91121-5

Supreme Court No. ____
(COA No. 69836-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRODERICK YOUNG,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Broderick Young, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Young seeks review of the Court of Appeals decision dated November 17, 2014, a copy of which is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The burglary antimerger statute gives a sentencing judge discretion to separately punish burglary from another offense with which it would otherwise merge. The prosecution argued that the court must presume a burglary conviction is separately punished and it was Mr. Young's obligation to prove that two offenses should be treated as a single crime when a burglary conviction elevates the other offense to a higher degree. Should this Court grant review to determine whether the court must presume that burglary is separately punished from any other offense and place the burden of proof on the defendant to convince the court that the antimerger presumption does not apply?

2. The burglary anti-merger statute gives a sentencing court discretion to separately punish burglary from another offense that is the same in fact and law. Here, the prosecution told the court that the Legislature required separate punishments even though the statute gives the court discretion. Did the court misunderstand its sentencing authority and impose separate punishments for burglary and a second offense based on the State's misrepresentation of its sentencing authority?

D. STATEMENT OF THE CASE

Broderick Young entered a stranger's home naked and lunged toward her, grabbing for her pants. 8/1/12RP 16; CP 28. She immediately pulled his hair, pushed him into a cabinet, and he ran outside. *Id.* She locked the door behind him and called the police; he was arrested shortly thereafter, still naked and wandering in the street. *Id.*

Taken to jail, Mr. Young was acting bizarrely, including keeping his cell full of feces and urine. 8/1/12RP 24. He suffered from hallucinations, delusions, and paranoia. *Id.* at 25-26. He was sent to Western State hospital two times during pretrial proceedings for

competency evaluations based on his lawyer's concern about his mental health. 7/28/11RP 2-3; 9/22/11RP 5; 4/26/12RP 3; 8/1/12RP 25-26.

Once found competent, he pled guilty as charged to attempted rape in the first degree and burglary in the first degree. 5/24/12RP 4-5. He had no criminal history that counted in his offender score other than the current offenses. *Id.* at 6.

At sentencing, the prosecution told the court that the "clear intent of the Legislature" and the court's "obligation" is to impose separate punishments on any burglary and "any offenses that might be committed in the course of the burglary." 8/1/12RP 11. Mr. Young asked the court to treat the offenses as a single crime, noting that each offense was already elevated to a higher degree because of the other offense. *Id.* at 21-22. Mr. Young also asked for an exceptional sentence below the standard range based on his mental health issues. *Id.* at 24-28; CP 32-34.

The court imposed separate punishment for the offenses, giving only the reason that the anti-merger statute "does apply." 8/1/12RP 36-37. It also refused to impose a sentence below the standard range on the basis that Mr. Young's mental illness made him dangerous and therefore he should receive more prison time. *Id.* at 33, 35. The Court

of Appeals affirmed the sentence, after striking a number of improper community custody conditions. It ruled that the court implicitly applied the correct legal standard even though the court did not explain its reasoning. Opinion at 3.

E. ARGUMENT

This Court should take review to address whether the burglary antimerger statute takes away the sentencing judge's discretion and whether the State bears the burden of proof

1. *At sentencing, the State insisted that the burglary antimerger statute mandates the presumption of separate punishments for any burglary*

Under the burglary anti-merger statute, the court has discretion to deviate from the requirement of merging the duplicative offenses. RCW 9A.52.050. The statute states, "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." Id. The statute gives the court authority to treat a burglary offense either separately from or as merged with another offense committed at the same time and place. *Id.* This statute predates

the Sentencing Reform Act. *State v. Williams*, __ Wn.2d _, 336 P.3d 1152, 1155 (2014).[1]

Under the SRA, when two or more current offenses constitute the "same criminal conduct," they shall "count as one crime" for purposes of sentencing. *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 1218 (2002); RCW 9.94A.589 (1)(a). Two offenses constitute the "same criminal conduct" when they involve the same victim, occur at the same time and place, and are based on the same overarching intent. *State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2005).

Under the constitutional prohibition on double jeopardy, two offenses merge for sentencing purposed when one offense is "elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code," and requires the court treat two convictions offenses as a single offense based on the punishment set forth for the greater offense. *State v. Parmelee,* 108 Wn.App. 702, 710, 32 P.3d 1029 (2001). No separate punishment may be imposed for the included crime unless it involved an injury to the victim that is separate and distinct

[1] In *Williams*, this Court ruled that the burglary antimerger statutes does not supersede the same criminal conduct analysis required under the SRA. 336 P.3d at 1155.

from the greater crime. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Merger reflects the double jeopardy principle that when two separate offenses require proof of the same facts, the Legislature intended a single punishment. *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); U.S. Const. amend. 5; Const. art. I, § 9. It also applies when one crime was used to effectuate the other, without a separate purpose or effect. For example, in *State v. Williams*, 156 Wn.App. 482, 494, 123 P.3d 1174 (2010), the defendant was charged with second degree assault with sexual motivation and rape in the first degree. In holding that the offenses merged, the Court explained, "[t]he only assault here was the attack and strangulation of KW before and during the act of rape. The assault was used to effectuate the rape. The assault had no purpose or effect independent of the rape." *Id.* at 495; *see also State v. Leming*, 133 Wn.App. 875, 888-89, 138 P.3d 1095 (2006) (double jeopardy violated by separate punishments for second degree assault based on intent to commit felony harassment and felony harassment).

The burglary antimerger statute lets a court impose separate punishments for burglary and a related offense when the merger

doctrine would otherwise require treating the two convictions as a single offense. However, the antimerger component of RCW 9A.52.050 is not mandatory or even presumptive. *State v. Davis*, 90 Wn.App. 776, 783-84, 954 P.2d 325 (1998). The statute lets a court deviate from otherwise mandatory requirements of merger, double jeopardy, and same criminal conduct but it does not require it to do so. *Id.*; *see State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

Despite the plainly discretionary language of RCW 9A.52.050, the prosecution 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. 8/1/12RP 11-12. The State claimed the Legislature's intent was to treat all burglaries as separate offenses from any crime that occurred at the same time. *Id.* at 11. It said Mr. Young's burden included the "obligation" that he must prove to the sentencing court why it should treat the burglary as merged. *Id.* at 12.

The prosecution's sentencing argument was patently incorrect. The statute is discretionary and does not place the burden on the defense. Yet the court followed the State's sentencing recommendation and never indicated it understood that Mr. Young carried no burden of

proof and there was no presumption mandating separate treatment for burglary and another offense that occurred as part of the burglary.

2. *The court treated the antimerger statute as mandatorily applying to any burglary.*

It is "fundamentally flawed" to treat the anti-merger statute as mandatory. *Davis*, 90 Wn.App. at 784 n.17. The court abuses its discretion if it applies the wrong legal standard or if it believes a blanket policy should apply to an individualized question at sentencing. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A judge is required to "actually consider" a legitimate sentencing request. *Id.* at 342. Appellate review of sentencing decisions exists to correct legal errors and abuses of discretion in determining which sentence applies. *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005).

The burden of proof at sentencing falls on the prosecution. *State v. Hunley,* 175 Wn.2d 901, 908, 287 P.3d 584 (2012). The State argued the burden fell on Mr. Young to prove why the court may deviate from the otherwise mandatory antimerger statute, even though the statute does not shift the otherwise governing burden of proof. 8/1/12RP 12. On the contrary, the State bears the burden at sentencing. *See Hunley,* 175 Wn.2d at 908-09.

The State also claimed that the "anti-merger" statute presumptively controlled the sentence and the court must "apply" it unless the defense sufficiently proves that it should not apply. 8/1/12RP 11-12. Yet there is no mandatory presumption favoring the application of the anti-merger statute. *See Davis*, 90 Wn.App. at 784 n.17.

Mr. Young offered legitimate reasons for the court to treat the two offenses singularly, rather than imposing separate punishment. 8/1/12RP 21-22. Both offenses of conviction were elevated to a higher degree based on the other, which is a benchmark of the application of the merger doctrine for other offenses. *Williams*, 156 Wn.App. at 495; *see also State v. Martin*, 149 Wn.App. 689, 701, 205 P.3d 931 (2009) (second degree assault based on the intent to commit rape and attempted rape in the third degree based on same facts and require single punishment under double jeopardy clause). The attempted rape was elevated from second to first degree because it occurred in a home; the burglary was elevated to a first degree offense because an assault occurred during the burglary. 8/1/12RP 21-22. The only assault that occurred was that which constituted the attempted rape. *Id.* at 22.

The two offenses occurred at the same time and place and involved the same victim. *See* RCW 9.94A.589(1)(a). No one else was

present. They both involved the same objective intent, as shown by the fact that Mr. Young entered the home naked and immediately tried to sexually assault the complainant. 8/1/12RP 16, 22. The incident lasted no longer than the failed attempt at rape, because the complainant quickly reacted, struck Mr. Young and caused him to flee. 8/1/12RP 16-17, 22. But for the existence of the anti-merger statute, these two simultaneous offenses would require singular punishment under the doctrine of merger and principles of double jeopardy, as well as the law governing same criminal conduct.

Moreover, Mr. Young faced an indeterminate life sentence no matter what minimum term the court imposed for attempted rape in the first degree. 8/1/12RP 27. After he served the minimum sentence imposed by the court based on the standard range, he would be released only at the direction of the authorities at the Department of Corrections. *Id.* Setting a lower minimum term as permitted under the merger and same criminal conduct doctrines would still give DOC amply authority to determine Mr. Young's risk of being safe in the community before releasing him. Despite the reasons Mr. Young offered for the court to treat the offenses singularly at sentencing, which would have reduced Mr. Young's minimum standard range, the court did not do so.

The court ruled only, "I would find that the antimerger statute does apply, and that the sentencing range score therefore would be a two." 8/1/12RP 36-37. It did not put its reasons on the record or state it understood the prosecution was incorrect when it explained the legal standard. The Court of Appeals summarily treated this comment as a reasoned decision demonstrating an exercise of discretion, but the record does not support this construction of the judge's ruling. See Opinion at 3.

Saying that the anti-merger statute "does apply," was not the question before the court. The statute "applies" any time a person is convicted of burglary and another offense. Yet the question the court needed to decide was whether, after considering the reasons for treating the offenses singularly or separately for purposes of punishment, the burglary should be separately punished. By finding the statute "does apply," the court was adopting the prosecution's language that the because the statute applies, the sentences may not merge or be treated as same criminal conduct. 8/1/12RP 12.

The judge never indicated or implied his awareness that the prosecution's statement of the law was incorrect. In ruling that the

statute would "apply," the court treated separate punishment as mandatory rather than a matter of its discretion.

While the court is not obligated to list its reasons for electing a certain sentence, it is required to employ the correct legal standard or it necessarily abuses its discretion. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *Cf. State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). Additionally, the court should place "on the record" the information used to determine the person's sentence. RCW 9.94A.500(1); *Hunley,* 175 Wn.2d at 908.

In other areas where a court has discretion, it must state its reasons so that appellate courts can examine the trial court's use of its discretion. For example, trial courts must specifically state the reasons for admitting certain kinds of evidence. *See, e.g., State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) (explaining court must "determine on the record" its basis for admitting the evidence under ER 404(b)); *State v. Alexis,* 95 Wn.2d 15, 18-19, 621 P.2d 1269 (1980) (remanding whether trial court appeared to balance probative value versus prejudice under ER 609 without properly weighing proper considerations).

The court's summary decision that the statute applies issued after the State misrepresented the governing legal standard does not insulate its ruling from appellate review. *See Grayson*, 154 Wn.2d at 342. It undermines the constitutional right to appeal to simply defer to an unexplained sentencing decision when the court has not explained that it understood the law. A court's exercise of discretion is untenable when it is not premised on an accurate understanding of the law. *See Rohrich,* 149 Wn.2d at 654. Here, the court did not exercise its discretion based on an accurate understanding of the law. It never corrected the prosecution's misstatement and indicated it believed its decision was simply whether the anti-merger statute applied, without considering the reasons to punish the offenses singularly under these circumstances.

This Court should grant review to clarify whether it is the defendant's "obligation" to prove that the court should not treat a burglary conviction as merged with another simultaneously committed offense that has been elevated in degree based on the burglary. It should also grant review to address whether the court may or must presume the Legislature intended burglary to be punished separately from another offense that would otherwise merge or be treated as same criminal

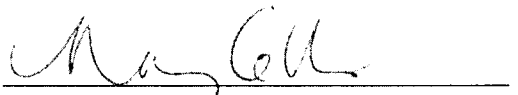
conduct, as the State argued to the trial court and the trial court accepted as an accurate understanding of the law.

F. CONCLUSION

Based on the foregoing, Petitioner Broderick Young respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 17th day of December 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRODERICK RAY YOUNG, Appellant.	)	No. 69836-2-I DIVISION ONE UNPUBLISHED OPINION FILED: November 17, 2014

BECKER, J. — Broderick Young appeals his sentence as well as certain community custody conditions. We remand for striking of some of the community custody conditions, and we affirm the remainder of the sentence.

FACTS

On July 19, 2011, Young entered the house of a 63-year-old woman while naked. He attacked her in the kitchen and attempted to pull her pants down. He was overpowered by his victim who was able to push him into a china cabinet. Young fled but was arrested by law enforcement a short distance from the victim's home.

The State charged Young with attempted rape in the first degree and burglary in the first degree. He pleaded guilty to both counts. On August 1, 2012, Young was sentenced to 110.25 months on the attempted rape and 34 months on the burglary charge, to run concurrently.

On appeal, Young seeks review of the propriety of his sentence and certain community custody conditions imposed by the court that will take effect upon his release from prison.

PROPRIETY OF SENTENCE

Young challenges the trial court's decision to sentence him separately for the attempted rape and the burglary instead of accepting his argument that the two offenses should be merged and counted as one offense.

Washington's antimerger statute states,

> 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.

This statute applies only to sentencing on current offenses, not to the scoring of prior convictions. State v. Williams, No. 89318-7, 2014 WL 5490401 (Wash. Oct. 30, 2014). Where it is applied to sentencing on current offenses, as it was here, it provides sentencing courts with discretion to punish a burglary separately, "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 State argued below that Young carried the "obligation" to prove a reason for not treating the burglary as a separate offense. Young contends that the court received the mistaken impression from the State's argument that application of the antimerger statute is mandatory rather than discretionary. He argues that because the court followed the State's sentencing recommendation

without indicating it understood that the State was mistaken, we must presume that the court did not apply the correct legal standard.

We review a discretionary sentencing decision for an abuse of discretion or misapplication of law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990).

This is not a case where the trial court categorically refused to exercise discretion. Cf. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). And it is not a case where the court was unaware of its discretion, as both parties' briefs and Young's oral argument made that clear. The court's remarks demonstrate the court's recognition that a decision had to be made about whether to apply the antimerger 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.

We conclude that in counting the two offenses separately, the trial court did not misapply the law and did not abuse its discretion.

COMMUNITY CUSTODY CONDITIONS

Young claims that the trial court erred when it imposed community custody conditions 5, 7, 10, and 19.

A trial court is authorized to impose crime related prohibitions and affirmative conditions as part of a felony sentence. RCW 9.94A.505(8); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009).

Condition 5 prohibits Young from visiting "establishments whose primary business pertains to sexually explicit or erotic material." Condition 10 forbids Young from possessing drug paraphernalia. The State does not oppose Young's request to have these two conditions stricken. As they do not appear to be crime related, we accept the State's concession.

Condition 7 orders Young to never "date women or form relationships" without receiving prior approval from a community corrections officer. Young contends that this community custody condition prohibiting him from forming relationships or dating women is unconstitutionally vague.

We review vagueness challenges to community custody conditions under an abuse of discretion standard. State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010).

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). Community custody conditions that fail to provide ascertainable standards of guilt to protect against arbitrary enforcement are unconstitutionally vague. Bahl, 164 Wn.2d at 752; State v. Sansone, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005). Because sentencing conditions are not laws enacted by the legislature, they are not afforded the same presumption of constitutionality as legislative enactments. Bahl, 164 Wn. App. at 753; Sanchez Valencia, 169 Wn.2d at 793. Nevertheless, "'a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point

at which his actions would be classified as prohibited conduct.'" Sanchez Valencia, 169 Wn.2d at 793 (internal quotation marks omitted), quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009).

When Young objected to condition 7 at sentencing, the State defended it on the ground that "contact with women generally is problematic for Mr. Young" and "this particular offense involved a woman." The State's sentencing memorandum quoted misogynistic statements Young made shortly after his arrest, including a remark that he "hated white bitches." The State argues on appeal that requiring Young to obtain approval before dating or forming a relationship with a woman would foster public safety.

Community custody conditions may require defendants to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d). Defendants may also be ordered to refrain "from direct or indirect contact with the victim of the crime or a specific class of individuals." RCW 9.94A.703(3)(b).

In another context, we upheld as sufficiently specific a condition that ordered a defendant not to "'date women nor form relationships with families who have minor children'" without prior approval by a community corrections officer. State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), review denied, No. 90538-0 (Wash. Nov. 5, 2014). We found the condition "reasonably crime-related and necessary to protect the public" because the defendant's crime involved children with whom he came into contact through a social relationship with their

parents. Kinzle, 181 Wn. App. at 785. In this case, Young's crime did not involve a woman with whom he had any kind of prior relationship. Under these circumstances, a general prohibition against forming relationships with women is not reasonably crime related, and it is too vague to provide fair warning to Young of exactly what conduct is prohibited and to protect against arbitrary enforcement. Condition 7 must be stricken.

Condition 19 requires Young to participate in polygraph examinations as directed by his community corrections officer. Young argues that the condition is overbroad and should have been limited to only such examinations as are necessary to monitor the other conditions of community custody. Courts have held that such a limitation is implicit. See, e.g., State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000). On remand, the limitation should be made explicit. "As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, ensure protection of those rights, and prevent confusion among judges, defendants and community corrections officers regarding the applicable legal standard." Combs, 102 Wn. App. at 953.

The matter is remanded for striking of conditions 5, 7, and 10 and for limitation of condition 19. The sentence is otherwise affirmed.

Becker, J.

WE CONCUR:

Tickey, J

Grosse, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69836-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erik Pedersen, DPA
Skagit County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 17, 2014