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CRIMINAL DIVISION  
KING COUNTY PROSECUTORS OFFICE

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 R.B.S., )  
 D.O.B. 6/17/1994, )  
 )  
 Appellant. )  
 )  
 )

No. 63828-9-J

STATE'S RESPONSE TO MOTION  
FOR ACCELERATED REVIEW

2009 OCT 13 PM 14:37  
COURT OF APPEALS  
FILED

**I. IDENTITY OF MOVING PARTY**

Appellant, R.B.S. (D.O.B. 6/17/1994) upon all files, records and proceedings, moves this court for accelerated review of the manifest injustice disposition imposed by the Honorable Judge Carol Schapira on July 10, 2009.

**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 reversal and remand for resentencing within the standard range. The State requests that the Court affirm the trial court's finding of manifest injustice and the disposition dependent thereon.

1 **III. FACTS RELEVANT TO THE MOTION**

2 **A. SUBSTANTIVE FACTS**

3 On October 14, 2008, at around noon, Renton police were called to the home of  
4 Melodie Perkins at 16110 128th Avenue SE. CP 3. A neighbor, Nancy Gaidjiergis  
5 reported seeing two unknown juveniles crawling into the basement window of the  
6 Perkins residence. CP 3. Upon arriving on scene to investigate, officers observed a  
7 vehicle drive by their location; said vehicle was recognized by another neighbor as  
8 being in the area and containing numerous juveniles at the time of the incident. CP 3-4.  
9 Officers stopped this vehicle, to find one of the suspects looking nervous and having in  
10 his possession two jewelry boxes that were later found to match property missing from  
11 the Perkins home. CP 4, 6. Upon processing the scene with Ms. Perkins, and taking  
12 fingerprints, officers found numerous valuables missing from the home, other items  
13 strewn about, and BB gun pellets shot from inside the home. CP 5-6.

14 Nearly three months later, Renton police was contacted by Seattle police, who,  
15 upon investigating a burglary in their jurisdiction, had arrested and interrogated Michael  
16 Vong. CP 6. Vong admitted to dozens of burglaries in south King County, and named  
17 R.B.S. as one of his accomplices. CP 6. The fingerprints of R.B.S. were found to  
18 match some of the latent prints taken from inside the Perkins home in mid-October. CP  
19 7. Pursuant to a search warrant served on the home of R.B.S. (while he was present in  
20 the home), police found stolen property from numerous burglaries, as well as the  
21 Nintendo game system that had been taken from the Perkins home. CP 7.

1           **B.     PROCEDURAL FACTS**

2           On April 7, 2009, the State filed charges against R.B.S. for Residential Burglary  
3 and Malicious Mischief in the Third Degree. CP 1-2. On May 11, R.B.S. waived case  
4 setting and set the case for fact finding. CP 8-9. On June 30, R.B.S. struck his fact  
5 finding date, and set the case for a plea; he agreed to plead to the Residential Burglary  
6 on the State's agreement to recommend 20 days of detention and dismiss the Malicious  
7 Mischief charge. CP 10. On July 10, immediately prior to disposition, the R.B.S. pled  
8 guilty to Residential Burglary in front of the Honorable Judge Carol Schapira. CP 11-16.

9           At disposition on this charge, as well as a count of Possession of a Stolen  
10 Vehicle (PSV) to which the respondent had previously pled, the State gave its agreed  
11 upon recommendation of 12 months of community custody, 36 hours of community  
12 service, and 15 days of detention on the PSV, and 20 days of detention with no further  
13 sanctions on the Residential Burglary. RP 13-14. The Juvenile Probation Counselor  
14 (JPC) recommended a manifest injustice disposition of 48 to 52 weeks at a Juvenile  
15 Rehabilitation Administration facility (JRA). RP 14. Upon consideration of the  
16 arguments of defense counsel and JPC, the Court imposed a manifest injustice  
17 disposition of 48 to 52 weeks at JRA. RP 24-26; CP 19-24. It is this disposition that  
18 R.B.S. now appeals. CP 26.

19           In imposing the manifest injustice disposition, the court relied upon three  
20 aggravating factors. Primary reliance was upon the lack of parental control apparent in  
21 the R.B.S.'s situation. RP 25. Secondary reliance was placed with the fact that R.B.S.  
22 had previously shown an inability to comply with conditions imposed by parole and  
23 probation officers when out in the community, evinced by the fact that he had not been  
24

1 attending school, or availing himself of the services set up by his JPC and parole officer.  
2 RP 25-26. Tacit, tertiary reliance went to the fact that the respondent's was a high risk  
3 to reoffend. RP 27 (judge lectures R.B.S. on the direction his behavior is taking him).  
4 For this final finding, as well as for the finding of a lack of parental control, the court  
5 relied upon the fact that stolen property from far more than this one burglary was found  
6 in a search of R.B.S.'s living space. RP 25.

7 **IV. GROUND'S FOR RELIEF SOUGHT**

8 **A. ACCELERATED REVIEW OF A MANIFEST INJUSTICE DISPOSITION**  
9 **IS AUTHORIZED BY STATUTE AND MANDATED BY THE RULES OF**  
10 **APPELLATE PROCEDURE.**

11 The State acknowledges that the Juvenile Justice Act authorizes accelerated  
12 review of manifest injustice dispositions. RCW 13.40.230. Indeed, the Rules of  
13 Appellate Procedure mandate accelerated review of juvenile dispositions outside the  
14 standard range. RAP 18.13.

15 **B. THIS COURT SHOULD AFFIRM THE DISPOSITION, BECAUSE THE**  
16 **IMPOSITION OF A STANDARD RANGE SENTENCE WOULD BE**  
17 **DANGEROUS TO SOCIETY AND DETRIMENTAL TO THE**  
18 **REHABILITATION OF THE JUVENILE.**

19 **1. Three Applicable Standards of Review.**

20 A dispositional court's finding of a manifest injustice is subject to appellate review  
21 under the standard set forth in RCW 13.40.230(2). That statute provides:

22 To uphold a disposition outside the standard range, the court of  
23 appeals must find (a) that the reasons supplied by the disposition  
24 judge are supported by the record which was before the judge and  
that those reasons clearly and convincingly support the conclusion  
that a disposition within the standard range would constitute a  
manifest injustice, and (b) that the sentence imposed was neither  
clearly excessive nor clearly too lenient.

This standard has been clarified as amounting to a three-part test:

- 1 (1) the reasons given by the trial court must be supported by the record;
- 2 (2) those reasons must clearly and convincingly support the disposition;
- 3 and
- 4 (3) this disposition cannot be too excessive or too lenient.

5 State v. P., 37 Wn. App. 773, 777, 686 P.2d 488 (1984) (citing State v. Rhodes, 92  
6 Wn.2d 755, 760, 600 P.2d 1264 (1979)).

7 Each of the three parts of the test has a different standard of review applicable  
8 thereto. The first part of the test is a review of the disposition judge's findings for  
9 substantial evidence. State v. P.B.T., 67 Wn. App. 292, 301, 834 P.2d 1031 (1992)  
10 (citing State v. Brown, 55 Wn. App. 738, 752, 780 P.2d 880 (1989)). Those findings will  
11 not be disturbed unless they are clearly erroneous. Id. The second is a review of  
12 whether those findings clearly and convincingly support a manifest injustice disposition.  
13 State v. P., 37 Wn. App. at 778. The clear and convincing standard remains largely  
14 undefined, but is akin to the criminal beyond a reasonable doubt standard. Id. The  
15 third part of the test is a review of the ultimate length of the sentence to determine if the  
16 disposition court abused its discretion by imposing a clearly excessive penalty. State v.  
17 Tauala, 54 Wn. App. 81, 86, 771 P.2d 1188, review denied, 113 Wn.2d 1007 (1989).  
18 When the term of the sentence has a tenable basis, it will be upheld on appeal. State v.  
19 S.S., 67 Wn. App. 800, 819, 840 P.2d 891 (1982).

20 While a manifest injustice disposition must pass all three parts of this test under  
21 RCW 13.40.230(3), it is not necessary for all factors from which the court based its  
22 decision to be recognized or upheld on appeal. State v. Johnson, 45 Wn. App. 716,  
23 719, 726 P.2d 1042 (1986). Even one remaining aggravating factor may be sufficient.  
24 State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987) (court upheld an exceptional  
sentence when only one factor out of four cited by the trial court was affirmed).

1 Although the State did not recommend a manifest injustice disposition at the time of  
2 sentencing in this case, it may nonetheless be required to defend such a disposition on  
3 appeal, and to do so is not a violation of the plea agreement. See State v. Poupart, 54  
4 Wn. App. 440, 449, 773 P.2d 893 (1989).

5 In this case, the sentencing court did not initially enter written findings of fact and  
6 conclusions of law regarding the imposition of the sentence, however, written findings  
7 and conclusions are not necessary to support a manifest injustice disposition. State v.  
8 S.H., 75 Wn. App. 1, 877 P.2d 205, review denied, 125 Wn.2d 1016, 890 P.2d 20  
9 (1994). Neither the Juvenile Justice Act of 1977, (RCW 13.40) nor the juvenile court  
10 rules require a sentencing judge to enter written findings to support a disposition outside  
11 the standard range pursuant to a manifest injustice finding. State v. E.J.H., 65 Wn. App.  
12 771, 775, 830 P.2d 375 (1992). Rather, this Court under RCW 13.40.230 reviews the  
13 whole record, including the sentencing court's oral ruling. Id.

14 Appellant reads JuCR 7.12(e) as imposing an affirmative duty upon the court to  
15 set out in writing its findings, however, JuCR 7.12(e) simply provides: "If the court  
16 imposes a sentence based on a finding of manifest injustice, the disposition order shall  
17 set forth those portions of the record material to the disposition." This Court can provide  
18 meaningful review by examining the sentencing court's oral ruling. E.J.H. at 775; State  
19 v. P., 37 Wn. App. at 778 (1984) (court conducts independent review of the whole  
20 record). In this case, the oral record is sufficiently clear so as to not require written  
21 findings, though such findings have since been entered.

1                   **2. The Court's Findings Were Supported by Substantial**  
2                   **Evidence.**

3                   The dispositional court found three aggravating factors, both statutory and non-  
4                   statutory. It found that there was insufficient parental control in the home. This finding  
5                   is substantially supported by the fact that stolen property was found in a part of the  
6                   father's home where he admittedly never looked, by the fact that the father left his boys  
7                   home alone for a month soon after a criminal search warrant was served on that home,  
8                   as well as by the fact that no parent was present for the disposition hearing. The court  
9                   found that the R.B.S. had violated prior conditions of probation or parole. This was  
10                  evinced by the fact that the R.B.S. had not gone back to school or availed himself of the  
11                  other services that his parole officer had worked hard to get him. The disposition court  
12                  further found that the respondent was a high risk to reoffend. It based this on the fact  
13                  that there was much more stolen property discovered pursuant to the search warrant  
14                  than simply what supported the instant charge, in addition to his non-responsiveness to  
15                  services.

16                  On appeal, R.B.S. does not appear to challenge these findings themselves, but  
17                  rather whether the court at disposition was entitled to consider some of the information it  
18                  did in making the findings. Appellant's Brief at 10-11. The "real facts" doctrine tends to  
19                  preclude courts from relying on uncharged offenses to justify upward departures from  
20                  the standard range. See State v. Melton, 63 Wn. App. 63, 72, 817 P.2d 413 (1992).  
21                  However, this doctrine does not apply to situations where the facts relied upon to justify  
22                  the exceptional sentence are closely related to the charged offense. State v. Tierney,

1 74 Wn. App. 346, 352, 872 P.2d 1145 (1994), cert. denied, Tierney v. Washington, 513  
2 U.S. 1172, 115 S.Ct. 1149 (1995).

3 In Tierney, the trial court, upon jury conviction of the defendant of Arson in the  
4 First Degree, relied on the defendant's "intentional infliction of major emotional distress"  
5 in imposing an exceptional sentence of 68 months (two times the high end of the  
6 defendant's standard range). 74 Wn. App. at 349-50. The defendant in that case had  
7 continued to make harassing and threatening phone calls to the victim and her family for  
8 months after scorching her residence, but was never charged with this harassment. Id.  
9 The Court of Appeals held that the trial court's reliance on this deliberate cruelty in  
10 justifying its exceptional sentence was not error, because "The real facts doctrine only  
11 bars reliance on those facts wholly unrelated to the current offense or those facts which  
12 would elevate the degree of crime charged to a greater offense than charged." Id. at  
13 352.

14 In the instant case, the fact that the evidence of other burglaries was found in a  
15 search of the respondent's home was inseparable from the proof of the crime charged.  
16 The warrant was signed and served pursuant to an investigation of a completely  
17 unrelated string of burglaries. Had there been a trial on this matter, it certainly would  
18 have come out in testimony that it was another agency's search warrant that turned up  
19 the stolen Nintendo from the Perkins home. It was not error for the disposition court to  
20 rely on these facts to justify its exceptional sentence, as they are not the type of "wholly  
21 unrelated" facts to which the real facts doctrine applies.

1                   **3.     These Findings Clearly and Convincingly Supported a**  
2                   **Manifest Injustice Disposition.**

3                   There are both statutory and non-statutory aggravating factors that may support  
4 a manifest injustice disposition. The statutory aggravating factors are found in the  
5 Juvenile Justice Act, at RCW 13.40.150(3)(i). It has been recognized by appellate  
6 courts on numerous occasions that this is not an exhaustive list, and that other  
7 aggravating factors may justify an exceptional sentence. Rhodes, 92 Wn.2d at 759  
8 (1979). This Court need not affirm all aggravating factors relied upon in order to find  
9 that the exceptional sentence is justified. Fisher, 108 Wn.2d at 429-30 (1987).

10                  One statutory factor is that the respondent “has failed to comply with conditions  
11 of a recent dispositional order.” RCW 13.40.150(3)(i)(iv). The disposition court in this  
12 case couched this factor as a lack of positive behavior in the community since being  
13 released from JRA. RP 25. On appeal, R.B.S. misconstrues the court’s reasoning as  
14 punishing him for doing well in detention and at JRA. Appellant’s Brief at 11-13. The  
15 disposition court mentions nowhere in its oral findings and conclusions R.B.S.’s positive  
16 behavior in detention; it rather focused on the respondent’s negative behavior in the  
17 community since returning from JRA. The JPC’s comments were introductory in nature,  
18 intended to express that R.B.S. was capable of good behavior, and how he mystified his  
19 JPC with the fact that he only exhibited good behavior when not out in the community.  
20 RP 14-15. Prior non-compliance with parole and probation is a statutory aggravating  
21 factor on which the court properly relied in imposing its exceptional sentence.

22                  A non-statutory factor that may support a finding that a standard range  
23 disposition would be a manifest injustice is lack of parental control over a juvenile  
24

1 offender. State v. T.E.H., 91 Wn. App. 908, 918, 960 P.2d 441 (1998). T.E.H. was a  
2 child molestation case with an 11-year-old respondent molesting a five-year-old girl. Id.  
3 at 911. The lack of parental supervision in that case led directly to the respondent's  
4 ability to commit the crime charged. Id. at 918. The same is true in the instant case.  
5 R.B.S. and his brother were able to store thousands of dollars worth of stolen property  
6 in their father's home, because the father never went into their portion of the house. RP  
7 17. R.B.S.'s father's inability to control his two children "is related to the degree of risk  
8 to society where the juvenile's behavior itself constitutes such a risk." 91 Wn. App. at  
9 918. This clearly supports an exceptional sentence.

10 High risk of a juvenile to reoffend is a non-statutory aggravating factor that has  
11 existed for decades. See State v. P., 37 Wn. App. at 778 (1984). Accord, T.E.H., 91  
12 Wn. App. at 917-18 (1998). That the disposition court relied upon this aggravating  
13 factor in imposing the exceptional sentence is evident in the fact that the court felt it  
14 appropriate to lecture R.B.S. on the divergent paths from which he had to choose. RP  
15 27. This aggravating factor is inseparably entwined with that analyzed in the preceding  
16 paragraph. Without parental control in the home, R.B.S. has shown that he will  
17 continue to deal in property stolen from the homes and persons of others.

18 These three valid aggravating factors, taken together or individually, clearly and  
19 convincingly support a disposition above the standard range. Local sanctions, which  
20 could not have included additional detention time, would not have been sufficient to  
21 provide R.B.S. with the services and education that he needed to become a productive  
22 member of society going forward. Nor would they have been sufficient to protect  
23 society from R.B.S.'s behavior absent those services.

1                   **4. The Length of the Sentence Was Not an Abuse of Discretion.**

2                   Once a disposition court has found that a standard range sentence would effect  
3 a manifest injustice, it is saddled with broad discretion in determining the appropriate  
4 length of that sentence. Tauala, 54 Wn. App. at 86 (1989). The appellate court must  
5 uphold the length of the sentence, so long as it has a tenable basis. S.S., 67 Wn. App.  
6 at 819 (1982). Because the length of the sentence in this case is not clearly excessive,  
7 it must be upheld. See RCW 13.40.230(2)(b).

8                   The length of the sentence imposed by the court in this case mirrored the  
9 recommendation of the JPC of 48 to 52 weeks in JRA. Compare RP 14 with CP 22.  
10 Considering that R.B.S. had committed multiple new felony offenses in just over a year  
11 since his release from JRA after 36 weeks, imposing more than 36 weeks would not  
12 seem to be unreasonable. Further, the JPC outlined how she calculated the length, RP  
13 20, and it can be inferred that the court adopted that reasoning by adopting the JPC's  
14 recommended term. The term of 52 weeks is not clearly excessive, and should be  
15 upheld by this Court.

16                   **5. Mitigating Factors Were Considered by the Court, and Were**  
17                   **Not Persuasive.**

18                   On appeal, R.B.S. argues that the disposition court erred by failing to find the  
19 existence of two mitigating factors. The Juvenile Justice Act confers no affirmative duty  
20 on a court to find any mitigating factors that may or may not exist. It simply imposes a  
21 duty on the court to "consider" whether those factors might exist. RCW 13.40.150(3)(h).  
22 Indeed, the disposition judge is not even required to expressly state that she has  
23 considered mitigating factors. See State v. M.L., 114 Wn. App. 358, 363, 57 P.3d 644  
24

1 (2002) (citing State v. N.E., 70 Wash.App. 602, 607, 854 P.2d 672 (1993)). It is  
2 sufficient if it is implicitly clear on the record that mitigating factors were considered. Id.

3 In the instant case, the disposition court clearly considered the arguments of  
4 counsel, and carefully read and digested the diagnostic report of the JPC, both of which  
5 cited the mitigating factors to which counsel refers. It is understandable, given the  
6 nature of the disposition imposed, that the court did not rely on those mitigating factors  
7 in its reasoning. The fact that R.B.S. had not committed an offense for a year prior to  
8 this offense is undercut by the fact that much of that year was spent at JRA on his  
9 previous felony. Further, the fact that R.B.S.'s actions did not threaten harm to others is  
10 undercut by the fact that there is a risk of harm inherent in committing the offense of  
11 residential burglary, particularly when it is committed armed with a BB gun.

12 **V. CONCLUSION**

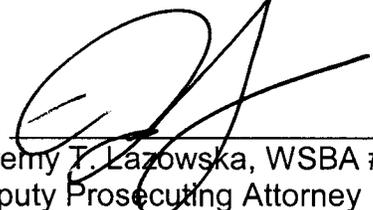
13 At disposition for the crime of Residential Burglary, the Superior Court did not  
14 commit reversible error when it found that a standard range sentence would effectuate a  
15 manifest injustice, and imposed an exceptional sentence of 48 to 52 weeks at JRA. Its  
16 findings were supported by substantial evidence. Those findings clearly and  
17 convincingly supported an exceptional sentence. The length of the sentence imposed  
18 was not so clearly unreasonable as to justify remand, and was in fact quite reasonable.  
19 Its failure to explicitly state its consideration of mitigating factors on the record is not  
20 reversible error. The exceptional sentence should be affirmed.

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DATED this 29th day of October, 2009.

Respectfully Submitted,

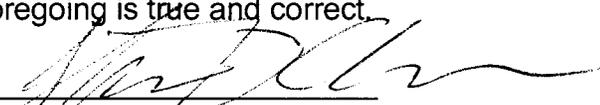
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
\_\_\_\_\_  
Jeremy T. Lazowska, WSBA #39272  
Deputy Prosecuting Attorney

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, at Nielsen Broman Koch, the attorney for the appellant, at 1908 E. Madison Street, Seattle, Wa 98122, containing a copy of the State's Response to Motion for Accelerated Review and Supplemental Designation of Clerk's Papers, in STATE V. RICHARD SEK., Cause No. 63828-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Steve Akerman  
Done in Seattle, Washington

Dated October 30, 2009