

64398-3

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NO. 64398-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHERWIN CORALES,

Appellant.

REC'D  
APR 16 2010  
King County Prosecutor  
Appellate Unit

TILED  
DEPT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 APR 16 PM 3:57

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

The Honorable Gregory P. Canova, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The appellant received ineffective assistance of counsel at sentencing.

Issue Pertaining to Assignment of Error

Appellant Sherwin Corales was convicted of burglary, unlawful possession of a firearm, and theft. The burglary and theft involved the same time and place, the same victim, and the same intent. However, Corales's attorney failed to request that the trial court treat the offenses as the same criminal conduct for sentencing purposes. Is remand for resentencing required because counsel was ineffective in preventing the court from exercising its discretion to treat the offenses as the same criminal conduct?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged appellant Sherwin Corales with residential burglary, unlawful possession of a firearm in the second degree, and theft of a firearm. CP 10-11. Corales elected to proceed with a bench trial. RP 6. The trial court found Corales guilty of all charges. RP 344. The court sentenced

Corales to 46 months of confinement. CP 15. Corales filed a timely notice of appeal. CP 41.

## 2. Trial Testimony

Late one night Roger Sprague's neighbor called and told him that people were in his house and the back door was open. RP 232. At the time, Sprague was at his recording studio and was not expecting visitors. RP 232-33. Sprague told his neighbor to call the police and raced home. RP 233.

When Sprague approached the house, he noticed that the back door was ajar and there was a hole in the back window. RP 234. Sprague went into the garage and found that many of his tools were missing. RP 235. Sprague's bedroom had been ransacked. RP 236. He noticed that a flat screen television, a Mac Pro computer, clothing, and a shotgun were gone. RP 236. Sprague estimated that around \$16,000 of goods had been stolen from his home. RP 239.

Sprague walked outside to talk to the police, who were in the street. RP 237, 239. Police told Sprague that they had caught some individuals running from his home to the house across the street. RP 239. Police asked Sprague to identify property they had found in a shed behind the neighboring home. RP 240. Sprague

recognized his shotgun and flat screen television. RP 240. Police found Sprague's computer in the dog kennel. RP 240. A woman came out of the home and handed Sprague a bottle of cologne that was his. RP 240. Police found most of the items that had been stolen from Sprague's home. RP 241-44.

Police arrested four young men they believed were involved in the burglary. RP 22-23. Appellant Sherwin Corales was among them. RP 23. Later that evening, Corales gave a statement to the police admitting his participation in the burglary. CP 24-25. Corales stated that he had carried the shotgun from Sprague's home. CP 25.

Corales did not testify at trial. The defense theory of the case was that Corales is not fluent in English, so there were likely inaccuracies in the statement that he gave to police that he would have been unable to identify and correct. RP 336-37.

At a CrR 3.5 hearing, the trial court found that Corales knew enough English to knowingly, intelligently, and voluntarily waive his rights when giving a statement to the police. CP 34-36. After the bench trial, the court concluded that Corales was guilty of residential burglary, unlawful possession of a firearm in the second degree, and theft of a firearm. CP 27.

### 3. Sentencing

The State calculated Corales's offender score as "five" for the burglary conviction since he had two prior felony convictions, two current felony convictions, and was on community placement at the time of the crime. RP 347. Corales had an offender score of "four" for the other two convictions since unlawful possession of a weapon in the second degree and theft of a firearm do not score against each other. RP 347. The prosecutor pointed out that any sentences imposed for those two crimes must run consecutively to one another. RP 347-48; RCW 9.94A.589(1)(c). The prosecutor recommended a total sentence of 46 months. RP 351. This recommendation was on the low end of the standard range given Corales's youth and evidence that he was not the leader in burglary. RP 351.

The defense attorney agreed with the prosecutor's calculation of Corales's offender score and did not say anything about the same criminal conduct issue at sentencing. CP 39. Instead, the defense attorney requested that the court consider imposing a DOSA. CP 39-40.

The trial court denied the defense request for a DOSA because there was no indication from the evidence that drugs were

involved in the planning or execution of the burglary. RP 353. Police did not find any drugs on Corales when they arrested him. RP 353. The court noted Corales's young age and followed the prosecutor's recommendation. RP 355. The court imposed a term of 29 months for the burglary conviction, 13 months for the unlawful possession conviction, and 33 months for the theft. CP 15. The term for burglary runs concurrently to the other two terms; the term for unlawful possession runs consecutively to the theft term for a total of 46 months of confinement. CP 15. The court imposed sentence without discussion of Corales's offender score or the same criminal conduct issue. RP 355.

C. ARGUMENT

CORALES WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE THAT THE OFFENSES OF BURGLARY AND THEFT CONSTITUTED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING.

Corales received ineffective assistance of counsel because his attorney failed to argue his burglary and theft offenses should be counted as the same criminal conduct in determining his offender score. Counsel mistakenly maintained Corales's offender score was "four" on the theft count when the trial court had the discretion to calculate the offender score as "three." Likewise, the

court could have reduced Corales's offender score on the burglary count by one point. Counsel's erroneous stipulation prevented the court from exercising its discretion on the issue.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Prejudice is demonstrated from a reasonable probability that, but for counsel's performance, the result would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

RCW 9.94A.589(1)(a) provides:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

"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). Whether one crime furthered the other informs the objective intent analysis. Id.

Two of the crimes charged in this case — burglary and theft — involved the same time, the same place, and the same victim. The crimes occurred on March 22, 2009. The crimes occurred inside Sprague's house. And Sprague was the victim of both crimes.

The only remaining question is whether the crimes involved the same criminal intent. "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). The burglary and theft offenses involved the same criminal intent because the burglary furthered the theft. Corales and his accomplices broke into the house for the purpose of stealing valuable items.

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 separately from other offenses otherwise constituting the same criminal conduct. Lessley, 118 Wn.2d at 781. However, 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).

Because the burglary and theft involved the same time, place, victim, and intent, defense counsel performed deficiently when he failed to ask the sentencing court to make a "same criminal conduct" finding that would have reduced Corales's offender score to "four" on the burglary count and "three" on the theft count. He stipulated to Corales's offender scores based on the apparent notion that the burglary could not be counted as the same criminal conduct in relation to the theft offense. This waived the issue. State v. Nitsch, 100 Wn. App. 512, 514, 997 P.2d 1000 (2000). But the failure to preserve error can constitute ineffective assistance and justifies examination of the error on appeal to determine ineffectiveness. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

"Reasonable attorney conduct includes a duty to investigate the relevant law." State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). A cursory review of the relevant cases would have revealed the court retained discretion to treat Corales's offenses as the same criminal conduct. Defense counsel was deficient in failing to ask the trial court to exercise its discretion in Corales's favor.

Had the court exercised its discretion in Corales's favor, his offender score on the burglary count would have been "four" instead of "five." His standard range for the burglary would have been 15 to 20 months rather than 22 to 29 months. His offender score for the theft count would have been "three" instead of "four." The standard range for the theft offenses would have been 26 to 34 months rather than 31 to 41 months. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of seven for first degree burglary and seriousness level of six for firearm theft).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome

by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). No legitimate tactical decision justified stipulating to an offender score that increased Corales's term of confinement when there was a possibility the court would have determined a lesser offender score had such a request been made. Defense counsel should have presented the same criminal conduct argument as a second alternative to the DOSA request given that both the prosecutor and the court indicated they were willing to be lenient given Corales's young age. RP 351, 355.

Whether current offenses encompass the same criminal conduct is a question within the discretion of the sentencing court. State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). But defense counsel must request that the court exercise its discretion. In Nitsch, defense counsel's stipulation to the offender score amounted to "a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion." Nitsch, 100 Wn. App. at 520. Here, defense counsel's stipulation foreclosed the trial court from exercising its discretion to count the burglary offense as part of the same criminal conduct.

Corales need not show counsel's deficient performance more likely than not altered the outcome. Strickland, 466 U.S. at 693. He need only show lack of confidence in the outcome. Thomas, 109 Wn.2d at 226. The court here did not address the same criminal conduct issue at sentencing. Corales establishes prejudice because this Court cannot be confident, based on the record, that the trial court would not have concluded that the burglary and theft constituted the same criminal conduct and reduced Corales's offender scores had it been asked to do so. Remand for resentencing is the appropriate remedy.

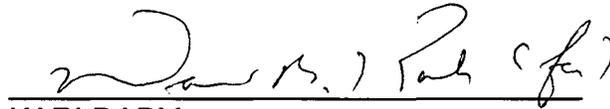
D. CONCLUSION

For the reasons set forth above, Corales's case should be remanded for a new sentencing hearing.

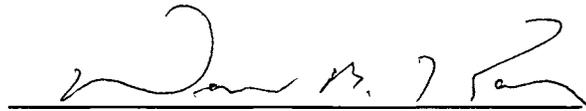
DATED this 16<sup>th</sup> day of April 2010.

Respectfully submitted,

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64398-3-I
	)	
SHERWIN CORALES,	)	
	)	
Appellant.	)	

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**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 16<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHERWIN CORALES  
DOC NO. 325155  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF APRIL, 2010.

x Patrick Mayovsky