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SEP 30 2010

King County Prosecutor  
Appellate Unit

NO. 65325-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

T.E.D.,

Appellant.

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2010 SEP 30 PM 4:10  
COURT OF APPEALS  
DIVISION ONE  
JENNIFER J. SWEIGERT

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

The Honorable Michael J. Trickey, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to dismiss.
2. The evidence was insufficient to support a finding of second-degree escape.
3. The court erred in finding appellant guilty of second-degree escape.
4. The court erred in entering judgment against appellant.

Issues Pertaining to Assignments of Error

1. Under RCW 13.40.070(3), the State may not both move to modify a juvenile's community supervision and file an information charging a criminal offense based on the same conduct. The State moved to modify appellant's supervision because he left his mother's home without permission and then charged him with second-degree escape for removing his EHM<sup>1</sup> ankle bracelet before leaving. Must his adjudication of guilt be reversed because the modification and the information were improperly based on the same conduct?

2. An EHM ankle bracelet is not a restraint. If the escape charge rests entirely on removal of the ankle bracelet, was there insufficient evidence of escape from custody?

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<sup>1</sup> Electronic Home Monitoring

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant T.E.D.,<sup>2</sup> born February 2, 1992, with second-degree escape. CP 1. The juvenile court denied T.E.D.'s motion to dismiss and found him guilty after a bench trial on stipulated facts. CP 21-23, 25-26. T.E.D. appeals. CP 49.

2. Substantive Facts

From October 21, 2009 to December 7, 2009, T.E.D. participated in the Alternatives to Secure Detention (ASD) program with authorization for Electronic Home Monitoring (EHM). CP 32. As part of his ASD contract, he acknowledged, "if I walk away from, leave without proper authorization, fail to return to, or abscond from, my approved residence or any facility or person to whose charge I have been committed, I will be charged with Escape." CP 32, 37. The contract also stated, "Failure to remain at my designated residence, or failure to return from an authorized leave or pass may result in escape charges being filed." CP 34. T.E.D. agreed to remain in the custody of his mother at her home. CP 34. Additionally, he agreed, "I will not tamper with or remove any of the electronic monitoring equipment."

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<sup>2</sup> This brief refers to appellant by his initials to protect the confidentiality of a juvenile. See, e.g., State v. C.A.E., 148 Wn. App. 720, 201 P.3d 361 (2009) ("It is appropriate to provide some confidentiality in this case. Accordingly, it is hereby ordered that initials will be used in the case caption and in the body of the opinion to identify the parties and other juveniles involved, except for governmental agencies.").

CP 35. He was warned that violation of any of the ASD contract could result in disciplinary action as prescribed by the contract, and leaving without authorization could result in escape charges. CP 37. On December 7, 2009, T.E.D. cut off the EHM ankle bracelet and left his mother's home. CP 33.

The following day, T.E.D.'s juvenile probation counselor (JPC) submitted a modification report to the court alleging T.E.D. "failed to reside in a JPC approved residence and failed to have parent's permission regarding his whereabouts by leaving home on 12-07-09 at approximately 3:00pm. Whereabouts of respondent is unknown." CP 16. JPC Ronald Tarnow recommended 30 days secure detention as a sanction for violating the conditions of his community supervision. CP 17. Similarly, Tarnow's Motion, Certificate, and Order for Arrest of Juvenile requested an arrest warrant because T.E.D. "violated the terms of the disposition order dated 08-03-09 by: failing to have parent's permission regarding whereabouts by leaving home on 12-07-09 at approximately 3:00pm. Whereabouts of respondent is unknown." CP 13. The State also filed the information in this case, alleging that between October 2, 2009 and December 7, 2009, T.E.D. escaped from EHM custody. CP 1.

T.E.D. moved to dismiss the escape charge based on RCW 13.40.070(3), which requires the State to choose between modification and filing new charges when a violation of community supervision occurs. CP 6.

The State argued its dual response was proper because it was not based on the same conduct. RP 18. It argued the modification motion was based on T.E.D.'s leaving home without parental permission; whereas the escape charge was based on his removing the EHM ankle bracelet before leaving. RP 18. The court agreed and denied T.E.D.'s motion to dismiss. RP 24.

C. ARGUMENT

1. THE STATE WAS PROHIBITED FROM FILING ESCAPE CHARGES AFTER MOVING TO MODIFY T.E.D.'S COMMUNITY SUPERVISION BASED ON THE SAME CONDUCT.

When a juvenile violates the terms of community supervision, the State is faced with a choice. It may file an information in juvenile court or divert the case. RCW 13.40.070(3). Or, "In lieu of filing an information or diverting an offense a prosecutor may file a motion to modify community supervision where such offense constitutes a violation of community supervision." RCW 13.40.070(3) (emphasis added). The plain language of this statute requires the State to choose between charging a violation as an offense or moving to modify supervision on that basis. State v. Murrin, 85 Wn. App. 754, 759-60, 934 P.2d 728 (1997). It may not do both. Id. If the State has already moved to modify based on the offense, criminal charges for that offense must be dismissed. Id. at 755-56.

T.E.D.'s adjudication of guilt for second-degree escape must be reversed because the State already moved to modify his community supervision based on his escape. The trial court erred in denying the motion to dismiss for four reasons. First, dismissal is required because the modification motion and the escape charge relied on the same underlying conduct of cutting off the bracelet and leaving the home without permission. This is necessarily the case because merely removing the ankle bracelet is insufficient evidence of escape. Even if removing the bracelet were sufficient to show escape, the underlying conduct is still the same because subsequently leaving the home was part of the ongoing offense of escape. Finally, dismissal of the charge in this case is consistent with legislative intent.

a. The State May Not Charge T.E.D. with Escape Because It Relied on the Underlying Conduct in its Motion to Modify His Community Supervision.

The State may move to modify community supervision in lieu of filing an information if "such offense" also violates the terms of community supervision. RCW 13.40.070(3). No Washington case has yet expressly discussed the contours of the "such offense" language from RCW 13.40.070(3), but some instruction can be gleaned from this Court's opinions in Murrin and State v. Tran, 117 Wn. App. 126, 69 P.3d 884 (2003).

Statutory construction is a question of law to be reviewed de novo. Murrin, 85 Wn. App. at 759.

The modification motion in Murrin alleged the juvenile had committed new offenses while on community supervision, including taking a motor vehicle on July 3, 1995. Id. at 756. Subsequently, the State charged Murrin with taking a motor vehicle without permission for the July 3, 1995 incident. Id. at 757. The court affirmed the trial court’s dismissal and held, “the express language of RCW 13.40.070(3) mandates the State to elect between filing an information and modifying community supervision when basing such State action on the same conduct.” Murrin, 85 Wn. App. at 760 (emphasis added).

The Murrin court’s use of the broader term “conduct” rather than the statutory term “offense” indicates the statute should apply when the modification motion relies on the same conduct as the information, not only when the modification motion specifically relies on a criminal offense. Thus, it is irrelevant that the modification motion in this case does not specifically refer to the criminal offense of escape, so long as the underlying conduct is the same.

Division Two of this Court adopted Division One’s Murrin rationale in Tran, holding that “under the plain language of RCW 13.40.070(3), the prosecutor may not file an information after he has elected to file a motion to

modify community supervision based on the same criminal offense.” Tran, 117 Wn. App. at 134. The modification motion in Tran alleged, among other allegations, that Tran “was brought home on January 24, 2002 by the Clark County Sheriff’s Office for driving without a license.” Id. at 129 n.1. The probation counselor noted that all the allegations were part of Tran’s ongoing out-of-control behavior. Id. at 129-30. When the State filed charges for driving without a license, Tran moved to dismiss under RCW 13.40.070. Tran, 117 Wn. App. at 130.

The State argued the modification did not rely on the criminal offense because when it alleged Tran was brought home for driving without a license, that allegation referred to a violation of Tran’s house rules, rather than to a criminal offense. Id. at 129 n.2. However, the appellate court noted that violation of the house rules and the curfew were the subject of separate allegations. Id. The trial court denied the motion to dismiss on a different rationale, reasoning that, because the elements of driving without a license were not laid out in the affidavit supporting the probation violation, the affidavit did not charge Tran with an offense. Id. at 131.

On appeal, Division Two appears to have assumed the information and the modification relied on the same offense, framing the issue as “whether RCW 13.40.070(3) prohibits the State from filing both a motion to modify a juvenile’s community supervision and a criminal charge based on

the same criminal offense.” Tran, 117 Wn. App. at 131. The Court adopted the Murrin holding but did not further discuss the trial court’s rationale that the affidavit supporting the probation violation did not allege all the elements of the criminal offense. In reversing the trial court without even discussing its rationale, the Tran court seems to have implicitly adopted the Murrin court’s broadening of the statutory term “offense” to include the conduct underlying that offense.

In this case, the conduct underlying both the community supervision modification and the escape charge occurred in a matter of minutes on the afternoon of December 7, 2009. CP 33. T.E.D. cut off his ankle bracelet and left. CP 33. The trial court appeared to accept the State’s argument that the modification and the information were based on separate conduct because the modification was based on T.E.D. leaving his mother’s home without her permission, whereas the information for escape was based on his removing the ankle bracelet. RP 18, 24. But attempting to separate this incident into separate acts of supervision violation (leaving) and escape (cutting off the bracelet) is to elevate semantic form over substance. Because T.E.D.’s supervision was modified based on his escape, the State may not also charge him with escape.

b. The Escape Charge Necessarily Relied on T.E.D. Leaving the Home Because Merely Removing the Ankle Bracelet Does Not Constitute Escape from Custody.

The State's argument that the escape charge relied solely on removing the ankle bracelet must additionally be rejected because removing an EHM ankle bracelet is not escape. Proof of escape requires proof of escape from either custody or a detention facility. RCW 9A.76.120(1)(b). When a person is under home detention, the home qualifies as a detention facility. State v. Parker, 76 Wn. App. 747, 748, 888 P.2d 167 (1995). Leaving the home while on house arrest is escape even if the ankle bracelet is not removed. Id. at 747-48. The fact that T.E.D. left his mother's home without authorization would be sufficient to show second-degree escape.

However, without that departure, merely removing the bracelet was not escape. Under the custody prong of the second-degree escape statute, "custody" is defined as "restraint pursuant to a lawful arrest or an order of a court." RCW 9A.76.010(2). But the EHM ankle bracelet is not a "restraint." Washington's criminal code does not define "restraint" in the context of escape charges. Where the Legislature has not defined a term, courts look to its ordinary dictionary definition. State v. Hachemy, 160 Wn.2d 503, 518, 158 P.3d 1152 (2007). By definition a restraint prevents or inhibits some course of action. Webster's Third New International Dictionary 193-37

(Philip Babcock Gove et al. eds. 1993) (restraint is “a means, force, or agency that restrains;” restrain means “to hold back from some action. . . prevent from doing something”). The EHM monitor does just that: monitor. See State v. Cole, 122 Wn. App. 319, 93 P.3d 209 (2004) (participant in Electronic Home Detention Program wore electronic device around her ankle so the device “could monitor whether she left her home, a prohibited activity.”). It in no way prevented or restrained T.E.D.’s movement or liberty; it merely alerted the State to his whereabouts.

The dictionary definition of restraint is consistent with prior cases. No Washington case has ever held that removal of the EHM ankle bracelet is sufficient to prove escape. For purposes of arrest, restraint may be accomplished by physical force, threat of force, or conduct implying force will be used. State v. Solis, 38 Wn. App. 484, 486, 685 P.2d 672 (1984). Escape from custody, rather than from a detention facility, requires that a person break free from a physical restraint on his or her movement. See, e.g., id. at 487 (when parole officer grabbed Solis’s arm, he was restrained and within her custody); State v. Bryant, 25 Wn. App. 635, 636-38, 608 P.2d 1261, 1263 (1980) (escape was complete once Bryant removed himself from sheriff’s physical restraint and fled, although he was recaptured minutes later).

The ASD contract also indicates removal of the ankle bracelet is not considered an escape. CP 34. It states that violation of the terms (such as refraining from tampering with or removing the monitoring equipment), may result in a return to secure detention. CP 34. However, under that contract, only the failure to remain at the designated residence or return from authorized leave that can result in escape charges. CP 34. Similarly, the “Acknowledgment of the Revised Code of Washington Alternatives to Secure Detention and Pass Status Youth” also warned T.E.D. that violating the ASD contract would result in “disciplinary action,” whereas only leaving home without authorization or failing to return would result in escape charges. CP 37.

To prove escape, the State had to prove T.E.D. escaped from a detention facility or from custody, i.e., either that he left the home or broke free from a restraint. Because the EHM bracelet monitors without restraining, removal of the bracelet, without more, is insufficient evidence of escape. Therefore, the escape charge necessarily relied on T.E.D. leaving his mother’s home. Since that is the same conduct used to justify modifying his supervision, RCW 13.40.070(3) prohibited the prosecutor from charging T.E.D. with escape.

c. Leaving Home Without Permission Was Part of the Ongoing Offense of Escape.

Even if removing the ankle bracelet were sufficient basis for the escape charge, it would still constitute the same offense as the conduct supporting the modification. Escape is complete the moment a person removes him or herself from physical restraint. Bryant, 25 Wn. App. at 638. From that moment, until the person is returned to custody, there is an ongoing criminal offense. See, e.g., United States v. Bailey, 444 U.S. 394, 413, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980) (“[W]e think it clear beyond peradventure that escape from federal custody as defined in § 751(a) is a continuing offense.”); see also, e.g., Wells v. State, 687 P.2d 346, 350 (Alaska App. 1984) (“[E]scape under Alaska law is a continuing offense.”); Campbell v. Griffin, 101 Nev. 718, 710 P.2d 70, 72 (1985) (“escape is by its nature a continuing offense”); State v. Martinez, 109 N.M. 34, 36-37, 781 P.2d 306 (N.M. App. 1989) (“[T]he statute indicates a legislative intent that escape constitutes a continuing offense.”).

A person does not commit a second criminal act in remaining at large, or in taking several steps in order to achieve escape from custody. See id. Thus, if removal of the ankle bracelet was escape, T.E.D. merely continued the same offense when he left his mother’s home. Because his

departure was part of his ongoing escape conduct and was also used to modify his supervision, dismissal was required under RCW 13.40.070.

d. The Denial of T.E.D.'s Motion to Dismiss Thwarts Legislative Intent By Subjecting a Juvenile to the More Punitive Philosophy of the SRA.

Finding the same conduct underlies both the modification and the information in this case is consistent with the legislative intent behind RCW 13.40.070. Leniency in punishment is a hallmark of the juvenile justice system versus the punishment of adults under the Sentencing Reform Act (SRA). State v. Chavez, 163 Wn.2d 262, 271, 180 P.3d 1250 (2008) (discussing State v. J.H., 96 Wn. App. 167, 182, 978 P.2d 1121 (1999)). The more lenient penalties of the Juvenile Justice Act promote its goals of rehabilitation and accountability, rather than retaliation. Chavez, 163 Wn.2d at 271-72. RCW 13.40.010.

The Legislature's mandate that juvenile offenders not be penalized twice for community supervision violations, with both modification of supervision and criminal charges based on the same conduct, appears to be part of the philosophy of leniency and rehabilitation that characterize the JJA in contrast to the SRA. Unlike juveniles, adults sentenced under the SRA are subject to both modification of supervision conditions and criminal escape charges based on the same conduct. RCW 9.94A.6333.<sup>3</sup> Permitting

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<sup>3</sup> RCW 9.94A.6333 provides in relevant part:

the State to split the conduct of escape into several different actions in order to penalize T.E.D. twice for his escape thwarts the Legislature's intent by essentially subjecting T.E.D. to the adult sentencing framework via semantic hair-splitting.<sup>4</sup>

The statutory language is plain. The State may move to modify community supervision "in lieu of" filing an information for an offense. RCW 13.40.070(3). It may not do both. Id.; Tran, 117 Wn. App. at 134; Murrin, 85 Wn. App. at 760. T.E.D. escaped from custody by cutting off his EHM ankle bracelet and leaving home without permission so that his whereabouts were unknown to the State. Because the State moved to modify his community supervision on this basis, it may not charge him with escape as well.

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(1) If an offender violates any condition or requirement of a sentence, and the offender is not being supervised by the department, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

•••

(4) Nothing in this section prohibits the filing of escape charges if appropriate.

<sup>4</sup> Cf. Bailey, 444 U.S. at 406-07 ("The administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors. This system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions, either traditional or novel, that Congress neither stated nor implied when it made the conduct criminal.").

2. ALTERNATIVELY, THE EVIDENCE WAS INSUFFICIENT TO PROVE SECOND-DEGREE ESCAPE.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), overruled on other grounds by Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). If this Court concludes the escape charge was based solely on removing the ankle bracelet, and not on leaving the home without permission, then T.E.D.'s adjudication of guilt and disposition should be reversed because the evidence is insufficient to support a finding of guilt. See section C.1.b., supra.

D. CONCLUSION

For the foregoing reasons, T.E.D. respectfully requests this Court reverse his adjudication of guilt and order of disposition for second-degree escape and remand with instructions to dismiss.

DATED this 30<sup>th</sup> day of September, 2010.

Respectfully submitted,

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WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65325-3-1
	)	
T.E.D.,	)	
	)	
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 30<sup>TH</sup> DAY OF SEPTEMBER, 2010, 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] T.E.D.  
6901 SW DELRIDGE WAY  
SEATTLE, WA 98106

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*

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