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COA NO. 66764-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D

STATE OF WASHINGTON,

Respondent,

JUL 22 2011

King County Prosecutor
Appellate Unit

v.

ROBERT ELMORE,

Appellant.

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

The Honorable Regina Cahan, Judge

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STATE OF WASHINGTON
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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in failing to exercise its discretion in determining whether to treat previous convictions for burglary and theft as the "same criminal conduct" for offender score purposes.

Issue Pertaining to Assignment of Error

Appellant was previously convicted of burglary and thefts based on acts that involved the same time and place, same victim, and same intent. Is remand for resentencing required because the court, relying on an erroneous view of the law, failed to exercise its discretion in determining whether to treat the previous burglary and theft offenses as the same criminal conduct for purposes of computing the offender score?

B. STATEMENT OF THE CASE

Robert Elmore pleaded guilty to one count of first degree trafficking in stolen property. CP 44-64, 70. Elmore's criminal history consisted of convictions for one count of second degree burglary and four counts of second degree theft. CP 80. The factual basis for these prior offenses was that Elmore entered the residence of one Larry Rodgers without his permission on July 1, 2004 and took a number of items. Supp CP ___, (sub no. 39, Declaration at 5, 7-9, 11-12, 2/7/11). These previous burglary and theft sentences were served concurrently. Supp CP ___, (sub no. 39, supra at 21).

At sentencing in the present case, the State maintained Elmore's offender score should be a "2." 4RP¹ 5. The State argued one point should be given for the four previous theft convictions because they were the same criminal conduct, and an additional point should be given for the burglary, which should be counted separately under the burglary anti-merger statute. 4RP 5.

Through counsel, Elmore argued his total offender score should be "1" because his prior convictions for burglary and theft all counted as the same criminal conduct for scoring purposes. CP 35-39, 67-69; 4RP 6-8. Elmore's attorney cited State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000) for the proposition that the burglary anti-merger statute did not apply because the prior convictions were served concurrently. CP 35-39, 67-69; 4RP 6-7.

The trial court agreed the previous theft convictions counted as same criminal conduct, but disagreed with counsel's interpretation of Tresenriter. 4RP 7-8. The relevant exchange is as follows:

Mr. Aralica: So, Mr. Elmore's convictions were concurrent and since they were concurrent and they were involved in the same criminal conduct, this Court should rely on the Tresenriter decision and even with the anti-merger statute still score Mr. Elmore as a one and count the burglary conviction.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 1/10/11; 2RP - 1/11/11 and 1/12/11; 3RP - 2/11/11; 4RP 2/25/11.

The Court: I have a question. I read this case differently. It seemed to say -- there's no question that all the thefts are concurrent. I mean, there's no question there. But it's all a matter of just the anti-merger and this case seemed to say the trial Court has discretion to apply the anti-merger statute and the burglary separate from the theft.

Mr. Aralica: I agree the Court does have discretion.

The Court: Okay.

Mr. Aralica: But again, Tresenriter talks about, you know, when -- talks about the circumstance as to when to utilize that discretion. And again, what I would indicate is the dispositive issue is: Were those convictions run concurrent? Were they run consecutive? And those are the things the Court should look at.

The Court: Okay. Anything else?

Mr. Aralica: No, your Honor.

[. . .]

The Court: I am going to find that the offender score is a two. I think that all of the thefts clearly are one, counted as one, and then *I don't think that the anti-merger statute allows the Court to have discretion, but to count the burglary as separate in this incident.* I think that makes sense. So, there is an offender score of two, which is 12 months and a day to 14 months.

4RP 7-8 (emphasis added).

The court ordered a 12+ month sentence, consisting of 180 days in a work ethic camp program and the remainder to be served on community custody. CP 77; RCW 9.94A.690. This appeal follows. CP 72-73.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION ON WHETHER TO TREAT THE BURGLARY AND THEFT OFFENSES AS THE "SAME CRIMINAL CONDUCT" FOR OFFENDER SCORE PURPOSES.

Reversal of the sentence and remand for resentencing is required because the court, operating under a mistaken view of the law, failed to exercise its discretion under the burglary anti-merger statute in determining whether the burglary offense should be counted as the same crime for scoring purposes.

- a. The Previous Burglary And Theft Convictions Meet The Same Criminal Conduct Test.

RCW 9.94A.525(5) governs offender score calculations. The sentencing court is required to count all prior convictions separately, unless (1) a prior court concluded the offenses encompassed the same criminal conduct, or (2) the current court decides concurrent prior adult offenses or consecutive prior juvenile offenses constitute the same criminal conduct. RCW 9.94A.525(5)(a)(i).² The court "*must* apply the

² RCW 9.94A.525(5)(a)(i) states: "In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior

same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct." State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008).

"Same criminal conduct" is defined as 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 test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The court agreed Elmore's four previous adult convictions for theft constituted the same criminal conduct. 4RP 8. The previous conviction for burglary also meets the same criminal conduct test in relation to the theft convictions because those offenses all involved the same time (July 1, 2004), the same place (the Rodgers residence), and the same victim (Rodgers). Supp CP __, (sub no. 39, supra at 5, 7-8). The crimes also involved the same objective intent because the burglary was incidental to and furthered the theft crimes — the unlawful entry was made to take the

juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used."

property inside without permission. Id. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). "[I]f one crime *furthered* another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

b. The Court Wrongly Failed To Exercise Its Discretion On Whether To Treat The Burglary And Theft Convictions As The Same Criminal Conduct.

RCW 9A.52.050, the burglary anti-merger statute, provides "[e]very 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." The court has discretion to punish burglary separate from other offenses otherwise constituting the same criminal conduct. Lessley, 118 Wn.2d at 781. The court also retains the discretion *not* to apply the anti-merger statute. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998).

Interpreting Tresenriter, the court's initial remark on the burglary anti-merge statute indicates a belief that it had the discretion to apply the burglary anti-merger statute: "this case seemed to say the trial court has

discretion to apply the anti-merger statute and the burglary separate from the theft." 4RP 7. That is a correct statement of the law.

But then the court, in ruling on the offender score issue, stated "I don't think that the anti-merger statute allows the Court to have discretion, but to count the burglary as separate in this incident." 4RP 8. That is a misstatement of the law. "If the trial court has discretion to apply the statute, it must also have discretion to refuse to apply it." Davis, 90 Wn. App. at 383.

Separate punishment is not mandatory under the burglary anti-merger statute. The trial court was therefore wrong in believing it did not have discretion to treat the burglary and theft offenses as the same criminal conduct. A court abuses its discretion when it relies on an erroneous view of the law. State v. Brown, 145 Wn. App. 62, 81, 184 P.3d 1284 (2008) (trial court abused its discretion when it imposed a standard range sentence based on erroneous legal view about seriousness level of offense). A court also abuses its discretion in failing to exercise it. State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

Analogy to other cases involving the trial court's failure to exercise discretion is instructive. For example, a court's failure to exercise its discretion in considering whether to impose an exceptional sentence below the standard range is reversible error. State v. Grayson, 154 Wn.2d 333,

341-42, 111 P.3d 1183 (2005); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007); see also State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) (court committed reversible error in erroneously concluding it did not have discretion to consider mitigating sentencing factor), aff'd, 169 Wn.2d 571, 238 P.3d 487 (2010). The court can decline to impose such a sentence in the exercise of its discretion. Grayson, 154 Wn.2d at 342. But "[w]hile no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Id.

The same rationale applies here. While Elmore was not entitled to have the court treat his burglary and theft offenses as the same criminal conduct as a matter of law, he was entitled to ask the court to consider such a sentence and to have it actually considered. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." State v. McGill, 112 Wn. App. 95, 102, 47 P.3d 173 (2002) (trial court's refusal to grant an exceptional sentence downward reviewable if court refused to exercise its discretion to depart from the standard range because it erroneously believed it lacked authority to do so).

Had the court exercised its discretion in Elmore's favor, the offender score would have been "1" instead of "2" for the current

conviction. His standard range would have been 6 to 12 months rather than 12+ to 14 months.³

Despite the burglary anti-merger statute, a sentencing court has authority to treat burglary and other offenses as the same criminal conduct. Davis, 90 Wn. App. at 783-84. Elmore's offenses satisfy the same criminal conduct test and he had the right to have the trial court actually consider whether to treat those offenses as the same criminal conduct. The court abused its discretion in failing to exercise its discretion. Remand for resentencing is required to give the court an opportunity to exercise its discretion.

D. CONCLUSION

For the reasons set forth above, this Court should remand the case for a new sentencing hearing.

DATED this 22nd day of July 2011

Respectfully Submitted,

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³ See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of IV for first degree trafficking in stolen property).

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 66764-5-1 |
| |) | |
| ROBERT ELMORE, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF JULY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT ELMORE
DOC NO. 885869
COUTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JULY, 2011.

x *Patrick Mayovsky*