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APR 01 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. _____

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL ALFRED POSEY, JR.,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 26771-7-III
Appeal from the Superior Court of Yakima County
Superior Court Cause Number 03-1-00820-1
The Honorable Susan Hahn, Judge

STEPHANIE C. CUNNINGHAM
Attorney for Petitioner
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

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I. IDENTITY OF PETITIONER

The Petitioner is Daniel Alfred Posey, Jr., Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished Commissioner's Ruling of the Court of Appeals, Division III, case number 26771-7-III, which was filed on January 29, 2009. (A copy of the Ruling is attached in Appendix A.) The Commissioner affirmed the disposition entered against Petitioner in the Yakima County Superior Court. A Motion to Modify Commissioner's Ruling was denied by order entered on March 3, 2009. (A copy of the Order is attached in Appendix B.)

III. ISSUE PRESENTED FOR REVIEW

Where the Juvenile Court has exclusive jurisdiction over the disposition of Appellant's case, but the Juvenile Court's jurisdiction lapsed because Appellant turned 21 years of age before disposition, did the Superior Court err when it entered a juvenile Disposition Order and a Protection Order in adult court?

IV. STATEMENT OF THE CASE

The State charged Daniel Alfred Posey, Jr. by Amended Information in the Yakima County Superior Court with three counts

of second degree rape—domestic violence, and one count of first degree assault while armed with a firearm. RCW 9A.44.050(1)(a), 10.99.020, 9A.36.011(1)(a), 9.94A.510(3). (CP 79-82) The case originated in Juvenile Court and was assigned a Juvenile Court cause number because Daniel was 16 years old both at the time of the alleged crimes and the filing of the Information. (CP 87-90, 79-82, 105, 106) However, because first degree assault is classified as a “serious violent offense”, the adult Superior Court had automatic original jurisdiction over the case, and it was transferred to adult Superior Court and assigned an adult court cause number.¹ (CP 87-90, 102, 103-04)

A jury found Daniel guilty of two counts of second degree rape, but found him not guilty of first degree assault and not guilty of the remaining second degree rape count. (CP 44, 70-78) Daniel had no prior juvenile adjudications or adult convictions. (CP 45) Under adult sentencing guidelines, his standard range was life with a minimum of 102-136 months. (CP 45) The trial court sentenced

¹Under the Juvenile Rehabilitation Act, RCW 13.04 et. seq., the Juvenile Courts have original jurisdiction when a person 17 years or younger is charged with a crime, except under certain limited circumstances. See RCW 13.04.030, 13.40.110. One of those exceptions is when a juvenile is 16 or 17 years old, and is charged with a crime defined as a “serious violent offense” under RCW 9.94A.030. First degree assault is so defined. Accordingly, the adult court had original jurisdiction in this case. RCW 13.40.110.

Daniel to a life sentence with a minimum term of 119 months of confinement. (CP 46)

Daniel appealed to this Court, arguing that the adult Superior Court did not have jurisdiction to sentence him as an adult after he was acquitted of the automatic-decline offense, that his due process and equal protection rights were violated when the adult trial court entered judgment and sentence against him, and that the trial court erred when it excluded evidence regarding the victims sexual preferences. (CP 21, 53; see also Appeal No. 23041-4-III) While Daniel's appeal was still pending, the Legislature amended the automatic-decline statute to require that juveniles acquitted of automatic-decline offenses be remanded to Juvenile Court for disposition. (See RCW 13.04.030(1)(e)(v)(E)(II)) In a supplemental brief, Posey argued that this statute applied retroactively to his case. (CP 21; see also Appeal No. 23041-4-III)

This Court disagreed with all of Posey's arguments, and affirmed his adult court judgment and sentence. (CP 22; see also Appeal No. 23041-4-III) Posey sought review at the Washington State Supreme Court. (CP 17-43) This Court unanimously agreed that Daniel was improperly sentenced as an adult, holding that the Legislature intended to impose more severe punishment only on

juveniles who are actually convicted of, not just charged with, certain criminal offenses; and that the adult court did not have jurisdiction to sentence Daniel. (CP 23-29, 32-33, 35, 38; see also State v. Posey, 161 Wn.2d 638, 647, 167 P.3d 560 (2007)) This Court remanded Daniel's case to the Juvenile Court "for further proceedings." (CP 33)

This Court filed its opinion on September 20, 2007. (CP 19) Daniel turned 21 years old on September 28, 2007. (CP 9, 87; RP 4) The Supreme Court Mandate was filed on October 16, 2007. (CP 17) The Juvenile Court held a hearing on remand on January 9, 2008. (RP 2-49) The presiding Juvenile Court judge, Susan Hahn, is also an adult Superior Court judge, and presided over Daniel's trial in adult court. (RP 2-3, 4)

Daniel moved to dismiss the case, arguing that the adult court lost jurisdiction upon his acquittal of the automatic-decline offense, and that the Juvenile Court lost jurisdiction upon Daniel's 21st birthday. (CP 13-15, 16; RP 6-16, 47) The judge agreed that the Juvenile Court no longer had jurisdiction over Daniel's case. (CP 92; RP 28-29, 48)

The judge then "transformed the room and the judge" into the adult Superior Court, and entered a Disposition Order imposing

a standard range disposition of 60-80 weeks, with credit for time served. (RP 30-31; CP 9-10) The judge crossed out the words "Juvenile Court" from the caption, and entered the Disposition Order under the adult court cause number. (RP 31; CP 9-12 (A complete Copy of the Order is attached in Appendix A.)) The court also entered a Protection Order and a Sex Offender Notice of Registration Requirements. (CP 7-8, 12; RP 44-45)

Daniel timely appealed to Division III of the Court of Appeals. (CP 3) The State filed a Motion on the Merits to Affirm, which a Commissioner granted in a written ruling. A subsequent Motion to Modify was denied.

V. ARGUMENT & AUTHORITIES

The issues raised by Posey's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court, and raises significant constitutional issues under the Washington State Constitution and the United States Constitution. RAP 13.4(b)(1),(2) and (3).

In its ruling, the Court of Appeals Commissioner first noted that the juvenile justice statute provides for exclusive original jurisdiction in the juvenile court, but that the adult superior court has

jurisdiction in certain situations. (Ruling at 4-5) The Commissioner noted that “the juvenile justice statutes provide for juvenile court jurisdiction in some but *not in all* juvenile matters.” (Ruling at 5; Emphasis in original.) The Commissioner reasoned that the superior court therefore had “residual jurisdiction in these other matters, including, as here, in circumstances in which additional action is required after the juvenile turns 18 or, at the outside, 21.” (Ruling at 5). That would be true, except for the fact that Washington statutes specifically and unequivocally vest in the juvenile court *exclusive* jurisdiction over cases like Daniel’s.

The juvenile courts in Washington State are vested with exclusive jurisdiction to handle matters involving juvenile defendants. RCW 13.04.030(1). An adult court can obtain jurisdiction over a juvenile defendant in one of two ways. The first is after a decline hearing in which the Juvenile Court transfers jurisdiction over the juvenile to the adult court. Decline of jurisdiction may only be ordered “upon a finding that the declination would be in the best interest of the juvenile or the public.” RCW 13.40.110.

The second, called automatic decline, occurs if the juvenile is charged with committing certain serious felonies. RCW

13.04.030 specifies the offenses that give rise to automatic decline:

Except as provided in this section, the juvenile courts in this state shall have exclusive original jurisdiction over all proceedings . . . [r]elating to juveniles alleged or found to have committed offenses . . . unless . . . [t]he juvenile is sixteen or seventeen years old and the alleged offense is . . . [a] serious violent offense as defined in RCW 9.94A.030[.] In such a case the adult criminal court shall have exclusive original jurisdiction.

RCW 13.04.030(1)(e)(v)(A). The crime of first degree assault is a “serious violent offense” listed in RCW 9.94A.030. Consequently, Juvenile Court jurisdiction was automatically declined, and the case proceeded to trial in adult court. (CP 102, 103-04)

The jury found Daniel not guilty of the first degree assault charge and firearm enhancement allegation, and guilty only of second degree rape, which is not a “serious violent offense” under RCW 9.94A.030. (CP 70-78) As a result, the adult court no longer had jurisdiction over Daniel’s case, and did not have authority to enter judgment or impose a sentence. State v. Posey, 161 Wn.2d 638, 647, 167 P.3d 560 (2007). At this point, the Juvenile Court’s jurisdiction was revived. Posey, 161 Wn.2d at 646-67; RCW 13.04.030(1)(e)(v)(E)(II).

However, RCW 13.40.300(3) clearly states, “[i]n no event may the juvenile court have authority to extend jurisdiction over any

juvenile offender beyond the juvenile offender's twenty-first birthday[.]" Juvenile Court jurisdiction is strictly construed. State v. Nicholson, 84 Wn. App. 75, 77, 925 P.2d 637 (1996) (citing State v. Rosenbaum, 56 Wn. App. 407, 410, 784 P.2d 166 (1989)). Even if a juvenile cause is pending but not yet heard on the merits, the Juvenile Court loses jurisdiction upon an offender's 21st birthday. See State v. Bushnell, 38 Wn. App. 809, 811, 690 P.2d 601 (1984) (citing State v. Brewster, 75 Wn.2d 137, 142-43, 449 P.2d 685 (1969); State v. Setala, 13 Wn. App. 604, 606, 536 P.2d 176 (1975)).

Therefore, when Daniel turned 21 on September 28, 2007, the Juvenile Court lost jurisdiction in this case. The judge correctly found that it had no authority as a Juvenile Court to enter a disposition order. However, the judge's decision to exercise adult court jurisdiction was flawed.

Wash. Const. Art. IV, § 6 provides that "[t]he superior court shall also have original jurisdiction in all cases and of all proceedings *in which jurisdiction shall not have been by law vested exclusively in some other court[.]*" (Emphasis added.) Thus, the Superior Court's jurisdiction is limited to cases "in which jurisdiction was not exclusively vested by law in some other forum or court." In

re Dillenburg v. Maxwell, 70 Wn.2d 331, 351-52, 422 P.2d 783 (1967) (citing State ex rel. Malmo v. Case, 25 Wn.2d 118, 169 P.2d 623 (1946)).

RCW 13.04.030(1)(e) vests the Juvenile Court with exclusive original jurisdiction in cases “[r]elating to juveniles alleged or found to have committed offenses.” More importantly, the amended RCW 13.04.030(1)(e)(v)(E)(II) now states:

The juvenile court shall have exclusive jurisdiction over the disposition of any remaining charges in any case in which the juvenile is found not guilty in the adult criminal court of the charge or charges for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense that is not also an offense listed in (e)(v) of this subsection.

Because disposition of Daniel’s case is vested by statute exclusively with the Juvenile Court, the adult Superior Court did not have jurisdiction or authority to act in this case.²

Moreover, RCW 13.04.450 states that the provisions of RCW chapter 13.04 (Basic Juvenile Court Act) and RCW chapter 13.40 (Juvenile Justice Act) “shall be the exclusive authority for the adjudication and disposition of juvenile offenders, except where

² RCW 13.40.110 also provides that, upon return to the Juvenile Court, the court may hold a decline hearing to determine whether to retain the case in Juvenile Court for the purpose of disposition or return the case to adult criminal court for sentencing. The State has previously conceded that there are no grounds to decline juvenile jurisdiction in this case. (CP 33)

otherwise expressly provided.” It is nowhere provided that the adult Superior Court shall impose disposition on juvenile offenders or that adult Superior Court shall exercise authority over juvenile cases. There is simply no authority, constitutional or statutory, permitting the adult Superior Court to enter a disposition in a case where the Juvenile Court had, but subsequently lost, exclusive jurisdiction after a juvenile offender reached the age of 21 years.

Finally, the Superior Court judge was incorrect when she stated that dismissal of the case would “quite simply be a miscarriage of justice[.]” (RP 29) The judge was clearly not considering the full history of this case. The State chose to charge crimes it was unable to prove, but that automatically sent Daniel into adult court. (CP 79-82) After being acquitted of the automatic-decline crimes, Daniel should have faced a maximum of 80 weeks (approximately one and one-half years) in a juvenile rehabilitation facility.³

Instead, Daniel was incarcerated for over four and one-half years in adult facilities, first the Yakima County Jail and eventually

³ A 16-year old offender with no criminal history is subject to a 30-40 week sentence under the juvenile sentencing statute, RCW 13.40.0357. A juvenile convicted of more than one offense must serve consecutive sentences. RCW 13.40.180. Accordingly, in juvenile court, Daniel would have been subject to a 60-80 week sentence.

Walla Walla State Penitentiary.⁴ It took the appellate process over three years to finally issue the correct ruling—that Daniel should have received, and the Legislature always intended him to receive, a juvenile disposition.⁵

Daniel was confined for roughly three years longer than he legally should have been, by no fault of his own. To dismiss the case, and thereby remove any juvenile adjudications or convictions from his record and relieve him of further financial or reporting obligations, is certainly not a miscarriage of justice. It instead can begin to rectify the injustice of having been improperly imprisoned for an additional three years in an adult correctional facility—three years of a young life that Daniel can never regain.

VI. CONCLUSION

The Juvenile Court lost jurisdiction over Daniel's case when he turned 21 years of age. But because exclusive jurisdiction was previously vested in the Juvenile Court, the Superior Court had no authority to assume jurisdiction in order to enter a disposition order

⁴ Daniel was arraigned on April 17, 2003 and held in the Yakima County Jail during trial. (CP 102, 110-12) He was imprisoned at Walla Walla State Penitentiary before he was returned to Yakima County for rehearing, and he was finally released from custody on December 26, 2007. (CP 108-09)

⁵ Daniel filed his first Notice of Appeal on May 24, 2004, and the Supreme Court filed its opinion on September 20, 2007. (CP 53, 19)

and a protection order, and to impose reporting requirements upon Daniel. The case should have been dismissed. This Court should reverse the Court of Appeals' Commissioner's Ruling, reverse the orders entered by the adult Superior Court, and remand for dismissal of the verdicts and terms imposed upon Daniel in this case.

DATED: March 30, 2009



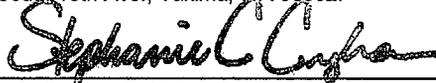
STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for Daniel A. Posey, Jr.

CERTIFICATE OF MAILING

I certify that on 03/30/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kenneth Ramm, DPA, Prosecuting Attorney's Office, 128 N. Second St., Rm. 211, Yakima, WA 98901; and (2) Daniel A. Posey Jr., 221 South 16th Ave., Yakima, WA 98902.



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

APPENDIX A
COMMISSIONER'S RULING

The Court of Appeals
of the
State of Washington
Division III

FILED

JAN 29 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ALFRED POSEY, JR.,

Appellant.

No. 26771-7-III

COMMISSIONER'S RULING

Daniel Alfred Posey, Jr. seeks review of his juvenile disposition order and a protection order, which the superior court entered January 9, 2008, after his twenty-first birthday. He argues that the superior court, sitting as an adult court, did not have jurisdiction to issue the orders. Mr. Posey asks that this Court reverse and remand for dismissal of his rape convictions.

In January 2004, the State charged Mr. Posey with three counts of second degree

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rape – domestic violence, and one count of first degree assault while armed with a firearm – domestic violence. The information alleged that the offenses occurred between January and April 2003. Because Mr. Posey was under 18, he made his first appearance on the charges in juvenile court. The juvenile court transferred the cause to adult court because Mr. Posey was 16 years old at the time of the alleged crimes, and first degree assault was a “serious violent offense” under former RCW 9.94A.030(37)(a)(v) (2002). The juvenile court must automatically decline jurisdiction over juveniles of Mr. Posey’s age who are charged with offenses enumerated there. *See* former RCW 13.04.030(1)(e)(v)(A) (2000).

A jury subsequently convicted Mr. Posey of two counts of second degree rape, but it found him not guilty of first degree assault and the third count of second degree rape. Under adult court sentencing guidelines, Mr. Posey’s sentence was life with a minimum standard range of 102-136 months in prison. The adult court sentenced him to a term of life in prison, with a minimum of 119 months on each count, to run concurrently. At the time of his June 2004 sentencing, Mr. Posey was 17 years old.

Mr. Posey appealed his judgment and sentence to this Court. *See State Posey*, 130 Wn. App. 262, 122 P.3d 914 (2005). While his appeal was pending, the legislature amended RCW 13.04.030 so as to explicitly require the adult court to remand the cause to the juvenile court if the minor is acquitted of the offense which triggered the automatic declination of juvenile court jurisdiction. RCW 13.04.030(1)(e)(A)(II) (2005). The court

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of appeals nevertheless affirmed Mr. Posey's judgment and sentence. On further review, the Washington State Supreme Court affirmed Mr. Posey's convictions, but held that the adult court did not have jurisdiction to impose a sentence after the jury had acquitted Mr. Posey of first degree assault, the offense that triggered automatic declination. *State v. Posey*, 161 Wn.2d 638, 649, 167 P.3d 560 (2007). The Supreme Court remanded "to the juvenile court for further proceedings."¹ *Id.* at 649.

The Supreme Court filed its opinion on September 20, 2007. Its mandate issued on October 16, 2007. Mr. Posey turned twenty-one on September 28, 2007.

Pursuant to the Supreme Court remand, the juvenile court held a hearing on January 9, 2008. Mr. Posey moved to dismiss the case, arguing that the juvenile court no longer had jurisdiction to sentence him because he was twenty-one, and that the adult court did not have jurisdiction to sentence him either. The juvenile court agreed with Mr. Posey that its jurisdiction had lapsed. Therefore, it did not have jurisdiction to sentence Mr. Posey.

The same judge, in effect, adjourned, then reconvened court as adult court. As the

¹ The *Posey* court at 646 observed that the legislature, in amending RCW 13.04.030, had "removed any doubt on [*State v. Mora's*[, 138 Wn.2d 43, 977 P.2d 564 (1999)] statutory interpretation by affirming what we determined to underscore the statutory division between the juvenile and adult criminal systems" – i.e., "that the juvenile receive treatment and rehabilitation through juvenile disposition." Under the amendment, "any juvenile properly charged in adult court of an enumerated offense [such as first degree assault] is 'returned' to juvenile court for imposition of sentence as a juvenile should the juvenile be convicted of a nonenumerated offense." *Id.*

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adult court, it sentenced Mr. Posey to the juvenile sentencing range of 30-60 weeks for each second degree rape conviction, for a total consecutive disposition of 60-80 weeks. The court credited him with the 80 weeks he had already served. It entered the sentence on a juvenile disposition order, but crossed out "Juvenile Court" from the caption and wrote in the adult court cause number. The court also entered a protection order as to the victim and ordered sex-offender registration.

Mr. Posey appeals.

The sole issue on appeal is whether the superior court, acting as adult court, had jurisdiction to enter a juvenile disposition order and a protection order.

"Jurisdiction is the power to hear and determine a cause or proceeding." *State v. Golden*, 112 Wn. App. 68, 72, 47 P.3d 587 (2002). Whether a court has jurisdiction in a cause or proceeding is a question of law subject to *de novo* review. *Crosby v. County of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

Here, the Supreme Court affirmed Mr. Posey's convictions. The only question before this Court is whether the superior court, acting as an adult criminal court, had jurisdiction to sentence Mr. Posey and to impose a protection order.

The clear answer is "yes." Under the Washington Constitution, art IV, sec. 6, the superior court has "original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested *exclusively* in some other court."

(Emphasis added.) In juvenile cases, the law provides for "exclusive *original*

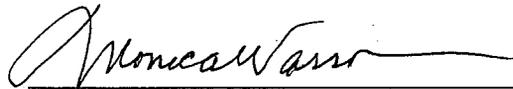
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jurisdiction” in the juvenile court. (Emphasis added.) RCW 13.04.030(1)(e). But the legislature has also provided that the juvenile court (1) can decline jurisdiction in certain instances, RCW 13.40.110; (2) has no jurisdiction if the juvenile offender is sixteen or seventeen at the time of the offense and the offense is a serious violent offense, RCW 13.04.030(1)(e)(v)(A); and (3) loses its jurisdiction over the juvenile offender no later than the offender’s 21st birthday. RCW 13.40.300(3).

Accordingly, the juvenile justice statutes provide for juvenile court jurisdiction in some but *not in all* juvenile matters. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 779, 100 P.3d 279 (2004). It therefore follows that superior court has residual jurisdiction in these other matters, including, as here, in circumstances in which additional action is required after the juvenile turns 18 or, at the outside, 21.

The Court holds that the adult court had jurisdiction to sentence Mr. Posey and did not err by denying Mr. Posey’s motion to dismiss or by entering the disposition order and the protection order. The State’s motion on the merits is granted and the disposition order and the protection orders are affirmed.

January 29, 2009



Monica Wasson
Commissioner

APPENDIX B

ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

FILED

MAR -3 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ALFRED POSEY, JR.,

Appellant.

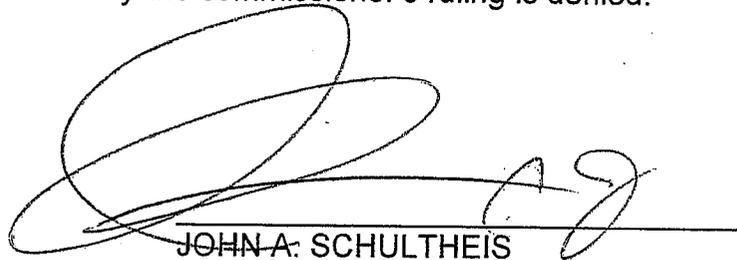
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) ORDER DENYING
) MOTION TO MODIFY
) COMMISSIONER'S RULING
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Having considered appellant's motion to modify the commissioner's ruling of January 29, 2009, and the record and file here;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

DATED: March 3, 2009

FOR THE COURT:



JOHN A. SCHULTHEIS
CHIEF JUDGE