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Jun 24, 2016
Court of Appeals
Division I
State of Washington

No. 74817-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

L.H.,

Appellant.

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

APPELLANT'S OPENING BRIEF/MOTION FOR ACCELERATED
REVIEW

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A. INTRODUCTION

After riding in a car that his friends had stolen, 14-year-old L.H. pleaded guilty to theft of a motor vehicle. L.H. had two previous felony dispositions for theft of a motor vehicle and escape. But by all accounts, L.H. had done very well before at the juvenile rehabilitation administration. The State and L.H. agreed that the standard range disposition of 15 to 36 weeks was appropriate. Still, at the behest of the juvenile probation counselor (JPC), who alleged a plethora of aggravating factors, the court sentenced L.H. to a manifest injustice sentence upward of 52 to 65 weeks. Many of the reasons cited by the JPC and adopted by the court are inapplicable or unsupported by the evidence. And the evidence did not establish that a standard range sentence would be inadequate to meet L.H.'s rehabilitative needs. Accordingly, this Court should reverse and remand for entry of a standard range sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court failed to enter adequate findings of facts.
2. The trial court failed to "set forth those portions of the record material to the disposition." JuCR 7.12(d).
3. The evidence was insufficient to support the manifest injustice disposition upward.

C. ISSUES

1. To support a manifest injustice disposition, the trial court must enter adequate findings. The court must also set forth those portions of the record material to the disposition. The court did not enter findings or set forth any portion of the record. Is the record inadequate for review, requiring reversal?

2. For the appellate court to uphold a manifest injustice disposition upward, the sentencing court's reasons must establish beyond a reasonable doubt that the standard range sentence for the juvenile offender presents a serious and clear danger to society. The court's manifest injustice disposition was premised on a plethora of aggravating factors. Many of these aggravating factors are either inapplicable or not supported by the evidence. And the few aggravators that have some basis in the evidence, such as a need for treatment, were not shown to justify the increase of L.H.'s sentencing range from 15-36 weeks to 52-65 weeks. Should the manifest injustice disposition be reversed for insufficient proof?

3. If one aggravator or combination of aggravators are deemed sufficient by a trial court to impose a manifest injustice sentence, it is incumbent upon the court to say so without equivocation. The trial court did not state that any one aggravator or combination of aggravators justified its decision. If any of the aggravators cited by the court are

inapplicable or lack a sufficient evidentiary basis, should this case be remanded with instruction for the court to reconsider its decision?

D. STATEMENT OF THE CASE

L.H., a 14-year-old boy, was charged with theft of a motor vehicle.¹ CP 4-5. According to the certification for determination of probable cause, there was a report of auto theft at “My Town Motors” on December 6, 2015 around 5:37 p.m. CP 5. An officer located the vehicle and, after the vehicle stopped, two males got out on foot and fled. CP 5. L.H., who had been a passenger in the backseat, got out of the car last and was arrested. CP 6-7.

On February 3, 2016, L.H. took responsibility and pleaded guilty to the offense. CP 18; RP 14. L.H.’s criminal history consisted of three prior dispositions from 2014: theft of a motor vehicle (a felony), escape in the second degree (a felony),² and possession of stolen property in the third degree (a misdemeanor).³ CP 14. His standard range sentence was 15 to 36 weeks at the Juvenile Rehabilitation Administration (JRA). CP 15; RP 10.

¹ RCW 9A.56.065.

² RCW 9A.76.120.

³ RCW 9A.56.170.

Both L.H. and the State recommended a standard range sentence. CP 18; RP 14, 27-29. Nevertheless, the juvenile probation counselor (JPC), Kelly DePhelps, recommended a manifest injustice sentence upward of 52 to 65 weeks. CP 18; RP 15-24. Ms. DePhelps contended that many aggravating circumstances supported a greater sentence. RP 12, 24; JPC Report at 2-4.⁴ In justifying her request, Ms. DePhelps noted that L.H. had previously done “exceptionally well at JRA. The staff there have nothing but glowing things to say about him.” RP 21-22. She praised L.H. as being a “really smart kid,” stating he “has the ability to pretty much succeed and be and do whatever he wants to do” RP 23. Still, she contended that for L.H. to succeed he needed to be confined to the JRA for a longer period of time. See RP 24.

Accepting Ms. DePhelps recommendation, the court imposed a manifest injustice sentence upward of 52 to 65 weeks. RP 34. The court agreed with Ms. DePhelps that most of the aggravating factors cited by her applied. RP 34-35; CP 9. The court wanted L.H. “to have the most opportunity to succeed.” RP 34. L.H. was upset upon hearing the court’s

⁴ The report was not filed in the trial court and is thus not part of the record on appeal. A copy of the report is attached as an appendix. A motion to seal the report has been filed at the same time as this brief. Once the motion is granted, the report will be filed.

ruling. RP 36. The court hoped that L.H. would “fin[d] the time helpful.”

RP 36. L.H. appeals.

E. ARGUMENT

1. The trial court failed to enter adequate findings to support its manifest injustice disposition and failed to set forth material portions of the record in support.

“Generally, a standard range disposition will be adequate to achieve the goals of the Juvenile Justice Act, including the goal of rehabilitation.” State v. Tai N., 127 Wn. App. 733, 745, 113 P.3d 19, 25 (2005). A court may only impose a disposition outside of the standard range if a sentence within the range would effectuate a “manifest injustice.” RCW 13.40.0357, 13.40.160(2). “Manifest injustice” means a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of [the Juvenile Justice Act].” The court’s determination of manifest injustice must be supported by clear and convincing evidence. RCW 13.40.160. This demanding standard is equivalent to the beyond a reasonable doubt standard. Tai N., 127 Wn. App. 741; State v. Rhodes, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), overruled on other grounds by State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003).

The court must enter “reasons” in support of its conclusion of manifest injustice. RCW 13.40.160(2). In other words, “the court’s

findings should include the evidence relied upon to reach its conclusion to declare a manifest injustice.” State v. Gutierrez, 37 Wn. App. 910, 914, 684 P.2d 87 (1984). Conclusory findings are inadequate for review. See State v. Strong, 23 Wn. App. 789, 793, 599 P.2d 20 (1979). “An appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

Further, the court’s order must “set forth those portions of the record material to the [manifest injustice] disposition.” JuCR 7.12(d). This Court “will insist upon compliance with [this] rule.” Strong, 23 Wn. App. at 793; but cf. State v. T.E.H., 91 Wn. App. 908, 917, 960 P.2d 441 (1998) (record was sufficient for review).

Here, these requirements are not met. Cf. Gutierrez, 37 Wn. App. at 912, 914 (trial court’s findings inadequate).⁵ The disposition order

⁵ The inadequate findings in Gutierrez read:

The juvenile has an extensive record of adjudications and diversions for a variety of criminal offenses and has been committed to the Division of Juvenile Rehabilitation on at least one prior occasion.

The Court therefore concludes, by clear, cogent and convincing evidence, that the interest of protection of community safety require[s] a sentence beyond the standard range of 15 to 30 days detention. Particularly, the Court concludes that a sentence

states that, “Findings will be entered by separate order.” CP 9. They have yet to be entered. Additionally, the court’s order does not set forth portions of the record material to the court’s disposition. CP 8-12. In justifying the manifest injustice determination, the order states only that it “is based on [n]eed for treatment exceeds what the community can provide; recent criminal history; alcohol/drug use; standard range too lenient; failure to comply with previous court orders; lack of parental control; uncharged criminal conduct.” CP 9. This is inadequate for review and requires reversal. See Strong, 23 Wn. App. at 793.

2. The evidence does not support the trial court’s decision to impose a manifest injustice disposition.

Even assuming the record were adequate for review, the record does not support the manifest injustice disposition. In reviewing this issue, the court inquires: “(1) Are the reasons given by the trial court supported by substantial evidence; (2) do those reasons support the determination of a manifest injustice disposition beyond a reasonable

within the standard range would constitute a manifest injustice. Further, commitment to the Division of Juvenile Rehabilitation for a period of fifty two (52) weeks is a more appropriate and reasonable sentence, taking into consideration the age of the defendant, his level of criminal sophistication and notable lack of success in rehabilitation, as evidenced by prior attempts at probation, commitment and parole.

Gutierrez, 37 Wn. App. at 912.

doubt; and (3) is the disposition either clearly too excessive or too lenient?” State v. Duncan, 90 Wn. App. 808, 812, 960 P.2d 941 (1998); RCW 13.40.230. In other words, the evidence in the record must support the decision beyond a reasonable doubt. Tai N., 127 Wn. App. at 741. Otherwise, reversal and remand is required with instruction for entry of a standard range disposition. Id. at 745.

Here, the trial court purported to base its manifest injustice disposition on a plethora of reasons: (1) need for treatment; (2) recent criminal history; (3) alcohol/drug use; (4) standard range too lenient; (5) failure to comply with previous court orders; (6) lack of parental control; and (7) uncharged criminal conduct. CP 9. Many of these aggravators do not apply and are not supported by sufficient evidence.

a. Uncharged criminal conduct may be considered only when the juvenile admits to the uncharged conduct.

The disposition order cites “uncharged criminal conduct” as a reason for the manifest injustice disposition. CP 9. Ms. DePhelps cited uncharged criminal conduct as a “non-statutory” aggravating factor that would support a manifest injustice disposition. JPC Report at 3. In one cursory paragraph, she represented that L.H. had stolen property from his family and cashed checks belonging to his father. JPC Report at 3. For legal support of this purported factor, Ms. DePhelps cited this Court’s

decision in State v. T.C., 99 Wn. App. 701, 707-08, 995 P.2d 98 (2000).

JPC Report at 3. But what T.C. held was that a juvenile court may consider *admitted* criminal conduct that was uncharged in evaluating the juvenile's risk of reoffense:

Because T.C. does not dispute that he admitted to the uncharged crimes at issue here, our inquiry is limited to whether juvenile courts may consider admitted criminal conduct at a disposition hearing to determine the juvenile's risk of reoffending. We conclude that they can. Courts can best effect the [the Juvenile Justice Act]'s goal of rehabilitation if they are able to consider a juvenile's admitted crimes when imposing an appropriate disposition because a juvenile's acknowledged wrongdoing may clarify for the court the extent and nature of the problem and the rehabilitation the juvenile needs.

T.C., 99 Wn. App. at 707-08 (emphasis added) (footnote omitted). Here, L.H. did not admit to stealing items. Indeed, Ms. DePhelps represented that L.H. denied stealing his father's checks. JPC Report at 3. Thus, the court erred in determining that "uncharged criminal conduct" was a reason to impose a manifest injustice sentence.

b. The standard range was not clearly too lenient considering the degree of seriousness of L.H.'s prior adjudications.

One aggravator that the juvenile court has been instructed to consider is whether "The standard range disposition is clearly too lenient considering the seriousness of the juvenile's prior adjudications."

RCW 13.40.150(3)(i)(vii) (emphasis added). The court cited this aggravator as a reason for the manifest injustice disposition. CP 9; RP 35. Ms. DePhelps cited this reason in her report, asserting that the standard range was too lenient considering prior adjudications. JPC Report at 2.

As stated in the account of criminal history listed in L.H.’s statement on plea of guilty, L.H.’s criminal history consisted of three prior dispositions—all nonviolent and relatively minor—from 2014: theft of a motor vehicle (a felony), escape in the second degree (a felony),⁶ and possession of stolen property in the third degree (a misdemeanor).⁷ CP 14. For reasons that are unclear, Ms. DePhelps erroneously asserted that L.H. actually had three prior felonies and that this was his fourth. JPC Report at 2. She incorrectly stated that L.H. had an adjudication for theft in the first degree. JPC Report at 2. She also asserted that L.H. had a charge of escape in the second degree that was dismissed as part of plea negotiations in 2014. JPC Report at 2. Based on this incorrect record, she claimed that L.H. had “a serious and consistent criminal history, which in turn poses a danger to the community as well as [L.H.]” JPC Report at 2.

⁶ RCW 9A.76.120.

⁷ RCW 9A.56.170.

Needless to say, a dismissed charge is not a prior adjudication. The evidence also does not establish that L.H.'s three prior adjudications were especially serious so as to make a standard range sentence "clearly too lenient." On their face, these were not crimes of violence or crimes that posed a risk of harm to a person. "Dissatisfaction with the standard range is not a valid basis for a manifest injustice disposition." Tai N., 127 Wn. App. at 745. This Court should conclude that the juvenile probation counselor did not prove beyond a reasonable doubt this aggravating factor.

c. The time since L.H.'s last offense was a mitigating factor, not an aggravating factor.

Another statutory aggravator is recent criminal history RCW 13.40.150(3)(i)(iv). The court cited this aggravator. CP 9; RP 35. In fact, as the juvenile probation counselor admitted, there had been at least one year between the current offense and any prior criminal offense. JPC Report at 2. But by statute, this is actually a mitigating factor. RCW 13.40.150(3)(h)(v) (listing as mitigating factor that "There has been at least one year between the respondent's current offense and any prior criminal offense"). The court erred in finding this aggravator. Gutierrez, 37 Wn. App. at 915.

d. A juvenile's history of using drugs or alcohol is not a freestanding reason to impose a manifest injustice sentence.

Neither the JPC's report nor the JPC's oral argument to the court recites "alcohol/drug use" as a reason to justify the manifest injustice sentence. JPC Report; RP 15-24. The JPC report refers to past alcohol and drug use by L.H., but it does not represent that this is some kind of freestanding aggravator that may justify a manifest injustice sentence. JPC Report 8-11. L.H.'s drug and alcohol use may relate to a need for treatment. But contrary to the disposition order, it is not a legal basis for an increased sentence.

e. The remaining reasons are inadequate to justify the manifest injustice disposition.

The remaining reasons are (1) need for treatment; (2) failure to comply with previous court orders; and (3) lack of parental control. These reasons did not support a sentence of 52 to 65 weeks at the JRA.

Treatment can be a basis for a manifest injustice disposition. State v. J.V., 132 Wn. App. 533, 541, 132 P.3d 1116 (2006); State v. T.E.C., 122 Wn. App. 9, 21, 92 P.3d 263 (2004). But there must be evidence to support the need for treatment. There must also be evidence to establish that the treatment needs would be fulfilled through the imposition of the manifest injustice disposition. See T.E.C., 122 Wn. App. at 22-23.

Here, the JPC did prove beyond a reasonable a doubt that a standard range sentence of 15 to 36 weeks would be inadequate for treatment. Ms. DePhelps' report does not explain why this sentence would be inadequate for L.H.'s treatment needs. JPC Report at 2. At the hearing, Ms. DePhelps argued that L.H. needed "12 weeks, of inpatient treatment, 12 weeks to address mental health issues, 12 weeks to work again on specifically his reasoning, decision-making skills revolving around, you know making better choices, and then another 12 weeks basically for victim awareness" RP 25. But she acknowledged that these could be done concurrently and that she was just giving a rough estimate. RP 25. Moreover, Ms. DePhelps praised L.H. for doing great at the JRA before, so there was no basis to believe that L.H. would not progress quickly. L.H. also had no program modifications since he had been detained. JPC Report at 12. Ms. DePhelps did not contest L.H.'s contention that the JRA could get him into a treatment program quickly. RP 27-28.

As for a failure to comply with previous court orders and a lack of parental control, L.H. did not challenge the JPC's representations on these points. But these factors also did not support the manifest injustice sentence. L.H. was already going to the JRA for a significant period of time, 15 to 36 weeks. Ms. DePhelps did not explain why a lack of

parental control and previous violations of court orders justified an increase to 52 to 65 weeks. Given the lack of an explanation, let alone a compelling explanation, it follows the court's decision is not supported by proof beyond a reasonable doubt.

The juvenile rehabilitation administration is not intended to warehouse children. Before a juvenile court imposes a lengthy and unordinary sentence for a relatively minor offense, there must be substantial evidence to justify such a departure. Because the reasons proffered by the juvenile probation counselor did not justify the extraordinary sentence imposed by the court upon L.H., this Court should reverse and remand with instruction for entry of a standard range disposition.

f. The trial court did not indicate that it would impose the manifest injustice sentence upward on the basis of any one reason. At the least, reversal and remand is warranted.

The trial court did not state that any of the reasons it found, standing alone, was dispositive. They were all intermingled. Thus, even if this Court holds that one or more of the reasons cited by the court would support a decision to impose a manifest injustice disposition, the trial court did not so state. Accordingly, remand is proper. See, e.g., Duncan, 90 Wn. App. at 816 (remanding where length of sentence appeared to be

based in part on improper speculation that juvenile would be released early); In re Dependency of A.M.M., 182 Wn. App. 776, 792, 332 P.3d 500 (2014) (reversing termination of mother's parental rights because she did not have notice of one the grounds used to support termination and trial court did not state that other grounds independently supported the order).

F. CONCLUSION

The trial court failed to enter adequate findings of fact and did not set forth the relevant portions of the record. The evidence did not prove beyond a reasonable doubt that the manifest injustice disposition was necessary. This Court should reverse and remand with instruction for the trial court to enter a standard range disposition.

DATED this 24th day of June, 2016.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74817-3-I
v.)	
)	
L.H.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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