

NO. 64958-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

NUR JAMAL MOHAMOUD,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CHRISTOPHER WASHINGTON

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**BRIEF OF APPELLANT**

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TABLE OF CONTENTS

|   | Page |
|---|------|
| A. <u>ASSIGNMENT OF ERROR</u> .....   | 1    |
| B. <u>ISSUES PERTAINING TO ASSIGNMENT OF ERROR</u> .....  | 1    |
| C. <u>STATEMENT OF CASE</u> .....   | 1    |
| D. <u>ARGUMENT</u> .....  | 4    |
| 1. THE JUVENILE COURT ERRED BY<br>IMPOSING A DEFERRED DISPOSITION<br>WITHOUT STATUTORY AUTHORITY..... | 4    |
| E. <u>CONCLUSION</u> .....  | 15   |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. B.J.S., 140 Wn. App. 91,  
169 P.3d 34 (2007)..... 11

State v. Bird, 95 Wn.2d 83,  
622 P.2d 1262 (1980)..... 6

State v. Clark, 91 Wn. App. 581,  
958 P.2d 1028 (1998)..... 7

State v. H.E.J., 102 Wn. App. 84,  
9 P.3d 835 (2000)..... 6

State v. Haws, 118 Wn. App. 36,  
74 P.3d 147 (2003)..... 7

State v. J.H., 96 Wn. App. 167,  
978 P.2d 1121 (1999)..... 4

State v. Lopez, 105 Wn. App. 688,  
20 P.3d 978 (2001)..... 6, 7, 8, 10, 11

State v. M.C., 148 Wn. App. 968,  
201 P.3d 413 (2009)..... 7, 8, 10, 13

State v. Watson, 146 Wn.2d 947,  
51 P.3d 66 (2002)..... 7

Statutes

Washington State:

RCW 9.94A.030 ..... 3, 12  
RCW 13.04.011..... 10  
RCW 13.40.010..... 4  
RCW 13.40.0357..... 3, 5  
RCW 13.40.127..... 3, 5, 6, 8, 9, 10, 12, 14  
RCW 13.40.160..... 5, 6, 13  
RCW 13.40.165..... 5, 13  
RCW 13.40.167..... 5  
RCW 13.40.190..... 6  
RCW 69.50..... 12  
RCW 70.96A ..... 12  
RCW 70.96A.520 ..... 11

Other Authorities

Juvenile Justice Act..... 1, 4, 5, 6, 8  
Sentencing Reform Act ..... 4

A. ASSIGNMENT OF ERROR

1. The juvenile court erred by entering the "Order of Deferred Disposition," which ordered a deferred disposition post-conviction without statutory authority.

2. The juvenile court erred by ordering a deferred disposition without following all statutory requirements.

3. The juvenile court erred by ordering a deferred disposition *sua sponte* without statutory authority.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A "deferred disposition" is not a disposition but is instead a disposition postponement that must be requested by a party before conviction and that must follow statutory procedures. Here, the juvenile court ordered a deferred disposition *sua sponte*, after conviction, without following statutory procedures, as if it were a dispositional option. Did the juvenile court err by not honoring the mandates of the Juvenile Justice Act?

C. STATEMENT OF CASE

Isaiah Sutton was sitting on a bench at school, when he heard someone yell, "Who are you looking at?" CP 3. Sutton

looked up and saw the 17-year-old respondent, Nur Jamal Mohamoud, standing on a stairwell looking at him. CP 2-3. Sutton did not know Mohamoud, other than seeing him around school. CP 3.

The school's security officer, Greg LaCour, saw Mohamoud yelling at Sutton. CP2. Sutton looked away, trying not to pay attention to Mohamoud. CP 3. Another student, Brandi Lindsay, saw Sutton avoiding a confrontation and told Mohamoud, "He's scared, go get him." CP 2-3. As LaCour yelled at Mohamoud to stop, Mohamoud punched Sutton three times in the face. CP 3.

Before Lacour could restrain Mohamoud, Mohamoud had begun kicking Sutton. CP 3. Sutton suffered four chipped teeth, a bloody nose, and a split lip. CP 2-3. Sutton's injuries required on-going dental visits for the chipped teeth, a loose tooth, and bruised gums. CP 3.

Mohamoud was charged with Second Degree Assault. CP 2. The juvenile court retained jurisdiction on October 30, 2009. CP 5-6. After a continuance, the trial date was set for December 15, 2009. CP 17-18.

Through plea negotiations, Mohamoud agreed to plead guilty to a reduced charge of Third Degree Assault. CP 19. Pursuant to

this agreement, both parties were to recommend a standard range disposition and Mohamoud expressly agreed not to request or agree to a deferred disposition.<sup>1</sup> CP 14-15; RP 12-14. At a pretrial hearing on December 8<sup>th</sup>, the trial was stricken and the case was sent to the Honorable Christopher Washington for the guilty plea and disposition on January 13, 2010. CP 19.

At the plea hearing on January 13<sup>th</sup>, Judge Washington appeared interested in imposing a deferred disposition in the case. RP 12-18. Neither defense nor the State moved for a deferred disposition sentence. RP 20. However, due to the court's legal inquiry, defense counsel said that the court could impose a deferred disposition *sua sponte*. RP 15. Judge Washington accepted Mohamoud's guilty plea to the reduced charge of Third Degree Assault, and then continued the disposition so the Juvenile Probation Counselor could provide more information for purposes of disposition. RP 20-23.

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<sup>1</sup> The reduced charge of Third Degree Assault has a standard range of up to 30 days in detention and is not a "violent offense," unlike the original charge of Second Degree Assault which has a standard range of 15-36 weeks at the Juvenile Rehabilitation Administration and is a "violent offense," making the charge ineligible for deferred disposition consideration. RCW 9.94A.030(50), 13.40.0357, 13.40.127(1).

After the plea hearing, the State filed a letter with the court reminding the court that Mohamoud had never asked for a deferred disposition, that any such request would be untimely, and that any issuance *sua sponte* of a deferred disposition at this point would be contrary to statutory authority. CP 14-16; RP 25-26. On February 1<sup>st</sup>, the court imposed a deferred disposition over the State's objection. CP 11-13; RP 29-30. The State appeals. CP 20.

D. ARGUMENT

1. THE JUVENILE COURT ERRED BY IMPOSING A DEFERRED DISPOSITION WITHOUT STATUTORY AUTHORITY.

The Juvenile Justice Act (JJA) was designed to respond to the needs of youthful offenders while still holding those offenders accountable for their actions. RCW 13.40.010(2); State v. J.H., 96 Wn. App. 167, 172-73, 978 P.2d 1121 (1999). A system of structured judicial discretion, similar to that provided in the Sentencing Reform Act, is created by the statute to balance these sometimes competing goals.

One aspect of this statutory scheme is a complex system of standard penalties, exceptional options, treatment options, and

supervision. See RCW 13.40.160(1) and 13.40.0357 (standard range dispositions); RCW 13.40.160(2) (manifest injustice dispositions); RCW 13.40.160(3) (treatment options for sex offenders); RCW 13.40.165 (chemical dependency treatment); RCW 13.40.167 (mental health treatment options). These are all dispositional options; different forms of punishment and rehabilitative measures imposed after conviction. See Id.

The JJA offers a different approach for first-time, non-violent felony offenders: the deferred disposition statute, RCW 13.40.127.<sup>2</sup>

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- <sup>2</sup> (1) A juvenile is eligible for deferred disposition unless he or she:
- (a) Is charged with a sex or violent offense;
  - (b) Has a criminal history which includes any felony;
  - (c) Has a prior deferred disposition or deferred adjudication; or
  - (d) Has two or more adjudications.
- (2) The juvenile court may, upon motion at least fourteen days before commencement of trial and, after consulting the juvenile's custodial parent or parents or guardian and with the consent of the juvenile, continue the case for disposition for a period not to exceed one year from the date the juvenile is found guilty. The court shall consider whether the offender and the community will benefit from a deferred disposition before deferring the disposition.
- (3) Any juvenile who agrees to a deferral of disposition shall:
- (a) Stipulate to the admissibility of the facts contained in the written police report;
  - (b) Acknowledge that the report will be entered and used to support a finding of guilt and to impose a disposition if the juvenile fails to comply with terms of supervision; and
  - (c) Waive the following rights to:
    - (i) A speedy disposition; and
    - (ii) call and confront witnesses.

The adjudicatory hearing shall be limited to a reading of the court's record.

Under this statute, following a stipulation of facts and other procedures, the court adjudicates the case but disposition is deferred and not entered. Id. This deferral allows juveniles who have been charged with a non-violent offense to accept responsibility early in the criminal process, agree to the facts as alleged, and possibly vacate the conviction from their record as a result of the deferral. Id.

While a juvenile court has discretion to tailor an appropriate disposition in a case, the court does not have inherent authority to defer a disposition. State v. H.E.J., 102 Wn. App. 84, 87, 9 P.3d 835 (2000); State v. Lopez, 105 Wn. App. 688, 20 P.3d 978 (2001). Only the Legislature may grant the trial court the power to defer a disposition. Lopez, 105 Wn. App. at 697 (citing State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980)).

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(4) Following the stipulation, acknowledgment, waiver, and entry of a finding or plea of guilt, the court shall defer entry of an order of disposition of the juvenile.

(5) Any juvenile granted a deferral of disposition under this section shall be placed under community supervision. The court may impose any conditions of supervision that it deems appropriate including posting a probation bond. Payment of restitution under RCW 13.40.190 shall be a condition of community supervision under this section. . . .

RCW 13.40.127.

The JJA expressly states that unless otherwise authorized “the court shall not suspend or defer the imposition or the execution of the disposition.” Id. (citing RCW 13.40.160). Thus, the statutory terms that grant juvenile courts the authority to defer a sentence are mandatory, and court action exceeding these statutory provisions is void. Lopez, 105 Wn. App. at 697 (citing State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998)).

When interpreting statutory provisions, this Court's primary objective is to ascertain and give effect to the intent and purpose the Legislature had in creating the statute. State v. M.C., 148 Wn. App. 968, 971, 201 P.3d 413 (2009). The language of the statute is the first gauge of this legislative intent. Id. When the language is clear on its face, this Court derives its meaning from the plain language but also avoids unlikely or absurd results. Id.; State v. Haws, 118 Wn. App. 36, 40, 74 P.3d 147 (2003).

The issue of whether a deferred disposition was ordered pursuant to statutory authority is reviewed *de novo*. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002); State v. Haws, 118 Wn. App. at 39.

The juvenile court in this case did not follow the statute's express procedural requirements, essentially treating a *deferred*

disposition as just another disposition option. The juvenile court's error was premised on its mistaken view that a deferred disposition is itself a form of disposition.<sup>3</sup>

This Court has already held, to the contrary, "that an order deferring disposition is not itself a disposition." M.C., 148 Wn. App. at 971-72. Instead, it is a disposition postponement created by the Legislature with strict procedural mandates. Id. at 971-72; Lopez, 105 Wn. App. at 697.

The JJA expressly states that this deferral procedure begins "upon motion at least fourteen days before commencement of trial. . ." RCW 13.40.127(2). Accordingly, the statute directs for the deferral procedure to be initiated not only before conviction, but specifically two weeks *before* trial. Here, the court ordered *sua sponte* a deferred disposition two weeks *after conviction* and seven weeks after the stricken trial date. Thus, the post-conviction deferred disposition order was untimely and is void at the outset.

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<sup>3</sup> The juvenile court believed that the deferred disposition should not be removed as a disposition option through the plea negotiation process and stated, "I guess if there was going to be an appeal, this would be about as good of [a] fact situation as I could hope for to substantiate my position, so that is how we will proceed on this case, and we will see whether or not this makes new law or not." RP 28-29.

Moreover, after a motion for a deferred disposition, there are statutory procedural requirements that the juvenile court must consider and perform before deferring the disposition. See RCW 13.40.127(1),(2),(3),(4); supra n. 2. Here, the juvenile court indicated its intention to order a deferred disposition and began determining the order's conditions without these statutory requirements first being met, including: parental consultation, any consideration on how the community and respondent would benefit, the respondent's stipulation to facts, the respondent's acknowledgment of the police reports to be used to find him guilty, and respondent's waiver of speedy disposition. Id.; RP 29.

Although the juvenile court untimely performed some of these statutory mandates, some were never done. RP 31-38. It was not until after the court imposed the deferred disposition that defense counsel indicated to the court that Mohamoud's parents were supportive of this decision. CP 32-33. Still, the court never indicated how the community or respondent would benefit from the deferred disposition he ordered, except for the post-hoc observation that Mohamoud deserved a deferral because he was a 17-year old without criminal history. CP 35.

Although defense counsel stated that Mohamoud did not object to the court's order after the court indicated its intention to impose a deferred disposition, Mohamoud certainly did not "agree" to the deferred disposition, as he was bound by the plea agreement not to agree. RP 30-31. An agreement to the deferred disposition requires the affirmative steps of stipulating to the facts of the police report, acknowledging that the facts of the police report would be used at a later disposition hearing, and waiving his rights to a speedy disposition. RCW 13.40.127(3). A court may not order a deferred disposition before this stipulation, acknowledgment, and waiver. RCW 13.40.127(4). These statutory procedures were never followed here. The belated statement that Mohamoud did not object is simply not equivalent to the "agreement" that is contemplated by the statute. The juvenile court erred by ordering a deferred disposition without following the strict statutory mandate.

This case is similar to State v. Lopez, where the State appealed after the trial court granted Lopez's motion for a deferred disposition following trial and conviction. Id. at 696-97. This Court held that "the trial court did not have express statutory authority to grant a post-conviction deferred disposition." Id. at 698. The deferred disposition procedures were mandatory, not discretionary.

Id. at 697. Specifically, the Court reasoned that since the juvenile court lacks the inherent authority to defer a sentence, the statutory requirement that a deferred disposition motion be made 14 days before trial is mandatory, and the juvenile court erred when it failed to honor this express legislative timeline. Id. at 696-97.

Accordingly, the post-conviction deferred disposition was void, and this Court reversed the juvenile court.

In State v. B.J.S., 140 Wn. App. 91, 169 P.3d 34 (2007), this Court reviewed whether a post-conviction request for a deferred disposition could amount to ineffective assistance of counsel. B.J.S. would have been eligible to be considered for a deferred disposition if he requested it 14 days before trial, but he instead went to trial and was convicted. Id. at 100-02. B.J.S. was erroneously advised by his attorney that he could seek a deferred disposition after an adjudication<sup>4</sup> hearing. Id. at 101. This Court held that it fell below an objective standard of reasonableness to advise a client that he or she could seek a deferred disposition after an adjudication hearing. Id. at 101-02. As a result of failing to properly advise B.J.S. as to the required pre-trial procedure for a

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<sup>4</sup> "Adjudication" has the same meaning as "conviction." M.C., 148 Wn. App. at 971 (citing RCW 13.04.011(1)).

deferred disposition, the Court found that B.J.S. received inaccurate legal advice and ineffective assistance. Id. at 102.

Most importantly, and in addition to these failures to follow the statute, the juvenile court here failed to appreciate that it could not initiate a deferred disposition on its own motion. The court read "upon motion" in the statute to mean that the court could bring its own motion to order a deferred disposition. RCW 13.40.127(2). However, this statutory language, especially the requirement that the motion be "at least fourteen days before commencement of trial," indicates the Legislature intended for only the juvenile respondent or the State to move for a deferred disposition. Id.

Generally, the Legislature expressly includes the court in the statute when it intends for the juvenile court to be a potential moving party in dispositional matters.<sup>5</sup> The Legislature granted this

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<sup>5</sup> There are situations where the Legislature has expressly authorized dispositions *sua sponte*. One example is for Chemical Dependency Dispositional Alternatives (CDDA).

"The purpose of this disposition alternative is to ensure that successful treatment options to reduce recidivism are available to eligible youth, pursuant to RCW 70.96A.520. The court must consider eligibility for the chemical dependency disposition alternative when a juvenile offender is subject to a standard range disposition of local sanctions or 15 to 36 weeks of confinement and has not committed an A- or B+ offense, other than a first time B+ offense under chapter 69.50 RCW. *The court, on its own motion or the motion of the state or the respondent* if the evidence shows that the offender may be chemically dependent or substance abusing, may order an examination by a chemical dependency counselor from

authority to the juvenile court for those dispositional options after conviction because at *disposition* courts generally have broad discretion. As discussed above, a deferred disposition is not itself a disposition. See M.C., 148 Wn. App. at 972. It is instead a deferral opportunity that is requested pretrial. The statute is structured to ensure the policy interest that a juvenile stipulates to the facts and accepts responsibility to the non-violent offense early in the criminal justice process. See RCW 13.40.127(1),(3).

The intent of the Legislature is quite clear which parties can request a deferred disposition. If the juvenile wishes to make the motion to begin the deferred disposition process, he or she is statutorily authorized to do so at least 14 days prior to trial.

RCW 13.40.127(2). If the State wishes to make a similar motion, it

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a chemical dependency treatment facility approved under chapter 70.96A RCW to determine if the youth is chemically dependent or substance abusing. . . ."

RCW 13.40.165(4) (emphasis added).

Special Sex Offender Dispositional Alternatives (SSODA) is another situation where the Legislature has specifically given the courts authority for *sua sponte* disposition.

"When a juvenile offender is found to have committed a sex offense, other than a sex offense that is also a serious violent offense as defined by RCW 9.94A.030, and has no history of a prior sex offense, *the court, on its own motion or the motion of the state or the respondent*, may order an examination to determine whether the respondent is amenable to treatment."

RCW 13.40.160(3) (emphasis added)

may as well; however, the juvenile is not obligated to agree to the deferred disposition if he or she would rather go to trial or not exercise the one-time deferral opportunity on that particular misdemeanor or felony offense. RCW 13.40.127(1),(2). In this case, neither party requested a deferred disposition. In fact, the plea agreement forbade it. Thus, the juvenile court did not have statutory authority to impose the deferred disposition *sua sponte*. The order is void and must be reversed and remanded for imposition of disposition on Mohamoud's plea of guilty.

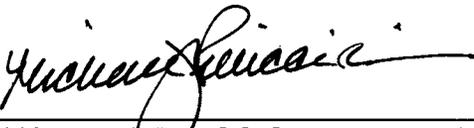
E. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to reverse Mohamoud's sentence.

DATED this 14<sup>th</sup> day of April, 2010.

Respectfully submitted,

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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 Catherine Elliott, the attorney for Nur Jamal Mohamoud, at Society of Counsel, 1401 E. Jefferson St. Fl 2, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. NUR JAMAL MOHAMOUD, Cause No. 64958-2, 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.

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