

65807-7

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NO. 65807-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

A.Z.,

Appellant.

2011 FEB 28 PM 4:31
COURT OF APPEALS
DIVISION ONE

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

The Honorable Steven Gonzalez, Judge

BRIEF OF APPELLANT

REC'D

FEB 28 2011
King County Prosecutor
Appellate Unit

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A. ASSIGNMENT OF ERROR

The disposition court acted without authority in ordering juvenile appellant to a two-year period of parole, including “sex offender Treatment (in JRA & on parole following custodial time).” CP 14 (Order of Disposition).

Issue Pertaining to Assignment of Error

Where the Legislature has vested exclusive authority in the secretary of the department of social and health services to determine whether a program of parole is appropriate, and if so, its terms, did the disposition court act outside of its authority in imposing a two year period of parole to include sex offender treatment?

B. STATEMENT OF THE CASE

A.Z. (date of birth 8/22/95) is appealing from the disposition imposed following his adjudication for first degree child molestation, allegedly committed against A.V. (date of birth 1/23/04), who is the younger sister of M.V., A.Z.’s friend and soccer teammate. CP 1, 10, 12-19; RP 28, 45, 49, 353.¹ A.V. claimed A.Z. touched her

¹ The verbatim report of proceedings consists of three bound volumes, consecutively paginated, of the adjudicatory hearing dated June 23, June 24 and June 29, 2010, referred to as “RP;” the court’s findings entered on June 30, 2010, referred to as “1RP;” and the disposition hearing dated July 15, 2010, referred to as “2RP.”

inappropriately while the two were wrestling; A.Z. denied anything untoward happened. RP 296, 370-71.

During Christmas break 2009, A.Z. spent several days with the Vasquez family at their home in Maple Valley. RP 27, 111, 359. A.Z.'s father coached the select soccer team on which A.Z. and M.V. both played. RP 45-46, 173, 353-54. As a result, the two families had grown close over the years, and it was common for A.Z. to spend several days at a time with M.V. and his family, consisting of M.V.'s father, Michael Vasquez, M.V.'s step-mother, Cammy Vasquez and M.V.'s younger sister and brother, A.V. and C.V., respectively. CP 28, 47-49, 162, 174-75, 355.

Michael and Cammy² thought of A.Z. as family. RP 46-47. As both described, A.Z. was great with M.V.'s younger siblings, perhaps because A.Z. had younger siblings of his own. RP 51-52, 176-77. If either A.V. or C.V. needed anything, A.Z. would get it for her or him. RP 51. A.V. and C.V. loved to pillow fight and wrestle with M.V. and A.Z. RP 52-54, 148, 177-79, 292, 356-57.

Typically, the kids would all wrestle each other at the same time. RP 55, 102-103, 292, 361. However, there was one occasion during that winter break when A.Z. wrestled with A.V. and

² First names are used to avoid confusion; no disrespect is intended.

C.V., without M.V. RP 361. A.V. claimed that when they were wrestling, A.Z. put his hand under her jeans and underwear and touched her vagina. RP 296. A.V. testified she told A.Z. to stop and he did. RP 302. A.V. said this happened once and C.V. was there at the time. RP 115, 147-49, 293, 299.

A.Z. denied the allegation. RP 370-71. He testified he came downstairs from M.V.'s room to get something to eat and was rammed in the legs by C.V., who was trying to tackle him. RP 362. In the wrestling match that ensued, A.Z. ended up on his stomach with C.V. on top of him and A.V. on top of C.V. RP 380. At this point, M.V. came downstairs and told A.Z. to hurry up, because the two were taking turns playing a video game. RP 361, 380. That was the end of it. RP 380.

Ultimately, the court found A.V. more credible and convicted A.Z. of the offense. 1RP 4-5. At the disposition hearing, the prosecutor recommended a standard range disposition of 15-36 weeks. 2RP 5. When questioned by the court about sex offender treatment and parole, the prosecutor requested the court impose two years of parole with sex offender treatment within and without the Juvenile Rehabilitation Administration (JRA). 2RP 7. Defense counsel did not agree sex offender treatment was appropriate and

noted that parole and the conditions thereof would be for JRA to decide. 2RP 8.

The court imposed the standard range disposition, as well as parole with sex offender treatment. 2RP 15. As set forth in the disposition: “imposed 2 yr. period of parole, sex offender treatment (in JRA & on parole following custodial time).” CP 14.

C. ARGUMENT

IT IS THE SECRETARY NOT THE COURT THAT REQUIRES AND FASHIONS JUVENILE PAROLE.

This Court reviews de novo whether a juvenile court had authority to act and did so in compliance with the Juvenile Justice Act of 1977. State v. Beaver, 148 Wash.2d 338, 344, 60 P.3d 586 (2002). State v. Watson, 146 Wash.2d 947, 954, 51 P.3d 66 (2002). When the meaning of statutory language is plain, the only permissible interpretation is that which gives effect to the plain language. State v. Keller, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001). Only if a statute is ambiguous do courts resort to canons of statutory construction to sort out its meaning. State v. Roggenkamp, 153 Wash.2d 614, 621, 106 P.3d 196 (2005).

Juvenile parole is governed by RCW 13.40.210. The statute provides in relevant part:

(1) The secretary³ shall set a release date for each juvenile committed to its custody. The release date shall be within the prescribed range to which a juvenile has been committed under RCW 13.40.0357 or 13.40.030 . . . [.]

...

(3)(a) Following the release of any juvenile under subsection (1) of this section, **the secretary may require the juvenile to comply with a program of parole** to be administered by the department in his or her community which shall last no longer than eighteen months, except that in the case of a juvenile sentenced for rape in the first or second degree, rape of a child in the first or second degree, child molestation in the first degree, or indecent liberties with forcible compulsion, the period of parole shall be twenty-four months and, in the discretion of the secretary, may be up to thirty-six months when the secretary finds that an additional period of parole is necessary and appropriate in the interests of public safety or to meet the ongoing needs of the juvenile. A parole program is mandatory for offenders released under subsection (2) of this section and for offenders who receive a juvenile residential commitment sentence of theft of a motor vehicle, possession of a stolen motor vehicle, or taking a motor vehicle without permission 1. **The decision to place an offender on parole shall be based on an assessment by the department of the offender's risk for reoffending upon release.** The department shall prioritize available parole resources to provide supervision and services to offenders at moderate to high risk for reoffending.

(b) **The secretary** shall, for the period of parole, facilitate the juvenile's reintegration into his or her community and to further this goal shall require

³ "Secretary" means the secretary of the department of social and health services. RCW 13.40.020(23).

the juvenile to refrain from possessing a firearm or using a deadly weapon and refrain from committing new offenses and **may require the juvenile to: (i) Undergo available medical, psychiatric, drug and alcohol, sex offender, mental health, and other offense-related treatment services;** (ii) report as directed to a parole officer and/or designee; (iii) pursue a course of study, vocational training, or employment; (iv) notify the parole officer of the current address where he or she resides; (v) be present at a particular address during specified hours; (vi) remain within prescribed geographical boundaries; (vii) submit to electronic monitoring; (viii) refrain from using illegal drugs and alcohol, and submit to random urinalysis when requested by the assigned parole officer; (ix) refrain from contact with specific individuals or a specified class of individuals; (x) meet other conditions determined by the parole officer to further enhance the juvenile's reintegration into the community; (xi) pay any court-ordered fines or restitution; and (xii) perform community restitution. Community restitution for the purpose of this section means compulsory service, without compensation, performed for the benefit of the community by the offender. Community restitution may be performed through public or private organizations or through work crews.

RCW 13.40.210 (emphasis added).

The meaning of this statute is plain. Following the release of any juvenile from the prescribed range under RCW 13.40.0357 or 13.40.030, the secretary of the department may require the juvenile to comply with a program of parole, not to exceed 18 months. If the juvenile was convicted of certain enumerated sex offenses, the period of parole, if imposed, shall be 24 months. RCW

13.40.210(3)(a). Thus, it is the secretary, not the court, that decides whether parole is appropriate “based on an assessment by the department of the offender’s risk for reoffending upon release.” Id.

Moreover, it is the secretary that has discretion to require sex offender treatment services as part of parole, not the court. RCW 13.40.210(3)(b). The court therefore had no authority to impose a two-year period of parole with “sex offender treatment (in JRA and on parole following custodial time).” CP 14.

In response, the state may argue A.Z.’s challenge is premature because the language preceding the condition states: “Respondent shall abide by the following terms as directed by the JPC.” CP 14. Based on this language, the state may argue the parole/treatment condition is not triggered unless actually ordered by the secretary. If such were the case, however, there would be no reason to include the parole condition in the disposition order in the first instance. Moreover, it is clear from the court’s oral ruling that it intended to impose parole, as well as the treatment condition during A.Z.’s commitment and parole.

Finally, this section of the disposition order also includes the condition prohibiting A.Z. from all contact with A.V. and the

Vasquez family. A reasonable person would not presuppose this condition to apply only if, and when, a parallel condition is ordered by the secretary.

In short, the court was without authority to impose parole or conditions thereof, as the Legislature clearly vested that authority exclusively in the department. The unlawful portion of the disposition should be vacated. State v. Paine, 69 Wn. App. 873, 882-83, 850 P.2d 1369 (1993) (a trial court acts without statutory authority by imposing a sentence that is contrary to law).

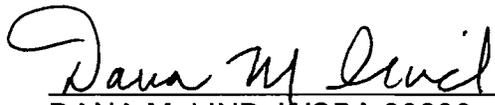
D. CONCLUSION

For the reasons stated above, this Court should vacate the unlawful parole condition from the disposition.

Dated this 28th day of February, 2011

Respectfully submitted

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