74233-7

NO. 74233-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

Evan Bacon,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

REPLY BRIEF

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A. INTRODUCTION TO REPLY BRIEF

This reply brief will first address E.B.'s arguments in response to the State's opening brief. However, this reply will also describe a number of events that have recently transpired in the lower court that must be addressed to resolve the appeal. Those developments will be explained below, but suffice it to say that while this appeal was pending, E.B. violated the terms of his disposition and the juvenile court signed an order revoking the suspended disposition. The order also reduced the term of confinement imposed by the original judge from 65 weeks to 40 weeks (a 38 percent reduction). Neither party has yet sought permission under RAP 7.2 to have that order formally entered.

The State respectfully asks this Court to hold that the juvenile court never had the authority to impose a suspended disposition and that a manifest injustice sentence was not warranted under these facts. The disposition should be reversed and remanded for imposition of a 65-week term of confinement at the Juvenile Rehabilitation Administration (JRA).

As to the recent order revoking the suspended sentence and imposing 40 weeks instead of 65 weeks, that order should be approved for entry only insofar as it revoked the suspended

sentence. The new judge had no authority to impose a term of confinement below the standard disposition range under these circumstances.

B. ADDITIONAL FACTS RELEVANT TO REPLY

The State's opening brief described the facts leading up to the lower court's imposition of a suspended disposition in this case. The sentence was suspended by the Honorable John Erlick, largely to give E.B. the opportunity to stay in school. The disposition court relied on the belief that, "One of the things that may be different is that school is now an anchor for Evan." RP (10/14) 45. The court repeatedly warned E.B. that it "would not hesitate to revoke" and that it would send E.B. to JRA for failure to comply with the terms of the sentence. RP (10/14) 54.. The State filed a notice of appeal in October, 2015.

On January 16, 2016, the State notified the court that E.B. "has been suspended from Bellevue High School for Behavioral Referral dated 1/15/16." CP 82.. Moreover, E.B. had also been missing classes and the Family Functional Therapy (FFT) program---another integral component of the suspended sentence---was terminated due to noncompliance. CP 83-84. The Juvenile

Probation Counselor (JPC) and the State recommended that the suspended sentence be revoked. CP 83-84.

In a hearing held on February 10, 2016 before the Honorable Roger Rogoff, E.B. admitted the allegations against him. CP 86-87. The court found a violation of supervision terms 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 set for March 23rd was continued until March 30th in light of a new criminal case that had been referred to the prosecutor's office. CP 93. The hearing was continued a second and third time to adjudicate that new case. CP 96-97.

The hearing was finally held on April 29, 2016. The State submitted information showing E.B.'s violations and asked to revoke the suspended disposition and commit E.B. to the JRA. CP 105-116. The juvenile court granted that motion, but then the court *sua sponte* ordered that E.B. should be held at JRA for "40-40" weeks instead of "65-65" weeks. CP 101. The court's written order does not explain the reduced confinement time except to say that the reduction is appropriate because "this is an MI Disposition and in light of the respondent's behavior on supervision. . . ." CP 101.

E.B. filed his response brief in this Court on June 17, 2016. His brief does not address the recent hearings in the trial court, even though it is apparent that counsel for E.B. was aware of the proceedings below, as he twice sought extensions of time for filing a response brief in light of those proceedings.

C. ARGUMENTS IN REPLY

1. E.B. WAS STATUTORILY INELIGIBLE FOR A SUSPENDED DISPOSITION.

E.B. has failed to respond to the State's argument that, as a matter of statutory construction, a suspended disposition was not available as to a juvenile convicted of robbery in the second degree, regardless of whether a manifest injustice sentence was imposed. See Br. of Appellant at 9-15. The State's argument focused on the language of the Juvenile Justice Act, and specifically on subsections .0357 and .160 of Chapter 13.40 RCW. The State specifically cited and analyzed RCW 13.40.160(10), which expressly says that "the court shall not suspend or defer the imposition or the execution of the disposition" except under the listed circumstances. The State also cited to RCW 13.40.160(2) which provides that "a disposition outside the standard range shall

be determinate." A suspended sentence is indeterminate by its very nature; its duration will vary depending on future events. In response, E.B. simply cites to cases regarding the general authority to impose suspended dispositions. Br. of Resp't. at 6-7. E.B.'s failure to grapple with Appellant's primary argument is tantamount to a concession that the argument is irrefutable.

E.B. argues that once the juvenile court has decided to impose a manifest injustice sentence the court has broad discretion to determine its length. Br. of Resp't. at 8-9. The State does not contest that assertion; the law is clear that judges have discretion to alter the length of a disposition or sentence once it has been determined that the standard range is improper. The State argued, however, that imposition of a suspended disposition is a difference in *kind,* not simply in *quantity.* A *suspended* disposition is not simply a *longer* disposition. The State argued that the law does not permit a judge to impose a suspended disposition simply because the judge has found a basis for a manifest injustice sentence, especially where suspended sentences are expressly restricted under the JRA. In other words, a juvenile court does not have the authority to impose any sentence it wants simply because it has found the basis for a manifest injustice disposition.

E.B. fails to address this argument. This Court should reverse E.B.'s disposition on this basis alone.

2. THE MANIFEST INJUSTICE DETERMINATION WAS NOT SUPPORTED BY THE EVIDENCE OR THE LAW.

E.B. next argues that sufficient evidence supported a manifest injustice determination. Br. of Resp't. at 13-14. He argues that the State's analysis is "without citation to anything in the record and omits a substantial amount of contextual detail." Br. of Resp't. at 14 (citing Br. of Appellant at 20-21). The State provided all the context needed to understand this event, with citations to the record, in its statement of the case. Br. of Appellant at 3-4. In particular, the State cited to the certification for determination of probable cause and the victim's medical records to illustrate that E.B. assaulted a woman when the woman tried to prevent him from taking her purse in a public library, and that the assault---an intentional blow to the victim's head---occurred when the woman was defenseless and down on one knee.

More importantly, the State argued below and on appeal that the totality of the circumstances did not "clearly and convincingly support the conclusion that the usual sentence would be an

injustice." The nature of the offense, together with E.B.'s prior criminal history and his failed attempts to receive treatment in the community, show that a manifest injustice disposition would be barely arguable, at best. Br. of Appellant at 20 (citing Exhibits 7, 8, 9). E.B. had committed several offenses before the robbery charged in this case, and he routinely failed to comply with court orders with regard to those prior offenses. In chronological order, his offenses and probation violations are as follows:

- December 11, 2013 – Assault in the Fourth Degree against mother (Ex. 3)
- May 23, 2014 – Assault in the Fourth Degree and Malicious Mischief in the Third Degree against mother (Ex. 4)
- July 23, 2014 – Two violations of terms of disposition (Ex. 4)
- September 15, 2014 – Four violations alleged (Ex. 4)
- September 29, 2014 – Six violations alleged
- December 19, 2014 – Warrant issues for E.B.'s failure to appear at modification hearing
- April 24, 2015 – Deferred disposition revoked
- October 12, 2014 – Malicious Mischief in the Third Degree against mother (Ex. 5)
- March 18, 2015 – Robberies involving an apparent firearm and multiple violations of probation from that disposition (Ex. 6)

- September 12, 2015 – Robbery in the Second Degree (this case)
- October 14, 2015 – Disposition on this case

See Br. of Appellant at 7-8.

A history of prior crimes and failed probation does not prove that a standard range disposition would be injustice; in fact, it could be argued that these circumstances were aggravating, not mitigating. Although some evidence supported the court's desire to attempt to treat E.B. in the community, balanced against the objective indicators above, the desire for community-based treatment did not establish that the standard disposition was a manifest injustice. The Court erred in deviating from the legislatively determined sentence. The disposition should be reversed and remanded for a standard range disposition.

3. THE JUVENILE COURT'S RECENT ORDER SHOULD BE APPROVED FOR ENTRY ONLY AS TO THE REVOCATION OF THE SUSPENDED DISPOSITION, BUT NOT AS TO THE REDUCED TERM OF CONFINEMENT.

RAP 7.2 restricts the authority of a lower court to act while a case is pending appellate review. It provides:

> (a) Generally. After review is accepted by the appellate court, the trial court has authority to act in a case only to the

> extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3.
>
> * * *
>
> (e) Postjudgment Motions and Actions To Modify Decision. The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. *If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.* The decision granting or denying a postjudgment motion may be subject to review. Except as provided in rule 2.4, a party may only obtain review of the decision on the postjudgment motion by initiating a separate review in the manner and within the time provided by these rules. If review of a postjudgment motion is accepted while the appellate court is reviewing another decision in the same case, the appellate court may on its own initiative or on motion of a party consolidate the separate reviews as provided in rule 3.3(b).

Rap 7.2 (italics added). In short, the rule requires a sequence of three events: the lower court must decide a postjudgment motion; this Court must grant permission for the ruling to be formally entered; an aggrieved party can then seek review of the final order.

In this case, the trial court has decided a postjudgment motion but this Court has not yet granted permission for the trial court to formally enter its order dated April 29, 2016. Thus, there is

presently no final, appealable order on the revocation of E.B.'s sentence. For the following reasons, the State asks this Court to grant permission to enter the order of revocation but not as to the imposition of a new sentence.[1]

As argued in the State's opening brief and in section C.2. above, a manifest injustice determination was not supported by the record. The Court's April 29, 2016, order depends entirely on the October 14th order. If a manifest injustice determination was never appropriate, then the juvenile court---in either October, 2015 or April 2016---did not have a basis upon which to impose anything but a standard range term of confinement. Thus, the new order plainly imposes a sentence that is flawed in the same way as the original order.

If this Court determines that the new order should be approved for filing in its entirety, then the State will be forced to file another notice of appeal. Although the new review can be consolidated with the existing review under RAP 7.2(e), duplicating review is unnecessary and inefficient under these circumstances. The new order adds nothing to support a manifest injustice

[1] Contemporaneous with the filing of this reply brief, the State has filed a separate motion to permit the filing of part of the revocation order.

disposition; indeed, the new order undercuts the manifest injustice determination. The juvenile court's April 29, 2016 order provides:

> IT IS HEREBY ORDERED that:
>
> For the violations, the suspended disposition is revoked. As this is an MI Disposition and in light of the respondent's behavior on supervision here, the Court is ordering a JRA commitment but not in the amount of 65 weeks. The Court has reconsidered the range of 65-65 weeks.
>
> The respondent shall be committed to the JRA for 40-40 weeks. The respondent has 77 days credit so far. The Court is hopeful that the respondent can be placed at Naselle.

CP 101. The only salient events occurring since October show that E.B. cannot comply with community-based treatment programs. The initial disposition depended, as it must, on foresight. Now, however, we have the benefit of hindsight. Hindsight shows that since October E.B. has almost completely failed to comply with the juvenile court's orders, evidenced by these two items that could be added to the list in section C.2. above.

- January 16, 2016 – Multiple violations of terms of suspended disposition including suspension from school, failure to attend school, and non-compliance with FFT
- Spring 2016 – New criminal charges

It is difficult to imagine how abject failure to comply with a mitigated disposition justifies an lesser sentence than was originally

imposed. At a minimum, the failure to comply with a manifest injustice disposition does not prove that a standard range disposition would have been unjust. E.B. was given every opportunity to comply with the juvenile court's conditions. Thus, "the respondent's behavior on supervision here" undercuts rather than supports the imposition of a manifest injustice disposition.

RAP 7.2 attempts to discourage lower courts from changing decisions under review, but it permits some change with approval of this Court. Under these circumstances, approving the juvenile court's new order in its entirety would simply complicate and prolong appellate review where it is clear that a manifest injustice disposition was never appropriate, and where it is also clear that nothing that occurred since October 2015 would provide new justification.

For these reasons, the State respectfully asks this Court to approve the April 29, 2016, order only insofar as it revokes the suspended sentence. The matter should be remanded to the juvenile court for entry of an order imposing a 65-week term of confinement.

4. THIS APPEAL IS NOT MOOT.

Appellate courts do not review issues that are moot. "A case is moot if a court can no longer provide effective relief." In re Pers. Restraint of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). However, courts may address a moot issue if it presents a matter of "continuing and substantial public interest." State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). In determining whether a sufficient public interest is involved, the court will consider "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." Cross, 99 Wn.2d at 377.

When it appeared that the juvenile court might revoke E.B.'s suspended disposition, the parties to this appeal anticipated that revocation might moot the appeal. However, because the juvenile court both revoked the suspended disposition and imposed a confinement term below the standard range, this Court must resolve the question whether a manifest injustice sentence was proper. Thus, this appeal is not moot.

Moreover, even if a manifest injustice issue was not in the case, the primary issue presented – whether a juvenile court can

impose a *suspended* sentence simply because it has made a finding of manifest injustice – is a question of substantial public interest that should be determined. The question is of public rather than merely private interest because it concerns the scope of a juvenile court's authority to punish juveniles adjudicated of a public crime. The record in this case shows that the trial court was at best uncertain as to whether it had the authority to impose a suspended sentence and, as argued above, caselaw establishes that courts have discretion to control the length of a sentence, but the cases do not address whether a juvenile court may impose a different *kind* of sentence, i.e., a suspended sentence. Thus, it is desirable to provide guidance to judges in this regard. Finally, the question will likely recur, as it has already recurred twice since the juvenile court imposed disposition in this case.

D. CONCLUSION

For the foregoing reasons, the October 14, 2015, disposition order should be reversed and the matter remanded to the trial court for imposition of an order of commitment to JRA for 65 weeks. Additionally, this Court should authorize the filing of the April 29th

order insofar as that order revokes the suspended disposition, but reject it insofar as it authorizes a commitment term of 40 weeks.

DATED this 25th day of July, 2016.

Respectfully submitted,

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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 Reply Brief, 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.

L Brame
Name

7/25/16
Date 7/25/16

Done in Seattle, Washington