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NO. 37312-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

E. R. M.,

Appellant.

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

The Honorable Rachell E. Anderson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The juvenile court erred in ordering collection of appellant's DNA sample.

Issue Pertaining to Assignment of Error

The court granted appellant, a juvenile, a deferred disposition following appellant's guilty plea. A condition of the deferred disposition order required collection of appellant's DNA sample. When a juvenile is granted a deferred disposition, is the court authorized to require collection of the juvenile's DNA sample as condition of a deferred disposition order?

B. STATEMENT OF THE CASE

E.R.M. was charged in the Juvenile Department of the Spokane County Superior Court with attempt to elude a police vehicle. CP 5. On December 31, 2019, E.R.M. filed a motion for deferred disposition under RCW 13.40.127. CP 14. E.R.M. also filed a Statement of Juvenile for Deferred Disposition contemporaneous with his motion. CP 9-13.

A hearing was held on the deferred disposition motion. The court found E.R.M.'s plea to the charge knowing and voluntary. RP 3-6.<sup>1</sup> The court granted E.R.M.'s motion for deferred disposition. RP 12; RP 21-27. The only disputed issue was whether E.R.M. would be required to provide a sample of his DNA as a condition of his deferred disposition. RP 6, 10-

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<sup>1</sup> RP refers to the verbatim report of proceedings for December 31, 2019.

11; CP 12 (1.5(c)). E.R.M. filed a memorandum opposing the collection of his DNA sample. CP 15-20. The court ordered E.R.M. to provide his DNA sample but stayed that part so E.R.M. could appeal the issue to this Court. CP 24; RP 14.

C. ARGUMENT

THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY WHEN IT IMPOSED THE COLLECTION OF E.R.M.'S DNA SAMPLE AS A CONDITION OF HIS DEFERRED DISPOSITION.

Resolution of this appeal turns on the interpretation of the statutes governing deferred disposition (RCW 13.40.127), and the collection of DNA samples (RCW 43.43.754). Statutory interpretation is a question of law reviewed de novo. State v. Hayes, 182 Wn.2d 556, 560, 342 P.3d 1144 (2015).

Statutory interpretation requires ascertaining legislative intent. State v. I.K.C., 160 Wn.App. 660, 665, 248 P.3d 145 (2011). In ascertaining legislative intent, courts look to the plain meaning of words used in a statute. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). The plain meaning of a statute is discerned from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

1. The deferred disposition statute does not authorize the court to require collection of a DNA sample.

Juvenile courts do not have inherent authority to suspend or defer a disposition. State v. A.S., 116 Wn.App. 309, 311-12, 65 P.3d 676 (2003). Only the Legislature can grant that power. State v. H.E.J., 102 Wn.App. 84, 87, 9 P.3d 835 (2000). Where the authority to defer a disposition is granted, the terms of the statutes granting that authority are mandatory. State v. Lopez, 105 Wn.App. 688, 697, 20 P.3d 978 (2001).

The legislature has granted courts the authority to defer disposition in a juvenile criminal case. RCW 13.40.127(2). The deferred disposition statute allows the court to place the juvenile under “community supervision” and impose “any conditions of supervision that it deems appropriate.” RCW 13.40.127(5). The statute, however, does not specifically authorize the court to require collecting a DNA sample from a juvenile granted a deferred disposition. And, collection of a DNA sample is not part of “community supervision” or a condition of supervision.<sup>2</sup> Thus, the court did not have the authority to order collection of a DNA sample

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<sup>2</sup> Community supervision is defined as an individualized program comprised of one or more of the following: (a) Community-based sanctions; (b) Community-based rehabilitation; (c) Monitoring and reporting requirements; (d) Posting of a probation bond. RCW 13.40.020(4)(a)-(d). “Community-based sanctions” include a fine of \$500 or less and up to 150 hours of community service. RCW 13.40.020(2)(a)-(b). “Community-based rehabilitation” includes education and treatment programs. RCW 13.40.020(1). “Monitoring and reporting requirements” include curfews and similar restrictions on the juvenile's movement. RCW 13.40.020(19).

from E.R.M. as a condition of the deferred disposition. See State v. Clark, 91 Wn.App. 581, 585, 958 P.2d 1028 (1998) (“If the legislature has enacted a statute that grants a court the power to suspend a disposition, the court must follow the statute's terms.”).

2. The statute governing the collection of a DNA sample from juvenile offenders does not authorize the court to require a juvenile to provide his DNA sample for collection in a deferred disposition order.

The DNA collection statute, RCW 43.43.754, likewise does not authorize or require collection of a DNA sample where the juvenile has been granted a deferred disposition. By its terms RCW 43.43.754 requires a disposition before a DNA sample can be collected from a juvenile offender. Collection of a DNA sample is not authorized or required in a deferred disposition order pursuant to RCW 43.43.754.

That statute directs that a DNA sample must be collected from every “adult or juvenile individual convicted of a felony.” RCW 43.43.754 (1)(a). It also prescribes the collection of the sample. If the juvenile is “serving” or is ordered to “serve” a term of confinement the facility holding the juvenile shall be responsible for obtaining the sample as part of the intake process. RCW 43.43.754 (5)(c). If the juvenile “will not serve a term of confinement” then the court is to order “the person to report to the local

police department or sheriff's office to provide the sample. RCW 43.43.754 (6).<sup>3</sup>

It has long been recognized that that each provision in a statute must be viewed in relation to other provisions and harmonized if possible, to insure proper construction of every provision. State v. Young, 125 Wn.2d 688, 696, 888 P.2d 142 (1995); Addleman v. Bd. of Prison Terms & Paroles, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986). Statutes relating to the same subject matter must be construed together and harmonized to maintain the integrity of each. Hallauer v. Spectrum Prop., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001). Thus, to ascertain the meaning of conviction in the context of RCW 43.43.754, requires reading the statute in its entirety and in relation to RCW 13.40.127.

A conviction is the triggering event requiring collection of a DNA sample. RCW 43.43.754 (1)(a). The statute does not define the term

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<sup>3</sup> The following are the provisions of the statute relevant to the issue on appeal: "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 (5)(c) provides in part that: "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 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..... " And, RCW 43.43.754 (6) provides in part that: "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..."

“conviction.” This Court has held “the entry of a plea of guilty, standing alone, unless specially made so by statute does not constitute a conviction.” State v. Crisler, 73 Wn.App. 219, 22, 868 P.2d 204 (1994), *aff’d sub nom. State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995); (quoting Tembruell v. Seattle, 64 Wn..2d 503, 510, 392 P.2d 453 (1964)). E.R.M. entered a plea as required by the deferred disposition statute<sup>4</sup> but neither RCW 43.43.754 nor RCW 13.40.127 makes his plea a conviction authorizing or requiring collection of his DNA sample.

A purpose of a deferred disposition is to provide the juvenile the opportunity to avoid an adjudication.<sup>5</sup> If the court finds pursuant to RCW 13.40.127(9)(a) that the juvenile is entitled to dismissal of the deferred disposition, "the juvenile's conviction shall be vacated and the court shall dismiss the case with prejudice, except that a conviction under RCW 16.52.205 shall not be vacated." RCW 13.40.127(9)(b). Only if the court finds the juvenile is not entitled to dismissal of the deferred disposition does the court revoke the deferred disposition and enter a disposition order. RCW 13.40.127(9)(c). “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. (emphasis added).

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<sup>4</sup> RCW 13.40.127(2), (5)

<sup>5</sup> “Adjudication” has the same meaning as “conviction.” RCW 13.04.011(1).

“Further, juveniles retain the opportunity to *avoid adjudication altogether* through diversion agreements *and deferred dispositions*. 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) (emphasis added).

Under the terms of the deferred disposition statute, there is no conviction unless the court revokes the deferred disposition and enters an order of disposition. As stated in J.H., supra, a deferred disposition avoids a conviction. Although E.R.M. pleaded guilty, that is not a conviction in the context of the DNA collection statute. Because a conviction is the triggering event for collection of a DNA sample, requiring collection of a DNA sample is not authorized in a deferred disposition.

The other provisions of the DNA collection statute support the same conclusion. The statute provides the authority for the collection of the sample if the juvenile is “serving” or is ordered to “serve” a term of confinement and the facility holding the juvenile is responsible for obtaining the sample as part of the intake process. RCW 43.43.754 (5)(c). If the juvenile “will not serve a term of confinement” then the court is to order “the person to report to the local police department or sheriff’s office to provide the sample. RCW 43.43.754 (6).

A court is not authorized to impose confinement as part of a deferred disposition. State v. I.K.C., 160 Wn.App. 660, 248 P.3d 145 (2011).<sup>6</sup> Thus, collection of a DNA sample is not authorized pursuant to RCW 43.43.754 (5)(c) because a juvenile granted a deferred disposition is not “serving” or ordered to “serve” a term of confinement in a facility.

Neither is collection of a DNA sample authorized under RCW 43.43.754(6). “One does not ‘serve’ a conviction.” State v. Harper, 50 Wn.App. 579-580, 749 P.2d 722 (1988). “One serves a sentence.” Id. at 580. “The term ‘conviction’ refers to the result of a criminal trial—entry of the judgment and sentence.” Id. (citing Black's Law Dictionary 301 (5th rev. ed. 1979)).

It is mandated that following a guilty plea the court is required to hold a disposition hearing. RCW 13.40.130(2). There are four statutory options for sentencing a juvenile: sentencing options A, B, C, D, RCW 13.40.0357.<sup>7</sup> A deferred disposition is not a listed sentencing option. It is not even a sentence. The term "disposition" has been interpreted to mean

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<sup>6</sup> Confinement means “physical custody by the department of children, youth, and families in a facility operated by or pursuant to a contract with the state, or physical custody in a detention facility operated by or pursuant to a contract with any county. RCW 13.40.020(6).

<sup>7</sup> Option A is a standard range disposition, Option B is a suspended disposition, Option C is chemical/mental health disposition, and Option D is a manifest injustice disposition. RCW 13.40.0357.

"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). In the case of a deferred disposition, there is no sentence until the trial court determines the juvenile has not met the conditions of the deferred disposition order and enters a juvenile offense disposition. Id.; RCW 13.40.127(7), (9). If the court vacates the conviction, there is no conviction.<sup>8</sup>

Collection of a DNA sample is not authorized pursuant to RCW 43.43.754(6) because it applies to a juvenile "who will not serve a term of confinement" and that implies a juvenile is ordered to serve a "sentence" that does not include term of confinement. A juvenile granted a deferred disposition, however, is not "serving" any sentence. State v. M.C., 148 Wn.App.at 972.

Furthermore, RCW 43.43.7541 directs that "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." It requires a percentage of that fee be

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<sup>8</sup>To "vacate" means "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary 1782 (10th ed. 2014).

remitted to the agency that collects the DNA sample. Id. That fee cannot be collected from a juvenile granted a deferred disposition because a deferred disposition is not a sentence. See Sate v. A.C.S., No.43080-1-I, 2013 WL 1628376 (April 16, 2013) (unpublished).<sup>9</sup> It is not logical that the legislature would require the payment of the DNA collection fee in every sentence where a DNA sample is ordered and not in every order requiring collection of a DNA sample if it intended to authorize the court to order a DNA sample where no sentence has been entered—such as an RCW 13.40.127 deferred disposition.

This Court should conclude the legislature intended that collection of a DNA sample is only authorized if the court enters a disposition in a juvenile case, but unauthorized if the court enters a deferred disposition.<sup>10</sup> That conclusion is compelled because a deferred disposition is not a conviction for purposes of the DNA collection statute. See Tembruell, 64 Wn.2d at 508 (“we must keep in mind that the words convicted or conviction may be intended to convey different meanings in different contexts”); see also State v. Smith, 158 Wn.App. 501, 246 P.3d 812 (2010) (interpreting the meaning of “convicted” in RCW 9.94A.640(2)(d)).

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<sup>9</sup> Pursuant to GR 14.1(a), E.R.M. cites this case as relevant but nonbinding authority.

<sup>10</sup> If the court revokes a deferred disposition and enters a disposition, there is a conviction for purposes of the DNA collection statute, and it can then order collection of offender’s DNA sample.

3. The strict construction rule and “rule of lenity” also support the conclusion that a deferred disposition is not a conviction as that term is used in the DNA collection statute.

Other rules governing statutory construction further support that collection of a DNA sample is not authorized or required where a juvenile is granted a deferred disposition. Criminal statutes should be literally and strictly construed. State v. Garcia, 179 Wn.2d 828, 837, 318 P.3d 266 (2014). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). For purposes of collecting a DNA sample from a juvenile offender, the narrow interpretation of “conviction” does not encompass a deferred disposition.

Even assuming the meaning of conviction in the DNA collection statute is susceptible to more than one reasonable interpretation, the rule of lenity requires the court "to adopt the interpretation most favorable to the defendant." State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008). Any ambiguity must be strictly construed against the State. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). Under this rule, the term

conviction as used in the DNA collection statute cannot include a deferred disposition.

4. The legislature did not authorize the court to order E.R.M. to provide a DNA sample as a condition of his deferred disposition.

In sum, when RCW 13.40.127(2) and RCW 43.43.754 are read together and interpreting the language of each statute in context, it leads to the conclusion the legislature did not intend collection of a DNA sample from a juvenile granted a deferred disposition. First, under the plain language of the deferred disposition statute, a court does not have the authority to require collection of a DNA as a condition of a deferred disposition order entered pursuant to RCW 13.40.127(2).

Second, under RCW 43.43.754 collection of a DNA sample is only authorized where there is a conviction. A guilty plea entered as part of a deferred disposition is not a conviction in the context of RCW 43.43.754.

Third, assuming it is reasonable to interpret conviction in RCW 43.43.754 to mean a guilty plea made pursuant to the deferred disposition statute, the ambiguity must be resolved in E.R.M.'s favor.

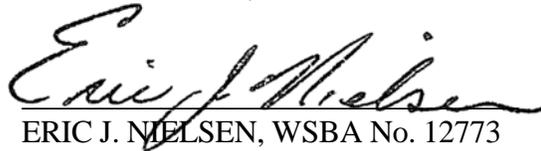
D. CONCLUSION

For the reasons stated, E.R.M. requests reversal of the juvenile's court order requiring collection of his DNA sample.

DATED this 11<sup>TH</sup> day of May 2020.

Respectfully Submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Eric J. Nielsen". The signature is written in a cursive style with a large initial "E".

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