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NO. 37312-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

E. R. M.,

Appellant.

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

The Honorable Rachell E. Anderson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE STATUTORY SCHEME DOES NOT DIRECT OR AUTHORIZE THE COURT TO MANDATE A JUVENILE PROVIDE THE STATE WITH HIS DNA SAMPLE AT THE TIME A DEFERRED DISPOSITION IS ORDERED BECAUSE A DEFERRED DISPOSITION IS NOT A “CONVICTION” TRIGGERING THE DNA COLLECTION STATUTE.

The State agrees that the issue in this case is involves statutory interpretation and is therefore subject to de novo review. Brief of Respondent (BOR) at 1. The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” State v. Dennis, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). The legislative intent of a statute is determined “solely from the plain language by considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” Id. at 172-73.

The State argues that under the DNA collection statute, RCW 43.43.754, a conviction is the triggering event for purposes of requiring a person to provide a DNA sample. BOR at 3.¹ E.R.M. agrees. The issue, however, is the meaning of the term “conviction” in the context of a deferred disposition entered pursuant to RCW 13.40.127.

¹“A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual convicted of a felony....” RCW 43.43.754(1)(a).

RCW 43.43.754 does not define conviction. The State contends conviction as used in the statute means the same as in the Sentencing Reform Act of 1981 (SRA). The SRA defines conviction as “an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030(9). It asserts that because E.R.M. entered a plea as required by the deferred disposition statute, that plea constitutes a conviction as defined in RCW 9.94A.030(9) and is therefore the triggering event under RCW 43.43.754. BOR at 2, 4, 6-7. There are several problems with the State’s argument.

First, RCW 43.43.754 itself draws a distinction between a conviction and a juvenile court adjudication of guilt. There are two ways a DNA sample is collected depending on whether a person is ordered to serve a term of confinement or no term of confinement, but both distinguish conviction from the adjudication of guilt of a juvenile: “For persons *convicted* of any offense listed in subsection (1)(a) of this section *or adjudicated guilty of an equivalent juvenile offense....*” RCW 43.43.754(5)(c) and (6) (emphasis added).²

² Those sections of the statute read:

For persons convicted of any offense listed in subsection (1)(a) of this section or adjudicated guilty of an equivalent juvenile offense, who are serving or who are to serve a term of

When interpreting a statute, it is the text of the statutory provision at issue in the context of the statute that informs the statute's intent. See Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10, 43 P.3d 4 (2002) (reading a statute “ ‘in the context of the entire act’ in which it appeared.” (quoting In re Estate of Lyons, 83 Wn.2d 105, 108, 515 P.2d 1293 (1973)). In differentiating a conviction from an adjudication of guilt of a juvenile the legislature has made it clear it did not intend the two to have the same meaning. If it intended “conviction” to also mean an adjudication of guilt why did it make the distinction? See Dennis, 191 Wn.2d at 173 (“Another tenet of statutory interpretation is that we must interpret a statute so as to ‘render no portion meaningless or superfluous.’” (quoting Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010))). Furthermore, borrowing the definition of conviction found in RCW 9.94A.030(9) is not appropriate or necessary where RCW 43.43.754 itself

confinement in a department of corrections facility or a department of children, youth, and families facility, the facility holding the person shall be responsible for obtaining the biological samples as part of the intake process. RCW 43.43.754(5)(c).

For persons convicted of any offense listed in subsection (1)(a) of this section or adjudicated guilty of an equivalent juvenile offense, who will not serve a term of confinement, the court shall order the person to report to the local police department or sheriff's office as provided under subsection (5)(b)(i) of this section within a reasonable period of time established by the court in order to provide a biological sample. The court must further inform the person that refusal to provide a biological sample is a gross misdemeanor under this section. RCW 43.43.754(6).

makes the distinction between conviction and a juvenile offense adjudication of guilt without reference to RCW 9.94A.030(9). See Davis v. Department of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (where the court declined to borrow the definition of “juvenile” from the juvenile justice statute to interpret the same term in the controlled substances statute).

By its terms the DNA collection statute only applies to juvenile offenders who have been adjudicated guilty. To find otherwise would render the phrase “adjudicated guilty of an equivalent juvenile offense” superfluous. The State’s reliance on the definition of conviction found in RCW 9.94A.030(9) is likewise a misplaced borrowing of a definition from the complex SRA statutory scheme only applicable to adult offender sentencing.

This leads to the second problem with the State’s argument. RCW 9.94A.030(9) definition of conviction directs that a conviction for purposes of sentencing an adult offender under the SRA means “adjudications of guilt pursuant to ...13 RCW.” RCW 13.04.011(1) in turn refers us back to RCW 9.94A.030: “‘Adjudication’ has the same meaning as ‘conviction’ in RCW 9.94A.030, but only for the purposes of sentencing under chapter 9.94A RCW.” RCW 13.04.011(1). Thus, a juvenile offender adjudication of guilt only means conviction for

sentencing purposes under the SRA. See State v. Johnson, 118 Wn.App. 259, 262, 76 P.3d 265 (2003), *review denied*, 151 Wn.2d 1021 (2004) (“The adult and juvenile statutes govern only sentences within the system to which the respective statutes apply.”). If the legislature intended an adjudication of guilt under Title 13 to mean a conviction as that term is used in the DNA collection statute it could have easily included reference to that statute in RCW 13.04.011(1) as well. See State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (courts cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language).

Because the DNA collection statute only requires a juvenile offender to provide a DNA sample if adjudicated guilty of an offense is equivalent to one of the crimes enumerated in the statute, the question is whether a deferred disposition is such an adjudication of guilt. Our Supreme Court has found it is not.

In State v. J.H., 96 Wn.App. 167, 180, 978 P.2d 1121, *review denied*, 139 Wn.2d 1014, 994 P.2d 849 (1999), *cert. denied*, 529 U.S. 1130, 120 S.Ct. 2005 (2000), the court tells us that a deferred disposition is entered in a juvenile case it is not an adjudication of guilt. In J.H. the issue was whether the 1997 amendments to the juvenile justice code made juvenile proceedings so like adult criminal proceedings that juvenile

offenders were entitled to a jury trial. The court addressed former RCW 13.04.011(1), which like the current version defined adjudications as convictions for purposes of SRA sentencing. Id. at 174. In reviewing the differences between an adult conviction and a juvenile court adjudication of guilt the court found one distinction that supported its holding juveniles were not entitled to jury trials was that the purpose of a deferred disposition was to “avoid adjudication altogether” unlike an adult charged with a crime. Id. at 180-181. If, as the J.H. court found, that a juvenile court deferred disposition avoids an adjudication of guilt, then under RCW 43.43.754 a deferred disposition it is neither a “conviction” nor an adjudication of guilt triggering the collection of a DNA sample.

Third, for people who are not serving a term of confinement, like E.R.M., the court must set “a reasonable period of time” for the person to report to a local law enforcement office to provide the DNA sample. RCW 43.43.754(6). It is reasonable, and consistent with the purposes of the deferred disposition statute, to delay the submission of a D.N.A. sample until the deferred disposition has been resolved. If the deferred disposition is successfully completed, the conviction must be vacated and there would be no requirement to order DNA collection and analysis. State v. J.O., 165 Wn. App. 570, 575, 265 P.3d 991 (2011). If the conviction is not vacated, then the juvenile will be obligated to provide a DNA sample.

Fourth, part of the DNA collection statutory scheme directs the court to order a person pay a fee for collecting the DNA and maintaining the database. RCW 43.43.7541. This fee is authorized only when a sentence is imposed. Id. The collection of a DNA sample is the responsibility of the place of confinement where a sentence orders confinement or by law enforcement when a sentence does not include confinement. RCW 43.43.754(5)(c) and (6). The neighboring statute, RCW 43.43.7541, requires the imposition of a fee for collecting the DNA sample as part of a person's sentence. The statutory scheme shows the legislature intended the obligation to provide a DNA sample be part of a person's sentence, which for a juvenile offender is a disposition.³ It would be odd for the legislature to intend to fund the program by assessing fees as part of a sentence against individuals required to submit samples but require collection of a DNA sample without providing a mechanism for them to pay the fee, as would be the case where a deferred disposition is ordered. See State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (“Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided.”).

³ A disposition means "sentencing or any other final settlement of a criminal case" State v. C.R.H., 107 Wn.App. 591, 596, 27 P.3d 660 (2001) (quoting Black's Law Dictionary 471 (6th ed.1990). An "order deferring disposition is not itself a disposition," but a disposition postponement. State v. M.C., 148 Wn.App. 968, 972, 201 P.3d 413 (2009).

The DNA collection statutory scheme envisions the term “conviction” to include sentencing. A deferred disposition is not the equivalent of a sentence.

Fifth, the State cites RCW 9A.04.040(3) claiming that statute is analogous to the DNA collection statute and supports its argument. BOR at 5-6. What that statute shows, however, is that the legislature knows how to expressly require an affirmative obligation for a person who enters a deferred disposition. In that statute the entry of a deferred disposition alone triggers the prohibition on restoration of firearm rights. The statute provides that, “[n]otwithstanding ... any other provision of law,” the prohibition on restoring firearm rights applies to any person “convicted” in adult or juvenile court, *regardless of what happens at “sentencing or disposition, post-trial or post-fact-finding motions, and appeals.”* RCW 9A.04.040(3) (emphasis added). The statute further explicitly states that its provisions apply to any conviction, “includ[ing] a dismissal entered after a period of probation, suspension or *deferral of sentence*, and also includes equivalent dispositions by courts in jurisdictions other than Washington state.” *Id.* (emphasis added).

This “analogous” statute shows the legislature knew how to include an obligation triggered by the entry of a deferred disposition. The absence of similar language in the DNA collection statute also shows the

legislature intentionally limited its application to exclude deferred dispositions. Delgado, 148 Wn.2d at 728; State v. S.G. Jr., 11 Wn. App. 2d 74, 78, 451 P.3d 726 (2019). The DNA collection statute contains no express language mandating the collection of a DNA sample from a person whose “conviction” stems from the entry of a deferred disposition, unlike the firearms prohibitions in RCW 9.41.040(3).

Sixth, the State also contends that a deferred disposition is a conviction for purposes of triggering the DNA collection statute based on the language in RCW 13.40.127(9)(c). That statute reads: “A deferred disposition shall remain a conviction unless the case is dismissed and the conviction is vacated pursuant to (b) of this subsection or sealed pursuant to RCW 13.50.260.” Id.; BOR at 4-5. That language was added in 2012 when the legislature revised the statute requiring juveniles to “[a]cknowledge the direct consequences of being found guilty and the direct consequences that will happen if an order of disposition is entered.” Laws of 2012, Ch. 177, Sec. 1 (S.S.B. 6240); RCW 13.40.127(3)(d)). In context, what the legislature likely intended was that a deferred disposition is considered a conviction for certain purposes, like the firearm prohibition for example. To find that based on this provision the legislature intended to authorize collection of a DNA sample as a condition or term of a deferred disposition would be wholly inconsistent with the language in

RCW 43.43.754 and RCW 13.04.011(1) and the statutory schemes. See S.M.G., Jr., 9 Wn. App. 2d at 348 (where the court found despite the language in RCW 13.40.127(9)(c) its application in the context of a juvenile's criminal history for disposition purposes would be inconsistent with the purpose of the deferred disposition statutory scheme).

Lastly, where the authority to defer a disposition is granted, the terms of the statutes granting that authority are mandatory. See Brief of Appellant (BOA) at 3 (cases cited). The deferred disposition statute does not specifically authorize the court to require collecting a DNA sample from a juvenile granted a deferred disposition. Id. at 3-4. Understandably the State's response fails to show where in that statutory provision the legislature authorized the court to impose the collection of a DNA sample as a term or condition of a deferred disposition: there is no such authorization. This is further evidence that the legislature did not intend to allow, much less require, collection of a DNA sample from a juvenile granted a deferred disposition.

While a "conviction" triggers the requirement of providing a DNA sample, in the context of a juvenile offender a conviction is an adjudication of guilt and final disposition. Under the plain text of the relevant statutes, and the DNA collection and Title 13 RCW statutory schemes as a whole, a deferred disposition is not a "conviction" that

triggers RCW 43.43.754. If, however, a deferred disposition is revoked collection of a DNA sample would be required as part of the subsequent disposition. Thus, the collection of a DNA sample from a juvenile who enters a deferred disposition may be imposed only if there is a final disposition.

2. AMBIGUITY IN THE STATUTORY SCHEME GOVERNING DNA COLLECTION FOR JUVENILES SUBJECT TO A DEFERRED DISPOSITION MUST BE RESOLVED IN FAVOR OF E.R.M.

A statute is ambiguous when more than one interpretation of the plain language is reasonable. State v. Weatherwax, 188 Wn.2d 139, 154, 392 P.3d 1054 (2017). The State asserts the DNA collection statute is not ambiguous based on its argument that a conviction is the triggering event, the term “conviction” means the same as its definition in the SRA, and that definition includes a deferred disposition pursuant to a guilty plea. BOR at 9-10. As shown above, E.R.M. does not believe the State’s interpretation is reasonable. However, if this Court finds that both the State’s and E.R.S.’s interpretations of the statute and statutory scheme are reasonable, the ambiguity must be resolved in favor of E.R.M.⁴ and against the State.⁵ Under these rules E.R.M. may not be required to submit to collection of his DNA unless or until a final disposition is imposed.

⁴ State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008).

B. CONCLUSION

For the above reasons and the reasons in E.R.M.'s opening brief, the court's order requiring E.R.M. to provide his DNA sample to law enforcement should be reversed.

DATED this 14 day of July 2020

Respectfully submitted,

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⁵ State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

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