary call regarding application of the anti-merger statute.

> MR. RICHARDS:... Or if someone breaks in and takes property and then decides that they're going to burn the house down. That would involve separate criminal intents, and there would be separate punishments. So it's not the situation that -- well, it's often the case that it's appropriate to punish someone separately for the burglary, and another offense that they committed inside. That's not the case here, because we have the same criminal intent.

---

[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

7/21/11 RP	Arraignment/Order for Competency Evaluation
9/22/11 RP	Competency Order/Arraignment
4/26/12 RP	Entry of Competency Order
5/24/14 RP	Guilty Plea Hearing
8/1/12 RP	Sentencing.

> Mr. Young's intent wasn't sort of the traditional burglary intents in terms of coming in to steal something. He was focused on one thing.
> THE COURT: If the antimerger statute is not applied, what is the range?
> MR. RICHARDS: Then the range becomes 83.2 -- 69.75 to 92.25 months.
> THE COURT: So it makes a difference of about 18 months then.
> MR. RICHARDS: And there is an overlap between whether -- whether the Court does or doesn't apply it. And then on the First Degree Burglary, it becomes 15 to 20 months instead of 26 to 34.
> THE COURT: Okay.

8/1/12 RP 22-3.

The trial court ended up applying the burglary anti-merger statute.

> I would find that the antimerger statute does apply, and that the sentencing range score therefore would be a two.
> I'm giving Mr. Young a range of 26 to 34 months on the Burg in the First Degree, and a range of up to 110 months on the Rape in the First Degree -- Attempted Rape in the First Degree.

8/1/12 RP 36-7, CP 53.

ii. Objections to Community Custody Conditions.

At sentencing the prosecutor noted some concern about some community custody conditions. 8/1/12 RP 37. The prosecutor agreed to strike conditions or portions of conditions 4, 5, 6, 11, 12, 14, 15, 16 and 19. 8/1/12 RP 38-9, CP 63-5.

Defense objected solely regarding condition 7 relating to women.

> MR. RICHARDS: Your Honor, in addition to the things that Ms. Kaholokula mentioned, I also have a concern about item

> seven, on which do not date women or form relationships unless receiving prior approval from the corrections officer. I don't see a basis for that condition.
> THE COURT: Okay.
> MS. KAHOLOKULA: Well, I think that contact with women generally is problematic for Mr. Young, and so I think that condition should remain. He has repeatedly expressed that he basically hates women, particularly white women, and this particular offense involved a woman.
> THE COURT: Well, we will leave it in, because it says without prior approval of CCO, so they can look at it and see and make an assessment. It's going to be a while before Mr. Young has an opportunity to date anybody.

8/1/12 RP 39-40.

IV. ARGUMENT

1. The judge was made aware the decision whether to apply the burglary anti-merger statute was discretionary.

The burglary anti-merger statute reads:

> 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 separately.

RCW 9A.52.050.

Young's contention relating to the burglary anti-merger statute is that the trial court improperly applied the statute because the prosecutor "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. 8/1/12 RP 11-2. What the prosecutor stated reads as follows.

> Defense is arguing that, number one, the two offenses should merge, and that this Court should not apply the antimerger statute; and two, that this Court should depart from the standard range and impose a sentence below the standard range. And as I understand their argument, it's because, one, the offenses are part and parcel with the other, with each other; and two, that the defendant has a mental issue.
>
> As far as the antimerger argument, your Honor, as I state in my briefing, the clear intent of the Legislature is that burglaries should be charged and sentenced separately from any offenses that might be committed in the course of the burglary. And I think the reason is fairly clear, and it's particularly obvious in this case, if there had only been a burglary, that's a far different offense from actually carrying out whatever the intended purpose of the burglary was.
>
> In this particular case we're talking about a young man who chose to break into a single woman's home in a rural area of the county -- I believe the house itself is situated on one acre, devoid of neighbors -- and attacking this woman in her home. The defense has the obligation to present to the Court a reason why the Court should not apply the antimerger statute, and I don't believe that the defense has provided any reason for that.
>
> This particular defendant, as I set forth in my memo, does not come before the Court squeaky clean. He has a zero offender score, but that's simply because one of the convictions, the burglary out of Oklahoma, is not comparable to a Washington felony.
>
> **And so I would ask the Court to apply** the antimerger statute and adhere to the intent of the legislature, and treat each offense separately from the other, given the offender score of two.

8/1/12 RP 12 (emphasis added). Although the prosecutor made an argument as to the intent of the legislature, the prosecutor did ask the court to apply the statute. The prosecutor's argument as to the "obligation to present the Court a reason" was in contrast to the reason presented by the prosecutor of a

single woman in a rural portion of the county. The prosecutor was stating a reason to exercise discretion a certain way and contending defense could not contrast that reason. Furthermore, the prosecutor's brief stated the application of the burglary anti-merger statute was discretionary. CP ___ (Sub. No. 53 at page 7, line 33). Young's brief also described the trial court's decision to apply the burglary anti-merger statute was discretionary. CP 34 (lines 5-24). And at sentencing Young's attorney also noted application of the statute was discretionary. 8/1/12 RP 21 (lines 14-17).

The trial court was aware that application of the burglary anti-merger statute was discretionary. And the trial court was shown to have considered the option when the court questioned the defense counsel about the effect of the difference. 8/1/12 RP 22-3.

> Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. Cf. *Garcia-Martinez*, 88 Wn. App. at 330.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)

. This was not a denial of consideration of the option, but the exercise of discretion.

Since both the prosecution and defense described application of the statute which uses the term "may" is discretionary, the defense has not established the judge improperly applied the burglary anti-merger statute.

2. Two community custody conditions not related to the crimes of conviction should be stricken.

> As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.505(8). RCW 9.94A.703(3)(d) permits conditions which require a defendant to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

It is well-accepted that probationers and parolees (and, thus, those on community custody) have a diminished right to privacy and liberty. *State v. Parris*, 163 Wn. App. 110, 117, 259 P.3d 331 (2011), rev. denied, 173 Wn.2d 1008, 268 P.3d 942 (2012), citing *State v. Lucas*, 56 Wn. App. 236, 783 P.2d 121 (1989), rev. denied, 114 Wn.2d 1009, 790 P.2d 167 (1990) and *State v. Simms*, 10 Wn. App. 75, 516 P.2d 1088 (1973), rev. denied, 83 Wn.2d 1007 (1972). Furthermore, "[c]onvicted sex offenders in Washington also have a reduced expectation of privacy because of the 'public's interest in public safety' and in the effective operation of government." *Parris*, 163 Wn. App. at 118, citing *In re Det. of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999); see also *State v. Olson*, 164 Wn. App. 187, 262 P.3d 828 (2011).

Generally, the imposition of crime-related prohibitions is reviewed for abuse of discretion. *State v. Ancira,* 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). However, appellate courts review whether the trial court had statutory authority to impose community custody conditions de novo. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). And in *State v. Bahl*, the Supreme Court stated that established case law holds that illegal or erroneous sentences and specifically vagueness challenges to conditions of community custody may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 753, 193 P.3d 678 (2008).

Thus, Young may challenge the conditions imposed for the first time on appeal.

i. Condition 5.

> Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

CP 63.

Young did not object to this condition below. As to this condition, the State concedes there is no evidence that the present offense was caused by or somehow connected with sexually explicit or erotic material. Young does have a condition to obtain a sexual deviancy evaluation and to follow the conditions in his treatment contract. CP 64-5 (Condition 17). As this matter may be a condition imposed as part of that contract, the State has no objection to striking the condition.

ii. Condition 7.

> Do not date women or form relationships unless prior approval from a Community Corrections Officer.

CP 64. Defense objected to this condition as follows:

> MR. RICHARDS: Your Honor, in addition to the things that Ms. Kaholokula mentioned, I also have a concern about item seven, on which do not date women or form relationships unless receiving prior approval from the corrections officer. I don't see a basis for that condition.
> THE COURT: Okay.
> MS. KAHOLOKULA: Well, I think that contact with women generally is problematic for Mr. Young, and so I think that condition should remain. He has repeatedly expressed that he basically hates women, particularly white women, and this particular offense involved a woman.
> THE COURT: Well, we will leave it in, because it says without prior approval of CCO, so they can look at it and see and make an assessment. It's going to be a while before Mr. Young has an opportunity to date anybody.

8/1/12 RP 39-40. The State's sentencing memorandum pointed out that Young had made statements shortly after arrest indicating that he "hated white bitches," the "white bitch beat him up" and that is he had sex with white women. CP __ (Sub. No. 53 at page 3).

The State contends that Young's offense of an unprovoked sexual attack of a white woman should result in condition to require him to require him to have approval of a community corrections officer before dating or forming a relationship with a woman. It would foster public safety. See *Parris*, 163 Wn. App. at 118.

i. Condition 10.

Do not possess drug paraphernalia.

CP 64. Young did not object to this condition below. The State has no objection to striking this condition.

i. Condition 19.

> Participate in urinalysis, Breathalyzer, polygraph examinations as directed by CCO. Participate in plethysmograph examinations as directed by sexual deviancy therapist.

CP 16. Young did not object to this condition below and here only objects to the condition pertaining to polygraph testing. The State contends polygraph testing is a permissible condition to monitor compliance with community custody.

> Vant claims that under our decision in *State v. Flores-Moreno,* polygraph testing at the CCO's discretion without limitations as a sentencing condition is impermissible and constitutes an abuse of discretion by the trial court. 72 Wn. App. 733, 866 P.2d 648 (1994). As the State correctly notes, however, the Washington Supreme Court's subsequent decision in *State v. Riles* permits the condition, stating, "Trial courts have authority to require polygraph testing under RCW 9.94A.120(9)(c) [recodified in July 2001 as RCW 9.94A.505(8)] to monitor compliance with other conditions of community placement." 135 Wn.2d 326, 351-52, 957 P.2d 655 (1998).
>
> Since *Riles* confirms the trial court's authority to order such testing by the CCO for the purpose of monitoring compliance with the other conditions of his sentence, we decline to overturn the condition. **If Vant's CCO subjects him to improper questioning during a polygraph examination, he may challenge the conditions at that**

time. *See State v. Riles,* 86 Wn. App. 10, 16-17, 936 P.2d 11 (1997), *aff'd,* 135 Wn.2d 326.

State v. Vant, 145 Wn. App. 592, 603, 186 P.3d 1149 (2008) (bold emphasis added).

V. CONCLUSION

For the foregoing reasons, this Court should affirm the length of Young's sentence but remand the case to the trial court solely for the purpose of entry of an order striking community custody conditions 5 and 10.

DATED this 10th day of June, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Nancy P. Collins, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 10th day of June, 2014.

_____

KAREN R. WALLACE, DECLARANT