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NO. 50884-2-II

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

In re the Personal Restraint of

Vichai Saly,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUES

1. Whether the trial court erred in sentencing petitioner as an adult in the absence of a juvenile decline hearing, because the amended charges to which petitioner pled guilty did not require automatic decline to the adult court.

2. Whether trial counsel provided ineffective assistance of counsel in failing to move for transfer of the case to juvenile court following amendment of the charges, where no legitimate tactic justified the failure and petitioner was deprived of the benefits of being treated as a juvenile.

3. Whether remand for decline hearing and new trial is the appropriate remedy.

B. STATEMENT OF THE CASE

On December 6, 1994, the State charged petitioner Vichai Saly (DOB: 2/1/78) with three counts of first degree assault. State's Resp. to PRP (Appendix A, at 2-4). Saly was 16 years old at the time, but he was charged in the adult division of Pierce County Superior Court because the charges required automatic decline of juvenile court jurisdiction. RCW 13.04.030(1)(e)(v)(A). On January 13, 1995, the prosecutor filed an amended information reducing the charges to three counts of second degree assault and adding one count of taking a motor vehicle without

permission. State's Resp. (Appendix A, at 21-23). Although none of these offenses resulted in automatic adult criminal court jurisdiction, the court did not remand the case to juvenile court. Instead, the court accepted Saly's guilty plea to the amended charges and imposed sentence as adult offender. State's Resp. (Appendix A, at 27-40). Saly did not appeal.

In September 2017, Saly filed this pro se personal restraint petition, arguing he had a right to be remanded to juvenile court on the amended charges, which was violated when the adult court entered judgment and sentence without a decline hearing. He asked this Court to remand for a decline hearing and new trial.

The State responded, conceding that no decline hearing was held and no waiver of juvenile jurisdiction was entered, and that the failure to address the declination issue was error. It argued, however, that the court acted within its jurisdiction in entering the judgment and sentence, and that this Court cannot provide an effective remedy.

This Court determined that the issues raised in Saly's petition are not frivolous. It appointed counsel to represent Saly and particularly requested that the parties address the remedy in further briefing.

C. ARGUMENT

1. THE ADULT CRIMINAL COURT LACKED AUTHORITY TO ENTER THE JUDGMENT AND SENTENCE ABSENT A DECLINE HEARING.

a. Saly's petition is not procedurally barred.

As a threshold matter, Saly's petition is properly before this Court because the adult criminal court lacked jurisdiction to impose the judgment and sentence in Saly's case. The one year time limit for collateral attack applies only if the judgment and sentence was "rendered by a court of competent jurisdiction." RCW 10.73.090(1). The adult division of the superior court lacked jurisdiction over Saly's case once the information was amended and Saly was no longer charged with an offense resulting in automatic decline of juvenile jurisdiction. "Absent the juvenile court's waiver of its exclusive jurisdiction, the adult criminal court did not have jurisdiction, i.e., it did not possess the power or authority to render a judgment in these proceedings." *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d 772, 785, 100 P.3d 279 (2004). Because the judgment in Saly's case was not "rendered by a court of competent jurisdiction," his personal restraint petition is not procedurally barred, regardless of the timing of its filing. *Id.*

- b. The adult criminal court lacked authority to enter a judgment in the proceedings once the charges were amended to non-automatic decline offenses.

A juvenile alleged to have committed a criminal offense has the statutory right to be prosecuted under the provisions of the Juvenile Justice Act if the State files charges before the juvenile turns 18, subject to limited exceptions. *State v. Maynard*, 183 Wn.2d 253, 262, 351 P.3d 159 (2015); RCW 13.04.030. Juvenile court offers an offender important benefits, including avoiding the stigma of an adult criminal conviction and less harsh penalties. *Maynard*, 183 Wn.2d at 259-60.

One of the exceptions to juvenile court jurisdiction involves proceedings relating to offenses for which the statute gives the adult criminal court exclusive original jurisdiction. The original charges against Saly were automatic decline offenses RCW 13.04.030(1)(e)(v)(A)(i). Once the State amended the charges to the non-automatic decline offenses of second degree assault and taking a motor vehicle without permission, however, exclusive jurisdiction reverted to the juvenile court. The law is clear: “once the prosecutor amends an information to charge offenses that do not result in automatic adult court jurisdiction, the adult criminal court must remand the matter to the juvenile court for a decline hearing.” *Dalluge*, 152 Wn.2d at 785 (citing *State v. Mora*, 138 Wn.2d 43, 54, 977 P.2d 564 (1999)).

No decline hearing took place in Saly's case, even though he was under 18 years old. Instead, the adult criminal court accepted his guilty plea, and he was convicted and sentenced as an adult. That was error. The adult criminal court lacked authority to proceed once the charges were amended to non-automatic decline offenses. *Mora*, 138 Wn.2d at 45. The juvenile court retained jurisdiction unless it decided to transfer jurisdiction following a decline hearing. As no decline hearing occurred, jurisdiction remained with the juvenile court. *Dalluge*, 152 Wn.2d at 785.

In *Dalluge*, petitioner, who was then 17 years old, was charged with an automatic decline offense, and the proceedings were initiated in the adult criminal division of the superior court. The State later amended the information, reducing the charges to non-automatic decline offenses. The case was not remanded to juvenile court, however, and Dalluge was convicted and sentenced in adult criminal court. *Dalluge*, 152 Wn.2d at 776. After his conviction and sentence were affirmed on appeal, Dalluge filed a personal restraint petition, arguing the adult criminal court had no jurisdiction over him, and he had been denied his right to a decline hearing in juvenile court. *Id.* at 777.

The Supreme Court noted that the plain language of RCW 13.04.030(1) requires juvenile court jurisdiction in cases relating to juveniles alleged to have committed offenses, with certain exceptions.

One exception is if the juvenile is 16 or 17 years old and the alleged offense a serious violent offense, the adult criminal court has exclusive original jurisdiction. *Dalluge*, 152 Wn.2d at 780 (citing RCW 13.04.030(1)(e)(v)(A)). Another exception to juvenile court jurisdiction is that the juvenile court may waive jurisdiction after conducting a decline hearing. *Dalluge*, 152 Wn.2d at 780 (citing RCW 13.04.030(1)(e)(i)). The Court determined that the legislature intended that the adult criminal court have jurisdiction over a juvenile proceeding only by means of automatic decline based on the nature of the offense, or as the result of a decline hearing. *Dalluge*, 152 Wn.2d at 781 (citing *Mora*, 138 Wn.2d at 49). The Court concluded that once the information was amended so that *Dalluge* was no longer charged with an automatic decline offense, *Dalluge*'s case no longer qualified for adult court jurisdiction, and the trial court should have remanded to juvenile court for a decline hearing. *Dalluge*, 152 Wn.2d at 783. "Absent the juvenile court's waiver of its exclusive jurisdiction, the adult criminal court did not have jurisdiction, i.e., it did not possess the power or authority to render a judgment in these proceedings." *Id.* at 785.

The Supreme Court again addressed jurisdiction over juvenile proceedings in *State v. Posey*, 174 Wn.2d 131, 272 P.3d 840 (2012). In that case *Posey*, at 16 years old, committed two counts of second degree

rape. He was tried and sentenced as an adult, but following direct appeal his case was remanded for sentencing in juvenile court. Posey turned 21 years old before the mandate was issued, and he challenged the juvenile court's authority to sentence him. The presiding judge, acting as a superior court judge, sentenced Posey as an adult, but within the standard juvenile range. Posey appealed, arguing that by statute neither the juvenile court nor the superior court had jurisdiction to sentence him. *Posey*, 174 Wn.2d at 133.

The Supreme Court explained that the legislature can promulgate laws as to which sessions of the superior court will hear certain types of cases. *Id.* at 136 (citing Wash. Const. art, IV, § 5). The superior court possesses original jurisdiction over juvenile cases, but those cases are assigned to the "juvenile court" session of the superior court. *Id.* at 136. Because the juvenile court is a division of the superior court, not a separate court, RCW 13.04.030 does not vest jurisdiction over juvenile cases in some court other than the superior court. *Id.* at 137. Instead, that statute designates the circumstances under which the juvenile court division, as opposed to the adult criminal court division, will have authority over cases involving juveniles, with jurisdiction remaining in the superior court. *Id.* at 140.

Thus, in Posey's case, because Posey was convicted of two felonies, and the superior court has jurisdiction over felony offenses, the superior court had jurisdiction to sentence him. The statute prohibiting the juvenile court from extending juvenile court jurisdiction beyond the offender's twenty-first birthday precluded the juvenile division from sentencing Posey, but it did not eliminate the superior court's jurisdiction to impose sentence. *Id.* at 140-41.

Here, unlike in *Posey*, Saly is not arguing that the superior court lacked jurisdiction over his proceedings. He is arguing that by statute the juvenile court division had authority over his proceedings, and thus the adult court division acted without authority when it entered the plea, judgment and sentence. This argument is not inconsistent with *Posey* and is governed by the holding in *Dalluge*.

Saly was 16 years old when the prosecutor filed the amended information, after which he was no longer charged with an automatic decline offense. Thus, the adult criminal court no longer had automatic jurisdiction over his proceedings. Absent the juvenile court's waiver of its exclusive jurisdiction the adult criminal court did not have the power or authority to render a judgment in these proceedings.

c. Saly was prejudiced by the error

Upon collateral review, the petitioner must establish he or she was actually and substantially prejudiced by the challenged error. *Dalluge*, 152 Wn.2d at 777. The prejudice Saly suffered as a result of the court's error was loss of the opportunity for juvenile adjudication, with all the benefits of being prosecuted as a juvenile rather than an adult. *See Maynard*, 183 Wn.2d at 261.

The State argues Saly has failed to show actual and substantial prejudice because he has not established that the juvenile court would have retained jurisdiction. This argument fails to recognize that it was the denial of a decline hearing, and thus the lost opportunity for juvenile court adjudication, that prejudiced Saly. He does not have to show that the juvenile court would have retained jurisdiction if a decline hearing had been held. *See Dalluge*, 152 Wn.2d at 788; *In Matter of Pers. Restraint of LaForge*, 195 Wn. App. 1058, at 3 (2016) (Unpublished opinion cited per GR 14.1(a)).

2. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST TRANSFER TO JUVENILE COURT.

Saly had the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. Defense counsel is

ineffective where counsel's performance was deficient and the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 225-26. Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Kylo*, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

Here, there is no legitimate reason for counsel's failure to move for transfer to juvenile court following the amendment of charges to non-decline offenses. Ignoring the right to a decline hearing did not provide Saly any tactical advantage. Mere oversight of the applicable statute is not strategy. *See Maynard*, 183 Wn.2d at 261). Saly was prejudiced because he was deprived of the benefits of being prosecuted under the JJA. *Id.* He has thus established that he received ineffective assistance of counsel.

3. THE REMEDY SALY SEEKS IS SUPPORTED BY CASE LAW.

The Washington Supreme Court has held that once a prosecutor amends an information against a juvenile to charge offenses that do not result in automatic adult court jurisdiction, the adult criminal court must remand the matter to juvenile court for a decline hearing. *Dalluge*, 152 Wn.2d at 785. Where a petitioner demonstrates on collateral attack that he or she was deprived of a decline hearing, the proper remedy is a *de novo*

hearing in superior court on whether declination of juvenile jurisdiction would have been appropriate. *Dalluge*, 152 Wn.2d at 785 (citing *Dillenburg v. Maxwell*, 70 Wn.2d 331, 355, 413 P.2d 940, 422 P.2d 783 (1966)). If declination would have been appropriate, the conviction stands. Otherwise, the conviction must be set aside and a new trial granted. *Id.* at 786-87.

The remedy Saly requests is a decline hearing and a new trial. This remedy is supported by case law.

The State argues that no remedy is available because Saly entered a guilty plea to the charges, and he has already served his sentence. It contends that Saly's guilty plea was knowingly, voluntarily, and intelligently entered and thus there is no basis to vacate it. What the State overlooks is that the adult criminal court had no authority to accept Saly's plea absent a decision by the juvenile court to decline jurisdiction after a hearing. Moreover, where Saly received ineffective assistance of counsel at the plea and sentencing hearing, it cannot be concluded that his plea was knowing, voluntary, and intelligent. The plea is as invalid and the judgment and sentence in this case. Thus remand for a decline hearing is an appropriate remedy. Unless the court concludes declination would have been appropriate, Saly is entitled to a new trial.

D. CONCLUSION

For the reasons addressed above, this Court should grant Saly's petition and remand for a decline hearing and new trial.

DATED this 4th day of December, 2018.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
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Certification of Service by Mail

Today I caused to be mailed copies of the Supplemental Brief of
Petitioner *In re the Personal Restraint Petition of Vichai Saly*, Cause No.
50884-2-II as follows:

Vichai Saly DOC# 732654
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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



Catherine E. Glinski
Done in Manchester, WA
December 4, 2018

GLINSKI LAW FIRM PLLC

December 04, 2018 - 2:08 PM

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