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REC'D

AUG 28 2013

King County Prosecutor
Appellate Unit

NO. 70265-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

BEE THOW SAYKAO,

Appellant.

Handwritten signature and date stamp: 8/28/13 1:20

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

The Honorable Kimberly Prochnau, Judge

APPELLANT BRIEF

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to apply a “same criminal conduct” analysis to two of the appellant’s prior convictions.

2. The trial court erred when it found the appellant has the current or future ability to pay legal financial obligations (LFOs).

Issues Pertaining to Assignments of Error

1. Did the trial court err in failing to apply a “same criminal conduct” analysis to the appellant’s 2006 convictions for second degree burglary and second degree malicious mischief?

2. Did the trial court err when it found that the appellant has the current or future ability to pay LFOs?

B. STATEMENT OF THE CASE¹

The State charged appellant Bee Thow Saykao with first degree assault and alleged a deadly weapon enhancement based on the October 2010 stabbing of Kenneth Bradley. CP 1-4. Saykao represented himself at trial after the superior court denied his multiple requests to rescind the

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 12/22/10; 2RP – 9/28/11; 3RP – 1/26/12; 4RP – 4/16/12; 5RP – 4/18/12; 6RP – 5/15/12; 7RP – 7/9/12; 8RP – 7/16/12; 9RP – 9/10/12 (motion to continue trial); 10RP – 9/10/12; 11RP – 9/11/12; 12RP – 9/12/12; 13RP – 9/12/12 (discussion of interpreter scheduling); 14RP – 9/13/12; 15RP – 9/17/12; 16RP – 9/18/12; 17RP – 9/19/12; 18RP – 9/20/12; 19RP – 9/21/12; and 20RP – 9/26/12.

waiver of counsel. 5RP 2-32; 7RP 9-10; 8RP 4; 11RP 48-49; CP 49-50, 119-20.

Saykao testified he acted in self-defense but also asked the court to instruct the jury on the lesser degree offense of second degree assault. CP 87, 95; 15RP 14-15; 16RP 4-11; 17RP 38-40. The jury convicted Saykao of the lesser offense but entered no verdict as to the deadly weapon enhancement. CP 105-08.

At sentencing, the State argued Saykao had an offender score of five based on four prior convictions, including one “doubled” conviction for second degree assault. 20RP 10; CP 115; former RCW 9.94A.525(8) (2010). Saykao argued his 2003 convictions should count as a single point. 20RP 9-10. The court determined those convictions were not same criminal conduct as they occurred on different dates and involved different victims. 20RP 11-12. Sentencing Exs. 1, 2, 3. But the court did not evaluate whether Saykao’s 2006 convictions for second degree burglary and second degree malicious mischief, based on conduct occurring on the same date, constituted same criminal conduct. Sentencing Ex. 1.

The court dismissed the deadly weapon allegation and, based on an offender score of five, sentenced Saykao to a standard range sentence of 26 months of incarceration. 20RP 16; CP 110, 112. The court also sentenced to Saykao to 18 months of community custody. CP 113.

The court asked Saykao about his ability to pay for an attorney on appeal. Saykao explained that due to the nearly two-year incarceration pending trial, he had no job prospects and could not afford an attorney. 20RP 15-16.

No additional discussion of Saykao's financial status occurred. Nonetheless, the court made the following preprinted "finding" on the judgment and sentence form: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 111 (Finding 4.2). The court imposed a total of \$600 in LFOs, all mandatory.² CP 111. The court entered an order requiring the Office of Public Defense to appoint an attorney on appeal. (sub no. 263, Order on Criminal Motion); Supp. CP ____ (sub no. 271, Correspondence).

Saykao appeals.

² See RCW 43.43.7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment). The Court left open the possibility of restitution, but none was sought. CP 111; Supp. CP ____ (sub no. 268, Memorandum re: Restitution); RCW 9.94A.753. The court waived other LFOs. CP 111; 20RP 16.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO APPLY A “SAME CRIMINAL CONDUCT” ANALYSIS TO SAYKAO’S 2006 CONVICTIONS.

A current sentencing court must calculate an offender score based on an offender's “other current and prior convictions.” RCW 9.94A.589(1)(a). A sentencing court is bound by an earlier court's finding that multiple offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i). If the previous court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current court must independently evaluate whether those prior convictions involve the same criminal conduct and, if they do, must count them as one offense. Id.; RCW 9.94A.589(1)(a); State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (“A sentencing court . . . must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. The court has no discretion on this.” (citation omitted) (citing RCW 9.94A.525(5)(a)(i); State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995); State v. Lara, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992)), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013);); cf. State v. Nitsch, 100 Wn. App. 512, 522, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000) (court has no duty to conduct a same criminal

conduct analysis sua sponte as to *current* crimes). The offender bears the burden of proving offenses encompass the same criminal conduct. Graciano, 176 Wn.2d at 539.

Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). “Intent, in this context, is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). “[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).

“A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030. Under former RCW 9A.48.080 (1994), a person is guilty of second degree malicious mischief if he “knowingly and maliciously causes physical damage to the property of another in an amount exceeding two hundred fifty dollars.”

Here, the judgment and sentence suggests the crimes occurred at the same location on the same date and involved the same victims. Sentencing Exhibit 1 at 4 9 (address information regarding no contact order); Id. at App. E (order setting restitution). As for intent, it seems clear that burglary may further malicious mischief. Lessley, 118 Wn.2d at 777.

While the prior sentencing court did not find Saykao’s 2006 convictions were the same criminal conduct, it ordered him to serve his sentences concurrently. Under these circumstances, and in light of Saykao’s objection to the State’s representation of his offender score, the current sentencing court was required to apply the same criminal conduct

test to the prior convictions. Torngren, 147 Wn. App. at 563; see also State v. Williams, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 4176076, *3 (Aug. 15, 2013) (sentencing court erred by relying on the burglary anti-merger statute to count Williams's prior burglary and robbery convictions separately rather than relying on the same criminal conduct test).

Saykao did not agree to his offender score. The court erred by failing to exercise its statutory duty under RCW 9.94A.525(5)(a)(1) to apply the same criminal conduct test to the 2006 convictions. Williams, 2013 WL 4176076, *3; Torngren, 147 Wn. App. at 563. Remand is required for the Court to apply the test mandated by the Sentencing Reform Act.

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

To enter a finding as to ability to pay legal financial obligations, a sentencing court must consider the defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012). The record reflects that although the court considered Saykao's financial status in determining whether he was indigent for purposes of appeal, it did not consider his ability to pay LFOs. The trial court's finding on Saykao's ability to pay must therefore be stricken.

Under former RCW 9.94A.760(1) (2008), the trial court may impose LFOs as part of the sentence, designating the total amount and segregating that amount according to separate assessments for restitution, costs, fines, and other required assessments. But RCW 10.01.160(3) prohibits the court from ordering a defendant to pay costs unless the defendant is or will be able to pay them.

This Court reviews the trial court's decision under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04. Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Calvin, ___ Wn. App. ___, 302 P.3d 509, 522 n.2 (2013) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Saykao's judgment and sentence contains the following preprinted language: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 111 (Finding 4.2). This finding conflicts with the evidence. Saykao explained he was employed at the time of the incident, but lacked employment prospects after serving two years in jail. 17RP 68-69; 20RP 16.

While formal findings are not required, 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. Put another way, where the trial court enters a finding, it must be supported by evidence. Calvin, 302 P.3d at 521-22 (remanding to strike unsupported finding, as well as imposition of certain discretionary court costs).

As in Bertrand and Calvin, the trial court failed to support its "finding" that Saykao had the present or future ability to pay his legal financial obligations. Cf. State v. Lundy, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 4104978 at *3-5 (Aug. 13, 2013) (distinguishing Bertrand and affirming imposition of LFOs in part based on Lundy's history of lucrative employment); State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991) (statement in presentence report that Baldwin was employable showed sentencing court properly considered burden of costs under RCW 10.01.160(3)).

Accordingly, the court's determination that Saykao had the present or future ability to pay the LFOs was clearly erroneous and should be stricken. Calvin, 302 P.3d at 522; Bertrand, 165 Wn. App. at 405. Moreover, before the State can collect even mandatory legal financial obligations, there must be a properly supported, individualized judicial determination that Saykao has the ability to pay. Id. at 405 n.16.

D. CONCLUSION

This Court should remand so the trial court may conduct a “same criminal conduct” analysis as to Saykao’s 2006 convictions and for the court to strike the unsupported finding from the judgment and sentence.

DATED this 28TH day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70265-3-1
)	
BEE SAYKAO,)	
)	
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 28TH DAY OF AUGUST 2013, 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 AND/OR VIA EMAIL.

[X] BEE SAYKAO
97 S. MAIN STREET
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF AUGUST 2013.

X Patrick Mayovsky

2013 AUG 20 1:20 PM
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA