

66462-0

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No. 66462-0-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

J.O., Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the court have jurisdiction to address the Appellant's failure to provide a biological DNA sample for purposes of identification, as the collection of a biological sample was not a condition of community supervision, the written motion to revoke had been filed prior to the expiration of the deferred time period, the subsequent filing of a written motion compelling a DNA sample, and the Appellant's failure to complete the terms of community supervision whereby precluding the court from vacating and dismissing with prejudice.?

2. When a juvenile is convicted and granted a deferred disposition for a felony offense, mandating DNA collection for identification purposes pursuant to RCW 43.43.754 constitutionally valid when the deferred disposition has not been dismissed with prejudice?

3. When a juvenile is found guilty of a felony offense and granted a deferred, is requiring the convicted felon to provide a DNA sample

under RCW 43.43.754 valid under the Fourth Amendment prior to the vacation and dismissal of the deferred disposition?

C. FACTS

J.O. was initially charged with one count of theft in the first degree and one count of malicious mischief in the third degree. CP 19. On April 28, 2010 the charges were amended and the Appellant after stipulating to the facts contained in the written probable cause statement or police reports and that the court could consider only that information in deciding guilt and requested a deferred disposition upon a finding of guilt to the felony charge. CP 11, RP 15-17. In the Appellant's statement for a deferred disposition under section 1.1, the Appellant was informed of the conditions of community supervision that could be imposed. CP 11, RP 15-16. Under a separate section on the statement of deferred disposition, the Appellant was provided notice that the conviction would result in the collection of DNA for purposed of identification per RCW 43.43.754. RP 16-17, CP 11.

The trial court found the Appellant, J.O., guilty of taking a motor vehicle without the permission in the second degree and the court granted the Appellant's request for a deferred disposition pursuant to RCW 13.40.127. CP 11. Under the deferred disposition, the Appellant was

ordered to 6 months of community supervision which included full payment of restitution in the amount of \$2,169.21. CP 11. Additionally, since the Appellant was found guilty of the felony offense of taking a motor vehicle without the owner's permission in the second degree and imposed 6 months of community supervision and restitution. CP 11. Under a separate section of the deferred disposition, the trial court ordered the Appellant provide a DNA sample for identification purposes due to the conviction of a felony offense and RCW 43.43.754. CP 11.

Prior to the expiration of the deferred disposition the state filed a motion to revoke for failure to pay restitution. On December 9, 2010 at the hearing for the motion to revoke was to be considered, the attorney for the Appellant stated that he still had not paid the full amount of restitution, but was intending to pay the rest at a later time. RP 2. The community supervision counselor stated that the Appellant had been charged and pled guilty of a felony offense the DNA still had to be collected. RP 3. After not knowing if the providing DNA was mandatory or discretionary, the court stated that the Appellant could either provide the DNA or the Appellant would not, the matter would be considered by the court at a hearing. RP4. At this same time, the Appellant still had not paid the full amount of restitution. RP 2-5. The court further stated that it wanted to be informed and updated on the DNA issue. RP 5. As the Appellant did

not provide DNA as previously ordered, the State filed a written motion compelling the collection of DNA after also providing the attorney with notice of issue that DNA was a mandatory requirement and not a discretionary decision for the court. RP 7 -8. The state indicated that the Appellant had not complied with the law nor the disposition order and therefore the court could not vacate the adjudication and dismiss the disposition. RP 8. Until the issue of DNA was resolved the following week, the court would not grant the Appellant's motion to vacate and dismiss the deferred disposition. RP 9.

After considering the memo submitted by the state and with nothing from the Appellant, the court held that it had jurisdiction and imposed the collection of DNA. RP 16. The court stated that per the Appellant's own statement and acknowledgement along with the order for deferred that the Appellant was aware and shall provide a biological sample for purposes of DNA identification analysis. RP 16-17. Additionally, the court stated that pursuant to section 4.12 of the order the Appellant shall fully cooperate in the testing and at the time of his statement and order he was represented by counsel. RP 17. The court held that long as the motion to revoke was filed before the deferred period had expired, the court continued to keep jurisdiction. RP 14. As no order had been entered dismissing the deferred, the court continued to have

jurisdiction. RP 14. The court further stated that just because the court was going to be signing an order dismissing and vacating, that it did not lose jurisdiction when an issue has not been resolved. RP 14. Thus, the court determined it still had jurisdiction. RP 14. The court held that the Appellant submit a DNA sample as the court did not have discretion. RP 17. The court stated that it could not dismiss and vacate based on the record as the Appellant not only owed restitution but also still had to give the DNA sample and thus the court did not lose jurisdiction. RP 21. The court ordered that it was the Appellant's obligation to provide the DNA sample and once accomplished it would dismiss the deferred disposition. RP 33.

D. ARGUMENT

1 THE COURT HAD JURISDICTION TO COMPELL A DNA SAMPEL AS IT WAS NOT A CONDITION OF COMMUNITY SUPERVISION AND THE STATE TIMELY FILE THE WRITTEN MOTION PRIOR TO THE EXPIRATION OF COMMUNITY SUPERVISION.

In order for a youth to be considered for a deferred disposition pursuant to RCW 13.40.127, the Respondent shall stipulate for the admissibility of the police reports, acknowledge they will support a finding of guilt and a disposition will be imposed if the juvenile fails to comply with supervision. RCW 13.40.127(3)(a),(c). After and entry of a

finding or a plea of guilty, the court shall defer the entry of a disposition and shall place the youth under community supervision. Furthermore, the court may impose any conditions of supervision that it deems appropriate.

Under a deferred disposition, payment of restitution under RCW 13.40.190 shall be a condition of community supervision. RCW 13.40.127(4),(5).

- a). DNA Collection Pursuant to Chapter 43.43 Is Not Discretionary Unlike the Conditions of Community Supervision

Pursuant to the Juvenile Court Act, community supervision is defined as

“an order of disposition by the court of an adjudicated youth not committed to the department or an order granting a deferred disposition. As a mandatory condition of any term of community supervision, the court shall order the juvenile to refrain from committing new offenses. As a mandatory condition of community supervision, the court shall order the juvenile to comply with the mandatory school attendance provisions of Chapter 28.225 RCW and to inform the school of the existence of this requirement. Community supervision is an individualized program comprised of one or more of the following: (a) community-based sanctions; (b) community-based rehabilitation; (c) monitoring and reporting requirements; (d) posting of a probation bond.” RCW 13.40.020(4).

The purpose of community supervision is to afford trial courts greater sentencing discretion for sentences of one year or less. State v. Bernhard, 108 Wash. 2d 527, 530-31, 741 P.2d 1 (1987), *overruled in part on other grounds in State v. Shove*, 113 Wash.2d 83, 85, 776 P.2d 132 (1989).

Conditions of community supervision are dependant on the particular facts and the circumstances surrounding the crime. Additionally, the terms of community supervision are discretionary prohibitions related to the crime and other sentence conditions that the court may impose. RCW 9.94A.030(7), State v. Shove, 113 Wash.2d at 89, 776 P.2d 132 (1989). Thus, under a deferred disposition pursuant to RCW 13.40127, the court has discretion on the imposition of the terms of community supervision under a deferred dispositions which may include payment of restitution.

However unlike the conditions of community supervision for a deferred disposition, there is no discretion regarding the collection of a biological DNA sample for purpose of identification for a conviction of a felony offense. “A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual convicted of a felony.” RCW 43.43.754(1)(a). Under RCW 9.94A.030(9), a conviction is defined as an adjudication of guilty pursuant to Title 10 or 13 RCW which includes a verdict of guilt, a finding of guilty, and an acceptance of a plea of guilt. RCW 9.94A.030. The collection of a

biological DNA sample is strictly limited for purposes of identification for convicted felons. RCW 43.43.754(1). The narrow purpose of the DNA collection for identification is further evident in the subsequent sections of the statute. For example, third parties do not have rights under this section and “no cause of action may be brought based upon the noncollection or nonanalysis or the delayed collection or analysis of a biological sample authorized to be taken under RCW 43.43.752 through 43.43.758”. RCW 43.43.754(6). Additionally, the legislature contemplated the implications of collecting DNA from felonious juveniles who have had a deferred disposition dismissed and vacated after successful completion of the terms of supervision.

“The detention, arrest, or conviction of a person based upon a database match or database information is not invalidated if it is a determination that the sample was obtained or placed in the database by mistake, or if the conviction or juvenile adjudication that resulted in the collection of the biological sample was subsequently vacated, or otherwise altered in any future proceeding” RCW 43.43.754(8).

Based on the language of the statute, a juvenile who is granted a deferred disposition for a felony offense is required to provide a biological DNA sample regardless if a deferred disposition is granted by the court and could possibly be dismissed and vacated at a later date. Since the

collection of DNA is mandatory and applies to all felony convictions or adjudications as opposed to conditions of supervision which are dependant on the facts and circumstances of the felonious crime, the imposition of providing a DNA sample does not fall under the discretionary umbrella of community supervision.

b) The Court Maintains Jurisdiction With the Filing of a Written Motion Before the Expiration of the Community Supervision.

Only when there has been a violation of the community supervision imposed under a deferred disposition shall the prosecutor or the community supervision counselor file a written motion petition the court to make a determination on the violation and consequently revoke the deferred disposition. RCW 13.40.127(7). Akin to the requirement of filing a written motion to modify community supervision, the motion to institute violation proceedings shall occur before the supervisory period ends. RCW 13.40.200, State v. May, 80 Wash.App. 711, 716-17, 911 P.2d 399 (1996), State v. Todd, 103 Wash.App. 783, 789-90, 14 P.3d 850 (2000). The State need only to provide a motion to revoke, and does not require detailed description of the alleged violation. State v. Todd, 103 Wash.App. 783, 788, 14 P.3d 850 (2000). Additional evidence may be presented if the juvenile denies the violation. State v. May, 80 Wash. App. 711, 714 n.2, 911 P.2d 399 (1996). If there is a finding that the

Respondent lacks compliance with the supervision, the deferred disposition is revoked and the court shall enter an order of disposition. RCW 13.40.127(7).

Additionally, at any time following the deferred, the court may, following a hearing, continue the case for an additional one-year period for good cause. RCW 13.40.127(8). This section suggests that the legislature intended to provide flexibility to the court if the juvenile would require additional supervision in accordance with the purpose of the Juvenile Justice Act's purpose. State v. Todd, 103 Wash.App. 783, 791, 14 P.3d 850 (2000).

Only when the court finds that the juvenile has fully complied with the conditions of supervision and payment of full restitution, the court shall vacate the conviction and dismiss with prejudice. Rcw 13.40.127(9).

In the present case, the appellant after an adjudicatory hearing was found to have committed the offense of taking a motor vehicle without the owner's permission in the second degree which is a felony offense. On April 28, 2010, the court granted J.O. request for a deferred disposition and imposed community supervision for six months and required payment of restitution in the amount of \$2,169.21. CP11 . Once he was convicted of the felony offense the appellant was mandated to provided the DNA sample pursuant to RCW 43.43.754(1)(a). This requirement to provide

DNA did not fall under the discretionary conditions of community supervision; therefore the State was not required to file a written motion alleging that the appellant was not in compliance with his terms of community supervision.

Even so, on October 20, 2010, eight days before the six months was to expire, the State presented a written motion to revoke the deferred disposition based on the failure to satisfy the outstanding restitution. RP 2,7. With the motion filed prior to the expiration of the deferred, the court retained jurisdiction over the appellant until there was a determination made by the court on the outstanding issues. RP 16-18, The motion to revoke began in December. RP 2. When the motion was eventually heard by the court, the appellant still had not paid the full amount of restitution and it was mentioned by the community supervising counselor that J.O. still had not provided the mandatory biological DNA sample. RP 6-9. With the proper notice prior to the expiration of community supervision, the court had jurisdiction to determine the appellant's lack of compliance with the deferred disposition. RCW 13.40127(7). When it was presented to the court that J.O. still had not paid restitution over a month after filing the motion to revoke, the court could not make the finding that J.O. had completed all of his obligations of community supervision and therefore maintained jurisdiction with the filing of the state's motion. Subsequently,

the court was prohibited from vacating the conviction and dismissing with prejudice.

Moreover, upon hearing that the respondent failed to provide DNA at the motion to revoke, the court then continued the motion for additional briefing from the parties in the issue of whether the court had any discretion in the requiring the DNA sample. RP 5-7. As requested the state provided additional briefing and requested the court compel DNA. With the continuance by the court to address the failure to provide DNA, the juvenile court retained jurisdiction over the appellant and his deferred disposition. RP 7.

2. AS THERE IS NO PRIVACY INTEREST EQUIVALENT TO A COMMON CITIZEN FOR AN APPELLANT GRANTED A DEFERRED WHICH HAS NOT BEEN VACATED AND DISMISSED; THERE WAS NO VIOLATION OF FOURTH AMENDMENT RIGHTS WHEN ORDERED TO PROVIDE A DNA SAMPLE PER RCW 43.43.754.

The Fourth Amendment provides, “[t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures” unless a warrant is supported by probable cause. U.S. Const. amend. IV. Collecting DNA without a warrant under RCW 43.43.754 from convicted felons is constitutional as the requirement for purposes of identification serve a compelling special need beyond the

normal purposes of law enforcement. State v. Olivas, 122 Wash.2d 73, 98, 856 P.2d 1076 (1993). Furthermore, the under the Fourth Amendment, the purpose of the DNA sample to identify felons and deter recidivism are special needs that go beyond ordinary law enforcement. State v. Surge, 160 Wash.2d 65, 79, 156 P.3d 208 (2007) *citing* State v. Olivas, 122 Wash.2d 73, 856 P.2d 1076 (1993). Even in light of new cases, the court still upholds the precedent in Olivas as the statute applies to convicted felons which have a different privacy interest than a common citizen. Convicted felons have no reasonable expectation of privacy in identification markers. State v. Surge, 122 Wn.App. 448,459, 94 P.3d 345 (2004). Even the Ninth Circuit rejects the Fourth Amendment challenge to requiring a DNA sample for identification. United States v. Kincaid, 379 F.3d 813 (9th Cir. 2004). *cert. denied*, 544 U.S. 924 (2005).

After further review, the Court upheld the decision in Surge and Olivas based on the totality of the circumstances, there is a connection between the purpose of the statute and a DNA database, the means of testing are minimally intrusive, the class of person being tested, and the special needs in context of law enforcement. State v. Surge, 160 Wash.2d 65, 82, 156 P.3d 208 (2007). The DNA sampling pursuant to RCW 43.43.574 for persons convicted of felony offenses does not violate the Fourth Amendment. State v. Surge, 160 Wash.2d 65, 82, 156 P.3d 208

(2007), State v. S.S., 122 Wash.App. 725, 727, 94 P.3d 1002 (2204), State v. Ward, 125 Wash.App. 243, 251, 104 P.3d 670, 671 (2004) *citing* State v. Olivas, 122 Wash.2d 73, 856 P.2d 1076 (1993) *and* State v. Surge, 122 Wash.App.448, 94 P.3d 345 (2004).

When the court found the appellant guilty of a taking a motor vehicle without permission in the second degree and granted his request for a deferred disposition, the respondent lost the privacy interests afforded a common citizen. Merely because there is a possibility that the conviction could be vacated and dismissed with prejudice if the appellant completes all the terms of community supervision does not afford the appellant a greater privacy interest than other convicted felons. Nor does it afford the appellant privacy interests associated with a common citizen. Therefore, requiring the appellant to provide a DNA sample for purposes of identification once he was found guilty of committing a felony offense and was granted a deferred which was not vacated and dismissed when the court mandated he provide the biological sample did not violate the appellant's Fourth Amendment rights. Nor was the Appellant's Fourth Amendment rights violated when the trial court compelled the collection of DNA for the purpose of identification before vacating and dismissing the adjudication and disposition.

**3. WHERE THE DEFERRED DISPOSITION
HAD NOT BEEN VACATED AND DISMISSED
FOR FAILURE TO FULLY PAY
RESTITUTION, REQUIRING THE
APPELLANT’S DNA WITHOUT A SEARCH
WARRANT DID NOT VIOLATE HIS
CONSTITUTIONAL RIGHTS.**

Under Article I, section 7 of the Washington State Constitution, “[n]o person shall be disturbed in their private affairs, or his home invaded, without authority of law”. A convicted felon does not have the same privacy rights as does a common citizen. Convicted felons lose their privilege of keeping their identification, which included fingerprints and DNA, from a government record as it is merely a method of obtaining and recording the identity of individuals convicted of felony crimes. State v. Surge, 160 Wash.2d 65, 74, 156 P.3d 208 (2007). The Surge Court concluded that as the purpose for collecting DNA pursuant to RCW 43.43.754 once convicted of a felony offense is narrowly defined for identification and the information “has not recognized in protected interest of convicted felons”, compelling DNA does not violate a convicted felon’s private affairs under article I, section 7. State v. Surge, 160 Wash.2d 65, 78, 158 P.3d 08 (2007), State v. Babiker, 126 Wash.App. 664, 669, 110 P.3d 770 (2005) *citing* State v. Surge, 122 Wash. App. 448, 94 P.3d 345 (2004). Furthermore, based on the language of the statute the legislature

intended that DNA would be collected from individuals granted a deferred disposition for a felony offense when it stated that a detention, arrest, or conviction based on a match from the database would not be invalidated where the juvenile adjudication was subsequently vacated. RCW 43.43.574(8). Hence, juveniles granted a deferred disposition with the potential for vacation of the adjudication did not create a separate privacy interest equivalent to a common citizen.

Once the appellant was found guilty of taking a motor vehicle without the owner's permission in the second degree, he lost the privacy rights commonly associated with a common citizen. CP 11. There is no separate privacy interest of a juvenile who has been convicted of a felony and might receive the benefit of having the conviction vacated and dismissed if they successfully complete the terms of supervision under a deferred disposition. The moment the appellant was convicted, his privacy interests are equivalent to any other convicted felon when it comes to the statutory requirement of providing DNA. There is no separate class of individuals who have been convicted of a felony and before dismissal and vacation of the conviction who have the same privacy interests as a common citizen. When the deferred had not yet been vacated nor dismissed for failure to pay restitution, the loss of privacy interest of the appellant were still equivalent to that of any other convicted felony.

At the motion to revoke the court was informed that the appellant had not yet paid the full amount of restitution, but that his mother was planning on paying the rest that afternoon. Thus, the court was prohibited from vacating and dismissing the deferred disposition. When prohibited from vacating and dismissing the conviction, the Appellant did not have the same privacy interests as a common citizen since he was still a convicted felon. Therefore, requiring the DNA sample pursuant to RCW 43.43.754 and his felony conviction did not violate the appellant's right to privacy under article I, section 7.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm the trial court's order compelling the Respondent to provide a biological sample for the purposes of DNA identification pursuant to RCW 43.43.754.

Respectfully submitted this 6th day of June 2011.


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CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Marianne White
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6-6-11
Date