

No. 96894-2

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 78442-1-I
)	
Respondent,)	STATE'S RESPONSE
)	TO MOTION FOR
v.)	ACCELERATED REVIEW
)	AND RESPONDING
)	BRIEF
)	
M.L.S.,)	
(DOB 08/28/01))	
)	
Appellant.)	
_____)	

I. IDENTITY OF MOVING PARTY

Appellant, M.L.S. (DOB 08/28/01), *hereinafter* appellant, upon all files, records and proceedings moves this Court for accelerated review of the manifest injustice disposition imposed by the Honorable Roger Rogoff on May 8, 2018, in King County Superior Court cause number 17-8-01303-1.

II. STATEMENT OF RELIEF SOUGHT

Appellant seeks accelerated review, pursuant to RCW 13.40.230 and RAP 18.13, of the manifest injustice disposition and requests a reversal and remand for re-sentencing within the standard range. Appellant argues that the disposition court erred when it entered the 52 to 52 week manifest injustice disposition because (1) the disposition imposed was excessive, (2) the

court relied on prohibited statutory and nonstatutory factors, (3) and there was insufficient evidence in the record to support the manifest injustice upwards. Appellant also argues that the court violated appellant's due process rights because appellant was not given proper notice of the aggravating factors that the court could consider at a disposition hearing.

III. FACTS RELEVANT TO THE MOTION

Appellant was charged as a juvenile in King County Superior Court with one count of assault in the third degree for throwing urine from a bottle at a Metro bus driver and then throwing the bottle at the driver, hitting the driver in the face, on November 1, 2017, in King County Washington. Clerk's Papers (CP) 5 – 6. On January 3, 2018, pursuant to plea negotiations, the State amended the charge to assault in the fourth degree and appellant made a Motion for a Deferred Disposition and filed a Statement of Juvenile for Deferred Disposition in support of his motion. CP 10, 11 – 15, 16 – 20.

The State agreed with the Motion for Deferred Disposition, which the court subsequently granted, finding appellant guilty of assault in the fourth degree based on the facts written in the police report. CP 7 – 9, 15. The court ordered appellant to comply with the Conditions of Community Supervision listed in the Findings of Fact and Conclusions of Law and Order Granting Deferred Disposition Pursuant to RCW 13.40.127, *hereinafter* Deferred Disposition, for six months. CP 7 – 9.

Appellant's standard disposition range for the Assault in the Fourth Degree was Local Sanctions, which includes up to 12 months of probation and up to 150 hours of community service. CP 17. If, at any time during the Deferred Disposition period, the court revoked the Deferred Disposition, the court is required to enter an Order of Disposition and impose a standard range sentence of Local Sanctions of up to an additional 12 months of probation, up to

an additional 150 hours of community service and up to 30 days in juvenile detention or could impose up to the statutory maximum punishment of up to 364 days in custody and up to a \$5000 fine. CP 17.

On April 16, 2018, the assigned Juvenile Probation Counselor (JPC) filed a Notice of Revocation of Deferred Disposition alleging a number of violations of the Deferred Disposition. Supp CP ____ (sub 45). On April 18, 2018, the JPC filed an amended Notice of Revocation of Deferred Disposition, adding an additional alleged violation of the Deferred Disposition, as well as a Motion, Certificate and Order for Arrest of Juvenile, which the court granted. Supp CP ____ (subs 46 and 47)

Appellant was arrested and booked on the warrant and was detained by the court at a warrant return hearing on April 20, 2018, and a future hearing was scheduled for April 24, 2018, to address the Motion to Revoke the Deferred Disposition. Supp CP ____ (sub 48). The Motion to Revoke hearing was continued twice for briefing and eventually began with testimony of one witness on April 30, 2018. Report of Proceedings (RP) 68-95; Supp CP ____ (subs 54, 55 and 57). The revocation hearing resumed and concluded on May 8, 2018. RP 96-162. Following the conclusion of testimony, the court revoked the Deferred Disposition and proceeded to disposition. Id. The State and probation requested the imposition of an upward Manifest Injustice Disposition 52 to 52 weeks at the Juvenile Rehabilitation Administration (JRA); appellant asked for a standard range sentence. Id. Based upon four alternative conclusions of law, the court granted the Manifest Injustice Disposition as requested by the State and probation. Id. Appellant now appeals that decision.

3. The appellant's treatment needs cannot be met in the community; and
4. The appellant is unable to comply with the court's orders.

CP 43-44. The court's imposition of an upward Manifest Injustice Disposition is supported by substantial evidence in the record and case law. The State respectfully requests that this Court find that the disposition court did not abuse its discretion and affirm the disposition based on a number of statutory factors from RCW 13.40.150 et. seq., and non-statutory factors supported by case law.

a. Aggravating Factors Supporting the Manifest Injustice Disposition

i. High Risk to Reoffend

High risk to reoffend is a non-statutory aggravating factor that may be used to justify a manifest injustice upwards. State v. T.E.H., 91 Wn. App. 908, 917-18, 960 P.2d 441 (1998). A finding of a high likelihood to reoffend need not be supported by a mental health professional's opinion. S.S., 840 P.2d at 816.

A juvenile trial court's finding that a juvenile poses a high risk of reoffending is sufficient grounds to justify a manifest injustice disposition. State v. N.E., 70 Wn. App. 602, 606-607 (1993). In State v. N.E., the juvenile court found that "in light of her untreated, long-term alcohol and drug abuse, as well as lack of parental control, [the juvenile] presents a high risk to reoffend, as evidenced by her recent and frequent criminal history, her failure to comply with recent disposition orders, and her running away from community based treatment." Id.

Like the juvenile in State v. N.E., appellant is a high risk to reoffend based on his record of criminal referrals in 2017, assaultive behavior while placed at Cypress House, inability to follow rules, lack of parental/guardian control, and significant drug and alcohol use that remains untreated.

While the appellant has no prior criminal convictions, he does have recent criminal conduct in 2017 that were sent to diversion programs. CP 40. In addition, the conclusion of law that appellant is a high risk to reoffend is supported by testimony and documentation about appellant's assaultive and dangerous behavior while placed at Cypress House. While placed at Cypress House, appellant assaulted peers and staff causing injury, tried to push a staff person down the stairs, tied another resident's and a staff person's hands together with a zip tie, and threatened staff and the household with a homemade blowtorch made from a lighter and an aerosol spray. RP 105, 121; CP 65-72.

In addition to this assaultive and threatening behavior, appellant also demonstrated during the period of the Deferred Disposition that he has a chronic inability to follow rules and comply with requirements and conditions imposed by the court and his community providers. RP 119, 126, 130-131; CP 64-72; *see also* CP 7-9.

The record supports the finding and conclusion that the appellant is a high risk to reoffend justifies the imposition of the Manifest Injustice Disposition in this case.

ii. Lack of Parental Control

The lack of parental control is also an accepted factor linked to likelihood of re-offense, and an appropriate basis for a manifest injustice sentence. T.E.H. at 918. A parent's inability to control the offender's behavior places society at a grave risk. Id.

The appellant is a dependent of the State of Washington. Therefore, his legal guardian is the Department of Social and Health Services (DSHS). As evidenced in the record, DSHS is unable to control the appellant. The appellant's legal housing placement was Cypress House. The staff at Cypress House were also unable to control the appellant.

The house rules and DSHS rules were revised and tailored as much as they possibly could be in an attempt to help the appellant be successful. RP 107-109, 110, 113-115; Exhibit 1. However, despite allowing exceptions and leniency in the house rules and DSHS rules, the appellant did not comply. No adult in charge of the appellant could control the appellant. He lived by his own rules and, by his own admission, often no one even knew where he was. RP 136. The facts in the record support the conclusion that there is a lack of parental/guardian control and justify the imposition of the Manifest Injustice Disposition in this case.

iii. The Respondent's Treatment Needs Support the Manifest Injustice Disposition

As articulated in State v. J.V., 132 Wn. App. 533, 541 (2006), a respondent's need for treatment is an aggravating factor that can support a manifest injustice. See also: State v. T.E.C., 112 Wn. App. 9 (2004). In J.V., a manifest injustice was ordered after the respondent had shown that he was not amenable to community supervision or engagement with his outpatient treatment program. Id. The court found that the respondent needed a structured and disciplined environment to address his treatment needs and that Juvenile Rehabilitation Administration (JRA) was appropriate. Id. Similarly, in T.E.C., court found that an extended period of structured residential care and specialized treatment may be appropriate where a juvenile is considered high risk to reoffend. T.E.C. at 17.

The facts in this case support that appellant is in need of the structured setting of JRA in order to meet both his health and treatment needs. Lesser attempts to meet these needs in the community have proven to be futile. Appellant refused to go to medical appointments when he had pneumonia and was vomiting blood. RP 101-102, 104-105, 106, 116. Appellant continues to use drugs and alcohol (even while suffering from pneumonia) and his substance abuse and addiction remain untreated while he is in the community. RP 105, 125, 135, 117; CP 68-72. In

short, as the court ruled, appellant is unable or unwilling to engage in any structured program designed to address his ongoing drug/alcohol addiction. CP 42.

The court found that a standard range sentence of local sanctions in this case would not provide any meaningful opportunity for services or rehabilitation that appellant needs. CP 42-43. The appellant had already served more days in custody than a standard range disposition would impose (30 days) and, therefore, would have been immediately released without having received any treatment or services. CP 32. In fact, if the court imposed a standard range sentence, appellant would be released into an even less stable situation than he was in when he was brought into custody on the warrant because he is no longer allowed to reside at Cypress House. RP 121-122. The court's only recourse to enter a disposition that would provide a meaningful opportunity for treatment and rehabilitation was to enter a Manifest Injustice Disposition in this case. The record supports a conclusion based on this aggravating factor that imposing the standard range in this case would result in a manifest injustice.

iv. Failure to Comply with Orders of the Court

The fact that an appellant has failed to comply with conditions of a recent dispositional order or diversion agreement is another aggravating factor the court may consider when imposing a Manifest Injustice Disposition. RCW 13.40.150(3)(i)(iv). The court cited the appellant's noncompliance with conditions of recent court orders, noting that the appellant "violated the terms of his pretrial release on the current matter, as well as his violations of the Court's Order on Deferred Disposition." CP 42. The court's order for Deferred Disposition in this case contains Conditions of Supervision, many of which appellant violated, including, but not limited to, no use of drugs and alcohol, no possession of weapons, follow parent/guardian rules and house rules. CP 8; RP 105, 117, 125. There is substantial evidence in the record that

appellant did not comply with conditions of a dispositional order of the court and in support of the Manifest Injustice Disposition.

3. The Appellant Received Proper Notice that the Court Could Impose a Manifest Injustice Disposition

The Deferred Disposition statute requires that a juvenile “[a]cknowledge the direct consequences of being found guilty and the direct consequences that will happen if an order of disposition is entered.” RCW 13.40.127(3)(d). The record demonstrates that appellant acknowledged the consequences at the time of entry of his Deferred Disposition on January 3, 2018. The appellant demonstrated to the court that he had a clear understanding of what a Deferred Disposition is and the consequences for not complying with the conditions of the Deferred Disposition. RP 8.

Further, appellant received notice of the potential dispositions in the event that the Deferred Disposition was revoked in the future. RP 14. At the time of the entry of the Deferred Disposition, appellant was provided notice that, in the event that his Deferred Disposition was revoked in the future, his standard disposition range for the assault in the fourth degree was Local Sanctions or up to the maximum punishment of up to 364 days in custody and up to a \$5000 fine. CP 17. During the colloquy with appellant, the court informed the appellant that, in the event of revocation, appellant would receive a standard range sentence unless the court found that there were “special circumstances or what we call aggravating factors that made the standard range sentence . . . a manifest injustice.” *Id.* The court informed the appellant that a manifest injustice disposition would be a “higher sentence” than a standard range sentence. *Id.*

The court’s questioning and instructing of the appellant during the Motion for a Deferred Disposition beyond satisfied the requirements of RCW 13.40.127(3)(d). This is not a basis for this Court to reverse and remand the case.

4. The Court Did Not Impose a Sentence Greater Than the Statutory Maximum

The appellant argues that the court imposed a sentenced greater than the statutory maximum. This argument is confusing and has no merit. The statutory maximum sentence for assault in the fourth degree, a gross misdemeanor, is 364 days and a \$5000 fine. Here, the court imposed a sentence of 52 to 52 weeks. A simple calculation shows that 52 weeks is in fact 364 days. The appellant received a disposition of 52 weeks, minus the credit time that he had already served in custody, which was 64 days. CP 31-33. The court’s sentence did not exceed the statutory maximum of 364 days.

V. CONCLUSION

The court imposed a manifest injustice sentence based on numerous statutory and non-statutory aggravating factors that are clearly and convincingly established by the record. The disposition in this case is not an abuse of discretion and it is in line with the stated purposes of the Juvenile Justice Act. The State respectfully requests that the Court affirm the disposition.

Respectfully submitted the 17th day of September, 2018.

By:



Claire Marie Gilchrist Thornton
Deputy Prosecuting Attorney, King County
WSBA #28036
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KING COUNTY PROSECUTOR'S OFFICE-JUVENILE DIVISION

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