

66801-3

66801-3

COA NO. 66801-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

T.H.,

Appellant.

REC'D  
AUG 27 2012  
King County Prosecutor  
Appellate Unit

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CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julia Garratt, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. AUTOMATIC TERMINATION FROM DRUG COURT BASED ON THE DECLINE PROVISION OF THE DRUG COURT POLICY MANUAL VIOLATED T.H.'S RIGHT TO EQUAL PROTECTION.
  - a. The State Trumpets An Inapplicable Burden of Proof.

The State argues T.H. has the burden of showing the challenged aspect of the drug court policy is unconstitutional "beyond a reasonable doubt." Brief of Respondent (BOR) at 9, 17. For this proposition, the State cites State v. Hirschfelder, 170 Wn.2d 536, 552, 242 P.3d 876 (2010). BOR at 9. Hirschfelder, however, invoked that burden of proof for challenges to legislation. Hirschfelder, 170 Wn.2d at 552. The State cites no case where the proof beyond a reasonable doubt burden applied to challenges to a court policy or other court action. See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search).

"In Washington, it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt." School Districts' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). The "beyond a reasonable doubt" burden of proof applied

to *statutory* challenges derives from separation of powers concerns. Respect for the legislature as a co-equal branch of government and its function as a "voice of the people" is the driving force behind this standard. Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). A party challenging a statute's constitutionality must prove the statute unconstitutional beyond a reasonable doubt because "the legislature is entitled to great deference." School Districts' Alliance, 170 Wn.2d at 608.

T.H. does not challenge the constitutionality of a statute. He challenges a drug court policy. His challenge is not directed at a law enacted by the legislature. The purpose behind the "beyond a reasonable doubt standard" is inoperative in this context. There is no separation of powers concern. There is no deference to be accorded to the legislative branch of government.

A court policy is at issue here. This Court, as a member of the judicial branch, owes no deference to lower courts in deciding issues of constitutional law. See State v. W.W., 76 Wn. App. 754, 758-60, 887 P.2d 914 (1995) (no mention of "beyond a reasonable doubt" standard in holding court rule violated equal protection). Questions of law are reviewed de novo. Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 64, 277 P.3d 18 (2012). Even if the "beyond a reasonable doubt" standard applies in this context, it

means nothing more than convincing the reviewing court that the drug court policy violates the constitution after a "searching legal analysis." School Districts' Alliance, 170 Wn.2d at 605.

- b. There Is No Rational Basis For Distinguishing Between The 17-Year-Old Juvenile Drug Court Participant Who Is Charged With A Serious Violent Offense And Thus Subject To Automatic Termination From Drug Court And The 18-Year-Old Drug Court Participant Who Is Charged With The Same Offense But Is Not Subject To Automatic Termination.

The State argues the equal protection clause is aimed at ensuring equal treatment by prohibiting "undue favor" and "hostile discrimination." BOR at 8. The right to equal protection is not triggered only under such circumstances. Unintentional oversight is sufficient to command equal protection if it results in an arbitrary, irrational disparity of treatment. In re Pers. Restraint of Bratz, 101 Wn. App. 662, 670, 5 P.3d 759, review denied, No. 70137-7 (2000) ("even if the resulting classifications were unintentional, they are arbitrary and, thus, violate rational basis review.").

In contending the juvenile drug court policy at issue here does not violate equal protection, the State relies principally on State v. Shawn P., 122 Wn.2d 553, 557, 859 P.2d 1220 (1993). BOR at 15-16. The issue in Shawn P. was whether the mandatory revocation of driving privileges, applicable only to teenagers (those 13 and older, but under 18) who are

convicted of consuming or possessing alcohol, violates equal protection. Shawn P., 122 Wn.2d at 557. The Court held "the mandatory revocation of driving privileges, which applies only to minor teenagers who are determined to have violated the minor possessing/consuming alcohol law, is rationally related to the legitimate state objectives of promoting highway safety and deterring illegal drinking by teenagers and thus does not violate constitutional equal protection guaranties." Id.

Shawn P. addressed an equal protection challenge in the context of young drivers and the disproportionate risk they pose of harming themselves and others on the road. Id. at 562. That case is not helpful in analyzing whether the drug court policy at issue here survives rational basis review. The question to be asked and answered is different.

No doubt there are situations where a rational basis exists to treat persons of a certain age differently than those of another age. But all equal protection analysis is context sensitive. In every case, the law or government action at issue must survive rational basis scrutiny by applying the law to the facts. The rational basis test considers whether differences in treatment are rationally related to a legitimate goal. But what the goal is, and whether the difference in treatment is rationally related to that goal, varies depending on the statute, rule or policy at issue.

There is no rational basis for the juvenile drug court policy to allow 18-year-old (or 19 or 20-year-old) juvenile drug court participants charged with first degree robbery to remain in the juvenile drug court program while automatically terminating 17-year-old (or 16-year-old) drug court participants charged with the same offense from the program. The State tries but fails to articulate a rational basis for the distinction in treatment.

The State observes equal protection does not require "the Legislature" to attack every aspect of a problem. BOR at 18. The State does not explain how participation in drug court, at the discretion of the trial court, is a problem that needs fixing.

Unlike Shawn P., the issue here does not concern the danger posed by teenagers driving drunk and the disproportionate risk to themselves and public safety they pose while on the road. The challenge is to the automatic termination provision of a juvenile drug court policy where the goal of the drug court program is rehabilitation through treatment for chemically dependent youth.

There is no legislative or court finding, nor is it even conceivable, that 17-year-old juvenile drug court participants pose a disproportionate or greater risk of harm to the community or themselves if the judge is allowed to exercise its discretion to retain the 17-year-old in the program.

Nor is there any basis to conclude the 17-year-old charged with first degree robbery is unable to benefit from continued drug court in contrast to their older counterparts. For 17 and 18-year-old participants charged with the same crime, the difference in classification between those subject to automatic termination and those not subject to automatic termination does not protect a legitimate interest. There is no rational basis for allowing the court to exercise its discretionary authority to retain the 18-year-old participant in drug court while barring the court from exercising any discretionary authority from retaining the 17-year-old under these circumstances.

The juvenile drug court policy lists the primary goals of the program as follows: (1) reduce recidivism of youth involved in the juvenile justice system; (2) enhance community safety; (3) reduce substance abuse; (4) reduce the impact of drug cases on the criminal justice system; and (5) enable drug court participants to become responsible, productive members of the community. CP 204.

In light of these goals, the State fails to articulate a rational basis for automatically removing younger participants charged with first degree robbery from drug court while allowing the court to retain their older counterparts charged with the same crime. The State's equal protection analysis does away with justifying the difference in treatment altogether.

That is not how the right to equal protection works. "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." In re Pers. Restraint of Young, 122 Wn.2d 1, 45, 857 P.2d 989 (1993) (quoting Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620 (1966)). The drug court policy at issue here fails that test.

The State argues the automatic termination provision was adopted with the following objectives in mind: community safety, offender accountability, punishment, and rehabilitation. BOR at 16 (citing RCW 13.40.010; RCW 2.28.170(3)(b)). From this, the State concludes the automatic termination provision is rationally related to those objectives "because it works to terminate JDC participants who have been declined to adult court for having allegedly committed a serious violent offense" such as first degree robbery. BOR at 16-17.

The State points out there are certain minimum requirements for *entry* into a drug court, including that the offender is not currently charged with or convicted of an offense that is a "serious violent offense" or involves use of a firearm. RCW 2.28.170(3)(b)(iii)(B), (C). BOR at 10. It contends the legislature legitimately chose to limit the availability of treatment and rehabilitation to nonviolent offenders. BOR at 10-11.

Yet the 18-year-old juvenile drug court participant who is charged with a crime involving use of a firearm in a first degree robbery is allowed to *remain* in drug court through the exercise of judicial discretion while the 17-year-old charged with the same crime is automatically *removed* under the policy. The State's suggestion that the automatic termination provision of the drug court policy simply reflects the minimum requirements for entry into drug court under RCW 2.28.170(3)(b) does not hold.

Under the logic of the State's argument, the juvenile drug court policy should automatically terminate the 18-year-old participant who is charged with first degree robbery involving use of a firearm. But it does not. Both the 18-year-old and the 17-year-old are charged with a violent offense. But the older participant is given the opportunity to remain in drug court through the exercise of judicial discretion while the 17-year-old is automatically booted.

Drug courts are "a highly successful approach to an enormous problem faced by society — people committing crimes related to their addiction." State v. Cassill-Skilton, 122 Wn. App. 652, 659, 94 P.3d 407 (2004) (Van Deren, J., concurring). The overarching function of drug court is to provide treatment for substance abuse, which reduces recidivism and enhances community safety while diverting offenders away

from the normal consequences of criminal behavior. Cassill-Skilton, 122 Wn. App. at 659. It is a "therapeutic court." CP 203. The primary responsibility of the juvenile justice system, meanwhile, is to respond to the needs of juvenile offenders because of their age and vulnerability. State v. Kuhlman, 135 Wn. App. 527, 531, 144 P.3d 1214 (2006).

No rational basis exists for barring the vulnerable and younger 17-year-old juvenile drug court participant from even arguing to the court that he should be allowed to remain in drug court as a matter of judicial discretion when his older counterpart is allowed to do so. The purposes of drug court are not served in any rational way by treating the two differently in this respect.

The opening brief referenced the three-part test for determining equal protection challenges under rational basis review: (1) the classification applies equally to all class members, (2) a rational basis exists for distinguishing class members from non-members, and (3) the classification bears a rational relationship to the legislative purpose. Brief of Appellant (BOA) at 12 (citing Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992)).

The Court in Shawn P. applied a one-part test to the equal protection challenge: "the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state

objectives." Shawn P., 122 Wn.2d at 561. In a footnote, the Court acknowledged it had "sometimes" stated the rational basis test as a three-part test, but that it "recently" expressed a "preference for the more meaningful and more simply stated 1-part test." Id. at 561 n.28. The Court did not explain in that footnote why the one-part test was "more meaningful."

After Shawn P., the Washington Supreme Court has used the three-part test under rational basis review for equal protection claims. See, e.g. Hirschfelder, 170 Wn.2d at 551; Philippides v. Bernard, 151 Wn.2d 376, 391, 88 P.3d 939 (2004); Griffin v. Eller, 130 Wn.2d 58, 65, 922 P.2d 788 (1996). This Court has done the same. See, e.g., Bennett v. Seattle Mental Health, 166 Wn. App. 477, 488, 269 P.3d 1079 (2012); King County Dept. of Adult and Juvenile Detention v. Parmelee, 162 Wn. App. 337, 359, 254 P.3d 927 (2011); State v. Scherner, 153 Wn. App. 621, 649, 225 P.3d 248 (2009).

It appears the difference between the two tests is one of wording rather than substance. The one-part test is more "simply stated." Shawn P., 122 Wn.2d at 561 n.28 (citing State v. Danis, 64 Wn. App. 814, 820-21, 826 P.2d 1096 (three-part test "appears to unnecessarily segregate the inquiry."), review denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992)). But

the inquiry remains the same. See Scherner, 153 Wn. App. at 648-49 (setting forth both formulations as if they were the same).

2. AUTOMATIC TERMINATION FROM DRUG COURT BASED ON THE DECLINE PROVISION OF THE DRUG COURT POLICY MANUAL VIOLATED T.H.'S RIGHT TO DUE PROCESS.

The State asserts T.H.'s due process claim cannot be raised for the first time on appeal under RAP 2.5(a)(3) because it does not rise to the level of manifest constitutional error. BOR at 19-20. It contends a drug court contract is not the equivalent of a guilty plea, citing State v. Drum, 143 Wn. App. 608, 181 P.3d 18 (2008), aff'd on other grounds, 168 Wn.2d 23, 225 P.3d 237 (2010). BOR at 21. Division Three in Drum held the drug contract was not the equivalent of a guilty plea but rather was like a deferred prosecution in that it left the adjudication of guilt for a later date. Drum, 143 Wn. App. at 619-20. The Supreme Court affirmed on other grounds and did not reach the merits of this issue. State v. Drum, 168 Wn.2d 23, 39, 225 P.3d 237 (2010).

Division Three's decision in Drum is inapposite. The adjudication of guilt issue is not implicated in this appeal. Rather, the argument is that due process requires the court and the prosecutor to honor the terms of the contract. The terms of the contract include the provision that T.H. *may* be terminated from drug court under certain circumstances, not that he will be

automatically terminated. CP 8 ("I agree and understand that if I engage in *any* criminal act, I may be prosecuted for *any* new charges, and this *may* result in my termination from the Drug Court Program.") (emphasis added).

This argument does not depend on the drug court contract being considered the equivalent of a guilty plea. But comparison to guilty pleas is useful in the breach of contract context given the stakes involved. Due process cannot be precisely defined, but it does require "fundamental fairness." In re Dependency of K.N.J., 171 Wn.2d 568, 574, 257 P.3d 522 (2011) (quoting In re Pers. Restraint of Blackburn, 168 Wn.2d 881, 885, 232 P.3d 1091 (2010)). As a matter of fundamental fairness, the terms of the contract should control, not the terms of a drug court policy that was not incorporated into the contract.

The State claims T.H. cannot show actual prejudice because the court exercised its discretionary authority to terminate T.H. from the program. BOR at 22-24. It argues the trial court, rather than exclusively rely on the automatic termination provision of the drug court policy manual, made a discretionary decision to terminate T.H. from drug court in its oral ruling on January 28, 2011. BOR at 22-23 (citing RP 14-15).

The State overlooks an important point of law: "[A] trial judge's oral decision is no more than a verbal expression of his informal opinion

at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." Ferree v. Doric Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963).

Even assuming the court's ambiguous oral statement could be construed as an alternative discretionary basis for terminating T.H. from drug court, that oral ruling was not incorporated into the written findings and conclusions. CP 71, 182-83. The oral ruling therefore has no legal effect and is not a proper basis to decide this appeal.

The written findings and conclusions unambiguously show the court relied on the automatic termination provision of the drug court policy as the basis for termination. CP 71, 182-83. If the trial court's written findings are unambiguous, the reviewing court does not look to the oral findings for interpretation. State v. Hescoek, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999).

Finally, this Court retains the discretion to consider the merits of T.H.'s due process argument even if it does not rise to the level of a manifest constitutional error. RAP 2.5(a) "never operates as an absolute bar to review." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). This Court may review an issue raised for the first time on appeal in the interest of

justice. RAP 1.2(a); State v. Lee, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999). The due process issue raised here is of public importance and is likely to recur given the sheer volume of participants in juvenile drug court and the boilerplate contract form used in each case. See Lee, 96 Wn. App. at 338 n.4 (review appropriate for issue of public importance).

B. CONCLUSION

For the reasons stated above and in the opening brief, T.H. requests vacature of the order terminating T.H. from juvenile drug court and remand for the juvenile court to exercise its discretion whether to terminate T.H. from drug court.

DATED this 27<sup>th</sup> day of August 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 66801-3
	)	
TERRY HOLLIS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27<sup>TH</sup> DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TERRY HOLLIS  
P.O. BOX 28454  
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2012 AUG 27 PM 4:14  
COURT OF APPEALS  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF AUGUST 2012.

x Patrick Mayovsky