

FILED  
Court of Appeals  
Division III  
State of Washington  
2/13/2020 3:18 PM

COA NO. 36867-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ISAAC S. SPRAUER,

Appellant.

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

The Honorable Brian Huber, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **THE EXCEPTIONAL SENTENCE MUST BE VACATED BECAUSE THE STATE DID NOT GIVE NOTICE OF ITS INTENT TO SEEK ONE PRIOR TO TRIAL.**

The State appropriately concedes the exceptional sentence must be vacated because the trial court violated Sprauer's Sixth Amendment right to a jury trial in finding the aggravating factors. Brief of Respondent (BR) at 1. The question of whether the State was required to provide notice before trial that it would seek an exceptional sentence is therefore probably moot.

The State, though, seeks to justify its failure to provide notice, relying on State v. Edvalds, 157 Wn. App. 517, 237 P.3d 368 (2010), review denied, 171 Wn.2d 1021, 257 P.3d 663 (2011). BR at 6-7. The State's reliance is misplaced because Edvalds supports Sprauer's argument.

Edvalds held notice need not be given for an exceptional sentence imposed under RCW 9.94A.535(2)(c), the free crimes factor. Edvalds, 157 Wn. App. at 535. The free crimes factor can be found by a judge without running afoul of the Sixth Amendment right to a jury trial. Id. at 534-35. "Notice is clearly required as to factors that go to the jury," but no notice was needed for the free crimes factor because it is an exception to the jury trial right articulated in Blakely v. Washington, 542 U.S. 296,

124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Id. at 532, 534-35. As conceded by the State, the factors relied on by the trial court here to impose an exceptional sentence require jury fact finding to comply with the Sixth Amendment. The reasoning in Edvalds reinforces Sprauer's argument that notice must be given for such factors.

The State nonetheless attempts to find solace in Edvalds by arguing the defendant, without having received proper notice, can request a continuance to address the State's attempt to obtain an exceptional sentence. BR at 6 (citing Edvalds, 157 Wn. App. at 530). The part of Edvalds cited by the State is contained in the factual recitation of the case but played no role in the legal analysis. No case holds lack of notice for an exceptional sentence ceases to be an error when the defense does not request a continuance. If the State's suggestion were followed, the notice requirement would be an empty shell because the State could violate it with impunity.

The State explains it did not provide notice because it anticipated obtaining a conviction for first degree assault, which would have provided a lengthy sentence that did not call for an exceptional sentence. BR at 6. The State's strategy failed because the jury acquitted Sprauer of first degree assault. It is not the appellate court's job to rescue the State from its own failed trial strategy. In re Pers. Restraint of Heidari, 159 Wn. App.

601, 615, 248 P.3d 550 (2011), aff'd, 174 Wn.2d 288, 274 P.3d 366 (2012).

**2. THE COURT ERRED IN REQUIRING MENTAL HEALTH EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.**

The State appropriately concedes the court erred in imposing the mental health condition in the absence of the requisite finding that Sprauer suffers from a statutorily defined mental illness that contributed to the offense. BR at 8. It requests remand for the court "to either strike the condition or to make the requisite finding." BR at 8.

If there is any fact finding on remand, it cannot be a matter of entering a rote finding that Sprauer meets the statutory requirement. There must be reasonable grounds "to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." RCW 9.94B.080. The definitions of a mentally ill person are varied and specific. RCW 71.24.025(32) ("Mentally ill persons" is defined "in subsections (1), (10), (39), and (40) of this section.").

The facts found must be supported by substantial evidence. See State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190, 1192 (2007) ("we review findings of fact that underlie the imposition of community custody for substantial evidence"), disapproved on other grounds by State v.

Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Padilla, 190 Wn.2d 672, 683, 416 P.3d 712 (2018) (to resolve crime-relatedness issues, courts review the factual basis for a condition under the "substantial evidence" standard). The State has not argued substantial evidence could support the findings required by statute. If this issue is remanded for possible fact-finding, the State will need to justify its request and the requisite legal standard must be met.

**B. CONCLUSION**

For the reasons stated above and in the opening brief, Sprauer requests the exceptional sentence be vacated, the challenged conditions of community custody be stricken or modified, the challenged legal financial obligations be stricken, the interest provision in the judgment and sentence corrected, and unauthorized interest be stricken.

DATED this 17<sup>th</sup> day of February 2020

Respectfully Submitted,

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**February 13, 2020 - 3:18 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36867-0  
**Appellate Court Case Title:** State of Washington v. Isaac S. Sprauer  
**Superior Court Case Number:** 17-1-00148-5

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