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Court of Appeals
Division III
State of Washington
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COA No. 36867-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent

v.

ISAAC SPRAUER,

Appellant.

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

RESPONDENT'S BRIEF

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A. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by defendant.

B. STATEMENT OF THE CASE

Following a jury trial, defendant was convicted of the lesser included offense of Assault in the Second Degree after being acquitted of Assault in the First Degree, and acquitted of the offense of Assault in the Fourth Degree. This timely appeal does not challenge the underlying conviction, but instead challenges the sentence with respect to the exceptional sentence, certain conditions of community supervision, and legal financial issues.

C. CONCESSIONS and ISSUES

The State concedes this matter should be remanded to the trial court for re-sentencing with respect to the following issues:

1. Exceptional sentence. The State concedes the imposition of the exceptional sentence imposed under RCW 9.94A.535(2)(b) and (d) should have been determined by the jury and not the judge.

2. Mental health evaluation. The court did not follow the requirements of RCW 9.94B.080 when imposing a condition of supervision that defendant obtain a mental health evaluation and to comply with any treatment recommendations.

3. Prohibition from associating with felons. The State concedes the condition of supervision prohibiting the association with felons as written is overly broad insofar as it prohibits association with felons as opposed to associating with persons known to be felons. The remedy on remand is to narrow or refine the language.

4. Legal financial obligations. The States concedes the crime victim's compensation assessment is the only cost that was ordered. All other costs and non-restitution interest were not imposed by the court but either were included in the Judgment and Sentence because of scrivener errors or not stricken from the boiler plate language of the form.

D. FACTS

Isaac Sprauer brutally strangled Tammy Myers twice (RP. 253-256), causing her eyes to fill with blood (RP 265, 278), and causing her to urinate herself (260). At one point Ms. Myers felt

she was going to die (RP. 256, 277-78) but for the intervention of another person (RP 259).

Pre-trial, Mr. Sprauer's attorney requested a competency evaluation and hearing under RCW 10.77. Mr. Sprauer was evaluated both by the state's evaluator, Dr. Amy Sellers of Eastern State Hospital, and by Dr. Tye Hunter, a court-appointed evaluator. Dr. Sellers noted in her report to the court that "Mr. Sprauer has a significant history of being a danger to others and an evaluation by a designated mental health professional should be considered prior to release from a non-psychiatric facility." CP 15. In his report, Dr. Hunter noted the many times Mr. Sprauer has had mental evaluations in numerous prior cases. CP Exhibit 4.

Upon conclusion of the competency hearing, the trial court found, although Mr. Sprauer suffered from mental illness, he was nevertheless competent to stand trial. CP 19-23. The matter then proceeded to trial on charges of assault in the first degree and assault in the fourth degree. CP 30.

On the assault of Ms. Myers, the jury chose to convict on the lesser included offense of assault in the second degree and acquitted on the offense of assault in the first degree. CP 55. The jury also acquitted Mr. Sprauer of assault in the fourth degree

involving Ms. Myer's adult son. CP 57. Had Mr. Sprauer been convicted of the higher offense, his standard range would have been 93 to 123 months.¹ The standard range for the lesser offense was 3 to 9 months.²

The matter later proceeded to sentencing where the State requested an exceptional sentence above the standard range, and defense counsel requested a standard range sentence. The court imposed an exceptional sentence of 30 months, along with 18 months of community custody. CP 63-71. The court's findings to support the exceptional sentence were based on unscored misdemeanors and felonies that if not considered would have resulted in a standard range sentence that was otherwise too lenient as per RCW 9.94A.535(2)(b) and (d). CP 72.

E. AUTHORITY AND DISCUSSION

I. Exceptional Sentence.

- a. "Too lenient" aggravating factor for prior criminal history should have been determined by a jury, not the court.

¹ 2018 Washington State Adult Sentencing Guidelines, p. 272

² 2018 Washington State Adult Sentencing Guidelines, p. 274.

Mr. Sprauer correctly points out that the exceptional sentence was not authorized to be determined by the judge. Upon a plain reading of RCW 9.94A.535(2), an exceptional sentence based on criminal history is to be determined by the judge and not the jury. RCW 9.94A.535 provides, in pertinent part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

...

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

...

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

However, our courts have weighed in on this very statute and declared the "too lenient" provision of section (2) unconstitutional when a jury is not involved in this determination.

State v. Saltz, 137 Wn. App. 576, 582, 154 P.3d 282 (2007).³ The State concedes the exceptional sentence imposed by the judge and not the jury was improper and that remand for resentencing is appropriate.

b. Notice by State.

Mr. Sprauer contends the State erred for not giving notice of intent to seek an exceptional sentence. The standard range for the higher charge was very significant and the State had no intention of seeking an exceptional sentence for that charge. Further, the plain text of RCW 9.94A.535 and the intertwined notice provisions of RCW 9.94A.537 do not apply where the aggravating factors are based on “the fact of a prior conviction.” See State v. Edvalds, 157 Wn.App. 517, 531-32 (2010). While *Edvalds* focused on the “free crimes” provision of RCW 9.94A.535(2)(c), and its holding does not apply to the “too lenient” provision of RCW 9.94a.535(2)(b) and (d), *Edvalds* is noteworthy because it recognized there are situations where the State is not faulted for not anticipating developments prior to conviction. One remedy referenced by *Edvalds* would have been a continuance by the defendant to address the State’s

³ Despite the pronouncement of RCW 9.94A.535(2)(b)’s unconstitutionality in 2007, the legislature has not corrected this provision even though it has amended other parts of the statute several times since then.

request. *Supra* at 530. Here, the defendant did request a continuance to research and brief the issue, and the sentencing was continued. CP 455.

Under the facts and circumstances as they developed in the matter at hand, the State should not be faulted for not giving notice on an uncharged lesser included offense. In this instance Mr. Sprauer is not prejudiced by the failure of the State to give notice of its intent to seek an exceptional sentence on an uncharged lesser included offense where defendant knew the state was seeking a lengthy sentence on the original charge.

II. Conditions of Community Supervision.

a. Mental health evaluation and treatment.

The sentencing court imposed a condition of supervision that defendant submit to a mental health evaluation and comply with recommended treatment. RCW 9.94B.080 allows such condition:

if the court finds that reasonable grounds exist 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. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court

may order additional evaluations at a later date if deemed appropriate.

In this instance, although the record contains the competency evaluations by two experts who noted Mr. Sprauer's mental health issues, and specifically that Dr. Sellers noted a need for an evaluation prior to being released into the community because of his extensive history of violence, and there was discussion at sentencing about Mr. Sprauer's mental health issues, the court imposed the evaluation and treatment condition without making an express finding required by RCW 9.94B.080. The remedy on remand is for the court to either strike the condition or to make the requisite finding.

b. Prohibiting association with felons.

Mr. Sprauer's complaint that he should not be prohibited from associating with felons during his supervision is not supported by statute or case law. Mr. Sprauer cites no case dealing with a supervision condition prohibiting association with persons known to be felons deemed to be invalid under freedom of association analysis. To the contrary, conditions restricting the freedom of parolees and probations to associate with persons who have been convicted of crimes have been upheld against First Amendment

challenges. See e.g., *Birzon v. King*, 469 F.2d 1241, 1243 (2nd Cir. 1972).

RCW 9.94A.703(3)(b) authorizes the sentencing court to impose a condition that refrains Mr. Sprauer from “direct or indirect contact with ... a specified class of individuals.” Mr. Sprauer, as a convicted felon, may have his freedom of association rights restricted if doing so would be “reasonably necessary to accomplish the essential needs of the [S]tate and public order.” *State v. Warren*, 134 Wn.App. 44, 70, 138 P.3d 1081 (2006). Prohibiting supervisees from contact with other felons is recognized as a valid method for reducing recidivism. “Offenders who associate with other criminal offenders are more likely to commit further crimes.” *Crime and Justice, Warren, R* (2007), *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries*, 47, Washington, DC: National Institute of Corrections.⁴ See also *United States v. Napulou*, 593 F.3d 1041, 1045 (9th Cir.)(2010)(Restricting association to law-abiding citizens “is reasonably related to the goals of rehabilitation and public safety.”); and 18 U.S.C. §3553(a)(2)(C) and (D)(Similar Federal probation conditions are designed to “prevent antisocial relationships and to

encourage prosocial relationships.”(Federal Probation and Pretrial Services, Chapter 2: Communicating/Interacting with Persons Engaged in Criminal Activity and Felons).⁵

There is a plethora of case law authority, however, on the issue of the knowledge requirements of the other person’s felon status. See for e.g., *State v. Knott*, No. 35546-2-III (2019); *United States v. King*, 608 F.3d 1122, 1128 (9th Cir. 2010); and *People v. Garcia*, 19 Cal.App. 4th 97 (1993). The State recognizes here that the language of the condition restricting contact with felons does not contain the mens rea element of knowledge or knowing. The remedy on remand here, as in *Knott*, is to narrow the language of the prohibition to include an element that the defendant had knowing contact with persons he knew were felons.

III. Legal Financial Obligations.

The State agrees with the facts and authority submitted by Mr. Sprauer on the issue of legal financial obligations, and agrees the Judgment and Sentence should be corrected to reflect that only the \$500 crime victim compensation assessment is ordered – and that all other offending provisions should be stricken.

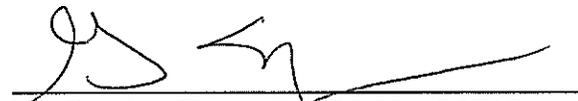
⁴ (<https://www.ncsc.org/~media/Microsites/Files/CSI/Reduce-Recidivism.ashx>).

⁵ <https://www.uscourts.gov/services-forms/communicating-interacting-persons-engaged-criminal-activity-felons-probation-supervised-release-conditions>

F. CONCLUSION

Based on the foregoing facts and authorities and concessions on certain issues, the State respectfully requests the court to remand this matter to the trial court for re-sentencing.

Respectfully submitted this
21st day of January, 2020



W. Gordon Edgar WSBA No. 20799
Prosecuting Attorney

IN THE COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,) Court of Appeals no. 36887-0-III
) Douglas County No. 171001485
)
v.)
) PROOF OF SERVICE (RAP 18.5(b))
ISAAC SPRAUER,)
) Appellant.

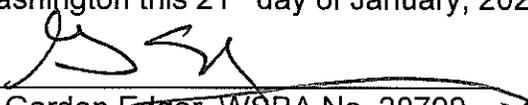
I, W. Gordon Edgar, do hereby certify under penalty of perjury that on January 21, 2020, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief to:

Casey Grannis
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And I deposited a mailed copy through the USPS to:

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Signed in Waterville, Washington this 21st day of January, 2020


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