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MAR 30 2012

King County Prosecutor
Appellate Unit

COURT OF APPEALS NO. 67765-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

MARTIN EGAN-RUSSERT,

Appellant.

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

The Honorable Steven Gonzalez, Judge,

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>King County Superior Court No. 11-1-00438-1 SEA</u>	1
2. <u>King County Superior Court No. 11-1-00191-8 SEA</u>	6
C. <u>ARGUMENT</u>	8
THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING A SEXUAL DEVIANCY EVALUATION AS IT WAS NOT CRIME-RELATED.	8
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007)	9
<u>State v. Barnett</u> , 139 Wn.2d 462, 987 P.2d 626 (1999)	8
<u>State v. Flores-Moreno</u> , 72 Wn. App. 733, 866 P.2d 648, rev. denied, 124 Wn.2d 1009 (1994)	10
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003)	9
<u>State v. Kolesnik</u> , 146 Wn. App. 790, 192 P.3d 937 (2008), rev. denied, 165 Wn.2d 1050 (2009)	9
<u>State v. Motter</u> , 139 Wn. App. 797, 162 P.3d 1190 (2007)	9
 <u>RULES, STATUTES AND OTHERS</u>	
Chapter 9.94A RCW	9
Former RCW 9.94A.650 (2010)	8
RCW 9.94A.505(8)	9
RCW 9.94A.030(10)	9
Sentencing Reform Act of 1981	9

A. ASSIGNMENT OF ERROR

The court acted outside its authority in ordering appellant to undergo a sexual deviancy evaluation as part of his sentence for felony harassment.

Issue Pertaining to Assignment of Error

Whether the court acted outside its authority in ordering appellant to undergo a sexual deviancy evaluation as a condition of community custody for telephone harassment where there was nothing sexual alleged about the harassment?

B. STATEMENT OF THE CASE

This appeal involves plea bargains entered under two separate cause numbers. CP 74-86, 142-46.

1. King County Superior Court No. 11-1-00438-1 SEA

On February 8, 2011, the King County prosecutor charged appellant Martin Egan-Russert with one count of attempted indecent liberties, allegedly committed against Jacqueline Brown on January 27, 2010. CP 1. The certification for determination of probable cause alleged that the attempt occurred at Egan-Russert's home, where Brown agreed to meet him for a dinner date. CP 8.

As recounted in the certification, Jacqueline reportedly told the responding officer:

Jacqueline [sic] arrived and went inside until Martin finished getting ready. While she was sitting on the couch, Martin walked up and sat down next to her. He attempted to kiss her and she pulled away from him. He then put his hands on her face and attempted to kiss her again. She again pulled away and told him she didn't want to kiss him. Martin stated "I could if I wanted to." After this he put his hand on the inside of her leg and attempted to push her legs apart. Jacqueline [sic] stated to Officer Fitzgerald that she thought he was going to attempt to touch her vagina because he started to slowly move his hand up her leg. She told him to stop again and she stood up to leave. He grabbed both of her arms and asked her to give him a few minutes to talk with her. When he was in another room, she gathered her belongings and left the house. She took the bus back to her residence and called 911 to report the incident (SPD #10-31154). Jacqueline [sic] stated Martin appeared to be highly intoxicated during their time together. She was fearful he would have attempted to hurt her or force himself on her if an unknown male did not show up at the residence when she was there. She did not have any injuries and declined medical attention at the scene.

CP 8.

Jacqueline reportedly gave a similar statement to the detective who later telephoned her:

When she got there, Martin told her that he wasn't ready and told her to come inside. She said she agreed, but the moment she stepped inside she felt uncomfortable. Martin appeared drunk and/or high. He was slurring, stumbling, and his pupils were extremely dilated. He placed himself between her and the door and started making sexual advances toward her touching her in her "female areas." She kept trying to push him away, but he kept advancing.

There was another male in the apartment that kept going in and out. She believed that he was a friend of Martin, but doesn't know his name.

Jacqueline [sic] believes that if the other male had not been there, she would have been raped by Martin. After about twenty minutes, she was able to build up enough courage to excuse herself. She was afraid the entire time that if she tried to leave that Martin would get upset and become violent based on his demeanor and intoxication. Martin followed her out and grabbed her by the arms. He lifted her up and said, "I can take whatever I want from you." She was able to pull away and backed away from Martin.

CP 8-9.

Before trial, however, the parties reached an agreement. Egan-Russert pled guilty to an amended information charging him with: (1) felony telephone harassment of Laura Miller; (2) attempted escape in the second degree; and (3) fourth degree assault of Jacqueline Brown, committed with sexual motivation. Supp. CP __ (sub. no. 79, amended information, 8/24/11). As part of the plea bargain, Egan-Russert agreed the court could consider as "real facts" those set forth in the certification for determination of probable cause. CP 52 (non-felony plea agreement); CP 53 (felony plea agreement); CP 56 (plea agreement for non-felonies incorporated by reference in statement of defendant on plea of guilty); CP 35 (plea agreement for felony incorporated by reference in statement of defendant); RP (9/2/11) 7-8.

For the non-felonies, Egan-Russert agreed to make an agreed sentencing recommendation consisting of: credit for time served at sentencing; mental health treatment; a substance abuse evaluation and follow-up treatment, and entry of various no contact orders. CP 55. Although the prosecutor indicated the state would recommend a sexual deviancy evaluation, this condition was not agreed. CP 55.

Regarding guilt for the fourth degree assault, Egan-Russert wrote:

On or about 1/27/10, in King County, WA, I intentionally assaulted Jacqueline Brown. I was drunk, I tried to kiss Ms. Brown and I placed my hand on her leg, for the purpose of sexual gratification.

CP 60.

For the felony telephone harassment charge, Egan-Russert likewise agreed to make an agreed sentencing recommendation for credit for time served at sentencing, a mental health evaluation, a substance abuse evaluation and follow-up treatment, and entry of various no contact orders. CP 35. The parties similarly noted that any recommendation for a sexual deviancy evaluation was not agreed. CP 35, 51. Nor was the location for a mental health evaluation. CP 51.

At the sentencing hearing on September 2, 2011, the parties made their agreed recommendations as anticipated. RP (9/2/11) 2-5, 7. The state made its request for a sexual deviancy evaluation based on the assault of Jacqueline Brown. RP 5. The defense agreed Egan-Russert's behavior was offensive, but argued it was fueled by intoxication not sexual deviancy. RP 8-9. The court indicated it would require the evaluation, however, based on the allegations in the certification for determination of probable cause. RP 16.

For the non-felonies (escape and assault), the court imposed (concurrent with King County No. 11-1-00191-8 SEA, discussed infra) 364 days suspended on condition Egan-Russert serve credit for time served, obtain a substance abuse evaluation and follow all treatment recommendations, obtain a mental health evaluation and follow all treatment recommendations, and obtain domestic violence batterer's treatment. CP 64.

On the felony telephone harassment of Laura Miller, the court imposed a first time offender waiver consisting of credit for time served (concurrent with King County No. 11-1-00191-8 SEA), and community custody for 12 months. CP 68. As conditions of community custody, the court ordered: an alcohol and substance

abuse evaluation; a mental health evaluation (by provider approved by community corrections officer (CCO)); domestic violence batterer's treatment; and a sexual deviancy evaluation (by a treatment provider approved by the CCO) and follow all treatment recommendations. CP 72; RP 15-16.

2. King County Superior Court No. 11-1-00191-8 SEA

On January 1, 2011, the King County prosecutor charged Egan-Russert with one count of residential burglary, allegedly committed at the home of Sara Grossman, on January 2, 2011. CP 87. The state also alleged Egan-Russert committed one count of third degree malicious mischief against the property of Lana Moore, the same day. CP 87-88. The certification for determination of probable cause alleged that Egan-Russert entered Grossman's home without her permission and threw clothes and other items about. CP 91. The certification further alleged that Egan-Russert caused damage to Moore's vehicle after she and Grossman discovered Egan-Russert at Grossman's home and were attempting to leave in Moore's car. CP 90.

Grossman would later admit she gave Egan-Russert permission to enter her apartment and a key. Supp. CP __ (sub.

no. 11, Sara Grossman's Demand for Revocation of Order Prohibiting Contact, 2/4/11).

Egan-Russert went to trial on amended charges of including a third count of felony harassment of Sara Grossman, but a defense motion for mistrial was granted at the end of trial. CP 105-106; Supp. CP __ (sub. no. 105, State's Trial Memorandum, 8/10/11); Supp. CP __ (sub. no. 104A, Clerk's Minutes, 8/10/11).

Thereafter, Egan-Russert pled guilty to an amended information charging him with one count of third degree malicious mischief, allegedly committed against the property of Lana Moore. Supp. CP __ (sub. no. 112, Statement of Defendant on Plea of Guilty, 8/24/11).

At the combined sentencing with No. 11-1-00438-1 SEA, the court imposed the following sentence on the malicious mischief charge: 11 months concurrent with No. 11-1-00438-1 SEA, suspended on condition of credit for time served, no contact with Lana Moore, obtain a mental health evaluation and follow all treatment recommendations. CP 138-40.

The court did not order Egan-Russert have no contact with Grossman. The court explained that it had imposed the domestic violence batterer's treatment (DVBT) as a protective measure,

instead (albeit on the other case, discussed supra). When defense counsel objected to the DVBT condition, Egan-Russert said he was “comfortable with [the court’s] choice.” RP 17.

C. ARGUMENT

THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING A SEXUAL DEVIANCY EVALUATION AS IT WAS NOT CRIME-RELATED.

There was no allegation the telephone harassment of Laura Miller was sexual in nature. Accordingly, the community custody condition requiring Egan-Russert to undergo a sexual deviancy evaluation was not crime-related, and the court had no authority to impose it as part of Egan-Russert’s first time offender waiver sentence. RCW 9.94A.650.¹

“A trial court may impose only a sentence which is authorized by statute.” State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Because it is solely the legislature’s province to

¹ In relevant part, former RCW 9.94A.650 provides:

(2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

(3) The court may impose up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years.

fix legal punishments, a proper community custody condition must be authorized by the legislature. State v. Kolesnik, 146 Wn.App. 790, 806, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009).

In general, conditions that do not reasonably relate to the circumstances of the crime are unlawful unless specifically permitted by statute. State v. Jones, 118 Wn.App. 199, 205, 76 P.3d 258 (2003). Generally, this Court reviews the imposition of a crime-related prohibition for an abuse of discretion. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, the issue of whether the trial court exceeded its statutory authority in imposing community custody conditions is reviewed de novo. Armendariz, 160 Wn.2d at 110; State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose “crime-related prohibitions” as a condition of a sentence. RCW 9.94A.505(8). A “crime-related prohibition” prohibits conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10).

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67765-9-1
)	
MARTIN EGAN-RUSSERT,)	
)	
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 30TH DAY OF MARCH 2012, 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] MARTIN EGAN-RUSSERT
5614 BROOKLYN AVENUE NE
SEATTLE, WA 98105

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH 2012.

x Patrick Mayovsky