

FILED
Apr 11, 2012
Court of Appeals
Division III
State of Washington

No. 29932-5-III

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

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER L. PENCE, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENT OF ERROR

[As stated by Appellant]

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.

B. THE ISSUES PRESENTED

[As stated by Commissioner Wasson]

Whether the juvenile court lost jurisdiction when Mr. Pence withdrew from diversion *after* he reached his 18th birthday?

Or

Was the court required to take some affirmative act to end its jurisdiction of the case?

C. STATEMENT OF THE CASE

Appellant Pence consumed alcohol during school hours on January 29, 2010. CP 163. At the time, Pence was seventeen years old. Id. On February 20, 2010, Pence turned eighteen years old. Id. On March 8, 2010, Pence entered into a diversion agreement with Juvenile Services. Id.

On March 14, 2010, appellant's mother, Lori Pence, after consulting with the family's attorney the previous day, wrote a letter to the juvenile court judge complaining of the treatment by juvenile services of her son. CP 169-71, 185-86, (Letter from Lori Pence, dated 3/14/10, is attached hereto and designated as Appendix, pp.12-14). Ms. Pence makes clear in this letter that the family decided voluntarily to withdraw their participation in the diversion program because they did not agree with the requirement that the appellant's driver's license be suspended. CP 169-171. The relevant portion reads as follows: "I asked if we could just do the Diversion Agreement without revoking his license she stated no. **I asked her [Linette Vaughn] to pull our Diversion Agreement** she said she was walking it over to the prosecutor immediately." [emphasis supplied]. CP 170.

On March 17, 2010, within days of the family's decision to "pull" the diversion agreement, appellant was charged as an adult in District

Court. CP 163. On July 1, 2010, appellant filed in the trial court a motion to dismiss “for lack of subject matter jurisdiction” with supporting memorandum. District Court denied the motion pretrial. Id. Appellant also filed a motion to suppress statements made by him in writing contained within a written apology furnished to the school principal. The trial court granted the motion to suppress. CP 163-64.

On August 18, 2010, appellant was convicted at trial by jury in District Court. Id. Appellant next appealed to Superior Court which affirmed the conviction. CP 177-79. Appellant then moved the Court of Appeals for discretionary review, which was granted. CP 188.

D. ARGUMENT

The Commissioner's Ruling frames the question presented as:

Whether the juvenile court lost jurisdiction when Mr. Pence withdrew from diversion *after* he reached his 18th birthday. Or, was the court required to take some affirmative act to end its jurisdiction of the case? CP 187-88.

As the Commissioner's Ruling makes clear:

RCW 13.40.080(7) is unambiguous and clearly applies only to situations in which the State seeks to terminate the diversion agreement because the divertee has violated its terms. CP 187.

As recognized by the Commissioner's Ruling, appellant was not "terminated" as contemplated by RCW 13.40.080. Rather, he chose not to participate in the diversion process. Hence, any argument that due process

is offended by the State's noncompliance with the terms of RCW 13.40.080(7) is moot.

The Commissioner has distilled the issue in this case to the question whether a divertee who chooses not to participate in the diversion process and has reached the age of eighteen years is entitled to "some affirmative act to end juvenile court's jurisdiction" or whether the loss of juvenile court jurisdiction is triggered simply by the fact of the divertee's withdrawal from diversion after turning eighteen.

The provisions of RCW 13.40.080 provide some guidance in resolving this question. RCW 13.40.080(7) sets forth the procedure to be followed once diversion has been terminated pursuant to the statute:

(e) The prosecutor may file an information on the offense for which the divertee was diverted:

(i) In juvenile court if the divertee is under eighteen years of age; or

(ii) In superior court or the appropriate court of limited jurisdiction if the divertee is eighteen years of age or older.

Respondent is unaware of any legal authority for juvenile court to retain jurisdiction under the circumstances of this case. Once the diversion agreement was withdrawn and appellant reached the age of majority, juvenile court no longer had jurisdiction.

Juvenile Court Rule 6.4, Advice about Diversion Process, requires that the divertee be advised in writing:

10. You do not have to participate in diversion. If you do not participate, **your case will go to court if charges are filed by the prosecutor.** ... [emphasis supplied].

Appellant sought and received advice from private counsel prior to the decision to withdraw his participation in diversion. CP 170. Counsel's representation of appellant has been constant throughout the litigation of this matter and continues to this day. It is disingenuous of appellant to raise the specter of denial of due process which would attach by the lack of representation at critical stages of the proceeding.

Appellant, through counsel, chose not to appeal the trial court's denial of his jurisdictional challenge, instead opting to proceed with a jury trial. Upon conviction by the jury, appellant now asks this court for relief from the jury's verdict. This is tantamount to invited error. At the least, it is not conducive to judicial economy. The issue here presented could have been litigated before incurring the expenditure of resources involved in subpoenaing witnesses, seating a jury, and conducting a jury trial.

Appellant seeks remand to the Juvenile Court "for further action". What further action appellant wishes Juvenile Court to take is unclear in light of the Commissioner's Ruling that the procedure for "termination" as

codified in RCW 13.40.080 does not apply. Appellant is now twenty years old. Juvenile Court can no longer assert jurisdiction in this case.

E. CONCLUSION

The State asks the Court to find that jurisdiction in Juvenile Court ended when the appellant, after reaching the age of eighteen years, chose not to participate further in the diversion agreement.

The State asks the Court to find that the fact that the appellant was represented by counsel, presumed competent, before deciding to withdraw from diversion, and through trial in district court, and direct appeal to superior court, allays any due process concerns under the circumstances of this matter. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Dated this 11th day of April, 2012.

Respectfully submitted,



Melvin D. Hoit
Attorney for Respondent
WSBA# 24095

F. CERTIFICATE OF MAILING

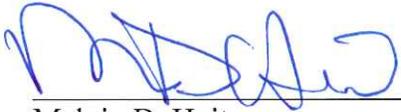
I, Melvin D. Hoit, do hereby certify and declare under penalty of perjury of the laws of the State of Washington that, on this 11th day of April, 2012, I caused to be placed in the U. S. Mail, postage prepaid First Class, true and correct copies of this *Brief of Respondent* addressed to the attorney for appellant as follows:

Douglas D. Phelps
Attorney and Counselor at Law
Phelps & Associates, PS
2903 N. Stout Rd.
Spokane, WA 99206-4373

and to the appellant as follows:

Christopher L. Pence
22714 W. Coulee Hite Rd.
Spokane, WA 99224

Signed this 11th day of April, 2012, at Davenport, Washington.



Melvin D. Hoit

G. APPENDIX

March 14, 2010

To The Honorable John F. Strohmaler,

My son Christopher L. Pence entered into a Diversion Agreement with Lincoln County Juvenile Court on 3/8/2010. He was 17 on 1/29/10 when the offense occurred (Minor In Possession or Consumption of Alcohol). We received a Diversion letter from Lincoln County Juvenile Court Services dated March 2, 2010 around March 3rd or 4th. I had spoken with Linette Vaughn on February 12th 2010 trying to get this resolved before my sons 18th birthday. Chris turned 18 on 2/20/2010. She told me that I could have Chris do some Drug and Alcohol classes, write a reflection letter of 500 words. I asked her if there was anything else that we needed to do. Linette said no that was all we would need to do. She stated that it would be at least 3 weeks out or more before we would hear from the court.

When I received Chris's letter from Lincoln County Juvenile Court Services I called Linette Vaughn and told her that Chris had turned 18 now, she stated she knew he was 18 and since the offense occurred prior to him turning 18 it would be handled in Juvenile Court. I told her I didn't think that was correct. She told me that they handle Diversion cases all the time when the juvenile has turned 18. I then spoke with Diversion folks from Spokane County. They told me that it is illegal to sign a diversion agreement after the juvenile turned 18 unless the court had extended jurisdiction past the 18th birthday. I decided to go ahead and meet with Linette Vaughn on Monday March 8th at 3:30 p.m. I again asked her about the legality of this, she said that it is best for kids and that they do this all the time in Lincoln County. Linette Vaughn then stated that she had not told me about all the additional things she wanted Chris to do. My son had done 3 drug and alcohol classes prior to this meeting and had written his apology and reflection letter. We gave Linette copies of drug and alcohol class information showing that Chris had completed them and Chris gave Linette Vaughn his apology and reflection letter. Linette read the letter and told Chris it was very good. We then got into the nuts and bolts of the Diversion agreement, she had given Chris 15 hours of community service, must do a drug and alcohol evaluation and comply with treatment and recommendations. She then added that he complete the Minors In Prevention class which cost \$125.00 he had already completed the 1st class of this program. She wanted him to do the additional 2 classes. He had already done two Substance abuse classes at Spokane County Juvenile Court. She also wanted him to do a urine analysis. His license would be revoked for 1 year with possibility of early reinstatement. I then told her that he needs his license he has a summer job working the Department of Natural Resources. He will be attending Blinn College in Bryan Texas in August of this year. Chris is going into the Fire Science program to be a fireman. The Texas program is one of the best in the country people from foreign countries come to this school. They train at the Brayton Fire Field in College Station Texas which is the largest fire training field in the United States. His job is vital to his college and he needs the money to help pay for his college. Linette stated that if he complied she would maybe request his license be reinstated after 90 days. I told Linette that I had not had a chance to speak

with our attorney about the Diversion agreement, the essence for Chris and his summer job. He graduates from Reardan High School on June 6th and starts his summer job right after that.

I was supposed to speak with our attorney on the 9th but he was unavailable. I decided to go ahead with the Diversion agreement; I signed it and sent it in. Chris's summer job and his future depended on his license. I left a message for Linette letting her know we had signed the Diversion Agreement.

Linette Vaughn called me at home on 3/10/10 at 4:40 p.m. stated she had received our signed Diversion agreement and that I needed to take Chris's license from him immediately and when we met with her again on Thursday March 18th 2010 she would punch a hole in his license. She stated she was faxing the revocation right now while we were on the phone. She told me to make sure he did not drive anymore.

Chris got a ride to school and rode the bus home from school. I told him his license was suspended and not to drive and he gave me his license. I then went on the Department of Licensing website where it speaks about the Minor license and suspensions. It states that you will need to take your license to the Department of Licensing or mail your license to them. It also states that your license will be revoked 45 days after they mail you the notice of revocation and you can also request a revocation hearing.

I then was able to speak with my attorney on Friday March 12th 2010; he told me that it is illegal to enter into a Diversion Agreement after a juvenile turned 18 unless the court had filed a motion extending jurisdiction past your 18th birthday. I immediately called Linette Vaughn she was out so I left a message.

She called back and I told her what my attorney had said and that the Diversion Agreement was illegal, she stated that "That is not what is best for kids and that is the way Lincoln County does it". She stated that she holds kids accountable for what they have done. I explained that we were not trying to get Chris out of anything. He has lost more than any court sanction could give him anyway. He invested 10 years of his life to wrestling. He was on a roll this year with wrestling and had defeated the state champion in overtime. He himself was working to be the State Champion at 189 and his team was the State Champions this year. He is a senior and he will never be a state champion wrestler and he will always regret what he did. He also missed out on F.C. C. L.A. Parliamentary Procedure team. He was suspended from school for 3 weeks, during that time he wrote apology letters to Jeff Roberts the School Principal, Eric Nikkola the Athletic Director and Rick Perleberg his Assistant Wrestling Coach and Ag teacher. He could not apologize in person so he wrote letters, he also wrote a letter to the Wrestling team that he let down. He also has learned a valuable life lesson. Teachers and students look at him differently now at school. I asked Linette Vaughn about his license revoke she stated she would check on it to see if it had gone through. She had told me on 3/10/10 that it was revoked. She called back and told me that his license was still valid and the revoke had not gone through yet. I asked if we could just do the Diversion Agreement without revoking his license she stated no. I asked her to pull our Diversion Agreement she said she was walking it over to the prosecutor immediately. I still wonder about the correct procedure with license and being told it is revoked and then it is not?

I find it hard to believe that a good kid makes one stupid mistake and his whole future can be tarnished for something most adults have done themselves. I drank under age in college that doesn't make it right but I feel Chris has owned his mistake and would just like to move forward. His license and his

summer job are very important to his future. Chris would be willing to follow the conditions of the Diversion Agreement except the revoke of his license, the law clearly states that juveniles under 18 are the only kids who can do Diversion unless jurisdiction has been extended past 18th birthday. Lincoln County Juvenile Court Services had plenty of time to have this resolved before he was 18. Now they are going to put him in the Adult system, they had plenty of time to have this taken care of in the Juvenile system. Chris would like to put this behind him and move forward. He knows he made a mistake and he has learned from this.

To Summarize:

1. There must be extended jurisdiction to enter a Diversion Agreement once the juvenile turns 18, it is not based on the age they commit the offense but when they sign.
2. There is no revocation until DOL sends the letter at about 45 days BUT more importantly he CAN NOT be revoked as juvenile now only if you file in District Court.
3. Turning him over to District Court is punitive and violates his rights to be handled as a juvenile especially since you knew he was turning 18 and we were willing to agree to the terms all but the license revoke as how your Diversion Officer handles them

I am also very concerned about other juveniles that may also be being legally mishandled based on statements made to me by your Diversion Staff. Please help us resolve this. Thanks so much for your consideration.

Sincerely,

Lori Pence

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