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NO. 89786-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NELSON MAYNARD,

Petitioner.

Filed 
Washington State Supreme Court

MAY 21 2014

Ronald R. Carpenter
Clerk 

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

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A. INTRODUCTION

Through no fault of his own, juvenile court jurisdiction lapsed for Christopher Maynard when no party sought to extend it. The lower court dismissed the charges against him, based upon the State's pre-accusatorial delay. A two-judge majority of the Court of Appeals reversed, remanding the case to superior court for Maynard to be tried as an adult. The majority found that the loss of juvenile jurisdiction was the fault of defense counsel, not the State. Nonetheless the Court of Appeals remanded the case to adult court for "further proceedings."

This Court has the authority and precedent to craft a just remedy for Maynard: remand to the juvenile court for the State to reoffer its plea proposal. This remedy is not only possible but appropriate. While *Amici* take no position on whether this harm is more the result of pre-accusatorial delay or ineffective assistance, this brief emphasizes that once the State files charges in juvenile court, the prosecutor, defense counsel and the court each share in the responsibility, as officers of the court and under their professional obligations, to ensure that juvenile court jurisdiction does not lapse due to mere omission or negligence.

B. IDENTITY AND INTEREST OF AMICI

The identity and interest of *Amici* is detailed in the motion of the amicus parties to accept this brief.

C. STATEMENT OF THE CASE

Amici adopt the statement of the case from the petition for review.

D. ARGUMENT

Where a juvenile has been deprived of his Sixth Amendment right to the effective assistance of counsel such that the trial court “loses” juvenile jurisdiction it is unjust to remand to the superior court for trial as an adult. The proper remedy for ineffective assistance of counsel in this case is remand to juvenile court for the State to reoffer its plea proposal. This remedy is available, fair, and in harmony with the purposes of the Juvenile Justice Act.

1. Maynard’s counsel was ineffective in failing to extend juvenile court jurisdiction where Maynard intended to accept the state’s favorable offer to remain in juvenile court and enter into a deferred disposition.¹

In its supplemental brief, the state makes the new argument that defense counsel may not have been ineffective. Supp. Br. of Resp. 6.² Neither the facts of this case nor a common understanding of juvenile court jurisprudence bear this out. There are few, if any, circumstances where an attorney would advise their client that they should allow juvenile

¹ *Amici* contend that both parties and the court had a duty to ensure juvenile jurisdiction did not lapse unintentionally once charges were filed there. *Amici*’s argument that defense counsel’s conduct was ineffective is not intended to absolve others of responsibility. Justice Penoyar’s dissent below and Petitioner’s briefing here and as Appellee below adequately address the pre-accusatorial delay argument. Accordingly, *Amici* have not repeated it here.

² *Amici* support defense counsel’s motion to strike from the State’s supplemental brief the withdrawal of its previously consistent concession that defense counsel was ineffective.

court jurisdiction to lapse so that they can face felony charges in adult court, with all of the attendant consequences. There are no circumstances where the failure of counsel to communicate acceptance of the state's offer in a way that results in the lapse of the offer and juvenile court jurisdiction can be termed effective representation.

The state argues that ineffective assistance of counsel has not occurred because there has been no conviction yet. In fact, the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapsed or are rejected. *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1402, 182 L. Ed. 2d 379 (2012). That right applies to “all ‘critical’ stages of the criminal proceedings.” *Id.*; accord *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009). The United States Supreme Court has made clear that defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. *Frye*, 132 S. Ct. at 1402. Likewise, this Court has affirmed the obligation of counsel to communicate with their client, especially when that client is a juvenile. *See State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010) (“The right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty.”).

Here, Maynard was denied effective assistance of counsel. His attorney failed to accept a favorable plea offer before Maynard's birthday and failed to move for an extension of jurisdiction that would have allowed him to take advantage of remaining in juvenile court. As a result, Maynard not only lost the plea offer that he wished to accept but also all of the advantages of juvenile court jurisdiction. This conduct falls well short of the standard for effective assistance of counsel. The state offered Maynard a favorable disposition nineteen days prior to his birthday. Maynard's attorney had a duty to communicate the favorable plea deal and its terms to him. *See Frye*, 132 S. Ct. at 1408 (holding defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused, and counsel was deficient in failing to communicate to defendant prosecutor's written plea offer before it expired). The offer was set to expire after Maynard's birthday. Although his attorney discussed the deal with Mr. Maynard and he wished to accept it, this was not communicated back to the prosecutor. His attorney did not notify the court and accelerate the hearing so that he could enter into the terms of the disposition or so that jurisdiction could be extended. Rather, she intended to have Maynard wait until the next hearing date, which was set after his 18th birthday. The plea,

and the court's jurisdiction, lapsed on Maynard's 18th birthday.³ Both the prosecutor and defense attorney appear to have been aware of Maynard's 18th birthday and did not take any action to extend jurisdiction. Regardless of whether Maynard's attorney was unaware of her client's approaching 18th birthday, or failed to take appropriate action, her actions did not meet the clear requirements for effective assistance established by *ANJ* and *Frye* that require an attorney to communicate and accept offers in a way that is meaningful for their clients.

Counsel's deficient performance clearly prejudiced Maynard. The state refiled charges in superior court, where he now faces an adult felony conviction. He lost both the favorable plea offer, which he had informally accepted, and the chance to be tried in juvenile court. The outcome of the proceeding clearly would have been different had his attorney been effective.

2. The Court's power to craft a remedy includes remanding a once-juvenile case back to juvenile court and requiring the state to reoffer its plea bargain.

The United States Supreme Court mandates that a Sixth Amendment violation requires a remedy tailored to the injury the

³ Even if the attorney had strategic decisions for letting the plea lapse, it is the client's, not the attorney's, choice to accept or decline a plea offer. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161, 1163 (1987) (Defense counsel has an ethical obligation to discuss plea negotiations with a client); *see also, Frye*, 132 S. Ct. at 1408.

defendant suffered. *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). The remedy for ineffective assistance of counsel “must ‘neutralize the taint’ of a constitutional violation.” *Lafler*, 132 S. Ct. at 1388 (quoting *United States v. Morrison*, 449 U.S. 361, 365, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)). Where a juvenile has been prejudiced by ineffective assistance of defense counsel, this Court has broad authority to craft a remedy that returns the juvenile at least close to the position he was in prior to the ineffectiveness. This Court has declined to look lightly upon ineffective assistance of defense counsel in the context of juvenile representation in the past and it should not begin to do so here. *See A.N.J.*, 168 Wn.2d 91 (holding manifest injustice necessitates allowing a juvenile to withdraw his plea where ineffective assistance of counsel led the juvenile to be misinformed of the consequences of the plea and to not be adequately informed of nature of charge).

The United States Supreme Court cases are instructive here. In *Frye*, counsel failed to inform the defendant of a plea offer and, after that offer lapsed, the defendant pled guilty on more severe terms. *Lafler*, 132 S. Ct. at 1383. In *Lafler*, defense counsel informed her client of a favorable plea offer but provided ineffective advice that led the defendant to reject the offer. 132 S. Ct. at 1383. The defendant went to trial and was

convicted, resulting in a sentence harsher than that offered in the rejected plea offer. *Id.*

“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.” *Lafler*, 132 S. Ct. at 1387. The Respondent in *Lafler* received a sentence that was three-and-one-half times more severe than he likely would have received if counsel had been effective by recommending he accept the offered plea. *Id.* at 1386, 1391. The Court held that in some circumstances where ineffective assistance of counsel caused the defendant to decline a plea offer, the proper remedy is for the court to consider whether the defendant has shown reasonable probability that but for counsel’s errors he would have accepted the plea and, if so, the court may exercise discretion to determine whether the defendant should receive the term of imprisonment offered by the government in the plea, the sentence received at trial, or something in between. *Id.* at 1389. But, where resentencing alone does not fully redress the constitutional injury, “the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal.” *Id.* at 1389. In *Lafler*, that was precisely the remedy ordered by the Supreme Court: “The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement.” *Id.* at 1391. The Supreme Court left “open to the trial court how best to exercise

[its discretion in determining how to proceed if respondent accepts the re-offered plea bargain] in all the circumstances of the case.” *Id.* at 1391.

In this case, counsel’s performance prejudiced Maynard in two ways. He was deprived of both the State’s plea offer and, perhaps much more significantly, he was deprived of the opportunity to have his case resolved in juvenile court. Reinstatement of the plea offer would only partially repair the harm; an appropriately tailored remedy requires also that the Court reinstate Maynard to juvenile court.

Remand to juvenile court is not without precedent. In *State v. Posey*, a 16 year old was charged with a serious violent offense, which required the juvenile court to automatically decline jurisdiction of the child, as well as other crimes. 161 Wn.2d 638, 641, 167 P.3d 560 (2007) (*Posey I*). This Court held the adult court lost jurisdiction over Posey when he was later acquitted of the automatic decline charge. *Id.* at 641, 644-47. Nonetheless, Posey was not remanded to juvenile court by the trial court but was sentenced as an adult. *Id.* at 641. This Court affirmed the conviction but remanded to juvenile court for resentencing. *Id.* at 649. The Court remanded to the juvenile court even though Posey had turned 18 during the pendency of the appeal. *Compare id.* at 641 (Posey 16 when crime committed) *with State v. Posey*, 130 Wn. App. 262, 122 P.3d 914 (2005) (over two years lapsed between Court of Appeals and Supreme

Court decisions). In fact, prior to issuance of the mandate in *Posey I*, Posey turned 21. *State v. Posey*, 174 Wn.2d 131, 133, 272 P.3d 840 (2012) (*Posey II*). Although RCW 13.40.300 does not provide for juvenile court jurisdiction beyond age 21, except with regard to restitution, this Court affirmed the superior court's imposition of a juvenile sentence on remand. *Id.* at 133, 142.

A juvenile may have no constitutional right to juvenile court jurisdiction, but as with plea bargains, once that jurisdiction is extended, a juvenile is unfairly denied the benefit when ineffective assistance of counsel or prosecutorial misconduct causes the juvenile to lose it. *Compare Frye*, 132 S. Ct. at 1406-07 (dismissing State's argument that there can be no ineffective assistance of counsel at plea rejection stage because there is no right to a plea offer or plea bargain); *Lafler*, 132 S. Ct. at 1387 (same) *with* Supp. Br. of Resp. at 7 (arguing child has no right to be tried in juvenile court). Regardless of the age of the juvenile when the error is remedied on appellate review, the proper remedy is to treat the juvenile consistently with the Juvenile Justice Act. If the juvenile turned 21 years old during the pendency of appeal, as in *Posey II*, the Juvenile Justice Act can be applied in superior court.

3. In addition to being preferable and within the scope of remedies available to the Court, remand to juvenile court is consistent with the Juvenile Justice Act.

Remand to juvenile court is consistent with legislative intent that, except in extraordinary circumstances not present here, juvenile offenders receive treatment and rehabilitation through the juvenile justice system. The primary distinction between Washington's juvenile justice and adult criminal systems hinges on the need of the offenders subject to each system. The Juvenile Justice Act responds to the needs of juvenile offenders by focusing on rehabilitation, not punishment. RCW 13.40.010(2); *Posey I*, 161 Wn.2d at 645 (citing *Monroe v. Soliz*, 132 Wn.2d 414, 419-20, 939 P.2d 205 (1997)). A juvenile disposition focuses on treatment and rehabilitation. *Posey I*, 161 Wn.2d at 645. The statute "reflects the intent to keep juveniles in the juvenile system to allow creative intervention at the juvenile justice level." *Id.*

The Legislature has provided for juvenile offenders should be tried as adults in only very limited circumstances, where they are charged with most serious offenses or where a finding that declination best serves the interests of the juvenile or the public. RCW 13.40.030(1)(e)(v); RCW 13.40.110; *see Posey I*, 161 Wn.2d at 645. But this exclusion is a limited exception to the policy of keeping juveniles in the juvenile justice system. *Posey I*, 161 Wn.2d at 645-46; *State v. Foltz*, 27 Wn. App. 554, 556, 619

P.2d 702 (1980) (exercise of discretion is “uniquely limited” at declination hearing); *State v. Massey*, 60 Wn. App. 131, 137, 803 P.2d 340 (1991) (State bears burden of showing propriety of transfer to adult court – by demonstrating transfer is in the best interest of child or public). Further, by providing for the extension of jurisdiction beyond a juvenile’s 18th birthday, “the legislature clearly intended to provide juvenile courts with a rehabilitative post-majority dispositional alternative.” *In re Pers. Restraint of Smiley*, 96 Wn.2d 950, 953-54, 640 P.2d 7 (1982) (quoting *State v. Binford*, 90 Wn.2d 370, 374, 582 P.2d 863 (1978)).

The requirement that juveniles be treated differently than adults is well-supported. Relying extensively on the well-researched opinions of social scientists, recent United States Supreme Court cases hold that juveniles must be treated differently by the justice system because juveniles are both categorically less culpable and more amenable to rehabilitation. *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (because of characteristics inherent to juvenile offenders, mandatory sentence of life without possibility of parole is unconstitutional as applied to juveniles convicted of homicide offense); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (because of a juvenile offender’s unique attributes, life without possibility of parole is unconstitutional as applied to juveniles convicted of non-homicide

offense); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (because of a juvenile offender's unique attributes, death penalty is unconstitutional as applied to juveniles). Moreover, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. In fact, "the brain does not reach full maturation until the age of 25." Deitch et al., *The Univ. of Tex. at Austin, From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, at 13 (2009).

At no point in Maynard's case did the State, the courts, or defense counsel argue that this juvenile was best suited for adult court. Rather, the State simply argues adult court is the only option after Maynard turned 18. The Juvenile Justice Act, the decisions of this Court and those of the United States Supreme Court provide for jurisdiction in the juvenile division of the superior court. That jurisdiction should be exercised.

4. Remand to superior court as an adult is a not a remedy because it puts the former juvenile in a substantially worse position that the he was in prior to the error.

Remanding juvenile offenders to adult court is not only contrary to the weight of authority but is a harsh punishment, rather than a remedy. As discussed, the adult criminal system is structured to punish adult offenders, not to rehabilitate and respond to the characteristics unique to our young citizens. This court has consistently concluded that because of

well-defined differences between Washington's juvenile justice and adult criminal systems, the JJA does not violate these constitutional provisions. *State v. Chavez*, 163 Wn.2d 262, 267, 180 P.3d 1250 (2008) citing *State v. Weber*, 159 Wn.2d 252, 264–65, 149 P.3d 646 (2006); *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997); *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Lawley*, 91 Wn.2d 654, 591 P.2d 772 (1979); *Estes v. Hopp*, 73 Wn.2d 263, 438 P.2d 205 (1968). Thus if remanded to adult court, juvenile offenders are placed in a system unresponsive to their needs.

A juvenile remanded as an adult faces a harsher sentence that is not tailored to achieve both accountability and the needs of the youthful offender. *Posey II*, 161 Wn.2d at 645. Here, the State charged Maynard with one count malicious mischief in the first degree and five counts third degree malicious mischief. Petit. for Review at 5, 9. Looking simply to a conviction on the most serious charge, first degree malicious mischief, Maynard faces 0 to 90 days confined at an adult prison under the supervision of the Department of Corrections. RCW 9A.48.070(2) (first degree malicious mischief is class B felony); RCW 9.94A.515 (first degree malicious mischief categorized as seriousness level II); RCW

9.94A.510 (sentencing grid).⁴ Under the Juvenile Justice Act, Maynard would be subject to local sanctions in the form of up to 30 days of confinement, up to 12 months of community supervision, up to 150 hours of community restitution or up to a 500 dollar fine; alternatively the disposition could be suspended. RCW 13.40.0357; RCW 13.40.020(17), RCW 13.40.127. The adult sentence is approximately three times more severe than a juvenile disposition.

In fact nearly any case resolution in adult court is almost always far more prejudicial than resolution in juvenile court in ways that extend far beyond the length of the ultimate sentence imposed. Termed adjudications rather than convictions because of the important advantages that flow from juvenile court, juvenile prosecutions can be diverted. RCW 13.40.080. Juvenile adjudications can be more readily sealed or vacated. *Compare* RCW 13.50.050 (11) and (12) with RCW 9.96.060; RCW 9.94A.640 and GR 15. Juvenile adjudications do not constitute strike offenses. RCW 9.94A.570. Juvenile adjudications are not scored as high as adult offenses if the juvenile reoffends as an adult. RCW 9.94A.525.

Posey II provides another example of the difference between juvenile and adult sentencing consequences. Posey was found guilty of two counts of second degree rape. The adult criminal court sentenced him

⁴ *Amici* presume Maynard would be sentenced with an offender score of zero.

to an indeterminate life sentence with a minimum term of 119 months. *Posey II*, 174 Wn.2d at 134. On remand, a standard range juvenile disposition of 60 to 80 weeks was imposed. *Id.* at 135. Even if Posey would have been released after the minimum term of his (overturned) adult sentence, he would have served more than six times as long in confinement than his maximum sentence under the Juvenile Justice Act, and that longer confinement would have been in the adult prison system.

In an adult prison, juvenile offenders like Maynard are about five times more likely to be raped or sexually abused and significantly more likely to commit suicide, which says nothing of the violence they may witness while confined in the adult system. U.S. Dep't of Justice, Report of the Attorney General's National Task Force on Children Exposed to Violence 190 (Dec. 12, 2012) (emphasis in original).⁵

The State fails to demonstrate a compelling interest in trying a person charged as a juvenile, rightly subject to juvenile court jurisdiction, in adult court. Presumably the State filed the charges in juvenile court because the child was deemed fit to avail him or herself of the benefits of that system. Moreover, the Legislature implemented the Juvenile Justice Act for the benefit of persons like Maynard and for the benefit of society. *See* RCW 13.40.010(2). It calls on the courts and the community to carry

⁵ Available at <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

out their functions consistent with the legislative intent. *Id.* Both sides suffer when that jurisdiction is deprived without reason.

The U.S. Department of Justice instructs,

Whenever possible, prosecute young offenders in the juvenile justice system instead of transferring their cases to adult courts. No juvenile offender should be viewed or treated as an adult. Laws and regulations prosecuting them as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned.

U.S. Dep't of Justice, *supra* at 23 (emphasis in original). As the Department of Justice's report makes clear, our communities are less safe when we deny juvenile offenders tailored treatment that enable them "to grow, mature, and become productive citizens." *Id.* at 189-90 (also noting "Children prosecuted as adults are 34 percent more likely to commit new crimes than are youth who remain in the juvenile justice system.").⁶

In short, remand to adult court for prosecution and sentencing as an adult is a disservice to the offender and to our State. It cannot be considered a remedy when viewed from anyone's perspective.

⁶ See also U.S. Dep't of Justice, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting* 26 (Sept. 2011) (results of extensive studies showing juveniles prosecuted as adults had greater recidivism rates and recidivated more quickly and more often than those prosecuted as juveniles "could be attributable to a variety of causes, including the direct and indirect effects of criminal conviction on the life chances of transferred youth, the lack of access to rehabilitative resources in the adult corrections system, and the hazards of association with older criminal 'mentors'"), available at <https://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf>.

E. CONCLUSION

Like his or her adult counterpart, a juvenile offender is entitled to a remedy tailored to the injury for a violation of the Sixth Amendment right to the effective assistance of counsel. In all cases originally filed in juvenile court, remand to juvenile court jurisdiction or for juvenile sentencing should lie. Where ineffective assistance also caused the State's plea offer to expire, the Court should also order the State to reoffer that plea deal.

DATED this 13th day of May, 2014.

Respectfully submitted,



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Subject: RE: State v. Maynard (#89786-7), Motion to File Amicus Brief and Amicus Brief of WDA, TeamChild and WACDL

Rec'd 5-13-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Travis Stearns [mailto:stearns@defensenet.org]
Sent: Tuesday, May 13, 2014 11:26 AM
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Subject: RE: State v. Maynard (#89786-7), Motion to File Amicus Brief and Amicus Brief of WDA, TeamChild and WACDL

Dear Supreme Court Clerk:

Attached please find the Amicus Motion and Accompanying Amicus Brief of the Washington Defender Association, TeamChild and Washington Association of Criminal Defense Lawyers in the case of *State v. Maynard*, # 89786-7.

Counsel for the parties are copied on this message and a certificate of service is also attached.

Please let me know if there are any difficulties with this filing.

Regards,

Travis Stearns

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