74233-7

NO. 74233-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

E.B.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

AMENDED BRIEF OF APPELLANT

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A. INTRODUCTION

The juvenile court imposed a suspended disposition on E.B. for the maximum term, 65 weeks, allowed under the standard disposition range. The State appealed, arguing that a suspended disposition was precluded by law and that a manifest injustice disposition was unwarranted. While the appeal was pending, E.B. violated the terms of his supervision, so the juvenile court revoked the suspended disposition and imposed a sentence below the standard range. E.B. has been serving that sentence in Juvenile Rehabilitation Authority, but the confinement period will end in November, 2016.

In light of the substantial changes that have occurred to this case while review was pending, the parties and the commissioner of this Court agreed to restrict the scope of appellate review to an issue of substantial public import, to wit: whether the juvenile court had the authority to impose a suspended disposition under the circumstances. This amended brief addresses only that issue.

The State respectfully asks this Court to hold that a suspended disposition is authorized under the Juvenile Justice Act under only limited circumstances not present here. A juvenile court does not have the authority to impose a suspended disposition

simply because the court believes that a manifest injustice will occur if the standard range of confinement is imposed. A suspended disposition is a different *kind* of disposition, not simply a *shorter* disposition.

This Court should remand the case to juvenile court for a new disposition hearing with directions to impose a determinate sentence. The juvenile court should be permitted to consider anew whether a standard range disposition would create a manifest injustice under the circumstances.

B. AMENDED ASSIGNMENT OF ERROR

The court erred in Conclusion of Law 7 by suspending the ordered disposition.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Under the Juvenile Justice Act (JJA), suspended dispositions are authorized under only limited circumstances and they are expressly forbidden as to an offender adjudicated of robbery in the second degree, and as to manifest injustice sentences. The court suspended a manifest injustice disposition on

E.B.'s offense of robbery in the second degree. Was the suspended disposition precluded by statute as a matter of law?

D. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

A woman laid her purse on the floor at a public library in Bellevue while making copies. E.B. came up behind the woman, grabbed her purse, and fled. The woman chased E.B., caught him near an elevator, and took hold of his backpack and her purse to prevent his escape. E.B. dragged the woman towards an exit door. In the struggle, the woman fell to one knee. E.B. then struck her in the side of the head with his fist, took the purse, and fled. He was caught and detained just outside the library by a witness. Police arrested E.B. after he was positively identified by the woman and the witness. He admitted that he had taken the woman's purse. CP 4-6.

The woman robbed and assaulted by E.B. spoke very little English but she was accompanied by her daughter who translated for her. CP 5. She commented after the robbery that her head was hurting "like it was too full." CP 5; RP (10/14) 21. She later went to

the hospital and through an interpreter provided the following medical history:

> This patient is a 45 y.o. female who presents after being assaulted. Was at the library just prior to arrival when someone took her purse and phone. When she pursued him, he hit her with his fist on the right side of her head. She fell to the ground. No LOC. Pain is located in the right arm, right knee, and dull right headache, 8/10 in severity. No vomiting. Some neck pain as well. Her legs and arms feel generally weak and tingly, and muscles in arms and legs are aching.

Exhibit 2 at 2. The medical diagnoses was as follows: Sprain of neck, sprain and strain of unspecified tile of shoulder and upper arm, head injury, unspecified (no loss of consciousness), hip, thigh, leg, and ankle, abrasion or friction burn. Id. at 1.

2. CHARGES, PLEA AND DISPOSITION.

E.B. was charged with robbery in the second degree. CP 3. Based on his criminal history, a standard range disposition was 52-65 weeks. E.B. pled guilty as charged. CP 31-39; RP (10/14) 20.

On disposition, the State and the juvenile probation officer recommended a standard range disposition. RP (10/14) 20-24. E.B.'s counsel recommended that the Court impose local sanctions as a manifest injustice downward departure from the standard range. CP 10-21; RP (10/14) 25-32. The Court initially ordered

that a disposition of 52-65 weeks at the Juvenile Rehabilitatoin Authority (JRA) be suspended for one year. RP (10/14) 46. The State objected and the probation officer pointed out that a manifest injustice sentence must be determinate. RP (10/14) 47. The court acknowledged that the sentence "was not expressly authorized by the statute." RP (10/14) 48. It said, however, that a manifest injustice sentence was appropriate because "I don't think [E.B.] intended on committing bodily injury." RP (10/14) 48. When the probation officer noted that a manifest injustice sentence must be outside the standard range, the court (at defense counsel's urging) decided to impose a "range" of 65-65 weeks. RP (10/14) 49-50; CP 71. Thus, the court imposed a "mitigated" sentence in the sense that it was suspended, but "aggravated" in the sense that the ultimate term of confinement was longer. The court believed that a higher term of potential confinement would give E.B. greater incentive to successfully complete probation. RP (10/14) 50; Supp. CP ___ (Conclusions of Law 6 and 7) (attached as Appendix A).

The State sought reconsideration of the disposition order on multiple bases, including that the Court's findings regarding amenability to treatment and counseling in the community were not supported by the record, and that RCW 13.40.0357 does not

authorize the Court to suspend a JRA commitment where a respondent is otherwise ineligible for an "Option B," or other alternative sentence. CP 59-68. Ten exhibits were filed in support of the motion. CP 46-47 (List of Exhibits).[1] The court denied the motion to reconsider. CP 45. Findings of fact and conclusions of law were entered. Appendix A.

The State filed a timely notice of appeal. It argued that a suspended disposition was not available as a matter of law and that a standard range disposition was not a manifest injustice. See Brief of Appellant, at 9-21.

3. EVENTS AFTER DISPOSITION.

A number of events occurred in the juvenile court while the appeal was pending. Specifically, in January, 2016, E.B. was suspended from Bellevue High School and the Family Functional Therapy (FFT) program---integral to the suspended sentence---was terminated due to noncompliance. CP 82-84. The Juvenile Probation Counselor (JPC) and the State recommended that the suspended sentence be revoked. CP 83-84. E.B. admitted the

[1] The exhibits are discussed at RP (11/3) 69-74. The contents of those exhibits and E.B.'s history in the juvenile court system were discussed in the Brief of Appellant, at 7-8.

allegations on February 10, 2016. CP 86-87. The juvenile court found a violation of supervision but declined to revoke the suspended disposition. Instead, the court ordered six days of work crew to be completed within 37 days. CP 90. A review hearing was held on April 29, 2016 at which the State again asked the court to revoke the suspended disposition. CP 105-116. The juvenile court granted that motion, but the court also ordered, *sua sponte* and without explanation, that E.B. should be held at JRA for "40-40" weeks instead of "65-65" weeks. CP 101.

E.B. filed his response brief in this Court on June 17, 2016. His brief did not address the recent hearings in the trial court.

The State filed a reply brief that detailed the recent events, argued that the juvenile court's latest order should be entered only insofar as it revoked the suspended sentence, and arguing that the appeal was not moot even though the suspended sentence had been revoked. Reply Brief, at 1-14. The State also filed a separate motion arguing that, pursuant to RAP 7.2(e), the juvenile court's order revoking the suspended sentence should be entered, but the portion of the order reducing the term of confinement should not be entered. Commissioner Neal ruled that only the order of revocation should be entered.

The Commissioner thereafter set a hearing to discuss the best way to proceed with the appeal. At that hearing, the State informed the court that it was primarily interested in settling the law regarding the ability of a juvenile court to enter suspended dispositions, that it would (for the time being) withdraw its objection to the manifest injustice finding an would not appeal such a finding if made on remand. The State also argued that the appeal was not moot. Counsel for E.B. agreed the suspended sentence issue should be decided by this Court.

Commissioner Neal subsequently entered a ruling directing the parties to file revised briefs limited to the narrowed scope of review and passing the issue to a panel of this Court despite the fact that it was technically moot.

E. ARGUMENT

The legislature has established a determinate disposition scheme for juveniles under which a judge has a number of carefully defined options. Suspended dispositions are authorized only in limited circumstances. None of those circumstances applied to E.B. The dispositional court essentially created a hybrid option not found in the statute in order to give a suspended disposition where

such a disposition was expressly forbidden by the plain language of the statute. The disposition should be reversed.

1. THE COURT DID NOT HAVE AUTHORITY TO SUSPEND A STANDARD RANGE DISPOSITION.

RCW 13.40.160(1) provides that "[t]he standard range disposition for a juvenile adjudicated of an offense is determined according to RCW 13.40.0357." RCW 13.40.0357 establishes "juvenile offender sentencing standards" and the section begins by dividing crimes in the criminal code into offense categories. Robbery in the second degree is placed in category B+ of the "juvenile disposition offense category."

The next part of the section is entitled "Juvenile Sentencing Standards" and it contains a grid much like the grid in the Sentencing Reform Act. The section provides: "This schedule *must* be used for juvenile offenders. The court may select sentencing option A, B, C, D, *or* RCW 13.40.167." RCW 13.40.0357 (italics added). By directing the court to "select" among "options," and by use of the word "or," the legislature clearly intends the items to be read in the disjunctive, so that courts will choose one of the listed options.

Under option A, imposition of confinement, a juvenile with two prior adjudications who is facing disposition of a robbery in the second degree (B+ category) will have a standard disposition range of 52-65 weeks. "When the court sentences an offender to a term of confinement exceeding thirty days, commitment *shall* be to the department for the standard range of confinement, except as provided in subsection (2), (3), (4), (5), or (6) of this section." RCW 13.40.160(1)(b) (italics added).[2]

"Trial courts lack inherent authority to suspend a sentence, [so] a trial court's authority to suspend a sentence is limited to the manner provided by the legislature." State v. Rodriguez, 183 Wn. App. 947, 958-59, 335 P.3d 448 (2014), review denied, 182 Wn.2d 1022 (2015).[3]

There are several limits on suspended sentences in the JJA. A disposition court may impose a suspended sentence under option B. RCW 13.40.0357 (option B (1)). However, the legislature forbade a suspended sentence if the juvenile was over the age of

[2] Subsection (3) pertains to sex offenses, subsection (4) pertains to chemical dependency, subsection (5) pertains to mentally ill offenders. There is no argument that E.B. falls into any of those categories.

[3] Rodriguez dealt with a sentencing under the Sentencing Reform Act. However, in the absence of conflicting juvenile authority, interpretation of chapter 9.94A RCW is instructive when interpreting the JJA. State v. Ashbaker, 82 Wn. App. 630, 632, 919 P.2d 619 (1996); State v. Donahoe, 105 Wn. App. 97, 103, 18 P.3d 618, 621 (2001).

fourteen and adjudicated of robbery in the second degree and the victim was injured. RCW 13.40.0357 (option B (3)(b)(iii)).

The court below recognized this limit, RP (11/3) 75-76, but believed the restriction could be circumvented by imposing a manifest injustice sentence. The court was mistaken. The JJA contains a broad limit on the use of suspended sentences. It provides:

> Except as provided under subsection (3), (4), (5), or (6) of this section, or option B of RCW 13.40.0357 or RCW 13.40.127, the court shall not suspend or defer the imposition or the execution of the disposition.

RCW 13.40.160(10). Subsection (10) is a clear mandate that suspended sentences not be allowed except under specific provisions. Subsection (2), pertaining to manifest injustice dispositions, is not included on the list of approved circumstances. Thus, it is clear that the legislature intended that a suspended disposition not be imposed pursuant to a manifest injustice disposition.

There is still another indication that the legislature did not intend that manifest injustice sentences be suspended. Option D creates the manifest injustice alternative. It provides: "If the court determines that a disposition under option A, B, or C would

effectuate a manifest injustice, the court shall impose a disposition outside the standard range under RCW 13.40.160(2)."

RCW 13.40.0357. However, the legislature also expressly said that "[a] disposition outside the standard range shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof." RCW 13.40.160(2). A suspended disposition is necessarily indeterminate because no fixed time of confinement will be served; indeed, it is possible that no time will be served at all. Thus, under options A, or B, or D of this statutory scheme, E.B. was definitively forbidden from obtaining a suspended disposition, whether or not the disposition was imposed pursuant to the manifest injustice provisions.

E.B. will likely argue that State v. Crabtree, 116 Wn. App. 536, 66 P.3d 695 (2003), supports the court's disposition. This argument should be rejected. Crabtree held that a disposition court was permitted to impose a chemical dependency disposition alternative (RCW 13.40.165) even though such a sentence was ordinarily limited to standard range dispositions. The court held that

> once a manifest injustice is declared, and the court elects to depart from the standard range, the sentencing scheme of the juvenile justice act no longer applies. The court is vested

> with 'broad discretion' to craft a disposition that will meet the needs both of the juvenile and of the community.

Crabtree, 116 Wn. App. at 545 (citing State v. Duncan, 90 Wn. App. 808, 815, 960 P.2d 941 (1998) and State v. Tauala, 54 Wn. App. 81, 86, 771 P.2d 1188 (1989)).

The cited cases are correct as far as they go, but they do not support the court's broad assertion. In State v. Duncan, the court held that "[o]nce a trial court has legitimately decided to depart from the standard range, it has broad discretion to determine the *length* of a manifest injustice disposition." Duncan, 90 Wn. App. at 815. Similarly, the only issue in State v. Tauala was whether a four-year disposition above the standard range was clearly excessive. Tauala, 54 Wn. App. at 86. The holdings in Duncan and Tauala are consistent with the JJA and the State does not challenge them. The whole point of granting a manifest injustice sentence is to alter the length of the sentence. Thus, it stands to reason that a judge altering the length would have broad discretion to do so.

A suspended disposition is different in *kind*, not just in *length*. Neither Duncan nor Tauala support the assertion that once a court decides to impose a manifest injustice disposition, the court can impose any type of sentence it sees fit. Thus, the reasoning in

Crabtree does not follow from the authority it relies upon, so that reasoning should not be extended to this context.

However, Crabtree is also distinguishable, so its holding is not binding in this context. The juvenile court in Crabtree did not purport to impose a chemical dependency disposition pursuant to RCW 13.40.165, so the court was not technically bound by the terms of that separate section. Here, however, the court imposed a manifest injustice disposition but suspended the disposition. This conflicts with the express language of the very statute that authorizes the disposition. As argued above, the manifest injustice statute expressly requires imposition of a determinate sentence, and a suspended sentence is necessarily indeterminate. RCW 13.40.160(2). Further, RCW 13.40.160(10) expressly forbids suspended sentences except for several listed alternatives; option D manifest injustice sentences are not listed. This direct conflict with the statute distinguishes suspended dispositions from conditions that include chemical dependency treatment.

In short, a juvenile court does not have authority to ignore all provisions in the juvenile justice act simply because it has elected to impose a manifest injustice disposition. More particularly, it may not ignore language expressly restricting suspended dispositions.

To hold otherwise would be to render useless the carefully crafted limits on suspended dispositions in juvenile cases. For these reasons, the disposition court erred by suspending disposition.

The State respectfully asks this Court to remand this case to the juvenile court for a disposition that does not include a suspended sentence. The question of whether a manifest injustice disposition is warranted should be determined by the court after argument by the parties.

F. CONCLUSION

For these reasons, the court's imposition of a suspended sentence should be reversed and the matter should be remanded to the juvenile court for a standard range disposition.

DATED this 5th day of October, 2016.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF KING, JUVENILE DIVISION

STATE OF WASHINGTON *Plaintiff,* v. EVAN BACON, D.O.B. 3/3/00 *Respondent.*	CAUSE NO. 15-8-01386-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR MANIFEST INJUSTICE DISPOSITION

This matter came before the undersigned Judge of the above-entitled court on October 14, 2015, and the Court having considered the legal memoranda submitted by the Defense, as well as the disposition report submitted by the Juvenile Probation Counselor Kelly DePhelps, the letter from Bellevue High School Special Education Teacher Brittany Craig, and having considered oral argument by Deputy Prosecuting Attorney Benjamin Carr, Defense Counsel Jennifer Beard, and having further considered the records and files in this case now, furthermore, the Court hereby makes the following findings of fact and conclusions of law.

I. **FINDINGS OF FACT**

1. On October 14, 2015, the court accepted the Respondent's guilty plea to one count of Robbery in the Second Degree.
2. On September 12, 2015, the Respondent grabbed a purse belonging to the victim. While waiting for the elevator, the victim caught up with the respondent and a struggle ensued over the purse. The victim fell during the struggle.
3. The victim suffered scrapped knees. The victim did not suffer serious bodily injury nor did the respondent contemplate that his conduct would cause or threaten to cause serious bodily injury to the victim.
4. The Respondent has had serious behavioral issues at home and in school in the past.
5. The Respondent has made significant improvement in his behaviors at school, in the home and in the court setting.
6. The Respondent recently spent time at Echo Glen, a Juvenile Rehabilitation Administration (JRA) facility. During his time there he received DBT instruction and was able to learn skills to help him moderate his behavior.
7. Upon release from JRA, respondent was placed on parole.
8. Since his release, numerous supportive services have been put in place in the community including Functional Family Parole (FFP), Functional Family Therapy (FFT), and individual and family therapy through Sea Mar Community Health Centers. These services continue to be available to support the respondent in the community.
9. The Bellevue School district completed comprehensive evaluation of the respondent's needs last year. The respondent was placed in a different school with

a specific program to address his needs for this school year. The respondent was showing improvement in his attendance and behavior this year. School is now an anchor for respondent to provide stability in his community behaviors.

10. Team Child assisted the Respondent and his family is setting up an appropriate education program and will continue to be available to assist respondent in these matters.
11. A referral can be made for a wrap team to provide additional support for the respondent and his family.
12. The Respondent has resources in place upon his release to protect the community and continue his progress in his behavioral improvement.
13. The Respondent's conduct during this offense neither caused nor threatened serious bodily injury or the Respondent did not contemplate that his conduct would cause or threaten serious bodily injury pursuant to RCW 13.40.150(3)(h)(i),
14. The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement pursuant to RCW 13.40.150(3)(i)(iv).

15. The Respondent historically has had significant conflict with his mother Staci Bergh. Since his release from JRA, the relationship has improved significantly and Given's mother is strongly supportive of his receiving a disposition other than manifest injustice downward. JDE

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.
2. That imposition of a standard range sentence would effectuate a manifest injustice.
3. A disposition of 65-65 weeks with the time suspended is the appropriate disposition to protect ~~society~~ the community. JDE

4. A statutory mitigating factor exists for a Manifest Injustice sentence under RCW 13.40.150(3)(h)(i),in that the Respondent's conduct neither caused nor threatened serious bodily injury or the Respondent did not contemplate that his conduct would cause or threaten serious bodily injury.
5. A statutory aggravating factor exists for a Manifest Injustice sentence under RCW 13.40.150(3)(i)(iv),in that the respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion.
6. A basis for the 65-65 week disposition range is that the respondent is being afforded an opportunity to rehabilitate in the community. If he is not successful in this endeavor, he will receive extra time at JRA to work on rehabilitation.

JPE Respondent stipulated to the extra time at JRA if he does not succeed in the community.

7. Suspending the time allows the respondent to utilize the community services that are currently in place. 12 months of community supervision and 65 weeks of suspended time serve to protect the community if the respondent is not able to follow the conditions of supervision.
8. The reasons for the Manifest Injustice disposition of 65-65 weeks with the time suspended on the condition the respondent follows the court's order are supported by clear and convincing evidence.

Sentence and disposition should be entered in accordance with these findings of fact and conclusions of law, which also incorporate by reference the briefing and supporting documents provided by the respective parties and the oral findings of the Court.

DONE IN OPEN COURT THIS 23RD day of ~~October,~~ November 2015.

for The Honorable Judge John Erlick

Presented by:

Jennifer Beard WSBA 19753
Attorney for Respondent

Approved for entry by:

Benjamin Carr WSBA 40778
Attorney for the State

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Thomas Kummerow at tom@washapp.org, containing a copy of the Amended Brief of Appellant, in STATE V. E.B., DOB: 3/3/2000, Cause No. 74233-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

CBrame
Name

10/5/16
Date 10/5/16

Done in Seattle, Washington