

66462-0

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NO. 66462-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

J.O.,

Appellant.

2011 JUN 27 PM 4:27
SUPERIOR COURT
DIVISION ONE

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY, JUVENILE
DEPARTMENT

The Honorable Alfred Heydrich, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. A WRITTEN REVOCATION MOTION ON ENTIRELY DIFFERENT GROUNDS IS INSUFFICIENT TO EXTEND THE COURT'S JURISDICTION IN LIGHT OF THE BRIGHT LINE RULE SET FORTH IN STATE V. MAY.¹

The State apparently concedes that, after J.O.'s refusal, it did not attempt to enforce the DNA sample until after the deferral period ended. Brief of Respondent at 3. That being the case, the only question is whether the written motion to revoke (based on expulsion from school and failure to pay restitution) was sufficient to maintain the court's jurisdiction over the DNA sample requirement, a separate issue never mentioned in that motion.

- a. The DNA Order Is, for All Intents and Purposes, a Community Supervision Condition.

The State argues it was not required to file a written motion to revoke based on the failure to provide the DNA sample because DNA sampling is not a discretionary condition of community supervision. Brief of Respondent at 6-9, 11. But the line the State attempts to draw here is a distinction without a difference. The DNA sample was ordered in the deferred disposition order. CP 9. Even if not technically a community supervision condition, it is a term of the deferred disposition order.

Moreover, both the juvenile court and the prosecutor considered the DNA sample to be a condition of community supervision. At the hearing on

¹ State v. May, 80 Wn. App. 711, 716-17, 911 P.2d 399 (1996).

December 22, 2010, J.O.'s attorney argued the court had already declared the conditions completed. RP 17. But the court responded that when it said that, it had not realized about the DNA order. RP 17. The prosecutor also argued that, by not providing a DNA sample, J.O. had not completed his community supervision conditions. RP 7.

Merely because the DNA sample is mandatory, rather than discretionary does not mean it can be brought up at any time, even after the deferral period is over. The statute limits the juvenile court's jurisdiction. State v. May, 80 Wn. App. 711, 716-17, 911 P.2d 399 (1996). By addressing issues not raised before the deferral period ended, the court exceeded its jurisdiction. Id.

b. The Motion to Revoke Based on School Expulsion and Failure to Pay Restitution Did Not Provide Notice of Proceedings Regarding the DNA Sample.

The State argues the written motion need not contain details of the violation and additional evidence may be presented at the hearing. Brief of Respondent at 9 (citing State v. Todd, 103 Wn. App. 783, 790, 14 P.3d 850 (2000); May, 80 Wn. App. at 717). This assertion is correct, as far as it goes, but it does not go as far as the State would like. Written notice of the violation is required, "with particularity." State v. Tucker, 171 Wn.2d 50, 53, 246 P.3d 1275 (2011); RCW 13.40.127(7); CR 7(b). The fact that the state may present additional evidence does not mean it may bring up entirely

new violations. That is what the State has done here. A written motion to revoke on one basis, or even two, does not preserve the court's jurisdiction on any and all violations that may have occurred.

This is not a case like Todd, where, although imprecise, the written motion clearly gave notice of the violation. In Todd, the State's motion alleged he was "to be charged with malicious mischief." 103 Wn. App. at 788. The court concluded this was sufficient notice of the alleged violation. Id. The court explained the statute "does not require a detailed description of the facts supporting *the* violation. It is appropriate for the State to present additional evidence if and when the juvenile denies *the* violation." Id. (emphasis added). Todd merely stands for the proposition that the State's motion to revoke need not allege every detail of a given violation. It does not stand for the proposition that a motion to revoke on one violation preserves the court's jurisdiction on any and all violations.

Not only must there be notice of the alleged violation, the State must also actually initiate proceedings. Tucker, 171 Wn.2d at 53. In Tucker, the Washington Supreme Court reversed the Court of Appeals opinion that proceedings were properly initiated before the end of the deferral period. Id. The Court of Appeals had concluded the juvenile court maintained jurisdiction because, before the end of the deferral period, the community supervision officer filed a report stating Tucker's deferred disposition would

be revoked if she did not pay the required restitution. State v. N.S.T., 156 Wn. App. 444, 232 P.3d 584 (2010), rev'd sub nom. State v. Tucker, 171 Wn.2d 50, 246 P.3d 1275 (2011). In so holding, the Court of Appeals specifically noted that the report adequately advised Tucker not just that the State would be moving for revocation, but of the basis for that motion, in compliance with due process. N.S.T., 156 Wn. App. at 452-53. But Washington's Supreme Court granted review and reversed, finding the supervision officer's report insufficient because it was not a motion asking the court to adjudicate the issue. Tucker, 171 Wn.2d at 53.

Unlike Tucker, J.O. was not notified his deferral period could be extended or the deferred disposition revoked if he failed to provide the DNA sample. The notice provided to J.O. in this case was far less than that provided in Tucker. There was no notice whatsoever, before the end of the deferral period, that the issue of the DNA sample would be adjudicated. Under Tucker, the court then lacked jurisdiction to address this issue. 171 Wn.2d at 53.

- c. If the DNA Order Is Not a Condition of Community Supervision, the Court Erred in Refusing to Vacate J.O.'s Conviction Based on his Failure to Comply.

Under the deferred disposition statute, the court "shall" vacate the conviction and dismiss the case with prejudice if the juvenile complied with the terms of supervision. RCW 13.40.127(9). If, as the State claims, the

DNA sample is *not* a condition of supervision, then the court erred in failing to order his conviction be vacated on December 15, 2010, when the restitution was paid in full on December 9. RP 9.

Deferred dispositions are governed entirely by statute. State v. Mohamoud, 159 Wn. App. 753, 762, 246 P.3d 849 (2011). The court has only that authority to defer that is granted by statute and must follow the procedures the Legislature provided. Id. Under the statute, there are only two possible outcomes: Either the juvenile fulfills the terms of community supervision, in which case the court shall vacate the conviction; or the juvenile fails to fulfill the terms of community supervision, and the case proceeds to a disposition hearing. State v. M.C., 148 Wn. App. 968, 972, 210 P.3d 413 (2009); see also Todd, 103 Wn. App. at 787 (if juvenile has satisfied terms of deferred disposition, “conviction is vacated and the court must dismiss the case with prejudice”).

If, as the State argues, the DNA sample was *not* a condition of community supervision, the court was required to vacate J.O.’s conviction no later than December 15, 2010, when it was clear the restitution had been paid in full. RP 9. The court had no authority to deviate from the statutory procedure by refusing to vacate J.O.’s conviction due to his failure to provide a DNA sample.

d. The Statutory Provision Allowing Continuance for Good Cause Does Not Extend the Court's Jurisdiction to Compel the DNA Sample After the Deferral Period Has Ended.

The State also claims the court continued to have jurisdiction because it may continue the proceedings “for good cause.” RCW 13.40.127(8). But the purpose of the continuance provision is to provide flexibility when the court determines the juvenile requires or would benefit from additional supervision. Todd, 103 Wn. App. at 791. The court did not determine J.O. needed or would benefit from additional supervision. It simply wanted to obtain his DNA. RP 9.

This provision is not meant to provide the State additional time to enforce the terms of the deferred disposition when motions were not filed before the end of the deferral period. See Todd, 103 Wn. App. at 791. (one year extension does not apply when State institutes proceedings in an effort to revoke the deferred disposition). The continuance provision does not grant the court jurisdiction to consider an issue not raised during the deferral period and does not save the order compelling the DNA sample in this case.

2. THE PRIVACY PROTECTIONS GRANTED TO JUVENILE OFFENDERS IN GENERAL AND UNDER THE DEFERRED DISPOSITION STATUTE CREATE A REASONABLE EXPECTATION OF PRIVACY GREATER THAN THAT OF CONVICTED FELONS.

The State repeatedly declares J.O. has no greater privacy interest than a convicted felon. Brief of Respondent at 12-14. Yet the cases it cites for

this assertion largely concern adult convicts and probationers, not juveniles. Id. (citing United States v. Kincade, 379 F.3d 813 (9th Cir. 2004); State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007); State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993); State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004); State v. S.S., 122 Wn. App. 725, 94 P.3d 1002 (2004).

Only one case cited by the State involves a juvenile, and that case does not address the issues raised here. See Brief of Respondent at 13-14 (citing S.S., 122 Wn. App. 725). The S.S. court affirmed the order requiring S.S. to provide a DNA sample based on Surge. S.S., 122 Wn. App. at 727 (citing Surge, 122 Wn. App. 448). The court's entire discussion of the Fourth Amendment issue is as follows:

He first contends the collection of the sample is an unlawful search in the absence of particularized suspicion and a warrant. We recently resolved this issue. In *State v. Surge*, we considered whether the taking of biological samples for DNA analysis as required by RCW 43.43.754, constitutes a search for which a warrant is required. We held that because the search serves a special need beyond normal law enforcement, no warrant is required.

S.S., 122 Wn. App. at 727 (footnotes omitted). The court did not address whether a juvenile had any greater privacy interest. Nor did S.S. receive a deferred disposition. Id. at 726.

This Court should also reject the State's claim that J.O.'s privacy interest is no greater than a convicted felon because of RCW 43.43.754(8).

That statute provides:

The detention, arrest, or conviction of a person based upon a database match or database information is not invalidated if it is determined that the sample was obtained or placed in the database by mistake, or if the conviction or juvenile adjudication that resulted in the collection of the biological sample was subsequently vacated or otherwise altered in any future proceeding including but not limited to post trial or post fact-finding motions, appeals, or collateral attacks.

RCW 43.43.754(8). This statute merely tells a person what to expect once a DNA sample has been collected and placed in the database, namely, that it will remain there, regardless of mistake or subsequent alterations in the conviction. But it does not affect a person's reasonable expectation of privacy upon being granted a deferred disposition before any sample has been obtained.

The State also seems to argue J.O.'s privacy interests were diminished because the order vacating his conviction had not yet been entered. Brief of Respondent at 15-17. But again, this makes no difference. The analysis of article I, section 7 in Surge and of the Fourth Amendment in Olivas both turn on the reasonable expectation of privacy. Surge, 160 Wn.2d at 72; Olivas, 122 Wn.2d at 91. The deferred disposition statute creates an expectation that if the conditions are satisfied for the period of the

deferral, a young person's privacy will be protected. See Brief of Appellant at 10-11 (noting provisions for vacating, dismissing, and sealing juvenile adjudications after successful completion of a deferred disposition). Given that greater expectation of privacy, this Court should hold that requiring J.O. to provide a DNA sample violated his privacy rights under the Fourth Amendment and Article I, Section 7.

D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse the order compelling J.O. to provide a DNA sample and order that the sample held by Whatcom County Juvenile Probation be destroyed.

DATED this 27th day of June, 2011.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66462-0-1
)	
JACOB ORCUTT,)	
)	
Appellant.)	

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 27TH DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JUNE, 2011.

x *Patrick Mayovsky*