

FILED

DEC 09 2011

STATE OF WASHINGTON  
IN

**No. 29932-5-III**

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

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**State of Washington,  
*Respondent***

v.

**Christopher L. Pence,  
*Appellant***

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Appeal from the Superior Court of Lincoln County  
on review from the District Court of  
Lincoln County

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*BRIEF OF APPELLANT*

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## TABLE OF CONTENTS

	Page No.
Table of Authorities	i
I. Introduction	1-2
II. Assignments of Error	2
III. Statement of the Case	2-3
IV. Argument	3-7
Issue 1: When the Juvenile Court allows entry of a juvenile into a diversion program the court must then hold a due process hearing requiring notice and a an opportunity to be heard prior to ending the Juvenile Court jurisdiction and before criminal charges may be filed in District Court?	4-7
V. Conclusion	8

## TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page Nos.</u>
<i>Corbitt v. J.I. Case Co.</i> , 70 Wn.2d 522, 539, 424 P.2d 290 (1967)	5
<i>State v. Abd-Rahmaan</i> , 154 Wash.2d 280, 111 P.3d 1157 (2005)	5
<i>State v. Dahl</i> , 139 Wash 2d 678, 990 P.2d 396 (1999)	5, 6, 7
<i>State v. Lawley</i> , 91 Wash.2d 654, 657-58, 591 P.2d 772 (1979)	5
<i>State v. Hodges</i> , 28 Wn.App. 902, 904, 626 P.2d 1025 (1981)	5

<u>Federal Cases</u>	<u>Page Nos.</u>
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L.Ed.2d 284 (1972)	5, 6, 7, 8

<u>Other Authorities</u>	<u>Page Nos.</u>
RCW 13.40.080	2, 3, 4
RCW 13.40.080 (1)	4
RCW 13.40.080 (5)(a)	4
RCW 13.40.080 (7)	4, 6, 7, 8
RCW 13.40.080 (11)	4, 6, 7, 8

## I. INTRODUCTION

On January 29, 2010 in Lincoln County Mr. Pence was alleged to have been drinking alcohol during school hours. The incident was alleged to have occurred when Mr. Pence was 17 years of age. (CP 120-121) Mr. Pence turned 18 years of age on February 20, 2010. (CP 121-122) On March 08, 2010 Mr. Pence entered into a Diversion Agreement pursuant to RCW 13.40.080. (CP 62) Mr. Pence wrote a letter of apology pursuant to his diversion agreement. (CP 70) Mr. Pence completed a treatment program pursuant to the diversion agreement under RCW 13.40.080. (CP 72)

The diversion reportedly ended based upon a contact from Mr. Pence's mother, Lori Pence, with a Linette Vaughn, the program director. (CP 169-170) Charges were subsequently filed against Mr. Pence in Lincoln County District Court. (CP 95-96) Mr. Pence challenged the subject matter jurisdiction in District Court. (CP 52-64) The case proceeded to jury trial and Mr. Pence was convicted and sentenced on August 08, 2010 in District Court. (CP 13-14)

Mr. Pence timely filed an appeal to Superior Court in Lincoln County challenging the jurisdiction of the District Court. The Honorable J. Strohmaier affirmed the conviction in the District Court. (CP 177-179) The Superior Court in its ruling found that a communication from Lori Pence, the mother of Christopher Pence, amounted to a withdrawal from the diversion program allowing the prosecution in Lincoln County District Court. (CP 178-179) A Motion for

Discretionary Review was granted by Commissioner's Ruling on July 27, 2011.  
(CP 184-188)

## **II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS**

1. The Superior Court committed reversible error by holding that jurisdiction of the juvenile could be terminated without holding a hearing to satisfy due process protections when a defendant has entered a diversion agreement pursuant to RCW 13.40.080.

## **III. STATEMENT OF THE CASE**

On January 29, 2010 in Lincoln County Mr. Christopher L. Pence was alleged to have been drinking alcohol during school hours. Mr. Pence was seventeen at the time of the incident. (CP 120-121) Mr. Pence turned eighteen years old on February 20, 2010. (CP 4, 35, and 62) Mr. Pence entered into a diversion agreement (CP 35 and 62) and began to perform his agreement. (CP 70 and 72)

The diversion was ended because of a contact from Christopher L. Pence's mother Lori Pence to Linette Vaughn, the program director. (CP 169-170) A complaint was filed in Lincoln County District Court. (CP 95-96) Jurisdiction was challenged in District Court. (CP 52-64) The case was taken to trial before a jury and Mr. Pence was convicted with a judgment and sentence entered on August 18, 2010. (CP 13-14)

The defendant timely filed an appeal to Superior Court in Lincoln County where the Honorable J. Strohmeier affirmed the conviction from the District Court. (CP 177-179) A motion for Discretionary Review was filed and granted by Commissioner's Ruling on July 27, 2011. (CP 184-188)

#### **IV. ARGUMENT**

Mr. Pence entered into a diversion agreement pursuant to RCW 13.40.080. (CP 35 and 62) Mr. Pence was allowed to enter into the diversion agreement after he turned 18 years of age. (CP 4, 35, and 62) Upon entering into the program Mr. Pence began to perform on the terms of the agreement by first writing a letter of apology (CP 70) and completing his "My Choice Program". (CP 72) Subsequently, the diversion program ended, apparently based upon communication from Lori Pence, the mother of Christopher Pence. (CP 169-171) A complaint was filed in Lincoln County District Court. (CP 95-96) Jurisdiction was challenged in District Court. (CP 52-64) After trial in District Court an appeal was filed in Superior Court challenging the jurisdiction of District Court. (CP 177-179) The Superior Court upheld the District Court jurisdiction ruling that the communication from the mother, Lori Pence, was a withdrawal from the diversion program allowing the prosecution in Lincoln County District Court. The Motion for Discretionary Review was granted by Commissioner's Ruling on July 27, 2011. (CP 184-188)

**Issue 1: Due process requires that a diversion program entered pursuant to RCW 13.40.080 may not be terminated without holding a hearing to satisfy due process requirements.**

The Revised Code of Washington governing diversion program reads: “A diversion agreement shall be a contract between a juvenile accused of an offense and a diversion unit whereby the juvenile agrees to fulfill certain conditions in lieu of prosecution.” (RCW 13.40.080 (1)) Additionally, “A diversion agreement may not exceed a period of six months and may include a period extending beyond the eighteenth birthday of the divertee.” [RCW 13.40.080 (5)(a)] “Divertees and potential divertees shall be afforded due process in all contacts with a diversion unit regardless of whether the juveniles are accepted for diversion or whether the diversion program is successfully completed. Such due process shall include, but not be limited to, the following”: RCW 13.40.080(7)

Mr. Pence entered into an agreement for diversion of his charges pursuant to RCW 13.40.080. The statute clearly states that the diversion agreement establishes a contact between the juvenile and the diversion unit. Nothing in the statute makes a parent a party to the agreement or does the statute address a parental role. Most importantly the statute requires “divertees shall be afforded due process in all contacts with a diversion unit regardless of whether the juvenile is accepted for diversion or whether the diversion is successfully completed.” The juvenile is to have the right to be “represented by counsel at any critical stage of the diversion process.” RCW 13.40.080 (11)

Washington Courts and many other jurisdictions have recognized the value to a defendant in having his case resolved in juvenile court. The presentation of a matter before the juvenile court is of substantial value to the defendant because adult court subjects the defendant to much harsher penalties and the loss of benefits of the juvenile system. *State v. Hodges*, 28 Wn.App. 902, 904, 626 P.2d 1025 (1981) citing *State v. Lawley*, 91 Wash.2d 654, 657-58, 591 P.2d 772 (1979) Mr. Pence entered into a valid diversion agreement. (CP 35 and 62) Mr. Pence took substantial steps toward completing the diversion agreement (CP 70 and 72) and detrimentally relied on the agreement with the state. Promissory estoppel requires, “(1) A promise which (2) the promisor should reasonably expect the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.” *Corbitt v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967)

In *State v. Dahl*, 139 Wash.2d 678, 990 P.2d 396 (1999) the Washington Supreme Court addressed the due process rights in a criminal probation revocation hearing. The *Dahl* case *supra* was followed by *State v. Abd-Rahmaan*, 120 Wash.App. 284, 84 P.3d 944 (2004) which found sentence modification hearings to be substantially similar to other revocation hearings, requiring the minimum due process protections articulated in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972) In *Morrissey* the U.S. Supreme Court

addressed “whether the Due Process Clause of the Fourteenth Amendment requires that a state afford an individual some opportunity to be heard “before” revoking his parole.” *Morrissey*, 408 U.S. at 472, 92 S. Ct. 2593 The court in *Dahl supra* and *Morrissey supra* held the following was required by due process:

“(a) written notice of the claimed violations of parole; (b) disclosure to parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body; and (f) a statement by the fact finders as to the evidence relied on and the reasons for revoking parole.”

Whether the case is a modification or termination of his agreement for diversion Mr. Pence should have received the due process requirements set forth in *Dahl supra* and *Morrissey supra*. Although the requirements of RCW 13.40.080 (7) clearly requires greater due process protections “Divertees and potential divertees shall be afforded due process in all contacts with a diversion unit regardless of whether the juveniles are accepted for diversion.” Additionally, RCW 13.40.080 (11) requires that a “juvenile may be represented by counsel at any critical stage of the diversion process, including intake interviews and termination hearings.”

Mr. Pence was removed from the diversion agreement based upon the request of the divertees mother. (CP 163, 169-171) The court conducted no

hearing to determine what was the desire of Christopher Pence or if he understood the consequences of terminating his contract. Without any hearing or opportunity to be heard, the prosecutor filed charges in District Court. (CP 163, 169-170, 95-96) The District Court proceeded to trial and the trial resulted in a conviction of criminal charges. (CP 13-15)

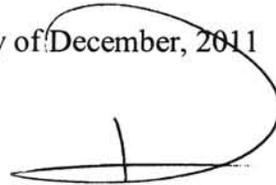
It is the defense position that the court must grant Mr. Pence minimal due process protections. First, due process is required in Diversion Agreements by RCW 13.40.080 (7) "Divertees and potential divertees shall be afforded due process in all contacts with a diversion unit.....such due process shall include, but not be limited to." RCW 13.40.080 (11) requires the divertee have the right to counsel. Further, the divertee has due process rights pursuant to the 14<sup>th</sup> Amendment. At a minimum the defendant is entitled to a notice and the opportunity to be heard prior to the revocation. *State v. Dahl*, 139 Wash.2d 678, 990 P.2d 396 (1999) citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972) The failure to grant Mr. Pence due process protections has resulted in his removal from the diversion program at the request of his mother, Lori Pence. The diversion contract was between the "juvenile accused of the offense and a diversion unit" not the parent. Due process protections are required to protect the accused from unwarranted or ill reasoned actions such as what occurred in this case.

## V. CONCLUSION

The requirements of due process based upon RCW 13.40.080 (7) requires “due process in all contacts with a diversion unit”. The RCW 13.40.080 (11) requires a right to be “represented by counsel at any critical stage of the diversion process.” These protections are in addition to the due process protections required by the Fourteenth Amendment Due Process Clause as required by *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)

The failure to grant Mr. Pence due process prior to removal from juvenile court requires reversal of the case and remand to juvenile court for further action. Due process hearings are required to protect divertees from arbitrary actions by government agents without due process of law.

Respectfully submitted this 9 day of December, 2011



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