

FILED
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Court of Appeals
Division III
State of Washington

NO. 29694-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

BRAIDEN MICHAEL CONNOR,

Defendant/Appellant.

APPELLANT'S BRIEF

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STATUTES

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ASSIGNMENTS OF ERROR

1. The trial court miscalculated Braiden Connor's offender score based upon the fact that the crimes of second degree assault and first degree robbery merge.

2. The trial court's restitution order was entered 191 days after entry of the Judgment and Sentence.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Do first degree robbery and second degree merge for purposes of calculating an offender score?

2. Does entry of the July 20, 2011 restitution order violate RCW 9.94A.753(1)?

STATEMENT OF CASE

On June 29, 2010, Mr. Conner was charged by Information with the following counts:

- I. First degree burglary with a deadly weapon enhancement.
- II. Conspiracy to commit first degree burglary with a deadly weapon enhancement.
- III. Second degree assault with a deadly weapon enhancement.
- IV. First degree robbery with a deadly weapon enhancement.

V. Conspiracy to commit first degree robbery with a deadly weapon enhancement.

(CP 1)

Mr. Connor posted bond on July 12, 2010. (CP 10)

Various scheduling orders were entered until Mr. Connor entered his Guilty Plea on December 6, 2010 to an Amended Information. (CP 12; CP 13; CP 14; CP 25).

The Amended Information charged Mr. Connor with first degree burglary, second degree assault and first degree robbery. Mr. Connor's guilty plea statement relied upon the probable cause affidavit. (CP 3; CP 23).

Based upon the fact that Mr. Connor had no previous criminal history, defense counsel moved for an exceptional sentence downward. The sentencing court denied Mr. Connor's motion for an exceptional sentence. Judgment and Sentence was entered on January 10, 2011. The trial court determined that Mr. Connor's offender score was four (4). (CP 33; CP 35; CP 44; RP 132, l. 13 to RP 133, l. 4).

The issue of restitution was left open for a period of 180 days. No restitution order was entered until July 20, 2011. (CP 61; RP 134, l. 24 to RP 135, l. 3).

Mr. Connor had filed his Notice of Appeal on February 4, 2011. (CP 57).

SUMMARY OF ARGUMENT

First degree robbery and second degree assault merge for purposes of calculating an offender score pursuant to *State v. Kier*, 164 Wn. 2d 798, 806-07, 194 P. 3d 212 (2008). Mr. Connor is entitled to be resentenced.

The trial court's restitution order violates RCW 9.94A.753(1). Mr. Connor should be relieved of his restitution obligation.

ARGUMENT

A. MERGER

...[A] sentence is excessive if based upon a miscalculated offender score”... and ... a defendant cannot agree to punishment in excess of that which the Legislature has established.” *In re Pers. Restraint of Goodwin*, 146 Wn. 2d 861, 873-74, 50 P. 3d 618 (2002). Generally a criminal defendant does not waive a challenge to a miscalculation of an offender score by failing to object in the sentencing court. *Id.* at 874.

State v. McDougall, 132 Wn. App. 609, 612, 132 P. 2d 786 (2006).

The State and Mr. Connor agreed to a sentence at the low end of the standard range for first degree robbery. The trial court imposed the low end of the standard range; *i.e.*, 51 months.

The record is devoid of any discussion concerning merger of second degree assault with first degree robbery Mr. Connor has the right to raise the issue on appeal.

In *State v. Kier, supra*, the Court ruled:

The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation. ...

...That the assault...involved assault with a deadly weapon, rather than by the infliction of substantial bodily harm, does not defeat application of the merger doctrine. The fact remains that the completed assault was necessary to elevate the completed robbery to first degree. *See: State Freeman*, 153 Wn. 2d 765, 778, 108 P. 3d 753 (2005); *accord State v. Prater*, 30 Wn. App. 512, 515, 635 P. 2d 1104 (1981) relying upon *State v. Johnson*, 92 Wn. 2d 671, 600 P. 2d 1249 (1979).

Mr. Connor, as an accomplice, entered Mr. Dahlen's residence for the purpose of recovering money supposedly stolen from Mr. Dahlen's former stepdaughter. A discussion was held, prior to entry into the house, that Mr. Dahlen would be assaulted in order to recover the money. (CP 3; RP 36, l. 2 to RP 62, l. 12).

There was no separate criminal intent involved. The assault raised the robbery from second degree to first degree. The crimes merge.

B. RESTITUTION

RCW 9.94A.753 states, in part:

This section applies to offenses committed after July 1, 1985.

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred and eighty days except as provided in subsection (7) of this section. ...

The July 20, 2011 restitution order totals \$2,682.86. The sum of \$18.45 relates to crime victim's compensation reimbursement. The other amounts involved Mr. Dahlen and Lutheran Community Services.

Subsection (7) of RCW 9.94A.753 allows for recovery of crime victims payments whether the restitution order is entered within the one hundred and eighty day period or not. Thus, the \$18.45 is appropriate. The remainder of the restitution must be vacated for noncompliance with the statutory provisions. The time limit contained in the statute is mandatory. *See: State v. Halsey*, 140 Wn. App. 313, 326, 165 P. 3d 409 (2007).

The record does not reflect that the State ever requested a continuance beyond the one hundred and eighty day period. Mr. Connor is entitled to be relieved of his restitution obligation with the exception of \$18.45.

CONCLUSION

First degree robbery and second degree assault, under the facts and circumstances of Mr. Connor's case, merge for purposes of calculating his

offender score. Mr. Connor's offender score is a 2 as opposed to a 4. Re-sentencing is required.

Mr. Connor is entitled to be relieved of his restitution obligation because the State did not present the order to the Court within 180 days as required by RCW 9.94A.753(1).

DATED this 9th day of November, 2011.

Respectfully submitted,

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