

COA NO. 73178-5-I

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

IN RE PERSONAL RESTRAINT PETITION OF
ARMONDO LAFORGE:

STATE OF WASHINGTON,

Respondent,

v.

ARMONDO LAFORGE,

Petitioner.

FILED
May 23, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Michael C. Hayden, Judge

PETITIONER'S REPLY BRIEF

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. **ARGUMENT IN REPLY**

1. **THE TRIAL COURT LACKED JURISDICTION IN THE ABSENCE OF A DECLINE HEARING AND REMAND FOR SENTENCING AS A JUVENILE IS AN AVAILABLE REMEDY.**

a. **At minimum, the trial court should be able to sentence LaForge under the Juvenile Justice Act if it determines on remand that juvenile jurisdiction would have been retained.**

The State continues to insist there is only one remedy available: a retrospective decline hearing, after which the convictions stand if the court would have declined jurisdiction, and a "new trial" in adult court if juvenile jurisdiction would have been retained. Brief of Respondent (BOR) at 7-8.

The common law is not frozen in time, like a fossilized creature trapped in amber. The law evolves in response to the evolving legal arguments put before the courts. Recent Supreme Court precedent shows the remedy of being sentenced in accordance with the Juvenile Justice Act (JJA) is available where juvenile court jurisdiction was improperly bypassed, even where the defendant is now over 18 years old. State v. Maynard, 183 Wn.2d 253, 263-64, 351 P.3d 159 (2015); State v. Posey, 174 Wn.2d 131, 135, 142, 272 P.3d 840 (2012) (Posey II).

Dillenburg v. Maxwell, 70 Wn.2d 331, 355-56, 422 P.2d 783 (1966) and In re Personal Restraint of Dalluge, 152 Wn.2d 772, 786-87,

100 P.3d 279 (2004) give the remedy of a new trial in the event the trial court determines juvenile jurisdiction would have been retained. The unanalyzed assumption in both cases is that the age of 18 is a point of no return, such that a new trial in adult court is the only remedy available in that circumstance.

Maynard and Posey II show this is not true. "The only absolute prohibition . . . to applying the JJA is when the defendant allegedly committed the crime after the age of 18." Maynard, 183 Wn.2d at 263. Where juvenile jurisdiction was improperly lost, sentencing as a juvenile is an available remedy even if the defendant is now over 18 years old. Maynard, 183 Wn.2d at 263-64; Posey II, 174 Wn.2d at 135, 142.

If a Dillenburg hearing is the remedy here, and if the trial court on remand determines juvenile jurisdiction would have been retained, then the trial court should have the authority to resentence LaForge under the JJA consistent with Maynard and Posey II. In that circumstance, LaForge suffers the same injury that the defendants in Maynard and Posey II suffered: loss of juvenile jurisdiction and the attendant loss of being sentenced as a juvenile.

In arguing against juvenile sentencing as a potential remedy, the State cites at length Chief Justice Madsen's dissent in Posey II, which criticized the majority for permitting imposition of a juvenile sentence

after the defendant reached 18. BOR at 20-21. In this manner, the State makes the point for LaForge. The dissent lost that argument. The majority rules.

Contrary to the State's contention, Dillenburg and Dalluge do not foreclose juvenile sentencing as a remedy in the event the trial court determines juvenile jurisdiction would have been retained. The defendant in neither case raised the argument that juvenile sentencing is an available remedy where the juvenile court would have retained jurisdiction for an offender that is 18+. That issue, which is squarely raised in LaForge's case, was not raised or discussed in Dillenburg or Dalluge. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); see also See State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999) ("Because we are not in the business of inventing unbriefed arguments for parties sua sponte, there certainly was no significance in our not doing so."). For this reason, no precedent bars juvenile sentencing as a remedy in the event a trial court determines at a retrospective decline hearing that juvenile jurisdiction would have been retained.

b. Trial counsel was ineffective in failing to request a transfer to the juvenile court once the charges were amended to non-automatic decline offenses.

The State says the traditional remedy for ineffective assistance in the plea context is withdrawal of the plea. BOR at 30. The State misconstrues the context at issue here. LaForge does not argue counsel was ineffective in misadvising him about the consequences of the plea. LaForge does not challenge his plea. Rather, counsel was ineffective in failing to move for transfer of the case to juvenile court following amendment of the charges.

The State argues LaForge cannot show prejudice because he cannot show the juvenile court would have retained jurisdiction. Even if this Court agrees with the State that LaForge cannot show prejudice at this juncture, the ineffective assistance claim remains alive, albeit kicked down the road. If on remand the trial court determines juvenile jurisdiction would have been retained, then prejudice from counsel's deficiency would be established at that point.

The question then becomes one of remedy. The remedy for ineffective assistance under the Sixth Amendment "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Maynard, 183 Wn.2d at 262 (quoting United States v. Morrison, 449 U.S. 361, 364, 101 S. Ct. 665,

66 L. Ed. 2d 564 (1981)). In Maynard, the remedy for lost juvenile jurisdiction due to ineffective assistance was resentencing under the Juvenile Justice Act. Maynard, 183 Wn.2d at 263-64. LaForge is entitled to the same remedy in the event the trial court on remand determines juvenile jurisdiction would have been retained. That is the remedy "tailored to the injury suffered." Id. at 262.

c. The trial court should first determine whether a fair retrospective decline hearing is feasible given the length of time that has passed.

The State says neither statute nor case law requires a preliminary feasibility determination for a retrospective decline hearing. The lack of case law on the issue is explained by the simple fact that the argument advanced by LaForge has not been raised before. The State acknowledges courts have remanded for retrospective decline hearings "without any discussion" of a prior feasibility determination. BOR at 22. That is why those cases are not controlling. Where a legal theory is not discussed, the decision does not control a future case where the legal theory is raised. Berschauer/Phillips, 124 Wn.2d at 824. For this reason, no precedent bars a feasibility determination for retrospective decline hearings. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140

Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

The lack of express statutory authorization for a feasibility determination is likewise no bar. Looking to the retrospective competency hearings for analogy, nowhere in the competency statute, chapter 10.77 RCW, is there any requirement that a feasibility determination be made for retrospective hearings. The appellate courts have fashioned that remedy. State v. P.E.T., 174 Wn. App. 590, 605, 300 P.3d 456, 463 (2013), remanded for reconsideration on other grounds, 181 Wn.2d 1007, 335 P.3d 940 (2014). The appellate court can do so in the context of a retrospective decline hearing as well.

The State points to the statutory provision that mandates a decline hearing: "Unless waived by the court, the parties, and their counsel, a decline hearing shall be held." RCW 13.40.110(2). That provision was not written with retrospective hearings in mind. Its plain language contemplates the hearing being held when it should have been held, in compliance with the law.

Even so, analogy to retrospective competency hearings is again helpful. Once there is reason to doubt competency, a competency hearing is mandated. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) ("Procedures of the competency statute . . . are mandatory

and not merely directory."); RCW 10.77.060(1)(a) ("Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant."). And yet if it is not feasible to hold a retrospective competency hearing because of lost or unavailable evidence, then the hearing is not held and another form of relief is triggered. P.E.T., 174 Wn. App. at 605.

The mandatory nature of the hearing at issue does not require the court to hold that hearing when it would not be feasible to do so. That proposition applies to retrospective competency hearings, and holds true for retrospective decline hearings as well.

The State disclaims any analogy between retrospective decline hearings and retrospective competency hearings on the theory that their respective inquiries are "fundamentally different." BOR at 23. According to the State, the latter is a time-sensitive inquiry while the former is not.

But there is a time-sensitive component to retrospective decline hearings. At that hearing, the trial court must determine "whether the facts before the juvenile 'session' of the superior court in the first instance

warranted and justified the transfer for criminal prosecution." Dillenburg, 70 Wn.2d at 355. The trial court, sitting as finder of fact at a retrospective decline hearing, must in effect travel back in time to consider the body of evidence that would have been available had the decline hearing been held when it should have been. While some "facts" related to the Kent¹ factors are still ascertainable at this stage, others may not be due to the passage of time.

In particular, the Kent factors of sophistication/maturity of the juvenile and the prospects for adequate protection or the public and rehabilitation of the juvenile are informed by information that would have been available years ago but may be unavailable now. The trial court must assess the juvenile's sophistication and maturity as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living. State v. M.A., 106 Wn. App. 493, 501, 23 P.3d 508 (2001). Maturity is more than a chronological age. Kids mature at different rates and are influenced by a variety of factors. The question is whether relevant evidence still exists by which LaForge's maturity as of 2004 may be accurately determined.

¹ Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

The trial court must also consider the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services, and facilities available in the juvenile court. M.A., 106 Wn. App. at 504. In a case where a declination hearing should have been held 11 years earlier, the Supreme Court addressed the rehabilitation factor and noted "[w]hether those measures would have been beneficial or successful in accomplishing rehabilitation is at least speculative" due to the passage of time. McRae v. State, 88 Wn.2d 307, 313, 559 P.2d 563 (1977) (holding Dillenburg doctrine did not apply retroactively).

The specter of speculation looms in LaForge's case. Are witnesses and contemporaneous reports addressing LaForge's mental and emotional makeup as of 2004 still available? What about evidence related to whether he was amenable to treatment in the juvenile system and the speed with which he could be expected to improve? What about evidence showing his home life and "environmental" situation at the time? The State can't say at this juncture. That is to be determined at the trial level on remand.

The State maintains neither of these factors is dispositive, as if to suggest they may be dispensed with altogether. Properly understood, no one factor is necessarily dispositive from the perspective of an appellate

court looking to see if a trial court has abused its discretion in declining jurisdiction. See State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993) ("All eight of these factors need not be proven; their purpose is to focus and guide the juvenile court's discretion.").

But "[t]he exercise of discretion in a juvenile declination hearing is uniquely limited." State v. Holland, 98 Wn.2d 507, 516, 656 P.2d 1056 (1983). The eight Kent factors must all be considered and delicately balanced. Holland, 98 Wn.2d at 515, 517. If factors that would otherwise be given weight by a trial court cannot be accurately assessed, then the decline hearing ceases to be a vehicle for accurate determination of whether declination would have been appropriate. If critical factors cannot be ascertained due to loss of evidence and inability to recreate it, then those factors cannot be delicately balanced against the others and the process is compromised.

The State points to State v. Williams, 75 Wn.2d 604, 607, 453 P.2d 418 (1969), where the Supreme Court upheld a trial court's declination determination and rejected the argument that consideration of the juvenile "social files" was an "absolute prerequisite to this determination." This just means a certain category of evidence is not necessarily needed in every case for the court to soundly exercise its discretion. To say something is not an "absolute" prerequisite is to say that at other times it

may be needed. It all depends on the facts of a particular case and how the court exercises its discretion based on those facts.

Seeking to essentially adjudicate the merits of the decline hearing as part of the personal restraint proceeding, the State claims the protection/rehabilitation factor is susceptible to determination and would not weigh in favor of retention of juvenile jurisdiction. That is for the trial court to decide based on a full record. And one thing the trial court could take into account is that a manifest injustice disposition would have been available if juvenile jurisdiction were retained in 2004. The State overlooks this option.

A juvenile court may impose a disposition outside the standard range if it determines a disposition within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2). A "manifest injustice" includes a disposition that would "impose a serious, and clear danger to society in light of the purposes of [the Juvenile Justice Act]." RCW 13.40.020(19). "These purposes include protection of the citizenry and provision of necessary treatment, supervision and custody of juvenile offenders." State v. Duncan, 90 Wn. App. 808, 812, 960 P.2d 941 (1998) (citing RCW 13.40.010(2)(a),(f)). Under a manifest injustice disposition, LaForge could have been confined until he was 21 years old, i.e., nearly

three and a half years following sentencing. RCW 13.40.300.² The trial court could take this into account in determining whether that length of time was sufficient for rehabilitation and, by extension, protection of the public.

The Kent factors are for the trial court to address in the first instance because "appellate courts do not weigh evidence and do not find facts." State v. Bennett, 180 Wn. App. 484, 489, 322 P.3d 815, review denied, 181 Wn.2d 1005, 332 P.3d 985 (2014). But the threshold question is whether a feasible retrospective decline hearing, at which the trial court has the evidence necessary to make a sound determination, can be held at this time. The trial court is best situated to make that determination. This Court should direct the trial court to make a preliminary feasibility determination.

B. CONCLUSION

For the reasons set forth above and in the opening brief, LaForge requests remand for sentencing in accordance with the Juvenile Justice Act. If this Court declines to remand for that purpose, the alternative is remand to determine whether a retrospective decline hearing is feasible. If the hearing is not feasible, LaForge should be resentenced in accordance with

² LaForge was sentenced in March 2004. He turned 21 in August 2007. See Judgment and Sentence, attached as App. I to opening brief.

the Juvenile Justice Act. If the hearing is feasible and the trial court determines the juvenile court would have retained jurisdiction, then LaForge should be resentenced in accordance with the Juvenile Justice Act.

DATED this 29th day of May 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Petitioner

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DIVISION ONE**

In re Personal Restraint Petition of)	
Armondo Laforge:)	
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STATE OF WASHINGTON)	
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v.)	COA NO. 73178-5-I
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ARMONDO LAFORGE,)	
)	
Petitioner.)	

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 23RD DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ARMONDO LAFORGE
3421 S. 263RD STREET
KENT, WA 98032

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MAY 2016.

X *Patrick Mayovsky*