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Court of Appeals
Division III
State of Washington

NO. 30475-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

TONY BARCLAY,

Appellant.

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

The Honorable Donald Schacht, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	7
1. BARCLAY’S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE UNDERCUT ITS LOW RANGE SENTENCING RECOMMENDATION, THEREBY BREACHING THE PLEA AGREEMENT.	7
a. <u>The State Breached the Plea Agreement by Offering Unsolicited Information Undercutting Its Low-End Recommendation</u>	8
b. <u>The Remedy Is Specific Performance or to Permit Bradley to Withdraw Both Pleas If He So Chooses.</u>	12
2. THE COURT EXCEEDED ITS AUTHORITY BY IMPOSING CONSECUTIVE SENTENCES WITHOUT FINDING ANY AGGRAVATING FACTORS.....	14
3. THE TRIAL COURT ERRED WHEN IT FOUND BARCLAY HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.....	18
4. THE SENTENCING COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY BY IMPOSING THE NO-CONTACT ORDER WITH MITCH SUTTON.....	19
5. IN THE ABSENCE OF EVIDENCE, THE TRIAL COURT LACKED AUTHORITY TO FIND CHEMICAL DEPENDENCY CONTRIBUTED TO THE OFFENSE, REQUIRE TREATMENT AND PROHIBIT ALCOHOL POSSESSION.	21

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>The Chemical Dependency Finding Should Be Stricken Because It Is Unsupported by the Record.</u>	22
b. <u>With No Evidence of Chemical Dependency, the Court Erred in Requiring Barclay to Participate in Treatment.</u> ..	23
c. <u>The Court Exceeded Its Authority in Imposing a Condition of Cummunity Custody Prohibiting Barclay from Possessing Alcohol.</u>	25
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Bradley</u> 165 Wn.2d 934, 205 P.3d 123 (2009).....	12, 14
<u>In re Pers. Restraint of Breedlove</u> 138 Wn.2d 298, 979 P.2d 417 (1999).....	15
<u>In re Pers. Restraint of Carle</u> 93 Wn.2d 31, 604 P.2d 1293 (1980).....	14
<u>In re Pers. Restraint of Shale</u> 160 Wn.2d 489, 158 P.3d 588 (2007).....	13
<u>In re Postsentence Review of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007).....	14
<u>McNutt v. Delmore</u> 47 Wn.2d 563, 288 P.2d 848 (1955).....	14
<u>State v. Ancira</u> 107 Wn. App. 650, 27 P. 3d 1246 (2001).....	19
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007).....	20
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	14
<u>State v. Bertrand</u> 165 Wn. App. 393, 267 P.3d 511 (2011).....	18, 19
<u>State v. Carreno-Maldonado</u> 135 Wn. App. 77, 143 P.3d 343 (2006).....	8, 9, 12, 14
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	19, 21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Grayson</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	18
<u>State v. Grewe</u> 117 Wn.2d 211, 813 P.2d 1238 (1991).....	22
<u>State v. Jerde</u> 93 Wn. App. 774, 970 P.2d 781 (1999).....	7, 8, 9
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	19, 21, 23, 24, 25, 26
<u>State v. Julian</u> 102 Wn. App. 296, 9 P.3d 851 (2000).....	21
<u>State v. Miller</u> 110 Wn.2d 528, 756 P.2d 122 (1988).....	14
<u>State v. Payne</u> 117 Wn. App. 99, 69 P.3d 889 (2003).....	23
<u>State v. Phelps</u> 113 Wn. App. 347, 57 P.3d 624 (2002).....	21
<u>State v. Rasmussen</u> 109 Wn. App. 279, 34 P.3d 1235 (2001).....	14, 16, 17
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	20
<u>State v. Sanchez</u> 146 Wn.2d 339, 46 P.3d 774 (2002).....	7, 8, 9
<u>State v. Sledge</u> 133 Wn.2d 828, 947 P.2d 1199 (1997).....	7, 8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Van Buren</u> 101 Wn. App. 206, 2 P.3d 991 (2000).....	7, 9, 11, 12
<u>State v. Xaviar</u> 117 Wn. App. 196, 69 P.3d 901 (2003).....	9

FEDERAL CASES

<u>Mabry v. Johnson</u> 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984).....	7, 12
<u>Neder v. United States</u> 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	12
<u>Santobello v. New York</u> 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).....	7

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 9.94A.360.....	16
Former RCW 9.94A.360(1).....	16
Former RCW 9.94A.400.....	16
Former RCW 9.94A.400(3).....	16
RCW 9.94A	10, 15, 16, 17, 19, 20, 22, 23, 24
RCW 9.94A.030	15, 19
RCW 9.94A.400	16, 17
RCW 9.94A.500	23
RCW 9.94A.505	20
RCW 9.94A.525.....	17

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9.94A.530	20
RCW 9.94A.535	10, 15
RCW 9.94A.589	15, 17
RCW 9.94A.607	22
RCW 9.94A.703	25, 26
RCW 9A.28	23
RCW 9A.44.100	22
RCW 9A.44.010	22
RCW 9A.44.050	22
RCW 69. 50	23
RCW 70.96A.020	22

A. ASSIGNMENTS OF ERROR

1. The State violated appellant's due process rights when it breached the plea agreement by undercutting its agreed sentence recommendation.

2. The court erred in imposing consecutive sentences for current offenses.

3. In the absence of evidence, the court erred in finding appellant has the current or future ability to pay legal financial obligations (LFOs). 1CP¹ 23 (Finding 2.5); 2CP 21 (Finding 2.5).

4. In the absence of evidence, the court erred in ordering appellant have no contact with Mitch Sutton.

5. In the absence of evidence, the court erred in finding appellant had a chemical dependency that contributed to the offense. 2CP 19 (Finding 2.1).

6. The court erred in requiring appellant to participate in chemical dependency treatment.

7. The court erred in requiring appellant not possess alcohol.

¹ 1CP cites refer to the clerk's papers in case number 30475-2-III (Walla Walla County No. 11-1-00326-1). 2CP cites refer to the clerk's papers in case number 30477-9-III (Walla Walla County No. 11-1-00335-1). As the issues are virtually identical, a motion to consolidate both appeals is being filed contemporaneously with this brief. This brief serves as the Brief of Appellant in both cause numbers.

Issues Pertaining to Assignments of Error

1. The State and appellant entered a plea agreement in which the State agreed to recommend the low end of the standard range. At sentencing, the prosecutor argued, based on facts not stipulated to in the plea agreement, that appellant could not blame his offense on his medication and that it involved a lot of planning. By offering such unsolicited information to the sentencing court, did the State undercut its low-range sentencing recommendation and breach the plea agreement?

2. Appellant pled guilty to assault and burglary under two separate cause numbers. The charges were sentenced the same day. Did the court err in imposing consecutive sentences without statutory authorization?

3. Did the trial court err when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay LFOs?

4. Did the trial court err in imposing a no-contact order with no evidence in the record that the person protected was in any way related to the offense?

5. Did the trial court err in finding appellant had a chemical dependency that contributed to the offense, requiring treatment, and prohibiting possession of alcohol?

B. STATEMENT OF THE CASE

On October 10, 2011, the Walla Walla County prosecutor charged appellant Tony Barclay with one count of second-degree burglary and one count of third-degree theft. 1CP 3-4. On October 14, 2011, the prosecutor also charged Barclay with second-degree assault. 2CP 5-6.

On December 8, 2011, Barclay pleaded guilty to the burglary and assault charges. 1CP 15; 2CP 13. In his statement on plea of guilty to the burglary, he stated that he:

in the County of Walla Walla, State of Washington, on or about the 9th day of October, 2011, with intent to commit a crime against a person or property, did enter or remain unlawfully in a building or fenced area used as part of a building as in definition of WPIC 2.05 definition, other than a vehicle or dwelling, located at 398 Grain Terminal Rd., Burbank.

1CP 15. With regards to the assault, his statement declares that he “in the County of Walla Walla, State of Washington, on or about the 21st day of August, 2011, intentionally assaulted Mary L. Barclay, and inflicted substantial bodily harm, the victim being a family or household member.” 2CP 13.

In exchange for guilty pleas on the assault and the burglary, the prosecutor agreed to dismiss both the theft charge and a charge of allowing an unauthorized person to drive under a third cause number. 1CP 12. The plea offer, identical in each case, states:

The State extends the following comprehensive plea offer. For pleas of guilty to Assault 2nd degree DV and Burglary 2nd degree the State will move to dismiss the remaining count and will also move to dismiss Wall Walla District Court cause PA 110108 (allowing an unauthorized person to drive).

1CP 19; 2CP 17. On the burglary charge, the prosecutor agreed to recommend 51 months (the low end of the standard range) to run concurrently with the sentence on the assault charge. 1CP 12. On the assault charge, the prosecutor agreed to recommend 69 months, (the standard range was 63-84 months) to run concurrently with the sentence on the burglary charge, 18 months supervision, and a domestic violence protection order. 2CP 10. The plea agreement acknowledged the court could order rehabilitative programs "if the judge finds that I have a chemical dependency that has contributed to the offense." 2CP 12.

At sentencing, the court heard from Barclay first. He told the court,

This is definitely not where I planned on being. I am sorry on both these. I think this is certainly due to my mental meds that have been getting changed every month trying to get me reestablished once they cut back on the ones they had me on for several years. But that is still no excuse. I know the difference between right and wrong. Both of these should never have happened. I'm sorry.

2RP² 2. Defense counsel then explained the agreement to 51 months for the burglary and 69 months for the assault to run concurrently. 2RP 2-3. The court asked the State if it had anything to add. The prosecutor on the assault case simply mentioned the request for the domestic violence protection order and 18 months supervision. 2RP 3. The prosecutor on the burglary case, however, stated:

The state is recommending 51 months on that charge. It does appear that when both Mr. Barclay and his co-defendant were stopped, their car seemed to be pretty well outfitted to be doing exactly what they were doing; stealing wire from places that were either not watched very well or sort of agricultural areas that don't have anybody around during the day.

So for him to blame it on his meds, I can see perhaps for the assault, but not so much here. There was a lot of planning involved here and especially to rig out their car so they could run a porch light off of it and that type of thing, had burglar tools in the car.

2RP 3-4.

The court found Barclay guilty of second-degree burglary and imposed legal financial obligations totaling \$1,673, to be paid \$50 per month beginning nine months after release from custody or when funds become available in the Department of Corrections. 2RP 4-5. Regarding confinement, the court stated the low end of the range was not appropriate.

2RP 5. It rejected the State's 51-month recommendation and imposed 60

² In each cause number there are two identical volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 8, 2011; 2RP – Dec. 19, 2011.

months. 2RP 5; 1CP 26. The court also ordered Barclay to have no contact with Mitch Sutton for five years. 2RP 5; 1CP 28.

The Court also found Barclay guilty of assault. The court again rejected the State's recommendation and imposed the high end of the standard range, 84 months, instead of the agreed-upon 69 months. 2RP 7; 2CP 24. The court inquired of the jail sergeant regarding credit for time served. 2RP 7. The sergeant replied, "If you are running them concurrent, 56 days." 2RP 7. The court responded, "I am not running them concurrent. I'm going to run them consecutively." 2RP 7.

The court also ordered 18 months community custody. 2RP 8; 2CP 24. On the assault charge, the court found Barclay had a chemical dependency problem that contributed to the offense and ordered him to obtain drug/alcohol treatment. 2RP 7; 2CP 19, 25. The court also ordered Barclay to pay \$1,807.50 in legal financial obligations. 2RP 7. The court then advised Barclay of his appeal rights and the hearing concluded. 2RP 9-10. There was no discussion of Barclay's financial circumstances. Nor was there any discussion of substance abuse or chemical dependency. Nevertheless, the community custody conditions included a requirement that Barclay "shall not consume or possess alcohol." 2CP 25. And the judgment and sentence on each count includes a finding Barclay has the ability to pay. 1CP 23; 2CP 21.

C. ARGUMENT

1. BARCLAY'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE UNDERCUT ITS LOW RANGE SENTENCING RECOMMENDATION, THEREBY BREACHING THE PLEA AGREEMENT.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838- 39, 947 P.2d 1199 (1997). "[D]ue process requires a prosecutor to adhere to the terms of the agreement." Id. at 839 (citing, inter alia, Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984)). Because a defendant gives up important constitutional rights by pleading guilty, the State must adhere to the terms by recommending the agreed-upon sentence. Sledge, 133 Wn.2d at 839; State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781 (1999). The State violated Barclay's due process rights when it undercut its agreed low-range sentence recommendation by arguing the burglary involved "a lot of planning," and his car was "outfitted" for stealing wire. 2RP 3-4.

Breach of a plea agreement is manifest constitutional error that may be raised for the first time on appeal. State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002);³ State v. Van Buren, 101 Wn. App. 206, 212, 2 P.3d 991 (2000). Constitutional error is manifest when the necessary facts are in

³ Sanchez is a plurality opinion, but neither the concurrence/dissent by Justice Chambers nor the dissent by Justice Madsen disagreed with the lead opinion that the issue was properly raised for the first time on appeal as manifest constitutional error.

the record and the error causes actual prejudice. Id. The facts necessary to Barclay's challenge are contained in the clerk's papers and transcripts discussed below. He has shown actual prejudice because, as in Sanchez, the court actually imposed a longer sentence than the prosecutor's recommendation. See Sanchez, 146 Wn.2d at 346 (breach of plea agreement causes actual prejudice where defendant not sentenced according to the plea agreement); 2RP 2-3, 5, 7.

a. The State Breached the Plea Agreement by Offering Unsolicited Information Undercutting Its Low-End Recommendation.

In determining whether a prosecutor has breached a plea agreement, this Court reviews the prosecutor's actions and comments objectively from the sentencing record as a whole. State v. Carreno-Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). Although the State need not enthusiastically make the sentencing recommendation, "[it] is obliged to act in good faith." Id. The State's duty of good faith requires it not undercut the terms of the agreement explicitly or implicitly by conduct indicating intent to circumvent its terms. Sledge, 133 Wn.2d at 840; Jerde, 93 Wn. App. at 780.

The State does not breach the agreement when it reiterates facts necessary to support an agreed high-end standard range recommendation or when other State agents argue for an exceptional sentence, provided they do not do so on the prosecutor's behalf. Carreno-Maldonado, 135 Wn. App. at

84; Sanchez, 146 Wn.2d at 349-55. Further, the prosecutor does not breach a plea agreement when the comment is in response to argument by defense counsel or when the court solicits the challenged comment. See Carreno-Maldonado, 135 Wn. App. at 85 (noting prosecutor's comment was not a response to a question by the court or argument by defense counsel).

A breach occurs, however, when the State offers unsolicited information that undercuts the State's obligations under the plea agreement. Id. at 83.⁴ Carreno-Maldonado was charged with one count of first-degree rape and multiple counts of second-degree rape. Id. at 79-80. The plea agreement required the State to recommend the low end of the standard range on the first-degree rape and the middle of the standard range on the second-degree rapes. Id. But at the sentencing hearing, the State, purportedly speaking for the victims, argued Carreno-Maldonado had preyed on vulnerable women and his crimes were "so heinous and so violent it showed a complete disregard and disrespect for these women." Id. at 81. The court sentenced Carreno- Maldonado to high-end standard range

⁴ See also State v. Xavier, 117 Wn. App. 196, 200-02, 69 P.3d 901 (2003) (breach where prosecutor referred to aggravating sentencing factors and other charges not pursued and called the defendant one of the most "prolific child molesters"); State v. Van Buren, 101 Wn. App. 206, 217, 2 P.3d 991 (2000) (breach where prosecutor downplayed mid-range sentencing recommendation and focused the court's attention on three aggravating factors); Jerde, 93 Wn. App. at 782 (breach where prosecutor emphasized aggravating factors when obligated to make a mid-range sentencing recommendation).

sentences. Id. at 82. Arguing the State had breached its agreement, Carreno-Maldonado sought to withdraw his guilty plea. Id.

On appeal, this Court held the State breached the plea agreement because its argument at sentencing undercut its agreed recommendation. Id. at 84. In so holding, this Court noted that with regards to the first-degree rape charge, the agreed recommendation was for the low end of the standard range, there was no need for the prosecutor to reference any additional facts. Id. Additionally, the prosecutor's remarks were not a response to a query from the court or an argument by defense counsel. Id. at 85.

The prosecutor in Barclay's case also offered unsolicited additional facts and argument that undercut the agreed recommendation. 2RP 3-4. The agreed recommendation on the burglary charge was 51 months, the bottom of the standard range. 1CP 12. No additional facts were needed to support that recommendation. On the contrary, the court would have had to find additional facts to impose anything less than that recommendation. See RCW 9.94A.535 ("The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.").

The prosecutor attempted to frame her remarks as a response to Barclay's own comments regarding his substance abuse problem, but they were not. Barclay's attorney expressly endorsed the 51 months agreed to in

the plea bargain. 2RP 2. Barclay himself blamed his offenses on changes in his medication, but expressly acknowledged that was no excuse:

I am sorry on both these. I think this is certainly due to my mental meds that have been getting changed every month trying to get me reestablished once they cut back on the ones they had me on for several years. But that is still no excuse. I know the difference between right and wrong. Both of these should never have happened.

2RP 2. Barclay did not request an exceptional sentence below the standard range. Nor did he request a Drug Offender Sentence Alternative. He did not even request mercy or leniency. Barclay merely apologized, tried to explain himself, and accepted responsibility. His comments did not trigger a need for the prosecutor to present additional facts undercutting the plea agreement.

A similar argument was rejected in Van Buren. In that case, the prosecutor agreed to recommend a sentence in the middle of the standard range. Van Buren, 101 Wn. App. at 209. However, at sentencing, the prosecutor brought up information that would support an exceptional sentence. Id. Later, Van Buren exercised her right to allocution. She told the court she was sorry, she “didn’t kill her,” “tried to help her,” and “never wanted this to happen.” Id. at 210. The prosecutor then argued Van Buren’s apology had no merit, there was no evidence she tried to help the victim and emphasized Van Buren’s lack of remorse. Id. On appeal, the State argued

the prosecutor merely made a fair response to Van Buren's request for a low-end sentence. Id. at 216.

The court rejected this argument for two reasons. First, the prosecutor did not link the argument to its agreed mid-range recommendation (lack of remorse being an aggravator that would justify an exceptional sentence). Id. at 216-17. Second, Van Buren's sentencing brief did not argue for a lower end sentence based on remorse. Id. at 217. As in Van Buren, the prosecutor here did not link her comments to the agreed recommendation, and Barclay's comments did not request any other sentence. Therefore, the State breached the plea agreement by bringing up unnecessary additional facts that implicitly argued for a longer sentence.

b. The Remedy Is Specific Performance or to Permit Bradley to Withdraw Both Pleas If He So Chooses.

When the State breaches its agreement, the defendant pleads guilty on a false premise. Mabry, 467 U.S. at 509. Such an error infects the entire sentencing proceeding and is structural error that cannot be harmless. Carreno-Maldonado, 135 Wn. App. at 88 (citing Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). This structural error is not limited to the burglary charge because the pleas were part of a package deal. See, e.g.; In re Pers. Restraint of Bradley, 165 Wn.2d 934, 942-43, 205 P.3d 123 (2009); In re Pers. Restraint of Shale, 160 Wn.2d 489, 158 P.3d

588 (2007). In considering whether pleas in different cause numbers are indivisible parts of a package deal, courts look at objective manifestations of intent. Bradley, 165 Wn.2d at 941. As a general rule, where pleas are made at the same time and described in one document, and accepted at a single proceeding, they are indivisible. Id. at 941-42. But these are not “elements” that must be met for a plea to be indivisible; other manifestations of intent can also lead to a finding of indivisibility. See id. at 943 (amended information to reduced charge on date of sentencing showed prosecutor’s intent to reduce charges in exchange for pleas to both cause numbers despite separate plea documents).

Barclay’s pleas are indivisible because they were part of a “comprehensive plea offer.” 1CP 19; 2CP 17. Barclay’s pleas were entered at the same time and accepted in the same proceeding, but were not contained in the same plea document. 1RP 2-11; 1CP 19; 2CP 17. But the language of the State’s offer makes clear this was an indivisible package deal: “The State extends the following comprehensive plea offer. For pleas of guilty to Assault 2nd degree DV and Burglary 2nd degree the State will move to dismiss the remaining count and will also move to dismiss [another cause number].” 1CP 19; 2CP 17.

Therefore, the breach of the plea agreement is structural error that tainted the entire sentencing proceeding encompassing both cause numbers.

Bradley, 165 Wn.2d at 942-43; Carreno-Maldonado, 135 Wn. App. at 88. Because the State breached the plea agreement, an error that cannot be harmless, the remedy is to allow Barclay to elect whether to withdraw the guilty pleas or seek specific performance by the prosecutor. State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988).

2. THE COURT EXCEEDED ITS AUTHORITY BY IMPOSING CONSECUTIVE SENTENCES WITHOUT FINDING ANY AGGRAVATING FACTORS.

A court's sentencing authority is limited; it may impose only those sentences authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). "When a sentence has been imposed for which there is no authority in law, the trial court has the duty and power to correct the erroneous sentence, when the error is discovered." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)). Barclay's sentence should be vacated because imposing consecutive sentences for offenses sentenced on the same day constitutes an unauthorized exceptional sentence. State v. Rasmussen, 109 Wn. App. 279, 34 P.3d 1235 (2001).

With the exception of serious violent offenses and certain firearms offenses, consecutive sentences for current offenses may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.⁵ RCW 9.94A.589. Neither second-degree assault nor second-degree burglary is a serious violent offense. RCW 9.94A.030(45).

By its plain language and by interpretation by this Court, RCW 9.94A.589(3) does not apply to this case. That provision states:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3) (emphasis added). This statute permits the court to expressly order a sentence to run consecutively to a sentence which “has been imposed.” RCW 9.94A.589(3). This language clearly refers to a previously imposed sentence, first because of its use of the past tense to refer to the other felony. Second, it specifically makes exception for subsection (1) referring to “two or more current offenses.” This subsection does not apply to a case like Barclay’s, with two sentences imposed on the same day

⁵ When a trial court imposes a sentence that is outside the standard range set by the Legislature, the court must find a substantial and compelling reason to justify the exceptional sentence. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 305, 979 P.2d 417 (1999).

at the same sentencing hearing within moments of each other. 2RP 1-10. This Court has already so held on nearly identical facts in Rasmussen, 109 Wn. App. 279.

Rasmussen was convicted of four separate offenses committed on three different dates over the course of eight months. Id. at 280-82. All three cause numbers were sentenced the same day. Id. at 282. Former RCW 9.94A.400(3), which the State relied on to argue for consecutive sentences, provided:

[W]henever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the rime being sentence unless the court pronouncing the current sentence expressly orders that they be served consecutively.

Rasmussen, 109 Wn. App. at 283 (quoting former RCW 9.94A.400(3)). Rasmussen argued this provision did not apply because offenses sentenced on the same date are “current offenses” under former RCW 9.94A.360(1) which states, “Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.400.” Rasmussen, 109 Wn. App. at 284 (quoting former RCW 9.94A.360).

The court agreed with Rasmussen and concluded that, absent unique circumstances where sentencing is delayed because the defendant absconded, RCW 9.94A.400(3) did not apply to offenses sentenced the same day. Rasmussen, 109 Wn. App. at 286. The court held that the court could not run the sentences consecutively without finding aggravating circumstances that would justify an exceptional sentence. Id. Rasmussen's sentence was vacated and the case remanded for resentencing. Id.

Former RCW 9.94A.360, which the court found applicable in Rasmussen, is identical in all relevant respects to RCW 9.94A.525, which states, "Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." RCW 9.94A.525. Like the different cause numbers in Rasmussen, Barclay's sentences, imposed on the same day, must be concurrent unless the exceptional sentence procedures of the SRA are followed. Because they were not, Barclay's exceptional consecutive sentences should be vacated and the case remanded for imposition of concurrent sentences. Rasmussen, 109 Wn. App. at 286.

3. THE TRIAL COURT ERRED WHEN IT FOUND BARCLAY HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 312). While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); cf. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

This error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 403, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973

P.2d 452 (1999) (defendant may challenge an illegal sentence for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's finding Barclay had the present or future ability to pay his LFOs. 2RP 1-10; 1CP 23; 2CP 21. And given Barclay's frequent incarcerations, this is unlikely to be true. Accordingly, finding 2.5 was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 404-05.⁶ Before the State can collect LFOs, moreover, there must be a properly supported, individualized judicial determination that Barclay has the ability to pay. Id. at 405 n. 16.

4. THE SENTENCING COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY BY IMPOSING THE NO-CONTACT ORDER WITH MITCH SUTTON.

As a condition of a sentence, the trial court may impose “[c]rime-related prohibition[s]” and prohibit “conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(13); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Appellate courts review crime-related prohibitions for an abuse of discretion. State v. Ancira, 107 Wn. App. 650, 653, 27 P. 3d 1246 (2001). In the right circumstances, a no contact order can constitute a “crime-related

⁶ Barclay does not challenge the imposition of these LFOs but rather the unsupported finding of present and future ability to pay.

prohibition” authorized under RCW 9.94A.505(8). State v. Armendariz, 160 Wn.2d 106, 111-18, 156 P.3d 201 (2007).

But no facts in this case connect Mitch Sutton to this crime. As discussed above, the only facts the court may consider in imposing sentence in this case are those Barclay admitted in his statement on plea of guilty. RCW 9.94A.530(2). That statement gives no clue as to the identity of Mitch Sutton or why contact with him would be prohibited. Nor was there any discussion of him at either the plea hearing or the sentencing hearing.

State v. Riles, 135 Wn.2d 326, 352, 957 P.2d 655 (1998), is on point. In Riles, defendant Gholston was convicted of raping a 19-year-old woman. Id. at 336. The court imposed a condition prohibiting “contact with . . . any minor-age children without the approval of your [CCO] and mental health treatment counselor.” Id. at 337. Striking this condition, the Court held the statutory authority for courts to prohibit contact with a specified class of individuals did not justify a no-contact order against minors when the victim was an adult. Id. at 352-53. Because there is no reasonable relationship in the record between Mitch Sutton and the offense, this condition of Barclay’s sentence must be stricken. Riles, 135 Wn.2d at 352-53.

5. IN THE ABSENCE OF EVIDENCE, THE TRIAL COURT LACKED AUTHORITY TO FIND CHEMICAL DEPENDENCY CONTRIBUTED TO THE OFFENSE, REQUIRE TREATMENT AND PROHIBIT ALCOHOL POSSESSION.

Whenever a sentencing court exceeds its statutory authority, its action is void. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). Sentencing courts may impose only those sentences the Legislature has authorized by statute. Id. Unauthorized sentencing conditions may be challenged for the first time on appeal. State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

Courts may only require treatment or prohibit possession of alcohol if chemical dependency or alcohol abuse contributed to the offense. State v. Jones, 118 Wn. App. 199, 204, 207-08, 76 P.3d 258 (2003). Neither the plea hearing nor the sentencing hearing nor the plea agreement indicates any evidence of substance abuse related to Barclay's offenses. Nevertheless, the court found chemical dependency contributed to the assault and imposed conditions requiring Barclay to participate in chemical dependency treatment and refrain from possessing alcohol. The finding is unsupported by the record and the conditions are unlawful because there is no evidence in the record that they are crime related. Jones, 118 Wn. App. at 204.

a. The Chemical Dependency Finding Should Be Stricken Because It Is Unsupported by the Record.

First, the trial court's finding is unsupported by the evidence. A sentencing court's factual findings are reviewed for substantial evidence. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). Chemical dependency means "[a]lcoholism; drug addiction; or dependence on alcohol and one or more other psychoactive chemicals, as the context requires." RCW 70.96A.020(4).⁷ There is no evidence, substantial or otherwise, that Barclay abused alcohol or was either addicted to or dependent on drugs or a "psychoactive chemical." At most, there is one reference to difficulty with his changing "mental meds." 2RP 2. The implication is of ongoing mental health needs requiring adjustment of prescription medication, not addiction or substance abuse.

RCW 9.94A.607(1)⁸ authorizes a trial court to find an offender's chemical dependency contributed to the offense and require treatment as a condition of the sentence. But a trial court may base its sentence only on

⁷ This definition applies in the criminal context. See RCW 9A.44.010(13) (Chemically dependent person "for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is 'chemically dependent' as defined in RCW 70.96A.020(4).").

⁸ RCW 9.94A.607 provides in relevant part:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

evidence in the record. State v. Payne, 117 Wn. App. 99, 105, 69 P.3d 889 (2003). Here, no evidence was presented. The court simply declared Barclay to be chemically dependent. Because there was no evidence of chemical dependency, the trial court erred by entering the finding.

b. With No Evidence of Chemical Dependency, the Court Erred in Requiring Barclay to Participate in Treatment.

Because there was no evidence of chemical dependency here, the trial court also erred by ordering treatment. See Jones, 118 Wn. App. at 212. In RCW 9.94A.500(1), the legislature specified a procedure by which a trial court may impose chemical dependency conditions:

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense. . . .

Despite the requirement of a “chemical dependency screening report,” no such report was mentioned during the sentencing hearing and none was filed. And the court did not order a presentence investigation.

On Barclay’s judgment and sentence, the trial court placed a check mark next to the preprinted entry that states, “The court finds

that the defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A._____.” 2CP 19. The court neither specified the appropriate statute upon which it relied nor cited to the evidence that supported the finding.

Because the court failed to follow statutory requirements, the chemical dependency finding must be stricken. See Jones, 118 Wn. App. at 209. Jones pleaded guilty to first-degree burglary and other crimes. Id. at 202. During the plea hearing, Jones’ attorney explained Jones was bipolar, was off his medication at the time of the offenses, was using methamphetamine at the time of his crimes, and that the combination “obviously resulted in what happened.” Id.

The court sentenced Jones after accepting his pleas. Id. No evidence was presented to suggest alcohol played a role in the offense. Id. As conditions of community custody, the court ordered Jones not to consume alcohol and to participate in alcohol counseling. Id. at 203. The court did not make any finding that alcohol contributed to Jones’ crimes. Id. On appeal, the court held the trial court could not require Jones to participate in alcohol counseling, given the lack of evidence that alcohol contributed to his crimes. Id. at 207-08. As in Jones, the condition requiring Barclay to participate in treatment should be stricken due to the court’s failure to follow statutory procedure and the lack of supporting evidence.

c. The Court Exceeded Its Authority in Imposing a Condition of Community Custody Prohibiting Barclay from Possessing Alcohol.

Under RCW 9.94A.703, a sentencing court may require an offender to “Refrain from consuming alcohol.” RCW 9.94A.703. However, it may not prohibit the mere possession of alcohol unless alcohol is related to the crime. Jones, 118 Wn. App. at 204. The condition of community custody prohibiting Barclay from possessing alcohol should be stricken because it exceeds the sentencing court’s statutory authority.

Under RCW 9.94A.703, the sentencing court must impose certain conditions of community custody and may impose or waive certain others. Among the waivable conditions is a requirement that the offender “Refrain from consuming alcohol.” RCW 9.94A.703. The statute also permits other conditions of community custody if they are “crime related.” RCW 9.94A.703. In this case, the court went beyond what was authorized by statute and imposed a condition that prohibits Barclay from even possessing alcohol despite the absence of any evidence alcohol played any role in his offense. 2CP 25.

The court has interpreted the prior version of RCW 9.94A.703 as permitting the court to impose a prohibition on consuming alcohol regardless of whether the crime involved alcohol.⁹ Jones, 118 Wn. App. at 207; RCW 9.94A.703 (“As part of any term of community custody, the court may order an offender to: . . . Refrain from consuming alcohol.”). However, other alcohol related conditions, such as a requirement of treatment, are only authorized if they are crime related. Jones, 118 Wn. App. at 207-08.

Here, there is no indication alcohol played any role in the offenses at issue. Yet, under this condition, Barclay could be arrested based on legal use or possession of alcohol by a member of his household. He is not permitted even to host a party wherein some of the guests may imbibe. The court should reverse this general ban on alcohol possession because it is unauthorized by statute. Id. at 212.

⁹ Jones considered the Sentencing Reform Act as it existed in 2001. However, like the law in effect currently, the 2001 law permitted the court to impose a condition of community custody that the offender “shall not consume alcohol” without mention of possession or purchase. 118 Wn. App. at 206; RCW 9.94A.703.

D. CONCLUSION

The State violated Barclay's due process rights when it breached the plea agreement by undercutting the bargained-for low-range sentence recommendation. This Court should vacate the judgments and sentences and remand the case so Barclay may either withdraw his guilty plea or hold the State to its bargain. Alternatively, the case should be remanded for imposition of concurrent, not consecutive, standard range sentences and to strike the unsubstantiated findings and conditions.

DATED this 12th day of June, 2012.

Respectfully submitted,

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State v. Tony Barclay

No. 30475-2-III

Certificate of Service by email

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 12th day of June, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 12th day of June, 2012.

X Patrick Mayovsky