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NO. 89786-7
Cowlitz Co. Cause NO. 11-1-00860-3

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**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Appellant,

vs.

CHRISTOPHER NELSON MAYNARD,

Respondent.

**SUPPLEMENTAL BRIEF TO PETITION
FOR REVIEW**

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 ORIGINAL

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I. STATEMENT OF ISSUES

- a. Whether the standard in *State v. Oppelt* is applicable when a defendant appears in juvenile court prior to the loss of juvenile court jurisdiction?
- b. Whether a juvenile defendant's counsel is ineffective when juvenile court jurisdiction is lost and if counsel is found to be ineffective what is the appropriate remedy?

II. STATEMENT OF THE CASE

On September 15, 2010, the Cowlitz County Prosecuting Attorney's Office received a report from the Woodland Police Department concerning multiple malicious mischief – graffiti accusations involving multiple suspects, including Christopher Maynard. Clerk's Papers 91-92. Between October 20, 2010 and June 16, 2011 the police officer and the assigned prosecutor were communicating about various requests for needed information. CP 91-93. The assigned prosecutor subsequently charged Maynard with multiple counts of malicious mischief. CP 93. On July 12, 2011, Maynard appeared in Cowlitz County Superior Court – Juvenile Department in response to a summons. CP 93. During Maynard's first appearance, the court appointed Tierra Busby as his counsel and set an arraignment date for the next week on July 19, 2011. CP 93.

On July 19, 2011, Maynard was present with his counsel, Ms. Busby. CP 93. The court set a pre-trial hearing, a readiness hearing and a trial date. CP 93. Less than one week later the State made an offer/sentencing recommendation in Maynard's case and sent it to counsel. CP 93. The State then e-mailed defense counsel concerning the extension of jurisdiction, including the ramifications of not extending jurisdiction. CP 93.

On August 9, 2011, Maynard appeared for his pre-trial hearing. CP 94. The State made a motion to dismiss the case as juvenile court jurisdiction had lapsed as Maynard's eighteenth birthday was on August 1, 2011 and no written order extending jurisdiction had been entered. CP 94. The court granted the motion to dismiss. CP 94.

The State then filed charges in adult superior court on August 26, 2011. CP 1-4. Maynard appeared in response to his summons. CP 5-10. Maynard's counsel then filed a motion to dismiss the charges on the basis of preaccusatorial delay and ineffective assistance of counsel. CP 11. After a brief evidentiary hearing the superior court granted the motion to dismiss. CP 106-111.

The State initiated an appeal on the grounds that no preaccusatorial delay existed and that the appropriate remedy for ineffective assistance of

counsel is a remand for a new trial, not a dismissal with prejudice. In the decision that was published in part, the Court of Appeals reversed the trial court's decision and remanded the case for further proceedings.

Maynard petitioned this Court for review of both issues. This court accepted review.

III. ARGUMENT

a. **Preaccusatorial Delay Does Not Exist When a Defendant Has the Opportunity to Appear Before a Juvenile Court Prior to Reaching the Age of Eighteen.**

Maynard argues that the Court should apply the three-part test for determining pre-accusatorial delay laid out in *State v. Oppelt*, 172 Wn.2d 285, 257 P.2d 653 (2011). Judge Penoyer's dissent, which Maynard heavily relies on, further argues the State failed to offer a reason why the timing of the filing of the information should change the test outline in *Oppelt*. The reason is laid out in *State v. Calderon*. However, there is a significant distinguishing factor between the instant case and other preaccusatorial delay cases: the time of filing charges. *Calderon*, a precursor to *Oppelt*, discusses that in order for a defendant to show a minimal amount of prerequisite prejudice due to a delay in charging the juvenile court must have been prevented from making a jurisdictional

decision. *See State v. Calderon*, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984).

In the case at bar, no prejudice existed against Maynard when the charges were filed in juvenile court on July 7, 2011, nor on July 12, 2011, when he first appeared before the court, nor on July 19, 2011, when he was arraigned with counsel present because at each of these dates he was under eighteen years of age and appearing in juvenile court. The court should determine whether preaccusatorial delay existed, not upon the refiling of charges in the adult superior court after juvenile court jurisdiction expired, but at a defendant's first appearance in juvenile court. Even if the court chooses to use Maynard's arraignment date of July 12, 2011 when he was represented by counsel, he was still under eighteen years of age and subject to juvenile court jurisdiction as his eighteenth birthday did not occur until August. This interpretation is consistent with *Calderon's* requirement that the juvenile court be prevented from making the jurisdictional decision.

Here, the juvenile court had two separate scheduled hearings at which to make the jurisdictional decision. More than just the specific hearing dates, Maynard had an attorney for thirteen judicial days equating to thirteen additional opportunities to have jurisdiction extended prior to

his birthdate. Unlike the other preaccusatorial delay cases where charges were directly filed in the adult superior court, the juvenile court in the instant case was never wholly deprived of the ability to make the jurisdictional decision. Because the juvenile court had multiple opportunities to address the extension of jurisdiction no prejudice can be demonstrated. Thus, if there is no prejudice to Maynard, then no further inquiry is needed as to the three-part test delineated in *Oppelt*.

b. The loss of Juvenile Court jurisdiction does not automatically mean counsel was ineffective.

The claim for ineffective assistance of counsel has two prongs to be analyzed: 1.) whether trial counsel's performance was below that of a reasonably competent attorney and 2.) whether the convicted defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Both are required for counsel to be considered ineffective.

Of note in the *Strickland* test is the focus on a *convicted* defendant. Here, there is no conviction. Maynard is still presumed innocent, even in adult superior court. While juvenile court jurisdiction cannot be recovered, Maynard still has the ability to challenge the State's evidence at trial with different counsel in adult court. He was not appointed to the same attorney in adult superior court as he was juvenile superior court.

In the State's prior briefing it conceded that the counsel in the juvenile court case was ineffective. However, this court is "not bound by erroneous concessions of legal principles." *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) *citing* *People v. Dodson*, 96 A.D.2d 1116, 467 N.Y.S.2d 709, 712 (1983).

Here, the State's concession may have been erroneous. A juvenile defendant's counsel may still be effective, even in allowing juvenile court jurisdiction to lapse for a variety of reasons, even when a deferred disposition is available to the juvenile. A defendant may desire to seek a diversion in adult felony court which never shows as a conviction, compared to the deferred disposition in juvenile court which displays a conviction for the length of the deferral period. RCW 13.40.127. Additionally, a juvenile offender's deferred disposition, even if successfully completed, will make the same defendant ineligible for first-time offender status should he ever face additional felonious charges as an adult. RCW 9.94A.650. Also, it may be determined the often less restrictive probation imposed by a court of limited jurisdiction may be of a benefit to their client if the charges are misdemeanors. All of these benefits may be taken into account by a juvenile offender when deciding whether or not to make a motion before the court to have juvenile court jurisdiction extended beyond the defendant's eighteenth birthday. Thus,

the first prong of the *Strickland* test may not have been met as a reasonable and prudent attorney could desire for juvenile court jurisdiction to lapse. In the instant case, Maynard was charged with multiple property crimes, rather than offenses against a person or persons. This is often the type of case handle in an adult felony diversion program where the damage can be rectified by payment and/or community service. Again, lending weight to why defense counsel would want juvenile court jurisdiction to lapse.

Maynard argues that his constitutional right to effective assistance of counsel would be a nullity if the court does not dismiss the case with prejudice. However, while a defendant may have a constitutional right to counsel, a defendant does not have a constitutional right to be tried in a juvenile court. *State v. Sharon*, 33 Wn.App 491, 655 P.2d 1193 (1982). Furthermore, the court views the juvenile court as an extension within the adult superior court, not a separate and distinct entity. *State v. Dalluge*, 152 Wn.2d 772, 779, 100 P.3d 279 (2004). This is an important distinction that defeats Maynard's argument about the illusory nature of a remand for new trial. In essence, Maynard was already being processed in the superior court. Thus, there is no issue with him continuing to be processed in the superior court, just like *Dalluge*.

The loss of juvenile jurisdiction does not automatically equate to ineffective counsel. As highlighted previously, there are multiple reasons defense counsel may wish juvenile court jurisdiction to lapse, even when a deferred sentence is available to the juvenile. Also, even if it is found that counsel is ineffective the remedy is not an outright dismissal, but a new trial in adult felony court consistent with the current remedy for a successful ineffective assistance of counsel claim.

IV. CONCLUSION

Based upon the foregoing reasons the Court should affirm the decision of the Court of Appeals and remand this case to the Superior Court for further proceedings.

Respectfully submitted this 2nd day of May, 2014.

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By


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CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Supplement Brief to Petitioner for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 2nd, 2014.


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Michelle Sasser

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Attached, please find the Supplemental Brief to Petition for Review with Cert of Service regarding the above-named individual.

If you have any questions, please contact this office.

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